

**MEETING OF THE NORTH CAROLINA  
ENVIRONMENTAL MANAGEMENT COMMISSION**

**Raleigh, North Carolina  
January 10, 2013  
Minutes**

The North Carolina Environmental Management Commission met in the Ground Floor Hearing Room of the Archdale Building, 512 North Salisbury Street, Raleigh, North Carolina. Chairman, Stephen T. Smith presided. The following persons attended for all or part of the meeting.

**COMMISSION MEMBERS:**

Christopher J. Ayers	William L. Hall	Jeff Morse	Amy E. Pickle
Yvonne C. Bailey	Benne C. Hutson	Mayor Darryl D. Moss	Clyde "Butch" Smith, Jr.
Marvin S. Cavanaugh	Dr. Ernest W. Larkin	Dr. David Peden	Stephen Smith
Marion E. Deerhake	Steve P. Keen	Dr. Charles H. Peterson	Steve W. Tedder
Tom Ellis	Kevin Martin	Dickson Phillips III	

**DIVISION OF WATER QUALITY:**

Tom Belnick	Karen Higgins	Jeff Manning	Jay Sauber
Ted Bush	Steve Kaasa	Susan Massengale	Kathy Stecker
Kevin Bowden	Evan Kane	Matt Matthews	Lois Thomas
Janice Bownes	Cyndi Karoly	Cam McNutt	Julie Ventalaro
Connie Brower	Elizabeth Kountis	Sarah Nienow	Chuck Wakild
Amy Chapman	Gary Kreiser	Robert Patterson	Debra Watts
Linda Culpepper	Keith Larick	Ken Pickle	
Richard Gannon	Annette Lucas	Diane Reid	

**SECRETARY'S OFFICE:**

Bill Cary  
Lacy Presnell, General Counsel

**ATTORNEY GENERAL'S OFFICE:**

Frank Crawley  
Jeannie Hauser  
Don Laton

**DIVISION OF WASTE MANAGEMENT:**

Debra Watts

**UNDERGROUND STORAGE TANK:**

Jan Manthey  
Ruth Strauss

**I. Preliminary Matters**

Chairman Smith called the meeting to order at 9:02 a.m. and recognized Secretary of State Elaine Marshall.

**Swearing-in Ceremony:** Secretary of State Elaine Marshall swore in Yvonne C. Bailey who recently was appointed to the Environmental Management Commission.

**Chairman Smith:** I need to ask whether any member knows of any conflict of interest or anything that causes an appearance of conflict of interest as to any item on our agenda. If so, please signify so now.

**Mr. Hutson:** I'll be recusing myself from item 13-03 which is the proposed change to the groundwater quality standards.

**Chairman Smith:** Any other conflicts? If anything occurs to you as the meeting unfolds, please let us know as soon as it occurs to you. Then, let's move to the minutes. You have the minutes for both our November 8<sup>th</sup> meeting and for the December 3<sup>rd</sup> special meeting. Are there any additions or changes or edits to those minutes?

**Dr. Larkin:** made a motion to approve the minutes. Second by Mr. Hutson.

**Chairman Smith:** The motion passed unanimously.

### **13-01 Request for Approval of Typographical Corrections to 15A NCAC 02H .1005 and Approval to Proceed to the RRC**

**Summary (Robert Patterson):** As Mr. Smith said, I am here today to get approval of typographical corrections to .1005 in the 2H rules. Just a really quick history, the .1005 was approved by the EMC back in March of 2011, and then it became effective June of 2012 after the legislative review. Essentially, these rules are just a cut and paste of the requirements from SL 2008-211 and the attachment A is the corrected .1005 rule with the corrections highlighted. Attachment B is just a copy of that original session law. These rules were effective this past summer and after we started using them a couple of months ago, we realized that there were a couple of errors found that were not caught during the original rule process, public notice and going through RRC. The specific errors were two sentences related to some of the buffer language that were included in the session law were mistakenly omitted when those requirements were transferred back to the rules. Then there was also just a single item that was mis-numbered that was put too far down in one of the numbering levels. Again, in attachment A you'll see the highlighted revisions of the items that were omitted. After direction by the attorneys at RRC, they said, basically we sent this information to them and said that's the best way to handle doing the typographical corrections, and I guess we are supposed to get approval from you here, EMC today. Then after that it will go directly back to RRC for them to approve and make the corrections in the rule.

**Motion to approve by Mr. Tedder, seconded by Mr. Ayers, passed unanimously.**

### **13-02 Request Approval to Proceed to Public Notice with Session Law Revisions to the Jordan Lake Nutrient Strategy and Approval of the Fiscal Analysis**

**Summary (Michael Hermann):** I'm here to request approval to proceed to public comment/public notice with session law revisions to the Jordan Lake nutrient strategy and approval of the fiscal analysis. As part of the presentation there are a couple of things that I'd like for you to take. First is that the nutrient strategy is something that has been established. It was established in 2009 and we're in the process of implementing it. Second, we're doing this process because it's required by session law. There are provisions within the session law which mandates us to bring these rules forward. Third, describe some of the changes to the session law in my presentation or changes to the rules from session law.

In my talk today I'm going to touch briefly on the rulemaking history as well as the history of the session laws that have affected the rules. I'll briefly describe the rulemaking timeline we're seeking to follow, hit some of the high points of the fiscal analysis and highlight some of the important changes to the rules from session law.

After a lengthy stakeholder process the Commission adopted the Jordan Lake nutrient strategy in 2008. Objections received to the nutrient strategy of the RRC required that the rules go down to the General Assembly for their review. In 2009 the General Assembly passed two laws that affected the rules and at the conclusion of the assembly the rule package became effective commencing implementation of the strategy and triggering some of the start dates and the timelines associated in the rules. Subsequent to 2009 there have been additional laws which have affected the rule packages. In total, six of the twelve rules have been affected by session law. So currently we are three years into the implementation of the strategy, three plus years since 2009. At this stage the buffer rules are fully in place along with the fertilizer management rule. Existing development, new development, state and federal stormwater, wastewater rules as well as agricultural rules are advancing toward full implementation. So we're heading towards or continuing along the path towards full implementation of the nutrient strategy. In the session laws there are sections that require us to amend or adopt these rules, that, in proposing these rules that they must be substantively identical to the session laws. We have to follow the procedures of the Administrative Procedures Act. An exception to that is that once the Commission has adopted these rules, they must return to the General Assembly without action from the RRC. So once these rules have been adopted they have to return to the General Assembly for their review there. So if we receive approval today we'll go to public comment in February and March. For that public comment process, given that we're following the substance of the rules and the scope of the comment can only be whether or not we've been faithful to the substance of the rules, we're seeking to use a comment process that is only through written comment. So we're not looking to use a public hearing process for this rule package. Following the public comment period we'll be back to the Commission for adoption. The rules will pass through the RRC and go to the General Assembly project for 2014. We've written these rules with the projected implementation or effective date of July 2014.

So I'd like to briefly discuss the fiscal assessment that we've done. We've completed a fiscal note analysis for the rule package which was approved by OSBM this past August. It is qualitative in nature and not the same as the more rigorous quantitative assessment of costs done in 2007 for the original rule package. We took this approach because our proposed rule changes only reflect the requirements of the session law. We argued that the rules are not imposing a

cost but the session law imposed the cost on the affected parties, and that we're only embodying the requirements of session law into rule. OSBM agreed with this approach. Overall the effects to the rules in terms of cost have been relatively minor, mostly delayed implementation resulting in late implementation costs to the rules. What I'd like to do now is to touch on the individual rules and highlight some of the important changes or the key changes to the rules to bring them to your attention. The purpose and scope rule was affected this past session with requirements that exempt WS-V areas from meeting certain standards within those areas unless they impact downstream WS-II, III or IV waters. The new development rule had three changes that I'd like to highlight. The first being that development that meets the loading rate targets for their development site without doing any kind of BMPs, those developments still have to treat 85% of the total suspended solids (TSS) on their development site, so that there's typically a one minimum BMP for all development under this rule. The session law also relaxed the onsite treatment standards for development making them consistent with the Neuse and the Tar-Pamlico. Delays in implementation from this past session, the rules were originally set to go into effect in August this past year, and now they're set to go into effect in August of 2014. The existing development stormwater rule for local governments was originally disapproved by session law and replaced. The session law enacted triggers that were set based on monitoring that the division is supposed to conduct. So the division is going to be monitoring the lake, and if the lake fails to show improvement in water quality, that lack of improvement, starting in 2014, will trigger measures starting in the Upper New Hope. Local governments will have to do stage II programs to treat existing development stormwater. The load reduction goals for the Stage II programs will be 8 percent in nitrogen and 5 percent reduction in phosphorous. Lastly, there's provision starting in 2023 that if lake standards have not been met in the Upper New Hope that further reductions will be required to achieve 35% reduction in nitrogen. The changes to the state and federal stormwater rule largely mirror those for the local government's stormwater rule and that the lake water monitoring will be used to trigger Stage II programs for treating existing development. If those triggers occur, DOT was given an option in there to have completed three BMPs per year to meet their compliance obligations to treat existing development. The buffer protection rule has added clarification that impacts to diffuse flow to the buffer, from outside the buffer are strictly prohibited, as well as there was some clarification on specifying the process for approving alternative stream maps. They'll be used for buffer protection in the Jordan. The last rule I wanted to touch on was the wastewater rule. Originally set to go into place for next June, compliance needed to be met by 2014. That date was shifted to 2016. For those treatment facilities where treatment operations are in the process of being upgraded, they can now delay their nitrogen compliance to 2018.

That completes my overview of the rule changes and I'll close with my action request which was to request approval to proceed to public comment with session law revisions to the Jordan Lake nutrient strategy as well as approval of the fiscal note addendum. I'll take any questions you may have.

**Mr. Martin:** I just have a quick question. In general, how was the process changed for adopting the alternative maps?

**Michael Hermann:** The process has changed to add the Geographic Information Coordinating Council approval in addition to the Commission approval for the approval of the alternative

stream maps. So both of those bodies would have to approve it as well as it goes to public comment, 30 day public comment period.

**Mr. Martin:** Thank you.

**Motion to approve by Mr. Tedder, seconded by Mr. Hall, passed unanimously.**

**13-03 Request for Adoption of Hearing Officer's Recommendations on Proposed Changes to Groundwater Rules: 15A NCAC 02L .0113 – Variance and .0202 – Groundwater Standards**

**Summary (Mr. Phillips):** This request for rulemaking submitted by McGuire-Woods on behalf of Rhodia, Inc March 2011 requested petitioning for an amendment to the groundwater quality standard for 1-1 dichloroethylene (DCE) to make a change from 7 ug/L to 350 ug/L. The basis for the change request was that the more recent health effects data published by EPA had indicated that a more relaxed standard could be justified. Though if you go to the data that's referenced, the IRIS data, you read it, and even though you're a lawyer and not a scientist trying to make sense of it, you come away with the conclusion that DCE is not a friendly substance. It's a substance that's used to make cling wrap and such things, and that ingestion of it certainly have questionable health benefits and that the relaxation of the standards struck me as being more based on a lack of any evidence to support, or efficient evidence to support a more stringent standard as opposed to any demonstration that ingestion of this compound does not have any adverse health effects. Be that as it may, there has not been a serious contest over the question of whether a more relaxed groundwater standard might be appropriate. The issue is that the EPA which had set the national maximum contaminant level for this compound at the 7 ug/L level had not chosen to change that again, because really there's no evidence that's it's not an appropriate standard. It's just arguably evidence that a more relaxed standard could be appropriate. Since the MCL remains 7 ug/L public water supplies in the country under federal and state law are required to meet the MCL. Therefore, a change from 7 ug/L to 350 ug/L, as our state groundwater standard, could set up a situation where a polluter is permitted to discharge, or rather to not be obligated to clean to a level that, nevertheless, could impact public water supply, and public water supply could be under the obligation to then address the exceedance where the source of the contaminant would have no obligation to do so, thereby shifting costs. The proposals to address this conflict of interests as it were, involved three possible proposals that ranged about as far from each other as any proposal I've encountered that we've put out to hearing. The first would have simply changed the groundwater standard from the 7 ug/L to the 350 level without any other change to the rule. That did run afoul of legal opinion and I think Rhodia contended it could be done. I think most of everybody else felt that clearly would run afoul of the rule if no other changes were made to the rule, which requires that the standard be set at the most restrictive of the six measures in .0202. Therefore, some other change to the rule would be required to do that. So a second option that was put out for comment was a change to .0202 that would permit the Commission to establish a groundwater standard that's less stringent than the existing maximum contaminant level on certain conditions. One being that there's more recent health effects data, as exists in this situation, that could support a more lax standard, finding that changing the standard would not endanger public health, and compliance with the maximum contaminant level would produce serious hardship

without equal or public benefits. Then, the third option involved a proposal for a statewide variance on similar conditions, such that a statewide variance could be ordered if the variance would not endanger public health, the information from the EPA published health effects data could support a more relaxed standard, and information would be generated, and then submitted concerning all potential affected sites, and there would be hardship from applying the higher standard. I'll also go ahead and address that one because I think there was a strong sentiment, fairly consistent in the comments, that really was not a workable approach, where you would have the statewide standard. But then you would have a statewide variance and it would not be clear which standard would apply in a given situation. I'm not clear what the applicant's obligation would be to canvas the entire state to provide information concerning potentially affected sites. So that did not seem to be a good approach.

In the end, the recommendation that I'm making is a variation on that approach, but to make that a site specific variance. My understanding is that when this issue was first raised with the staff and Commission, the conclusion was the appropriate way to deal with this situation where a party under a cleanup obligation wanted to make a case that it should not be required to meet the groundwater standard, that it apply for a variance... variance being the tried and true, long established way of addressing situations where the general application of a rule and general applicability imposes an undue hardship, and it's not justified in this particular case. Therefore, as I understand it, the applicant did pursue a variance but that foundered for various reasons and resulted in this request for rulemaking. Nevertheless, it still seems to me that the variance approach is the better and more appropriate way to deal with this situation, which is a request that you vary from the existing standard. The proposal which is submitted for your consideration involves an amendment to the variance rule which is .0113 that creates an opportunity to obtain a site specific variance on less stringent grounds than the general variance provision would require. Whereas, the general variance requirements would require that there be a showing of serious financial hardship. This variance provision which would be available in situations where there is more recent health effects data to suggest that the maximum contaminant level should not necessarily be required. It could be sought simply on the basis that there's a showing of hardship, and a showing that there would be no adverse health effects. Among other things, in addition to being the standard way of dealing with these situations, it avoids some of the problems that I would see with an approach that would allow us to set a different standard than the MCL. One problem is the one that I've already alluded to which is that you could have the situation where a party obligated to clean up contamination would not be obligated to clean up to the MCL, which then could permit contamination of a public water supply or private water supply well. That would then either be required to or would elect to, the public water supply would be required to conform to the MCL. It also simply strikes me as using a broader brush than necessary to create this special variation, special amendment to the standard where a variance approach should be perfectly appropriate and adequate in a given case. I did part company with staff on this. Staff submitted an alternate proposal which would allow the Commission to establish a more relaxed standard that's supported by EPA health data, but would require the enforcement of the maximum contaminant level at any private drinking water well or public water system that might impact it. I do think if the Commission were to go the route of allowing for the adoption of the standard which is more relaxed than the MCL in these specific special conditions, that we would need to have the requirement that withstanding that, the MCL would need to be enforced where there would be contamination of a private drinking water well or public water system. While, in theory, I think that it fairly alleviates some of the concern with the provision, nevertheless, would

still have some concern about that, both from a practical standpoint and perhaps from a legal standpoint that this Commission is charged with establishing standards for groundwater, as it is for other waters. But I don't think there is any provision of the law allowing us to set standards that are different from place to place. Indeed, I think that would be a bad precedent. The concern I would have is that a polluter or other person obligated for being a responsible party to clean up a site could make an argument on that, in this situation, that there's no adequate legal basis to require a cleanup at a particular site to a level that would be more stringent than the ground standard that the Commission had adopted for the state. So Mr. Chairman that's my report. I note that the record here is about 336 pages and I know that everyone has thoroughly digested every aspect of the record. I'd be happy to answer any questions that you might have.

**Mr. Chairman:** Before we open it up for discussion and questions, I'd like to give two other people the opportunity to speak if they want to. First DWQ, Mr. Wakild, does anyone want to speak on behalf of DWQ?

**Chuck Wakild:** I think we're good.

**Chairman Smith:** And then Mr. Martin of the Groundwater Committee, do you want to say anything on behalf of the Groundwater Committee?

**Mr. Martin:** Well the Groundwater Committee hasn't talked about this in a long time. So I guess I'll reserve my comments to be those of mine once we open it up for discussion.

**Chairman Smith:** Then I'll open it up with the questions and discussions.

**Mr. Morse:** I'd like to hear the staff's alternate recommendation, why they are proposing it.

**Ms. Deerhake:** Point of order?

**Chairman Smith:** Point of order Ms. Deerhake.

**Ms. Deerhake:** Should the hearing officer be making a motion?

**Chairman Smith:** I expect he will but I haven't heard it from him yet. I don't know that it has to be made before we hear additional information. But Mr. Phillips you're free to make a motion any time you choose. But let's hear from staff first and then if Mr. Phillips is so moved to make a motion, then we will move into questions and discussion.

**Evan Kane:** Thank you. My name is Evan Kane and I'm the supervisor of the Groundwater Planning Unit within the Division of Water Quality and assisted Connie Brower and Sandra Moore in the conduct of this rulemaking. The specific question was, I believe, the background on DENR's alternate proposal and why we were including that. We felt that the adjustments to the criteria in rule .0202 are consistent with the EMC's intent to protect the groundwater to a level that does not create a public health hazard. We felt that they established a clear and consistent process for this situation and others like it, and had the additional benefit of establishing specific criteria that have to be met in order to adopt a standard that is less stringent

than the MCL or secondary MCL. So while not perfect and not addressing every public comment that we received, we felt like it was consistent with the EMC's authority to establish groundwater standards for the state based on the state's needs independent perhaps, of what the federal government may be establishing for public water systems under a different statute. The additional language that was inserted in .0202(b)(4) specifically allowing the Director to apply the MCL at a private water supply well or a public supply well arise, as Mr. Phillips has commented, from a number of public comments expressing concern with offloading compliance costs on to a public water system and subsequent concern with creating a different standard for private well users, than may be established for those on public water supplies. The intent of that additional language is to protect well users while easing the burden of cleanup for parties, such as Rhodia. We chose this particular route for addressing those concerns, because we felt a precedent had been established, in the other conditions in .0202(b), conditions 1-3 which allows the Director to use some alternate levels as a standard in special circumstances, such as situation, where the numeric standard is established below the practical quantitation limit of the laboratory, and situations where the naturally occurring concentration of a substance is greater than the numeric standard. Also, in other cases where substances exist in combination where that combination presents different health risk impacts than the individual substances alone. Does that address your question, Mr. Morse?

**Mr. Morse:** Yes. Thank you sir.

**Mr. Phillips:** Well, I will make a motion that the Commission adopt the hearing officer's recommendation in this matter for reasons I've already given and for additional reasons I may give as we move forward. Ms. Pickle seconded.

**Mr. Martin:** And again, this is not me speaking as Groundwater Committee Chairman. This is my personal opinion. I do respect and understand what Mr. Phillips took on in this process and don't really envy him in dealing with it. Because I dealt with something similar eight years ago. There are a couple of things I want to point out that I actually support the staff's alternate proposal for really three main reasons. One, the hearing officer's proposal will require the petitioner, yet again to have to wait to go through RRC and the legislature, which we would have to do with the alternate, but then apply for another variance process. We sent them down that road a number of years ago with assurances that it would be a quick and painless process. I think eight years later it is safe to say it was neither, and they deserve a swift resolution to this issue which the staff proposal will do. In addition to making the changes to the standard, it also changes the standard as well as makes recommendations for how we can deal with this again in the future. Years ago we were told that this was a unique situation. There really weren't any other parameters like this that were going to come up, and based on my reading of the report staff has identified at least two others that, the next time we go through Triennial Review, that would be subject to a similar situation with the MCL. So, then we're putting forward again another variance process which takes time and money, not only for the petitioner but for the state to process. Eight years ago when I objected the change in the standard from 7 ug/L to 350 ug/L based purely on the language in the rules, the Division of Health Services were championing the position of changing it. So I am comfortable that the health and public welfare is being protected, particularly with the insertion of the private and public drinking water well protections where the Director will apply that. Just so you know this alternative is in attachment 1, exhibit

(n) and it's page 96. The changes are highlighted in yellow. The Division of Health Services eight years ago wasn't even asking for us to do that protection of the private wells. So I would make a substitute motion that we adopt staff's recommendation as presented in the attachment, exhibit (n). (Mr. Tedder seconded.)

**Chairman Smith:** Discussion? My understanding of the rules, that is Roberts Rules, is that once we finish discussion, we vote on whether or not to accept the substitute motion, not on the merits of the substitute motion. If we accepted it, then it becomes the main motion and we discuss and vote on it. So we have a motion to substitute with a second. Is there discussion on that?

**Ms. Pickle:** To be clear, we're discussing the substitute motion in substance or do you want discussion simply on whether or not to substitute it?

**Chairman Smith:** I'd like for you to talk about whatever you want to talk about.

**Ms. Pickle:** I don't have the benefit of eight years of discussion of this with the Commission and want to be clear. When I read staff's recommendation, although I appreciate and I think we're all in accord with the overall intent of what we're trying to do here, the language that's substituted in subsection four is not similar to, and it is not the same kind of exception that are detailed in the other three. The breadth of what is being attempted to do by a statewide variance and then except out certain water supplies, it is a precedent that I'm concerned has unintended consequences and goes much further than this specific case. Part of the reason to look at and support a site specific variance is that it gives the flexibility for the Director and for this Commission to address conditions just like Rhodia's without necessarily opening up a box that we may not want to, we may not understand what the implications are. So part of my, I concur with sort of the sentiment and I feel like we're all pulling in the same direction, the vehicles that have been chosen by staff; I don't feel are legally consistent and have potential legal consequences that we may not understand and we may not have the capacity, resources or information in front of us to fully appreciate the precedent that this would be.

**Ms. Bailey:** I guess one of my questions for the hearing officer was you know the variance procedures already established in the statute and the rule, and the variance procedure basically is in the way it's written as is, it is a site specific procedure because an individual will come to the Commission and apply for a variance. If they're trying to do a cleanup they will apply for a variance. So I was wondering what the thought process was to add a site specific variance for .0200 when .0200 is usually almost, always when you want a variance. What was your thought process?

**Mr. Phillips:** Remember we started out with one of the three proposals being the statewide variance, and my proposal is a site specific variance, adopted essentially the same kind of level of showing as for the statewide variance. The rationale for a different, a special variance would be that the general variance would assume that it would apply to all situations including ones where you'd have an exceedance of a maximum contaminant level or whatever the groundwater standard is where there would clearly be a health concern. We're talking about a situation in which there's strong evidence that there is no health concern or there's at least some evidence

that there's no health concern. Therefore, arguably the standard for variance could be lesser than in the general standard. That would be the rationale.

I want to echo what Ms. Pickle said that I do think that the exception language that the staff proposes in (b)(4) allowing the application of the standard of the MCL only in certain areas. It is a different kind of special application than in the preceding three paragraphs which one concerns where there's a practical quantitation limit where the standard is less than the practical quantitation limit, there's no option but to go with the quantitation limit. Also when the background substance exceeds the standard, then there's not much to be done about that. So I do think you've got a different kind of issue.

**Dr. Peterson:** I understand this distinction and the caution that the hearing officer's recommendation represents. I ask this question, though. The part that frustrates me is that this company has applied for a variance and they're still going to have to do it again. Is there any way to modify this recommendation such that it establishes this variance possibility and at the same time grants the first variance under that particular establishment of variance, given they have applied already?

**Mr. Phillips:** I was going to comment that we certainly, I talked with staff about that. Thought about it and tried to think of a way to do it. I don't know that has been resolved finally. In the end when we're talking about changing a state rule, while we certainly have to consider the petitioner's interest and the reason for the petition, that ultimately we're talking about changing a rule that applies to everybody. I think the reasons why the request for variance failed along the way were not entirely clear to me. I'm not sure within themselves would be justification for altering in a state rule because of an individual applicant has difficulty with complying with the particular requirements of a variance.

**Chairman Smith:** Mr. Crawley, did you want to say anything on Dr. Peterson's question?

**Mr. Crawley:** I was just going to say that this is a matter concerning rulemaking and whether or not there's an application for a variance, variance criteria and conditions have been met.

**Mr. Martin:** Just to address the question about not being clear why the variance wasn't approved. If we need to, and I don't want to put Yolanda with Waste Management on the spot, but I can if we need to. But in generic terms the EMC and staff assured anyone that would be subject to this when we chose to go the variance route the first time, that under the existing language they would be eligible for a variance, and it would be issued pretty much automatically under this situation. However, once the variance was filed with Waste Management, upon review of the actual language closely, they didn't meet the criteria. Now if you want to know specifically what criteria they didn't meet, Yolanda can address that. That's why the variance was rightly rejected by the state and understandably why the petitioner was kind of upset after what they had been told by us and staff before. I think the approach here is maybe to try to fix the variance process with another variance process so that wouldn't happen again. But to me that boat has sailed and we know of at least two other parameters out there that are going to have this exact same problem. So why not just deal with it all and not put the private sector through additional time and cost when there's no health benefit according to the Division of Health Services.

**Mr. Phillips:** Well I'm not sure that any other potential applicant with regard to this compound or any compound, it may be candidates. I don't know if there's any reason to think those applicants would have any similar difficulty with the variance process. My sense was that there were particular issues that this applicant failed to be able to comply with on this site, whereas my understanding is there were a number of other contaminants that are also an issue. I don't think that we should get into that too far because we don't know all the facts, frankly.

**Chairman Smith:** Alright we have a motion to accept the substitute and we have a second of that motion as affirmed the discussion. Yes Ms. Deerhake.

**Ms. Deerhake:** Thank you Mr. Chairman. I would not be prepared necessarily to talk about this at the legal level, but I would like to talk about it a little bit more at the technical or scientific level. To express my support for the primary motion, not the substitute motion, and that is because I do believe that the intent of these rules is to protect our most pristine resource we have left, which is steadily decreasing with drought. That is our groundwater. The fact that we rely on the EPA and their more extensive resources that they have for evaluating health effects research is very important. By putting in a language such as endangering public health, it puts the onus on, the state of North Carolina become the health effects evaluators. We must all admit we really just don't have the resources to do that on a large scale basis which I think this rule would do. It would open up for shopping for health effects data that suit petitioners or interested, perhaps polluters concerns for getting relief. I empathize with their need for relief. I understand and am willing to support the DCE exception, but I do not think that a broad revision of the entire groundwater standards is appropriate. I think it needs to be taken care of upon a variance basis so that we can limit the investment of our state resources as needed for specific chemicals.

**Mr. Martin:** Just a comment. Make sure we don't lose sight of the fact that the MCL should have been changed by now. It should have been changed eight years ago because of the method of how they calculate it. However, EPA, when asked back eight years ago said, "We don't have the time, we don't have the money and it's not a priority for us." If they had done what they should have already done, we could have approved this standard eight years ago under the rules that were written. My belief is that after eight years EPA is not going to take the time to take care of this, they're not going to take the time to take care of future issues that we're going to have and we're going to be here over and over again. I respect everyone's opinion on the primary motion but it is why I feel so strongly about the secondary.

**Mr. Morse:** And I concur with Kevin's comment. I also want to support the state's alternate recommendation. I want to bring the Commission back to the discussion that we had only six or eight months ago. When this issue first came up one of the underlining issues we were discussing was the ability of the EMC and the state staff to have the ability to choose, maybe not have to use the most extreme standard or the most restrictive standard to give the state flexibility and this Commission flexibility in establishing the criteria. It just seems much more reasonable, both for the environment and for the stakeholders, to have that option. That was the root of some of our discussions. So when we went out to public hearing the Commission asked the staff to come up with three options including being one that would give that discussion of what the state staff recommended the ability of the state and the Commission to have some flexibility. But it is

not at the expense of the environment. The flexibility that we're asking for still has to protect to the highest levels the environment. But if there's some options that can be looked at that are cost effective but still maintain that high level, we should have that flexibility. I think what the state option provided and the explanation they gave, gives the EMC what they're asking for, to a limited extent. That's why I'm supporting the state's recommendation and I think that's the intent of why we even went out with three options, especially option #2. It's a modified option.

**Dr. Larkin:** The discussion about flexibility, the broad nature of the change on one side and the more limited option, the site specific, the individual option on the other, I think that is a point in this discussion. It seems to me that; are the basis of this not just the environment, per se but it has to do with public health, and protecting our citizens? I think, for that reason, to open up flexibility we've not had or not sure what to do with, or how it would be interpreted is pretty dangerous. We've got a very strict standard written out with these six things that I think that's strict for a reason. I would come down on the side of the scale that limits the amount of tinkering that we do with these rules and that allows us to be more specific for an individual person, individual industry and individual chemical because they're all different. The variance that the state would allow us to do that on a very specific basis for a given situation and that's sort of the approach that I favor.

**Chairman Smith:** Any other discussion? We have a motion for acceptance of the substitute motion and the substitution motion, if it was accepted would be to support the staff recommendation. Nine voted in favor of the motion and six opposed. The substitute motion is accepted and becomes the primary motion, the primary motion now being that we accept the staff recommendation for resolution of this issue. Is there a discussion on that?

We have a motion and a second that we accept the staff recommendation. (Nine voted in favor and six opposed. The motion carried.) Let me note that Mr. Hutson recused himself and did not participate in the discussion or the decisions that we just made.

#### **13-04 Request Approval of the Proposed Reclassification of Segments of Maiden and Allen Creeks in Catawba and Lincoln Counties (Catawba River Basin) to Class WS-V**

**Summary (Corey Basinger):** Good Morning Mr. Chairman and members of the Commission. My name is Corey Basinger, the regional supervisor of the Winston Salem Regional Offices, Surface Water Protection Section. At the request of Director Wakild I served as the hearing officer for this proposed reclassification. In March 2012 and May 2012, the Water Quality Committee and the Commission, respectively, approved the Town of Maiden's request to proceed with rule-making for portions of Maiden and Allen creeks in the Catawba and Lincoln County. This slide show the portions of the creeks and their respective watersheds. These waters are proposed to be reclassified from WS-II high quality waters to WS-V. This reclassification would recognize the fact that these waters were formally used as water supplies and that the high quality water designation assigned to these waters was not the result of sampling that revealed high quality water, but rather solely due to the WS-II classification. On August 16, 2012, division staff and I conducted a public hearing in Maiden, North Carolina. Of the nine individuals who attended this hearing three individuals spoke in favor of the reclassification, an additional speaker had concern but did not oppose the classification. During the comment period one letter providing a positive position and one letter providing a negative position were

received. The comments contained several issues of concern which can be grouped with corresponding DWQ responses as follows: Concern was expressed that Maiden should plan for its current water supply needs. Maiden has a contract with the City of Hickory to meet the town's current and projected potable water supply needs. If in the future water supply needs are not being met these waters could possibly be considered for reclassification as public water supplies; (2) concern was also expressed that a good reason should be provided for this proposal and that the county would benefit from reduced development restrictions which residents in the area may not want. Maiden provided the following reasons for this reclassification. First, Maiden does not and will not use these waters as water supplies. Two, Maiden's water treatment facility has been dismantled. Three, Maiden has a long term contract with the City of Hickory to provide treatment of water, and lastly, protective measures in the form of phase II rules already apply. In addition, should new development occur in the Maiden and Allen Creek watersheds, although none is currently planned, local governments and their constituents are not required to remove current ordinance restrictions and the phase II rule protections must stay in place. Finally, concern was expressed that the Hickory water treatment facility uses many chemicals that are affecting receiving waters and that the creeks do not currently meet water supply standards, and that streams should not be needlessly degraded by this proposal. The use of chemical in the City of Hickory's water treatment facility is nearly average compared to chemical use at other such facilities and the plant's wastewater regulatory compliance history has been extremely good. In addition, based on projected uses in these watersheds, which the water supply high quality water and phase II rules do not affect, there is no indication these streams would be degraded. Finally, there is no data showing that these waters do not currently meet water supply standards. The reported proceeding which was sent to all EMC members prior to today's meeting includes all written comments received and further details on the comments and the division's response regarding the proposed reclassification. Based on consideration of these comments and available data, division staff and I recommend that the proposed reclassification of Maiden Creek and Allen Creek as described in the agenda item and the report on these proceedings be approved. If reclassified the proposal would be effective estimated March 1, 2013. At this time Elizabeth Kountis and I will entertain any questions that you may have. If so, Elizabeth can provide more detail to refresh your memory in this process.

**Chairman Smith:** Questions or discussion?

**Mr. Ayers:** One question. You mentioned they have a long term contract water purchase agreement. Is there a number associated with that contract, five years, 10 years or 20 years? Do you know?

**Elizabeth Kountis:** It's a 25 year contract.

**Mr. Ayers:** Ok.

**Chairman Smith:** I have one question of either or both of you. I understand the reasons that the Town of Maiden gave for making this request. I read them and then I heard you repeat them. I accept all those and believe all of those. I'm sure they are all valid. At the same time, inertia being what it is, I'm still wondering why the town took the initiative to make this request when it would seem to me to be more typical for the town to have just left it alone. Not having any need

for it, that is the current classification, apparently not having any development plans. I don't see how the town is inconvenienced at all by the continuation of these classifications and I'm curious if you picked up any additional insight in this process of why the town would take on some extra work for itself and make this request.

**Elizabeth Kountis:** We have had in the past, though not very frequently, similar type requests. So in this case we're just going on basically what their request provided. That's really about all I can say on that.

**Mr. Martin:** This is sort of towards your question, Steve. I don't have personal knowledge of Maiden's thinking but like you said before. I think we had, Raleigh had a request for the Neuse River to go back to a WS-V. A lot of it has, like you said, are there any current development plans? The way it works is if somebody was interested in developing there, the minute they heard we would have to go to the EMC and go through a reclassification process in order to develop the property the way we could under a WS-V, they would walk away and go somewhere else. Secondly, I have heard that in many cases these classifications are used by property owners to argue the tax valuation of their property because the use of it is much more limited, so it's a revenue issue for local municipalities. Even if nothing is proposed, the owners can argue nothing can be proposed, nothing of the density you are assessing me at. So that's just a guess on my part why they would do it.

**Chairman Smith:** And those are good points. I recognize those. I thought about the first one. The second one I think that if that was the case in Maiden, that would have been on their list of reasons. But we can speculate about that.

**Mr. Martin:** I don't think Maiden would advertise to their citizens that they would like to be able to raise their taxes. So I can understand why that wouldn't have been on their list.

**Dr. Peterson:** Corey, I was confused by what you said relative to the existing water quality. What you said was there is no evidence that the water quality is degraded in any way in either of these two creeks. I'd like to know what is the water quality, not that there's no evidence. Is there evidence that it is good water quality, and where does that evidence apply over the course of these two creeks whose classifications are about to be changed?

**Elizabeth Kountis:** We're thinking about two different types of standards here in terms of the water supply water quality standards, there is no data that those standards are not being met. Now in terms of the looking at the benthic data for the high quality waters' designation there is data there, available for Maiden Creek, but not Allen. In terms of the data for Maiden Creek that was actually generated after that creek became WS-II. That is after it became high quality. What we have does, in fact, shows that it's less than excellent water quality.

**Dr. Peterson:** But that implies not much less than excellent. Means not fair or poor?

**Elizabeth Kountis:** It is actually impaired.

**Dr. Peterson:** Ok. And then related to this my second part of this question was that even I need reminding of why it went in a proposal all the way to WS-V as opposed to some other sort of WS designation.

**Elizabeth Kountis:** Sure. There are basically three reasons why a WS-V was chosen and not a Class C designation. The first being that the WS-V classification is North Carolina's only classification that recognizes formerly used water supplies. Title 15A of the Code 02B .0218 states and I quote, "The best usage of WS-V waters are as follows: waters that are protected as water supplies which are generally upstream and draining to class WS-IV waters or waters previously used for drinking water supply purposes or waters used by industry to supply their employees, but not municipalities or counties with a raw drinking supply source." So in this case the town does understand it cannot be using these waters as public water supply should they be reclassified to WS-V. The second reason that a WS-V was chosen for this proposal is that it may be regulatorily easier on various parties if the public water supply classification is desired in the future. For instance if a discharger comes into this watershed it would be more cost effective for them as it would already be meeting the water supply water quality standards. Finally the Clean Water Act states that removal of an existing use such as a water supply use in this case would require showing the use cannot be attained, showing the use could be attained by implementing regulatory measures or adding a use requiring more stringent criteria. In this case we know that the water supply use is currently attainable and the requestor doesn't want additional stringent criteria applied to the waters. Also, according to this Act existing uses are those attained in a waterbody on or after November 28, 1975, which is a condition in this case.

**Mr. Tedder:** That covered part of my question as far as the reclassification. But I think this is not anything that has not been before the Commission before. We've had several to follow in that very same category. But what if was a water supply you can't go below a WS-V. You can't go back to a C. I think the recommendation is very appropriate for the waters at the appropriate classification. I'm going to move for approval of staff and the hearing officer's recommendation.

**Chairman Smith:** We have a motion to approve the staff and hearing officer's recommendation by Mr. Tedder and a second by Mr. Ayers. The motion passed with one dissenting vote (Mr. Butch Smith)

Our next agenda item appears as a request for approval of the 2014 303(d) Listing Methodology. You all probably received my email from late yesterday afternoon that this is being postponed until March. The Water Quality Committee considered at some length yesterday and decided to reschedule for its March meeting and Mr. Wakild is going to give us a brief summary of what transpired yesterday at the Water Quality Committee.

### **13-05 Request for Approval of the 2014 303(d) Listing Methodology**

**Summary (Chuck Wakild):** Sure. Thank you. At the committee meeting yesterday Kathy Stecker gave an overview of the 303(d) process that a number of you had heard before and maybe some of you were hearing for the first time. There were pretty extensive questions, answers back and forth, robust discussion. But it became clear early on that a couple of things weren't in the condition that the Commission would like to see. One was (and we agreed to provide by the next meeting) a more comprehensive and written response to the comments that

were received. We received comments from roughly a dozen organizations and individuals on specific thoughts on the 303(d) process or related information. So we are going to go back and provide a more detailed and written response to those comments. We will seek people out, commenters out, and make sure we fully comprehend what's on their minds. Any Commission member can certainly express further views to us. The second is a more comprehensive document of what I call the whole water quality assessment process. That is how streams get into categories one, two, three, four and five, five being the 303(d) list. But we'll look at how all of those categories are completed and also provide the mechanism criteria, if you will, for delisting; from how do you delist from category one to some other category. We'll also look at the process of how you may move from a category four, for example where mercury now resides or streams for mercury to some other category, category one or two in particular. So we'll provide all of that as well as the gray areas where the data may be seemingly conflicting or in one way or another, it's just not clear that a stream ought to be classified this or that, and what factors and judgments go into that. We'll include all of that and make it as transparent and readable for the general public and Commission as well as what we need to get to EPA for their eventual review. We'll include more information on the data, data solicitation and quality control measures and those kinds of things. We will include specifics of use of fish consumption advisories, how we'll deal with those and fish tissue data, how the stream assessment units are determined, the size of them in particular, I think has been a question. What we'll do between now and then is we'll seek some back and forth, some with Commission members. Anybody is welcome. You know our address and as well as people who have an interest in this. We should get these two documents, I think, you can look for the response to comments and this more comprehensive water quality assessment document by a week or so before the next Commission meeting. You can have a chance to look at it and my anticipation will be before the Commission looking for approval of the assessment document, so that we can get on with the next water quality assessment that's due to EPA April 2014. Questions?

**Chairman Smith:** Thank you Mr. Wakild.

### **13-06 Request that the Environmental Management Commission Delegate Limited Authority to a Special Air Permit Appeals Committee for Final Agency Decision (Resolution)**

**Chairman Smith:** As you know the EMC has an NPDES Committee because the Clean Water Act requires that the decision about appeals of NPDES permits needs to be made by an entity made up of individuals that do not derive their income from an NPDES permit holder. Similarly, the Clean Air Act has a comparable, different but comparable, provision requiring that the final agency decision maker on matters relating to air quality permits should be made by an entity whose members, the majority of whose members do not derive their income from air quality permit holders. EPA has not previously been enforcing that provision and so we've never had to deal with it. But it has become part of the EPA's periodic review and approval of state implementation plans. North Carolina has a SIP review later this spring and DAQ needs to be in a position of showing EPA that North Carolina has a process by which the ultimate decision maker, final agency decision maker on air quality permit appeals is made up of individuals that comply with that Clean Air Act provision. So the AG's office recommended that we create a special committee, the Air Permit Appeal Committee and delegate to it the limited authority to hear appeals from the Office of Administrative Hearing of matters relating to air permits.

As you know the Administrative Procedure Act has been revised so this committee is not likely to have much business; we'll probably disband it before very long. But we need to have it in place. So with that Mr. Crawley prepared a resolution delegating this limited amount of authority for this limited purpose to this committee. Our by-laws provide that the EMC Chair has the authority to establish committees like Dave Moreau did, for instance, with the Renewable Energy Committee. So we will create a special Air Permit Appeal Committee. We're asking that you delegate this limited authority and then Mr. Crawley is going to survey all of you to see which ones of you qualify for service on this committee. Not all of us qualify for service on the NPDES Committee, also that restriction. All of us won't qualify for service on this committee. Then I'll appoint members and it'll do what it's supposed to do.

The Steering Committee met yesterday on short notice and made the recommendation that the EMC delegate this authority as contained specifically in the resolution that you have before you. Mr. Crawley do you want to add anything to that?

Motion to approve by Mr. Keen, seconded by Mr. Hutson, passed unanimously. So we moved our information items. The first information item we have is a report by Mr. Tracy Davis on the update of the Mining and Energy Commission. Mr. Davis is Division Director for the Mining and Energy Commission

## **II. Information Items**

### **13-01 Update on the Mining & Energy Commission**

**Tracy Davis:** My name is Tracy Davis and I am the Director for the Division of Energy, Mineral and Land Resources formerly known as the Division of Land Resources. Our division serves as staff to the Mining and Energy Commission. I was asked to come before you today to give an overview of the Mining and Energy Commission and its current activities. As you may be aware Senate Bill 820, the Clean Energy and Economic Security Act, was passed this past summer by the legislature. It became effective in August and reconstituted the Mining Commission to the Mining and Energy Commission. The Mining and Energy Commission, in a nutshell, is responsible for development of a modern regulatory program, for the regulation of oil and gas, including the use of horizontal drilling and hydraulic fracturing. Just to touch on the membership of the commission, there are 15 members in total-three ex officio seats and four appointments each by the Governor, Speaker of the House and the Senate Pro Tem. To draw down a little closer to what those seats represent, we've got a member from the County Board of Commissioners in the Triassic Basin, an elected official from a municipality within the Triassic Basin, and two representatives of non-governmental conservation interests. The three ex-officio seats are the Chair of the Minerals Research Lab at NC State, a state geologist, Dr. Kenneth Taylor in our division, and the Assistant Secretary of Energy, Department of Commerce. There are two representatives of the mining industry, one geologist experienced in oil and gas, an engineer with experience in oil and gas, a representative of a publicly traded natural gas company, a licensed attorney with experience in legal matters associated with oil and gas exploration, and Ms. Pickle from the Environmental Management Commission, who represents your commission regarding water and air resource management issues. We have a member from the Commission of Public Health that's knowledgeable in waste management.

As I stated earlier, the authority of the commission is to develop the modern regulatory program (which will be housed in our division) and also adopt rules under the Oil and Gas

Conservation Act, which I'll cover here in a few minutes. In the senate bill, there are over 25 different categories or types of rules, that need to be addressed by the Mining and Energy Commission and associated commissions. There are also three studies that have to be conducted in regards to funding sources, local government regulation and compulsory pooling. I'll go into those in a little more detail later. There are some limits on the commission that we call the MEC. For the MEC's rulemaking authority there is rulemaking authority reserved for other state agencies and commissions. The Environmental Management Commission is spelled out in the senate bill that is to address stormwater and air pollution standards, the Department of Labor, with health and safety standards for workers and the Commission for Public Health for waste management issues. Evan Kane will be speaking in more detail about the Environmental Management Commission's responsibilities in relation to oil and gas, but we have had some discussions with water quality and air quality, about how we're going to coordinate the various commissions and the rulemaking that will be done by each commission to make sure that we don't have conflicts or overlap. I've also talked with waste management about our coordination with them for the Public Health Commission. Also, to emphasize at the current time, rulemaking authority is only given for onshore oil and gas activities. As I noted, there'll be quite a bit of coordination between staff of the various commissions. We are all to complete our rules associated with oil and gas per Senate Bill 820 by October 1, 2014. The rulemaking, it says in the bill obviously, that rulemaking must be conducted in an open fashion and involve various stakeholders and technical experts, so we can make sure we get the rules in place to address the issues that could arise. We are also to look at existing statute rules to see if those rules are applicable, or if they need to be amended, or repealed and replaced by new rules. The commission's required to submit numerous reports. We have annual reports and quarterly reports. The annual reports are due by October 1<sup>st</sup> of each year and the quarterly reports are due by January 1<sup>st</sup> and every quarter thereafter. We've completed those two reports so far, just on the ramp up stage of this new commission. As far as our division, we provide the support to the commission. We will be issuing the permits for oil and gas activity. We are required to set up a registry for landmen which I can give you a quick definition, which is someone who works out mineral rights or leases, and negotiates contracts with landowners. They're required to register with the department of their credentials, and their experience with doing those types of activities, so we have a registry of those folks. That's already on the website under the Mining and Energy Commission where folks can go in there and get the applications, complete and submit to the department. Then we make that registry available on the website. We're also required to enforce the Act and the rules for permitting inspection and enforcement, as well, once the program is up and running. So within our division, we have actually two sections, the Geological Survey Section which does geological mapping and mineral resource identification and documentation. We have the Land Quality Section which is the regulatory side of our agency. There are three existing regulatory programs that you may be familiar with, the Erosion and Sedimentation Control Program, the Mine Permitting Reclamation Program and the Dam Safety Permitting Program. We created a new regulatory program within Land Quality called the Energy Program with three positions, that we were funded or given funding for this past session. We are in the process of hiring those folks on board. They hit the ground running because we have meetings coming up on the 24<sup>th</sup> and 25<sup>th</sup> with the commission including some additional meetings between now and then. Walter Haven is the Energy Program Supervisor who will be the main contact for the commission with the staff. Katherine Marciniak, environmental senior specialist will work with him. She'll be doing research and helping with

the logistics of the commission meetings and rule drafting. We are in the process of filling the geologist position which is our third position. Interviews have been completed and we have a package that's being submitted for approval to offer, hopefully, this week.

To talk about the commission and its functions, there are six standing committees. Two of those were established in the senate bill. One is a committee on mining and one is a committee on civil penalty remissions. The committee on mining was given exclusive responsibility and authority over matters pertaining to mining and reformation under the Mining Act of 1971, and it's an associated rule. It essentially took over the responsibilities of the non fuel mining industry in North Carolina. It was previously covered by the Mining Commission so they have their own authority to handle mining permit issues, policies and rulemaking, penalties and that type of thing. Their membership was established in the senate bill. They did elect a chair to that committee, but the members are designated in the senate bill. There is also the committee on civil penalty remissions which would be structured similar to what the EMC does with civil penalty remissions. There are three additional committees that the commission established to do basically the research and rule drafting, and a fourth additional committee which is the Rules Committee. The first three that you see on the screen were established based on a grouping of the rule assignments that were in the senate bill. Staff looked at those rules and tried to put them in buckets as we call it, environmental standards related rules, water and waste management rules, administration of oil and gas rules, and rules that were more tied to well drilling in the oil and gas industry. So you can see that, I put in a few of those types of rules that the MEC will be looking at establishing, researching and establishing some draft rules. Under the Environmental Standards is the hydro-geologic investigations, collection of baseline data, well siting setbacks, and fracturing fluids in other similar type issues. In the Water and Waste Management we'll look at limits on water use, water and wastewater management plans and waste disposal. In the Administration of Oil and Gas, we will look at pre-drilling activities, well construction, recordkeeping and well spacing. A fourth new committee which is the Rules Committee is one that Ms. Pickle is chairing. That's a sort of an administrative committee. That committee is going to look at all the rule drafts that come from these three prior committees, and make sure that they integrate properly, that they're understandable and there are no conflicts amongst the different committees that the rules overlap. They'll also be looking to see which rules need to stay rules and which ones may be statutory changes that have to go to the legislature. That committee is looking at a framework to put these rules into place and doing a format that would be following the process of the well gas bill life from pre-drilling and production, and then through closure and reformation of the well sites.

I also mentioned earlier about the funding step through three studies that the commission is charged with completing. While the rules have to be done by October 1, 2014, the three studies have to be completed by October 1<sup>st</sup> of this year. So they're on a shorter timeframe and these are studies that were spelled out in the senate bill that identified their scope as well as minimal participants on this study group. So the study for funding needs and financing will identify sources of funding for additional local government or to address local government impacts for structure repair and regulatory program costs. Those participants are the department, DOT, League of Municipalities and the Association of County Commissioners. The second study is a study of local government authority. This is to look at the appropriate scope of local regulation of oil and gas activities within the counties, municipalities. The commission is charged with recommending a uniform system that allows some local regulation, but is not prohibitive to oil and gas production and exploration. The participants are DENR, League of Municipalities and

county commissioners. The third study is to look at the current law on integration and compulsory pooling or forced pooling. That's to look at finding recommendations of the current state law on pooling and those participants are DENR and the Department of Justice. I'll make a note that all three of these study groups have met and the directors of each of these study groups went out and reached out to several stakeholder groups. So these participants are quite broader than what's shown here on the slides. They've brought in quite a few members to their study groups to get all the interest covered. They're a little bit more flexible where they can meet as they see fit throughout the months ahead to get their work accomplished by October 1<sup>st</sup>. Whereas the committees are meeting the day before the full commission meeting, and all the members of the Mining and Energy Commission that are on the committees. We also have a DENR Manager Stakeholder Group that will be off to the side that we'll be using to dovetail with the committees and the study groups to have input review and give feedback on draft rules and the study imports. This is a group of individuals that represent various interests. They're going to meet probably monthly at first, maybe every other month depending on the workload or the products that come out of the committees and study groups. They will start with the orientation likely, this month or early next month to kind of talk about how this group will function and how they'll interact with the committees and study groups through the DENR staff. The meetings will be less frequent as we go through different phases of the rulemaking and the studies where maybe there will be instances where some of the topics that are going to be discussed at the stakeholder group is not of interest to some of the interested parties, then only some parties may participate. There may be other times where there is a low on some of the outputs. We might skip a month as far as the meeting goes. We're trying to keep this direct involvement, representatives of the study group are the stakeholder group to 20-25 people just to help facilitate the discussions and make sure that it is productive and we're getting the feedback and interaction and education amongst the stakeholders, and getting the proper feedback back again to the committees and study groups. This group could disband after all the study and rules are completed, but we would like to have that group continue on to evaluate the program and the rules during implementation to see if there's anything that we need to do to make some adjustments to the program procedures that may be in place at the time or any other rule refinement. This is just a quick map of what I've discussed. You'll see the Mining and Energy Commission. Again the committees across the top of the page are Mining and Energy Commission members only with staff serving each of those committees. They report directly to the commission. Their meetings will be the day before the full commission. The study groups along the side are again required to complete their studies. They'll report directly to the Mining and Energy Commission with each of their studies once they're completed. Those studies will likely have findings and recommendations. There may be recommendations for statutory changes which the commission would then refer to the General Assembly. If there's rulemaking that's needed, then the commission can determine which of those committees would be charged with drafting rules based upon those recommendations. Then the stakeholder group that I mentioned earlier; this just lists some of the participants. I won't go through them but a lot of these participants were listed in Senate Bill 820. The department was required to coordinate on the rulemaking in the studies moving forward and this is how we typically do that. I know this is how the EMC and its staff work with stakeholders to do rulemaking, so we will be following the same type of model.

Just to give you an update on the MEC today, it has been four meetings of the full commission of September 6<sup>th</sup> with just an orientation meeting on public records and public

meetings and ethics requirements. On September 28<sup>th</sup> we discussed a proposed committee structure that I showed you and discussed some modifications to that as well as the stakeholder process. We also met on November 2<sup>nd</sup>. They approved operating procedures for the commission and finalized the committee and study group structure, stakeholder involvement and committee and study group appointments were made during that meeting. We had a December 18<sup>th</sup> and 19<sup>th</sup> where we completed our first committees and study group meetings. Most of those were held on the 18<sup>th</sup> with the full commission. One of the study groups met on the 19<sup>th</sup>. If you want information on that, in interest of time all this information has been posted to our webpage so that the public and any interested parties can look at the minutes of those meetings; the handouts and the recordings are also posted. These are the meeting dates for 2013. We're meeting on January 24 with committees and January 25 will be the full MEC meeting here in this Ground Floor Hearing Room. These are the dates that are planned for the rest of the year for the formal committees and full commission. The study groups are going to be meeting different dates than this and those dates are on our website. One key date is September 5 and 6 which is the final meeting before the study group reports are due, so that would be one where I'm sure the commission would be briefed on the draft reports and receive final feedback before they finalize those by October 1.

Of ongoing actions, we have again hired most of our staff. For one, the geologist will hopefully be hired soon. We have potential changes. We already have changes in commission membership. We've had a couple of seats vacated by members leaving their current ex officio seats or had some business issues and couldn't continue to serve in their seats that they were appointed. There's going to be at least two appointments to those seats. We also have an expansion budget request for the program. We were given those three positions, \$250,000 for three positions. We chose those three classifications to get the work started with technical folks but we still need additional folks to help us to work through the process which would be public information officer, a rules coordinator which we don't have in our division, an economist that will work the fiscal notes related to each of these rules, some IT support and some attorney support. We also are asking for operating funds for both the program and the commission. We were given the three positions but no operating funds for either the program or the commission's activities. So I will be trying to support that. We encouraged stakeholder involvement through our DENR stakeholder group as well as direct input to the committee chairs and to the study group directors and also sharing that information through staff as we need to with other commissions and staff within DENR. We're also putting everything on the website. We're trying to mirror the EMC's website. Lois Thomas has been a big help in helping us look at a framework that we can get our information up on the website of all our meetings and all the documentation so the public can be involved and be aware of what's going on throughout the process. Lastly, we're making presentations such as this to various groups inside and outside the department, in the private sector and across the state with citizen groups. We probably talk about the commission and its activities as well as the DENR report on natural gas and on the geology of the area of interest. With that said, this is the way to stay abreast of the activities of the commission. For much more detail we have a ListServe that we ask people to join if they want to get notices about meetings and other important activities. Also, the best way would be to go to our web portal to look at all the webpages on the committees, study groups and full commission and its activities. I appreciate the opportunity to present to you today and will be glad to answer any questions.

**Chairman Smith:** Mr. Davis, thank you very much. That's an excellent report and I appreciate you being available on pretty short notice. If you have some additional time let me open it up for questions and discussions.

**Ms. Pickle:** If I could just take a second to start with thanking Mr. Davis for the very thorough overview and to take an opportunity in this forum to thank him for all of his support and the support that is going to need to come over the next two years. To give you all an idea of the magnitude of the task ahead of the Mining and Energy Commission, looking at other states' regulatory systems for oil and gas, they have between 100 and 200 individual rules for hydraulic fracturing and shale gas development. The MEC is looking to develop (we'll say on average) 150 rules in approximately a year and a half, and as all of you, I know, who have worked on rule packages with the EMC know, that is a tremendous undertaking and in a very short period of time for a resource that we have here in North Carolina, but have limited test wells and limited information about. But the huge information gathering, base lining and overall regulatory effort that, if I can say publicly is a greater magnitude than what we've probably undertaken here in the EMC. I will also say that I owe all of you a debt of gratitude because I have invoked this commission on numerous occasions on the ways to do things and how the MEC might proceed in a way that is efficient, collegial and moves forward with the best possible information science and mines on it. So I'm very thankful to all of you and expect to be coming back at pretty regular intervals and asking for expertise. Part of my role is to make sure that when we pull on one string with a rule from the MEC, we're not unraveling something else that we've done here in this commission. There are certainly a lot of areas of regulatory overlap beyond those mentioned by Mr. Davis. I will say just as a quick clarification or addendum to the information that Mr. Davis presented, often when we hear the term "ex officio" we automatically assume that those members are non-voting. That's not true for the MEC. So when you look at the number of members who are voting and participating for the MEC. Those ex officio positions are thereby for true of their title as opposed to the individual and they are conferred full voting responsibilities and serve fully on the commission.

**Mr. Hutson:** I don't know who it is that would answer this. I saw that air and stormwater remains with this commission. Does anybody know, to paraphrase Howard Baker, what we have to do and when we have to do it by?

**Ms. Pickle:** I believe Mr. Kane is going to be addressing at least some of that in the presentation after this. I will also to add to your confusion, the session law actually says that the EMC retains all of its jurisdiction and then lists those two out, and particularly in areas that are actually retained. So I imagine that there are areas of additional overlap specifically called out in the legislation.

**Mr. Keen:** It's real encouraging to see how you've taken the municipalities, the League of Municipalities and the North Carolina Association of County Commissioners and made them stakeholders in this. I would ask that you be sensitive, to particularly the county commissioners, with landowners where these will be taking place these, I guess fracturing or mining, as we move forward. You'll have a lot of landowners that will want to look at the leasing and the property values as they pass them off from generation to generation. Having those ideals with

landowners, the commissioners are definitely sensitive to those citizens. I'm sure we'll see that in their public hearings and so forth as we proceed further. Thank you.

**Mr. Morse:** I think Amy responded to the question I was going to ask. I noticed in that slide the commission was earmarked for stormwater and for air quality but I was interested in where the rule of groundwater issues would be addressed. Would that be part of the comprehensive package?

**Tracy Davis:** That's correct. I did have a sneak preview of Evan Kane's presentation. I think he is going to go into a lot more detail about the specific rules that would fall under the EMC and how it goes out beyond just those two subject matters.

**Dr. Peterson:** I had an analogous question about groundwater and to the groundwater question which is surface water quality. I don't know enough about these mining processes, but in many, that could be affected by the mining process, and wondered if that responsibility still lays in the EMC's purview.

**Tracy Davis:** I would just say that Evan has gone through the existing water quality rules in various areas and looked at what's still applicable, what needs to be amended and maybe where some gaps are. Then we'll be working together to see which commission needs to take the lead on that, whether it's one of our committees or if it's one of the EMC's committees. We'll need to coordinate those specific topics.

### **13-03 Water Quality Rulemaking in Response to the Clean Energy and Economic Security Act (Senate Bill 820)**

**Evan Kane:** I am here to provide you with some information that will hopefully dovetail well with what Mr. Davis has just presented regarding water quality rulemaking needs in response to the Clean Energy and Economics Security Act, Senate Bill 820.

I'll provide a little bit of historical background on the history of how we got to this point. I supposed a bullet point I could have included in here was starting with the 18<sup>th</sup> Century and leading up into the 20<sup>th</sup> Century, there were a number of tentative explorations of North Carolina's hydrocarbon production potential throughout the state which yielded some information that the North Carolina Geological Survey began reevaluating in about 2008. Based on reevaluation of that exploration data they documented and publicized that potential shale gas resource existing in North Carolina in the Triassic Basins shown here in sort of olive green, these Triassic Basins in the Piedmont here through Sanford and Lee County and up in Rockingham County. That work, and some land leasing activities that were occurring about the same time, led to legislature interest in this subject in order to address concerns over North Carolina's preparedness to deal with potential exploration, development of shale gas within the state. The legislature passed and the Governor signed into Session Law 2011-276 which directed DENR to conduct a study, a very wide ranging study of the environmental economic and social impacts that might result from shale gas development within the state. The Division of Water Quality, Division of Waste Management, Land Resources, Air Quality and others contributed heavily to that study. Within DWQ we had a team of about seven people contributing to that on various aspects related to water quality. This DENR study concluded that the development of shale gas

could be done safely if adequate regulatory programs were in place. The study included 27 specific recommendations for regulation improvements, administration of programs and additional study. In March of 2012, I spoke to this commission to provide an update about the water quality considerations that were included in our report. In May of 2012, we released the study. Unfortunately, we were hoping that during the course of our study we would have the opportunity to see quantitatively what type of resource we were looking at. That information from the US Geological Survey did not come out until about a month after our study. Just to give you a little bit of context, I've got some numbers from that USGS report. The estimated amount of technically recoverable shale gas according to the USGS in North Carolina, the mean of their estimate, is about 1700 BCFG. That compares to the technically recoverable gas in the Marcellus at about 2% of what is there in a four state area. So a relatively small amount of gas here in North Carolina; given the low price currently for natural gas, it would seem that the prospects for development of this resource are pretty small over the next several years. But this is a number of caveats that I've put on that conclusion. This is the first quantitative estimate of North Carolina's gas and subsequent estimates may go up or down. Additionally, factors such as entrepreneurial innovation developing in a different business model for getting the gas to market or wildcatting natural disasters or geopolitical events could change the economics of the situation for North Carolina. In July of 2012 the legislature passed Senate Bill 820, the Clean Energy and Economic Security Act, which directed DENR to do a number of things establish the Mining and Energy Commission and various other requirements. Major provisions of that bill were to establish the Mining and Energy Commission reconstituting it from the Mining Commission as noted by Mr. Davis. It authorized hydraulic fracturing and horizontal drilling in North Carolina which were in effect banned previously, not out of any concern over hydraulic fracturing per se, but over concerns that existed, maybe back in the 30s and 40s with the oil and gas industry at that time. However, it also prohibited issuance of any drilling permits until the legislature comes back and lifts a temporary moratorium on fracturing and horizontal drilling. It also improved a number of regulations of oil and gas activities in North Carolina's Oil and Gas Conservation Act that had not been significantly updated since the 40s. There were a number of areas where the legislature chose to make necessary improvements there. Most concerned, I guess for this commission, is that it directed the EMC, the Commission for Public Health and the Mining and Energy Commission to adopt necessary regulations for what the bill termed "a modern Oil and Gas Regulatory Program" by October 1<sup>st</sup> of 2014. As Mr. Davis has noted, the Mining and Energy Commission was given about 25 rule areas for adoption. I'm not going to go over all of those but some of them pertain to administrative issues, fees and etc. But I will touch on a few of those that might seem to be the areas where the EMC would have overlap or perhaps the assumption would be that the EMC would have authority. Drilling permit application requirements based on sampling of air and water, oil and gas well construction standards which is an area where currently there are departmental rules in 15A NCAC 5D which address some well construction standards for oil and gas wells. Then there are EMC rules in 2C .0100 pertaining to water supply wells and certain other wells. We have kind of stretched those two sets of rules to cover gaps in the past when we've had individual well permits come in for oil and gas exploration. The intent of the scope of the Mining and Energy Commission's rulemaking responsibilities with oil and gas would be to come up with a much more robust set of standards that are specifically tailored to addressing modern drilling practices and hydraulic fracturing. Siting standards for oil and gas wells: currently there are essentially no siting standards for oil and gas wells, at least none explicit in rule. That will be addressed by the Mining and Energy

Commission. Limits on water use and establishment of water management plans are also within the purview of the Mining and Energy Commission and the management of waste. The specifics on the siting and the act directs the Mining and Energy Commission, to address infrastructure such as storage pits and tanks on site, including setback requirements and identification of places where those structures should not be erected. The siting standards: it specifically says in the bill that, “these siting standards shall be consistent with any applicable water quality standards adopted by the EMC or by local governments pursuant to water quality statutes and standards for development in water supply watersheds.” I think that begins to get at Dr. Peterson’s question about surface water protection. I think I made other issues related to management of waste on site and oil and gas well construction standards, and issues like that get to, at least a large number of the groundwater protection concerns expressed by Mr. Morse. Additionally the Mining and Energy Commission is responsible for developing rules regarding prohibitions on the use of certain chemicals, disclosure of chemicals used in hydraulic fracturing and other parts of the process, blowout and spill prevention and response as well as well closure and site reclamation. The legislation specifically identified two areas for the EMC to adopt rules. One for stormwater control which this grew out of recommendation of the DENR study report as well as a third party review by a group called the State Review of Oil and Natural Gas Environmental Regulations, that pertained to stormwater and whether stormwater control was needed beyond the normal sediment and erosion control for construction related stormwater issues. Because these drilling pads tend to persist for a number of years and are sites where a number of waste and chemicals are handled, there may be stormwater issues that are not addressed sufficiently by typical construction stormwater or sediment and erosion control plans. The legislation also directed the EMC to look into regulation of toxic air emissions from drilling operations. The Division of Air Quality is here and has been participating in our discussions about necessary rulemaking, and if you have questions they can certainly address those today. The legislation also amended the Environmental Management Commission’s authority to include matters within its jurisdiction that allow for and regulate horizontal drilling and hydraulic fracturing for the purpose of oil and gas exploration and development. The DWQ staff involved in the DENR study have examined the EMC’s other rules beyond stormwater relating to water quality protection. We’ve looked at the mandate in the session law and the mandate to the EMC, the Mining and Energy Commission and the Commission for Public Health have identified two rulemaking areas with regard to water quality that definitely need revision. The first of those is as I mentioned stormwater as directed by statute. As I’ve already mentioned the concern here is simply that you have impervious surface several acres in size which would typically, at least in the operations that we’ve seen in northeastern Pennsylvania and other states, typically persist for several years throughout the lifetime of the well. The construction phase, the hydraulic fracturing and even into the production phase of the well, and during those phases you have things other than sediment and erosion concerns that you may need to deal with such as waste handling, waste storage tanks, chemical handling and etc. that warrant some consideration as stormwater runoff. These oil and gas operations are exempted from federal NPDES stormwater requirements until they have a release of reportable quantity. So state regulations are necessary to fill that gap. Additionally within the rules for waste not discharged to surface water, the 2T rules, we’ve identified one specific that needs to be fixed. I will take personal responsibility for this one because at the time that we did a major overhaul of the non-discharge rules several years ago, the question was raised about whether ditch witch installed horizontal drilling to install utility lines along roadways, under creeks and things like that, whether we had any particular concern with the

spreading of those wastes on site in a way that wouldn't impact surface waters, whether that could be deemed permitted. I said, "Sure we can deem that permitted," and I wrote a rule without too much thinking, went out to public hearing and so on. It specifically says that exempted from permitting are from either site specific or general permits, are drilling muds, cuttings and well water from water supply wells and from water wells, as well as from other construction activities including directional boring. As mentioned, that was intended to deal with things like the ditch witch rig you see there and not intended it to deal with a rig that handles 30 ft. of rod at a time and may drill thousands of feet both vertically and laterally through the ground. So we would seek to close that apparent loophole for this type of operation and provide an alternative route for the disposal of those cuttings, and purge waters and muds, and do that in a way that would preserve the loophole, preserve the exemption for the things that we intended to address such as water supply wells and those small utility borings. At this time we're not proposing revision to any other EMC water quality rules. I suppose I could list all of the EMC water quality rules that we're not proposing for revision, but I'll touch on some that come to light or come to the forefront as areas we wanted to evaluate the need for, in particular. If you don't see it listed up here, we certainly think there's not a need to revise it. If you see it listed up here it simply means that we thought there might be a need to revise it. We did some of the evaluation and determined that we did not.

The first of those is the pretreatment rules in 2H .0900. The current pretreatment regulations require that before a publicly owned treatment works may accept wastewater from an industrial facility, it has to be evaluated to determine if it fits the definition of significant industrial user. That wastewater characterization is evaluated for potential to impact the treatment system. We feel that the current pretreatment regulations are sufficient to protect the publicly owned untreated works. EPA has also additionally been working on ethylene guidelines for wastewater generated by the oil and gas exploration industry and expects to have guidelines in place by October of 2014. You can maybe, based on your particular experience, take that with a grain of salt as these things go. The well construction standards additionally, we do not think need revision for an oil and gas regulatory program because of the Mining and Energy Commission's specific mandate to develop well construction regulations for oil and gas, hydraulic fracturing and directional drilling, in particular. With regard to well construction standards and permitting requirements for injection wells, currently at the federal and state level, regulations for injection wells exempt fluids using well development, rehabilitation or stimulation from the definition of injection, for the purposes of the Safe Drinking Water Act and for the purposes of North Carolina's injection well rules. Hydraulic fracturing is considered stimulation by all other states with active oil and gas programs, as well as under the Safe Drinking Water Act unless diesel fuel is used in the fracturing fluids. So while hydraulic fracturing entails the physical injection of fluids, it's not an injection for the purposes of the 2C .0200 rules. So we do not think that revision of those rules is necessary at this time. Finally we're not proposing to amend the state's groundwater classifications and standards. At this point we believe there's enough uncertainty about the hydrogeology and hydrogeologic situation and even deep water quality within the Triassic Basins that to engage in that effort would risk potentially failing both to provide the regulatory certainty that an industry might be seeking, as well as failing to provide sufficient protection to the groundwaters of the state. We are, of course, open to stakeholder input on this approach and the scope of the rulemaking. We'll be sharing our proposed scope with the stakeholders going forward.

The stakeholders process is specifically required by Senate Bill 820 but I will note that the stakeholders process actually was one of the recommendations in DENR's report and the stakeholders process is consistent with the way the Division of Water Quality has handled all rulemaking for a number of years now. We plan to have two stakeholder meetings related specifically to water quality regulations. A correction on this slide is DENR is still in the process of identifying these specific stakeholders. They have gotten general agreement from groups to provide stakeholders but the specific individuals have not been fully identified yet. The stakeholders process as noted by Mr. Davis on a previous slide would involve stakeholders. We are planning to use the DENR-wide stakeholders group that's being assembled for the Mining and Energy Commission as well as other rulemaking areas, and tap into that and dovetail into the process of putting together agendas, and allowing stakeholders to identify which meetings they need to attend. That stakeholders group will involve representatives from local government, industry consumer protection groups and agriculture. We would add to that since we're looking at this particular permit exemption in the 2T rules, representatives of the water well drilling industry and utility contract industry to ensure that the necessary part of their business is kept in place. The rulemaking targets I will cover briefly here. The deadline as mentioned for the Mining and Energy Commission as well as for the Environmental Management Commission is to adopt rules by October 1, 2014. We will approach the Mining and Energy Commission with an information item related to water quality rulemaking at their January meeting. We intend to have the first stakeholder meeting sometime in the next several weeks to share with the stakeholders the scope of proposed water quality rulemaking, and gather input from them on that scope. We will provide them with some marching orders to help us in developing conceptual rules and have a second stakeholder meeting sometime later in the spring of this year. We intend to have rules for the Water Quality Committee to review and recommend to be moved forward in August of 2013, slightly in advance of the September meeting of the Water Quality Committee, at which time we would be asking the Water Quality Committee to send those proposed rules to the full commission. At the same time we will be working on a fiscal note and getting OSBM approval of that fiscal note in November of 2013 and have an EMC action item to send these proposed rules to public comment in November 2013, as well. A number of other dates there, just administrative targets that we need to hit. We anticipate having the first public hearing sometime between January 6 and February 14, 2014. Then we would conduct review evaluation of the public comments, make any necessary revisions to the proposed rule, and bring that rule back for Water Quality Committee adoption in July of 2014 and full EMC adoption in September of 2014. That would allow the EMC to meet the October 1 deadline for rule adoption. Following adoption by the EMC we would be filing that with the Rules Review Commission and subject to their review. That's all I have to present. I'll be happy to take any additional questions that may come up.

**Chairman Smith:** Thank you Mr. Kane. That's a very good report. I appreciate that.

**Mr. Butch Smith:** I have two questions. The last time I recollect that we've only had 95 and 96 when we did the test run of wells?

**Evan Kane:** No. The information on which the state geological survey studies have been based has been private exploration by oil and gas companies speculating there may be some oil or gas there. The most recent well drills were 1997 or 1998. There were two wells drilled.

**Mr. Smith:** It might have been because, I don't know, why I was thinking '95 or '96. The other question is fracturing has been going on since 1947. Do we have any examples of actual data showing that when they fracture it actually gets into the groundwater?

**Evan Kane:** That's an area where, specific to the fracturing, the evidence is maybe a little bit sketchy right now, but we do know is that, I'll cite one particular example-a study by the Groundwater Protection Council which is an organization of state groundwater protection agencies such as our own, that released back in 2008 examined groundwater incidents including disruption of supply, contamination and etc. arising from oil and gas exploration activities. They looked at state records of incident investigations in Ohio and Texas over a 25-year period in Ohio, 16-year period in Texas, documented the origin of the groundwater contamination of groundwater incidents based on the phase and the lifetime of exploration and production cycle of a well. I think what the study illustrates is that there are a number of mechanisms for groundwater disruptions or groundwater quality contamination from oil and gas exploration activities. It illustrates that, perhaps, they don't happen often, but that they arise from things happening at the surface like waste handling, well construction, well drilling, improper casing and cementing of wells, and things like that, handling of waste during the production phase of a well. The study did not document any cases of groundwater incidents arising from well stimulation which would be the hydraulic fracturing phase. So you can use that to support, I suppose, the argument that hydraulic fracturing does not contaminate groundwater, has not been documented to contaminate to groundwater. But I think if you look at the overall implications of the study I think it highlights a number of areas where we do need to take precautions to ensure protection of groundwater. Hydraulic fracturing may be a particular concern in North Carolina due to our unique geology but there are certainly other areas that, I think, warrant careful consideration and development of regulations. I think that the intent of Senate Bill 820 in directing the Mining and Energy Commission to develop modern regulations for well construction and waste management, and etc. is to prevent groundwater contamination from what we know to be the most obvious sources of groundwater contamination from oil and gas.

What I generally have encouraged people to do is not to focus on the fracturing, per se, because then we get into debates about whether on one side there are many people who, when they say fracturing they mean the entire process of drilling and bringing a well into production and closing it out. Then there are others when they say fracturing they mean just that 24-48 hour period in which the well is being fractured. I think we need to look at all of the potential sources of groundwater contamination. I think that actually is the scope of intent of Senate Bill 820 is to look at all those potential sources.

**Mr. Smith:** The reason that I was asking about the '95, '97 wells they tested whether it be the oil or whoever tested them and that's what I'm saying it seems to me which you did illustrate that number that's coming out of ground and what's there might be more or might be less. The example I had of a well punched and the douser said I was supposed to get a lot of water. But I didn't. Six hundred feet and I only got ten gallons a minute, but he told me it was a bunch of

water in there. That's why I'm curious how they actually projected and what they're doing without actually running test wells down there to see.

**Mr. Kane:** I suppose I should defer to anybody that's here from the geological survey. But they do have geophysical information, seismic exploration that was done across the basin. They have information from those two test wells in '97 or '98. They have collected outcrop samples of the formation that is the target for shale gas exploration and put all of that data together to extrapolate away how much of the resource. Maybe they're aggregate. You may still have situations where you drill an individual well and come up dry with regard to water or gas, but aggregate. The feeling of the geological survey is that there is some shale gas down there potentially exploitable.

**Mr. Keen:** I guess this is just a statement from the logistical standpoint of what supersedes one project in site selections. In the site planning process, I would encourage to maybe get with, again municipalities and the commissioners. You got comprehensive land use plans from these counties that are running out, as I guess DOT, which I saw they were a stakeholder, to get these tip plans, improvement plans. I think the administration is looking probably at a 25 year plan there but the counties are looking at 15, 20, 25 years out. The eastern part of North Carolina has actually got a plan to 2050 but where some of these areas are in site planning the comprehensive land use plans, I think, I don't know if you would want to make them mandatory for a specific time as you're doing this by October 1, 2014. Don't know if the commissions would require that. But it would certainly be handy as we move forward to get those comprehensive land use plans in place. Not just by the counties, but municipalities. Thank you.

**Chairman Smith:** Other comments? (none) Thank you Mr. Kane.

**Ted Bush:** Thank you Mr. Chairman. As Chairman Smith pointed out, what we wanted to do this morning is to take a few minutes and briefly update you on some of the discussions relative to this proposed process of keeping this commission informed on where we are and where we intend to go in terms of our permitting processes. What we generally would like to be able to do is to put in place a process that would allow you to be well informed when not only are there public hearings, but when there are other items that may be potentially controversial, may generate the potential public interest and may raise questions that may at some point in the process come to the attention of this commission. What we'd like to be able to do is to try and get out ahead of that process a little bit by keeping the commission well informed. In looking at some of the types of actions that we generally may be talking about, it could involve any of the items that are listed here on the list, new permits. It could be renewals or modifications. Oftentimes there are changes proposed that could generate public interest and attention. It could mean providing information on some of our special orders by consent where those items are in the process. Then oftentimes potential permit related actions could include some ongoing discussions that may be ongoing with either of the divisions that we're talking about this morning and staff. That may be prior to any type of public meeting requests or any actual application. We've included in your package attachment A. You have a spread sheet that provides an indication of those Division of Water Quality permits that are currently on the list. That list and that spreadsheet is generally divided into three categories. You have facility permit information down the left hand side of that sheet. You have a shaded area in the middle of the

document which provides listing criteria or the basis that particular project was included as a part of the summary. Then on the far right of your attachment A you have project comments or information about the description of that particular project that may be of particular interest.

Looking a little bit further in terms of the listing criteria, in other words those things that got that particular project on the list in the first place. Again, it may be any of the items that are listed here, variances, situations where public hearings have been requested. There may be situations where there are ongoing violations at a particular facility and as a result of that there's some significant public interest. New or innovative systems of practices-oftentimes we will receive permit applications for processes that are not tried and true, those situations where there may need to be some collection of information in order for us to have an adequate indication of what to expect for this particular type of project. So unusual project types would also be there. Best professional judgment, that was included as somewhat of a catchall to include all those categories where there may be some need that staff determines that this needs to be brought to the attention of the commission, and it may not fall into any of the other categories that are listed here. Some examples of some of those best professional judgment types of categories would be, as indicated here, could be based upon the history of the facility or that particular facility type. Sensitive water bodies, obviously one of the interests of this commission is to protect sensitive water bodies. So for those types of permit actions that could have an impact on some of those water bodies, it would be our intention to bring that to the attention of this commission. Some of the larger projects oftentimes will require more than one type of permit so multiple permits being required could be an indication of a need to bring it to your attention. Then just in general oftentimes there may be significant public interest or significant public concern and it may be, not necessarily as a result of some actual scientific concern, but just that it could be an indication that there needs to be some form of public education. It's just a lack of knowledge about what this particular project may entail. But when there is that public concern it would be our intent to bring those items to your attention. Looking forward – what we would propose to do is plan to update you on a routine basis by including information in the package and giving you the opportunity to ask whatever questions you deem appropriate. Then we would have appropriate staff available to answer questions in whatever level of detail we need to be prepared to answer them. We've got staff here this morning if there are questions about any of the materials that were included as a part of your attachment A or if you have questions about the process. As Chairman Smith pointed out earlier, Director Holman is going to be providing some additional information relative to the air quality side of things. So you may quite possibly have questions about both but if you have questions about the portions that you've heard so far or the list that you've got included in your package as attachment A, I'll be glad to try and address those issues.

**Ms. Bailey:** I just have one quick question. I was looking at attachment A and it says unusual project types, see footnote. But I didn't see any footnotes.

**Ted Bush:** I think that was to coincide with the information that you were provided here on the screen this morning.

**Ms. Bailey:** And this is the type of chart that we would be getting here ....

**Ted Bush:** That's what we are proposing. If there is some different or alternative format we certainly would be glad to look at it being presented in whatever form you deem appropriate.

That's what we would recommend. At this point if we need to provide it in a different format we certainly would be glad to do that.

**Mr. Morse:** Would this information be transmitted as part of our agenda packet every time we meet and so will that be open to the public record?

**Ted Bush:** Oh absolutely. It is on the website currently. So this presentation that you've just seen as well as the attachment A, both of those are already on the website. A proposal would be to incorporate those as a part of your package during each meeting. Now from that perspective we wouldn't expect the list to change drastically from one meeting to the next, but just as a mechanism for updating you, it would be our intent to provide that as a part of the package and to make that publicly available on the website during each meeting.

**Chairman Smith:** Alright. Thank you. Other questions, comments or suggestions? Give this some thought and if you have any suggestions let us know.

**Sheila Holman:** Thank you Chairman Smith. Mr. Wakild and I were just talking. I don't think my staff have done a really date historical search of the delegation. Nor does he think his staff has so that's one thing we will take back as an action item and see what we can find. This morning what I'd like to do first again since you all don't routinely deal with permitting unless it's a contested permit. Just want to remind you of our public notice requirements. For our Title IV permits, our larger facilities, we have just under 300 of them currently across North Carolina. There is a 30 day public notice and comment period required for those as well as those large new projects that fall under the prevention of significant deterioration permitting. When we put the notice out there is a calendar on the website and there's a link to not only the draft permit, but also to permit review. That permit review is the regulatory evaluation. What rules will this facility be required to meet. Finally if we start getting requests for a public hearing during the public notice and comment period our rules say that if the Director finds that a public hearing is in the best interest of the public the Director shall require a public hearing to be held on the draft permit. For our smaller synthetic minor sources the public notice and hearings are at the Director's discretion and basically I have to evaluate, is there a significant public interest so that we can do a notice, should we consider a hearing. Typically through the years our hearings have been on our larger projects. You guys will recall not only the Duke Energy Cliffside Six but also Titan Cement. Additionally, Mr. Bush talked about historically controversial projects, those projects that communities don't necessarily want to see come into their community. Asphalt plants is one of the examples where the division historically has held a public hearing for any new or expanding asphalt plant as well as incinerators. Similar to the Division of Water Quality we would look at new and unique industry processes, a potential reason to have a public hearing we might believe that's in the public's interests. Want to also remind you that for all air permits as part of the permit application there's a zoning consistency determination. So for the facilities that would be locating in a community that has zoning they have to go and get that consistency determination. That comes in with the permit application. For facilities locating in areas without zoning we do have a notice requirement. That rule was passed several years ago. It's 15A NCAC 2Q .0113. Not only do they have to publish a legal notice in the paper, the facility, they also have to put up a sign at the property where the proposed facility is going to be located. I say

this just because I want to remind everyone what all the various noticing requirements are as we go through the process. We have reviewed all our current in-house applications. They tend to be the more typical applications and we don't see any at this time that likely warrant a public hearing. You all do not have a spread sheet from me. As I talked with staff I think we concluded that creating a spreadsheet, we believe is more appropriate when we have the application in hand. We'll continue to tell you about pre-applications. We'll tell you about other media events that we've heard about a potential project even though we may not have an application in as we go through the process. But for our spreadsheet what our proposal is when we have an application in hand that we believe a public hearing will be required for, that will go on to the spreadsheet. It will be a similar spreadsheet to what DWQ has provided. We do have or have had several potential applications that may be coming in and I just wanted to share those with you. There are basically five across the state. Three involve what I'd call it, the top three involve the new process where a new process in North Carolina, we think it would probably warrant a public hearing. The last two are projects that have already generated some media and that's one point I wanted to make. You all at times seem surprised. We at times seem surprised because things are happening at the local level. We may not have even had a discussion with the consultant or with the company. So I may get a call from the Governor's office or I may get a call from the Secretary's office, "What's the situation," and I may not have a lot of information. So I just want you to understand that we're all surprised about potential projects.

I did want to take just a few minutes to walk through a couple of tools that are available. I want you all to be aware of the effort we've made in North Carolina, at the department level and the division level to make the permitting process as transparent as possible. First of all I'll start with the application status reports. These are reports that are generated nightly. We have a fairly sophisticated computer tracking system. So as our permanent engineers look at various new permit applications if they take an action, if they realize they need additional information from the company and they send out a request for additional information, they enter that into the database. Nightly there's a pull that not only creates a very brief status report which I'll show you an example shortly, but it also creates a more comprehensive report. These are as you can see available on the web. The briefer one just has the list with the facility, the application type, the review engineer. The more detailed spreadsheet is going to have the whole history for each of these applications, when the original application came in, when that additional information was requested, when that additional information came in and etc. This information then feeds the DENR permit application tracker and this feature is front and center on DENR's website. Right now I've only clicked the air quality permit applications so you can see where the applications are in North Carolina that air quality permit applications, but also Public Water Supply, Water Quality and Water Resources applications are also available. We have the ability to zoom in closer and closer. I've just selected the particular facility here located in Denton. This is a renewal application. It shows the application was received on 12/6. So far there has been no additional information requests and it has the primary reviewer, Hilary King who is one of the permit engineers in our Winston-Salem regional office. As DENR conducted listening sessions over the last few years it became apparent that the industry, as well as the general public, as well as our management, wanted a system like this where they could very quickly go and get information on what's the status of this application. Finally I wanted to talk briefly about our recent project. I talked about the Title IV noticing requirements indicating that we had all of our Title IV permits available on the web. We have a total of Title IV and non Title IV sources, almost 2,700 facilities permitted in North Carolina. So there were roughly 2,400 permits that

were not available electronically. We've recently completed a process to get every current permit, air permit, in North Carolina available on the web. There's also a very broad search engine. You can look at this one which has all the Title IV sources in Catawba County, for example. So you can search on the air permits in a lot of different ways. There's a table that lists each and every permit in the state and the blue hyperlink takes you directly to that permit. We also have the mapping feature. In conclusion I just wanted to say that the department is also looking at and we've been partnering with several other state agencies to do a greater e-business application looking at potential e-permitting as we go forward. So I just want to conclude with we are trying very hard to make sure that the permitting process is as transparent as possible and that we're making information available not only to the facility but the general public as quickly as we can. I will answer any questions.

**Chairman Smith:** Questions or comments of Ms. Holman? (none)

That concludes our information items so we move into status reports by EMC committee chairs. The Water Allocation met. Mayor Moss is being a mayor right now instead of an EMC member. So he's not here.

### **III. Status Reports**

#### **A. Water Allocation Committee Jeff Morse, Acting Chairman**

We met yesterday and discussed two information items. One concerning the coastal plain capacity use area 5-year assessment and the other is the Orange County and Sewer Water Authority request to convert allocations. Both these issues will be coming back before us. There will be a management plan presented to the committee this coming March and I believe we will be hearing more about the request to convert allocation requests from Orange Water Sewer Authority.

**[The Groundwater Committee did not meet.]**

#### **B. Air Quality Committee Marion Deerhake, Chairman**

The Air Quality Committee did meet. We had two presentations. One an information item and the other a concept that was made as a result of the air toxics legislation from the last session. The concept deals with the amendments to the regulations that are required as a result of that legislation. The information item talked about the permit applications and information processing that has been required during a 5 year period that was reported to the Environmental Review Commission in December. As we move toward drafting of the air toxics rules there are specific recommendations that the Division of Air Quality made after an extensive stakeholder discussion process. You can find those recommendations and all of the ones that were in the package are going to go into drafting. You can find those in the Air Quality Committee agenda item package. We had a revision which was simply an erroneous matter of correction of asbestos acceptable ambient level. That will be taken care of without any real controversy. It was an error that was made at the original development of the AAL list, just a simple miscalculation. Then there was also a concept on amending permit rules to clarify commenting requirements for sources subject to maximum achievable and general available for coal technology standards. We had a draft rule which dealt with revision of the arsenic acceptable ambient level following the Scientific Advisory Board's analysis of a presentation which

interpreted and came up with a method of calculating it to revise AAL for arsenic. There is an economic analysis that accompanies that I believe it's 137 or 157 facilities would fall outside the permitting requirements as a result of this revision to the arsenic. A hundred plus out of four hundred plus facilities. So that will be coming to the EMC perhaps at the March meeting. Then we also had an update on the PM2.5 national ambient air quality standard and its effect on North Carolina. North Carolina is in good condition, though, in terms of PM2.5. That's the smallest particulate that's regulated by EPA for respiratory and human health purposes. Remarks from Ms. Holman updating us on the sulfur dioxide non attainment designation. For the Wilmington area it looks as if the monitoring announces there will not be a non attainment designation, it will be in compliance.

**[The NPDES Committee did not meet.]**

**C. Renewable Energy Committee Dickson Phillips, Chairman**

The Renewable Energy Committee had speakers from the North Carolina Department of Commerce, the Energy Division, I think it's called, and the U.S. Fish and Wildlife Service and the Wildlife Resources Commission. This was concerning wind energy projects and the draft legislation that we prepared back in 2009 and have updated it with some changes that we were looking at including provisions to ensure avoidance of conflicts with military installations and uses. We're going to be looking at that possible legislation further in the next two months and may well bring it to you in March for your consideration and make a recommendation to the General Assembly on that wind energy permitting legislature.

**IV. Concluding Remarks**

**D. Water Quality Committee Dr. Charles H. Peterson, Chairman**

It was well left off. The Water Quality Committee discussed something that was not yet right but getting right and we're going to deal with it again in March. We'll all get the full story then.

**Mr. Cavanaugh:** I want to come out and thank the staff for a job well done. We have a group of people around this horseshoe with many different minds and many different thoughts. They're able to speak to and satisfy all of our questions either through a straight answer or going and getting one, and I thank the staff for that. I really do appreciate it.

**Chairman Smith:** Other comments from commission members? Directors?

**Ms. Holman:** I want to begin by thanking you, Chairman Smith, as well as Mr. Crawley, Ms. Bircher also from the Attorney General's office, Mr. Cary from the department for your help in addressing the Section 128 issue. That did evolve relatively recently and I appreciate the quick action and the ability to certify that we're in compliance with the Clean Air Act. Also wanted to address Mr. Hutson's question about the air quality rulemaking on the hydraulic fracturing side. We are continuing to do our assessment of what additional rulemaking is necessary. I have talked with Chairman Smith about the presentation in March assessing that evaluation and I would expect that at either the Air Quality Committee meeting or the EMC and we can discuss which agenda it should be on. Thank you.

**Chairman Smith:** Counsel?

**Frank Crawley:** Let me update you on some of your past decisions and how they stack up in the court system. The Rockingham 401 certification which the EMC affirmed issuance of 401 to Progress Energy for the relicensing of the Tillery Dam. In early December the Court of Appeals upheld the Superior Court's order affirming the EMC's decision. So the period for petitioning for discretionary review in Supreme Court is currently running and we're waiting to see if Rockingham and American River are going to petition for further review. The House of Raeford's Farm civil penalty case, they filed judicial review in Duplin County. PCS Phosphate 401 certification case filed for judicial review in Wake County. The Ash Pond declaratory ruling that you did in December, they filed for judicial review for this week in Wake County. Then last Friday the Superior Court Judge issued his order in the Rose Acre case that was heard by the NPDES Committee with respect to the NPDES permit and its conditions, and affirmed the EMC's decision that it ought to go back to the OAH for an evidential hearing. It looks like everything that you've touched in the last 18 months has gone to the court system for further review.

**Mr. Morse:** Once it goes to the court review it doesn't come back to us. We're finished with it. Is that correct?

**Frank Crawley:** The thirty days is running with respect to the Rose Acre matter. They have thirty days to elect if they want to appeal to the Court of Appeals. If they don't then the order is for a remand to OAH and it will work its way back here if that's the track it takes.

With no further comments the meeting adjourned at 12:04 a.m.

(NOTE: Attachments are on file in the Division of Water Quality with the Official Minutes.)

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Lois C. Thomas, Recording Clerk

By Commission Members  
By Directors  
By Counsel  
By Chairman

Adjournment AG01-10-13