NO. 338PA23 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * *

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Petitioner;	)	
v.	)	From Wake County
N.C. FARM BUREAU FEDERATION, INC., Respondent.	)	

NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK AND NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Petitioners;	)	
v.	)	From Wake County
N.C. FARM BUREAU FEDERATION, INC., AND NC DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Respondents.	)	

* * * * * * * * * * * * * * * * *

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AND THE N.C. CHAMBER LEGAL INSTITUTE

* * * * * * * * * * * * * * * * *

INDEX

TABLE OF CASES AND AUTHORITIES----------ii

STATEMENT OF IDENTITY AND INTEREST----------2

INTRODUCTION----------3

ISSUE PRESENTED----------5

ARGUMENT----------5

I. The Division's Actions Violate the NCAPA and Undermine Separation of Powers---------5

A. The NCAPA Was Enacted to Prevent Government by Bureaucracy----------6

B. The Permit Conditions Easily Fit the Definition of a "Rule" Because They are Generally Applicable----------10

C. Neither the NCAPA nor Section 143-215.10C(a) Exempt General Permits from Rulemaking----------13

II. Small Businesses Will Suffer if Agencies Are Allowed to Enact Rules Without Following APA Procedures----------16

A. The Permitting Conditions are Excessive and Harm Businesses------17

B. The Scope of the Division's Actions Will Expand and Create an Unpredictable Environment for Businesses----------22

CONCLUSION----------23

CERTIFICATE OF SERVICE----------25

TABLE OF CASES AND AUTHORITIES

CASES

Adams v. N.C. Dep't of Nat. & Econ. Res., 295 N.C. 683 (1978)----------6

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)----------7

Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res., Div. of Env't Mgmt., 337 N.C. 569 (1994)----------14, 15

Gray v. Powell, 314 U.S. 402 (1941)----------7

In re Broad & Gales Creek Cmty. Ass'n, 300 N.C. 267 (1980)----------16

In re Halifax Paper Co., 259 N.C. 589 (1963)----------14, 15

Meyer v. Walls, 122 N.C. App. 507 (1996)----------16

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992)----------7

City of Asheboro v. *N.C. Dep't of Env't Quality*, 2024 WL 4650282 (N.C.O.A.H. Sept. 12, 2024)----------14

N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc., 291 N.C. App. 188 (2023)----------10, 11, 12, 17

N.C. State Bd. of Educ. v. State, 371 N.C. 149 (2018)----------9

N.L.R.B. v. Hearst Publ'ns, 322 U.S. 111 (1944)----------7

State ex rel. Utils. Comm'n v. Pub. Staff, 309 N.C. 195 (1983)----------9

Taylor v. Robinson, 131 N.C. App. 337 (1998)----------16

Telematch, Inc. v. United States Dep't of Agric., No. CV 19-2372 (TJK), 2020 WL 7014206, at *7 (D.D.C. Nov. 27, 2020----------21, 22

United States v. Butler, 297 U.S. 1 (1936)----------7

Vass v. Bd. of Trs. of Tchrs' & State Emps. Comprehensive Major Med. Plan, 324 N.C. 402 (1989)----------15

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978)----------8

Wells v. Consol. Jud. Ret. Sys. of N.C., 254 N.C. 313 (2001)-------9

STATUTES

N.C. Const. art I, § 6----------6

N.C. Const. art. II, § 1----------9

N.C. Gen. Stat. § 143-215, et seq.----------20

N.C. Gen. Stat. § 143-215.10C(a)----------4, 11, 12

N.C. Gen. Stat. § 150B-1(a)----------9

N.C. Gen. Stat. § 150B-1(d-g)----------14

N.C. Gen. Stat. § 150B-2(8a)----------4, 10, 14

N.C. Gen. Stat. § 150B-19.1(e)----------18

RULES

15A N.C.A.C. 2A .0101–0105----------11

15A N.C.A.C. 02Q .0308(a)----------14

N.C. R. App. P. 28.1(b)----------1

OTHER AUTHORITY

Cost Scenarios, 353- Monitoring Well, USDA Natural Resources Conservation Service (Dec. 12, 2013), https://tinyurl.com/ywdc4b3x----------18

Cost Scenarios, 353- Monitoring Well, USDA Natural Resources Conservation Service (Dec. 2, 2014), https://tinyurl.com/3exr6cy4----------18

D.W. Israel; D.L Osmond; J.C. Roberts, Potential impacts of implementation of the phosphorus loss assessment tool (PLAT) on the poultry industry in North Carolina: case studies, Journal of Soil and Water Conservation (Jan. 1, 2007)----------19

Holly Wade and Madeleine Oldstone, *Small Business Problems & Priorities*, NFIB.com, October 2024, https://nfib.com/wp-content/uploads/2024/10/2024-Small-Business-Problems-Priorities.pdf----------17

Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 Geo. Mason L. Rev. 573 (2021)----------8

Mallory Simpson, How That Chicken Got to Market, Homegrown, NC State University (Sep. 25, 2020) https://homegrown.extension.ncsu.edu/2020/09/25/how-that-chicken-got-to-market/----------20

Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 Geo. Mason L. Rev. 683 (2021)----------7

Stenn Survey: Almost a Quarter of Small Businesses Have Fewer Than Six Months of Cash Reserves, Business Wire (October 29, 2024, 08:05 AM) https://www.businesswire.com/news/home 20241029441129/en/Stenn-Survey-Almost-a-Quarter-of-Small-Businesses-Have-Fewer-Than-Six-Months-of-Cash-Reserves----------18

The Federalist No. 47 (James Madison)----------6, 9

NO. 338PA23 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * *

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Petitioner;	)	
v.	)	From Wake County
N.C. FARM BUREAU FEDERATION, INC., Respondent.	)	

NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK AND NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Petitioners;	)	
v.	)	From Wake County
N.C. FARM BUREAU FEDERATION, INC., AND NC DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, Respondents.	)	

* * * * * * * * * * * * * * * * *

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. AND THE N.C. CHAMBER LEGAL INSTITUTE[1]

* * * * * * * * * * * * * * * * *

[1] Pursuant to Rule 28.1(b)(3) of the North Carolina Rules of Appellate Procedure, no other person or entity—other than *amici curiae*, its members, or its counsel—have directly or indirectly written this brief or contributed money for its preparation.

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The North Carolina Chamber Legal Institute is a nonpartisan, nonprofit affiliate of the North Carolina Chamber of Commerce, the leading business advocacy organization in North Carolina. The N.C. Chamber is organized to provide a medium through which persons having a common business interest in the improvement of conditions favorable to the economic development of North Carolina may promote their common business interest by: (i) identifying, investigating, studying, researching, and analyzing in a nonpartisan manner those aspects of the legal environment and legal system in North Carolina that enhance the business climate, workforce development, and quality of life of the State, including the prospects for the creation and retention of jobs for the State's citizens; (ii) educating and instructing the business community and general public by disseminating and publishing the knowledge gained as a result of those activities; and (iii) serving as a

champion for job providers on potentially precedent-setting legal issues with broad business climate, workforce development, and quality-of-life implications before state and federal courts. Throughout the state, the N.C. Chamber's member businesses employ citizens from every walk of life.

Here *amici* take interest in this case because NFIB, as the nation's leading small business association, has members in every industry, including farming operations, and the N.C. Chamber, as the leading business advocacy organization in the state, is committed to promoting common business interest for people of our state. NFIB's and the N.C. Chamber's members have an interest in ensuring that the government follows the administrative rulemaking process and considers the vital input of those being regulated. When agencies neglect to promulgate rules that are binding on the public, this harms businesses, depriving them of the benefit of various levels of review that can improve a rule or stop its promulgation entirely.

If the Court of Appeals decision is overturned, it is likely that small businesses in every industry within the State of North Carolina will be negatively affected, as such a decision would open the door for every executive branch agency to regulate without having to go through the rulemaking process.

INTRODUCTION

The North Carolina Department of Environmental Quality, Division of Water Resources (the Division) seeks to redefine what constitutes a rule, skirting the plain meaning of the North Carolina Administrative Procedure Act (NCAPA), attempting

to draw conflicts between otherwise harmonious statutes, and subverting the rulemaking process.

Under N.C. Gen. Stat. § 143-215.10C(a) (2021), farmers need either a general or an individual permit to operate animal waste management systems. The Division, which is in charge of issuing such permits, changed the conditions for obtaining a general animal waste management permit. The new permitting conditions include burdensome analyses and monitoring requirements, as well as intrusive reporting obligations that go far beyond the scope of what the general permit purports to regulate. The effect on farmers will be extraordinarily negative, and to make matters worse, the conditions were imposed without going through the process provided by the NCAPA because the Division does not consider them to be rules.

The NCAPA defines a "rule" as "[a]ny agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly." N.C. Gen. Stat. § 150B-2(8a). As the Court of Appeals held, the permit conditions are rules because they fit all three characteristics of a rule: 1) a regulation, standard or statement; 2) of general applicability;[2] and 3) that implements or interprets an enactment of the General Assembly.

Despite the conditions' effect on the public, the Division refuses to consider them generally applicable. But permitting conditions, created to bind farmers to

[2] As respondent N.C. Farm Bureau stated in its new brief, it is probable that the General Assembly meant a "statement of general applicability" to be a separate phrase, and that the modifier "of general applicability" should not be understood as applying also to regulations and standards. This is the correct approach. Our brief will show, however, that the Division's arguments fail even when one applies the reading most charitable to the Division's position. If the Division is successful on the question of syntax—though it should not be—it would be a hollow victory, as the permit conditions are generally applicable.

regulatory schemes, easily meet the definition of a rule. The Division's understanding of the term "rule" relies upon the rationale that if something isn't called a rule, it ceases to be one. But if a rule simply means whatever an agency wants it to mean, the NCAPA holds no legal weight.

If this Court allows unpromulgated rules to operate as if promulgated, it will gut the NCAPA, undermine separation of powers, and harm businesses. Under such a ruling, government agencies in North Carolina would be able to regulate without accountability. Such circumvention is a short road to government by executive fiat, in which individuals and businesses are subject to an ever-increasing list of new conditions for doing business, all without procedural safeguards. Instead, this Court should uphold the lower court ruling and act as a bulwark against government encroachment on both the NCAPA and the North Carolina Constitution.

ISSUE PRESENTED

The issue presented in this appeal is whether the conditions in the animal waste general permits are "rules" under the North Carolina Administrative Procedure Act.

ARGUMENT

I. THE DIVISION'S ACTIONS VIOLATE THE NCAPA AND UNDERMINE SEPARATION OF POWERS.

The Framers saw fit to enshrine in our federal Constitution the principle of separation of powers by dividing authority between the legislative, executive, and judicial branches. This is primarily because "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or

many . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47 (James Madison).

In the same vein, the State of North Carolina enacted an express separation of powers and non-delegation provision in its own constitution. N.C. Const. art. I, § 6. ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). This Court has recognized that "the constitutional inhibition against delegating legislative authority does not preclude the legislature" from giving executive agencies rulemaking authority, "provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 697 (1978). And an important consideration when determining whether the guiding standards are adequate is one of proper procedure: "the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards." *Id.* at 698.

Thus, proper procedural safeguards, which the NCAPA provides, are at times all that stands between a permissible use of lawmaking authority by the executive, and unconstitutional usurpation of that authority.

A. The NCAPA Was Enacted to Prevent Government by Bureaucracy.

Prior to the passage of the federal Administrative Procedure Act (federal APA) in 1946, the question of whether agencies had the authority to create law was largely unsettled. In the early United States, delegations of authority occurred only "in case of emergency when Congress was not in session or over matters that were sufficiently

far from major public concerns[.]" Ronald A. Cass, *Rulemaking Then and Now: From Management to Lawmaking*, 28 GEO. MASON L. REV. 683, 688 (2021). The scope was limited, focusing mostly on setting rates rather than making laws. *Id.* at 684.

Though the role of agencies shifted enormously in practice, the Supreme Court of the United States held to a traditional, historical view of agency rulemaking through the 1930s, striking down sweeping agency programs without reservation. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding that the National Industrial Recovery Act was unconstitutional); *United States v. Butler*, 297 U.S. 1 (1936) (striking down the Agricultural Adjustment Act). But just a few years later, the Court began deferring to agencies. *See, e.g., Gray v. Powell*, 314 U.S. 402 (1941) (deferring to agency discretion in decisions related to the Bituminous Coal Act); *N.L.R.B. v. Hearst Publ'ns*, 322 U.S. 111, 114, (1944), *overruled by Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) (deferring to the National Labor Relations Board on questions of fact).

What changed? The New Deal, and the New Deal Court.

The New Deal's essential tenet was that Congress moved too slowly to meet changing social conditions, and thus the task of crafting policy fell to the executive branch, which entrusted experts, rather than the people's elected representatives in the legislative branch, with creating programs for the public's benefit. With an unprecedented expansion of executive agencies, and changes to the composition of the courts, FDR's sixteen-year long march through the branches of government appeared

to be successful. But when public attitudes[3] changed regarding the New Deal, Congress took up the task of trying to regulate agencies.

There were failed attempts to rein in agency overreach, including the Walter-Logan bill, passed in 1940 and promptly vetoed, but the first successful attempt at regulating agencies came with the federal APA in 1946. The federal APA was a compromise between the New Deal's proponents, who wanted agencies to administer vast sweeping programs with little accountability, and its opponents who thought that the agencies had too much authority to make, enforce, and adjudicate the law. It thus "settled long-continued and hard-fought contentions, and enact[ed] a formula upon which opposing social and political forces have come to rest." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 523 (1978) (internal citation omitted). The federal APA accomplished this by letting agencies do largely what the New Deal proponents wanted—effectively, legislating on behalf of Congress—while obeying a set of procedures that ensured Congress would have the last word.

The North Carolina General Assembly enacted its own version of the APA in 1973. The history of the federal APA, down to the name of the statute, is imbued into its North Carolina counterpart, and provides guidance on its purpose and scope. Both allow agencies to make rules, provided they observe the statutory procedures, yet do

[3] In the late 1930s, Americans came to associate the New Deal with emerging authoritarian regimes. Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 585 (2021). Not only did public opinion change—that of both parties, *see id.* at 594—but also that of "[a]cademics previously sympathetic to the administrative state," who "began to voice concerns that agencies were overly bureaucratic, prone to prioritizing expertise over public participation, [and] captured by the industries they regulated." *Id.* at 594–95.

not confer a blank check of legislative authority to the executive branch. As with the federal APA, the NCAPA " 'establish[es] a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures ensure that the functions of rulemaking, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.' " *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 156 (2018) (quoting N.C. Gen. Stat. § 150B-1(a) (2017)). In other words, preventing "[t]he accumulation of powers . . . in the same hands." *See* The Federalist No. 47 (James Madison).

However, if the Division's unpromulgated rule can avoid the NCAPA's procedural requirements, deriving permission from the General Assembly's silence, then this purpose of ensuring separation of powers in rulemaking will be wholly subverted. If so, the powers of the legislative branch—despite the North Carolina Constitution's assertions to the contrary, *see* N.C. Const. art. II, § 1—are vested in the executive when it comes to rulemaking, without the procedural safeguards required by law. The executive's construction of the legislative branch's silence as a grant of authority goes far beyond its capacity and threatens to envelop even the judicial function of interpretation. As this Court has held, "it is ultimately the duty of courts to construe administrative statutes," and "courts cannot defer that responsibility to the agency charged with administering those statutes." *Wells v. Consol. Jud. Ret. Sys. of N.C.*, 354 N.C. 313, 319 (2001) (citing *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 306 (1983)).

The Division's understanding of the NCAPA is far from a separation of powers. Rather than three powers reserved to three coequal branches, such an arrangement appears more like three powers in one branch—or one will, that of the executive, spread over three branches. Bureaucrats, rather than legislators or judges, would have the final say. The General Assembly surely did not envision such a distortion of constitutional principles. To effectively ensure the separation of powers, the NCAPA must not be watered-down, nor its definitions changed at will.

B. The Permit Conditions Easily Fit the Definition of a "Rule" Because They are Generally Applicable.

The NCAPA defines a rule as "[a]ny agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly." N.C. Gen. Stat. § 150B-2(8a). There is considerable controversy between the parties on whether "general applicability" modifies "statement" or also modifies "regulation" and "standard," and *amici* concur with respondent N.C. Farm Bureau's assessment in favor of the former proposition. Even if the Court were to hold the latter, however, the question of whether the permit conditions are rules should remain straightforward. Generally applicable agency regulations, standards, or statements that seek to apply the law are rules, regardless of what other designation—including a "permit condition"—that they may bear.

As the Court of Appeals noted, the parties agree that the permit conditions implement or interpret an enactment of the General Assembly. *N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n, Inc.,* 291 N.C. App. 188, 193 (2023)*, review allowed sub nom. N.C. Dep't of Env't Quality, Div. of Water Res. v. N.C. Farm Bureau*

Fed'n, Inc., 906 S.E.2d 469 (2024). The Division has made no serious effort to contend that the conditions are not regulations, standards, or statements. It thus seems that—aside from the syntax issue—the chief area of contention is whether the permit conditions are generally applicable. The Court of Appeals held that they are because they are "inten[ded]" to apply to "most animal waste management systems," *id.* at 195 (quoting N.C. Gen. Stat. § 143-215.10C(a)); the Division argues that they aren't because they "apply to no one," *see* New Brief of Petitioner at 13. However, even as a rhetorical matter, the Division's reasoning cannot hold, as the conditions clearly do apply to *someone*—any farmer who needs to dispose of animal waste and applies for a general permit.

What the Division meant, of course, is that farmers must first apply for a general permit before its conditions are enforced against them. It is this farmer-submitted permit application that, according to the Division, deprives the regulation of general applicability. But many rules, even some promulgated by the Division, contain this same dynamic, wherein one first applies for authorization to engage in an activity, and then must conform to certain standards as a condition of being granted such authorization. For example, the Division adopted Rules .0101–.0105 of Title 15A Subchapter 18D of the North Carolina Administrative Code, T15A.18D .0101–.0105, which present conditions for water treatment facility operators to obtain certification. The Division could argue that these conditions "apply to no one" because members of the public are not forced to apply for the certificate—they must opt-in to apply for it. Similarly, here, farmers—who, with

existing operations on the line, have very little to no choice in the matter—must apply for the general permit before the permit conditions are applicable to them.[4] There is the same "opt-in" at play in both situations, yet the Division considers one to be generally applicable, and the other not. The Court must correct this paradoxical reading of the NCAPA and affirm that an agency regulation, standard, or statement being attached to an application cannot and does not determine whether it is generally applicable. Holding otherwise would undermine rules already on the books by eliminating their logical foundation.

The Division also argues that the Court of Appeals ruling "creates an unworkable situation" when it comes to general applicability "in which an agency would not know if its actions were rules until after the actions are finalized and at least partially implemented." *See* New Brief of Petitioner at 14, 31–32. However, this gets the ruling incorrect. The Court of Appeals did not say that general permits are generally applicable because most farmers actually apply for them—though they do—but rather, because the "*intent* of the General Assembly [is] that most animal waste management systems be permitted under a general permit." *N.C. Dep't of Env't Quality*, 291 N.C. App. at 195 (quoting N.C. Gen. Stat. § 143-215.10C(a) (emphasis added)). Therefore, a ruling that the permit conditions are generally applicable has nothing to do with the number of farmers who apply for a general permit, but rather,

[4] The Division erroneously frames the option to apply for an individual permit instead of a general permit as a free choice, when the Division has the authority to require any person who may otherwise be eligible for a general permit to apply for an individual permit, and on the other hand, can deny an applicant an individual permit and require the person to apply for a general permit. *See* N.C. Gen. Stat. 143-215.10C(a). This "choice" is therefore illusory because, contrary to its contentions, the Division ultimately decides which of the two permits an individual will receive.

the General Assembly's express intent that general permits are *meant* to cover most farmers. This is a better reading of the term "general applicability" that does not lead to the impracticable and absurd result of a rule being generally applicable when promulgated and then losing its general applicability in time, or, the Division's equally implausible alternative, that a binding regulation is not a rule if it requires an application.

The Division does not have to wait to see if "most" farmers apply for a general permit before they determine that its conditions are rules, no more than it had to judge whether "most" water treatment facility operators applied for certification before adopting T15A.18D .0101–.0105 as rules. There, the Division rightly recognized that its own intent to cover most or all individuals in a field made those rules generally applicable enough to justify rulemaking. The Division should have used the same reasoning for the permit conditions at issue here and complied with the rulemaking process.

C. Neither the NCAPA nor Section 143-215.10C(a) Exempt General Permits from Rulemaking.

As stated above, from the clear definitions set forth in the NCAPA, the permit conditions are rules, and all rules apart from the exceptions and exclusions enumerated in the statutes—of which general permits are not included—must go through the rulemaking process, subjecting themselves to review and public comment. [5] There are a multitude of exemptions to the NCAPA's requirements, *see*

[5] As an additional example of a new regulatory requirement imposed without following rulemaking requirements, the Division of Air Quality imposes on certain permittees an ongoing duty to disclose the presence of materials containing fluorinated chemicals at its facilities that have the potential to

N.C. Gen. Stat. § 150B-1(d-g), and a list of exclusions, *see* N.C. Gen. Stat. § 150B-2(8a)(a-l), but none of these include general permits.

For the Division to be correct that the General Assembly intended to exempt general permits from rulemaking, either the NCAPA or section 143-215.10C(a) would need to exempt general permit conditions from the rulemaking process. But neither statute does. In the absence of clear evidence of an exemption, the Division relies on its own inference that the General Assembly intended to write in an exemption—yet for some reason, never did.

This Court has made clear that "implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be," and "[a]n intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation." *Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res., Div. of Env't Mgmt.,* 337 N.C. 569, 591 (1994) (quoting *In re Halifax Paper Co.*, 259 N.C. 589, 594 (1963)). This reasoning holds when applied to the NCAPA as well: "the General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the

---

emit fluorinated chemicals in the environment. Pursuant to 15A NCAC 02Q .0308(a), however, the Division of Air Quality *only* has authority to issue a permit, modify a permit or renew a permit, rescind a permit, or deny a permit application. These additional regulatory requirements circumvent the defined NCAPA regime that requires formal rulemaking, yet permittees are currently faced with a significant regulatory burden of identifying *any* potential fluorinated chemical at their facilities to the Division of Air Quality. *See also City of Asheboro* v. *N.C. Dep't of Env't Quality*, 2024 WL 4650282 (N.C.O.A.H. Sept. 12, 2024) (concluding that the North Carolina Department of Environmental Quality Division of Water Resources erred in issuing and authorizing the enforcement of a National Pollutant Discharge Elimination System permit with 1,4-dioxane effluent discharge limitations because it imposed such limitations without following the rulemaking process under the NCAPA).

Act's requirements[.]" *Vass v. Bd. of Trs. of Tchrs' & State Emps. Comprehensive Major Med. Plan*, 324 N.C. 402, 407 (1989). When the General Assembly " 'ha[s] not expressed or otherwise made manifestly clear an intent to [supplant the Administrative Procedure Act],' " it would be alien to this Court's precedent to read one in. *Empire Power Co.,* 337 N.C. at 591 (quoting *In re Halifax Paper Co.,* 259 N.C. at 594). Neither implications drawn from silence nor guesswork can "create an implication of amendment or repeal." *Id.*

Yet silence and guesswork are all the Division has to offer as evidence of the General Assembly's intent. The Division attempts to rely on extrinsic evidence—namely, the fact that the General Assembly has not yet seen fit to punish the Division for violating the NCAPA—to claim that the legislature's intent is to exempt general permit conditions from rulemaking requirements. But this creates a conflict between the NCAPA and N.C. Gen. Stat. § 143-215.10C(a), in which N.C. Gen. Stat. § 143-215.10C(a) would supersede the NCAPA's requirements, all without a word from the General Assembly on the matter. The two statutes should not be read in a way that would put them at odds, especially not on mere speculation.

A statute must be read in the context of other statutes, and courts should not create rifts or logical inconsistencies between them. "Interpretations that would create a conflict between two or more statutes are to be avoided, and statutes should be reconciled with each other whenever possible." *Taylor v. Robinson*, 131 N.C. App. 337, 338 (1998) (internal quotation marks and ellipses omitted) (citing *Meyer v. Walls,* 122 N.C. App. 507, 512 (1996), *aff'd in part, rev'd in part,* 347 N.C. 97 (1997)).

In addition, an administrative agency "is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority"—and these powers of necessary implication are read narrowly as "those powers that are ascertainable as inherent in the underlying policies of the statute." *In re Broad & Gales Creek Cmty. Ass'n,* 300 N.C. 267, 280 (1980) (citation omitted). Nothing in either the NCAPA nor N.C. Gen. Stat. § 143-215.10C(a) would give the Division explicit authority to forgo rulemaking when it comes to general permits. Nor would the plain language or underlying policies of either statute compel a court to read them as contradictory.

Instead, the Court should read the two statutes as harmonious: absent a clear statutory exemption, if something fits the definition of a rule, it must go through rulemaking, even if the agency chooses to call it a general permit condition. To hold otherwise would read a silent repeal of the NCAPA into N.C. Gen. Stat. § 143-215.10C(a), or, at the very least, create a new category of silent exemptions, wherein agencies can assert that the General Assembly, without so much as a reference to the NCAPA, intends to circumvent its requirements. Both cut against this Court's precedent in *Vass* and *Empire Power* and should be disfavored. Such interpretive gymnastics are unnecessary when a better, consistent alternative is readily available: affirm that the NCAPA means what it says and N.C. Gen. Stat. § 143-215.10C(a) does not contradict it.

II. SMALL BUSINESSES WILL SUFFER IF AGENCIES ARE ALLOWED TO ENACT RULES WITHOUT FOLLOWING APA PROCEDURES.

Small businesses are only as successful as the economic and regulatory environments in which they operate. When the government conducts itself in a fair and predictable manner, they thrive—if not, they face difficulties. It is thus no surprise that small business owners rank "Unreasonable Government Regulations" and "Uncertainty Over Government Actions" among their top ten problems and priorities. Holly Wade and Madeleine Oldstone, *Small Business Problems & Priorities*, NFIB.COM, October 2024, https://nfib.com/wp-content/uploads/2024/10/2024-Small-Business-Problems-Priorities.pdf. The permitting conditions at issue here are unreasonable, and they create uncertainty for small businesses. They are unnecessarily burdensome and the method through which they were enacted leaves virtually every business in the state vulnerable to regulation by unpromulgated rule.

A. <u>The Permitting Conditions are Excessive and Harm Businesses.</u>

The three general permit conditions being challenged are as follows: "(1) farmers with waste structures within the 100-year floodplain must install monitoring wells; (2) certain farmers must conduct a Phosphorus Loss Assessment Tool ("PLAT") analysis; and (3) all permitted farmers must submit an annual report summarizing the system's operations." *N.C. Dep't of Env't Quality*, 291 N.C. App. at 191. The expansive scope of these conditions and harmful effects should be considered, not merely because they are injurious to farmers, but because if the Division had followed the APA process, such egregious conditions may have never been adopted in the first place.

First, monitoring wells are expensive for farmers, often costing thousands of dollars to install. USDA's Natural Resources Conservation Service (NRCS) estimated in cost scenarios that a monitoring well of the kind described in the permit conditions could cost around $7,000-$8,000 in some cases, or, in others, as high as $23,000. *See Cost Scenarios, 353- Monitoring Well*, USDA NATURAL RESOURCES CONSERVATION SERVICE (Dec. 12, 2013), https://tinyurl.com/ywdc4b3x; *Cost Scenarios, 353- Monitoring Well*, USDA NATURAL RESOURCES CONSERVATION SERVICE (Dec. 2, 2014), https://tinyurl.com/3exr6cy4. There is no universal metric for what it costs to install a monitoring well, and given that uncertainty and variability, the Division should have at least gone through the rulemaking process, which requires agencies to "quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible," N.C. Gen. Stat. § 150B-19.1(e). The general permit process does not include this critical safeguard, allowing the imposition of thousands of dollars of out-of-pocket costs on farmers without so much as a clear estimation of those costs.

The average farmer is a small business owner, and small businesses are unable to shoulder thousands in unexpected expenses. A recent survey showed that many small businesses—almost a quarter of them—have only one to five months of cash reserves on hand. *Stenn Survey: Almost a Quarter of Small Businesses Have Fewer Than Six Months of Cash Reserves*, BUSINESS WIRE (October 29, 2024, 08:05 AM) https://www.businesswire.com/news/home/20241029441129/en/Stenn-Survey-Almost-a-Quarter-of-Small-Businesses-Have-Fewer-Than-Six-Months-of-Cash-Reserves. They should not have to go in the hole for up to tens of thousands of dollars

to construct a monitoring well, especially when the Division was required to be upfront about those costs through the NCAPA rulemaking process.

The permit's imposition of mandatory Phosphorus Loss Assessment Tool (PLAT) analyses fares no better. Though farmers already have to test the levels of phosphorous present in the soil to measure the loss of phosphorus to surface water caused by spreading manure, those farmers whose fields have a high phosphorus index are required, under the permit conditions, to do a more detailed PLAT analysis. If the PLAT rating is likewise high, farmers are required to engage in mitigation—which means spreading less manure.

Mandatory PLAT analyses, if allowed to stand, can have a detrimental effect on farms in North Carolina. A 2007 study evaluated three counties in the state, each in a major poultry production area and representative of a different geographical region, and determined that "[i]mplementation of PLAT assessments in these areas has significant potential to limit land application of poultry manure." D.W. Israel; D.L Osmond; J.C. Roberts, Potential impacts of implementation of the phosphorus loss assessment tool (PLAT) on the poultry industry in North Carolina: case studies, JOURNAL OF SOIL AND WATER CONSERVATION (Jan. 1, 2007). This leads to a predictable and utterly avoidable problem: "PLAT analyses could have profound effects on poultry *production* in these counties." *Id.* (emphasis added). Lowered poultry production means lower poultry supply, and higher poultry prices. Presumably, the results of this study also apply to egg hens, as they likewise produce manure that must be spread.[6]

[6] It goes without saying that what applies to chicken manure can apply to other animal manure as well—and thus the PLAT analyses may affect other agricultural products in the same manner.

The Division is thus proposing that a regulation which may increase poultry and egg prices, hurting both farmers and consumers, does not need to go through the rulemaking process.

Indeed, North Carolina is ranked number two nationally in poultry and egg production, and farmers rely on it, with over 44% of farm income coming from poultry. Mallory Simpson, How That Chicken Got to Market, Homegrown, NC State University (Sep. 25, 2020) https://homegrown.extension.ncsu.edu/2020/09/25/how-that-chicken-got-to-market/. Such an important agricultural industry should not be subject to intrusive regulation via permit conditions. Yet this is precisely what the PLAT analysis condition does.

The third and most egregious condition is the annual report, which goes far beyond the scope of what the permit purports to regulate. It requires that farmers who apply for and are granted a general permit disclose the average number of animals by type at the facility. This report carries with it two risks at once.

First, the report creates a backdoor registry of all farm animals and farm operations, giving the Division oversight and information to which it otherwise would not be entitled under existing law. Currently, swine, cattle, and wet poultry farms are subject to Animal Feeding Operations permitting by the Division. *See* N.C. Gen. Stat. § 143-215, et. seq. Yet the report requires information about *all* animals, not just those subject to the Division's authority—the Production Summary on the Animal Facility Annual Report form requires a count of *every* kind of animal by type. Such a sweeping intrusion into a farm operation should implicate, at the very least, the protections of

the rulemaking process, if not also the Fourth Amendment's protections against warrantless searches and seizures. This goes far beyond the information that the General Assembly has authorized the Division to collect, and regardless of how it is used, the collection of such information is not authorized by law. Only by law, in the form of a promulgated rule, can an agency do such things.

Not only is the mandatory disclosure of average number of animals by type injurious in itself, but it also carries with it the risk of public disclosure. If made public, such information can cause harm from competitors, who would gain insight into the details of a farm operation, not to mention that it may provoke harassment and even lawsuits from environmental or animal welfare organizations. And even government assurances to the contrary cannot truly protect this information. Data about a farm operation provided to the government and then released to the public, even if anonymized or aggregated, can be "unlocked" with commercial or other data. Take for instance a case in which the USDA revealed that, in some instances, "with the aid of publicly-available information, the public can connect [information sought in a FOIA request] to . . . individuals or entities and reveal their personal information." *Telematch, Inc. v. United States Dep't of Agric.,* No. CV 19-2372 (TJK), 2020 WL 7014206, at *7 (D.D.C. Nov. 27, 2020), *aff'd*, 45 F.4th 343 (D.C. Cir. 2022). The information at issue in that case, like the information farmers are required to submit under the general permit, concerned closely-held business information, specifically the "acreage of the agricultural operation, crop types, legal descriptions and other identifying information," *see id.*, that likewise would bring financial harm

to farms if made public. The USDA, despite statutes prohibiting the release of such information, was unable to keep it private, and there is no reason to believe that the Division would have any greater ability to prevent the public from accessing the information at issue here.

The harm to farm operations—many of whom are small businesses—that results from these permit conditions is incalculable. Farmers have no choice but to build expensive monitoring wells, conduct PLAT analyses that limit their use of their land, and provide sensitive and unwarranted information to the government, all without so much as a rule (let alone a statute) providing for these requirements.

B. The Scope of the Division's Actions Will Expand and Create an Unpredictable Environment for Businesses.

Businesses expect government actions to be predictable and reasonable and, above all, accountable to a democratic process. When agencies exercise legislative power without following the NCAPA, the government's actions cease to be predictable, because they abandon well-established processes; they become less reasonable when designed within the echo chamber of an agency; and they lack democratic accountability, being imposed from on high by government bureaucrats. Under such conditions, the executive's actions become arbitrary, capricious, and oligarchical.

Though permitting conditions may seem to occupy a small, insulated corner of the law, the ripple effect of the Division's actions, if given credence, may be felt throughout every agency in the executive branch, for the simple reason that this case is not solely about permitting conditions. It is about whether agencies can tell the

Legislature and courts what a rule is, instead of the other way around. If so, today's permitting conditions affecting animal waste management systems could be tomorrow's permitting conditions affecting agriculture operations generally, or certain classes of businesses in various industries, or all of them at once. The slippery slope of the Division's actions is too steep and must be leveled out.

CONCLUSION

For the reasons above, *amici* urge this Court to affirm the decision of the Court of Appeals.

This the 28th day of February 2025.

MINCEY BELL MILNOR

BY: /s/ Chad E. Rhoades
CHAD RHOADES
N.C. State Bar No.
MINCEY BELL MILNOR
Affiliated, Cranfill Sumner LLP
2001 K. St. NW, Suite 250 North Tower
Washington, DC 20006
Telephone: 717. 210. 1998
Email: rhoades@minceybellmilnor.com

N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list her name on this document as if she has personally signed it.

K. LANDIN JOHNSTON
N.C. State Bar No. 59357
MINCEY BELL MILNOR
Affiliated, Cranfill Sumner LLP
2001 K. St. NW, Suite 250 North Tower
Washington, DC 20006
Telephone: 717. 210. 1998
Email: johnston@minceybellmilnor.com

Attorneys for Amici Curiae NFIB Small Business Legal Center, Inc. and the N.C.

CERTIFICATE OF SERVICE

This is to certify that the undersigned this day has served the attached *Amici Curiae* Brief via electronic mail to the following counsel of record:

Marc Bernstein
Special Deputy Attorney General
North Carolina Department of Justice
mbernstein@ncdoj.gov
Taylor H. Crabtree
Assistant Attorney General
North Carolina Department of Justice
tcrabtree@ncdoj.gov
Attorneys for Petitioner N.C. Department of Environmental Quality, Division of Water Resources

Julia F. Youngman
jyoungman@selcnc.org
Blakely E. Hildebrand
bhildebrand@selcnc.org
Iritha Jasmine Washington
jwashington@selcnc.org
Irving Joyner
ijoyner@nccu.edu
Edward Casper
ecasper@lawyerscommittee.org
Attorneys for Petitioners North Carolina Environmental Justice Network and North Carolina State Conference of the National Association for the Advancement of Colored People

Phillip Jacob Parker, Jr.
jake.parker@ncfb.org
Stephen A. Woodson
steve.woodson@ncfb.org
Stacy Revels Serno
stacy.sereno@ncfb.org
Meghan N. Cook
meghan.cook@ncfb.org
Attorneys for Respondent N.C. Farm Bureau Federation, Inc.

This the 28th day of February 2025.

MINCEY BELL MILNOR

BY: Electronically submitted
CHAD E. RHOADES
N.C. State Bar No. 48041
MINCEY BELL MILNOR
Affiliated, Cranfill Sumner LLP
2001 K. St. NW, Suite 250 North Tower
Washington, DC 20006
Telephone: 717. 210. 1998
Email: rhoades@minceybellmilnor.com

Attorneys for Amici Curiae NFIB Small Business Legal Center, Inc. and the NC Chamber Legal Institute