PERSPECTIVES ON MODERN REGULATORY GOVERNANCE

ORAL HISTORY PROJECT

ROBIN W. SMITH

Assistant Secretary for the Environment, North Carolina Department of the Environment and Natural Resources, 1999-2013

Interviewed by Edward Balleisen, Ashton Merck, and Kate Preston

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Kenan Institute for Ethics, Duke University, Durham, NC

Interview I: March 23

Ashton Merck: This is an oral history of Robin Smith conducted by Ashton Merck, a doctoral student in the Duke history department.

Edward Balleisen: And Edward Balleisen, a historian and member of the Sanford School of Public Policy at Duke.

Kate Preston: And Kate Preston, an undergraduate student studying public policy and history.

Ashton: We're here at the Kenan Institute for Ethics on Monday, March 23rd, 2015. We'll be discussing Robin's twenty-five-year career in environmental law and regulation for the state of North Carolina. We'll be focusing on her time as the assistant secretary for the environment at the North Carolina Department of the Environment and Natural Resources.

Today, we'll be discussing a bit about her formative years and education, so let's get started.

How did your education and early life experiences lead you to law? And then, from there, how did you become interested in environmental law and regulation more specifically?

Robin Smith: How did it lead me to law? I don't know exactly how to answer that question other than I was interested really early in government and public policy, and law seemed like a logical thing to do. When I say "early," I mean middle-school age. I was really interested in public policy and following what was happening in government.

Didn't know any lawyers growing up. It had nothing to do with any relationships or experience. It was really just that. Then came to Duke as an undergrad, history major, with a plan all along to go to law school and with an interest in public law as opposed to private practice.

Edward: Did your parents have anything to do with this interest?

Robin: Not a thing. No, my father is an engineer. None of his three daughters received any of that ability at all. [laughs] No. I don't know exactly where it came from. They were always following what was going on in the world, but in terms of a really strong interest particularly in law or politics or government, not that I recall.

Edward: Was there a teacher who maybe sparked this? I'm just curious whether...

Robin: I really can't think of anything in particular. I just really... I remember from what would seem like a very early age, probably 12, 13, reading the editorial page in the Sunday newspaper and just getting interested in the opinion side of things.

I really don't remember anything from school that would have sparked it particularly.

Edward: Was there one national or state event that maybe you...what's your first memory of policy or governance or politics?

Robin: The Nixon Administration. That would sort of focus your attention, really.

[laughter]

Robin: It's probably right around then. Probably the Nixon Administration, the whole Watergate thing.

Edward: Did you watch Sam Ervin in the hearings?

Robin: Oh, yeah. Saw some of the televised hearings.

Edward: That was my first political memory also.

Robin: Is that really? That's so funny.

[laughter]

Robin: It's the kind of thing that really does make an impression. Especially since Sam Ervin was the chair of the Watergate committee, he was the hometown boy so to speak. Yeah. It was interesting.

Ashton: I still am interested in how you got into environmental law particularly. To what extent did law school prepare you?

Robin: You're not going to like the answer to this question.

[laughter]

Robin: Law school -- I'm sure it did prepare me, because law school prepares you for many things. It's a really useful set of skills, but I was not particularly focused on environmental issues in law school. I was just more interested in public policy generally.

In fact, my first job out of law school had nothing to do with the environment. I was actually the police attorney for the city of High Point for two years, which was fascinating.

[pause]

Ashton Merck: All right. We're going to start back up.

Edward Balleisen: I want to hear a little bit more about law school but can I even take you back one step further?

Robin Smith: Mm-hmm.

Edward: What'd you do at Duke?

Robin: What did I do at Duke?

Edward: In terms of what was your focus? You said you were...

[crosstalk]

Robin: I was a history major.

Edward: Did you do a thesis? Did you do much research of any kind? What kind of courses did you take?

Robin: Gosh, what kind of courses did I take? That was a long time ago. A number of American history courses. I'm trying to think. I had a history major, I almost had a second major in religion. I took a number of courses in the religion department. I can't tell you. Larry Goodwin who'd written a lot about politics and he also wrote about labor issues I think. I had one of his courses. I can't think beyond that.

Edward: Took anything with Bill Chafe?

Robin: Not that I recall. Just general.

Edward: What lead you to the High Point Police Department? How did you get that job?

Robin: I don't remember how I came across it, exactly. I think a friend of mine may have alerted me to it. I was looking at a couple of different options at the time. Of the options I was looking at, it was the oddest and the most interesting, and "Well, why not."

It was a very interesting experience because this was at a point when there were very few women serving on the police force in High Point. There were a few, but very few. It was still an extremely male organization. The police chief was a really pretty progressive guy, they had started increasing their education requirements for their officers. He was great to work with.

I ended up, what they mostly wanted a lawyer to do specifically for the police department, as supposed to having to rely to the City Attorney's Office all the time, was to help them with things like search and seizure questions, and, "Can I kick this door down now or do I have to wait?" sort of thing. So, it was really great experience.

Edward: So, you learned a tremendous amount about enforcement techniques and legal constraints with respect to those.

Robin: I learned a lot about police officers...

[laughter]

Robin: ...and the way they think. I had gone through the basic criminal law and procedure classes in law school, but that's a whole different thing from actually working with officers who were out there making decisions on a minute-to-minute basis.

While I was there, they had a civil rights lawsuit that was filed by a...This was filed by a prisoner who had been arrested. I think he was charged with second-degree murder or something like that. They took him into custody and left his car where they arrested him. He had a lot of stuff in the back of his car that then went missing, and so he, later, filed a civil rights claim that he had been deprived of property without due process.

We had one of those, which normally, you would think, the city's insurance company would defend, except they refused to. There was an argument between the city and their insurance carrier whether this fell into some sort of gray area.

Edward: Did they allege negligence, the insurance company or...?

Robin: I don't remember the details of what the fight over the insurance coverage was but the end result was I was a year and a half out of law school and arguing a civil rights case in the Fourth Circuit Court of Appeals in Richmond before it was all over with. That was insane. It was a fascinating experience.

Edward: It also sounds like you had the opportunity to have to deal with problems.

Robin: Yeah.

Edward: Someone just out of law school would rarely have the authority or responsibility to handle.

Robin: Right. It was just, I think, one of the attractions. Whether people realize it in advance, you're not working for government. You don't have the luxury of carrying somebody else's briefcase for five years. They just can't hire that many people. You're going to have to actually get in there and do something fairly soon. Now that was unusual. You would not normally have somebody that relatively soon out of law school dealing with that kind of case, but they didn't really have anybody else to do it.

Edward: Could you rely on a mentor or did you have somebody to talk to about this…?

Robin: Yeah, actually it's funny. At the time, my now husband and I were still dating. I guess we may have just gotten engaged at that point. He's at the School of Government and was then. He'd gone to the School of Government...

Edward: At UNC?

Robin: ...Law School at UNC. Actually, his area originally of practice had been Criminal Justice and Civil Liability. That was hugely helpful at the time, so … sort of a mentor?

[laughter]

Robin: You take them where you can find them, I guess.

Edward: For sure.

Ashton: Maybe moving from you and now that the [inaudible 05:46] serving Court of Appeals for this civil rights case, what kind of cases were you dealing with when you got to work for the attorney general or how did you get from police department at High Point, North Carolina to the attorney general's office?

Robin: Yeah, there were several steps between there. The way I got from the High Point Police Department to actually starting to work in environmental law and regulation was because my now husband and I were engaged, he was in Chapel Hill on a School of Government faculty, I was in High Point and started looking for something back closer to the Triangle area.

At the time, state government agencies had staff attorneys, which they really don't so much anymore.

Edward: The year we're talking about now was?

Robin: '83, '84, or something like that.

There was a staff attorney position that was open with the coastal management program in the Department of Environment and Natural Resources. That's the job I took to get back over this way and continue to work in public policy, but it was specifically with the coastal program to begin with. Then I went from the coastal program to the AG's office after that.

Edward: Let's start with the coastal program before we move to the AG's office. What kinds of responsibilities did you have there?

Robin: I started, say, in a staff attorney position which at the time was doing a lot with administrative appeals, permit appeals, variance decisions for permits, and just general, sort of day to day legal advice in terms of developing regulations and policy issues. It was partly administrative law and partly just general advising the staff on legal issues that they were running into.

Edward: How much did you have to learn on the job? Did you take administrative law in law school?

Robin: You know, I don't think that I did. I don't remember that I did.

Edward: This must have been a pretty steep learning curve or not so much once you got on that?

Robin: I think easing into it that way through one program and their kind of specific procedures was a lot of easier. There's actually in law school a pretty big gap between anything you would learn in an administrative law course and anything you would do in practice. Not much of it carries over from law school class to practical experience.

I think probably the easiest way to learn it may be doing something like what I ended up doing, which was just learning as you go in terms of carrying out variance procedures and setting up administrative hearings and that kind of thing.

Edward: What was the balance between the adjudicative regulation, somebody that wants a variance and has to go through the process to get it? Then you also mentioned that you were involved in rulemaking processes in the same position. Was it more the first than the second?

Robin: That's a good question. At most, it was 50/50. It might have been slightly more sort of day to day just legal advice. Variances were a pretty standard or a routine thing.

At that time, the Coastal Resources Commission was meeting regularly every two months. Every two months on their agenda, they would have at least one and generally more than one variance request.

That was sort of a steady thing, but it was against the background of sort of day to day working on policy issues or working on questions about legally what can we do in terms of management of wild horses at the Shackleford Banks coastal reserve which was part of that program too.

Edward: Could you describe maybe one of the typical kind of variance request, and the kinds that would be allowed and the ones that maybe would be denied?

Robin: The ones that were most often denied were oceanfronts setback variances. The state for a long time, very long time, has had setbacks on the oceanfront for any new construction.

The setback is based on a formula that uses the erosion rate for that particular area of shoreline, but then there's also an absolute minimum in the rule. It will say, "If your average erosion rate where you own your beach front lot is 3 feet per year, then your setback is 90 feet," so it's 3x30.

You measure that from the first line of vegetation, so not from the water, but from the first vegetation line back. The absolute minimum is 60 feet from the vegetation line. The commission would sometimes vary the specific setback.

If you could show that you can still be behind the dune line, you're well behind the vegetation line, I don't recall them ever varying the 60 foot minimum. They may have done it since then, but for a very long time, that was just…no.

Edward: In the mid-'80s, that was sacrosanct.

Robin: Right. I think it was sacrosanct for a very long time after that. I think it's been very unusual probably even now for the commission to vary an oceanfront setback to that extent. Other types of setbacks were easier for people to get.

If you're not on the ocean front, you're on one of the sands, and you want to build a dock, the rules say, because you don't want people blocking their neighbors' access to the water, there's a buffer between docks.

If you've got lots like this down the coastline, your dock has to have 15 feet on either side of it so that you're not skewing over into your neighbor's area. Some people could not just

make it work that way, and you could get an exception from your neighbor. If your neighbor said, "OK, I'll waive the offset," that's fine. Sometimes, neighbors wouldn't.

That's the kind of thing that, occasionally, the commission would say, "Yeah, you can move an extra five feet. It's not going to block the neighbor. In the circumstance, it's going to be OK." The fact that the neighbor's being hard to get along with is not a good enough reason to prevent you from having a dock at all.

There are a lot of little things like that they would vary, and some bigger things, but the setbacks tended to be "holy."

[laughter]

Edward: Was there informal lobbying in this context? Was it a very formal legal process, or would developers attempt to feel out the commission on policy questions of this sort?

Robin: I think, generally, people were very well behaved. These were quasi-judicial proceedings. It was inappropriate, in fact, it was a violation of the Administrative Procedures Act attempt to lobby any of the commission members on a variance.

We actually did have that happen one time. It was after I left the coastal programming while I was in the attorney general's office, but still advising the coastal resources commission as the commission's council, not the staff council.

At that time, we did have one notorious incident in which, this is during the Martin administration, so the last Republican governor in the state. The governor had nothing to do with it.

Edward: Before McCrory.

Robin: Before McCrory. The governor had nothing to do with it, but the secretary, and deputy secretary at the Department of Environment at the time – particularly, the deputy secretary – apparently did get involved calling commission members on behalf of the variance applicant, which was totally inappropriate.

It came to public attention, because one of the commission members at the meeting brought it up, and said, "Before we start into this variance, I want to put on the record that I've been contacted." He didn't say by whom, although that all became clear later.

"I've been contacted on behalf of the variance applicant, and I don't think that was appropriate, but I want to make sure that is on the record, and it's not going to affect my decision."

Well, before it was all over with, virtually every member of the commission acknowledged that they had been contacted as well. To their credit, they were ticked off that it was all playing out that way.

Edward: This, I assume was a bipartisan commission.

Robin: Yes, so you had carry over members from the previous governor's appointments. You had some new members, but it didn't break along partisan lines at all in this issue. I think they were uniformly pretty ticked off at having been put in this position.

There was one commission member who apparently was not contacted because after we had started down this road of one person saying, "I was contacted," then there was a discussion about whether this was problematic. Yes, it is. Then the decision was made, "Well, we ought to all make a disclosure whether we were, or not, and whether that would affect our votes.

They started going down the line of commission members. They get to this one commission member who said, "Well, I wasn't contacted, and I want to know why the hell not."

[laughter]

Edward: Were these all lawyers who had been appointed to the commission?

Robin: Oh, no. Most of them were not. It was quite a range of folks. When I first was working for the coastal program, the chair of the commission was a gentleman by the name of Parker Chesson who was the President of the College of the Albemarle up in Elizabeth City. Later on went on to be Vice-President of the Community College System.

He was basically an educator. You had engineers, people with backgrounds in fisheries. I think there was actually a seat on that commission for someone with background, or experience in commercial fishing.

The statute has descriptions of different types of expertise to be included on the commission. It was a wide ranging group of folks, and you'd usually end up with maybe a lawyer, or sometimes two, but a 15-member commission. That would not have been the general background.

Edward: Within the staff, what were the general issues like? You mentioned in High Point that it was certainly evident to you that there weren't that many women in positions of authority. Was it the same here?

Robin: It was a pretty good mix actually on the coastal program staff, and on the commission actually. That really wasn't much of an issue. Did not feel nearly as much like the boys' club at the police department was.

Edward: A few years there, so this was '80...

Robin: '84 to probably about '89. I think I was there about five years.

Edward: Five years?

Robin: Yeah, something like that.

Edward: Then what were the considerations that led you to seek the job in the attorney general's office?

Robin: I mentioned we were, at that point, in the Martin administration, and the relationships between the Republican appointees, and the secretary's office, and the folks who were in the divisions, not just the coastal program, although I think it became the focus of a lot of political attention as you might guess with all the money involved in coastal development. It was really a bad situation for a while.

It got to be...

Edward: In the sense of being tense?

Robin: Yes. There was just sort of constant tension over policy decisions. Constant pressure on the staff.

Edward: Did this show up in the rulemaking process? Was it more there or on the adjudication side?

Robin: Both. Part of the problem was … this is probably not unusual for political appointees who have come to those positions without having first having any experience with these kinds of programs. They were always late weighing in.

It's one thing if you're working with a political appointee in your organization who actually gets engaged relatively early on an issue, and says, "Here's the direction we want to go." They were never that organized. It was always the last minute.

You've got a staff person, the assistant director of the program standing in front of a committee at a commission meeting presenting a rule. You get the "hook" from the deputy secretary of the department suddenly turns up and says, "No, we're not doing that." It was just completely unprofessional among other things. Disorganized. It was just not a good situation.

Edward: Do you recall a specific instance? A given rule where that kind of “hook from the side of the stage” came in?

Robin: Yeah. I actually don't remember the details of the rule. My memory is it had something to do with marinas. There were always a lot of issues about marinas and marina operations, because you get a fair amount of water pollution issues related to either chemical, gasoline, waste...

Edward: There are always leaks.

Robin: We were going through this period of re-looking at marina regulation, because of some of the water quality problems that had been identified.

It was something about that and I don't recall what the details were, but I do recall the assistant director of the program, the coastal program, and I was in the AG's office at this point. Not on the staff anymore. But the assistant director was standing in front of this

commission, committee that was dealing with that particular rule making, when the deputy secretary of the department walked in and basically pulled him aside… and then he turned purple and...

[laughter]

Robin: Actually, he credits me with saving his job, because I took him by the arm and said, "Let's walk outside."

[laughter]

Robin: "Let's go for a little walk."

[laughter]

Robin: It's ridiculous. Whenever your disagreements are over policy and it's clearly not the way to handle it, but they were always sort of a day late and a dollar short on things like that.

Kate: I have a question about what were the backgrounds of these political appointees? You said they seemed like they didn't come in with a lot of experience in environmental rule making or anything like that. Where did they come from? How did they get to...?

Robin: Real estate. Banking. The department secretary had a background mostly, I think, in investment banking. He may have had some involvement with like a conservation related organization, but not a regulatory program.

But there were a lot of people in the department at that time whose backgrounds were largely out of real estate and banking. The deputy secretary actually had a PhD in fisheries biology, but he was the exception in terms of having had experience in environmental regulatory or environmental sciences area.

I think there's another assistant secretary who had some previous government experience, not environmental. It was more strictly administrative personnel kind of stuff.

Edward: Before we move to the AG's office, one last question on the first go-around with a piece of DENR, which would be – what was the role of science at this point?

We're in the mid-'80s. There are these big National Academy of Science reports coming through on risk assessment and risk management. Were you aware of that conversation at this point? What was the nature of engagement with scientific expertise and the link between that and risk assessment, risk management within the coastal management division?

Robin: I think there was a fair amount. The entire oceanfront management program was built around a risk model. That's why the state...I think North Carolina was one of the first states in the country to develop an ocean front setback and one of the few that did it based on calculating average erosion rates.

In the early days, that meant using historic aerial photography and trying to calculate shoreline movement. I think they did it in one mile segments of the coast. Now it's all digitized. Over time, the technology changed, but it was all being driven by a sort of risk management idea tied to what's actually going on, on the coast. What do we know about how the shoreline's moving? How quickly it's moving? How quickly it's eroding in one place versus another? How do we make regulations that reflect that?

Edward: There was a real commitment to adaptive policy making?

Robin: Yes. Yes.

Edward: Really be monitoring. Getting good data.

Robin: Update the erosion rates every five years. Recalculate your average numbers. Change the ocean setbacks. As you get more data, you've got a bigger database to look at those long-term trends. That's probably the best example although they were doing a lot of work at the time on protecting coastal wetlands, and the role of coastal wetlands, and coastal ecology. It was very much tied to the science.

This was a policy staff, and I think you'd have to describe it that way. Most of the people on the staff, many of them had science degrees, many of them had master's degrees, and fisheries biology, or something along those lines, or ecology. These weren't PhDs who were doing hard research, or ever had wanted to do hard research.

They were sort of those folks who were doing simultaneous translation between hard science, and trying to do policy implementation.

Edward: So did you had to learn a lot of science as well on the fly, or…?

Robin: Yeah, I did, and I think, I was talking about this issue a little bit a couple of days ago at the Water Resources Research Institute annual conference in Raleigh, how do you use science in public policy making? I think, especially for lawyers, you need to learn "enough."

You can't really learn it all, but you have to become bilingual, and understand enough to understand where you're going, or where you think you ought to be going with a policy decision.

[background noise]

Ashton: Sorry...um…

Robin: I will add one thing to that. Scientists, and unsolicited opinion. I think one of the ways really hard scientists struggle with policy making, is because they are understandably in the mode of doing research, and they know where the weaknesses are, and the data that they've got. They know they never have a full picture.

I think a lot of hard scientists have trouble taking that knowledge of the incompleteness of the scientific understanding, and translating that into policy. I think what the policy

people have to do is understand that too, and then say, "Yes, but we know enough. We know enough about this to make these decisions, and move things forward."

Edward: They have to get comfortable both with...

Robin: With the uncertainty. [laughs]

Edward: ...probability, and uncertainty. "Our best view at the moment is X, but it may change."

Robin: Right. OK.

[laughter]

Robin: Sorry.

Ashton: I feel that for you too, defining of terms is important, because how you define what a wetland is changes how you do the policy as well. If you change the definition of the terms legally, then that changes what it is. Anyway…

Let's just talk about what you worked on at the attorney general's office, and if there were any highlights, or cases that really… or what you did every day. The nature of your work there.

Robin: It was a mix of things, and so half of what I did was advising commissions, so the environmental commissions. Where before, I'd been on the staff, and largely working with staff folks, when I went to the AG's office, I became commission counsel for a number of those regulatory commissions, or the people who were actually making rule decisions, or the quasi-judicial decisions.

So I had the Coastal Resources Commission, still, the Sedimentation Commission, and a few others. I probably spent most of my time in terms of commission work with the coastal resources commission, because they were generating more than anybody else, any of the others that I had. I had about five, but they were major, and minor commissions.

Edward: All in environmental policy?

Robin: All environmental, yeah.

Edward: If you reflect back on those interactions, does it seem like there was a difference in the quality of leadership inside the commissions?

Robin: Over time?

Edward: Either over time in a single commission, or between the commissions?

Robin: Yes, to both. If you take the Coastal Resources Commission which was one of the major commissions in terms of its impact, the quality and the nature of the leadership really changed fairly dramatically over a period of time.

Part of that was just the personalities involved, but yes, there were ups and downs, and it makes a big difference. Having a good commission chair makes a huge difference in terms of how well a policy discussion goes.

And a smart commission chair knows not to try to dictate the end result, but to try to herd the cats toward some good reasonable decision. A bad commission chair tries to bulldoze everybody, ticks everyone off, and generally creates mayhem, and also smokes his pipe in violation of the rules at the Duke Marine Lab.

[laughter]

Robin: He shall remain nameless. There was a big difference between commissions; there was also a difference in that the coastal commission was probably always one of the most diverse. Even in the periods when it had less strength in terms of leadership, always had a corps of very capable members, and generally had a good majority of people.

Again, bipartisan, who recognized that what they were doing was important, and they might not always agree on what the right direction was, but they worked hard at it. They did their homework, they worked hard at it. Thought it was the important thing to do.

Some of the smaller commissions, and more narrowly focused commissions, like say the Mining Commission were smaller. I think you'd have to describe them as a little bit more parochial, because they were so much more limited to a certain type of activity, tended to draw people from those industries or from businesses related to the industry they were regulating. They were much, much more industry-focused and influenced, I think, than, say, the coastal commission could be. There were a lot of differences.

Edward: It sounds like the coastal commission really wrestled with regulatory tradeoffs?

Robin: Yes.

Edward: Between awareness of the imperative of growth and employment on the one hand and a concern for the various kinds of environmental worries on the other. Say, with the coast risk, maybe the Mining Commission was focused more on growth and employment?

Robin: Yes, and also just had a narrower focus of the inland. You're talking about rules for mine reclamation. Yeah, if they're looking at rules for reclaiming mined property and if most of the people on your commission have had some experience with the industry one way or the other, they may not be mine company operators but they may be other folks with related expertise.

It just becomes a much narrower discussion. It's narrower to begin with in terms of subject, but it becomes narrower in terms of how broadly people are looking at, policy questions and potential impacts, there's just not a lot of air getting into the room.

Edward: On the coastal commission, did it get its marching orders from the legislature and then work within that framework or was there an attempt as well not only to engage

the rulemaking processes that legislature asked for, but also to go back to the legislature and try and influence policy as issues came up in the commission?

Robin: For a long time, I don't remember there being a lot of legislative changes, for a very long time. Part of this is ancient history to some extent. Just getting the Coastal Area Management Act passed was a huge legislative fight in the 1970s. They finally eked out the votes to pass it, and two years later, there was a repeal movement, largely fueled by the people at the coast, property owners at the coast.

They had gone through this huge battle and then a repeal effort. Once all that settled down, there was actually relatively little legislative intervention for a pretty good period of time. At the same time, both the commission and the staff, I think, realize we don't want to go over there and ask for everything. What a good time to start asking for a minimum. You needed to let the dust settle in, get things going.

The statute itself, like most state environmental laws, is very broad. There's nowhere in the Coastal Area Management Act that it tells the commission to adopt oceanfront setbacks. What it talks about is regulating coastal development to ... It talks about encouraging or supporting the economy and also talks about managing, reducing risk and protecting sensitive natural resources. It's a very broad set of standards.

They had the job of doing all of the regulations that try to translate "what does it mean to reduce risk on the ocean front?" And where they went was toward the oceanfront setbacks and the state prohibition on seawalls and a number of other pretty forward-leaning policies for the 1980s nationally.

Nobody at the General Assembly who had any power said no for a long time.

Edward: Did the senators' representatives from the coast deal with your office? Do they have...?

Robin: Oh, yeah.

Edward: They, nonetheless, engage on a regular basis with specific decision-making processes.

Robin: Occasionally on rulemaking issues ... Well, let me back up. It depends on whether you're talking about my office, the AG's office, not so much. Once you're in the AG's office, you're pretty insulated directly from political interference. If they have a problem with your boss, they go to the AG.

That was one definite advantage to being there as opposed to in the Department of Environment and Natural Resources. If you're in the Department of Environment and Natural Resources, it's very common to get calls. Generally, they would go to the division director or the assistant director, not to a lowly staff person, although that sometimes happened too.

It was more frequent to calls from state legislators, especially influential legislators, concerned about an individual constituent's permit application or enforcement problem, just calling, "What's going on? Can't we fix this?" Maybe, maybe not.

[laughter]

Edward: Let me, just for one second, go back to that first period at the coastal division. Was there a real focus on public comment in the rulemaking process?

Robin: Yes.

Edward: So that was important. Did the public really engage? If so, who are the key…? If you had a typical rule making process, who could you expect to show up in the public comments?

Robin: At that time, it was less common to use something like a stakeholder group, which became much more common 10 years ago or so. Earlier, basically, the program was doing what the state Administrative Procedures Act required, which was public notice, public hearing on rules.

Depending on what it was, you could get significant – especially on a coastal rule because you've got the combination of local property owners, prospective developers, folks with vacation property, commercial fishermen. You've got all of these different interest groups. It's very – it's sort of local in a way. It's different from a statewide issue in that sense.

Yes, they could get significant amounts of public input and attendance of public hearing if it were a rule that really had an impact on a variety of interest groups.

Edward: And that input actually influenced decision making?

Robin: Yes.

Edward: Or not so much?

Robin: I think it did. I don't want to jump ahead. I think stakeholder groups do that in a different way, but I think certainly people raised issues in public hearings that, not always but would occasionally cause someone on the staff or on the commission say, "Hadn't really thought about that particular angle."

I think with most public hearings on, I say most, if you're dealing with an issue, it's very technical and you get a lot of comments say, if you're not talking about coastal development and you're talking about hazardous waste rules, you're going to mostly hear from industry people or people with a pretty high degree of expertise. If you're looking at a development rule, whether it's at the coast or storm water rule statewide, you're going to hear from a much wider range of folks.

Not all of those folks have that level of expertise to really be able to focus their comments in a way that is going to give the staff or the commission something to work

with. You're going to get a lot of, "I don't like its" or, "I do like its" without much else attached to it.

You do get some percentage of folks who are able to identify issues that staff hasn't thought about, commission hasn't thought about. And my general sense was, they were more than happy to take that into consideration. I don't think I ever worked with the commission at a time when it was essentially closed off from any idea of change in a direction they had started on.

Edward: So half of your time at the attorney general's office...

Robin: Was commissions.

Edward: Was commissions, and half was? Litigation?

Robin: Environmental litigation. A combination of enforcement cases and other things. In terms of the bigger kinds of enforcement cases, I guess I'll add, I sort of morphed over time into a particular position, which was sort of what they call in the AG's office, special litigation, which means I wasn't doing trial work for the most part. I did a little bit of that, but I was mostly doing appellate cases. Somebody else is doing the administrative hearing. Then often, I was picking it up when it went up on appeal on the record that had already been established to the Superior Court on judicial review or to the Court of Appeals. That was largely what I was doing.

I did some actual hearing work. The range of things was, on the enforcement side, we had a couple of big enforcement cases. One of the earliest ones that I dealt with was a notorious developer who had been working. His family owned a lot of property down near North Topsail Beach, and he largely developed that entire area around North Topsail.

They committed in the process of trying to put in a wastewater treatment plant for one of their new developments, committed this huge sedimentation violation that ultimately, almost completely filled in an estuarine creek, which is what turned it into a coastal management enforcement case.

I had that one, was one of the earliest sort of bigger and more unusual cases because part of what we were arguing was, I didn't pick it up as a sedimentation violation, which is what it actually was.

On the sedimentation program at the time, I wasn't really working with them at the time. They didn't take any enforcement action to speak of even though the guy bulldozed the site and done nothing in terms of sediment controls, but we picked it up as a coastal management enforcement case, arguing that by not controlling the sediment, allowing it to flow downstream and filling this estuarine creek that he had violated CAMA.

Edward: CAMA being?

Robin: The Coastal Area Management Act, but essentially that he had filled estuarine waters without a permit. We were backstopping the failure of the sediment program to

take any effective action and having to argue that the sediment violation was also a coastal management violation.

That was one. There was another big one, which actually came out of the policy dispute over wetlands, both national and state wetlands policy. Without going into the gory details, unless you want them you could ask, but there had been a long-standing Corps of Engineers policy about accidentally filling wetlands.

If you're doing work in a wetland and you're ditching it, say you're digging a ditch through a wetland, that doesn't require a federal Clean Water Act permit. The only thing that requires the permit is filling the wetland. There had been this policy that the Corps of Engineers had developed over time under the federal law that said, "If in the process of ditching or excavating through this wetland, you have incidental fill."

You're digging. Some amount of what you're digging and taking out falls back, we're going to treat that as fill that requires a Clean Water Act permit. That had gone for a while until there was a court case that overturned that policy.

In the process of overturning that federal policy, a lot of developers in southeastern North Carolina, Brunswick County in particular, decided that the gates had opened and they could excavate wetlands to their heart's content, forgetting that the state had a Sedimentation Act and some other state laws that also applied. We ended up with some big state enforcement cases out of that little excavation party that went on for a while.

Edward: One of the challenges with enforcement in any, whether it's the police department in High Point or the Attorney General's office is, which cases to pursue, given that you have serious constraints on how many people you can put to work on any kind of issue and time and the resources, what your budget looks like.

What was that process of priority setting? How did these particular cases bubble up to the top of the pile?

Robin: They come up through the program staff. You got program staff out there, whether it's the coastal program or the sediment program every day, inspecting projects, inspecting sites, writing notices of violation, most of those things get resolved at the staff level. The problem gets fixed.

Edward: Informal interaction.

Robin: There may or may not be a civil penalty. Most people who get civil penalties write the check and life goes on, and you don't worry about it. The things that tend to bubble up are the people and get referred up to the AG's office. That's how we got them. We didn't reach down for the most part. The AG has some authority to generate actions, enforcement actions on his own.

Generally, if you're working with a specific program, those cases are coming up from the staff level. They're getting referred up, because someone is not cooperating, and so you're at the point where you either have to file a lawsuit to collect a penalty that's not been paid

or you have to file a lawsuit and ask for an injunction. Don't order them to do what they will not do, short of that.

The other set of cases are the permitting cases, and so you also have cases that come up on that side where permit's been denied, persons appeal the permit denial, and it's going up on the review of that decision. Again, those tend to be the bigger cases that have more money at stake for someone to pursue that.

I think the one I mentioned on email was the Shell Island Resort case at Wrightsville Beach where the inlet was within 60 feet of the foundation of Shell Island Resort. They wanted to build a seawall and a revetment right there down the end of the hotel and across the front along the front shoreline at Wrightsville Beach, and the commission denied – well, the staff denied their permit, Commission denied the variance, they filed suit and alleged to taking a property without compensation by the denial of that permit. That one went all the way up to the court appeals.

Edward: It was decided how?

Robin: It was decided in the state's favor. What we argued was, they had no property right to build a structure on state-owned submerged lands even if their building was threatened.

Edward: It would be interesting to hear a little bit about the posture of the North Carolina courts towards these kinds of questions in the 1990's when you were at the AG's office. What kind of reception did you get at the various levels of appeal with these types of cases?

Robin: That's a good question. If you were starting out in an enforcement case or a permit appeal in a Superior courtroom, you were generally out in one of the coastal counties. Superior Court judges in the coastal counties were all over the place. There were judges out there who were clearly and unapologetically hostile to the coastal program. You knew that, going in, and they didn't particularly try to hide it.

There were others who were much more neutral, to – most of them probably were neutral to a few who you could say were supportive, at least understood where you were trying to go, so it was really a mix at the Superior Court level. There are a few cases that went up through federal courts.

Interestingly enough, Judge Terrence Boyle who's been back in the news recently, he's Republican. He was appointed to the federal bench by Jesse Helms, has always been great on environmental cases. Do not ask me to explain that, but there's been a number who've come up on the federal side through Judge Boyle in the eastern district of North Carolina and he's always been good.

When you get to the state appellate courts, I think it was generally fairly good for the state and for environmental protection issues in the '90s and probably into the 2000s a little bit. I think it's become more... "hostile" may not be the right word, but not friendly in recent years.

Edward: You describe a caseload or workload even after you move to the AG's office. If I'm understanding this correctly, that was still shaded towards the coast.

Robin: Yes, because although the coastal program was a small program, it was generating a lot of the major litigation. Probably the only other program that generated this much was the water quality program, which is statewide.

Edward: Could you describe maybe some of the issues that you had to handle on that side of the litigation ledger?

Robin: On which side?

Edward: The water quality.

Robin: I actually wasn't doing much for the water quality. There was a different lawyer who was assigned to the Environmental Management Commission to do most, but there are probably a couple actually doing water quality more specifically and then another couple doing air quality work for that commission.

That's a bigger commission that covers both water quality and air quality, so it was divided up. The Environmental Management Commission and the coastal commission were probably the two major generators of litigation and policy activity.

Edward: Were you pretty much in a silo then? Would you have interaction with these other parts of the office?

Robin: We definitely had interaction. There are a lot of issues that just crossed over pretty naturally because if you're dealing with a stormwater issue through the coastal program, you've also got some degree of involvement about the state water quality program who's over here.

Same thing with wetlands issues, there was always a fair degree of overlap in interest areas. Those program staffs work together really closely.

In the coastal area, there was actually a joint permit application for your coastal management development permit and your Clean Water Act water quality certification. The water quality staff, the coastal staff, there may have been another state program involved, overtime, developed a joint application process so they could look at those things together.

Edward: My sense is that while you were in the AG's office, there were something of a move to delegate enforcement responsibilities from the EPA to the states. Did that play into your caseload at all? How much did you pay attention with what was going on at the EPA? How much of a shadow did that cast on priorities at state level?

Robin: Some, probably, or maybe I was just more aware of it. There was probably more of that after I moved back over to DENR from the AG's office. We met, I say we, AG'S office program level staff, like the division directors, for water quality, air quality, and those folks.

There were regular meeting with EPA staff in Region IV. Region IV would host twice a year meetings in Atlanta, with all the Region IV state directors, to talk about common issues. There is always a lot of communication back and forth.

As far as I know, the state was always doing most of the enforcement. EPA went occasionally because they would elevate something to a national priority. They would start looking at something more closely, and for a while in the '90s into the 2000s, it was hog farms.

There were a few incursions into North Carolina where EPA would send a team down to do inspections of waste management systems and animal operations and things like that. There was always a lot of back and forth.

There was not a lot of direct EPA intervention or what they call over-filing in an enforcement case, which means they can come in and file an enforcement case even if the state hasn't taken any action. Or even if the state has, EPA can come in. It always has that independent authority to take action, but there was actually very little of that. A fair amount of communication, not a lot of direct intervention.

Edward: How about the relationship you had with your counterpart, say, in South Carolina or Virginia? Was there a network that emerged around there?

Robin: Yeah, actually there was. I think all of these programs have national associations. On the coastal program side there's an organization called the Coastal States Organization, which is a national organization of states with Coastal Zone Management Act programs. They've existed for a long time and met regularly with the folks at NOAA in Washington in the Office of Coastal Resource Management up there.

I can't keep track of all of them. There are a number of different organizations that are similar to that on the air quality, water quality side, where state directors get together. Typically what happens is they have these big annual meetings, which will involve, say on water quality and air quality, they would have their separate annual meetings with all the state directors being invited. Plus you'd get this huge contingent from EPA, so EPA was always part of that conversation too.

Edward: Shall we move to the transition to DENR?

Ashton: You started at DENR in October of 1999. That was not that long after Hurricane Floyd.

Robin: It was two weeks. It was a bad decision on my part.

[laughter]

Ashton: Can we talk a little bit about that transition and how that all went down?

Robin: Yeah, that was not one of my better decisions. It was interesting. It was a mess. It was just a godawful mess, and a situation where you had a physical mess in terms of cleanup of all sorts. You had your usual...you know, every time you get a flood like that,

you get your range of the storage tanks, whether they're underground storage tanks or above-ground gasoline storage tanks that break free, you kind of make a run for it and you have to collect all those and to clean up leaks.

Then we had all the animal issues. There were a lot of dead turkeys and pigs after Hurricane Floyd to be dealt with and it was just a mess. It was a mess in terms of policy as well because I think there were several ways in which people realized that the policies that look like they make sense in the cold light of day before a huge flood are much more difficult to deal with when you're trying to recover from the aftermath of huge flood.

A lot of those had to do with the animal operations and the impact on the farms and how to deal with both the excess water in the waste management systems and the dead animals. By the way, wet pigs don't burn.

[laughter]

Robin: Tried that.

[laughter]

Robin: Unless you're barbecuing it, it doesn't work.

[laughter]

Edward: What led you to contemplate a move out of the AG's office? What was intriguing to you about the DENR opportunity?

Robin: I think it was the policy side of it. I enjoyed doing the legal side and, just because I've had relationships with most of these programs and commissions for a really long time, I was probably able to push the envelope more than most people without getting in trouble on the lawyer influencing policy side of things.

As the lawyer, that's not your job. Your job is to help them figure out how to do what they needed to do. Tell them where the limits are. It was interesting to me to be able to have it more active, more direct out of the daylight role on policy development.

Kate: How did you cultivate those relationships as a lawyer in that role where you could get to the point where you felt comfortable sort of exerting that influence?

Robin: I think I had the good sense not to say to the extent I had influence, I think it would've been very subtle. I think one thing, you cannot abuse that relationship because that's going to kill the opportunity right there.

You can't really do it overtly. I guess I'm describing it now is influencing policy. I'm not sure that's exactly what it was at the time. Although, I think it had probably something that influenced.

If you're working with people for a long period of time, say, the commission members. I was sitting beside the commission chair at umpteen thousand, it felt like, commission

meetings over the years. I'm sitting right beside him at the commission table and issues come up or the conversation kind of gets wrapped around the axle among commission members and confused over what the rules are.

I guess I probably more than some lawyers in that position felt comfortable saying, "Mr. Chairman, can I try to untangle some of the confusion about what the rules say." You sort of step in and say, "Here's what this says. Here's what that says. Here's what the issue is you seem to be struggling with."

You could not and shouldn't try to say, "Here's the direction you're going in." Sometimes what really does make a difference is just clarifying what the issue actually is and helping people figure out where are the limits of what we can do, what are we really talking about here.

Edward: What is the intersection between the substantive concern and the procedural framework that you're all operating under, which I actually understand better than you do, especially that type of product.

Robin: Without saying it out loud.

[laughter]

Robin: "Mr. Chairman, can I help?"

I think over time, because I had that relationship with them, I think they trusted my judgment and trusted that I wasn't trying to railroad them in a direction, and I wasn't. I think it really was basically trying to help clarify what the conversation was and what the law and rules were that they were trying to affect.

Edward: It sounds like personal style matters in that situation.

Robin: It matters a lot because there are a lot of lawyers and I've seen a lot of lawyers over the years in the AG's office working with commissions who would never, in a million years, say, "Mr. Chairman, perhaps I can clarify this."

They will wait until somebody asks them a direct question, which is another way to do it. It's just I can't stand the thrashing around.

[laughter]

Robin: It's like, "Stop, stop." That's a personal style thing. I guess, to some extent, maybe people feel like that's not their role that they should wait, you speak when you're spoken to and you give an opinion when somebody asks for it. That's another way to do it.

Ashton: It sounds like, to some extent, your shift to DENR was kind of getting more into that being able to be the clarifying role more often and that was kind of more directly your role. So – moving back to – I guess because we're trying to move into specifics projects, we keep going back to the big picture, which is fantastic.

[laughter]

Ashton: It's great. Especially with the Hurricane Floyd situation, to what extent were you trying – You're having to negotiate these immediate problems of wet pigs everywhere and trying to make actually good policy in this crisis event. How do you prioritize when you're in the midst of a crisis like that?

Robin: I think, to some extent, you kind of intuitively know what you need to be giving attention to, but you're also not the only one in charge of setting the priorities. If you've got the president of the state's Senate screaming at you over the telephone about what the hog farmers are being required to do, that tends to rise to the top of the priority list.

We'd have gotten there anyway because the things that were high priorities were pretty obvious high priorities and they were high priorities for environmental reasons, but also for economic and political reasons. All the combatants probably converged on the same priority list before it was all over with.

Edward: Which were?

Robin: It was dealing with the animal waste management systems which, of course, flooded in the immediate aftermath of the storm. Once the storm had passed and the water level started dropping, those lagoons were still full of water. And of course, it was going to rain again. Not a hurricane necessarily, but they were full.

One of the big issues that everybody ended up fighting about was what do you do. You've got to get the level of water in the lagoons down because having it too high can threaten the integrity of the lagoon structure. You could be looking at a breach, but where do you go?

You've got ground that's saturated. Under the rules – under state and federal rules, it's not lawful to spray animal waste on saturated ground. What do you do with it? That was a huge fight for a long time.

The farmers wanted to pump it. Their position was – we've just had a huge flood, this is not going to affect, you know, in the long-term, this is not going to have a significant environmental impact with all the dilution and all the water. The environmental organizations were dead set against that, against pumping anything else out of those lagoons as long as the ground was saturated.

You've got the political folks at the General Assembly saying it's not feasible for farmers to pump this waste into trucks and haul it off somewhere else. That's not going to work. You've got EPA saying, "Well, the rules say," OK, so that's not being helpful.

Ultimately, there was sort of a not very pretty compromise, that sort of worked, probably didn't have any long-term impacts and EPA agreed to [inaudible 01:05:38] .

[laughter]

Edward: Basically, they conceded. This is not normal time. This is emergency time. We will avert our eyes a little bit.

Robin: I think EPA had to recognize that a rule that says you can't pump on saturated ground was written for normal conditions in which you're trying to stop a farmer from over-applying waste. That was not this situation.

This was an emergency situation where you can't leave the waste there, it's going to either overflow or rupture the lagoon. You've got to do something and there aren't enough trucks in the world to truck it away and nowhere to take it to anyway. It was that kind of thing.

Kate: We're going back to a question we asked earlier about the role of science. In a crisis event like that where you're dealing with sort of really unusual circumstances of situations like how did you incorporate science? Did you incorporate science?

Or was it more of a negotiation that sort of like the different stakeholders and their immediate like we need to deal with this today, like what was figured out?

Robin: It's probably sort of a combination. I'm not sure there was a lot of science to be helpful, quite honestly, under those circumstances to really tell you is this going to have an impact or not.

We did have a lot of meetings with folks from the federal Department of Agriculture and the Natural Resource Conservation Service and other folks, the NC State Animal Agriculture folks who are experts on various things about what can we do, is it possible.

Normally, we don't pump waste from a hog lagoon on to forested land, but if that's a possibility nearby, is that something we can do without causing long-term damage. Nobody had a lot of hard numbers, but I think there were a lot of conversations with experts about what's your sense of what's better or worse, the best we can do in the circumstances.

Edward: Once the compromise was agreed to, did you put in place any extraordinary monitoring to get a sense of whether those estimates were correct or not.

Robin: I don't know the answer to that. That would've been done through the water quality program if it was done. I don't know if they did or not. I have a dim memory that someone and it may not have been them, it may have been someone from one of the academic institutions did a study after Floyd.

I assume this meant they were taking some samples right afterwards and concluded that they didn't find any long-term elevation of, say, bacteria levels or anything like that in the rivers and streams that had all kind of dispersed pretty quickly which of course was the hope. I think somebody did that work. I don't know that it was state and staff that did it.

Edward: Could we set a little of the context for your new role at DENR. What specifically was your position? Who did you report to? Who did you have under you? What was your jurisdiction?

Robin: The assistant secretary for environment oversaw the regulatory programs, the environmental protection programs of the department. The department was divided and still is, to some extent, between environmental protection programs and natural resource conservation programs.

On the conservation side, you have the parks programs, a variety like the Natural Heritage Program, which mostly rely on land acquisitions or conservation easements or do non-regulatory sorts of research and support work related to conservation.

On the environment protection side, you've got the classic regulatory programs. I had water quality, air quality, waste management, coastal management, sedimentation, all the regulatory folks, except division of marine fisheries enforces state and federal fisheries regulations and they're over on the natural resource side.

That's what I did. Reported to the secretary. The division directors for each of the programs that I listed reported to me; I reported to the secretary, and…did you have another question?

Edward: Just really general questions. In the AG's office, you said about 50 percent of your time was spent interacting with commissions as legal adviser and 50 percent was litigation. How would you characterize the sort of breakdown of your day to day portfolio once you were in place in this amazing crisis of Floyd had sort of subsided?

Robin: Clearly about maybe not even 10 percent of sort of strictly administrative. Keeping an eye on what's going on in the division in terms of budget. That would become a much bigger issue every year when you're trying to put together a budget for the following year.

Who needs new money? Who's going to take a cut? If we have to take an overall department cut, how do you allocate that among the different programs? Just keeping an eye on that kind of administrative thing.

The rest of it was largely policy direction and what that looked like on any given day or year depended on what the hot topic was. I spent probably a year and a half to two years working a lot with the water quality program when they were trying to put together the state's Phase II Stormwater Permitting Program under the Clean Water Act.

That was sort of the big transition toward requiring most of the cities in the state to have stormwater permitting programs. Trying to set the regulations for that and then we went through a round of legislative objections to those rules and trying to negotiate with the legislature on legislation to make some adjustments around the edges to satisfy those concerns.

That was a good two years. It was never one thing at a time. You never had the luxury of saying, "OK, I'm just doing Phase II Stormwater this year," but tended to be dominated at any given time by some particular issue.

Edward: Did that process predominantly loft over the division because of something that EPA was doing or the legislature, or was it something that you had some control over that could set yourself?

Robin: A lot of it was the former. With Phase II Stormwater, the state had to adopt standards. That was a federal mandate. Other things came up either as a department initiative or a combination of something developed initially by, say, an environmental nonprofit.

Best example of that would be the Clean Smokestacks Act back in 2002, '01 or '02, somewhere around there where the state actually adopted a legislation to put significant reductions on nitrogen oxide and sulfur dioxide emissions from coal-fired power plants over a period of time.

That idea was sort of germinated by some nonprofit environmental organizations talking directly to the electric utilities. Then they brought it to the department and the department said, "You know, that sounds like a good idea to us."

Ultimately, the form of that idea changed as everybody really worked on it, but that kind of triangle of interest took that idea to the General Assembly, and that's what ultimately ended up in the Clean Smokestacks Act.

Depending on how much you're able to generate ideas independently depends a lot on who the governor is and who the secretary is and how willing they are to have your back when that happens. There were some things like that.

There was some legislation we worked on private well permitting that was basically an administration initiative. There were some things on water conservation. There was a water conservation bill that was largely an administration initiative coming out of a couple of droughts in 2002 and then 2007.

It came from all different directions.

Edward: I'm going to suggest that we just take a brief break and we'll start up again in just a few minutes.

Robin: OK.

[break]

Ashton Merck: We're back with Robin Smith, Ed Balleisen, Kate Preston, and myself, Ashton Merck. When we left off we were talking about stormwater regulation and when that became particularly salient in North Carolina.

For me, when I was researching into these issues, stormwater was the one that was just so interconnected with all of the other policy domains. Whatever you did with stormwater affected other aspects of water quality. You had problems with coastal stormwater. You have upstream communities, downstream communities…

How do you deal with these issues? You kind of got into it earlier when you were talking about the EPA has rules, and the state has rules. How do you deal with these issues that are so interconnected? You're dealing with a Jenga sort of game of trying to make all of the issues fit together into something that works for a policy? I can be more specific if that's a really vague question.

Robin Smith: I don't know the answer to that, exactly. You screw it up.

[laughter]

Robin: It's very much a trial and error, sort of thing, in some respects. A lot of those issues in stormwater may have, actually, been the first one, the beginning of the serious use of stakeholder groups to develop regulations.

That was one of the ways of trying to deal with the complexity. All of the interest at stake was to do more than the Administrative Procedures Act required us to do, in terms of public participation, and do a much more negotiated rulemaking process.

Edward Balleisen: Was that patterned at all or was emerging at the federal level? Where did that idea come from?

Robin: I don't know, to tell you the truth. I never really thought about whether it was patterned on anything in particular. I don't know.

Ashton: Maybe elaborate on who those stakeholders were, and what their interest was in stormwater.

Robin: In stormwater, the major interest would have been the non-profit environmental organizations. Particularly, some of those who focused a lot on water quality in particular. The real estate development interest, the North Carolina Home Builders Association and the Association of Realtors because the biggest effect of stormwater rules is on future development projects and how you have to design and build those projects.

Local governments...because under the Phase II Stormwater program in particular, local governments had the responsibility to do most of the enforcements so the way the program was set up, the local governments had to have a Clean Water Act permit for their stormwater discharges. To get that permit they had to have certain types of controls in place within their jurisdiction.

That really put the local governments in the position of having to be the direct regulator in a lot of respects of the development activity in their town or city. The municipalities were very concerned, both about direct costs to them and also about the regulatory responsibilities that would come to it.

These are probably the three big … agriculture is mostly exempt from everything, except to the extent that they get paid to do good things.

Edward: That's because of the structure of...

Robin: Because they are agriculture. [laughs]

Edward: That's an artifact of how big a slice of the state economy that represents and also the rural power in the legislature?

Robin: Yeah. That's true not only just in the state but nationally. Some of it is an artifact of agriculture having been a much different "animal" 50 years ago than it is now. People tend to think of not unduly burdening family farms where there are not as many family farms anymore but were still living with the results of that concern and a lot of respect.

Ashton: The kind of rhetoric…

Robin: Yeah. They're not totally exempt from everything but there are a fair number of exemptions. Even in something like stormwater where they are a part of the overall stormwater strategy, they are handled very differently than anyone else in that universe.

Edward: All carrots, few sticks.

Robin: Yes, very cooperative. The emphasis is put on encouraging agriculture to do watershed-based cooperative agreements to reduce runoff from agricultural lands. It's just a different "animal" so to speak.

Kate: How did you work with other administrative agencies? Going back to what Ashton was actually talking about the "Jenga," you just have to like work with all different regulations. Did you spend a lot of time working with other administrative agencies to create the legislation for stormwater or is it mostly just sort of DENR-focused?

Robin: On stormwater, it was mostly in terms of writing the rules. It was mostly going on within DENR. There was an EPA sort of component to it because we were doing this in response to a federal mandate and there was a federal set of rules that set the minimums for what states and municipalities had to do under the Phase II Stormwater Program.

We always had one eye over there, but mostly it was all going on within the department and then the Environmental Management Commission which has the actual rulemaking authority for the water quality program.

The staff was developing the rules and mostly working with the stakeholders. They put together a draft rule package, then they have to go through the committees in the Environmental Management Commission, and get the commission members to agree and they'll make changes as they go along to send something out to formal public notice and comment. Then the commission makes a final decision.

Edward: Could you situate this for us specifically in time from EPA sort of prod, nudge, shove? How long did it go from that to then the adoption of a final rule?

Robin: I can't tell you without looking back what the specific dates were, but my guess...

Edward: Roughly.

Robin: The mandate for Phase II Stormwater came down in the late 1990s. The water quality program probably really started working on the issue somewhere around 2000. I probably didn't get pulled into it until around 2000-2001.

We went through the rulemaking legislative objections, legislation, a second round of legislation, I mean by the time you got from, say, 2000 when maybe the first stakeholder conversations were starting up, to the final legislation that was playing with some of the requirements, it was at least five years and may have been six.

Edward: Then the rulemaking after that?

Robin: The rulemaking came earlier than that. What we had was stakeholder group, the Environmental Management Commission adopted rules and probably that whole process took three years, at least.

Then under the state law when new rules like that are adopted, the legislature can object to the rules and prevent them from going into effect until there's some legislative action.

That happened on the Phase II Stormwater rules. There was an objection. There was legislation that year that made some changes. There was another stakeholder process at the General Assembly being run by legislative staff to do changes to the rules by legislation.

There was a second round of legislation the following year that was less...it was smaller. There was a big package and there was a follow up the following year. All of that was to make changes to the rules that are already been adopted by the Environmental Management Commission.

Then once the legislature does that, then the Environmental Management Commission has to go back and actually change the rules that they adopted to be consistent with the legislation. It took forever. Forever.

Ashton: Maybe on the note of taking forever, do you want to talk about … you drafted, or helped draft some legislation during the drought to sort of rethink how North Carolina manages their water during droughts. Do you want to talk about kind of that process and what went on with that?

Robin: That was I guess after the 2007 drought. In particular, we had come through a really serious drought just a few years before and found ourselves back in exactly the same situation. Not only back in the same situation as a state, but had some local governments that had been in dire condition four years before and were back in dire condition four years later because nothing had really changed in terms of how they were managing their system.

That was one of the initiatives that really came out of the...I guess the Easley Administration supported the water resources legislation in trying to get a better state framework for water conservation measures and drought response.

Largely, up until that point, both of those things fell to local government. The state had an advisory role but no particular ability to influence or require a local government to go further with conservation measures and that was the problem that legislation was largely designed to address - was to give the state a little bit more power to compel local governments to move at a point when it might make a difference in drought impacts.

Edward: So did the second macro event really convince people, "Oh geez, this is something we can't really ignore now"? It sounds like you had the first big event and you had to deal with it as a sort of crisis management but it wasn't enough to really drive policy making towards a substantive effort at future mitigation but then the second one came and we constructed the...

Robin: Yeah.

Edward: ...the sense of urgency. Is that right?

Robin: I think that's largely it, and I think the exclamation point on that second event was very much the fact that we had the same problem children the second time around that we did the first time around. It wasn't just that we had another drought, although it was a significant statewide drought, but that some of the local governments that we had had to hook-up to fire truck hoses to get water to their hospital in 2002 or 2003, whenever that earlier drought was, were right back in the same situation a few years later. Nothing had changed.

Edward: And some of those communities were…?

Robin: I can't remember the name of the town. I could find it if I looked at home on my computer.

Edward: Area of the state?

Robin: Western Piedmont, a small town. Very few towns, at that point, had emergency interconnections to another system, and so if their water source went down, they didn't have a backup plan. One of the things in addition to just strengthening the state's role in water conservation in a serious drought, there is a lot of emphasis put on planning as well, and some funding, the state provided funding to a number of local governments to develop emergency response plans and emergency interconnections to other systems.

For those that were really vulnerable to drought because of their particular type of water source, there were resources put toward putting those communities in a stronger position. It was not just regulatory, it was also resources for planning and for infrastructure.

Ashton: When you say the state, you're talking about DENR or are you talking about state agencies as a group?

Robin: It was the state generally, if I remember. It's been a while since I looked at that bill. There were some additional emergency authorities, or we revise the way the governor's emergency powers are written to some extent.

There were some changes there. Largely, it was creating a regulatory structure to drive local governments to ratchet up water conservation measures based on different levels of drought, and that was being implemented by the department. That was under DENR.

Edward: The impetus for that as well as the construction of the specific regulatory frameworks, or the thresholds would be...

Robin: Tier 1, tier 2.

Edward: Exactly. How much of that was really a function of DENR, or the governor's office driving this? To what extent was it a partnership with a broader coalition? If it wasn't the ladder, who were the key players there?

Robin: There were a lot of players. Maybe I should back up half a step. Before this legislation, the State had a pretty well developed drought monitoring program in DENR They had long been this network in which DENR worked with some federal agencies in terms of drought monitoring.

We had already developed the different tiers of drought. We were already putting out drought notices to different parts of the state, tier 1, tier 3, whatever, and what that meant in terms of water supply.

There was already this network of both state, and federal agencies that had been working together for a long time on drought monitoring, and planning, and information. Getting information out to our local government.

That already existed, and that group worked. It had input as well in the development of the legislation. The foundation for the legislation already existed in the drought monitoring program, and the tiers, the different tier levels.

Edward: There were technocratic ideas just waiting there on the shelf to be pulled in.

Robin: Well, and they were all being used. It had been used for a long, for information, education purposes, and supporting local governments in a non-regulatory sense, but yeah, gave us the...

We had the bones of the next step already in place, and already had the agencies talking to each other. They had been for a long time, so what was missing was any way to really push local governments to act early enough for it to help.

Robin: Was there a resistance to this new framework, or was it...?

Robin: Oh yeah.

[laughter]

Edward: Can we hear about...

Robin: There's always a resistance. A lot of the concerns were from local government. It was largely a local government issue. To some extent, maybe from business, and industry, and development interests who were concerned about being able to count on water supply knowing that the water was going to be there.

This was mostly a local government issue, and then there were a few just niche businesses. Carwashes. They really cared a lot about how you wrote those different conservation steps, and at what point they might be forced to turn of the spigot completely.

There're very water intensive uses like that who were really concerned about how this might play off, and where they would fit in that scheme. If there was some way for them to manage their water use differently to avoid the "death point" in the conservation program.

There's a lot of discussion about that, but it was local government, and then a few were intensive businesses.

Edward: Did you hear from state representatives on that last concern from the car wash places? Because it strikes me they were a little bit like funeral directors in that every district...

Robin: Everybody's got one. [laughs]

Edward: Has several, right. This is the issue they care more about in that moment than anything else.

Robin: I don't remember specifically whether we heard a lot from legislators about that. It got more attention as an issue than you would guess given it was car washes. I'm guessing there probably was some legislative interest in it, but I don't recall anything.

Edward: And the coalition on the other side? Was there a constellation of interest groups, stakeholders, and political forces demanding some type of macro-framework?

Robin: I think there was a lot of interest in the environmental community in having some sane and predictable way to manage drought. Obviously from their point of view it's not about supplying car washes. It's about making sure you've got a minimum amount in the stream that will support an ecological system.

You're trying to balance all of this. It's not just business, development, and having the water come out of the spigot. You've also got the issues of low flows and how that's affecting wastewater and fish, so yes.

I was actually assistant secretary for cat-herding, as well.

[laughter]

Robin: On all these things. [laughs]

Ashton: Maybe perhaps similarly I'm thinking more about people who live in the upstream communities of Jordan Lake where they don't access the water in Jordan Lake, but they are still putting nutrients into the water.

How do you as a state agency, and you're dealing with people all across the state, deal with people who are accessing water resources in different ways? You have people who are fishermen on Jordan Lake whereas people who are drinking the water in Jordan Lake. How do you deal with these different sets of stakeholders?

Robin: Different kinds, different users.

Ashton: Different users, yeah.

Edward: Maybe we could use Jordan Lake as the way into that since that was such a contentious issue? Maybe you could set the scene for us a little bit there.

Robin: Jordan Lake was one of the water bodies in the state that has poor water quality because of excess nutrients and...

Edward: This is in Southern Durham County?

Robin: Southern Durham County. Then the watershed expands up north and west to capture anything that goes into Guilford County, as she said. You've got a large watershed. You've got a shallow water body that was predicted at the time it was built that it would have water-quality problems similar to this because there's just not a fast movement of water through that system, so it sits for relatively long periods of time.

It's got nutrient problems, which means algae largely, algae blooms, and occasional fish-kills because of the algal blooms. The state, what we had to do under the Clean Water Act was develop a plan.

It was a water body that had impaired water quality. We're required under the Clean Water Act to develop a plan to address that water-quality impairment, so the Jordan Lake Nutrient Strategy -- another probably seven-year horrific process.

Edward: This started when? When did the EPA “trigger” this...

Robin: I don't remember it. It gets complicated on these, because every two years the state has to update its list of impaired water bodies. It's called the 303D list under the Clean Water Act. Once a water body is on that list, what the state is required to do, or EPA will do it if the state doesn't, is develop what's called a "Total Maximum Daily Load."

For whatever pollutant is causing that impairment what you're supposed to do is set a cap on that pollutant to try to get it back down to a level that meets water quality standards.

Edward: This would be a local cap in that watershed?

Robin: For that water body. It's relatively easy if you're talking about a water body that's receiving, say, wastewater discharges from a number of industries and the problem is zinc. And so what you do is ratchet down on their NPDES discharge permits for zinc.

You put tighter controls on each one of the dischargers and say, "You've got to get more zinc out of your wastewater discharge because here's the target we're trying to hit." It's a lot harder in a water body like Jordan Lake where so many of the problems are not direct discharges. It's runoff stormwater.

Edward: It's not one factory or even 10 factories. It's almost everybody.

Robin: Everybody in the watershed is making their own small contribution, yes.

[laughter]

Ashton: And agriculture.

Robin: And agriculture, yes. The nutrient strategy was a rule-making process to figure out how to in effect do a Total Maximum Daily Load for the key nutrients, nitrogen and phosphorous, that were going into Jordan Lake from agriculture.

A lot of it from runoff coming off developed areas -- your fertilizer on your lawn and those sorts of things. Some of it from wastewater treatment plants, municipal plants, just normal wastewater discharge, and try to figure out a reduction plan that would get you to a target level that would allow the lake essentially to recover.

Edward: This sounds like it was heavily dependent in part on very complex scientific assessment of the sources of these two key nutrients.

Robin: Sources and also how modeling, they do – the Division of Water Quality did modeling on response in the lake – if you increased this over here, what happens to the level of nitrogen and phosphorous in like over there.

It's a very complicated process and I still don't fully understand in terms of doing the water quality modeling that leads you to, first, a target number and then the beginnings of a strategy idea in terms of what sectors you need to get the most reductions from. What percentage of the reduction needs to come from wastewater dischargers versus stormwater runoff versus agricultural runoff?

Edward: So, this started in 2000 or were you not...

Robin: That was probably around early 2000s too. I don't remember the exact year. Again, this was another one that dragged on for like seven or eight years and several rounds of legislation.

Edward: Could you take us through the process by which DENR would actually access this scientific expertise? Was this all done in-house by people working for DENR or did you subcontract some of it out and, if so, to whom?

Robin: The initial modeling work was done. I don't know that it was done before I went to the department, but as these things often go, things don't necessarily bubble up to me immediately. You sort of reach the crisis point and then I get it. Thank you.

[laughter]

Robin: They had been working on it for a while. By the time I really came into the Jordan Lake issue, they had already done the modeling. They may have actually already had one series of stakeholder meetings early on.

They had a stakeholder group that basically was focused on the modeling itself. How do we do the modeling? What are the inputs? Sort of getting some buy-in to that phase of it. I didn't really get involved until after that.

I know enough to be dangerous about water quality modeling as far as know they did, I believe they did it all in-house. Now they may have consulted EPA, Office of Water folks. I wouldn't be surprised if they did, but they didn't contract out the modeling and they didn't have EPA do the modeling.

Kate: This is just a question about how all that started. It seems sort of until it would be a crisis situation, like who was concerned about algae growth in Jordan Lake? Like how did that become an issue before it was a crisis?

Do you know what I mean? It's like who was monitoring that before and decided that was an issue...

Robin: Yeah, the state does routine water quality monitoring all across the state. One of the state's obligations under the Clean Water Act is to report what water bodies in the state have impaired water quality. Meaning they cannot meet the water quality standard and what the cause of that impairment is.

Then, technically, that triggers the need to do something about it. Realistically, there are a lot of water bodies on that list that have not been addressed yet in other states. There's something of an ongoing, tussle between EPA and all of the states over the years over how to get these total maximum daily loads done.

EPA probably hasn't pushed it as hard as they need to. Some states have done much more than others. You've had to say, in North Carolina, there was that federal requirement. There was also a sense at the Division of Water Quality that it was something we needed to do, partly for water supply reasons.

Ashton: I mean, this is why something as simple as stream buffers – If you get rid of stream buffers, you're just throwing a wrench in the entire system. It's like stream buffers are one part of this much more complex system. Was it the Regulatory Reform Act of 2013? This was almost after you've left DENR, but that was the effort to remove the stream buffers.

Robin: They tried it the year before too.

[laughter]

Robin: It was not the first time.

Ashton: Not the first time nor the last.

Robin: One of the pitfalls in all of these, if you're dealing with a big complicated issue like Jordan Lake issue, have a lot of people working for a long time trying to figure out what's the right balance in terms of what you're asking of municipalities and agriculture and developers, and how do you try to reduce the burden as much as possible.

You've worked through all that and then it goes over to the General Assembly. I mean we've gone through several rounds of having legislation that address specific rules and the changes weren't always negative. In fact, we came out at most of those processes in pretty good shape and probably improved those rules a little bit.

But the danger is, depending on the reason for the legislative objection and the particular philosophy of the legislators, it's very easy for a legislator to have the Home Builders Association with the Realtors Association whispering in their ear about how this is killing our property value, this is a property rights issue and you need to do away with these buffers, these individual property owners shouldn't be bearing the cost of supporting this water quality program. Well, you take that away and the fact remains we still got to meet that total maximum daily load and that means asking for more reductions from industry and wastewater treatment plants and potentially agriculture.

But that's the kind of thing where you pull that one thread, it has a lot of impact. Legislators who don't...there never were a lot of legislators who have much knowledge of environmental issues or environmental laws. There were some...I would count them on my fingers probably even through 2012 who were really interested in environmental issues. And more who were generally predisposed to say, "Yeah. That's a good thing," but the details were not there.

Most of them know nothing. It's particularly difficult. The less they know and the more they are interested in hearing from business and industry as opposed to the Sierra Club, the greater risk there is that one of those threads gets pulled at some point and unravels a big, complicated scheme.

Edward: Can I take you back to the process of bringing all of these players around the Jordan Lake issue to the table? What did that actually look like in a nitty gritty sense? This is a separate process. How many meetings are we talking about? What was the way in which you got each of these constituencies to talk to each other and to grapple with the modeling and the other scientific evidence to try and craft some type of agreed framework?

Robin: You get everybody in a room and you suffer a lot. [laughs] They had a stakeholder group around the modeling, putting together the model before I was involved. My understanding is it had the usual cast of characters -- local governments, business and industry, engineering folks.

Then after I really got more involved in it, there was another larger stakeholder group that met periodically as the rules were being developed. Usually what you're doing is go in sort of section by section through the rules you're trying to develop.

There was, for Jordan Lake, there would have been a rule on stormwater standards for new development. If you're working on that rule, typically anybody who has been participating in the stakeholder process...you generally, you'll try to invite at the beginning all the main characters, but it's not closed in any sense.

You'd sent out in advance of the meeting, "Well, where here's what we're starting. Here's a draft that we're starting from." At least this is the ideal way to do it. Send it out. Let people read it. Think about it a little bit before they get to the meeting. Then you're basically just walking through. Does this work? Does this work? What are the problems that you're seeing?

Sometimes trying to fix those on the fly. Sometimes saying, "We have to go back and maybe talk to our modeling staff to see if something works or not." Then you go back at the next meeting with a revised draft. You're doing that for all the different types of rules.

Edward: For so many issues now, the science turns out to be very contentious. I'm wondering was that part of the dynamic with Jordan Lake? Or did people largely accept the expert analysis, but then argue over its implications? Or argue about its implications? Or how to translate that into a distribution of responsibility caps?

Robin: Probably more the latter. I don't think there was much argument over what the conditions were in Jordan Lake or what the contributions, the pollutant contributions were. Which sectors the nitrogen and phosphorus were coming from.

There was an argument – it sort of cuts across the science/engineering/policy issue – there was an argument about how much can you really expect improvement in Jordan Lake, given the way the lake was built, the predictions early on that it was going to be problematic, because it's shallow, it's slow moving, it's going to tend to concentrate nutrients.

And so…are you asking reasonable things of developers and local governments, given the amount of improvement you may or may not be able to actually expect? That turned out to be probably... it's not exactly a science question. It sort of is. But it was about the relationship between the solution and the problem. Is the solution going to actually solve the problem? Or are we going to spend a lot of money and never solve the problem?

Edward: So there are going to be high costs for limited benefits basically?

Robin: Right. Right.

Ashton: Similarly, I think one of the solutions that came to fore was the SolarBee technology.

Robin: Oh, my God.

[laughter]

Ashton: To what extent does this sort of emerging shiny technology complicate the solution or offer new opportunities to solve the problem? Like you're saying, there is this opportunity for it be high cost and low benefit. Maybe SolarBee isn't the best example, but maybe there are other examples of...

Robin: It's a great example of marketing.

[laughter]

Robin: I'm not sure it's a great example of much else.

Ashton: Yeah. I guess...

Robin: It was the shiny new object. I don't know.

Edward: Can you tell us a little bit about it?

Robin: The back story is, you've got this big watershed, part of which is in Guilford County, where coincidentally the current president pro tem of the senate has part of his district. The Guilford County people and to a lesser extent, Alamance County, Burlington folks -- objected to both the proposed wastewater treatment plant and stormwater rules all the way through the Jordan Lake rulemaking process, even though the Haw River arm of Jordan Lake runs up into their jurisdiction, and those communities were clearly contributing both wastewater and stormwater to the lake system.

The simple explanation is they get no benefit from Jordan Lake. Fixing the water quality problem is all cost to them. There had been previous attempts to exclude them from the Jordan Lake wastewater and stormwater requirements. Their legislative delegation had been making runs at this for the last four years at least.

Those have been beaten back. Then SolarBee came along and it became the bright, shiny object for the Guilford County folks in particular.

Ashton: It's their magic bullet.

Robin: It is they...

Ashton: They think.

Robin: I don't know what they think it is. But yeah, that was sort of the last act in what has been a long running play by Guilford County to avoid being covered by the Jordan Lake nutrient rules. From a broader perspective, the Solar Bee experiment doesn't make sense. It's going to end up being costly in terms of both time and money, but isn't likely to solve the water quality problem in Jordan Lake.

You can't solve the problem if you continue dumping as much or more nutrients into the Haw River arm of Jordan Lake. The fact that the SolarBees are stirring it up when it gets there is not going to solve the problem.

Then, of course, we had a couple go rogue this winter. Broke off their moorings and floated away.

Kate: Can you explain what SolarBees are?

Robin: I'm not sure that I can, actually! They are solar-powered… they're essentially fans in the water, so they're solar powered. If you see pictures of drones, they sort look like that, but in the water. They're like...

Ashton: Kind of like those mayflies that have four legs, and...

[crosstalk]

Robin: Yeah, so they've got a simmer sort of solar engine...

Ashton: Solar panels...

Robin: ...section, and then they've got these arms. The idea is they individually circulate the water for some distance. It's supposed to aerate the water, so the idea is to increase the oxygen, and avoid as many algal problems, and low oxygen events that kill fish, and things like that.

They have never been used in a water body like Jordan Lake. They haven't been particularly successful where they have been used, except, as I understand it, in very small confines.

If you put one in your final waste water treatment lagoon as part of the water waste treatment plant, it may help you oxygenate the water before you're discharging it, but nobody has ever tried to use it for this purpose before.

Edward: The implicit argument you're making here is that these would have to be so powerful, and you may have little local circulation going on, but to really deal with the problem of something as big as Jordan lake, you need some pretty large Bees?

Robin: Or a lot of them. They put out how many? It was dozens, and dozens they put out in the whole river arm in this pilot project. To me, it's just so obviously ridiculous. We've got water bodies where people are fishing, and boating. Even if they stay where you put them, which as it turns out, they don't.

[crosstalk and laughter]

Robin: You've got navigation issues. It's just...

Edward: You're adding risks at the same time that you're supposed to...

Robin: ...and apparently creating no benefit for the...

Edward: There are big water issues around discrete bodies of water like Jordan Lake. Then there's a bigger macro question of how to manage North Carolina's extraordinary population growth.

Robin: Water supply, yeah.

Edward: How did that issue come onto your radar screen?

Robin: In several ways. One was the water conservation legislation, and just trying to improve the State's water supply planning, and drought management. While I was at the department, we really ramped up a river basin water supply modeling program.

We've been modeling water quality for a long time, but didn't have water supply models for most of the State's rivers that would tell you in terms of quantity, what happens if you add another intake point here, and take out 3 million gallons a day? What does that do to downstream users?

We've been dealing with it on the case by case basis. If somebody came in, and needed a particular type of state permit, or if a town wanted to put in a new water intake for a water treatment plant, you would force them to do that analysis before you issue the permit solely on an individual basis.

Nobody was looking at that systematically up and down a river system, and try understanding both how it was functioning now, and building that structure for being able to predict better in the future, what happens if somebody comes in, and sticks another pipe in the stream.

That was a big part of it, was getting that modeling system up and running. We still are only one of two states in the nation that don't require permits for large water withdrawals.

Ashton: That's because of agriculture.

Robin: They have a large influence on that.

Edward: This exercise of supply modeling started roughly when?

Robin: It probably goes back to something about 2002.

Ashton: Was it something that you did for the water infrastructure commission, or was it associated with something else?

Robin: It got started a little earlier. It evolved out of the re-licensing of the hydro-power plants in North Carolina. The first major re-licensing was the Duke Energy Hydro plant on the Catawba River. To do that re-licensing of the hydro facility, most of those plants were first permitted 50 years ago, and they got a piece of paper that said, "Yeah, go do it."

There wasn't really any environmental review at the time, so the re-licensing of all those plants has been one thing driving a lot of the recent study of water allocation, water

supply in the river systems. The Catawba was the first major FERC re-licensing state, and it was probably completed 2000-2001 to '02, something like that.

Edward: FERC, just remind listeners.

Robin: Oh, Federal Environmental...I'm sorry.

Edward: Federal Energy...

Robin: ...Energy Regulatory Commission.

Edward: Yes.

Robin: Yes.

Edward: Sorry.

Robin: Sorry. Anybody operating a Hydro-power plant like that has to have FERC license to do it, so they get that from the federal department of energy, but the State participates in those re-licensing.

On the Catawba, Duke Energy – there was another stakeholder there too, but – Duke Energy largely did the modeling with the State agency. The water resources staff at the State level sort of being part of that, but Duke did it under their own model.

What happened after that was that division of water resources, and DENR started to build their own model out for the different river systems across the state. There are 17 major river systems, but the FERC process already started phase moving on all of that.

Then I'm trying to even think. Water resources, the infrastructure council. That was a money issue largely on the infrastructure side. It was how do we fund water, and sewer infrastructure?

Edward: Are the city governments of Charlotte, and Raleigh, and Greensboro with some sale [inaudible 47:47] looking? Are they increasingly demanding policy on the score given the incredible comparatively rapid growth of the populations of these centers?

Robin: Yes, especially Raleigh. Raleigh needs another water source, and they've been pushing for several years to create a new reservoir on the Little River. They've run into a lot of push-back on that idea, from the environmental organizations, but also from the United States Army Corps of Engineers, which issues the major federal permits for an impoundment like that.

The argument has largely been over whether Raleigh actually has some other alternatives for water supply that would have less impact than a new reservoir, including potentially taking more water from Jordan Lake up to Kerr Lake, taking water from Ker Lake.

Raleigh actually has been at the epicenter of that over the last probably six, or seven years, because of the Little River dam proposal, which, I think, they have loosened their grip on that idea. They've been worn down.

[laughter]

Robin: They've been worn down partly because DENR and the water resources staff actually did a fair amount of work to show Raleigh, "You've got some other alternatives. I know we will help you with those alternatives. How about that?"

Edward: Robin, thank you very much for this session. This is a great start for the two-phase interview.

Robin: You're really welcome.

Edward: We will look forward to continuing the conversation next time.

Interview II: April 8

Ashton Merck: This is an oral history of Robin Smith conducted by Ashton Merck, a doctoral student in the Duke History Department.

Edward Balleisen: Edward J. Balleisen. Faculty member in history in the Sanford School of Public Policy, also at Duke.

Kate Preston: Kate Preston, a senior at Duke studying public policy.

Ashton: We're here at the Kenan Institute for Ethics on Wednesday, April 8, 2015. We've been discussing Robin's career in environmental law and regulation, including her time as Deputy Attorney General. We also devoted some time to discussing the development of policies on swine waste and stormwater regulation during her time as the Assistant Secretary of the Environment of the North Carolina Department of Environment and Natural Resources.

Today, we will continue that discussion by looking at the impacts of sea level rise, ocean front erosion control measures, and hydraulic fracturing in the state of North Carolina, and conclude with some more general reflections on regulatory policy.

I wanted to start talking about sea-level rise, because you were on the advisory committee for the North Carolina Sea Level Rise Risk Management Study. Correct?

Robin Smith: That's correct.

Ashton: OK. Can you talk a little bit about the study, how it came to be, your specific role, and the interactions with other people who worked on the study to produce that, those findings?

Edward: Maybe just speaking with the timing...

[crosstalk]

Ashton: Oh yeah, timing. Kind of what's happening to make the study...?

Robin: Well, let me ask you a question.

Ashton: Sure.

Robin: Did you find any report?

Ashton: I didn't.

Robin: There isn't one.

[laughter]

Robin: That all became a very black hole, and I don't remember exactly what year the study started. It must have been 2009.

Ashton: Yes. I have 2009 to 2010.

Robin: It started because the State, and I wasn't in on the planning of this, because it was largely being done through the emergency management program in the State Department of Administration.

That's actually where the State's division of emergency management was, and they were doing a lot of the work on flood risk, just generally. They had managed a lot of the response to earlier flood events in the State like Hurricane Floyd, and the river flooding with that.

They received, I believe a grant that came through FEMA to do this...I think it was intended to be something like a pilot project with the State.

Edward: The Federal Emergency Management...

Robin: The Federal Emergency Management Agency to do this sort of pilot project to try to identify sea level rise risk. That's how it started and again, I can't talk real intelligently about exactly how that all came about or what the parameters were because it was going on in a different department and I was just asked to be part of the advisory group.

The advisory group met a few times. Before the group ever met, there had apparently been a fair amount of work going on between the state division of emergency management and the FEMA folks and some of the other federal agencies involved in doing these kinds of risk assessments.

They had spent maybe as much as a year before the advisory group ever met, getting data organized and doing a variety of things, and then the first meetings were really about starting to share some of that data and talk about the implications.

I don't remember how many times they met -- a handful of times, but then you're getting up toward 2010, 2011, and the political changes, and it just disappeared off the face of the earth. There was never a report. There was never any explanation of what happened to the study.

I actually at one point called -- my understanding was one of the people involved in that study was still at the state division of emergency management after the change of administration, so after 2012 -- actually tried to call over there to find out what had happened with the report, because you can go to the web page for that study and nothing. Never got my calls returned. [laughs]

It's just...so something happened, but I don't know what it was. Clearly someone put the end to that discussion.

Ashton: That's very interesting.

Robin: Yeah, it is very interesting.

Edward: What was the tenor of discussion in the few meetings that did occur with the advisory group?

Robin: I don't know. It's been a while. Like I said, these were fairly large groups and most of the meetings that I attended it was more about the agency folks and they had some consultants working with them presenting information than it was a real back-and-forth.

I think they were sort of starting toward that discussion of policy issues, but it really was still at the stage of how do we assess the data and understand where the risk may be greater or lesser on the coast given projections of sea level rise.

It's more of a technical, "here's what we know, how do we use this data" kind of thing as opposed to really talking about how you translate that into any sort of policy decisions.

Edward: Before the discussion descended into the black hole, it was really still situated at the level of risk assessment.

Robin: Yes, very much.

Edward: Rather than risk management or the formulation of alternative policy choices or possibility...

Robin: There may have been some very general discussions of what kinds of things might be done to minimize risk, but nothing at a specific level at all. At least the meetings I attended, it never really got past the consultants sort of presenting information for the most part. So. And then we as a state lost interest, apparently. [laughs]

Ashton: Maybe to kind of transition between or to think about these political changes with regard to sea level rise, there's also been, in response to recent political shifts, a major change in the way that North Carolina has dealt with oceanfront erosion with now since...I've forgotten the year.

Robin: 2011, probably.

Ashton: Most likely. Terminal groins had been prohibited since the '70s, since CAMA, the Coastal Area Management Act.

Robin: With a few exceptions, but yes.

Ashton: With a few exceptions, but they've made more exceptions recently and that seems to be a relatively significant policy reversal for North Carolina.

Edward: Just to start. Would you be willing to offer a brief definition or description of a terminal groin?

Robin: On the oceanfront or inlets, you really have two types or three types of hard erosion control structures. Seawalls that run horizontal to the shorelines and they track

the shoreline. Revetments which like seawalls run horizontally but are more sloped. They're not vertical walls as much as they are a sloped structure.

Then groins are built perpendicular to the shoreline. Terminal groins, I don't remember the exact US Army Corps of Engineer's definition, but the basic idea is that a terminal groin is a groin that you build at the end of a beach segment.

Really, what we're talking about in this legislation are groins at inlets where if you got an inlet, you've got an island and island an inlet between. You're building these perpendicular structures on one side or the other, and sometimes both sides of an inlet to keep the inlet open and also to trap sand on the beach on either side of the groin.

Seawalls and revetments are really kind of armoring the shoreline, drawing a line in the sand and saying, "Here's where the erosion is going to stop because it just can't go further than that hard structure."

A groin is technically being built to trap the sand on one side of the groin. You've got sand flowing along the shoreline. Just offshore, you've got this structure. At some point, the sand that's in the surf zone that's coming in around it and being trapped by that groin and building up the shoreline just on the other side of the structure. That's the theory, anyway.

Ashton: With that in mind, North Carolina has minimized the amount of that type of erosion control structure for some time and that has recently changed.

My understanding is that “not using” terminal groins in North Carolina has been regarded as a success compared to other states that had used it.

Can you talk a little bit about that, maybe? I'm just interested…really, my interest in this is what changed? Did people just forget the original rationale and that's what caused the policy shift or is this related to these political concerns about erosion and sea level rise?

Robin: Then there's money. [laughs]

Ashton: Then there's money, exactly. Yeah.

Robin: Money has a lot to do with it. Philosophically, I guess the state's policy, the coastal programs policy on any type of hard erosion control on the ocean front and inlets has pretty much been in place since the mid-1980s. Philosophically, the idea was, first of all, most of those structures actually damage the beach. They can increase erosion on adjoining properties and they become a barrier…so, seawalls may protect behind the seawall, but erosion continues up to the seawall itself, which means you lose that wet sand beach on low tide, so it becomes an obstacle to people actually accessing the ocean and using the beach.

In answer to your question, I think partly you've got an entirely new group of policymakers at the state level, many of whom were never part of that discussion and don't know much about what the basis for the decision was to begin with.

You've got the development of the coast over the last 20 years, which has become increasingly expensive and valuable property. You've got some property owners in places like Figure Eight Island. Figure Eight has been driving a lot of this discussion, along with Bald Head.

Edward: Where's Figure Eight?

Robin: Figure Eight is just to the north of Wrightsville Beach, so if you know Wrightsville Beach and the Shell Island Resort sits at the north end of Wrightsville Beach, just the other side of that inlet is Figure Eight Island, which is a privately developed island. It's not incorporated. It's restricted-access. You can only get there by bridge and only if you own property.

Edward: Or a visitor to someone who owns...

Robin: Or a visitor to someone who owns property. Very expensive homes.

Edward: This is close to Wilmington.

Robin: Yes.

Edward: Then Bald Head is, remind us where that is…

Robin: Bald Head is to the south, near the town of Southport, very close to the South Carolina line. It's only accessible by ferry.

Edward: The setup there is...

Robin: Bald Head is actually incorporated, but it was very restricted-development, because it was restricted-access, by ferry. It's not as glittering and wealthy a development scheme as Figure Eight. But they both had similar problems, because they both sit near...Figure Eight is right at the inlet -- I guess Mason's Inlet -- and is affected by the inlet's movement.

What inlets do is move back and forth. They tend to migrate in one direction and then they migrate back. Some of them behave differently, but anyway they tend to move. Bald Head Island is sitting right at the mouth of the Cape Fear River, so near the state port at Wilmington. They're affected by what's going on with that deep-dredge channel. I think they are probably correct that that is having some effect on erosion on some of their beaches.

You've got some very wealthy, politically connected property owners who are struggling with erosion and shoreline changes that are not normal erosion. They have to do with how these inlets move, and don't have a lot of good solutions. What they would say, and have been saying for years is, "Beach nourishment is not enough in a situation like that, because you're basically throwing the sand in the water."

It's just not going to stay there long enough, just because you've got so many factors moving the sand offshore. They've been pushing for years for the ability to use, particularly groins and jetties near these inlets to try to stabilize those shorelines.

Edward: Maybe you could talk a little bit about the extent to which there's an advocacy coalition on the other side of the question, in response to the well-connected constituencies that you just mentioned who have a very intense interest in a specific set of environmental questions around rather discrete parts of the coast…who pushes back? Who has been, if anyone, vigorous in pushing back against those kinds of proposals?

Robin: It's largely been some of the state chapters of national organizations like the Sierra Club -- they've been involved to some extent. One of the significant organizations at the coast is the North Carolina Coastal Federation, and so they've always been involved in issues like this.

Those are probably two of the primary players on the oceanfront issues, as well as local organizations. You'll have some local environmental organizations based in places like Wilmington or Brunswick County down near Southport and those beaches, who are also concerned about what the impact of hard structures will be downstream of the structure itself.

Kate: I have a question. You mentioned that the original conversations, that this happened a long time ago, in the 1980s [indecipherable 0:17:24] now being all the people who are now making decisions about it weren't there, and so weren't part of it. How do you, sort of, "teach the history," or how do you think as regulators explaining the original decisions, how that transfers over, over time? Can you talk a little bit about that in this context or in others?

Robin: Yeah. A lot of that happens if there's a real push for new legislation, and the push for the terminal groin pilot project had started before I left the department. When a bill like that's introduced, a lot of the way you do that is by individually talking to legislators, going to legislative committee meetings, answering questions about it and explaining what that history is.

"Here's why we are where we are. Here's why our position is what it is." I think the dangerous point we're at now is that most likely these state agencies in a position to do that now would not be allowed to do that, unless the McCrory administration is planning on staking a strong position against oceanfront erosion control, which I'm having trouble imagining.

Their staff, the staff who've been there for some time in the coastal management program probably don't have that same room to maneuver right now in terms of what they say to a legislative committee.

Then you talk to citizen's groups. I think at the coast, that long education process has gone on for a while. A lot of people understand it. It has been a while ago, but the last time there were a majority of Republican appointees to the state's Coastal Resources

Commission, which I guess would have been back in Jim Martin's administration. He was governor.

There were Republican appointees to the Commission who were major developers, including one of the people who did most of the developments up at the northern coast, up near Duck, north of Nag's Head, which again has been marketed as really high end, and mostly marketed to people from the northeastern part of the United States. But he was a strong supporter of the prohibition on hard erosion control. From his perspective, he is selling a beautiful beach, not seawalls and groins.

It doesn't always cut on political lines, but you do have to have that level of understanding of why you came to that policy decision to begin with and what the implications are of changing it, not just on the environment, but on the way we develop the coast, on how we market the coast.

Edward: During your tenure, did DENR do any studies on the impacts of the groins and seawalls that had actually been put in place before the 1980s turned away from it?

Robin: Yes. There was a legislatively required study and report that was done probably in 2010, 2011. Technically, it was done by the Coastal Resources Commission, but of course, that means they were being supported by their staff and the department.

There were so few terminal groins in this state that there weren't a lot to look at. In North Carolina, there is a small handful. But the report and study also looked at experiences with terminal groins in other states. There is a report that looks at all of that and looks at the question of what kind of impact do these structures have, can we predict the impact, and is there a way to manage those impacts to allow those structures to be built where they seem to be appropriate and manage the impacts on the beach?

Edward: One theme that is emerging here with respect to the oceanfront erosion control issue is the interplay between local politics at the beach, state politics and national policy and politics. You mentioned that the initial discussion about sea level rise was prompted by a FEMA inquiry to the state. I'm wondering whether -- this is a question that Ashton had framed for us -- whether you might talk a little bit about how events elsewhere, say something like Hurricane Sandy, impacts the discussion or the debates in any way around some of these issues?

Robin: That is a really good question because...let me back up half a second. Coastal management is one of those areas which is almost exclusively an area of state decision making. There is a federal Coastal Zone Management Act. Largely, it is one of those that, even more so than the Clean Air Act and Clean Water Act, are really just frameworks for state policy decision making.

Originally, the federal law became a way to try to incentivize states to develop coastal management programs. It provided funding and grants to the states. There were some carrots involved both in terms of the grant money and the fact that if you had a state coastal zone management program that met some minimal requirements in the federal law, then you also have a little more leverage in affecting federal activities in your coastal

zone. Whether that is offshore oil and gas or other federally permitted projects, it gives the state a little bit more leverage on that federal decision making, too.

But the framework for the coastal programs is very minimal at the federal level. You got to have policies on mitigation of risk. But there is nothing in the federal statute that would say anything about whether you allow or don't allow hard erosion control structures or even require setbacks, necessarily, on the oceanfront. It is a state-driven program for the most part.

What was your original question?

Edward: That is fantastic context for the relationship. But then there is the possibility that events or processes elsewhere could flow back.

Robin: Oh, Sandy, that is right.

Edward: You mentioned that part of this report was looking at the evidence of groins and jetties elsewhere.

Robin: Right, impact, yeah.

Edward: That is a development over time that is a long term process that you can evaluate.

Robin: Right.

Edward: Then you have these massive events that seem, at least momentarily, to reconfigure conversations and agendas. The question I guess we would be interested in is to what extent did that change the conversation in North Carolina at all?

Robin: I don't think it really had any impact in North Carolina, partly because well before Sandy we had had some major events in the previous 15 years that didn't really need Sandy to focus attention on some of the issues at the coast. Directly, probably not all that much, but even indirectly in terms of how it might affect federal policies that then trickle down to the states, it seems to have had very little impact. The Federal Emergency Management Agency and the Federal Flood Insurance Program were already, before Sandy, struggling to figure out a way to make flood insurance premiums better reflect different levels of risk. There has been huge political pushback on that for 10 years. After Sandy, there still is.

I don't think we are there yet in terms of federal policy changing significantly in response to some of these big events. In North Carolina, like I say, we were beyond that point before Sandy ever occurred.

I think the FEMA project here of sea level rise was partly the state. At that time, the state was interested in the issue. It was interested in pursuing it. We had just come out of a couple of hurricanes with significant damage. FEMA had some money to share. It was a joint interest in that issue at the time. The joint part fell away, ultimately. [laughs] Oh well.

Ashton: Since we have talked about this interplay between federal level and state level, and now, to move maybe back to the local level just for a minute. We talked about ineffective policy measures last time with the Solarbees, maybe another similar sort of conversation we can have about sandbags. [laughs]

Robin: [laughs] Oh.

Ashton: Maybe talk a little bit about why sandbags have been allowed as a temporary control and how effective or ineffective that has been in various areas, various places.

Robin: The tradeoff for the prohibition on hard erosion control structures was to allow people to use temporary structures constructed of sandbags. The idea was to allow that for a limited period of time, usually you would be doing it immediately after a storm event where you have had a sudden erosion problem arise and you would be using them to stabilize the shoreline until the beach recovers, except it hasn't worked out that way because some areas just have very serious, chronic erosion problems, more than others. The Coastal Resources Commission has been probably more forgiving than it should have been, although there are a lot of political realities here, in allowing sandbags to stay in place longer than the rules were intended to allow. They have done that by granting variances and allowing people to extend the time.

There hasn't been a real good answer to that question, partly because it has so many different moving pieces. The situations are different from one location to another. The reason for allowing them to stay is different. They still haven't cracked that nut in terms of getting them off the beach.

In terms of how successful they are, they can be very useful for the purpose the rules originally intended them to be used, which is you have had a big storm, it has eaten up 25 feet of beach overnight and so you have got homes that are sitting right there at the surf zone. But you also know, because it happened that way in a big storm, you know the beach is going to recover. It is going to recover over some period of time.

As a temporary measure, it can make perfect sense. Where it stops making sense is where you are really not talking about that kind of sudden, episodic event, you are talking about a more long term, chronic problem.

Ashton: By long term, you mean like 20 years.

Robin: That is it, yeah.

[laughter]

Robin: That is correct, yes.

Ashton: This is more than just a problem of enforcement and telling people to put their sandbags away. This is a situation in which, at some point, you have to leave it in the hands of local governments, you would say, or…? Like you said, it has just been too many moving parts to come to a final decision on.

Robin: I don't know what the best solution is, and actually I will say, going back maybe five or six years, the Coastal Commission and the Coastal Management staff did start sort 'triaging' the older sandbag structures for enforcement. They actually did start down the path of "we are going to have to have some of these removed." They did do that. They did pursue those. I don't know exactly what the status of all that is at this point.

It is just very difficult, obviously. You end up having to sue people in some cases and ask for injunctions to get the sandbags removed if they won't do it voluntarily. If there is a house sitting there behind the sandbags that is clearly threatened, it is a difficult situation.

Edward: There is no more important issue in the world for that family than this.

Robin: That is exactly right. I think Commission members are sympathetic to that, especially in cases where there is really nowhere else to go. There is nowhere to move the house. There is a second row of houses immediately behind so there is just not a good solution. The houses fall in the water.

Kate: I have a question about how you manage that. Maybe it is not the smartest idea, then, to build a house right in this area where it is going to be potentially washed away. As a regulator or policymaker thinking about that, where is your responsibility to protect people who maybe built a house in a questionable area, and making sure that they're OK, safe, regulated, and all of that? Letting people deal with the consequences if they built their house too close to the shoreline, that's your problem. How do you navigate that?

Robin: I think what the state program has tried to do -- and this, I generally support this. Philosophically, here's where our policy is. We recognize there are occasionally going to be hard cases that justify a variance. There are also going to be situations where no matter what you do, and no matter how many variances you issue, once things reach a certain point, sandbags aren't going to survive either.

That's one of the advantages of sandbags over seawalls, is, if you look at South Nag's Head, where they've had a huge erosion problem for years, there literally are houses that have and will continue to fall into the water, because you cannot maintain these sandbags once you've got a certain amount of pressure from the tide.

In some ways, that resolves itself. It creates another set of problems. That is, how do you force property owners to remove a structure that's partially collapsed on the beach? That's turned into a series of lawsuits too, on the northern part of the coast in particular.

I think you're always walking that line between what's reasonable to allow someone to do on a limited time basis, and then at what point do you have to say, there's nothing more you can or should do to try to maintain that house in that location. Now, we need to be talking about how do we make sure there's not an exposed septic tank on the beach, and a collapsed swimming pool, timbers from the house supports. It's not easy. [laughs]

Ashton: I don't really have a good segue into shale gas, but if you wanted to talk about anything else related to the coast, maybe share your opinions related to this question

about coastal development, and mitigating or figuring out the risks. Your opinions on Highway 12, given that it keeps being destroyed by every storm surge.

Edward: Highway 12, just remind us, is where?

Robin: Highway 12 is the highway that runs down the northern part of the coast. It runs south from Nags Head to Hatteras Island, so it crosses Oregon Inlet and it goes down Hatteras Island. It's the Hatteras Island segment that has been repeatedly washed away over the last 20 years.

It's tied up in the controversy over replacing the Oregon Inlet Bridge, because as long as you try to maintain a bridge access from the southern part of the northern Outer Banks, from Nag's Head to Hatteras Island, if you're insisting on keeping a road corridor there and keeping a bridge over Oregon Inlet, obviously there has to be a road on the other side too.

It's just become one big argument over should we replace the Oregon Inlet Bridge, or should we be doing something else in terms of access to Hatteras Island? Once you've committed to Oregon Inlet Bridge, you've pretty much committed to keeping Highway 12 on Hatteras Island in place too.

That just is not a realistic proposition. I think even DOT has recognized that for several years, but politically...

Edward: The Department of Transportation?

Robin: Yes, the State Department of Transportation. I won't speak for them, but I think they know it. I think they've known it for a while.

Edward: Can you paint for us a picture of the advocacy coalitions on both sides of this issue?

Robin: A lot of the advocacy for replacing the Oregon Inlet Bridge where it currently is and maintaining Highway 12 on Hatteras Island has come from the communities in the northern Outer Banks, so Nag's Head and the towns to the north of Hatteras Island, Dare County, the county in which those towns are located, has been adamant that there should continue to be road access to Hatteras Island.

Edward: The argument there is, because the interest is to make sure that the traffic goes through them?

Robin: I assume so. It's an economic argument largely, I think. You've got tourists coming from the northeastern United States coming down through those towns on the northern Outer Banks, and then traveling down to Hatteras Island, Buxton. There's a national wildlife refuge, and a national seashore down there.

I think that's largely been the reason. For a long time, that area of the state had a very strong political advocate, the President pro tem of the State Senate was a long standing Democratic Senator from that district.

Edward: Perhaps that would be Marc Basnight. [laughs]

Robin: Marc Basnight, yeah, who had arguably more political power than anyone in the state, including the governor while he was there. It got stuck on that issue.

Edward: And on the other side?

Robin: Largely the same coalitions of state environmental organizations, so again the North Carolina Coastal Federation, Sierra Club, Southern Environmental Law Center legally representing some of those state organizations. You also, in that case, have the issue of the fact that there is a national seashore.

There's Cape Hatteras National Seashore, and the Pea Island National Wildlife Refuge right there along Highway 12. The federal agencies have policies for both the national seashore and the park that largely prohibit artificial stabilization of those areas.

There's also been this state/federal fight going on for years over can we armor the shoreline at the foot of the Oregon Inlet Bridge? What can we do in terms of stabilizing Highway 12? The state has long run into the problem that much of that is federal land.

The state owns the road right of way, but immediately landward of the road right of way are federal lands that are being managed under federal policies that don't allow artificial stabilization either.

Edward: Another federal player increasingly on these kinds of issues is the military. Has that voice been part of the conversation on any of these issues around erosion or coastal management?

Robin: Not so much on the oceanfront management issues, but a fair amount on some other recent issues like, the potential for wind energy development. The military is very concerned about that. There had been some earlier concerns...I'm trying to think, going back much further over military restricted areas in the waters of the North Carolina Coast and how that was affecting state fisherman.

There are areas of the coastline where you just can't go in a boat. Some of that is safety related. There's old ordnance out there. Unless you want your boat going sky high, it would be just as well not to be trying to fish there.

[laughter]

Robin: There are restricted areas in the water. There's restricted air space all over the North Carolina coast, which is the wind concern largely. The potential for conflicts between turbines and either actual low flying in military training exercises or interference with radar for the military facility.

There have been issues from time to time. The wind issue has been the most recent. One other thing, before we leave the coastal issues that's always been a theme in the background of all of this, is public access to the beach.

Both access to the beach, and use of both the wet sand and dry sand beach has been... The state for years, has taken a very strong position on the public's right to use not just the wet sand beach below knee high water, but also the dry sand beach up to the dune line for recreation purposes.

That issue flares up from time to time. Right now, there's apparently a case, I don't know which court it's in. I need to find out. Yet another case where oceanfront property owners are challenging both state and local policies.

They started out, actually they were in an area that had been damaged by one of the hurricanes, so they had lost a fair amount of beachfront in this town. The town was trying to do a beach nourishment project in coordination with the corps of engineers.

To do that, they have to get easements from each of the oceanfront property owners, because when you put the sand out there, some of it's gotta go above the mean high water line, obviously or else it immediately washes away. What they do is get easements from the oceanfront property owners to start building out the beach nourishment project.

These folks apparently, and this has happened before, refused to sign an easement. This also happened apparently some places after Sandy up in the Northeast, where people would not give an easement to the local government and to the corps to do a beach nourishment project to stabilize the beach in front of their house.

Don't ask me how that reasoning works, but this particular couple apparently started resisting that, and then has also challenged the town's right to establishment an easement for emergency vehicle access up and down the beach in front of their house.

That case is knocking around and apparently the Pacific Legal Foundation, which is the big private property rights group out of the West, has gotten involved in that case in North Carolina. Those flings flare up from time to time too.

Ashton: You were the lead author on the study of the issue of oil and gas exploration in North Carolina. Can you talk a little bit about the context that led up to that study, and again this process of putting all the information together? There was a published study and I did read it, so...

[laughter]

Robin: Bless your heart. [laughs]

Ashton: I read part of it.

[laughter]

Robin: You read the executive summary. I know how that works. [laughs] It was long.

Ashton: It was long.

Robin: How that came about? Partly it came about because there were some geologists in the Department of Environment and Natural Resources who got a little over excited. Geologists actually don't get excited all that often, so when they do, watch out.

They discovered that there was some data, some old data, available from previous exploration in North Carolina for coal and oil and gas. Actually, I think it wound up in the hands from someone at Duke. I don't know if they were at the Nicholas School or probably its predecessor organizationally at Duke, but anyway.

The folks in the state geology group got access to some of that information and got interested in it, because of the sudden uptick in fracking activity. The new technology, the use of horizontal drilling, the fact that it became such a huge thing, first in the Western part of the United States and then moving up to Pennsylvania.

They got interested in whether this old data may indicate that North Carolina also had shale deposits that could produce shale gas, and started talking about that. First, at some geological meetings of people of their own kind, but nationally. Then, I don't know how they first got to the point where they were talking to local government officials and legislators about it. That is something the department should have known before it happened, but I'm not sure that we actually did.

It sort of grew out of that. The local government folks in North Carolina, the legislators, ultimately the Governor's office at the time got all excited about the potential. That's what led to the legislation that required the department to do the study.

Edward: This was not coming from large scale hydrocarbon companies?

Robin: No.

Edward: Or small scale hydrocarbon companies...

Robin: No.

Edward: It was a local development ethos or...

Robin: It came out of the state geologists who got interested in it and then started talking about it. The political interest grew out of that. It came from local and state folks who thought there might be potential to attract developers to that resource.

Ashton: Maybe before we talk about your recommendations that you developed as a result of this study, just sort of a context, talk about what hydraulic fracturing is and the two advocacy coalitions that have developed since that time, since they started talking to legislators and it became more of a political issue than maybe it was when it was just geologists talking about it at their groups.

Robin: What is it? It's the process of injecting liquid at a very high pressure underground to fracture the shale and release the gas. I guess some variations on hydraulic fracturing have been used for a very long time in the oil industry, but what changed was some of the technology and the use of horizontal drilling.

Instead of just being used as a way of fracture, a vertical well in this shale plays, they were turning the well horizontally and fracturing along those horizontal arms, and doing it at much higher pressure than the oil industry had used 30, 40 years ago.

It's not a totally new technique, but it was new technology, and much higher pressure, and using horizontal as well as vertical well fracturing to release the gas. Then you pump it at the top. That's what it is.

It uses large volumes of water to do the fracturing. The water has some combination of chemicals as well. That cocktail will vary depending on the company and the geographic location and what they think will be helpful in getting a good fracture.

The chemicals tend to represent less than five percent of the total volume, but that could still be a significant amount given the sheer volume of liquid that's used, like three to five million gallons to fracture a well.

That's what it is. What was the other part of the question?

Edward: It would maybe be good to hear a little bit about how this study group formed, who was part of it, and what your process was? The dates also, when did you get going on this?

Robin: I believe the legislation was 2011, so we started the summer of 2011, and had to complete the report in less than a year. The due date was May 1st, 2012. It was a very short timeline and virtually no money. There was I think $100,000 total appropriated and most of that ended up going to doing some additional sampling in the areas of the state that had the most potential for shale production.

We did not have either the time or the money to contract out any work by any consultants. We had to do it entirely internally. What it really had to be was a literature review. There was no giving the time or the money. There was no ability to do any new research or as I said, bring in consultants who might've worked on this kind of issue in other states.

It really had to be a literature review. That's what it was. It was done entirely with state staff in the different programs. Water quality, air quality, the geologists -- to the extent that we left them in the room after they had lit this fire.

[laughter]

Ashton: The other part of my question that I had asked before was, since the time that that study was called for in the legislature, just briefly review the advocacy coalitions. Either side that developed once the issue got politicized a little bit more than it might have been with the geologists.

Robin: Yeah, so it was largely in terms of support for hydraulic fracturing, it was largely local elected officials in some of the counties where there appeared to be a shale resource. It was state legislators of both political parties who saw it as a potential economic development opportunity.

Ultimately, the governor at the time, Beverly Perdue, her administration, the Governor's office, seemed to be very interested. They weren't out in front of the parade, but getting close.

Edward: Not standing in front of it with an outstretched arm.

Robin: Definitely not doing that. It was for the most part state and local elected officials. Some number of folks with potential development interests on those areas, some large landowners or people who thought they could sell leases on their property or could function as the middlemen for sale of leases. There was a little bit of that.

On the other side, you had every major environmental organization in the state, plus a number of local community groups that grew up as this was developing and who were somewhat less enthusiastic than some of their elected officials were.

Edward: And geographically, what the part of state that we are talking here is?

Robin: That major shale belt extends as far over as parts of Durham County but for the most part, we're talking about Chatham County, Lee County, where the town of Sanford is, down that area, extending maybe as far as south as Southern Pines down toward Moore County.

The epicenter has been Lee County, Chatham County area. Lee County, the Sanford folks were very active in promoting the idea of developing a shale resource.

Kate: The geological reports indicate that there is some shale, but not nearly to the extent there is in Pennsylvania or anything. When thinking about how to regulate that, did that impact anything that it's not necessarily going to be a humongous industry in North Carolina, or that it's going to be more small scale?

Robin: It should. Whether it is or not, I think, remains to be seen. Realistically, I don't see any major oil and gas producers coming to North Carolina any time in the near future, if ever -- which, to me, means you look at the cost-benefits in a different way if what you may have is a very small resource.

There were some folks who had started. This included some people in the state Department of Commerce at the time who had already started thinking about it, because it appeared to be so limited as not really the kind of Pennsylvania national source of shale gas, but asking the question, "Is there some other way we could take advantage of this as a more local regional resource?"

"What can we think about in terms going at it that way as opposed to assuming someone's going to come in here, and build a pipeline, and start pumping shale gas out?"

Otherwise, what you're looking at is the potential for very small companies, wildcatters, who has many issues as we have with large companies, small companies that are under-resourced are worse. That's a real concern.

Edward: They can also disappear, I assume.

Robin: Yes. They go bankrupt. They have no resources. They leave messes behind. That's the worst-case scenario. It doesn't always happen, but that's the concern.

I think you should be looking at it differently in that situation. I'm not sure all the political folks were looking at it differently.

Edward: The report that you put together on the basis of this literature reviewing, drawing on the expertise that the division has and their staffs came through what sorts of conclusions?

Robin: One of the conclusions and the one that probably attracted the most push back was that we could not say, based on the information available, that there was no safe way to do hydraulic fracturing. That was one thing.

It's sort of at a stage where there was actually very little data. One of the problems with groundwater contamination, in particular, is if you're not looking for it, you're not going to find it. When you start looking for it, you almost always do.

We were at a stage where there just wasn't a lot of data from other states about things like groundwater contaminations and...

Edward: From the water being injected in.

Robin: ...from the water being injected. Some of the folks at Duke like Rob Jackson at the Nicholas School were doing research at the time on impacts to groundwater and drinking water supplies that was kind of ongoing. You had some preliminary information.

That was kind of one thing, that no, we can't come out and say there's no possible way to safely extract shale gas, but the other findings were we don't think we have a significant resource. It's a very limited resource even if you assumed every piece of it could be exploited, which it clearly can't because of the location of cities and towns.

Another conclusion was, we are different from both Pennsylvania and the Western states in terms of where our groundwater supply is. Our groundwater is much closer to the surface than in some of those other states, we have more potential for groundwater contamination. That it would be completely inappropriate in a state like North Carolina to do underground injection of the wastewater from a fracking operation which is very commonly done in other states. Our geology and hydrology makes that a very bad option.

There were a number of things basically saying, "Here's why we are different from some of these other states. If some of these activities occur, we would need some additional safeguards for groundwater in particular than many of these other states have in place."

There was also the issue of water supply and do we have sufficient water supply in this part of the state where the shale is located to actually do fracking without impacting availability of water for other purposes. That was another concern that was sort of highlighted.

That was sort of the gist of it that we can't say, "Hell no!" We don't have a basis yet to say, "Hell no!" but we can say there are some reasons to be concerned about this and some very specific policy issues that need to be addressed before anything should happen in North Carolina.

We're not Texas. We're not Pennsylvania. We can't lay down some sort of template from either of those two states on this state and be assured it's going to be adequate.

Edward: Reports that don't get completed and fall into black holes obviously have very little impact. Reports that do get completed sometimes don't have very much impact. Scope into archives or up on the shelf and take a bit of storage space. What was the impact with this report and why did it fall into whatever category it did?

Robin: It's probably hard to judge that from the inside. I think the message got across on some of the more significant environmental issues like underground injection of wastewater. While there have been since then a few skirmishes that have never even made into...Actually, it did make it into a bill.

There have been a couple of attempts to change state law to allow underground injection of wastewater, but they've all failed even after changes in administration.

I think some of the basic message about things like that about the inappropriateness of doing underground injection of waste that came out of that report actually did have an impact on what happened in the legislature later.

Beyond that, it's always kind of hard to judge. You're right, it gets put up on a shelf and part of the question then is who remembers that it's there and knows to look at it later when a question comes up without a specific impact or whether there's data on one thing or another.

Kate: As part of the legislature's framework for fracking in their bills that came out of that data creating the Mining and Energy Commission in North Carolina to create sort of fracking rules.

I was wondering, could you talk a little bit about DENR's relationship to the MEC and whether you felt like they've adopted through the recommendations or conclusions that you found in the report and how the MEC is staffed with a lot of DENR people. How does that interact, or how have they interacted together, the two organizations?

Robin: I guess the relationship is similar to most of the environment commissions in the state. Most people, I bet 99 percent of the people or more in the state, don't realize that DENR itself has very little rulemaking authority. Virtually none.

Most of it is in these citizen commissions that are organized under the department, but they don't actually directly take marching orders from the secretary or the governor but the department provides staff to those commissions.

There's that really ongoing relationship. If you're working out a set of rules, it's the DENR staff that are working on putting the drafts together based on whatever direction.

Partly, it's a two-way conversation. Often, the DENR staff will be saying to the commission members, "Here's what we would recommend." The commission members may say either before that or afterwards, "Well, here's what we want."

You have that back and forth between the staff and the commission on how to draft the rules. That's what happened in this case and the commission gets to make the final decision on what's adopted and not adopted. It's very much a cooperative effort in most cases to get there.

I think, overall, they did a decent job. I think they had some folks, very smart people on that commission who had a lot of background, some in the industry, others in state environmental regulation who were able to, I think, got things generally in a productive direction.

There were some degree of legislative interference on things like the disclosure of fracking chemicals, and...

Edward: And the issue there is? What's the issue there?

Robin: The biggest issue turned out to be, what can the industry withhold from the public? So, trade secrets.

Edward: Our particular chemical admixture is not something we wish to share.

Robin: Yeah, our recipe for fracking fluid, what the industry would say is, it's a trade secret. We're willing to provide you some general information, but don't think it's appropriate to make the exact constituents or formula public information.

There was a lot of back and forth over that for a year and a half, and some very bad ideas about how to resolve that got beaten back. Ultimately, I don't know that they came out exactly where I would have preferred it to be, but that was a big issue.

Ashton: There was also some concern about, maybe, not making the trade secrets available to the public, but making them available to regulators, and there was still some pushback to keep trade secrets “secret” to regulators as well, and that's...I don't know really know what …

Robin: Which is insane. [laughs]

Ashton: Yeah … Yeah, I don't know.

Kate: Can you talk a little bit about...It sounded like it was the lawmaker or regulators didn't want the liability responsibility, or that was one argument for it that if they have a trade secrets and something happened, then they could get sued for them, or something?

Robin: It was not a totally coherent debate, really. The argument that was being made was that, because of the state's public records law, it would be difficult for either the department or the commission to actually protect the confidentiality of the trade secret information if it was provided to the department, or the commission, or both.

That was the argument for restricting access to the trade secret information, not just from the public, but from the actual regulators. That argument never made any sense to me, because the department and other departments, the state government, deal with trade secret information all the time, and the Public Records Act clearly makes it unlawful for the department to release trade secret information to the public.

If it's protected as a trade secret, there are already laws in place that prevent the release of that information. What was really going on there... [laughs]

Your guess is as good as mine, but I don't think it had much to do with the way the state public records law works in reality, because we've been dealing with that trade secret issue for years.

This is really no different from trade secrets that the department staff has had reason to deal with in the past in air quality permitting. Different industries may have trade secret information that comes in as part of their permit application for air emissions.

It's just not a new issue, but, clearly, there were some folks on the American Petroleum Institute side who were pushing to have their secrets treated differently than other people's secrets.

Edward: Should we take a break?

Robin: Sure.

[break]

Ashton Merck: OK. We're going to pick back up from our oral history interview with Robin Smith. I'm Ashton Merck. I'm here with Edward Balleisen, and Kate Preston.

We're at the Kenan Institute for Ethics, on Wednesday April 8th, 2015. As Professor Balleisen mentioned while we were taking our break, can you talk a little bit about the transition from DENR to private practice over the last few years, and who your clients are and the nature of your work, after leaving public service?

Robin Smith: When I first left the department, one thought had been that I was interested in doing something like the Environmental Law and Policy blog, just because there was never time to do anything like that when I was working with the department.

I thought it would be fun and interesting to be able to spend a little bit more time thinking about helping other people understand the background of some of these issues because there aren't very many other sources for that.

That was really my one thought. I wasn't particularly thinking a lot about building a practice. I wanted to do the blog and then I thought I would figure out beyond that what I wanted to do. But fairly quickly I ended up doing some work with some of the state nonprofit environmental organizations, largely, who...many of them rely on the Southern Environmental Law Center for litigation support, but they don't really have or haven't really had an analogue to that on the legislative-rulemaking-policy development side.

That's really what I've ended up doing, is working with some groups like the North Carolina chapter of the Sierra Club, the Coastal Federation, Environmental Defense Fund on some issues that are either in the legislature already that they want to try to influence or rulemaking activities going on at the state level. That kind of thing -- just consulting on the law and the policy, helping occasionally with drafting legislation or drafting proposals for rules or comments on one or both. That kind of thing.

Edward Balleisen: To take you back just one step, when exactly did you leave DENR?

Robin: In just 2012.

Edward: The thought process there was...?

Robin: Fall of 2012 was the last gubernatorial election, and the sitting government was not running for reelection. There was going to be a new governor one way or the other. I had been at the department for 12 years at that time and had set a record for anyone staying in that position. [laughs]

It was just time to go. I wasn't really interested in going through another transition, if as the odds were at the time, it was also going to be a change of political party controlling the governorship -- and that of course is what happened -- there was no possibility that I was going to stay.

I made the decision before the election that fall to go ahead and start the paperwork to retire from state government the end of the year, and that's what I did. I had enough service time and unused leave time to have full retirement. It worked out well. [laughs]

Edward: Can you describe for us the blog that you started at that point and that you continue to this point.

Robin: What I've been trying to do is write from a fairly non-political – I didn't want to do an opinion blog, but try to do a fairly non-political … which doesn't mean it's completely un-opinionated – a blog based on environmental law and policy that tried to provide some background on either the law or the development of policy or analysis of proposed legislation aimed not at lawyers, but at the really smart citizens and legislators who try to follow those issues, but don't have a lot of sources to go to for that information. That's really what I've been trying to do.

We talked last time a little bit about the need to be sort of 'bilingual' if you're working in policy areas, and being able to talk to lay people about fairly complicated issues. Part of the point was to continue to provide some of that explanation for folks who like I said are very, very smart, very interested, but don't work in these subject areas on a day to day basis necessarily.

Edward: Do you have a sense of what kind of audience that you're finding?

Robin: A variety. A lot of people who are in the non-profit environmental world, a fair number of citizens who've become active on some of these issues, especially fracking and coal ash, in the last couple of years, DENR staff and some legislators, legislative staff.

Edward: The blog focus is particularly on North Carolina environmental policy.

Robin: Generally, yeah, and how that relates in some cases to what's going on at the federal level and national policy decisions but largely on the state and how that influences the state.

Edward: One last question for me on this new framework that you have after public service. Are you drawing predominantly or even exclusively on your own experience, skill set, and time or have you built out a staff as well?

Robin: No, really just relying on my own work. No staff...

[laughter]

Robin: ...other than my terrier, who provides security.

[laughter]

Ashton: Maybe thinking about how you're transitioning to new audiences and new clients, what in your experience has been the biggest misconception about regulation, either what it is or how it works, in your various jobs and over time? What's something that you find yourself having to explain to people a lot or something that you want people to know about regulation?

Robin: One thing is probably the one I mentioned earlier, which is that most of the rulemaking decisions are not made by the Department of Environment and Natural Resources. They're made by political appointees who are serving on a voluntary basis on all these commissions. Almost no one knows that. I think even the legislators who actually do know that on some intellectual level tend to forget from time to time where the decisions are actually being made.

I think the other thing is that most people, including legislators, do not have a good understanding of how much flexibility exists at the state level to change some of the policies they are most concerned about. They tend to forget that there is in many cases at least a federal framework, and sometimes federal standards, behind many of these state policies.

That's something that has to be explained frequently, is that while we have a lot of room to maneuver, we don't have perfect freedom and there are some baseline federal standards in many of these programs that we have to hit one way or the other. There may be a million different ways to get there, but we have to get there. Those are probably the two major things.

Ashton: Similarly, on that point of there's still a federal standard, even if the state standard...you've got to meet it somehow. You've got to follow the Clean Water Act, the Clean Air Act. We talked about this a little bit before. The phrase "regulatory reform" -- what has that meant in reality? Also, what people think it means, especially with regard to environmental policy in North Carolina? I think this has come up more frequently over the past few years than maybe during the time you were at DENR.

Robin: Yeah. I'm trying to decide whether the real response is different from the snarky response. [laughs]

Edward: We're interested in both.

Ashton: We're interested in both. You can give the real response...

Robin: Where does this information go again? There is a kernel of legitimate concern behind regulatory reform. Unfortunately in the political world it tends to manifest itself in ways that don't particularly align with those legitimate concerns.

The short version of that is much of it's about political support. If I were to answer that question with respect to the water quality program – what is regulatory reform about in the water quality program – the snarky answer, but it comes very close to the truth, is it's about making the state homebuilders association and the realtors association happy.

To some extent, it's about making major industries happy or addressing specific issues they have. A lot of it is about development. Probably 75 percent is about that.

Edward: How would you articulate what you described as the kernel of legitimate concern? I'm paraphrasing there, but that's the gist of it.

Robin: Nobody does rule-making perfectly, just like nobody does legislation perfectly. There have been times when I thought that rules that came out of the Environmental Management Commission...the ones that come to mind immediately, there were some coastal storm water rules that the commission adopted back in 2006-07, somewhere around there.

There were just some things that ended up in those final rules that I thought were not terribly realistic. You could, on a very broad level, understand why the commission or some members of the commission wanted to do what they did, but the cost-benefit wasn't there.

It wasn't there in terms of water quality improvement on some of those provisions. It wasn't there in terms of the political pain to get those water quality improvements.

There are times when people's judgments about how to balance those issues wouldn't be the decisions that I would necessarily make. If I wouldn't make them, then I can assure you that members of the [laughs] North Carolina General Assembly wouldn't. That's just going to happen, and you have to deal with that.

There are things that need to be tweaked that may not be totally realistic. I actually think there are fewer of those on the environmental regulatory side than people believe there are. Generally, the commissions do a pretty good job of balancing out all the different interests. If anything, they occasionally are too understanding of the needs of business and industry, but that is what it is.

Edward: Your career has largely spanned the formalization of risk assessment and risk management within regulatory institutions, both at the federal level and particularly now, since this has been the subject of much of our conversation, at the state level.

It sounds like the basic techniques of cost-benefit analysis became your bread and butter. Was that the case right from the beginning of your service at DENR, or has it become more that way over time? I'd be curious about reflections as to how that process maybe has changed, whether you think there are revisions that could happen or revisions that have happened.

Do people do a good job of it at this point?

Robin: It depends on what you think a good job would be. Let me explain why I would say that. There's the federal model of doing cost-benefit analysis, where you do these extremely complex models. EPA does it for environmental rules and health-related rules. You calculate how many people will die and how many people will lose income.

The state has never done that. I think there are certainly people in the legislature and people at various times in the state budget office who would like to see state regulatory programs do it that way, do a more technically complex cost-benefit analysis of every new rule. There have been occasional runs at pushing agencies harder and harder, at the state level, to do more and more comprehensive cost-benefit analysis.

Unfortunately, money never comes with that, and if you don't have the money, if you don't have an economist on staff or that you're capable of contracting with, then it's never going to happen. There's always been that interest. It's never been backed up by resources, so the state's never gotten there.

Now, if that's your ideal model of doing cost-benefit analysis, state agencies have not done that at all, much less done a good job of that. What they have done are what the state would call a fiscal analysis, which are more limited. What the agencies are required to do under state law is look at what a new rule would cost the state. That was the original requirement.

Edward: Cost the state, as in direct costs...

[crosstalk]

Robin: In terms of implementing. Yes, direct outlays or indirect outlays...

Edward: ...for state government?

Robin: Yes.

Over the years, engrafted onto that, there were additional requirements for those fiscal analyses to look at impacts on local government and on the Department of Transportation, because so many environmental rules affect road construction, especially stormwater things. Now it's basically a three-part analysis -- looking at state costs, local government costs, and State Department of Transportation costs.

There's not a framework in place to do a real analysis of general costs to either the population at large or general savings, in terms of the kind of EPA analysis of lives saved, that kind of thing. There's no framework for that at the state level.

Edward: It seems like there must be some type of eyeball test on that wider question.

Robin: There is.

Edward: What does that look like?

Robin: The way the state has generally done it or the way the environmental programs have done it for the last 15 years or so is that gets dealt with in the rule-development process, largely through stakeholder groups. You've got the manufacturers, the Chemical Industry Council coming in saying, "Look, here's a problem we have with your draft rule, in terms of what it would force our people to do."

Some of those problems may be direct costs. It may be, "It's going to cost us whatever to do it." Some of it may be indirect costs or technical issues, but it all gets wrapped up into the broader conversation about, "What is it we're trying to accomplish with the rule? What do we have to accomplish with the rule?

"Are there things we can and should do to reduce both the costs and other burdens, which may be more technical or logistical, to make it work better for everybody?" It becomes part of that whole...I actually like that approach better, because I think it generally leads you to better results in the end.

EPA's doing very sophisticated cost-benefit analysis but they're still mostly engaged in a, not so much a two-way, it's a one-way conversation where they put a draft rule out, they get lots of written comments, they revise the rule.

That doesn't allow for a lot of back and forth. I mean, they clearly have other conversations like meet with industry groups in their states but their official rulemaking process is still driven largely by...we put out something for the public to respond to. Everybody sends in their written comments, from industry and maybe 25 pages single-spaced from the environmental organizations, it may be form letters.

You get that whole mix of things but there's not a conversation going on, on a large level with all those people represented in the room at the same time. I like the stakeholder model better, as painful as it is and it's time consuming as it can be, because you get a better understanding of what the problems actually are.

And so you're sitting there with the local government folks who are saying, "You know, we see what you want us to do. We don't actually have authority to do that. Here's why we don't have authority to do that. Here's what our enabling laws say that we can do." Then you get the industry folks saying, "you know, so it creates this problem for us. We can do something else but we can't do it exactly this way," and you adjust.

Cost and benefits can all wrapped up in that whole conversation about how do you make it work best for everybody involved and still hit what your ultimate target needs to be.

Edward: How much capacity do environmental groups have to engage in that conversation in ways that where appropriate can challenge the analysis or claims being performed by the industry?

Robin: In varying degrees and they all operate in different ways. I would say probably Sierra Club deals with the broadest range of issues in the state but they've got a very small staff and not a lot of capacity to put toward that. You know, an organization like Environmental Defense Fund, is more targeted on what they work on and they're more geared toward doing their own research and policy development.

They come in a very strategic way. They'll say, "Our interest this year is in mitigation projects and so here's what we're working on." They're not typically keeping an eye on a day-to-day basis on everything that's going on the North Carolina General Assembly. They may keep an eye on it, but that's not how they engage. They've got their agenda and they're working on a more, sort of a deeper level with their national staff.

That's the kind of thing they do need help with. It's analyzing, what is this bill draft actually do? What do we like about it? What we don't like about it? What do we need to fix? How can we fix it? Can you suggest language to fix it?

Edward: Have you seen significant changes over the course of your career and how industry organizes around analyzing and then engaging with these kinds of issues or conversely how environmental groups have?

Robin: Not a lot, to tell you the truth. No, not really. I think the business and industry groups, whether you're talking about industrial organizations or the Home Builders Association, they've got their agenda. They've got their list of rules they don't like and would like to see go away completely in their dream world or maybe be modified in some fashion.

I think depending on how much political clout they have, they maybe more or less willing to compromise. The more power they believe they have at the General Assembly, the less willing they are to engage in compromising at the rulemaking level.

They just don't play or they play minimally and watch what's going on, but then try to address it at the legislature. I don't think any of that has particularly changed over time.

The environmental organizations, I think they're more sophisticated now in the way they work on things than they would've been 15 or 20 years ago. I think they do have somewhat more resources to put at it.

On the big issues, I guess I don't fully know what they were doing 15 or 20 years in terms of coordinating between their national offices and their state offices on issues. There were certainly a lot of that going on over the last few years on coal ash and, before that, to some extent on fracking too.

Kate: It sounds sort of like when you're talking about with these environmental organizations don’t necessarily have a ton of resources or their capacity really to be

well-versed in the obvious issues we're looking at in sort of big industrial coalitions that do you have people who have time to sit down and dissect all this information.

When you get them all together, would you say that the environmental organizations are still able to like, make change? Or does it sort of fall on like the commission members and their individual…like individual people to sort of make the difference between just letting industries sort of run the conversation?

Robin: It currently depends on who sits on these commissions and who's sitting in the general assembly and what their past experience has been makes a big difference. I don't think there's any question about that.

If you have commission members, even if they're not a majority of the commission members, who are really good at just kind of clarifying and framing an issue, that can go a long way to putting you on a better path to a solution than you otherwise would have.

This is just personal observation and I'm sure it's not all that novel. With the turnover in the legislature in the last three years from having been Democratic for so long and then being entirely under Republican control, part of what's happened is you've got folks in the legislature who've never had the ability to influence these issues before, and so were never engaged even to the extent they were Republicans, they weren't in a position to do much. They didn't really get all that involved.

With the change of administration both in the governor's office and the legislature in terms of political affiliation, I think the other thing you lost was the history of dealing with some of these influential business and industry groups.

And so, Marc Basnight was a perfect example. He was the President pro tempore in the Senate, long-time Democrat, been there forever, had huge political power. Marc was a mixed blessing on environmental issues. He was great on big picture stuff. He totally got it, the importance of protecting water quality and water supply and the coast.

Where Marc was a challenge was if he had a particular constituent. So the big picture didn't always translate to the constituent issue for Marc. There were tussles occasionally about how you apply those policies to a constituent.

But he totally got the big picture. He and other Democrats who've been there for a long time, and this isn't a political affiliation issue as much as it is just experience, just having had political power for a while, they had dealt with the Home Builders Association, the Realtors Association and the industry groups long enough to know bullshit when they heard it, quite honestly. And to feel that they had sufficient power to sometimes say no to those organizations or know when to draw a line.

I think when you get a big political party shift like we've had in the last several years and you suddenly have a lot of people who haven't had power for a long time, just like every new governor comes in with their heads full of everything that lobbying groups have told them and it takes them two years of their first term to figure out that not everything they were told was totally true, same thing happens with legislators.

They've gotten elected. They've heard all this horrible stuff about the state's environmental programs and how fascist they are, basically. And they believe more of it, that's their frame of reference. Again, I don't think it's political party. It's how long have you been there, how much time have you had to kind of understand the context of what's going on and kind of be better able to sort out the bullshit from the real issues.

That's kind of where we still are, unfortunately, is I think there's been a learning curve, a big learning curve. The coal ash spill last year I think went some way toward changing part of that curve, but it's just experience and being comfortable exercising political power and knowing you can say no and when you shouldn't say no.

Does that make sense?

Ashton: I'm trying to figure out a good follow up for that.

[laughter]

Ashton: I had something, and now it's gone. I guess you were talking earlier about how when you're trying to effect change when you were at DENR, a lot of it is just talking with legislators. So, you were talking about some senators have that experience and you obviously had that experience as well.

There are obviously advantages and there might be some disadvantages to that as well. Could you think of anything that might be a disadvantage?

Robin: A disadvantage to...?

Ashton: A disadvantage when you're working with people who don't have that experience, trying to convey the deep past of an issue over time to someone. Maybe you can use the Coal Ash Bill as an example of its progression through the legislature. Or you can just punt if you want to.

[laughter]

Robin: Yeah, it's always a challenge. I think one important part of that is, as I've said before, being able to talk to legislators and to other lay people where they are, and talk about those issues in a way that makes sense to them.

Also understanding what their interest is, so you can make whatever argument you need to make in a way that's actually persuasive. It just is what it is, and it's always going to be that way. You're never going to be dealing, especially if you're in a set of programs that are fairly complicated because of the combination of science and the impacting of lots of different interests.

It's never going to be easy, and you're never going to be dealing with legislators or local government officials who have spent the kind of time and energy that you have, working in a program like that. To understand it, you just have to figure out how to communicate it to them.

Kate: Building on the idea that not everybody who has a say in the political process has tons of expertise in these kinds of issues, a big part of regulatory rulemaking in this country is public participation, so that anybody who wants to have a comment on a rule can come and speak and have their voice heard. I was wondering if you could talk a little bit about that -- how you balance the dynamic between needing really technical expertise and public participation, and how you incorporate both, and your experiences with that?

Robin: That's a really good question. You get a really wide range of comments, both written and in public meetings, and clearly, the ones that are the most helpful are the ones that are the most focused. The people who have either figured out what their own issue is and can really describe it, describe the problem, describe the issue, don't always have a solution, but at least they can clearly identify something that needs to be addressed.

You've got the more sophisticated lobbyist types who have an agenda for their clients and who are generally very focused, and then you've got a wide range -- and we saw this with the public meetings on the fracking study -- of people who are concerned on a more general level, don't have a lot of detailed information, and that's part of the reason they have the meetings is people come to the meetings concerned and wanting to express their concern, and they're not – at that point, it's not so much about getting input from the public on how to craft a rule. It's more about answering questions and responding to comments, and helping people get a better context for what's going on.

The form letters saying, "I hate fracking," aren't terribly useful if you're trying to put together a rule. It just doesn't take you anywhere. Somebody can make a decision above the pay grade of the department that North Carolina's not going to ever allow fracking, but the department can't make that decision, and if you're crafting a set of rules, that doesn't really help you in any particular way.

What is helpful is to hear from somebody about, "I happen to know something about the geology of Chatham County, and we've got some issues here you need to be looking at in terms of ground water," or a local government official saying, "We're really concerned because we know we've got a limited water supply. We don't have a lot of other areas to go to, so we're concerned that if fracking happens here, it's going to put a strain on our water supply for other purposes. You need to be looking at that."

That kind of thing is helpful, but you're getting the whole range of general angst, and then much more focused comments. You've got to do it. I think there's no way around the fact that you've got to do it. It's an important thing to do, even if the comments you get aren't things you necessarily can use in crafting the rule.

It's important to have that back and forth with the public, so that they can hear what you have to say, what the department has to say, about the issue, understand, clear up some of the misconceptions. Maybe we all don't agree after the end of all that, but at least maybe we're closer to operating from the same starting point in terms of understanding.

Edward: One theme that comes through for me, at least, very clearly in this discussion is the way that your networks have deepened over the course of your career. The number of

people with whom you've engaged and built relationships around environmental policy issues has clearly deepened and grown over the decades.

I'm wondering whether that has had a geographic dimension as well. Clearly it involves North Carolina, centrally, but to what extent have you become connected to national groups of regulators or of policy makers more generally around regulatory issues? To what extent have you been integrated into regional networks, so that there's a conversation on a regular basis with people in Virginia, South Carolina, Georgia, or perhaps not?

Robin: Before I left the department -- I may have mentioned this last time, but I'm not sure. That varies a lot depending on what area you're working in. Almost every environmental program has a network of national connections. There's a national association of everything from wastewater treatment operators to directors of state water programs.

There's a coastal states' organization that's an organization of the state coastal management programs, so at different periods of time, when I was doing a lot of work with the coastal program, I went to a lot of the coastal states, organization meetings, because that would include program directors, lawyers, EPA and other Federal agency folks.

Same thing with the water quality program. Depending on what you're doing at any given time, you may be going to the water directors' meeting, or there's also an organization of all of the state environment secretaries or commissioners, they have different titles; but the Environmental Council of States is the organization that's the top state environment officials across the country, and they meet, maybe twice a year, at least once a year.

Again, those also involve Federal program staff from EPA, and they end up talk generally about state issues. EPA sponsors regional meetings, so the Region IV EPA office in Atlanta hosts the state secretaries and their staffs, or comes up to North Carolina and meets with the state folks on a regular basis.

Then they also have separate meetings for their water directors, air directors, whatever, so there's a lot of opportunity for that, I think. Since leaving the department, a lot of what I've been doing has been sort of at the interface between the state chapters of some of these environmental organizations and their federal, their national offices, particularly with Sierra Club. I've probably done the most work with Sierra Club, and largely because of coal ash, because that was a big national issue for them.

It spanned both the state and national offices, as we were trying to work on that legislation. It just depends. The opportunities are different, depending on what your role is at any given time.

Kate: What have you found is the most helpful in building those networks, in terms of sharing information or building coalitions? What is it that you benefit from those informal networks?

Robin: A lot of it is just sharing information, the opportunity to hear how other states have solved similar problems. That is really helpful. You can get some good ideas, because other folks have tried things we haven't, or in a lot of cases, we've tried things that they haven't, and so that's useful.

Sometimes it doesn't always translate. Texas isn't North Carolina, and things that work there don't work here and vice versa sometimes, but it's always worth talking about. Then there's coordinated action, where we all gang up on EPA. [laughs] That's occasionally useful, too.

[laughter]

Ashton: Given all this discussion that we've been having, and what you've just been saying about networks, there's a phrase that I think is very close to Professor Balleisen's heart that I think you, in the past, have pushed back against. Do you think you see yourself as a policy entrepreneur?

[laughter]

Robin: You planted that question, didn't you?

Edward: [laughs]

Ashton: He reviewed the questions before. You can take from that what you will.

Robin: I have never thought about it that way. I told Ed that after the workshop...I think is what I told him, is the model that came to mind when I was in state government was more warlike than commercial.

Ashton: Possibly more appropriate.

Robin: Yeah. [laughs] No, I have never thought about it that way. I don't know. Partly because, maybe, okay, this is off the top of my head, I have not been in the position of being a lobbyist, exactly. I think that description may fit a lobbyist, whether it is for a nonprofit or an industry organization or local governments or whoever, better because they tend to have an agenda that is very much driven by their particular needs. What they are trying to do is get someone to adopt their agenda, whether it is in a rule or in legislation.

I think if you are working in the kind of job that I had in state government, you are rarely, you are sometimes in that position. There have been times when we had a governor who was willing to really push a policy change. That tends to be unusual. It usually takes a very big, messy issue to get you to that point.

But to the extent, there have been things like the water conservation legislation from several years ago and some other things, where a governor would say, "Yes, this is a policy change that we are going to advocate for and the governor's office is going to support and DENR is going to do the legwork on it and we are really going to push this in the general assembly."

But probably 90 percent of the time that is not the role you are in. I think usually the role you are in is trying to manage all of the different inputs, all the different entrepreneurs who are trying to influence your decision and trying to make sure that you get to an outcome that makes sense and satisfies whatever state or federal mandate goal you are trying to reach.

Edward: It sounds like you see the role that you played more as that of policy broker.

Robin: It is a mix. Because you do, at least if you are working in an administration that supports you, you do have a bottom line. You've got to have a bottom line because you have got to know where you need to come out at the end of this negotiation.

But it is not as much about selling a final product as it is saying, "Here is the goal. Here is the standard. Here is the fundamental purpose." Now, we can hit that fundamental purpose in any one of a number of ways. Most likely we have some good ideas about how to do that. You usually start by saying, "Here is what we think we ought to do."

But from there, once that discussion opens up outside of department staff, it is less about selling a final outcome than it is about trying to herd the cats towards some final decision that works, that works politically, that works in terms of your environmental goals.

Edward: How much of that, in your experience, has involved an explicitly experimental mindset in the sense that we have to deal with a problem, here are some ideas about how to deal with it, we are going to bring all the stakeholders together. But at the end of the day we are going to come up with what we think is the best approach but we also know it may encounter all kinds of unintended...

Robin: No, it will. [laughs]

Edward: There will be unforeseen dynamics associated with this policy, so we have to have a framework in place to evaluate and then regroup and reconsider. Has that been your experience or not so much?

Robin: I think that has been the experience a lot, within some limits. It is rare that you are starting from a blank page completely. That is almost never the case because of either federal mandates or state law mandates or whatever is going on. It is not totally free form brainstorming.

But there have been many cases where you go into it...I should say not all of this is initiated by the department, either, obviously. A lot of times you are playing defense and reacting to something that has been introduced as a bill in the General Assembly. You are starting from somebody else's really bad piece of paper and trying to pull it back to something that makes sense.

But one of the things that some of the industry organizations had wanted for a while were changes in the state's air toxics regulations. The state regulates toxic air pollutants somewhat differently than the federal program does. We implement the federal program,

but on top of that we do more on air toxics than the EPA requires. The industry wanted us to change that for a while.

That was one of those situations, this happens a lot, where they complained and they complained and they complained. They talked to the air quality staff. The staff says, "Yeah, there are some things we can do, some things we can't." They complained some more and got legislation directing the department to do a study of the air toxics program. Then you are doing a study and you are meeting with all of these stakeholders.

In that situation we spent several days in a conference room at the legislature talking to business and industry folks about, "What do you see the problems being with the air toxics program? What are the changes that you want?" I think we went into it with a pretty open mind. We kind of knew what our bottom line was going to be. But before you got to that bottom line there were a fair number of things that could change.

Sometimes you just have to say that. "Sorry, we're not going there. But if you have got some other good ideas." Or other ideas, [laughs] that wasn't a good idea, then let's talk. We did. They had some ideas. It ended up in some changes that were workable.

Edward: You mentioned before that the state agencies in North Carolina, at least, have never had the bandwidth, the resources, the capacity to do the sorts of sophisticated modeling...

Robin: Of costs and benefits.

Edward: ...of projecting costs and benefits that are now more commonly the norm at the federal level, especially with rules that have big impacts. Does it follow, as well, then from that that DENR didn't have the capacity when you were there to look systematically at the actual impacts of the rules that it put in place? Sort of retrospective assessments of whether your assumptions and decisions had the impact that you hoped they would?

Robin: I think that is a real problem for state agencies, because no they don't. I think what largely drives that, sometimes you get there because the agency itself recognizes we have got a problem here, things aren't working. Maybe where that leads is to the department doing some sort of study.

But it is very difficult, when you are trying to meet all the latest federal mandates and fend off really bad ideas coming from various quarters, to have the luxury to go back and say we want to do a complete review of our stormwater program because we suspect, given we started down that road 20 years ago, that there are things that we would do differently now than we did then.

Sometimes the agency will initiate that. Storm water is one example where the Environmental Management Commission and the state staff said several years ago, "We have now worked through five or six different stormwater programs in this state because they grew out of these individual regional problems like nutrients in Falls Lake or coastal stormwater issues that really had to do with bacteria, not nutrients."

We have got all these different programs that developed slightly differently. They have a lot of overlap in terms of standards, but they are not identical. Isn't it time for us to look across all those and say, "Can we simplify this or the things we've learned that we can standardize in a way that's less confusing to the public, less confusing to the local government."

They actually did that. Said, "We're going to create basically a standardized stormwater program." There's still the regional programs, the Falls Lake, Jordan Lake, different programs. There's now also something called the universal stormwater rule that if a local government decides they want to do that, they can use one template that will satisfy all of those things.

I think there's some interest now actually in some of the environmental organizations to look at stormwater again, not from that perspective, but from the perspective of how effective have the stormwater standards been.

There's two pieces to that. One is, did we get the standards, the requirements right the first time through or are there things we need to improve. The other piece of that is, has the state had sufficient compliance resources to even be sure that the systems that we permitted were built and operated the way they should be permitted. You really need to know the answer to that one first to know whether your standards are working.

Do we even know what's out there and how it's operating and then once we answer that question, can we assess how good the standards are?

Edward: Who do you think ideally would carry out those types of studies, retrospective studies? Would it be best to have it in the agency assuming you could inject resources into the agency to add that piece to its portfolio, or would it make sense to have somebody else do it, NGOs or industry or some clashing combination of different perspectives?

Robin: I don't know if I have a strong sense of that. Usually it's probably more cost and time effective to have the agency do it just because you've got all that institutional memory there and they know where all the records are. They know where all the data is. They know what they've permitted.

Otherwise, you spend a lot of time trying to get a consultant or someone just up to the point where the state permitting enforcement staff is. So I think it usually works better for them to do it, but to have some public participation aspect of that. It shouldn't be completely internal. It needs to have some possibility for public input and reaction to what they're finding.

A lot of time what may happen, I don't know if anything like that happened this year. There's some interest in trying to make something happen on the stormwater study.

A lot of these things, if the agency doesn't decide something is high enough priority to initiate it internally, a lot of these things happen because of legislation that requires a study and a report back to the General Assembly on an issue.

There's some folks interested in doing that on stormwater and trying to get the legislator interested in asking DENR to do a review of the effectiveness of the stormwater programs and report back in a year or so, and whether that will come with any money to help do that is always the question.

Edward: Any last questions?

Ashton: I have one at you guys. This is a really general question. You've been working in environmental law and policy for 25 years. We talked about all these various issues that have come into play during your time.

Over the next 25 years, what are the major issues that you think are going to need to be addressed by the next generation, if you will, of regulators in North Carolina, so looking forward?

Robin: The two big ones may be sea-level rise and how you manage those impacts on the coast and the decisions that state makes about infrastructure at the coast and development, you know, risk management sorts of decisions about development. The other one is water supply.

We haven't had a drought in the last five years or so, but there will be another one. The state at some point is going to have to bite the bullet and require permits for water withdrawals. Those are the two big things.

The state's doing a lot of work on most of these issues in terms of studies and developing models. There's a fair amount of capacity in terms of understanding of whether it's water supply in the different river basins, or the situation at the coast and how that differs from north to south on erosion and various things.

There's a lot of capacity there, but there's going to be a series of policy decision the state is going to have to wrestle with and hasn't yet, and hasn't really shown an inclination to wrestle with yet.

Those will be a couple of things. I'm sure there are others.

Edward: Robin, thank you so much.

Robin: You're welcome.