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May 1, 2018

BY EMAIL – ORIGINAL BY FIRST CLASS MAIL

J.D. Solomon
Chairman
N.C. Environmental Management Commission
c/o Phillip Reynolds
N.C. Department of Justice
114 West Edenton Street
Raleigh, NC 27603

Jennifer Everett
DEQ Rule Comments
North Carolina Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27609

Re: Comments of WASCO LLC regarding 15A N.C.A.C. 02I – Petitions for Rulemaking and Declaratory Rulings

Dear Chairman Solomon and Ms. Everett:

This firm represents WASCO LLC ("WASCO"), which submitted a Petition for Rulemaking to the North Carolina Environmental Management Commission (the "Commission" or "EMC") on December 4, 2017. The EMC denied WASCO's Petition for Rulemaking at its March 8, 2018 meeting. In addition, the Commission is scheduled to hear WASCO's March 5, 2018 Petition for Declaratory Ruling on May 10, 2018.

During the EMC's March 8, 2018 meeting, Chairman Solomon noted that the Commission has the ability – as part of the mandatory rules review process – to initiate new rulemaking proceedings to address concerns that are identified during this review. To that end, WASCO offers the following comments for the EMC's consideration.

I. Comments regarding Procedures Governing Petitions for Rulemaking

WASCO believes the Commission's rules should afford the petitioner an opportunity to address the full EMC as a matter of right. As currently drafted, 15A N.C.A.C. 02I.0503(a) affords the EMC's counsel and the Division Director to whom the Petition for Rulemaking was addressed to participate in the full Commission's discussion of a rulemaking petition. The

petitioner's sole opportunity, as a matter of right, to advocate for its petition is limited to addressing the EMC committee to which the chairman referred the petition for review pursuant to 15A N.C.A.C. 021.0502. 15A N.C.A.C. 021.0503(a) does not contain any limits on the purpose or content of the Director's discussion with the full Commission and creates a dynamic in which one party interested in a rulemaking petition may have the chance to argue the merits of the petition to the full Commission while another interested party does not.

WASCO appreciates the opportunity for detailed discussion that arises out of the referral of a rulemaking petition to a committee of the EMC. Indeed, the Groundwater and Waste Committee spent considerable time listening to WASCO's arguments in support of its Rulemaking Petition, and WASCO believes that process should remain in place. However, given that the full Commission is ultimately the body that must grant or deny a rulemaking petition, the petitioner should have some opportunity, as a matter of right, to address all of the individuals who will vote to grant or deny its petition. While the demands on the Commission's time will likely require that the Petitioner's opportunity to speak to the full EMC be limited to a brief period of time, the current procedure only guarantees the petitioner a chance to address a small subset of the full Commission.

In addition, the Commission should consider clarifying its authority to rule on a petition for rulemaking by explicitly stating its ability to amend or modify the language proposed by the petitioner and to initiate a rulemaking proceeding on the basis of that modified language. To be sure, WASCO invested a considerable amount of time preparing its petition for rulemaking, and the members of Groundwater and Waste Committee – as well as Chairman Solomon (who participated extensively in the Committee's discussions) – invested time to review and understand WASCO's petition as well as the Department of Environmental Quality's ("DEQ") opposition to WASCO's petition. It is hard to imagine that the General Assembly intended that a petition for rulemaking be an all-or-nothing proposition and that all of the effort required to prepare and evaluate such a petition be wasted if the petitioner's proposed language was not exactly as the EMC would like.

Finally, WASCO believes the Commission should explicitly state its willingness to modify the deadlines for action on a petition for rulemaking and to conduct more than one hearing before the appropriate committee of the EMC – if the petitioner agrees to waive the deadlines contained in N.C.G.S. § 150B-20. As the Commission is well aware, environmental law is one of the most complex areas of the state's regulatory authority. And, as noted above, significant effort is required for a petitioner to prepare a meaningful petition for rulemaking and for the EMC's members to understand it. By reserving the ability of a Committee to conduct more than one hearing on a petition for rulemaking, the Committees will be in a better position to understand each petition completely and make a fully vetted recommendation to the Commission. Imposing a limit of one hearing before a Committee artificially limits the ability of citizens to request changes to the rules and have those requests heard in a meaningful way – especially when the petition involves a complex area of law. It also creates the opportunity for opponents of a rulemaking petition to raise complex objections to a petition that a Committee cannot resolve within the time allotted for one hearing and thereby frustrate a legitimate rulemaking petition.

II. Comments regarding Procedures for Declaratory Rulings

When the Commission issues a declaratory ruling, it issues a ruling “as to the validity of a rule or as to the applicability to a given state of facts of a statute ... or ... rule or order of the agency.” N.C.G.S. § 150B-4(a). As such, a petition for declaratory ruling authorizes the Commission to act as a citizens’ oversight board for DEQ and affords the regulated community an alternative to the Office of Administrative Hearings to seek oversight of DEQ’s activities.

By their nature, declaratory ruling proceedings involve a controversy between members of the public and DEQ, but the Commission has no procedural rules or guidance to describe how those proceedings should occur. For example, 15A N.C.A.C. 02I.0603 authorizes the Commission to request written statements on the merits of a declaratory ruling petition and it authorizes the EMC to conduct a hearing on the petition, but:

- It does not afford a petitioner the right to submit a reply to any opposition brief that DEQ might file;
- It does not establish deadlines for DEQ submit an opposition or for the petitioner to submit a reply;
- It does not establish a procedure for any party to submit documents relevant to whether “a given state of facts” exists;
- It does not establish a procedure for a petitioner to amend its petition in the event of an intervening change in facts or the law; and
- It does not create a procedure by which, if all parties consent, the Commission can stay proceedings on a petition to facilitate settlement discussions.

In order to ensure that proceedings on a petition for declaratory ruling are fair to all parties, WASCO believes the Commission should initiate a stakeholder process intended to produce procedural rules that are akin to the North Carolina Rules of Civil Procedure but that are also tailored towards the unique nature of a declaratory ruling proceeding. WASCO believes that a clear statement of the “rules of the road” is necessary so that all parties have an upfront understanding of the EMC’s expectations regarding a petition for declaratory ruling.

As I am sure you can see, my client believes the rules in 15A N.C.A.C. chapter 02I are necessary but that substantial revisions are needed to ensure procedural fairness in the future. Please feel free to contact me at (919) 835-4173 if I can provide you with any additional information.

Sincerely,



Sean M. Sullivan

J.D. Solomon
Jennifer Everett
May 1, 2018
Page 4



cc: Rodney G. Huerter, Esq.