



SENATE BILL 71: Commission Appointment Modifications.

2015-2016 General Assembly

Committee:

Introduced by: Sen. Lee

Analysis of: Ratified

Date:

August 16, 2016

Prepared by:

Jennifer McGinnis
Staff Attorney

OVERVIEW: *Senate Bill 71 would have: (1) required a coal combustion residuals impoundment owner to provide permanent alternative water supplies for residents in areas surrounding coal combustion residuals surface impoundments; (2) extended the period for public comment and review of proposed risk classifications for coal combustion residuals surface impoundments; and (3) modified appointments to the Coal Ash Management Commission, the Mining Commission, and the Oil and Gas Commission, in accord with the holding of McCrory v. Berger.*

BILL ANALYSIS:

Section 1(a) of the bill would have required 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 the Department of Environmental Quality (DEQ) to establish permanent replacement water supplies for each household that had 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 have provided that this provision would be effective when the bill 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 have required 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.

Karen Cochrane-Brown
Director



Legislative Analysis
Division
919-733-2578

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Section 1.1 (b) would have provided that this provision would have been effective when the bill became law.

Section 2(a) would have made the following changes to the Coal Ash Management Commission (CAMC):

- Decreased the number of appointments from 9 to 7.
- Modified 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 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).
- Modified 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.
- Deleted 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.
- Decreased the duration of membership terms from six years to four years.

Section 2(b) of the bill would have required DEQ to submit a proposed classification for each coal combustion residuals surface impoundment to the CAMC, as reconstituted under the bill, 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 bill. The bill would then have provided 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 was disapproved through the CAMC's failure to act within the 120 day period, the CAMC could have extended 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 have only existed 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 bill would have provided that the Governor must submit nominations for the Governor's initial appointments to the CAMC, as reconstituted by the bill, no later than 30 days after the date the bill became law.

Section 2(d) of the bill would have provided that the Environmental Management Commission (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 bill (August 1, 2016), the CAMC as reconstituted by the bill had not been appointed; or, (ii) if at any point a court of competent jurisdiction issued a temporary or permanent order enjoining the authority, operation, or

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activities of the CAMC as reconstituted by the bill, or issued any other decision or order that prevents the CAMC from carrying out its statutory duties.

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

Section 2(f) of the bill would have required 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 bill would have required DEQ to, no later than September 1, 2016, submit a proposed classification for review and approval to the CAMC, as reconstituted by the bill or, the EMC, if applicable pursuant the provisions of the bill.

Section 2(g) would have addressed staffing and budget issues of the CAMC, as reconstituted by the bill, and, in the event the EMC assumed all powers and duties of the CAMC according to the terms of the bill, would have addressed staffing and budget issues of the EMC.

Section 2(h) would have provided that these changes to the CAMC and the Coal Ash Management Act would have been effective when the bill became law.

Section 3(a) of the bill would have:

- Modified 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).
- Decreased the duration of membership terms from six years to four years.

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

Section 3(c) would have provided that these changes to the Mining Commission would have been effective when the bill became law.

Section 4(a) of the bill would have:

- Modified 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

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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).

- Increased the duration of membership terms from three years to four years.

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

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

Section 4(d) would have provided that these changes to the Oil and Gas Commission would have been effective when the bill became law.

Section 5 would have provided that the provisions of the bill would be severable, and if any phrase, clause, sentence, or provision was declared to be unconstitutional or otherwise invalid, the validity of the remainder of this bill would not have been affected thereby

Section 6 would have provided that the bill would have been effective when it became law.

BACKGROUND: In January 2016, the Supreme Court of North Carolina issued a decision in the matter of [McCrory 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."

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."