State versus local government power to regulate environmental problems in NC

[photo by CochranCJ]

In late March 2016, North Carolina took front stage in national political news. The legislature convened for a one-day special session to pass a bill preventing local governments from enacting anti-discrimination ordinances. Some of the news coverage, national and state, addressed the general issue of the legislature's stripping power away from local governments in other areas, notably local government structure, taxing authority and infrastructure ownership.

Over the past five years, the North Carolina legislature has also stripped the state's local governments of many of their powers to regulate environmental threats. This trend has not been widely reported. In this entry I will catalog some of the recent changes in local government's environmental regulatory powers--all of them reductions in such powers.

These changes also should be viewed in a longer historical context, however. There has been dynamic ebb and flow between local governments, the State, and the federal government in power to regulate the environment ever since the passage in the 1970s and 1980s of the nation's major federal environmental statutes. This entry will also go back to the start of the State of North Carolina and describe what I see as **five major periods with different arrangements of local versus State environmental regulatory power**:

1. **A Preindustrial era** of purely local control (1700s to 1900)
2. **Early industrial era** of State floors with local flexibility (1900 to 1970)
3. **Late industrial era** of federal mandates with potential State flexibility, limited in NC by the legislature (1970 to 1990)
4. **Postindustrial era** of federal and State "devolution" of power, yielding many localized or "place-based regulations" (1990s to 2010)
5. **Great Recession and post-recession era** clampdown on agency and local environmental discretion (2011 to present)

An important feature of all this ebb and flow is that **new eras never completely wiped out the programs and laws created in early eras.** The power swished around like water beneath coastal piers, but **the old programs often remained, like barnacles, some alive and others just crusty hulks of their former living selves**. I will start with the recent era and work backwards in time. Some of the most interesting legal problems are presented by the persistence of those earliest barnacles.

By way of context, North Carolina is a "modified Dillon's Rule" state. When the question is "Can a

North Carolina local government legally do this or that?" the first steps in answering are to determine whether the legislature has authorized the local government to act in this or that way, and then to consider whether State or the federal government has preempted the local action. There is an additional layer of complexity in analyzing local government environmental authority questions in North Carolina. That is the State Constitution's environmental provision, rarely construed by courts.

In 2013, the North Carolina General Assembly passed a provision that began as a bar to any local environmental ordinances. As passed, it was a “Temporary Limitation on Environmental Ordinances by Cities and Counties” (SL 2013-413).

> SECTION 10.2(a) **“**Notwithstanding any other provision of law and except as authorized by this section, a city or county may not enact an ordinance that regulates a field that is also regulated by a State or federal statute enforced by an environmental agency or that regulates a field that is also regulated by a rule adopted by an environmental agency. A city or county may enact an ordinance that regulates a field that is also regulated by a State or federal statute enforced by an environmental agency or that regulates a field that is also regulated by a rule adopted by an environmental agency if the ordinance is approved by a unanimous vote of the members present and voting.”

This provision sunsetted by its own terms on Oct. 1, 2014. Another of the recently annual "Regulatory Reform" bills passed in the 2014 Session did not continue the bar on local action. Hearings in the interim had shown there was no real problem with local governments in the State enacting crazy environmental ordinances.

However, the sunset of this global restriction on local environmental ordinances did not signal renewed State support for local regulation generally. **Instead, the legislature moved in 2014 and 2015 to preempt or otherwise ban particular, disparate types of local environmental protection**. Most widely discussed and publicized were bans on local regulation of oil and gas exploration ("fracking") and coal ash disposal, a hot topic thanks to a major spill in 2014.

- Oil and gas exploration & development aka “fracking” (GS 113-415.1, 2015)(no local role plus unique State administrative review)
- Coal ash disposal reform (GS 130A-309.205, SL 2014-122) (no local role plus similar State administrative review of allegedly infringing local ordinances)

But fossil fuel interests weren't the only ones that the legislature sought to protect from local regulation. A wide variety of bans and restrictions on local water pollution protection efforts were enacted to help profits of land developers.

The General Assembly prominently curtailed local efforts to improve stormwater quality, in several ways:

- Stormwater programs that require state approval (GS 143-214.7, 2015) must submit ordinances for State re-review by March 1, 2016, to ensure they are no more stringent than the State requires. A Department of Environmental Quality interpretive memo (Jan 2016) sought to narrow this ambiguous statute by stating that it is only for State-run programs that are delegated to local governments at their request—not for programs that local governments are required to have.
- Stormwater programs shall not impose “new or increased stormwater controls for (i) preexisting development or (ii) redevelopment activities that do not remove or decrease existing stormwater controls. (SL 2014-90, GS 214.7(b3)).
- Other narrow, particular changes (e.g. for coastal stormwater regulations) may affect local ordinances.

Restrictions on local regulation of water quality weren't limited to stormwater. Other provisions passed by the North Carolina legislature from 2013 through 2015 include:

- Riparian buffers (GS 143-214.23A, 2015) can be wider than State standards only with demonstration of scientific need.
- Rules declared by State to be “voluntary” or with legislatively delayed effective date (H44, SL 2015-246, sec. 2) cannot be enforced by local ordinances. Presumably (but not clearly) this provision was aimed at implementation of the Jordan Watershed Nutrient Rules, and perhaps also the rules attempting to clean up excess nutrients in Falls Reservoir.
- No local action that discourages private well drilling (GS 87-97(e) & SL 2011-255).
- Standardized State forms for drinking water well certification and well identification details with no ability for local customization (GS 87-97(a1) & SL 2014-120, sec. 43).
- Thirty day time limit for issuing local well permits (SL 2013-121, sec. 35).
- Transfer of City of Asheville water system assets to Metro Water & Sewer District (SL 2013-50).

There were also **legislatively-imposed limits on local air pollution control programs**:

- Limits on city regulation of open burning in extraterritorial jurisdictions (160A-193(c), 2014).
- No local air regulation of combustion sources like heaters, fireplaces (GS 143-215.112(c)(6), 2014).

There was even **a cut in the local environmental powers that have the longest tradition of local autonomy, the power to regulate solid waste** in a given community:

- No local regulation of storage of non-hazardous recyclable materials like asphalt pavement & shingles unless within 200 yards of residences (GS 130A 309.09A, SL 2013-413, sec.

50).

In sum, **since the Great Recession of 2008 and even more strongly since Republican control of both houses of the legislature returned in 2011, the State of North Carolina has moved strongly away from the ideas of local flexibility and place-based regulation of environmental issues, instead asserting central, more standardized control directed from Raleigh.**

Era of federal and State "devolution" and place-based regulations (postindustrial, 1990s to 2010)

The significance of this recent reduction of local environmental powers in North Carolina is only clear when viewed in historical context. For the twenty or so years prior to 2010, the trend in State environmental law and policy was to push authority and discretion down to local levels of government, whenever and wherever there were local government units willing to take on the responsibility of addressing environmental problems. This was also true at the federal level, where there was much talk and some action towards the "devolution" of environmental regulatory duties to the states and to local government.

Some of this trend to local power came from the recognition that **the most pressing environmental problems of the era concerned "diffuse" (also known as "nonpoint source") pollution and highly varied environmental settings**. For example, in this era of the 1990s and 2000s the nation first really began to try to improve stormwater quality. Urban runoff had been recognized as a primary cause of water quality problems much earlier, but U.S. EPA had frankly acknowledged in the 1970s and 1980s that stormwater problems were not amenable to single, centralized solutions. At the outset of the national clean water program, EPA announced it would focus first on point sources, through the permitting program now called "NPDES" (National Pollution Discharge Elimination System). It took until the 1990s for EPA rules to begin including stormwater as part of NPDES permitting.

Many factors that drive the type and degree of stormwater problems in a given area vary radically in different places: amount of impervious surface, precipitation, slope, soil type, nature and ownership of the conveyance system across the land, and even the basic legal rights and duties related to surface water. All these factors suggest that an optimum environmental control strategy for stormwater quality needs a heavy dose of local variation and input. In the 1990s and 2000s this went beyond local input to locally crafted and administered programs. A typical approach was for EPA and the State to require some basic standards and set some minimum legal coverage thresholds, then let local governments propose their own programs that implemented and might even vary those standards within local jurisdictions. This "State floor with local variation and program implementation responsibility" was also paralleled in the federal Phase 1 and Phase 2 stormwater programs.

Similar approaches were used in trying to address excess nutrients in water and solid waste reduction, and even, to a lesser extent, local air quality problems. This is why **the State of North Carolina has different nutrient control strategies for the Tar-Pamlico and Neuse river basins, the Lake Jordan, Falls Lake and Randleman Reservoir watersheds, and others**. Many other types of environmental problems can only be solved by careful attention to local environmental settings and particular local institutional structures. For example, fish and game management depends vitally on particular habitat variables, and their change through time, qualities that are hard to regulate from a central government setting.

Many people, myself included, called the regulatory innovations in this era "place-based regulation," an acknowledgement that efficient solutions to environmental problems of the day needed to vary by place. As a direct result, legal authority for environmental program implementation, and often actual standard-setting, was normally pushed as far down towards the local level as local willingness to shoulder that authority would allow. Seen against this backdrop, the recent stripping away of local powers--particularly in areas like stormwater management, where local power has been thought vital--is all the more significant. It is a major change in philosophy.

Era of federal mandates with potential State flexibility, limited in NC by the legislature (late industrial era, 1970 to 1990)

It's similarly hard to understand the importance of the place-based regulations of the late twentieth century and turn of the 21st century without acknowledging the preceding period. **Sometimes called the rise of "command and control" environmental regulation, the 1970s and 1980s also stand out for the arrival of the federal government on the environmental scene**. Environmental problems have always been a subject of governmental concern and action in the United States, but the federal role was fairly muted before the passage of the Clean Air Act of 1970, the Clean Water Act of 1972, the Resource Conservation and Recovery Act of 1976, and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund"). There were important federal environmental laws before the 1970s (for example, the Rivers and Harbors Act of 1899, which gave regulatory responsibility to the U.S. Army Corps of Engineers for waters of the United States), but the late industrial era greatly expanded federal powers.

This came about from public recognition that **waste problems created by the industrial revolution were too large and complicated and posed too many significant risks to leave them entirely to States and local government**. This fact was impressed upon the citizens of the nation by several well-publicized problems, such as the fires on the Cuyahoga River in Cleveland, the hazardous waste at Love Canal in New York, and the dioxin contamination at Times Beach in Missouri. North Carolina had its own infamous incidents, such as the dumping of PCB waste along hundreds of miles of roads in the Piedmont, followed by its botched disposal in a poor and

predominantly African-American community in Warren County.

The main model of federalism for environmental programs in this era was comprised of federally-created minimum standards ("floors"), with encouragement to states to take over and run the implementation of the programs, and to create more stringent standards if they believed them necessary or appropriate. States also generally had the flexibility to delegate program implementation responsibility (and standard raising) further out, to the local level. The Superfund program was an exception to this pattern, with the federal government retaining primary responsibility and control over implementation. But such a degree of federal control was mostly limited to a relatively small list of sites (the "National Priorities List"). Many states, including North Carolina, chose to create their own similar, State-run programs ("baby Superfund laws") to clean up a wider set of contaminated sites. The federal control over Superfund was also balanced by explicit grants of authority to states and private citizens to bring CERCLA claims on their own, without federal governmental mediation and filtering.

Even back in the "environmental hey day" era of the 1970s and 1980s, however, one can see predecessors of the present-day anti-environmental feelings in the North Carolina legislature. By "anti-environmental feelings" I mean legislative distrust of shared power and discretion to solve environmental problems, as seen in the recent stripping of local legal authority. The new federal programs allowed states and local governments to build varied and more stringent programs on top of the federal floors. North Carolina's response, however, until the 1990s, was to limit that discretion by a series of statutes that insisted that many core environmental programs be implemented in a way that was no more stringent than required by federal law. In an earlier blog entry, I discussed the return to these "Hardison amendments" in recent years and also included some rare video of Sen. Hardison himself attempting to explain the rationale behind these limits.

The pattern for federalism in the 1970s and 1980s actually came from earlier environmental legislation in the states, including North Carolina.

Era of State floors with local flexibility (early industrial, 1900 to 1970)

North Carolina and other states began to realize that State government involvement with environmental problems was necessary to manage those problems well before 1970. While industrial waste largely escaped State control until the arrival of U.S. EPA in the 1970s, the human waste problems created by cities generated a lot of conflict and disputes that were not solved by the courts. **With the rise of the public health system, starting in the late 19th century, and the recognition that human waste was a source of serious disease, the State began issuing standards for, first, drinking water treatment, and later, wastewater treatment**. Most of North Carolina's major cities began piping their waste away from densely populated areas, and many of them began treating that waste, before the requirements of the 1972 federal clean water act.

The public health system was at the center of this early era of environmental protection. It makes

sense, then, that **the public health system's organizational pattern in the 20th century--a central State public health director and agency, with front-line work handled by local public health agencies--became the template for this first era of direct State involvement in environmental problem-solving**. The State standards for drinking and wastewater treatment were minima and their implementation (with all the discretionary decisions that implementation necessarily involves) were mostly left to local health departments. In addition to particular standards, the health system (at both State and local levels) was granted broad powers to address any sort of public health problem through the mechanism of declaring a "public health nuisance."

As with the laws of all these eras, the barnacles from this early industrial period are still on the books--and in the case of the public health system's potential role in solving environmental problems, the laws still have power. See GS 130A-39(b) (power of local health boards to enact more stringent rules in areas normally governed by the State Environmental Management Commission); GS 130A-19 (public health nuisance authority, now extended to counties, GS 153A-140 , and cities, GS 160A-193). But in a parallel to the long-delayed willingness of the State to take on the waste problems of the private sector, which led to the federal legislation of the 1970s, it's not uncommon even in recent years to see North Carolina judges unwilling to believe that local health boards have the power to regulate environmental problems of industro-political powerhouses like the tobacco industry and agribusiness. S*ee Craig v. Chatham County,* 356 N.C. 40 (2002) (judges reluctant to give local health regulations the power they appear, statutorily, to have, in the face of agribusiness challenge); *City of Roanoke Rapids v. Peedin*, 124 N.C. 578 (1996) (Halifax smoking case, striking down local smoking rules on creative but flimsy legal grounds).

How did the state deal with environmental problems before there was a public health system, or any other ongoing agencies of State government? After all, environmental issues go all the way back at least to the Colonial era; concerns about them are embedded in the original Charter for the Carolinas given to the Lords Proprietors by the King of England in 1663 and 1665 ("in the parts of America not yet cultivated or planted, and only inhabited by some barbarous people, who have no knowledge of Almighty God").

Era of purely local control (preindustrial, 1700s to 1900)

North Carolina looked to its local governments, with the aid of the courts, for environmental governance before the industrial era. Local governments had powers to address nuisances and to provide for solid waste handling. Some took it on themselves to provide drinking water (Salem being the nation's second public water supply system, after its sister city Bethlehem, Pennsylvania became the first) and regulations on things like open burning and livestock in the streets. It was "every place for itself," albeit with some early processes created by the legislature for resolving common environmental conflicts, like the need to drain one's property. The courts would look to the county clerks or ad hoc bodies to carry out administrative duties.

These early local powers still exist in some forms. Most importantly, there is the **general police power** of cities and counties to pass ordinances that protect “public health, safety and welfare.”

> A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

G.S. 153A-121. Same for cities: see GS 160A-174. **Cities also have explicit power to "control emissions of pollutants**," GS 160A-185, a statute that dates from 1917, as does the **explicit city power to regulate explosive, corrosive, flammable and radioactive substances**, GS 160A-183 . **Counties have long had broad powers over solid waste**, GS 153A-136 (1955).

In sum, the recent trend of the North Carolina legislature in stripping environmental powers from local governments is unusual--in fact largely unprecedented--in the state's history. But it comes in a longer historical context in which first local, then state, and ultimately federal powers have ebbed and flowed, leaving behind a complicated, barnacled legal landscape.