Senators,

Thank you for the opportunity to provide feedback from the Department on the Senate PCS to H 765.

For reasons that are explained below, DENR cannot support the bill as written. The Department would welcome the opportunity to work with legislators to craft a bill that addresses our concerns and accomplishes the goal of responsible regulatory reform. The Department's comments are as follows:

Section 4.1a--ENVIRONMENTAL SELF-AUDIT PRIVILEGE AND LIMITED IMMUNITY: As written, there could be potential for a party to conduct an environmental audit, discover older activities that caused the (non-illegal, pre-regulatory) discharge of hazardous substances and then the state could not use that as evidence in court to enforce a remedial action order. See page 14 line 39. The text does have provisions for corrective action for illegal discharges, but not for older discharges.

The purpose section, paragraph (a) on page 13, line 27 helps, but uses the text "… audits of their compliance programs and management systems…" Could auditing of "management systems" be interpreted as discovering older discharge habits? If so, parties merely need do an EA, find where they discharged in the past and report it. Then that information could not be used to enforce cleanup. Additional comment: Page 18, Lines 9-11—the Department is unsure of how this would apply to multi-unit facilities (Chain of Gas Stations for example).

The proposed bill could have a negative impact on the Department and the Division of Air Quality due to vagueness and potential discrepancies with EPA's "Incentives for Self-Policing" policy.

The proposed bill could have a negative impact on facilities due to the potential for EPA oversight and overfile actions. The EPA has authority to react if the state does not respond appropriately and follow the EPA's Federally Reportable Violation (FRV) and High Priority Violation (HPV) policies.

Vagueness or potential discrepancy concerns:

- 8-58.61 (a) – "violation was corrected within a reasonable period of time."
    - "reasonable period of time." is not defined
- 8-58.61 (c)(1) "The disclosure is made within 14 days following a reasonable investigation of the violation's discovery through the environmental audit."
    - There is no definition for the length of a reasonable investigation. The law would be clearer if it stated "14 days from discovery." Additionally, other state or federal laws or rules may require reporting in a quicker time period. DAQ rulemaking could specify the timelines; however, other parts of the bill are very specific with respect to time. EPA "Incentive for Self-Policing" policy criteria requires notification within 21 days of discovery.

- 8-58.61 (c)(5)"…diligently pursues compliance and promptly corrects the noncompliance within a reasonable period of time."
    - "reasonable period of time." is not defined. EPA policy requires correction within 60 calendar days of discovery.
- 8-58.61 (d)(4) "The violation was not corrected in a diligent manner"
    - "diligent" is not defined
- 8-58.61 (d)(7) "The violation has resulted in a substantial economic benefit to the owner or operator of the facility."`
    - "substantial economic benefit" is not defined. A monetary benefit can be calculated for most violations.
- 8-58.61 (e) provides for the burden of demonstration of a voluntary disclosure to be shifted from the violator to the agency, but then states that the ultimate burden is on the person claiming immunity.

"If a person meets the burden of proving that the disclosure is voluntary, the burden shifts to the enforcement agency to prove that the disclosure was not voluntary, based upon the factors set forth in this section. The person claiming immunity from civil or administrative penalties or fines under this section retains the ultimate burden of proving the violations were voluntarily disclosed.

Section 4.7a—AMEND RISK-BASED REMEDIATION PROVISIONS: The Department appreciates the effort of the Committee to address risk based remediation but has concerns about the language present. Put plainly, the Department's primary goal is to efficiently and thoroughly clean up as many of the hazardous waste sites around the state as possible. There are currently 1000's of these sites in North Carolina; very few are being cleaned up. The vast majority of these sites have been neglected due to systemic inefficiencies, and the Department fears the amended language represented here will not sufficiently change the status quo. We are happy to share with you the unnecessary hurdles we have identified thus far and would welcome the opportunity to craft a law which will enable these sites to be remediated in an efficient and environmentally responsible way.

Section 4.9—AMEND THE LAW GOVERNING BROWNFIELDS REDVELOPMENT TO EXTEND ELIGIBILITY UNDER THE PROGRAM TO BONA FIDA PROSPECTIVE PURCHASERS, IN ACCORDANCE WITH FEDERAL LAW:

Questions from Committee members:

What is the Department's position on this provision?

It seems that the main purpose of this part of the PCS as it relates to Brownfields is to allow for owners who have not caused or contributed to contamination at the property to redevelop that property under a brownfields agreement without having to "sell" the property. This is a worthy goal and is an occasional issue we have heard raised by brownfield stakeholders. However, the benefits of this bill can be achieved without a

reference to federal CERCLA. The Department would propose the following modification of the Brownfields Property Reuse Act definition of "prospective developer" to achieve this goal without the resultant side complications that are possible (fewer entities qualifying for an agreement):

"Prospective developer" means any person with a bona fide, demonstrable desires to ~~either buy or sell~~ develop or redevelop a brownfields property ~~for the purpose of developing or redeveloping that brownfields property~~ and who did not cause or contribute to the contamination at the brownfields property.

How many sites have moved through the Brownfields Program since its inception?

There have been 337 Brownfields agreements finalized since the program's inception.

Section 4.18(a)—AMEND ISOLATED WETLANDS LAW: The section clarifies what was adopted by the GA last session. The Department is already implementing the isolated wetlands program in the manner prescribed in this section.

Questions from Committee members:

What is the Department's position on this provision? DENR would prefer this definition of an isolated wetland:

'Isolated wetlands' means a Coastal Isolated Wetland, Bogs, Seep, Hardwood Flat, Non-Riverine Swamp Forest, Pocosin, Pine Savanna, Pine Flat, or Basin Wetland as described in the North Carolina Wetland Assessment User Manual prepared by the North Carolina Wetland Functional Assessment Team, version 4.1 October, 2010, that are not jurisdictional wetlands under the federal Clean Water Act. An "isolated wetland" does not include an isolated man-made ditch or pond constructed for stormwater management purposes or any other man-made isolated pond."

What are the different types of isolated wetlands?

Coastal Isolated Wetlands, Bogs, Seep, Hardwood Flat, Non-Riverine Swamp Forest, Pocosin, Pine Savanna, Pine Flat, or Basin Wetland

How much of the State's isolated wetlands are basin wetlands and bogs and how much of the State's isolated wetlands are other types of isolated wetlands?

Coastal isolated wetlands cover 30,000 acres of land in eight coastal counties, bogs range from ¼ acre to 468 acres. 4.4 percent of NC's wetland permits are for isolated wetlands.

Section 4.19(a) AMEND COASTAL STORMWATER REQUIREMENTS: This section would change the low density threshold for coastal ORW waters from 12% built-upon area to 24% built-upon area. In addition, since the existing session law (2008-248) then references SA water requirements back to this same paragraph this Bill would change SA waters requirements within ½ mile and draining to SA waters to 24% built-upon area also. This would have a large impact on low density development projects on the coast in some of our most sensitive waters. This could lead to water quality impacts and impact the waters' ability to support their designated usages. In the rule making

process for rule change to coastal areas in 2007 and 2008 these low density levels where set at 12% due to continued closure of shell fish waters on the coast. A change of this type could lead to individual projects being challenged as by outside parties that question the potential of the projects to assure that they can meet water quality standards and protect best usages.

Studies have shown that while good to fair diversity was noted in all headwater streams with less than 10% impervious cover, nearly all stations with 12% or more impervious cover recorded poor diversity. The same sharp drop in macroinvertebrate diversity at around 12 to 15% impervious cover was also observed in streams in the coastal plain and piedmont of Delaware (Shaver et al., 1995).

Other studies have utilized other indicators to measure the impacts of urbanization on stream insect communities. For example, Jones and Clark (1987) monitored 22 stations in Northern Virginia and concluded that aquatic insect diversity composition changed markedly after watershed population density exceeded four or more individuals per acre. This population density roughly translates to half-acre or one acre lot residential use, or perhaps 10 to 15% imperviousness.

Jones, R. and C. Clark. 1987. "Impact of Watershed Urbanization on Stream Insect Communities." American Water Resources Association. Water Resources Bulletin. 15(4)

Shaver, E., J. Maxted, G. Curtis and D. Carter. 1995. "Watershed Protection Using an Integrated Approach." In Stormwater NPDES Related Monitoring Needs. Engineering Foundation. American Society of Civil Engineers. Crested Butte, CO. August 7-12, 1994.

Section 4.21—EXEMPT LINEAR UTILITY PROJECTS FOM CERTAIN ENVIORMENTAL REGULATIONS:

Numerous divisions within the Department have serious environmental concerns with this section. Because of the perceived negative impacts, DENR opposes Section 4.21 and requests that it be stricken from the bill. More information:

This language will have potentially serious impacts to wastewater collection systems and sewer line installations. It appears that anyone could put sewer lines (or other utilities) in anywhere without regard to any potential environmental impact.

Furthermore, It looks like this section would make all linear utility projects exempt from the Sediment Act, State Stormwater Laws and Mining Act among other state implemented laws like buffer requirements and watershed laws and we cannot support this proposed statute. We have major concerns with this on an environmental level, as utility projects making up thousands of acres of disturbance every year offer the same potential for E&SC issues as any other land disturbance. In fact, in many cases, these projects can result in more serious concerns due to the number of times they may have to cross streams and other features, as well as traverse sensitive terrain (steep slopes, highly erodible soils, wetlands, etc.). The potential for offsite sediment pollution on multiple property owners and into waters of the state would be immense and per

Supreme Court precedence these property owners would be severely limited in ways to collect property and environmental damages incurred on them by the Utility because the State Agencies that would normally enforce the environmental laws to protect land and waters could not because of this exemption and because no violation of law was cited or "Noticed." The complaints that would be generated as a result of this proposed legislation would be innumerable. Exempting Public and Private Utilities like this would be potential for severe environmental damage. Also, from a stormwater post-construction viewpoint, it appears that the defined projects might be mostly ones that don't result in built-upon area so they may not be "development" and require too many requirements. However, these projects would have impact from a sediment and erosion control standpoint and should be covered by the sediment act and the construction general permit. If these projects are exempt from the Sediment Act, they would still be covered by the Federal NPDES stormwater program and would potentially require an Individual Stormwater Permit that would still require erosion and sediment control to be addressed and would take quite a bit more time to obtain 3-9 months and would require public notice of the permit. The individual permits are currently avoided due to the efficiency of the current system (less than 30 days) which requires an Erosion and Sediment Control Plan Approval from the State and then automatically receives a General Stormwater Permit.

Below, we have included some photos of erosion and sedimentation issues along a large, linear project here in Wake County which totaled more than 200 acres of pipeline construction. This project had a total of 5 contracts, with plans for each submitted within 3 months of each other and all contracts/areas active and under construction simultaneously. This project had multiple notices of violation of the Sedimentation Pollution Control Act and lost sediment onto adjacent property and into streams at several locations.

The Public Water Supply Section, Division of Water Resources also opposes language in the “Exempt Linear Utility Projects From Certain Environmental Regulations” Section 62-351. The language as proposed states “Except as required by federal law…” activities related to the construction of public water lines will be exempt from regulation by the Public Water Supply Section.

In accordance with federal National Primary Drinking Water Regulations (not federal law) the Public Water Supply Section for many decades has implemented a program to protect public health through the review and approval of engineering reports, plans and specifications for water system infrastructure. As the primacy agency for implementation of the federal program, we must maintain a program to assure that the design and construction of new or significantly modified public water systems are able to comply with drinking water regulations (see Attachment 1). If the State does not satisfy the requirements of the National Primary Drinking Water Regulations, primacy will be lost and EPA will have to take over the North Carolina public drinking water program.

In addition, the 1996 amendments to the federal Safe Drinking Water Act specifically state that a State shall receive only 80% of the allotment the State is otherwise entitled to receive under the Drinking Water State Revolving Fund (DWSRF) program if the primacy agency is not implementing a program to evaluate the "technical capacity" of new and expanding public water systems (see Attachment 2). It is the existing program for the review and approval of engineering reports, plans and specifications that the State has used to demonstrate compliance with this federal law.

Although water system reports, plans and specifications are prepared by Professional Engineers, we believe our review and approval adds significant value and is appreciated by most applicants. A simple but not uncommon example is the submittal of documents that specify public water distribution lines must be disinfected prior to being placed in operation, but do not provide current or sufficient details to ensure that contractors will perform the disinfection in accordance with current American Water Works Association standards. Our review and approval process provides public health protection by ensuring important details such as these are not overlooked.

Again, DENR strongly opposes Section 4.21 and requests that it be removed from the bill.

Section 4.25—AMBIENT AIR MONITORING:

Questions from Committee Members:

What is the Department's position on this provision?

DENR is basically already doing what is mandated in 4.25 at the Secretary's direction. DENR believes the provision is therefore extraneous and not needed at this time. Air quality has improved in NC so much over the last decade that these monitors are no longer needed and there will be no adverse health effects. In addition to the fact that air quality has improved making the monitors no longer required, the Department supports eliminating non-required monitors in order to reallocate resources (monitors and staff time) that will be needed to satisfy upcoming EPA standards with regard to sulfur dioxide. The Department would support moving the date in section 4.25(b) from September 1, 2016 to January 1, 2017.

How many ambient air quality monitors does the State have? How many would be discontinued by this provision?

In 2015, DENR is operating a total of 74 criteria pollutant monitors at 46 sites across the state. This number does not reflect the monitors operated by the three local air programs or EPA. If approved by EPA, the proposed 2016 network plan will result in 9 fine particle monitors and 3 ozone monitors being discontinued, and a total of 9 sites being shut down. This proposed plan basically meets the requirement of the proposed provision.

How does DENR determine where to place monitors?

The monitoring network addresses several layers of EPA and other requirements/ needs. These requirements (40 CFR 58 Appendix D) vary by pollutant, but typically:

- Each state is required to have at least one "core" monitoring station covering a wide variety of pollutants. North Carolina is required to have two such sites (Charlotte and Raleigh)
- EPA regulations cite minimal monitoring requirements based on an MSA's population and the local concentration of the pollutant.
    - For example, the minimal threshold for having at least one ozone monitor is 350,000 population and for PM2.5 it is 500,000. But if pollutant concentration within the MSA is >85% of the standard, the number of required monitors increases and the threshold drops to 50,000 population. North Carolina has eight MSA's with at least 350,000 people.
    - This 85% threshold is critical in determining network size, as we'll discuss later.
- Near-road monitors are required in the larger metropolitan areas. North Carolina currently has two such sites (Charlotte and Raleigh), but three more are required in 2017 unless the rule changes (Durham, Greensboro, and Winston-Salem).
- There is a proposed rule that requires one or more SO2 monitors at each facility whose emissions exceed a minimum threshold, proposed to be as low as 1,000 tons/year. The state has an option to model instead of monitor such facilities. There is a similar rule for lead, but North Carolina has no sources that currently exceed the emissions threshold.
- EPA has additional requirements for rural transport and background monitors for certain pollutants.
- Certain air quality permits require background monitoring information be included in the air modeling calculations. Although EPA does not require the state to do this monitoring, North Carolina has traditionally operated an "industrial expansion" network so that such data is readily available for the air quality permitting process. Otherwise, industries would have to initiate their own monitoring and wait for one year of data before proceeding with their permit application.
- There is also special interest monitoring. The most notable example is the monitoring site established in Lee County to characterize the air in advance of shale gas development, in support of Session Law 2011-271. Special interest monitoring can also include urban air toxics or pollen.

The most predominant networks are the ozone and fine particle. Part of the reason for their large size is the historically high concentrations of those pollutants. As emissions controls were installed over the past 10-15 years, we have measured lower ambient

concentrations, especially for fine particles. The concentrations of both pollutants fell to levels below the federal standard, and we were able to re-designate the entire state in attainment of those standards.

As the concentrations fall further, below 85% of the standard, we are able to revisit whether or not the monitor is still "required" to be operated. In recent years we have requested permission to discontinue a number of monitors and received EPA approval for many of them.

- Two years ago we shut down three fine particle monitors and one ozone monitor.
- Last year we requested shutting down six fine particle monitors and three ozone monitors; EPA approved five PM2.5 monitors and one ozone monitor.
- For the 2016 network plan, we are requesting discontinuation of nine PM2.5 and three ozone monitors; EPA's decision is expected this fall.

Has a health assessment been conducted on the impact of this provision?

Since only monitors that meet an ambient standard can be shut down, there are no expected adverse health effects.

Section 4.37—AMEND STORMWATER MANAGEMENT LAW:

DENR would prefer to see this section omitted and would rather work with the Committee to better address the issues this section intends to affect. That being said, comments are as follows:

Paragraph (a) - We support extending the deadline for fast-track rule adoption from July 1, 2016 to November 1, 2016. This will allow the fast-track stakeholder team additional time to assist us with the stormwater rules review and readoption process. Additional time also allows us to cover the fast-track program and the rules review and readoption process in a single rulemaking effort, which will result in a better final product for the regulated community as well as more efficient use of staff time.

Paragraph (b)(2)

(2) We recommend that vegetative buffers adjacent to intermittent streams not be measured from the centerline of the stream bed, but rather from the top of bank as per current session law and administrative code. Measuring vegetative buffers from top of bank is consistent with other state environmental programs. If vegetative buffers were measured from the centerline of intermittent streams, this would add extra work for the regulated community to precisely determine the transition point from perennial to intermittent for stream segments and reflect the change in vegetative buffer boundaries on their plans.

(3) We recommend that this language be omitted in favor of following the acceptable calculation methods already agreed upon and made available to the development community by the ongoing fast-track stakeholder team (i.e., the discrete NRCS Method and the Simple Method). The language "acceptable engineering hydrologic and hydraulic methods" is vague and would be difficult for state and local stormwater staff to implement because it does not specify how an "acceptable" method would be determined.

(4) We are concerned with a blanket allowance of development within the vegetative buffer even if the stormwater is discharged outside of the buffer for the following reasons:

- Vegetation in buffers is necessary to protect the stability of streambanks and to remove pollutants.
- Development within the buffer is likely to result in problems with flooding.
- It is often difficult and costly to direct stormwater flow uphill to a stormwater control measure.

The existing stormwater rules include variance procedures for activities in the buffer area. During our ongoing rule review process the Division can look at potential flexibility in these variance procedures.

(5) We recommend that this language be omitted in favor of following the current language in S.L. 2008-211, which applies SA requirements to developments that are BOTH within ½ mile AND draining to SA waters. Currently, developments that do not meet both of those criteria are not subject to SA waters requirements. Therefore, it does not seem like this language adds value.

Paragraph (d) - We recommend retaining the language "or exceed" to allow local governments to exceed minimum state standards when they deem it necessary to protect local water resources that may be crucial to the economic welfare of the community, such as recreational uses. In addition, allowing local governments to exceed minimum state standards affords them the flexibility to align their stormwater requirements with their other ordinances, thereby streamlining the local permitting process. For example, many local governments have setback requirements for flood control purposes which exceed the state's minimum setback requirements. In cases where local governments have a unified development ordinance, it would be impossible for the Commission to ascertain whether the setback was a requirement of a stormwater program or a local flood control ordinance.

Section 4.37.(c) - The Environmental Management Commission is currently in the process of readoption of rules, including the stormwater rules along with implementing fast track stormwater rules. The process will lead to adjustments that could require changes to local government ordinances. If requirements in this section are retained, this requirement should be timed so that it occurs after and not before the adoption of the fast-track and rules review and readoption updates so that the

local governments can demonstrate compliance with the new stormwater requirements. If this requirement is maintained, then we recommend that the deadline be extended until July 1, 2019 to allow time for the state rulemaking process and then the resulting local government ordinance revision processes.

Section 4.37.(d) – We appreciate the opportunity to work with the Environmental Review Commission to update State law for the management of stormwater as deemed appropriate and necessary by our stakeholders. We would meet this requirement in association with the stakeholder processes associated with rule re-adoption and fast track stormwater that are already ongoing. We anticipate that the stakeholder review process will be complete by the 2016 Regular Session.

Overall Stormwater Comment – we have been given directions in the past few years to develop a stakeholder team to look at a number of stormwater issues, develop and readopt rules, etc. We are nearing the end of an aggressive process to accomplish this and have had a large number of stakeholder give a large amount of time and effort to the process. It would be helpful to allow this process to work to its conclusion before making additional changes that could impact the efforts of this group.

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