BEFORE THE ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

CAPE FEAR RIVER WATCH, ENVIRONMENTAL JUSTICE COMMUNITY ACTION NETWORK, HAW RIVER ASSEMBLY, AND MOUNTAINTRUE, PETITIONERS.	**PETITION TO WITHDRAW NORTH CAROLINA'S NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT PROGRAM**

TABLE OF CONTENTS

NATURE OF PETITION

1. This is a petition to the Administrator of the United States Environmental Protection Agency ("EPA") pursuant to 40 C.F.R. § 123.64(b) to commence proceedings to determine whether to withdraw approval of North Carolina's National Pollutant Discharge Elimination System ("NPDES") permit program delegated under the Clean Water Act to the State of North Carolina. As detailed below, the North Carolina General Assembly ("legislature") has caused the State to violate the requirements of the federal Clean Water Act and the Memorandum of Agreement ("MOA") between the State and EPA that governs how North Carolina must administer its NPDES program.

2. First, the legislature has systematically acted to block the North Carolina Department of Environmental Quality ("DEQ") from effectively implementing its NPDES permit program and from protecting North Carolina families from water pollution—including toxic industrial chemicals like per-and polyfluoroalkyl substances ("PFAS") and 1,4-dioxane. For instance, the legislature has amended the state laws governing the appointment and composition of the State's Environmental Management Commission ("EMC") and Rules Review Commission ("RRC") such that these commissions have been effectively captured by a supermajority in the legislature that is hostile to environmentally protective regulation. Together these commissions are blocking the agency's development and use of numeric water quality standards for PFAS and 1,4-dioxane, impeding its implementation of the narrative standards,[1] and threatening to take permitting authority away from agency experts.

[1] Under the Clean Water Act, the water quality standards that states are required to adopt can include numeric standards or criteria (for instance, setting the maximum concentration level of a pollutant permitted in a water body) or narrative ones (such as a criterion that describes the desired conditions of a

3. Second, the legislature has enacted legislation that gives the Office of Administrative Hearings ("OAH") final decision-making authority over NPDES permits, thereby stripping DEQ and the EMC of the roles assigned them by the Memorandum of Agreement and threatening DEQ's ability to issue protective permits.

4. Third, the legislature has enacted laws prescribing specific permitting conditions for discharges from fish farms and wastewater discharges into small creeks and streams. These laws unlawfully usurp the State's environmental agencies' authority to evaluate permit applications and issue permits tailored to the discharger and receiving waterbody. These laws also prevent the public from participating in the permitting process, and they violate the backsliding provisions of the Clean Water Act.

5. Finally, the State budget enacted by the legislature has perpetually and systematically underfunded DEQ for over a decade, resulting in a backlog of expired NPDES permits and a lack of agency capacity to adequately develop and enforce protective NPDES permits.

6. North Carolina families depend on DEQ to control harmful pollution released into the State's rivers, creeks, and streams. By unlawfully stripping the agency of its ability to control this pollution, the legislature's actions not only violate the Clean Water Act and the MOA—they threaten hundreds of thousands of North Carolinians who fish, swim, play in, and get their drinking water from North Carolina waters.

---

water body or what it means for a water body to be free from certain negative conditions). 40 C.F.R. § 131.11; *see also Water Quality Standards: Regulations and Resources: What are Water Quality Standards?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/wqs-tech/what-are-water-quality-standards#:~:text=Water%20quality%20criteria%20can%20be,from%E2%80%9D%20certain%20negative%20conditions) (last visited Aug. 26, 2024).

7. The legislature has gone too far. To protect North Carolinians, EPA should withdraw North Carolina's NPDES permitting program unless these issues are resolved and the State is returned to compliance.

PETITIONERS AND THEIR INTERESTS

8. Cape Fear River Watch is a § 501(c)(3) non-profit public interest organization with its headquarters in Wilmington, North Carolina. Cape Fear River Watch's mission is "to protect and improve the water quality of the Cape Fear Basin for all people through education, advocacy and action." Cape Fear River Watch has over 1,000 members, many of whom live near, drink water from, and fish, paddle, boat, and work in and along the Cape Fear River.

9. Cape Fear River Watch advocates at the local, state, and federal levels on behalf of the Cape Fear River and the people who use it. The organization has become a national voice for combatting industrial chemical pollution due to its experience fighting PFAS from Chemours, a PFAS manufacturer in Fayetteville, North Carolina. For decades, Chemours, along with its predecessor DuPont, has contaminated the region's drinking water supplies, including thousands of wells, as well as the Cape Fear River, which is the drinking water supply for 500,000 North Carolinians, directly impacting all of Cape Fear River Watch's members. The Cape Fear River not only supplies the drinking water for the region, but it supports a thriving fishing, tourism, and recreation industry. Because of Chemours' pollution, Cape Fear River Watch's members are afraid to drink the water in their homes, schools, churches, and public eateries; they are afraid of bathing their children in the water, eating produce from their gardens, and swimming in

their pools, and they are fearful of engaging in cultural past-times for this region—fishing and recreation activities in and around the river.

10. The Cape Fear is North Carolina's most ecologically diverse watershed; the Lower Cape Fear is notably a biodiversity hotspot, recording the largest degree of biodiversity on the eastern seaboard of the US, north of Florida. Fish, birds, reptiles, and mollusks of the region have all been proven contaminated by PFAS. The State recently issued its most stringent fish consumption advisory to date, warning that due to high levels of PFAS, no fish from the area of the Cape Fear River sampled are safe to eat for children or women of child-bearing age, and others should limit their consumption to just one fish per year.[2] People in the region have PFAS levels in the blood at up to four times the national average.[3] And unfortunately, Chemours is not the only source of industrial pollution impacting the organization's members. Cape Fear River Watch and its members have also participated in the public comment process for water quality standards for 1,4-dioxane and for numerous NPDES permits issued to entities that discharge 1,4-dioxane and PFAS into the Cape Fear River and its tributaries.

11. Because many of Cape Fear River Watch's members live downstream of industrial and municipal sources of PFAS, 1,4-dioxane, and other harmful chemicals, the organization relies on a functioning NPDES permitting program to ensure the River is safe for drinking, fishing, and recreation.

---

[2] *NCDHHS Recommends Limiting Fish Consumption From the Middle and Lower Cape Fear River Due to Contamination with "Forever Chemicals,"* N.C. DEP'T OF HEALTH & HUMAN SERVS. (July 13, 2023), https://perma.cc/2MSB-EKPU.

[3] *PFAS Exposure and Thyroid Related Outcomes in Communities Along the Cape Fear River*, N.C. STATE UNIV., https://superfund.ncsu.edu/project-1/#:~:text=We%20found%20six%20newly%20identified,in%20Wilmington%2C%20NC%2C%20have%20had (last visited Aug. 28, 2024).

12. Environmental Justice Community Action Network ("EJCAN") is a § 501(c)(3) non-profit organization based in Clinton, North Carolina, that works to ensure that all residents in Sampson County have access to clean and safe air, water, and soil so that they have a healthy environment in which to live, work, worship, play, and thrive. EJCAN has approximately 200 members who attend monthly EJCAN meetings, other EJCAN events, and/or receive regular updates about EJCAN's advocacy work. Protecting water quality in Sampson County is one of EJCAN's main goals as many of its members fish in nearby streams and rely on private drinking water wells for their household water supply.

13. Many of EJCAN's members live in a community near the largest landfill in North Carolina, the Sampson County landfill. For decades, the landfill accepted PFAS-laden waste from various industries across the State. Over the past year, EJCAN members were shocked and scared to find incredibly high PFAS levels in their drinking water wells. Sampling confirmed that PFAS from the Sampson County landfill had spread to nearby surface waters, including to Bearskin Swamp where EJCAN members fish, hunt, and recreate. The landfill has sought a NPDES permit to authorize operation of a reverse osmosis system to treat leachate and decrease PFAS discharges into waterways. To protect its members and all Sampson County residents, EJCAN advocates for strict control of the landfill's water pollution, including through use of the NPDES permitting process.

14. Effective application of the Clean Water Act's NPDES program would protect the creeks and streams that EJCAN's members use and rely on. Strong NPDES

permits would make the organization's members feel safer and would support EJCAN's mission to achieve a healthy environment.

15. Haw River Assembly is a § 501(c)(3) non-profit citizens advocacy organization founded in 1982 with its headquarters in Pittsboro, North Carolina. Haw River Assembly's mission is to "promote environmental awareness, conservation and pollution prevention; to speak as a voice for the river in the public arena; and to put into people's hands the tools and the knowledge they need to be effective guardians of the river." Haw River Assembly has over 1,000 members many of whom live in Pittsboro, North Carolina, and who drink water from; fish, swim, paddle, and work in; and otherwise enjoy the Haw River.

16. Haw River Assembly has spent years studying, publicizing, and advocating against discharges of industrial chemicals like PFAS and 1,4-dioxane. The organization fights for protective PFAS and 1,4-dioxane regulation because its members who live in communities along the Haw River like Pittsboro, North Carolina, have been left with no other alternative but to drink water laden with these chemicals for years, harming their health and well-being. The PFAS and 1,4-dioxane in Pittsboro's water comes from upstream municipal wastewater treatment plants, including the city of Greensboro and city of Burlington, who receive contaminated water from their industrial customers. As a result of the cities' pollution, residents of Pittsboro, including Haw River Assembly's members, have some of the highest levels of PFAS in blood *in the entire country*, and many have had to install costly home filters out of fear of PFAS and 1,4-dioxane. To protect its members, Haw River Assembly submits comments on NPDES

permits and, when necessary, files legal challenges to ensure both the State and polluters comply with the Clean Water Act.

17. Because so many of its members drink, swim, and play in the river downstream of direct and indirect dischargers, Haw River Assembly depends on the tools of the Clean Water Act's NPDES program that, if used consistently and properly, would stop pollution at the source.

18. MountainTrue is a § 501(c)(3) nonprofit public interest organization with about 15,000 members and supporters headquartered in Asheville, North Carolina, that engages in environmental policy and project advocacy and on-the-ground conservation projects. MountainTrue's mission is to champion resilient forests, clean waters, and healthy communities in the Southern Blue Ridge. MountainTrue hosts four Riverkeeper Programs—the Broad Riverkeeper, the French Broad Riverkeeper, the Green Riverkeeper, and the Watauga Riverkeeper—all of which are dedicated to protecting, preserving, and restoring their respective watersheds. In addition to its Riverkeeper Programs, MountainTrue engages in water quality projects, programming, and advocacy throughout its entire service area across twenty-four Western North Carolina counties, including in the Hiwassee River, Savannah River, Little Tennessee River, and New River basins, among others.

19. MountainTrue's members drink water from, swim, paddle, fish, and otherwise enjoy many of the rivers that make the western region of North Carolina so special, and they are concerned about unnecessarily high levels of pollution in the rivers. Members and staff avoid swimming in the rivers downstream of known industrial sources and often travel out of their way to paddle and swim in less polluted waters. Some

members and staff avoid contact with the river altogether when pollution levels are high, and others no longer eat fish caught in the vicinity of industrial dischargers.

20. Several of the watersheds under MountainTrue's purview are adversely affected by pollution discharges from fish farms, including the French Broad River and its tributaries in particular. Accordingly, MountainTrue has advocated for strong permit limits for aquaculture facilities and is adversely affected when the legislature overrides improvements to permits put in place by DEQ. MountainTrue is also harmed when quartz mining operations and other industrial polluters continue to discharge pollution under expired permits with outdated conditions. MountainTrue has also advocated for Technology Based Effluent Limits ("TBELs") to be included in multiple NPDES permits in Western North Carolina and is harmed when those are not adopted into final permits.

21. Consistent application of Clean Water Act's NPDES program would allow MountainTrue's members to better enjoy their activities on the water.

22. The legislature has enacted laws and restrictions on funding that substantially impair DEQ's ability to protect the surface waters that Petitioners and their members rely on for drinking, swimming, boating, canoeing, fishing, nature observation, and other uses, in violation of the Clean Water Act and the MOA.

LEGAL BACKGROUND AND THE MEMORANDUM OF AGREEMENT BETWEEN NORTH CAROLINA AND EPA

23. Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), authorizes the Administrator of EPA to approve applications by states, including North Carolina, to administer their own NPDES permit programs for discharges into navigable waters

unless the Administrator determines that the laws of each such state do not provide adequate authority to carry out the program.

24. The Administrator of EPA initially granted North Carolina's request for approval of its NPDES program on October 19, 1975.[4] The Administrator subsequently authorized North Carolina's pretreatment program on June 14, 1982, and its general permits program on September 6, 1991.[5]

25. 40 C.F.R. § 123.24 provides that EPA and a state administering its own NPDES program shall execute a memorandum of agreement that includes terms, conditions, and agreements relevant to the administration and enforcement of the state's NPDES program.

26. EPA and North Carolina entered into a memorandum of agreement (the "MOA") to govern the administration of North Carolina's NPDES permitting, compliance, and enforcement programs. The version of the MOA currently in effect, entitled "National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of North Carolina and the United States Environmental Protection Agency Region IV" (attached hereto as Exhibit 1), was executed by the North Carolina Secretary of the Environment and Natural Resources on October 1, 2007, and by the Regional Administrator for EPA Region 4 on October 15, 2007.

27. The MOA designates the North Carolina Environmental Management Commission and the Division of Water Quality within the Department of Environment

---

[4] North Carolina: Approval of the State Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 51,493 (Nov. 5, 1975).

[5] *See NPDES State Program Authority*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/npdes/npdes-state-program-authority (last visited Aug. 26, 2024).

and Natural Resources as the entities in the state that will administer North Carolina's NPDES program. The Department of Environment and Natural Resources has now been reorganized and renamed the "Department of Environmental Quality," and its Division of Water Quality has now been combined with the former Division of Water Resources and renamed the "Division of Water Resources" ("DWR").

28. The MOA further outlines specific requirements that North Carolina's NPDES program must meet.

29. Section III(A)(1) of the MOA mandates that North Carolina "[c]reate and maintain the legal authority and, to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program."

30. Section IV of the MOA states that North Carolina "is responsible for drafting, providing public notice, issuing, modifying, reissuing, denying, and terminating permits in accordance with Sections III and IV of this MOA, 40 C.F.R. Parts 122-123, and any other applicable regulations."

31. Section IV(D) of the MOA further establishes the procedures by which public participation is guaranteed in the NPDES permit application process and provides that "[a]ll NPDES major permits and general permits shall be publicly noticed in a manner constituting legal notice to the public under State law, in accordance with 40 C.F.R. § 124.10(c)(3)."

32. Section IV(D)(6) of the MOA further provides, "[t]he State shall provide an opportunity for judicial review in State court of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process in accordance with 40 C.F.R. § 123.30."

33. Other sections of the MOA confirm the obligation of the State to not only provide public notice of draft permits, but also to allow for the public to participate in public hearings and to submit comments, and to respond to those comments and take them into account in issuing the final permit.

34. EPA's delegation and approval of North Carolina's NPDES permit program is conditional on the State complying with the requirements of the Clean Water Act, the MOA, and applicable state statutes and regulations as approved by EPA.

35. Section 402(c)(3) of the Clean Water Act, 33 U.S.C. § 1342(c)(3), authorizes the EPA Administrator to withdraw approval of North Carolina's NPDES permit program upon determining that the State is not administering the program in accordance with the requirements of Section 402 of the Clean Water Act, 33 U.S.C. § 1342. The Clean Water Act's implementing regulations further provide that the Administrator may withdraw program approval when a state program no longer complies with 40 C.F.R. part 123, and list circumstances that justify such a determination. These include the failure to comply with the terms of the MOA, action by a state legislature limiting state authorities, and failure to exercise control over activities required to be regulated, among other things.[6]

36. EPA's authority to withdraw the State's authority over its NPDES program is also memorialized in the MOA. Section IX(B) of the MOA states that North Carolina "shall keep EPA fully informed of any proposed modification or court action which acts to amend, rescind or repeal any part of its authority to administer the NPDES program. EPA acknowledges that the State has no veto authority over acts of the State

[6] 40 C.F.R. § 123.63.

legislature and, therefore, reserves the right to initiate procedures for withdrawal of the State NPDES program approval in the event that the State legislature enacts any legislation or issues any directive which substantially impairs the State ability to administer the NPDES program or to otherwise maintain compliance with NPDES program requirements."

37. Federal law, including 40 C.F.R. § 123.64, provides that the EPA Administrator may order the commencement of proceedings to determine whether to withdraw approval of a state's NPDES permit program under 40 C.F.R. part 123 in response to a petition from an interested person alleging failure of the state to comply with the requirements of 40 C.F.R. part 123.

GROUNDS FOR WITHDRAWAL

38. The North Carolina legislature has taken actions that rob DEQ of its authority to operate North Carolina's NPDES program and deprive DEQ of the resources it needs to do so, such that the State can no longer meet its obligations under the MOA, the Clean Water Act, and its implementing regulations.

I. The North Carolina legislature is preventing DEQ from controlling toxic 1,4-dioxane and PFAS in NPDES permits.

39. For far too long, communities across North Carolina have been drinking water laden with harmful PFAS and 1,4-dioxane. Under Governor Roy Cooper's administration, DEQ has made it a priority to address these toxic chemicals. The agency has invested significant resources in studying the scope of the contamination, sought to adopt compound-specific numeric water quality standards, and tried to issue NPDES permits relying on pre-existing EPA-approved narrative water quality standards.

40. Rather than support the agency in its efforts to protect North Carolinians, the legislature has blocked DEQ's efforts. It has done this by taking over appointment power for the rulemaking arm of DEQ (the Environmental Management Commission) and the entity charged with reviewing DEQ's rules (the Rules Review Commission) and stacking those commissions with individuals who are ideologically aligned with the supermajority in the legislature that is hostile to environmental regulation.[7] The legislature has also passed laws that disrupt the process of adopting numeric and implementing narrative water quality standards for these pollutants. By hijacking these commissions and enacting these laws, the legislature has effectively stripped DEQ of its ability to adopt water quality standards and issue protective NPDES permits, thereby preventing the State from "[c]reat[ing] and maintain[ing] the legal authority...to carry out all aspects of the State NPDES program."

A. The legislature's capture of the EMC.

41. The legislature has fundamentally changed the EMC from the executive branch-controlled commission to whom EPA delegated authority into a legislative instrument designed to disrupt DEQ's pollution control efforts, in violation of the MOA.

42. When EPA first authorized North Carolina to administer its own NPDES program, the governor had the power to appoint and remove all thirteen members of the EMC, and most positions were required to be filled with people with certain areas of

[7] In North Carolina, if DEQ wishes to adopt or amend a rule, including a water quality standard, it must first present the rule to the Water Quality Sub-Committee of the EMC. Following the sub-committee's affirmative vote, DEQ can present the rule to the full EMC for approval to go to public notice and hearing. During the public process, a member of the EMC will be appointed as a Hearing Officer and will compile a report explaining the agency's rulemaking and responding to public comments received. Upon recommendation of the Hearing Officer, the EMC will then vote to adopt the rule. Once adopted, the final stage of the rulemaking process is to present the rule to the RRC, which can block agency rules from going into effect, as explained in more detail below.

expertise, such as registered engineers with experience in "planning or conservation of water or air resources."[8] The legislature has gradually increased its own role in appointing members of the EMC. At the time the State and EPA signed the MOA in 2007, the legislature appointed six members, while the governor appointed thirteen,[9] and the governor still had the power to remove any member no matter who appointed the member.[10]

43. In October 2023, however, the legislature passed Session Law 2023-136 (Senate Bill 512) over Governor Roy Cooper's veto.[11] In Section 2 of that law, the legislature seized majority control of the appointments to the 15-member EMC by decreasing the number of gubernatorial appointments by two—from nine to seven—and instead granting those two appointments to the Commissioner of Agriculture, who belongs to the same political party as the conservative supermajority in the legislature. The legislature continues to appoint six members.

44. Session Law 2023-136 also seized the governor's appointment power of the EMC chair, who is now elected by the full EMC (the majority of whom are now aligned with the conservative supermajority). The governor also no longer has the power to remove any commissioners appointed by an entity other than himself, even for misfeasance, malfeasance, or nonfeasance.[12]

---

[8] N.C. Sess. Law 1973-1262, § 20.

[9] N.C. Sess. Law 2001-486, § 2.16; N.C. Sess. Law 2013-360 § 14.23.

[10] N.C. Sess. Law 2000-172 § 4.1.

[11] N.C. Sess. Law 2023-136 (Oct. 10, 2023), attached hereto as Exhibit 2.

[12] N.C. Gen. Stat. § 143B-283(b1).

45. The new appointments to the EMC became effective in October 2023,[13] creating the current supermajority-controlled EMC.

46. Governor Cooper filed a lawsuit on October 10, 2023, alleging that Session Law 2023-136 unconstitutionally limits the executive's ability to carry out its duties and violates the separation of powers.[14] Governor Cooper alleges that, by taking over appointment power of the EMC and other executive committees, the legislature sought to control not only the State's lawmaking function, but also the execution of those laws in violation of the state constitution.[15] Governor Cooper's case is currently on appeal.[16]

B. The legislature's creation of the RRC.

47. The legislature has given the RRC *de facto* control over DEQ's ability to adopt and implement water quality standards, effectively transferring a crucial part of the NPDES program to an entity not authorized by the MOA and further depriving the agency of its ability to "[c]reate and maintain the legal authority…to carry out all aspects of the State NPDES program."

---

[13] N.C. Sess. Law 2023-136 § 13.2.

[14] Complaint, *Cooper v. Berger*, 23CV028505-910 (Wake Cnty. Super. Ct., Oct. 10, 2023), available at https://portal-nc.tylertech.cloud/Portal/.

[15] *Id.* at 40–46; *see also* N.C. CONST. Art. III, §§ 5(4); 5(8); 6.

[16] *See* Notice of Appeal, 23CV028505-910 (Wake Cnty. Super. Ct., Mar. 11, 2024), available at https://portal-nc.tylertech.cloud/Portal/. The trial court held that the changes made to five of the challenged boards and commissions, including the EMC, satisfied separation of powers requirements, and enjoined changes to the makeup of two other boards as unconstitutional. *See* Order, *Cooper v. Berger*, 23CV028505-910 (Wake Cnty. Super. Ct., Feb. 28, 2024), available at https://portal-nc.tylertech.cloud/Portal/.

48. The RRC was established in 1986 by the North Carolina legislature to review rules adopted by state agencies. The RRC is currently made up of ten commissioners, all appointed by the legislature.[17]

49. In 1995, the legislature extended the review authority of the RRC, giving it the power to block agency rules.[18] The constitutionality of the RRC has been challenged multiple times, but North Carolina courts have not definitively ruled on that issue. Litigants and academics have opined that the structure and functioning of the legislatively appointed RRC violates the separation of powers for a number of reasons. First, the legislature effectively vested the RRC with the power to interpret laws governing agency rulemaking—power that properly belongs to the courts. Second, the change gave the RRC the power to effectively override agency rules, which should be the province of the full legislature acting through both houses.[19]

50. When evaluating rules, the RRC is required to limit its review to whether the rule satisfies a three-pronged test: (1) whether the rule is within the agency's statutory authority; (2) whether the rule is clear and unambiguous; and (3) whether the rule is

---

[17] N.C. Gen. Stat. § 143B-30.1; N.C. Sess. Law 1985-1028 § 32.

[18] N.C. Gen. Stat. § 150B-21.12(d) (1995); N.C. Sess. Law 1995-507 §. 27.8(h), (y).

[19] *Cooper v. Berger,* 20-CVS-09542 (Wake Cnty. Super Ct., 2020) (lawsuit filed by North Carolina governor in 2020 against legislature challenging constitutionality of Rules Review Commission, dismissed before resolution); *N.C. Bd. of Pharmacy v. Rules Rev. Comm'n*, 174 N.C. App. 301, 307, 620 S.E.2d 893, 897 (2005), *rev'd in part,* 360 N.C. 638, 637 S.E.2d 515 (2006) (discussing but not deciding agency's argument that the Rules Review Commission's authority to veto the implementation of agency rules is unconstitutional); NC Attorney General Opinion: "Separation of Powers; Powers of Judicial Department; Administrative Agencies (Feb. 22, 1991) https://ncdoj.gov/opinions/separation-of-powers-powers-of-judicial-department-administrative-agencies/ (concluding that giving the Rules Review Commission the power to indefinitely delay duly adopted agency rules is likely unconstitutional); Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1212–15 (1999) (describing legal constitutional challenges to the Rules Review Commission's authority to block rules); Charlotte A. Mitchell, Comment, The North Carolina Rules Review Commission: A Constitutional Quandary, 82 N.C. L. REV. 2092, 2098–2102 (2004) (opining that the Rules Review Commission's authority to veto agency rules is "unlikely to withstand a constitutional challenge").

reasonably necessary to fulfill the agency's duties.[20] The RRC is specifically prohibited from considering the quality and efficacy of rules,[21] yet the RRC frequently blocks rules on impermissible grounds.[22]

51. Moreover, the RRC is not subject to the restrictions on lobbying and *ex parte* communications that normally apply to administrative agencies, so there is a strong potential for commissioners—who have no expertise in environmental rulemaking, the Clean Water Act, or the NPDES program—to succumb to political pressure from special interest groups and stop draft rules from becoming regulations.

C. Legislatively-controlled commissions are blocking DEQ from adopting numeric standards for 1,4-dioxane.

52. The EMC and RRC, as contrived by the legislature, have blocked DEQ's efforts to adopt numeric water quality standards for 1,4-dioxane, preventing the agency from "[c]reat[ing] and maintain[ing] the legal authority…to carry out all aspects of the State NPDES program," in violation of the MOA.

53. North Carolina suffers from some of the highest levels of 1,4-dioxane pollution in the entire country. 1,4-Dioxane is a clear, man-made chemical that is used in, and produced as a byproduct of, many industrial processes. The chemical is toxic to humans, causing liver and kidney damage at incredibly low levels. In recognition of the

---

[20] N.C. Gen. Stat. § 150B-21.9.

[21] N.C. Gen. Stat. § 150B-21.9.

[22] *See, e.g.*, Complaint, *N.C. Env't Mgmt. Comm'n v. N.C. Rules Rev. Comm'n*, 23-CV-0320960910 (N.C. Super. Ct., Wake Cnty., Nov. 9, 2023), https://perma.cc/99TR-RGJ6; Complaint, *N.C. Dep't of Env't Quality v. N.C. Rules Rev. Comm'n*, 23-CV-031533-910 (Wake Cnty. Super. Ct., Nov. 3, 2023), https://perma.cc/3MUU-GR8Q.

harms caused by 1,4-dioxane, EPA has established a lifetime cancer risk of one-in-one million people at 0.35 parts per billion ("ppb").

54. Between 2014 and 2016, DEQ confirmed three "hot spots" of 1,4-dioxane contamination in North Carolina: the wastewater treatment plants in Greensboro, Asheboro, and Reidsville. The 1,4-dioxane in each of the city's wastewater treatment plants comes from industrial customers that pay to send their waste to the city's sewer system. Because the cities do not remove 1,4-dioxane from their wastewater, the pollution flows into downstream drinking water supplies.

55. Because of these and other sources, North Carolinians drink water contaminated with 1,4-dioxane at levels two to four times higher than the remainder of the country.[23] The Town of Pittsboro, for example, pulls its drinking water from the Haw River downstream of Greensboro and Reidsville's pollution. At times, Pittsboro's 1,4-dioxane levels have been measured as high as 114 ppb, more than 320 times the cancer risk level. Because Pittsboro cannot remove 1,4-dioxane at its drinking water treatment plant, any 1,4-dioxane pulled from the Haw River ends up in the treated drinking water sent to residents, schools, churches, businesses, and restaurants.

56. Other communities farther downstream in the Cape Fear River watershed have likewise been forced to drink water contaminated with 1,4-dioxane. The chemical has been detected in the drinking water sources for Cary, Apex, Chatham County, Sanford, Fayetteville, Pender County, Brunswick County, and the Cape Fear Public

[23] N.C. Dep't of Env't Quality, 1,4-Dioxane in Drinking Water Legislative Report (May 1, 2024), at 2, https://perma.cc/6KF9-PACJ.

Utility Authority—utilities that collectively serve approximately 800,000 North Carolinians.

57. DEQ has tried to adopt numeric water quality standards for 1,4-dioxane to more efficiently control 1,4-dioxane coming from the cities of Greensboro, Asheboro, and Reidsville, as well as from other municipal and industrial sources. DEQ's efforts, however, have been blocked by the RRC, the new supermajority-controlled EMC, and the legislature itself.

58. DEQ first sought to adopt numeric water quality standards for 1,4-dioxane in 2021. Prior to that rulemaking, DEQ had regulated 1,4-dioxane under the EPA-approved narrative Toxic Substances Standard, 15A N.C. Admin. Code 2B.0208, limiting concentrations of the chemical to 0.35 ppb in drinking water sources and 80 ppb in non-water supply waters. Noting that numeric standards would allow DEQ to more efficiently control 1,4-dioxane while providing regulatory certainty to permittees,[24] DEQ sought to codify numeric water quality standards identical to the values already used by the agency (0.35 and 80 ppb).

59. Following a thorough ten-month-long rulemaking process during which DEQ released a fiscal analysis for public review, hosted a public comment period,[25]

[24] Industrial and municipal sources of 1,4-dioxane have long advanced the argument that DEQ lacks the authority to control 1,4-dioxane until the agency has adopted a numeric water quality standard. While that assertion is incorrect, the agency pursued numeric standards to make clear to both the public and the regulated community that 1,4-dioxane must be limited in surface waters. *See* N.C. Dep't of Env't Quality, Regulatory Impact Analysis 2020-2022 Triennial Review – Surface Water Quality Standards (May 2021), at 14–18, https://perma.cc/5BH5-CEWE.

[25] During the public comment period, the EMC received more than 2,500 comments supporting the development of strong numeric water quality standards for 1,4-dioxane and other toxic chemicals. *See* Env't Mgmt. Comm'n, Report of Proceedings to the Environmental Management Commission on the Proposed Changes to the Surface Water Quality Classifications and Standards (Mar. 10, 2022), at 13, https://perma.cc/98VL-HUY3.

facilitated a public hearing, released a hearing officer's report with the agency's rationale, obtained approval from EPA and the Office of State Budget Management ("OSBM"), and otherwise complied with all state rulemaking requirements, Governor Cooper's EMC (the "now-ousted EMC") adopted the 1,4-dioxane numeric standards. In doing so, the now-ousted EMC recognized the importance of the standards for protecting North Carolina families.

60. As the final step in the rulemaking process (and as required by North Carolina law), the now-ousted EMC sent DEQ's 1,4-dioxane numeric water quality standards to the RRC for review.[26]

61. After receiving multiple letters from known industrial and municipal sources of 1,4-dioxane pollution and meeting with the chief administrative law judge,[27] the RRC staff counsel recommended objecting to the rule. Following his advice, the RRC blocked the rule from being implemented.

62. One of the 1,4-dioxane polluters that lobbied the RRC was the City of Reidsville. The City emphasized to the RRC that it did not want to comply with the numeric standards because doing so would be expensive, and the City argued that the EMC's fiscal analysis was improper. Although OSBM (the agency tasked with reviewing

---

[26] *RRC Meeting Agenda February 2023*, N.C. OFFICE OF ADMIN. HEARINGS (Feb. 16, 2023), https://www.oah.nc.gov/news/events/rrc-meeting-agenda-february-2023 (compiling a record of agency submissions and communications, as well as public comments submitted during the RRC's review).

[27] *See* Letter from Patrick Mincey and Robert El-Jaouhari, Counsel to City of Reidsville, to Members of the Rules Rev. Comm'n (Apr. 13, 2022), attached hereto as Exhibit 3; Email from Martie Groome, City of Greensboro, to Larence Duke, Counsel for Rules Rev. Comm'n (May 18, 2022), attached hereto as Exhibit 4; RRC, Letters of Objection & Requests for Legislative Review 15A NCAC 02B .0212, .0214, .0215, .0216, & .0218 (May 2022), attached hereto as Exhibit 5; *see* Email from Lawrence Duke, Counsel for Rules Rev. Comm'n, to Jeanette Doran, Rules Rev. Comm'n (Apr. 20, 2022) ("Several municipalities oppose the addition of 1,4-dioxane as a regulated substance. The arguments against approval of the set of Rules making this change have merit.... I am planning on meeting with Chief Judge vanderVaart this afternoon to discuss the merits of the arguments, and it is likely that I will be issuing a staff opinion opposing approval."), attached hereto as Exhibit 6.

and approving fiscal notes for proposed rules) had already signed-off on the EMC's fiscal analysis, the RRC—*while admitting it did not have authority to do so*—declared that it disagreed with the EMC's fiscal analysis and blocked the rule from going into effect.[28] Counsel for the RRC afterwards thanked Reidsville for providing the commission with the justification it was looking for to stonewall the rule.[29]

63. In November 2023, the now-ousted EMC filed a lawsuit challenging the RRC's objection of the 1,4-dioxane numeric water quality standards on impermissible grounds, recognizing the importance of defending these standards.[30] In February 2024, however, after the legislature's seizure of the EMC, the supermajority-controlled EMC swiftly dismissed the lawsuit, thereby ensuring the numeric standards did not go into effect.[31]

64. Yet DEQ persisted with its efforts to protect North Carolina families from 1,4-dioxane, this time as part of the State's 2023-2025 Triennial Review.

65. In January 2024, DEQ once again presented numeric 1,4-dioxane standards to the EMC's Water Quality Committee, asking the commissioners to approve the agency's rule package so it could present the rules to both the full EMC and to the public for comment. As part of the request, DEQ explained that EPA had required the

---

[28] RRC Staff Opinion, 15A NCAC 02B. 0208, .0212, .0214, .0215, .0216, .0218 (May 19, 2022), at 1 (stating "it is not for the Rules Review Commission to 'check the math' of the fiscal note"), attached hereto as Exhibit 7.

[29] Email from Lawrence Duke, Counsel for Rules Rev. Comm'n, to Robert El-Jaouhari, Counsel for City of Reidsville (June 13, 2022) ("I don't know if I communicated it fully after those meetings, but I greatly appreciated your hard work crafting arguments and providing data on the 1,4 dioxane rules. Thank you."), attached hereto as Exhibit 8.

[30] Complaint, *N.C. Env't Mgmt. Comm'n v. N.C. Rules Review Comm'n*, *supra* note 22.

[31] Notice of Voluntary Dismissal Without Prejudice, *N.C. Env't Mgmt. Comm'n v. N.C. Rules Review Comm'n,* 23-CV-032096-910 (Wake Cnty. Super. Ct., Feb. 16, 2024), attached hereto as Exhibit 9.

agency to use updated health criteria when calculating the 1,4-dioxane numeric standards.[32]

66. As part of the 2023-2025 Triennial Review, DEQ also sought to update the narrative Toxic Substances Standard by incorporating EPA's same updated health criteria.[33]

67. But the EMC Water Quality Committee did not send the 2023-2025 Triennial Review to the full EMC, citing a need for more time to review the 1,4-dioxane materials.[34] As part of the discussion, Commissioner Michael Ellison, newly appointed by the legislature, asked whether the EMC could ignore EPA's health criteria.[35]

68. On February 1, 2024, the Environmental Policy Advisor to North Carolina's Senate President-Pro-Tem wrote to J.D. Solomon, the newly-appointed Chair of the EMC, explicitly asking that the EMC delay 1,4-dioxane standards, stating, "*Please*

---

[32] At the time, the updated health criteria shifted the proposed numeric water quality standards to 0.33 µg/L for drinking water supplies and 73 µg/L for non-water supplies. *See* N.C. Dep't of Env't Quality, 2023-2025 Surface Water Triennial Review Amendments to Select Rules in 15A NCAC 02B .0200 (Jan. 10, 2024), at slide 18, https://perma.cc/2MAW-UX8C.

[33] *Id.* at slides 6–12.

[34] *See* N.C Env't Mgmt. Comm'n, Water Quality Committee, YOUTUBE (Jan. 10, 2024), https://www.youtube.com/watch?v=ajQZyt35mnE&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=18, at 5:25–6:22 (Chairman Steve Keen explaining that he made the item an informational item, rather than an action item, because there were attachments that he and other members wanted more time to review) [hereinafter "EMC, January Water Quality Committee Recording"]; *see also* N.C. Env't Mgmt. Comm'n, Draft Water Quality Committee Meeting Minutes (Jan. 10, 2024), at 2–3 (explaining the Chair of the Water Quality Subcommittee reclassified the decision to move the Triennial Review forward to an informational item because the rulemaking was "complex" and he desired more discussion), https://perma.cc/27Z8-T2FU.

[35] EMC, January Water Quality Committee Recording, *supra* note 34 at 44:40–45:17.

let me [know] if EMC would be willing to delay action on 1,4-dioxane if the Collaboratory[36] could provide the cost data for the fiscal note before the July meeting."[37]

69. The supermajority-controlled EMC was also lobbied by 1,4-dioxane polluters. On March 8, 2024, the cities of Greensboro, Asheboro, and Reidsville sent a letter to the EMC urging the commission to delay the rulemaking as it considers whether "additional modifications" to the proposed standards are necessary.[38] In the letter, the three cities provide misleading and fearmongering information about the cost of complying with the proposed standards. The cities could easily control their pollution by using their Clean Water Act pretreatment authority to require their industrial customers to remove 1,4-dioxane before sending their waste to the cities' wastewater plants.[39] But the cities ignored this possibility and instead argued that the costs would be "extraordinary."[40]

70. Over the next five months, the supermajority-controlled EMC continued to block the 1,4-dioxane standards. The EMC's Water Quality Committee adopted

---

[36] The North Carolina Collaboratory was created by the legislature in 2016 to "facilitate[e] the dissemination of the policy and research expertise of the University of North Carolina System and other institutions of higher learning across the State for practical use by state and local government." *About*, N.C. COLLABORATORY, https://collaboratory.unc.edu/about/ (last visited Aug. 14, 2024).

[37] Email from Jenny Kelvington, Office of the Senate President Pro Tempore, to J.D. Solomon, N.C. Env't Mgmt. Comm'n (Feb. 1, 2024) (emphasis added), attached hereto as Exhibit 10.

[38] Letter from Elijah Williams, City of Greensboro et al., to Members of the Water Quality Committee, N.C. Env't Mgmt. Comm'n (Mar. 8, 2024), at 2, attached hereto as Exhibit 11. These cities' wastewater treatment plants receive 1,4-dioxane from their industrial customers. As recently as January and April of 2024, one of Greensboro's industries released 1,4-dioxane at 7,160 ppb and 5,530 ppb, respectively. City of Greensboro, Amended Special Order By Consent EMC SOC WQ S19-010 Year Three Report (May 31, 2024), at PDF pg. 30, https://perma.cc/AWZ8-2C8B [hereinafter "Greensboro, Year Three Report"].

[39] *See, e.g.*, One Water Engineering et al., Treatment Technologies & Implementation Costs to Comply With Proposed 1,4-Dioxane Discharge Limits, Preliminary Report (Apr. 30, 2024), at 3, https://perma.cc/8S5K-GRED ("[I]t is important to highlight the efficacy of source control, which is commonly more effective and can be implemented more quickly than treatment at POTWs").

[40] Letter from Elijah Williams, *supra* note 38, at 3.

polluters' economic arguments,[41] questioned the legitimacy of EPA's data,[42] suggested the need for studies based on exposure to humans before regulating 1,4-dioxane,[43] and ignored the pleas of impacted downstream communities who expressed "concern[] that 1,4-dioxane discharges will continue and may increase if source control regulation is not implemented."[44]

---

[41] *See, e.g.*, N.C. Env't Mgmt. Comm'n, Water Quality Committee, YOUTUBE (Mar. 13, 2024), at 1:14:00–1:17:00 (questioning the costs associated with the rule), https://www.youtube.com/watch?v=L1FCj9LKwn8&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=16 [hereinafter "EMC, March Water Quality Committee Recording"]; *id.* at 1:29:00–1:34:45 (discussing the cities' cost arguments, raising concerns with the fiscal impacts of adopting the 1,4-dioxane numeric standards, adopting the cities' arguments that the agency's use of the narrative standard as an economic baseline was improper); *id.* at 1:45:28–1:45:52 ("The costs are massive [] no matter how you look at it for the [] treatment plants…I think we owe it to them…to make sure we get this rule right."). DEQ's fiscal analysis is reviewed by the North Carolina Office of State Budget and Management, not the EMC. Moreover, DEQ and the EMC must set water quality standards based on sound scientific rationale, that "reflect[s] the latest scientific knowledge." 33 U.S.C. § 1314(a)(1); *see also* 40 C.F.R. § 131.11(a)(1). Standards must protect the designated uses of North Carolina's rivers, streams, and lakes—whether those waters are used for fishing, swimming, or drinking water. 40 C.F.R. § 131.11(a)(1). Cost concerns are not a valid basis for arbitrarily weakening water quality standards.

[42] *See, e.g.*, EMC, March Water Quality Committee Recording, *supra* note 41, at 1:16:52–1:24:08 (questioning EPA directive to update the bioaccumulation factor used in developing numeric criteria for 1,4-dioxane); *id.* at 1:44:21–1:45:23 ("I would comment that the sound scientific rationale requirement is [] a challenge, I think. We are relying on all kinds of EPA numbers and um this is the same EPA that changed the nationwide requirements for lead in drinking water based solely on the research of Dr. Herbert Needleman whose research was totally panned because it turned out he falsified all his data….This is the same EPA that fed people diesel fumes right up the road in RTP….There's recently published reports of top tier peer-reviewed journals that find almost 50 percent of those studies cannot be replicated and / or the data were bogus….As far as 1,4-dioxane goes, I think we need to do a lot more homework before we put these standards into a rule."); N.C. Env't Mgmt. Comm'n, Water Quality Committee, YOUTUBE (Apr. 4, 2024), at 1:05:08–1:06:01, https://www.youtube.com/watch?v=_nuBFXW2IqI&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=12 (questioning EPA's recommendations for calculating 1,4-dioxane numeric standards because the studies are not "promulgated in rule…they have not had cost numbers done behind them); *id.* at 1:06:16–1:06:50 (Commissioner Ellison stating that the EPA studies relied on by DEQ were "questionable, to be charitable" and later stating that "there can be a different of opinion in what the EPA considers sound science and what others might consider sound science").

[43] *See* N.C. Env't Mgmt. Comm'n, Water Quality Committee, YOUTUBE (May 8, 2024), at 2:17:01–2:18:23 https://www.youtube.com/watch?v=FtXZSa4Me5k&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=10 [hereinafter "EMC, May Water Quality Committee Recording"] (Commissioner Ellison asking "are there any new epidemiological studies on 1,4-dioxane in humans" and continuing to push when Assistant Secretary Masemore tried to explain EPA and leading scientific organizations do not expose humans to cancer causing chemicals).

[44] Letter from Sean Sullivan, Willams Mullen, to Members of the N.C. Env't Mgmt. Comm'n (May 1, 2024), attached hereto as Exhibit 12.

71. At the time of this petition, DEQ has spent time and resources *over three years* trying to adopt numeric water quality standards for 1,4-dioxane—a cancer-causing chemical present in North Carolina's drinking water supplies. First, the RRC unlawfully tossed a ten-month-long rulemaking finalized by the now-ousted EMC. And now, the supermajority-controlled EMC has spent more than seven months holding hostage DEQ's 2023-2025 Triennial Review (including the 1,4-dioxane standards).

72. Amidst this regulatory capture, the legislature enacted additional laws in October 2023 that have further hindered DEQ from controlling 1,4-dioxane. Section 8 of Session Law 2023-137 required the EMC to study the narrative water quality standard for toxic substances, including evaluating the economic impact of applying the standard.[45] Section 9 of the same bill required DEQ to "prepare a human health risk assessment of 1,4-dioxane in drinking water," instructed the North Carolina Collaboratory to evaluate 1,4-dioxane treatment technology, and directed DEQ to report its cost-benefit analysis of the technical and economic feasibility of different treatment technologies to a joint legislative committee.

73. The Water Quality Committee of the supermajority-controlled EMC has used these studies as additional excuses to avoid taking action on the 1,4-dioxane numeric water quality standards, stating that the EMC cannot act without first receiving and scrutinizing the three reports required by the bill.[46]

---

[45] N.C. Sess. Law 2023-137 (Oct. 10, 2023), provided hereto as Exhibit 13.

[46] *See, e.g.*, EMC, March Water Quality Committee Recording, *supra* note 41, at 2:01:45–2:02:29 (a commissioner, believed to be Chair Solomon, explaining that the committee does not have the narrative standard report or the 1,4-dioxane reports ordered by the legislature and should not move forward); *id.* at 2:13:15–2:13:47 (same commissioner again explaining that because the committee has not "even heard the narrative standards report," the committee should not move forward).

D. The EMC is blocking DEQ from adopting numeric water quality standards for PFAS.

74. At the same time the supermajority-controlled EMC prohibited DEQ from adopting numeric water quality standards for 1,4-dioxane, it also stalled numeric water quality standards for PFAS, obstructing the agency's ability to "[c]reate and maintain the legal authority…to carry out all aspects of the State NPDES program."

75. PFAS are a group of 15,000 man-made chemicals that pose a significant threat to human health at extremely low levels. Two of the most studied PFAS—perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS")—have been shown to cause developmental effects in fetuses, kidney and testicular cancer, liver malfunction, hypothyroidism, reduced fertility, delayed puberty, and low birth weight and size, among other things. Epidemiological studies show that many of the negative health impacts associated with PFOA and PFOS can result from exposure to other PFAS. Recognizing the harms caused by these chemicals, EPA has established drinking water standards for PFOA and PFOS at 4 parts per trillion ("ppt"), with a maximum contaminant level goal of 0 ppt, noting that no level of exposure to these chemicals is safe. EPA has also set drinking water standards for several other PFAS.

76. PFAS pollution has devastated the State of North Carolina. In 2017, it was revealed that Chemours, a chemical manufacturing company, and its predecessor DuPont had been releasing PFAS into the air, groundwater, and surface water in the Cape Fear River watershed for decades—poisoning the drinking water supplies for more than 500,000 North Carolinians. People drinking water from the Cape Fear River downstream of the facility had been exposed to PFAS levels as high as 130,000 ppt. Chemours' groundwater pollution has also spread across nine counties, contaminating more than

9,000 private drinking water wells.[47] To date, PFAS have been recorded in private drinking water wells as high as 8,438 ppt.[48] As a result of Chemours' pollution, families are scared to drink their water, parents are afraid to bathe their children, farmers are worried for the safety of their crops and livestock, and utilities have been forced to invest hundreds of millions of dollars to work toward protecting their customers.

77. Unfortunately, Chemours is not the only source of PFAS in North Carolina. DEQ suspects as many as 616 industrial dischargers, municipal wastewater treatment plants, and significant industrial users (which release wastewater into wastewater treatment plants) are releasing PFAS across the state.[49] As a result, an estimated 3.5 million North Carolinians have PFAS in their drinking water at concentrations exceeding EPA's drinking water standards.[50]

78. While the drinking water impacts are extreme, PFAS have also been recorded in fish that many North Carolinians catch for subsistence and recreation. In 2023, after documenting extensive PFAS contamination of fish in the Middle and Lower Cape Fear River, the North Carolina Department of Health and Human Services issued strict fish consumption advisories for eight fish species.[51]

---

[47] *See* Chemours, Consent Order Progress Report For First Quarter 2024 (Apr. 30, 2024), https://perma.cc/3P9R-L6Y4.

[48] *See* Geosyntec, Four Counties Private Well Sampling Monthly Report – June 2024 (July 15, 2024), at 7, https://perma.cc/E9HW-VKMW.

[49] N.C. Dep't of Env't Quality, Proposed Surface Water Quality PFAS Standards, Implementation Plan and Regulatory Impact Analysis (July 10, 2024), at slide 23, https://perma.cc/6CHE-EWGZ.

[50] *Id.* at slide 7; N.C. Dep't of Env't Quality, Fiscal Note for Adoption Amendment of 15A NCAC 02B .0200 and 15A NCAC 02B .0400 (June 26, 2024), at 9, at https://perma.cc/A5K9-QJW4.

[51] *NCDHHS Recommends Limiting Fish Consumption*, *supra* note 2 (recommending that vulnerable populations limit their consumption of American Shad, Blue Catfish, and Channel Catfish to no more than one meal per year across all species, while cautioning that the same people should not eat Bluegill Flathead Catfish, Largemouth Bass, Striped Bass, and Redear).

79. Given that PFAS have already devastated so many North Carolina communities, DEQ has made it a priority to address the toxic chemicals through the adoption of numeric water quality standards. DEQ Secretary Elizabeth Biser explained, "[a]bsent DEQ's proposed rulemaking actions, the entire burden of complying with the new drinking water standards," recently finalized by EPA, "will fall to public water system customers.... The key question at hand is whether everyday North Carolinians should bear the entire burden of cleaning up PFAS contamination (while also dealing with the health impacts), or whether businesses releasing PFAS into the environment should also bear responsibility."[52]

80. DEQ's effort to address PFAS contamination, however, is being blocked by the supermajority-controlled EMC.

81. In July 2023, DEQ previewed to the now-ousted EMC that it would propose water quality standards for eight PFAS commonly found in North Carolina's waterways. The commissioners at the time enthusiastically supported the agency's efforts and welcomed a more detailed presentation on the proposed standards.

82. In November 2023, DEQ again discussed PFAS water quality standards, this time presenting to the new supermajority-controlled EMC. At the meeting, DEQ Assistant Secretary Sushma Masemore emphasized how important PFAS standards are for protecting the health of North Carolinians. Assistant Secretary Masemore made clear that DEQ wanted numeric standards so it could more efficiently include PFAS limits in NPDES permits. At the time, DEQ hoped that the full EMC would vote on finalizing the

[52] Letter from Elizabeth Biser, N.C. Dep't of Env't Quality, to Gary Salamido, N.C. Chamber of Commerce (May 1, 2024), at 2, attached hereto as Exhibit 14.

PFAS standards in November 2024, so that DEQ could complete the rulemaking process and begin using them to protect the drinking water sources for over 9 million North Carolinians.

83. Over the next eight months, DEQ continued to discuss the PFAS surface water quality standards with the EMC Water Quality Committee.

84. At the same time, representatives of industrial polluters began lobbying the EMC. The North Carolina Chamber of Commerce urged the supermajority-controlled EMC "to delay any action" on PFAS standards until it received "greater clarity on the benefits and cost of regulation."[53] Similarly, the North Carolina Manufacturers Association copied the EMC on a letter to DEQ where the Association questioned the agency's use of EPA data in setting water quality standards and stated that the costs associated with complying with the standards "will place NC manufacturing at a significant competitive disadvantage."[54]

85. Secretary Biser responded to the Chamber's demands by making clear that "it is the state's responsibility to implement and enforce the Clean Water Act," and that establishing standards "is part of DEQ's authority under state and federal law."[55] She wrote separately to the EMC emphasizing how many times DEQ has presented the PFAS standards to the EMC and explaining that "it is the State of North Carolina's responsibility to address [PFAS] discharges" into drinking water sources.[56]

---

[53] Letter from Gary Salamido, N.C. Chamber of Commerce, to Secretary Biser, N.C. Dep't of Env't Quality (Apr. 22, 2024), at 2, attached hereto as Exhibit 15.

[54] Letter from Kenneth Lin, N.C. Manufacturers Alliance, to Julie Grzyb, N.C. Dep't of Env't Quality (May 4, 2024), at 5, attached hereto as Exhibit 16.

[55] *See* Letter from Elizabeth Biser, *supra* note 52, at 1–2.

[56] Letter from Elizabeth Biser, N.C. Dep't of Env't Quality, to J.D. Solomon, N.C. Env't Mgmt. Comm'n (May 1, 2024), at 1, attached hereto as Exhibit 17.

86. Before the July 2024 EMC meeting, Commissioner Steve Keen (newly re-appointed by the legislature and new chair of the Water Quality Committee) and the Director of DWR, Richard Rogers, exchanged emails regarding the proposed agenda. Commissioner Keen insisted that PFAS standards be prevented from moving forward. Specifically, Commissioner Keen demanded that DEQ's presentation remain an informational (rather than action) item on the committee's agenda, and that as a result, the Water Quality Committee would not vote to move forward with the rulemaking.[57] Director Rogers pushed back, emphasizing that DEQ will have completed the rulemaking package and will ask that the Committee vote on the rule during the upcoming meeting.[58]

87. On July 10, 2024, DEQ explicitly requested that the Water Quality Committee move the PFAS standards forward to the full EMC, emphasizing the need for urgent control of PFAS contamination. DEQ's presentation also laid out how many times the agency had presented on the proposed water quality standards to the Water Quality Committee and the full EMC.

88. But the Water Quality Committee again side-stepped DEQ's efforts with numerous irrelevant questions and demands. For instance, Commissioner Michael Ellison, a new legislative appointee, asked the following questions:

a. "How long have PFAS generally been in use?"
b. "How many people have died in North Carolina from PFAS poisoning?"
c. "Has anyone ever died of an illness that was directly attributable to PFAS as confirmed by postmortem examinations?"

---

[57] *See* Emails between Richard Rogers, N.C. Dep't of Env't Quality, and Steve Keen, N.C. Env't Mgmt. Comm'n (Jun 2024), attached hereto as Exhibit 18.

[58] Indeed, DEQ did make the rulemaking package available to the Commissioners two weeks prior to the Water Quality Committee meeting. *See* Email from Richard Rogers, N.C. Dep't of Env't Quality, to Steve Keen and Michael Ellison, N.C. Env't Mgmt. Comm'n (June 26, 2024), https://perma.cc/9ZPS-M2C4.

d. "Of the [significant industrial users], do any of them make critical medical devices where PFAS are like the only way to make that medical device properly functional?"
e. "Did [the State] use the real fish tissue concentrations from [the State's] fish monitoring in developing the fish tissue consumption part of your limits?"
f. "Has there been a mass balance established for ground-surface water interactions and PFAS contamination?"
g. "What are the primary [groundwater] aquifers that are contaminated?"[59]

When DEQ attempted to explain the scope of the rulemaking and provide answers to his questions, Commissioner Ellison insisted that the agency put more information on those irrelevant topics in the regulatory impact analysis before the rulemaking could progress.

89. Assistant Secretary Masemore implored the EMC to focus on what is at stake if North Carolina is left without PFAS standards, highlighting that DEQ has prioritized PFAS "for over two years," as she noted, "We are asking the EMC to accept the health science showing these eight PFAS are harmful to human health." Ultimately, she asked, "What does North Carolina believe that they want to do to protect our public?... We have articulated here the best way to acknowledge the cost and the impact to the regulated community. Because in the absence of that, the ratepayers—the everyday North Carolinian—is going to have to pay…to clean up that drinking water. They may have to pay for that through their health outcomes."[60]

90. Nevertheless, the Water Quality Committee voted *again* to defer movement on the PFAS standards. Commissioner Keen closed with the following

[59] N.C. Env't Mgmt. Comm'n, Water Quality Committee, YOUTUBE (July 10, 2024), at 1:10:26–1:36:31, https://www.youtube.com/watch?v=Ynku7iCfFqc&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=5.

[60] *Id.* at 1:02:42–1:05:42.

remark: "once you set a surface water standard, it's extremely difficult to get the EPA to allow you to adopt something less strict."[61]

91. At the time of this petition, DEQ has spent nearly a year trying to convince the supermajority-controlled EMC Water Quality Committee to allow the rulemaking process for PFAS standards to begin. After months of extensive and repetitive DEQ presentations and reports on the costs, benefits, and dire need for PFAS water quality standards, the EMC has continued to delay even the first step of the rulemaking—condemning North Carolinians to continued exposure to toxic chemical pollution.

E. The EMC has previewed plans to take NPDES permitting authority from DEQ experts.

92. The supermajority-controlled EMC further intends to upend the roles of DEQ and the EMC by taking permitting authority away from agency experts and relegating it to partisan commissioners. Again, this would prevent DEQ from "[c]reat[ing] and maintain[ing] the legal authority…to carry out all aspects of the State NPDES program," as the MOA requires.

93. On July 11, 2024, the day after the EMC Water Quality Committee again blocked DEQ from moving forward with water quality standards for toxic chemicals, the full EMC announced its plans to assume permitting authority over NPDES permits when permittees are displeased with DEQ's proposed permits.[62]

---

[61] *Id.* at 2:46:43–2:46:50.

[62] N.C. Env't Mgmt. Comm'n, Full Commission Meeting Recording Part 2, YOUTUBE (July 11, 2024), at 58:10–1:03:45, https://www.youtube.com/watch?v=r_vdoXCNHLc&list=PLsBpAjvXXIH0YXv94qvh-fsvd4lSXSaNA&index=1.

94. Newly-appointed EMC Chair J.D. Solomon expressed concern that water quality permits issued by DEQ are overly stringent and bemoaned that business interests must resort to the legislature or courts to seek relief for permits they do not like. He suggested that even though the EMC had delegated permitting authority to DWR, North Carolina law anticipated that the EMC would issue permits, so the EMC could take that authority back.

95. Chair Solomon then invited three members of the regulated community to "frame" the concern with DEQ-issued permits. Each speaker expressed that the EMC should take over specific permits so that they, or their members, would have the benefit of weaker permits.

96. A representative of the North Carolina Farm Bureau Federation complained about DEQ's efforts to strengthen the NPDES General Permit NCG530000, the permit for discharges from seafood packing and rinsing, aquatic animal operations, and similar waste—efforts that have since been shut down by the North Carolina legislature as a result of his organization's lobbying efforts (as outlined below in Section IV).

97. The city of Greensboro's water reclamation manager then expressed grievances regarding DEQ's efforts to limit Greensboro's 1,4-dioxane pollution. As discussed in paragraphs 53–54 above, DEQ has identified Greensboro as one of three largest 1,4-dioxane sources in North Carolina and, for years, has been trying to update the city's NPDES permit for its wastewater treatment plant, NC0047384, to include 1,4-dioxane limits. Greensboro's representative explained that the city was unhappy with the

limits it expected to receive in its NPDES permit—even after DEQ proposed significantly less stringent limits than included in an earlier draft, which the city can easily meet.[63]

98. General Counsel for the North Carolina Water Quality Association advocated for the EMC to establish "a very abbreviated" process to conduct discretionary review of an NPDES permit when requested by a discharger. He explained that the EMC should use the abbreviated process to review DEQ's work and take control over controversial permits, permits raising issues of first impression, and permits where applicants feel they were not heard by the agency, stating that the abbreviated process would "level the playing field."

99. Chair Solomon then announced that the EMC's NPDES Permit Committee, which has not met on a regular basis for years, will work on this issue and will report back at the November 2024 EMC meeting.

100. The EMC commissioners are not permitting experts and most do not have the expertise or experience necessary for setting permit limits that protect water quality. As evidenced by the EMC's July 11, 2024, meeting, commissioners are further subject to, and swayed by, political pressure that could influence permitting decisions. Allowing begrudged permittees to withdraw their permit from DEQ's oversight and place it in the hands of inexperienced, supermajority-controlled commissioners would prevent DEQ from exercising its authority to issue NPDES permits that protect North Carolinians and meet its obligations under the MOA, 40 C.F.R. part 123, and the Clean Water Act.

[63] *See* Greensboro, Year Three Report, *supra* note 38, at 26.

F. The legislative supermajority's control over the EMC and RRC is preventing the State from complying with the MOA and the Clean Water Act.

101. The legislative supermajority's takeover of the EMC and control of the RRC has limited the authority of DEQ in such a way that the State can no longer adopt water quality standards or issue NPDES permits to protect North Carolinians or meet its obligations under the MOA, 40 C.F.R. part 123, and the Clean Water Act.

102. First, the legislative supermajority's control over the EMC and RRC prevents North Carolina from "[c]reat[ing] and maintain[ing] the legal authority . . . required to carry out all aspects of the State NPDES program" in violation of Section III(A)(1) of the MOA.

103. Second, the legislature's capture of the EMC and RRC violates Section II(2) of the MOA because it occurred without securing EPA's approval of: (1) the "new division of responsibilities among the agencies involved" (that is, a new division of responsibilities between the EMC and DEQ), and (2) the "transfer [of] all or any part of any program from the approved State agency to any other State agency (that is, transfer from DEQ to the RRC). Likewise, it also violates Section III(A)(3) to the extent that the legislature did not follow the MOA's procedures for submitting those changes in the NPDES program to EPA for approval.

104. Third, the legislature's control of the EMC and RRC is continually violating Section III(A)(4) of the MOA every day that it prevents DEQ from "[p]rocess[ing] in a timely manner and proposing to issue, reissue, modify, terminate, or deny State NPDES permits to … [i]ndustrial [and] commercial … dischargers" and "[d]omestic wastewater treatment facilities." For instance, the control of the EMC and

RRC is preventing, at a minimum, the timely processing and issuing of NPDES permits with appropriate limits for known sources of PFAS and 1,4-dioxane.

105. Finally, the legislative supermajority's control over the EMC and RRC further prevents North Carolina from developing and adopting water quality standards for inclusion in NPDES permits that protect public water supplies, fish and wildlife, recreation, and other purposes as required by North Carolina's Water Quality laws, N.C. Gen. Stat. § 143.214.1, and the Clean Water Act, 40 C.F.R. Part 131.

106. Because of the myriad ways in which the legislative control of the EMC and the RRC creates violations of the Clean Water Act's implementing regulations and the MOA, EPA should withdraw its authorization of North Carolina's NPDES program unless these issues are resolved. Resolution of these issues should include: restoring the governor's control of executive branch agencies through appointment and removal power, removing environmental rules from the purview of the RRC, restoring the duly adopted 2022 1,4-dioxane standards by publishing them in the North Carolina Administrative Code without DEQ having to perform a new rulemaking process, and moving forward with a Triennial Review that includes updated standards for PFAS and 1,4-dioxane and an update to the narrative Toxic Substances Standard.

II. North Carolina's Office of Administrative Hearings is preventing the State from complying with the MOA and the Clean Water Act.

107. In 2011, the North Carolina legislature modified state law to grant the Office of Administrative Hearings ("OAH") final decision-making authority for NPDES permits.[64] Prior to this change, administrative law judges in OAH would hear contested

[64] N.C. Session Law 2011-398 § 21 (July 25, 2011).

cases and offer recommended decisions that would be reviewed by the EMC before being finalized. As a result of the legislature's actions, an administrative law judge—who is not a member of the executive agency, who does not necessarily have scientific expertise or experience in NPDES permitting, and who does not preside over a forum that invites or even accepts input from the public—becomes the final agency decisionmaker.[65]

108. This change violated the MOA in several ways. First, the MOA delegates NPDES permitting authority to DEQ and the EMC, not to OAH. By transferring permitting authority to OAH without following the procedure in the MOA or obtaining prior approval of EPA, the legislature violated Section II(1) and II(2) of the MOA.

109. The transfer of authority also violates the public participation provisions of Section IV(D) of the MOA. OAH does not allow members of the public to submit comments or otherwise participate in a contested case without becoming a party to the case. In practice, this cuts the public and EPA out of the permitting process.

110. First, when a discharger is unhappy with its permit and decides to challenge its permit in OAH, affected members of the public and others are not notified. This includes those who have submitted public comments and spoken at public hearings, and therefore have a clear stake and interest in the outcome of the permit. They may have been satisfied that the final permit would protect them and their families and/or their businesses and customers. Happy with the permit and unaware of any permit challenge, they would have no reason to intervene in a permit challenge to protect their interests. The reality is that most affected community members and other parties will not learn of

[65] Additionally, the chief administrative law judge serves as the director of OAH and therefore supervises the RRC, whose actions to undermine DEQ's administration of the NPDES program, are described above in Sections I(B), (C). N.C. Gen. Stat. §§ 7A-751, 143B-30.1.

ongoing permit challenges in time to intervene. By the time any administrative law judge has made a final permitting decision (which also is not broadly communicated to the public), any attempts to get involved in an appeal may be shut down.

111. Moreover, it is not fair or feasible for *every* party who could potentially be affected by a change in *every* permit to garner the resources to intervene in *every* contested case hearing. Even drinking water utilities that provide water to hundreds of thousands of North Carolinians lack the resources to fully litigate all permit challenges brought by upstream polluters who are displeased with their permits.

112. By excluding the public from participating effectively in permitting decisions, the legislature's creation of OAH violates Section IV(D)(6) of the MOA.

113. Commenters raised these concerns to EPA after enactment of N.C. Session Law 2011-398 § 21.[66] At that time, EPA was concerned that this drastic delegation of authority to OAH altered the implementation of federal environmental programs by changing the roles of DEQ and OAH's administrative law judges.[67] After further communications with OAH and DEQ,[68] EPA accepted the shift in roles but cautioned that its acceptance was conditional. EPA stated that "should the application of Senate Bill

---

[66] *See, e.g.*, Letter from Derb Carter and Julie Youngman, S. Env't L. Ctr., to Gwendolyn Fleming, U.S. Env't Prot. Agency (Jan. 30, 2013), attached hereto as Exhibit 19. In addition, the North Carolina Attorney's General's office has issued several advisory opinions regarding a prior bill that would have accomplished the same result that concluded, "transferring final decision-making power . . . to an administrative law judge" would likely be "unconstitutional" because it would violate separation of powers principles by giving judicial powers to an executive branch entity. N.C. Attorney General Advisory Opinion In re Separation of Powers: House Bill 968; State Personnel Act (July 6, 1999), attached hereto as Exhibit 20.

[67] Letter from A. Stanley Meiburg, Deputy Regional Administrator, U.S. Env't Prot. Agency Region 4, to Dee Freeman, Secretary, N,C. Dept. of Env. and Nat. Res. (June 1, 2011) (expressing similar concerns with another 2011 bill, H623 § 4 that contained identical provisions), attached hereto as Exhibit 21.

[68] See Letter from Julian Mann, Office of Admin. Hearings and Dee Freeman, N.C. Dep't of Env't Quality, to Mary Wilkes, U.S. Env't Prot. Agency (July 19, 2012), attached hereto as Exhibit 22.

781 (N.C. Sess. Law 2011-398) in the future result in changes to the roles and responsibilities of OAH and DENR with regard to permit/enforcement issuing authority; or should EPA's statutory and regulatory permitting role, in fact be impacted," the MOA would need to be revisited.[69]

114. The concerns of EPA and others have manifested. Over the past few years, administrative law judges in OAH have prohibited the agency from carrying out DEQ's responsibilities under the NPDES program, disrupting DEQ's role and ability to execute the program as required by the MOA and the Clean Water Act.

115. For instance, the chief administrative law judge recently ruled against DEQ in a permit challenge in a way that could strip DEQ of its ability to use narrative water quality standards to set limits in *all* NPDES permits. In August 2023, DEQ issued an NPDES permit to the city of Asheboro—one of the leading sources of 1,4-dioxane pollution in North Carolina—for its municipal wastewater treatment plant. The permit contained limits for 1,4-dioxane based on North Carolina's EPA-approved narrative Toxic Substances Standard.[70] The permit also included a five-year compliance schedule, affording Asheboro copious time to comply with the permit limits. The permit further detailed pretreatment tools that the city should use to ensure that the burden of addressing the 1,4-dioxane would fall on Asheboro's industrial customers, rather than on Asheboro residential wastewater ratepayers or people living in downstream communities.[71]

---

[69] Letter from Mark Wilkes, U.S. Env't Prot. Agency, to Dee Freeman, N.C. Dep't of Env't Quality and Julian Mann, N.C. Office of Admin. Hearings (Aug. 9, 2012), attached hereto as Exhibit 23.

[70] *See* N.C. Dep't of Env't Quality, Final NPDES Permit Renewal Permit NC0026123 (Aug. 21, 2023), https://perma.cc/3HKN-HQUS; N.C. Dep't of Env't Quality, Review Fact Sheet NPDES Permit No. NC0026123 (Aug. 29, 2023), https://perma.cc/E48K-JWWZ.

[71] It is worth noting that Asheboro had begun investigations into its industrial users and had already identified the leading sources of 1,4-dioxane. *See, e.g.*, Email from Sarah Laughlin, City of Asheboro to

Asheboro nevertheless challenged the permit in OAH, arguing that DEQ did not have the authority to set limits based on narrative water quality standards and instead must go through the formal rulemaking process (the same rulemaking process other municipal sources of 1,4-dioxane had lobbied to stop, as described above in Section I(C)).

116. The chief administrative law judge allowed the cities of Greensboro and Reidsville (two other significant sources of 1,4-dioxane) to also challenge Asheboro's permit, even though the cities were not affected by Asheboro's permit terms and their petitions were filed *seven months* past the statutory deadline.[72]

117. Water utilities downstream of Asheboro participated as *amici curiae* in support of DEQ and the 1,4-dioxane limits the agency imposed in Asheboro's permit. In their brief, they explained, "This case is about the Upstream Dischargers' . . . wish to make 1,4-dioxane someone else's problem. They want to allow their wastewater customers to dispose of their 1,4-dioxane by releasing it into the Upstream Dischargers' sewer systems . . . [and] into the Cape Fear River Basin." They continued, "there are real people who live downstream of the Upstream Dischargers.... Indeed, the Downstream Intervenors serve close to 750,000 of those real people, and those real people should not

---

Mark Pederson, StarPet Inc. (Dec. 8, 2022) https://perma.cc/RD3K-LKS2, (explaining that once the city got a permit with limits, it would be necessary to amend StarPet's industrial user permit); Email from Sarah Laughlin, City of Asheboro, to Kaline Davis, Covanta (Dec. 8, 2022), https://perma.cc/5VCU-CJHW (same); Email from Sarah Laughlin, City of Asheboro, to Susan Harrison, WasteManagement (Dec. 8, 2022), https://perma.cc/QH5J-9KFR (conveying information about Asheboro's permit and explaining "it will affect [the landfill] also").

[72] In earlier filings, Greensboro had sought to extend the scope of the case to address PFAS, previewing its goal of prohibiting the agency from controlling all toxic chemicals. *See* Petitioner City of Asheboro's and Intervenor-Petitioner City of Greensboro's Memorandum of Law in Support of Their Joint Motion for Summary Judgment, *City of Asheboro v. N.C. Dep't of Env't Quality*, 23 EHR 04121 (N.C. Office of Admin. Hearings, Jan. 8, 2024), at 3, https://perma.cc/L5ER-J2X7 (asking the administrative law judge to take judicial notice that PFAS are a concern and that DEQ would likely seek to control the group of chemicals in the future and asked the administrative law judge to "get it right now").

have to bear the burden of Upstream Dischargers' refusal to abide by the clear language of federal and state law any longer."[73]

118. Ultimately, the chief administrative law judge ruled for Asheboro in June 2024 and ordered the city to submit a proposed order granting the city's motion for summary judgment. While the final written decision has yet to be issued, Asheboro's proposed order states that the agency cannot issue permit limits based on the EPA-approved narrative Toxic Substances Standard and must instead adopt a numeric water quality standard through rulemaking, which has repeatedly been stymied by the supermajority-controlled EMC and RRC. The proposed order states that the EPA-approved narrative standard is "VOID AND UNENFORCEABLE."

119. This decision, imposed by OAH and not by the agency to whom EPA delegated authority, could have broad-reaching implications. DEQ relies upon the EPA-approved narrative Toxic Substances Standard to control dozens of harmful pollutants that do not have numeric water quality standards. Stripping DEQ of the authority to set limits for these pollutants overrides its application of EPA-approved water quality standards; doing so denies the agency a critical tool necessary to implement the NPDES program and to keep North Carolinians safe from toxic chemicals. OAH is therefore poised to eliminate a key tenet of the NPDES program, impacting the agency's ability to carry out its responsibilities under the Clean Water Act and the MOA.[74]

---

[73] Amicus Brief of the Downstream Intervenors, *City of Asheboro v. N.C. Dep't of Env't Quality*, 23 EHR 04121 (N.C. Office of Admin. Hearings, Jan. 16, 2024), at 1–2, https://perma.cc/PU95-XPU2.

[74] *See* 40 C.F.R. §§ 122.44(d) (explaining NPDES permits must "[a]chieve water quality standards…including State narrative criteria for water quality), 123.25 (applying requirements to State permitting programs); MOA § III(A)(10).

120. Recently, the chief administrative law judge has also been ordering DEQ and other parties to submit briefs on new and separate legal issues not raised by any party in the case. For instance, in Asheboro's recent NPDES permit challenge, the chief administrative law judge twice ordered the parties to present supplemental briefing on issues that none of the parties had raised, tying up significant agency resources and demonstrating an apparent lack of expertise and/or familiarity with NPDES permitting. In another recent case challenging a buffer authorization issued by DEQ to a mining operation, the administrative law judge required the parties to brief a legal issue raised *sua sponte* and then ruled against DEQ based solely on the issue he had fabricated.[75]

121. The chief administrative law judge has also ordered DEQ to pay crippling attorneys' fees to permittees, including fees accumulated because of his own demand for briefing on new, irrelevant legal issues. In two recent cases, the chief administrative law judge ordered DEQ to pay nearly *one million dollars* in attorneys' fees combined.[76] Under North Carolina law, there is a high bar for ordering an agency to pay attorneys' fees,[77] and these instances are reportedly the first time the agency has been ordered to pay such fees. Not only does this practice harm an agency that is already suffering from the legislature systematically cutting its budget, as described in Section V below, it represents an emerging pattern of administrative law judges penalizing DEQ for doing its

---

[75] *Umstead Coalition v. N.C. Dep't of Env't Quality*, 22 EHR 01337 (N.C. Office of Admin. Hearings, May 10, 2023).

[76] *Wake Stone Corp. v. N.C. Dep't of Env't Quality*, 22 EHR 00952 (N.C. Office of Admin. Hearings, Aug. 11, 2023); *LDI Shallotte v. N.C. Dep't of Env't Quality*, 22 EHR 01468 (N.C. Office of Admin. Hearings, Nov. 16, 2022).

[77] N.C. Gen. Stat. § 150B-33(b)(11) (allowing an administrative law judge to assess "reasonable attorneys' fees" against an agency only upon a finding that the agency "has *substantially prejudiced* the petitioner's rights *and* has acted *arbitrarily or capriciously* or," in human resources cases, upon a finding of "discrimination, harassment, or [justification for] reinstatement or back pay") (emphasis added).

job. This effectively paralyzes the agency from issuing those permits that are most likely to be challenged by permittees and from defending those permits in OAH.

122. In sum, by re-assigning final permitting decision authority to OAH, the legislature has altered the roles of the NPDES program, disrupted the public's ability to participate in final NPDES permitting decisions and judicial review processes, and denied the agency the ability to issue NPDES permits that protect North Carolinians and meet its obligations under the MOA, 40 C.F.R. part 123, and the Clean Water Act.

123. The legislature's transfer of final permitting authority to OAH and the subsequent abuses of power by OAH administrative law judges are even more egregious when combined with related MOA violations described in Sections I(B), (C) above. The RRC (appointed by the legislature, housed in OAH, and directed by the chief administrative law judge)[78] has prevented DEQ from adopting numeric water quality standards for 1,4-dioxane. At the same time, the legislature and the supermajority-controlled EMC are both blocking numeric water quality standards for both PFAS and 1,4-dioxane. All the while, the chief administrative law judge is limiting the agency's ability to use the narrative water quality standard for toxic substances and effectively penalizing DEQ for doing its job. In trying to protect North Carolinians from toxic chemicals and meet its obligations under the MOA, DEQ is being blocked at every turn.

124. In light of these violations, EPA should withdraw its authorization of North Carolina's NPDES program unless these issues are resolved by, among other

[78] As explained above in footnote 65, the chief administrative law judge serves as the director of OAH and supervises the RRC.

things, repealing N.C. Sess. Law 2011-398 § 21 and restoring final decision-making authority to DEQ and the EMC.

III. The legislature enacted laws that circumvent DEQ's authority over NPDES permits for discharges into small creeks and streams throughout the State.

125. Over the past year, the legislature enacted Session Law 2023-134 and Session Law 2024-44, which remove water quality protections for low- and zero-flow streams by requiring DEQ and EMC to promulgate regulations that prescribe lax permit limits. These laws violate Section 402 of the Clean Water Act, federal regulations, and the MOA in multiple ways.

126. These laws further represent a trend in North Carolina, where the legislature dictates the terms under which discharges occur, usurping the role of rulemaking and permitting from DEQ—the agency to whom EPA delegated permitting authority, and the agency with the expertise and knowledge to ensure that permits are adequately protective of North Carolina waters.[79]

127. The legislature enacted Session Law 2023-134, the State's 2023 Appropriations Act, in July 2023. Section 12.9 of the Act provides that DWR and DEQ must "authorize permitted discharges of highly treated domestic wastewater to surface waters of the State, including wetlands, perennial streams, and unnamed tributaries of named and classified streams where the 7Q10 flow or 30Q2 flow of the receiving waterbody is estimated to be low flow or zero flow … from wastewater treatment systems capable of meeting" only nine water quality-based effluent limitations, rather than considering all of the State's water quality standards, as required by the Clean Water

[79] *E.g.*, N.C. Gen. Stat. § 143-215.1 (allowing permitting through rules for certain activities, rather than through the application and permitting process approved by EPA in the MOA, possibly in violation of the MOA).

Act and North Carolina's NPDES permitting program. The relevant excerpt of this session law is attached hereto as Exhibit 24.

128. Section 12.9 therefore does away with the State's water quality standards, requiring the EMC to adopt a rule that greenlights pollution into small creeks and streams throughout North Carolina. It allows DEQ to consider only a handful of pollutants—each of which has an effluent limit *predetermined by the legislature*—without consideration of the particular characteristics of the discharge, the discharger, or the receiving waterbody —even though DEQ is the agency with the expertise and scientific knowledge to develop adequately protective permit terms, not the legislature.

129. The law puts streams throughout North Carolina at risk.[80] Even though the permits mandated by the session law could apply to facilities receiving industrial wastewater,[81] it prohibits DEQ from evaluating and setting limits for harmful pollution that might be present in such discharges, including PFAS, 1,4-dioxane, nutrient pollution, contamination from sanitary sewer overflows, and other pollution that could be particularly problematic in small creeks and streams.

130. In November 2023, DEQ notified EPA of its concerns that the law conflicted with "the permitting framework established by the Clean Water Act, EPA's

---

[80] G.L. Giese & Robert R. Mason, Jr., Low-Flow Characteristics of Streams in North Carolina: U.S. Geological Survey Water-Supply Paper 2403 (1993) https://pubs.usgs.gov/wsp/2403/report.pdf (showing state-wide dispersal of low-flow and zero-flow streams that would be affected by N.C. Sess. Law 2023-134 and N.C. Sess. Law 2024-44); J. Curtis Weaver & Benjamin F. Pope, Low-Flow Characteristics and Discharge Profiles for Selected Streams in the Cape Fear River Basin, North Carolina, through 1998 (2001) https://pubs.usgs.gov/wri/wri014094/pdf/report.pdf (same, within Cape Fear River Basin).

[81] The term "domestic wastewater" is defined in the law to include "commercial or light industrial operations." However, even industries that discharge a small amount can be significant sources of toxic chemical pollution. Lisa Sorg, *Burlington finds high levels of 1,4-Dioxane in wastewater, which is headed downstream; Apollo Chemical again named as source*, NC NEWSLINE (Jan. 24, 2024), https://ncnewsline.com/briefs/burlington-finds-high-levels-of-14-dioxane-in-wastewater-which-is-headed-downstream-apollo-chemical-again-named-as-source/.

NPDES regulations 40 CFR Part 122 & 123, other NC statutes and regulations (including EPA-approved water quality standards), and the [MOA]."[82] The letter identified numerous "potential conflicts with legal requirements" and requested that EPA review the legislation and provide a written response.

131. In February 2024, EPA Region 4 notified DEQ that Section 12.9 of Session Law 2023-134 "is not consistent with [North Carolina's] NPDES program requirements."[83] The letter listed several ways that the law runs afoul of North Carolina's obligations under the MOA and the Clean Water Act. EPA stated that the legislation:

a. limits DEQ's ability to develop NPDES permit terms based on Clean Water Act requirements, using its judgment and expertise;

b. modified the State's NPDES program without following the procedures described by law and by the MOA;

c. prevents DEQ from requiring complete permit applications that include specific information mandated by 40 C.F.R. § 122.21;

d. requires DEQ to issue permits with only a narrow set of pre-determined effluent limits rather than using its own expertise and judgment;

e. prevents DEQ from imposing any requirements beyond those few effluent limits listed in the legislation and thus prevents DEQ from carrying out its responsibility to ensure that NPDES permits includes water quality-based

[82] Letter from Sushma Masemore, Assistant Secretary for Environment, N.C. Dep't of Env't Quality, to Cesar Zapata, Acting Director, Water Division, U.S. Env't Prot. Agency Region 4 (Nov. 17, 2023), attached hereto as Exhibit 25.

[83] Letter from Kathlene Butler, Director, Water Division, U.S. Env't Prot. Agency Region 4 to Sushma Masemore, Assistant Secretary for Environment, N.C. Dep't of Env't Quality (Feb. 6, 2024), attached hereto as Exhibit 26.

effluent limits for all pollutants that have reasonable potential to cause or contribute to violations of state water quality standards; and

f. imposes pre-determined effluent limits and thus deprives the public of the opportunity to participate in the permitting process in a meaningful way.

132. Following EPA's notification, the North Carolina General Assembly subsequently enacted Session Law 2024-44 in July 2024 (attached hereto as Exhibit 27), which is substantively the same as the 2023 session law to which EPA objected. The differences in the 2023 and the 2024 laws are immaterial, and Session Law 2024-44 violates the Clean Water Act and the MOA in the same ways outlined by EPA's February 2024 letter.

133. Section 5.1 of Session Law 2024-44 is entitled, "Modernize Wastewater Permitting to Support Environmentally Sound Economic Development." Instead of ordering the EMC to directly adopt the rule described above, the law mandates that DEQ and EMC "develop and submit to [EPA] for USEPA's approval draft rules that establish methodologies and permitting requirements" for the same discharges into the same waters outlined in the 2023 Session Law.

134. Session Law 2024-44 goes on to require that those rules include a provision that the discharge permits will include only eight water quality-based effluent limits—limits that were again pre-determined by the legislature and are virtually identical to the nine pre-determined limits in the 2023 law already rejected by EPA. Under any rule developed pursuant to Session Law 2024-44, just as with the 2023 law, DEQ would be constrained from including effluents limits on pollutants like arsenic, mercury, lead, polychlorinated biphenyls (PCBs), pesticides, herbicides, radioactive substances, 1,4-

dioxane, PFAS, etc.—even if the permit applicant discharged those pollutants at levels that have a reasonable potential to cause or contribute to violations of the State's water quality standards.

135. The 2024 version therefore continues to prevent DEQ from considering and applying all North Carolina water quality standards, violating Section 402 of the Clean Water Act, which requires that NPDES permits "apply, and insure compliance with, ... applicable requirements" prescribed elsewhere in the Act, including by setting effluent limitations necessary to meet the State's water quality standards.[84]

136. Finally, the law requires that the draft rules provide that a permit application will be deemed complete in specific circumstances and that DEQ must approve or deny any permit application within 180 days. This threatens DEQ's ability to comply with the Clean Water Act requirement that the State ensure "that the public ... receive notice of each application for a permit and ... provide an opportunity for public hearing before a ruling on each such application."[85]

137. Session Law 2024-44, signed into effect on July 8, 2024, required DEQ to submit draft rules to EPA by August 1, 2024. Noting the infeasibility of such a demand, DEQ and EMC submitted a Draft Rule Concept to EPA on July 31, 2024, requesting that EPA review the draft language and provide input on whether the amendments would comply with the Clean Water Act and NPDES rules.[86]

---

[84] 33 U.S.C. §§ 1342(b); 1311(b)(1)(C); 40 CFR § 122.44(d).

[85] 33 U.S.C. § 1342(b)(3).

[86] N.C. Env't Mgmt. Comm'n, July EMC Meeting, *supra* note 62, at 30:39–57:10. *see also* Letter from J.D. Solomon, N.C. Env't Mgmt. Comm'n, and Richard Rogers, N.C. Dep't of Env't Quality, to Katie Butler, U.S. Env't Prot. Agency (July 31, 2024), attached hereto as Exhibit 28; N.C. Env't Mgmt. Comm'n, 15A NCAC 02B.0206 Draft Concept Rule Flow Design Criteria for Effluent Limitations (July 31, 2024), attached hereto as Exhibit 29.

138. Because Session Law 2024-44 requires DEQ and EMC to adopt rules to accomplish the same ends as Session Law 2023-134, it suffers from the same infirmities described by EPA in Paragraph 131.

139. Session Law 2024-44 therefore violates Section 402 of the Clean Water Act, federal regulations, and the MOA, which require North Carolina to "create and maintain the legal authority … required to carry out all aspects of the State NPDES program" and to comply with federal regulations in reviewing, drafting, providing public notice, and issuing NPDES permits.

140. Because of the many ways in which Session Law 2024-44 violates federal law, federal regulations, and the MOA, EPA should withdraw its authorization of North Carolina's NPDES program unless these issues are resolved by, among other things, the repeal of Section 5.1 of 2024-44, repeal of N.C. Gen. Stat. § 143-215.1(c8), and suspension of rulemaking pursuant to those laws.

IV. The legislature enacted a law that circumvents DEQ's authority over NPDES permits for discharges from aquaculture facilities.

141. North Carolina Session Law 2023-63 also usurps DEQ's permitting authority by requiring DEQ and the EMC to revert to a prior, less protective version of the NPDES General Permit for Aquaculture and Seafood Packing Facilities. The law thus violates Section 402 of the Clean Water Act, federal regulations, and the MOA, and it is another instance in which the North Carolina legislature dictates the terms of permits and robs DEQ of its authority to protect state waters.

142. In 2021, DEQ adopted a new General Permit for Aquaculture and Seafood Packing Facilities that replaced the 2018 version.[87] From 2017 to 2020, DEQ extensively studied water quality impacts from fish farms and determined that additional protections were needed to safeguard North Carolina waters.[88] The 2021 permit therefore required additional best management practices to protect waters downstream of fish farms and other aquaculture facilities, as well as increased monitoring for temperature, pH, total ammonia nitrogen, total phosphorus, and turbidity. These changes, DEQ determined, would ensure protection of state water quality standards. The agency allowed two years for permitted facilities to come into compliance with the new permit. EPA approved the new permit.

143. The North Carolina legislature then enacted Session Law 2023-63 over the governor's veto in June 2023. Section 14.1 of that law is entitled, "Direct the Environmental Management Commission to Withdraw the 2021 NPDES General Permit for Aquaculture and Revise It to Be Substantively Identical to the Previous General Permit," and it does exactly what its title implies: it requires DEQ and EMC to revert to the outdated and less protective 2018 permit—a permit with pre-determined terms that dischargers, including those represented by the North Carolina Farm Bureau, would find acceptable. The relevant excerpt of this session law is attached hereto as Exhibit 33.

---

[87] NC NPDES General Permit NCG530000 To Discharge from Seafood Packing and Rinsing, Aquatic Animal Operations, and Similarly Designated Wastewaters (Mar. 1, 2018), attached hereto as Exhibit 30.

[88] Letter from Jeaneanne Gettle, Director, Water Division, U.S. Env't Prot. Agency Region 4, to Steven W. Troxler, Commissioner, North Carolina Department of Agriculture and Consumer Services (Jan. 5, 2022) (acknowledging DEQ's fish farm study and mentioning that EPA had worked with DEQ, NC Department of Agriculture, NC Farm Bureau, NC Aquaculture Association, and industry representatives during the development of the 2021 permit), attached hereto as Exhibit 31; NC NPDES General Permit NCG530000 To Discharge from Seafood Packing and Rinsing, Aquatic Animal Operations, and Similarly Designated Wastewaters (Dec. 1, 2021), attached hereto as Exhibit 32.

144. DEQ acted as required by Session Law 2023-63 and submitted a draft permit to EPA that essentially reverts to the 2018 permit conditions. EPA Region 4 responded to DEQ in a letter dated November 15, 2023, stating that "EPA has significant concerns that the substantiative terms of the draft modification to the NPDES permit do not comply with Clean Water Act requirements … and is potentially subject to EPA objection."[89] The letter outlined preliminary concerns, which EPA reiterated and elaborated in a second letter dated December 15, 2023.[90] Both letters listed several ways that the law and draft permit run afoul of the MOA and the Clean Water Act, including:

a. the procedures followed did not comply with Clean Water Act and its implementing regulations;

b. the draft permit does not ensure compliance with water quality standards as required by 40 CFR 122.44(d);

c. the effluent monitoring is not representative of the monitored activity;

d. the session law and draft permit violate the anti-backsliding requirements of 40 CFR 122.44(I)(1); and

e. there was no cause to modify the existing permit under 40 CFR 122.62.

EPA concluded by requesting "that NCDEQ consider withdrawing the draft permit modification and allowing the current permit to remain in place."

145. The legislature has not repealed Session Law 2023-63, despite EPA's concerns.

---

[89] Letter from Cesar Zapata, Acting Director, Water Division, U.S. Env't Prot. Agency Region 4, to Richard Rogers, Director, N.C. Dep't of Env't Quality Div. of Water Resources (Nov. 15, 2023), attached hereto as Exhibit 34.

[90] Letter from Cesar Zapata, Acting Director, Water Division, U.S. Env't Prot. Agency Region 4, to Richard Rogers, Director, N.C. Dep't of Env't Quality Div. of Water Resources (Dec. 15, 2023), attached hereto as Exhibit 35.

146. Session Law 2023-63 violates Section 402 of the Clean Water Act, federal regulations, and the MOA by:

a. modifying the state's NPDES program without following the procedures described by law and by the MOA;

b. limiting DEQ and DWR's ability to develop NPDES permit terms based on Clean Water Act requirements, using their judgment and expertise;

c. preventing DEQ from requiring complete permit applications that include the specific information required by 40 C.F.R. § 122.21;

d. requiring DEQ to issue a general permit and allow discharges with only a limited set of pre-determined effluent limits rather than using its own expertise and judgment to set terms that will ensure the state's water quality standards are not violated;

e. preventing DEQ from imposing any requirements beyond those effluent limits listed in the legislation and thus preventing DEQ from carrying out its responsibility to ensure that the NPDES permits it issues include water quality based effluent limits for all pollutants that have reasonable potential to cause or contribute to violations of state water quality standards; and

f. imposing pre-determined effluent limits and thus depriving the public of the opportunity to participate in the permitting process in a meaningful way.

147. Because of the many ways in which Session Law 2023-63 creates violations of federal law, federal regulations, and the MOA, EPA should withdraw its

authorization of North Carolina's NPDES program unless these issues are resolved by, among other things, the repeal of Section 14.1 of 2023-63 and reinstatement of the 2021 permit as originally issued by DEQ and approved by EPA.

V. The legislature has fettered DEQ by repeatedly and systematically underfunding it.

148. One of North Carolina's primary responsibilities under the MOA is to "[c]reate and maintain . . ., to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program."

149. The North Carolina legislature has chronically underfunded DEQ, and specifically, DWR, leaving the staff unable to effectively administer the program in myriad ways. As stated in a 2022 news article, "DEQ was one of the chief targets of cuts and underfunding under the administration of Gov. Pat McCrory, who was governor from 2013 to 2017."[91] The underfunding of DEQ and DWR has led the agencies to be plagued by a lack of adequate staffing, which has in turn led to their inability to fulfill all the State's obligations under the MOA.

150. In November 2022, a news article reported that 19.19 percent, or "[n]early one-fifth of [DEQ's] job positions," were "unfilled, leaving the agency responsible for administering regulations to protect water, air quality and the public's health in a tight pinch that is not likely to loosen any time soon."[92] It noted that another 14 percent of DEQ staff was eligible for retirement. The same article reported that the legislature could tap into the billions of dollars in state reserves to address the deficit in funding DEQ and

---

[91] Trista Talton, *Understaffed Environmental Agency "Stretched to the Limit,"* COASTAL REVIEW ONLINE (Nov. 10, 2022), attached hereto as Exhibit 36.

[92] *Id.*

similarly situated state agencies. But that did not happen, and DEQ has remained underfunded.

151. Because of chronic budget shortfalls, DEQ's salaries are low, even relative to other state agencies' salaries. For example, DEQ leaders earn less than many non-leadership employees at the North Carolina Department of Transportation. In 2022, the Secretary of DEQ earned a lower salary than 44 Department of Transportation employees and just 67 percent of the salary of her counterpart, the Secretary of Transportation. The Director of DWR earned less than 833 Department of Transportation employees. Upon information and belief, the pay discrepancies continue throughout the ranks of the two agencies.[93]

152. DWR salaries compare even less favorably to private-sector salaries. DWR leadership have stated that they have difficulty recruiting, hiring, and retaining qualified staff because the pay DWR can offer is so low compared to comparable jobs elsewhere. At times, DWR salaries are only half of what is offered in comparable private industry job markets.

153. Low salaries caused by legislative budget decisions have put DEQ and DWR at a competitive disadvantage in filling open positions and retaining experienced workers with the needed expertise.[94] The November 2022 article reported that "36

[93] *North Carolina State Employees*, OPEN THE BOOKS, https://www.openthebooks.com/north-carolina-state-employees/ (last visited Aug. 26, 2024) (using search terms: 2022 in the "year" field and the name of each agency in the "employer" field).

[94] The November 2022 Coastal Review Online article reported that "36 percent of [DEQ] employees who have quit the department say salary was a factor in their decision to leave" and that "[m]ore than half, 56 percent, of job offers were declined based on pay." *See* Talton, *supra* note 91. A DEQ leader told the reporter, "[a]t DEQ's current funding levels, many budgeted salaries are not competitive in the current job market, and engineers may be one of the clearest examples. . .. Among state agencies, DEQ has the second highest need for engineers behind only (Department of Transportation)."

percent of [DEQ] employees who have quit the department say salary was a factor in their decision to leave" and that "[m]ore than half, 56 percent, of job offers were declined based on pay." A DEQ leader told the reporter, "At DEQ's current funding levels, many budgeted salaries are not competitive in the current job market . . . market competition for engineers makes retention and recruitment particularly difficult." As of the date of the article, 112 of DWR's 459 positions were vacant, a vacancy rate of 24.4 percent.

154. Budget-driven vacancies have persisted. In January 2023, the DWR director reported to the EMC: "In the new year, the Division continues to be challenged with filling vacancies. ... [W]e continue to have an average 23% vacancy rate. Retention is a greater concern as staff continue to find higher paying positions . . .. This loss of staff will be amplified as our workload will increase significantly with the permitting of [American Rescue Plan Act[95]] projects and the continuing economic growth the State is experiencing."[96] Throughout 2023 and 2024, DWR has continued to report an average of 72 vacancies to the EMC and an inability to hire new staff given the agency's low salary ranges.[97]

155. The agency routinely cites the lack of adequate staffing and other resource shortages for failing to fulfill all the State's obligations under the MOA and the Clean Water Act.

---

[95] American Rescue Plan Act of 2021, Pub. L. 117-2 (Mar. 11, 2021).

[96] N.C. Dep't of Env't Quality Divisions' Comments (Jan. 12, 2023), at 2 (Richard Roger's Director of Division of Water Resources), attached hereto as Exhibit 37.

[97] Copies of N.C. Dep't of Env't Quality Div. of Water Resources' Director's reports for March 2023 to July 2024, attached hereto as Exhibit 38. Originals are available at https://edocs.deq.nc.gov/WaterResources/Browse.aspx?id=2105786&dbid=0&repo=WaterResources.

156. For instance, in June 2023, EPA Region 4 staff encouraged DWR to explore Technology Based Effluent Limits ("TBELs") for the NPDES permit for the Camp Lejeune Marine Corps Base. In response, DWR's permit engineer informed EPA staff that "DWR has no institutional capacity to develop robust legally defensible TBELS in accordance with the EPA Guidance."[98]

157. Similarly, in response to comments on a draft NPDES permit for another significant discharger, Befesa Zinc Metal, DWR staff represented that "DWR has no institutional capacity to develop their own [Best Professional Judgment Best Available Technology] in according with EPA Guidance." DWR's response continued, "This effort would be enormous in nature and will require full-time commitment from numerous existing staff members" and noting that the work would require expertise "beyond what exists in the DWR."[99]

158. Likewise, in responding in 2021 to comments on the NPDES permit for the Blue Ridge Paper mill in Canton, North Carolina, DWR staff simply wrote, "DWR has no capacity to develop their own TBELs."[100]

159. The lack of sufficient staff and other resources has not only affected the content and protectiveness of NPDES permits; it has also led to a backlog of expired permits, with many entities discharging under old permits with outdated conditions. According to EPA data, 26.2 percent of North Carolina's NPDES permits were expired

---

[98] Email from Sergei Chernikov, N.C. Dep't of Env't Quality, to LeAnn Lopez, U.S. Env't Prot. Agency (June 28, 2023), attached hereto as Exhibit 39.

[99] N.C. Dep't of Env't Quality, Responses to Comments on Befesa Zinc NPDES Permit NC0089109 (July 10, 2023), attached hereto as Exhibit 40.

[100] N.C. Dep't of Env't Quality, Responses to Comments on Blue Ridge Paper NPDES Permit NC0000272 (Apr. 16, 2021), at 6, attached hereto as Exhibit 41.

as of October 2023, significantly exceeding both the 19.4 percent backlog for all Region 4 states and 20.8 percent for the nation.[101] Among these are expired permits for quartz mining facilities such as NC0000353 and several others in western North Carolina, mentioned in paragraph 20 above, as well as backlogged applications like the one authorizing reverse osmosis treatment of landfill leachate and subsequent discharge from the Sampson County landfill, discussed above in paragraph 13 above.

160. DWR has also pointed to lack of staff, money, and other resources as the reason for failing to fulfill other aspects of North Carolina's NPDES permitting program. For instance, in its Quality Assurance Project Plan for its 2017 Ambient Monitoring System Program, which provides instream water quality data for use in NPDES permitting and other purposes, DWR wrote, "Given the significant resources required for staff and the analytical costs of such studies, it is not feasible that all waterbodies identified through this process can be sampled."[102]

161. Moreover, DWR staff reported that, due to staffing shortages, it has been unable to do anywhere close to the number of sampling events scheduled as part of its Ambient Monitoring System and Random Ambient Monitoring System. In 2021, it completed only 2,957 sampling events of the 4,125 scheduled, mostly due to vacancies in Regional Offices. In 2022, DWR was able to complete only 2,420 sampling events of the 4,145 scheduled, with the shortfall again being caused by staffing shortages. Because staffing shortages varied across regional offices, some river basins were affected more

---

[101] U.S. Env't Prot. Agency, FY 2023 End of Year NPDES Individual State-Issued Existing Permit Backlog (Based on ICIS-NPDES Data as of Oct. 2, 2023), attached hereto as Exhibit 42. This and other reports can be found on this webpage: NPDES State Individual Permit Backlog, https://www.epa.gov/npdes/npdes-permit-status-reports.

[102] N.C. Dep't of Env't Quality, Ambient Monitoring System (AMS) Program Quality Assurance Project Plan 15 (Feb. 2017), https://perma.cc/3P4W-FAPM.

than others; for instance, only 17 percent of scheduled samples were collected in the Hiwassee and Savannah basins in 2021, and only 32 percent in the Little Tennessee and French Broad basins. This shortfall results in a dearth of critical data useful for setting limits in NPDES permits.[103]

162. Similarly, in responding to comments regarding the state's 2018 Draft 303(d) List of impaired waters, DWR staff wrote "DWR welcomes any assistance in developing a Watershed Action Plan [for the Pigeon House Branch of the Neuse River] that can be used to guide restoration as the various land use change projects are underway. Currently DWR does not have staff resources available to develop a plan here in the near future."[104] It also wrote in the same response that "resource limitations and focused monitoring efforts in Jordan and Falls Lakes have limited the amount of data that can be collected at other locations."[105] Finally, it wrote, "The 2018 assessment methodology for pathogen indicators (fecal coliform bacteria) includes a delisting methodology that was not previously published. . . . Follow up sampling [for fecal coliform in] is not part of [DWR's] protocol due to staff resources." [106] A DWR employee later stated that the delisting methodology "had no science involved" and was developed to keep the number of listed waters to a minimum.

---

[103] N.C. Dep't of Env't Quality, WSS Data Summaries for 2024 Integrated Report (2024IR), attached hereto as Exhibit 43.

[104] N.C. Dep't of Env't Quality, North Carolina 2018 Draft 303(d) List Public Comment NC Division of Water Resources Responsiveness Summary (Mar. 14, 2019), at 54–55, attached hereto as Exhibit 44.

[105] *Id.* at 71.

[106] *Id.* at 70–71.

163. In sum, the legislature's budget cuts have led to a lack of adequate staff, expertise, and other resources, causing DWR to fail in meeting its obligations under the MOA by:

a. preventing the agency from timely processing, issuing, or denying permit applications;

b. preventing the agency from ensuring that the conditions of permits are written in compliance with applicable water quality standards and other permitting requirements;

c. preventing the agency from thoroughly monitoring and enforcing all permit conditions, and

d. preventing the agency from ensuring that permits are based on accurate data.

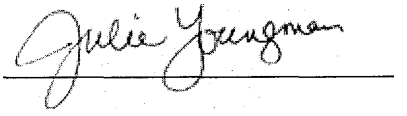
164. The legislature's passage of the State's annual budgets has thus failed to comply with Section III(A)(1) of the MOA and the State's obligation to "[c]reate and maintain...the resources required to carry out all aspects of the State NPDES program." EPA should withdraw its authorization of North Carolina's NPDES program unless these issues are resolved by, among other things, eliminating the budget shortfalls and fully funding DWR and DEQ.

CONCLUSION

For the foregoing reasons, Petitioners request that EPA issue an order commencing proceedings to determine whether to withdraw approval of the North Carolina NPDES permit program and other authorities delegated under the Clean Water

Act due to actions taken by the North Carolina legislature and ultimately withdraw that approval if the violations described above are not resolved.

Respectfully submitted this 28th day of August, 2024.



Julie Furr Youngman
jyoungman@selcnc.org

Jean Zhuang
jzhuang@selcnc.org

Hannah M. Nelson
hnelson@selcnc.org

Mary Maclean Asbill
mmasbill@selcnc.org

Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
Tel: (919) 967-1450
Fax: (919) 929-9421

Counsel for Petitioners

APPENDIX OF EXHIBITS

Exhibit 1. National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of North Carolina and the United States Environmental Protection Agency Region 4 (Oct. 15, 2007).

Exhibit 2. N.C. Sess. Law 2023-136 (Oct. 10, 2023).

Exhibit 3. Letter from Patrick Mincey and Robert El-Jaouhari, Counsel to City of Reidsville, to Members of the RRC (Apr. 13, 2022).

Exhibit 4. Email from Martie Groome, City of Greensboro, to Larence Duke, Counsel for RRC (May 18, 2022).

Exhibit 5. RRC, Letters of Objection & Requests for Legislative Review 15A NCAC 02B .0212, .0214, .0215, .0216, & .0218 (May 2022).

Exhibit 6. Email from Lawrence Duke, Counsel for RRC, to Jeanette Doran, RRC (Apr. 20, 2022).

Exhibit 7. RRC Staff Opinion, 15A NCAC 02B. 0208, .0212, .0214, .0215, .0216, .0218 (May 19, 2022).

Exhibit 8. Email from Lawrence Duke, Counsel for RRC, to Robert El-Jaouhari, Counsel for City of Reidsville (June 13, 2022).

Exhibit 9. Notice of Voluntary Dismissal Without Prejudice, *N.C. Env't Mgmt. Comm'n v. N.C. Rules Review Comm'n,* 23-CV-032096-910 (Wake Cnty. Super. Ct., Feb. 16, 2024).

Exhibit 10. Email from Jenny Kelvington, Office of the Senate President Pro Tempore, to J.D. Solomon, N.C. Env't Mgmt. Comm'n (Feb. 1, 2024).

Exhibit 11. Letter from Elijah Williams, City of Greensboro et al., to Members of the Water Quality Committee, N.C. Env't Mgmt. Comm'n (Mar. 8, 2024).

Exhibit 12. Letter from Sean Sullivan, Willams Mullen, to Members of the North Carolina Environmental Management Commission (May 1, 2024).

Exhibit 13. N.C. Sess. Law 2023-137 (Oct. 10, 2023).

Exhibit 14. Letter from Elizabeth Biser, N.C. Dep't of Env't Quality, to Gary Salamido, N.C. Chamber of Commerce (May 1, 2024).

Exhibit 15. Letter from Gary Salamido, N.C. Chamber of Commerce, to Secretary Biser, N.C. Dep't of Env't Quality (Apr. 22, 2024).

Exhibit 16. Letter from Kenneth Lin, N.C. Manufacturers Alliance, to Julie Grzyb, N.C. Dep't of Env't Quality (May 4, 2024).

Exhibit 17. Letter from Elizabeth Biser, N.C. Dep't of Env't Quality, to J.D. Solomon, N.C. Env't Mgmt. Comm'n (May 1, 2024).

Exhibit 18. Emails between Richard Rogers, N.C. Dep't of Env't Quality, and Steve Keen, N.C. Env't Mgmt. Comm'n (Jun 2024).

Exhibit 19. Letter from Derb Carter and Julie Youngman, S. Env't L. Ctr., to Gwendolyn Fleming, U.S. Env't Prot. Agency (Jan. 30, 2013).

Exhibit 20. N.C. Attorney General Advisory Opinion In re Separation of Powers: House Bill 968; State Personnel Act (July 6, 1999).

Exhibit 21. Letter from A. Stanley Meiburg, U.S. Env't Prot. Agency Region 4, to Dee Freeman, N.C. Dep't of Env't & Nat. Res. (June 1, 2011).

Exhibit 22. Letter from Julian Mann, Office of Admin. Hearings and Dee Freeman, N.C. Dep't of Env't Quality, to Mary Wilkes, U.S. Env't Prot. Agency (July 19, 2012).

Exhibit 23. Letter from Mark Wilkes, U.S. Env't Prot. Agency, to Dee Freeman, N.C. Dep't of Env't Quality and Julian Mann, N.C. Office of Admin. Hearings (Aug. 9, 2012).

Exhibit 24. Session Law 2023-134 (July 1, 2023).

Exhibit 25. Letter from Sushma Masemore, N.C. Dep't of Env't Quality, to Cesar Zapata, U.S. Env't Prot. Agency Region 4 (Nov. 17, 2023).

Exhibit 26. Letter from Kathlene Butler, U.S. Env't Prot. Agency Region 4 to Sushma Masemore, N.C. Dep't of Env't Quality (Feb. 6, 2024).

Exhibit 27. Session Law 2024-44 (June 28, 2024).

Exhibit 28. Letter from J.D. Solomon, N.C. Env't Mgmt. Comm'n, and Richard Rogers, N.C. Dep't of Env't Quality, to Katie Butler, U.S. Env't Prot. Agency (July 31, 2024).

Exhibit 29. N.C. Env't Mgmt. Comm'n, 15A NCAC 02B.0206 Draft Concept Rule Flow Design Criteria for Effluent Limitations (July 31, 2024).

Exhibit 30. NC NPDES General Permit NCG530000 To Discharge from Seafood Packing and Rinsing, Aquatic Animal Operations, and Similarly Designated Wastewaters (Mar. 1, 2018).

Exhibit 31. Letter from Jeaneanne Gettle, U.S. Env't Prot. Agency Region 4, to Steven W. Troxler, N.C. Dep't of Agriculture and Consumer Servs. (Jan. 5, 2022).

Exhibit 32. NC NPDES General Permit NCG530000 To Discharge from Seafood Packing and Rinsing, Aquatic Animal Operations, and Similarly Designated Wastewaters (Dec. 1, 2021)

Exhibit 33. Session Law 2023-63 (June 27, 2023).

Exhibit 34. Letter from Cesar Zapata, U.S. Env't Prot. Agency Region 4, to Richard Rogers, N.C. Dep't of Env't Quality (Nov. 15, 2023).

Exhibit 35. Letter from Cesar Zapata, U.S. Env't Prot. Agency Region 4, to Richard Rogers, Director, N.C. Dep't of Env't Quality (Dec. 15, 2023).

Exhibit 36. Trista Talton, Understaffed Environmental Agency "Stretched to the Limit," Coastal Review Online (Nov. 10, 2022).

Exhibit 37. Richard Rogers, N.C. Dep't of Env't Quality, Divisions' Comments (Jan. 12, 2023).

Exhibit 38. Copies of DWR's Director's reports for March 2023 to July 2024

Exhibit 39. Email from Sergei Chernikov, N.C. Dep't of Env't Quality, to LeAnn Lopez, U.S. Env't Prot. Agency (June 28, 2023).

Exhibit 40. N.C. Dep't of Env't Quality, Responses to Comments on Befesa Zinc NPDES Permit NC0089109 (July 10, 2023).

Exhibit 41. N.C. Dep't of Env't Quality, Responses to Comments on Blue Ridge Paper NPDES Permit NC0000272 (Apr. 16, 2021).

Exhibit 42. U.S. Env't Prot. Agency, FY 2023 End of Year NPDES Individual State-Issued Existing Permit Backlog (Based on ICIS-NPDES Data as of Oct. 2, 2023).

Exhibit 43. N.C. Dep't of Env't Quality, WSS data summaries for 2024 Integrated Report (2024IR).

Exhibit 44. N.C. Dep't of Env't Quality, North Carolina 2018 Draft 303(d) List Public Comment NC Division of Water Resources Responsiveness Summary (Mar. 14, 2019).