STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	FILE NO. 20 CVS 09542

FILED
2022 AUG 15
WAKE CO., C.S.C.
BY

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 TEMORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* CAPE FEAR RIVER WATCH, CAROLINA WETLANDS ASSOCIATION, CLEANAIRE NC, DEMOCRACY GREEN, HAW RIVER ASSEMBLY, MOUNTAINTRUE, NORTH CAROLINA BLACK ALLIANCE, NORTH CAROLINA COASTAL FEDERATION, SOUND RIVERS, AND WEST END REVITALIZATION ASSOCIATION IN SUPPORT OF PLAINTIFF GOVERNOR ROY A. COOPER

Cape Fear River Watch, Carolina Wetlands Association, CleanAIRE NC, Democracy Green, Haw River Assembly, MountainTrue, North Carolina Black Alliance, North Carolina Coastal Federation, Sound Rivers, and West End Revitalization Association, as *amici curiae*, respectfully request leave to file the accompanying brief attached hereto as Attachment A in support of Plaintiff Roy A. Cooper, III, the Governor of the State of North Carolina.

AMICI CURIAE'S INTEREST IN THIS CASE

Amici are ten nonprofit organizations whose missions center on securing clean air, clean water, thriving ecosystems, and environmental justice for all North Carolinians. *Amici* represent advocacy from the remote wilds of the North Carolina mountains, to the urban cores of our Piedmont cities, to the reaches of our coastal plains. They engage in advocacy before North Carolina's state agencies, including by participating in the rulemaking process to advance policies in line with their interests. *Amici* have advocated or are currently advocating for proposed rules that must be approved by the Rules Review Commission ("RRC") in order to go into effect. These groups have seen their efforts to protect North Carolina's environment thwarted by RRC objections to proposed rules, and by the chilling effect that frequent, unfounded objections have on the rulemaking process.

Haw River Assembly

Haw River Assembly ("HRA") is a nonprofit organization that works to restore and protect the Haw River and Jordan Lake and to build a watershed community that shares that vision. HRA's goals are to speak as a voice for the Haw River and to equip communities to be effective guardians of the River. HRA engages in various forms of advocacy to further these goals, including participating in the rulemaking process before state agencies such as the Environmental Management Commission ("EMC").

HRA has been heavily engaged in advocacy to protect communities in the Haw River watershed from the industrial contaminant 1,4-dioxane, which the

Environmental Protection Agency ("EPA") considers a likely carcinogen. Long-term exposure to 1,4-dioxane may cause damage to vital organs, including the liver and kidneys. Although 1,4-dioxane is currently subject to a narrative water quality standard in North Carolina, which theoretically limits allowable levels of the pollutant in water supply waters, in reality the lack of a numeric standard for 1,4-dioxane makes it difficult for state agencies tasked with protecting the state's water quality to protect the state's rivers from entities discharging 1,4-dioxane into them. *See* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282(a)(2). This shifts the burden of protecting the health of North Carolinians from the state to water treatment facilities and inhibits HRA's efforts to protect the Haw River.

HRA advocated for adoption of a numeric 1,4-dioxane standard for all surface waters in the Department of Environmental Quality's ("DEQ") 2021 Triennial Review process, and the EMC ultimately approved a rule imposing such a numeric standard. The RRC, however, rejected the proposed 1,4-dioxane standard in May 2022, citing concerns with the substance of the fiscal note submitted in connection with the proposed rule. HRA is concerned that the rule will continue to be blocked due to the policy preferences of RRC members.

Carolina Wetlands Association

Carolina Wetlands Association is a nonprofit, nonpartisan, science-based organization dedicated to promoting the understanding, protection, restoration, and enjoyment of the wetlands and associated ecosystems of North and South Carolina. Carolina Wetlands Association furthers its mission by employing a variety of

education and advocacy strategies, including participating in rulemaking pertaining to wetlands.

For over a year, Carolina Wetlands Association has advocated for the EMC to create a permitting regime for wetlands that the state has an obligation to protect, *see* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282(a)(2); N.C. Const. art. XIV, § 5, but that were temporarily not subject to permitting due to changes in federal law. In April 2021, Carolina Wetlands Association, in coalition with other groups, submitted comments to the EMC in support of temporary wetland rules to fill this permitting gap. The EMC and the RRC both approved those temporary rules.

In January, 2022, the EMC adopted permanent wetland rules, which addressed the exact same subject matter as the temporary rules and would have accomplished the same goal of authorizing impacts to wetlands protected under state law that were not subject to regulation under federal law. Carolina Wetlands Association supported these rules as necessary to protect the state's wetlands, *see* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282; N.C. Const. art. XIV, § 5, by imposing conditions on development and preventing illegal wetland destruction. The RRC has subsequently prevented these rules from going into effect. Carolina Wetlands Association is concerned that the rule will continue to be blocked due to the policy preferences of RRC members.

MountainTrue

MountainTrue is a nonprofit organization that exists to support resilient forests, clean waters, and healthy communities in the Southern Blue Ridge.

MountainTrue engages in community planning, policy and project advocacy, on-the-ground projects, and supports the French Broad, Green, Watauga, and Broad Riverkeepers. MountainTrue's policy advocacy involves participation in the rulemaking processes of various state agencies.

In furtherance of its goal to protect water quality in the state, MountainTrue has advocated for the enactment of a statewide *E. coli* water quality standard to reduce the risk to humans posed by bacteria in freshwater bodies used for recreation. Malfunctioning wastewater treatment plants, leaking septic systems, and runoff from animal agriculture operations can all introduce illness-causing bacteria into North Carolina's waterways. MountainTrue has advocated for use of an *E. coli* standard to assess levels of these bacteria—rather than the current fecal coliform standard—because *E. coli* is supported by the latest science and by EPA recommendations as a superior indicator of health risk to recreational users of a waterbody. As part of these advocacy efforts, MountainTrue submitted comments on DEQ's 2021 Triennial Review of North Carolina's water quality standards to push for a statewide *E. coli* standard.

DEQ is currently in the process of developing a bacteria study and reviewing materials to inform development of a statewide *E. coli* water quality standard. Pursuant to its obligation to promulgate rules protecting the state's water quality, *see* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282(a)(2), the EMC will then engage in rulemaking to develop the *E. coli* standard, which will require RRC approval to go into effect.

Due to the problems with the current rulemaking process in the state and based on previous RRC action, MountainTrue is concerned that the RRC will not approve the *E. coli* standard due to the policy preferences of RRC members, blocking the EMC's efforts to protect North Carolinians from bacteria pollution in recreational waterbodies consistent with the agency's statutory obligations. MountainTrue has also engaged in advocacy in support of the adoption of a numeric 1,4-dioxane water quality standard, discussed above.

West End Revitalization Association

West End Revitalization Association ("WERA") is a community-based nonprofit organization with a mission to improve quality of life for low-income communities and communities of color that have been denied access to basic amenities and infrastructure. WERA originated in the West End community of Mebane, North Carolina, spurred into action by the proposed siting of a highway bypass through two historic African American and indigenous communities. WERA successfully advocated for the relocation of the bypass, saving homes, churches, and cemeteries in the historic communities from destruction. Still, the bypass was ultimately constructed, increasing the burdens of pollution on these same communities.

Today, Mebane and the surrounding area hosts multiple major industrial and distribution facilities; these facilities increase the burdens of air pollution in nearby communities, including through the numerous freight trucks moving supplies and goods to and from the facilities. Recognizing the harms such pollution can have on

surrounding communities, WERA advocates for policies that would reduce pollution from the transportation sector. For instance, in 2018, WERA provided a declaration in support of litigation that successfully defeated an EPA policy encouraging the production and sale of super-polluting "glider" freight trucks, describing the ways in which communities of color—like those in Mebane—face disproportionate burdens from polluting vehicles.

Continuing this line of advocacy to minimize pollution from truck traffic, WERA supports the adoption in North Carolina of the Advanced Clean Trucks ("ACT") Rule. The ACT Rule is a set of standards that was recently adopted by the state of California pursuant to the Clean Air Act and that clean air advocates are pursuing for adoption in North Carolina. The Rule would require manufacturers of medium- and heavy-duty vehicles in the state to ensure that zero-emission vehicles—rather than heavily polluting diesel trucks—make up an increasing percentage of sales of these vehicles by 2035. The Rule will benefit North Carolinians, particularly in communities already burdened by high levels of pollution, by decreasing air pollution that causes health problems and emissions of climate change-inducing greenhouse gases.

Although the ACT Rule has not yet reached the rulemaking stage in North Carolina, many different groups—spanning environmental, health, and business

interests—have advocated for the EMC to adopt it.[1] The Rule falls within the EMC's authority and mandate to adopt rules for air quality and emission control standards. *See* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). To go into effect, the Rule would have to be approved by the RRC. WERA is concerned that the current rulemaking process in North Carolina will hamper the EMC's ability to enact the ACT Rule, interfering with WERA's efforts to advance environmental justice in the state.

CleanAIRE NC

CleanAIRE NC is a nonprofit organization that works to promote the health of all North Carolinians by pursuing equitable and collaborative strategies to address air pollution and fight climate change. CleanAIRE NC educates the public, collaborates with policymakers, and engages in advocacy to reduce air pollution in the state. The organization's advocacy includes participating in state agencies' rulemaking process.

In January 2021, CleanAIRE NC collaborated with the North Carolina Coastal Federation to petition DEQ's Division of Air Quality to adopt rules limiting carbon dioxide pollution from the electric power sector. Specifically, they proposed rules to establish the necessary framework for North Carolina to join the Regional Greenhouse Gas Initiative—a cooperative effort among eastern states to cap and

[1] *See* Letter from Nineteen Groups to Governor Roy Cooper Supporting ACT Rule (Attachment B); Letter from Thirty Businesses and Business Groups to Governor Roy Cooper Supporting ACT and HDO Rules (Attachment C).

reduce carbon dioxide emissions from the electric power sector. Promulgating such rules is within the EMC's authority and duty to control air pollution, *see* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). The EMC granted CleanAIRE NC's petition in July 2021 and is in the process of conducting the necessary analyses to support a proposed rule. The EMC expects to adopt the rule in May 2023 and present it to the RRC for final approval in June 2023. CleanAIRE NC is concerned that the RRC will block both this rule and the ACT Rule from going into effect due to the policy preferences of the RRC members, preventing the EMC from protecting the air that North Carolinians breathe.

North Carolina Coastal Federation

North Carolina Coastal Federation is a nonprofit organization dedicated to protecting and restoring the water quality and habitats of the North Carolina coast. The Federation pursues policies including responsible coastal management practices, thriving oyster and other marine life populations, increased use of nature-based stormwater management practices, and increased use of living shorelines.

The Federation, along with CleanAIRE NC, successfully petitioned DEQ's Division of Air Quality to enact rules to enter the state into the Regional Greenhouse Gas Initiative. The Federation believes that the proposed rules would help combat the effects of climate change on the state's coast, including increased storms, flooding, and rising temperatures. As outlined above, the rulemaking is currently in progress, and the Federation is concerned that the RRC will hamper

efforts to enact these rules due to the policy preferences of RRC members. The Federation is also concerned about the permanent wetland rules discussed above.

Sound Rivers

Sound Rivers is a nonprofit organization dedicated to protecting the Neuse and Tar-Pamlico River basins. The organization works to advance the health and beauty of these rivers and their watersheds by engaging in education, monitoring the health of the rivers, investigating sources of pollution, cleaning up the rivers, and advocating for polices that protect the watersheds. Sound Rivers works before state agencies to advocate for policies that protect the Neuse and Tar-Pamlico basins.

Sound Rivers views adoption of both the 1,4-dioxane numeric water quality standard and the statewide *E. coli* water quality standard as important steps in protecting residents who rely on the Neuse, Tar, and Pamlico Rivers from exposure to contaminants and disease-causing bacteria. For the reasons stated above, Sound Rivers is concerned the RRC will prevent these rules from going into effect due to the policy preferences of RRC members.

Cape Fear River Watch

Cape Fear River Watch is a nonprofit organization dedicated to protecting and improving the water quality of the Cape Fear River Basin. To pursue this goal, Cape Fear River Watch advocates before state agencies in support of policies that protect and enhance water quality. Cape Fear River Watch supports adoption of both the 1,4-dioxane numeric water quality standard and the statewide *E. coli*

water quality standard. Cape Fear River Watch has also advocated for the passage of the proposed permanent wetland rules. For the reasons stated above, Cape Fear is concerned the RRC will prevent these rules from going into effect due to the policy preferences of RRC members.

North Carolina Black Alliance

North Carolina Black Alliance is a nonprofit organization that works at the state level to strengthen the network of elected officials representing communities of color and to collaborate with grassroots organizations to advance progress on a range of issues, including environmental justice. The Alliance works to ensure clean water and air in Black communities, eliminate inequality in the siting of hazardous waste facilities, aid Black communities in preparing for and addressing the burdens of climate change, further energy justice, and advocate for equitable access to energy-efficient housing, transportation, and clean energy infrastructure. To further these aims, the Alliance engages in advocacy before North Carolina's state agencies to advance policies that promote environmental justice. The NC Black Alliance is broadly concerned about air quality, water quality and climate change. The Alliance is concerned that the RRC will prevent State agencies from taking action on these issues in a meaningful timeframe due to the policy preferences of RRC members.

Democracy Green

Democracy Green is a grassroots nonprofit organization that works at the intersection of democracy and environmental justice to address systemic impacts

burdening the most climate-impacted and disenfranchised communities. Democracy Green prioritizes supporting frontline communities, connecting them with immediate aid when it's most needed and building their long-term political power. The organization engages in advocacy related to air pollution, water pollution, and any other environmental factors that affect human health. To this end, Democracy Green supports the adoption of rules that will protect communities from the risks posed by naturally occurring and manmade contaminants.

In particular, Democracy Green supports rules such as the 1,4-dioxane water quality standard and statewide *E. coli* water quality standard that would protect North Carolinians from acute and long-term health risks from the state's waterways. Democracy Green is concerned that the RRC's objection to the 1,4-dioxane standard and anticipated interference with the passage of an *E. coli* standard inhibit state agencies' efforts to protect communities from environmental harm consistent with their statutory mandates.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

In this case, the Governor has filed facial challenge to the constitutionality of the RRC. An *Amicus* Brief is desirable because each of the *amici* have direct experience with the harm caused by the RRC on a day-to-day basis. *Amici* have seen their efforts to protect North Carolina's environment thwarted by RRC objections to proposed rules, and by the chilling effect that frequent, unfounded objections have on the rulemaking process, and can demonstrate for the Court the real-world repercussions of rules delayed and denied at the hands of the RRC.

ISSUES OF LAW TO BE ADDRESSED

Amici support the issuance of a declaratory judgment that the current composition of the RRC is unconstitutional. In their proposed brief, the *amici* argue that the structure of the RRC violates the separation of powers principle in our state Constitution by preventing the Governor from fulfilling his constitutional duty to faithfully execute the law, N.C. Const. art III, § 5(4). and is an illegal impediment to orderly rulemaking in North Carolina. Specifically, North Carolina's executive-branch agencies are charged with implementing the laws of the state by adopting detailed regulations. N.C. Const. art III, § 11. The agencies are guided by their own expertise, and they act within the bounds of their authority imposed by the duly elected legislature. When the RRC, a body composed entirely of legislative appointees, acts to review and block those carefully crafted regulations, it exercises legislative power to infringe the authority of the executive branch, but without the bicamerialism of action by both houses of the full General Assembly and without presentment to the Governor, as required by the North Carolina Constitution. N.C. Const. art II, § 22. In so doing, the RRC violates the separation of powers mandated by the North Carolina Constitution.

CONSULTATION WITH COUNSEL

Counsel for *amici curiae* has consulted with counsel for all other parties regarding their position on whether this motion should be granted. Counsel for plaintiff Roy Cooper, for the legislator defendants, Philip Berger and Timothy Moore, and for the defendant State of North Carolina all consent to the motion.

For these reasons, a*mici curiae* respectfully request that the Court allow this motion and accept for filing the conditionally filed *amicus* brief attached as Attachment A.

Respectfully submitted the12th day of August, 2022.

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I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Motion for Leave to File Brief of *Amici Curiae* Cape Fear River Watch, Carolina Wetlands Association, CleanAIRE NC, Democracy Green, Haw River Assembly, MountainTrue, North Carolina Black Alliance, North Carolina Coastal Federation, Sound Rivers, and West End Revitalization was served upon all counsel indicated below via e-mail addressed to the following:

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This the 12th day of August, 2022.

/s/ Kimberley Hunter
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ATTACHMENT A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

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State ex rel. Stephan v. Kan. House of Reps.,
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Thomas v. N.C. Dep't of Hum. Res.,
478 S.E.2d 816 (N.C. Ct. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997) 15

State ex rel. Utils. Comm'n v. N.C. Sustainable Energy Ass'n,
803 S.E.2d 430 (N.C. Ct. App. 2017).. 15

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N.C. Sess. L. 2017-10 14

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THE COUNCIL OF STATE GOV'TS, 53 THE BOOK OF THE STATES 99-102 tbl. 3.26 (2021), https://issuu.com/csg.publications/stacks/46495f12f95847e6935d331969ed650a. 17

DIV. OF PUB. HEALTH, N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA CLIMATE AND HEALTH PROFILE 9 (2015), http://epi.publichealth.nc.gov/oee/climate/ClimateAndHealthProfile.pdf 7

E. coli (Escherichia coli): Symptoms, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2021), https://www.cdc.gov/ecoli/ecoli-symptoms.html. 6

Health Effects of Ozone Pollution, U.S. EPA (June 14, 2022), https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution. 7

Laura Leslie, *New Rules Review Commissioners Test the Waters*, WRAL: N.C. CAPITOL (Aug. 18, 2011), https://www.wral.com/news/state/nccapitol/blogpost/10017455/........ 19

Letter from Anca Grozav, Assistant State Budget Officer, Off. of State Budget & Mgmt., to Jeanette Doran, Chair, Rules Rev. Comm'n (May 12, 2022), https://www.oah.nc.gov/media/13224/open........ 10

Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (Apr. 7, 2020)........ 7

N.C. Rules Rev. Comm'n, List of Approved Temporary Rules (May 20, 2021), https://www.oah.nc.gov/media/12949/open........ 10, 11

NORTH CAROLINA CLIMATE RISK ASSESSMENT AND RESILIENCE PLAN 4-4 (June 2020), https://files.nc.gov/ncdeq/climate-change/resilience-plan/2020-Climate-Risk-Assessment-and-Resilience-Plan.pdf........ 7

Sen. Berger Press Shop, *Sen. Hise Responds to Latest Cooper Lawsuit to Consolidate Power*, MEDIUM (Aug. 28, 2020), https://bergerpress.medium.com/sen-hise-responds-to-latest-cooper-lawsuit-to-consolidate-power-2d4e60fc921........ 19

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INTRODUCTION AND STATEMENT OF INTEREST

North Carolina's administrative agencies provide an important mechanism for the Governor to faithfully execute the duly promulgated laws of our state by adopting detailed regulations. They do so by engaging in complex rulemaking processes that include conducting thorough studies and incorporating input from the public, and a range of specialists including the regulated community.

Amici are ten nonprofit organizations whose missions center on securing clean air, clean water, thriving ecosystems, and environmental justice for all North Carolinians. *Amici* represent advocacy from the remote wilds of the North Carolina mountains, to the urban cores of our Piedmont cities, to the reaches of our coastal plains. They engage in advocacy before North Carolina's state agencies, including by participating in the rulemaking process to advance policies in line with their interests. *Amici* have advocated or are currently advocating for proposed rules that must be approved by the Rules Review Commission ("RRC") in order to go into effect. Specifically, a*mici* have advocated for passage of a numeric 1,4-dioxane standard for surface waters, a permitting regime for wetlands that the state has an obligation to protect, a statewide E. coli water quality standard, the adoption of rules to enter the state into the Regional Greenhouse Gas Initiative, and the adoption of the Advanced Clean Trucks Rule to reduce polluting emissions into the State's air.

These groups have seen their efforts to protect North Carolina's environment thwarted by RRC objections to proposed rules, and by the chilling effect that

frequent, unfounded objections have on the rulemaking process. Full details of *Amici's* concerns about individual rules are further detailed in their motion to file an amicus brief.

Amici are concerned that an RRC comprised solely of legislative appointees puts an unconstitutional barrier in place that prevents the Governor from fulfilling his or her duty to faithfully execute laws and protect the people of North Carolina through the expertise of his or her administrative agencies. *Amici* support Governor Cooper's request to this Court for a declaratory judgment declaring the current composition of the RRC unconstitutional.

ISSUE PRESENTED

Does an RRC that is composed of members exclusively appointed by the legislature, and that has power to prevent executive rules from being adopted and implemented, prevent the Governor from fulfilling his or her constitutional duty to faithfully execute the laws and thus violate the separation of powers clause in the North Carolina Constitution?

ARGUMENT

I. Rulemaking is essential to the people of North Carolina

The Governor of North Carolina has a constitutional obligation to ensure the laws are faithfully executed. N.C. Const. art. III, § 5. There is nothing more fundamental to that duty than rulemaking. Without careful rulemaking, laws cannot be executed.

"Since the beginning of the Republic," agencies have made rules. *City of Arlington v. F.C.C.*, 569 U.S. 290, 305 n.4 (2013). Such administrative rules may sometimes "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of —the 'executive Power.'" *Id.*; N.C. Const. art. III, § 11.

Executive rulemaking is essential because it allows an expert body—an administrative agency with expert staff—to implement the will of constituents as represented through their elected legislators. 2 Am. Jur. 2d *Administrative Law* § 127. Since legislatures cannot realistically foresee every potential circumstance affected by sweeping laws, administrative rulemaking offers a practical mechanism for agencies to fill in the gaps consistent with the statutory scheme. *Id.* Rulemaking generally allows the legislature to "engage the expertise and assistance of administrative agencies to effectuate the beneficial purpose of legislation." 73 C.J.S. Public Administrative Law and Procedure § 97 (2022). Moreover, rulemaking plays an information-serving role in allowing members of the regulated community to efficiently comply with the law and avoid adverse enforcement actions.

Courts have consistently confirmed the importance of rulemaking as a means of implementing laws. For example, in *Mistretta v. United States*, the U.S. Supreme Court upheld a federal constitutional challenge to the U.S. Sentencing Commission, explaining that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. 361, 372 (1989); *accord*

Bd. of Trustees of Jud. Form Ret. Sys. v. Att'y Gen., 132 S.W.3d 770, 781 (Ky. 2003) ("given the realities of modern rule-making, Congress has neither the time nor the expertise to do it all; it must have help.") (citing *Mistretta*, 488 U.S. at 372).

The North Carolina Supreme Court has explained that "the problems which a modern legislature must confront are of such complexity" that agencies must be allowed rulemaking authority. *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978). *See also Hope—A Women's Cancer Ctr., P.A. v. State*, 693 S.E.2d 673, 677 (N.C. Ct. App. 2010) (citing *Adams* extensively in finding a statute's general policy goals to offer sufficient guidance for administrative agency rulemaking).

Administrative rules are consistently used to execute laws pertaining to deeply important issues such as establishing specific standards for safety, public health, and sustainable use of resources. Such rules seek to effectuate laws enacted by the General Assembly in the most effective way possible, balancing complex scientific issues, real world substantive and procedural challenges, resource constraints, and government efficiencies.

The Governor relies on the subject matter expertise of executive-branch agencies and departments to faithfully execute state policy related to the environment. For example, the Environmental Management Commission ("EMC") is charged with executing the state's obligations under federal and state environmental protection laws; the members of the EMC are selected based on their expertise in relevant areas, and they are aided in that work by the scientific experts

at the Department of Environmental Quality ("DEQ"). In a recent exercise of that authority, the EMC completed thorough scientific studies and community engagement on water quality standards to set limits for the contaminant and likely lethal carcinogen 1,4-dioxane. As part of that work, it accepted extensive comments from both entities who would be regulated by the rule as well as advocacy groups such as the Haw River Assembly, Sound Rivers, and MountainTrue before adopting a numeric water quality standard for the contaminant.

Likewise, the executive branch has expertise, in the EMC and DEQ, to study issues like *E. coli*-contaminated human and animal fecal wastewater in our rivers and lakes, which cause severe gastrointestinal issues when ingested[1] and present a particular danger to children attempting to enjoy our state's tainted waterways. The EMC is in the process of developing proposed *E. coli* standards to protect human health, as required by statute, and those standards will undergo public review to become final proposed rules. N.C. Gen. Stat. §§ 143-211(c).

Similarly, North Carolina administrative agencies are required to develop rules that address harmful air pollutants that affect human health and exacerbate climate change. N.C. Sess. L. 2021-165; N.C. Gen. Stat. § 62-110.9. Air quality and respiratory diseases scored the highest on the N.C. Department of Health and Human Services Climate-Health Scorecard, noting North Carolina's childhood

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[1] *E. coli (Escherichia coli): Symptoms*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2021), https://www.cdc.gov/ecoli/ecoli-symptoms.html.

asthma rates are already higher than the national averages.[2] Near-surface ozone pollutants[3] trigger a variety of respiratory diseases including asthma, bronchitis, emphysema, and lung infections that, while dangerous on their own, also put people at risk for secondary complications from other diseases like COVID-19.[4] Air quality is strongly tied to social determinants of health, causing marginalized racial and economic groups to experience the health impacts of extreme heat, drought, allergens, and energy burden more severely and at higher rates.[5] Rules to curb air pollution are essential to addressing critical health impacts like childhood asthma and other respiratory illnesses, often disproportionately felt by predominantly low-income communities and communities of color.

In theory and practice, rules and the agencies that create them exist to serve the fundamental purposes of effective government. The executive branch must do the highly technical and time-intensive work of setting forth specific regulations to implement legislation that the legislative branch simply cannot do in the legislation itself.

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[2] DIV. OF PUB. HEALTH, N.C. DEP'T OF HEALTH & HUM. SERVS., NORTH CAROLINA CLIMATE AND HEALTH PROFILE 9 (2015), http://epi.publichealth.nc.gov/oee/climate/ClimateAndHealthProfile.pdf.

[3] *Health Effects of Ozone Pollution*, U.S. EPA (June 14, 2022), https://www.epa.gov/ground-level-ozone-pollution/health-effects-ozone-pollution.

[4] Lisa Friedman, *New Research Links Air Pollution to Higher Coronavirus Death Rates*, N.Y. TIMES (Apr. 7, 2020), https://nyti.ms/2UROU3Y.

[5] NORTH CAROLINA CLIMATE RISK ASSESSMENT AND RESILIENCE PLAN 4-4 (June 2020), https://files.nc.gov/ncdeq/climate-change/resilience-plan/2020-Climate-Risk-Assessment-and-Resilience-Plan.pdf.

II. The RRC is an illegal block to Rulemaking in North Carolina

The N.C. Supreme Court has cautioned that "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *McCrory v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016) (discussing N.C. Const. art. I, § 6, and citing *Hart v. State*, 774 S.E.2d 281, 285 (N.C. 2015)). The North Carolina General Assembly, however, does just that through the RRC.

The legislature appoints every single commissioner of the RRC, and the Governor has extremely circumscribed powers to remove or supervise members. *See* N.C. Gen. Stat. §§ 143B-13(d), 30.1, 120-121. No rule, except emergency rules, can become final before being approved by the RRC. N.C. Gen. Stat. §§ 150B-21.8, 150B-21.12. The RRC thus acts as a legislative gatekeeper to the Governor's faithful execution of the laws.

In exercising this gatekeeping role, the RRC is authorized to decide "whether a rule meets all of the following criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
> (2) It is clear and unambiguous.
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
> (4) It was adopted in accordance with Part 2 of this Article."

N.C. Gen. Stat. § 150B-21.9(a).

The RRC is required to "restrict its review to determination of the standards set forth in this subsection" and must not "consider questions relating to the quality or efficacy of the rule," *id.* The RRC, however, often exceeds its purview by purporting to exercise the limited discretion that exists within these four criteria, when in reality it is basing its decisions on factors outside of those criteria, and because there is no immediate check on the RRC's judgment, the RRC uses this tactic to delay, and even block, any rules it chooses to.

For example, the RRC is currently blocking passage of a new water quality standard for 1,4 dioxane from going into effect, threatening the health and welfare of North Carolinians. On April 21, 2022, the RRC failed to approve the proposed 1,4-dioxane standard (as part of a proposed modification to rules 15A N.C. Admin. Code 02B.0208, .0212, .0214, .0215, .0216, and .0218 (2022)) due to a tied vote, at which point it moved the item to the May 2022 agenda. RRC staff recommended rejection of the rules on the basis that they were not adopted in accordance with the cost analysis requirements of the Administrative Procedure Act ("APA"). *See* N.C. Gen. Stat. § 150B-21.4. In a written opinion purporting to exercise discretion that it does not have, an RRC Staff Attorney stated (erroneously), that "while RRC generally will not substantively review a fiscal note, it is warranted in this instance." [6] Not only is substantive review of a fiscal note by the RRC not

[6] N.C. Rules Rev. Comm'n, Staff Opinion on Rules 15A N.C. Admin. Code 02B .0208, .0212, .0214, .0215, .0216, and .0218 1 (2022), https://files.nc.gov/ncoah/documents/Rules/RRC/04212022-Environmental-Management-Commission-Staff-Opinion.pdf.

warranted, but it is *not allowed.* As Assistant State Budget Officer Anca Grozav noted in a May 12, 2022, letter to RRC staff, "The APA permits the Rules Review Commission to object to a rule in relation to a fiscal note only in circumstances where an agency fails to prepare or obtain OSBM [Office of State Budget and Management] approval of the fiscal note (§ 150B- 21.4(b1))."[7] In this case, DEQ met that requirement, leaving the RRC no discretion to usurp the statutorily defined role of OSBM to determine whether agencies' fiscal notes satisfy the provisions of the APA. RRC staff doubled down ahead of the May 2022 RRC meeting, again recommending rejection of the 1,4-dioxane rules on the same grounds.[8] The Commission rejected the rule on May 19, 2022. The RRC has thus far prevented the rule from going into effect.

The RRC is also currently blocking passage of permanent rules to provide a standalone permitting mechanism for authorizing impacts to North Carolina wetlands. In May 2022, the RRC rejected permanent rules based, in large part, on the RRC's contention that DEQ does not have the authority to promulgate the rules under the so-called Hardison Amendment, which prohibits agencies from adopting rules for the protection of the environment that are more restrictive than a federal rule pertaining to the same subject matter. N.C. Gen. Stat. § 150B-19.3(a). This contention was entirely arbitrary as the RRC had already concluded in May 2021

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[7] Letter from Anca Grozav, Assistant State Budget Officer, Off. of State Budget & Mgmt., to Jeanette Doran, Chair, Rules Rev. Comm'n (May 12, 2022), https://www.oah.nc.gov/media/13224/open.

[8] N.C. Rules Rev. Comm'n, Staff Opinion on Rules 15A N.C. Admin. Code 02B.0208, .0212, .0214, .0215, .0216, and .0218 1–2 (May 20, 2022), https://www.oah.nc.gov/media/13299/open.

that DEQ has delegated authority to promulgate such rules.[9] The baseless objection has the effect of preventing Governor Cooper from fulfilling his constitutional role to faithfully execute the laws of our state and protect North Carolina's treasured wetlands.

Because of these and other recent actions by the RRC, *amici* are concerned that a number of future rulemakings. Several *amici* are interested in DEQ's current effort to develop a statewide *E. coli* water quality standard pursuant to its obligation to promulgate rules protecting the state's water quality. *See* N.C. Gen. Stat. §§ 143-211 to 143-215.74M, 143B-282(a)(2). This standard would go through EMC rulemaking and will require RRC approval to go into effect. In July 2021, the EMC granted the petition of two *amici* to adopt rules to establish the necessary framework for North Carolina to join the Regional Greenhouse Gas Initiative—a cooperative effort among eastern states to cap and reduce carbon dioxide emissions from the electric power sector. Promulgating such rules is within the EMC's authority and duty to control air pollution. *See* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). This rulemaking would require RRC approval to go into effect. Finally, several *amici* are pressing for the adoption of the Advanced Clean Trucks Rule, a set of standards that would require manufacturers of medium- and heavy-duty vehicles to ensure that zero-emission vehicles—rather than heavily

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[9] *See* N.C. Rules Rev. Comm'n, List of Approved Temporary Rules (May 20, 2021), https://www.oah.nc.gov/media/12949/open (listing Env't Mgmt. Comm'n Rules 15 NCAC 02H .1301, .1401–05 as approved).

polluting diesel trucks—make up an increasing percentage of sales of these vehicles by 2035. The Rule falls within the EMC's authority and mandate to adopt rules for air quality and emission control standards. *See* N.C. Gen. Stat. §§ 143-215.105 to 215.114C, 143B-282(a)(2). This rulemaking would require RRC approval to go into effect. *Amici* are concerned that these efforts will either be slowed down by the RRC or may not move forward at all due to the hurdle to rulemaking caused by the legislatively appointed RRC exceeding its authority and blocking executive action.

III. **The structure of the RRC violates separation of powers principles set out in recent case law**

By actively working to prevent the Governor from faithfully executing the State's laws via administrative rulemaking, the current formation of the RRC—comprised entirely of commissioners selected and appointed by the legislature—violates our Constitution. In *McCrory*, the North Carolina Supreme Court rejected a structure where the legislative branch "exerted too much control over commissions that have final executive authority" and thus "prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed." *McCrory v. Berger*, 781 S.E.2d at 256. The Court made clear the impact that appointment authority has on control of a body, noting that "the degree of control that the Governor has over . . . commissions depends on his ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office." *Id.* And the Court went on to explain:

> 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.

Id.

Here, where the General Assembly appoints every single commissioner, and the Governor has extremely circumscribed powers to remove or supervise members, the problem is exacerbated. The end result is not a collaborative approach between branches to ensure that laws are faithfully executed. Rather, the result is an improper legislative impediment to executive rulemaking, interfering with the Governor's duty to faithfully execute laws the General Assembly has passed.

In *Cooper v. Berger*, the North Carolina Supreme Court made clear that the constitution demands that the Governor need not simply be able to have power to preclude others from "forcing him or her to execute laws in a manner to which he or she objects," but also requires the Governor to "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." 370 N.C. 392, 809 S.E.2d 98 (N.C. 2018). An RRC comprised of legislative appointees with the power to block rules promulgated by such executive branch agencies is a clear affront to this holding.

Once rulemaking authority is delegated to an executive branch agency, the execution of that authority rests solely with the executive branch. *See, e.g., Mo.*

Coal. for Env't v. Joint Comm'n on Admin. Rules, 948 S.W.2d 125, 134 (Mo. 1997); *see also Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (once the legislature "makes its choice in enacting legislation, its participation ends"). If the legislature wants to be more specific about any of the laws it has passed, it must do so via the required constitutional practice of bicameral action and gubernatorial approval. N.C. Const. art II § 22. And indeed, the legislature frequently does so. *See, e.g.,* (N.C. Sess. L. 2013-395 and N.C. Sess. L. 2017-10 directing the EMC to make hyper-specific changes to the Jordan Lake Rules).

Similarly, Section 150B-21.3(b1) of the North Carolina General Statutes specifically contemplates a scheme where the General Assembly can pass a bill to disapprove a rule adopted by an executive branch agency. Under that section, when ten or more persons object to a rule that has wound its way through the rulemaking process, the legislature is notified and can act to repeal the rule through "a bill enacted into law" by both houses of the legislature and presented to the Governor for approval or veto. *Id.*; *e.g.,* N.C. Sess. L. 2021-176 (disapproving 15A N.C. Admin. Code 10B.0201 (2022), previously adopted by the N.C. Wildlife Resources Commission).

What the legislature may not do is make an end-run around the constitutionally prescribed process for changing the law through a separate, unelected body that has no gubernatorial check. When the legislatively appointed RRC blocks a rule, it is effectively–and impermissibly–exercising a legislative power to impede the executive's exercise of its powers, but without the required

bicameralism and presentment that are hallmarks of the legislative process, N.C. Const. art. II, § 22, and thereby violating the separation of powers clause. N.C. Const. art. I, § 6. "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." *McCrory*, 781 S.E.2d at 257 (declaring schemes where the legislature appointed over half the members of bodies with control over executive policies unconstitutional).

Moreover, to the extent there are concerns about the legality of any of the rules that are implemented, our constitutional structure already provides a check for that: the judiciary. Rules promulgated by executive agencies are subject to judicial review. *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Examiners*, 821 S.E.2d 376, 379–80 (N.C. 2018) (reviewing regulation for validity given statute and legislative intent); *see also Thomas v. N.C. Dep't of Hum. Res.*, 478 S.E.2d 816, 822–23 (N.C. Ct. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997) (voiding regulation that conflicted with enabling statute); *State ex rel. Utils. Comm'n v. N.C. Sustainable Energy Ass'n*, 803 S.E.2d 430, 433 (N.C. Ct. App. 2017) (holding that an agency "misread the plain language" of applicable statute and reversing its decision).

There may be wisdom in a body that ensures, in a straightforward, ministerial way, that rules are necessary to implement laws on the books and are clear on their face. But such a responsibility is necessarily executive in nature and cannot be performed by a legislatively controlled body.

Other states make this clear. Where legislatures in other states have attempted schemes to hold veto power over executive rulemaking, those schemes have been held to violate separation of powers. For example, The Supreme Court of New Jersey explained that an exercise of legislative power that "effectively amend[s] or repeal[s] existing laws without the participation by the Governor" "offends the separation of powers … and contravenes the Presentment Clause requirement that changes in legislative policy be effected by a majority vote of both houses of the Legislature and approval by the Governor or, after executive veto, by a two-thirds vote of both houses." *Gen. Assemb. v. Byrne*, 448 A.2d 438, 439 (N.J. 1982).

Likewise, the Missouri Supreme Court held that a subcommittee of legislators could not prevent executive agencies from properly promulgating and enforcing regulations. *Mo. Coal. for Env't v. Joint Comm'n on Admin. Rules*, 948 S.W.2d 125, 129 (Mo. 1997), *as modified on denial of reh'g* (Feb. 25, 1997). The Missouri Supreme Court explained that the statutory scheme which allowed legislators to veto executive rules prevented executive efforts to protect public and environmental health against harmful noise and air pollution. *See id.* at 128.

Likewise, the Supreme Court of Kentucky rejected the authority of the state Legislative Research Commission ("LRC")—an arm of the legislative branch—to prevent administrative regulations from becoming effective. *See Legislative Rsch. Comm'n By & Through Prather v. Brown*, 664 S.W.2d 907, 911 (Ky. 1984). The LRC had effectively granted one of its subcommittees the authority to prevent any

rule from taking effect unless the General Assembly was in session and approved the rule via joint resolution. *Id.* at 918. The Supreme Court of Kentucky stated that the scheme had "the effect of creating a legislative veto of the actions of the executive branch," which violated the separation of powers doctrine. *Id.* at 918, 919.

Other state courts have similarly struck down legislative regulatory review mechanisms on constitutional grounds. *See, e.g., State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 593 (W. Va. 1995) (striking legislature's ability to block rules by neglecting to approve them in rules review subcommittee for "impermissibly encroach[ing]" on executive duties); *State ex rel. Stephan v. Kan. House of Reps.*, 687 P.2d 622, 634, 638 (Kan. 1984) (finding statute authorizing legislature to block rules via joint resolution unconstitutional under separation of powers doctrine and presentment requirements).

By contrast, legal, constitutional structures to streamline rulemaking and ensure it is done well do exist. Several states have bodies that perform this task but do so in a purely advisory way.[10] In some cases, objections to rules are not binding on the agency but simply become part of the administrative record. *See* Fla. Stat. Ann. § 120.545 (2021) (rule withdrawn only if agency fails to respond to committee objection; committee cannot block a rule itself but merely note its objections to the legislature which can then consider passing legislation to address

[10] *See* THE COUNCIL OF STATE GOV'TS, 53 THE BOOK OF THE STATES 99–102 tbl. 3.26 (2021), https://issuu.com/csg.publications/stacks/46495f12f95847e6935d331969ed650a.

the rule); Neb. Rev. Stat. §§ 84-907.10(4), 84-908 (Governor charged with approval of rules; objection by a legislator or legislative committee does not prohibit rule promulgation). And indeed, North Carolina's RRC operated in such a fashion from its inception in 1985 until 1996. N.C. Sess. L. 1985-1028 § 32. (This North Carolina law, which was in place from 1985-1996, provided that rules would become effective even with RRC objection).

IV. The current structure of the RRC is dysfunctional and must change

While the RRC has existed in this same unconstitutional structure for more than twenty-five years,[11] the current situation where our legislature is controlled entirely by one political party, while the Governor is from a different party, combined with the hyper-partisan tensions within state government mean that the unconstitutional structure has become dysfunctional and harmful to North Carolina.

It is a matter of law that when the executive and legislative branches are led by different parties, they are presumed to be at odds. *Cooper v. Berger*, 809 S.E.2d at 112 n.12 (noting that while the court was "unable to conclude with absolute certainty that persons chosen by the chair of the opposing political party will invariably and in all instances act to thwart the Governor's policy preferences at every turn" the court was unwilling to "turn a blind eye to the functions

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[11] SL 1995-507 § 27.8 changed the law to the current situation where only rules approved, and not simply reviewed, by the RRC become effective.

appropriately performed by the leader of an opposition party in our system of government"). As such, it is natural that any body comprised of members appointed solely by the leaders of the majority party in the legislature is likely to be hostile to an executive led by the opposing party.

And indeed, it has become plain to *amici* that the RRC is currently being weaponized by the General Assembly to limit the ways in which the Governor can "faithfully execute the laws" of North Carolina. Leaders in the General Assembly have admitted that they see the RRC as a legislative limit on executive function. In a press release issued by the Senate President Pro Tempore, Phil Berger, Senate Deputy President Pro Tempore Ralph Hise described the RRC as a "check on executive authority."[12] The press release went on to accuse the Governor of a "power grab" by seeking to restore the constitutionally mandated separation of powers with the present lawsuit. In a similar vein, a Rules Review Commissioner noted to a reporter that "the charge I had on being appointed to the commission was, are there rules that are creating high unemployment in our state, and are there rules that are killing jobs? . . . We've gotta have rules, I don't have any question about that, but what can we do economically regarding rules to help the state?"[13]

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[12] Sen. Berger Press Shop, *Sen. Hise Responds to Latest Cooper Lawsuit to Consolidate Power*, MEDIUM (Aug. 28, 2020), https://bergerpress.medium.com/sen-hise-responds-to-latest-cooper-lawsuit-to-consolidate-power-2d4e60fc921.

[13] Laura Leslie, *New Rules Review Commissioners Test the Waters*, WRAL: N.C. CAPITOL (Aug. 18, 2011), https://www.wral.com/news/state/nccapitol/blogpost/10017455/.

Such statements demonstrate that the legislature views the RRC as a way to prevent the Governor from implementing rules. And the Commission has demonstrated, in its rejection of rules over the past several years, that it accepts this charge. In addition to the blocking of rules on 1,4 dioxane and wetlands permits discussed above, the RRC has repeatedly blocked other rules, including a rule from the Department of Public Safety regarding temporary State law enforcement personnel to cities and counties, [Complaint at ¶34], and rules from an expert agency within the Department of Health & Human Services ensuring forensic evaluators working in criminal trials are employed by established mental health organizations, [Complaint at ¶¶35–39].

Moreover, staff at the RRC do not simply limit themselves to the duty of reviewing rules to ensure their compliance with the law, but rather are engaged in a variety of schemes to expand their capacity to review and veto rules. For example, RRC staff have spent significant time researching and advocating for a change in the law which would require "scientific standards" to go through the rulemaking process. Currently, "scientific standards" are expressly excluded from the definition of "Rules" and changes to scientific standards were not required to go through the

Rules Review process. The RRC staff has lobbied the legislature to change the law so that scientific standards would now come under their purview.[14]

Amici all work to protect the health and welfare of North Carolinians. They rely on executive agencies to be able to promulgate and implement laws according to their expertise, taking into account current scientific, economic, and technological realities. Rulemaking in North Carolina has become dysfunctional, and a change to the composition of the RRC is essential for our State.

CONCLUSION

For the forgoing reasons, *amici* urge the Court to grant the motion for summary judgment of the Plaintiff, Governor Cooper, and issue a declaratory judgment that the current composition of the RRC under N.C. Gen. Stat. § 143B-30.1(a) is unconstitutional.

[14] *See* Email from William W. Peaslee to Donald R. van der Vaart (Mar. 15, 2022). (Exhibit 1) (RRC Counsel providing Chief Administrative Law Judge and Director of the Office of Administrative Hearings with draft legislation to make scientific standards subject to the rule making process); and Email exchange between Christine Cline, William W. Peaslee, and Donald R. van der Vaart (Mar. 9-15, 2022). (Exhibit 2) (Discussion between RRC Counsel, the Director of the Office of Administrative Hearings, and an Office of Administrative Hearings Law Clerk about how to make scientific standards subject to the rulemaking process.).

Respectfully submitted this the 12th August, 2022.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing document was served upon all counsel indicated below via e-mail addressed to the following:

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This the 12th day of August, 2022.

/s/ Kimberley Hunter
Kimberley Hunter
SOUTHERN ENVIRONMENTAL LAW CENTER

EXHIBIT 1

From: Peaslee, William W <bill.peaslee@oah.nc.gov>
Sent: Tuesday, March 15, 2022 9:35 AM EDT
To: vanderVaart, Donald R <donald.vandervaart@oah.nc.gov>
Subject: GS 150B-8a(h) proposed legislation
Attachment(s): "Proposed legislation 150B Definitions.docx"

Good morning,

Attached please find a draft of legislation to resolve the scientific standard loop-hole. Essentially this fix removes the exception to the definition of "Rules" thus making these standards subject to the rule making process.

William W. Peaslee
Rules Review Commision Counsel / Legislative Liaison
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Bill.Peaslee@oah.nc.gov

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

EXHIBIT 2

From: vanderVaart, Donald R on behalf of vanderVaart, Donald R <donald.vandervaart@oah.nc.gov>
Sent: Monday, March 14, 2022 11:12 AM EDT
To: Cline, Christine <christine.cline@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>
Subject: Re: Best Guess at Defining "Scientific, Architectural etc Standard"

Perfect - we should simply have it removed

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From: Cline, Christine <christine.cline@oah.nc.gov>
Sent: Friday, March 11, 2022 3:35:03 PM
To: vanderVaart, Donald R <donald.vandervaart@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>
Subject: RE: Best Guess at Defining "Scientific, Architectural etc Standard"

Good afternoon,

I've looked at each state's APA and the federal APA, and none contain an exclusion of "scientific, architectural, engineering standards, forms, or procedures" from their rulemaking process or from their definition of a "rule." Although NC provides that these things are not "rules," (NC Gen Stat 150b-2(8a)(h)) it, like many states, permits such standards to be incorporated into the administrative code by reference. *See* N.C. Gen. Stat. 150B-21.6; 1 CFR 51.7. North Carolina appears to be the only state that elected to exclude such standards from their definition of a rule. Most states did not reference "scientific, etc. standards," in their APA. Those who used similar terms did not provide a definition in their APA, although these were allowed to be incorporated or adopted into a rule by reference. *See e.g.* Ala. Code 41-22-3, Ala Code 41-22-9; RI Stat 42-35-1, RI Stat 42-35-3.2; MI Stat 24.207, MI Stat 24.232. I was unable to find any state that excluded a scientific or engineering standard, form, or procedure from rulemaking.

Thank you,
Christine

From: vanderVaart, Donald R <donald.vandervaart@oah.nc.gov>
Sent: Thursday, March 10, 2022 7:11 AM
To: Cline, Christine <christine.cline@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>
Subject: Re: Best Guess at Defining "Scientific, Architectural etc Standard"

Christine- thank you. Please also check the exceptions from rule making either the feds or another state like FL might have that might cover this question?

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From: Cline, Christine <christine.cline@oah.nc.gov>
Sent: Wednesday, March 9, 2022 12:53:10 PM
To: vanderVaart, Donald R <donald.vandervaart@oah.nc.gov>; Peaslee, William W <bill.peaslee@oah.nc.gov>
Subject: Best Guess at Defining "Scientific, Architectural etc Standard"

Good afternoon,

Unfortunately, the Federal nor Model APA contain a definition for "scientific, architectural, engineering standards, forms or procedures," etc. Most other states do not provide definitions for these terms in the Administrative Procedure Act.

However, "scientific standard" can be read to mean:

- "scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a manner consistent with the best available science," 15 USC 2625(h) (definition section of the Toxic Substances Control provisions);
- "a practice that has been recognized as supported by research evidence by an evidence-based clearinghouse, which utilizes methods such as systematic, empirical techniques, rigorous data analyses, measurements or observational methods, or randomized controlled trials," N.H. Stat. 170-G:1 (defining "evidence-based practice") (alterations omitted);
- "standards based on rigorous, systematic and objective procedures that allow the user to predict with confidence that a decision . . . is appropriate," 1 Co. Admin. Code 301-42:2207501-R-2.01 (defining adequately validated accepted scientific standards in their Rules for Basic Literacy);
- "research standards that apply rigorous, systematic, and objective methodology to obtain reliable and valid knowledge . . . and present findings and make claims that are appropriate to and supported by the methods that have been employed." 20 USC 9501(18)(A) (Education Research, Statistics, Evaluation, Information, and Dissemination Definitions)

Black's Law Dictionary also defines "standard" as "stability, general recognition, and conformity to established practice."*Standard*, Black's Law Dictionary (5th ed 1979). A similar definition is contained the in American Heritage Dictionary: "An acknowledged measure of comparison for quantitative or qualitative value; criterion." *Standard*, The American Heritage Dictionary (2d College Ed 1982). According to the American Society of Mechanical Engineers, a standard is "a set of technical definitions, rules, guidelines, or characteristics set forth to provide consistent and comparable results, including" items manufactured uniformly, tests and analyses conducted reliably; and "facilities designed and constructed for safe operation." An "engineering standard" "establishes agreed parameters for design, capacity, or property characteristics which permit interchangeability of parts or materials." University of Alberta Library, *What is a Standard?*, A Primer on Engineering Standards (date and URL omitted).

Regarding "criteria" or characteristics of a standard, it would be possible to incorporate the criteria for expert testimony. N.C. R.

Evid. 702 provides that experts can give testimony in the form of an opinion regarding scientific or technical knowledge if the testimony is "based upon sufficient facts or data"; "is the product of reliable principles and methods"; and "the witness has applied the principles and methods reliably to the facts of the case." Rule 702 was modeled after the factors set forth in *Daubert*. These factors include: whether or theory or technique can be and has been tested; whether it has been subjected to peer review and publication; whether there is a high known or potential rate of error; whether there are standards controlling the techniques operation; and whether the theory or technique enjoys general acceptance with in a relevant scientific community. *Daubert v. Merrell Down Pharmaceuticals, Inc.* 509 U.S. 579, 592-94 (1993). It would be difficult, but the *Daubert* factors could be the criteria for an acceptable "scientific standard." These factors have been applied in cases regarding the admissibility for scientific, technical, and engineering experts.

In sum, my best guess is that a "scientific, architectural, engineering standard, form or procedure" is a product of reliable principles and methods that have been rigorously tested and analyzed, that establishes parameters for agency action?

Other than that, I didn't see much of a definition and "of, relating to, or employing the methodology of science," didn't seem particularly helpful.

Let me know if this is what you are looking for. If not, I'd be happy to continue researching this issue this afternoon.

Christine Cline
Law Clerk
Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6714
Phone: (984) 236-1922

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ATTACHMENT B

CALSTART • Ceres• CleanAIRE NC • Democracy Green • Dream.Org • E2 • Electrification Coalition • Environmental Defense Fund • Interfaith Power and Light • Natural Resources Defense Council • NC Clinicians for Climate Action • NC Council of Churches • NC Justice Center • NC League of Conservation Voters • NC Sierra Club • NC Sustainable Energy Association • Southern Alliance for Clean Energy • Southern Environmental Law Center • West End Revitalization Association

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August 4, 2022

Governor Roy Cooper
c/o Eric Fletcher
Office of the Governor
20301 Mail Service Center
Raleigh, NC 27699-0301

Dear Governor Cooper,

The undersigned organizations write to express our united interest in the adoption of the Advanced Clean Trucks Rule in North Carolina. Adopting this Rule will bring necessary health, climate, and economic benefits to North Carolinians, reduce the State's dependence on oil, and solidify the State's status as a leader in clean transportation. Each of the undersigned organizations views this as a top priority for climate action and urges your administration to take swift action to advance the Rule.

As you know, transportation is the largest source of climate change-inducing greenhouse gas emissions in North Carolina, representing roughly 36% of the State's emissions.[1] We

---

[1] N.C. Dep't of Env't Qual., North Carolina Greenhouse Gas Inventory (1990-2030) 5 (Jan. 2022), https://deq.nc.gov/media/27070/download?attachment.

commend your administration's action to address this problem by prioritizing clean transportation through Executive Order 246, which recognized in particular a need to transition medium- and heavy-duty vehicles to zero-emission vehicles.[2] The Multi-State Medium- and Heavy-Duty Zero Emission Vehicle Memorandum of Understanding, which North Carolina signed in 2020, also recognized the importance of reducing greenhouse gas emissions by targeting medium- and heavy-duty vehicle traffic and committed North Carolina to fostering a market for zero-emission versions of such vehicles.[3] Consistent with the environmental justice commitments expressed in Executive Order 246, the Memorandum places special emphasis on the need to accelerate the transition to zero-emission versions of these vehicles in disadvantaged communities that have historically shouldered a greater burden from air pollution.[4]

Through these actions, North Carolina has identified itself as a leader in its commitment to reducing greenhouse gas emissions and promoting environmental justice by committing to clean transportation; adopting the Advanced Clean Trucks Rule would solidify that status.

The undersigned groups see adoption of the Advanced Clean Trucks Rule as a top priority for North Carolina. The rule targets pollution from medium- and heavy-duty vehicles, which generate an outsized share of pollution from transportation. These trucks are only 6.5% of the vehicles on the road in North Carolina, yet they contribute almost 34.5% of transportation greenhouse gas emissions, 71.2% of pollution from nitrogen oxides, and 54.57% of direct fine particulate matter pollution.[5] The Rule requires manufacturers to ensure that zero-emission vehicles—rather than heavily polluting, diesel-fueled trucks—comprise an increasing percentage of sales of medium- and heavy-duty vehicles over time. We were pleased to share with your staff an analysis from RTI International, which demonstrates that the Advanced Clean Trucks Rule will substantially decrease harmful emissions from medium- and heavy-duty vehicles in North Carolina, including emissions of nitrogen oxides, fine particulate matter, and greenhouse gases.[6] By reducing greenhouse gases, the Rule will target a major driver of climate change and assist North Carolina in reaching the climate and clean transportation goals you set out in Executive Order 246.

The pollution reduction that the Advanced Clean Trucks Rule provides will also bring health benefits to North Carolina by reducing emissions of pollutants associated with negative health outcomes. Reducing levels of pollutants like nitrogen oxides and fine particulate matter in the air is associated with reduced incidences of mortality, infant mortality, non-fatal heart attacks, cardiovascular hospital emissions, emergency room visits for asthma, and lost workdays.[7] And because diesel traffic is a dominant driver of disparities in health outcomes

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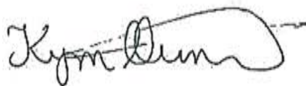
[2] Exec. Order No. 246, North Carolina's Transformation to a Clean, Equitable Economy (Jan. 7, 2022).
[3] Multi-State Medium- and Heavy-Duty Zero Emission Vehicle Memorandum of Understanding (signed by N.C. July 10, 2020), https://www.nescaum.org/documents/mhdv-zev-mou-20220329.pdf/.
[4] *Id.*; Exec. Order No. 246.
[5] U.S. Env't Protection Agency, MOVES3: Latest Version of MOtor Vehicle Emission Simulator (MOVES) (2021), https://www.epa.gov/moves/latest-version-motor-vehicle-emission-simulator-moves (as obtained on December 15, 2021).
[6] Jeffrey Petrusa et al., RTI International, *North Carolina Clean Transportation Study* 15-19 (Apr. 2022), https://www.rti.org/publication/north-carolina-clean-transportation-study ("RTI Report").
[7] *Id.* at 20.

associated with air pollution,[8] with disproportionate impact all too often in low-income communities and communities of color, targeting this source of pollution will further environmental justice.

The Advanced Clean Trucks Rule is also good for North Carolina's economy. The Rule will encourage investment in clean transportation research, development, and manufacturing, spurring innovation and creating domestic jobs. Further, the analysis by RTI International shows that the Advanced Clean Trucks Rule would bring billions of dollars in cost savings to the State. Estimates of the monetized health and climate benefits of the Rule between 2020 and 2050 amount to well over $35 billion, and potentially much higher.[9] Other types of benefits—such as fuel cost savings—will only add to this total in the coming decades.[10] Companies spanning a variety of sectors agree that adopting the Advanced Clean Trucks Rule is good business: A group of thirty major businesses, employers, investors, and business groups in the state—including Arrival, which recently established manufacturing operations in Charlotte, as well as Durham-based FlexGen—have expressed strong support for the Rule.[11]

In sum, we strongly support the adoption of the Advanced Clean Trucks Rule as a top priority for climate action in North Carolina.

Sincerely,



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Senior Attorney
Southern Environmental Law Center
Chapel Hill, North Carolina

Cynthia Satterfield
North Carolina Sierra Club

Joel Porter
CleanAIRE NC

CeCe Grant
Dream.Org

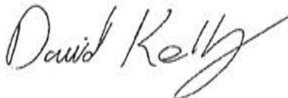
Alli Gold Roberts
Ceres

Anne Blair
Electrification Coalition

[8] *See, e.g.*, Mary Angelique G. Demetillo et al., *Space-Based Observational Constraints on NO_2 Air Pollution Inequality From Diesel Traffic in Major US Cities*, 48 Geophysical Research Letters (Aug. 2021), https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2021GL094333.
[9] RTI Report at 21-23.
[10] *Id.* at 20-29.
[11] Letter from Thirty Business Entities to N.C. Governor Roy Cooper (June 3, 2022), https://e2.org/wp-content/uploads/2022/06/Final_Joint-NC-ACT-Business-Support-Letter.pdf.

Stan Cross
Southern Alliance for Clean Energy

Luis Martinez
Natural Resources Defense Council



David Kelly
Environmental Defense Fund

Claire Williamson
North Carolina Justice Center

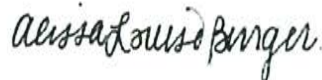
Carrie Clark
North Carolina League of Conservation Voters

Kathleen Shapley Queen, MD
NC Clinicians for Climate Action

Sanja Whittington

Sanja Whittington
Democracy Green

Ward Lenz
NC Sustainable Energy Association

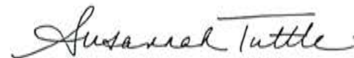


Alissa Burger
CALSTART

Zach Amittay

Zach Amittay
E2

Jennifer Copeland
NC Council of Churches



Susannah Tuttle
NC Interfaith Power & Light

Omega R Wilson

Brenda A Wilson

Omega and Brenda Wilson
West End Revitalizaion Association

ATTACHMENT C

June 3, 2022

Governor Roy Cooper
North Carolina Office of the Governor
20301 Mail Service Center
Raleigh, NC 27699-0301

Dear Governor Cooper:

As vehicle manufacturers, infrastructure provider ready to deploy zero-emission technologies in North Carolina, as well as major businesses, institutions, employers, investors, and business groups with significant investments in the state, we write to express our strong support for adoption of the Advanced Clean Trucks (ACT) and Heavy-Duty Omnibus (HDO) rules in North Carolina before the end of 2023.

In 2020, through your leadership, North Carolina joined over a dozen states in signing a joint memorandum of understanding (MOU), committing to electrifying, and eliminating toxic air pollution from new medium- and heavy-duty vehicles (MHDVs) by 2050. This spring, the MOU signatory states released a draft Action Plan that highlights adoption of the ACT and HDO rules as powerful tools to reach the MOU's goals. Six states have already adopted the ACT rule and three have adopted the HDO rule including New Jersey, New York, Massachusetts, Oregon, Washington and California. Several more states are considering adoption, including Colorado, Connecticut, Maryland, and Maine.

The ACT rule is designed to reduce costs of zero-emission MHDVs by requiring manufacturers to increase model availability, which helps meet the needs of fleet operators across multiple vehicle classes and further develops the market for these vehicles in our state. The ACT rule will also drive investment in clean transportation research and development. We expect that adopting the ACT rule will enable cost-effective electrification of MHDVs at the pace and scale needed to meet climate and air quality goals, while delivering public health and economic benefits for communities and businesses alike.

Meanwhile, the HDO rule will reduce dangerous air pollution from new combustion trucks and encourage manufacturers to produce more durable vehicle parts. Adopting HDO will result in significant public health cost savings before there is a full-scale transition to zero-emission vehicles sales, while reducing maintenance costs for fleets.

We understand the risks of climate change and impacts of air pollution, and we have made significant commitments to reduce our greenhouse gas (GHG) emissions in order to protect the health and economic well-being of the communities in which we live and operate. Transportation is the largest source of GHG emissions across the nation and a substantial component of our carbon footprints. Transportation emissions also release harmful air pollutants that disproportionately impact low-income communities. Improving air quality is the right thing to do for public health and for these communities, and also makes economic sense. Fewer instances of respiratory illness, missed days of work, and hospitalizations will increase personal disposable income and help reduce the financial pressure on our healthcare system. These impacts cross state lines, just like the MHDVs in our fleets and value chains.

Increased access to cost-effective zero-emission MHDVs will allow us to remain competitive in a market where our customers, investors, patients, and employees increasingly expect us to lead on sustainability. Low- and zero-emission vehicles offer significant cost savings through lower fuel and maintenance costs and reduce the risks associated with the volatility of fossil fuel prices and supply. MHDV electrification will support domestic innovation and investment in clean technology manufacturing—creating new domestic jobs, cutting costs for our value chains, mitigating climate risk, improving public health, and reducing healthcare costs.

However, MHDV electrification still faces significant challenges due to higher upfront costs and battery range. Market-enabling policies like the ACT and HDO rules will rapidly accelerate the long-term cost savings, climate, and clean air benefits of MHDV electrification, while spurring widespread deployment of charging stations that will support MHDVs. The more states that adopt ACT and HDO rules, the greater the market-forcing benefits, thereby lowering costs and creating a more stable and self-sustaining market.

We strongly support adoption of the ACT and HDO rules in North Carolina to accelerate MHDV electrification, help the state meet the goals outlined in your Executive Order 246, allow both manufacturers and fleet operators to capture savings from economies of scale, and provide more cost-effective emissions reductions.

Sincerely,

ABB
AMPLY
Arjuna Capital
Arrival
Bollinger Motors
BYD
Carolina Solar Energy
Chambers for Innovation & Clean Energy
ChargePoint
Cree Lighting
Eaton
EQ Research
Earth Equity Advisors
E2 (Environmental Entrepreneurs)
FlexGen
Highland Electric Fleets
HYZON Motors
IKEA
Lion Electric
Nestlé
New Belgium Brewing
Nikola
Proterra
Rivian
Sierra Nevada Brewing Co.
TerraWatt Infrastructure
Tesla
Unilever
Xos
Zeem Solutions