



North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

John E. Skvarla, III
Secretary

November 3, 2014

MEMORANDUM

TO: THE ENVIRONMENTAL REVIEW COMMISSION
The Honorable Mike Hager, Co-Chair
The Honorable Ruth Samuelson, Co-Chair
The Honorable Brent Jackson, Co-Chair

FROM: Neal Robbins, Director of Legislative Affairs

SUBJECT: Report to the Environmental Review Commission of the North Carolina General Assembly on the Scope of Local Authority for Ordinances

DATE: November 3, 2014

Pursuant to S.L. 2014-120, section 32(b), the North Carolina Department of Environment and Natural Resources and the North Carolina Department of Agriculture and Consumer Services to report no later than November 1, 2014 to the Environmental Review Commission of the North Carolina General Assembly on any local government ordinances that impinge on or interfere with any area subject to regulation by the respective Department.. Please consider the attached as the formal submission this report.

If you have any questions or need additional information, please contact me by phone at (919) 707-8618 or via e-mail at neal.robbs@ncdenr.gov.

cc: Mitch Gillespie, Assistant Secretary for Environment

North Carolina Department of Environment and Natural Resources

**Report to the Environmental Review Commission of the North Carolina General
Assembly on the Scope of Local Authority for Ordinances**

Regulatory Reform Act of 2014, Session Law 2014-120, Section 32

Due November 1, 2014

I. Report on Scope of Local Authority for Ordinances

Section 32(a) of the Regulatory Reform Act of 2014 (the “Act”) repeals the temporary limitation on enactment of environmental ordinances by cities and counties enacted by the Regulatory Reform Act of 2013, North Carolina Session Law 2013-413, Section 10(b). Section 32(b) of the Act requires the North Carolina Department of Environment and Natural Resources (“NCDENR”) and the North Carolina Department of Agriculture and Consumer Services (“NCDA&CS”) to report no later than November 1, 2014 to the Environmental Review Commission of the North Carolina General Assembly on any local government ordinances that impinge on or interfere with any area subject to regulation by the respective Department. In completing this study, both Departments were to gather public input.

Section 32 of the Act states:

SCOPE OF LOCAL AUTHORITY FOR ORDINANCES

SECTION 32.(a) Section 10.2 of S.L. 2013-413 is repealed.

SECTION 32.(b) No later than November 1, 2014, and November 1, 2015, the Department of Agriculture and Consumer Services shall report to the Environmental Review Commission on any local government ordinances that impinge on or interfere with any area subject to regulation by the Department.

SECTION 32.(c) No later than November 1, 2014, and November 1, 2015, the Department of Environment and Natural Resources shall report to the Environmental Review Commission on any local government ordinances that impinge on or interfere with any area subject to regulation by the Department.

SECTION 32.(d) In developing the reports pursuant to Sections 32(b) and 32(c) of this act, the Department of Environment and Natural Resources and the Department of Agriculture and Consumer Services shall solicit and receive input from the public regarding any local government ordinances that impinge on or interfere with any area subject to regulation by the respective Department.

II. Gathering Public Input on Local Ordinances

On September 16, 2014, the Departments issued a joint press release titled “State seeking public input on local laws that could interfere with state environmental, agricultural rules.” The press release was sent to the DENR communications listserv and posted on the front page of the website. The communications listserv reaches 300-400 news agencies throughout the state. The press release asked the public to send comments to a NCDENR email box or physical address through October 15, 2014. The press release was also shared separately with the North Carolina League of Municipalities, North Carolina Association of County Commissioners, and the North Carolina Chamber of Commerce. A copy of the press release is Appendix A.

III. Summary of Comments

The NCDENR received a total of five comments to the public input email inbox which are summarized below. This includes a comment forwarded from the NCDA&CS. The comments in their original form are included as Appendix B.

Comment 1: Trout Buffer Variances and US Department of Agriculture (USDA) Natural Resources Conservation Services (NRCS) Stream Projects- a representative of the Henderson County Soil and Water Conservation District shared a conversation with an engineer for the USDA-NRCS. The engineer writes that they have always been exempt from trout buffer requirements under the North Carolina Sedimentation Pollution Control Act (the “SPCA”) under the agricultural exemption.

Response: The Land Development Code of Henderson County, Section 200A-203 requires a permit for development in the Special Flood Hazard Areas as designated by the Federal Emergency Management Agency (“FEMA”) in its Flood Hazard Boundary Map. Natalie Berry of the Henderson County local program was involved in determining whether a project was subject to the trout buffer regulations where there was a local Special Flood Hazard Designation and the project was being overseen by the USDA-NRCS. After discussions with NCDENR, staff did agree that the project was for agricultural purposes and would not be subject to the SPCA.

Comment 2: Agriculture Best Management Practices and Floodplain Ordinances – a representative of the Henderson County Soil and Water Conservation District writes that it would be helpful to have additional clarification of which agricultural best management practices are and are not subject to a permit. There is a recommendation for a guidance document from the state to improve consistency in implementing floodplain ordinances.

Response: Local governments may adopt ordinances to regulate uses in flood hazard areas in accordance with NC General Statute § 143-215.54. The law provides that uses including general farming, pasture, outdoor plant nurseries, horticulture, forestry, mining, wildlife sanctuary, game farm, and other similar agricultural, wildlife and related uses may be made of flood hazard areas without a permit provided the use complies with any other applicable laws or regulations.

Comment 3: Environmental Remediation in Guilford County – an engineer with ARCADIS U.S., Inc. inquires about the Guilford County Health Department having regulatory jurisdiction for environmental remediation projects. The engineer states that Guilford County fees may be excessive since NCDENR will perform the services for free.

Response: Staff from the Inactive Hazardous Sites Branch, NCDENR, responds that Guilford County staff does assist our program in oversight of cleanup actions but that the program has not been delegated to the County. The work of the County is reviewed by the NCDENR Inactive Hazardous Sites Branch Central Unit Supervisor. The assistance of the County is a benefit to NCDENR, but we cannot provide insight into the appropriateness of the amount or frequency of the local fee.

Comment 4: Uniform Environmental Covenants (“UEC”) - UEC is being used in several states to link laws and regulations together and establish standardized and defensible groundwater, soil, and waste cleanups. The UEC is often written to force various agencies to accept one standard or another for cleanups to avoid internal conflicts and discrepancies on how laws, regulations and policy is implemented. UEC should be used in NC to leverage best practices and standards among all agencies that enforce permits and oversee cleanups.

Response: The model Uniform Environmental Covenants Act creates “environmental covenants” that allow the long-term enforcement of clean-up controls and land use restrictions on contaminated property. The Department is currently conducting a study on risk-based clean-up

of contaminated properties that will address these same issues. That report is due on November 1, 2014 to the Environmental Review Commission.

Comment 5: A representative of ENRISCO, PC states that the Falls Lake Watershed Protection ordinance should be revisited and the extent of protection redefined to more reasonable distances from the lake. According to the representative, there is a leaking UST in the area of local water wells and the ordinance prevents the installation of water or sewer lines to connect local water well users to municipal water service.

Response: This comment was made by an environmental consultant managing a leaking underground storage tank project for the regulatory responsible party. The view below shows an area near US Highway 1 near Wake Forest. The green line generally marks the watershed protection boundary which encompasses land area to the west (left of green line). The restrictions the consultant commented on relate to the private residences within the protected area.



The Utility provider (City of Raleigh) thus far has not been amenable to extending water services to any customers west of US 1 due to a provision in the City of Raleigh's Comprehensive Plan that allows the extension of City services outside the City limits only if the City Council makes a determination that there is an imminent threat to public health, safety and welfare. The allowance of some exceptions in cases such as this example would seem to be worth considering. The outcome of providing water services would benefit the residents by removing the threat of their wells being contaminated from the

petroleum release. Also the responsible party for the release would have more options for other cleanup approaches, all of which would provide a cost savings to the NC Trust Fund.

The “Falls Lake Watershed Protection ordinance” mentioned in the comment refers to the City of Raleigh’s Comprehensive Plan for the Falls Lake watershed, which is not an ordinance. The Comprehensive Plan serves as a policy guide for development under the City’s Unified Development Ordinance.

IV. Local Ordinances that Impinge or Interfere with Areas Subject to Regulation

At this time, NCDENR does not have any recommendation with regard to local ordinances that impinge on or interfere with areas subject to regulation by the Department. The comments made by the public will be taken into account in ongoing studies, the implementation of laws, and in communication with local governments.

Appendix A: NCDENR Press Release

Release: Immediate
Date: Sept. 16, 2014

Contact: Jamie Kritzer
Phone: 919-707-8602

State seeking public input on local laws that could interfere with state environmental, agricultural rules

RALEIGH – The N.C. Department of Agriculture and Consumer Services and the N.C. Department of Environment and Natural Resources are seeking input from the public about any local ordinances that might interfere with the state agencies' own regulations.

The Regulatory Reform Act of 2014, passed by the General Assembly in August, requires both departments to report on "any local ordinances that impinge on or interfere with any area subject to regulation by the Department(s)" by Nov. 1. The legislation also directed the two departments to seek public input regarding such ordinances.

The departments are accepting comments through Oct. 15.

For the N.C. Department of Agriculture and Consumer Services, the public may submit comments to Keith Larick, NCDA&CS, 1001 Mail Service Center, Raleigh, NC 27699-1001 or may post comments online at <http://www.ncagr.gov/LocalOrdinances/>.

For the N.C. Department of Environment and Natural Resources, people may submit comments to Layla Cummings, 1601 Mail Service Center, Raleigh, N.C. 27699-1601, or by email to public.input@ncdenr.gov.

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Appendix B: Comments Sent to NCDENR

Comment 1

From: Brokaw, Laurie - NRCS-CD, Hendersonville, NC [<mailto:laurie.brokaw@nc.nacdnet.net>]
Sent: Tuesday, September 23, 2014 2:51 PM
To: SVC_DENR.Public.Input
Subject: Trout Buffer Variance - NRCS stream projects

State seeking public input on local laws that could interfere with state environmental, agricultural rules

Recent conversation sent in reference to this public input request

From: Natalie Berry [<mailto:nberry@hendersoncountync.org>]
Sent: Monday, September 22, 2014 4:53 PM
To: Brokaw, Laurie - NRCS-CD, Hendersonville, NC
Subject: FW: Trout Buffer Variance - NRCS stream projects

FYI

From: Stokes, Jake - NRCS, Waynesville, NC [<mailto:jake.stokes@nc.usda.gov>]
Sent: Monday, September 22, 2014 1:15 PM
To: laura.herbert@ncdenr.gov
Cc: Natalie Berry; Walker, Alan - NRCS, Waynesville, NC
Subject: Trout Buffer Variance - NRCS stream projects

Ms. Herbert,

I'm glad we had the opportunity to talk this morning about the Trout Buffer Variance that we have become accustomed to when implementing stream bank and channel stabilization projects. I understand your question, arising from the permit request for the Kerri Lyda-Taylor farm, regarding if the work planned is truly agricultural in nature when the purpose of the project may seem to have no relation to agricultural activity. We believe that all of our stream work is agricultural in nature in one way or another and I'd be glad to give you my thoughts.

As a non-regulatory Service where all work is at the request of the agricultural operator, we are invited on to farms to address the concerns of the operator. Sometimes those concerns are glaring and obvious and sometimes they are just looking for ideas on how to make their land more productive, sustainable, or beneficial to the ecosystem and environment. The majority of requests to address stream instabilities is the result of productive farmland lost to an unstable stream. This may be pastureland, hay land, cropland, or potentially productive land on agricultural (forestry included) operations. Many times the cause of the stream instabilities is due to past and/or current agricultural practices. Some examples of these practices include livestock access to the stream channel, Riparian buffer and woody vegetation removal to expand crop or hay land, and past channelization and straightening of streams. Of course if we are going to stabilize these impaired stream we will require that any practices detrimental to stream stability, like unrestricted livestock access to the stream, be ceased and resolved.

We also require on all of our stream stabilization jobs that herbaceous and woody vegetation be installed to protect the investment and provide all the benefits that come with Riparian vegetation. We work with each agricultural operator to determine an acceptable buffer width on the particular project. We require herbaceous and woody plant materials and always push for multiple rows of trees above bank. *In no cases* would a completed project have less buffer width than before.

As I mentioned on the phone, I've been working with stream stabilization projects in Western NC for 14 years and NRCS has never had to request a Trout Buffer Variance since we work exclusively on agricultural land and all of

our projects are in some way agricultural in nature. I've asked around and unfortunately no one knows of a past written agreement. I'm glad we took another look at this just for my own understanding of why we've always been exempt.

Please feel free to call or email if you have any questions.
Thanks,

Jake Stokes, P.E.
USDA-NRCS Civil Engineer
Waynesville Area 1 Office
828 456 6341 ext4 or ext109

Comment 2

From: Brokaw, Laurie - NRCS-CD, Hendersonville, NC [mailto:laurie.brokaw@nc.nacdnet.net]
Sent: Wednesday, October 15, 2014 9:51 AM
To: SVC_DENR.Public.Input
Subject: Flood Plain ordinance, etc.

Hello Keith and Layla,
I have worked with both Buncombe and Henderson County Soil & Water Conservation Districts for a total of 12 years (6 years each).
In both counties we have had recurring questions of what agricultural best management practices do and don't require permits.
Over the years this has included: County (Flood plain/erosion control), State (NCDENR) and Federal (ACOE) agencies.
In some cases, projects were required to perform a full no-rise study, which can be hugely time consuming.
Clarification on what ag BMP's are/are not exempt from permitting would be helpful.
This needs to be documented somewhere and not change on a whim as staff change.
These rules/issues are also interpreted very differently from one county to the next.
The USDA-NRCS District Conservationist in our county has very different guidelines in the other county she covers.
If the flood plain ordinance is a state program, implemented at the county level, then there should be some sort of guiding document from the state for the county staff to use – consistently!
All this being said – I think a small portion of the problem is that many government staff are up to speed on traditional engineering practices, but not on the benefits of the ag bmp's.
We have taken the time to help our county flood plain person gain knowledge of these practices.
She is sort of stuck between a rock and a hard place, at times, as she sees the benefit of an installed practice, but also sees how it does not quite fit into flood plain ordinance guidelines as she interprets them.
Again – a guiding document would be helpful for all.
There are some great NC Dept. of Ag and USDA- NRCS engineers/staff that might assist a work-group to do this!

Thank you for taking the time to ask for our input.
Laurie Brokaw
Soil Conservationist / Education Coordinator
Henderson County Soil & Water Conservation District
61 Triple Springs Rd.
Hendersonville, NC 28792
828-697-4949 - office
828-280-3981 – cell

Comment 3

From: Malone, Donald [mailto:Donald.Malone@arcadis-us.com]

Sent: Wednesday, September 24, 2014 1:39 PM

To: SVC_DENR.Public.Input

Cc: Malone, Donald

Subject: State seeking public input on local laws that could interfere with state environmental rules

Can you please provide insight to the rationale for the Guilford County Health Department having regulatory jurisdiction in lieu of NCDENR for environmental investigation and remediation projects in Guilford County. The fees they charge (\$60/well application fee and \$60/well annually) seems a bit excessive to administer the program,...especially for large sites. It is also a service that is provided for free by NCDENR. I have relationships and enjoy working with several folks within the GCHD, so I am not knocking their effort, level of care, or compassion for what they do. However, they don't have the same background or experiences as NCDENR staff in the regional offices, and thus, can't provide the same level of direction on environmental investigation and remediation projects. Thus, they are essentially charging fees to fund the CGHD, and as a result, our clients are paying more money for lesser services (i.e., than if working directly with NCDENR).

Perhaps consider rolling part of the CGHD into the NCDENR WS Regional office, or have NCDENR Staff reside in Greensboro? In lieu of doing away with the GCHD program completely?

Thanks in advance for our input.

D

Donald R. Malone, PE | Principal Engineer (NC) / Certified Project Manager 2 | donald.malone@arcadis-us.com

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Comment 4 (Forwarded from NC Department of Agriculture and Consumer Services)

Name: Jay Bennett

Email: Jay.bennett@amec.com

Subject: Uniform Environmental Covenants (UEC)

Comments: UEC is being used in several states to link laws and regulations together and establish standardized and defensible groundwater, soil, and waste cleanups. The UEC is often written to force various agencies to accept one standard or another for cleanups to avoid internal conflicts and discrepancies on how laws, regulations and policy is implemented. UEC should be used in NC to leverage best practices and standards among all agencies that enforce permits and oversee cleanups.

Comment 5

From: ENRISCO, PC [mailto:enriscoinc@aol.com]

Sent: Monday, October 20, 2014 9:17 AM

To: SVC_DENR.Public.Input

Subject: Comment on Local Ordinance Interfering with Agency Regulations

The Falls Lake Watershed Protection Ordinance does not allow water or sewer lines to be installed within this protective area. This area is defined to the east of Falls Lake all the way to Capital Boulevard where water and sewer lines are installed east of the highway but not on the west side.

Of concern is a leaking UST location on the east side of Capital Boulevard and at least eight residential water supply wells within 500 feet of the release on the west side of the highway. One alternative to actively remediating contaminated groundwater would be to connect local water well users to the municipal water service.

It is my opinion that the Falls Lake Watershed Protection ordinance should be revisited and have the extent of protection redefined to more reasonable distances from the actual lake itself. The ordinance itself is important in protecting that valuable drinking water resource.

David Jerosé
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