

Fact Sheet Re: House Bill 765 Senate PCS - "Regulatory Reform Act of 2015"

- H 765, as passed by the House, was a one-provision bill about transporting gravel. The Senate PCS is a 50-page omnibus regulatory reform bill with many concerning environmental provisions that deserve substantive review and consideration.

Section 1.4: Attorney's Fees

- The provision would require the state to recover "reasonable" attorneys' fees any time it was the prevailing party in a case dealing with environmental impact or the construction of transportation infrastructure. The fees are assessed against the *law firm* representing the parties and can only be avoided if the named parties being represented post a bond for payment of attorney's fees or if the law firm has a contract with its clients allowing such recovery. This provision targets law firms that represent environmental, civic, community, and health organizations.
- While plaintiff groups may be prevented from recovering fees if there are "special circumstances" that would make the award of attorney's fees "unjust" there is no similar provision limiting the state from recovering fees. If the intent is to prevent frivolous lawsuits, then the award of attorney fees should hinge on whether the lawsuit is frivolous. This provision would have a chilling effect, limiting the ability of citizens to ensure enforcement of environmental laws.

Section 4.1: Environmental Self-Audit Privilege and Limited Immunity

- Broadly applied immunity for environmental violations undercuts the effectiveness of penalties and fines as a deterrent to future violations (because the polluter can always avoid the penalty by "confessing").
- Polluters do not need this provision to protect them from having to pay fines and penalties--Enforcement actions for water quality permit violations have dropped from an average of **567** per year under Governors Easley and Perdue to only **268** per year under Governor McCrory. Failure to enforce water quality laws pollutes our waters, harms the public and punishes responsible companies that comply with the law.

Section 4.7: Risk Remediation

- Makes changes to risk-based remediation laws including:
 - Industrial sites where contamination has migrated onto adjacent properties would become eligible for the risk-based cleanup program for the first time, although the bill does require that any off-site contamination has to be remediated to unrestricted use standards (i.e., the groundwater standard);
 - Newly contaminated sites could also become eligible for a risk-based cleanup. The bill removes language in the existing law that limits use of the risk-based program to sites where contamination had been reported to DENR by the time the law went into effect in 2011.

Section 4.9: Brownfields

- Changes the state Brownfields law to adopt some federal definitions from the Superfund law (CERCLA) in place of existing state definitions. The problem is that the federal and state

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definitions are used for different purposes. The state “brownfields redeveloper” definition describes people who *can receive liability protection* for many types of environmental contamination as well as other economic benefits (such as discounted property taxes) by taking on the redevelopment of contaminated property. The bill would replace that term with “bona fide prospective purchaser” which is used in federal law to describe people who *do not have liability* under federal hazardous substance laws/rules.

- The problem: The federal “bona fide prospective purchaser” definition gives liability protection to a person who buys property contaminated by a listed “hazardous substance” after the substance was placed on the site. Thus, this change in our state definition might allow an owner **who actually caused contamination** by something other than a listed “hazardous substance” (petroleum, some constituents of coal ash, etc.) to get liability protection and other benefits under the Brownfields Act just by showing that no federally listed “hazardous substance” has been deposited on the property since he/she owned it.

Section 4.14: Wastewater

- Would allow engineers to essentially self-permit onsite wastewater systems. These are wastewater systems, such as septic systems, currently permitted by local health departments. The engineer would have to give the local health department a notice of intent to construct the system and a final post-construction report, but this bill would make the property owner’s engineer completely responsible for both design and installation of the system.
- This approach seems to be based on the notion that the engineer and soil scientist can be sued by the property owner if things go bad. The problem of course is that systems often don’t fail immediately; failure may come several years later leading to a fight about the cause — bad engineering, bad installation or failure on the part of the property owner to properly maintain the system. There is also the possibility that the system could be initially installed in violation of state rules — too close to the drinking water well on an adjacent property or in inappropriate soils — as there is a provision in the bill allowing the engineer to use wastewater system technology that has not been approved by the State “at the engineer’s discretion”.

Section 4.18: Isolated Wetlands

- This section limits the ability of DENR to protect the state’s water quality and reduce flooding by limiting the scope of state regulated wetlands to only a Basin Wetland or Bog as defined in the NC Wetland Assessment User Manual.
- Many wetlands that appear isolated from surface waters are actually vital components of regional water systems, since they recharge local and regional aquifers. A true test to determine if a wetland is “isolated” would be to verify that there is no connection to groundwater.
- Wetland Facts:
 - A single acre of wetlands can store almost 1 million gallons of water reducing the damage caused by flooding and infiltrating that water into groundwater.
 - Wetlands retain most of the chemicals entering them and serve an important role in water quality, pollution abatement, and the process of cycling of nitrogen, sulfur, methane and carbon dioxide.

- Many of the U.S. bird populations including ducks, geese, and many song-birds feed, nest, and raise their young in wetlands.
- Section 4.18. (c) Limits the amount of mitigation that must be carried out for destruction of state regulated wetlands. This transfers the burden of providing water quality and water quantity from the polluter to the water users- e.g. ratepayers to municipal water utilities or private well owners and septic system users- as the standards for protecting water quality have not changed.

Section 4.19: Coastal Stormwater Requirements

- This section would allow more development to be considered “low density” under the coastal stormwater rules, raising the low density limit from 12% built upon area to 24% built upon area. The bill would also eliminate one of the current triggers for requiring non-residential development to comply with the coastal stormwater rules — addition of 10,000 square feet or more of built upon area. By deleting that trigger, nonresidential and residential development would be treated the same way — the coastal stormwater rules would only apply if the project requires a sedimentation plan (disturbance of 1 acre or more) or a Coastal Area Management Act major development permit.

Section 4.21: Utility Regulation Exemption

- This section exempts any construction of a utility line- such as a gas pipeline or a power line- from state regulation and requires the federal agencies to do the permitting. This would exempt all of these projects from any state water quality requirements or land protection requirements.
- Exemption of construction activities from the Sedimentation and Pollution Control act is problematic, as there is not a clear federal corollary and these projects can have a large cumulative impact.
- This could be an attempt to insulate municipalities w/ outdated sewage infrastructure from liability for sewage spills caused by inadequate maintenance of their wastewater collection systems, as it might be used to invalidate collection system permits

Section 4.24: Idling Rules

- This section would repeal heavy-duty vehicle idling restrictions, which will be extremely detrimental to air quality.

Section 4.25: Air Monitors

- Requires the Div. of Air Quality to remove air quality monitors not required by EPA. The provision would significantly reduce the number of state monitors used to assess air quality and demonstrate compliance with federal ambient air quality standards. DENR has opposed this in the past; additional monitors have actually helped the state demonstrate attainment of air quality standards and limit the size of non-attainment areas in the past.
- This is a repeat of the General Assembly’s failed attempt in 2014 to shut down approximately half of the air quality monitors in North Carolina. This provision failed in 2014 for good reason: it would eliminate much of the monitoring of dangerous air pollution that North Carolinians breathe, causing premature death and worsening many serious illnesses like asthma in children.

- Without these monitors, the public and the N.C. Division of Air Quality will be kept in the dark about increases in pollution, which is especially concerning since many of these monitors are located in areas with historically poor air quality.
- There is no evidence of a safe level of exposure for many of the monitored pollutants, such as ozone and fine particle pollution.

Section 4.30: Linear Stream Impacts

- Section (a) seems to prevent DENR from requiring minimum federal mitigation requirements on a state 401 certification if the project impacts less than 300 feet of a stream unless DENR first does an individual assessment of impacts on stream ecology. This seems odd, as the Army Corps of Engineers would require the minimum level of mitigation to acquire a federal 404 permit anyway.
- Part 2 of Section (a) arbitrarily limits mitigation to a 1:1 ratio as opposed to requiring actual functional replacement of the impacted stream. (Natural systems have been found to provide better habitat, more pollution removal, and greater water quantity reliability than man-made systems- especially in the near term- so generally more than a 1:1 ratio is needed to replace function.)

Section 4.37: Water Pollution Waivers: Stormwater & Buffers

- This section limits the flexibility that local communities have to protect their water quality by mandating that the state minimum for stormwater management is all a community can do even if they were protecting their own water supply. Section 4.37 (d) requires all existing programs to be reviewed and updated to limit them to the state minimum standard.
- This section would allow **unlimited development** (such as a pool, a fence, a driveway, etc.) in a buffer as long as the project complies with state stormwater rules. Basically, eliminates the buffer.
- Buffers are reduced by measuring the buffer from the center line of an intermittent stream rather than the edge of stream flow.