N.C. Environmental Legislation, 2015: Deregulating and obscuring the consequences

2015 was another big year in changes, almost entirely deregulatory changes, in North Carolina's environmental laws. The General Assembly's first ratified bill of the session, S.L. 2015-1 ("Amend Environmental Laws"), was an assortment of changes to such diverse programs as coal ash cleanup, solid waste generally, and air toxics. Among the General Assembly's last ratified bills was S.L. 2015-264 (misleadingly entitled a "technical corrections bill as recommended by the General Statutes Commission") with a section appearing after midnight in the waning hours of the session, for the first time, with no prior committee review or public debate, that attempts to prohibit any local government regulation of oil and gas exploration, development and production. Between these two bookends, against the backdrop of Volkswagen's admission that it faked its emission results on millions of supposedly "Clean Diesel" cars worldwide, were dozens of provisions affecting nearly all facets of N.C. environmental law. I have summarized these provisions in this framework:

1. Changes that reduce public environmental information
2. Changes that allow more pollution, or more development in environmentally sensitive areas.
    - Air
    - Water
    - Land
3. Environmentally protective changes
4. Environmental finance
5. Matters in limbo and miscellany

If Volkswagen, listed as recently as 2013 as "best in class" on Dow Jones' Sustainability Index, was actually willing to blatantly defraud consumers and federal regulators, what are the odds that smaller, less well capitalized companies will self-regulate properly when it comes to environmental externalities?

Changes that reduce public environmental information

Minimizing SEPA

The long term trend in environmental law, from the 1970s through the 1990s, was ever-increasing effort to inform the public about the environmental consequences of development and other human activity. The State Environmental Policy Act, or SEPA, was an early part of this; North Carolina passed it in 1971 as part of a national wave of state analogues to the National Environmental Policy Act (NEPA), passed in 1969. The idea was that, before the State made decisions about the spending of public money or significantly changed the use of public lands, it would first study and

inform the public and the decision makers about the environmental consequences of the action. The process of doing this has long rubbed many decision makers the wrong way, since those decision makers often feel quite firmly that they already know what the best decision is. They are often irritated at having to wait before making it.

S.L. 2015-90 greatly curtails the scope of SEPA. It limits its application to "significant" expenditures, defined now as over $10 million for a single project or related group of projects, not including contribution of funds by local governments or in-kind contributions;

- limits the "public land" trigger for SEPA coverage to land-disturbing activity of greater than 10 acres that results in substantial, permanent changes to the land;
- expands the types of categorical exemptions that agencies can create and requires them to establish these exemptions;
- greatly expands the statutory exceptions for actions that have other state permits;
- completely excludes any project required or authorized by the legislature;
- requires a statement only of the "direct" environmental impacts, so limits any concern with secondary and cumulative impacts; and
- limits the ability of natural resource agencies to have input into decisions outside of the formal comment period.

Taken together, these changes almost completely gut SEPA.

Interestingly, S.L. 2015-90 also specifically excludes interbasin transfers of water from the new thresholds for SEPA coverage and continues to require study of the secondary and cumulative impacts of interbasin transfers.

Audit Privilege and Environmental Immunity

These are two different concepts now embedded in a new Part 7D in G.S. 8. The audit privilege is a way to shield internal assessment of environmental problems from regulatory and public disclosure. The idea is to encourage almost everyone regulated under almost all environmental laws, including local governments (but oddly excluding coal ash management and cleanup) to conduct internal environmental audits. There are some process and format requirements to attend to if you plan to do one of these audits. The main thing is that **you lose the privilege if you fail to take corrective action or eliminate violations you find within an unspecified "reasonable period of time.**" The agency formerly known as DENR, now DEQ (Department of Environmental Quality), has had a formal, written policy of not seeking copies of environmental audits since 1995, and so far as I know, has not even been accused of violating this policy. So **this part of the new law doesn't much change the fundamentals of the regulator/regulated relationship**.

What is a big—perhaps a tectonic—change comes with the immunity provisions. These allow an owner or operator of a facility to self-disclose noncompliance and thus avoid any fines

for noncompliance, so long as the disclosure is made promptly after an audit, the discloser initiates some resolution of the violation diligently, cooperates with the regulator, and corrects the noncompliance in an unstated reasonable time. The big deal change here: you can get this immunity even if you do your audit, say, the day after the State inspector finds the problem. You don't have to beat the State to the discovery. The theory of environmental enforcement has always been this: the State will never employ enough inspectors to really seek out and find all or even most environmental violations, so it has relied on the fact that if you *are* caught breaking the law, you will have to pay some fine. That threat has been relied on to keep companies honest and on a level playing field. Query whether that theory still works when you can wait for the State to catch you, and if and only if they do, you can fix the problem and get off without any penalty. There are eight factors that make a disclosure non-voluntary and thus not eligible for the immunity, so if you are thinking of taking this course with respect to environmental problems you should consult the new GS 8-58.61(d). There is also an explicit preemption provision that prevents local ordinances and permits from limiting the audit privilege or the new environmental immunity.

Life of facility permitting for landfills and transfer stations

It's no secret that siting and permitting solid waste disposal facilities is one of the hardest things a local government occasionally has to do. The public's opposition to having such a facility located in their backyards is always strong. Nonetheless, landfill and transfer station permit issuance and renewal has been a chance for the public to weigh in on how it wants its waste handled. Now a provision in the budget bill, H97, SL 2015-241, sec. 14.20A, changes that by establishing **permits for the life of a solid waste disposal facility, defined as the full time from when it first receives waste until it is closed. There will be no more 5 or 10 year periods when permits must be reviewed and renewed**. This also includes local franchises for solid waste landfills, although there is an apparent contradiction between the new language in GS 130A-294, which says local government solid waste landfill and transfer station franchises are for the life of the facility, and existing laws GS 153A-36 and 160A-319, which say a local government franchise cannot be issued for more than 30 years. I expect the EMC or a future legislature will have to clarify this in the rulemaking that they are supposed to do by July 2016, or in a future bill.

No local regulation of oil and gas exploration, development or production (fracking)

In the wee hours of the last day of the session, and I mean sometime after midnight, language first appeared in a conference report on a "technical corrections" bill that tries to **completely prohibit local regulation of oil and gas exploration**. The bill is S119, SL 2015-264, sec. 56.2. In the 2014 session, the legislature passed a statute that prevented local governments from passing ordinances that *prohibited* or had the effect of prohibiting fracking. The new language expands that bar to cover ordinances that seek to *regulate* fracking. If there are general ordinances that someone feels act to regulate oil and gas operations, they can petition the State Oil and Gas Commission to preempt the challenged local ordinance. It's unclear exactly what impact this will have on the several local moratoria that have been passed on oil and gas operations. The new

statute is aimed at ordinances, not moratoria. However, what's the purpose of a moratorium if not to consider new or amended local ordinances? In any event, it is clear that this legislature believes local government has no role in regulating this particular industrial activity. All the regulation is to take place out of Raleigh, **unless someone persuades a court that art. XIV, sec. 5 of the N.C. Constitution really does give local governments the constitutional power to protect parks, streams, wetlands and other environmentally significant places.**

Removing all ambient air monitors not required by federal law

H765, S.L. 2015-264, sec. 4.25 **directs DENR (now DEQ) to request in its next annual monitoring plan submitted to U.S. EPA to remove all air quality monitors not required by federal law**. North Carolina built up a more robust network of air monitors in the last 25 years in order to demonstrate to EPA that its areas of nonattainment with federal air standards, mostly in regard to ozone, were smaller than EPA thought. In other words, we wanted to have a finer grid that would result in smaller nonattainment areas than EPA was proposing. Now that the whole state is, for the first time, in attainment with the current ozone standard, the legislature and DEQ itself are proposing to eliminate all the extra monitors. However, the federal ozone standard is now going to be lowered again, and in truth, the scientific and health evidence suggests it should be lowered even further than U.S. EPA has proposed. So we will again have at least some parts of the state in nonattainment with the federal standard. Apparently DEQ feels it can confine this area without the additional air monitors. We shall see. In any event, this is yet another change that has the result of decreasing publicly available information about environmental quality.

Limits on farm and other private property documentation by employees and third parties

H405, S.L. 2015-50, **allows an employer to take legal action against employees and third parties who document things (including the use of unattended cameras and surveillance devices) without permission.** The bill lets the employer sue for monetary damages, including attorneys fees and a $5,000 per day penalty. In the debates this was construed as "ag-gag" legislation intended to prevent documentation of animal cruelty at agricultural operations, but the bill is broader than that. The restrictions could also affect employee efforts to document ongoing environmental violations such as improper disposal of hazardous waste. Still, it fits with the tenor of 2014's Farm Act, which keeps most records of noncompliance on farms confidential from the public. Governor Pat McCrory vetoed H 405, but the General Assembly overrode the veto to allow the bill to become law.

Changes that allow more pollution, or more development in environmentally sensitive areas

Air toxics from fracking

In the original legislation that allowed fracking, the legislature required the development of rules to govern the emissions of hazardous air pollutants, or air toxics, from fracking operations, including truck traffic. However, in S.L. 2015-1 **the legislature removed this requirement and made it optional for the EMC to regulate air toxics connected with oil and gas operations**. The language was originally offered as a floor amendment, causing some consternation among members, who first voted it down. But proponents persisted and it eventually passed.

Water

There were many changes that reduce protection of water quality, and the actual impact of several of the changes is and will remain unclear until DEQ provides some interpretation of the new laws. What follows is just a brief summary.

A good example of the important changes that will need more interpretation from DEQ is the striking of a single word in G.S. 143-214.7, the word being "exceed," which was the word that allowed local stormwater programs authorized by this statute to be more stringent than the state's model program. (H.765, S.L. 2015-264, sec. 4.20). This change will require all local stormwater programs authorized by this statute to be submitted to the EMC by March 2016 for review to see whether the local program is in fact no more stringent than the State model program. A lot of important things are not clear about this: First, this statute does clearly cover the Phase 1 and Phase 2 and coastal stormwater programs, but it's less clear whether the intent is to cover other things as well. Also, many local governments have tried valiantly to integrate all these state and federal stormwater requirements into their own unified development ordinances. So to make this submission by March 2016, if you have a stormwater program, you need to make a determination whether your ordinances are authorized by GS 143-214.7 or instead by some other authority, such as your police powers or one of the handful of other statutes that allow local governments to work on drainage problems. Second, it's not clear just what the State "model program" includes, and we shall have to await DEQ's or the EMC's interpretation of that, since whatever it is, it is now the ceiling for local stormwater controls under GS 214.7. Fittingly, another provision of the bill directs the Environmental Review Commission of the legislature to study whether to make simplifying rewrites of the entire set of state stormwater statutes and recommend legislation to the 2016 Session. Bonne chance. See http://elinc.sog.unc.edu/how-did-stormwater-control-get-so-complicated-the-coastal-stormwater-chapter-part-1/ and http://elinc.sog.unc.edu/how-did-stormwater-control-get-so-complicated-the-coastal-stormwater-chapter-part-2/ for my analysis of why stormwater regulation is inherently complicated.

In the continuing, multi-year saga of the legislature's inquiry into whether gravel is impervious, the General Assembly this year wrote directly into the statutes some extraordinarily specific language that one would normally expect to appear only in the most technical of administrative rules. Going forward, for all your stormwater programs that are approved by the State under G.S. 143-214.7, the important term **"built-upon area" does not include gravel comprising "a surface of number 57 stone, as designated by the American Society for Testing and Materials, laid at least four**

inches thick over a geotextile fabric; or a trail as defined in G.S.113A-85 that is either unpaved or paved as long as the pavement is porous with a hydraulic conductivity greater than 0.001 centimeters per second (1.41 inches per hour)." H634, S.L. 2015-149.

This same paragraph in the state stormwater statutes was again amended in H765, S.L. 2015-264, sec. 4.20 to make **important deregulatory changes in the technical engineering requirements for stormwater programs, particularly for allowed development in riparian buffers and for development that drains to shellfish waters.**

Speaking of riparian buffers, H44, S.L. 2015-246, sec. 13.1, makes changes that affect many local governments. First, it deletes the statute that currently authorizes local governments to be delegated to run the state's riparian buffer requirements. Second, it creates a new section, GS 143-214.23A, that puts limitations on local government riparian buffer requirements. In essence, your **local riparian buffer regulations can't be more stringent than "necessary to comply with or implement federal or State law or a condition of a permit, certificate, or other approval issued by a federal or State agency" unless you show the EMC some scientific studies that demonstrate the more stringent buffer requirement is necessary to protect water quality, or unless you had your requirements in place before August 1997 and had certain findings and exclusions.** If the EMC hasn't approved your application to keep a more stringent buffer program in place by January 2017, it is no longer enforceable. There are other changes in this bill that affect how planning departments must use and view riparian buffers.

H765, SL 2015-264, sec. 4.31 **eliminates the State's regulation of intermittent streams to the extent allowed by federal law, which is itself being contested right now in the national fight over the federal Waters of the US rule.** Intermittent streams are the portions of streams in the headwaters that only contain water part of the year. This bill means that, unless the federal government prohibits it, NC will allow dredging, filling and other alteration of these streams without requiring mitigation. This has big implications for both water quality and stormwater/flood control.

Similarly, sec 4.18 of H765 **largely eliminates a distinctive feature of NC wetlands law, which is its concern with isolated wetlands**. These are wetlands that lack a surface connection to navigable waters. Their regulatory status under the federal Clean Water Act has been unclear and problematic for decades, but NC has chosen to protect them since the mid 1990s, simply by not distinguishing them from other, more clearly connected wetland types. However, henceforth impacts to those wetlands will only be mitigated for two, fairly rare classes of them, basin wetlands and mountain bogs.

Another change, long sought by the private mitigation bankers in the state, **directs DEQ to seek permission from the U.S. Army Corps of Engineers to broaden the geographic scope in which mitigation can take place for impacts to streams and wetlands.** In the past, per agreement with the Corps, NC and the private mitigation bankers had to find mitigation projects within the 8 digit hydrologic unit code—a river subbasin—where the impact to streams or wetlands

occurred. S.L. 2015-241 (budget bill) sec. 14.24.

NC has been kicking the can down the road for almost twenty years in its cleanup of Jordan Lake and similar waterbodies that are impaired by excess nutrients, which can lead to outbreaks of toxic algae, as the nation saw these past two years in the Great Lakes. This session of the legislature took another whack at the can by **extending for three years the experiment with in-lake treatment, better known as the SolarBee technology, machines in the lake that agitate the water. The budget bill also authorized another $1.5 million to be spent on SolarBees, from the Clean Water Management trust Fund.**

A curiously **obscure provision in H44, SL 2015-246, sec. 2, prohibits cities and counties from enforcing rules declared by a state agency to be voluntary or where the General Assembly has delayed the effective date of an EMC rule. I am guessing this is aimed at preventing those local governments that went ahead and implemented the Jordan watershed (and perhaps other nutrient sensitive waters) rules as they were supposed to do back in 2009 from actually enforcing their ordinances.**

Section 14.6p of the budget bill, SL 2015-241, allows **wider use of supposedly temporary sandbags and other structures on the coast, by eliminating the requirement that there be an imminently threatened structure and explicitly letting a property owner run sandbags all the way across their property whether there is an imminent threat, or not.**

Section 14.6r of the budget bill **expands the number of authorized hardened structures, or terminal groins, from four to six,** and directs that two of them be on the sides of New River Inlet in Onslow County and Bogue Inlet between Carteret and Onslow Counties. **Suffice it to say that NC's longstanding policy against hardening the shoreline is now history.**

Finally in this category of reduced regulation of water pollution, Section 14.26 of the budget bill **changes the way that sediment and erosion control violations can be enforced, including a new overall cap of $25,000 on civil penalties and process changes for remission requests.**

Land

The changes allowing more pollution to remain on land all involve reduced requirements on landowners to clean up contaminated property. First, **the system for handling leaks of petroleum from noncommercial underground storage tanks, which are primarily home heating oil and farm gasoline and diesel tanks, is completely revised**. Per sections 14.16A & B of the budget bill, **there is no longer a requirement to immediately clean up spills and releases, or to do anything about them until notified by DEQ that there is a risk to human health, public safety, or the environment**. Second, there is no longer a noncommercial underground storage tank fund to compensate tank owners for cleanups, allowing that portion of the gas tax formerly used for this fund to go instead back to the highway fund.

Second, **the use of "risk based cleanup" for contamination, meaning only actually cleaning up a site if a calculation shows that it poses some significant level of risk to health, and otherwise relying on land use controls, is extended to contamination that goes off the owner's property,** with the written consent of the neighbors whose property was also contaminated. **This kind of risk-based cleanup is also extended to releases from above-ground storage tanks, and perhaps most importantly, extended to future cleanups, not just sites reported to DENR in the past.** These changes are made by H765, SL 2015-264, secs. 4.7 & 4.8.

Third and finally, **the brownfields program is expanded to allow its use by owners without the requirement of a sale to a new owner.** The brownfields program lets an owner of property that is or is perceived to be contaminated negotiate with the State over just what needs to be done to make the property safe, not necessarily clean—this may be just an agreement on how the property will be used in the future. Since its inception in 1997, a brownfields agreement has only been available to purchasers who had nothing to do with the contamination, on the theory that allowing current owners to use it would reduce incentives to keep property free from pollution, and also that the State had few resources to check whether a current owner did or didn't have anything to do with existing contamination. Now, under sec. 4.10 of H765, SL 2015-264, there is no more need for a transaction in order to make a property eligible for a brownfields agreement.

Environmentally protective changes

There are a few changes from this session that provide greater environmental protection.

There are many tweaks to last year's coal ash legislation, and I am not going to try to cover them all here.

For solid waste more generally, a wider concern for local governments, H157, S.L. 2015-1, **tightened up some definitions of recovered material and clarified how it must be stored in order to avoid regulation as solid waste. The bill also tightened some management requirements for construction and demolition debris and garbage diverted from the waste stream.**

H638, SL 2015-194 requires DEQ to work with the Wildlife Commission and the Army Corps of Engineers to try to get more habitat gains out of wetland and stream mitigation.

The budget bill, sec. 14.7, **prohibits commercial landscapers from using oyster shells**. This is part of the State's ongoing effort to recycle those shells into oyster restoration efforts. Secs 14.9-.10 **expands 2014's Jean Preston Oyster Sanctuary, in honor of Sen. Jean Preston, in Pamlico Sound, into a network of aquaculture restoration efforts.**

Environmental finance changes

There are a lot of changes this year to environmental funding and financing provisions. I will just list them in this blog. We will continue to advise on their details through the Environmental Finance Center, and as to the changes in solid waste fees and required connections to water and wastewater systems, Kara Millonzi has covered them in a blog post on Coates' Canons.

- Water and sewer authorities (H538, SL 2015-207) and Municipal Service Districts
- General package of funding changes sought by the State Water Infrastructure Authority
- State funding for dredging
- Phaseout of noncommercial UST fund
- Funding for shale gas exploration
- Solid waste fees
- Water hookups and interconnections

Matters in limbo and miscellany

There is more restructuring of **the agency formerly known as DENR, which is now the Department of Environmental Quality, or DEQ**. State parks, the zoo, the museum of science, the aquariums, the Clean Water Management Trust Fund and the natural heritage program are all moved to the Department formerly known as the Department of Cultural Resources, now the Department of Natural and Cultural Resources. (H97, the budget bill, sec. 14.30.) I have blogged about the longer view on restructuring at DEHNR, at elinc.sog.unc.

In addition to the name change for the Department itself, **the former Ecosystem Enhancement Program is now the Division of Mitigation Services** (H157, S.L. 2015-1).

Finally, a reminder that **all the rules of the Department of Environmental Quality are under review, and a new provision this year lets the reviewing commission, the EMC, avoid having to do any fiscal analysis for readoption of a rule if they make it less stringent**. H765, SL 2015- 264, sec. 1.6

Summary: immediate concerns for local government

The coal ash law enacted last year requires the 1,559 intermediate- and high-hazard dams (not just coal ash dams) in NC to have Emergency Action Plans. Many local governments are owners of such dams, and S14, sec 8(b) requires these Emergency Action Plans to be submitted to DEQ and the Department of Public Safety by Dec 31, 2015. It also allows them to be prepared without the need for a professional engineer's seal, unless you happen to own a coal ash impoundment. In

which case, good luck.

By Mar. 1, 2016, identify any stormwater ordinances requiring State approval under GS 143-214.7 and submit them to DEQ. They will be evaluated for whether they are more stringent than the State model program.

Before 2017, identify any riparian buffer requirements in excess of 30’ in width and prepare scientific justification for any such greater widths you wish to retain.

This year’s changes in environmental law will raise a lot of hard questions. As always, we here at the School of Government will do our best to help you answer those questions as they apply to your city or county.