

Environmental Management Commission
Water Allocation Committee
Minutes

January 9, 2019
9:00 a.m.

On January 9, 2019, the Water Allocation Committee or WAC met in the Ground Floor Hearing Room at the Archdale Building in Raleigh, North Carolina.

WAC Members in Attendance:

Dr. Suzanne Lazorick (WAC Chairwoman)
David Anderson (WAC Vice-Chair)
Shannon Arata
Charlie Carter
Mitch Gillespie
Bill Puette
JD Solomon (EMC Chairman)

Others Present:

Marion Deerhake
Dr. Stan Meiburg
George Pettus
Dr. Albert Rubin
Philip Reynolds, Attorney General's office

I. Preliminary Matters:

In accordance with North Carolina General Statute §138A-15, Chairwoman Lazorick asked if any WAC member knew of a known conflict of interest or appearance of conflict with respect to items on the January 9, 2019 WAC agenda; none of the committee members identified a conflict. Chairwoman Lazorick asked if there were any comments or corrections regarding the minutes from the October 9, 2018 meeting. There were no comments and the October 9, 2018 minutes were unanimously approved.

II. Information Items:

**A. Water Law and Water Rights in North Carolina
(Richard Whisnant, UNC School of Government)**

Water resources planning requires consideration at the regional as well as local scale. River basins are viewed at a regional scale and in many cases are shared with neighboring states. Problems that North Carolina faces regarding water resources are often similar to problems faced by other states. Though the state's river basins share commonalities, each river basin also has its own unique challenges and issues.

Comprehensive water planning needs to consider groundwater, which requires an understanding of the underlying geology, how the groundwater flows, and appreciating the differences in groundwater movement between the coastal plain and mountains, given the differences in geology.

Our region's big water challenge is driven by the population growth in areas lacking adequate water storage. Often the areas of greatest growth are situated in the headwaters of river systems so therefore there is not much opportunity for water storage. Many of the major cities in Europe are located along the coast. North Carolina's major cities are located inland, largely in the piedmont which receives good precipitation but has small headwater streams. Building shallow reservoirs in these areas leads to severe nutrient over-enrichment problems, algal growth and other water quality concerns. Growth without adequate water storage results in high susceptibility to drought and a predicted escalation in conflict over water. North Carolina needs laws and policy in place to deal with those conflicts.

What is regulated in North Carolina? North Carolina is one of the most unregulated states in the country regarding water extraction; we are one of only two states (Alabama is the other) that don't require a permit to withdraw surface water. One must go to court in order to stop a surface water withdrawal. After brief discussion, the committee requested staff clarification and input. Tom Fransen stated that a capacity use area has the ability to regulate water extraction at 100,000 gallons per day. A capacity use area may be applied to surface or groundwater. At this time, North Carolina has only applied this regulation in one case to the Central Coastal Plain Capacity Use Area (CCPCUA) in order to regulate groundwater extraction. In North Carolina, interbasin transfers (IBT) only apply to surface water and regulate the movement of water between river basins that exceed 2 million gallons per day. One does not need a permit to use a temporary pipe in order to extract surface water; however, a 401/404 permit is required for a permanent intake structure to extract surface water.

North Carolina is regulated by courts and the principle of ancient riparian rights. "Pure" riparian rights, which originated during the Roman Empire, failed long ago. This ideal was altered when early settlers build mills, which required building a dam on a waterway and moving water from its natural course. Mr. Whisnant also briefly discussed the doctrine of reasonable use, in which a landowner whose property is adjacent to a body of water has the right to make reasonable use of the water as it flows through their property. Capacity use areas are an example of altering common law. However, in the case of the CCPCUA, implementing this regulation has resulted in successfully recharging and raising groundwater levels in the affected coastal counties. When it comes to water, there is no such thing as a "free market." The state has struggled with water and property rights. An elaborate government system is needed to adjudicate water claims and regulate water; more government (not less) is needed in order to regulate water. The CCPCUA legislation allowed North Carolina to be classified as a "regulated riparian system" but doesn't allow the state to regulate in times of scarcity.

North Carolina is one of the most regulated states in the country when it comes to interbasin transfers (IBT). Geography and historical development has led to many IBTs in North Carolina (with towns and cities originating and growing along ridgelines where the landscape is high and dry, but where distributing water to the town's service area across the ridgeline serves to transfer water from one river basin to another). North Carolina has chosen to be more stringent on regulating IBTs and less stringent on water extraction. Mr. Whisnant briefly cited the example of the Seven Cities project from the 1950s. That proposed project reflected the roots of the IBT approach and the death of a central planning approach. The project, ultimately rejected, proposed an intake on the Yadkin River, with water pumped to a central reservoir to supply seven major cities in the Triad. The plan was rejected because downstream users on the Yadkin opposed the large water withdrawals that would have resulted from implementation of the plan.

North Carolina does not have a strong history of state-level water planning. The state has typically relied on local water supply or watershed plans, which are then pulled together, rather than crafting a comprehensive plan on a statewide scale. Good plans are driven from the local level to meet federal, regional, or state needs; however, the local scale often doesn't fit the scale of larger water problems that need to be addressed.

There are a number of strengths to North Carolina's water regulation. The goal of integrating water resources and water quality along with surface water and groundwater is a good approach. The state has also accomplished much of its planning and regulation on the cheap compared to other states, which is fine as long as North Carolina has enough water and there are no major water quality problems. Additionally, there are many models for regional water cooperation to tackle common water resources challenges.

Along with strengths, there are also weaknesses to North Carolina's approach to water regulation. The state's regulatory system evolved without concern for water scarcity. Therefore, there are questionable priorities in shortages such as the farm versus city issue (the question of the rights of cities to pump water from a river for the water supply of a city, thereby removing the water from a direct riparian use). As mentioned earlier, the state's lack of regulations on water extraction enables uncontrolled surface water extraction. A landowner has no power to prevent an upstream neighbor from pumping water out of a river. The state's hydrologic modeling of river basins is still somewhat crude and incomplete. Regional and interstate water cooperation still has a long way to grow. More time and dedicated resources are needed to support those efforts. Additionally, North Carolina has a resilience problem. This was particularly apparent in the 2007 drought when every place in the state received at least 35 inches of rain, more than many parts of the country receive in an average year, but many of the state's water systems suffered from extreme drought and severe water shortages.

Mr. Whisnant identified a number of opportunities for the state's water resources. Water is a rare nonpartisan environmental issue (i.e., we all need water). Business interests and basic human needs might transcend other policy divisions. Though water prices have gradually been rising, they are still very low when considering the total cost of providing potable tap water. Fortunately, there is a rising recognition of water as a key

environmental and economic asset. In addition to opportunities, a number of threats to improving North Carolina water resources were also identified. Complacency among major water users, deferred maintenance, and poor citizen and cultural understanding of threats to our water resources are some human-related threats. Additional threats include nutrient over-enrichment, particularly in reservoirs, and emerging contaminants.

When considering the right scale to tackle long-term water concerns, Mr. Whisnant referenced the 2008 Water Allocation Study which he co-authored with Bill Holman, in which a recommendation was made to direct more resources and power behind river basin scaled planning organizations, especially where water scarcity is expected in the next 50-75 years.

Mr. Carter asked a question about litigation between the state of North Carolina and Virginia Beach regarding an IBT. Mr. Whisnant stated that the dispute was in part generated by a political stance. The Roanoke River Basin Bi-State Commission was put in place after that legal fight. Mr. Carter asked specifically why Virginia Beach looked to the Roanoke River for their water supply rather than the James River or other Virginia rivers that would not have prompted an inter-state legal battle. Mr. Whisnant replied that he was unsure but speculated that it could have involved concerns over water quality.

Dr. Rubin asked a question concerning groundwater withdrawal and who owns extracted groundwater. Mr. Whisnant replied that once water is “captured” or pumped from underground, the water belongs to whoever pumped it. He also stated that the CCPCUA rules have helped address over-pumping issues in a region of the state’s coastal plain.

Dr. Meiburg observed that having a forum to come together and discuss issues at a higher level helps government be more effective, referring to inter and intra-state commissions. He then asked what the EMC can do to help strengthen such interstate commissions? Mr. Whisnant stated that having staff come together to better understand one another’s systems is helpful. He also stated that going to court doesn’t necessarily end a relationship (as was the case with the legal fight between North Carolina and Virginia); a strong relationship will allow the parties to keep coming back together to work on common issues.

Mr. Gillespie agreed with the assessment that North Carolina’s IBT law is strict and also agreed that the state has conducted water planning on the cheap. He said that he is interested in looking at the policy regarding water rates. Mr. Gillespie stated that he believes consumers should pay a fair price for water and supports increasing rates. He believes that the NC Department of Commerce should look at water supply availability before recruiting industry to the Triangle. Instead, emphasis should be placed on recruiting industry to other water-rich parts of the state. He also believes that the EMC should look at IBT requirements. With 17 river basins and 38 IBT basins defined in statute, Mr. Gillespie questioned whether the same IBT law should apply to the IBT basins if the transferred water remains within the same river basin. He suggested that the WAC could review the IBT statute and make incremental changes to the law.

Mr. Solomon observed that regional river basin councils are complicated, in part due to determining who should serve on them as well as the fact that drought management districts are different from water supply districts.

III. Concluding Remarks:

Chairwoman Lazorick asked if there was anything else that needed to be discussed or if there were other comments. There were no additional comments by the committee members or staff. The meeting was adjourned.