Exhibit E

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 2488
HALLIE TURNER, a minor, by and through her Legal Guardian, KELLY TURNER, Petitioner, v. NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, Respondent.	**ORDER**

This matter coming before the undersigned Superior Court Judge, presiding over the November 9, 2015 Non-Jury Civil Session of the Superior Court Division of Wake County, the same having been called for hearing on November 13, 2015, upon appeal filed by Petition for Judicial Review of the January 14, 2015 "Decision on Completeness of Petition for Rulemaking" issued by the Chairman of the North Carolina Environmental Management Commission (herein "EMC" or "Commission"). Petitioner was represented by Gayle Goldsmith Tuch and by Shannon M. Arata and James P. Longest, Jr. of the Duke Environmental Law and Policy Clinic. Respondent was represented by Special Deputy Attorney General Jennie Wilhelm Hauser and Assistant Attorney General Scott A. Conklin.

Following the hearing and consideration of the parties' arguments, briefs, and all matters of record, the Court enters the following findings and conclusions.

I. JURISDICTION AND STANDARD OF REVIEW BY THE SUPERIOR COURT

The North Carolina Administrative Procedures Act ("NCAPA" or "the Act") at N.C. Gen. Stat. § 150B-20(d), provides that the denial of a Petition for Rulemaking is a final agency decision and is subject to judicial review under Article 4 of the NCAPA, N.C. Gen. Stat. § 150B-43, *et. seq.*

Our appellate courts have held that the proper standard of review under the NCAPA, N.C. Gen. Stat. § 150B-51(b) through (d), depends on the issues presented on appeal. *State ex rel. Utilities Comm'n v. Bird Oil Co.*, 302 N.C. 14, 273 S.E.2d 232 (1981). The issues in this appeal involve the denial of a Petition for Rulemaking to initiate a complex, comprehensive program of CO_2 emission reductions. Petitioner contends that the Chairman's decision to dismiss her Petition for Rulemaking as incomplete was unlawful, erroneous, capricious, and arbitrary.

The NCAPA establishes the scope of judicial review of a state agency action. In pertinent part, the Act provides that:

> in reviewing a final decision, the court may affirm the decision of the agency or remand the case to the agency or to the administrative law judge for further proceedings. It may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b).

The North Carolina Court of Appeals has clarified that

> [w]hen the assigned error contends that the agency violated §§ 150B-51(b)(1), (2), (3), or (4), the court engages in de novo review. "Under the *de novo* standard of review, the trial court consider[s] the matter anew[] and freely substitutes its own judgment for the agency's." With respect to §§ 150B-51(b)(5) or (6), on the other hand, the reviewing court applies the "'whole record test.'"

Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 703, 635 S.E.2d 442, 446 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007) (citations omitted).

II. PETITIONER'S CLAIM UNDER THE STATE ETHICS ACT

In her Petition for Judicial Review, Petitioner alleges the Chairman should have recused himself from the decision on the Petition for Rulemaking because of his existing conflicts of interest and bias against such rulemakings. Petitioner also alleges that because the Chairman's law firm represents clients who oppose restrictions on greenhouse gases and support efforts to deny climate change, the law firm's clients had a substantial interest in seeing her Rulemaking Petition denied and the start of rulemaking delayed and, therefore, the Chairman's determination violated the due process principles incorporated within the NCAPA and the EMC's rules.

Any alleged ethical violation by Respondent's Chairman for his participation in the Rulemaking Petition at issue is a determination that is solely within the jurisdiction of the North Carolina State Ethics Commission (herein "the Ethics Commission"). North Carolina General Statutes § 138A-12 establishes the procedure for initiation of such complaints with the Ethics Commission. The mere involvement of the Respondent's Chairman in the decision on the Petitioner's Rulemaking Petition does not itself invoke the jurisdiction of this Court over claims under N.C. Gen. Stat., Chapter 138A.

As to Petitioner's claim of violation of due process rights associated with her allegation of wrongful decision by the Chairman, Petitioner is in error. Petitioner was afforded the opportunity to present, and a process for presenting, her Petition for Rulemaking to the EMC. Petitioner availed herself of this process by submitting her request to the Director of DENR's Division of Air Quality. Subsequent to this submission, the Chairman of the EMC reviewed the Petition for Rulemaking and determined that it was deficient, and the Chairman issued his decision finding the Petition to be incomplete. The Chairman's decision was issued within the timeframe established by N.C. Gen. Stat. § 150B-20. Petitioner then exercised her procedural right to file a Petition for Judicial Review pursuant to N.C. Gen. Stat. § 150B-43. In this regard, Petitioner has been afforded, and has fully exercised, her procedural rights surrounding her Petition for Rulemaking. Petitioner has not established that she was denied due process.

Moreover, the State Ethics Act, in and of itself, is not a tool to "undo" an action taken by a public official who has a conflict of interest. The State Ethics Act was created, *inter alia*, as a mechanism for the State Ethics Commission to investigate and determine a public servant's compliance with or violation of the requirements of the Act. N.C. Gen. Stat. § 138A-10(c). Even if the Chairman had erred under the State Ethics Act by participating in this decision, about which the Court expresses no opinion, the Chairman's decision would not automatically be reversed. For each of the foregoing reasons, Petitioner's claim under the State Ethics Act and her request to present in this proceeding new evidence of the Chairman's alleged conflict of interest must be denied.

III. DETERMINATION ON THE CHAIRMAN'S DECISION ON COMPLETENESS OF THE RULEMAKING PETITION

A. Petitioner's ability to Petition the Commission for Rulemaking

The NCAPA creates the ability for any person to petition a State agency to adopt a rule and requires agencies to establish a procedure for submission of such petitions to the agency. N.C. Gen. Stat. § 150B-20(a). The EMC has promulgated rules governing its consideration of Rulemaking Petitions, which rules are codified at 15A NCAC 02I .0501, *et seq.* The Rulemaking Petition must include the following to be deemed "complete":

> (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;
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> (2) the statutory authority for the agency to promulgate the rule(s);
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> (3) a statement of the reasons for adoption of the proposed rule(s);
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> (4) a statement of the effect on existing rules or orders;
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> (5) copies of any documents and data supporting the proposed rule(s);
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> (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);
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> (7) a statement explaining the computation of the cost factors;
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> (8) a description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s); and
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> (9) the name(s) and address(es) of the petitioner(s).

15A NCAC 02I .0501(b). Additionally, the Commission's rules on Petitions for Rulemaking provide that "Petitions failing to contain the required information shall be returned by the Director on behalf of the Chairman." 15A NCAC 02I .0501(c).

The present appeal concerns the Chairman's exercise of his authority, pursuant to Commission rule 15A NCAC 2I .0501(c), to determine whether the Petition for Rulemaking

filed by Petitioner contained the required information, i.e., was "complete" or was "incomplete." Petitioner contends that determining whether a petitioner has submitted a "complete" petition is a ministerial act delegated by rule to the Chairman of the EMC, while emphasizing Petitioner's position that once a petitioner has submitted a complete petition, the petitioner "'shall be afforded the opportunity to present the petition' to the Committee to demonstrate her case." However, contrary to Petitioner's contention, the EMC has specifically given the Chairman of the EMC authority to make decisions on behalf of the EMC with regard to whether a Petition for Rulemaking is complete. 15A NCAC 2I .0501(c).

Petitioner quotes the language of 15A NCAC 2I. 0502(a), that "[t]he Chairman shall refer complete petitions to the appropriate subject area committee of the Commission for review and recommended action." This rule does not, however, require a petition that is not complete to be referred to committee. Additionally, Petitioner argues that another of the Commission's rules states that a petitioner "shall be afforded the opportunity to present the petition" to the committee. 15A NCAC 2I. 0502(d). However, Petitioner's argument erroneously presumes a situation where the petition is complete, which is not the present case.

B. EMC's Authority to Promulgate Rules

The "responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *High Rock Lake Partners, LLC v. N.C. Dept. of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citation omitted); *see also Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001).

The EMC was expressly created, *inter alia*, "with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of

the State. *See* N.C. Gen. Stat. § 143B-282(a). The Water and Air Resources Chapter sets forth the details of the EMC's rulemaking powers. *See, e.g.*, N.C. Gen. Stat. § 143-211 (a) and (c).

In North Carolina, "[a]n 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 legislature's grant of authority." *Beason v. N.C. Dep't of Sec'y of State*, 743 S.E.2d 41, 46 (2013) (citation omitted). However, North Carolina courts "apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise." *High Rock Lake Partners, LLC*, 366 N.C. at 319, 735 S.E.2d at 303; *see also, In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 382, 379 S.E.2d 30, 35-36 (1989); *Matter of Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654-55 (1980) (citation omitted).

C. Correctness of Chairman's Decision

North Carolina General Statutes § 150B-19.3(a) creates the gravamen of Petitioner's complaint about the Chairman's "Decision on Completeness." In his decision the Chairman determined Petitioner failed to address this statute's prohibition on any rulemaking by the EMC which would impose a more restrictive standard than that imposed by federal law where Petitioner failed to demonstrate in the Rulemaking Petition that at least one of the five statutory conditions listed in N.C. Gen. Stat. § 150B-19.3(a) applied to her Petition.

The EMC has been granted statutory authority to promulgate rules regarding air pollution. N.C. Gen. Stat. §143B-282. However, this rulemaking authority is expressly limited by N.C. Gen. Stat. §150B-19.3, which became effective October 1, 2011, and which provides that State agencies that "implement and enforce State and federal environmental laws," including the EMC,

> 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 the adoption of the rule is required by [one of five specific exceptions].

N.C. Gen. Stat. §150B-19.3(a) (emphasis added). The five statutory exceptions to this prohibition are:

> (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.

Id.

The cardinal rule of statutory construction is to uphold the legislative intent. *See N.C. Sch. Bd. Ass'n v. Moore*, 359 N.C. 474, 488, 614 S.E.2d 504, 512 (2005). "The starting point for interpreting a statute is the language of the statute itself." *State ex rel. Pender County Child Support Enforcement Agency v. Parker*, 319 N.C. 354, 358, 354 S.E.2d 501, 504 (1987). 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.

In the present case the "subject matter" Petitioner is seeking to have the EMC regulate, the emission of CO_2 as a Green House Gas ("GHG") for the purpose of addressing global climate change, is already being regulated by the federal government. The United States Environmental Protection Agency ("EPA"), pursuant to the Federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"), has promulgated several rules addressing GHG, including CO_2, in an attempt to address climate change. In 2011, EPA promulgated GHG emission standards,

including those for CO_2, for passenger cars, light-duty trucks, and medium duty passenger vehicles. 75 Fed. Reg. 25324 (May 7, 2010). EPA also promulgated regulations addressing GHG emissions for major stationary sources that are required to obtain what are referred to as Prevention of Significant Deterioration ("PSD") or Title V operating permits. 40 CFR §§ 51.166(b)(48) and 70.2.

Petitioner claims that her Rulemaking Petition gives the EMC flexibility as to how to regulate sources of CO_2 in order to achieve the Petitioner's goal of an annual 4% reduction. However, reviewing the Rulemaking Petition as a whole, including the section describing the likely impacts of the proposed rule, clearly shows Petitioner is not simply asking the EMC to promulgate rules that mirror or implement EPA's regulations on GHGs. Instead, Petitioner is seeking more restrictive standards, limitations, and requirements on emitters of CO_2. 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 to this Petition for Rulemaking since there is no act of the General Assembly or United States Congress, federal regulation, budgetary policy, or court order that requires that the proposed rule be adopted. 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. *Id.* (emphasis added). The issue of global climate change, which is the basis for this 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.

Since Petitioner is seeking to add further restrictions regarding subject matter already addressed by federal regulation and has failed to show that one of the five listed exceptions under N.C. Gen. Stat. §150B-19.3 applies, Petitioner has failed to provide in her Rulemaking Petition the statutory authority for the EMC to promulgate the proposed rules. Read as a whole, it is clear from the language of N.C. Gen. Stat. §150B-19.3 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 regarding subjects regulated under federal law. In order for a Petition for Rulemaking to be complete it must contain "the statutory authority for the agency to promulgate the rule(s)" requested by Petitioner." 15A NCAC 2I .0501(b)(3).

The assessment of a petition's completeness is not simply an arithmetic count of the nine components required for a petition to be deemed complete, but also an assessment of the petition's completeness as to its content under the rule's nine components and a petition's completeness as to eligibility for promulgation as a rule based upon said content. 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.

Where it is alleged that an agency's decision was based on an error of law, a *de novo* review is required. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 403 S.E.2d 430 (1991). *De novo* review requires a court "to consider a question anew, as if not considered or decided by the agency . . . [and] . . . [t]he court may 'freely substitute its own judgment for that of the agency.'" *Friends of*

Hatteras Island v. Coastal Resources Comm'n. 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995) (citations omitted). However,

> even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation. It is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers "so [] long as the agency's interpretation is reasonable and based on a permissible construction of the statute." "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

County of Durham v. North Carolina Dep't of Env't. & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), *disc. rev. denied*, 350 N.C. 92, 528 S.E.2d 361 (1999) (citations omitted). This deference applies to the agency's specialized knowledge and interpretation of regulations it administers as well. In 1994, the North Carolina Supreme Court stated:

> Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. In other words, we must defer to the [Agency's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [Agency] intent at the time of the regulation's promulgation. This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns."

Morrell v. Flaherty, 338 N.C. 230, 237-38, 449 S.E.2d 175, 179-80 (1994) (citations and quotations omitted), *cert. denied*, 515 U.S. 1122, 132 L. Ed. 2d 282 (1995). In this matter the EMC delegated by rule the decision on completeness of Rulemaking Petitions to its Chairman,

and 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 there is no error of law in the Chairman's decision.

As for Petitioner's allegations that the decision was arbitrary or capricious,

> The reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.
>
> The 'arbitrary or capricious' standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are 'patently in bad faith, 'or 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or 'fail to indicate 'any course of reasoning and the exercise of judgment.'

ACT-UP Triangle v. Comm'n for Health Services, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (citations omitted). The whole record test is the standard of review employed when the agency's action is alleged to be arbitrary or capricious. *Walker*, 100 N.C. App. at 502, 397 S.E.2d at 354. The whole record test also is applied to determine whether the decision is supported by substantial evidence in view of the record submitted. *In Re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and is more than a scintilla or a permissible inference."

"The whole record test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In Re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979). A trial court may not weigh the evidence presented to an agency or substitute its own judgment for that of an agency. *Lackey v. North Carolina Dep't Human Resources, 306 N.C. 231, 238, 293 S.E.2d 171,*

176 (1982); King v. North Carolina Env't. Management Comm'n, 112 N.C. App. 813, 816, 436 S.E. 2d 865, 868 (1993). 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.

There is also a recognized presumption in North Carolina's jurisprudence that official acts taken by public officials are made in accordance with the law. *Albemarle Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E.2d 811 (1972); *accord, Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E.2d 101 (1962); *In re Housing Authority of the City of Charlotte*, 233 N.C. 649, 65 S.E.2d 761 (1951). The burden is upon the party asserting otherwise to overcome such presumption by producing contrary evidence sufficient to overcome the presumption. *Huntley v. Potter*, 255 N.C. 619, 628, 122 S.E. 2d 681, 686-87 (1961). In the present case, the record shows the Chairman took an action to determine the completeness of the Petition for Rulemaking, a determination the Commission had specifically authorized him to make; therefore, pursuant to well-established jurisprudence, the Chairman's decision is entitled to the presumption that the determination was in accordance with the law. Petitioner has failed to meet her burden to overcome this presumption.

Although the Chairman's decision included surplusage language on behalf of Respondent, nonetheless it does not negate or diminish the existence of substantial evidence in view of the entire record, as established under N.C. Gen. Stat. § 150B-51(b)(5) and (6), and it does not rise to a level which violates Constitutional provisions, exceeds statutory authority, the jurisdiction of Respondent, was made upon unlawful procedure, or was affected by error of law as set forth in N.C. Gen. Stat. § 150B-51(b)(1), (2), (3), or (4).

BASED UPON the foregoing, it is ORDERED by the Court that the final agency decision of the North Carolina Environmental Management Commission, through its Chairman, dismissing Petitioner's Petition for Rulemaking as incomplete, is AFFIRMED.

This the 11th day of December, 2015.

Michael R. Morgan, Superior Court Judge