SOUTHERN ENVIRONMENTAL LAW CENTER

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January 30, 2013

Gwendolyn Keyes Fleming
Regional Administrator
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

A. Stanley Meiburg
Deputy Regional Administrator
U.S. EPA Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104

Re: Final Agency Decisions Under the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act in North Carolina After Passage of the Regulatory Reform Act of 2011

Dear Ms. Fleming and Mr. Meiburg:

Our organization has sixteen lawyers practicing environmental law in the public interest in North Carolina. We write to you seeking clarification of the process for final agency decisions in North Carolina as it relates to the public participation requirements of North Carolina's delegated federal programs. For over 25 years, we have been practicing in front of the North Carolina Environmental Management Commission (EMC") and, since its establishment, the North Carolina Office of Administrative Hearings ("OAH"). We have serious concerns regarding the changes to the administrative review process rendered by the "Regulatory Reform Act of 2011" (North Carolina Session Law 2011-398 or Senate Bill 781) (hereinafter, the "Regulatory Reform Act" or the "Act"). We are unable to provide clear advice to the numerous organizations that we represent on their procedural and substantive rights under the federally delegated environmental programs in North Carolina, in light of confusing and conflicting interpretations of the effects of the recent legislative changes.

As you are aware, the Regulatory Reform Act eliminates the requirement that the "recommended" or "proposed" decision of an Administrative Law Judge ("ALJ") be returned to the agency for final decision. In the case of matters involving the Clean Water Act ("CWA"), Clean Air Act ("CAA"), and Resource Conservation and Recovery Act ("RCRA"), the EMC has traditionally reviewed the ALJ's recommended decision and then rendered the final agency decision under the authority delegated to it by the

EPA. This process is memorialized in a Memorandum of Agreement ("MOA") between North Carolina and the United States Environmental Protection Agency ("EPA"), and that MOA also prescribes the means for making changes to the process.

As a result of the enactment of the Regulatory Reform Act, the ALJ's decision is now the final administrative decision in most contested cases, including those involving the CWA, CAA, and RCRA. This provision became effective for contested cases commenced on or after January 1, 2012. The Act required OAH and the Department of Environment and Natural Resources (DENR) to seek approval from EPA "to become an agency responsible for administering programs under" the CWA, CAA, and RCRA before transferring final decision-making authority to OAH. N.C. Sess. L. 2011-398, § 55.2. In order to allow time to obtain the approval, the effective date for these cases was extended until June 15, 2012. The MOA also requires the State to notify EPA when it proposes to transfer authority for final agency decision-making to a new entity such as OAH, and to obtain EPA approval of that transfer of authority.

DENR and OAH represented to several state legislative committees that, during the process of reviewing this matter with EPA, it was determined that no change in the State's MOA with EPA is required. Accordingly, North Carolina Session Law 2012-187 made clarifying changes to the Regulatory Reform Act to provide that OAH and DENR need not obtain approval from EPA, if it was determined that no approval was necessary. The law also further delayed the effective date until October 1, 2012. N.C. Sess. L. 2012-187, § 7.3.

EPA wrote to DENR on or about June 11, 2011, to state its understanding of the effect of the Regulatory Reform Act, including that "OAH, in which the ALJs reside, would appear to become the agency with final decision-making authority over challenged permits." EPA's letter delineated the various legal requirements that DENR and OAH must meet under the terms of the MOA, as well as under the CAA, CWA, RCRA, and other applicable federal laws, to effectuate that change. Among the many legal requirements listed were: notification to EPA, public notice and comment, approval by EPA, and issuance of a statement by the North Carolina Attorney General certifying the propriety of the changes to the administrative process.

Despite the plain and unambiguous language of the Act that clearly labels the ALJ's decision as the "final decision" in a contested case, DENR and OAH nevertheless concluded that they need not seek EPA's approval of the new procedure for final agency decisions under the CAA, CWA, and RCRA. In a letter dated July 19, 2012, OAH (through the Chief ALJ) and DENR (through the Secretary) represented to EPA, the state legislature, and the public that OAH's role in contested environmental cases would be limited in scope to review under the state Administrative Procedures Act, that is, determining whether DENR acted erroneously, failed to use proper procedure, exceeded

its authority or jurisdiction, acted arbitrarily or capriciously, or failed to act as required by law or rule. The letter asserts that OAH will not undertake to write permit terms, but will hold hearings and issue decisions on any challenges of permits issued under the CAA, CWA, and RCRA, and that DENR will correct any errors identified by OAH. The letter further asserts that EPA would be able to review the redrafted permit, just as it reviews initial permits. The letter concludes that it will be unnecessary for OAH to seek EPA's approval to be an agency responsible for administering programs under the CAA, CWA or RCRA, or for the existing MOA to be amended.

EPA responded to DENR and OAH in a letter dated August 9, 2012, describing its understanding that the Regulatory Reform Act has effected no changes to the roles and responsibilities of DENR as described in the current MOA and program approvals/authorizations and has not affected EPA's statutory and regulatory permitting role under its federal environmental programs, and that therefore no MOA amendments or program revision submissions are necessary at this time. EPA's letter explicitly states that it understands that OAH would "not undertake the drafting or redrafting of permit terms or conditions (*including, presumably, penalty action terms or conditions*)" (emphasis added). EPA's letter emphasizes that, "should the application of [the Regulatory Reform Act] 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, then the procedural and legal requirements described in [EPA's] June 11, 2011, letter to DENR would have to be reexamined."

We believe that indeed the roles of DENR and OAH have changed, and that EPA's role therefore will be affected. We are writing regarding several issues that, in fact, do not seem to be resolved and that do affect DENR's permit enforcement/issuing authority and EPA's statutory and regulatory permitting role. In addition, these changes may have significant effects on the rights of the public to participate meaningfully in the administrative permitting process. Below we provide additional information to EPA on certain issues and seek clarification on other issues.

First, while DENR and OAH state that they agree that OAH will not undertake the drafting or redrafting of permit terms or conditions, they appear to disagree regarding which entity will undertake the drafting or redrafting of *penalty* action terms or conditions. In recent communications and in some public presentations, each entity seems to be saying that it may have that authority; surely both cannot. If OAH does in fact undertake to set a penalty, rather than merely to identify errors made by DENR in setting penalties and to allow DENR to correct its errors and set a new penalty, then OAH will effectively be the final agency decision-maker without having satisfied the legal requirements of the MOA and federal law. This must be clarified.

Additionally, we have not seen or heard clearly articulated that EPA will still retain the opportunity to review, comment on, or object to certain classes or categories of permits in circumstances in which OAH orders DENR to amend a permit in some fashion and then DENR reissues the amended permit. Will EPA still retain the opportunity to review, comment on, or object to redrafted permits? If so, how will DENR resolve any discrepancy between the OAH's final decision and any objections by EPA? The July 19 letter contemplates that DENR may appeal an adverse decision by OAH directly to superior court without first issuing a redrafted permit. In such instances, what will be the "final agency decision," and when and how will EPA have the opportunity to review, comment on, and object to it?

Next, we have questions regarding judicial review of final decisions issued under the new procedure prescribed by the Regulatory Reform Act. As explained above, the July 19 letter states that DENR may appeal an adverse decision by OAH directly to superior court without first issuing a redrafted permit that complies with OAH's instructions. This new pathway will effectively exclude participation by third parties. In such instances, it appears that DENR does not intend to issue a new permit that complies with OAH's final decision before taking that appeal. That will create a Catch-22 for third parties – such as environmental groups and downstream water users – that were not aggrieved by a permit as it was originally issued, but could be harmed by permit terms dictated by an OAH final decision and would want to challenge those terms if a new permit were issued by DENR. Such a party will be effectively excluded from the review process by the Act's elimination of the agency's role as final decision-maker and by DENR's immediate appeal to superior court.

For example, if a party agreed with limits contained in a permit as it was originally issued, it would have no reason to initiate its own contested case before OAH. That party also likely would encounter opposition if it attempted to intervene in the initial stage of a contested case before OAH brought by, for instance, the permittee to challenge the stringency of the terms of the permit. Moreover, it would be cost-prohibitive for every third party who could potentially be affected by reissued permits to intervene in every contested case brought by dissatisfied permit applicants. A large number of intervenors in each contested case would certainly impede the efficient dispatch of justice and overwhelm the limited resources of the OAH and courts.

On the other hand, intervention *after* the OAH's decision may not be available to third parties or, at minimum, provide for their meaningful participation. If, in the example described above, OAH were to determine that the permit conditions were too numerous or too stringent and were to order DENR to strike or revise several of them and reissue the permit, it is not clear that the previously excluded environmental group or downstream water user would be able to intervene at that point and seek judicial review. Although to the best of our knowledge this situation has not yet been tested in the courts,

OAH may no longer have jurisdiction to allow intervention after issuing its final decision. Yet the superior court may not allow intervention by a party that did not participate below. Either scenario would allow no opportunity for intervention by the previously excluded third party. And even if a third party were allowed to enter the fray for the first time before the superior court, the judicial review would be based on an incomplete record developed without the third party having the opportunity to introduce expert testimony and other evidence related to its concerns.

Further, it is not clear under the Regulatory Reform Act whether parties who were not aggrieved by an original permitting decision, and did not participate in the original contested case, would be allowed to initiate their own new contested case challenging the newly issued, weaker permit, after the original contested case has been appealed through the court system. In recent communications and presentations, OAH and DENR expressed conflicting views regarding whether such a new contested case would be allowed. All of these questions raise concerns that the new procedure under the Regulatory Reform Act excludes members of the public from participation in the permit review process, in violation of both the spirit and the letter of federal law.

Finally, we have concerns about the constitutionality of the final decision-making procedure prescribed by the Regulatory Reform Act. The North Carolina Constitution mandates a strict separation of powers. In a 1999 opinion letter addressing an earlier plan to change the role of OAH to that of final agency decision-maker, the North Carolina Attorney General's office stated that OAH finality "presents substantial constitutional questions and probably would not survive a challenge in the courts." Letter to Ronald G. Penny, State Personnel Director, from Ann Reed, Senior Deputy Attorney General, *et al.* (July 6, 1999) at p. 3. The letter explains that allowing OAH to make final agency decisions would change its nature from a quasi-judicial entity, as allowed by Article III, section 11, into an executive agency exercising purely judicial powers. It would amount to creation of a new court in violation of Article IV, section 1, of the State Constitution. This sentiment was endorsed by Governor Beverly Perdue in her "Governor's Objections and Veto Message" regarding the Regulatory Reform Act, dated June 30, 2011. (Copies of the Attorney General's letter and Governor's Objections are enclosed.) In light of these expressions of the unconstitutionality of OAH's issuing final decisions, it is unlikely that the State could satisfy the MOA's requirement for a certification from the Attorney General that the State has adequate legal authority to implement the legislated changes.

In sum, because of the various issues described above, it appears that OAH has, for at least some purposes but without proper authority, become the agency responsible for administering programs and making final decisions under the CWA, CAA, and RCRA. It also appears that EPA's role in the permitting process has been affected, and its ability to review, comment on, and object to permitting decisions has been

circumvented in some respects. Finally, the public's rights to participate meaningfully in the permitting process in federally delegated programs, and its rights to participate in required approval of significant changes to delegated programs, have been circumvented by these changes.

Accordingly, we ask that EPA address these issues. North Carolina must either comply with the MOA and federal legal requirements described in EPA's letter of June 11, 2011 (including by providing an Attorney General's certification and by seeking EPA approval) if it wishes to continue to apply the new procedures prescribed by the Regulatory Reform Act to contested cases involving federal delegated programs under the CAA, CWA and RCRA, or risk de-delegation of these programs.

We are available to discuss any of the matters raised herein. Thank you for your attention to this matter.

Very truly yours,

Derb Carter
Director, Carolinas Office

Julie Youngman
Senior Attorney

Enclosures

cc (w/encl.):
Mary J. Wilkes, Regional Counsel and Director, EPA Region 4
Beverly Banister, Director, Air, Pesticides and Toxics Management Div., EPA Region 4
James Giattina, Director, Water Protection Division, EPA Region 4
Alan Farmer, Director, RCRA Division, EPA Region 4
Hon. Julian Mann, III, Director and Chief Administrative Law Judge, OAH
John E. Skvarla, Secretary, NCDENR
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MICHAEL F. EASLEY
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REPLY TO: Ann Reed
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July 6, 1999

Mr. Ronald G. Penny
State Personnel Director
Office of State Personnel
116 West Jones Street
Raleigh, North Carolina 27603-8004

Re: Advisory Opinion: Separation of Powers; House Bill 968; State Personnel Act

Dear Mr. Penny:

This letter responds to your request for a legal opinion regarding the provision in House Bill 968 empowering administrative law judges in the Office of Administrative Hearings ("OAH") to make final decisions in contested cases. You asked whether transferring final decision-making power, relating to employment controversies subject to Chapter 126 of the General Statutes, from the State Personnel Commission to an administrative law judge violates the Separation of Powers provision of the Constitution of North Carolina. N.C. Const. art. I, § 6. It is our opinion that a court would likely find such a provision unconstitutional because it would result in executive branch officers exercising purely judicial powers of adjudicating legal controversies -- a function that only a court may exercise. Bestowing final decision-making power on OAH also would change the nature of that agency from a "quasi-judicial" executive branch agency to a court, likely in violation of Article IV, § 1 of the Constitution, which forbids the General Assembly to "establish or authorize any courts other than as permitted by this Article." N.C. Const. art. IV, § 1.

Article I, § 6 provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The Supreme Court held in *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), that the separation of powers doctrine is strictly adhered to in this state. *See also, Advisory Opinion In re Separation of Powers*, 305 N.C. 767, 771-72, 295 S.E.2d 589, 591 (1982). As the Supreme Court noted in *State ex rel. Wallace v. Bone* and *Advisory Opinion In re Separation of Powers*, the power of the government in North Carolina "shall be divided into three branches distinct from each other, viz: The power of making laws; The power of executing laws and The power of Judging." *Bone*, 304 N.C. at 597, 286 S.E.2d at 82; *Advisory Opinion*, 305 N.C. at 774, 295 S.E.2d at 593.

There is no question that the Office of Administrative Hearings is an agency in the executive branch of government. The statute creating OAH provides that:

> There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III,

> Sec. 11 of the Constitution [1] and, in accordance with Article IV, Sec. 3 of the Constitution has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it was created. The Office of Administrative Hearings is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process . . . .

N.C. Gen. Stat. § 7A-750 (1995 & Supp. 1998).

The express language of N.C. Gen. Stat. § 7A-750 makes it plain that OAH was created as a limited executive branch tribunal to preside over administrative proceedings arising within the executive branch. *See State ex rel. Martin v. Melott*, 320 N.C. 518, 359 S.E.2d 783 (1987) (Court discussed nature of OAH in context of upholding statute authorizing Chief Justice to appoint Chief Administrative Law Judge.) *See also, Employment Security Commission v. Peace*, 128 N.C. App. 1, 8-9, 493 S.E.2d 466, 471 (1997) (OAH was created as source of independent hearing officers in the executive branch and not as a court). Administrative law judges were given only "quasi-judicial" power to avoid the commingling of judicial and executive power in the hands of administrative law judges who unquestionably are members of the executive branch of government. As the Supreme Court made clear in *Bone*, it is the commingling of such governmental powers and functions that the Separation of Powers provision in Article I, § 6 forbids.

House Bill 968 would amend present law to grant administrative law judges in OAH the power to make final decisions in contested cases. Such an amendment would convert the role of OAH from that of providing hearing officers to preside over administrative proceedings and make recommended decisions to the role of adjudicating controversies between adverse parties. The administrative law judges then would not only find facts but also would apply the law to the facts to decide the outcome of controversies. At that point, they would be acting as courts in the exercise of "The power of Judging" (*see Bone* and *Advisory Opinion*, *supra*) — a purely judicial function which only a court may exercise. As the Supreme Court made plain in *Bone*, such an exercise of judicial power by a member of the executive branch violates Article I, § 6 of the Constitution. Further, when the General Assembly vests a power constitutionally reserved to the judiciary in an administrative agency, it creates a court in violation of Article IV, § 1 of the Constitution. N.C.

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[1] Article III, § 11 provides that all executive branch "administrative departments, agencies and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to their major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."

[2] Article IV, § 3 provides that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice."

Const. art. IV, § 1. *State v. Matthews*, 270 N.C. 35, 153 S.E.2d 791 (1967); *Utilities Commission v. Old Fort Finishing Plant*, 264 N.C. 416, 142 S.E.2d 8 (1965).

As noted earlier, N.C. Gen. Stat. § 7A-750 provides that administrative law judges in OAH are authorized to exercise only such "judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes" for which that agency was created, referencing Article IV, § 3. It is clear that the power to make final decisions in contested cases is not "reasonably necessary" to "provide a source of independent hearing officers to preside in administrative cases *and thereby prevent the commingling of legislative, executive and judicial functions in the administrative process.*" N.C. Gen. Stat. § 7A-750 (emphasis added). To the contrary, giving administrative law judges the authority to make final decisions would result in commingling of governmental power in the hands of administrative law judges -- a result which the statute seeks to avoid.

Finally, we are concerned that the vesting of power in OAH to trump decisons made directly by the Governor or indirectly by his appointees is inconsistent with Article III, § 1 of the Constitution. That section provides that "[t]he executive power of the State shall be vested in the Governor." While the General Assembly certainly may prescribe how and through whom the Governor will exercise the executive power, we doubt that the General Assembly may deny him the power altogether and vest it in an appointee of the Chief Justice.

For the foregoing reasons, we conclude that HB 968 presents substantial constitutional questions and probably would not survive a challenge in the courts. If you have any additional questions, do not hesitate to call us.

Sincerely,

Ann Reed by 2PN

Ann Reed
Senior Deputy Attorney General

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[illegible] Nance
Special Deputy Attorney General

Thomas F. Moffitt by 2PN

Thomas F. Moffitt
Special Deputy Attorney General

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR
20301 MAIL SERVICE CENTER • RALEIGH, NC 27699-0301

BEVERLY EAVES PERDUE
GOVERNOR

June 30, 2011

GOVERNOR'S OBJECTIONS AND VETO MESSAGE

Senate Bill 781, "*An Act to Increase Regulatory Efficiency in Order to Balance Job Creation and Environmental Protection*"

I am strongly in favor of regulatory reform. Through my Executive Order, I have spearheaded the effort to improve our State's regulatory system by taking a balanced approach that protects the economy, public health, public safety, and the environment, and I will continue to do so. While I wholeheartedly support the General Assembly's desire to pass laws aimed at reforming our bureaucracy, those laws have to be balanced and meet constitutional standards. Senate Bill 781 fails this test. It would take final decision-making authority in certain circumstances away from state agencies and instead give it to the Office of Administrative Hearings – a result that the Attorney General has repeatedly declared is in violation of the North Carolina Constitution. I urge the General Assembly to revisit the issue of regulatory reform.

Therefore, I veto the bill.

Beverly Eaves Perdue

This bill, having been vetoed, is returned to the Clerk of the North Carolina Senate on this 30th day of June, 2011, at 4:15 pm for reconsideration by that body.

RECEIVED FROM GOVERNOR
Date: June 30, 2011
Time: 4:50 pm
Sarah Clapp