

NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

Minutes of August 14, 2014 Meeting

The North Carolina Environmental Management Commission met on Thursday, August 14, 2014 in the main floor hearing room in the Archdale Building, Raleigh, North Carolina. Commissioners present were:

Benne Hutson, Chairman
Kevin Martin, Vice Chairman
Jerry Carroll
Charlie Carter
Tommy Craven
Dan Dawson
E. O. Ferrell
Bill Puette
Bob Rubin
Butch Smith
Steve Tedder
Julie Wilsey

Commission Counsel Mary Lucasse was also present.

I. Preliminary Matters

The meeting was called to order at 1:00 p.m. with Chairman Hutson presiding. Chairman Hutson read the notice required by N.C.G.S. §138A-15(e). No conflicts of interest or appearances of conflicts of interest were identified at this time.

II. Action Items

Agenda Item 14-25: Request that Commission Suspend Requirement that Rulemaking Issue be Acted on by Committee and for Approval to Proceed to Publication for Public Comment and Hearing on Rule 15A NCAC 02B .0295

Chairman Hutson stated that there was one item before the Commission involving a request that the Commission suspend the requirement that rulemaking be acted on by committee and for approval to proceed to public comment and hearing on Rule 15A NCAC 02B .0295. This action is required by the Commission due to a statute recently passed and signed into law by the General Assembly and the Governor, respectively.

Commission counsel Lucasse stated that the Commission's Internal Operating Procedures, Article 7, Section 2, require that rulemaking begin with the Commission's appropriate committee. Due to the short timeframe for action to be taken under the recently enacted statute, the Commission first needs a motion to waive this requirement of the Internal Operating Procedures. That motion must be passed by a two-thirds majority. After that action is taken, the Commission will proceed with the presentation on the temporary rulemaking.

Commissioner Tedder moved to waive the requirements of Article 7, Section 2 of the Commission's Internal Operating Procedures requiring rulemaking to begin with the Commission's appropriate committee. Commissioner Ferrell seconded the motion. After opportunity for discussion, the motion passed unanimously.

Karen Higgins, Division of Water Resources, made the presentation regarding the substance of the temporary rule. Ms. Higgins provided some history regarding the consolidated buffer mitigation rule process, how the temporary rulemaking developed and the substance of the proposed temporary rule.

Ms. Higgins stated that the process for the consolidated buffer mitigation rule began in 2006 with discussions among Division staff and interested stakeholders. Four formal stakeholder meetings were held in 2009 and 2010. The matter was first presented to the Commission's Water Quality Committee in September 2009. There were ultimately 11 different presentations to the Water Quality Committee. In November 2012, the Commission approved the rule to proceed to public notice and comment. Two public hearings were held in February 2013. In May 2013, the Commission adopted the proposed rulemaking.

In June 2013, the rule was presented to the Rules Review Commission which raised three objections to the rule. After working with the Rules Review Commission, the objections were resolved and it was approved by the Rules Review Commission in July 2013.

More than 10 letters of objection to the rule were submitted to the Rules Review Commission. As a result, pursuant to North Carolina law, the rule was sent to the General Assembly for either affirmative rejection or lack of action which would result in approval.

Subsequent to the letters of objection being filed with the corresponding referral to the General Assembly, the Division formed a stakeholder group to develop changes to the rule. That stakeholder group met five times between October 2013 and March 2014. In addition to consideration of the objections raised to the Rules Review Commission, the stakeholders group also considered reforms put forward by the Department's Ecosystems Enhancement Program.

Ms. Higgins then reviewed the proposed changes to the rule contained in the report of the stakeholders committee which the statute mandates be adopted in the temporary rule.

Michael Ellison, director of the Department's Ecosystems Enhancement Program, addressed the submission of the letters of objection to the Rules Review Commission. Some of those letters were filed by Department employees which Mr. Ellison stated were submitted by those employees in their capacity as private citizens that were interested, concerned and had knowledge about the rules. Mr. Ellison then reviewed the substantive objections raised in the letters.

At the conclusion of the Mr. Ellison's presentation, Chairman Hutson opened the floor for questions and discussion.

Commissioner Tedder asked Mr. Ellison why he and others in the Department who objected to the rule as adopted in 2013 were not involved in the development of that rule. Mr. Ellison said the adoption of the rule was a protracted process taking seven years during which time a number

of things changed in the buffer mitigation world, the condition of the state's economy and economic development conditions that the rules affect. Mr. Ellison stated that some of the Ecosystems Enhancement Program's comments were incorporated into the hearing officer's report on the rule.

Commissioner Tedder asked if it was a correct statement that there was not a lot of coordination during the last one to two years of discussions between the Ecosystems Enhancement Program and the Division of Water Resources. Mr. Ellison responded that the Ecosystems Enhancement Program was not necessarily an active participant during the rule drafting process.

Commissioner Martin then offered comments. He stated he was disappointed that the Commission was not involved in this process. While stating that the proposed changes in the temporary rule were valid and ones he could support, he was disappointed that the Department convened the stakeholder group without telling the Commission, especially when this stakeholder group was not all inclusive like the original stakeholder group was.

Chairman Hutson then asked why the Commission had not been told that the stakeholder group had been formed and was acting on this matter. He stated that the bill introduced in the General Assembly was introduced very late in the session after it was announced that legislative committees would no longer be meeting.

Mr. Ellison stated that he did not know the answer to that question was. He stated that the stakeholder group was more of a technical review group and that passage of this legislation had been a priority for the Department and was not a last minute issue. Chairman Hutson responded that he had not said it was a last minute issue but that it had been introduced as legislation very late in the legislative session. Chairman Hutson asked Ms. Higgins if Mr. Reeder had provided her with any information as to why the Commission had not been told of the formation and work of the stakeholders group and the development of the temporary rule. Ms. Higgins responded that she had spoken with Mr. Reeder and had learned that the Division had been asked by the Department to resolve the issues with the Ecosystems Enhancement Program and they brought in persons with appropriate technical knowledge of doing mitigation projects to resolve those matters and to present their resolution to the Department.

Chairman Hutson then recognized Mitch Gillespie, Assistant Secretary for Environment in the Department. Assistant Secretary Gillespie stated that the only thing the Department was guilty of was trying to improve the rule to protect and enhance the environment. He said it was his intention at all times to notify the Commission of any action that would be needed from the Commission. He said it was always the intent of the Department to come before the Commission in the event that the legislation did not pass.

Commissioner Martin commented that if the Commission ever adopts rules in the future and if anything like the process that has just been described is contemplated; he wants to know about it. Commissioner Martin stated that the Commission should have the opportunity to participate in such efforts.

Commissioner Tedder stated that describing the objections filed with the Rules Review Commission by Department employees as just being done as private citizens was not a

convincing point with him. He said what has been described leaves the appearance that a decision was made to avoid the Commission and to avoid the public notice and comment process and he did not like that.

Commissioner Martin moved to proceed to public comment and hearing on the proposed changes to 15A NCAC 02B .0295 as a temporary rule as presented in the draft rule. Commissioner Tedder seconded the motion.

Chairman Hutson asked Ms. Higgins if the adoption of the temporary rule was going to impact the ongoing regulatory review process for the 2B rules. Higgins said it should not impact that process. Chairman Hutson also noted that the temporary rule would expire in August 2015 but a final rule would not be in place until September 2015 and asked whether the schedule needed to be changed to avoid this gap. Ms. Higgins responded that if the permanent rule is adopted prior to the time the temporary rule expires, even if that final rule has not been through the Rules Review Commission process, the permanent rule will have been adopted in a timely fashion.

Prior to calling for the vote, Chairman Hutson exercised the discretion of the chair to make additional comments. He expressed significant concerns with regard to the process for the development of this temporary rule and the legislative enactment requiring the Commission to adopt it. Chairman Hutson stated that his biggest concern is that the Commission did not know this effort was going on until the bill itself was introduced.

Chairman Hutson also noted the differing roles of the Commission and the staff with the Commission looking to the staff to provide technical and scientific support but with the Commission making the policy decisions. He stated that staff may or may not agree with those policy decisions but they needed to be respected. He stated that it was in his opinion an unacceptable situation to have a Department employee objecting to the Rules Review Commission as it creates a situation where there is little or no trust that the Commission can have with staff working on a matter.

Finally, Chairman Hutson addressed the fact that the General Assembly mandated that the Commission adopt these rules. He noted that it was an important part of the Commission's deliberative process to get public input through the public notice and comment procedures of the Administrative Procedure Act. However, those attributes would not be found here as the public notice and comment on the temporary rule would be nothing more than a facade because the Commission has no authority to change the temporary rule mandated by the General Assembly.

Chairman Hutson then called for a vote on the motion. The motion passed unanimously.

There being no further business before the Commission, the meeting was adjourned at 2:30 pm.