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STATE OF NORTH CAROLINA
WAKE COUNTY 2015 MAY -1 PM 12: 51

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY, C.S.C.

Civil Action No. 15-CVS-_____

BY _____

CLEAN WATER FOR NORTH CAROLINA,
MARTHA GIROLAMI, ANNA BAUCOM,
and DARRYL MOSS,

Plaintiffs,

v.

NORTH CAROLINA MINING AND
ENERGY COMMISSION, NORTH
CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES and the STATE OF NORTH
CAROLINA,

Defendants.

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiffs, Clean Water for North Carolina, Martha Girolami, Anna Baucom, and Darryl Moss, hereby allege and say:

NATURE OF THE ACTION

1. Pursuant to the Uniform Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 to -267, and Rule 57 of the North Carolina Rules of Civil Procedure, Plaintiffs, Clean Water for North Carolina, Anna Baucom, and Darryl Moss ("Plaintiffs"), hereby facially challenge the constitutionality of N.C. Gen. Stat. § 113-415.1, which grants the North Carolina Mining and Energy Commission ("MEC")¹ of the North Carolina Department of Environment and Natural

¹ Per N.C. Sess. Law 2014-4, codified at N.C. Gen. Stat. §§ 143B-293.1 to -293.6, the North Carolina Mining and Energy Commission will become the North Carolina Oil and Gas Commission on August 1, 2015. This renaming does not change the statutory authority granted

Resources (“DENR”) judicial authority to determine whether locally-enacted ordinances are preempted by the statutory provisions within this section. This statutory delegation of the judicial power to interpret the law contained within § 113-415.1 usurps the power of the judicial branch of State government in violation of Article I, Section 6 of the North Carolina State Constitution, making this statutory provision facially unconstitutional.

THE PARTIES

2. Plaintiff Clean Water for North Carolina (“CWFC”) is a 501(c)(3) nonprofit membership organization founded in 1984, with its principal place of business located in Asheville, North Carolina, and an administrative office located in Durham, North Carolina. CWFC has over 500 members, over ninety-nine percent of whom live, work, and recreate throughout North Carolina, and many of whom live, work, and recreate in the communities overlying North Carolina’s Triassic basins and other possible oil- and gas-containing formations. CWFC’s mission is to promote clean, safe water and empowered, just communities through community organizing, advocacy, education, and technical assistance.

3. CWFC researches environmental problems, analyzes public policy, and educates and empowers people to be engaged and active in protecting their communities. CWFC helps local communities develop strategies to address threats to their environment and health. CWFC has an interest in educating communities on how to protect themselves from shale gas development, and advocates for local ordinances to regulate such development. To those ends, CWFC has opposed the North Carolina General Assembly’s statutory provisions that limit local regulatory powers, and has opposed the MEC’s draft regulations that promulgate

to the Commission. As such, this Complaint addresses the cited statutory powers granted to the Commission under both names.

the General Assembly's respective statutes. *See, e.g.*, CWFNC Oral Comments on Oil and Gas Rules (Aug. 22, 2014), *available at* http://portal.ncdenr.org/c/document_library/get_file?uuid=10d9e6b9-6b3f-42ba-b4dd-9245ddc8b3a6&groupId=8198095; Comments from CWFNC to the MEC on Draft Oil and Gas Rules (Sept. 30, 2014) (attached); Public Presentations from August 2014 to Present (presentation list on file with CWFNC). CWFNC has members who live in communities where shale gas developments are likely to occur, and who advocate for their local communities to enact ordinances to control shale gas development.

4. Plaintiff Clean Water for North Carolina has standing to bring this lawsuit on behalf of its members in that its members would otherwise have standing to sue in their own rights; the interests it seeks to protect are germane to its organizational purpose; and neither the claim asserted, nor the relief requested, requires the participation of the individual members in this lawsuit.

5. Plaintiff Martha Girolami lives and pays taxes in Chatham County, North Carolina, resides above the southern end of the Durham sub-basin of the Deep River Triassic basin, which is susceptible to future extraction of natural gas by horizontal drilling and hydraulic fracturing. At all times complained of, Martha Girolami has owned real and personal property within Chatham County. Chatham County imposes an ad valorem tax on property, which Martha Girolami has paid each and every year that she has owned property and will continue to do so. Martha Girolami's ad valorem tax rate has been based on a system of valuation, and she has received no abatement or exemption from this legal responsibility. She also pays various types of taxes to the State of North Carolina, including state income taxes and state sales taxes on items purchased. Martha Girolami has advocated for local governments' rights to regulate hydraulic

fracturing activities within their territorial boundaries, and opposes the use of her tax dollars to enact the unconstitutional delegation of judicial power to the MEC to interpret the State law and rule upon the preemption of local ordinances. Plaintiff Martha Girolami is a member of CWFNC and a member of its Advisory Board, consisting of nonvoting members of CWFNC's Board of Directors (the "Board") who advise the Board and staff on a range of program-related issues.

6. Plaintiff Anna Baucom lives, works, and pays taxes in Anson County, North Carolina, and currently serves as the Chairman of the Anson County Board of Commissioners ("the Board of Commissioners"). The Board of Commissioners represents the citizenry of Anson County, a large portion of which overlies the southern end of the Wadesboro sub-basin of the Deep River Triassic basin that is susceptible to natural gas extraction by horizontal drilling and hydraulic fracturing. Anson County has enacted an ordinance that could face a preemption challenge that under current law would be brought before and heard by the MEC, and may enact future ordinances to protect the County's citizens and environment from shale gas development. Plaintiff Anna Baucom is a member of CWFNC and a member of its Advisory Board, as described above.

7. Plaintiff Darryl Moss lives, works, and pays taxes in Creedmoor, North Carolina, and currently serves as Mayor of the City of Creedmoor. As Mayor, Plaintiff Darryl Moss represents the citizenry of Creedmoor, which overlies the northern end of the Durham sub-basin of the Deep River Triassic basin that is susceptible to natural gas extraction by horizontal drilling and hydraulic fracturing. Creedmoor has enacted an ordinance that could face a preemption challenge that under current law would be brought before and heard by the MEC, and may enact future ordinances to protect the City's citizens and environment from shale gas development.

Plaintiff Darryl Moss is a member of CWFNC and a member of its Advisory Board, as described above.

8. Plaintiffs have standing to bring this lawsuit as parties "whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise." N.C. Gen. Stat. § 1-254.

9. Plaintiffs are aggrieved and irreparably harmed by the General Assembly's unconstitutional granting of the judicial power to the MEC, a commission of an administrative agency within the executive branch of government, to interpret the laws and make rulings on the question of whether local ordinances are preempted by State law. The resulting actual and potential injuries will not be redressed except by an order from this Court, declaring that Defendants enacted General Statute Section 113-415.1 and were granted respective powers in violation of the North Carolina State Constitution.

10. Defendant MEC is a State commission whose creation, powers, and duties originate from statutes enacted by the North Carolina General Assembly.

11. Defendant DENR is an administrative agency of the State of North Carolina, authorized by statutes enacted by the North Carolina General Assembly to support and assist the MEC in carrying out its statutory duties.

12. Defendant State of North Carolina, through its General Assembly, enacts local and general legislation, including North Carolina General Statutes Section 113-415.1.

JURISDICTION AND VENUE

13. The Superior Court has jurisdiction over this action pursuant to the North Carolina Declaratory Judgment Act. N.C. Gen. Stat. §§ 1-253 to -267.

14. This Court has the “power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed,” and “such declarations shall have the force and effect of a final judgment or decree.” N.C. Gen. Stat. § 1-253.

15. An action under the Declaratory Judgment Act is appropriate when it “will serve a useful purpose in clarifying and settling the legal relations at issue, and [] when it will terminate and afford relief from uncertainty, insecurity and controversy giving rise to the proceeding.” *Goldston v. State*, 31 N.C. 26, 34, 637 S.E.2d 876, 881 (2006) (citing *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002)).

16. The Declaratory Judgment Act is to be liberally construed and administered. N.C. Gen. Stat. § 1-264.

17. An actual and justiciable controversy exists between the Plaintiffs and Defendants.

18. This Court also has jurisdiction over this action pursuant to North Carolina General Statutes Section 1-267.1(a1), which requires that this Court hear “any facial challenge to the validity of an act of the General Assembly.”

19. Proper venue lies in Wake County pursuant to North Carolina General Statutes Section 1-77(2) because the causes of action asserted herein arose from the North Carolina General Assembly’s official acts and the MEC’s grants of authority occurring in Wake County, North Carolina.

FACTS AND ALLEGATIONS

20. The MEC is a commission of an administrative agency within the executive branch of State government, duly formed and existing pursuant to N.C. General Statutes Section

143-293.1(a), whose powers and duties are enumerated in North Carolina General Statutes Sections 143B-291.1(b) and (c).

21. Article I, Section 6 of the North Carolina State Constitution provides that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”

22. North Carolina Courts have confirmed that this separation of powers provision reserves to the judicial branch the power to interpret the laws and decide legal controversies. *See, e.g., Thomas v. N.C. Dept. of Human Res.*, 124 N.C. App. 698, 707-09, 478 S.E.2d 816, 821-23 (N.C. App. 1996).

23. North Carolina Courts also have established that acts of the General Assembly are presumed to be constitutional until those acts are shown to be unconstitutional. *Painter v. Wake Cnty. Bd. of Ed.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975).

24. North Carolina Courts have held that statutes governing administrative agencies that violate the State’s constitutional principle of separation of powers are unconstitutional. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 609, 286 S.E.2d 79, 89 (1982); *Accord State ex rel. Martin v. Melott*, 320 N.C. 518, 524, 359 S.E.2d 783, 787 (1987).

25. On March 16, 2015, a Three-Judge Panel in the Wake County Superior Court held that the composition of the MEC’s membership violated the separation of powers principle enshrined in Section 6 of Article I of the North Carolina State Constitution. *McCrory v. Berger*, No. 14-CVS-015201, 2015 WL 1324855 (N.C. Super. Mar. 16, 2015).

26. Since the MEC’s creation, the North Carolina General Assembly has granted the MEC additional powers and assigned to it additional duties, including the power and duty to

interpret State statute in determining whether local ordinances are preempted by State law. N.C. Gen. Stat. § 113-415.1.

27. This statutory provision exceeds a permissible grant of quasi-judicial powers to an administrative agency, and transforms the MEC into a judicial body within the executive branch.

28. Section 113-415.1 contravenes the separation of powers doctrine and constitutes an unconstitutional legislative delegation of judicial authority to an administrative agency.

29. The negative implications of this unconstitutional statutory provision are worsened by the fact that, until further action by the State of North Carolina, an unconstitutional commission is tasked with exercising the judicial power to render preemption decisions.

30. The North State Carolina Constitution provides that all courts should be open and that justice shall be administered without favor as codified in Article I, Section 18.

31. Judges in the General Court of Justice are governed by the Code of Judicial Conduct which serves as a shield to protect the people from potential abuses of the judicial power. Yet the members of the MEC are not subject to the Code of Judicial Conduct in exercising their judicial power to render preemption decisions. This failure to govern the judicial power with adequate safeguards compounds the problems created by lodging this power in the MEC. Public statements made by current members of the MEC show the danger of bias and favoritism is present.

32. Expenditure of public funds by the MEC compounds the error in its creation by expending tax revenues for an illegal purpose.

33. The assertion of the MEC's power to trump the power of local governments to assert the will of the people compounds this error since the power of the General Assembly derives from the power of the people.

34. The people of North Carolina enacted by popular vote an amendment to the Constitution now codified as Article XIV, Section 5, which directly grants powers to local governments to protect the air and water from pollution.

CLAIMS FOR RELIEF

35. Plaintiffs reallege and incorporate herein by reference the foregoing paragraphs of this Complaint.

36. There exists a present controversy between Plaintiffs and Defendants as to the constitutionality of North Carolina General Statutes Section 113-415.1 with respect to its granting the MEC the judicial power to interpret State law and decide whether local ordinances are preempted by State law.

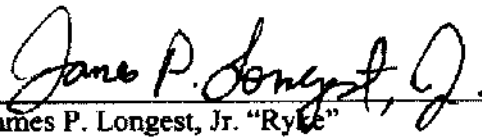
37. Plaintiffs seek a declaratory judgment from this Court that North Carolina General Statutes Section 113-415.1 is facially unconstitutional and void as to violating the fundamental principle of separation of powers as set forth in the North Carolina State Constitution and confirmed by the North Carolina Courts.

PRAYER FOR RELIEF

WHEREFORE, based upon all of the allegations contained in the foregoing paragraphs, Plaintiffs respectfully request that this Court:

1. Adjudge and declare that N.C. General Statutes Section 113-415.1 does not comply with the requirements of Article I, Section 6 of the North Carolina State Constitution;
2. Award costs to Plaintiffs pursuant to N.C. General Statutes Section 1-263; and
3. Grant any other relief that this Court deems to be just and proper.

Respectfully submitted this 1 day of May, 2015.



James P. Longest, Jr. "Ryle"

N.C. Bar No. 18297

DUKE ENVIRONMENTAL LAW & POLICY CLINIC

210 Science Drive, Box 90360

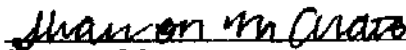
Durham, NC 27708-0360

Phone: (919) 613-7207

Fax: (919) 613-7262

E-mail: longest@law.duke.edu

Counsel for Clean Water for North Carolina



Shannon M. Arata

N.C. Bar No. 47544

DUKE ENVIRONMENTAL LAW & POLICY CLINIC

210 Science Drive, Box 90360

Durham, NC 27708-0360

Phone: (919) 613-7251

Fax: (919) 613-7262

E-mail: shannon.arata@lawnet.duke.edu

Counsel for Clean Water for North Carolina


CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Complaint for Declaratory Judgment on the persons named below by depositing a copy thereof in the United States mail by certified mail, return receipt requested.

This 1 day of May, 2015.

Sam M. Hayes
General Counsel
North Carolina Department of Environment and Natural Resources
1601 Mail Service Center
Raleigh, NC 27699-1601
Counsel for Defendants Mining & Energy Commission and North Carolina Department of Environment & Natural Resources

Roy Cooper
Attorney General
Attorney General's Office
9001 Mail Service Center
Raleigh, NC 27699-9001
Counsel for the State of North Carolina


Shannon M. Arata
N.C. Bar No. 47544
DUKE ENVIRONMENTAL LAW & POLICY CLINIC
210 Science Drive, Box 90360
Durham, NC 27708-0360
Phone: (919) 613-7251
Fax: (919) 613-7262
E-mail: shannon.arata@lawnet.duke.edu
Counsel for Clean Water for North Carolina