

# 2013 North Carolina Environmental Legislation Summary

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The 2013 session of the North Carolina General Assembly came to a close on July 26, 2013, and a number of legislative actions this year impacted environmental regulation in North Carolina. Governor McCrory has now signed into law all of the Bills discussed in the following summary. While there are several new laws that raise important policy issues for the State, the following highlights attempt to spotlight matters of potential immediate or near-term practical significance to our clients.

## **I. Changes Impacting Property Development**

SL2013-121 (H279) allows the North Carolina Department of Environment and Natural Resources (DENR) (or a local government with appropriate permitting authority) to transfer, upon the request of a successor-owner, various land development permits (stormwater permits, erosion control plans, permits for sewer systems, sewer system extensions, disposal systems, or land application of waste). This may provide a remedy for banks or successor developers taking over projects in foreclosure, default, or otherwise.

SL2013-82 (H480) mandates development of a “fast-track” permitting system for stormwater permits. DENR is instructed to develop “Minimum Design Criteria” by September 1, 2014. Development of the Minimum Design Criteria requires DENR to consult “a technical working group that consists of industry experts, engineers, environmental consultants, relevant faculty from the University of North Carolina, and other interested stakeholders.” Because “design criteria” are specifically exempted from rulemaking under Chapter 150B (the Administrative Procedure Act), it appears that development of these design criteria, while involving public input, will not require formal rulemaking and fiscal note analysis. The Environmental Management Commission (EMC) is directed to adopt implementation rules for the new stormwater fast-track permitting system by July 1, 2016.

SL2013-265 (S638) directs DENR and the North Carolina Department of Transportation (DOT) to petition the Wilmington District of the Army Corps of Engineers to allow for greater flexibility to perform stream and wetland mitigation outside of the 8-digit Hydrologic Unit Code (HUC) where the development occurs. This could result in increased development potential and decreased wetlands mitigation costs.

SL2013-55 (H706) allows decommissioned manufacturing buildings, including electric generating stations, to be demolished and buried in the shadow of their prior footprint without obtaining a landfill permit.

SL2013-413 (H74), the omnibus regulatory reform legislation, amends the definition of "built-upon area" for stormwater programs to exclude various surfaces, including gravel areas.

SL2013-108 (H789) amends the Brownfields Property Reuse Act to make underground storage tank (UST) sites eligible for the Brownfields Program. The measure broadens the liability protections afforded to potential developers of contaminated properties to include UST related contamination, which had previously been excluded from the Program.

SL2013-413 (H74) allows local governments to enter into development agreements for Brownfields properties of less than 25 acres.

## **II. UST Clean-Up**

SL2013-360 (S402) reduces the amount of clean-up costs paid by the state fund for non-commercial leaking petroleum underground storage tank clean-up. The homeowner will now have to pay a portion of the clean-up costs (up to \$2,000.00). Of potential import to those involved in future land transactions and their lenders is a requirement that DENR study "methods to strengthen liability protections for buyers and lenders of residential properties that have known non-commercial UST releases in order to facilitate property transfers." That report is due to the legislature by April 1, 2014.

## **III. Waste Management**

See discussion of SL2013-55 above (demolition of manufacturing buildings).

SL2013-25 (S24) relaxes the siting requirements for construction and demolition debris landfills in rural counties (the 11 counties with population less than 15,000), requiring a setback of 500 feet (instead of 1 mile) from state gamelands.

SL2013-135 (H629) allows county and state financing authorities to provide financial assistance to disposal facilities that handle agricultural and forestry waste.

SL2013-340 (S372) requires the EMC to provide notice and an opportunity for comment from the governing body of the county where land application of wastewater treatment plant sludge has been proposed.

SL2013-409 (H321) repeals a requirement that local governments develop solid waste management plans, a process that involved public meetings, education and enforcement programs, and DENR oversight.

SL2013-413 (H74) modifies DENR's role in approving applications for solid waste management facilities. It also requires applicants to hire third-parties to review permit applications and study environmental impacts, adjust buffer requirements, relaxes cleaning frequency for leachate collection systems, and changes certain hauling requirements from "leak-proof" to "leak-resistant" equipment. It also identifies a number of mandatory factors for DENR to consider when determining the penalty amount for solid waste violations.

## **IV. Coastal Issues**

SL2013-138 (H707) requires DENR to take steps to ensure that shallow draft (up to 16 feet deep) navigation channels in interior coastal waterways are safe and navigable by entering into long-term agreements with the U.S. Army Corps of Engineers and assisting local governments in obtaining Corps and Coastal Area Management Act (CAMA) permits for channel dredging and beach disposal of dredged materials. It also creates the Oregon Inlet Land Acquisition Task Force to study and report by May 1, 2014 to the General Assembly on the State's option for acquiring the federal government's interest in the Oregon Inlet and surrounding land.

SL2013-360 (S402) directs DENR's Division of Marine Fisheries to seek involvement from the commercial fishing industry in North Carolina in the "development of a plan to determine a source of funding to support the Marine Fisheries At-Sea

Observer Program,” a program critical to commercial fishers’ ability to continue fishing in compliance with the Endangered Species Act.

SL2013-384 (S151), the Coastal Policy Reform Act of 2013, makes a number of changes to marine fisheries laws, terminal groin construction and municipal authority to enforce ordinances within the state’s public trust areas. With regard to terminal groin construction, an applicant now only needs to show that “structures or infrastructure are threatened by erosion.” It is no longer necessary to show that the threat is “imminent” or that “nonstructural approaches to erosion control, including relocation of the threatened structures, are impractical.” The Act also requires that the mandated inlet management plan “must be reasonable and not impose requirements whose costs outweigh the benefits” and the plan is not required to address sea level rise. The financial assurances need not fund “restoration of public, private, or public trust property if the groin has an adverse impact on the environment or property.” Finally, local governments are given more flexibility in providing financial assurances (akin to that available for solid waste landfill closure). The number of permitted terminal groins remains capped at four.

The Coastal Policy Reform Act also makes several changes in regard to municipal protection of public trust areas. Cities are granted authority, by ordinance, to regulate ocean beachfront within the public trust area of the State. This Act seeks to reverse the holding in *Town of Nags Head v. Cherry, Inc.*, in which the Town’s effort to abate a nuisance (created when storms and erosion left a beachfront house without power, sewer, or water) was set aside by the Court of Appeals on the grounds that only the State could act to protect public trust interests.

#### **V. Energy**

SL2013-51 (H484) requires the developer of a “wind energy facility” (e.g., a wind turbine farm) to obtain a siting permit from DENR. This statute is designed to prevent interference with military training air space, in addition to adding environmental safeguards. It requires early consultation with DENR and detailed plan disclosures (subject to the trade secret protection provision).

SL2013-365 (S76), which largely deals with “fracking” issues, also establishes an Offshore Energy Management Fund, provides for allocation of revenues from offshore energy production, and encourage the Governor to negotiate with Virginia and South Carolina the creation of a regional energy compact to develop a unified regional strategy for the development of offshore energy resources. This legislation also moves the Energy Policy Council and the State Energy Office, which had previously been under the Department of Commerce, into DENR.

#### **VI. Water**

SL2013-360 (S402) creates within DENR a new division -- the Division of Water Infrastructure. It consolidates the water infrastructure functions formerly carried out by either the Division of Water Quality or the Division of Water Resources. It abolishes the State Water Infrastructure Commission and creates a new Water Infrastructure Authority, which will be responsible for making grants for local public water and wastewater infrastructure projects. The Authority will also create a master plan for the State’s water infrastructure needs.

SL2013-395 (S515) further delays some aspects of the Jordan Lake water quality rules, which are designed to reduce the input of nutrients into Jordan Lake from tributaries within its watershed. The suspension period coincides with a study program mandated by SL2013-360 (S402), which describes in detail and funds a pilot project for reduction of nutrients in Jordan Lake.

#### **VII. Regulatory Reform SL2013-413 (H74)**

In addition to the numerous changes discussed above, the Regulatory Act makes other significant changes to environmental regulatory functions:

1. All agencies are required to review all rules every 10 years and justify the need for their continued use. EMC surface water and wetlands rules are identified as the first rules to be reviewed.

2. Units of local government are prohibited from enacting local ordinances addressing environmental issues already regulated by state or federal law until October 2014 unless the governing body votes unanimously for such an ordinance.
3. Local governments are prohibited from enforcing zoning requirement more than 10 years after a use loses grandfather status.
4. Rules for closing waste lagoons at cattle facilities and set-back requirements for reclaimed water storage ponds are modified.
5. Statutory requirements for controlling the effects of complex sources on air quality are removed.
6. Rules allowing open burning without an air quality permit are modified.
7. The Act clarifies underground storage tanks that are not required to have secondary containment until 2020.

*For more information, contact a member of the Brooks Pierce environmental and/or governmental affairs team(s).*

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