

Legislative Wrap-up I: A summary of legislative action on water quality July 30, 2013

By Robin Smith – SmithEnvironmental Blog @ <http://www.smithenvironment.com/home/>

Budget - The final budget directs the Department of Environment and Natural Resources (DENR) to combine programs in the Division of Water Quality (DWQ) and the Division of Water Resources DWR and reduces the budget for the reorganized programs by \$2 million. The \$2 million cut amounts to a 12.4% reduction to the combined programs. The budget also makes two specific program cuts that reduce appropriations for water resource and water quality programs by another \$735,257. Total reductions may go even higher than \$2.7 million if water resource/water quality programs also share in the 2% department-wide reduction required by the final budget. Although both the Division of Water Resources and the Division of Water Quality deal with water, the two have very different responsibilities and little overlap in functions; it will be difficult for the reorganized programs to absorb another 12.4 % cut without hurting program delivery.

Division of Water Quality (DWQ) has responsibility for preventing and reducing water pollution in the state's rivers, lake, streams and groundwater supplies. By delegation of authority from the U.S. Environmental Protection Agency, DWQ issues federal Clean Water Act permits to wastewater and stormwater dischargers. DWQ also issues state water quality permits for animal waste management systems, injection wells, and for land application of waste.

Division of Water Resources monitors water supply – the amount of water in rivers, lakes, streams and aquifers rather than its quality. DWR has responsibility for state and local water supply planning; drought monitoring and drought response; and approval of water transfers from one river basin to another (for example, taking water from an intake on the Neuse River to provide drinking water to a city in the Cape Fear River basin). The Public Water Supply section in DWR enforces the federal Safe Drinking Water Act, which regulates drinking water systems to ensure that the water coming out of the tap is safe to drink.

Both divisions have river basin planning programs – DWR water supply plans use data on water use to model for future water supply and DWQ water quality plans track data on pollutant levels, identify sources of pollution and provide a foundation for addressing water quality problems. The two types of planning complement each other, but neither can take the place of the other. It will be important to continue to have strong water quality and water supply planning programs if the state is to have a scientific and technical basis for good water policy decisions.

The budget will test DENR's ability to continue to deliver good science, timely permit reviews, compliance assistance, and enforcement with fewer resources. The department will also have to keep an eye on the effect of reduced state appropriations on federal grants supporting programs in the two divisions. The state receives a significant amount of federal grant money to support activities required under the delegated Clean Water Act and Safe Drinking Water Act programs. Those grants require a certain level of state "match" money — which is often provided in the form of state-funded positions in those programs.

Jordan Lake - Legislation delays further implementation of the Jordan Lake Nutrient Strategy for three years (Senate Bill 515). The General Assembly had already delayed the original Jordan Lake compliance

dates for reducing the amount of nitrogen and phosphorus in wastewater discharges (until 2016) and for implementing new development stormwater programs (until 2014). The practical effect of the bill will be to push those dates out three more years. A number of local governments in the Jordan Lake watershed have already started implementing local stormwater ordinances and can continue with those programs. The purpose of the delay is to allow the state to “[explore] other measures and technologies to improve the water quality of the Lake”. A related budget provision earmarks \$1.35 million from the 2013-2014 appropriation for the Clean Water Management Trust Fund for a pilot project to test the use of technology to improve water quality in Jordan Lake. The budget provision describes the technology to be tested very specifically in three pages of bill text and seems to direct funds to a particular product. Both in committee and on the floor of the House, legislators identified the technology as SolarBee— a technology used to aerate water tanks and raw water reservoirs. The bill exempts the pilot project from normal state contract procedures, which means DENR will not be required to advertise for bids.

Prospects for the success of the pilot project are already in doubt. A prominent North Carolina scientist, Professor Emeritus Kenneth H. Reckhow of Duke University, has said that aeration technologies are not effective in large water bodies like Jordan Lake. Even if the technology can improve in-lake conditions, the U.S. Environmental Protection Agency has put the state on notice that in-lake treatment cannot substitute for pollution reductions required under the Clean Water Act (7_10_2013 Letter to Rick Glazier re B Everett Jordan Reservoir TMDL-1). If EPA holds to that position, the technology will fail its primary purpose — which is to relieve upstream communities in the Jordan Lake watershed of the need to invest in wastewater treatment plant upgrades and stormwater controls on new development.

Groundwater (and possibly coal ash) - Section 46 of House Bill 74 (Regulatory Reform Act) seems to narrow DENR’s ability to address groundwater contamination caused by a permitted waste disposal site. When the state issues a permit for land application of waste or for waste disposal in a landfill, the permit sets a groundwater compliance boundary. Some degree of groundwater contamination will be allowed inside the compliance boundary, but the permit holder cannot cause groundwater standards to be violated outside the compliance boundary. The new language in House Bill 74 continues to allow the Environmental Management Commission (EMC) to set compliance boundaries by rule and by permit, but creates a presumption that the compliance boundary will be the property line. (By comparison, landfill permits have generally set the groundwater compliance boundary at 250 feet from the actual waste disposal area.)

The bill then goes on to limit the circumstances in which DENR can require “cleanup, recovery, containment, or other response” to groundwater contamination inside the compliance boundary. Before requiring any action inside the compliance boundary, DENR would have to show that the groundwater contamination: 1. has already caused a violation of water quality standards in nearby surface waters or can reasonably be predicted to cause a water quality standard violation; 2. presents an imminent threat to the environment or to public health and safety; or 3. causes a violation of groundwater standards in bedrock (which seems to mean contamination of deep groundwater).

The presumption that the property line will be the compliance boundary will likely create pressure on the EMC to allow much larger compliance boundaries than in the past. Expansion of the compliance boundary carries with it the possibility of larger areas of groundwater contamination. The new law also makes it more difficult for DENR to require a permit holder to take action inside the compliance

boundary –even to contain or reduce the flow of contaminated groundwater off site. DENR could only require steps to contain contaminated groundwater by showing that the groundwater contamination had caused –or will cause – a specific water quality violation or an imminent threat to health, safety or the environment. The fact that the contamination has moved beyond the compliance boundary (and perhaps already migrated off the property and toward a river or lake) will not be enough. The clear risk will be that acting only after a problem already exists will create a larger and more expensive problem to remedy in the future.

The provision appears to be linked to an ongoing controversy and threatened litigation over groundwater contamination and seeps from ponds where coal-fired power plants have disposed of coal ash. The Catawba Riverkeeper has filed a notice of intent to sue under the Clean Water Act over contamination from two coal ash disposal sites — a Duke Energy coal ash pond associated with the Riverbend Steam Station and a Progress Energy coal ash pond in Asheville. The Duke Energy coal ash pond is located on the banks of Mountain Island Lake and near a water intake for the City of Charlotte. Monitoring around the coal ash pond has detected contaminants in groundwater that exceed groundwater standards, but the Division of Water Quality has not yet decided whether corrective action will be necessary. The Riverkeeper’s complaint claims that contaminants from the coal ash are reaching the lake in seepage from the impoundment and through a groundwater connection to the lake. The House Bill 74 language means that groundwater violations alone –even beyond the compliance boundary — would not necessarily require steps to contain an ongoing flow of contaminated groundwater to the lake. DENR would first have to show that the groundwater contamination is causing or will cause an actual water quality standard violation in the lake or an imminent threat to health, safety or the environment.

Regulatory Reform – More on regulatory reform in a later post, but HB 74 includes a requirement that agencies review and readopt existing rules of “substantive public interest” every 10 years. The bill defines “substantive public interest” so broadly that it will cover every environmental rule of any real substance. The state’s Rules Review Commission will set the initial schedule for review of rules, but the bill directs the commission to schedule surface water and wetland standards for review in the first round of rule review.

Miscellaneous – House Bill 74 contains a number of other minor changes, including technical amendments to the laws on permitting animal waste management systems and an exemption from riparian buffer requirements for agricultural ponds.

Failed Water Quality Legislation - One major change did not happen. The N.C. Homebuilders Association had pushed legislation to eliminate state water quality permitting requirements for wetlands that do not fall under federal Clean Water Act permitting jurisdiction. An earlier post provides some background on the difference between federal and state wetlands jurisdiction. The language first appeared in a Senate farm bill (Senate Bill 638), but was dropped from the bill once it reached the House. The Senate agreed to the change — possibly because farmers already have broad exemptions from wetland permitting requirements. During the last few days of the legislative session, the exemption language popped up again in a Senate committee substitute for House Bill 938. The House sent the bill to committee and never took it up for a concurrence vote. The bill will still be eligible for consideration next year when the General Assembly reconvenes in May.

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Shale Gas/Hydraulic Fracturing. This is one area where the big news may be the legislative proposals that failed. The Senate adopted two controversial shale gas provisions, but neither passed the House. Legislation adopted in 2012 effectively put a moratorium on hydraulic fracturing by prohibiting issuance of permits until the Mining and Energy Commission adopted rules and the General Assembly acted to specifically allow permitting. The N.C. Senate had always wanted to set a specific date for permitting to begin and tried again this year in Senate Bill 76 (the Domestic Energy Jobs Act). The version of the bill that came out of the Senate repealed the 2012 language and authorized the Department of Environment and Natural Resources to begin issuing permits for hydraulic fracturing on March 1, 2015 without any further legislative action. The House had concerns about the change. After back and forth on alternative language and intensive lobbying in the last days of the legislative session, the final bill kept the permitting moratorium in place.

The other controversial Senate proposal had to do with disclosure of information on chemicals used in hydraulic fracturing fluid. The Senate intervened on behalf of the oil and gas industry when energy giant Halliburton expressed concern about a chemical disclosure rule drafted by the Mining and Energy Commission. The commission's draft rule requires drilling companies to disclose all chemicals used in hydraulic fracturing fluid to the Department of Environment and Natural Resources, but allows DENR to keep any trade secret information confidential. You can find more about the chemical disclosure rule and trade secret protection in this post. In an effort to make the rule more acceptable to the oil and gas industry, the Senate adopted language directing the Mining and Energy Commission to revise the rule to allow drilling operators to withhold information on trade secret chemicals unless DENR needed the information to respond to environmental damage or a specific health problem. In the face of significant opposition, the Senate modified the language to allow state regulators to review information on trade secret chemicals at the same time the drilling company disclosed other chemicals used in the fracturing fluid. The revised language did not allow DENR to actually receive information on trade secret chemicals — the department could only review information that remained in the drilling company's possession. In the final days of the legislative session, the bill containing the Senate language died and the restriction on chemical disclosure died with it. Failure of the legislation allows the Mining and Energy Commission to move ahead with the original draft rule on chemical disclosure.

The final version of Senate Bill 76 signed by the Governor included a number of less controversial changes related to shale gas and hydraulic fracturing:

- Rules adopted by the Mining and Energy Commission are exempted from the requirement for a fiscal analysis. State law generally requires every proposed rule that has an economic impact of \$1 million or more (based on the total impact on everyone affected by the rule) to be accompanied by a fiscal analysis.
- Minor changes in the makeup of the Mining and Energy Commission.
- Three new studies to look at: 1. creation of a coordinated permitting process that will allow issuance of a single environmental permit for all oil and gas exploration and production

activities; 2. the appropriate level of severance tax for oil and gas resources; and 3. implementation of the 2012 registration requirement for people involved in purchase or lease of property for oil and gas exploration and development.

- Technical amendments to an existing law allowing the state to limit the total amount of oil and gas produced in the state (G.S. 113-394).
- New criteria for setting the amount of the reclamation bond required for oil and gas activities and a process for either the drilling company or the property owner to appeal the bond amount.

LEED Certification. House Bill 628 (Protect/Promote Locally Sourced Building Materials) was signed into law after a major rewrite in the Senate. The original House bill would have prohibited state building projects from seeking Leadership in Energy and Environmental Design (LEED) certification under U.S. Green Building Council standards because few North Carolina forestry operations meet standards necessary to earn LEED credit for sustainable wood products. You can find more explanation of the controversy over sustainable forest practices and the LEED standard here. The Senate rewrote the bill to allow construction of state projects under “green” building standards that give credit for use of local building materials — which LEED standards do. The final bill also calls for study of the energy efficiency standards for state buildings that were adopted in 2007.

Renewable Energy. Legislation to repeal the state’s Renewable Energy Portfolio Standard died. With the support of a number of conservative political organizations — including Americans for Prosperity — House Bill 298 and Senate Bill 365 (both titled the Affordable and Reliable Energy Act) proposed to repeal the 2007 state law requiring major electric utilities to generate an increasing percentage of power from renewable energy sources. An earlier post talked about the politics of the renewable energy standard and the practical problem the bill presented for Republican legislators. The tension between the practical (jobs) and the political (conservative opposition to subsidies for renewable energy) played out in both the House and the Senate. In the end, neither bill got all of the committee approvals needed to get to a floor vote.

The General Assembly adopted legislation setting up a permitting program for wind energy projects (House Bill 484). The bill largely responds to concerns about the potential impact of wind turbines on military training activities in the coastal area. Two onshore coastal wind projects already proposed for the coastal area had generated questions about interference with radar and risk to pilots flying low-level military training routes. Aside from establishing environmental criteria for permitting wind turbines, the bill requires DENR to provide notice of the permit application to commanders at nearby military installations and to the Federal Aviation Administration. The bill makes interference with military operations a basis for denying a wind energy permit.

The final budget for 2013-2015 eliminated state funding for the N.C. Biofuels Center. The General Assembly created the Biofuels Center in 2007 to encourage biofuels production in N.C. using non-food crops. The Biofuels Center set a goal of replacing 10% of the state’s imported petroleum with homegrown biofuels. To develop biofuels production, the Biofuels Center made grants to support biofuels research and to develop pilot projects. Late in July, the N.C. Biofuels Center board decided that it would not be practical to continue operations without state funding; the Center will close by the end of October and unused grant money will be returned to the state.

Offshore Energy. Senate Bill 76 also addressed offshore energy production. One section of the bill creates a plan for allocating revenue from offshore energy production off the N.C. coast. The first \$250 million in royalties to the state would go into an Offshore Emergency Fund to be used for emergency response and cleanup in case of an offshore oil or gas spill. Any royalties to the state beyond the first \$250 million would go largely to the General Fund (75%); the remaining 25% would be divided among the Highway Trust fund (5%), the Community College System (5% for programs to train students in fields related to energy development), DENR (5% for coastal projects), the UNC system (5% for energy-related research and development); State Ports Authority (3% for ports infrastructure associated with energy production); and Department of Commerce (2% to recruit energy-related industries to the state).

Note: Offshore oil and gas production would almost certainly occur in federal waters beyond the three-mile limit of state jurisdiction. North Carolina will not receive any royalties from offshore production in federal waters unless Congress specifically authorizes revenue-sharing with the state.

The bill also encourages the Governor to negotiate a regional energy compact with the states of Virginia and South Carolina to develop a regional strategy for offshore energy production in the three-state region. The General Assembly directs Governor McCrory to work with his counterparts in those states to encourage the U.S. Department of Interior to amend the national 2012-2017 Five Year Leasing Plan to include leasing for oil and gas exploration and development in waters of the Atlantic Ocean off the VA-NC-SC coast.

Energy Policy Act. Senate Bill 76 makes significant changes to the state's Energy Policy Act (the Act begins at G.S. 113B-1). The changes generally run in the direction of reducing the emphasis on energy efficiency and renewable energy and increasing the emphasis on job creation. The amended Energy Policy Act has more to say about expanding development of all energy sources – including natural gas and nuclear power — and much less about energy conservation. The bill changes the makeup of the Energy Policy Council (an advisory board created to guide state energy policy) along the same lines:

- The seat on the Council for a person with experience in alternative fuels or biofuels becomes a seat for a representative of an investor-owned natural gas utility.
- The seat designated for a person with experience in energy efficient building design or construction becomes a seat for an energy economist.
- The seat on the Council for a person with experience in renewable energy becomes a seat for an industrial energy consumer.

The General Assembly also consolidated state energy programs in the Department of Environment and Natural Resources. The budget bill moves the State Energy Office (which has largely carried out federally funded energy efficiency programs) from the Department of Commerce to DENR. Senate Bill 76 moves the Energy Policy Council, which had also been under the Department of Commerce, to DENR. The Council will be staffed by the Division of Mineral, Energy and Land Resources.