

# 9

## Environment and Natural Resources

---

The 2004 session produced significant environmental legislation, including an act requiring a license for coastal recreational fishing and an act authorizing innovative debt financing of protected open space. A controversial bill intended to help implement federal Phase II stormwater requirements was also enacted.

### **Agriculture**

#### **Nutrient Management for Feedlots**

S.L. 2004-176 (H 1112), Phosphorous Nutrient Management/Animal Feedlots, changes the definition of *animal operation* in the state water quality statutes to separate permit requirements for operations with liquid animal waste management systems from the requirements for dry litter operations. The act also adds phosphorus as a nutrient that may be the rate-limiting nutrient (as opposed to nitrogen) for nutrient management plans.

#### **Duties and Qualifications of Technical Specialists**

Section 12.7C of the appropriations act [S.L. 2004-124 (H 1414)] purports to prohibit, until July 1, 2006, any change in the “requirements and qualifications” for animal waste management systems technical specialists or any changes in the activities they are authorized to carry out. This special provision appears to target a pending decision of the Board of Professional Engineers on whether animal waste technical specialists are engaged in the practice of engineering.

#### **Raw Milk Sharing**

Section 6.2 of S.L. 2004-195 (S 823), the environmental technical corrections bill, makes technical corrections to several environmental laws and also prohibits cooperatives and bartering to share raw milk.

## Coastal Resources

### Coastal Recreational Fishing License/Saltwater Fishing Fund

In 1994, the “Year of the Coast,” various interests began calling for a bill requiring licensure for coastal recreational fishing. In light of this and of the declining commercial fishing industry and the widespread adoption of recreational licensing elsewhere along the Atlantic seaboard, the legislature began, in 1996, to consider such a bill. Since that time the ensuing stream of annual bills exempted or otherwise mollified the casual weekly visitor to the coast who wanted to drop a line off a pier for an afternoon, so that eventually the only interest groups who seriously objected to the bill were, ironically, the commercial fishermen, who genuinely feared the increased power recreational anglers would have once recreational license fees began supporting marine fisheries. Yet year after year, the opposition from commercial fishers was enough to stop the bill in the Senate. In the 2004 session, a coastal recreational license bill finally emerged from the Senate, in the form of a drastic markup to H 831, and passed as S.L. 2004-187. The new law contains many complex and contradictory provisions, leaving its proponents somewhat split in the degree and direction of their support. Nonetheless, it enacts a license requirement effective January 1, 2006 (thus allowing one more year of legislative tweaking to the controversial aspects of the bill—that is, the money provisions). The act establishes a Saltwater Fishing Fund to receive income from the fees for the new recreational licenses. Investment income on the fund’s corpus would be controlled and distributed by a nine-member board of trustees, appointed by the Governor, the President Pro Tempore of the Senate, and the Speaker of the House. Funds can be granted to state agencies, local governments, and nonprofit organizations for a broad but politically astute set of purposes, including the following:

- Resource and habitat enhancement, restoration and enhancement of submerged aquatic vegetation, and creation and restoration of oyster habitat
- Grants to fund fisheries management research
- Acquisition of land for fishery habitat enhancement
- Purchase or construction of public beach access areas and public marinas
- Emergency dredging for the restoration of access to public fishing areas
- Establishment of scholarships for individuals pursuing degrees in marine science
- The board’s administrative and operating expenses

The act prohibits use of the fund for law enforcement purposes. The license itself would cost \$15 annually, with a seven-day license costing \$1. Lifetime licenses will also be made available. Persons under eighteen years of age are exempt from the license requirements. The legislature appropriated \$450,000 to the Division of Marine Fisheries and \$300,000 to the board of trustees as start-up money for the licensing program. Those funds must be repaid from license revenues within eight years.

### New Urban Waterfront Development

S.L. 2004-117 (S 732), masquerading as a pilot project, is actually a legislative override of Coastal Resources Commission (CRC) rules to allow a “new urban” waterfront development for a particular project in Chowan County. The CRC only began allowing coastal waterfront development that was not “water dependent” to be built next to the water in the late 1990s, and, through rules and limitations in recent enabling legislation, had restricted such development to historic waterfronts that had previously been used for non-water-dependent purposes (examples of such development include the restaurants along Chandler’s Wharf in Wilmington and hotels and businesses on the old waterfront in New Bern). S.L. 2004-117 further widens the crack in what was once an ironclad CRC policy against building urban structures directly on the waterfront.

### **Fort Fisher Beach Access**

Section 12.3 of the appropriations act attempts to resolve a controversy concerning nighttime access to the beach at Fort Fisher in New Hanover County. It directs Department of Environment and Natural Resources (DENR) and UNC Wilmington scientists to study the likely effects of night access to the beach on the local economy, endangered sea turtles, and nesting birds. The researchers must report their recommendations to the General Assembly by February 1, 2005. The special provision also allows night access from September 15 to April 15 for people who purchase a permit; the terms of and fee for the permit will be determined based on the study.

### **Beach Engineering**

Section 30.12 of the appropriations act requires the Joint Legislative Transportation Oversight Committee to consider creating a state dredging program that uses dredge spoils for beach engineering.

## **Enforcement**

Two interesting bills dealing with environmental enforcement were introduced in 2004, but both failed. House Bill 868, "Improve Environmental Enforcement," would have raised maximum fines for environmental violations and removed the cap on the portion of fines that could be retained by DENR to cover enforcement costs. This cap was necessitated by constitutional litigation brought by the Craven County Board of Education, which had successfully diverted the bulk of proceeds from environmental enforcement efforts to local schools.

House Bill 1393, "Federal Enforcement by Marine Inspectors," would have authorized the Division of Marine Fisheries to contract with the National Marine Fisheries Service to enforce federal fishing laws in state waters.

## **Environmental Finance**

### **Budget**

The budget increases DENR funding for the last year of the biennium by slightly over \$1 million. Special provisions in the budget

- earmark \$500,000 to the Museum of Natural Sciences for the development of a plan to expand the museum, contingent on the museum raising private matching funds;
- require the Wildlife Resources Commission (WRC) to "segregate revenue affected by the requirements or conditions of federal law from revenue that is not affected by the requirements or conditions of federal law";
- excuse the WRC from paying fees when it handles certain recycled materials;
- direct the WRC to make a one-time payment in lieu of taxes of \$37,500 to Swain County for the loss of future property tax revenue as a result of having had the Needmore Tract put into conservation status;
- transfer funds remaining in the Partnership for the Sounds for the Pamlico County education initiative to Pamlico County;
- earmark \$5 million for projects approved in April 2004 by the State Energy Council (affiliated with the State Energy Office in the Department of Administration) and \$1 million to the council for weatherization assistance;
- earmark \$15 million for stormwater controls on existing DOT facilities along the entire coast and \$26.5 million for twenty-two water resources development projects;
- authorize DENR to transfer \$6.9 million from the General Water Supply Revolving Loan Account and \$776,000 from the Industrial Development Fund to match federal Safe Drinking Water Act funds;

- authorize the Division of Waste Management in DENR to use up to \$50,000 of its appropriation to monitor and conduct emergency cleanup at the Texfi contaminated site in Fayetteville; and
- specify that unspent funds appropriated in 2003 for the Oregon Inlet Project will not revert to the General Fund but will be transferred to the accounts of the N.C. Seafood Industrial Park Authority to be spent on maintenance dredging of Oregon Inlet.

### **Express and One-Stop Permitting**

The appropriations act revises DENR's one-stop permitting program to require automatic issuance of a permit if the agency misses a permit deadline by more than sixty days. It also expands DENR's express permitting program (faster processing for applicants who pay more) to two more regional offices to be chosen by the agency.

### **Dedicated Funds**

The 2004 budget act appropriates \$62 million to the Clean Water Management Trust Fund (CWMTF), the same amount provided in the 2003 biennial budget. Section 6.31 of the act authorizes the CWMTF to use up to \$4.1 million for farmland preservation projects, and directs the Department of Agriculture to prepare a master plan for farmland preservation in North Carolina. The Farmland Preservation Fund itself received no appropriation. For a discussion of the new Saltwater Fishing Fund, see "Coastal Resources," above.

### **Certificates of Participation**

S.L. 2004-179 (H 1264), "Finance Vital Projects/Studies," authorizes the state to use certificates of participation, or "special indebtedness," for a variety of projects, including conservation land acquisition. This form of borrowing gives a substantial degree of state backing to project financing without requiring voter approval. Authority for land conservation expenditures from the Clean Water Management Trust Fund, the Natural Heritage Trust Fund, and the Parks and Recreation Trust Fund is capped at a collective \$45 million. The projects will include acquisition of land around military bases and the creation of a new public park on Lake James in the upper Catawba basin.

### **Payments in Lieu of Taxation**

S.L. 2004-188 (S 933) requires that before a state agency or local government can acquire land in a tier one or two county for wetland mitigation, it must pay the county government twenty times the land's annual property tax liability.

### **Present-Use Value Taxation**

S.L. 2004-8 (H 1465) allows farmland owned by a family business to retain present-use value tax status even when the land is leased to another farmer.

### **Tax Credits**

S.L. 2004-243 (H 1602) postpones from 2005 to 2006 the sunset on limits for tax credits for donations of property interests by partnerships.

S.L. 2004-153 (H 1636) provides a tax credit for purchasing, dispensing, or processing renewable fuels, defined as biodiesel from animal or plant materials.

Senate Bill 848 would have created generous tax credits for donations to a proposed new hybrid/alternative fuel vehicle research facility in Northampton County, but the bill did not pass.

## **Contaminated Property Cleanup**

### **Underground Storage Tanks**

The state continues to struggle with its public funding program for leaking underground storage tanks; the fund has become the financial tail that wags the cleanup dog, and in recent years the tail has barely been wagging. Section 30.10 of the appropriations act provides an additional one-time appropriation to the fund and also makes substantive changes in how the fund can be used. The supplementary appropriation comes from the motor fuels tax and is ultimately expected to provide an additional \$32 million to the Commercial and Noncommercial Leaking Tank Funds and the Water and Air Quality Account by the end of fiscal 2004–2005. Money is also independently appropriated to create an additional accounting position that will handle claims on the funds and to cover the legislative pay increase for fund personnel. Substantive changes to the program affect pre-approvals of cleanups that ultimately will be subsidized in part from the public funds. Pre-approvals (which are now required for certain cleanups to go forward) are prohibited unless DENR has the funds available to pay resulting claims within ninety days of claim approval (which is currently impossible, in light of fund insolvency). Exceptions are possible if the responsible party requests pre-approval so that cleanup work can proceed or if some emergency exists that presents an imminent threat to human health or the environment. The provision also authorizes and requires both rule-making and departmental pronouncements outside the rule-making process on which cleanup activities require pre-approval and what level of costs the funds will cover. DENR is directed to give priority in its reimbursements to higher risk sites, “risk” being specified as to both human health and the environment.

The special provision also directs the Environmental Review Commission and the General Assembly’s Joint Legislative Transportation Oversight Committee to study and report by January 2005 on the role of the state and the funds vis-à-vis cleanup needs, the adequacy of revenue for the trust funds, privatization of trust fund administration, the state’s role in the cleanup of orphan underground storage tank (UST) sites, and whether existing UST rules and related enforcement are adequate to prevent future releases from USTs.

### **Dry Cleaning Solvent Cleanup**

S.L. 2004-48 (S 1219) increases the amount of money from the Dry Cleaning Solvent Cleanup Fund that can be used to pay for assessment or remediation of dry cleaning solvent contamination from 10 to 25 percent of revenues credited to the fund in a given fiscal year.

## **Marine Fisheries**

### **Shellfish Leases**

S.L. 2004-150 (H 1427) establishes training requirements for new shellfish cultivation lease applicants and increases permit and rental fees. Section 12.7B of the appropriations act creates a program for “under dock” oyster culture, including permitting, training, and reporting requirements.

### **Fishery Management Plans**

S.L. 2004-160 (H 1429) changes the goal for fisheries management from “optimal yield” to “sustainable harvest” and sets a time frame of ten years for rebuilding overfished stocks.

## **State Parks, Natural Areas, and Land Conservation**

### **Changes to the State Parks**

S.L. 2004-24 (H 1574) adds the Lower Haw River State Natural Area to the state parks system and directs DENR to study the feasibility of establishing a state recreation area at Blewett Falls Lake, on the border between Anson and Richmond Counties. S.L. 2004-25 (H 1607) removes a small portion of land in the Hemlock Bluffs State Park from the State Nature and Historic Preserve and State Parks System for a right-of-way to widen Kildaire Farm Road in Cary. The bill also transfers the Horne Creek Living Historical Farm near Pilot Mountain from the parks system to the Department of Cultural Resources.

### **Local Open Space Preservation**

S.L. 2004-119 (H 1547) allows the Town of Chapel Hill to purchase land outside its jurisdiction to preserve as open space. For a period, the bill also authorized the town to create a system for transfer of development rights, a local authority previously sought by the Town of Huntersville and rejected. The language for Chapel Hill, passed by the House but not the Senate, was removed in conference.

### **Game Lands**

Section 19.8 of the appropriations act transfers the 1,094-acre Light Ground Pocosin property in Pamlico County from the Department of Administration to the WRC for management as a game land.

## **Water**

### **Stormwater**

The current major frontier in water pollution control, after the regulation of point source dischargers that began in earnest with the Federal Water Pollution Control Act of 1972, is reducing pollution from “nonpoint” sources, primarily the problems that occur whenever it rains and the resulting runoff carries pollutants from streets, roofs, and yards directly into streams. In 1990 the U.S. Environmental Protection Agency (EPA) published rules for stormwater management for cities with a population of over 100,000; this was Phase I of the federal stormwater control effort. In 1999 EPA finalized rules for Phase II stormwater controls, which apply to a far greater number of places—generally, to places defined by the Census Bureau as “urbanized areas” and to smaller construction sites. Like most federal environmental programs, the federal Phase II stormwater rule gives states the option of implementing the program themselves, rather than having EPA attempt to regulate localities directly. North Carolina has been trying to establish its state Phase II program since 1999. But despite serious efforts, including various facilitated stakeholder processes, North Carolina lags behind most other states and missed the key deadline under the federal rule for having permits issued to owners of “municipal separate stormwater systems” (the various devices, such as curb and gutter systems, for channeling stormwater to streams). In part, the problem is the almost unique way in which North Carolina maintains ownership of its roads—at the state rather than the county level, differing from most other states. This means that North Carolina counties, unlike those in most other states, are often not “owners of municipal separate stormwater systems” and are thus not subject to the federal rule, as it was promulgated. This has created difficult questions for North Carolina—namely, who will regulate stormwater in urbanized areas outside of designated Phase II cities, and how will that regulation occur? To make matters more complicated, the Environmental Management Commission (EMC) passed both a temporary and a final rule creating a system for such regulation, but the Rules

Review Commission objected to the final rule. The two commissions, along with an environmental group, are now in litigation over the rule; meanwhile, the cities that are certainly subject to the Phase II federal rule, in addition to developers who are developing in urbanized areas, risk EPA and citizen enforcement actions for proceeding without the stormwater permit and controls required under the federal rule.

S.L. 2004-163 (S 1210) was the legislature's effort to clear up some of this turbid situation. It primarily makes the EMC's temporary rule the basis for a Phase II program in North Carolina, adding some administratively complex arrangements for development in urbanized areas outside the 123 municipalities now designated as Phase II communities. The act also establishes designation and petition procedures to bring additional communities under the program no sooner than 2010. In addition, new developments in the unincorporated areas surrounding designated Phase II municipalities must meet stormwater management requirements if they are located in a federally defined "urbanized area" or within the potential extraterritorial jurisdiction (ETJ) of a Phase II municipality (the ETJ is the area outside the city limits in which the city may exercise planning and zoning authority). A city's potential ETJ extends 1–3 miles beyond its boundaries (depending on the population of the city). If the municipality is not actually exercising its planning and zoning authority throughout the entire area, then DENR is supposed to implement stormwater management requirements in any areas not regulated by the municipality. Counties may request delegation from DENR and implement the stormwater program themselves in unincorporated areas regulated under the bill. Furthermore, if the combination of area covered by Phase II municipalities, the potential extraterritorial jurisdiction around those municipalities, and other urbanized areas totals at least 85 percent of the county, then stormwater requirements apply to any new development in the entire county. As additional cities come into the Phase II program through state designation, the EMC may require stormwater controls in unincorporated areas surrounding those cities.

Other stormwater legislation includes Section 6.29(a) of the appropriations act, providing that retail merchants may not pave more than four hundred square feet of surface for a nursery display area unless they control stormwater runoff. Another budget special provision directs the Department of Transportation to use \$15 million of its funds to clean up state-maintained stormwater pipes that discharge into the ocean.

### **Drinking Water**

S.L. 2004-143 (H 1083) attempts to resolve a lingering controversy over the responsibilities of landlords who submeter and charge tenants for providing water or sewer service in apartment complexes and other multifamily housing units. Such landlords who have knowledge of contamination must notify tenants of any violations of water quality standards. The act also clarifies the responsibility of the supplying water system and the landlord for water quality problems occurring within the residential water system.

### **Wastewater**

S.L. 2004-140 (S 1202) provides for ten-foot setbacks between septic systems in certain types of sandy soils. Current state rules require a distance of twenty feet between septic systems. The act applies only to lots platted before July 1, 1977. The act also authorizes the Commission on Health Services to adopt rules that incorporate the provisions of the bill.

### **Water Resources**

S.L. 2004-83 (S 859) establishes a Catawba/Wateree River Basin Advisory Commission and a Yadkin/PeeDee River Basin Advisory Commission, with representation from both North Carolina and South Carolina. The purpose of each commission is to lead discussions about the use, stewardship, and management of the respective river basins.

*Richard Whisnant*

