Comments Concerning the Proposed Jordan Reservoir Water Supply Nutrient Rules

The County of Durham believes that the proposed Rules are ill conceived in that they attempt to shift the cost of regulation from the State to the local governments. In particular, the proposed Rule .0266 is especially troubling. This is the Rule which mandates retrofitting of existing developments. The Division of Water Quality estimates that the cost to local governments to comply with this Rule is $400 million. It is noted that the total cost of compliance by local governments with the proposed Rules is $656 million. Beyond the fact that the County believes the EMC lacks statutory authority to enact the Rule, the attempt to shift a $656 million dollar cost from the State to the counties and cities is unprecedented and unconstitutional.

Additionally, the County firmly believes that the EMC lacks statutory authority to require the enactment of stormwater programs by counties. The attempt to bootstrap the authority by using the watershed protection program will ultimately fail, and the County urges the EMC to reject these proposed Rules. Below is listed specific areas where the County believes the proposed Rules are *ultra vires*, unconstitutional, or both.

1) Environmental Management Commission (EMC) Lacks Statutory Authority for the Proposed Rules.

The proposed rules cite N.C. Gen. Stat. §§ 143-215.1 & 143-214.5 as the statutory basis for the adoption of the rules. Specifically, 15A NCAC 02B .0265 requires a stormwater management program for new development, and 15A NCAC 02B .0266 requires a stormwater management program for existing development. However, these statutes do not allow the proposed stormwater rules as promulgated. In fact, N.C. Gen. Stat. § 143-214.7 is the specific statute which deals with stormwater regulation in North Carolina. N. C. Gen. Stat. § 143-214.7 provides for a voluntary program of stormwater control based on a model program developed by the State. Instead of a voluntary program, the EMC is trying to mandate its program. Specifically, paragraph "c" of this statute reads in pertinent part:

> The Commission shall develop model stormwater management programs that may be implemented by State agencies and units of local government. . . A State agency or unit of local government **may** submit to the Commission for its approval a stormwater control program for implementation within its jurisdiction. To this end, State agencies may adopt rules, and units of local government **are authorized to adopt** ordinances and regulations necessary to establish and enforce stormwater control programs.

Where as here, a statute is clear and unambiguous, there is no room for interpretation, and the ordinary meaning of the words control. *See, Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999). In *Whittington v. North Carolina Department of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990), the Court of Appeals stated the rule of construction as to this matter:

> Moreover, when one statute speaks directly and in detail to a particular situation, that direct, detailed statute will be construed as controlling other general statutes regarding that particular situation, absent clear legislative intent to the contrary.

The statute provides for a voluntary program in which the State is mandated to develop a model stormwater management program which may be implemented by units of local government if they so desire. This provision of the statute is controlling over the other general statutes and other provisions of the statute. This provision of the statute acts as a limitation on the power of the EMC to do no more than is expressly authorized by this statute since its provision speaks directly to the stormwater program which may be enacted by counties. The EMC is without authority to require a program which mandates the adoption of programs and ordinances by local governments as proposed by these Rules.

2) The EMC Lacks Authority to Require a County to Adopt Ordinances and Acquire Property.

The regulations require counties to adopt certain specified ordinances which require the approval of DEAR. The counties in North Carolina exercise the delegated legislative power of the General Assembly as provided in Article VII, § 1 of the Constitution. See generally, *In Re Alamance County Court Facilities*, 329 N.C. 84, 405 S.E.2d 125 (1991). Here an appointed administrative body is requiring an elected legislative body to enact certain laws over which it holds a veto. In considering whether or not an administrative body could compel a county to enact or reenact an ordinance, the Commonwealth Court of Pennsylvania held:

> Because local legislative bodies may act, or not act, as they believe proper, it is outside the province of either the judicial or executive branches to compel these legislative bodies to amend, or repeal and reenact, their zoning ordinances. Thus, an administrative agency, such as the Commission, lacks the authority to order a municipality to rezone, nor can it impose sanctions for failure to rezone . . .

East Lampeter Township v. County of Lancaster, 744 A.2d 359, 365-366 (Pa. Cmwlth. 2000).

The basis behind the lack of authority of the administrative agency being able to direct an ordinance be enacted is Article I, § 6 of the North Carolina Constitution which provides as follows:

> The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Such a mandate by a State agency, a part of the executive branch of government, to require a legislative body to pass a particular piece of legislation over which it has veto power exceeds the legislative authority of the EMC as it does not have authority to enact rules in violation of the North Carolina Constitution.

3) EMC has Exceeded its Authority in Enacting Requirements which Contradict N.C. Gen. Stat. § 153A-12.

Not only do the proposed rules require enactment of a program with its attendant ordinance, .0262(3)(d)(I) requires that "local governments to assume ultimate responsibility for operation and maintenance of high-density stormwater controls, to enforce compliance, to collect fees, and other measures." This requirement mandates that the Board of Commissioners acquire property, set fees, and enforce ordinances. The decision on whether to acquire property, set fees, and pass and enforce ordinances is all delegated to the Board of Commissioners as the elected representatives of the people by N.C. Gen. Stat. § 153A-12. To the extent that the rules attempt to require these actions by the Board of Commissioners, they are invalid as the authority and discretion to require these actions is vested in the Board of Commissioners by statute, and not in the Environmental Management Commission.

4) The Requirement to Conduct a Feasibility Study is Not Authorized by Statute, is in Violation of Article V of the North Carolina Constitution, and is Ambiguous.

.0266 of the proposed rules requires local governments to conduct feasibility studies and then to implement the requirements as are set forth by the study. There is no statutory authorization to require the expenditure of funds by a county to contract with a firm to do a feasibility study. In *In Re Alamance Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991), the Supreme Court held that "Article V [of the North Carolina Constitution] prohibits the judiciary from taking public monies without statutory authorization." The same is true of the Executive Branch. Article V of the Constitution also prohibits the Executive Branch from taking public monies without statutory authority. Here the Legislature has apparently not provided funds for the State to do feasibility studies on the Jordan Lake watershed. The EMC thus is attempting to usurp the authority of the Board of County Commissioners to seize its money by requiring the counties to do the studies for which the EMC does not have the funds. Not only is there a lack of statutory authority, this proposed action is unconstitutional.

The further requirement sought to be imposed by the Rules that the local government implement a program as determined by the study within 48 months is ambiguous. The Rules have the force of law and are enforced by civil and criminal penalties. However, it is entirely unclear what kind of program is required. The requirements of the program are to be determined by a study which has not been performed. The proposed rules leaves to the imagination what is required by the Rules to be in compliance.

5) .0266 is in Conflict with N. C. Gen. Stat. § 153A-344.1 "Vesting Rights"

The General Assembly in N. C. Gen. Stat. § 153A-344.1 enacted a statute which provides for a statutory vested right to develop property in phases over time. .0266(3)(a)(ii) requires the local government to develop and submit "a proposed implementation rate and compliance schedule for load reducing activities" for existing development. This by definition would require changes not only to phased developments, but also to developments which have been completely built out. The Vested Rights statute was enacted precisely to prevent the government from changing the rules in midstream. Here not only is the attempt being made to change the rules midstream, but to change the rules after the stream has been crossed. The EMC does not have, nor could it have, any delegated authority which would allow it to pass a rule which would have the effect of repealing a General Statute. Where, as here, a proposed rule is direct contravention of a statute, the statute prevails, and the rule is preempted.

6) The EMC is Without Authority to Set the Policy of the State Which is the Province of the General Assembly.

The North Carolina Supreme Court in Adams v. North Carolina Department of Natural and Economic Resources, 295 N.C. 683, 697-698, 249 S.E.2d 402, 411 (1978) in setting forth the test for a legitimate delegation of power to an administrative agency stated that the delegation was valid when: "the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature". If the agency is asked to make such important policy choices, then the delegation is improper and illegal. In the proposed Rules, the issues such as the requirement of programs for retrofitting existing development and requiring ordinances to be adopted are just such important policy choices as should properly be made by the legislature. Even if the legislature had attempted to delegate this authority the delegation would be invalid. Instead as shown above, no delegation has occurred, and the EMC has no authority to usurp the authority of the General Assembly and make these rules, and if the delegation had occurred, it would constitute an unlawful delegation of legislative power.

Respectfully submitted,

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