



SENATE BILL 71: Comm'n Appointment Modifications.

2016-2017 General Assembly

Committee:		Date:	May 31, 2016
Introduced by:		Prepared by:	Jennifer McGinnis Staff Attorney
Analysis of:	Conference Committee Substitute (S71-CCSRI-3)		

SUMMARY: *The conference committee substitute (CCS) for Senate Bill 71 would (1) require a coal combustion residuals impoundment owner to provide permanent alternative water supplies for residents in areas surrounding coal combustion residuals surface impoundments; (2) extend the period for public comment and review of proposed risk classifications for coal combustion residuals surface impoundments; and (3) modify appointments to the Coal Ash Management Commission, the Mining Commission, and the Oil and Gas Commission, in accord with the holding of *McCrorry v. Berger*.*

Changes made by CCS to 3rd Edition as passed by the House:

1. Page 4, lines 23-28: revises the permanent water supply requirements language to eliminate the language inadvertently added that tied provision of water supplies to exceedances of federal drinking water standards and State groundwater standards, and **replaces it with a requirement for an impoundment owner to provide a permanent water supply to all households with a drinking water supply well within a one-half mile radius of an impoundment, if the household's well is not separated from the impoundment by the major stem of a river or other body of water that would prevent migration of contaminants to a well** (in addition to those households located in an area in which contamination resulting from constituents associated with the presence of an impoundment is expected to migrate, as demonstrated by groundwater modeling, and hydrogeologic, geologic, and geotechnical investigations of the site).
2. Page 4, lines 32-33: language added to the permanent water supply requirements language **to require consideration of groundwater modeling data from sources other than an impoundment owner** (which could be submitted through the public comment period associated with the deadline extension required by the bill for development of proposed classifications) for the purpose of identifying which households an impoundment owner will be required to provide water to under the binding agreement they must execute with the Department of Environmental Quality (DEQ).
3. Page 4, lines 45-46: language added to the permanent water supply requirements language **to require an impoundment owner to enter into binding agreements with public water suppliers** if they will be connecting households to the public water supply.
4. Page 5, line 15: **Technical correction** to beneficial reuse requirement provision.
5. Page 10, line 36: **Addition of the word "potential" before the clause "risks to public, health, safety, and welfare"** in the provision that directs the Coal Ash Management Commission (CAMC) or the Environmental Management Commission (EMC), as applicable, to consider, in determining a proposed classification for an impoundment, the binding agreement that an

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impoundment owner must execute with DEQ to identify the households for which the impoundment owner will be required to provide water. Without inclusion of the word “potential,” the clause may be construed to create a statutory presumption that without an impoundment owner providing water to all the households specified, there are risks to the public health, safety, and welfare, of those households. As many of the “do-not-drink” advisories issued by the Department of Health and Human Services (DHHS) to the households in question were withdrawn by DHHS, including language in the statute that presumes there are risks to the households at this point is questionable.

6. P. 11, line 36: **Addition of the word “potential” before the clause “risks to public, health, safety, and welfare”** see explanation in previous note.

BILL ANALYSIS:

Section 1(a) of the PCS would require that the owner of a coal combustion residuals surface impoundment, as soon as practicable, but no later than October 1, 2017, execute a memorandum of agreement or other binding agreement with DEQ to establish permanent replacement water supplies for each household that has a drinking water supply well located: (i) within one-half mile radius from the established compliance boundary of an impoundment, and is not separated from the impoundment by the mainstem of a river, or other body of water that would prevent the migration of contaminants through groundwater from the impoundment to a well and (ii) in an area in which contamination resulting from constituents associated with the presence of an impoundment is expected to migrate, as demonstrated by groundwater modeling, and hydrogeologic, geologic, and geotechnical investigations of the site. Preference would be given to permanent replacement water supplies by connection to public water supplies, however, the State Water Infrastructure Authority would be given authority to determine, after evaluation of information submitted by an impoundment owner, if connection to a public water supply for a particular household would be cost-prohibitive, and authorize installation of a filtration system instead. If installation of a filtration system were authorized, an impoundment owner would be responsible for ongoing periodic required maintenance of the filtration system.

Section 1(b) would provide that this provision would be effective when the PCS became law, and apply only to households with drinking water supply wells in existence on the date the act became effective

Section 1.1(a) would require an impoundment owner to submit plans to DEQ, no later than December 1, 2016, to make at least 2.5 million tons of coal combustion residuals per year available for beneficial use for addition to concrete; and require the impoundment owner, no later than June 1, 2018, to begin to supply the residuals for beneficial use.

Section 1.1 (b) would provide that this provision would be effective when the PCS became law.

Section 2(a) would make the following changes to the CAMC

- Decrease the number of appointments from 9 to 7.
- Modify the appointments to the CAMC by establishing 7 appointments, 5 to be made by the Governor subject to confirmation by the General Assembly by joint resolution, 1 appointment to be made upon recommendation of the President Pro Tempore of the Senate, and 1 appointment to be made upon recommendation of the Speaker of the House of Representatives. (The membership as originally enacted included a total of 9 members, and provided for 3

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appointments by the Governor, 3 appointments by the President Pro Tempore of the Senate, and 3 appointments by the Speaker of the House of Representatives).

- Modify the CAMC's quorum requirement to provide that 4 members of the CAMC, at least three of whom must be gubernatorial appointees, constitute a quorum for the transaction of business.
- Delete language in the Coal Ash Management Act, which provides that the CAMC is to "exercise all of its powers and duties independently" and is not "subject to the supervision, direction, or control" of the Division of Emergency Management of the Department of Public Safety in which it is administratively located.
- Decrease the duration of membership terms from six years to four years.

Section 2(b) of the PCS would require DEQ to submit a proposed classification for each coal combustion residuals surface impoundment to the CAMC, as reconstituted under the PCS, for the CAMC's approval as soon as legally practicable, but no later than 10 days after all appointments have been made to the CAMC as reconstituted by the PCS. The PCS would then provide the CAMC 120 days to review the proposed classifications and specify that if the CAMC fails to act during that time period, the proposed classifications would be deemed disapproved. If a proposed classification is disapproved through the CAMC's failure to act within the 120 day period, the CAMC may extend the deadline for no more than 120 days if necessary for adequate review of a proposed classification. A right of appeal pursuant to the Administrative Procedure Act concerning a classification would only exist for a final decision made by the CAMC, as evidenced by issuance of a written determination, to include findings in support of its decision to approve or disapprove a classification.

Section 2(c) of the PCS would provide that the Governor must submit nominations for the Governor's initial appointments to the CAMC, as reconstituted by the PCS, no later than 30 days after the date the PCS became law.

Section 2(d) of the PCS would provide that the EMC would assume all powers and duties for review and approval of proposed classifications for all coal combustion residuals surface impoundments and associated closure plans if: (i) upon expiration of the extended public comment period for proposed classifications established by the PCS (August 1, 2016), the CAMC as reconstituted by the PCS has not been appointed; or, (ii) if at any point a court of competent jurisdiction issues a temporary or permanent order enjoining the authority, operation, or activities of the CAMC as reconstituted by the PCS, or issues any other decision or order that prevents the CAMC from carrying out its statutory duties.

Section 2(e) would provide that no classification for any coal combustion residuals surface impoundment, regardless of when such classification was issued, shall be construed to be deemed approved or final, or implemented as such by DEQ, until the CAMC, as reconstituted by the PCS, has approved the classification, or the EMC has approved the classification, as applicable under the provisions of the PCS.

Section 2(f) of the PCS would require DEQ to: (i) extend the period for receipt of public comment on the written declarations for proposed classifications for all coal combustion residuals surface impoundments until August 1, 2016; (ii) consider any comments, information, and data received during this period; and (iii) incorporate any comments, information, and data necessary for issuance of a classification that accurately reflects the level of risk posed by the coal combustion residuals surface impoundment. In addition, the PCS would require DEQ to, no later than September 1, 2016, submit a proposed classification for review and approval to the CAMC, as reconstituted by the PCS or, the Environmental EMC, if applicable pursuant the provisions of the PCS.

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Section 2(g) would address staffing and budget issues of the CAMC, as reconstituted by the PCS, and, in the event the EMC assumes all powers and duties of the CAMC according to the terms of the PCS, would address staffing and budget issues of the EMC.

Section 2(h) would provide that these changes to the CAMC and the Coal Ash Management Act would be effective when the PCS became law.

Section 3(a) of the PCS would:

- Modify the appointments to the Mining Commission by providing, in addition to 2 ex officio positions: 4 appointments to be made by the Governor subject to confirmation by the General Assembly by joint resolution, 1 appointment upon recommendation of the President Pro Tempore of the Senate, and 1 appointment upon recommendation of the Speaker of the House of Representatives. (The membership as originally enacted provided for 2 ex officio positions, 2 appointments by the Governor, 2 appointments by the President Pro Tempore of the Senate, and 2 appointments by the Speaker of the House of Representatives).
- Decrease the duration of membership terms from six years to four years.

Section 3(b) of the PCS would provide that the Governor must submit nominations for the Governor's initial appointments to the Mining Commission, as reconstituted by the PCS, no later than 30 days after the date the PCS became law. Upon failure of the Governor to submit names by December 1, 2016, however, the Lieutenant Governor would be directed to make such appointments.

Section 3(c) would provide that these changes to the Mining Commission would be effective when the PCS became law.

Section 4(a) of the PCS would:

- Modify the appointments to the Oil and Gas Commission by providing: 5 appointments to be made by the Governor subject to confirmation by the General Assembly by joint resolution, 2 appointments upon recommendation of the President Pro Tempore of the Senate, and 2 appointments upon recommendation of the Speaker of the House of Representatives. (The membership as originally enacted provides for 3 appointments by the Governor, 3 appointments by the President Pro Tempore of the Senate, and 3 appointments by the Speaker of the House of Representatives).
- Increase the duration of membership terms from three years to four years.

Section 4(b) of the PCS would provide that the Governor must submit nominations for the Governor's initial appointments to the Oil and Gas Commission, as reconstituted by the PCS, no later than 30 days after the date the PCS became law. Upon failure of the Governor to submit names by December 1, 2016, however, the Lieutenant Governor would be directed to make such appointments.

Section 4(c) would provide that rules set forth in 15A NCAC 05H (Oil and Gas Conservation Rules) are effective until the Oil and Gas Commission, as reconstituted by the PCS, amends or repeals the rules.

Section 4(d) would provide that these changes to the Oil and Gas Commission would be effective when the PCS became law.

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Section 5 would provide that the provisions of the PCS would be severable, and if any phrase, clause, sentence, or provision is declared to be unconstitutional or otherwise invalid, the validity of the remainder of this PCS would not be affected thereby

Section 6 would provide that the PCS would be effective when it became law.

BACKGROUND: In January 2016, the Supreme Court of North Carolina issued a decision in the matter of [*McCrorry v. Berger*](#) (Justice Newby concurring in part and dissenting in part), which involved a challenge to legislation creating the Coal Ash Management Commission, and the Oil and Gas and Mining Commissions (formerly, the Mining and Energy Commission) on the basis that, among other things, the legislative appointments to the Commissions violated several provisions of the State's Constitution, including the separation of powers clause¹ (N.C. Const. Art. III, sec. 5(8)) and the appointments clause² (N.C. Const. Art. 1, sec. 6).

The Court held "while the appointments clause itself places no restrictions on the General Assembly's ability to appoint statutory officers, the challenged provisions violate the separation of powers clause."

EFFECTIVE DATE: The PCS would be effective when it becomes law.

¹ This clause states "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

² This clause states: "The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for."