

**MINUTES
ENVIRONMENTAL REVIEW COMMISSION
March 22, 2012**

The Environmental Review Commission (ERC) met on Thursday, March 22, 2012 at 9:30 a.m. in Room 544 of the Legislative Office Building. Senator Rouzer presided.

The following members were present: Senator David Rouzer, Co-Chair, Representative Mitch Gillespie, Co-Chair, Representative Ruth Samuelson, Co-Chair, Senators Stan Bingham, Don East, Fletcher Hartsell, Brent Jackson, Bill Rabon, Representatives Joe Hackney, Pat McElraft, and Chuck McGrady. Mr. Jeff Hudson and Ms. Jennifer McGinnis, Commission Counsels; Ms. Jennifer Mundt, Commission Analyst; and Ms. Mariah Matheson, Research Assistant; Ms. Sarah Neunzig, Commission Clerk; Sergeants-at-Arms Fred Hine, Bill Bass, Martha Parrest, Billy Fritcher, Steve Wilson, and Ken Kirby also attended. Attachments #1 and #2.

On March 7, 2012, notice was sent to members and interested parties via e-mail. An additional reminder e-mail was sent on March 16, 2012. Copies of the notices are included in the attachments to these minutes as Attachments #3 and #4. Copies of the agenda for the meeting, visitor registration sheets, and a memorandum regarding the disposition of reports are included in the attachments to these minutes as Attachments #5, #6 and #7 respectively.

Call to order and introductory remarks

Senator Rouzer called the meeting to order and welcomed members, staff, and visitors in attendance. He recognized his Co-Chairs, Representative Gillespie and Representative Samuelson, for introductory remarks.

Approval of the minutes for the December 14, 2011 meeting of the Commission

Senator Bingham offered a motion to approve the minutes. The Commission as a whole approved the December 14, 2011 minutes; Attachment #8.

Quarterly Report by the Environmental Management Commission

Senator Rouzer recognized Mr. Stephen Smith, Chairman of the Environmental Management Commission (EMC) to present the EMC's quarterly report on its operations, activities, programs and progress for the period from October 1, 2011 through December 31, 2011. A copy of the quarterly report is included as Attachment #9.

Mr. Smith discussed the EMC's recent open burning resolution, which asks the General Assembly to reconsider the decision on open burning with regard to setbacks. Mr. Smith said that the EMC was concerned that the change in the open burning setback requirements would exasperate health problems in the most vulnerable populations, including the young and the elderly. A copy of the Memo from EMC about the Resolution to the Air Toxins Program is included as Attachment #10.

Senator East asked about the open burning rules and the correlation to breathing problems in children. Mr. Smith responded that there is substantial data that shows that the proximity to open burning has a direct negative impact to those susceptible to breathing illnesses and diseases, particularly elderly people and young children. Mr. Smith said that he would provide the appropriate supporting data to Senator East's office.

Representative Hackney asked for the definition of buffer mitigation. Mr. Smith replied that its meaning includes various things relating to restoration and various credits and trading packages of buffers and wetlands in particular, in North Carolina. Representative Hackney asked about buffer reductions. Mr. Smith said that current

buffer mitigation regulations now allow for the reduction or elimination of a buffer, however, the buffer must be replaced somewhere else.

Representative Hackney asked about the environmental impacts of interbasin transfers. Mr. Smith said that the environmental document and analysis stage determines if an environmental impact statement is required for an interbasin transfer or not.

State Air Toxics Program

Introduction and Overview of Introduced Legislative Proposals to Amend the Program

Representative Gillespie spoke briefly about the proposed legislation to reform the State Air Toxics Program and how the version under discussion has changed from the previous version. Commission Counsel, Jeff Hudson, provided additional information about the changes to the proposed legislation and its impact on the State Air Toxics Program. A copy of the proposed legislative bill draft and bill summary are included as Attachments #11 and #12, respectively.

Potential Implementation of Legislative Proposals to Amend Program

Senator Rouzer recognized Ms. Sheila Holman, Director of the Division of Air Quality (DAQ) of the Department of Environment and Natural Resources (DENR) to discuss the potential implementation of legislative proposals to amend the State Air Toxics Program. A copy of the presentation is included in the attachments to these minutes as Attachment #14.

Ms. Holman explained that the federal program, administered by United States Environmental Protection Agency (EPA), is a technology-based program for which technology standards are developed. According to Ms. Holman, those technology standards are fairly stringent. These standards have resulted in emissions reductions. The EPA is required to evaluate whether any residual risk remains after the technology standard was established every eight years and EPA is making progress on evaluating standards.

Ms. Holman said that the State Air Toxics program began in 1990 and was in response to the federal government's inaction. She explained that the State program focuses on appropriate health standards. The proposed legislation would provide an exemption for those sources that are exempt from the federal requirements or in cases in which the EPA fails to establish emission standards for a given industrial sector. The legislation would maintain DENR's authority to act when a public health risk is found. The legislation also would require DAQ to review the air toxics rules and the implementation of those rules to determine if changes could be made to reduce unnecessary regulatory burden and increase the use of DAQ resources while maintaining protection of public health and report back to the Commission by November 2012.

Ms. Holman continued to describe the differences in how the program is currently implemented versus how it would be implemented under the proposed legislation. Aspects of the Program that would not change under the proposed legislation include permitting for all emissions sources at a facility that is subject to both federal and State requirements and the protection of public health consistent with current health based standards.

Representative Gillespie asked if the Governor had weighed in on this proposal. Ms. Holman yielded to Ms. Robin Smith, Assistant Secretary of DENR. Ms. Smith said that she has shared the bill draft with the Governor and the Governor was very supportive, as the proposed legislation continues to protect public health.

Representative Gillespie asked about the safety net discussed on page 1, line 27, specifically about the safety net timeline and how long pollution would be emitted before the State could implement the safety net? Ms. Holman responded that DENR will be evaluating permit applications as they come in and will consider additional assessments before they issue an air quality permit. If a problem arises, they will work with a facility in the early design stages, because that is the easiest and most flexible time to change plans.

Representative Gillespie asked if DENR should be required to do modeling and how does DENR currently manage the modeling? Ms. Holman responded that most of the large emissions sources do their own modeling and submit the modeling results to DAQ staff during the permit application process. The bulk of the modeling falls on the industry. However, some smaller emitters need assistance to conduct the modeling and DENR will help them with their modeling. When the program was initially created the ability to do all of the modeling in-house was provided.

Representative McElraft asked how the program gives disclosure when someone applies for an air toxic permit and at what point do the neighbors get notified that the facility is applying for the permit? Ms. Holman said that in-house permits being considered are posted on DENR's website. If there is a public outcry they would schedule a public hearing as part of the permit process.

Senator Jackson asked if the proposed change is more user-friendly or more stringent than the previous program? Ms. Holman said that the proposed legislation is refining when facility-wide modeling is conducted, instead of requiring facility-wide modeling for each permit modification. Senator Jackson asked about the frequency of the inspections and who is doing the inspections. Ms. Holman said that the air quality permit is issued by the State of North Carolina and covers both State and federal requirements. The EPA has an oversight role over North Carolina's permits, but EPA does not oversee day-to-day permit activity or inspections. The larger facilities are inspected on an annual basis and the smaller facilities are inspected every two years.

Representative McGrady stated he had been working with Rural Advancement Foundation International (RAFI-USA) and asked if the proposed legislation will be consistent with hydraulic fracturing emissions. Ms. Holman responded that emissions would be evaluated on a case-by-case basis as the permit applications are submitted to DENR. Representative McGrady asked if most of the air emission problems associated with hydraulic fracturing are covered under the federal rules. Ms. Holman said that there are some rules already in place with federal government and some that are not.

Representative Hackney asked how this proposed legislation would change the attempt to pursue hydraulic fracturing in North Carolina from an air toxics perspective. Ms. Holman responded that it would affect existing as well as new facilities. This would affect the new facilities and cause them to look at their emissions and what is federally exempt. That would be determined in the permit application and an evaluation would be made to determine if there's a possible public health risk.

Comments from Environmental Community on the Program

Senator Rouzer recognized Dr. David Tayloe, Jr., Past-President of the American Academy of Pediatrics. Dr. Tayloe gave a presentation on potential impacts the proposed air toxics legislation would have on children, including medical issues relating to respiratory disease resulting from exposure to air toxics. A copy of the presentation is included in the attachments to these minutes as Attachment #15.

According to Dr. Tayloe, in 2003 North Carolina released 34 million pounds of toxic cancer causing carcinogens, currently covered under the State air toxics program. The State program ensures that facilities located close to citizens (hot spots) are regulated and covers air 21 toxics that are not regulated the federal program.

Dr. Tayloe continued that the State program helps prevent respiratory diseases in children, as children are more susceptible than adults. There are 140,000 children with asthma, 80% of those cases develop in the years after birth to adolescence. Developing lung tissue is more susceptible to lung damage. Playing outside in the afternoon is a risk factor, particularly in high ozone communities. Thus, he feels that the national ozone standards should not be revised downward.

Representative Gillespie reiterated that the bill draft does not dismantle the air toxics program and Dr. Tayloe's comments are related to the bill draft in its current form, not in its final form.

Representative Hackney asked about the symptoms of children with asthma and other lung problems. Dr. Tayloe responded that most children with asthma experience wheezing and have difficulty breathing. They also have low tolerance for exercise and they wake up in the middle of the night coughing, which causes them to miss school. Representative Hackney said that despite comments to the contrary, the program is still being weakened. The question is how much it is being weakened.

Representative McElraft asked if there has been an outcry from Virginia and South Carolina's pediatricians since they have already enacted what North Carolina is planning to do with this program. Dr. Tayloe does not know and had attempted to find out.

Senator East said that companies have left our country because we have regulated and taxed them out of business. He asked for the medical community's response to other countries that have no rules and who can emit whatever they want. Senator East said that over-regulation hurts business. Dr. Tayloe responded that it depends on what type of environment citizens want to raise their children and live in. His profession values public health and environment more than business in this case.

Senator Rouzer recognized Mr. Dan Conrad, Legislative Counsel for the North Carolina Conservation Network. Mr. Conrad also spoke on behalf of Environment North Carolina, the Sierra Club, and the Southern Environmental Law Center. Mr. Conrad gave a presentation on the potential implementation of legislative proposals to amend the State Air Toxics Program. A copy of his presentation is included in the attachments to these minutes as Attachment #16.

Mr. Conrad noted that numerous studies have shown the benefit of regulations to the economy and have minimal effects on industry's effectiveness. Mr. Conrad said that businesses chose to locate in North Carolina because of North Carolina's high quality of life. According to Mr. Conrad one of the referenced businesses chose to locate to China instead of Texas, despite Texas' low air quality standards. Mr. Conrad said that Texas' state program has been managed so poorly that the U.S. EPA had to take it over.

Mr. Conrad also expressed concern over indemnification, which means that companies cannot be held liable or sued if the facility goes through permitting. The exemption language established emission standards, as defined in the Code of Federal Regulations (CFR). Mr. Conrad expressed concerns about the exemption language. As drafted it could possibly allow a facility to exempt itself from federal regulations.

Mr. Conrad said that the primary goal of the bill is to reduce modeling requirements, as the Director's Call already exists. According to Mr. Conrad, the new law will shift the program's emphasis from one that is preventative to retroactive, which will increase the chance for something to slip through the cracks. With the enactment of Senate Bill 781 (Regulatory Reform Act of 2011, S.L. 2011-398), challenges could be made to the Director's Call. Mr. Conrad also noted that DENR should be properly funded to implement the proposed legislation.

Mr. Conrad continued that the maximum achievable control technology (MACT) is a federal one-size fits all program. It does not take into consideration the type of facilities near the industrial site, such as schools. The State program looks at the health risk. Thus, the Director's Call should take into account the siting of these facilities. Whereas the federal program looks at threatening toxics nationally, the State program looks at local toxics. Therefore the groups that Mr. Conrad represents believe there should be language in the statutes to would require the Director's Call, specifically with regard to air pollutants unique to this State and within proximity to a school. Mr. Conrad urged the Commission to require a reporting requirement on the implementation of the legislation to make sure it doesn't have detrimental effects.

Representative Gillespie said that there would be a revised bill draft to share with the Commission at the next meeting.

Representative McGrady asked how often DENR has used the Director's Call in the recent past. Mr. Conrad responded that it's not used very often, because in the current program all of the modeling is done up front and all the sources are already in the program. However, he would ask DENR for more precise information. Ms. Holman, she said they have implemented the Director's Call two times in the mid-1990s, as part of the evaluation of boilers across the State. They also issued a Director's Call in 2007.

Regulated Community's comments about Proposed Amendments to the Program

Senator Rouzer recognized Mr. Preston Howard, President of the Manufacturers and Chemical Industry Council of North Carolina. His comments represent those of the regulated community and their response to the legislative proposals to amend the State Air Toxics Program. A copy of the presentation is included in the attachments to these minutes as Attachment #17.

Mr. Howard said that North Carolina is currently at a distinct disadvantage, as other states in the southeast have already implemented revisions similar to those in the proposed legislation to their air toxics programs. Mr. Howard said that the most important aspect of production is how quickly a product can come to the market. The market is not just global, but local. The manufacturing community has been trying to reduce the duplicative process of the State Air Toxics Program for quite some time.

According to Mr. Howard, there's not much additional environmental benefit to the duplicative process and the modeling effort. Since 2000, the level of air toxics emissions in the State has declined by 70%. The reason for that decline has little to do with the State Air Toxics Program. The reduction coincides with the implementation of the federal MACT program. The manufacturing community does not want the program eliminated, but wants it to become more consistent, so they can compete in the market place. The health protections can be met with the Director's Call, as well as with the other tools they have. They have a good team of inspectors that regularly inspect these facilities.

Report on the Study of the Cost of Assessing and Remediating Inactive Hazardous Substances

Senator Rouzer recognized Ms. Charlotte Jesneck, Head of the Inactive Hazardous Sites Branch of the Superfund Section in the Division of Water Management within DENR. Ms. Jesneck presented a report on the study of the cost of assessing and remediating inactive hazardous substance or waste disposal sites for which there is no financially viable responsible party and the implementation of S.L. 2011-186/HB 45 (Accelerate Cleanup of Industrial Properties). A copy of the presentation is included in the attachments to these minutes as Attachment #18.

Ms. Jesneck gave an update on the status and an overview of the orphaned sites under the Inactive Hazardous Sites Response Act. Ms. Jesneck also discussed risk-based remediation of industrial sites. According to Ms. Jesneck it is difficult to determine who is responsible for a site, as businesses were not required to keep records prior to the 1980s. There are approximately 323 orphaned sites and 283 high-risk orphaned contaminated sites. The most common is a contaminated water well site, some of which are the result of homeowner activities or migrating toxins from abandoned waste sites (i.e. drums left in the woods). Since about half of North Carolinians get their drinking water from wells, exposure to contaminated water is a concern.

Representative Samuelson asked about sites that are listed as "no further action" status. She has received a complaint from a constituent that there is still a large amount of paperwork to be filed after receiving a "no further action" status.

Ms. Jesneck said that there are two types of sites that fall into that category: 1) Sites that have been completely cleaned up to unrestricted use standards are not required to file any additional paperwork. 2) Sites with land use restrictions are required to provide an annual certification that they are still complying with the land use restrictions. That is the only required paperwork.

Representative Samuelson asked about the nature of the work that is involved in filing from year to year if nothing has changed. Ms. Jesneck said that they sign a document that states they are still complying with the land use agreement, which is filed with the register of deeds and submitted annually. There is nothing new that needs to be recorded or paid.

Senator East asked if there is a substance that could be injected into the ground in the affected area to treat underground petroleum leaks. Ms. Jesneck responded that there is technology that is used for petroleum leaks. Certain leaks respond to different types of bacterial strains. The petroleum serves as the food source for the bacteria added to the contaminated site. Chlorinated solvent and chemical sites aren't as easy to remediate as petroleum and require a different type of injection. Some of these chemicals are denser than water and when it sinks, it can be difficult to extract it.

Senator East asked if there are currently any sites in North Carolina in which this type of treatment was used. Ms. Jesneck said that she does not work in that department and she's unaware of any.

Representative McElraft asked about a property that was cleaned and then later sold at a profit. Could a lien be placed on the property to payback the cost of clean-up? Ms. Jesneck responded that legislation had been discussed in the past to do so, but they do not currently have the authority to do that.

Senator Hartsell asked about the status of the cleanup of the Badin Works site on the Yadkin River in Baden, North Carolina. Ms. Jesneck answered that the Badin site is not handled by her program and she referred the question to Mr. Dexter Matthews.

Mr. Dexter Matthews, Director of the Division of Waste Management, DENR, said that they are close to publishing a remedial action plan on the next stage of cleanup, involving polychlorinated biphenyls (PCBs). There is also ongoing sampling that was just completed in the entire river basin, and that information is currently being reviewed by the Epidemiology Section of the Public Health Division of the Department of Health and Human Services, a report should be released with that information in the next few months.

Senator Bingham asked Mr. Matthews about the arsenic contamination at the Badin site. Mr. Matthews responded that on the site itself there are a multitude of solid waste management units in which waste had been disposed of over the years. Most of those sites have a "no further action" status, yet there are a number of sites that have interim measures, such as removal of waste, cap on landfills, etc. The remaining work to be done on the property has been proposed for remediation and will be handled under that plan, which will also be available for public comment.

Senator Bingham asked about the large accumulation of wood chips and the arsenic contamination due to the wood chips. Ms. Jesneck responded that the wood chips were treated with copper chromium arsenic which is the cause of the contamination.

Representative Samuelson asked about the cost of producing the "no further action" list annually and if the property owner was notified of what they need to do to get off of the list. Ms. Jesneck said that DENR sends everyone on the ranking list a letter once a year. The cost is minimal.

Senator Hartsell asked Mr. Matthews about the cyanide contamination at the Baden works site. Mr. Matthews said the report he mentioned, which will be published in a few months, will address this along with other contaminants. Senator Hartsell requested a copy of the report. Mr. Matthews will update the Commission with the details at the next meeting.

Update on Directional and Horizontal Drilling and Hydraulic Fracturing (Fracking)

Senator Rouzer recognized Ms. Robin Smith, Assistant Secretary of Environment, DENR. Ms. Smith provided an update on DENR's study of the use of directional and horizontal drilling and hydraulic fracturing or "fracking" for the purpose of oil and gas exploration in the State. A copy of the presentation is included in the attachments to these minutes as Attachment #19.

Ms. Smith said that the current data on shale gas in the State is limited to two gas wells in Lee County. This data is being used as a basis for what shale gas resources may be present in addition to estimates for potential environmental and economic impacts. This data may not be representative of the entire Sanford Sub-basin, let alone the entire State of North Carolina. Ms. Smith indicated that they are still researching the direct impact on communities and have had to exclusively review community impacts experienced in other states. The oil and gas industry can have impacts on infrastructure. The economic benefits are still unclear, in part because of limited data. The economic impacts were developed by Department of Commerce. A copy of the Executive Summary of Directional and Horizontal Drilling and Hydraulic Fracturing is included as Attachment #13.

Ms. Smith discussed water withdrawals. According to Ms. Smith, North Carolina does not have a mechanism to manage water withdrawals. Ms. Smith noted that we probably have sufficient surface water supplies to meet the needs of hydraulic fracturing; however, we don't have the groundwater supply. There are fairly abundant surface water resources, but not all areas have equal surface water resources. Some are richer than others and all are prone weather and drought cycles. As a State, we cannot manage those water withdrawals without a permitting program. Hydraulic fracturing wells use three to five million gallons of water per day. If there's no regulatory mechanism in place, there can be significant impacts. If you draw that water down too quickly you can have streams go dry and make downstream users pick up the telephone. The State needs to be able to manage the water.

Ms. Smith noted that the report lists a number of areas for further study, including groundwater study and the separation between groundwater and gas and oil wells. Ms. Smith discussed the study's recommendations, which included the following:

1. Collect pre-drilling baseline data on resource quality.
2. Water management.
3. Enhance existing oil and gas well construction standards to address the additional pressures of hydraulic fracturing and horizontal drilling.
4. Develop setback requirements and identify areas where oil and gas activities should be prohibited.
5. Develop a State stormwater regulatory program for oil and gas drilling sites.
6. Develop specific standards for management of oil and gas wastes.
7. Require:
 - Full disclosure of hydraulic fracturing chemicals and constituents to regulatory agencies.
 - Public disclosure of hydraulic fracturing chemicals, except for trade secrets, through FracFocus or State agency website.
8. Prohibit the use of diesel fuel in hydraulic fracturing fluids.
9. Develop a robust data management system to:
 - Include GIS capabilities.
 - Store baseline water and air quality data.
 - Track production for royalties / severance tax.
 - Facilitate public disclosure of data.
 - Provide electronic permitting to the industry.
 - Enable effective permitting, inspection and enforcement.
10. Ensure State agencies, local first responders, and the industry are prepared to respond to a well blowout, chemical spill, or other emergency.
11. Develop a modern oil and gas regulatory program while preventing physical and economic waste of oil and gas resources
12. Keep environmental permitting in DENR where the process would benefit from the expertise of State geological staff and the ability to coordinate air, land, and water quality permitting programs.
13. Develop a coordinated permitting process.
14. Address the distribution of revenues from oil and gas excise taxes and fees.

15. Identify a source of funding for repair of roads damaged by truck traffic and heavy equipment.
16. Clarify the extent of local government regulatory authority over oil and gas activities.
17. Complete additional research on impacts to local governments and local infrastructure.
18. Complete additional research on potential economic impacts.

Representative Gillespie said that DENR did a good job on this study. However, he's disappointed that the Attorney General's Office hasn't provided input yet. Ms. Smith said that the Attorney General's Office will be addressing consumer issues, such as forced pooling or unitization, as well as well setbacks.

Senator Bingham asked if there had been concerns with drilling across another person's property? Ms. Smith said that would be something the Attorney General's Office will address. A state would normally approve a drilling block and some homeowners may be forced to participate. This practice is called "forced pooling" or "unitization." In most states where drilling occurs, methods for defining drilling blocks have been developed.

Commission discussion and announcements

Senator Rouzer thanked the members and staff, and announced the next meeting will be held on Thursday, April 26, 2012, at 9:00 a.m. in room 544 of the Legislative Office Building. The dates and times are subject to change and notice will be given if they change.

Adjournment

The meeting was adjourned at 12:30 p.m.

Co-Chair Senator David Rouzer

Co-Chair Representative Mitch Gillespie

Co-Chair Representative Ruth Samuelson

Attest:

Sarah Neunzig, Committee Clerk