# The Impact of *McCrory v. Berger* on State Boards and Commissions

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NOTE: The comments of the panelists are their own personal views and should not be attributed to either their employers or the School of Government. The course materials were originally presented by Chris Browning at a North Carolina Bar Association seminar on May 20, 2016 to the Government and Public Sector of the Bar Association entitled "*McCrory v. Berger* and Separation of Powers in an Administrative State." Accordingly, the materials should not be viewed as an admission, comment or concession by any of the panelists.

## I. The North Carolina Supreme Court's Opinion in *McCrory v. Berger*

In *McCrory v. Berger,* 368 N.C. 633, 781 S.E.2d 248 (2016), the North Carolina Supreme Court held that legislative appointments to executive branch agencies may, in some circumstances, violate the Separation of Powers provision of the North Carolina Constitution, N.C. Const. art. I, § 6. The Court held that the three commissions before the Court (the Coal Ash Management Commission, Oil and Gas Commission and Mining Commission) had been improperly constituted as a result of the legislative appointments to those commissions.

Governor McCrory, joined by former Governors Hunt and Martin, brought a complaint asserting that legislative appointments to executive branch boards and commissions violates the Appointments Clause, N.C. Const. art III, § 5(8), and the Separation of Powers Clause, N.C. Const. art. I, § 6. The Appointments Clause provides:

> The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

N.C. Const. art III, § 5(8). The Separation of Powers Clause states:

> The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

N.C. Const. art. I, § 6.

A three-judge panel of the Wake County Superior Court held that all legislative appointments are invalid. The Superior Court concluded that because the statutes creating the Coal Ash Management Commission, Oil and Gas Commission and the Mining Commission "provide for legislative appointment of some members," these statutes constitute "an impermissible commingling of the legislative power and executive power" in violation of the Separation of Powers Clause. Superior Ct. Slip op. at 11 (reprinted in N.C. S. Ct. Record on Appeal, No. 113A15, pp. 61-72).

The North Carolina Supreme Court modified and affirmed the decision of the three judge panel. Although the Supreme Court agreed that the three commissions before it were not properly constituted, the Supreme Court made clear that not all legislative appointments are invalid.

### The Appointments Clause

In *McCrory*, the North Carolina Supreme Court rejected the Governor's argument that legislative appointments to executive branch agencies violate the Appointments Clause. In *Martin v. Melott*, 320 N.C. 518, 359 S.E.2d 783 (1987), each of the six Justices sitting on that case concluded that the Appointments Clause does not prohibit the legislature from making executive branch appointments. In *Melott,* the plurality concluded:

> As we read Article III, Sec. 5(8), it is clear that it means the Governor has the power to appoint an officer of the State with the advice and consent of a majority of the Senators, unless there is some other provision for the appointment. In this case there is another provision. The General Assembly has provided for the appointment . . .

*Id.* at 520, 359 S.E.2d at 785; *see also id.* at 528, 359 S.E.2d at 789 (Meyer, J., joined by Whichard, J., concurring) (recognizing that General Assembly can determine who makes the appointment); *id.* at 533, 359 S.E.2d at 792 (Martin, J., dissenting) (recognizing that General Assembly can determine who makes the appointment, but concluding that the appointment at issue violates Separation of Powers). After analyzing the history of the Appointments Clause, the Supreme Court in *McCrory*, consistent with the *Melott* decision, concluded:

> [The Appointments Clause] authorizes the Governor to appoint all constitutional officers whose appointments are not otherwise provided for by the constitution. It follows that the appointments clause does not prohibit the General Assembly from appointing statutory officers to administrative commissions.

368 N.C. at 644, 781 S.E.2d at 255.

The Separation of Powers Clause

In concluding that the legislative appointments before it violate Separation of Powers, the Supreme Court summarized its opinion as follows:

> [W]e hold that the challenged appointment provisions violate the separation of powers clause. When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. . . . When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates.

*Id.* at 647, 781 S.E.2d at 257 (emphasis added). The Court expressly stated that it was not creating any bright line rules that could be applied in other cases. The Court noted:

> We cannot adopt a categorical rule that would resolve every separation of powers challenge to the legislative appointment of executive officers. Because each statutory scheme will vary the degree of control that legislative appointment provisions confer on the General Assembly, we must resolve each challenge by carefully examining its specific factual and legal context.

*Id.* at 646-47, 781 S.E.2d at 257 (emphasis added). In the absence of such a categorical rule, the meaning and application of the *McCrory* decision will likely be litigated for years to come.

The *McCrory* Factors

Despite the Court's refusal to adopt a categorical rule in *McCrory*, one can glean three factors that are likely to be applied in future cases:

1. Whether the Governor has the ability to remove the legislative appointees;

2. Whether the Governor makes a majority of the appointments;

3. Whether the Commission is given final authority to execute laws the Governor is charged with enforcing (i.e., whether the Commission carries out a "core" executive function);

The first factor (the Governor's ability to remove appointees) is somewhat perplexing. The statutes at issue provide that the Governor may remove a Commission member for "misfeasance, malfeasance or nonfeasance." N.C. Gen. Stat. § 130A-309.202(e) (Coal Ash Management Commission); N.C. Gen. Stat. § 143B-291(d) (Mining Commission); N.C. Gen. Stat. § 143B-293.2(c)(1) (Oil and Gas Commission). This same language appears in countless other statutes. *See, e.g.,* N.C. Gen. Stat. § 104E-8 (Governor is given authority to appoint all 11 voting members of the Radiation Protection Commission, but can only remove those members for "misfeasance, malfeasance or nonfeasance"). Consequently, an undue emphasis on this first factor could call into question virtually all boards and commissions with legislative appointees.

Limiting the Governor's ability to remove board and commission members based on misfeasance, malfeasance or nonfeasance serves valid public policy objectives. If this limitation were not placed on the Governor's ability to remove commission members, a substantial risk exists that any new Governor would remove the appointments of a prior Governor and replace those members with his or her own appointments. This would undermine continuity within boards and commissions and risk substantial disruption of their work.

Moreover, the Supreme Court's emphasis on the Governor's ability to remove members seems to overlook the fact that board and commission members are required to take an oath of office to perform their work on behalf of the State as a whole – and not for the benefit of the individual who appoints them. Under the North Carolina Constitution, each board and commission members must take an oath that he or she "will faithfully discharge the duties of my office." N.C. Const. art. VI, § 7.

The second factor (whether the Governor makes a majority of the appointments) would appear to be relatively straightforward. The Court, however, emphasizes that it is creating no bright line rules. Accordingly, litigation can be expected even when the Governor has a majority of the appointments – particularly a bare majority. As a corollary, courts will have to resolve what happens when the Governor has a majority of the appointments, but the General Assembly has placed limitations on who the Governor may appoint. For example, if the Governor were given a majority of appointments to an environmental board, but one or more of those appointees were limited to licensed attorneys whose practice focuses on the representation of industrial concerns in environmental matters, a question may arise as to whether the Governor truly has the

ability to appoint the majority of voting members of the board. *Cf.* N.C. Gen. Stat. § 143B-283(a1)(7) (requiring one of Governor's appointees to the Environmental Management Commission must be actively employed by, or recently retired from, an industrial manufacturing facility). The Court's potential concern that the Governor no longer controls the board or commission would presumably be even greater if the qualification imposed by the General Assembly is likely to result in frequent recusals of the Governor's appointees.

The third factor (whether the board performs a core executive branch function) creates the greatest uncertainty among the three factors referenced in *McCrory*. In the modern administrative state, virtually every board and commission fulfills some quasi-legislative, quasi-judicial and quasi-executive functions. Moreover, the decision adds little guidance as to what constitutes "the final say on how to execute the laws." 368 N.C. at 647, 781 S.E.2d at 257. In two separate places, the opinion references "core" functions and powers of the executive. *Id.* at 636, 781 S.E.2d at 250 ("[O]ne branch [may] not prevent another branch from performing its core functions."); *id.* at 645, 781 S.E.2d at 256 (legislature cannot "'unreasonably disrupt a core power of the executive'") (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). The Court's decision strongly implies that the process of reviewing administrative rules for compliance with the Administrative Procedure Act does not constitute a "core" executive function. *Id.* at 648 n.7, 781 S.E.2d at 258 n.7. The Court does not otherwise discuss what is or is not a core executive power. Perhaps the analysis falls within Justice Stewart's adage: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).

Justice Newby's Dissent

Justice Newby provided the lone dissent in the *McCrory* case. Although he agreed with the majority's conclusion that legislative appointments do not run afoul of the Appointments Clause, Justice Newby vehemently disagreed with the majority's conclusion that the appointments at issue violate the Separation of Powers Clause.

Justice Newby noted that "the authority to appoint the official has never been deemed the power to control the appointee." 368 N.C. at 649, 781 S.E.2d at 258 (Newby, J., concurring). According to Justice Newby, the Supreme Court has recognized for over a century that "filling the position is not exercising the power of the position." *Id.* at 649 n.8, 781 S.E.2d at 259 n.8.

Left unsaid in Justice Newby's dissent is that it would seem extremely odd for the Court to have upheld legislative appointments for the past century based on the Court's construction of the Appointments Clause without it ever occurring to the Court (or prior Governors and past Legislatures) that those same appointments might be invalid under the Separation of Powers Clause. Examples abound of the General Assembly making appointments to executive branch agencies going back to the 1800s. Act of Jan. 26, 1899, ch. 24, § 3, 1899 N.C. Sess. Law 119, 119 (General Assembly appointment of directors to State Prison of North Carolina); Act of Feb. 10, 1899, ch. 68, § 1, 1899 N.C. Sess. Laws 201, 201 (providing for General Assembly appointments to Board of Internal Improvements); Act of Mar. 2, 1899, ch. 19, § 2, 1899 N.C. Sess. Laws 111, 111 (General Assembly appointment of commissioners with general supervision of shell-fish industry).

## II. Uncertainty in the Wake of *McCrory*

The *McCrory* decision creates more questions than it answers. Some of the agencies and commissions that stand in the bull's eye are discussed below.

Specific Boards and Commissions

The boards and commissions in which the Governor does not have a majority of the appointments or in which the Governor has a bare majority are most likely to be in the crosshairs following the *McCrory* decision, particularly if the board or commission is engaged in controversial decisions.

- Global Transpark. The Global Transpark Authority is comprised of 6 members appointed by the Governor, 6 members appointed by the General Assembly, 1 member appointed by the Lenoir County Commissioners, 1 member appointed by the Kinston City Council, the Secretary of Commerce, the Commissioner of Agriculture, the Chair of the States Ports Authority, the President of the North Carolina System of Community Colleges and the President of the University of North Carolina. Additionally, the State Treasurer serves *ex officio* in a non-voting capacity. Thus, the Global Transpark has 19 voting members – 8 are appointed by the Governor or someone the Governor has appointed (i.e., Secretary of Commerce and Chair of the States Ports Authority). As the Global Transpark notes on its website, it is "a division of the North Carolina Department of Transportation and is under the supervision of the Secretary of Transportation." Accordingly, there would appear to be little question that it performs core executive functions and that the Governor's failure to appoint a majority of the voting members of the Authority interferes with his ability to execute the laws. Like most other boards and commissions, the Governor may only remove a member of the Authority for "misfeasance, malfeasance, or nonfeasance." N.C. Gen. Stat. § 63A-3(g). Thus, Global Transpark Authority would appear to be similarly situated to the Coal Ash Management Commission, Mining Commission and Oil and Gas Commission. In the absence of a legislative fix, the Global Transpark Authority will likely be held to be unconstitutionally constituted. Accordingly, anyone who has entered into contracts with the Global Transpark subsequent to Jan. 29, 2016 (the date of the *McCrory* decision) is doing so at its peril. Ironically, Governor Martin, one of the plaintiffs in the *McCrory* case, was the driving force behind the creation of the Global Transpark.

- Turnpike Authority. The North Carolina Turnpike Authority was created in 2002 in order to facilitate the funding of some highway projects with tolls. Due to the controversy surrounding some of its projects, the Turnpike Authority would appear to be a likely target post-*McCrory*. Like the Global Transpark, the Turnpike Authority falls within the Department of Transportation and would presumably be viewed as conducting core executive branch functions. The Governor has no authority to remove members appointed by the General Assembly. N.C. Gen. Stat. § 136-89.182(g). The only factor working in the Authority's favor is that the Governor effectively appoints a bare majority of the Authority. N.C. Gen. Stat. § 136-89.182(c) (9 voting members consisting of 4 appointed by the Governor, 4 by the General Assembly and the Secretary of

Transportation). The Supreme Court, however, seems to have indicated that this is not a dispositive factor in and of itself. Moreover, the Supreme Court has not answered the question as to what happens when a gubernatorial appointee must recuse himself or herself from a decision or if a member of the Governor's majority becomes incapacitated.

- Lottery Commission. Like the Turnpike Authority, the Governor has a bare majority of the appointees to the Lottery Commission. N.C. Gen. Stat. § 18C-111 (5 by the Governor and 4 by the General Assembly). Given the controversy surrounding the creation of the Lottery Commission (and the billions that would be at stake if the acts of the Commission were declared void *ab initio*), a class action on behalf of losing lottery purchasers is certainly not beyond the realm of possibility.

- Environmental Management Commission. The EMC is involved in highly controversial decisions, thereby increasing the incentive for someone to attack the authority of the EMC. The EMC is composed of 15 members – 9 appointed by the Governor and 6 appointed by the General Assembly. The Governor's appointments, however, are restricted. *See, e.g.*, N.C. Gen. Stat. § 143B-283(a1)(7) (one appointee must be actively employed by, or recently retired from, an industrial manufacturing facility). With respect to unrestricted (or "at large") appointments to the EMC, the Governor has one, and the General Assembly has six. The *McCrory* decision provides no guidance with respect to restricted appointments. Similarly, the decision does not touch on whether the Governor's appointees must constitute a majority of any committee that has been delegated final authority by the EMC (such as the Civil Penalty Remissions Committee or Special Air Permits Appeals Committee).

- Rules Review Commission. The RRC is charged with ensuring that administrative rules adopted by agencies comply with the procedural requirements of the Administrative Procedures Act. All 10 members of the RRC are appointed by the General Assembly. N.C. Gen. Stat. § 143B-30.1. In *McCrory*, the Supreme Court strongly foreshadowed that the RRC is properly constituted. The majority noted:

  > [T]he General Assembly may have broader latitude than it does here when it appoints members to commissions whose functions are different from those of the commissions in the present case, such as the Rules Review Commission.

  368 N.C. at 648 n.7, 781 S.E.2d at 258 n.7. Nevertheless, the RRC has been at the center of constitutional challenges in the past, see Br. of N.C. Board of Pharmacy, *N.C. Board of Pharmacy v. Rules Review Comm'n,* No. 673A05, at 49-76 (N.C. S. Ct.) (filed May 22, 2006), and the quote set out above may not discourage advocates from continuing to bring legal challenges with respect to the RRC.

Licensing Boards

Numerous licensing boards have a majority of legislative appointments. *See, e.g.,* N.C. Gen. Stat. § 74-C (Private Protective Services Board); N.C. Gen. Stat. § 74F-5 (Locksmith Licensing Board); N.C. Gen. Stat. § 89G-4 (Irrigation Contractors' Licensing Board); N.C. Gen. Stat. § 90-171.21 (Board of Nursing); N.C. Gen. Stat. § 90-353, -354 (Board of Dietetics/Nutrition); N.C. Gen. Stat. § 90-383 (Board of Fee-Based Practicing Pastoral Counselors); N.C. Gen. Stat. § 90-626 (Board of Massage and Bodywork Therapy); N.C. Gen. Stat. § 90-650 (Respiratory Care Board); N.C. Gen. Stat. § 90A-73 (On-Site Wastewater Contractors and Inspectors Certification Board); N.C. Gen. Stat. § 90D-5 (Board of Interpreter and Transliterator Licensing); N.C. Gen. Stat. § 143-143.10 (Manufactured Housing Board); N.C. Gen. Stat. § 143-151.46 (Home Inspector Licensure Board); N.C. Gen. Stat. § 143B-168.4 (Child Care Commission); *see also* N.C. Gen. Stat. § 17C-7 (Criminal Justice Education and Training Standards Commission); N.C. Gen. Stat. § 17E-3 (Sheriffs' Education and Training Standards Commission); N.C. Gen. Stat. § 90-113.32 (Substance Abuse Professional Practice Board): N.C. Gen. Stat. § 90C-23 (Board of Recreational Therapy Licensure); N.C. Gen. Stat. § 106-65.23 (Structural Pest Control Committee).

Whether these boards can continue as currently structured post-*McCrory* will depend on whether the licensing of professions that impact public health and safety stands as a core executive function.

Disciplinary Action of the Judicial Standards Commission of Executive Commissions

The Judicial Standards Commission is comprised of 13 members – 5 appointed by the Chief Justice, 2 by the Governor, 2 by the General Assembly and 4 by the State Bar Council. N.C. Gen. Stat. § 7A-375(a). Thus, neither the Chief Justice nor the Governor has a majority of the appointments to the Commission. Nevertheless, the Commission plays a role in disciplining both judicial and executive branch officials.

With respect to judges, the only disciplinary action that the Commission may take is to either issue a private letter of caution or recommend action by the North Carolina Supreme Court (which may include public reprimand, censure, suspension or removal from office). Accordingly, the role of the Commission in disciplining judges is likely to be viewed as advisory in nature and therefore in compliance with *McCrory v. Berger*.

The Judicial Standards Commission, however, also has jurisdiction over commissioners and deputy commissioners of the Industrial Commission. N.C. Gen. Stat. § 97-78.1 (applying the Code of Judicial Conduct to commissioners and deputy commissioners and making them subject to the rules and procedures of the Judicial Standards Commission). The Industrial Commission is presumably an executive branch agency – all of its members are appointed by the Governor. N.C. Gen. Stat. § 97-77(a). Nevertheless, commissioners and deputy commissioners can be disciplined by the Judicial Standards Commission (which does not stand as an executive branch agency). Any commissioner or deputy commissioner who is sanctioned by the Judicial Standards Commission should be highly motivated to challenge the authority of that Commission to do so under *McCrory v. Berger*.

Contested Case Proceedings

Under the Administrative Procedure Act, an Administrative Law Judge makes the final agency decision in contested case proceedings for many executive branch agencies. N.C. Gen. Stat. § 150B-34. The Chief Judge of the Office of Administrative Hearings is appointed by the Chief Justice of the North Carolina Supreme Court. N.C. Gen. Stat. § 7A-752. The Chief Judge of OAH, in turn, appoints the other ALJs. N.C. Gen. Stat. § 7A-753. Accordingly, a potential argument exists that final executive agency decisions in contested case proceedings are now being made by direct or indirect appointees of the Chief Justice of the North Carolina Supreme Court in contravention to the *McCrory* decision.

Gubernatorial Appointments Versus Appointments by Other Council of State Members

Unlike the federal government, executive powers in North Carolina are divided among several elected officials – all of whom sit on the Council of State. The *McCrory* decision expressly states that it is not deciding whether a constitutional issue may arise when an appointment power is given to a Council of State Member other than the Governor. The Supreme Court noted:

> Our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State.

368 N.C. at 646 n.5, 781 S.E.2d at 256 n.5. Thus, the Court has declined to determine whether bodies such as the Fire and Rescue Commission are improperly constituted. That Commission has a majority of appointments by a Council of State member – but not by the Governor. The Fire and Rescue Commission is composed of 15 members – 12 appointed by the Commissioner of Insurance, 1 by the Governor and 2 by the General Assembly. N.C. Gen. Stat. § 58-78-1.

III. Effect of a Determination that a Board or Commission is Improperly Composed

The Court in *McCrory* did not address whether the past acts of a board or commission that is improperly constituted are retroactively invalid. That issue, however, is being pressed by litigants. In *Haw River Assembly v. Rao*, No. 15 CvS 127 (Wake County Superior Court), the Southern Environmental Law Center ("SELC"), on behalf of its clients, has asserted that the Mining and Energy Commission is unconstitutional because that commission includes members appointed by the General Assembly. SELC further asserts that all actions of the Commission, including all rules promulgated by the Commission, "are null and void *ab initio*." Plaintiffs' Motion for Preliminary Injunction ¶ 4, *Haw River Assembly v. Rao*, No. 15 CvS 127 (Wake County Superior Court) (filed April 14, 2015). SELC argues in that motion:

> An unconstitutional commission composed of members unconstitutionally and unlawfully holding office cannot promulgate and implement rules, accept permit

> applications or issue permits. Where the legislature undertakes to create a public office by an unconstitutional statute, the holder of such office is not an officer de facto. As such, the de facto officer doctrine, which gives validity to acts of officers whose incumbency is assumed to be proper, does not apply. A statute declared unconstitutional is void *ab initio* and has no effect.

*Id.* ¶ 8 (citations omitted). When a judicial determination is made that a board or commission is composed in such a way as to violate the Separation of Powers Clause, further litigation may follow to determine the validity of actions by the board or commission that pre-date that judicial determination.

## IV. Conclusion

Under the *McCrory* decision, the validity of the action of any board or commission with legislative appointments may be subject to litigation. In the absence of a legislative fix, the Supreme Court's failure to adopt a "categorical rule" will likely give rise to continuing litigation with respect to numerous boards and commissions. Until this uncertainty is resolved, whenever a board or commission that has one or more legislative appointees renders an adverse decision against one's client, counsel should evaluate whether the validity of the board or commission is subject to challenge under *McCrory*.

## Appendix

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| **STATE OF NORTH CAROLINA**<br><br>**WAKE COUNTY** | **IN THE GENERAL COURT OF JUSTICE**<br>**SUPERIOR COURT DIVISION**<br>**Civil Action No. 15-CV-000127** |
| **HAW RIVER ASSEMBLY and KEELY WOOD PURICZ,**<br><br>**Plaintiffs,**<br><br>**v.**<br><br>**VIKRAM RAO, et al.,**<br><br>**Defendants.** | **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EXPEDITED HEARING**<br><br>**[N.C. R. Civ. P. 65; Local Rule 14.4]** |

Plaintiffs Haw River Assembly and Keely Wood Puricz (collectively, "Plaintiffs") respectfully move the Court for a preliminary injunction against Defendants, the State of North Carolina; the North Carolina Department of Environment and Natural Resources ("DENR"); the North Carolina Mining and Energy Commission ("MEC"); Vikram Rao, in his official capacity as both a Member and the Chairman of the MEC, and Ray Covington, Ivan Gilmore, Martin Matthews, George Howard, Charles Taylor, and James Womack, in their official capacities as Members of the MEC (collectively "Defendants") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure. Plaintiffs seek a preliminary injunction to prevent serious and irreparable harm to Plaintiffs arising out of the unconstitutional MEC developing a rule set to govern natural gas extraction that is not adequate to protect Plaintiffs' drinking water, property values and quality of life. Plaintiffs assert that they are likely to be successful on the merits of the underlying case and that they are likely to sustain irreparable loss unless the injunction is issued. Plaintiffs request an expedited hearing on the matter pursuant to Local Rule 14.4. In support of this Motion, Plaintiffs show the Court the following:

1. On January 5, 2015, Plaintiffs filed a Complaint for Declaratory Judgment in the above-captioned action, challenging the constitutionality of N.C. Gen. Stat. §143B-293.2(a), which governs appointments to the MEC.

2. The MEC is charged with the power and duty to adopt rules necessary to administer the Oil and Gas Conservation Act pursuant to N.C. Gen. Stat. § 113-391 and for the development of the oil, gas, and mining resources of the State. N.C. Gen. Stat. § 143B-293.1(a). All rules adopted by the Commission shall be enforced by DENR. *Id.*

3. On November 14, 2014, pursuant to N.C. Gen. Stat. § 150B-21.3(b)(1), the MEC adopted 15A N.C. Admin. Code Subchapter 5H, a suite of regulations purportedly authorizing the MEC and DENR to issue permits for natural gas extraction in North Carolina (the "fracking rules"). The fracking rules were approved by the Rules Review Commission on December 17, 2014, and January 15, 2015, and went into effect on March 17, 2015. Therefore, the fracking rules now purport to authorize DENR and the MEC to issue permits for oil and gas exploration and development activities using horizontal drilling and hydraulic fracturing treatments to extract natural gas from shale formations in the state beginning March 17, 2015. S.L. 2014-4 (S 786).

4. As Plaintiffs allege in their Complaint, the MEC, with a majority of members appointed by the North Carolina General Assembly ("General Assembly"), represents a usurpation of executive power by the legislature in violation of Article I, Section 6 of the Constitution of North Carolina, the "separation of powers" doctrine. As the MEC was formed in violation of the North Carolina Constitution, all actions of the MEC, including the adoption of 15A N.C. Admin. Code Subchapter 5H, are null and void *ab initio*.

5. A court may issue a preliminary injunction to preserve the status quo of parties during litigation "(1) if a plaintiff is able to show likelihood of success on the merits of his case

and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d754, 759 (1983) (internal citations omitted).

6. On March 16, 2015, a three-judge panel formed pursuant to N.C. Gen. Stat. § 1-267.1 ruled in favor of the plaintiffs in the case of *Patrick L. McCrory, et al. v. Phillip E. Berger, et al.*, Sup. Ct. Case No. 113A15 ("*McCrory v. Berger*"), finding that the General Assembly overstepped its authority in enacting the statutes that created the Coal Ash Management Commission, the Oil and Gas Commission[1], and the Mining Commission. Specifically the panel found, *inter alia,* that N.C. Gen. Stat. § 143B-293.2 is unconstitutional in that it provides for legislative appointment of some of the members of the Oil and Gas Commission. *McCrory v. Berger* at 11.

7. The three-judge panel is the only court authorized to determine the facial constitutionality of a statute. Because the three-judge panel convened to hear *McCrory v. Berger* found N.C. Gen. Stat. § 143B-293.2 to be unconstitutional, the statute mandating that the MEC have a majority of legislative appointments, N.C. Gen. Stat. § 143B-293.2(a), is also unconstitutional. While there is no case law regarding the precedential value of the decision of a three-judge panel, we can look to analogous law regarding panels of the Court of Appeals for guidance. There, "where one panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, the decision in *McCrory v. Berger* should be considered binding on this court

[1] After July 31, 2015, the Mining and Energy Commission will evolve into the Mining Commission and the Oil and Gas Commission. The Oil and Gas Commission will retain jurisdiction over the fracking rules. N.C. Gen. Stat. § 143B-293.

and success on the merits in this case is all but guaranteed, unless that decision is overturned by the Supreme Court.

8. An unconstitutional commission composed of members unconstitutionally and unlawfully holding office cannot promulgate and implement rules, accept permit applications or issue permits. Where the legislature undertakes to create a public office by an unconstitutional statute, the holder of such an office is not an officer de facto. As such, the de facto officer doctrine, which gives validity to acts of officers whose incumbency is assumed to be proper, does not apply. ("Where the legislature undertakes to create a public office by an unconstitutional statute, is the incumbent of such an office an officer de facto? This query must be answered in the negative for the very simple reason that there can be no officer, either de jure or de facto, unless there is a legally existing office to be filled." *Idol v. Street*, 233 N.C. 730, 734 (1951).) A statute declared unconstitutional is void ab initio and has no effect. ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).) Therefore, there is a great likelihood that the challenge to the validity of the fracking rules will be successful on the merits.

9. As of March 17, 2015, North Carolina is now positioned to permit fracking to extract natural gas from shale formations. Plaintiffs, who live and work at the very heart of North Carolina's shale resource, have suffered and will continue to suffer irreparable harm as a result of the action of the unconstitutional MEC in enacting fracking regulations.

10. Plaintiffs' irreparable harms have grown with each meeting of the MEC, up through the finalization of the fracking rules, and will only grow further with delay in this case. As the MEC deliberated on the fracking rules, landmen have moved around Lee, Chatham and

Moore County convincing landowners to lease their mineral rights to gas companies. As the rules were developed, Plaintiffs saw their rights to know what chemicals will be pumped into the fracking wells next door were debated and ultimately curtailed by the MEC, concealing from Plaintiffs the risks they face. They have followed the debate that resulted in rules that will allow open pits of fracking wastewater, containing chemicals from fracking fluid and naturally occurring contaminants from deep in the earth, including high levels of salts, heavy metals, and naturally occurring radioactive materials, to be stored in open pits near their family farms. They have seen setbacks from drinking water sources reduced by the MEC as that unconstitutional body deliberated that aspect of the rules. As the MEC is now able to issue permits for fracking, Plaintiffs fear that their property will be forced against their will into a drilling unit, that it has lost value, and that it will continue to lose value. They fear that their property will become contaminated and that they will only be able to sell at a distressed rate, if at all. Complaint at Ex. 2, Ex. 3.

11. Plaintiff Haw River Assembly ("HRA") has over 1,000 individual members, including members who live directly above the Triassic Basin shale formation in Lee, Chatham, and Moore Counties where natural gas extraction in North Carolina is most likely to occur. Some of these members are terrified that landowners near them will obtain permits to extract natural gas through horizontal drilling and hydraulic fracturing and that their drinking water wells will become contaminated as a result of this process. Complaint at Ex.1, Ex. 2, Ex. 3.

12. "Forced pooling," also known as compulsory pooling, is used to create a drilling unit by forcing non-consenting landowners to participate in a proposed drilling unit, thereby allowing fracking to occur on and under their property against their wishes. Complaint at Ex. 3.

Current North Carolina laws gives the MEC the authority to pool landowners this way. N.C. Gen. Stat. § 113-393.

13. Keely Puricz, as detailed in her standing affidavit, lives on a 12-acre horse farm in Lee County between Pocket Creek and Raccoon Creek, at the epicenter of the ostensible natural gas resource. Several of her neighbors have leased their land for fracking, and Puricz fears her property will likely be force-pooled into one of the first drilling units once gas extraction begins in North Carolina. Complaint at Ex. 3.

14. The unlawful fracking rules are wholly inadequate to protect Plaintiffs' interest. Because of this, Puricz and members of HRA have been forced to make difficult decisions. Puricz and her family have decided to try to sell their land and leave the area rather than bear the risks presented by inadequately regulated gas extraction. She is greatly concerned about the impact that the close proximity of leased land has already had on the value of her property, and is unsure whether she can ever sell her property. Puricz was advised by a real estate agent that the proximity of leased land to her property will make her property very difficult to sell, even at a greatly reduced price. She was informed that no land in Lee County near a lease is currently selling. *Id.* A preliminary injunction from this Court would suspend all activities under the unlawful fracking rules and would thereby prevent further harm to Ms. Puricz and her family while the ultimate question of the constitutionality of the MEC is determined. Complaint at Ex. 3

15. Further, the natural gas industry is facing uncertainty in North Carolina. A preliminary injunction would not cause undue harm to the industry but, to the contrary, would eliminate uncertainty by temporarily suspending decisions, actions and investments made in permit applications, land acquisitions and leaseholds in reliance on the legally infirm mandates

of the MEC. It would be inefficient and unwise for the State of North Carolina to allow the issuance of a permit to a company, which would lead to investment, hiring, and other business decisions, and then have that permit revoked because the MEC and the rules it has adopted are unconstitutional.

16. When considering whether a plaintiff is likely to suffer irreparable loss absent an injunction, a judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978). The harm to the defendants in this case is negligible, whereas the harm to the plaintiffs, as detailed above, is great. Upon information and belief, the MEC has not yet received any applications for a permit under the specious fracking rules. Therefore, the time for a preliminary injunction is now, before actions are taken in reliance on an unconstitutional suite of regulations.

17. Another factor that the court may consider when considering a motion for preliminary injunction is the effect on the public interest. *Huggins v. Wake County Bd. of Educ.*, 271 N.C. 33, 42, 157 S.E.2d 703, 709 (1967) (considering the disruption to the operation of a school and the interest of the children enrolled therein and the interests of the public in their education). As detailed above, the interest of North Carolina citizens in having clean drinking water, property value, and the right to use their property as they so choose, is at stake. The public also has an interest in ensuring that only constitutional government bodies are empowered with making decisions that substantially affect their person, property, and interests.

18. A preliminary injunction will prevent the Court from ultimately having to wrestle with difficult questions related to vested rights. North Carolina courts have struggled with the issue of whether to give any effect to unconstitutional statutes, and have ultimately found that "a

test of reasonableness and good faith is to be applied in determining the effect which a judicial decision that a statute is unconstitutional will have on the rights and obligations of parties who have taken action pursuant to the invalid statute." *American Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 149 (1980). Courts have applied this test in deciding whether to give retroactive or prospective effect to statutes found to be unconstitutional. *Id.* (internal citations omitted). This court need not contemplate retroactive consequences of a declaration that the fracking rules are void, as the rules currently have only prospective effect.

19. A preliminary injunction of the fracking rules would enjoin DENR and the MEC from implementing the fracking rules, including accepting permit applications and issuing permits. This is necessary pending a trial on the merits in this case because (a) Plaintiffs are likely to succeed on the merits of their claims that N.C. Gen. Stat. § 143B-293.2(a), which governs appointments to the MEC, violates the separation of powers doctrine and is therefore unconstitutional; and (b) implementation of the fracking rules, including accepting permit applications and issuing permits, will result in irreparable injury to Plaintiffs.

20. Plaintiffs respectfully submit that, in view of the circumstances of this case, the court exercise its discretion to require no security or only a nominal security and set the matter for expedited hearing as permitted under Local Rule 14.4.

WHEREFORE, Plaintiffs respectfully request that:

1. The Court enter a preliminary injunction enjoining the MEC's rules, 15A N.C. Admin. Code Subchapter 5H, thereby enjoining the submission of permit applications and the consideration of permit applications by the MEC and DENR pursuant to these rules.

2. The Court order the injunction to remain in effect for the duration of this litigation.

3. The Court order that no security be required.

4. The Court set this matter for expedited hearing for April 17, 2015.

5. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 14th day of April, 2015.

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Mary Maclean Asbill – N.C. Bar No. 38936
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*Attorneys for Plaintiffs Haw River Assembly and Kelly Wood Puricz*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Preliminary Injunction was served on all Defendants by first-class mail, with a courtesy copy provided by electronic mail as well, addressed as follows:

Roy Cooper, North Carolina Attorney General
Alexander McC. Peters, Senior Deputy Attorney General (apeters@ncdoj.gov)
Melissa L. Trippe, Special Deputy Attorney General (mtrippe@ncdoj.gov)
Ann W. Matthews, Special Deputy Attorney General (amatthews@ncdoj.gov)
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

This the 14th day of April, 2015.

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STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR

PAT MCCRORY
GOVERNOR

ROBERT C. STEPHENS
GENERAL COUNSEL

VIA EMAIL AND US MAIL

March 11, 2016

Mr. Michael Jacobs
North Carolina Coal Ash Management Commission
4299 Mail Service Center
Raleigh, North Carolina 27699

Re: Status of the Coal Ash Management Commission Subsequent to *McCrory v. Berger*

Dear Mr. Jacobs:

The North Carolina Coal Ash Management Commission (hereinafter the "Commission") has worked diligently over the past year to meet its responsibilities set forth in the Coal Ash Management Act. You, the other members of the Commission and the Commission staff are to be commended for your efforts and the work product resulting from those efforts.

However, on January 29, 2016, the North Carolina Supreme Court issued its opinion in *McCrory, et al. v. Berger et al.* In the opinion, the Supreme Court held that the Commission is an unconstitutional body in violation of the separation of powers principle in the Constitution.

This letter is to advise you that as a result of the Supreme Court's decision, the Commission no longer exists as a legal entity and does not have any legal authority to take any further action. It cannot and should not attempt to exercise any of the powers and duties assigned to it by the Coal Ash Management Act or otherwise. The Commission can neither be convened nor can it meet.

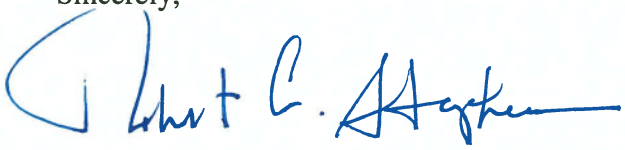
This inability to act includes the duties assigned to the Chair of the Commission to organize and direct the work of Commission staff. Since the Commission no longer exists as a legal entity, the three staff members of the Commission cannot be supervised and directed by the Commission's Chair. Until further notice, the staff of the Commission shall be supervised and

directed by the Director of the Division of Emergency Management within the Department of Public Safety, where they are administratively housed.

Accordingly, you, the other members of the Commission, and the Commission staff should take no further action in the name of the Commission. The Office of the Governor and the Department of Environmental Quality are studying options to deal with coal ash management. As soon as those options are identified, we will discuss them with you.

Again, on behalf of the Governor and this office, we would like to thank you for your previous work and for the time you have devoted to helping the people of North Carolina.

Sincerely,



Robert C. Stephens
General Counsel

CC: Frank Perry, Secretary, NC Department of Public Safety
Mike Sprayberry, Director, NC Division of Emergency Management
Donald van der Vaart, Secretary, NC Department of Environmental Quality

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

MICHAEL F. EASLEY
GOVERNOR

Governor's objections and Veto Message

Senate bill 1283, "An act to appoint persons to various public offices upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives and to make various changes to boards and commissions."

Following adjournment of the legislative session, information has become available to the appointing authorities that several of the appointees, under the bill, to either new, expanded or existing boards and commissions do not meet the statutory requirements necessary to serve on the board or commission to which they were appointed. Two of the appointees are deceased, and at least five of the appointees are not qualified for other reasons, principally because they do not meet the statutory requirements for appointment or they have conflicts that statutorily prohibit their appointment. In addition, the bill mistakenly makes six appointments that are required to be made by the Governor.

Therefore, I veto the bill.

The bill, having been vetoed, is returned to the Clerk of the Senate on this 3rd day of November, 2002 at 2:40 p.m. for reconsideration by that body.

Michael F. Easley

**SECTION 5.3.** Unless otherwise provided for in this act, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 4th day of October, 2002.

Marc Basnight
President Pro Tempore of the Senate

James B. Black
Speaker of the House of Representatives

VETO

Michael F. Easley
Governor

Approved ~~_____~~ .m. this _____ day of _____, 2002

Michael F. Easley, Governor

November 7, 2002
Date