

STATE OF NORTH CAROLINA
 COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
 SUPERIOR COURT DIVISION
 23 CVS _____

NORTH CAROLINA ENVIRONMENTAL)
 MANAGEMENT COMMISSION,)
)
 Plaintiff,)
 v.)
)
 NORTH CAROLINA RULES REVIEW)
 COMMISSION,)
)
 Defendant.)
)
 _____)

COMPLAINT

The Plaintiff, the North Carolina Environmental Management Commission (“EMC”), brings this declaratory judgment action to remedy the Defendant North Carolina Rules Review Commission’s (“RRC”) unlawful objection to the EMC’s proposal to codify its pre-existing standards for the carcinogenic toxin 1,4-dioxane. The RRC strayed far beyond its legislatively prescribed role and based its objection on its own disagreement with the conclusions of the agency’s fiscal note, which had been approved by the Office of State Budget and Management (“OSBM”). Further, the RRC lacks both the statutory authority and economic expertise to substantively review a fiscal note. The law is clear that, as relevant here, the RRC can only reject a rule if the agency fails to obtain a fiscal note or if OSBM does not approve the agency’s fiscal note. This rejection of the rule by the RRC has caused uncertainty among regulated entities and threatens to impede the EMC’s efforts to protect the public from toxic chemicals like 1,4-dioxane. The EMC brings this action to return the EMC’s proposed rule to the RRC for approval, to return

the RRC to its proper role in the rules review process, and to protect the drinking water supplies of all North Carolinians.

The Plaintiff EMC complaining of Defendant RRC, alleges and says:

PARTIES

1. Plaintiff EMC is a State commission created pursuant to N.C. Gen. Stat. § 143B-282 *et. seq.*, and empowered to promulgate rules establishing water quality standards to protect human health and the aquatic environment, including those adopted pursuant to Section 303(c) of the Clean Water Act. N.C. Gen. Stat. §§ 143-214.1, and 143-215.3.

2. Defendant RRC is a State commission created under Chapter 143B of the North Carolina General Statutes, known as the Executive Organization Act of 1973. The RRC is tasked with reviewing proposed administrative rules for compliance with certain enumerated provisions of the Administrative Procedure Act (“APA”). N.C. Gen. Stat. §§ 143B-30.1 and -30.2; *see also* N.C. Gen. Stat. § 150B-21.9. Defendant RRC’s Registered Agent for service of process is William W. Peaslee, NC Rules Review Commission, 1711 New Hope Church Road, Raleigh, NC 27609.

JURISDICTION

3. When the RRC has returned a permanent rule to an agency, jurisdiction for a declaratory judgment action rests in the Wake County Superior Court pursuant to N.C. Gen. Stat. § 150B-21.8(d).

VENUE

4. Wake County, North Carolina is a proper venue for this action pursuant to N.C. Gen. Stat. § 150B-21.8(d).

LEGAL FRAMEWORK

5. The EMC has authority to revise or adopt water quality standards under the federal

Clean Water Act and N.C. Gen. §§ 143-214.1 and 143-215.3.

6. The EMC is the agency authorized and empowered to promulgate those standards. N.C. Gen. Stat. §§ 143-214.1, 143-215.3, and 143B-282.

7. Water quality standards consist of, in part, the designated uses of a water body and criteria to protect those uses.

8. Uses include things like “aquatic life propagation, survival, and maintenance of biological integrity (including fishing and fish)” as well as “a source of water supply for drinking, culinary, or food processing purposes.” *See* 15A NCAC 2B .0211(1) and .0212(1).

9. Criteria can be numeric or narrative statements of conditions necessary to protect those uses. For example, cyanide less than 5.0 µg/L would be a numeric criterion, 15A NCAC 2B .0211(5), whereas, “[o]ils, deleterious substances, or colored or other wastes: only such amounts as shall not render the waters injurious to public health . . .” is a narrative criterion. 15A NCAC 2B .0211(12).

10. No person is allowed to cause a violation of these standards without a permit. N.C. Gen. Stat § 143-215.1.

11. The EMC is also required to review and update those standards every three years through a process known as the “triennial review” pursuant to Section 303(c)(1) of the Clean Water Act. *See* 33 U.S.C. § 1313(c)(1).

12. As part of the 1989 triennial review, in response to certain 1987 amendments to the Clean Water Act, the EMC promulgated 15A NCAC 2B .0208, which sets forth standards for toxic substances and temperature. The regulation specifies a narrative standard: “the concentration of toxic substances, either alone or in combination with other wastes, in surface waters shall not render waters injurious to aquatic life or wildlife, recreational activities, or public health, nor shall

it impair the waters for any designated uses.” 15A NCAC 2B .0208(a). The regulation then sets forth specific and detailed analytic methods for interpreting this standard with regard to carcinogenic and noncarcinogenic compounds.

13. In order to protect human health, 15A NCAC 2B .0208(a)(2)(B) provides that the concentration of carcinogenic toxic substances should not result in more than one case of cancer per million people exposed.

14. To calculate the concentration required to achieve that level of protection, the regulation directs that the agency to use specified procedures. The result is a detailed analytical formula with certain specified inputs (including risk level, water consumption rate, and fish consumption rate) that allows the agency or the regulated entity to calculate an allowable concentration once one knows certain parameters regarding the carcinogenicity and bioaccumulation of a particular toxin.

15. The concentrations that result from these calculations are known as “in-stream target values.”

16. Once a concentration has been derived, it can then be used to calculate a permit limit based on such things as the permitted discharge volume at a particular facility and the characteristics of the receiving water body (e.g., its classification and flow).

17. This regulation has been in place for over thirty years and has been relied upon by the North Carolina Department of Environmental Quality (“DEQ”) to set discharge limits in myriad permits.

FACTUAL ALLEGATIONS

1,4-dioxane

18. 1,4-dioxane is a synthetic industrial chemical whose primary historical use was as

a stabilizer in industrial solvents. It is also a byproduct in some plastics manufacturing processes. It is considered a likely carcinogen by the EPA.¹

19. In 2010, the EPA completed a carcinogenicity risk assessment for 1,4-dioxane.

20. This risk assessment contained toxicity values used by DEQ to calculate in-stream target values for 1,4-dioxane of 0.35 µg/L in water supply waters and 80 µg/L in all other surface waters as provided in 15A NCAC 2B .0208.

21. DEQ also began to investigate sources of 1,4-dioxane contamination in North Carolina waters and to impose limits and monitoring conditions on those sources using the in-stream target values.

22. For example, in October 2014, DEQ's Division of Water Resources initiated a study of the Cape Fear River Basin aimed at identifying potential sources of the toxin. That study concluded that the most significant sources were wastewater treatment facilities.

The Rulemaking Process

23. As part of the 2020 – 2022 Triennial Review, the EMC proposed to codify existing in-stream target values for 1,4-dioxane as numeric standards to provide for greater transparency and certainty for the regulated community and the public. The EMC proposed to amend the following rules to include numeric standards for the discharge of 1,4-dioxane into surface waters based on existing in-stream target values: 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, and .0218.

24. The EMC prepared a Regulatory Impact Analysis² or “fiscal note” covering all the proposed amendments to the Subchapter 02B Rules for the Triennial Review. The fiscal note was

¹ https://www.epa.gov/sites/default/files/2014-03/documents/ffrro_factsheet_contaminant_14-dioxane_january2014_final.pdf

² A Regulatory Impact Analysis is a fiscal note. See OSBM, Budget Manual § 10.

included in pages 91-166 of the Hearing Officer's Report ("HOR"), attached hereto and incorporated herein as Exhibit 1.

25. The EMC prepared the fiscal note for the proposed rule amendments being addressed as part of the Triennial Review and did so in accordance with the requirements contained in N.C. Gen. Stat. §§ 150B-21.4(a), (b), and (b1).

26. As directed by N.C. Gen. Stat. § 150B-21.4(b1) (2), the EMC first determined the baseline against which the impacts of the proposed rule amendments were assessed.

27. For each of the amendments being considered, the EMC relied on its existing rules as the regulatory baseline to determine whether additional costs or expenditures would be required *as a result of the proposed amendments*. See N.C. Gen. Stat. §§ 150B-21.4(a), (b), and (b1).

28. With respect to 1,4-dioxane, the EMC relied on existing in-stream target values calculated based on the existing requirements contained in 15A NCAC 02B .0208, which were the very same values proposed for codification as a numeric standard. Exhibit 1, p 100.

29. The EMC then went on to analyze whether the codification of existing in-stream target values would result in additional costs or benefits as compared to the baseline. A portion of the EMC's analysis states:

Compared to the regulatory baseline for 1,4-dioxane – which is comprised of the existing in-stream target values -- there should not be additional costs to existing or future NPDES wastewater permittees and no change in health and environmental benefits as a direct result of the codification of the [in-stream target values] into the NC administrative code. The proposed rule will reflect the requirements and processes already being enforced. For this reason, we did not attempt to monetize costs or benefits for 1,4-dioxane.

Exhibit 1 p 107

30. Because the in-stream target values are already being used by DEQ to set regulatory limits on discharges based on the requirements already present in 15A NCAC 2B .0208 and

because these limits would continue to be in effect whether or not the target value was codified as a numeric standard, any costs of compliance with these values are not attributable to the proposed rule change.

31. Therefore, the EMC concluded that the proposed amendments for 1-4-dioxane, which merely would codify existing in-stream target values, would not have any additional economic impacts.

32. The Office of State Budget and Management (“OSBM”) reviewed the EMC’s submission under the standards specified in N.C. Gen. Stat. §§ 150B-21.4(a), (b) and (b1), agreed with EMC’s baseline analysis, and approved the EMC’s fiscal note on February 11, 2021.

33. On May 17, 2021, the EMC published the fiscal note and also a notice of text in the North Carolina Register, and opened the written comment period on the rules. Exhibit 1 pp 61-88.

34. The EMC held a public hearing on July 20, 2021, and the public comment period closed on August 3, 2021.

35. After the conclusion of the public comment period, a Hearing Officer’s Report (“HOR”) was prepared. The HOR contained copies of each of the public comments received during the public comment period, including those related to the fiscal note, and made recommendations regarding the proposed amendments. Each of the comments were considered and responses were provided in the HOR. *See* Exhibit 1 pp 13-54.

36. The proposed rule amendments, as well as the fiscal note and HOR, were considered by the EMC’s Water Quality Committee at its January 2022 meeting, and the Committee took action to recommend that the full EMC approve the fiscal note and HOR and approve the proposed amendments.

37. The proposed amendments, including the HOR and fiscal note, came before the full EMC at its March 2022 meeting upon the recommendation of the Water Quality Committee. After considering the record before it, the EMC approved the HOR and fiscal note, and adopted the proposed rule amendments pursuant to N.C. Gen. Stat. § 150B-21.2.

Proceedings Before the RRC

38. Following completion of its rulemaking process, the EMC submitted to the RRC for review the proposed amendments to the Subchapter 2B Rules comprising the Triennial Review package, including the codification of the in-stream target values as numerical standards for 1,4-dioxane.

39. The rules were placed on the agenda as an action item for the April 2022 RRC meeting.

40. In advance of that meeting, RRC Counsel Lawrence Duke prepared a staff opinion, attached hereto as Exhibit 2, recommending that the RRC object to the proposed rule amendments related to 1,4-dioxane. The sole basis for the recommended objection was Mr. Duke's assertion that the EMC had failed to comply with the cost analysis requirements of the APA, notwithstanding the fact that the agency had prepared a fiscal note, submitted it to OSBM for approval, and had received approval from OSBM.

41. Despite the EMC's preparation and adoption of a fiscal note and OSBM's approval of that analysis, Mr. Duke asserted that the fiscal note contained "no quantitative assessment of costs." Although Mr. Duke acknowledged that generally the RRC does not substantively review a fiscal note, he advised the RRC to object to the proposed rule amendments based on his subjective view of the fiscal note as "confusing" and "mere conjecture" in its analysis of the economic impact of the rule changes.

42. At its April 2022 meeting, the RRC deadlocked 4-4 on whether to approve the Subchapter 2B rule changes and the rules were carried over to the RRC's May meeting.

43. On May 12, 2022, OSBM sent a letter to the RRC responding to the assertions in the RRC staff opinion and offering to discuss it further with the RRC. This letter and its related emails are attached hereto as Exhibit 3. The letter expressly reaffirmed OSBM's conclusion that the fiscal note prepared by the EMC complied with the APA, including the fiscal note's analysis of the in-stream target value baseline and its conclusions. OSBM's May 12, 2022 letter also reiterated its position that N.C. Gen. Stat. § 150B-21.4 vests OSBM – and not the RRC – with the authority to determine whether a fiscal note was properly prepared in compliance with the Administrative Procedure Act.

44. In advance of the May Meeting, RRC Counsel Mr. Duke prepared an updated staff opinion. Again, Mr. Duke recommended that the RRC object to the rules solely on the same basis related to the baseline used in the fiscal note. See attached Exhibit 4.

45. On May 19, 2022, the RRC met again. Notwithstanding OSBM's letter and the arguments of EMC counsel, among others, the RRC voted to object to the 2B Rule package based on staff's recommendation and notified the EMC of its decision by letter, attached hereto as Exhibit 5.

46. The RRC's objection letter acknowledged that the EMC prepared a fiscal note, but nonetheless determined that the fiscal note did not comply with the APA.

47. The RRC rejected the EMC's determination of the baseline and entirely disregarded OSBM's concurrence and approval of the baseline relied on by the EMC.

48. In so doing, the RRC acted contrary to the relevant provisions of the APA, which provide that “an agency shall ... [a]ssess the baseline conditions against which the proposed rule

is to be measured” and that only the “[f]ailure to prepare or obtain approval of the fiscal note . . . shall be a basis for objection.” N.C. Gen. Stat. § 150B-21.4(b1) (emphasis added).

49. It also ignored entirely the fact that N.C. Gen. Stat. § 150B-21.4 vests OSBM with sole authority to approve and/or certify an agency’s fiscal note. *See* N.C. Gen. Stat. §§ 150B-21.4(a), (b), and (b1) (requiring agencies to prepare a fiscal note in certain circumstances and requiring OSBM’s certification and approval of it).

50. On July 23, 2022, the EMC responded to the RRC pursuant to N.C. Gen. Stat. § 150B-21.12(a)(2), indicating that it was declining to change the rules based on the RRC’s objection since the RRC did not object to the actual language of the rules at issue. The July 23, 2022 letter noted that the EMC would be providing additional information in an effort to resolve the objection. A copy of the EMC’s letter is attached hereto as Exhibit 6.

51. By letter dated August 12, 2022, the EMC provided additional information to the RRC in an effort to resolve the objection. A copy of the EMC’s August 12, 2022 letter is attached as Exhibit 7

52. In its August 12, 2022 letter, the EMC explained that the codification of the in-stream target values as numerical standards did not change the regulatory requirements imposed by the already existing narrative criterion of Rule 02B .0208. As the letter explains “the proposed rules codify existing requirements, there is no change in the baseline and, therefore, there will be no additional benefits achieved or costs imposed by the change in rule.” Exhibit 7, p 3.

53. The EMC further pointed out that the Staff Recommendations prepared by Mr. Duke used selective and incomplete quotes from the fiscal note to suggest that the EMC was aware of anticipated costs and simply chose to disregard them. The full text explains that the EMC did not attempt to monetize the costs of complying with the values *because* compliance with those

very same values is already required by the existing rule.

54. The EMC's August 12, 2022 letter also sought to clarify that it is the role of OSBM, not the RRC, to substantively review fiscal notes. The letter stated that OSBM had already approved the fiscal note for the proposed rule amendments and had reiterated its approval in OSBM's May 12 letter.

55. At its August 18, 2022 meeting, the RRC specifically refused to entertain or consider the EMC's response to the objection. The RRC took the position that it was without authority to consider the EMC's response because the EMC had not proposed changing the *language* of the rule. The RRC took this position despite the fact that it had not objected to the language of the proposed rule amendments and did not request any changes to the proposed language before it. A copy of the minutes of the August meeting are attached hereto as Exhibit 8.

56. Upon information and belief, the RRC has not previously objected to a proposed rule for failure to comply with the requirements contained in N.C. Gen. Stat. § 150B-21.4 where, as here, the agency had both prepared a fiscal note and obtained OSBM's approval and certification of it.

57. Pursuant to N.C. Gen. Stat. § 150B-21.12(d), the EMC submitted a written request to the RRC on February 10, 2023, seeking the return of proposed rule amendments to Rules 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, and .0218. As copy of the EMC's request to return the proposed rule amendments is attached hereto as Exhibit 9 and is incorporated herein by reference.

58. The RRC returned the proposed rule amendments on February 13, 2023. A copy of the letter notifying the EMC that the proposed rule amendments were being returned is attached hereto as Exhibit 10 and incorporated by reference.

FIRST CLAIM FOR RELIEF

59. The allegations contained in Paragraphs 1 through 58 are incorporated into this claim for relief as if fully set forth herein.

60. The EMC seeks a declaratory judgment from this Court that the RRC acted outside its statutory authority in objecting to the EMC's proposed amendment to 15A NCAC 2B .0208 codifying the numerical standard for 1,4-dioxane.

61. The RRC's basis for its objection was the EMC's alleged failure to include in its fiscal note a quantification of the costs attributable to the rule to the greatest extent possible.

62. The RRC acknowledged that a fiscal note had been prepared and had been approved by OSBM.

63. The RRC's objection is based on its own determination of an alleged substantive deficiency in the fiscal note, even as the staff opinion specifically acknowledged that "[staff's] opinion is also not alleging that the fiscal note prepared by the Environmental Management Commission is erroneous, because it is not for the Rules Review Commission to 'check the math' of the fiscal note." *See* Exhibit 4 p 1.

64. The RRC exceeded its authority in basing its objection on its disagreement with the EMC's fiscal note, which had been prepared and approved by OSBM in compliance with N.C. Gen. Stat. § 150B-21.4.

65. The APA squarely places the authority to substantively review the fiscal note with OSBM. *See, e.g.*, N.C. Gen. Stat. §150B-21.4(a), (b), and (b1). Pursuant to N.C. Gen. Stat. § 21.2(a), when necessary, an agency prepares and submits a fiscal note to OSBM, and OSBM must review and approve it *prior* to the agency publishing the text of the proposed rule in the North Carolina Register. The APA makes clear that only the failure to prepare a note altogether or the

failure to obtain approval of the note can be the basis of an objection. *See* N.C. Gen. Stat. § 150B-21.4(b1) (“Failure to prepare or obtain approval of the fiscal note as required by this subsection shall be a basis for objection to the rule under G.S. 150B-21.9(a)(4)”).

66. The RRC lacked statutory authority to object to the rules based on its disagreement with the EMC’s identified baseline to assess the impacts of the proposed rule amendments.

67. In objecting to the EMC’s proposed rule amendments as described in this Complaint, the RRC has created significant uncertainty as to the application of N.C. Gen. Stat. § 150B-21.4, as to which agency is delegated the authority to review and approve fiscal notes, and as to the circumstances under which the RRC can object to a proposed rule based on the requirements of N.C. Gen. Stat. § 150B-21.4.

68. The EMC is entitled to a declaratory judgment that the RRC lacked statutory authority to object to the rules based on its disagreement with the EMC’s analysis in the fiscal note.

SECOND CLAIM FOR RELIEF

69. The allegations contained in Paragraphs 1 through 68 are incorporated into this claim for relief as if fully set forth herein.

70. Assuming, *arguendo*, that the RRC had the authority to second guess the determinations by both EMC and OSBM as to the appropriate regulatory baseline used in the fiscal note, the RRC erred in its assessment.

71. The existing provisions of 15A NCAC 2B .0208 establish the requirements for setting discharge limits based on in-stream target values for 1,4-dioxane in water supply waters and in all other surface waters.

72. The in-stream target values are derived using an EPA-approved scientific formula

that uses identified input values to address the discharge of toxic, carcinogenic substances. Such substances cannot be discharged in quantities that will render waters injurious to, among others, human health, including through consumption. The existing provisions of 15A NCAC 02B .0208 remain in effect and applicable to the discharge of 1,4-dioxane, and the numeric values proposed by the EMC for codification are identical to existing in-stream target values derived from the requirements contained in 15A NCAC 02B .0208.

73. Further, since regulated entities are already limited by the rule in the amount of 1,4-dioxane that they can discharge, costs to comply with the proposed numeric values are not attributable to the proposed rule amendments, and the EMC and OSBM were correct in determining that the implementation of the proposed amendments would not result in any additional costs *as compared to the existing requirements*.

74. Moreover, even while recommending objection to the proposed rule amendments, Mr. Duke acknowledged in his May opinion, “[t]his opinion is also not alleging that the fiscal note prepared by the Environmental Management Commission is erroneous, because it is not for the Rules Review Commission to “check the math” of the fiscal note.” *See* Exhibit 4 p 1.

75. Even assuming the RRC has the authority to “look behind” or “check the math” of an approved fiscal note, there was no basis for the RRC to find that the fiscal note’s analysis was erroneous or prepared in bad faith, even if it disagreed with its conclusions. *See* N.C. Gen. Stat. § 150B-21.4(c) (“An erroneous fiscal note prepared in good faith does not affect the validity of a rule.”) Such action was not permitted by the APA.

76. The EMC’s fiscal note, including its analysis and conclusions, was reviewed and approved by OSBM in accordance with N.C. Gen. Stat. §§ 150B-21.4(a), (b), (b1), and (b2) . OSBM undertook its review using the applicable statutory requirements and the criteria outlined

in Chapter 10 of the State Budget Manual. Conversely, the RRC relied on vague and contradictory reasons in objecting to the EMC's fiscal note.

77. The RRC's own counsel acknowledged that the EMC's fiscal note was not erroneous.

78. In erroneously rejecting the EMC's use of existing regulatory requirements as an appropriate baseline for assessing the impact of proposed rules, the RRC created significant uncertainty as to an agency's responsibility in assessing a proposed rule's impact and as to the criteria used by the RRC to determine whether an agency has correctly identified the appropriate baseline.

79. The EMC is entitled to a declaratory judgment that the RRC erred in determining that the EMC had failed to comply with the APA by relying on existing requirements as the baseline to assess the impacts of the proposed rule amendments in preparing its fiscal note.

PRAYER FOR RELIEF

WHEREFORE the EMC requests that this Court:

80. Issue a declaratory judgment as requested in the First Claim for Relief that the RRC exceeded its authority in rejecting the EMC's proposed rule amendments related to 1,4-dioxane, including 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, .0218;

81. Issue a declaratory judgment as requested in the First and Second Claims for Relief that the RRC erred in rejecting the EMC's proposed rule amendments related to 1,4-dioxane criterion, including 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, .0218, as the EMC has complied with all requirements of the APA required for RRC approval to add the criterion to the existing rules; and

82. Issue an order remanding the EMC's proposed rule amendments to the RRC for RRC's approval consistent with Article 2A of North Carolina General Statute, Chapter 150B; and

83. Award such relief as the Court deems just and proper.

Respectfully submitted this 7th day of March, 2023.

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