

THIS TIME IT WAS PERSONAL

**WHAT IT'S LIKE TO BE SUED ABOUT GREENHOUSE GASES
BY OUR CHILDREN'S TRUST**

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INTRODUCTION

In my 35-plus years of practice, I have given countless presentations to and written hundreds of papers for environmental law programs. This paper and presentation is, however, a first for me. Instead of an analysis of a legal issue or updates on recent legal developments, I am writing here about my personal experience of being the target of a lawsuit brought by a 13-year old girl from Raleigh, North Carolina over a denial of a petition to enact a State regulation that would significantly limit greenhouse gas emissions.

This is a story about politics, law, personal attacks and media frenzy. In the end, the correct legal decision was made. The question is, does that really matter?

THE PLAYERS

Hallie Turner: A 13-year old Raleigh, North Carolina middle school student involved in public climate activism since age 10.

Our Children's Trust: An Oregon-based nonprofit organization "leading the game-changing, youth-driven, global climate recovery campaign to secure the legal right to a stable climate and healthy atmosphere." (Quote taken from Our Children's Trust website.)

Gayle Goldsmith Tuch: Raleigh attorney representing Hallie Turner and assisted by Our Children's Trust.

Shannon M. Arata and James P. Longest, Jr.: Attorneys with Duke Environmental Law and Policy Clinic (part of Duke University Law School) representing Turner on appeal.

North Carolina Environmental Management Commission: A 15-member citizen board appointed by the Governor, the Senate President and the Speaker of the House responsible for adopting all of North Carolina's air, water, and solid and hazardous waste regulations.

THE POLITICS

In the November 2010 elections, the Republican wave reached the North Carolina State legislature as Republicans gained a majority in both the State Senate and House of Representatives. In November 2012, the wave became a tsunami as the voters elected a Republican governor (Pat McCrory) and gave the Republicans veto-proof majorities in both houses of the legislature. For the first time since 1868, the Republicans controlled both the State's executive and legislative branches.

THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

North Carolina has a number of commissions governing everything from funeral homes to barber shops. The commissions are made up of citizen volunteers. Each commission has rulemaking and, in some instances, quasi-judicial authority. Some members are appointed by the Governor, others by the Senate President and others by the Speaker of the House.

One of the most impactful commissions is the Environmental Management Commission (the "EMC"). Created by statute in 1973 (N.C.G.S. §143b-282), the EMC as of the 2010 elections consisted of 18 members with 12 appointed by the Governor and three each appointed by the

Senate President and the Speaker of the House. The Governor's appointments had to satisfy specific expertise and experience criteria, such as expertise in hydrology or water pollution control, air pollution control or current or past experience in agriculture or manufacturing. All of the Senate and House appointments were at large appointments. In July 2012, then Speaker of the House (and now U.S. Senator) Thom Tillis appointed me to the EMC.

2013: POLITICS AND COMMISSIONS COLLIDE

In January 2013, the Republican Governor was sworn in and the veto-proof Republican legislative majorities took control. One of the legislature's first targets was all of the State's various commissions. The Republicans' goal was simple – get the Democratic appointees off and replace them with Republican appointees. Normally this happens gradually over a legislative term with new party appointees going on when terms of existing appointees naturally expire. However, having waited nearly 150 years to have the power to appoint any and all commission members, the Republicans began considering legislation to fire and replace all sitting commissioners in one fell swoop.

The hue and cry among Democrats and in the media over this effort was strident. In the meanwhile, commissions were left in limbo. At the conclusion of its meetings in January, March, May and July, EMC members said goodbye to each other wondering if they would ever be together again. As the Republican effort dragged on for months, Governor McCrory began a more subtle effort, using his statutory power to replace Democratic-appointed commission chairs. As part of that, I was appointed Chair of the EMC in July 2013.

Near the end of the legislative session in July 2013, the effort for a standalone fire-all-commissioners bill had died. But the Republican effort was not over. Traditionally, one of the last acts of a legislative session is the adoption of the State's budget. Wanting to get control of at least one important commission, the Republicans buried a provision near the end of the appropriations bill reducing the size of the EMC to 15 members and firing all of the current EMC members effective July 31. A copy of this portion of the bill is attached as Exhibit A.

Concurrent with that action, the Speaker of the House and Senate President reappointed all of the current Republican members of the EMC, including myself. In August, the Governor reappointed me as chair.

The leadership challenge I faced was daunting. I was now the chair of one of the most important commissions in the State consisting of members appointed by a Republican Party considered by many as anti-environmental. There were no longer any Democrats or members from such groups as the Sierra Club on the EMC, leaving those groups feeling disenfranchised and no longer having any ability to have a voice in environmental rulemaking. I will leave it for another paper to discuss how I tried to handle that situation.

HALLIE TURNER'S RULEMAKING PETITION

North Carolina's Administrative Procedure Act allows any person to "petition an agency to adopt a rule by submitting to the agency a written rule-making petition requesting the adoption." N.C.G.S §150B-20(a). This statutory provision also requires each agency to "establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in

considering a rule-making petition.” The EMC’s implementing regulations are contained in 15A NCAC 2I, Section 500.

By a letter dated December 5, 2014, Hallie Turner’s attorney submitted a “Petition for Rule-making, on Behalf of Hallie Turner, for Promulgation of a Rule Based on the Best Available Climate Science to Limit North Carolina’s Carbon Dioxide Emissions” (the “Petition”.) A copy of the Petition is attached as Exhibit B. The Petition, running 47 pages in length, recounts Hallie’s love for “reading, writing, art and spending time with friends” along with her “determination to leave behind a small carbon footprint”, invokes the public trust doctrine based on the premise that “the water and *air resources* of the State belong to the people”, and cites reams of articles and reports contending that greenhouse gases are causing climate change that endangers the health and welfare of humans, plants and animals.

Specifically, the Petition requested that the EMC promulgate a rule that:

1. Ensures that Statewide carbon dioxide (“CO2”) emissions peak in the year 2015;
2. Adopts and implements a CO2 emissions reduction plan that, consistent with the best available science, reduces Statewide CO2 emissions by at least 4% annually until at least 2050;
3. Establishes an accounting, verification, and inventory system for Statewide CO2 emissions;
4. Requires the issuance of annual reports providing the public with accurate data on the effectiveness of North Carolina’s efforts to reduce CO2 emissions; and
5. Requires the adoption of any policies or regulations necessary to implement the emissions reduction plan referred to in (1) through (4) above.

Petition at pages 2-3.

THE “COMPLETENESS” DETERMINATION

Before the Petition could be acted upon by the EMC, I had the legal responsibility as chair to determine whether or not the Petition was “complete”. 15A NCAC 2I.0502(a). To be complete, the Petition had to contain the following information:

1. The text of the proposed rule(s) conforming to the Codifier of Rules’ requirements for publication of proposed rules in the North Carolina Register;
2. The statutory authority for the agency to promulgate the rule(s);
3. A statement of the reasons for adoption of the proposed rule(s);
4. A statement of the effect on existing rules or orders;

5. Copies of any documents and data supporting the proposed rule(s);
6. A statement of the effect of the proposed rule(s) on existing practices in the area involved, including cost factors for persons affected by the proposed rule(s);
7. A statement explaining the computation of the cost factors;
8. A description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s); and
9. The name(s) and address(es) of the petitioner(s).

15A NCAC 2I.0501(b).

From my review, there was only one question – did the EMC have the “statutory authority . . . to promulgate the rule.”

In 2012, the North Carolina legislature passed a law imposing a specific limitation on the EMC’s authority to adopt rules. N.C.G.S.§150B-19.3 provided as follows:

- (a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the following:
 - (1) A serious and unforeseen threat to the public health, safety, or welfare.
 - (2) An act of the General Assembly or United States Congress that expressly requires the agency to adopt rules.
 - (3) A change in federal or State budgetary policy.
 - (4) A federal regulation required by an act of the United States Congress to be adopted or administered by the State.
 - (5) A court order.

N.C.G.S. §150B-19.3(a).

From my perspective as chair, the analysis for the statutory authority issue was simple. Were there any federal laws or rules “pertaining to the same subject matter” as the proposed rule? If the answer was no, the Petition was complete. If the answer was yes, was the proposed rule more restrictive than the existing federal laws or rules? If the answer was no, the Petition was

complete. If the answer was yes, did any of the five exceptions apply? If the answer was yes, the Petition was complete. If the answer was no, the Petition was incomplete and the EMC could not consider it.

As to the first question – were there any federal laws or rules “pertaining to the same subject matter” as the proposed rule – Ms. Turner’s lawyer stated that the “Petition does not conflict with §150B-19.3 **because there are no federal rules in force that limit carbon emissions.**” Petition at p. 24. Emphasis added. However, this contention was wrong as EPA in 2010 had promulgated rules establishing greenhouse gas emission standards for light-duty vehicles and establishing corporate average fuel economy standards.

This conclusion led to the second question – was the proposed rule more restrictive than the existing federal laws or rules? Since the proposed rule would apply to parties not currently subject to the existing federal regulations (such as power plants and manufacturing facilities), it was more restrictive.

This conclusion led to the third question – did any of the five exceptions in N.C.G.S. §150B-19.3(a) apply? The Petition did not address any of these exceptions and I was not aware of any judicially noticeable facts that I could consider as to the exceptions 2 through 5. As to the first exception – “a serious and unforeseen threat to the public health, safety, or welfare” – I noted that since many of the studies and reports cited in the Petition dated back as far as 1989 with others dated somewhere between 2005 and 2009, any threat could not be classified as “unforeseen.” I deliberately did not address the issue of whether the threat from greenhouse gas emissions was serious in recognition that any conclusion on that issue would be subject to criticism from either climate change believers or deniers.

Based on this analysis, on January 14, 2013, I issued a ruling that the Petition was incomplete. A copy of my Decision on Completeness of Petition for Rulemaking is attached as Exhibit C. This was my last act as chair of the EMC. After staying in Raleigh for over 40 nights a year and spending over 500 hours a year on EMC work during my two years as chair and needing to spend more time with my family and on my paying job, I resigned from the EMC the very next day.

HALLIE TURNER’S APPEAL

On February 23, 2013, Hallie Turner filed a Petition for Judicial Review in North Carolina Superior Court (the State’s general trial court that also hears appeals of administrative decisions) challenging my decision that the Petition was incomplete. A copy of the Petition for Judicial Review is attached as Exhibit D.

The Petition for Judicial Review does not address the basis for the incompleteness determination, namely that the EMC did not have statutory authority to adopt the proposed rule. There is no mention of N.C.G.S. § 150B-19.3. There is no discussion of my analysis or application of that statute. Rather, Turner’s lawyers make only a bald, unsupported assertion that the “Petition met all requirements under 15A NCAC 2I.0501(b) and therefore was ‘complete’.” Petition for Judicial Review at paragraphs 16 and 18.

Instead, Turner and her lawyers relied on the principle that if you cannot challenge the judgment then challenge the judge. For the first time, Turner and her lawyers claimed that I did

not act ethically in ruling on the Petition. The ethical assault begins by citing my law firm biography which states that I assist “clients in administrative proceedings regarding issuance of permits, civil penalties, and other enforcement actions.” That point is mere Pablum compared to what follows as Turner and her lawyers point out that my firm at the time had a consulting business that was a “registered lobbyist for the Koch brothers and others including Halliburton” and that the “Koch brothers . . . [would] strongly benefit from this denial of this Petition.” No surprisingly, there is no mention of the fact that Turner and her lawyers knew about my experience and my law firm at the time they filed the Petition and never raised any ethical concerns.

THE DECISION

On December 11, 2015, Superior Court Judge (now North Carolina Supreme Court Justice) Michael Morgan issued his decision on the appeal (the “Decision.”) After concluding that he had no jurisdiction to consider the alleged ethics issue, Judge Morgan addressed the substance of the incompleteness determination and found as follows:

1. “The cardinal rule of statutory construction is to uphold the legislative intent. . . . Read as a whole, it is clear from the language of the N.C. Gen.Stat.§150B-19.3 that the legislature intended, except in very specific circumstances, to prohibit the EMC from promulgating rules that create additional regulatory restrictions beyond those required by federal law for subjects regulated under federal law.” Decision at page 8.
2. “. . . Petitioner is seeking more restrictive standards, limitations, and requirements on emitters of CO2. Therefore, the EMC does not have the authority to promulgate the proposed rules unless the rules fall under one of the five specific listed exceptions under N.C. Gen.Stat.§150B-19.3. The exceptions contained in N.C. Gen.Stat.§150B-19.3(a)(2) through (5) clearly do not apply . . . Furthermore, Petitioner has failed to provide information that the exception in N.C. Gen.Stat.§150B-19.3(a)(1), a ‘serious and unforeseen threat to the public health, safety, or welfare’ applies to this proposed rule. . . . The issue of global climate change, which is the basis for the Petition for Rulemaking, is not a sudden recently unforeseen issue. As noted by the Chairman, in his decision on behalf of the EMC, some of the studies cited by Petitioner in support of her Petition date back to 1989 with others dating to 2005, 2007, 2008, and 2009, well before the passage of N.C. Gen.Stat.§150B-19.3.”
3. “The rule proposed was more stringent than the applicable federal regulations, which is prohibited by N.C. Gen.Stat.§150B-19.3, and none of the exceptions to N.C. Gen.Stat.§150B-19.3 were shown to exist; therefore, the Petition was incomplete and the Chairman, on behalf of the EMC, properly made this determination and issued his decision.”
4. “. . . the Chairman interpreted the EMC’s rule on Petitions for Rulemaking to require Petitioner to demonstrate the EMC had statutory authority to adopt the proposed rule in light of N.C. Gen.Stat.§150B-19.3. This interpretation is not plainly erroneous or inconsistent with the plain language of the rule; therefore, deference is required, and this Court concludes that there is no error of law in the Chairman’s decision.”

5. “In making his decision on behalf of the EMC to deny the Rulemaking Petition because it was incomplete, the Chairman thoughtfully considered the information provided by Petitioner, as demonstrated in his detailed decision; therefore, the action of the agency could not be arbitrary or capricious.”

A copy of the Decision is attached as Exhibit E. The Decision was not appealed.

MEDIA COVERAGE

Although the rule of law prevailed, Turner and Our Children’s Trust won the publicity battle. A simple Google search of “Hallie Turner Air Pollution” or “Hallie Turner North Carolina EMC” produces dozens of news articles from local North Carolina papers to the Miami Herald and the New York Times. As you would expect, the focus of every article is on Hallie, “the 13-year-old climate change hero” and “a self-described activist since the fourth grade.” Most articles note the support her case received from lawyers from Our Children’s Trust. My alleged ethical deficiencies were consistently covered. As to the basis for the incompleteness decision, mere mentions are virtually non-existent.

LESSONS LEARNED

1. These are not regular lawsuits. The groups bringing them are not motivated by economics.
2. The first and primary focus has to be on legal issues. Long-standing legal principles of statutory construction and standards for reviewing agency action still apply.
3. In the media and on the web, you are going to lose, even if you win the case in court. A business or government agency gets no sympathy when children alleged by their adult advocates to be committed to protecting the environment are on the other side.
4. The groups supporting these cases have political and fund-raising motivations. They want these cases to last so they can keep getting press coverage and can appeal to their donor base. Consequently, settlement negotiations are likely futile.