



ENVIRONMENTAL REVIEW COMMISSION

January 15, 2014

Room 643 of the Legislative Office Building

The Environmental Review Commission (ERC or Commission) met on Wednesday, January 15, 2014 at 9:30 A.M. The meeting was held in Room 643 of the Legislative Office Building. Representative Ruth Samuelson presided.

Members present were: Representative Ruth Samuelson, CoChair, Representative Mike Hager, CoChair, Senator Austin M. Allran, Senator Stan Bingham, Senator Andrew Brock, Senator Bill Cook, Senator Fletcher L. Hartsell, Jr., Senator Gene McLaurin, Senator Ronald Rabin, Representative William D. Brisson, Representative Rick Catlin, Representative Jimmy Dixon, Representative Pricey Harrison, Representative Pat McElraft, Representative Chuck McGrady, Representative Chris Millis, and Representative Roger West. Dr. Jeff Warren, Senate Senior Policy Advisor; Emily Wilson, House Senior Policy Advisor; Mr. Jeff Hudson, Commission Counsel, Ms. Jennifer McGinnis, Commission Counsel, Mr. Jeff Cherry, Commission Counsel; Ms. Jennifer Mundt, Commission Analyst; Ms. Mariah Matheson, Research Assistant; Lindsey Dowling, Tori Bragg, and Towers Mingledorff, Commission Clerks; and Sergeants-At-Arms Garland Shephard, Larry Elliott, Ashley Mickens, Ed Kesler, Billy Fritscher, and Steve Wilson. (Attachment #1 and #2.)

Notice was sent to members and interested parties via e-mail on *October 2, 2013*. A copy of the notice is included in the attachments to these minutes as Attachment #3. Copies of the agenda for the meeting and visitor registration sheets are included in the attachments to these minutes as Attachment #4 and Attachment #5.

Call to Order, Minutes Approval and Introductory Remarks

Representative Samuelson called the meeting to order and welcomed members, staff, and visitors in attendance. Representative Samuelson introduced staff and asked the members of the Commission to introduce themselves. She then put forth the November Commission minutes to be approved. They were approved unanimously. These minutes are attached as Attachment #6.

Representative Samuelson gave an overview of the ERC meeting. She referenced the four working groups that are meeting to discuss a number of issues that the full Commission wouldn't have time to review in detail. These groups will report back to the full Commission.

Review of engineering

Representative Samuelson recognized Representative Chris Millis who gave an overview of the engineering working group. Representative Millis and Senator Bingham were further examining Section 58 of House Bill 74 (Regulatory Reform Act of 2013). Representative Millis said that in short, they are looking to review State regulatory agencies and the local governments that report directly to the Department of Environment and Natural Resources (DENR). This is in an effort to determine if the regulators knowingly or unknowingly encroach upon engineering practices. This study examines two main aspects to regulatory engineering: legal liability and regulatory reform for technical review. The report is scheduled to be presented in March.

Mr. Tracy Davis, Director of Mineral and Land Resources

Representative Samuelson recognized Mr. Tracy Davis, Director of Mineral and Land Resources (DEMLR), DENR for a presentation on the State's stormwater programs, including the annual report on implementation of stormwater runoff rules and programs. Mr. Davis gave a quick summary on transferring the Stormwater Permitting Program from the former Division of Water Quality (DWR) to DEMLR, an overview of the different stormwater programs, an update on legislative change to Built-Up Area and associated definition of gravel as pervious, and highlights from the October 1, 2013 Annual Stormwater Program Report. A copy of Mr. Davis' PowerPoint presentation is included in the attachments to these minutes as Attachment #7. The following questions were asked:

Representative Catlin stated that in order to perform any engineering task in the State, you must be a licensed, professional engineer. Additionally, he stated that there are additional expenses associated with being an engineer, such as professional license fees. If regulators are influencing the design of the license and fees it may directly influence the cost of livelihoods for engineers.

Senator Rabin asked if Mr. Davis stumbled upon any unnecessary rules or regulations while compiling this presentation.

Mr. Davis replied that he didn't get into that level of the review, but rather the overall process. He stated they will be doing a rules review as a result of HB 74. He stated that his division is very willing to work with engineers while evaluating these rules.

Mr. William "Gus" Simmons, Professional Engineers of North Carolina

Representative Samuelson recognized Mr. William "Gus" Simmons PE, Cavanaugh & Associates PA, to give a presentation on the evaluation of regulatory review of engineering work, on behalf of the Professional Engineers of North Carolina (PENC). A PowerPoint presentation is attached to these minutes as Attachment #8.

Mr. Simmons stated that the PENC supports the review of applications that require regulatory approval, including those requiring the work of a Professional Engineer, as prescribed by State law. PENC encourages all members of the public, including regulatory reviewers, refer

any work completed by a professional engineer that is purported to be negligent or incompetent, to the North Carolina Board of Examiners for Engineers and Surveyors (NCBELS).

Mr. Simmons discussed inconsistencies in review processes and practices among and between groups within a given regulatory agency and further inconsistencies among staff within the same grouping. PENC encourages regulatory agencies to develop and implement programs and practices that establish an improved standardization process and increased consistency among regulatory reviewers. Lastly, Mr. Simmons discussed PENC's findings and recommendations.

No questions were asked.

Bingham Facility

Rep. Samuelson recognized Dr. Rob Lowman, PhD, Associate Vice Chancellor for Research, Research Professor of Psychology, University of North Carolina at Chapel Hill (UNC-CH), for a presentation on the UNC Bingham Research Facility at UNC Chapel Hill. A PowerPoint presentation is attached to these minutes as Attachment #9. Dr. Lowman discussed the Bingham Research Facility wastewater treatment problems and gave an overview of the research that the Bingham Research Facility conducts. The following questions were asked:

Rep. Samuelson commended Dr. Lowman and the UNC Bingham Research Facility for recognizing their error and displaying leadership to correct them.

Sen. McLaurin asked how many dogs are at the facility and where do they come from. Dr. Lowman said that the facility houses over 200 dogs. They breed many of the dogs, while some come from owners who realize their animal is not healthy.

Sen. Brock asked what the total costs of this renovation was and how much did it cost to replace the facility's noisy chillers. Dr. Lowman answered that the financials are included in the handout but the chillers cost \$271,216. These were not a total loss because the facility was able to use the old chillers at other locations across campus or sell them. Thus, this number was not the total out-of-pocket expense for the University.

Sen. Brock asked if the wetland violations from the spray irrigation system was created at the facility. Dr. Lowman replied that one of the incursions was from the wet weather basin that led to the property and the other was a result of the emergency or "overflow" basin that led into wetlands. The Army Corps of Engineers permitted the road, but required us to mitigate the emergency basin and we have done that to their satisfaction.

Sen. Brock commented that the old tactics and strategies to regulate spray irrigation systems used for environmental reasons cause more problems now, 20 to 25 years later. These problems are man-made. Some companies are looking at 25-year-old pipes that have now been naturalized or a dry basin that was used as a spray field is now considered a wetland because it was sprayed upon. He observed that the problems with the businesses are consistent with the problem seen at the Bingham Facility.

Rep. Hager asked what has been the total cost of the errors and overruns that you've seen at the property. Dr. Lowman replied that the answer is not clear cut because he said you could theoretically include the grants lost because of the lack of infrastructure built on the land. His best guess was that roughly \$3 million has been spent replacing systems that needed to be replaced. These primary expenses include the new domestic wastewater system, the pump and haul, and the expenses of the ultra-quiet chillers. The total expenses have been approximately \$16 million. These upkeeps should maintain the facility to have a 30 year life span.

Rep. Hager asked if the price included the original land purchase. Dr. Lowman said the original land cost approximately \$31,500 and is included in that price.

Rep. Hager asked what process occurred to lead to the resolution of the violations and if there is due-diligence being served to keep this from happening again. Dr. Lowman replied there were engineers, contractors and university personnel involved in both committing the violations and also resolving the problem. The University could have had more oversight and hired engineers could have steered us in the wrong direction, but the blame should be spread around. Dr. Lowman explained that the liners leaked due to the improper compaction of the soil due to rocks and tree branches sticking through the lining. This is an example of the University and the engineers not working together as well as they should have.

Rep. Hager asked if anyone has absorbed the negative consequences of the nearly \$4 million taxpayer dollars. Dr. Lowman replied that some of the individuals involved with creating the original plan for the Bingham facility are no longer at the University. No one has been directly sued as a result due to the cost, time and trouble. The facility decided to move forward.

Rep. Dixon asked if any of the agencies offered to help correct the problem before issuing fines. Dr. Lowman replied that they were in regular consultation with DENR who willingly gave advice about how to proceed. They hired an additional outside consultant, but found DENR to be capable and helpful regardless. DENR has helped in the redesign of the new facility. However, the leak occurring for 60 days, which required a fine to maintain regulatory standards. The integrity of the system required the Bingham facility to be held accountable for the problem.

Rep. McElraft asked if the collaboration with North Carolina State University (NCSU) in the housing of more animals will bring back the National Institutes of Health (NIH) grants to continue the research of these genetic disorders. Dr. Lowman stated that the collaboration will not bring back the NIH grants because they were specifically for the recovery of costs for construction. However, the possibility of collaborating with NCSU is exciting. In the future, we want to consider the logistics of the transportation back and forth and other elements to facilitate this partnership.

Rep. Samuelson asked what happened to the consolidation of the dogs when the facilities were unable to be constructed. Dr. Lowman said the Carrboro facility was renovated to hold the dogs from the Francis Owen blood research lab. Due to the facility issues, the program lost its

investigator for muscular dystrophy dogs. Rep. Samuelson also asked what von Willebrand disease is. Dr. Lowman referred the question to the expert, Dr. Tim Nichols. Rep. Samuelson stated she will follow up with the expert after the meeting.

Rep. Harrison stated her appreciation for Dr. Lowman's leadership at UNC-CH, and asked if there are any other large animals at the facility. Dr. Lowman stated that the temporary Carrboro facility currently only houses dogs. The researchers are considering other projects after the facility issues are fully resolved and the dogs are moved back to their rightful place.

Sen. Hartsell also inquired about the definition of von Willebrand disease. Dr. Tim Nichols answered the question and defined the disease as a bleeding disorder. The von Willebrand factor is a protein that prevents clotting. It is the most common inherited bleeding disorder that affects both men and women that affects quality of life and reproductive health. One of the most helpful findings from this research has helped reduce the need for transfusions in some individuals.

Mr. Cliff Leath

Rep. Samuelson recognized Mr. Cliff Leath, Owner of property adjoining the Bingham Facility, for a presentation regarding the Bingham facility from his perspective as a neighbor. Mr. Leath said that the problems began in 2009. Mr. Leath gave a timeline of the Bingham Research Facility and showed photos of the facility's leaking wastewater lagoons. Mr. Leath is concerned about the facility's environmental impact to nearby property owners. Mr. Leath believes that the Bingham Research Facility should not have been repurposed, as they have a facility in Carrboro that is closer and can be utilized in the same manner. The details of Mr. Leath's presentation are outlined in his PowerPoint presentation (attachment #10). No questions were asked. Rep. Samuelson stated that the presentations on the Bingham Facility were for discussion only and no action was planned to be taken at this time.

Cities and Counties Environmental Ordinance Working Group Discussion

Rep. Samuelson recognized Rep. McGrady to give an overview of the working group tasks. Rep. McGrady spoke on behalf of himself and Sen. Brock, who were given the task to examine what constitutes environmental ordinances in cities and counties as a result of House Bill 74. The cities and counties wanted to be heard as well as other groups that have specific concerns to discuss.

Erin Wynia

Rep. Samuelson recognized Erin Wynia, Legislative and Regulatory Issues Manager, North Carolina League of Municipalities (NCLM), to give a short presentation regarding what influences environmental ordinances within the cities, including water supply. More details about Ms. Wynia's presentation are included in the PowerPoint presentation attached to these minutes (Attachment #11).

Rep. Harrison asked how long Chapter 160 has been in the statutes. Ms. Wynia didn't know and Rep. Samuelson referred the question to staff.

Sen. Hartsell asked how the Unified Development Ordinances (UDO) in a county affects the work of the NCLM and how many of these ordinances exist. Ms. Wynia stated that she would find out how many ordinances of this nature exist and would report back to the Commission. Additionally, Ms. Wynia responded that a UDO was an attempt to consolidate and codify all ordinances into land use. These environmental ordinances would be a part of the consolidation and would become a part of the UDO. Sen. Hartsell asked if there were any multi-city or city-county UDOs. Ms. Wynia responded that Lee County and the City of Sampson are all under one Unified Development Ordinance.

Rep. Hager stated that it is part of the ERC's responsibility to look at the ordinances that exist and protect citizens from undue ordinances. Rep. Hager asked if there is another area, outside of Lake Lure, in which an environmental attribute like a lake or beach drives the economy within the community. Ms. Wynia stated that coastal communities like Emerald Isle and Lake James would consider their economies to be driven by these attributes.

Johanna Reese, Association of County Commissioners

Rep. Samuelson recognized Johanna Reese, Director of Government Relations, North Carolina Association of County Commissioners, to give a brief presentation on the county involvement to maintain local ordinances in the event that they may be as strict or stricter than State and federal laws or regulations. This PowerPoint presentation is attached to these minutes as Attachment #12.

Rep. Harrison asked if there are State minimums for steep slope regulations. Ms. Jennifer McGinnis, Commission Counsel, replied that none of the State laws regulating steep slopes were enacted, thus nothing prohibits local governments from creating these regulations.

Rep. Millis stated that his focus for this working group is to examine the additional layers of regulation local governments have created if the issue is already addressed by federal or State governments. He stated that this overlap should be examined to eliminate confusion and unintended consequences.

Elizabeth Robinson, North Carolina Retail Merchants Association

Rep. Samuelson recognized Ms. Elizabeth Robinson, Director of Government Relations, North Carolina Retail Merchants Association (NCRMA), to speak about concerns the industry has had regarding environmental ordinances. Ms. Robinson represented small and large retailers across the State. The NCRMA has concerns when a county or local government wants to pass an additional ordinance under the guise of environmental protection. However, these local governments may be attempting to circumvent North Carolina's prohibition on the regulation of commerce by local acts. The purpose of this prohibition is to avoid a "patchwork of laws from county to county," as stated by the North Carolina Supreme Court. Companies that have migrated from other states are complimentary of this process in which the State attempts to

maintain a uniform regulatory scheme at every level. In spite of this, the retailers have had to combat localities that have the effect of obstructing commerce.

An example of this was when the City of Raleigh wanted to enact an ordinance that would put a fee for drive-through pharmacies. Additionally, Chapel Hill proposed banning drive-through pharmacies altogether, citing greenhouse gas emissions. Similarly, Raleigh, Durham and Chapel Hill all considered fining retailers for losing shopping carts, citing they would end up in river beds. Raleigh passed, then later repealed, a ban on the installation of new or replacement garbage disposals with fines up to \$25,000 for violations. Chapel Hill almost banned leaf blowers, citing emissions and noise concerns, and then settled for restrictions on decibel limits for leaf blowers. In many of these instances, the NCRMA was able to get involved to work out a voluntary compromise between the city and the industry to combat the most onerous provisions that were being considered. However, Ms. Robinson stated that the NCRMA doesn't have the resources to track every proposal across the State though they do impede commerce.

Chris Thomas, Charlotte Real Estate Association

Rep. Samuelson recognized Mr. Chris Thomas, Charlotte Real Estate Association, for comments. Mr. Thomas stated that Mecklenburg County's stormwater regulations exceed that of the State and federal requirements and in some cases make new development and redevelopment challenging and occasionally cost-prohibitive. These ordinances are well intentioned, but when grouped together they undermine the feasibility of these projects. Redevelopment opportunities are more common when bouncing back from a recession. Local ordinances mandate that stormwater regulations that are necessary for pre-building opportunities at the State level are also mandated for redevelopment properties as well. The impact of this is less redevelopment due to the cost. The justification for these local ordinances from the agency office near Mecklenburg County is that the local ordinances are following suit with pending federal regulations that will be enacted in the future. However, there has not been a time when a federal regulation has been backdated. He cited an example that a Matthews-based grocery was unable to expand due to these stormwater controls and stated it would be likely that businesses like this would leave the area due to restrictive regulations.

Lisa Martin, North Carolina Homebuilders Association

Rep. Samuelson recognized Ms. Lisa Martin, Director of Governmental Affairs, North Carolina Homebuilders Association, for comments. Ms. Martin stated that many of the concerns deal primarily with the Building Code. There are local governments that try to implement ordinances through the Building Code. Additionally, another issue is that local governments achieve this through environmental buffers without justification. Ms. Martin also agreed that the word "stringent" should be defined during the Legislative Short Session and should be addressed as retroactive.

Rep. Catlin asked what would happen if a local ordinance was implemented prior to HB 74 and was brought to the Commissioners to be modified. Does the ordinance stay in place? Mr.

Jeff Hudson, Commission Counsel, answered that there are different interpretations and should be clarified if the language stays in place.

Sen. Brock asked if there were any cities that passed an ordinance that would order a grocery store to retrieve lost shopping carts or face a fine. Ms. Robinson replied that it was a proposal that was stopped before the ordinance was enacted.

Rep. McGrady asked the speakers to compile a list of particular ordinances that are still problematic and report them to the working group.

Sen. Hartsell commented that the justifications for many of these ordinances are to preserve the health and safety of North Carolinians. However, the State Constitution provides for protection of health and safety as well as the protection of commerce across the State.

Rep. Samuelson asked if cities and counties are required to go through a rules review process and if not, is there an avenue for it to be done. Mr. Jeff Hudson stated that cities and counties aren't subject to the rulemaking process in statute and nothing requires them to review the existing ordinances.

Environmental Management Commission

Mr. Benne Hutson, Chair of the Environmental Management Commission (EMC), gave a presentation on the EMC's quarterly reports, its operations, activities, and progress from July 2013 through December 2013, attached to these minutes as attachment #13. Mr. Hutson discussed what has been done over the past quarter and what is currently in progress as a result of the Regulatory Review Act of 2013 (HB 74) from last session. Mr. Hutson also stated that it would be easier to report to the ERC as needed rather than quarterly. He reiterated that the fiscal note process for the nearly 1,000 regulations being reviewed is a time consuming process. Additionally, he mentioned that a definition of "gravel" is necessary.

Rep. Catlin stated that the fiscal note issue is a big issue. When a rule is repealed, the fiscal note process is not necessary. Rep. Catlin also asked why these rules are categorized by public interest. Mr. Hutson said the statute defines what "public interest" is. Based upon the experience of the EMC, there is always someone who would like to change the statutes. However, there are some rules that will be reviewed due to other criteria or was federally mandated.

Rep. Samuelson stated that the process is three-phased. The second phase determines whether the comments on the rule merit putting the rule through the review process. Mr. Hutson stated that he hopes the EMC will get this process underway before the Legislative Short Session.

Rep. Catlin asked if a rule is slowed through the rules review process if the fiscal note is not completed. Mr. Jeff Hudson replied that the rule cannot be fully reviewed until the fiscal note is completed and must comply with the Administrative Procedure Act (APA). Rep. Catlin

clarified that the rule would stay in place until the fiscal note was completed. Mr. Hudson confirmed.

Sen. Jackson asked why the definition of “gravel” is necessary because the rule seemed well defined. Mr. Hutson stated that the word is defined in other statutes like conservation easements and has confused the regulatory community. Additionally, Mr. Hutson states that the definition affects what is or isn’t classified as “built-upon.” The last concern was an environmental concern with the permeability or impermeability of the rock. The smaller, round rock is loose and provides permeability. The larger, angled stone compacts and thus doesn’t permeate. This has an effect on stormwater controls.

Sen. Jackson asked why the EMC went through the temporary rule process. Mr. Hutson replied that the issue was raised by the statute. A temporary rule that is triggered by statute has to be adopted within 270 days of the law going into effect. The normal rulemaking process takes anywhere from eighteen months to two years. The EMC decided the action should be taken sooner rather than later.

Sen. Jackson asked what the rule will say in regards to gravel. Mr. Hutson replied that gravel will be defined as a clean, loose aggregate material ranging in diameter from 0.8 inches to 3 inches. This way, gravel is clean and washed so that it won’t find compaction.

Rep. Millis asked if the definition of built-upon area is defined only for the State regulatory purpose of maintaining stormwater quality or if the definition has local government implications. Mr. Jeff Hudson replied that the definition of built-upon area in House Bill 74 applies to the State stormwater statute and is a State definition.

Rep. Millis asked if the EMC has looked at other materials that contribute to runoff. Mr. Hutson stated that the temporary rule can only address the issue raised directly from the statute. Other materials will be addressed as part of the overall review process.

Rep. Samuelson stated that to conserve time, the overview of the Yadkin Hydroelectric Project will be posted online and will be revisited at a later meeting if deemed necessary.

Mr. Tom Reeder, Division of Water Quality

Mr. Tom Reeder, Director of the Division of Water Resources (DWR), DENR, gave a report on the State Water Supply Plan and the reorganization of the DWR of DENR. Mr. Reeder also explained water efficiency, water supply assistance to local governments, hydrologic modeling, ecological flows, coastal plain aquifers, interbasin transfers, and the Jordan Lake Pilot Test. A copy of his PowerPoint presentation is attached to these minutes as attachment #14.

Rep. McGrady asked for an updated organization chart and for it to be distributed. Mr. Reeder stated that the final chart isn’t published because of privacy violations. Rep. McGrady also asked if the SolarBee effort at Jordan Lake has been compared to the unsuccessful technology in Cabarrus County. Mr. Reeder stated that the company says the technology has a 90-95% success rate when the implementation and operation of the technology follows the recommendations put forth. Rep. McGrady asked if the company blamed the Cabarrus County

Water and Sewer Authority for the failure of the product. Mr. Reeder stated that he didn't ask for the documentation of the previous project.

Rep. Harrison asked if DENR is engaged in the oversight and monitoring of Jordan Lake. Mr. Reeder stated that DENR is already monitoring and has a monitoring plan for the pilot test as well. Rep. Harrison asked if the coastal counties rely on aquifer and desalinization since they don't heavily rely on surface water. Mr. Reeder stated that the vast majority of the counties rely on aquifers. Rep. Harrison asked if North Carolina has protections in place to regulate the containment of these toxic chemicals so that the State could avoid a spill similar to that in West Virginia. Mr. Reeder stated that North Carolina would be able to handle the situation better. The Department of Environment Protection in West Virginia relied on contract workers to do the sampling, but North Carolina conducts the sampling itself. Rep. Harrison clarified that DENR would be able to monitor situations in the event of a spill. Mr. Reeder confirmed.

Rep. Catlin stated that coastal counties have enough water to meet water supply needs for approximately 29 years in the event of a catastrophe. However, he stated that ponds are drying up and there are no regulations in the aquifers in the region. Rep. Catlin would like these reviewed. Mr. Reeder stated that DENR can certainly evaluate aquifers in the eastern part of the State.

Rep. Dixon asked if it was possible that the initial assessment of the aquifer was flawed since the recovery exceeded expectations. Mr. Reeder replied that it was unlikely. He stated that the reason for the excessive recovery was the switch of many local governments from regional water systems to surface water.

Rep. Samuelson asked what the impact of another drought would be in relation to aquifer recovery. Mr. Reeder replied that aquifers are recovered and recharged. In the event of a drought, the State and local governments could revitalize the aquifer system that provides a redundancy to surface water.

Rep. Catlin stated that as a result of the aquifer, rates are extremely high causing many residents to install irrigation wells.

Sen. McLaurin stated that as a petroleum distributor he sees little oversight of above ground storage tanks. He asked if there is any proactive measure necessary to prevent a water scenario similar to that in West Virginia. Mr. Reeder stated that he would ensure it.

After hearing no more questions, Rep. Samuelson adjourned the meeting. The next meeting shall occur on February 17th and 9:30 a.m.