

# The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation

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## INTRODUCTION

In 1967, North Carolina entered an era of prolific environmental law-making. By 1975, forty-two new environmental statutes and one constitutional amendment (the “Environmental Bill of Rights”) had

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been enacted.<sup>1</sup> The statutes included the Environmental Policy Act; modernized water resources management, air and water pollution control, and pesticide control laws; sedimentation pollution control and oil pollution control laws; coastal area management and estuarine protection laws; a surface mining act; scenic rivers, nature and historic protection, and trails laws; increased state parks funding, and a Clean Water Bonds Act.<sup>2</sup>

From 1975 to 1985 another seventeen new environmental laws were added.<sup>3</sup> These included modernized solid and hazardous waste and septic tank laws; a hazardous chemicals right-to-know act, a safe drinking water law; an endangered plant law; nature reserves, archaeological protection and coastal submerged lands laws; and a mountain ridge protection act.<sup>4</sup> A strong and innovative state role in environmental protection legislation would continue into the twenty-first century.<sup>5</sup>

Two new policy themes characterize this modern environmental legislation and contrast it with the policies of the conservation era that preceded it:

- A greater emphasis on *protecting and preserving* natural resources than on the *development and use* policies of the conservation era.
- An emphasis on *stopping* pollution rather than merely *assimilating wastes* (a goal of previous pollution legislation).<sup>6</sup>

These new policy themes are reflected in the regulatory and management legislation itself but also in an extensive body of statutory policy declarations, findings and preambles.<sup>7</sup> Judicial interpretation has begun to flesh out the meaning of these policy declarations and their legal consequences.

This essay is a sequel to a *North Carolina Law Review* article describing the environmental legislation of 1967-1983.<sup>8</sup> It will trace the evolution and legislative history of modern environmental policy declarations and their interaction with earlier conservation policy declarations. It will also examine two topics that illustrate the evolution of environmental policy through legislation on subjects that are impor-

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1. Milton S. Heath, Jr. & Alex Hess, III, *The Governors' Leadership Role in Developing Modern North Carolina Environmental Law*, 84 N.C. L. REV. 2031, 2058-61 (Tables 1-6); see also Appendix A in the current article.

2. *Id.*

3. *Id.* at 2061-63 (Tables 7-8).

4. *Id.*

5. *Id.* at 2033.

6. *Id.* at 2035.

7. This essay will sometimes refer to them, collectively, as "preambles" or "policy declarations."

8. Heath & Hess, *supra* note 1, at 2031, 2031-65.

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tant elements of environmental law: interbasin transfers of water and intergovernmental pollution control law (the “Hardison Amendments”). These two topics were selected to illustrate policy developments reflected in the legislation itself rather than in policy declarations because each of them has had significant legal and political consequences.<sup>9</sup>

Out of this examination of environmental and conservation policy will emerge a theory concerning the potential range of legal consequences of environmental policy declarations. For convenience, this essay is organized into the three subjects listed in the Table of Contents.

## I. THE ENVIRONMENTAL ERA

On April 8, 1971, Governor Robert Scott sent the General Assembly an environmental message that laid out a road map for environmental policy in North Carolina.<sup>10</sup> The message and a package of accompanying bills touched on the major environmental issues of the day – environmental policy; water and air resources management and pollution control; preservation of natural and scenic rivers; coastal and estuarine resources management; oil spill, pesticide, sedimentation and surface mining control; and protection of the visual environment. The overriding policy endorsed by Governor Scott was reflected in his “realization that population growth, economic development, and technological changes often work to the detriment of our physical environment.”<sup>11</sup> Our task”, he concluded, “is that of blending the enhancement of our physical environment with the enhancement of our economic and social well-being.”<sup>12</sup>

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9. The Hardison Amendments barred an expansion of North Carolina environmental policy for two decades. This plainly had both legal and political consequences. Interbasin transfer policy in North Carolina has energized political leaders to stake out positions that obviously matter to their constituents. This is the case whether those positions align political leaders with one segment or another of their communities, or seek an acceptable compromise on divisive issues. The legal consequences of interbasin transfer policy at one time involved legislated prohibitions. They have lately evolved to dependence on expansive contested administrative law proceedings in search of elusive answers that are difficult to reach. *See infra* notes 81-83.

10. Robert Scott, Governor of N.C., Environmental Message (April 8, 1971), in ADDRESSES AND PUBLIC PAPERS OF ROBERT WALTER SCOTT, GOVERNOR OF NORTH CAROLINA, 1969-1973, at 71 (Memory F. Mitchell ed., 1974).

11. *Id.* at 72.

12. *Id.*

Governor Scott's message was both timely and persuasive. The General Assembly shared Scott's view that "we have witnessed a ground swell of public concern for the environment."<sup>13</sup> Within three years the Assembly enacted virtually the entire Scott legislative package and a proposed constitutional amendment concerning the environment, the "Environmental Bill of Rights."<sup>14</sup>

The next section of this essay will examine the Environmental Bill of Rights<sup>15</sup> along with the policy statements of the North Carolina Environmental Policy Act (SEPA)<sup>16</sup> and the Hardison Amendments.<sup>17</sup> The policies expressed in the Environmental Bill of Rights and SEPA reflect the fundamental direction of North Carolina environmental policy for the next two decades. That fundamental direction was temporarily modified in the area of intergovernmental relations by the Hardison Amendments.

#### A. ENVIRONMENTAL POLICY DECLARATIONS

##### The Environmental Bill of Rights

Article XIV, Section 5 of the North Carolina Constitution embodies a fundamental constitutional starting point for environmental policy in North Carolina.<sup>18</sup> This constitutional provision is popularly known as the Environmental Bill of Rights.<sup>19</sup> Its first paragraph reads as follows:

*It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.*<sup>20</sup>

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13. *Id.* at 71-72.

14. Heath & Hess, *supra* note 1, at 2032, 2036-38, 2046, 2052.

15. N.C. CONST. art. XIV, § 5

16. North Carolina Environmental Policy Act of 1971, ch. 1203, 1971 N.C. Sess. Laws 1763 (codified as amended at N.C. GEN. STAT. §§ 113A-1 TO -13 (2005 & Interim Supp. 2006)). The acronym SEPA is commonly used to distinguish state environmental policy acts from NEPA, the National Environmental Policy Act. 42 U.S.C. §§ 4321-4370f (2000).

17. *See supra* note 9; *See infra* notes 81-83.

18. N.C. CONST. art. XIV, § 5

19. John L. Sanders, *Proposed Amendments*, POPULAR GOV'T, Sept. 1971, at 14, 14.

20. N.C. CONST. art. XIV, § 5, para. 1 (emphasis supplied).

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It is worth emphasizing that the constitutional provision begins with the words, "It shall be the policy."

The second paragraph of the Environmental Bill of Rights provides that, "[t]o accomplish the aforementioned public purposes," local and state governments may acquire properties that will constitute a "State Nature and Historic Preserve."<sup>21</sup> These properties are not to be used for other purposes without a vote of three-fifths of the members of the General Assembly.<sup>22</sup>

The late Senator Hargrove "Skipper" Bowles introduced and championed a bill embodying the Environmental Bill of Rights, which was enacted on June 21, 1971.<sup>23</sup> The bill as introduced was drafted at Senator Bowles' request by University of North Carolina Law School Professor Thomas Schoenbaum. The voters of the state approved the proposed constitutional amendment in the general election on November 7, 1972.<sup>24</sup>

John L. Sanders, a constitutional scholar and former director of the Institute of Government, summarized the policy clause of the Environmental Bill of Rights in the 1971 legislative issue of *Popular Government*, as follows:

In its final form, the amendment declares a public policy of conserving and protecting the natural resources of the state, controlling air and water pollution, and preserving as part of the common heritage of the state "its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty". *This declaration may serve as a constitutional basis for future state and local action on these subjects.*<sup>25</sup>

One might add that the litany of "common heritage" and preservation values in the Environmental Bill of Rights provides express constitutional support for governmental actions favoring some aesthetic and environmental values that have not always been regarded as within the scope of the police power.

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21. *Id.* at para. 2.

22. *Id.*

23. Act of June 21, 1971, ch. 630, 1971 N.C. Sess. Laws 586, 586-87 (codified as amended at N.C. CONST. art. XIV, §5). Senator Bowles was the principal introducer of the Environmental Bill of Rights proposal in the 1971 General Assembly. S. 96. Institute of Government Daily Bulletin No. 15, February 2, 1971, p. 97. Having secured the enactment of S. 96 in the General Assembly, Bowles campaigned for its approval by the voters. The author (Heath) consulted with Senator Bowles and Professor Schoenbaum.

24. See election returns in NORTH CAROLINA MANUAL, 1973, at 433, 436-37 (John L. Cheney, Jr. ed., 1973).

25. Sanders, *supra* note 19, at 14 (emphasis supplied).

Two lawsuits reflect the North Carolina Supreme Court's interpretation of important aspects of the Environmental Bill of Rights, the *Credle* case<sup>26</sup> and the *Smith Chapel* cases.<sup>27</sup>

*The Credle Case: Public Trust and Common Heritage Resources*

The original bill introduced by Senator Bowles expressed a State policy of protecting "resources which are held in trust for the People of the State."<sup>28</sup> This policy declaration reflected the thinking of the bill's principal drafter, Professor Schoenbaum, who regarded the public trust as a key feature of environmental policy.<sup>29</sup> The phrase "held in trust for the People" was deleted from the bill at an early stage and replaced by the phrase "the common heritage of the state."<sup>30</sup> Did this amendment represent a conscious rejection of the public trust concept, or simply a change in wording that substituted one equivalent phrase for another?

The latter interpretation appears to be supported by the 1988 decision of the North Carolina Supreme Court in the *Credle* case.<sup>31</sup> The Court used the public trust concept to justify its dismissal of *Credle's* claims of title to 640 acres of largely submerged land in Swan Quarter Bay.<sup>32</sup> The Court reviewed a series of legislative actions that supported the State's public trust claims to the property and observed: "The people of North Carolina endorsed the public policy behind these legislative actions in 1972 by adopting a constitutional amendment which is now section 5 of article XIV of this state's constitution."<sup>33</sup> This characterization of the constitutional amendment, itself a declaration of "policy," represents an application of policy that has significant legal consequences.

*The Smith Chapel Cases: The Durham City Stormwater Ordinance*

In 1994, the City of Durham adopted a "Phase I" stormwater management program, as required by federal law.<sup>34</sup> Durham proposed to finance the program by charging fees based on impervious area that

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26. *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825 (N.C. 1988).

27. *See infra* note 34.

28. MILTON S. HEATH, JR., MEMORANDUM: NORTH CAROLINA ENVIRONMENTAL BILL OF RIGHTS: ORIGINS AND IMPLICATIONS 4-5 (1999).

29. *Id.* at 8.

30. *Id.*

31. *Credle*, 369 S.E.2d 825.

32. *Id.* at 830-31.

33. *Id.* at 831.

34. This description of the early events in the *Smith Chapel* cases is based on that in *Smith Chapel Baptist Church v. City of Durham*, 502 S.E.2d 364, 366 (N.C. 1998)

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would apply to all developed land in the city.<sup>35</sup> The City's statutory authority under the municipal enterprise law was to adopt fees to provide "structural and natural stormwater and drainage system service."<sup>36</sup> The City imposed fees calculated to finance not only the structural and natural systems themselves but also administrative costs.<sup>37</sup> Several Baptist churches brought suit challenging the fees as beyond the City's statutory authority.<sup>38</sup> Superior Court Judge Howard Manning agreed that the City had exceeded its authority by imposing fees for the entire stormwater management program.<sup>39</sup> Upon appeal, the North Carolina Supreme Court agreed that the City lacked statutory authority to finance the entire cost of the program in this fashion.<sup>40</sup> However, the ordinance was upheld as an appropriate exercise of the powers given to political subdivisions by the Environmental Bill of Rights "to protect land and waters" and "to control and limit the pollution of our air and water."<sup>41</sup>

Writing for the Court, Justice Webb stated (after quoting the constitutional provision):

We believe [N.C. Constitution Article XIV, Section 5] gives our cities the authority to regulate our waters. If the City has this power, we believe we should follow the rule of *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 336 N.C. 37, 45, 442 S.E.2d 45, 50-51 (1994), that when a city has the power to regulate activities, it has a supplementary power reasonably necessary to carry the program into effect. See N.C.G.S. § 160A-4 (1987).

In this case, it was reasonably necessary for the City of Durham to assess fees against landowners to finance the stormwater program to comply with the WQA. The City could base the amount of fees on the amount landowners contributed to the stormwater problem. In this case, the contribution to the problem is measured by the impervious area of each lot.<sup>42</sup>

For local governments, the Environmental Bill of Rights as so interpreted would represent a form of "home rule," specifically, a constitutional charter of environmental home rule. Since the constitutional

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(*Smith Chapel I*) and *Smith Chapel Baptist Church v. City of Durham*, 517 S.E.2d 874, 876-78 (N.C. 1999) (*Smith Chapel II*).

35. *Smith Chapel I*, 502 S.E.2d at 367.

36. *Id.* at 366.

37. *Id.* at 366-67.

38. *Id.* at 367.

39. *Id.* at 364.

40. *Id.* at 367.

41. *Id.*

42. *Id.*

provision by its terms expresses “the policy of this State,”<sup>43</sup> the *Smith Chapel* decision is an interpretation that treats a policy statement as having the force of law itself.

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This was not the end of the matter, however. In an extraordinary decision of the North Carolina Supreme Court filed 13 months after the original decision, the original decision was turned on its head. The original *Smith Chapel* case would more appropriately be labeled “*Smith Chapel I*,” and the later decision “*Smith Chapel II*.”<sup>44</sup>

Four justices joined Justice Webb in *Smith Chapel I*: Justices Whichard, Parker, Mitchell and Frye (concurring).<sup>45</sup> The *Smith Chapel I* decision was filed July 30, 1998, three months before the fall 1998 general election.<sup>46</sup> Justices Webb and Whichard did not run for re-election and the two Democratic Party nominees to succeed them were defeated by two eastern North Carolina Republicans, Justices Wainwright and Martin.<sup>47</sup> Anticipating this possibility, the losing parties in *Smith Chapel I* filed for rehearing in hopes of persuading the newly constituted court to reach a different result. These hopes were realized when the court, by a vote of 4 to 3, issued a new decision, *Smith Chapel II*, that superseded *Smith Chapel I*.<sup>48</sup> The majority opinion in *Smith Chapel II* based its decision on lack of statutory authority<sup>49</sup> and did not mention the Environmental Bill of Rights — probably because the constitutional issue was not argued to the Court.<sup>50</sup>

An Institute of Government memorandum published in January 1999 marshaled a legislative history argument that lent additional support to the *Smith Chapel I* decision.<sup>51</sup> This memorandum was made

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43. N.C. CONST. art. XIV, § 5, para. 1.

44. See *supra* note 34 for the respective designations.

45. Heath, *supra* note 28, at 2; *Smith Chapel I*, 502 S.E.2d at 365-66.

46. *Smith Chapel I*, 502 S.E.2d at 364.

47. See N.C. STATE BOARD OF ELECTIONS, THE OFFICIAL CERTIFIED RESULTS FOR THE 1998 GENERAL ELECTION: 1998 GENERAL ELECTION GRAND TOTALS AND CANDIDATE ADDRESSES, available at <http://www.sboe.state.nc.us/98generl/totals.pdf> (last visited May 9, 2007).

48. *Smith Chapel II*, 517 S.E.2d 874 (N.C. 1999).

49. *Id.* at 880-81.

50. The author (Heath) was told by counsel that they would not argue the constitutional point.

51. Heath, *supra* note 28, at 4, 6.

Two textual features of the Senate committee substitute reinforce the holding of *Smith Chapel I* that the Environmental Bill of Rights established a source of constitutional authority for local governments to act *without intervening legislative authorization*:

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available to counsel for the City of Durham and the North Carolina League of Municipalities, but the City and the League elected not to present this argument to the Court. The Institute of Government memorandum reviewed and documented the legislative history of the Environmental Bill of Rights in detail, and will be available if these issues are revived in some future litigation.<sup>52</sup>

### The North Carolina Environmental Policy Act

A second fundamental statutory source of environmental policy is the North Carolina Environmental Policy Act (SEPA).<sup>53</sup> Like the Environmental Bill of Rights, SEPA was enacted by the General Assembly in 1971.<sup>54</sup>

SEPA was generally modeled after NEPA, the National Environmental Policy Act.<sup>55</sup> These two laws provide the statutory authority for environmental assessment and impact analysis—NEPA, for the impact

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- The division of Article XIV, § 5 into two separate paragraphs suggests grammatically that each paragraph serves a separate purpose - the first paragraph, to delineate certain “proper function[s]” for state and local governments; and the second paragraph, to define procedures for dedicating properties to the State Nature and Historic Preserve.
  - In the second sentence of the proposed constitutional amendment, the original bill directed *the General Assembly* to make adequate provision for certain implementing actions. The comparable sentence of the Senate Committee Substitute provides that “it shall be a proper function of *the state of North Carolina and its political subdivisions*” to make adequate provision for these implementing actions.

*Id.*

The Daily Bulletin of the Institute of Government highlighted this change in language by digesting it as follows: “Committee Substitute . . . refers to the *State of North Carolina and its political subdivisions* (was to General Assembly) as entities which properly should control air, water and noise pollution . . .” Institute of Government, UNC-Chapel Hill, Daily Bulletin No. 81, May 5, 1971, at 666.

This change in language squarely supports *Smith Chapel I*. Moreover, the text of Article XIV, Section 5 itself clearly supports *Smith Chapel I* by its reference in the last sentence to “The General Assembly.” When it intended to require intervening legislation to implement the constitution, the General Assembly knew how to say so.” The Senate Committee substitute, with House amendments, was the version of the Bowles bill that was finally enacted.

52. *Id.*

53. North Carolina Environmental Policy Act of 1971, ch. 1203, 1971 N.C. Sess. Laws 1763 (codified as amended at N.C. GEN. STAT. §§ 113A-1 TO -13 (2005 & Interim Supp. 2006)).

54. Heath, *supra* note 28, at 1.

55. 42 U.S.C. §§ 4321-4370f (2000).

of federal activities on the environment; and SEPA, for the impact of state activities on the environment.<sup>56</sup>

SEPA and NEPA share an analytical framework for systematic analysis of environmental impact. They share a common methodology of applying this analysis: a preliminary environmental assessment (EA) is prepared in order to determine whether a finding of no significant impact (FONSI) should be issued, or a full-fledged environmental impact statement (EIS) should be prepared.<sup>57</sup> They both provide welcome sources of gainful employment for many practitioners. Both statutes have withstood the challenge of extensive litigation, and have emerged as thoroughly tested legal tools for environmental study and evaluation.<sup>58</sup>

### *Statement of Purpose and Policy Declaration*

The stated purposes of SEPA are to educate and provide the public with an awareness of the environment; to require State agencies to report the environmental consequences of their activities; and to declare a State policy that will “encourage the wise, productive and beneficial use of the natural resources of the State without damage to the environment, maintain a healthy and pleasant environment; and preserve the natural beauty of the State.”<sup>59</sup>

Section 3 of SEPA further elaborates on these purposes in the following Declaration of State Environmental Policy:

The General Assembly of North Carolina, recognizing the profound influence of man’s activity on the natural environment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to

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56. 42 U.S.C. §§ 4332-4335 (2000); N.C. GEN. STAT. §§ 113A-4 to -13 (2005 & Interim Supp. 2006).

57. *Id.*

58. *Id.*

59. North Carolina Environmental Policy Act of 1971, ch. 1203, § 2, 1971 N.C. Sess. Laws 1763, 1763 (codified as amended at N.C. GEN. STAT. §§ 113A-2 (2005)).

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preserve the important historic and cultural elements of our common inheritance.<sup>60</sup>

*The Legal Consequences of SEPA's Policy Declaration*

A series of North Carolina appellate decisions has treated SEPA's statement of policy as a starting point for analysis of SEPA issues or for interpretation of related statutes.

The first reported case to judicially enforce SEPA's EIS provisions was a 1981 Court of Appeals decision, *In re Appeal from Environmental Management Commission*.<sup>61</sup> This decision required the Orange Water and Sewer Authority to prepare an EIS under SEPA for the proposed Cane Creek Reservoir.<sup>62</sup> After summarizing SEPA's policy declaration, the court described the EIS requirement as clarifying "the sort of consideration of environmental values . . . compelled by the Act."<sup>63</sup>

One year earlier the Court of Appeals had made a similar observation in *Orange County Sensible Highways v. Department of Transportation*,<sup>64</sup> saying that SEPA's Section 4 EIS requirement "give[s] effect to the policy" stated in Section 3.<sup>65</sup> The court went on to hold that the Board of Transportation might be required to prepare an adequate EIS under SEPA, explaining:

Nonetheless, one statute may expand upon a right granted in another statute, and, where possible, it is the duty of the Appellate Courts to interpret statutes so as to be consistent with each other. Consequently, for four reasons we hold that this controversy involves a "contested case" within the meaning of G.S. 150A-43.<sup>66</sup>

Another 1981 Court of Appeals decision<sup>67</sup> used the policy declaration of SEPA section 3 as a reason for approving a State condemnation of land as an addition to Eno River State Park. The court observed:

In the case sub judice, the condemnation of defendants' land for the Eno River State Park was "[t]o complete state ownership of the Cole Mill Access Area, Eno River State Park, providing protection and public access to an area known as the Bobbit's (sic) Hole". At trial further evidence tended to show that Bobbitt Hole was an historical site, that

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60. North Carolina Environmental Policy Act of 1971, ch. 1203, §3, 1971 N.C. Sess. Laws 1763, 1763-64 (codified at N.C. GEN. STAT. §§ 113A-3 (2005)).

61. 280 S.E.2d 520 (N.C. Ct. App. 1981).

62. *Id.* at 526-27.

63. *Id.* at 524.

64. 265 S.E.2d 890 (N.C. Ct. App. 1980).

65. *Id.* at 900-01.

66. *Id.* at 906.

67. *State v. Williams and Hesse*, 674, 281 S.E.2d 721 (N.C. Ct. App. 1981).

the land to be condemned was situated between lands already owned by the State and incorporated in the Park and that the acquisition of defendants' land was necessary in order to have contiguous hiking and horse trails in the Park. We feel that these purposes are clearly consistent with the declaration of the Environmental Policy Act as defined in G.S. 113A-3.<sup>68</sup>

*Lewis v. White*, an early North Carolina Supreme Court decision whose viability has been questioned by a later Court of Appeals decision<sup>69</sup> held that SEPA did not require an EIS as a condition precedent to begin construction of the State Art Museum at the site of Polk Prison. The court dismissed any SEPA requirement with the observation: "It is perfectly obvious that . . . the substitution of an art museum for a prison will not adversely affect the environment."<sup>70</sup> Even in this decision the court found it necessary to address and discount SEPA's policy statement.

It is apparent that SEPA's policy statement has significant legal consequences. It has been used both to interpret and clarify the Act's EIS requirements, and as a guide to the interpretation of related statutes.

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68. *Id.* at 725.

69. *Lewis v. White*, 216 S.E.2d 134 (N.C. 1975), superceded on other grounds by statute as stated in *State v. Williams and Hesse*, 281 S.E.2d 721, 725-26 (N.C. Ct. App. 1981). *Lewis* was decided prior to the enactment of environmental regulations in Title 1, Chapter 25 of the North Carolina Administrative Code. Pursuant to Section 25.0105, any property which "significantly" affects the environment requires the filing of an EIS with certain exceptions. The first of these exceptions provides:

When the proposed project will clearly have no significant impact upon the environment or if the benefits to be accrued from the proposed project clearly outweigh any adverse environmental effect; in such cases a negative declaration should be filed pursuant to provisions of 1 NCAC 25.0202. Though this Code provision requires the filing of a negative declaration when the State agency determines that an Environmental Impact Statement is not required by G.S. 113A-4, the requirement may be waived by the failure of the landowner party in a condemnation proceeding to raise the environmental issue.

70. *Lewis*, 216 S.E.2d at 143-44.

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### Policy Developments on Inter-Governmental Law and Policy: The Hardison Amendments

Intergovernmental relations in environmental law and policy have varied widely over the past century. Changing patterns in water and air pollution control illustrate this variety.<sup>71</sup>

Until early in the 20th century, localized action was dominant. The principal legal tools of the era for pollution control were local prosecutions, nuisance abatement actions, and civil suits. Almost until the enactment of the U.S. Clean Air Act Amendments of 1970, air pollution control continued to be the province of a few city governments in areas with serious air pollution problems, and only limited state government involvement except in California, New York, and New Jersey. As for water quality programs, reliance on state programs began to grow from about 1910. There was little federal presence in either air or water pollution control until the 1970s.

The emergence of the environmental movement in the late 1960s, highlighted by Earth Day 1970, ushered in a period of federal dominance that continues to this day. The impact of the federal environmental laws and programs of the 1970s was “inevitably substantial for two reasons - federal law is the supreme law of the land, and Congress . . . enacted a bewildering variety of arrangements that affect the respective roles of federal, state, and local governments in environmental regulation.”<sup>72</sup>

#### *Congress and the States in 1970s Environmental Legislation*

In the environmental laws of the 1970s, Congress might have elected to “occupy the field” to the exclusion of the states. Instead, Congress chose to invite or permit state legislation that did not undercut federal law.

The Federal Clean Water Act,<sup>73</sup> for example, does not exclude “the right of any state . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants, or . . . control . . . of pollution, except that . . . such State . . . may not adopt or enforce any . . . limitation . . . or standard . . . which is less stringent than the . . . limitation . . . or standard . . . under this chapter.”<sup>74</sup> In a similar vein, the Federal

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71. See Milton S. Heath, Jr., *Environmental Regulation*, in *STATE AND LOCAL GOVERNMENT RELATIONS IN NORTH CAROLINA*, 102, 102-03 (Charles D. Liner ed., 2d ed. 1995) (reviewing material addressed in this heading).

72. *Id.* at 103.

73. Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000).

74. *Id.* at § 1370.

Solid Waste Disposal Act<sup>75</sup> declares that, “nothing in this title . . . shall be construed to prohibit any state . . . from imposing any requirements . . . which are more stringent than . . . these regulations.”<sup>76</sup> 42 U.S.C. § 7412(r)(ii) contains language concerning accidental air pollution releases similar to that of the Solid Waste Disposal Act, preserving the state’s right to impose “more stringent requirements.”<sup>77</sup> Furthermore, 42 U.S.C. § 7407(a) recognizes the primary responsibility of the states to assure air quality within their areas.<sup>78</sup>

*North Carolina’s Response to the Congressional Invitations: The Hardison Amendments*

Initially, the latitude allowed by federal law for “more stringent” state standards generated some interest within the executive branch of North Carolina state government in adopting regulations that would embody more stringent state pollution control standards.<sup>79</sup> This executive branch reaction, in turn, prompted objections in business circles that were communicated to state legislators. The end result was a series of statutes enacted by the North Carolina General Assembly between 1974 and 1978 establishing a policy that made federal law the ceiling for state environmental regulation. That policy, with some variations from program to program, was that North Carolina pollution control regulations would be no more stringent than federal regulations.<sup>80</sup>

This legislation became known as “the Hardison Amendments,” after its principal sponsor, Senator Harold Hardison of Lenoir County. Senator Hardison served eight terms in the North Carolina Senate from 1973 through 1987, including four terms as Chair of the powerful Senate Appropriations Committee.<sup>81</sup> Senator Hardison’s conviction

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75. Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (2000).

76. *Id.* at § 6929.

77. Clean Air Act, 42 U.S.C. § 7412(r)(11) (2000).

78. *Id.* at § 7407(a).

79. These standards were either stricter than comparable federal standards or would fill gaps not covered by federal regulation. Telephone conversation with William Raney, former N.C. Assistant Attorney General (March 7, 2007).

80. Milton S. Heath, Jr., *Environmental Regulation*, in *STATE AND LOCAL GOVERNMENT RELATIONS IN NORTH CAROLINA*, 102, 103 (Charles D. Liner ed., 2d ed. 1995).

81. Harold Hardison served in the North Carolina House in 1971 as well as in the Senate from 1973 through 1988. In 1975, he was Chair of the Senate Appropriations Subcommittee on General Government and Transportation, and from 1977 through 1984 he was Chair of the full Senate Committee on Appropriations. 1971 N.C. HOUSE JOURNAL 4; 1973 N.C. SENATE JOURNAL 3; 1975 N.C. SENATE JOURNAL 9; 1977 N.C. SENATE JOURNAL 13; 1979 N.C. SENATE JOURNAL 13; 1981 N.C. SENATE JOURNAL 14; 1983 N.C. SENATE JOURNAL 14.

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that federal law should be the ceiling for environmental regulation was probably fueled by objections from one or more of his constituents to environmental regulation in general and water quality regulation in particular. Since a softening of federal regulation was not directly within the grasp of a state legislator or his constituents, Senator Hardison concentrated on using state legislation to preclude state regulation that went beyond federal law.<sup>82</sup>

Ultimately, the Hardison Amendments covered air and water pollution control, as well as hazardous waste regulation.<sup>83</sup> The Second Session of the 1973 General Assembly enacted the original water quality Hardison Amendment in 1974—stating the legislative intent that “effluent standards and limitations . . . shall be no more restrictive than the most nearly applicable federal effluent standards and limitations.”<sup>84</sup> In 1975, the original air quality Hardison Amendment was enacted, stating the legislative intent that the state’s “air quality rules, regulations and procedures . . . shall be no more restrictive than those adopted by the United States Environmental Protection Agency.”<sup>85</sup> In 1978, similar “no more stringent” concepts were included in the 1978 Solid Waste Management Act Revision, which included hazardous waste facilities.<sup>86</sup>

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82. These observations reflect a series of conversations during the 1973 and 1975 North Carolina legislative sessions between the author (Heath) and James Wallace of Chapel Hill (a leading environmentalist), as well as Durwood Laughinghouse of Hyde County (a long-time confidant of Senator Hardison).

83. Senator Hardison’s influence within the Executive Branch, as well as the Legislative Branch, is illustrated by the author’s experience in 1977, *before* the hazardous waste Hardison Amendment was enacted. The author asked James Stamey, then head of the Division of Environmental Health, why his division was acting as if a hazardous waste Hardison Amendment existed. Stamey replied that the division might as well do that, because Senator Hardison could get one enacted if he wished – which, indeed, is what happened in 1978. Act of June 16, 1978, ch. 1216, 1977 N.C. Sess. Laws (2d Sess.) 146 (codified at N.C. GEN. STAT. §§ 130-166.21D, *repealed* by Act of May 30, 1989, ch. 168, §§ 10, 17, 1989 N.C. Sess. Laws 320 (ch. 168, § 17 codified as amended at N.C. GEN. STAT. 130A-294(e) (2005 & Interim Supp. 2006))).

84. Act of March 6, 1974, ch. 929, 1973 N.C. Sess. Laws (2d Sess.) 68 (codified at N.C. GEN. STAT. §§ 143-215(c), *repealed* by The Expansion and Capital Improvements Appropriations Act of 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1733).

85. Act of June 24, 1975, ch. 784, 1975 N.C. Sess. Laws 1110 (codified at N.C. GEN. STAT. §§ 143-215.107(f), *repealed* by The Expansion and Capital Improvements Appropriations Act of 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1733). See Milton S. Heath, Jr. and Christy Eve Reid, *Environmental Legislation*, in NORTH CAROLINA LEGISLATION 1975, 107, 110 (Joan G. Brannon ed., 1975).

86. Act of June 16, 1978, ch. 1216, 1977 N.C. Sess. Laws (2d Sess.) 146 (codified at N.C. GEN. STAT. §§ 130-166.21D), *repealed* by Act of May 30, 1989, ch. 168, §§ 10,

A pair of 1979 statutes, sponsored by the Textile Manufacturers Association, revised the water and air Hardison Amendments in an effort to adapt them to that industry's needs.<sup>87</sup> Between them, these two statutes required an economic impact analysis of air quality rules not governed by EPA standards, made it clear that the air rules apply to EPA ambient air quality standards and emission standards, and enabled mills to argue for revision of water quality standards applicable to specific stream segments on the basis of natural pollution or man-induced conditions, or benefit-cost relationships.<sup>88</sup>

In retrospect, the 1979 Textile Manufacturers bills represent the high-water mark of the contribution of the Hardison Amendments to alleviating the concerns of the business community about the cost of responding to water and air pollution control. After the 1979 legislative session the business community found itself increasingly responding to the concerns of the environmental community about problems created by the Hardison Amendments.

For most of the 1980's, the General Assembly intermittently debated the Hardison Amendments but took no further action on them. Then, in 1989, with the act that created the North Carolina Hazardous Waste Management Commission, the General Assembly repealed N.C. Gen. Stat. § 130-166.21D<sup>89</sup> which embodied the Hardison hazardous waste restriction. It was replaced by a rewritten N.C. Gen. Stat. § 130A-294(e) that provided that hazardous waste program regulations "may incorporate standards and restrictions which exceed and are more comprehensive than comparable federal regulations."<sup>90</sup>

In 1991, environmental groups finally persuaded the General Assembly to substantially rewrite the air and water Hardison Amendments.<sup>91</sup> The principal changes made in 1991 were these:<sup>92</sup>

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17, 1989 N.C. Sess. Laws 320 (ch. 168, § 17 codified as amended at N.C. GEN. STAT. 130A-294(e) (2005 & Interim Supp. 2006)).

87. Act of June 8, 1979, ch. 929, 1979 N.C. Sess. Laws 1275 (codified as amended at N.C. GEN. STAT. §§ 143-214.3 (2005)); Act of June 8, 1979, ch. 931, 1979 N.C. Sess. Laws 1276 (codified at N.C. GEN. STAT. §§ 143-215.107(f), *repealed* by The Expansion and Capital Improvements Appropriations Act of 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1733.).

88. Milton S. Heath, Jr. and Sandi Postel, *Natural and Economic Resources and the Environment*, in NORTH CAROLINA LEGISLATION 1979, 169, 182, 184-85 (Joan G. Brannon and Ann L. Sawyer, eds. 1979).

89. Act of May 30, 1989, ch. 168, § 10, 1989 N.C. Sess. Laws 320, 350.

90. Act of May 30, 1989, ch. 168, §§ 10, 17, 1989 N.C. Sess. Laws 320 (ch. 168, § 17 codified as amended at N.C. GEN. STAT. 130A-294(e) (2005 & Interim Supp. 2006)).

91. Act of June 26, 1991, ch. 403, §§ 2-3, 1991 N.C. Sess. Laws 749 (codified at N.C. GEN. STAT. §§ 143-215(c) and N.C. GEN. STAT. §§ 143-215.107(f), *repealed* by The

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- Emission control and effluent standards can be more restrictive than federal requirements if benefits exceed costs.
- No evaluation is needed for a rule for which there is no comparable federal standard and no numerical analysis is required for a rule that delays meeting federal deadlines.
- Limits and conditions in air or water quality permits require no evaluation.
- EMC's findings of record create a rebuttable presumption that environmental and other public benefits exceed environmental and economic costs.
- EMC may not adopt effluent limits applicable to animal or poultry operations, but \$5,000 penalties may be assessed for willful discharges of pollutants to waters.
- The air quality program no longer would be limited to adopting PSD standards or non-attainment standards only if federally mandated.

In 1995, opponents of the Hardison Amendments finally achieved their long-term goal of eliminating the Hardison Air and Water Quality Amendments. Chapter 507 of the 1995 Session Laws repealed the air and water quality Hardison Amendments.<sup>93</sup> The result was to free the state to exercise the discretion that was given it by the federal Clean Air and Clean Water Acts to adopt policies that did not undercut federal law and that, in some respects, were more stringent than federal law. Because the Executive Branch ordinarily adopts state rules, one effect of the repeal of the air and water Hardison Amendments was to allow the Executive Branch to share with the Legislative Branch the discretion to adopt standards that are more stringent than applicable federal standards.<sup>94</sup>

By the end of 1995, the policy of making federal law the ceiling for state pollution control regulation that had so dominated North Carolina politics for more than a decade had largely run its course.

In 1995, Harold Hardison had not been an incumbent senator for six years. Opposition within the environmental community to the federal-law-ceiling had gathered enough political strength to elicit a legis-

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Expansion and Capital Improvements Appropriations Act of 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1733.).

92. Milton S. Heath, Jr., *Natural Resources and the Environment*, in NORTH CAROLINA LEGISLATION 1991, 147, 155-156 (Joseph S. Ferrell ed., 1992).

93. The Expansion and Capital Improvements Appropriations Act of 1995, ch. 507, § 27.8, 1995 N.C. Sess. Laws 1525, 1733 (repealing N.C. GEN. STAT. §§ 143-215(c), 143-215(d), 143-215.107(f) and 143-215.107(g)).

94. In North Carolina, the Legislative Rules Review process may dilute this ability of executive agencies to exercise the discretion granted by the Federal Clean Air and Clean Water Acts.

lative endorsement of repealing the air and water Hardison amendments.

#### B. LAND USE MANAGEMENT POLICY DECLARATIONS

This section of the essay examines a series of statutes and policy statements enacted during the years 1971 to 2000 concerning land use management. It begins with four statutes of the years 1971 to 1983: the Coastal Area Management Act,<sup>95</sup> the Land Policy Act,<sup>96</sup> the Pesticide Law,<sup>97</sup> and the Mountain Ridge Protection Act.<sup>98</sup> It then turns to nine statutes that collectively address the natural areas protection and public access aspect of land use management and span the entire period from 1971 to 2000: the Natural and Scenic Rivers Act of 1971,<sup>99</sup> the North Carolina Trails System Act<sup>100</sup> and Appalachian Trails System Act of 1973,<sup>101</sup> the beach access law of 1981,<sup>102</sup> the Nature Preserves Act of 1985,<sup>103</sup> the coastal reserves act of 1989,<sup>104</sup> the Clean Water Management Trust Fund Act of 1996,<sup>105</sup> the Conservation Easements Program Act of 1997,<sup>106</sup> and the open space protection act of 2000 (the

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95. Coastal Area Management Act of 1974, ch. 1284, 1973 N.C. Sess. Laws (2d Sess.) 463 (codified as amended at N.C. GEN. STAT. §§ 113A-100 to -134.3 (2005 & Interim Supp. 2006)).

96. Land Policy Act of 1974, ch. 1306, 1973 N.C. Sess. Laws (2d Sess.) 597 (codified as amended at N.C. GEN. STAT. §§ 113A-150 to -159 (2005)).

97. North Carolina Pesticide Law of 1971, ch. 832, 1971 N.C. Sess. Laws 1199 (codified as amended at N.C. GEN. STAT. §§ 143-434 to -470.1 (2005)).

98. Mountain Ridge Protection Act of 1983, ch. 676, 1983 N.C. Sess. Laws 645 (codified as amended at N.C. GEN. STAT. §§ 113A-205 to -214, 153A-448, and 160A-458.2 (2005)).

99. Natural and Scenic Rivers Act of 1971, ch. 1167, § 2, 1971 N.C. Sess. Laws 1718, 1718-21 (codified as amended at N.C. GEN. STAT. §§ 113A-30 to -44 (2005)).

100. North Carolina Trails System Act, ch. 670, 1973 N.C. Sess. Laws 995 (codified as amended at N.C. Gen. Stat. §§ 113A-83 to -95 (2005)).

101. North Carolina Appalachian Trails System Act, ch. 545, 1973 N.C. Sess. Laws 858 (codified as amended at N.C. GEN. STAT. §§ 113A-72 to -77 (2005)).

102. Act of July 10, 1981, ch. 925, § 1, 1981 N.C. Sess. Laws 1422, 1422-24, the Public Beach and Coastal Waterfront Access Program (codified as amended at N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (2005)).

103. Nature Preserves Act, ch. 216, 1985 N.C. Sess. Laws 182 (codified as amended at N.C. GEN. STAT. §§ 113A-164.1 to -164.11 (2005)).

104. Act of June 19, 1989, ch. 344, § 1, 1989 N.C. Sess. Laws 779, 780-81 (codified as amended at N.C. GEN. STAT. §§ 113A-129.1 to 129.3 (2005)).

105. An Act to Modify the Continuation Operations Appropriations Act of 1996, ch. 18, § 27.6 1995 N.C. Sess. Laws (2d Spec. Sess. 1996) 631, 825-830 (current version at N.C. GEN. STAT. §§ 113A-251 to -259 (2005 & Interim Supp. 2006)).

106. Act of June 26, 1997, ch. 1997-226, § 6, 1997 N.C. Sess. Laws 479, 482-84 (codified as amended at N.C. GEN. STAT. § 113A-230 to -235 (2005)).

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one million acres act).<sup>107</sup> Collectively, these statutes provide another extensive source of public policy concerning environmental protection and preservation.

### The North Carolina Coastal Area Management Act (CAMA)

After years of study and planning, the General Assembly enacted the Coastal Area Management Act in 1974 creating a comprehensive plan for cooperative State and local management of a 20-county area.<sup>108</sup> Two years later the Act faced a broad constitutional challenge by a group of coastal landowners that was finally resolved by the North Carolina Supreme Court in *Adams v. North Carolina Department of Natural and Economic Resources*.<sup>109</sup>

CAMA's preamble, a set of legislative findings, was drafted primarily by Professor Arthur Cooper of North Carolina State University, a recognized scientist and land use expert.<sup>110</sup> These findings played a crucial role in the successful defense of the constitutionality of CAMA against the charge that the Act was a constitutionally prohibited "local act." In the following passage from the Supreme Court decision in the *Adams* case, the court quoted the CAMA legislative findings and relied on them to counter the prohibited local act challenge:

§ 113A-102. *Legislative findings and goals.* - (a) Findings. - It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be

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107. Act of June 28, 2000, ch. 2000-23, 2000 N.C. Sess. Laws 98 (codified as amended at N.C. GEN. STAT. §§ 113A-240 to -241 (2005)).

108. See Milton S. Heath, Jr., *A Legislative History of the Coastal Area Management Act*, 53 N.C. L. REV. 345, 345-347 (1974).

109. 249 S.E.2d 402 (N.C. 1978).

110. Telephone conversation of author (Heath) with Professor Arthur Cooper (Mar. 12, 2007).

destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

...

The above cited legislative findings are confirmed by the trial record and indicate that the unique, fragile and irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment. We conclude that the coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone.<sup>111</sup>

The *Adams* case dramatically illustrates the importance of a well designed preamble as an aid to interpretation of controversial legislation. The very survival of CAMA turned upon this preamble.

In *State of North Carolina ex rel. Cobey v. Simpson*,<sup>112</sup> the North Carolina Supreme Court upheld an order of the Secretary of The Department of Environment, Health and Natural Resources (DEHNR) to remove structures and fill materials deposited in a coastal wetlands area of environmental concern. In reaching its conclusion the court relied on a recent clarifying amendment to CAMA's injunctive relief provisions that clearly mandated the issuance of an injunction.<sup>113</sup> The court found reason in the title of the amending act to treat the amendment as clarifying rather than changing the law.<sup>114</sup> It accepted the legislative interpretation as an aid to judicial interpretation of the act.<sup>115</sup>

### Land Policy Act: A Preamble Left to Dry

The proponents of CAMA had a grand design of land use programs that included a Mountain Area Management Act (MAMA) and a Land Policy Act.<sup>116</sup>

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111. *Adams*, 249 S.E.2d at 407-08 (N.C. 1978).

112. 423 S.E.2d 759 (N.C. 1992).

113. *Id.* at 763.

114. *Id.* at 763-64.

115. *Id.*

116. Land Policy Act of 1974, ch. 1306, 1973 N.C. Sess. Laws (2d Sess.) 597, 597-606 (codified as amended at N.C. Gen. Stat. §§ 113A-150 to -159 (2005)). The Land Policy Act directed state land use agencies to develop appropriate land use planning and management arrangements for the Piedmont region. N.C. GEN. STAT. § 113A-153 (2005). These plans were forestalled when opponents of the program persuaded the legislature to abolish the Land Policy Agency in 1981. See Act of July 8, 1981, ch. 881, 1981 N.C. Sess. Laws 1310. If CAMA, MAMA, and the Land Policy Act had all been implemented, North Carolina would have had a comprehensive set of environmental land management arrangements from the mountains to the coast.

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The mountain area bill was modeled after the coastal act, with adjustments for mountain circumstances. In the late stages of the 1974 legislative session time ran out on the mountain bill—the coastal act was finally passed April 11, 1974 (two days before the end of the session), and the mountain bill died in committee. A redrafted version was introduced in 1975 but it, too, was not enacted.<sup>117</sup>

In 1974, the same year CAMA was enacted, the General Assembly enacted the third installment of the land use triad, the Land Policy Act.<sup>118</sup> It created a Land Policy Council to administer a program that included development of a land classification system and “a state land use policy, incorporating environmental aesthetic, economic, social and other factors . . .”<sup>119</sup> Geographically, its target was to explore a land policy system primarily for the Piedmont to complement CAMA.<sup>120</sup>

Throughout the late 1970s, the land policy staff labored to produce a set of documents that might ultimately serve as the basis of another regional land use management program. In 1981 the land policy program ran afoul of an unsympathetic House of Representatives, which persuaded the Senate to join in abolishing the Land Policy Council and its advisory committee.<sup>121</sup>

The remainder of the Land Policy Act remains standing with its legislative findings, and land classification and land policy provisions—a mute tribute to a dormant dream of a state land policy program.<sup>122</sup> N.C. GEN. STAT. § 113A-151, with its legislative findings and declaration of intent and purpose, is set forth in Appendix B as a reminder of the policy that might-have-been.

Could this statutory remnant be revived now as a guide for current state land policy, notwithstanding the abolition of the Land Policy Council? Potentially the answer is “yes.”

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117. The proposed Mountain Area Management Act (MAMA) would have applied to North Carolina’s mountain region a set of planning and regulatory measures that were modeled after CAMA. In 1974, time ran out on a mountain area management bill (S. 973, H.R. 1374) and a renewed attempt in 1975 ended when the versions of the reintroduced bill (S. 467, H.R. 596) were left in committee. Heath & Reid, *supra* note 85, at 123.

118. Land Policy Act of 1974, ch. 1306, 1973 N.C. Sess. Laws (2d Sess.) 597, 597-606 (codified as amended at N.C. GEN. STAT. §§ 113A-150 to -159 (2005)).

119. Land Policy Act of 1974, ch. 1306, 1973 N.C. Sess. Laws (2d Sess.) 597, 599-605 (codified as amended at N.C. GEN. STAT. §§ 113A-153 to -156 (2005)).

120. Land Policy Act of 1974, ch. 1306, 1973 N.C. Sess. Laws (2d Sess.) 597, 599-605 (codified as amended at N.C. GEN. STAT. §§ 113A-153 to -156 (2005)).

121. Act of July 8, 1981, ch. 881, 1981 N.C. Sess. Laws 1310.

122. N.C. GEN. STAT. §§ 113A-151, -155 to -156 (2005).

N.C. GEN. STAT. § 113A-151(b) declares the intent and purpose that the state land policy “ shall serve as a guide for decision-making in State and federally assisted programs which affect land use, and shall provide a framework for . . . local governments.”<sup>123</sup> This language, together with other provisions concerning state land policy that remain on the statute books (i.e., N.C. GEN. STAT. § 113A-155) are not necessarily dependent upon actions of the defunct Land Policy Council. They remain a potential vehicle for land policy guidance and implementation.

### The North Carolina Pesticide Law of 1971: A Preamble as History Lesson

A 1971 environmental statute, the Pesticide Law,<sup>124</sup> was the product of a comprehensive two-year legislative study that was incorporated into Governor Scott’s legislative program.<sup>125</sup> It consisted of registration and regulation of pesticides; licensing of pesticide dealers, applicators, and consultants; and regulation of pesticide application and shipment.<sup>126</sup> It put North Carolina in a position to qualify for delegation of federal responsibilities by EPA and, in some ways, extended beyond federal law (for example, in the licensing of dealers and consultants).<sup>127</sup>

The study commission that generated this legislation wanted to leave a visible record of its activities and its concepts of pesticide management to complement its extensive report. It directed the author (Heath), who had served as its staff, to draft a preamble to the pesticide bill that would provide such a record. That preamble is included in Appendix B as an example of a preamble and policy declaration conceived in the spirit of the pesticide study commission, as a detailed legislative history document, and, as it were, a short form of a study commission report.

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123. See text in Appendix B.

124. North Carolina Pesticide Law of 1971, ch. 832, 1971 N.C. Sess. Laws 1199, 1199-1225 (codified as amended at N.C. GEN. STAT. §§ 143-434 to -470.1 (2005)).

125. LEGISLATIVE RESEARCH COMMISSION, PESTICIDES, REPORT OF THE LEGISLATIVE RESEARCH COMMISSION TO THE 1971 GENERAL ASSEMBLY (1970).

126. See N.C. GEN. STAT. §§ 143-440 to -462 (2005).

127. N.C. GEN. STAT. §§ 143-448 to 450, -455 to -456 (2005).

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### The Mountain Ridge Protection Act: A Preamble Awaiting a Call

The 1983 General Assembly enacted a Mountain Ridge Protection Act<sup>128</sup> that regulated construction of tall buildings and structures on high mountain ridges—a visual protection measure that fits the last category of Governor Scott’s 1971 environmental message.<sup>129</sup> The Act responded to the construction of a ten-story condominium atop Little Sugar Mountain in Avery County directly across from the late Hugh Morton’s Grandfather Mountain resort.<sup>130</sup>

There have been no reported cases concerning the preamble to the Ridge Law. As this essay goes to press, a controversy is developing between proponents and opponents of windmill construction on high mountain ridges, including “windmill farms”—large clusters of very tall structures that might occupy many of North Carolina’s high mountain ridges. There is a long-standing dispute over whether a one-word reference to “windmills” in the Ridge Law should be interpreted as allowing the construction of such structures on high mountain ridges.<sup>131</sup>

It is possible that the Ridge Law’s preamble would be relevant to this controversy. That preamble is included in Appendix B because of its potential bearing on that controversy or other related issues.

#### *Protection of Natural Areas and Arrangements for Public Access, Funding, and Support in the Environmental Era*

A series of statutes enacted between 1971 and 2000 reflect the environmental protection and public access values of the environmental era. These statutes include:

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128. Mountain Ridge Protection Act of 1983, ch. 676, 1983 N.C. Sess. Laws 645 (codified as amended at N.C. GEN. STAT. §§ 113A-205 to -214, 153A-448, and 160A-458.2 (2005)).

129. Scott, *supra* note 10, at 71.

130. The origins and history of the law have been explored in detail in an earlier law review article. Milton S. Heath, Jr., *The North Carolina Mountain Ridge Protection Act*, 63 N.C. L. REV. 183 (1984).

131. See *Power Peaks: North Carolina’s Plentiful Winds Belong in the State’s Energy Portfolio, but an Ashe County Proposal Raises Tough Issues*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 14, 2007, at A10; John Murawski, *Plan to Harvest the Wind Gets Unlikely Opposition: Renewable Energy Advocates Say Turbines Would Ruin the Appalachians*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 10, 2007, at D1, 6; Rick Martinez, *A Wind Power Project Generates Gusts of Opposition*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 3, 2007, at A17.

- 1970s - The Natural and Scenic Rivers Act of 1971,<sup>132</sup> the North Carolina Trails System Act,<sup>133</sup> and the Appalachian Trails System Act of 1973.<sup>134</sup>
- 1980s - The beach access law of 1981,<sup>135</sup> the Nature Preserves Act of 1985,<sup>136</sup> and the coastal reserves act of 1989.<sup>137</sup>
- 1990s - The Clean Water Management Trust Fund Act of 1996<sup>138</sup> and the Conservation Easements Program act of 1997.<sup>139</sup>
- 2000s - The open space protection act of 2000 (the one million acres act).<sup>140</sup>

In philosophy, these laws and their policy declarations offer a study in contrast to the conservation era statutes that addressed a similar range of resource management topics. Management and development are the main themes of the conservation era statutes. Preservation and protection are the main themes of the environmental era statutes.

### Protection of Natural Areas

Five of these statutes address the protection of natural areas by a variety of mechanisms: The Natural and Scenic Rivers Act, the Nature Preserves Act, the coastal reserves act, the Conservation Easements Program Act, and the open space protection act. They share a goal of identifying, preserving and protecting the values of undeveloped natural areas. These areas include:

- Free-flowing rivers, to be considered for protection in a system of natural and scenic rivers. The declaration of policy of the Natural and Scenic Rivers Act “finds that certain rivers of North Carolina

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132. Natural and Scenic Rivers Act of 1971, ch. 1167, § 2, 1971 N.C. Sess. Laws 1718, 1718-1721 (codified as amended at N.C. GEN. STAT. §§ 113A-30 to -44 (2005)).

133. North Carolina Trails System Act, ch. 670, 1973 N.C. Sess. Laws 995 (codified as amended at N.C. GEN. STAT. §§ 113A-83 to -95 (2005)).

134. North Carolina Appalachian Trails System Act, ch. 545, 1973 N.C. Sess. Laws 858 (codified as amended at N.C. GEN. STAT. §§ 113A-72 to -77 (2005)).

135. Act of July 10, 1981, ch. 925, § 1, 1981 N.C. Sess. Laws 1422, 1422-24 (codified as amended at N.C. GEN. STAT. §§ 113A-134.1 to -134.3 (2005)).

136. Nature Preserves Act, ch. 216, 1985 N.C. Sess. Laws 182 (codified as amended at N.C. GEN. STAT. §§ 113A-164.1 to -164.11 (2005)).

137. Act of June 19, 1989, ch. 344, § 1, 1989 N.C. Sess. Laws 779, 780-81 (codified as amended at N.C. GEN. STAT. §§ 113A-129.1 to -129.3 (2005)).

138. An Act to Modify the Continuation Operations Appropriations Act of 1996, ch. 18, § 27.6 1995 N.C. Sess. Laws (2d Spec. Sess. 1996) 631, 825-30 (current version at N.C. GEN. STAT. §§ 113A-251 to -259 (2005 & Interim Supp. 2006)).

139. Act of June 26, 1997, ch. 1997-226, § 6, 1997 N.C. Sess. Laws 479, 482-84 (codified as amended at N.C. GEN. STAT. § 113A-230 to -235 (2005)).

140. Act of June 28, 2000, ch. 2000-23, 2000 N.C. Sess. Laws 98 (codified as amended at N.C. GEN. STAT. §§ 113A-240 to -241 (2005)).

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possess outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values of great present or future benefit to the people,"<sup>141</sup> that warrant their protection in a natural and scenic rivers system. These findings were drafted for the committee that assisted in preparing Governor Robert Scott's environmental message of April 8, 1971.<sup>142</sup>

- Areas that have special habitat values, or scientific and education values to be included in a State Registry of Natural Heritage Areas.<sup>143</sup>
- Undeveloped coastal areas with important fish and wildlife protection, water quality, aesthetic enjoyment and other public trust values, to be reserved for protection in their undeveloped state as coastal reserves.<sup>144</sup>
- Riparian buffers, greenways, and other natural areas to be conserved and protected through a conservation easements program with support from a conservation grant fund.<sup>145</sup>
- A program to accelerate and coordinate state programs for conservation, farmland, and open space lands, with a goal of preserving a million additional acres of land.<sup>146</sup>

The Nature Preserves Act contains a declaration of policy and purpose that is typical of these statutes. It provides that:

(a) The continued population growth and land development in North Carolina have made it necessary and desirable that areas of natural significance be identified and preserved before they are destroyed. These natural areas are irreplaceable as laboratories for scientific research, as reservoirs of natural materials for uses that may not now be known, as habitats for plant and animal species and biotic communities, as living museums where people may observe natural biotic and environmental systems and the interdependence of all forms of life, and as reminders of the vital dependence of the health of the human community on the health of the other natural communities.

(b) It is important to the people of North Carolina that they retain the opportunity to maintain contact with these natural communities

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141. Natural and Scenic Rivers Act of 1971, ch. 1167, § 2, 1971 N.C. Sess. Laws 1718, 1719 (codified as amended at N.C. GEN. STAT. § 113A-31 (2005)).

142. Telephone conversation of author (Heath) with Dr. Leigh Hammond (Mar. 12, 2007).

143. Nature Preserves Act, ch. 216, § 1, 1985 N.C. Sess. Laws 182, 184 (codified as amended at N.C. GEN. STAT. § 113A-164.5 (2005)).

144. Act of June 19, 1989, ch. 344, § 1, 1989 N.C. Sess. Laws 779, 780-81 (codified as amended at N.C. GEN. STAT. §§ 113A-129.1 to -129.3 (2005)).

145. Act of June 26, 1997, ch. 1997-226, § 6, 1997 N.C. Sess. Laws 479, 482-84 (codified as amended at N.C. GEN. STAT. §§ 113A-230 to -235 (2005)).

146. Act of June 28, 2000, ch. 2000-23, 2000 N.C. Sess. Laws 98 (codified as amended at N.C. GEN. STAT. §§ 113A-240 to -241 (2005)).

and environmental systems of the earth and to benefit from the scientific, aesthetic, cultural, and spiritual values they possess. The purpose of this Article is to establish and maintain a State Registry of Natural Heritage Areas and to prescribe methods by which nature preserves may be dedicated for the benefit of present and future citizens of the State.<sup>147</sup>

This declaration of policy was drafted by Charles Roe, the first director of the Natural Heritage program with assistance from Professor William Campbell of the Institute of Government, long-time specialist in real estate law.<sup>148</sup>

#### *Arrangements for Public Access and Support*

Four of these statutes address the need for public access to natural areas and funding of clean water programs: the trails acts, the beach access law, and the Clean Water Management Trust Fund Act.

The trails acts encourage the development of the Appalachian Trails System and the North Carolina Trails System. Their shared theme and policy is reflected in the statement of policy and purpose for the Appalachian Trails System Act of 1973:

(a) In order to provide for the ever-increasing outdoor recreation needs of an expanded population and in order to promote public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas of the State, the Appalachian Trail should be protected in North Carolina as a segment of the National Scenic Trails System.

(b) The purpose of this Article is to provide the means for attaining these objectives by instituting a North Carolina Appalachian Trail System, designating the Appalachian Trail lying or located in the North Carolina Counties of Avery, Mitchell, Yancey, Madison, Haywood, Swain, Graham, Macon, and Clay, as defined in the Federal Register of the National Trails Act as the basic component of that System, and by prescribing the methods by which, and standards according to which, additional connecting trails may be added to the System.<sup>149</sup>

A similar set of objectives animates the beach access law. The legislative findings in support of the beach access law emphasize the traditional public interest in the beaches, the need for increased beach access, and for public parking facilities that make increased beach access more practical.<sup>150</sup> Professor David Owens of the Institute of

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147. N.C. GEN. STAT. § 113A-164.2 (2005).

148. Telephone conversation of author (Heath) with Charles Roe (Feb. 27, 2007).

149. N.C. GEN. STAT. § 113A-73 (2005).

150. Act of July 10, 1981, ch. 925, § 1, 1981 N.C. Sess. Laws 1422, 1422-23 (codified as amended at N.C. GEN. STAT. §§ 113A-134.1 (2005)).

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Government drafted these findings while he was serving as Director of the North Carolina Division of Coastal Management.<sup>151</sup> See Appendix B for the text of these findings.

The Clean Water Management Trust Fund's statement of purpose stresses the need to clean up surface water pollution and to protect unpolluted waters, including drinking waters.<sup>152</sup> It also expresses the General Assembly's intent that the Fund be used to build a network of riparian buffers and greenways for environmental, educational and recreational benefits—as well as the General Assembly's belief that the results will be beneficial to wildlife and marine fisheries habitat.<sup>153</sup> The Fund's Executive Director and twenty-one member Board of Trustees have broad discretion to allocate the substantial revenues that the General Assembly has regularly appropriated for this purpose.<sup>154</sup>

### C. WATER AND AIR RESOURCES POLICY DECLARATIONS

This section of the essay begins by examining two 1967 water and air resource management laws and their policy declarations. The first of these statutes is the 1967 water and air resources reorganization act,<sup>155</sup> and the second is the capacity use areas act.<sup>156</sup>

After noting the preamble to the Sedimentation Control Act, the section then turns to an analysis of the common law and statutory development of policy concerning interbasin transfers and other diversions of water.

#### Preamble to 1967 Water and Air Resources Reorganization Act

The 1967 legislative session marked the starting point of modern environmental law in North Carolina. It produced, among other things, our first contemporary regulatory water laws, including the capacity use areas law,<sup>157</sup> the Well Construction Act,<sup>158</sup> and the Dam

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151. Conversation of author (Heath) with Professor David Owens (Feb. 26, 2007).

152. N.C. GEN. STAT. § 113A-251 (2005).

153. N.C. GEN. STAT. § 113A-251 (2005).

154. N.C. GEN. STAT. § 113A-256 (2005).

155. North Carolina Water and Air Resources Act, ch. 892, 1967 N.C. Sess. Laws 1144 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.9 (2005)).

156. Water Use Act of 1967, ch. 933, 1967 N.C. Sess. Laws 1236 (codified as amended at N.C. GEN. STAT. §§ 143-215.11 to -215.22B (2005)).

157. Water Use Act of 1967, ch. 933, 1967 N.C. Sess. Laws 1236 (codified as amended at N.C. GEN. STAT. §§ 143-215.11 to -215.22B (2005)).

158. North Carolina Well Construction Act, ch. 1157, 1967 N.C. Sess. Laws 1784 (codified as amended at N.C. GEN. STAT. §§ 87-83 to -96 (2005 & Interim Supp. 2006)).

Safety Law.<sup>159</sup> Another main product of the 1967 legislature was a reorganization of the state's water and air resources programs in a new Department of Water and Air Resources that included both the state's water and air pollution control agency and water resource management agency.<sup>160</sup> The preamble to that statute contains a declaration of public policy drafted by the author and Representative Norwood Bryan of Fayetteville.<sup>161</sup> Bryan, a Yale Law School graduate and legal scholar, would leave a major imprint on North Carolina's environmental legislation of the years 1967-1974.

The declaration of public policy of the 1967 water and air resources act reads as follows:

Sec. 143-211. It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly, within the context of this Article, to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interests of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare. It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. . . . Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.<sup>162</sup>

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159. Dam Safety Law of 1967, ch. 1068, 1967 N.C. Sess. Laws 1580 (codified as amended at N.C. GEN. STAT. §§ 143-215.23 to -215.37 (2005)).

160. North Carolina Water and Air Resources Act, ch. 892, 1967 N.C. Sess. Laws 1144 (codified as amended at N.C. GEN. STAT. §§ 143-211 to -215.9 (2005 & Interim Supp. 2006)). (The functions of the Board of Water and Air Resources and the Board of Water Resources of the State of North Carolina were transferred to the Environmental Management Commission by Act of April 11, 1974, ch. 1262, §§ 19-23, 1973 N.C. Sess. Laws (2d Sess.) 373, 380-88 (codified as amended at N.C. GEN. STAT. §§ 143B-282 to -285 (2005)).

161. Telephone conversation of author (Heath) with Norwood Bryan (Feb. 21, 2007).

162. North Carolina Water and Air Resources Act, ch. 892, § 1, 1967 N.C. Sess. Laws 1144, 1144-45 (codified as amended at N.C. GEN. STAT. § 143-211 (2005)).

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Three aspects of this preamble deserve comment. One is its emphasis on environmental quality and prevention of damage, balanced by encouragement of economic development. This reflects its time of enactment. The water and air reorganization was adopted in 1967, at the end of the conservation era and the beginning of the environmental era: it shares in the policy values of both periods.

A second aspect is authorship. The text of this preamble and SEPA's preamble share both wording and environmental quality concepts. This reflects Representative Bryan's contributions to the drafting of SEPA in 1971 as well as the water and air preamble in 1967.<sup>163</sup>

The third feature worthy of comment is the assertion in N.C. GEN. STAT. § 143-211 that water and air resources "belong to the people."<sup>164</sup> This assertion contradicts a basic tenet of the riparian rights doctrine that the waters of a flowing stream belong to no one,<sup>165</sup> but it can be understood as an appropriate emphasis on the public interest in water.

#### Findings Under the Capacity Use Areas Act (The Water Use Act of 1967)

The principal regulatory statute enacted by the General Assembly in 1967 was the capacity use areas act,<sup>166</sup> also sponsored in the House by Representative Bryan and Representative (later Chief Justice) Exum.<sup>167</sup> It empowered the Board of Water and Air Resources (now the

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163. See *supra* note 161.

164. N.C. GEN. STAT. § 143-211(a) (2005).

165. MILTON S. HEATH, JR., CONTEMPORARY EASTERN WATER RIGHTS REGULATION, U.N.C. WATER RESOURCE PAPERS, No. 17, 3-4 (1966).

166. Water Use Act of 1967, ch. 933, 1967 N.C. Sess. Laws 1236 (codified as amended at N.C. GEN. STAT. §§ 143-215.11 to -215.22B (2005)).

167. 1967 NORTH CAROLINA SENATE JOURNAL 425, 687, 691, 706, 717, 735 (1967); 1967 NORTH CAROLINA HOUSE JOURNAL 641-42, 903-04, 1025, 1029, 1039, 1075 (1967); NORTH CAROLINA GENERAL ASSEMBLY HOUSE OF REPRESENTATIVES SESSION 1967, RULES AND DIRECTORY OF MEMBERS, COMMITTEES, AND HOUSE OFFICERS 19 (1967); June 23, 1967 House Amendment to S.B. 465, 1967 Gen. Assem., Reg. Sess. (N.C. 1967). Senator Futrell (Chairman of the Senate Committee on Conservation and Development) and Representative Ragsdale (Chairman of the House Committee on Water Resources and Control) were the principal introducers of identical bills (S.B. 465 and H.B. 991) to grant authority to the Board of Water and Air Resources. Representatives Bryan and Exum were members of the House Committee on Water Resources and Control and Bryan was also a member of the Committee on the Calendar that handled S.B. 465 when it was received from the Senate. It was on Bryan's motion that the sole committee amendment was adopted before the bill was sent back to the Senate for concurrence. Bryan's name also appears on the pink amendment sheet for the bill. See also Norwood E. Bryan, Jr., *Norwood E. Bryan, Jr.: Member of the House of Representatives from the 23d District, North Carolina General Assembly*, in THE

Environmental Management Commission) to declare a capacity use area when it finds that the use of water within that area requires coordination and regulation under a system of permits for withdrawal or use of water by large water users.<sup>168</sup> The declaration of purpose and capacity use areas findings of the act provide:

**Declaration of purpose.**

It is hereby declared that the general welfare and public interest require that the water resources of the State be put to beneficial use to the fullest extent to which they are capable, subject to reasonable regulation in order to conserve these resources and to provide and maintain conditions which are conducive to the development and use of water resources.<sup>169</sup>

**Declaration of capacity use areas.**

(a) The Environmental Management Commission may declare and delineate from time to time, and may modify, capacity use areas of the State where it finds that the use of groundwater or surface water, or both, require coordination and limited regulation for protection of the interests and rights of residents or property owners of such areas or of the public interest.

(b) Within the meaning of this Part "a capacity use area" is one where the Commission finds that the aggregate uses of groundwater or surface water, or both, in or affecting said area (i) have developed or threatened to develop to a degree which requires coordination and regulation, or (ii) exceed or threaten to exceed, or otherwise threaten or impair, the renewal or replenishment of such waters or any part of them.<sup>170</sup>

In the early 1970s, the Board established a capacity use area in the phosphate mining region that centered in Beaufort County. More recently, that area was modified to include two critical aquifers that have served as water sources for Kinston and other towns.<sup>171</sup> In the late 1970s the Commission declined to establish a capacity use area on the Yadkin River in the vicinity of a projected nuclear power plant in Davie County.<sup>172</sup> This decision was affirmed by the North Carolina Court of Appeals, which held in *High Rock Lake Ass'n v. North Carolina*

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NEW LEGISLATOR IN THE NORTH CAROLINA GENERAL ASSEMBLY 23, 23-25 (Milton S. Heath ed., 1970) (for a description of the handling of the H.B. 991 and related bills).

168. N.C. GEN. STAT. § 143-215.13 (2005).

169. N.C. GEN. STAT. § 143-215.12 (2005).

170. N.C. GEN. STAT. § 143-215.13 (2005).

171. Telephone conversation of author (Heath) with John Morris (Mar. 12, 2007).

172. See *High Rock Lake Ass'n v. Envtl. Mgmt. Comm'n*, 276 S.E.2d 472, 473 (N.C. Ct. App. 1981) (describing the Commission's decision).

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*Environmental Management Commission*<sup>173</sup> that the Commission's action was not arbitrary or capricious—citing the “broad statutory language” of G.S. 143-215.13, under which the Commission had acted.<sup>174</sup>

This is another instance, like the SEPA decisions, where statutory findings have served as the basis of a judicial decision sustaining agency action.

**Preamble to the Sedimentation Pollution Control Act of 1973**<sup>175</sup>

The preamble to the Sedimentation Pollution Control Act recites the conditions that lead to sedimentation of waters and the need for control of erosion and sedimentation through a program of mandatory minimum standards that will permit development to continue with the least detrimental effects from pollution by sedimentation.<sup>176</sup>

**D. POLICY DEVELOPMENT ON INTERBASIN TRANSFERS AND OTHER DIVERSIONS OF WATER**

Interbasin transfers, transwatershed diversions, and other movements of water away from rivers and streams have been a familiar feature of civilization since ancient times. These transfers are almost always controversial, pitting upstream against downstream interests, consumptive water users against non-consumptive users, and riparian landowners (who own land adjacent to the water) against non-riparians.<sup>177</sup>

There are at least three separate kinds of water transfer—movements from one river basin to another (Figure 1), from one watershed or subwatershed to another (Figure 2), and upstream withdrawal coupled with downstream discharges (Figure 3). Each of these is capable of causing damage to riparian landowners by reducing the amount of available water, and equally capable of creating controversy.

As used in this essay, the term “watershed” as used in this essay means a catchment area that is part of a larger river basin or watershed. For many years in North Carolina, there was no confusion about the meaning of the term “river basin.” Every publication of the state's water pollution control agency (the State Stream Sanitation Commit-

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173. 276 S.E.2d 472 (N.C. Ct. App. 1981).

174. *Id.* at 474-78.

175. Sedimentation Pollution Control Act of 1973, ch. 392, 1973 N.C. Sess. Laws 476 (codified as amended at N.C. GEN. STAT. §§ 113A-50 to -67 (2005 & Interim Supp. 2006)).

176. N.C. GEN. STAT. § 113A-51 (2005).

177. Milton S. Heath, Jr., *Interbasin Transfers and Other Diversions*, POPULAR GOV'T, Fall 1989, at 33, 33-34.



Figure 1

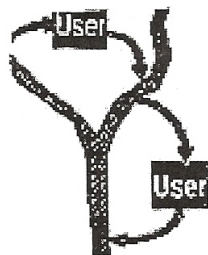


Figure 2



Figure 3

tee) showed 17 major river basins in a map on its cover – such as the Neuse, the Cape Fear, the Yadkin, the Catawba, and the Roanoke.<sup>178</sup> But some engineers began using the term to identify smaller sub-basins, while the U.S. Department of Interior, at the other extreme, spoke of larger aggregations such as the “Southeast River Basins.”<sup>179</sup> In time, political pressures led the North Carolina General Assembly to define 38 river basins for purposes of the state’s interbasin transfer law.<sup>180</sup>

However defined, the phenomenon of interbasin and transwatershed transfers has a long history in North Carolina. Many policy concerns weave their way through North Carolina’s law of interbasin transfers and other diversions of water. These issues will be explored, first, in terms of common law water rights concepts, and then in terms of interbasin transfer legislation.

### Common Law Concepts

In eastern states like North Carolina that follow the riparian rights doctrine of water rights, the owners of riparian land along a stream are entitled to have the stream flow to them substantially unchanged in quantity and quality, subject only to reasonable uses by other riparians. They owe a similar duty to other riparians.<sup>181</sup>

In western states that follow the prior appropriation doctrine of water rights, holders of appropriative rights can “own the water.” In eastern riparian rights states, no one can “own” the flowing water in a

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178. See, for example, *Public Hearing Regarding Proposed Classification of the Waters of the Watauga River Basin: Hearing Before the North Carolina Stream Sanitation Committee* (1962).

179. Heath, *supra* note 177, at 33.

180. N.C. GEN. STAT. § 143-215.22G (2005).

181. Heath, *supra* note 165, at 5; *Smith v. Town of Morganton*, 123 S.E. 88, 89 (N.C. 1924).

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stream,<sup>182</sup> but only the right to make reasonable uses, subject to the reasonable uses of others.

Eastern states take a variety of positions on the status of diversions. In some states (though not North Carolina), diversions are flatly prohibited, no matter what the circumstances. In other states diversions for use beyond the watershed are illegal. In still other states, diversions for use on non-riparian land are illegal.<sup>183</sup>

These issues are often linked with the question of damages. There is a generally accepted rule in many of the eastern states that diversions are only actionable when they are “unreasonable” and result in “material injury” to plaintiffs.<sup>184</sup> North Carolina has one case that follows this rule involving the watering of a locomotive that used the water beyond the watershed.<sup>185</sup> But North Carolina also has cases involving municipal water supply defendants in which the opinion indicates that municipal water supply diversions are generally illegal—but the facts involved material injury.<sup>186</sup> North Carolina’s courts generally have been unwilling to award injunctions against water supply diversions or advance injunctive relief.<sup>187</sup>

Diversion issues also have been a factor in water damages litigation resulting from floodwater or storm water overflows. North Carolina for many years followed the civil law rule of liability in such cases, that subjects the owner of lower lying land to an easement for drainage of natural flow of surface waters. One expression of this rule was that the upper owner may increase the flow of water in connection with developing or altering land, but may not divert it.<sup>188</sup> In *Pendergrast v. Aiken*, the North Carolina Supreme Court in 1977 abandoned the civil law rule in favor of a reasonable use rule that applies a balancing of benefits and detriments resulting from land development, much in the manner of common law nuisance decisions.<sup>189</sup> It is not clear whether the anti-diversion element of the civil law rule was completely eliminated by the *Pendergrast* decision or whether it still survives.

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182. Heath, *supra* note 165, at 1-2.

183. *Stratton v. Mt. Hermon Boys' School*, 103 N.E. 87 (Mass. 1913).

184. Heath, *supra* note 177, at 34-35.

185. *Harris v. Norfolk and W. Ry. Co.*, 69 S.E.2d 623 (N.C. 1910).

186. See, e.g., *Cook v. Town of Mebane*, 131 S.E. 407 (N.C. 1926); *Pernell v. City of Henderson*, 21 S.E.2d 902 (N.C. 1941); *Smith v. Town of Morganton*, 123 S.E. 88 (N.C. 1924).

187. *Geer v. Durham Water Co.*, 37 S.E. 474 (N.C. 1900); *Walton v. Mills*, 86 N.C. 277 (N.C. 1881).

188. *Youmans v. Hendersonville*, 96 S.E. 45 (N.C. 1918); *Mizzell v. McGowan*, 26 S.E. 283 (N.C. 1897).

189. *Pendergrast v. Aiken*, 236 S.E.2d 287 (N.C. 1977).

Altogether, no strong North Carolina common law policy against diversions is evident—rather, there have been selective responses to special circumstances, such as municipal water supply diversions that result in material injury to plaintiffs.

### Interbasin Transfer Statutes

#### *Anti-Diversion Riders*

In 1959, the General Assembly began to attach anti-diversion riders to water resources management legislation. That year it attached riders prohibiting diversion from small watershed projects<sup>190</sup> developed under the soil conservation law and from Corps of Engineers reservoir projects.<sup>191</sup>

In 1961, another anti-diversion rider was attached to a water supply and wastewater statute.<sup>192</sup> This rider remained on the statute books until it was repealed in 1993 by the state's first comprehensive interbasin transfer statute. The 1961 statute was sought by Research Triangle Area interests in order to facilitate joint water supply and wastewater systems of local governments.<sup>193</sup> The rider attached to that statute (later codified as N.C. Gen. Stat. § 153A-287) prohibited “the diversion of water from any major river basin, the main stem of which is not located entirely in North Carolina downstream from the point of such diversion . . . except where such diversion is now permitted by law.”<sup>194</sup>

The “major river basins” referred to in the act were generally agreed to be seventeen in number. If one examines a river basin map, it will be apparent that the 1961 rider:

- Did *not* apply to the entirely intrastate river basins that are the principal rivers of the Research Triangle Area (the Neuse, the Cape Fear and the Tar); but
- *Did* apply to the interstate river basins (such as the Catawba, Yadkin, Roanoke, Broad and Nantahala) on which most of the

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190. Act of June 9, 1959, ch. 781, § 7, 1959 N.C. Sess. Laws 771, 775 (codified as amended at N.C. GEN. STAT. §139-8(12) (2005 & Interim Supp. 2006)).

191. Act of April 17, 1959, ch. 308, § 7, 1959 N.C. Sess. Laws 255, 257.

192. Act of June 17, 1961, ch. 1001, 1961 N.C. Sess. Laws 1303 (codified at N.C. GEN. STAT. §153A-287 (1987 & Cum. Supp. 1992)), repealed by Act of July 15, 1993, ch. 348, §5, 1993 N.C. Sess. Laws 1064, 1070.

193. Heath, *supra* note 177, at 35.

194. Act of June 17, 1961, ch. 1001, 1961 N.C. Sess. Laws 1303 (codified at N.C. Gen. Stat. §153A-287 (1987 & Cum. Supp. 1992)), repealed by Act of July 15, 1993, ch. 348, §5, 1993 N.C. Sess. Laws 1064, 1070.

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hydro-electric projects of the state's major electric power companies are located.<sup>195</sup>

The principal proponents of the 1961 rider were these power companies, who were concerned about the possibility of transfers of water that would reduce the power production and revenues of their hydro-electric plants.<sup>196</sup> The net effect of the 1961 legislation was that the major power companies got the protective rider that they wanted, and the Triangle Area local governments got the exemption that they wanted for their river basins.

### *State Approval Requirements*

Starting in 1955, another series of statutes began requiring local governments in some circumstances to obtain state approval for water projects. N.C. Gen. Stat. § 162A-7,<sup>197</sup> a 1955 statute, required state approval before water and sewer authorities could condemn water rights. The same requirement was extended by N.C. Gen. Stat. § 153A-285 in 1973 to counties and cities acting jointly.<sup>198</sup> N.C. Gen. Stat. § 153A-285 also required counties and cities acting jointly to obtain state approval in order to divert water from one stream to another. Approval of such diversions was required from *any river*, not merely from one river basin to another.<sup>199</sup>

By 1973, the Environmental Management Commission (EMC) was the state agency for approval of these projects,<sup>200</sup> as a result of the State Government Reorganization process that began in 1971. The Commission and its staff, the Division of Water Resources, were beginning to accumulate experience in interpreting and administering these statutes, a process that would continue until 1993.<sup>201</sup> While this was happening, legislators whose constituents had strong convictions, both

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195. OFFICE OF ENVIRONMENTAL EDUCATION, NORTH CAROLINA DEPT. OF ENVIRONMENT AND NATURAL RESOURCES, *DISCOVER NORTH CAROLINA'S RIVER BASINS* 2-3 (2001) (containing a map of the river basins).

196. Milton S. Heath, Jr., *Interbasin transfers: Back in the News*, POPULAR GOV'T, Fall 1994, at 21.

197. Act of May 23, 1955, ch. 1195, § 6 1/2, 1955 N.C. Sess. Laws 1198, 1204-05 (codified at N.C. GEN. STAT. §162A-7 (1987 & Cum. Supp. 1992)), repealed by Act of July 15, 1993, ch. 348, §6, 1993 N.C. Sess. Laws 1064, 1070.

198. Act of May 24, 1973, ch. 822, § 1, 1973 N.C. Sess. Laws 1233, 1281 (codified at N.C. GEN. STAT. §153A-285) (1987 & Cum. Supp. 1992)), repealed by Act of July 15, 1993, ch. 348, §4, 1993 N.C. Sess. Laws 1064, 1070.

199. *Id.*

200. Act of April 11, 1973, ch. 1262, § 23, 1973 N.C. Sess. Laws 373, 383 (codified as amended at N.C. GEN. STAT. §143B-282) (2005)).

201. Heath, *supra* note 196, at 22.

for and against interbasin transfers and other diversions, were considering their options. As a long-time observer of this scene,<sup>202</sup> the author (Heath) is well aware of the strength of convictions—sometimes the sheer ferocity of feelings—that swirl around these issues. Hardly a month has passed in his years of consulting without a reminder that opposition to water transfers among affected landowners is akin to an article of faith, and that support of water transfers by some perennially water-short communities is perceived as an act of survival. Legislators faced with such divisive issues ultimately are caught in a battle of property owners vs. consumers. None of the legislation enacted before 1993—neither the anti-diversion riders, nor the limited state approval requirements—resolved these conflicts.

### *The 1993 Interbasin Transfer Law*

In 1993, a growing consensus was reached in support of a repeal of all of the earlier legislation in favor of a comprehensive compromise statute. In essence, that compromise rejected the prohibition approach in favor of an expansion of the state approval mechanism.<sup>203</sup> Among the main features of the 1993 law were these:<sup>204</sup>

- EMC approval was required for future interbasin transfers (IBT's) of 2 million gallons per day or more from one river basin to another,<sup>205</sup> including both water supply and wastewater or storm water discharges.<sup>206</sup>
- A new and ingenious definition of "river basins" expanded the number of regulated basins from the traditional 17 major basins to a total of 38 basins.<sup>207</sup> Subject to some exemptions that blunted potential resistance from areas with existing systems,<sup>208</sup> the combination of covering 38 basins and wastewater, as well as water supply projects, created a much more comprehensive system of law than any of the previous measures.
- The EMC was given a set of standards to guide its discretion in granting or denying permit approval that drew on previous combinations of benefits vs. detriments (from the 1961 statute), plus

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202. Heath, *supra* notes 177 and 196.

203. Act of July 15, 1993, ch. 348, 1993 N.C. Sess. Law 1064 (codified as amended at N.C. GEN. STAT. §§143-215.22G through 215.22I (2005)).

204. Heath, *supra* note 196, at 22-23 (reviewing the main features of the 1993 statute).

205. N.C. GEN. STAT. § 143-215.22I(a) (2005).

206. N.C. GEN. STAT. § 143-215.22G(3) (2005); N.C. GEN. STAT. § 143-215.22I(d)(3)(c) (2005).

207. N.C. GEN. STAT. § 143-215.22G(1) (2005).

208. N.C. GEN. STAT. § 143-215.22I(b) and (i) and (j) (2005).

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some new factors that drew on newer environmentally conscious laws.<sup>209</sup>

- In the 1993 statute, the EMC was directed to approve IBT applications unless it concluded by a preponderance of the evidence based upon detailed findings of fact that “the potential detriments of the proposed transfer outweigh the benefits.”<sup>210</sup> This version of the burden of proof, heavily debated in the 1993 General Assembly, would not be “forever”—at the next turn of the political wheel, in 1997, the burden of proof would be reversed by an amendment to the 1993 law.<sup>211</sup>
- One planning feature of the 1993 law created a water registration requirement broader than the IBT approval. It covered groundwater, as well as surface water, and withdrawals of one million gallons per day rather than two million gallons per day.<sup>212</sup>
- “Those familiar with modern administrative law will recognize in [the findings required by this law] an invitation to extended proceedings on any issues contested by the parties”<sup>213</sup>—a lawyers’ and engineers’ full employment law that would warm the hearts of many professionals.

Before the end of the 20th century, there would be more ratcheting of planning and regulatory requirements under the IBT law, in addition to the shift in burden of proof. 1991 legislation would bring an effort, probably unsuccessful, to extend the reach of North Carolina’s regulations into Virginia in pursuit of the Gaston Pipeline Project.<sup>214</sup> 1998 legislation would bring a declaration of state policy to “maintain, protect and enhance water quality,”<sup>215</sup> a step that paralleled a U.S. Supreme Court decision that expanded state water quality certifications to include water use as well as water quality implications.<sup>216</sup> The 1998 legislation would also require the EMC to consider cumulative impacts of transfers in and out of river basins in developing water

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209. N.C. GEN. STAT. § 143-215.22I(f) (2005).

210. Act of July 15, 1993, ch. 348, § 1, 1993 N.C. Sess. Laws 1064, 1068 (codified as amended at N.C. GEN. STAT. §143-215.22I(g) (1996)).

211. Act of September 17, 1997, ch. 524, § 1, 1997 Sess. Laws 2343, 2343 (codified as amended at N.C. GEN. STAT. §143-215.22I(g) (2005)).

212. N.C. GEN. STAT. § 143-215.22H (2005).

213. Heath, *supra* note 196, at 23.

214. N.C. GEN. STAT. § 143-215.22A (2005).

215. Act of October 2, 1998, ch. 168, § 1, 1998 N.C. Sess. Laws 542, 543 (codified at N.C. GEN. STAT. §143-211(b) (2005)).

216. PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700 (1994).

quality management plans for the state's river basins, and it enlarges on other planning requirements.<sup>217</sup>

Contested IBT approvals have become a regular feature of the water management landscape.<sup>218</sup> As recently as January 2007, a contested request for approval of a Concord-Kannapolis transfer via the Charlotte water supply system was granted by a 13-1 vote of the EMC—always subject to possible further appeals.<sup>219</sup>

### *Parting Thoughts on IBT Policy*

Does North Carolina have a policy “against” the often-debated IBT? No, that was repealed by the compromise of 1993<sup>220</sup> in favor of an expansion of the familiar administrative apparatus of the state.

Does North Carolina “favor” IBTs as a matter of state policy? Probably not, in light of the heavy burden of proof that falls upon the proponents of IBTs that fall within the 1993 IBT law.<sup>221</sup>

Are the current regulatory arrangements governing IBTs “forever”? It would be hard to argue forcefully that they are “forever,” in light of the ups and downs of past history,<sup>222</sup> future uncertainties (i.e. global warming), and the delicate political balance that is required to support the current arrangements. Yet, the necessity of some reasonable degree of stability for publicly or privately funded water and sewer infrastructure—even if it entails IBTs—demands the attention of reasonable policy makers. We are currently tied by water law to state approval rather than prohibited withdrawals, based upon underlying common law riparian rights principles, rather than competing arrangements such as the appropriative concepts typical of the great west.

“Interbasin transfers and other diversions” will probably continue to pose environmental policy issues worthy of careful study into the

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217. Milton S. Heath, Jr., *Environment and Natural Resources*, in NORTH CAROLINA LEGISLATION 1998 88 (John Saxon ed., 1998).

218. Heath, *supra* note 196, at 25-27.

219. See Bruce Henderson, *State OKs Disputed Water Transfer: Opponents Along the Catawba Vow Appeal*, CHARLOTTE OBSERVER (Charlotte, N.C.), Jan. 11, 2007, at A1.

220. Act of July 15, 1993, ch. 348, § 4-6, 1993 N.C. Sess. Laws 1064, 1070.

221. N.C. GEN. STAT. § 143-215.221(g) (2005).

222. The past history is reviewed in the articles cited at Heath, *supra* notes 177 and 196. For examples of proposals in the 2007 Session of the General Assembly that would place additional complex restrictions on interbasin transfers, see S.B. 1421 and H.B. 960 (and identical S.B. 1360). Among other things, S.B. 1421 would create a new presumption against (and a new clear and convincing evidence test for) IBTs. H.B. 960 (and S.B. 1360) would require IBT proposals to have letters of support from all upstream and downstream public water suppliers (including out-of-state suppliers), and to be accompanied by a series of complicated technical assessments.

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planning horizons of our society. As was observed earlier, it surely is plain that water transfers and diversions embody environmental policies that have significant legal and political consequences.

## II. THE CONSERVATION ERA

The environmental era that began in the late 1960s was preceded by a conservation era launched at the end of the nineteenth century. The movement that produced this period was led by the likes of Theodore Roosevelt, John Muir, and Gifford Pinchot. The early conservation era saw the origins of the national parks system. Later, it generated public power, oil and gas development, forestry, wildlife conservation, and soil and water conservation programs.

In North Carolina, the statutes that implemented these resource management programs at the state level contained policy statements that encouraged management and use of resources in contrast with the preambles of environmental-era statutes that stressed protection and preservation. For example, 1971 amendments to the North Carolina Oil and Gas Conservation Act<sup>223</sup> incorporated environmental values by making the statute originally enacted in 1945 read:

### § 113-382. Declaration of Policy.

In recognition of imminent evils that can occur in the production and use and waste of natural oil and/or gas in the absence of equal or correlative rights of owners of crude oil or natural gas in a common source of supply to produce and use the same, *and in the absence of adequate measures for the protection of the environment*, this law is enacted for the protection of public interests against such evils by prohibiting waste and compelling ratable production *and authorizing regulations for the protection of the environment*.<sup>224</sup>

Another contrast between environmental- and conservation-era philosophies can be seen by comparing the 1967 water and air measures law and the 1998 interbasin transfer law with an earlier 1959 water resources statute. The 1967 statute expresses a public policy to maintain “a total environment of superior quality.”<sup>225</sup> The 1998 law contained a declaration of state policy to “maintain, protect and

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223. Act of July 1, 1971, ch. 813, 1971 N.C. Sess. Laws 1168 (codified as amended at N.C. GEN. STAT. § 113-382 to -415 (2005)).

224. Act of July 1, 1971, ch. 813, §§ 3-4, 1971 N.C. Sess. Laws 1168, 1168 (codified as amended at N.C. GEN. STAT. § 113-382 (2005)) (1971 amendments appear in italics).

225. Act of June 22, 1967, ch. 892, § 1, 1967 N.C. Sess. Laws 1144, 1144-45 (codified as amended at N.C. GEN. STAT. § 143-211 (2005)).

enhance water quality.”<sup>226</sup> By comparison, the 1959 water resources law provides:

**§ 143-352. Purpose of Article.**

The purpose of this Article is to create a State agency to coordinate the State’s water resource activities; to devise plans and policies and to perform the research and administrative functions necessary for a more beneficial use of the water resources of the State, in order to insure improvements in the methods of conserving, developing and using those resources.<sup>227</sup>

The soil and water conservation law contains a more generic declaration of policy that combined utilization and development with protection and prevention objectives, providing as follows:

(b) Declaration of Policy. - It is hereby declared to be the policy of the legislature to provide for the conservation of the soil and soil resources of this State, and for the control and prevention of soil erosion, and for the prevention of floodwater and sediment damages, and for furthering the conservation, utilization, and disposal of water, and the development of water resources and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety and general welfare of the people of this State.<sup>228</sup>

The General Assembly did not adopt policy statements for forest development or marine fisheries programs until 1977 and 2004, respectively.<sup>229</sup> Despite their late origins, these statements focused on development and production, much in the manner of earlier conservation era legislation.<sup>230</sup> Thus, the 1977 Forest Development Act finds that, “It is in the public interest of the State to encourage the develop-

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226. Act of October 2, 1998, ch. 168, § 1, 1998 N.C. Sess. Laws 542, 543 (codified at N.C. GEN. STAT. §143-211(b) (2005)).

227. Department of Water Resources Act, ch. 779, § 1, 1959 N.C. Sess. Laws 758, 759 (codified at N.C. GEN. STAT. § 143-352 (2005)).

228. Act of June 9, 1959, ch. 781, § 3, 1959 N.C. Sess. Laws 771, 771 (codified as amended at N.C. GEN. STAT. § 139-2(b) (2005)).

229. Forest Development Act, ch. 562, § 2, 1977 N.C. Sess. Laws 661, 661-62 (codified as amended at N.C. GEN. STAT. § 113A-177 (2005)); Act of August 2, 2004, ch. 2004-150, § 1, 2004 N.C. Sess. Laws 502, 503 (codified as amended at N.C. GEN. STAT. § 113-201 (2005)).

230. Preambles, findings, policy statements, and statements of purpose and intent can be found in many of the statutes concerning these earlier natural resource management programs. See N.C. GEN. STAT. §113A-190 (2005) (primary forest product assessments); N.C. GEN. STAT. §113-60.4 (2005) (forest insect protection); N.C. GEN. STAT. §113-60.11 (2005) (Southeastern Interstate Forest Fire Protection Compact); N.C. GEN. STAT §113-60.21 (2005) (Regulation of Open Fires); N.C. GEN.

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ment of the State's forest resources and the protection and improvement of the forest environment."<sup>231</sup> The 2004 marine fisheries law provides:

(a) The General Assembly finds that shellfish cultivation provides increased seafood production and long-term economic and employment opportunities. The General Assembly also finds that shellfish cultivation provides increased ecological benefits to the estuarine environment by promoting natural water filtration and increased fishery habitats. The General Assembly declares that it is the policy of the State to encourage the development of private, commercial shellfish cultivation in ways that are compatible with other public uses of marine and estuarine resources such as navigation, fishing, and recreation.

(b) The Marine Fisheries Commission is empowered to make rules and take all steps necessary to develop and improve the cultivation, harvesting, and marketing of shellfish in North Carolina both from public grounds and private beds.<sup>232</sup>

Perhaps the most telling evidence of the management-development philosophy of North Carolina's early conservation agencies lies in the organizational emphasis of the state department that housed their programs for many years. North Carolina had an omnibus Department of Conservation and Development (C&D) that existed until it was replaced by a Department of Natural and Economic Resources under the 1973-74 reorganization of state government.<sup>233</sup> The old Department of C&D included not only divisions of parks, forestry, and commercial fisheries, but also divisions of commerce and industry, and travel and promotion.<sup>234</sup> (Commerce and Industry, and

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STAT. §113-60.40 (2005) (North Carolina Prescribed Burning Act); N.C. GEN. STAT. §113-44.8 (2005) (State Parks Act).

231. Forest Development Act, ch. 562, 1977 N.C. Sess. Laws 661, 661 (codified as amended at N.C. GEN. STAT. § 113A-177(a)(1) (2005))

232. Act of August 2, 2004, ch. 2004-150, § 1, 2004 N.C. Sess. Laws 502, 503 (codified as amended at N.C. GEN. STAT. § 113-201 (2005)).

233. Act of April 11, 1974, ch. 1262, §§ 11-87, 1973 N.C. Sess. Laws (2d Sess.) 373, 377-417 (current version at N.C. Gen. Stat. §§ 143B-279.1 to -344.23 (2005 & Interim Supp. 2006)) (replacing the Department of Conservation and Development with the Department of Natural and Economic Resources (DNER)).

234. For the period before the transition to DNER, see PROCEEDINGS OF INSTITUTE: CHAPEL HILL, NORTH CAROLINA, SEPTEMBER 29 TO OCTOBER 1, 1955, THEME: ECONOMIC DEVELOPMENT OF NORTH CAROLINA 84-91 (1955) (describing the early activities of the Division of Commerce and Industry of the Department of Conservation and Development) and PAUL W. WAGER & DONALD B. HAYMAN, RESOURCE MANAGEMENT IN NORTH CAROLINA 4 (chart), 118-19 (1947), for the responsibilities of the Divisions of Commerce and Industry and Advertising. See also N.C. GEN. STAT. § 113-3(2) and (3) (1966) (113-3(3) repealed in 1977) (duty to promote more profitable use of lands and

Travel and Promotion were transferred to a new Department of Commerce in a 1977 reorganization that re-named Natural and Economic Resources as Natural Resources and Community Development.<sup>235</sup> Two later reorganizations renamed the omnibus department as Environment, Health and Natural Resources in 1989, which became the Department of Environment and Natural Resources in 1997.<sup>236</sup> “Development” was in the title of the old C&D Department, and it played a strong, if not dominant, role in the department’s affairs for many years.

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forests and to promote the development of commerce and industry); N.C. GEN. STAT. § 113-8 (2005) (Board of Conservation and Development to make investigations of the natural, industrial and commercial resources of the State and to take measures to promote conservation and development); N.C. GEN. STAT. § 113-10 (1966) (repealed 1973) (duty of Director of Conservation and Development to examine and survey the economic resources of the State and to investigate industrial and commercial enterprises and advantages); N.C. GEN. STAT. § 113-15 (1966) (repealed 1977) (duty for the nationwide advertising of North Carolina); N.C. GEN. STAT. § 113-15.1 (1966) (repealed 1969) (Division of Community Planning).

235. Act of April 14, 1977, ch. 198, 1977 N.C. Sess. Laws 185 (current version at N.C. GEN. STAT. §§ 143B-427 to -472.97 (2005 & Interim Supp. 2006)) (reconstituting the Department of Commerce and transferring the Division of Economic Development, the North Carolina National Park, Parkway and Forests Development Council, the Science and Technology Committee, and the Science and Technology Research Center from DNER to Commerce); Act of June 28, 1977, ch. 771, 1977 N.C. Sess. Laws 1008, 1008-13 (current version at N.C. GEN. STAT. §§ 143B-279.1 to -344.23 (2005 & Interim Supp. 2006)) (reorganizing the Department of Natural and Economic Resources (DNER) into the Department of Natural Resources and Community Development (DNRCD)). See also Milton S. Heath, Jr. and Robert L. Farb, *State Government*, in NORTH CAROLINA LEGISLATION 1977, 283, 286-87 (Joan G. Brannon ed., 1977). See also DORIS MAHAFFEY & MERCER M. DOTY, WHICH WAY NOW? ECONOMIC DEVELOPMENT AND INDUSTRIALIZATION IN N.C. 19-20 (1979) (for responsibilities of the Department of Conservation and Community Development and DNER prior to 1977 and the “close working relationship between developers and environmentalists within the single Department of Natural and Economic Resources”).

236. In 1989, the Department of Natural Resources and Community Development (DNRCD) was reorganized into the Department of Environment, Health and Natural Resources (DEHNR). Act of July 1, 1989, ch. 727, 1989 N.C. Sess. Laws 2125, 2125-2268 (current version at N.C. Gen. Stat. §§ 143B-279.1 to -344.23 (2005 & Interim Supp. 2006)). In 1997, the Department of Environment, Health and Natural Resources (DEHNR) was reorganized into the Department of Environment and Natural Resources (DENR) and Health Services was transferred to the new Department of Health and Human Services. Current Operations and Capital Improvements Appropriations Act of 1997, ch. 443, §§ 11A.1 to 11A.130, 1997 N.C. Sess. Laws 1344, 1508-1628 (current version at N.C. Gen. Stat. §§ 143B-279.1 to -344.23 (2005 & Interim Supp. 2006)).

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III. INTERPRETING PREAMBLES: A THEORY CONCERNING THE LEGAL  
CONSEQUENCES OF ENVIRONMENTAL PREAMBLES AND  
DECLARATIONS OF POLICY

The question addressed in this section is: what is the potential range of legal consequences of the environmental preambles, policy declarations, and findings that have been examined in this essay?

The short answer is: "various." That is, there is a *range* of potential legal consequences.

At one end of the range is the notion that such preambles, policy declarations and findings have no independent legal consequences. At the other end of the range, these documents may have powerful legal consequences of a constitutional nature or by way of expressing a rule of law. In the middle ground between these two extremes, these documents may be treated as aids to interpretation of the action portions of their statutes or of other statutes.

*The Middle Ground*

Several of the North Carolina appellate decisions reviewed in this essay illustrate this "middle ground." These include the decisions that apply SEPA's declaration of policy as a starting point for interpreting SEPA's environmental impact provisions and for interpreting related statutes.

In the Orange County highway decision, the Court of Appeals stated that SEPA's environmental impact requirements "give effect to this policy" stated in Section 3.<sup>237</sup> The Cane Creek decision described the environmental impact requirement as clarifying "the sort of consideration of environmental values . . . compelled by the Act."<sup>238</sup> In extending this reasoning to the interpretation of other statutes, the Orange County highway decision said that "it is the duty of the Appellate Courts to interpret statutes so as to be consistent with each other."<sup>239</sup> In *State v. Williams and Hessee*, another Court of Appeals panel used the SEPA policy declaration as a reason for approving the condemnation of land for the Eno River State Park, saying that the condemnation involved circumstances "clearly consistent with the declaration of the Environmental Policy Act."<sup>240</sup>

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237. *Orange County Sensible Highways v. Dept. of Transp.*, 265 S.E.2d 890, 900-01 (N.C. Ct. App. 1980).

238. *In re Appeal from Environmental Mgmt. Comm'n*, 280 S.E.2d 520, 524 (N.C. Ct. App. 1981).

239. *Orange County*, 265 S.E.2d at 906.

240. *State v. Williams and Hessee*, 281 S.E.2d 721, 725 (N.C. Ct. App. 1981).

The *High Rock Lake* case demonstrates that this reasoning is not limited to the SEPA policy declaration. This is another Court of Appeals decision that relied on statutory policy declarations (of the capacity use areas law) as the basis for sustaining an agency decision.<sup>241</sup>

Altogether, this array of cases is a substantial vote of confidence for the “middle ground” view of policy declarations as “aids to interpretation” of legislation by the courts. Practitioners of the art of statutory interpretation will recognize these North Carolina cases as examples of purpose-oriented interpretation guided by acceptable sources such as legislative history and cogent, well formulated policy declarations. North Carolina’s state courts may not be as devoted to this style of interpretation as was the United States Supreme Court that once decided *Holy Trinity Church v. United States*.<sup>242</sup> Nonetheless, the North Carolina Supreme Court has shown its willingness to consider purpose-oriented interpretation<sup>243</sup> and to rely on legislative history<sup>244</sup> in appropriate cases.

#### *No Legal Consequences*

One is tempted to posit an option that these preambles, policy declarations, and findings have no legal consequences. After all, isn’t this really window dressing or hearts and flowers anyway? As Dr. I. Beverly Lake observed in the opinion he wrote for the court in *Lewis v. White*,<sup>245</sup> rejecting any role for SEPA in that early decision, “It is perfectly obvious that. . .the substitution of an art museum for a prison will not adversely affect the environment.”<sup>246</sup> (Even if it may seem unlikely that any court in the year 2007 would so cavalierly dismiss a law that is so firmly embedded in the social fabric today, there were no dissents from Dr. Lake’s opinion in *Lewis v. White*.)

Whatever one makes of *Lewis v. White* (the only reported environmental case even arguably in the “no legal consequences” category), it does serve as a reminder of some black-letter law on preambles. *American Jurisprudence* states: “A preamble is not part of a statute itself and

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241. *High Rock Lake Ass’n v. Evtl. Mgmt. Comm’n*, 276 S.E.2d 472, 474-78 (N.C. Ct. App. 1981).

242. 143 U.S. 457 (1892).

243. *North Carolina State Art Soc’y v. Bridges*, 69 S.E.2d 1 (N.C. 1952); *State v. Earnhardt*, 86 S.E. 960 (N.C. 1915).

244. *Lithium Corp. of America, Inc. v. Town of Bessemer City*, 135 S.E.2d 574 (N.C. 1964).

245. See *supra* note 69 and accompanying text.

246. *Lewis*, 216 S.E.2d at 144.

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has no substantive legal force. [It] may only be used as a tool of construction.”<sup>247</sup> *Strong’s North Carolina Index Archive* cites one early case from the 1800s that has a similar observation in a headnote, but not in the text.<sup>248</sup>

*Sutherland on Statutory Construction* has a much more extensive discussion of preambles, which makes it plain that their interpretation may vary from case to case. It also shows that the early dismissal of preambles was partly a matter of drafting style; early preambles preceded the enacting clause of a statute in “whereas” form, and it could easily be said that a preamble was no part of the statute.<sup>249</sup>

One lesson to be drawn from the black-letter law on preambles is a precaution: if the drafter of a policy or purpose or findings statement calls them something other than “preambles,” this may avoid the litigation risk that a court will be dismissive of their content because of their labels. So, *Cave* preambles!

### *Powerful Legal Consequences*

The final category to be addressed in this range of possible interpretations is the one that accords powerful legal consequences to policy declarations. This category is illustrated by the *Adams* case, upholding the constitutionality of the Coastal Area Management Act (CAMA),<sup>250</sup> and *Smith Chapel I*, interpreting the Environmental Bill of Rights.<sup>251</sup>

*Adams* shows the potential of a well-drafted set of legislative findings—combining economic and environmental data in a modern “Brandeis brief”<sup>252</sup>—to serve as the basis of an appellate decision upholding the constitutionality of legislation. The proponents of CAMA, anticipating the likelihood of a constitutional challenge to the act, assigned the task of drafting these findings to Professor Arthur

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247. See 73 AM. JUR. 2D STATUTES § 46 (2001).

248. 13 STRONG’S N.C. INDEX ARCHIVE, STATUTES § 31 (2000) (citing *Blue v. McDuffie*, 44 N.C. (Busb.) 131 (1852)).

249. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:04 (6th ed. 2000).

250. *Adams v. North Carolina Dept. of Natural & Econ. Res.*, 249 S.E.2d 402 (N.C. 1978).

251. *Smith Chapel I*, 502 S.E.2d 364 (1998).

252. The term “Brandeis brief” refers to a: “brief . . . that makes use of social and economic studies in addition to legal principles and citations. The brief is named after Justice Louis D. Brandeis, who as an advocate filed the most famous such brief in *Muller v. Oregon*, 208 U.S. 412 . . . (1908), in which he persuaded the Court to uphold a statute setting a maximum ten-hour workday for women.” BLACK’S LAW DICTIONARY 200 (8th ed. 2004).

Cooper,<sup>253</sup> an established expert on this subject matter, and this proved to be a very important decision.

In *Smith Chapel I*, a sympathetic court interpreted a constitutional policy declaration as establishing a new rule of law that authorized local governments to finance a stormwater management program on the basis of a constitutional amendment without further enabling legislation.<sup>254</sup> If this decision had not been overruled in *Smith Chapel II*,<sup>255</sup> it would have established a form of constitutional home rule—environmental constitutional home rule—previously unknown to North Carolina law.<sup>256</sup>

An early federal interpretation of the U.S. Clean Air Act Amendments of 1970 is another example of a case that relied on a legislative declaration of purpose to create a new rule of law. A suit by the Sierra Club produced a U.S. District Court opinion that enjoined the Administrator of EPA from approving parts of state implementation plans that allowed already clean air to degrade to the level of secondary air quality standards.<sup>257</sup> The District Court based its decision on language in the Clean Air Act's statement of purpose, which declares that the "purposes of this title are (1) to *protect and enhance* the quality of the Nation's air resources so as to promote the public health and welfare. . ."<sup>258</sup> This decision was affirmed without opinion by the Court of Appeals,<sup>259</sup> and then by the Supreme Court in a 4-4 decision, leaving the District Court opinion as the law of the land.<sup>260</sup> Acceding to this line of decisions, Congress created the prevention of significant deteri-

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253. Telephone conversation of author (Heath) with Professor Arthur Cooper (Mar. 12, 2007). Professor Cooper drafted the CAMA findings with the assistance of Thomas Kane, an attorney who had developed an early draft of CAMA. See Heath, *supra* note 108, at 346, 352. See also *supra* note 110.

254. *Smith Chapel I*, 502 S.E.2d at 367.

255. *Smith Chapel II*, 517 S.E.2d 874 (1999).

256. Frayda Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1989 n.30 (2006).

257. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972).

258. *Id.* at 255-56 (The opinion discussed the legislative history of the "protect and enhance" language which predated the Clean Air Act Amendments of 1970 and noted the emphasis placed upon it by the administrative guidelines of the agencies charged with carrying out the directives of the Air Quality Act of 1967. The language of the declaration of purpose is now codified at 42 U.S.C. § 7401(b) (1) (2000)).

259. *Sierra Club v. Ruckelshaus*, 4 ERC 1815, 2 Env'tl. L. Rep. 20,656 (D.C. Cir. 1972).

260. *Fri v. Sierra Club*, 412 US 541 (1973).

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oration program in the 1977 amendments to the Clean Air Act.<sup>261</sup> Thus, this new and important set of rules of law ultimately can be traced to a Congressional reference to enhancing and protecting air quality in the statement of purpose in the Clean Air Act.

Decisions that interpret policy declarations as establishing rules of law<sup>262</sup> obviously are the exception, not the rule. Any theory of the potential range of legal consequences of policy declarations, however, would not be complete if it did not allow for this possibility.

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There has been no reported appellate litigation concerning a majority of the environmental statutes reviewed in this essay. Until proven otherwise, it is reasonable to assume that these policy declarations, if litigated hereafter, will be viewed by the courts as aids to purpose-oriented interpretation of their statutes and other related statutes. That is, they are likely to occupy the “middle-ground” of interpretation alongside the policy statement of SEPA. Only time can tell whether any of these other policy declarations will be viewed as having “no legal consequences” or “powerful legal consequences”.

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261. Prevention of Significant Deterioration of Air Quality, Subpart I, Clean Air, 42 U.S.C. §§ 7470-7479 (2000). *See also* 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW, AIR AND WATER § 3:2, at 352 (1986).

262. The “rule of law” established by the *Sierra Club* case had legal consequences in the traditional sense of an enforceable rule (by injunction, in that case). The “rule of law” established by *Smith Chapel I* was an enabling rule with extraordinary consequences. It empowered North Carolina local governments to adopt ordinances without statutory authority—a major change in the capacity of local governments and in their relationship to the General Assembly.

APPENDICES: LISTS OF ENVIRONMENTAL POLICY PREAMBLES AND  
DRAFTERS, SELECTED PREAMBLES

Appendix A: Environmental and Conservation Era Preambles and  
Declarations of Policy

I. The Environmental Era

A) Environmental Policy Declarations

- Environmental Bill of Rights<sup>263</sup>
- North Carolina Environmental Policy Act: Purposes, Declaration of Policy<sup>264</sup>

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264. North Carolina Environmental Policy Act of 1971, ch. 1203, §§ 2-3, 1971 N.C. Sess. Laws 1763, 1763-64 (codified as amended at N.C. GEN. STAT. §§ 113A-2 to -3 (2005)).

265. Coastal Area Management Act of 1974, ch. 1284, § 1, 1973 N.C. Sess. Laws (2d Sess.) 463, 463-64 (codified as amended at N.C. GEN. STAT. § 113A-102 (2005)).

266. Land Policy Act of 1974, ch. 1306, § 1, 1973 N.C. Sess. Laws (2d Sess.) 597, 597-99 (codified as amended at N.C. GEN. STAT. § 113A-151 (2005)).

267. North Carolina Pesticide Law of 1971, ch. 832, § 1, 1971 N.C. Sess. Laws 1199, 1199-1201 (codified as amended at N.C. GEN. STAT. § 143-435 (2005)).

268. Mountain Ridge Protection Act of 1983, ch. 676, § 1, 1983 N.C. Sess. Laws 645, 646 (codified as amended at N.C. GEN. STAT. § 113A-207 (2005)).

269. Natural and Scenic Rivers Act of 1971, ch. 1167, § 2, 1971 N.C. Sess. Laws 1718, 1719 (codified as amended at N.C. GEN. STAT. §§ 113A-31 to -32 (2005)).

270. Nature Preserves Act, ch. 216, § 1, 1985 N.C. Sess. Laws 182, 182-83 (codified as amended at N.C. GEN. STAT. § 113A-164.2 (2005)).

271. Act of June 19, 1989, ch. 344, § 1, 1989 N.C. Sess. Laws 779, 780 (codified as amended at N.C. GEN. STAT. § 113A-129.1 (2005)).

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273. North Carolina Appalachian Trails System Act, ch. 545, § 2, 1973 N.C. Sess. Laws 858, 858-59 (codified as amended at N.C. GEN. STAT. § 113A-73 (2005)).

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274. North Carolina Trails System Act, ch. 670, § 1, 1973 N.C. Sess. Laws 995, 995 (codified as amended at N.C. GEN. STAT. § 113A-84 (2005)).

275. Act of July 10, 1981, ch. 925, § 1, 1981 N.C. Sess. Laws 1422, 1422-24 (codified as amended at N.C. GEN. STAT. §§ 113A-134.1, -134.3 (2005)).

276. An Act to Modify the Continuation Operations Appropriations Act of 1996, ch. 18, § 27.6 1995 N.C. Sess. Laws (2d Spec. Sess. 1996) 631, 825-826 (current version at N.C. GEN. STAT. § 113A-251 (2005)).

277. Act of June 28, 2000, ch. 2000-23, § 2, 2000 N.C. Sess. Laws 98, 99 (codified as amended at N.C. GEN. STAT. §§ 113A-240 (2005)).

278. North Carolina Water and Air Resources Act, ch. 892, § 1, 1967 N.C. Sess. Laws 1144, 1144-45 (codified as amended at N.C. GEN. STAT. § 143-211 (2005)).

279. Water Use Act of 1967, ch. 933, § 2, 1967 N.C. Sess. Laws 1236, 1236 (codified as amended at N.C. GEN. STAT. § 143-215.12 (2005)).

280. Sedimentation Pollution Control Act of 1973, ch. 392, § 2, 1973 N.C. Sess. Laws 476, 476 (codified as amended at N.C. GEN. STAT. § 113A-51 (2005)).

281. Act of July 1, 1971, ch. 813, §§ 3-4, 1971 N.C. Sess. Laws 1168, 1168 (codified as amended at N.C. GEN. STAT. § 113-382 (2005)).

282. Department of Water Resources Act, ch. 779, § 1, 1959 N.C. Sess. Laws 758, 759 (codified as amended at N.C. GEN. STAT. § 143-352 (2005)).

283. Act of June 9, 1959, ch. 781, § 3, 1959 N.C. Sess. Laws 771, 771 (codified as amended at N.C. GEN. STAT. § 139-2(b) (2005)).

284. Forest Development Act, ch. 562, § 2, 1977 N.C. Sess. Laws 661, 661-62 (codified as amended at N.C. GEN. STAT. § 113A-177 (2005)).

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285. Act of August 2, 2004, ch. 2004-150, § 1, 2004 N.C. Sess. Laws 502, 503 (codified as amended at N.C. GEN. STAT. § 113-201 (2005)).

286. Oil Pollution Control Act of 1973, ch. 534, 1973 N.C. Sess. Laws 816 (current version at N.C. GEN. STAT. §§ 143-215.75 to -215.94 (2005)).

287. Act of June 11, 1969, ch. 791, 1969 N.C. Sess. Laws 824 (codified as amended at N.C. GEN. STAT. § 113-229 (2005)).

288. Mining Act of 1971, ch. 545, 1971 N.C. Sess. Laws 466 (codified as amended at N.C. GEN. STAT. §§ 74-46 to -68 (2005)).

289. North Carolina Clean Water Bond Act of 1977, ch. 677, 1977 N.C. Sess. Laws 789, 789-803.

290. Act of June 16, 1978, ch. 1216, 1977 N.C. Sess. Laws (2d Sess) 146 (current version at N.C. GEN. STAT. §§ 130A-290 to -310.58 (2005 & Interim Supp. 2006)).

291. Ground Absorption Sewage Disposal System Act of 1973, ch. 452, 1973 N.C. Sess. Laws 534, 534-37 (current version at N.C. GEN. STAT. §§ 130A-333 to -343.1 (2005 & Interim Supp. 2006)).

292. Hazardous Chemicals Right to Know Act, ch. 775, 1985 N.C. Sess. Laws 1135, 1135-43 (codified as amended at N.C. GEN. STAT. §§ 95-173 to -218 (2005)).

293. Plant Protection and Conservation Act, ch. 964, 1979 N.C. Sess. Laws 1297 (current version at N.C. GEN. STAT. §§ 106-202.12 to -202.22 (2005)).

294. North Carolina Drinking Water Act, ch. 788, 1979 N.C. Sess. Laws 908, 908-17 (current version at N.C. GEN. STAT. §§ 130A-311 to -328 (2005 & Interim Supp. 2006)).

295. Archeological Resources Protection Act, ch. 904, 1981 N.C. Sess. Laws 1339 (current version at N.C. GEN. STAT. §§ 70-10 to -20 (2005)).

296. Act of May 30, 1985, ch. 279, N.C. Sess. Laws 228 (codified as amended at N.C. GEN. STAT. § 113-206 (2005 & Interim Supp. 2006)); Act of May 30, 1985, ch. 278, N.C. Sess. Laws 227 (codified at N.C. GEN. STAT. § 146-20.1 (2005)); Act of May 30, 1985, ch. 277, N.C. Sess. Laws 227 (codified at N.C. GEN. STAT. § 1-45.1 (2005)); Act of May 30, 1985, ch. 276, N.C. Sess. Laws 226 (codified at N.C. GEN. STAT. § 146-6 (2005)).

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## Appendix B: Selected Preambles and Policy Declarations

**Chapter 113A. Pollution Control and Environment****Article 9. Land Policy Act****§ 113A-151. Findings, intent and purpose<sup>297</sup>**

(a) Findings.—The General Assembly hereby finds that:

(1) The land of North Carolina is a resource basic to the welfare of her people.

(2) A lack of coordination of governmental action; a lack of clearly stated, sound, and widely understood guidelines for planning; and a lack of systematic collection, classification, and utilization of information regarding the land resource have led to inconsistencies in policy and inadequacies in planning for the present and future uses of the land resource.

(3) Governmental agencies responsible for controlling land use and private and public users of the land resource are often unable to independently develop guidelines for land-use practices which provide adequate and meaningful provision for future demands on the land resource, while allowing current needs to be met.

(4) Systematic and sound decisions as to the location and nature of major public investments in key facilities cannot be made without a comprehensive State policy regarding the land resource.

(5) Those affected by State land-use policy and decisions must be given an opportunity for full participation in the policy-and decision-making process. Such a process must allow for the final implementation of policy by local governments. The State should take whatever steps necessary to encourage and assist local governments in meeting their obligation to control current uses and plan for future uses of the land resource.

(b) Intent and Purpose.—The General Assembly declares that it is the intent of this Article to undertake the continuing development and implementation of a State land-use policy, incorporating environmental, esthetic, economic, social, and other factors so as to promote the public interest, to preserve and enhance environmental quality, to protect areas of natural beauty and historic sites, to encourage beneficial economic development, and to protect and promote the public health, safety, and welfare. Such policy shall serve as a guide for decision-making in State and federally assisted programs which affect land use, and shall provide a framework for the development of land-use policies and programs by local governments. It is the purpose of this Article to:

(1) Promote patterns of land use which are in accord with a State land-use policy which encourages the wise and balanced use of the State's resources;

(2) Establish a State policy to give local governments guidance and assistance in the establishment and implementation of local land planning and manage-

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297. Land Policy Act of 1974, ch. 1306, § 1, 1973 N.C. Sess. Laws (2d Sess.) 597, 597-99 (codified as amended at N.C. GEN. STAT. § 113A-151 (2005)).

ment programs so as to effectively meet their responsibilities for economically and environmentally sound land-use management;

(3) Establish a State land-use policy which seeks to provide essential public services equitably to all persons within the State and to assure that citizens shall have, consistent with sound principles of land resource use, maximum freedom and opportunity to live and conduct their activities in locations of their personal choice;

(4) Condition the distribution of certain federal and State funds on meeting reasonable and flexible State requirements for basic land planning; such conditions to include a clear statement of the State's authority and responsibility for review of planning and management by local governments;

(5) Develop and maintain coordination of all State programs having a land-use impact, including joint planning and management of State lands with adjacent nonstate lands, so as to ensure consistency with the purposes of this Article;

(6) Promote the development of systematic methods for the exchange of land-use, environmental, economic, and social information among all levels of government, and among agencies at all levels of government.

### **Chapter 143. State Departments, Institutions, and Commissions**

#### **Article 52. Pesticide Board**

##### **Part 1. Pesticide Control Program: Organization and Functions**

##### **§ 143-435. Preamble<sup>298</sup>**

(a) The Legislative Research Commission was directed by House Resolution 1392 of the 1969 General Assembly "to study agricultural and other pesticides," and to report its findings and recommendations to the 1971 General Assembly. Pursuant to said Resolution a report was prepared and adopted by the Legislative Research Commission in 1970 concerning pesticides. In this report the Legislative Research Commission made the following findings concerning the use and effects of pesticides and the need for legislation concerning control of pesticide use, of which the General Assembly hereby takes cognizance:

(1) The use of chemical pesticides has developed since the 1940's into a major, new billion-dollar industry. Pesticides have bettered the lot of mankind in many ways and especially have assisted the farmer by their contribution to a stable and inexpensive supply of high quality food, fiber and forest products. The control of insects, fungi and other pests is essential to the public health and welfare and specifically to the prevention of disease, to the production and preservation of food, fiber, and forests and to the protection of other aspects of modern civilization.

(2) The use of pesticides for these important purposes is currently a matter of serious public concern and their use in some instances presents risks to

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298. North Carolina Pesticide Law of 1971, ch. 832, § 1, 1971 N.C. Sess. Laws 1199, 1199-1201 (codified as amended at N.C. GEN. STAT. § 143-435 (2005)).

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man and the environment which must be weighed against the benefits of those uses in the overall public interest. Evidence is accumulating that extensive use of persistent pesticides poses hazards to health and the environment. Environmental problems resulting from the use, overuse and misapplication of some chemicals, and the disposal of unused chemicals and containers, have grown to the point where contamination of the environment is approaching significant proportions. There is concern among scientists and public health personnel about the long-term chronic effects of pesticide pollution on human health. Contamination by DDT has been shown to be global in extent. Moreover, recent experience in North Carolina and elsewhere has shown that the more toxic but less persistent pesticides cannot safely be substituted for the persistent "hard" pesticides without stringent safeguards.

(3) More extensive observation, study and monitoring of the effectiveness and the use of pesticides and of undesirable side effects on man and on the environment and of their relative importance for the overall public health and welfare are desirable in the public interest.

(4) Continued and strengthened control of the quality of pesticides and the control of labeling claims, direction for use and warnings are necessary for the protection of the purchasing public, including the household consumer, the farmer and other users.

(5) No existing legislation in North Carolina effectively limits or controls the use of pesticides. Misuse and misapplication of pesticides, while effectively controlled by law with respect to structural pest control operators, is not adequately controlled with respect to some other major groups of pesticide applicators. Careless disposal of unused pesticides and contaminated containers is not controlled by law, and no North Carolina legislation requires that pesticide dealers, who are the principal source of advice for many pesticide users, be qualified to give advice or be held responsible for their advice. These gaps in legal control of pesticides are important and should be remedied.

(b) The purpose of this Article is to regulate in the public interest the use, application, sale, disposal and registration of insecticides, fungicides, herbicides, defoliant, desiccants, plant growth regulators, nematocides, rodenticides, and any other pesticides designated by the North Carolina Pesticide Board. New pesticides are continually being discovered or synthesized which are valuable for the control of insects, fungi, weeds, nematodes, rodents, and for use as defoliant, desiccants, plant regulators and related purposes. However, such pesticides may be ineffective or may seriously injure health, property, or wildlife if not properly used. Pesticides may injure man or animals, either by direct poisoning or by gradual accumulation of poisons in the tissues. Crops or other plants may also be injured by their improper use. The drifting or washing of pesticides into streams or lakes can cause appreciable danger to aquatic life. A pesticide applied for the purpose of killing pests in a crop, which is not itself injured by the pesticide, may drift and injure other crops or nontarget organisms with which it comes in contact. In furtherance of the findings and recommendations of the Legislative Research Commission, it is hereby declared to be the

policy of the State of North Carolina that for the protection of the health, safety, and welfare of the people of this State, and for the promotion of a more secure, healthy and safe environment for all the people of the State, the future sale, use and application of pesticides shall be regulated, supervised and controlled by the State in the manner herein provided.

## **Chapter 113A. Pollution Control and Environment**

### **Article 14. Mountain Ridge Protection**

#### **§ 113A-207. Legislative findings<sup>299</sup>**

The construction of tall or major buildings and structures on the ridges and higher elevations of North Carolina's mountains in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and to visitors to the mountains. Supplying water to, and disposing of the sewage from, buildings at high elevations with significant numbers of residents may infringe on the ground water rights and endanger the health of those persons living at lower elevations. Providing fire protection may be difficult given the lack of water supply and pressure and the possibility that fire will be fanned by high winds. Extremes of weather can endanger buildings, structures, vehicles, and persons. Tall or major buildings and structures located on ridges are a hazard to air navigation and persons on the ground and detract from the natural beauty of the mountains.

## **Chapter 113A. Pollution Control and Environment**

### **Article 7. Coastal Area Management**

#### **Part 6. Public Beach and Coastal Waterfront Access Program**

##### **§ 113A-134.1. Legislative Findings<sup>300</sup>**

(a) The General Assembly finds that there are many privately owned lots or tracts of land in close proximity to the Atlantic Ocean and the coastal waters in North Carolina that have been and will be adversely affected by hazards such as erosion, flooding, and storm damage. The sand dunes on many of these lots provide valuable protective functions for public and private property and serve as an integral part of the beach sand supply system. Placement of permanent substantial structures on these lots will lead to increased risks of loss of life and property, increased public costs, and potential eventual encroachment of structures onto the beach.

(b) The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic

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299. Mountain Ridge Protection Act of 1983, ch. 676, § 1, 1983 N.C. Sess. Laws 645, 646 (codified as amended at N.C. GEN. STAT. § 113A-207 (2005)).

300. Act of July 10, 1981, ch. 925, § 1, 1981 N.C. Sess. Laws 1422, 1422-23 (codified as amended at N.C. GEN. STAT. §§ 113A-134.1 (2005)).

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well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State. Public access to beaches and coastal waters in North Carolina is, however, becoming severely limited in some areas. Also, the lack of public parking is increasingly making the use of existing public access difficult or impractical in some areas. The public interest would best be served by providing increased access to beaches and coastal waters and by making available additional public parking facilities. There is therefore, a pressing need in North Carolina to establish a comprehensive program for the identification, acquisition, improvement, and maintenance of public accessways to the beaches and coastal waters.

