

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

**Raleigh, North Carolina
September 13, 2012
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	J. Dickson Phillips III
Marvin S. Cavanaugh	Benne Hutson	Mayor Darryl D. Moss	Clyde "Butch" Smith, Jr.
Tom Cecich	Steve P. Keen	Dr. David Peden	Stephen Smith
Marion E. Deerhake	Dr. Ernest W. Larkin	Dr. Charles H. Peterson	Steve W. Tedder
Tom Ellis	Kevin Martin	Amy E. Pickle	

DIVISION OF WATER QUALITY:

Bradley Bennett	Alan Clark	Elizabeth Kountis	Jason Robinson
Janice Bownes	Nora Deamer	Susan Massengale	Jay Sauber
Ted Bush	Bethany Georgoulis	Matt Matthews	Lois Thomas
Kevin Bowden	Deborah Gore	Sandra Moore	Julie Ventaloro
Connie Brower	John Huisman	Diane Reid	Chuck Wakild
Amy Chapman	Steve Kaasa	Jon Risgaard	

DIVISION OF AIR QUALITY:

Sheila Holman
Mike Abraczinskas
Joelle Burleson
Michael Petratjic

DIVISION OF WASTE MANAGEMENT:

Ruth Strauss
Debra Watts

DIVISION OF WATER RESOURCES:

Tom Reeder
Tom Fransen
Sarah Young

ATTORNEY GENERAL'S OFFICE:

Frank Crawley

I. Preliminary Matters

Chairman Smith: Our first order of business is the consideration of the minutes from the July 12, 2012 meeting. Are there any changes or revisions to the minutes?

Mayor Moss: made a motion to approve the minutes. Mr. Cavanaugh seconded. Chairman Smith asked for discussion which there was none and the minutes passed.

Chairman Smith: Let me ask members if any member knows of any known conflict of interest or potential appearance of conflict with respect to matters before the Commission, please signify that at the time; or if any conflicts or apparent conflicts you become aware of as the meeting unfolds please state so at that time.

Mr. Tedder: I want to recuse myself from item 12-29.

Chairman Smith: That's the House of Raeford.

Ms. Deerhake: I'm recusing myself from that same one. I notified you in advance of that.

Ms. Pickle: With respect to item 12-30 the Nicholas Institute has a contract with Environmental Defense Funds to conduct policy analysis unrelated to that contested case. While it's not an actual conflict I believe it might present an appearance of conflict. So out of an abundance of caution, I'm recusing myself from that agenda item.

Chairman Smith: Thank you. Any other recusals or statements relating to apparent conflicts? Additions or deletions to the agenda?

Mr. Tedder: If I could I'd like to request for allowing, maybe an expanded discussion. But item 12-24 at the end of at least what is listed in the agenda, if we could add the phrase "or other directives as deemed appropriate by the Commission". This is on the 12-24 where we're discussing methodology for 303d and I'd just would request that be added so it would be duly noticed so we could fully have our discussion.

Chairman Smith: Well, we could add that but we couldn't convert that into a broader action item, because the public hasn't had adequate notice of it. 12-24 is a request for approval of a request for public comment on the questions of whether the EMC should be more involved in setting future assessment methodologies. And too, if so, to what extent? That's the first step in us moving into consideration and decision on the extent to which we are involved in the 2014 assessment methodologies. The anticipated schedule at this point is that we ask for public comment. That will go out as part of the Division's request for public comment on the 2014 methodology. Then depending on how quickly that public comment concludes either at the November meeting, which is what I expect or at the January meeting, the anticipation is that we, as a Commission have a full discussion on the extent to which we want to be involved in the

setting or changing of the assessment methodology for the 2014 303d list. So that's why that item is listed as it is and the public has been so noticed.

Mr. Morse: I appreciate your recommendation in supporting that with one question. This might be posed to the staff. Does this schedule still allow the opportunity for the EMC to make a decision as to whether or not we will support or agree or recommend the policy of the state staff or approve the policy that the state staff recommends on methodology? Does that still give us time before they have to submit it to Atlanta and for the approval? I just want to make sure that we still have the opportunity to support a policy that they're recommending before it actually has to be sent to Atlanta and they approve. Do you follow what I'm asking?

Chuck Wakild: Yes I believe that would still allow time. I think we need to have a methodology in place that we're actually going to use for the 2014 list which we'll submit in April of 2014. So if we have something in January we can make that date.

Mr. Morse: Thank you.

Chairman Smith: And in further answer, I would expect us to be considering this in November. I think we can get the public comments back and summarized and to us in time for our November package. That's what we're working towards.

Mr. Tedder: You mentioned that the item on here for it to be duly noticed to the public. Maybe this is directed at Frank but as long as we handle this at this point in the meeting, I would think it would be duly noticed. We do it before we start the actual agenda. Is that not correct?

Chairman Smith: Mr. Crawley advises me that he is ambivalent about an answer to this question. I am not comfortable having us make a decision on the merits of our involvement in the assessment methodology without adequate notice to the public. I think that what we have given the public notice of is that we're going to request public comment. We've already received one substantial comment even before we requested it, that coming in from Progress Energy or Duke Energy. I think there are likely to be other public comments that we will be receiving. I'm not comfortable having us make a decision on or considering making a decision on the merits today. So Mr. Tedder, I'm going to rule your request out of order and stay with the schedule that we presently have.

Mr. Tedder: That's fine but I think the representative of the AG's office has provided conflicting information on that same question in the past. That's the only reason that I bring it up. So I'm fine.

Chairman Smith: Thank you. Any other additions or deletions to the agenda? I'll call on the Division of Water Resources Director, Tom Reeder.

Tom Reeder: Thank you Mr. Chairman and Members of the Commission. Yesterday before the beginning of the Water Allocation Committee meeting I made a few brief remarks about a fallen friend and colleague in the Division of Water Resources. Chairman Smith was kind

enough to invite me down to reiterate those remarks before the EMC today. I'm talking about Steve Reed who was the Head of our river basin management section who unexpectedly passed away at the end of July while hiking on the Appalachian Trail in Vermont. Steve was a good friend of mine. He was a great human being and he was a real dedicated public servant to the State of North Carolina. Besides working full time he was a volunteer deacon at his church. He volunteered a lot of time as a troop leader with the Boy Scouts, even though his children had been adults for many, many years, and he volunteered a lot with the youth group at his church, spending a lot of his personal leave time chaperoning trips and taking the time to drive youth groups around, and things like that. So if you measure a person's value by how much of themselves are willingly give to others and expect absolutely nothing in return, Steve really exceeded expectations in that regard. As a public servant again his actions spoke much louder than his words. He had 37 years with the Division of Water Resources. I know for a fact he could have retired very comfortably years ago, but he didn't because he loved what he was doing. He felt passionate about protecting the waters of North Carolina. For those of you who don't know he was the lead partner negotiator in the major FERC processes that we just concluded. Thanks to the actions of Steve and other stakeholders in that process we have thousands of acres of prime recreational lands and natural areas that are now under the public trust that weren't there before for future generations in North Carolinians to enjoy. But you know that's really what Steve was all about. His passing leaves a great void for personal and professional void in the Division, but I know for a fact that I, for one am a better person for having been lucky enough to know him in those years I was in the Division of Water Resources. So thank you very much Mr. Chairman.

Chairman Smith: Thank you Mr. Reeder. We have one other addition to the agenda and that is a resolution that you all have seen thanking Donnie Brewer and commending him for his years of service on the EMC.

Dr. Larkin: Moved to accept that resolution and Mr. Morse seconded it.

Chairman Smith: asked for discussion and a vote. The motion passed unanimously.

II. Action Items

12-22 Request Approval of the Proposed Water Supply Reclassification for the Segment of the Roanoke River along the Bertie/Martin County Line to Class WS-IV Critical Area and WS-IV

Danny Smith: I served as a hearing officer for this reclassification process. In January and March of this year, the Water Quality Committee and the Commission, respectively, approved the Martin County Regional Water and Sewer Authority to request to proceed with rulemaking for the Roanoke River and Bertie and Martin Counties. On June 5, 2012 the Division staff and I conducted a public hearing in Williamston, NC. The purpose of the hearing was to receive public comments on the abovementioned proposed reclassification and associated fiscal note. Of the 13 people who attended the hearing two people spoke in favor of the reclassification. During the comment period we received two letters. Both of those letters provided positive support for the reclassification. The Report of Proceedings which was sent to the members of the EMC prior

to today's meeting includes all written comments received in further details on this proposed reclassification. So based on consideration of the comments and available data, staff and I recommend the proposed reclassification of the Roanoke River as described in the agenda item and the Report of Proceedings be approved. If the reclassification is approved the proposed effective date is estimated to be January 1, 2013. Accordingly we request approval of the Roanoke reclassification in Martin and Bertie Counties to Class WS-IV. If you have any additional questions, myself or Elizabeth Kountis will be happy to address them.

Chairman Smith: Questions or comments?

Dr. Peterson: On behalf of the Water Quality Committee and their enthusiasm in moving this to public hearing initially, I make the motion that we adopt the recommendation of the hearing officers and approve these.

Chairman Smith: Motion by Dr. Peterson and second by Mr. Tedder. Discussion? Hearing none the Chairman asked for a vote. The vote was unanimous and the motion passed. Thank you Mr. Smith.

12-23 Request for Approval of the Statewide Mercury TMDL and Wastewater Permitting Strategy

Chairman Smith: Before we open that up for discussion let me review where we are procedurally. In July we considered this and after considerable discussion we had a motion and a second. The motion was a two part motion. It was to disapprove the TMDL as presented and to adopt what came to be discussed as the 5m approach. After additional discussion of that we had a substitute motion that we postponed consideration of the original motion until this meeting, and there were multiple seconds to that. Then that was combined with that we learn more about the 5m approach and that we learn more about how to craft what we were calling an "off ramp", that is, how to back out surface waters that are not polluted by mercury. To learn more about the 5m approach the Division of Water Quality set up a meeting with EPA staff in Atlanta. That meeting was attended by, as EMC representatives, Mr. Morse and Ms. Deerhake. It was also available to the Commission by conference call and Mr. Smith, Ms. Pickle and I called in. I think what would be appropriate now would be to have a report from Ms. Stecker on that 5m meeting in Atlanta. Then if any members that were either present in person or by telephone want to add to that report you will have an opportunity to do so. New members have a written summary of that meeting. I think that has been posted to the webpage so it should be available to the public. So let's hear from Ms. Stecker and then we will move into discussion.

Kathy Stecker: Thank you Mr. Chairman. I'm going to skip the first two slides to get to the 5m summary. It is attachment C on this agenda item so it's available to everyone, the summary of the 5m meeting with EPA.

You'll recall that 5m is an alternative to a TMDL. It allows deferral of TMDL development while ongoing mercury reductions are documented. The meeting took place on August 8th and there were 14 EPA staff from many programs, including permitting and assessment. The Director, Jim Giattina was also present. The agenda focused on very specific questions about 5m. I thought this was a great summary. You can see a clearer version in your attachment but

Ms. Deerhake created this after the meeting. I'm not going to go into it in detail, but the TMDL process is on the left and the 5m is on the right. The diagram illustrates how long, complicated and unpredictable the 5m process would be. No state has pursued the 5m listing since the option was established by EPA in 2007. So North Carolina would be the first. I've summarized some of the key differences between the two approaches. While the TMDL applies statewide all waters are not necessarily eligible for the 5m category. There would have to be a waterbody by waterbody screening. An approved TMDL allows removal of waters from the 303(d) list but subcategory 5m waters are still on the 303(d) list. With the TMDL we can have a reasonable permitting strategy but 5m does not allow any flexibility in permitting because waters are still on the 303(d) list. We would not be able to implement our wastewater permitting strategy under 5m. EPA approves TMDLs within 30 days but no state has used 5m to date. Therefore, it'll be a slow process; probably of years of planning and negotiation with EPA. Finally, EPA does not reevaluate approved TMDLs. But EPA would review the state's progress and documentation for 5m every two years. That's the conclusion of my 5m summary.

Chairman Smith: Thank you. The other thing before I open it up for questions and discussion, at the close of our July meeting, Mr. Morse; when I looked back in the minutes I was reminded that Mr. Morse indicated that he either wanted to or was considering withdrawing his motion, so I'll call on Mr. Morse and ask what your pleasure is?

Mr. Morse: Mr. Chairman at this time I will ask that we withdraw my motion.

Chairman Smith: And Mr. Cavanaugh was the seconder. Are you agreeable with that?

Mr. Cavanaugh: I will.

Chairman Smith: What that does is put us back to Square One. Mr. Morse and Ms. Deerhake do you want to add anything about the 5m meeting or Mr. Smith or Ms. Pickle, since you are participants at varying degrees?

Ms. Deerhake: We appreciated the opportunity to make that trip and speak with EPA. I believe Ms. Stecker captured the essence of it. Thank you.

Mr. Morse: The only comment I'll make is that it was interesting to go down to Atlanta and talk to the officials who created a program that they didn't know how to implement and use. The other part is, I felt that it was a very important meeting. At least it made me aware that by staying with the TMDL approach as the state indicated, there's much more flexibility for permit holders. And I did not want to lose that flexibility to protect the permit holders and that's the main reason I'm supporting this issue.

Chairman Smith: Thank you sir. One other thing and then I really will open it up for questions and comments. That is I want to thank Mr. Wakild and the Division of Water Quality. They put a large amount of time and resources, and when I say resources I'm talking about expense money into that 5m meeting in Atlanta, and in these tight budget times that was a considerable outlay. I believe Ms. Deerhake and Mr. Morse are being reimbursed for their expenses. Chuck, how many people from DWQ were there?

Chuck Wakild: Four.

Chairman Smith: Four. So it was an impressive response to our concerns and we appreciate that. Now, questions or comments?

Mr. Tedder: I'd like to express my appreciation for Marion and Jeff making that effort to do that to resolve some questions that we had. I do appreciate the work the staff has done, especially working through the permitting strategy. I think that's excellent. I may not agree with how we got to where we are but we're there. We've had a lot of discussion on this topic and to maybe bring it to somewhat of a conclusion for right now, I'd like to make a motion that we approve the TMDL as prepared by the staff and also the permitting implementation plan as provided to us yesterday afternoon.

Chairman Smith: Thank you Mr. Tedder. Second by Mr. Morse. Is there discussion?

Mr. Hutson: Kathy or Chuck, can you explain to me what the exit ramp strategy is? As I read the permitting strategy, I see consideration of factors that can be out there. But I don't understand if somebody were to do a segment analysis of either the water column or the fish tissue, and it shows that there is not a mercury problem, does that segment then come off the 303(d) list and is it still subject to the TMDL permitting strategy that we're voting on today?

Kathy Stecker: If I may, I have a slide and a little bit of discussion about that.

First, please keep in mind with an approved TMDL all waters come off the 303(d) list so we won't be talking about on or off the 303(d) list any more. On the bottom half of that slide is an off ramp, an example of an off ramp that would work and be consistent with an approved TMDL. Note that this is an off ramp from impairment, not an off ramp from the TMDL. So once we have an approved TMDL we can review waterbody specifically, fish tissue and water column data and evaluate if those waters are not impaired by mercury in fish tissue. If they're not impaired then we can move those waters from an impaired category to an unimpaired category immediately. We can post the new categorization immediately on our website. Note that because we're not talking about the 303(d) list any more EPA does not participate, so there's no review and approval by EPA of that decision.

Mr. Morse: Steve mentioned something was changed or agreed to yesterday. Where's the final language that has been agreed to? I haven't seen it.

Kathy Stecker: The permitting strategy is attachment B on your agenda item and it has been updated.

Mr. Morse: As of yesterday?

Kathy Stecker: Yes.

Mr. Morse: The only question I have is that if a particular permit holder goes to the expense and they find out that there's no fish tissue issues and the maximum limit right now is 47

nanograms per liter, correct? If they currently, say I have a permit and I'm currently at a hundred or two hundred and I go through the effort of indicating that I have no negative capacity or limits. Will I be able to get back my limits that I currently have in my permit when I go for reissuance?

Kathy Stecker: You're talking about limits above 47?

Mr. Morse: Yes.

Kathy Stecker: In the permitting strategy we have a provision for special situations for getting a limit above 47 and what we have in there, we consider the technical feasibility, the economic reasonableness along with fish tissue and water column data. That's part of the permitting strategy.

Mr. Morse: Expand on what you mean by technological and/or economic?

Kathy Stecker: I don't know that I can give a lot of detail on that right now.

Mr. Morse: I guess what I'm asking is if the numbers show that I can have a higher limit than 47, the decision to go above 47 is going to base whether or not it's too costly to go at 47, or it will save you money if you can go or if it'll cost you much more to go higher. Like you still have the ability to go higher or if the technology is there to take you higher? What do those two issues have to do with the overall issue of that you don't have an impairment and you don't have any negative numbers, why should it be limited to whether or not there's a financial hardship or a technology issue? Why are there those caveats?

Kathy Stecker: The TMDL, the statewide TMDL gives us an aggregate wasteload that can't be exceeded and that's the concern there.

Chairman Smith: Other comments or questions?

Mr. Cecich: Getting back to the off ramp question, right now all the waters of the state are considered impaired for mercury.

Kathy Stecker: Correct.

Mr. Cecich: So in this off ramp suppose an organization does the water column, fish tissue categorization finds that no mercury levels, does that one stream section then become...does that get taken off the list of impairments, so there's a master map somewhere that says this one, the whole state's impaired except for this one stream? Is that how that would work?

Kathy Stecker: It would be a waterbody by waterbody examination of available data. But, yes we could make those changes and put them on our website on a map, on a table.

Mr. Cecich: Is there a longer term strategy? Because I know part of the argument that was made last time is that many of the waters of the state probably aren't impaired. Is there a

strategy then to start working on that? What's the longer term strategy? I understand the short term strategy with the TMDL. What's the longer term strategy with respect to the classification of impaired waterbodies?

Kathy Stecker: I can answer generally and then you can ask me to be more specific. We have pledged in the TMDL to continue to look at and analyze all the fish tissue data that DWQ continues and others continue to collect. So we'll be looking for both more unimpaired waters as well as waters that maybe won't be covered sufficiently by the TMDL, and might need some special attention, like a site specific TMDL.

Mr. Cecich: Just one follow-up. I'm not sure if Jeff's question addresses. A business or an organization, municipality does this characterization and finds that those areas aren't impaired, how does that affect the overall, the fact that they're no longer impacted by the TMDL. But since it's a statewide TMDL, how then is that factored into their particular permit? How does that affect the rest of the state?

Kathy Stecker: Once again it's not an off ramp from the TMDL so the statewide aggregate wasteload still applies. But with any TMDL there's got to be a way to measure how you're doing, what progress you're making and how you're improving, and for example the nutrient TMDL for Lake Wylie from the 90s. We currently meet standards there but the only way we're going to continue to meet standards is to continue to apply that TMDL, those limits. So it's the same concept here.

Jeff Poupert: I think one thing to keep in mind, it's important that North Carolina has to keep some reserve as part of that aggregate load for future industrial and municipal growth. So to restore limits back up to the one or two hundred level that you mentioned would use up all that reserve capacity that we have for future industrial and municipal growth through the out years.

Mr. Morse: To follow up your comment, Tom, the long term strategy, would we not be addressing the long term strategy as we start looking at the future 303 methodology and in fact, saying 2014 if the staff comes up with methodology that looks at this issue of mercury. It could take a whole different approach than what we took in 2012. Would that not be part of that long term strategy as we address it in the methodology process of our 2014 303(d) listing?

Kathy Stecker: Certainly, we could consider different assessment methodologies for mercury and fish tissue.

Mr. Morse: That, to me would be a long term strategy we're looking for.

Mr. Hutson: Following up on the comment that was just made, I'm still struggling to get my arms around if we have a statewide wasteload allocation; it's almost like a head works analysis at a local POTW. Why do you have to have consideration of technical and feasibility or economic costs to make decisions as to what limits will be, as opposed to we have to have, we can't exceed this total wasteload to have some reserve or setting your limit at X, so that we keep that reserve?

Kathy Stecker: Remember that the considerations of technical feasibility and economic reasonableness only come into play if you want a limit above 47. It's not considered for other discharges. They would get a water quality based limit based on their site specific conditions.

Mr. Hutson: So we're saying that 47 is the statewide maximum limit unless there's technical and feasibility or an additional cost even if that is not related to preserving the margin that is needed out of the total wasteload allocation?

Kathy Stecker: We still would not exceed even if we concluded that it was technically infeasible and/or economically unreasonable still could not exceed the statewide aggregate wasteload.

Mr. Hutson: I understand that. But even if there was enough margin in there, somebody can't go above 47 unless you can show technical and feasibility or significant economic costs?

Jeff Poupert: That was not meant to be an inclusive list. It was meant to give some factors that would be considered with technical and feasibility economic considerations. We're trying to avoid here's the first come first serve or the first person to do a fish tissue study that finds their waters clean comes in and asks for a higher limit that they don't really need, and uses up North Carolina's reserve capacity for future municipal and industrial growth. That's what we're trying to avoid to keep us under that 81 and manage that well, and not create that sort of gold rush mentality.

Mr. Hutson: You may want to, have some discussion considering language in the permitting strategy because as I read it, the only factors that you can consider are technical and feasibility and economic considerations. And whether there might be other language that would say or other factors that the Division deems appropriate under site specific circumstances may give you more leeway. Because as I read the second bullet in C2 nothing above 47, unless the Division determines it's technical infeasible or economically unreasonable. I've heard what you just said and I think your proposed strategy may tie your hands more than you think.

Mr. Morse: And I concur.

Chairman Smith: Let's get the Division's response. Mr. Wakild do you want to say anything in regard to what Mr. Hutson just said about the language of the permitting strategy?

Chuck Wakild: Let me probably more reinforce what has been said. As with any technical or any industrial standardized effluent limit that's typical for industrial categories, this is intended to place a limit that is essentially cost and technology driven, and that's what we have here. This 47 nanograms per liter is achieved by nearly everybody in North Carolina. There's a handful, probably less than five, the number changes every now and then. But probably less than five who don't already meet that number. So what we have done over the last ten years or so is reduced mercury and effluent limits from roughly 250 lbs. per year down to roughly now in the mid 60-70 lbs. per year. We've achieved the wastewater treatment plants of the world have achieved enormous results here. Putting the 47 in as a maximum will lock those gains in and we won't sort of drift back, if you will. We do have, if the TMDL is approved, we have a drift back

limit of 81 which, obviously offers still substantial protections. But you get into the situation that Jeff describes because we issue permits routinely, reissue permits routinely on a river basin basis. So if you're the first river basin to come up after the TMDL is approved and you document your stream segment is unimpaired for mercury, and so we incrementally start passing that out, it will be all gone. We'll rush up to the 80 lbs. in a short period of time. Everybody won't get the benefit of that. It'll be the more or less first come first serve and it just doesn't seem fair. It doesn't seem like a good policy from a water quality point of view. I think this is from our point of view is the best way to handle it.

Dr. Larkin: I was going to shift gears a little bit. If you want to pursue this issue I'll wait.

Mr. Cavanaugh: Just one thing I want to make sure that I am clear of it. If everything passes and EPA approves our TMDL, that automatically is going to remove my stream from a 303(d) list for mercury?

Kathy Stecker: That's correct.

Ms. Deerhake: I want to appreciate Mr. Hutson explaining again. I just couldn't follow what he was saying.

Mr. Hutson: I'll try. In the permitting strategy under Section C which is on the last page, it deals with special situations and there it says, is it permit limits above the LCA which I understand is 47 may be assigned in cases where the Division of Water Quality determines that achievement of the LCA is technically infeasible or economically unreasonable. My question to staff was as I read that if somebody comes in and have some reason other than technical infeasibility or economic costs as a basis for going above the LCA under this strategy they cannot go above it. The only two grounds are technical infeasibility and/or economic costs. I just wanted to make sure that could there be other situations that come up that would require you to go above the LCA either permanently or temporarily that are not economically driven or technology driven.

Chuck Wakild: We took the words here out of the variance statute. These are the criteria by which somebody can get a variance to the water quality standards according to the statute. It seems like that has served us well over time. We have a few variances in effect in North Carolina but otherwise we have what I would consider to be a pretty workable situation. One more point about putting something that's kind of general in there about there may be other circumstances. There's no end to the stories you can get from people what their special circumstances are and it's awful difficult to put any consistent and good criteria to those to make a judgment. You can get into those kinds of conflicts, if you will, or disagreements with permittees if they see a crack in the door. But, again all of this is somewhat, I think, theoretical because we don't have, there just aren't sources out there where this is going to really matter; I don't believe.

Mr. Cecich: Again trying to understand the logic on the off ramping. I understand that there's 81 TMDL and we can't exceed that. What would be the conditions then that an organization

would seek to do work on fish tissue study and why would they do that? I realize that it gets their stream off the list. If it won't make a difference or can't make a difference because of the state total, is there any value in having the off ramp strategy?

Kathy Stecker: One of the concerns we were hearing last time was about the appearance or the reputation of a waterbody that you could say this waterbody is not impaired. So that's what we were responding to.

Chairman Smith: There were questions the last time, Mr. Cecich about for instance if an economic development person from Stockton, California called Valdese, the Valdese Town Manager might want to say my waters are not impaired.

Mr. Cecich: That's a fair point and understandable one. But from individual organizations, my sense then that it really doesn't matter because of the overall maximum limit.

Kathy Stecker: It doesn't matter for permitting purposes. But people are interested in waters for other reasons.

Mr. Tedder: I had a comment. Again we talk about taking it off the 303(d) list, Kathy. We're really moving in it from a five to a four. But it's under a TMDL. It's not necessarily disappearing off of the impaired waters list. It's still on there, it's just a different category. Is that correct?

Kathy Stecker: Yes it is. The difference that I wanted to emphasize, though is once it's in category four it's not part of the 303(d) list. It's not part of EPA's review and approval. It's up to us then to determine impairment after that. It's impaired but it doesn't require a TMDL. It's not in category five and it's not on the 303(d) list.

Mr. Tedder: I kind of understand Mr. Hutson's comments there and questions. You kind of never know what's going to come up. We're taking our best educated guess if we sit around the table. I'm willing to at least offer one little bit of additional language which to that if you would like to entertain that, that may handle that but not really change the course of history today.

Chairman Smith: How about offering that and let Mr. Wakild take down the language and then ask DWQ staff to consider that. We're talking about permitting strategy here and I don't know that needs to go in the form of a substitute motion and going through that procedural process. But if you would put it out for all of our consideration including DWQ.

Mr. Tedder: Under the second part of C, the third sentence down after where it says fish tissue, water quality data will be considered in assigning limits or other factors or combination of factors, the Division determines appropriate for such limit determinations.

Chairman Smith: If you would Mr. Wakild just give that some consideration as you go forward with the finalization of your permitting strategy and not calling on you. I don't hear calling on a decision at this moment. If it proves to become problematic then pass the information back to us. But just give that some consideration.

Mr. Morse: We are adopting today a permitting strategy. Are we not as part of our motion?

Chairman Smith: That's what I heard.

Mr. Morse: Are we going to be able to come back to permitting strategy and amend it if we come up with the language that Mr. Tedder recommends and the staff says ok? Will that come before us again to have to adopt?

Chuck Wakild: I'm sorry but I didn't hear it.

Mr. Morse: My question was we are adopting the TMDL strategy and the permitting strategy. Steve's recommendation if we don't include that recommendation in the motion to adopt, what happens after you review it? Will we have to come back to amend the permitting strategy to include that language?

Chuck Wakild: Well I think yes. But if you have some language that we can agree on here shortly and include it in a motion we are ok, obviously.

Chairman Smith: Let's try to do it today. I for one would like for this not to be back on our agenda for a while.

Mr. Phillips: I haven't heard any reasons that we should be trying to modify this permitting strategy language. I haven't heard any specific example of anything other than technological infeasibility or economic hardship that would be a basis. There seems to be also a sort of implication that it would be a good thing to be able to increase discharge levels of mercury above the 47. I don't think that's a good thing. I think we should all agree that it's generally not a good thing. And of course in the permitting strategy the Division has got to act consistent with the regulations in an arbitrary manner and if you throw in a generalized and anything else that seems like a good idea kind of thing, it's just going to invite more legal challenges and problems. I'd oppose monkeying with that.

There are those four or five entities that we seem to be fluffing off that might have a major impact in affecting new business operations. That could be major corporations or businesses. I know there's only four or five but that still doesn't mean we can't be concerned for their interest and how this is overall affected.

I was going to not pose an option. You got the standard, technological infeasibility and the economic hardship but what else do you need to have?

Jeff Poupart: As Chuck mentioned we brought this from the variance language which has served us for many years and I cannot envision, personally a scenario that doesn't meet either technology or cost affecting an industry or municipality. I can't envision something other than technology or cost.

Chairman Smith: So then what you're saying is the Division's position is that this language has worked well in the variance context, that is, a variance to water quality standards for many years and no requests have come in that would be outside of those two.

Jeff Poupert: And it could create a problem if we had multiple, sort of ghost factors that would be considered arbitrary and capricious if we didn't consider some other imaginary factor.

Chairman Smith: Right. Mr. Cavanaugh, you had a comment and Mr. Ayers had a comment.

Mr. Cavanaugh: A couple of things to make sure I understand two things. I think I heard this just now that what I read and it is still up on the screen it will be removed from a 303(d) list. But then I heard there's another list that it's still impaired and I heard that in the conversation. I know. I listen real intently. The whole purpose of beating this thing to death is we arbitrarily just cast this net but every stream in the State of North Carolina is on a impaired list for mercury when half of them are not impaired. I, for number one don't want anybody suggesting any kind of mercury that's going to damage anything to anybody. Never in my lifetime would I ever want that. But help me understand that if this, what I see on the screen is approved and we're removed from a 303(d) list, but there's another list. Somebody wants to come to our city and calls DWQ or some agency, oh yea it's on an impaired list. That's got to be gotten rid of somehow or another. If it's not impaired, it's not impaired. Am I missing something?

Kathy Stecker: There are five categories that a waterbody can go into when it's assessed and category five is the 303(d) list, and those are impaired waters that require a TMDL. That's the big EPA action is taking on that part of the list. There are also waters that are impaired that don't require a TMDL for various reasons and that's the list that waters that get an approved TMDL go on to first. Then when you make an individual evaluation of how we're doing, how are we progressing, then we can reevaluate new data and move it to an unimpaired category, and there are two unimpaired categories. Then there is one category for things where it's inconclusive.

Mr. Cavanaugh: So if I'm hearing and understanding correctly it was placed on the 303(d) list. It had to be placed on something so it was placed on one. Automatically when we don't know anything about now we're moving it to another list that is going to take forever to get it off that list and can you give me a timeframe on how long it's going to take for me to remove Little Snow Creek up in Stokes County which has no mercury in it from this list, when it's not impaired anywhere?

Kathy Stecker: We would evaluate any data immediately and make the change immediately.

Mr. Cavanaugh: Ok. I'm going to let that rest. I'm not going to beat that horse anymore.

The second issue that I heard to make sure I'm understanding something. The magic number seemed to be 47 but I heard that we've got this pot if I interpreted it correctly. We got a statewide pot that if I've got a system here that will kick out more than 47, I could be approved to do that. How healthy is that? How did we arrive at this 47 number? Should it have been 57 to start with or whatever? There's going to be some systems that put out a lot less. What kind of extenuating circumstances would push automatically to get above this 47 that would eat up the statewide pot that we've got? Help me a little bit with that before I cast a vote on this thing.

Kathy Stecker: I think that's kind of what we've been saying other than the technical infeasibility or economic unreasonableness. We don't know of any other situation that would need to be considered to get more than 47.

Mr. Cavanaugh: Ok. It could happen but we don't know of anything. Is that correct?

Kathy Stecker: That's correct.

Mr. Cavanaugh: Thank you.

Mr. Ayers: I have a couple of questions as opposed to comments. Part of this and may be my own confusion. I'm a little confused about listing and particularly how they related to off ramp and I've also have a question about permitting strategy. All fresh waters will be dropped from category five to category four.

Kathy Stecker: That's correct.

Mr. Ayers: But then we're talking about the off ramp. Does the off ramp remove them from category four or does it remove from our own internal state list of impaired waters?

Kathy Stecker: It removes them from category four.

Mr. Ayers: Ok, removes them from category four. They just go away or do they go to category three?

Kathy Stecker: They go to category one which means they're not impaired.

Mr. Ayers: Ok, not impaired. That clears up a big misunderstanding on my part.

Kathy Stecker: They gotta be somewhere.

Mr. Ayers: Well that's what I was thinking. I didn't think there would be another list laying out there. So if we remove them from four down to one with the off ramp, is this going this a proactive approach or we actually going to look throughout North Carolina of trying to proactively delist stuff, or are we going to be responsive as people come in looking for permits and so forth and bring us data that say this water should be off ramped?

Kathy Stecker: Kind of a combination because we do collect a great deal of fish tissue data ourselves. So we would have that available to evaluate. And then if people bring us data on their request we can evaluate it.

Mr. Ayers: Ok. Just following up on that program, I hate to use the word program but is there going to be a proactive program for getting these waters off the off ramp or onto the off ramp? Or do you think....I hear you say it's going to be a combination of both. But is it going to be primarily reactive or proactive from a department's standpoint?

Kathy Stecker: I think we can be both. We can have a routine as we do now, routine assessment of fish data. We're always looking at more recent data including it in our assessment but also as people, we can react as people bring data to us.

Mr. Ayers: Ok. I guess my last question would just also or a comment. I looked through the permitting strategy and I didn't see a great deal of ways that really spoke to the off ramp. Now maybe it's because I'm trying to listen to everybody and read through this at the same time. But if you could point me to that I would appreciate it.

Kathy Stecker: That was deliberate because the off ramp is not necessarily related to permitting. Waters would be eligible for the off ramp just by virtue of the data there, regardless of whether there's a permit under consideration.

Mr. Ayers: What are we approving today that would have some sort of documentation of the off ramp?

Chairman Smith: We have Dr. Larkin and Mr. Hall. But before I call on Dr. Larkin at long last I want to recognize DWQ Director Emeritus Coleen Sullins who just walked in the room. It's nice to see you back Ms. Sullins.

Dr. Larkin: Is there an amendment on the floor?

Chairman Smith: No.

Dr. Larkin: If not, is there going to be one? I'd like to kind of go one way or the other on this.

Mr. Hutson: I raised the question for us to find out what staff's view was. Based on the explanation I've heard from staff I don't think an amendment is necessary. If they've said with the number here in technical and feasibility economic, that's fine. When I read that language initially it just concerned me that it tied your hands too much. I wasn't trying to start what we started here.

Dr. Larkin: I wanted to see whether we had an amendment or not because if not related to what we've been talking about. But it does have to do with the long term strategy. I think Tom you mentioned and maybe Jeff and that is. I understand it's not anywhere on the documentation we've been seeing because it may not be related to permitting, certainly not immediately, but let me ask a couple of questions about the physiology or the mercuriology or whatever. We say that most of the deposition is from the atmosphere. Presumably a good bit of that is not just falling into the rivers and lakes but falling on the ground and running into them. Is that right?

Kathy Stecker: Yes.

Dr. Larkin: If that's the case and that is the majority of the mercury that gets into our waters, it seems to me that we ought to give some additional consideration to groundwater and stormwater. How are we doing with that? Here's another reason that it is a good idea to control stormwater.

We have buffers in some rivers but kind of for different reasons but we do know, I think that if we can hold mercury in the soil it will be absorbed there, and it may not get into the waters as well as if we just dump it right in off the ground. So I think as part of the long term strategy we might want to think about a way to consider stormwater on a more statewide level. I think that's a little bit of a larger project than for this particular discussion. But I just wanted to raise that issue and see if any of that resonated.

Chuck Wakild: Let me just make one comment. You probably already know but I think you're exactly right. The larger the contribution really comes in the nonpoint source category and we've been talking about this 81 lbs. in the point source category. But the TMDL also addresses a 4,000 lb. category in the nonpoint source category and the real long term solution is in reducing mercury deposition from the air. We've talked a lot about that in past meetings and when the TMDL was discussed. North Carolina has really stepped up in that regard but there is still an overwhelming amount of mercury that's deposited from sources outside of North Carolina from other parts of the country as well as around the world. That long term strategy really needs to be continued to the extent that we can influence other people and having adopted this gives us another place to stand, so to speak encouraging other people to control mercury emissions across the country and around the world. But that intermediate step of falling from the air onto the ground, it washes off in stormwater is obviously recognized.

Mr. Hall: Thank you Mr. Chairman. My concern deals with the potential cost that permit holders will incur in the state and there are hundreds of those, who I understand from all that I've heard there are hundreds out there who don't contribute anything to the problem. But if I read through the strategy and interpret it right they could be subject to having permit limits which would incur monitoring costs. My question is in the example that was given in this strategy didn't indicate that particular discharger had any problems but they were given a limit based on the 12 nanograms water column limit. So how does an entity really get on the off ramp, get on this highway to freedom? I don't see that passage. I see a blockage at the off ramp.

Kathy Stecker: I was just going to maybe make a correction that under the permitting strategy fewer facilities will be required to monitor and fewer facilities will have limits than they have now. That's one of the benefits of the permitting strategy is to give relief because through the TMDL we've documented that atmospheric sources are the primary sources, and we've set the statewide aggregate load for wastewater. So we actually get some relief and flexibility in permitting.

Mr. Hall: I understand. But if I'm sitting on a stream that has no mercury concentration in it, the fish are good, my discharge is good does that mean that when I get a reissue of my permit I do not get a limit of any type. Because your example doesn't show that.

Chuck Wakild: In the case where if your effluent has no mercury in it, you don't get an effluent limit and you don't have to monitor it. That's in the permitting strategy. Maybe it's not clear enough but it's there.

Mr. Hall: All I've heard is we're under a statewide TMDL and everyone will be affected. So you going to do a case by case basis?

Chuck Wakild: It will be case by case and we estimate around 60 some people will have a mercury limit at the end of the day.

Mr. Hall: Ok.

Kathy Stecker: It will be fewer than 60.

Chuck Wakild: Fewer than that will have a limit.

Mr. Hall: All the other permittees will not have a limit and there will be nothing in their permit that requires them to incur additional costs in monitoring the things of that nature.

Chuck Wakild: I don't believe anybody will incur additional costs and many people will experience a cost savings.

Mr. Hall: Ok.

Mr. Morse: Well part of the permitting strategy up until last week if you fell in that category you didn't have to provide MMP, the Mercury Minimization Plan. Now EPA is demanding or directing the state to conclude that every permit holder has to do an MMP. There's going to be cost to that, is there not?

Jeff Poupart: You are correct. Hopefully it's offset by the reduced monitoring costs. We estimate at least a \$150,000 dollars in reduced monitoring costs. We plan to develop the MMP with a stakeholder process to create the most effective and the least burdensome MMP possible. It's not all facilities. We estimate, a quick estimation because it's impossible; it's a moving target at 39%, roughly 59 municipal facilities of the 156 would have to do MMPs. That's my current read.

Mr. Morse: That wasn't clear.

Jeff Poupart: It's all of municipals that we have consistent mercury found in their effluent and it's a moving target. I can't guarantee that's the number but that's what it looks like.

Mr. Ayers: Question. On the permitting strategy talking about major facilities, can you define major for me?

Jeff Poupart: Major is defined for municipals as one million gallons but we talked to EPA about using a two million gallon threshold. They're a subset of those two. We'll be able to capture the vast majority of the flow and keep some of your smaller towns from having the bureaucrat burden with the MMP.

Mr. Ayers: And what did EPA say?

Jeff Poupart: They were fine with that as long as we justified that. There's approximately 1.2 billion gallons of water that comes out excluding those towns with only limited 65 gallons. The percentage is so small it's hardly worth considering.

Dr. Peden: It seems to me that while we may not reach an absolutely perfect consensus, we have addressed an ability to have specific streams be listed as unimpaired for economic reasons. We've been able to deal with the 303(d) issues. I think we've seen that the 5m processes is much less useful than the TMDL and to prevent needing to kill yet another acorn horse species like the Zebra that would come up, I would call this question.

Chairman Smith: Mr. Smith only if that's a second because the call to question as I understand it is not debatable. It needs to be voted on if it's seconded.

Mr. Smith: I just have one question. You're leaving out water plants as a physical chemical that we have to test for and we do test for mercury, and we do not have mercury in what I'm assuming that the water plants be dropped from this test.

Jeff Poupart: There's still a priority pollutant analysis required once every three times in five years by everybody and it includes mercury. So water plants would still have some requirement and that's not anything we can forget.

Mr. Smith: Well about seven or eight years ago water plants didn't have to do that as far as the discharge. We have a discharge permit.

Jeff Poupart: I can't. If you meet the threshold for having to do priority pollutant analysis you're going to have to do that.

Mr. Smith: I got three employees in school which you have to have schooling every year and everything.

Jeff Poupart: To take the mercury.

Mr. Smith: It's pretty expensive.

Chairman Smith: We have a request that we call the question and a second. Mr. Crawley informs me that this is not debatable. It has to be voted on and for approval requires a two thirds majority. All voted in favor of the question.

We have a motion to approve the TMDL and the permitting strategy. That motion is by Mr. Tedder and seconded by Mr. Morse. No further discussion under the question being called. All those in favor please say aye and opposed say no. Better do a by hands show. Seventeen voted in favor and one opposed.

Mr. Cavanaugh: I would like if it's in order, Mr. Chairman to defend my no. The purpose for the no is as I've stated. I am totally against mercury in our streams. I've lived on the streams and fished all my life. I do not want that damaged but I'm not sure that we have, in my heart of hearts I'm not sure we've totally addressed what we need to address. I see a hardship still being

placed on the towns. Now we've got to go in our towns and cities and prove that we don't have mercury that we didn't have to start with. Then that's I felt uncomfortable and I felt it was in my responsibility as a good Commissioner to vote no.

Chairman Smith: Thank you sir. The motion carries.

Mr. Tedder: Just as a quick follow and I totally understand your concerns. It's kind of one those deals once you get on the list, it's hard to get out from under that rock. It's impossible almost to get out from under the rock. I'm really encouraged to hear staff is going to look at our own fish tissue data. I wish it had occurred before we got to this point and that's encouraging to maybe get from a category four to a category one. I'll applaud those efforts. One other thing that I think is worth everybody understanding and I'm not sure what staff would use to make that determination. But we have no fish tissue criterion in this state. We have a water quality standard which is never violated. We have no fish tissue criterion. We have just ad hocly developed one without rulemaking that disguised again to this process and I hope that's something that we can address at some point, whether it be 303(d) or whether it be through triennial review. But I also know that as far as triennial review there's no fish tissue criterion being proposed. So we're kind of not doing some of the things we need to never get back in this spot again. I think we ought to keep those things in mind as we move forward with the long term plan. We're not there yet. We're just getting over kind of a bind that we put ourselves in.

12-24 Request for Approval of Request for Public Comment on the Questions of (1) Whether the EMC Should be More Involved in Setting Future Assessment Methodologies for Developing the State's List of Impaired Waters Pursuant to the Clean Water Act, and if so, (2) To What Extent

Chairman Smith: Discussion? Motion?

Mr. Martin: I have a question. I've heard a lot of stuff said about that supposedly somewhere there's a rule or regulation of federal standard or something that says the EMC is supposed to be involved in this process. It's my understanding historically other than hearing information items about what staff intended to do, that was our involvement. So to me this is sort of like asking the public to tell us whether or not we should follow the rules we already have. Do we have a legal opinion on what the current rules says and what our requirements are under that rule?

Chairman Smith: No. The statute says that the EMC is the oversight or I don't have the language right in front of me right now. The policy has been and that policy certainly predates me and I think predates everybody on the Commission has been that the EMC has heard information items as you say on the TMDL methodology, but has not taken action relating to the assessment methodology. I don't know if that was ever formally delegated to DWQ. If it was I haven't been able to find that there was a formal delegation. But at the same time you know our understanding is that we formally delegated water quality permitting to DWQ. Nobody remembers when that occurred. Nor have I been able to find that it exists anywhere in our records but it is our understanding that has occurred and I accept that. Well I say water quality permitting, water quality and air quality permitting. So that's an example of something that we have delegated to staff and we've delegated a number of other things. I think either this one was

delegated to staff formally or as a matter of practice it was delegated to staff. So now since several of you have expressed interest in the EMC being more involved in the setting or oversight an approval of the TMDL assessment methodology, my thinking was that since that's a significant step, as you say, that we need to go about in a deliberate way. My thinking was, first of all and this was precipitated by Mr. Greeson's letter coming in a month of so ago, in which either Progress or Duke undertook to make a number of comments about how they would like for us to be involved in the assessment methodology. I thought, well clearly there's public interest in this. Let's hear from the public. Let's also ask for staff to consider the extent to which some of our options that we can choose because we don't want, I assume to be involved in the use of (clique) the weeds of assessment methodology. I don't think most of us are qualified to do that and so at what level does our oversight and involvement start and stop. Those are the sorts of questions that came in my mind. So as a first going through this, let's ask the public comment. We can piggyback on what the department's already doing and still have time to be involved in the 2014 decision, and let's consider and ask for other considerations about the extent to which we would be involved and then let's as a group make an informed decision. So that's why I put this agenda on. This agenda item was framed the way it is. Does that answer your question?

Mr. Martin: It does. I understand. I may be the only one. I just might be more comfortable if I could find out, do the vote at the same time but just have our attorneys look at the language and say, do you have the flexibility to consider anything you get in these public comments without going through a rulemaking process to change this rule? Or are you or are you not changing the rule based on what you think you may do? I mean it's back to the same thing of if we've been doing it wrong the whole time, that's not an excuse to keep doing it wrong. But if somewhere back in ancient history there was a delegation which there may have been, of course then it's been being done perfectly like other processes. I hadn't been able to find it either.

Chairman Smith: Nobody has. Two minor things. One is it's not a rule. We're working off statutory enabling legislation that is included in 143B-282C. If you take a look at that you'll see what the language is we're talking about is statutory language which has been existence for decades. I wouldn't characterize it as doing it wrong. It is the practice that under which the EMC has been operating.

Mr. Morse: Mr. Chairman, to get this process moving I'd like to make a motion that we approve the request as presented as item 12-24.

Mr. Hutson seconded.

Chairman Smith: asked for discussion. The vote was unanimous and the motion carried.

12-25 Request for Waiver of 30 day Rule and Approval to Proceed to Public Notice and Hearing with Revisions to the Consolidated Buffer Mitigation Rules (15A NCAC 02B .0295) That Were Approved for Public Notice and Hearing by the EMC in the July 2012 Meeting and for the Proposed Repeal of Buffer Mitigation Rules for the Neuse River (15A NCAC 02B .0242), Catawba River (02B .0244), Randleman Lake (02B .0252), Tar-Pamlico River (02B .0260), Jordan Lake (02B .0268), and Goose Creek Watersheds (02B .0609) and Associated Fiscal Note

Dr. Peterson: Mr. Chairman I neglected when we spoke to the agenda to note that this item's consideration needs to be postponed. It was removed from the Water Quality Committee's agenda on yesterday for the same grounds which is continued discussion on the fiscal note which is made complicated, I might add by the degree to which we incorporated flexibility and options into what we want to take to public notice. When you've got three options for one thing, four options for the next that makes 12 options altogether, and the way you can combined them, so there's a bit of a workload in dealing with those sorts of things that we're still working on. I apologize that we were ambitious but that interaction has not been a single interaction with the Office of Management and Budget. It has been going back and forth and it is still fortunately gone back rather than forth at this time. So I request on those grounds postponement of this item.

Chairman Smith: I don't think it requires action on your part. It's already been taken off the agenda and didn't go to Water Quality Committee yesterday. Mr. Wakild do you want to add anything to that?

Chuck Wakild: Dr. Peterson's summary is accurate.

12-26 Request to Proceed to Public Notice for Repeal of the Clean Water Bond Act (01A NCAC 22 .0101-.0102, .0201- .0209, .0301-.0303, .0401 -.0403, .0501-.0506, .0601 - .0606, .0701 -.0704, .0801- .0802, .0901 -.0906, .1001 -.1002, .1101- .1103)

Gary Kreiser: I'm here today to request approval to proceed to public notice repeal Title I Chapter 22 of the North Carolina Administrative Code better known as the Clean Water Bond Act. I'm just going to give a brief history of where we're at today.

So in 1977 the Act was established to provide grants to local governments to construct and improve wastewater treatment plants collection and water supply systems. Then in 2010 as part of the Executive Order 70 was the establishment of a rule modification and improvement program, and that program is coordinated through the Office of State Budget and Management, OSBM. Then in 2011 these rules were identified to be repealed.

Just some real basic information about this act. This act consists of 46 rules. It is a Department of Administration rule administered by DENR and the program has concluded and no funds remain. So you're thinking this is a DOA rule. Why am I before the EMC? The legislation allowed the Department of Administration, the Commission of Health Services which is now known as Commission of Public Health, and the EMC to adopt rules to administer this act. It also requires concurrence of all three agencies to repeal these rules. So the repeal process based on advice from the Rules Review Commission staff, all three agencies should propose to repeal these rules, publish a joint public notice in the North Carolina Register and then all three should repeal these rules. Both DOA and the Commission of Public Health have agreed to go to public notice, and that's what I'm asking today from the EMC. It's just to agree to go to notice. The fiscal analysis has been prepared and OSBM has approved it, and there's a no cost to repealing these rules. After the public notice period we go back to all three agencies to formerly repeal the rules and the expected repeal is in early 2013. In summary the rules are obsolete. They've been identified but to be repealed, no cost. OSBM has approved it and so what we ask

today is to just to recommend that the EMC approve the request to proceed to public notice to repeal. I'll be happy to answer any questions.

Chairman Smith: Any questions or comments?

Mr. Tedder: I make a motion to approve.

Chairman Smith: We have a motion to approve and a second by Mr. Keen. Discussion? No discussion and the vote was unanimous. The motion passed.

12-27 Request for Adoption of Proposed Changes to Rulemaking Petition Rules Codified in 15A NCAC 2I .0501

Sandra Moore: I'm here before you today to request your approval of proposed changes to the rulemaking petition rules in Title 15A of the North Carolina Administrative Code, Subchapter 2I 0501. I'll go over these proposed changes and the rulemaking changes and remind you that attachment A for this agenda item is the fiscal analysis that was performed for these proposed rules and the proposed changes are highlighted in appendix A of the fiscal analysis.

At the July 2011 EMC meeting the Commission requested changes to the rulemaking petition rules and passed a motion to take to public notice and hearing changes to 2I .0501 to add a requirement in paragraph A for the petitioner to submit an electronic or digital copy of the rulemaking petition and to remove the requirement in paragraph c for the petitioner to submit 20 copies of the petition when the petition exceeds 20 pages. The Division of Water Quality prepared a fiscal analysis for this rulemaking that was approved by the Office of State Budget and Management in January of 2012 and by the Commission at its 2012 meeting. The fiscal analysis estimated a cost savings of \$200 dollars per petition when the petition is around a hundred pages. The proposed rule and fiscal analysis was published in the May 1, 2012 North Carolina Register. A public hearing was not required for de minimus rules. A 60 day public comment period was held from May 1 to July 2 and no comments were received. On July 12, 2012 the fiscal analysis was certified by the Office of State Budget and Management that the agency adhered to the principles in General Statute 150B-19.1 and Executive Order #70. Today I'm requesting adoption of these rules by the EMC, and if adopted today they'll be filed with the Rules Review Commission for review at their October meeting. If approved by the Rules Review Commission in October they would become effective on November 1st of this year. The Division recommends that the EMC adopt these proposed revisions and I'll be happy to answer any questions that you might have at this time.

Chairman Smith: And you all understand that this is, as we continue to move into the digital age it's an obsolete requirement. Discussion?

Mr. Hutson: As the person who filed those two petitions last year and got mean looks from his clients as to the cost they charged for copying and more mean looks from my assistant putting 20 copies together, I'm going to move approval of the proposed rule change. Mayor Moss seconded.

Chairman Smith: asked for discussion and a vote. The vote was unanimous and the motion carried. Thank you.

12-28 Request for Approval of Pittsboro's Local Program Implementing the Jordan Lake New Development Stormwater Rule, and Delegation of Further Approval Authority to the DWQ Director

Jason Robinson: This item was brought before the Water Quality Committee meeting yesterday where it was approved to proceed to full Commission today. Again I'm coming before you today to seek approval of Pittsboro's Jordan new development stormwater management program and also to seek delegation of further approval authority to the director. My presentation will be very brief. It is a follow-up item to an agenda item I brought back in May. I'll give a brief review of the Jordan New Development Rules, go into a few details of Pittsboro program and then give an update on legislation that occurred in the most recent session that affects the Jordan New Development.

The Jordan New Development Rule became effective in August 2009 along with the rest of the Jordan strategy. The Commission approved a model ordinance and an accounting tool in March 2011. Local governments submitted their local programs in September of 2011. DWQ reviewed these programs. I requested them and contained some changes from the local governments, most of the programs and then presented them to the Commission for their approval May 2012. At that time the Commission approved 33 of the 34 local programs. One program, Pittsboro was incomplete and therefore is not approved by the EMC. This agenda item is a follow-up to that. Pittsboro has since completed their program. DWQ staff reviewed it and had to make a few changes and feel the program is now acceptable, a few details of Pittsboro's program, a consultant was hired to complete the program and they're currently seeking an engineer to implement it. They did use DWQ's model ordinance with a few minor changes. They chose to use the nutrient accounting tool that was developed by DWQ for their model program. Pittsboro does not plan to implement the new development programs in state and federal projects in their jurisdictions.

As a separate item we wanted to make you aware of some session laws that were passed this last session in regards to the new development stormwater rule. The local programs were originally slated to be adopted and implemented by the local governments to August of 2012. However, session laws 2012-200 and 2001 which became effective August 1st of this year delayed that implementation date until August 2014. We've talked to the local governments of the 30 of 34 local governments that responded to us. Seven have told us that they're going to voluntarily implement, go ahead and adopt and start implementing their programs because the rules dictate that any development that occurs prior to the implementation of these new development programs would be considered existing development and would therefore contribute to local governments low reduction burdens according to the Jordan existing development rule. Pittsboro staff has told us that they won't begin implementing their new development program immediately, however, they have to be implementing by the summer of 2013.

Of requested actions Pittsboro's program as revised before you meets the requirements of the Jordan new development rule and therefore ask the Commission to approve Pittsboro's program. The last time I came before you in May with the other 33 programs. We also ask the Commission to delegate authority to the DWQ director for approval of future minor program revisions and to the Water Quality Committee for any significant or unique program alterations,

and as requested by the Committee yesterday to also make sure that we make the EMC aware of any of these revisions that may come forward.

Chairman Smith: asked for any questions.

Dr. Peterson: On behalf of the Water Quality Committee they did hear this item as Jason reported yesterday and Jason reported the outcome. We recommend the full Commission approve. This is the twenty third of the local governments that moved and we approved the others with the same petition, that if there are changes subsequently, the director has authority from us to move on that, but if there's some complexity, it comes to the Water Quality Committee. We also ask that any of these actions that are taken be reported to us so that we keep our finger on that process. With that I make that motion that Jason has suggested that we make.

Chairman Smith: Motion by Dr. Peterson and second by Mr. Hall. Discussion? The Commission voted unanimously and the motion carried.

Mr. Tedder: I meant to bring it up a while ago. Before we move on there are a couple of items that I know will be quite lengthy. I am kind of back to where we were with the TMDL and I am not trying to recreate anything, believe me. But we are kind of in new territory with this process and I would just ask that staff be requested to bring the TMDL on permitting strategies back to the Commission for reconsideration, if either EPA or the courts seek to require implementation inconsistent with what we approved today. That is just a request.

Chairman Smith: That sounds like a reasonable request. Everybody comfortable with that request? I see Mr. Wakild nodding his head, yes. We move to 12-29.

Administrative Hearings – Contested Cases

Commission legal counsel noted the Commission was sitting as the final agency decision-maker in their quasi-judicial role and had before it two contested cases. He noted that the facts and legal issues in the cases had been considered by the Administrative Law Judge and that the Commission had received the official records and the ALJ's recommendations. He then reviewed the standards which were applicable.

12-29 House of Raeford Farms, Inc. v. DENR, Division of Water Quality, 10 EHR 5508, DV 09-0046, Duplin County

Assistant Attorney General Anita LeVeaux presented oral argument for the Department and requested the Commission reject the ALJ's decision and enter a final decision upholding the separate civil penalty assessments for unlawfully discharging waste to the waters of the State and violating water quality standards for dissolved oxygen and settleable solids and sudge. House of Raeford Farms, Inc. was represented by Lori P. Jones of Raleigh, N.C. who presented oral argument and requested the Commission not adopt the ALJ's decision and instead enter a final decision reversing the civil penalty assessments and vacating the ALJ decision.

After discussion by the Commission, a motion was made by Mr. Hutson to not adopt the ALJ's decision as the final decision and instead uphold the assessment of the civil penalties and two-thirds of the investigation costs for the unlawful discharge to the waters of the State and the violation of the water quality standard for settleable solids and sludge; and also to uphold the ALJ's decision to reverse the civil penalty assessment for violation of the numerical dissolved oxygen standard because it was not supported by a preponderance of the evidence.

The motion received a second.

Chairman Smith called for discussion or questions from Commission members.

Chairman Smith called for a vote on the main motion which carried by majority vote.

Having considered the whole record, arguments, and submissions of the parties, the Environmental Management Commission, upon duly made motion and majority vote, did not adopt the complete Decision by the ALJ as the Final Agency Decision. The Environmental Management Commission upheld the assessment of the \$25,000.00 civil penalty for discharging waste to the waters of the State in violation of water quality standards without a permit and the \$25,000.00 civil penalty for violating the water quality standard for floating solids, settleable solids or sludge that occurred on or about September 9, 2009. The Commission vacated the penalty assessment for a violation of the numeric water quality standard for dissolved oxygen because it was not supported by the preponderance of the evidence. The Commission upheld the assessment of the reasonable enforcement and investigation costs pursuant to N.C.G.S. §143-215.3(a)(9) in the amount of \$905.30.

12-30 Pamlico-Tar River Foundation, Environmental Defense Fund, NC Coastal Federation and Sierra Club v. DENR, Division of Water Quality, and PCS Phosphate Company, Inc. (Respondent-Intervenor), 09 EHR 1839, Wake County.

Chairman Smith: Ok everybody I'll call us back to order. Thank you for being so prompt.

Steve Keen: Mr. Chairman I'd like to recuse myself, and also I will be leaving at 1:30. I have a meeting in New Bern at 4:00 p.m.

Chairman Smith: Thank you Mr. Keen. And I will note that Ms. Pickle has already recused herself. Before we get to the merits of that case we have two filings under old NCGS Section 150B-36a. That statute has since been repealed but I'll read it to you. "If a party files in good faith a timely and sufficient affidavit of personal bias or other reason for disqualification of a member of the agency making the final decision, the agency shall determine the matter as a part of the record on the case and the determination is subject to judicial review at the conclusion of the case."

Mayor Moss: Mr. Chairman I need to recuse myself from this one as well. It just hit me that the City of Creedmoor just became a member of the Tar-Pamlico Association earlier this week so may be not a direct connection, but out of an abundance of caution.

Chairman Smith: Thank you sir. So noted. This statute preceded the creation of the Ethics Commission and the State Ethics Statute. It may very well be that if the General Assembly had considered this statute when they were writing in the State Ethics Statute, they would have repealed it for that reason but they did not. So it falls to us will require to make a determination of the matter if such a request is filed. We have two of those requests filed before us today. One relates to Dr. Larkin and to Ms. Pickle. Ms. Pickle has recused herself for other reasons. The request did not relate to Ms. Pickle's or rather Environmental Defense's contract with the Nicholas Institute, a contract that Ms. Pickle had some involvement with. But nonetheless, she's recused herself for that reason. The second request involves Messers Ayers, Martin, Hall, Tedder and Hutson. I'll tell you for the record and these matters have all been posted on the webpage so they're all public record. Mr. Crawley and I requested of the Ethics Commission opinions as to whether or not any of those seven should recused themselves or whether they have a conflict of interest or the statute has been changed potential conflict of interest. It no longer reads appearance of a conflict of interest but potential conflict of interest. The Ethics Commission has given us....we asked as to Ms. Pickle and Dr. Larkin first because that request came in first, the Ethics Commission had enough time to give us a letter of opinion as to Dr. Larkin. That has been posted as well as part of this record finding no conflict of interest or appearance of conflict of interest no reason for him to recuse himself. I'll note that my understanding of the law is that does not decide for this statute's purposes. It's still incumbent upon us to make a decision. The request as to Ms. Pickle was withdrawn once she decided to recuse herself since it was moot at that point. The second such filing came in later and we made the same request of the Ethics Commission as to the group of five, the second five. One other thing as to all seven of these as part of our request that the Ethics Commission give us an opinion Mr. Crawley and I asked each of the seven to prepare a written response, factual response as to the matters contained in the request for us to consider or not whether or not they had a conflict of interest. Each of the seven prepared those factual responses, put it in a letter form to either me or Mr. Crawley and we included those in what went to the Ethics Commission. So what the Ethics Commission got was the original filing, the first coming from PCS Phosphate, the second coming from the collection of petitioners and the Ethics Commission got letter requests from Mr. Crawley and me asking for an opinion and letter from each of the seven people with their factual response to the matters. Late yesterday afternoon Mr. Crawley received via email from the Ethics Commission saying as you requested I have reviewed (this is from Kathleen Edwards of the State Ethics Commission) available information and have concluded that State Government Ethics Act would not restrict Messers Ayers, Martin, Hall, Tedder and Hutson from participating in the Environmental Management Commission's consideration of the decision in the matter of Pamlico Tar River Foundation, et. al v. DENR and PCS Phosphate Company, Inc. This conclusion is based upon the application of the conflict of interest requirement set forth in GS 138A 36a and 36c. That too will be posted to the EMC's webpage if it has not already so that all of this is as transparent as we can make it even though what comes from the Ethics Commission are confidential opinions. Be it coming to us we have the right to make those public and that's what we've done. With that you EMC members are left with the decision as to whether or not the remaining six individuals should be called upon to recuse themselves. Mr. Crawley and I think there's one more piece of information that probably would be useful to you and that is to hear from each of the six their answer to the question. Having considered everything that is in this record including these filings by these two parties do you believe that you can decide this case based on the facts and law within the record or do you believe individually that you should

recuse yourselves either for a conflict of interest or for a potential conflict of interest using the new statutory language. So with that I'll ask each one of you individually to give us an answer for the record on that question. I'll begin with Mr. Ayers.

Mr. Ayers: Yes I believe I can make a decision based upon the facts in the record and upon the case, I do not see a reason to recuse myself.

Mr. Hall: I can make a decision based on the facts I've read in the record and I will not recuse myself.

Mr. Hutson: I can make a decision based on the facts in the record and will not recuse myself.

Dr. Larkin: I also believe I can make a decision based on the facts and the record and will not recuse myself.

Mr. Martin: I also believe I can base my unbiased decision on a review of the facts of the case and choose not to recuse myself.

Mr. Tedder: I think I can make my decision based on the facts of the case and also choose not to recuse myself.

Chairman Smith: Have I overlooked any of the remaining six. Now is there any other information that you Commission members think would be helpful to you in making your decision as to these six individuals? Do you have any questions of anyone as to these requests coming from these two sets of parties? Then I'll ask you your pleasure. Do you want to do this by six individual motions and votes or do you want to do it by collective motion and vote, and I have no preference? Does anyone want to do it by individual? If you do we'll do it that way. No problem. It won't take too long.

Mr. Cecich: I make a motion that we accept all members as being able to hear this case.

Mr. Cavanaugh seconded the motion.

Chairman Smith: Discussion?

Mr. Martin: Just for clarification I'm assuming that none of the six of us are voting on this motion.

Chairman Smith: That's a good point. How many are left if we take out the six and you take out the people that have recused themselves? We have 15 members remaining after the three who recused themselves. So is it correct that for a quorum we need.... Mr. Crawley asked us to reconsider and do it individually. So Mr. Cecich would you be willing to withdraw your motion and Mr. Cavanaugh? Then let's do it individually and for you individuals each one of you will not be voting for or against yourselves. I think that's probably wise and the three people who have recused themselves are not voting. So do I entertain a motion as to Mr. Ayers?

Mr. Cecich: I make a motion that we accept Mr. Ayers as being able to hear this case.
Dr. Peterson seconded.

Chairman Smith: asked for discussion and hearing none the motion passed.

Mr. Cecich: I make a motion that we accept Mr. Hall as being able to hear this case.
Dr. Peterson seconded.

Chairman Smith: asked for discussion and hearing none the motion passed.

Mr. Cecich: I make a motion that we accept Mr. Hutson as being able to hear this case.
Dr. Peterson seconded.

Chairman Smith: asked for discussion and hearing none the motion passed.

Mr. Cecich: I make a motion that we accept Dr. Larkin as being able to hear this case.
Dr. Peterson seconded.

Chairman Smith: asked for discussion and hearing none the motion passed.

Mr. Cecich: I make a motion that we accept Mr. Martin as being able to hear this case.
Dr. Peterson seconded.

Chairman Smith: asked for discussion and hearing none the motion passed.

Mr. Cecich: I make a motion that we accept Mr. Tedder as being able to hear this case.
Mr. Cavanaugh seconded.

Chairman Smith: asked for discussion and hearing none the motion passed. Did I miss anybody? Well I want to say this to the members of the EMC it has been my observation over the last seven years you have all shown yourselves as far as I'm concerned to be people of high integrity. It has also been my experience that the EMC collectively and individually has a decades-long record of policing itself effectively. I can't remember a single meeting in which at least one of you and usually more than one of you did not state for the record some association you might have with some piece of business before us and your assessment of the extent to which it might constitute a conflict of interest or being appearance of potential conflict of interest. Many times, virtually every meeting, one or more of you recused yourself on one or more issues, and I commend you for treating the questions before you, even before the Ethics Commission and the ethics law, with the importance they deserve. I trust that we will continue in that pattern. I'm thankful that 150B-36a has been repealed and even for those cases in the pipeline that might apply to it, I hope that we never see such filings again. But if we do we'll deal with them as seriously and as completely as we possibly can.

Dr. Peterson: Mr. Chairman I have issues to raise to the Commission and to our attorneys relative to my involvement with one of the parties that's before us whether I have a conflict of interest. I am a lifetime member of the Coastal Federation and have on multiple occasions

served pro bono as an expert witness for them on water quality actions that they have brought in before ALJs. The question is should that disqualify me from serving today?

Chairman Smith: I think that's a question you have to ask of yourself to begin with.

Dr. Peterson: I feel comfortable that I can judge on the merits and not have a bias because of it. I also feel comfortable that the entire panel ought to know of that in the same way that we know everything about Dr. Larkin.

Chairman Smith: I think our history has been that we accept individual Commission members at their word as to matters that might raise the potential for a conflict of interest or the appearance of a conflict of interest. I see no reason for us to deviate from that procedure on this case.

Pamlico-Tar River Foundation, Environmental Defense Fund, NC Coastal Federation and Sierra Club v. DENR, Division of Water Quality, and PCS Phosphate Company, Inc. (Respondent-Intervenor), 09 EHR 1839, Wake County

The Pamlico-Tar River Foundation, Environmental Defense Fund, NC Coastal Federation and Sierra Club were represented by Derb S. Carter, Jr. of the Southern Environmental Law Center in Chapel Hill, N.C. The DENR/DWQ was represented by Assistant Attorney General John A. Payne. The Respondent-Intervenor, PCS Phosphate Company, Inc. was represented by George W. House, Esquire and Alexander Elkan of Greensboro, N.C.

Derb S. Carter, J. presented petitioners' argument for not upholding the summary judgment decision by the ALJ and reversing and vacating the 401 Water Quality Certification issued to PCS Phosphate, Company, Inc. Assistant Attorney General John Payne and George W. House presented the DENR's and PCS Phosphate Company, Inc.'s arguments that the decision by the ALJ should be adopted as the Final Agency Decision.

Ms. Pickle, Mr. Keen and Mr. Moss did not participate in the deliberations or decision in the contested case. Before considering the merits of the case and arguments of Petitioners, Division of Water Quality and Intervenor PCS Phosphate Company, Inc., the Commission considered, as required by N.C.G.S. § 150B-36(a), PCS's August 24, 2012 Request for Disclosure, Investigation, and Determination of Commissioner Conflicts and Disqualification regarding Commissioners Larkin and Pickle, and Petitioners' September 5, 2012 response and Request for Disclosure, Investigation, and Determination of Commissioner Conflicts and Disqualification regarding Commissioners Martin, Tedder, Hall, Hutson and Ayers. Commissioner Pickle had previously announced her recusal from the contested case for reasons not related to Respondent-Intervenor's Request. The Commission determined, by separate motions and unanimous votes, that Commissioners Larkin, Martin, Tedder, Hall, Hutson and Ayers were not disqualified would be allowed to participate in the deliberations and decision in the contested case.

After oral presentations by the parties and Intervenor, the Commission asked questions of the attorneys. A motion was made by Mr. Morse to adopt the ALJ Decision as the final decision. There was a second to the motion by Mr. Tedder.

Chairman Smith called for discussion or questions from Commission members.

Mr. Phillips made a substitute motion to not adopt ALJ Decision but to grant summary judgment on one issue to Petitioners and remand the remaining issues for an evidentiary hearing. The motion received a second but failed by a majority vote.

After further discussion, the Chairman called for a vote on the main motion. The motion carried by a vote of eight in favor and seven opposed. By show of hands, Commissioners Cecich, Ellis, Hall, Hutson, Martin, Morse, C. Smith and Tedder voted in favor of the motion. Commissioners Ayers, Cavanaugh, Deerhake, Peterson, Larkin, Peden and Phillips voted against the motion.

The Commission's final decision is summarized as follows:

Upon consideration of the whole record, written exceptions and arguments of the parties and Intervenor, the Commission, upon duly made motion and majority vote, adopted the decision of the Administrative Law Judge, with its findings of fact and conclusions of law, as the final agency decision.

After a break due to a medical emergency of Chairman Smith, Dr. Peterson reconvened the meeting. The commission discussed how best to proceed. On motion by Mr. Phillips and second by Mr. Cavanaugh, the Commission voted unanimously to recess until a special called meeting to be held on October, 11, 2012 to complete the present agenda items.

(The meeting recessed at 4:15 pm.)

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

Lois C. Thomas, Recording Clerk

By Commission Members
By Directors
By Counsel
By Chairman

Recessed AG09-13-12