

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 28505-910

ROY A. COOPER, III, in his official
capacity as GOVERNOR OF THE
STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY K.
MOORE, in his official capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; THE STATE OF
NORTH CAROLINA; NORTH
CAROLINA ENVIRONMENTAL
MANAGEMENT COMMISSION; and
JOHN (JD) SOLOMON, in his official
capacity as CHAIR of the North
Carolina Environmental Management
Commission; CHRISTOPHER M.
DUGGAN, in his official capacity as
VICE-CHAIR of the North Carolina
Environmental Management
Commission; and YVONNE C. BAILEY,
TIMOTHY M. BAUMGARTNER,
CHARLES S. CARTER, MARION
DEERHAKE, MICHAEL S. ELLISON,
STEVEN P. KEEN, H. KIM LYERLY,
JACQUELINE M. GIBSON, JOSEPH
REARDON, ROBIN SMITH, KEVIN L.
TWEEDY, ELIZABETH J. WEESE, and
BILL YARBOROUGH, in their official
capacities as COMMISSIONERS of the
North Carolina Environmental
Management Commission.

Defendants.

SUPPLEMENTAL COMPLAINT

Plaintiff Governor Roy Cooper, pursuant to North Carolina Rule of Civil Procedure Rules 15(d), 19 and/or 20, seeking (a) a declaratory judgment under N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, and (b) a permanent injunction under North Carolina Rule of Civil Procedure 65, hereby alleges and says:

185. Governor Cooper re-alleges and incorporates by reference all allegations of his initial Complaint as if fully set forth herein.

SUPPLEMENTAL PARTIES AND JURISDICTION

186. Defendant North Carolina Environmental Management Commission (“EMC”) is an executive commission within the Department of Environmental Quality with “the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State.” N.C. Gen. Stat. § 143B-282.

187. Defendant John (JD) Solomon is the Chair of the EMC and a resident of Johnston County. Defendant Moore, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Solomon to the EMC for a term expiring on June 30, 2027. Session Law 2023-113, § 2.22. Defendant Solomon is sued in his official capacity.

188. Defendant Christopher M. Duggan is the Vice-Chair of the EMC and a resident of Union County. Defendant Moore, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Duggan to the

EMC for a term expiring on June 30, 2025. Session Law 2021-131, § 2.23. Defendant Duggan is sued in his official capacity.

189. Defendant Steven P. Keen is a Commissioner of the EMC and a resident of Wayne County. Defendant Moore, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Keen to the EMC for a term expiring on June 30, 2025. Session Law 2021-131, § 2.23. Defendant Keen is sued in his official capacity.

190. Defendant Charles S. Carter is a Commissioner of the EMC and a resident of Wake County. Defendant Berger, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Carter to the EMC for a term expiring on June 30, 2025. Session Law 2021-131, § 1.34.(b). Defendant Carter is sued in his official capacity.

191. Defendant Timothy M. Baumgartner is a Commissioner of the EMC and a resident of Johnston County. Defendant Berger, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Baumgartner to the EMC for a term expiring on June 30, 2027. Session Law 2023-113, § 1.49. Defendant Baumgartner is sued in his official capacity.

192. Defendant Michael S. Ellison is a Commissioner of the EMC and a resident of Johnston County. Defendant Berger, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant

Ellison to the EMC for a term expiring on June 30, 2027. Session Law 2023-113, § 1.49. Defendant Ellison is sued in his official capacity.

193. Defendant Joseph Reardon is a Commissioner of the EMC and a resident of North Carolina. On October 26, 2023, Commissioner of Agriculture Steve Troxler, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Reardon to the EMC for a term expiring on October 25, 2027. Commissioner Troxler's appointment of Defendant Reardon was made under authority purportedly granted in Senate Bill 512. Defendant Reardon is sued in his official capacity.

194. Defendant Bill Yarborough is a Commissioner of the EMC and a resident of North Carolina. On October 26, 2023, Commissioner of Agriculture Steve Troxler, exercising his personal and individual discretion and without consulting the Governor, appointed Defendant Yarborough to the EMC for a term expiring on October 25, 2027. Commissioner Troxler's appointment of Defendant Yarborough was made under authority purportedly granted in Senate Bill 512. Defendant Yarborough is sued in his official capacity.

195. Defendant Robin Smith is a Commissioner of the EMC and a resident of North Carolina. Defendant Smith was appointed to the EMC by the Governor for a term expiring June 30, 2025. Defendant Smith is sued in her official capacity.

196. Defendant Yvonne C. Bailey is a Commissioner of the EMC and a resident of New Hanover County. Defendant Bailey was appointed to the EMC by the

Governor for a term expiring June 30, 2027. Defendant Bailey is sued in her official capacity.

197. Defendant Marion Deerhake is a Commissioner of the EMC and a resident of Wake County. Defendant Deerhake was appointed to the EMC by the Governor for a term expiring June 30, 2025. Defendant Deerhake is sued in her official capacity.

198. Defendant H. Kim Lyerly is a Commissioner of the EMC and a resident of Durham County. Defendant Lyerly was appointed to the EMC by the Governor for a term expiring June 30, 2025. Defendant Lyerly is sued in his official capacity.

199. Defendant Jacqueline MacDonald Gibson is a Commissioner of the EMC and a resident of North Carolina. Defendant Gibson was appointed to the EMC by the Governor for a term expiring June 30, 2025. Defendant Gibson is sued in her official capacity.

200. Defendant Kevin L. Tweedy is a Commissioner of the EMC and a resident of Durham County. Defendant Tweedy was appointed to the EMC by the Governor for a term expiring June 30, 2027. Defendant Tweedy is sued in his official capacity.

201. Defendant Elizabeth J. Weese is a Commissioner of the EMC and a resident of North Carolina. Defendant Weese was appointed to the EMC by the

Governor for a term expiring June 30, 2025. Defendant Weese is sued in her official capacity.

202. The Commissioner Defendants are only named in this Supplemental Complaint with respect to Count 8.

203. This Court has jurisdiction over the parties and subject matter of this lawsuit, and venue is proper.

SUPPLEMENTAL FACTS

H. As applied, Senate Bill 512 has interfered with the Governor's ability to ensure faithful execution of the State's environmental laws by the EMC.

1. Prior to enactment of Senate Bill 512, the Governor had sufficient control over a majority of the EMC and could ensure that the laws were faithfully executed in connection with the environmental matters over which the EMC has jurisdiction.

204. The North Carolina Supreme Court has made clear separation of powers requires that the Governor retain sufficient control of executive boards and commissions to ensure faithful execution of the law:

When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. *When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area.* The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.

McCrorry v. Berger, 368 N.C. 633, 647 (2016) (emphasis added).

205. Building on *McCrorry*, the Supreme Court further explained:

[W]e have no doubt that the relevant constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well.

Cooper v. Berger (“*Cooper I*”), 370 N.C. 392, 414–15 (2018) (emphasis added).

206. Prior to enactment of Part II of Senate Bill 512, Section 143B-283(a1) gave the Governor the right to appoint nine of the fifteen members of the EMC. The remaining six members were appointed by the General Assembly (three at the recommendation of the Speaker of the House of Representatives and three at the recommendation of the President Pro Tempore of the Senate).

207. Immediately prior to passage of Senate Bill 512, the Gubernatorial Commissioners to the EMC included Defendants Bailey, Deerhake, Lyerly, Gibson, Smith, Tweedy, and Weese. At that time, there were two other Gubernatorial Commissioners who also served on the EMC:

- a. Donna Davis was appointed to the EMC by the Governor for a term expiring June 30, 2027.
- b. Pat Harris was appointed to the EMC by the Governor for a term expiring June 30, 2027.

208. Immediately prior to passage of Senate Bill 512, the legislature's appointees to the EMC included Defendants Solomon, Duggan, Baumgartner, Carter, Ellison, and Keen (the "Legislative Commissioners").

209. By appointing Donna Davis, Pat Harris, and Defendants Bailey, Deerhake, Lyerly, Gibson, Smith, Tweedy, and Weese (the "Gubernatorial Commissioners"), the Governor maintained sufficient control over the EMC to carry out his constitutional obligation to ensure faithful execution of the laws over which the EMC has jurisdiction.

210. Immediately prior to passage of Senate Bill 512, Defendant Smith served as Chair of the EMC.

2. Consistent with the Governor's views and policies, the EMC acted to prevent carcinogenic substances from being dumped in North Carolina's drinking water.

211. 1,4-dioxane is a contaminant of emerging concern in North Carolina. It 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 currently considered a likely carcinogen by the United States Environmental Protection Agency.

212. Over the past decade, discharges of this carcinogenic chemical into the State's drinking water have become a problem. Elevated levels of 1,4-dioxane have previously been identified downstream of the Greensboro, Reidsville, and Asheboro wastewater treatment plants, and the State's Division of Water Resources has worked in collaboration with those facilities to reduce the discharge.

213. In March 2022, the EMC approved proposed amendments to its rules to include numeric standards for the discharge of 1,4-dioxane into surface waters based on existing in-stream target values: ISA NCAC 02B .0208, .0212, .0214, .0215, .0216, and .0218 (“Proposed 1,4-Dioxane Amendments”).

214. The Proposed 1,4-Dioxane Amendments were supported by a fiscal note (the “Fiscal Note”) prepared by the EMC and reviewed and certified by the Office of State Budget and Management (“OSBM”).

215. On May 19, 2022, the North Carolina Rules Review Commission (“RRC”) met and voted to object to the Proposed 1,4-Dioxane Amendments, on the grounds that the Fiscal Note did not comply with the APA. The RRC’s objection blocked the Proposed 1,4-Dioxane Amendments from going into effect. The RRC consists of 10 members appointed by the General Assembly.

216. 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 APA.

217. The EMC responded to the RRC’s objection on August 12, 2022, and was rebuffed again by the RRC at its August 18, 2022 meeting. The RRC’s decision to block the Proposed 1,4-Dioxane Amendments stymied the EMC’s ability to make rules.

218. On September 8, 2022, the EMC voted 9-4 in favor of authorizing its counsel to seek the return of the Proposed 1,4-Dioxane Amendments, and to undertake all actions necessary to pursue judicial review of the RRC’s objections to

those rules. Of the nine votes in favor of acting, a decisive number of the Gubernatorial Commissioners voted consistently with the Governor's views and priorities regarding implementation of the Proposed 1,4-Dioxane Amendments. All four votes against authorizing litigation were by Legislative Commissioners.

219. On March 7, 2023, pursuant to such authorization, the EMC filed a complaint against the RRC (the "EMC I Complaint"). A true and correct copy of the EMC I Complaint is attached hereto as **Exhibit A**.

220. On March 20, 2023, the EMC voluntarily dismissed the EMC I Complaint without prejudice.

221. On November 9, 2023, the EMC reasserted its claims against the RRC by filing a new lawsuit (the "EMC II Complaint"). Like the EMC I Complaint, the EMC II Complaint was verified by Defendant Smith, then the Chair of the EMC. A true and correct copy of the EMC II Complaint is attached hereto as **Exhibit B**.

3. The General Assembly, enlisting the Commissioner of Agriculture, seizes control of the EMC.

222. Under North Carolina law, the Commissioner of Agriculture is an officer with no duties except those prescribed by the law. N.C. Const. Art. III, § 7(1), (2). Because the Commissioner of Agriculture's powers exclusively are determined by statutes enacted by the General Assembly, the General Assembly has the ability to vest or remove powers from the Commissioner of Agriculture, including appointment powers. Thus, the Commissioner of Agriculture's exercise of appointment powers is subject to legislative control.

223. On October 10, 2023, Senate Bill 512 became law, allocating two new appointees to the EMC to Commissioner Troxler.

224. The General Assembly allocated appointees to Commissioner Troxler because he would appoint commissioners to the EMC who collectively share the same views and priorities as the Legislative Commissioners.

225. On October 26, 2023, Commissioner Troxler appointed Defendants Reardon and Yarborough (the “Agriculture Commissioners”) to the EMC under authority purportedly granted in Senate Bill 512.

226. That same day, pursuant to Section 6.1.(a)(1) of Session Law 2023-139, which was enacted the same day as Senate Bill 512, Donna Davis and Pat Harris, were removed from their seats on the EMC.

227. As a result of Senate Bill 512, seven current members of the EMC are Gubernatorial Commissioners. The remaining eight current members of the EMC are the Legislative Commissioners and Agriculture Commissioners, all of whom are directly or indirectly controlled by the General Assembly.

228. A chart identifying the 15 commissioners of the EMC as of November 2023 is attached hereto as **Exhibit C**.

229. The reallocation of two appointees on the EMC from the Governor to the Commissioner of Agriculture has prevented the Governor from carrying out his constitutional obligation to ensure faithful execution of the laws or impermissibly interfered with the Governor’s ability to do so.

230. On November 10, 2023, the EMC held a meeting of the full commission. Section 6.1.(a)(2) of Session Law 2023-139 required the EMC to hold an election for Chair following Commissioner Troxler's appointments.

231. Under the EMC's bylaws, the Chair of the EMC serves as the head of the commission and has the power to call special meetings, schedule work sessions, alter the order of business at meetings of the commission, appoint committees of the commission, designate chairs for those committees, appoint members to committees, and appoint hearing officers for comment on regulations or any public hearing conducted by the Commission. A true and correct copy of the EMC's bylaws are attached hereto as **Exhibit D**.

232. Much of the EMC's work is done via the Air Quality, Water Quality, Water Allocation and Groundwater & Waste Management committees. The members and chairs of each committee are named by the Chair of the EMC.

233. At its November 10, 2023 meeting, the EMC considered two nominees for Chair: Defendant Smith (a gubernatorial appointee to the commission and the then-current chair) and Defendant Solomon (a legislative appointee to the commission and a former chair).

234. The EMC first considered the nomination of Defendant Smith. Defendant Smith received seven votes from Defendants Bailey, Deerhake, Lyerly, Gibson, Smith, Tweedy, and Weese, all of whom are gubernatorial nominees to the EMC and represent the Governor's views and policies.

235. The EMC next considered the nomination of Defendant Solomon. Defendant Solomon received eight votes from Defendants Carter, Duggan, Keen, Baumgartner, Ellison, Solomon, Reardon, and Yarborough.

236. But for Senate Bill 512's reallocation of two appointees from the Governor to the Commissioner of Agriculture, Defendant Solomon would not have been elected Chair of the EMC.

237. Defendant Solomon does not share the Governor's policy views and priorities with respect to how the EMC should execute the laws that are within the jurisdiction of the EMC. For example, Defendant Solomon personally disagrees with the Governor's policy views and priorities reflected in the Proposed 1,4-Dioxane Amendments and the related EMC II Complaint.

238. Defendant Solomon's election as Chair has therefore interfered with the Governor's ability to ensure that the State's environmental laws are faithfully executed.

4. The Legislative Commissioners and the Agriculture Commissioners collectively prevent the Governor from ensuring faithful execution of the laws by attempting to dismiss the EMC II Complaint.

239. After his election as Chair, Defendant Solomon scheduled a "Discussion of EMC vs. RRC (23CV032096-910) – 1,4 Dioxane Rulemaking" at the January 11, 2024 meeting of the EMC.

240. At the January 11, 2024 meeting, the EMC considered whether to voluntarily dismiss the EMC II Complaint. Defendants Carter, Duggan, Keen, Baumgartner, Ellison, Solomon, Reardon, and Yarborough voted in favor of

dismissing the EMC II Complaint. Defendants Bailey, Deerhake, Lyerly, Gibson, Smith, Tweedy, and Weese voted against dismissing the EMC Complaint. As a result, the EMC voted 8-7 to voluntarily dismiss its own claims against the RRC.

241. But for Senate Bill 512's reallocation of two appointees from the Governor to the Commissioner of Agriculture, the EMC would not have voted to voluntarily dismiss the EMC II Complaint.

242. Under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, voluntary dismissal of the EMC II Complaint at the behest of Defendants Carter, Duggan, Keen, Baumgartner, Ellison, Solomon, Reardon, and Yarborough will operate as an adjudication on the merits. Thus, the appointees of the legislature and the Commissioner of Agriculture have prejudiced the ability of the Governor (through his appointees) to ensure the laws are faithfully executed with respect to the Proposed 1,4-Dioxane Amendments and the related EMC II Complaint against the RRC.

COUNT 8: DECLARATORY JUDGMENT (AS-APPLIED CHALLENGE)
As Applied, Part II of Senate Bill 512 (Environmental Management Commission) Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution

243. Governor Cooper re-alleges and incorporates by reference all allegations of his initial Complaint and this Supplemental Complaint as if fully set forth herein.

244. A present and real controversy exists between the parties as to the constitutionality of Part II of Senate Bill 512.

245. Individually, and as a whole, the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 unconstitutionally allow the General

Assembly, directly and indirectly through politically aligned officers whose duties it prescribes, to exercise executive power vested in the Governor.

246. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 unconstitutionally interfere with the Governor performing his core executive function of ensuring that the laws are faithfully executed.

247. Accordingly, as applied, Part II of Senate Bill 512 violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

248. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that, as applied to the Governor, the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows, in addition to his prayer for judgment in the initial Complaint:

1. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional as applied to Plaintiff Governor Cooper and are therefore void and of no effect;

2. That the Court enter an order, pursuant to North Carolina Rule of Civil Procedure 65, enjoining the EMC's January 11, 2024 decision to dismiss the EMC II Complaint in order to protect the parties' interests during the pendency of the litigation;

3. That the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 16th day of January, 2024.

/s/ Amanda S. Hawkins

Jim W. Phillips, Jr.

N.C. State Bar No. 12516

jphillips@brookspierce.com

Eric M. David

N.C. State Bar No. 38118

edavid@brookspierce.com

Daniel F. E. Smith

N.C. State Bar No. 41601

dsmith@brookspierce.com

Amanda S. Hawkins

N.C. State Bar No. 50763

ahawkins@brookspierce.com

*Attorneys for Plaintiff Roy Cooper,
Governor of the State of North Carolina*

OF COUNSEL:

**BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.**

Suite 2000 Renaissance Plaza

230 North Elm Street

Greensboro, NC 27401

(336) 373-8850

(336) 378-1001 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via email as follows:

WOMBLE BOND DICKINSON (US) LLP
Matthew F. Tilley
matthew.tilley@wbd-us.com
Russ Ferguson
russ.ferguson@wbd-us.com
Sean E. Andrussier
sean.andrussier@wbd-us.com
Michael A. Ingersoll
mike.ingersoll@wbd-us.com
Peyton M. Poston
peyton.poston@wbd-us.com
Attorneys for Legislative Defendants

NC DEPARTMENT OF JUSTICE
Stephanie Brennan
Sbrennan@ncdoj.gov
Amar Majmundar
Amajmundar@ncdoj.gov
Attorneys for The State of North Carolina

NORTH CAROLINA ENVIRONMENTAL
MANAGEMENT COMMISSION
Bill Lane, General Counsel
bill.lane@ncdenr.gov
Philip Reynolds
PReynolds@ncdoj.gov

This the 16th day of January, 2024.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.

By: /s/ Amanda S. Hawkins
Amanda S. Hawkins

STATE OF NORTH CAROLINA

VERIFICATION

COUNTY OF WAKE

Kristi Jones, being first duly sworn, deposes and says:

I am the Chief of Staff to Governor Roy A. Cooper, III, the Plaintiff in this action. I have read the foregoing Supplemental Complaint and know the contents thereof. The allegations therein are true of my own knowledge, except as to those things therein stated upon information and belief. As to those things stated upon information and belief, I believe those things to be true.

This the 11 day of January, 2024.

Kristi Jones

Kristi Jones

STATE OF NORTH CAROLINA

WAKE COUNTY

Signed and sworn to before me this day by Kristi Jones.

Witness my hand and official stamp or seal, this 11th day of January, 2024.

Scarlett Hargis

Notary Public *Scarlett Hargis*
Dec. 21, 2028

My commission expires:



EXHIBIT A

**EMC v. RRC I Complaint,
23CV005003-910 (Without
Exhibits)**

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

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.

JOSHUA H. STEIN
Attorney General

By: /s/ Christine M. Ryan
Christine M. Ryan
Assistant Attorney General
N.C. State Bar No. 24497
cryan@ncdoj.gov
Phillip T. Reynolds
Special Deputy Attorney General
N.C. State Bar No. 34174
preynolds@ncdoj.gov

N.C. Department of Justice
Environmental Section
P.O. Box 629
Raleigh, NC 27602
(919) 716-6000
(919) 716-6767 Fax

Attorneys for Plaintiff EMC

EXHIBIT B

**EMC v. RRC II Complaint,
23CV032096-910 (Without
Exhibits)**

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV032096-910

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 EMC’s proposed rule amendments codifying its pre-existing narrative standards for the carcinogenic toxin 1,4-Dioxane. 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, RRC lacks both the statutory authority and economic expertise to substantively review an approved fiscal note. The law is clear that, as relevant here, RRC can only reject a rule on the basis of the fiscal note if the agency, when required, fails to prepare a fiscal note or if OSBM does not approve the agency’s fiscal note. This rejection of the proposed rule amendments by RRC has caused uncertainty among regulated entities and threatens to impede EMC’s efforts to protect the public from toxic chemicals like 1,4-Dioxane. EMC brings this action to return EMC’s proposed rule amendments to RRC for approval, to return 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 Part 3 of the Executive Organization Act of 1973, found in Article 1 of Chapter 143B of the North Carolina General Statutes. 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, Counsel, NC Rules Review Commission, 1711 New Hope Church Road, Raleigh, NC 27609.

3.

JURISDICTION

4. When 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).

5.

VENUE

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

7.

LEGAL FRAMEWORK

8. 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.

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

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

11. 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).

12. Criteria can be either 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).

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

14. 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).

15. As part of the 1989 triennial review, in response to certain 1987 amendments to the Clean Water Act, 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 narrative standard with regard to carcinogenic and noncarcinogenic compounds.

16. 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.

17. To calculate the concentration required to achieve that level of protection, the regulation directs that the agency 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.

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

19. 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).

20. 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

21. The compound 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 currently considered a likely carcinogen by the EPA.¹

22. In 2010, the EPA completed a carcinogenicity risk assessment for 1,4-Dioxane.

23. This risk assessment contained toxicity values which were then 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.

24. 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.

25. 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 of 1,4-Dioxane were discharges from wastewater treatment facilities.

The Rulemaking Process

26. As part of the 2020 – 2022 Triennial Review, EMC proposed to codify existing in-stream target values for 1,4-Dioxane from narrative standards to numeric standards to provide for

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

greater transparency and certainty for the regulated community and the public. 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 (“Proposed 1,4-Dioxane Amendments”).

27. 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 included in the Hearing Officer’s Report (“HOR”) with the Proposed 1,4-Dioxane Amendments at pages 91-166, attached hereto and incorporated herein as **Exhibit 1**.

28. 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).

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

30. For each of the amendments being considered, 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) (emphasis added).

31. With respect to the Proposed 1,4-Dioxane Amendments, EMC relied on existing in-stream target values calculated based on the existing requirements contained in the narrative standard from 15A NCAC 02B .0208, which resulted in the very same values proposed for codification as a numeric standard. See **Exhibit 1**, p 100.

32. EMC then went on to analyze whether the codification of existing in-stream target

² A Regulatory Impact Analysis is also referred to as a fiscal note. See Office of State Budget and Management Budget Manual § 10.

values would result in additional costs or benefits as compared to the baseline. A portion of 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

33. Because the in-stream target values are already being used by DEQ to set regulatory limits on discharges based on the narrative 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 would not be attributable to the proposed rule amendments.

34. Therefore, EMC concluded that the amendments for 1,4 Dioxane merely codify existing in-stream target values and would not have any additional economic impacts.

35. Pursuant to the APA, the Office of State Budget and Management (“OSBM”) is tasked with reviewing and approving an agency’s fiscal note for a permanent rule, when such is required by N.C. Gen. Stat. § 150B-21.4.

36. OSBM reviewed EMC’s fiscal note under the standards specified in N.C. Gen. Stat. §§ 150B-21.4(a), (b) and (b1) and Chapter 10 of the State Budget Manual. OSBM agreed with EMC’s fiscal analysis for 1,4-dioxane and other compounds included in the note, and OSBM approved EMC’s fiscal note on February 11, 2021.

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

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

39. 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 comment was considered and responses were provided in the HOR. *See Exhibit 1* pp 13-54.

40. The proposed rule amendments, as well as the fiscal note and HOR, were considered by 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.

41. 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, 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

42. Following completion of its rulemaking process, EMC submitted to 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 numeric standards for 1,4-Dioxane.

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

44. In advance of that meeting, RRC Counsel Lawrence Duke prepared a staff opinion,

attached hereto as **Exhibit 2**, recommending that RRC object to the amendments related to the Proposed 1,4-Dioxane Amendments. The sole basis for the recommended objection was Mr. Duke's assertion that 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.

45. Despite 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 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.

46. At its April 2022 meeting, RRC deadlocked 4-4 on whether to approve the Subchapter 2B rule changes related to the Proposed 1,4-Dioxane Amendments and the rules were carried over to the RRC's May meeting.

47. On May 12, 2022, OSBM sent a letter to RRC responding to the assertions in the RRC staff opinion and offering to discuss it further with RRC. This letter and its related emails are attached hereto as **Exhibit 3**. OSBM's letter expressly reaffirmed their conclusion that the fiscal note prepared by 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 RRC – with the authority to determine whether a fiscal note was properly prepared in compliance with the Administrative Procedure Act.

48. In advance of the May Meeting, RRC Counsel Mr. Duke prepared an updated staff opinion. Again, Mr. Duke recommended that RRC object to the Proposed 1,4-Dioxane

Amendments solely on the same basis related to the baseline used in the fiscal note. See attached **Exhibit 4**.

49. On May 19, 2022, RRC met again. Notwithstanding OSBM's letter and the arguments of EMC counsel, among others, RRC voted to object to the Subchapter 2B Proposed 1,4-Dioxane Amendments based on staff's recommendation and notified EMC of its decision by letter, attached hereto as **Exhibit 5**.

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

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

52. In so doing, 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 to the rule under G.S. 150B-21.9(a)(4)." N.C. Gen. Stat. § 150B-21.4(b1) (emphasis added).

53. 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).

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

of EMC's letter is attached hereto as **Exhibit 6**.

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

56. In its August 12, 2022 letter, EMC explained that the codification of the in-stream target values as numeric standards did not change the regulatory requirements imposed by the already existing narrative criterion of Rule 02B .0208. As the letter explained "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.

57. EMC further pointed out that the Staff Recommendations prepared by Mr. Duke used selective and incomplete quotes from the fiscal note to suggest that EMC was aware of anticipated costs and simply chose to disregard them. The full text of the fiscal note explains that 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.

58. EMC's August 12, 2022 letter also sought to clarify that it is the role of OSBM, not 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.

59. At its August 18, 2022 meeting, RRC specifically refused to entertain or consider EMC's response to the objection. RRC asserted that it was without authority to consider EMC's response because EMC had not proposed changing the *language* of the rule. RRC took this position despite the fact that RRC had neither objected to the language of the proposed rule amendments nor requested any changes to the proposed language before it. The contradictory position taken by

RRC left EMC without any recourse to challenge the RRC's refusal to approve the Proposed 1,4-Dioxane Amendments. A copy of the minutes of the August meeting are attached hereto as **Exhibit 8**.

60. Upon information and belief, RRC has previously declined to object to proposed rules based on alleged deficiencies in a fiscal note, citing a lack of authority to do so.

61. Upon information and belief, 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.

62. Pursuant to N.C. Gen. Stat. § 150B-21.12(d), EMC submitted a written request to 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 EMC's request to return the Proposed 1,4-Dioxane Amendments is attached hereto as **Exhibit 9** and is incorporated herein by reference.

63. RRC returned the Proposed 1,4-Dioxane Amendments to EMC 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

64. The allegations contained in Paragraphs 1 through 60 are incorporated into this claim for relief as if fully set forth herein.

65. EMC seeks a declaratory judgment from this Court that RRC acted outside its statutory authority in objecting to EMC's proposed amendment to 15A NCAC 2B .0208 and the other Proposed 1,4-Dioxane Amendments, codifying the numeric standard for 1,4-dioxane.

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

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

68. RRC's objection is based on its independent assertion 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.*

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

70. 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)").

71. RRC lacked statutory authority to object to the Proposed 1,4-Dioxane Amendments based on its disagreement with EMC's identified baseline to assess the impacts of the proposed rule amendments.

72. In objecting to EMC's Proposed 1,4-Dioxane Amendments as described in this Complaint, 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 under which circumstances RRC can object to a proposed rule based on the requirements of N.C. Gen. Stat. § 150B-21.4.

73. EMC is entitled to a declaratory judgment that RRC lacked statutory authority to object to the Proposed 1,4-Dioxane Amendments based on its disagreement with EMC's analysis in the approved fiscal note.

SECOND CLAIM FOR RELIEF

74. The allegations contained in Paragraphs 1 through 70 are incorporated into this claim for relief as if fully set forth herein.

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

76. 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.

77. 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 EMC for codification are identical to existing in-stream target values derived from the requirements contained in 15A NCAC 02B .0208.

78. 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 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*.

79. Moreover, even while recommending objection to the proposed rule amendments, RRC Counsel 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*.

80. Even assuming RRC has the authority to “look behind” or “check the math” of an approved fiscal note (which EMC expressly denies), there was no basis for 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.”) RRC’s action is not supported by the APA.

81. 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 approved fiscal note.

82. RRC’s own counsel acknowledged that EMC’s fiscal note was not erroneous.

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

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

PRAYER FOR RELIEF

WHEREFORE, EMC requests that this Court:

85. Issue a declaratory judgment as requested in the First Claim for Relief that RRC exceeded its authority in rejecting EMC's Proposed 1,4-Dioxane Amendments, including 15A NCAC 02B .0208, .0212, .0214, .0215, .0216, .0218;

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

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

88. Tax the costs of this action, including reasonable attorney's fees, to Plaintiff as allowed by law; and

89. Award such equitable and legal relief as the Court deems just and proper.

Respectfully submitted this 9th day of November, 2023.

JOSHUA H. STEIN
Attorney General

By: /s/ Christine M. Ryan
Christine M. Ryan
Assistant Attorney General
N.C. State Bar No. 24497
cryan@ncdoj.gov

Phillip T. Reynolds
Special Deputy Attorney General
N.C. State Bar No. 34174
preynolds@ncdoj.gov

N.C. Department of Justice
Environmental Section
P.O. Box 629
Raleigh, NC 27602
(919) 716-6000
(919) 716-6767 Fax

Attorneys for Plaintiff EMC

STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

VERIFICATION

I, Robin Smith, in my official capacity as Chair of the North Carolina Environmental Management Commission, being duly sworn, deposes and says that I have read the foregoing COMPLAINT, I am acquainted with the facts of this matter, and the information contained therein is true to my knowledge except as to any matters stated on information and belief and as to those matters I believe them to be true.



Robin Smith
Chair, NC Environmental Management Commission

Subscribed and sworn to before me
This, the 9th day of November, 2023.

Paula Chappell

Notary Public

My Commission Expires: 10/30/2024

(SEAL)

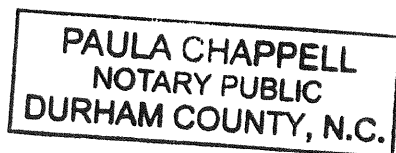


EXHIBIT C

North Carolina Environmental Management Commissioner List

**North Carolina Environmental Management Commission
Department of Environmental Quality**

Name	Address	Telephone	Qualifications	Term
1) John (JD) Solomon, EMC Chair pamlicojd@gmail.com	216 Stonebrook Drive Clayton, NC 27520	919-760-1774 (W)	House/13	6-30-2027
2) Christopher Duggan, EMC Vice-Chair cduggan@dugganlegal.com	P. O. Box 481 Monroe, NC 28111	704-776-9610 (W)	House/12	6-30-2025
4) Yvonne C. Bailey baileyemc@gmail.com	1216 Pinfish Lane Carolina Beach, NC 28428	919-264-3050 (C)	Governor/7	6-30-2027
5) Timothy Baumgartner tbaumemc@gmail.com	(Intentionally left blank)	919-631-0009 (C)	Senate/13	6-30-2027
6) Charles (Charlie) Carter carterdenr@gmail.com	Earth & Water Law 1455 Pennsylvania Ave., NW, Suite 400 Washington, DC 20004	202-280-6362 (W)	Senate/15	6-30-2025
7) Marion Deerhake m.e.deerhake@gmail.com	1409 Canfield Court Raleigh, NC 27608	919-302-3065 (W)	Governor/4	6-30-2025
8) Michael S. Ellison mellisonEMC@gmail.com	126 Streamview Drive Cary, NC 27519	919-357-8672 (W)	Senate/14	6-30-2027
9) Steve P. Keen stevepkeenemc@gmail.com	412 Hwy 581 South Goldsboro, NC 27530	919-920-7023 (W)	House/11	6-30-2025
10) Dr. H. Kim Lyerly HERBERT.LYERLY.NCEMC@GMAIL.COM	203 Research Drive, Suite 433 Durham, NC 27710	919-681-7970 (W)	Governor/1	6-30-2025
11) Jacqueline MacDonald Gibson jmacdon@ncsu.edu	North Carolina State University Dept. of Civil, Construction & Environmental Engineering 915 Partners Way Raleigh, NC 27695-7908	919-515-2266 (W)	Governor/3	6-30-2027
12) Joe Reardon josephreardonemc@gmail.com	(Intentionally left blank)	919-291—8425 (C)	NCDA&CS/9	10-25-2027
12. Robin Smith robinsmithemc@gmail.com	Robin Smith Law Office PLLC P.O. Box 2343 Chapel Hill, N.C. 27515	919-370-6631 (C)	Governor/2	6-30-2025
13) Kevin L. Tweedy ktweedemc@gmail.com	1150 SE Maynard Drive, Suite 140 Cary, NC 27511	919-388-0787 (W)	Governor/8	6-30-2027
14) Elizabeth Jill Weese jweeseemc@gmail.com	(Intentionally left blank)	919-828-2940 (W)	Governor/6	6-30-2025
15) Bill Yarborough BillyarboroughEMC@gmail.com	(Intentionally left blank)	919-515-2266 (W)	NCDA&CS/9	10-25-2027

EXHIBIT D

North Carolina Environmental Management Commission Bylaws

**INTERNAL OPERATING PROCEDURES
OF THE ENVIRONMENTAL MANAGEMENT COMMISSION
OF NORTH CAROLINA**

ARTICLE I

Authority

These procedures are adopted pursuant to the authority contained in North Carolina General Statutes §143B-18 and §143B-282, et seq.

ARTICLE II

Purpose

The purpose of the Environmental Management Commission (Commission) shall be to fulfill the duties prescribed for it in the General Statutes of North Carolina, particularly those provided at N.C.G.S. §87-83, et seq., §143-211, et seq. (including Articles 21, 21A, and 21B), and §143B-282, et seq.

ARTICLE III

Membership

The membership of this Commission shall be as set forth in North Carolina General Statute §143B-283.

ARTICLE IV

Officers

Statutory officers of this Commission are the Chairman appointed by the Governor, and the Vice-Chairman, to be elected by and from the members of the Commission for a term of two years or until his or her regular term expires, whichever comes first.

ARTICLE V

Meetings

Section 1. The Commission shall meet at such times and places as may become necessary to discharge its statutory duties as set forth in the General Statutes. N.C.G.S. §143B-285 requires a regular meeting at least once in each quarter, and allows special meetings at the call of the Chairman or upon the written request of at least five members. Regular meetings shall generally convene on the second Thursday of January, March, May, July, September, and November in the Ground Floor Hearing Room, Archdale Building, Raleigh, North Carolina. In addition, work sessions may be scheduled by the Commission Chairman as needed.

Section 2. The Commission Chairman may call such special meetings as he or she deems necessary; provided, timely notice in advance of all special meetings must be given to each and every member of the Commission; further provided, said notice requirement shall be adequately discharged by letter or comparable electronic means to the members of the Commission at their last known address.

Section 3. A majority of duly appointed members of the Commission shall constitute a quorum.

Section 4. Meetings of the Commission shall be open to the public; provided, the Commission

may hold an executive session where allowed by N.C.G.S. §143-318.11.

ARTICLE VI

Records

Section 1. Minutes and other records of all Commission meetings shall be kept under the direction of the Director of the Division of Water Resources, said record to be supplemented, where possible, by electronic recording. Minutes shall be maintained according to the retention schedule approved by the Division of Archives and History.

Section 2. The Secretary of the Department of Environmental Quality (DEQ), or his designee, shall be responsible for filing all rules (as defined in N.C.G.S. §150B-2) of the Commission in proper form as required by Chapter 150B, Articles 2 and 5, of the North Carolina General Statutes.

ARTICLE VII

Standard Order of Business

Section 1. The Commission adopts the following as its Standard Order of Business, provided that the order of business may be altered by the Chairman in his discretion, or at the request of the Steering Committee, in order to more efficiently carry out the Commission's business or for the convenience of the public:

1. Preliminary Matters
 - a. Call to Order
 - b. Approval of minutes of previous meeting
 - c. Summary of approval documents
 - d. Revisions or additions to the agenda
2. Action Items
3. Status Reports
4. Informational Items
5. Concluding Remarks
 - a. By Commission members
 - b. By Chairman
6. Adjournment

Section 2. The Commission may take action on a rulemaking matter that has a State or federal deadline occurring before the next regularly scheduled Commission meeting at any time after action on the rulemaking by the appropriate committee. Except as otherwise provided, the Commission shall take no actions on rulemaking issues that have not been acted on by the appropriate committee at least thirty days prior to the Commission meeting at which the rulemaking matter is presented to the Commission for further action without the affirmative vote of at least a two-thirds majority of those present and voting to allow consideration of the matter.

ARTICLE VIII

Notice Requirements

Section 1. In accordance with General Statutes, Chapters 87, 143, 143B and 150B, the Secretary of the Department of Environmental Quality, or an appropriate designee shall be responsible for the timely issuance of any applicable notices to those parties upon whom the right of legal notice of Commission hearings, meetings, decisions, and official actions is conferred.

Section 2. The Commission may adopt special notice procedures as it deems necessary, subject to the requirements of the General Statutes.

ARTICLE IX

Committees

Section 1. The Chairman of the Commission shall appoint such committees, standing or special, as the Chairman or Commission shall from time to time deem necessary. The Chairman shall designate the chairman of each committee from among its members and shall be an ex officio member of all committees. A majority of duly appointed members of committees shall constitute a quorum.

Section 2. Duly appointed committees may adopt at their discretion any internal procedures necessary to the discharge of their business; provided, no procedures adopted by any committee shall be inconsistent with these procedures or any other rules adopted by the Commission, or with any statutes applicable to the Commission. The chairman of the committee shall report the committee's recommendation.

Section 3. A Steering Committee composed of the Commission Chairman, the Commission Vice-Chairman and the Chairman of the each of the Commission's standing committees shall be appointed by the Commission Chairman. The Chairman of the Commission shall be Chairman of the Steering Committee and the Vice-Chairman of the Commission shall be Vice-Chairman of the Steering Committee. The Steering Committee shall carry out such administrative functions as the Commission Chairman may direct and may make recommendations to the full Commission on any matters it deems relevant to the Commission's work.

Section 4. The following committees are established as standing committees of the Commission:

- NPDES Committee
- Air Quality Committee
- Groundwater Quality and Waste Management Committee
- Water Quality Committee
- Water Allocation Committee
- Civil Penalty Remissions Committee

The Chairman of the Commission shall appoint all members of each such committee and designate the Chairman of each committee. Additional one-issue special committees may be appointed by the Chairman of the Commission as needed. In addition, committees may establish sub-committees as needed.

ARTICLE X

Parliamentary Authority

Section 1. The rules contained in the current edition of Robert's Rules of Order shall govern the Commission in all meetings, where applicable and not inconsistent with these procedures and any special rules of order the Commission may adopt, or with any statutes applicable to the Commission.

Section 2. The Chairman of the Commission and the chairman of any committee may or may not vote on any issue before the body over which that person is presiding. If a tie occurs, the motion fails.

ARTICLE XI

Hearings

Section 1. The Chairman shall appoint any Commission member or members, or appropriate qualified employee or employees of the Department of Environmental Quality, as hearing officer for any required public hearing to receive comments on regulations or to preside over any public hearing conducted under any statutes applicable to the Commission.

Section 2. In making hearing officer appointments, the Chairman shall consider the geographic location of the hearing, the technical complexity of the matter being considered, the public interest in the matter, and the necessity of having an impartial hearing officer without personal bias.

Section 3. All hearing officers appointed pursuant to this Article shall report their recommendations, along with the record of the hearing, to the full Commission for decision or action, and may recommend adoption thereof.

Section 4. The Commission at its regularly scheduled meetings will frequently hear reports and recommendations for the adoption of rules which have been subjected to public notice, comment period and hearing. The Commission will refrain from allowing additional public comment at the meeting, since the matter is not then in public hearing; but the Commission may allow limited public discussion if the circumstances warrant and all positions appear to be adequately represented by those present.

Section 5. With respect to any quasi-judicial matter pending before the Commission, including requests for declaratory rulings, special orders on consent, remissions, interbasin transfer certificates, and variance petitions, all members of the Commission and hearing officers shall refrain from directly or indirectly communicating outside of the formal hearing proceedings with any person, party or their representative regarding issues of fact or law pertaining to the pending matter unless all parties are provided notice of the communication and given an opportunity to participate therein. This section shall not be deemed to limit discussion with State employees whose function is to assist the Commission in fulfilling its duties, and who are not directly involved in investigating or prosecuting the pending matter or with other Commission members, provided that no factual information not part of the record is transmitted, and such communication does not abrogate each member's responsibility to personally decide the matter.

Section 6. It is each member's responsibility to review and become familiar with the facts and written submissions of the parties prior to the meeting at which a quasi-judicial decision is to be made. Parties to the proceeding, but not the general public, will be given the opportunity to address the Commission or the standing committee making the final decision, after the recommendation of the staff hearing officer or panel is received. Oral presentations are limited to issues of record, and will not exceed 15 minutes unless the Chairman or the chairman of the

standing committee rules otherwise. After all presentations, discussion and voting shall proceed. A decision shall be made based upon the record as a whole or such portion as may be cited by any party to the proceeding. No Commission member shall investigate the facts independently, but in making his decision shall consider only the evidence presented in the record. Pursuant to N.C.G.S. §143-318.11, executive sessions may be called for discussions of legal questions.

Section 7. Motions filed with the Commission by persons seeking leave to file amicus curiae briefs in pending quasi-judicial matters shall state the nature of the applicant's interest, the reasons why the brief is desirable, the questions of law to be addressed in the brief and the applicant's position on those questions. The proposed brief may be conditionally filed with the motion for leave. The motion shall be referred to the Chairman who shall rule on the motion. The Chairman's ruling shall be served upon the applicant, the Department, and parties of record.

Section 8. Motions filed with the Commission by persons seeking leave to intervene in pending proceedings for declaratory rulings, variances or interpretive statements shall be referred, with any response timely filed by the Department or parties, to the Chairman who shall rule on the motion. The Chairman's ruling shall be served upon the applicant, the Department and parties of record.

Section 9. Any written argument, memorandum, or brief submitted to the Commission or any of its Committees pursuant to any section of Article XI, shall be limited to thirty-five pages if the font used is a non-proportional type and to 8,750 words if proportional type is used.

ARTICLE XII

Remission Requests

Section 1. The Committee on Civil Penalty Remissions will meet as necessary to consider requests for remission and make the final decisions. When the Chairman of the Commission has allowed a violator's request for oral argument, the Committee will hear oral presentations by the violator and the staff of the Department of Environmental Quality. The violator will be notified of the date, time and location of the meeting when his oral argument on the remission request will be heard and the matter decided.

Section 2. By submitting a request for remission of a civil penalty assessed by the Department under N.C.G.S. §143-215.6A (f), the Committee recognizes that the violator has agreed that an evidentiary hearing is unnecessary, that all facts alleged in the assessment by the Department are stipulated, and that the only issue for resolution is the reasonableness of the penalty imposed. The amount of the penalty will be determined by the Committee in accordance with N.C.G.S. §143B-282.1 and the Internal Operating Procedures of the Environmental Management Commission. The Secretary's recommendation on the remission request shall be the final agency decision unless it is modified by the Committee through a motion and vote of a majority of the Committee members in attendance. The Committee may order the full penalty be paid, accept the recommendation of the Director or reduce the penalty in accordance with N.C.G.S. §143B-282.1. When a request to make an oral presentation is allowed, parties to the proceeding, but not the general public, will be given the opportunity to address the Committee, after the recommendation of the staff is received. Oral presentations are limited to issues of record, and should not exceed 5 minutes per side unless the Committee chairman rules otherwise. Pursuant to N.C.G.S. §143-318.11, executive sessions may be called for discussion of legal questions.

ARTICLE XIII

Attendance

Regular attendance at Commission meetings is a duty of each member. Commission members recognize that, pursuant to N.C.G.S. §143B-13(b)(iv), their membership becomes vacant by their ceasing to discharge the duties of their office over a period of three consecutive meetings except when prevented by sickness.

ARTICLE XIV

Conflict of Interest

Section 1. The members of the Commission are covered persons for the purposes of Subchapter II of Chapter 163A, the Elections and Ethics Enforcement Act (N.C.G.S. § 163A-1, et seq.), establishing the ethical standards for covered persons. The members of the Commission, regardless of appointing authority, are bound by the standards enunciated in the Elections and Ethics Enforcement Act and the interpretations of the standards as developed through promulgations and advisory opinions of the Bipartisan State Board of Elections and Ethics Enforcement.

Section 2. Members of the Commission must police themselves against actual and potential conflicts in the discharge of their statutory duties. In circumstances involving actual conflict of interest, the member must publicly announce their conflict and immediately discontinue any involvement in the matter including discussions of it with other members of the Commission or staff to the Commission. Members who disqualify themselves for actual conflict of interest must also file a written statement with the Chairman of the Commission. Members of the Commission may appear to defend themselves if regulatory actions are initiated against them by the State Ethics Commission.

Section 3. Unless a member of the Commission with a potential conflict of interest places it in the public record, the member must withdraw from participation in the matter. When a member publicly withdraws from a matter due to a potential conflict of interest, no further explanation is required. Should the potential conflict of interest be disclosed in a written document, it must be read into the minutes of the Commission before deliberation or discussion of the matter begins. A member with a potential conflict of interest who decides to participate in the pending matter must disclose, in the Commission meeting when the matter is called as an agenda item, the nature of the potential conflict of interest and the reason it does not cause them to withdraw from further participation in the matter.

Section 4. The members of the NPDES Committee shall be selected from those nine members, and any others, meeting the conflict of interest requirements of N.C.G.S. §143B-283(c); i.e., they shall be persons who do not derive any significant portion of their income from persons subject to permits or enforcement orders under Chapter 143 of the General Statutes. The NPDES Committee will act on all matters involving the issuance of NPDES permits.

ARTICLE XVI

Amendments

These procedures may be amended at any regular or special meeting of the Commission by a

three-fourths vote of the members present; provided that a copy of the amendment must be sent by first-class mail or electronically mailed to each Commission member seven days prior to the adoption of the amendment or otherwise be made available to each commission member five days prior to the adoption of the amendment.

Effective: January 11, 2018

J.D. Solomon, Chairman
Environmental Management Commission