NCASCA
NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION

TO: NORTH CAROLINA RULES REVIEW COMMISSION

On behalf of the North Carolina Ambulatory Surgical Center Association (NCASCA), please accept this letter in opposition to the temporary rule, 04 NCAC 10J .0103, proposed by the North Carolina Industrial Commission. NCASCA represents North Carolina's community-based ambulatory surgical centers (ASCs) to promote the value of North Carolina's ASCs as a critical component of the health care delivery system.

**THE INDUSTRIAL COMMISSION'S TEMPORARY RULE DOES NOT MEET THE CRITERIA FOR A TEMPORARY RULE SET FORTH IN G.S. § 150B-21.1(a)**

- The Industrial Commission contends that the Decision of Superior Court Judge Paul Ridgeway entered on August 9, 2016 is the basis for temporary rulemaking. However, that Decision is not a basis for temporary rulemaking.

- If a court order is the basis, that order must require the immediate adoption of a temporary rule. The Superior Court Decision does not require the immediate adoption of a temporary rule. Instead, the Decision recognized the invalidity of the Industrial Commission's attempted adoption of a new fee schedule for ambulatory surgery centers without following required rulemaking procedures. The Decision kept in place the fee schedule for ASCs that had been lawfully adopted in 2013.

- If this Court decision were a basis for temporary rulemaking, then almost any court order could provide a basis for temporary rulemaking, which was not the intent of the General Assembly in setting forth very limited and specific criteria for temporary rulemaking.

**THE INDUSTRIAL COMMISSION'S TEMPORARY RULE DOES NOT MEET THE STANDARDS OF G.S. § 150B-21.9**

- The proposed temporary rule has not been adopted in accordance with Part 2 of the Administrative Procedure Act.
    - On October 18, 2016, the Industrial Commission provided public notice of its proposed temporary rule and provided an opportunity for written and public comment as required.

- After those time periods had ended, the Industrial Commission published a substantially different proposed temporary rule without allowing any public comment as required by the statute.
- The most significant change is the inclusion of a formula for determining the reimbursement for certain surgical procedures that had not been included in the proposed temporary rule and had not been proposed by any persons involved in commenting on the proposed temporary rule.
- The Industrial Commission intends to make effective a temporary rule without allowing the opportunity for public comment as required under G.S. § 150B-21.1.

- The Commission's proposed temporary rule is not clear and unambiguous.
  - The temporary rule first published on December 2, 2016 provides in Subpart (h)(1) and (2) that there should be a maximum reimbursement rate of 200% and a maximum reimbursement rate of 135%. However, it is not clear – 200% of what and 135% of what?

- The proposed temporary rule is not reasonably necessary to implement or interpret North Carolina law. Instead, it is contrary to the statutory objections applicable to the Commission's adoption of fee schedules.
  - Under North Carolina law, fee schedules adopted by the Industrial Commission are required to be adequate to ensure that injured workers are provided the standard of services and care intended by the Workers' Compensation Act, providers are reimbursed reasonable fees for providing these services, and medical costs are adequately contained. The fee schedule proposed in this temporary rule does not accomplish these requirements.
  - The proposed fee schedule fails to address all procedures that can be performed in ambulatory surgery centers. As a result, injured workers will be denied access to ambulatory surgery centers causing delays in services and higher inpatient costs and copays for certain procedures.
  - Because the proposed fee schedule fails to provide reasonable reimbursement to ambulatory surgery centers, injured workers also will not receive the level of access that they would have if reasonable reimbursement were provided.
  - Medical costs are not being adequately contained. The proposed fee schedule provides a financial incentive for hospitals to shift certain surgical procedures to the highest cost inpatient setting and results in a disincentive for ambulatory surgery centers to serve injured workers in the lowest cost setting.

NCASCA
NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION

For the reasons set forth above, NCASCA opposes the temporary rule, 04 NCAC 10J .0103, as proposed by the North Carolina Industrial Commission.

This the 14th day of December 2016.

K. Collins

Kelli Collins, President
North Carolina Ambulatory Surgical Center Association

**SURGICAL CARE AFFILIATES' ADDITIONAL COMMENTS IN OPPOSITION TO THE TEMPORARY RULE, 04 NCAC 10J .0103, PROPOSED BY THE NORTH CAROLINA INDUSTRIAL COMMISSION**

TO: NORTH CAROLINA RULES REVIEW COMMISSION

Surgical Care Affiliates, LLC ("SCA") maintains that the North Carolina Industrial Commission ("NCIC") lacks statutory authority to promulgate a temporary rule. As set out in detail in its initial comments to the Rules Review Commission regarding this temporary rulemaking, the August 9, 2016 Superior Court Decision in *Surgical Care Affiliates LLC v. North Carolina Industrial Commission* does not require the NCIC to immediately adopted a temporary rule. Unfortunately, it does not appear that the Staff Opinion released last week engages in any analysis as to whether the NCIC has the authority to promulgate a temporary rule.

Even if, however, the Rules Review Commission concludes that the NCIC has the authority to promulgate a temporary rule "in response to" the Court Decision, the Rules Review Commission must then consider whether the other statutory criteria are met. N.C. Gen. Stat. § 150B-21.9. The NCIC's temporary rule, as drafted, is ambiguous, lacks statutory authority, and is inconsistent with the statutory purpose behind the Workers' Compensation Act.

**THE NCIC HAS FAILED TO COMPLY WITH THE NOTICE AND COMMENT REQUIREMENTS FOR A TEMPORARY RULE.**

The Rules Review Commission is charged with determining whether the NCIC complied with the temporary rulemaking process in N.C. Gen. Stat. § 150B-21.1(a3), which states:

> Unless otherwise provided by law, the agency shall:
>
> (1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.
> (2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S.

> 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.
> (3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
> (4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.

On October 18, 2016, the NCIC submitted a temporary rule to OAH and provided notice to the public. The proposed temporary rule at that time was nearly identical to the improperly promulgated permanent rule that had been set aside by the Superior Court. It was this version of the rule that was the subject of NCIC's notice, the public hearing, and the opportunity for comment. Although the stakeholders certainly did not share a consensus view of the temporary rule, all agreed that the temporary rule left out procedures that could be performed at ASCs, created more uncertainty to the Workers' Compensation system, and created additional costs. Some stakeholders proposed solutions to address this gaping error.

No stakeholder proposed or supported the language in the revised temporary rule. In effect, the NCIC provided notice and an opportunity to comment on one temporary rule and has adopted a different temporary rule for which no notice or opportunity to comment have been provided.

The NCIC's bait-and-switch violates the plain requirements of the temporary rulemaking process. *See* N.C. Gen. Stat. § 150B-21.1(a3). The NCIC submitted a rule to the Codifier of Rules, accepted written comments on a proposed temporary rule, and held a hearing on a proposed temporary rule. A mark-up created by the NCIC shows the significant differences between the proposed temporary rule that was the subject of the public notice and comment and the adopted temporary rule. *See* the attached temporary rule filed with Rules Review that highlights the significant changes. Therefore, the Rules Review Commission should reject the temporary rule as violating the requirements of N.C. Gen. Stat. § 150B-21.1(a3).

## THE TEMPORARY RULE IS UNCLEAR AND AMBIGUOUS.

The temporary rule remains unclear and ambiguous. For example, the temporary rule provides in Subpart (h)(1) and (2) that there should be a maximum reimbursement rate of 200% and a maximum reimbursement rate of 135%. However, it is not clear how these maximum reimbursement rates should be applied. 200% of what? 135% of what? Subpart (g) references two different Medicaid Payment Systems: the Hospital Outpatient Prospective Payment System and the Ambulatory Surgical Center Payment System. It states that ASCs shall be paid a percent of these Payment Systems, but the temporary rule does not explain which System should apply to which procedures.

## THE TEMPORARY RULE CONFLICTS WITH THE STATUTORY PURPOSES BEHIND THE WORKERS' COMPENSATION FEE SCHEDULE.

North Carolina law requires that fee schedules adopted by the Commission be adequate to ensure that injured workers are provided the standard of services and care intended by the Workers' Compensation Act and that providers are reimbursed reasonable fees for providing these services. The Commission also is required to ensure that medical costs are adequately contained. N.C. Gen. Stat. § 97-26(a). The Commission's temporary rule does not meet these requirements.

### *The Proposed Fee Schedule Still Does Not Cover All ASC Procedures.*

The Commission's temporary rule does not set a fee schedule for all procedures that can be performed in ASCs. Instead, for those surgical procedures that are not included in either the Medicare Outpatient Prospective Payment System or the Medicare Ambulatory Surgical Center Payment System, the revised temporary rule provides no fee schedule.

By crafting a fee schedule that uses only the Medicare fee schedule as its foundation, the proposed rule does not recognize that a wide variety of procedures can be performed safely and cost-effectively on the working-age population. The workers' compensation population is

typically younger and healthier than the Medicare population, meaning that there are additional procedures that can be performed safely and effectively with a shorter stay. As noted by the National Council on Compensation Insurance ("NCCI"): "WC claimants have very different demographics, medical conditions, and priorities than retirees. It would be a mistake to blindly rely on Medicare rates as perfect measures of resources appropriate to treat work-related injuries." NCCI, *Effectiveness of Workers Compensation Fee Schedules - A Closer Look* (Feb. 11, 2009).

***The Failure to Propose a Fee Schedule Covering All Surgical Procedures Results in Greater Costs to the System.***

The failure to include all procedures that can be safely performed on an outpatient basis results in a significant cost to the system. Total joint replacements (knee, hip, and shoulder) currently are paid by Medicare only in the inpatient setting and these cases are routinely performed on patients – especially young and otherwise healthy patients like many injured workers – in the ASC setting.

To meet the goals of the Workers' Compensation Act, the Commission should be proposing a fee schedule that promotes having these procedures performed in ASCs instead of in a more costly inpatient setting. The proposed fee schedule will continue to encourage hospitals to provide these surgical procedures in the highest cost setting.

When confronted with an injured worker who needs a procedure not paid for under Medicare's Outpatient Prospective Payment System, a hospital can choose to perform the procedure in its inpatient setting. The result is a much higher cost to the system for an inpatient stay and for the procedure. Providing certainty in the reimbursement to ASCs for procedures like total joint replacements would allow the injured worker's doctor to make the decision for the patient about the best site of service for these procedures.

Workers' compensation patients can be prioritized in an ASC setting and are often seen more quickly than they are in a hospital setting. This, combined with the ASC industry's low infection rates and high quality of care, allows for a rapid return to work, resulting in savings to the system for disability expenses beyond the savings proposed under the fee schedule.

The impact of not having a fee schedule that includes all procedures can be shown by the drop in workers' compensation cases performed in ASCs since April 2015 when the invalid fee schedule began being used. SCA's Workers' Compensation cases declined by 4.2% between April 1, 2015 and March 31, 2016. An NCCI analysis of case volume shows a decline in volume of workers' compensation cases by all North Carolina ASCs in 2015 of 8.2%.

Data collected by WCRI demonstrated that common outpatient surgeries done in North Carolina ASCs was 45% lower than in most states. WCRI, Compscope™ Medical Benchmarks for North Carolina, 17th ed. (Oct. 2016). Additionally, NC injured workers reported that they had "big problems getting the primary provider that they wanted." *Id.* Significantly reducing the payments to ASCs for treating injured workers—which is what the temporary rule does—would exacerbate injured workers' access to surgical care in ASCs and increase costs to the system.

* * *

The issues identified in these comments highlight why the General Assembly created a permanent rulemaking process that is more deliberative and more exhaustive and why the General Assembly limited temporary rulemaking to narrow situations that required the immediate adoption of temporary rules. This is not one of those situations.

The revised temporary rule being considered by the Rules Review Commission is one that never received any notice and comment by stakeholders prior to its adoption. This violates the Administrative Procedure Act. Because it was hastily drafted and even-more-hastily revised, the temporary rule is unclear and ambiguous.

The temporary rule also will hurt injured workers and create costs to the workers' compensation systems. The NCIC retains the authority to amend all fee schedules using the permanent rulemaking process. Instead, the NCIC is misusing the temporary rulemaking process to avoid the effects of a Superior Court decision and to implement a reimbursement methodology that has not been vetted or analyzed for its impact.

For the reasons set forth above and in the Initial Comments filed by SCA, the Rules Review Commission should conclude that the Industrial Commission's temporary rule fails to meet the statutory requirements that apply to a temporary rule.

This the 14th day of December 2016.

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*Attorneys for Surgical Care Affiliates, LLC*

Rule 04 NCAC 10J .0103 is amended under temporary procedures as follows:

**04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES**

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

(1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.

(2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.

(3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

(1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.

(2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.

(3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.

(2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.

(3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

(1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.

(2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.

(3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the ~~Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective~~ most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment ~~System~~ Systems reimbursement formula and ~~factors~~ factors, including all OPPS and ASC Addenda, as published annually or referenced by website in the Federal Register ~~("the Medicare ASC facility-specific amount").~~ ("the OPPS/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPS/ASC Medicare rule shall be applied in the calculation of

the maximum allowable amount for any institutional service it provides. ~~Reimbursement shall be based on the fully implemented payment amount in Addendum AA, Final [AA (Final ]ASC Covered Surgical Procedures for CY 2015, [2017)] and Addendum BB, Final [BB (Final ]ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2015,[ 2017) ]as published in the Federal Register, or their successors.[ The maximum reimbursement rate for institutional services provided by ambulatory surgical centers is 200 percent of the Medicare ASC facility-specific amount.]~~

(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers is as follows:

~~(1) Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.~~

~~(2) Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.~~

~~(3) Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.~~

(1) A maximum reimbursement rate of 200 percent shall apply to institutional services that are eligible for payment by CMS when performed at an ASC.

(2) A maximum reimbursement rate of 135 percent shall apply to institutional services performed at an ASC that are eligible for payment by CMS if performed at an outpatient hospital facility, but would not be eligible for payment by CMS if performed at an ASC.

~~[(h) Notwithstanding Paragraph (g) of this Rule, if surgical procedures listed in Addendum EE (Surgical Procedures Excluded from Payment in ASCs for CY 2017) to the most recently adopted and effective Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems as published in the Federal Register, or its successors, are provided at ASCs, they shall be reimbursed with the maximum amount being the usual, customary, and reasonable charge for the service or treatment rendered.]~~

(i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages set out in Paragraphs (b), (c), (e), (f), and (h) [~~(g)~~ ]of this Rule.

(j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee schedules in Rule .0102 of this Section.

(k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG") payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no more than the billed charges.

(l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

*History Note:* *Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410;*
*Eff. April 1, ~~2015.~~ 2015;*
*Temporary Amendment Eff. January 1, 2017.*

December 14, 2016

*Via Electronic Mail*

Rules Review Commission
NC Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6700

Re: Comments in Opposition to the Temporary Rule, 04 NCAC 10J .0103, as Proposed by the North Carolina Industrial Commission

Dear Commissioners and Commission Staff:

Surgery Partners, Inc. which operates Wilmington SurgCare in Wilmington, North Carolina and Orthopaedic Surgery Center of Asheville in Asheville, North Carolina, opposes the adoption of temporary rule 04 NCAC 10J .0103. The Industrial Commission's attempted amendment of 04 NCAC 10J .0103 does not meet the narrow criteria specified for adoption of a temporary rule set forth in N.C. Gen. Stat. § 150B-21.1(a). Accordingly, the Rules Review Commission ("RRC") should reject the amendment of temporary rule 04 NCAC 10J .0103 as being adopted without statutory authority.

When reviewing a temporary rule promulgated by a state agency, the RRC must determine if a rule meets four "standards," including whether the rule is "within the authority delegated to the agency by the General Assembly." N.C. Gen. Stat. § 150B-21.9. Here, the Industrial Commission ("Commission") argues that the authority to adopt the proposed amendment to 04 NCAC 10J 0.103 as a temporary rule is provided by N.C. Gen. Stat. § 150B-21.1(a)(5). Under N.C. Gen. Stat. § 150B-21.1(a)(5), an agency may adopt a temporary rule when it finds the notice and hearing requirements of N.C. Gen. Stat. 150B-21.2 would be contrary to the public interest and that the *immediate* adoption of the rule is *required* by a recent court order (emphasis added).

The Commission claims that the adoption of this temporary rule is "necessitated" by the August 9, 2016 Decision entered by Wake County Superior Court Judge Paul Ridgeway in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission.* However, the Commission expressly admits in its Findings of Need Statement that Judge Ridgeway's Decision did *not* order the Commission to engage in temporary rulemaking. Rather, the Decision only invalidates the Commission's attempted adoption of a new fee schedule for ambulatory surgery centers ("ASCs"), due to the Commission's failure to comply with fiscal note requirements in accordance with Article 2A of the North Carolina Administrative Procedure Act.

The effect of the Decision is merely to revert to the prior fee schedule for ASCs, which was approved by the RRC in December 2012, lawfully enacted by the Commission in January

2013, and utilized successfully for two years. The Superior Court decision does not cause any cessation in activity within the North Carolina workers' compensation system. ASCs can still be reimbursed for the care they provide to injured workers, and those injured workers can still file claims for such treatment. Thus, the adoption of a temporary rule amending the fee schedule for ASCs is not *required* by either the language of the Decision or the effects of the Decision, as per the criteria set forth in N.C. Gen. Stat. § 150B-21.1(a)(5). When the plain language of a statute such as N.C. Gen. Stat. § 150B-21.1(a)(5) is clear and unambiguous, courts must give the statute its plain and definite meaning. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996).

Despite the fact that the August 9, 2016 Decision has been stayed by the Superior Court during the Commission's appeal to the North Carolina Court of Appeals, the Commission claims that following the Decision it has a "statutory obligation to adopt a rule as quickly as possible to restore balance to the workers' compensation system." The General Assembly has given no authority to the Commission to adopt such a rule through temporary rulemaking. If all state agencies could use such conclusory and vague justifications for the adoption of temporary rules, it would be easy for agencies to violate permanent rulemaking procedures and subsequently pursue temporary rulemaking based on a court order invalidating those rules, in order to achieve the same outcome. Allowing agencies to interpret the temporary rulemaking criteria so broadly would ultimately obviate the need for the permanent rulemaking process.

In addition to a lack of statutory authority to use the temporary rulemaking procedure in this scenario, the Commission has also presented no evidence that the public interest will be harmed by following the standard permanent rulemaking process. Rather, the Commission merely points to the Superior Court Decision resulting in the pre-April 1, 2015 fee schedule remaining effective as the sole justification for bypassing the permanent rulemaking process. The lack of requisite discussion regarding the public interest again indicates that the Commission is inappropriately using the temporary rulemaking procedure to circumvent the vital permanent rulemaking requirements of N.C. Gen. Stat. § 150B-21.2.

In conclusion, Surgery Partners, Inc. opposes the adoption of this temporary rule because it exceeds the authority delegated to the Commission by the General Assembly to amend the rule, as established by the plain language of N.C. Gen. Stat. § 150B-21.1(a).

Sincerely,

Linda Simmons
Regional Vice President
Surgery Partners, Inc.
331 Springwater Chase
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**BUSINESS AND INSURANCE COMMUNITY INITIAL COMMENTS IN SUPPORT TO THE TEMPORARY RULE 04 NCAC 10J .0103, PROPOSED BY THE NORTH CAROLINA INDUSTRIAL COMMISSION**

TO: THE NORTH CAROLINA RULES REVIEW COMMISSION

The undersigned organizations representing a large cross-section of business, insurance and local government organizations write to respectfully urge approval by the North Carolina Rules Review Commission (RRC) of the temporary rule amending 04 NCAC 10J .0103 as properly adopted by the North Carolina Industrial Commission (IC).

The IC has legally and justifiably acted in accordance with Chapter 150B of the North Carolina General Statutes specifically N.C.G.S. 150B-21.1(a) to adopt a temporary rule in response to a recent court order. By adopting this temporary rule the IC has in fact returned stability to the workers' compensation system rather than leaving businesses, insurers and state and local governments in limbo and a great deal of uncertainty while the IC appeals the decision of Judge Ridgeway to the North Carolina Court of Appeals.

Additionally, it should be noted that Judge Ridgeway issued a stay of his own order which Judge Ridgeway had previously handed down in Wake County Superior Court. More importantly, during the hearing on whether to grant the motion to stay, Judge Ridgeway inquired of the parties whether there existed a possibility that the IC could immediately commence rulemaking concerning the subject matter now before the RRC. Judge Ridgeway repeatedly asked questions to the parties regarding the applicable timelines and processes for temporary and permanent rulemaking under the Administrative Procedures Act in an attempt to reach consensus among the parties and remove uncertainty. Judge Ridgeway even requested to hear testimony under oath from Kendal Bourdon, Rulemaking Coordinator for the North Carolina Industrial Commission, to thoroughly explore the rulemaking process and applicable timeframes for both temporary and permanent rules. Renee Montgomery and Matthew Wolfe representing SCA, had the opportunity to cross-examine Ms. Bourdon about the emergency, temporary and permanent rulemaking process. In other words, both Judge Ridgeway certainly contemplated and SCA was thoroughly aware that the IC had the ability and statutory authority to proceed to temporary and/or permanent rulemaking. Neither Ms. Montgomery nor Mr. Wolfe raised the issue before Judge Ridgeway, which they now raise before the RRC, of any alleged lack of authority by IC to adopt a temporary rule. To the contrary, SCA now comes before the RRC alleging lack of statutory authority simply because the IC had previously denied SCA's petition for rulemaking and SCA simply does not like the temporary rule that is before the RRC. Undoubtedly, if the IC had adopted the fee schedule previously proposed by SCA that would have cost North Carolina businesses, insurers and state and local governments millions of dollars or a fee schedule that was more to SCA's liking, SCA would likely be fully in support of the rule before the RRC.

What Surgical Care Affiliates (SCA) fails to mention in its written comments is that an objection by the RRC to the temporary rule adopted by the IC would result in irreparable harm to businesses in North Carolina that purchase workers' compensation as required by North Carolina law. The fee schedule SCA seeks to revert to would result in an estimated 23% increase in cost when ten (10) randomly selected procedures recently performed by ambulatory surgical centers in various geographic areas of North Carolina were analyzed. Additionally, the National Council on Compensation Insurance (NCCI) has determined that the estimated negative economic impact would be between $21 million and $24 million in additional annual premium based upon 2014 written premium in North Carolina (see *Analysis of Hypothetical Changes to North Carolina Medical Fee Schedule Proposed to be Effective October 1, 2016* prepared by the National Council on Compensation Insurance (NCCI)). Additionally, SCA's position

would adversely affect medical costs incurred by the State of North Carolina, local governments and school boards, among others.

The temporary rule to which the SCA objects merely readopts what nearly every affected party believes to be the fee schedule for all medical providers when the original rule was properly adopted in accordance with the North Carolina Administrative Procedures Act pursuant to Chapter 150B of the North Carolina General Statutes, and was promulgated at the request of stakeholders that included various members of North Carolina's business community, the North Carolina Hospital Association, the North Carolina Medical Society, workers' compensation insurance companies, the North Carolina Advocates for Justice, and the North Carolina Association of Defense Attorneys. These groups spent nearly three years negotiating in an effort to find common ground. The negotiation, including a jointly-funded study of fee schedules by an agreed-upon consultant, culminated in a formal mediation by noted North Carolina mediator Andy Little. This effort produced a thoughtful compromise that brought North Carolina's medical expenses in line with those of surrounding states and near the median average of other states studied by the Workers' Compensation Research Institute (WCRI). At no point did the parties to the negotiation prevent any other party that asked to be included in the negotiation from participating. This was a carefully crafted and delicate compromise achieved after many long hours of hard work and vigorous negotiation.

Simply stated, SCA's objection to the IC's adopted temporary rule is stale. SCA had every opportunity to engage in the rule-making process regarding fees conducted by the IC dating back to 2011. Yet, at every stage of the formal and informal process (including the above-referenced stakeholder negotiation, two rounds of administrative rulemaking and two statutory changes), SCA never took advantage of the ample opportunities to provide public comment, both at public hearings and through the submission of written comments as set out in the Administrative Procedures Act in Article 2A of Chapter 150B of the General Statutes. The IC properly published the text of the original proposed rule in the *North Carolina Register* on November 17, 2014; properly held a public hearing on December 17, 2014, to receive public comments; properly accepted written comments from the public from November 17, 2014 until January 16, 2015; and properly allowed parties to submit and make comments before formal adoption and submission of the rule by the IC to the North Carolina Rules Review Commission (RRC). Despite being presented every opportunity for input, SCA never sought to utilize these opportunities to be heard on the substance of the proposed rule as afforded by the law. Additionally, SCA neglected to appear before this RRC to raise the very issue that it now asserts, i.e., that the IC failed to adopt the rule in accordance with Part 2 of Article 2A of Chapter 150B of the North Carolina General Statutes (see N.C.G.S. 150B-21.8(a)(4)). Nor did SCA exercise the rights granted to any member of the general public to file ten (10) letters of objection to the proposed rule with the RRC and subject the proposed rule to legislative review (See N.C.G.S. 150B-21.3(b2)).

Despite never engaging in even a single stage of the long-standing Administrative Procedures Act during the IC's adoption of the original rule, SCA filed suit alleging that the IC did not have statutory authority to adopt a fee schedule for ambulatory surgical centers without conducting a fiscal note. While the IC prevailed in Wake County Superior Court on this argument, the order from Wake County Superior Court was stayed pending appeal. In response to this court order and in compliance with Chapter 150B, the IC has properly sought to remove the uncertainty that currently exists in North Carolina's workers' compensation system by further clarifying the fee schedule in an equitable and just manner that ensures stability in the workers' compensation system and that injured workers have access to treatment for their workplace injuries. Now eighteen months after the fact, SCA is essentially objecting to the temporary rule after SCA's substantial failure to utilize the very process that the North Carolina General Assembly has established to ensure that those potentially affected by a proposed administrative rule can comment on, and even object to, that rule before the administrative agency, the RRC and ultimately the North Carolina General Assembly.

In summary, to side with SCA's petition for rulemaking would not only reward SCA's failure to timely exercise its right to comment, but would undermine the entire Administrative Rulemaking process created by the North Carolina General Assembly. For these reasons, the following groups strongly urge the North Carolina Industrial Commission to approve the IC's temporary rule amending 04 NCAC 10J .0103.

Sincerely,

Capital Associated Industries, Inc.
North Carolina Association of County Commissioners
North Carolina Association of Defense Attorneys
North Carolina Association of Self-Insurers
North Carolina Automobile Dealers Association, Inc.
North Carolina Chamber
North Carolina Farm Bureau and Affiliated Companies
North Carolina Forestry Association
North Carolina Home Builders Association
North Carolina League of Municipalities
North Carolina Manufacturers Alliance
North Carolina Retail Merchants Association
American Insurance Association
Property Casualty Insurers of America Association
Builders Mutual Insurance Company
Dealers Choice Mutual Insurance, Inc.
First Benefits Insurance Mutual, Inc.
Forestry Mutual
The Employers Association, Inc.
Employers Coalition of North Carolina
WCI, Inc.

**SURGICAL CARE AFFILIATES' INITIAL COMMENTS IN OPPOSITION TO THE TEMPORARY RULE, 04 NCAC 10J .0103, PROPOSED BY THE NORTH CAROLINA INDUSTRIAL COMMISSION**

TO: NORTH CAROLINA RULES REVIEW COMMISSION

The temporary rulemaking process is a deviation from the permanent rulemaking process. Because of the presumption that permanent rulemaking should be used, the Rules Review Commission reviews every temporary rule to determine whether it meets the limited criteria for adoption of a temporary rule set forth in N.C. Gen. Stat. § 150B-21.1(a). The Industrial Commission's ("IC") attempted amendment of 04 NCAC 10J .0103 does not meet the criteria for adopting a temporary rule.

The IC relies upon a "recent court order" that neither explicitly nor implicitly requires a temporary rule. The IC instead contends that "the effects of" the recent court order make a temporary rule necessary. The effect of the recent court order is to revert to a lawfully adopted prior fee schedule for certain medical services.

Unlike two other times when temporary rules have been required by a recent court order, the IC's temporary rule is not necessary to comply with or enforce the recent court order or to ensure activities can continue that would otherwise be prohibited by the recent court order. Instead, the IC is merely trying to avoid the consequences of a recent court order that invalidates one of its rules for failing to comply with the permanent rulemaking requirements under the Administrative Procedure Act ("APA"). The IC is now trying to do through temporary rulemaking what it failed to do properly through permanent rulemaking—change a fee schedule. We request that the Rules Review Commission prohibit this attempted end-around the APA.

## THE CRITERIA FOR ADOPTING A TEMPORARY RULE HAVE NOT BEEN MET.

### Immediate Adoption of the Temporary Rule is Not Required by Recent Court Order.

The IC contends that N.C. Gen. Stat. § 150B-21.1(a)(5) provides the statutory authority for adopting the proposed amendment to 04 NCAC 10J .0103 as a temporary rule. Under this criterion, the immediate adoption of the rule must be required by a recent court order. However, there is no recent court order that requires the immediate adoption of an amendment to 04 NCAC 10J .0103.

The IC contends that "the effects of" the August 9, 2016 Decision in *Surgical Care Affiliates LLC v. North Carolina Industrial Commission* "necessitate the expedited implementation of this temporary rule," admitting that the Decision does not order or even mention temporary rulemaking. The IC is misreading the clear language of the temporary rule statute, N.C. Gen. Stat. § 150B-21.1(a). The court order upon which the IC relies does not require the immediate adoption of a temporary rule. As the N.C. Supreme Court has stated on numerous occasions, when the language of a statute is clear and unambiguous, courts must give the statute its plan and definite meaning. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996); *Lemons v. Old Hickory Council, Boy Scouts of America*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

### The Superior Court Decision is No Basis for Temporary Rulemaking.

Because the IC had failed to obtain the required fiscal note for permanent rulemaking, the Honorable Paul Ridgeway, Wake County Superior Court Judge, reversed the IC's declaratory ruling that it had complied with all of the requirements. In the Decision, Judge Ridgeway concluded:

> The Commission's attempted adoption of a new fee schedule for ambulatory surgical center services, but limited solely to those services, as set forth in 04 NCAC 10J .0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the Prior Rule, specifically 04 NCAC 10J .0101(d)(3), (5), and (6), to the extent that the amendment removed the old fee schedule for ambulatory surgical centers, are invalid and of no effect."

The Decision does not direct the IC to pursue temporary rulemaking or require temporary rulemaking implicitly. The "effects" of the Decision do not require temporary rulemaking either. The "effect" of the Decision in *Surgical Care Affiliates* was to recognize the invalidity of the IC's attempted adoption of a new fee schedule for ambulatory surgery centers ("ASCs"), which had the effect of keeping in place the fee schedule for ASCs that had been lawfully adopted in 2013. As a result, there is a fee schedule for ASCs. If the IC chooses to change that ASC fee schedule, it can pursue permanent rulemaking complying with all of its requirements.

**The IC's Position that "The Effects of the Decision" Provide Justification for Temporary Rulemaking Has No Merit.**

The IC contends, contrary to the plain language of the temporary rule statute, that "the effects of the Decision" require the immediate adoption of the proposed rule. The IC uses conclusory statements about "restoring balance to the workers' compensation system."

If such conclusory statements could be justification for a temporary rule, all agencies would be promulgating temporary rules any time a decision was made on judicial review that an agency had failed to follow the required permanent rulemaking process. Such a broad interpretation of the temporary rulemaking criteria would permit a rulemaking agency to blatantly violate the permanent rulemaking process, invite a court order that invalidates those rules, and then pursue temporary rulemaking based on "the effects of the court order." That is what the IC is attempting to do here.

By the IC's logic, agencies could use temporary rules in the wake of almost any court order, legislation, or regulation by citing alleged negative effects. The exception (temporary rulemaking) would swallow the rule (permanent rulemaking).

**The Proposed Temporary Rule is Not Necessary to Comply With or Enforce the Decision.**

To our knowledge, there have been only two other times that agencies have promulgated temporary rules required by a recent court order. These two cases further demonstrate that the IC fails to meet the threshold for temporary rulemaking in this case.

The Environmental Management Commission ("EMC") adopted temporary rules in 2001 as required by the Supreme Court's recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). The Supreme Court invalidated the Army Corps of Engineers' jurisdiction over the discharge of fill into isolated waters. At that time, there had been no State permitting process because it would have been duplicative. When the Corps of Engineer lost jurisdiction, the State alone retained jurisdiction over activities impacting isolated, intrastate waters. But there was no permitting process. As concluded by the North Carolina Attorney General, the Supreme Court decision meant that "[u]ntil a permit program is codified in the [EMC's] rules, no activities involving the discharge of waste into isolated waters in violation of water quality standards can occur in this State." Thus, the "immediate necessity for proceeding with temporary rules is evident." Authority of the Environment Management Commission to Adopt Temporary and Permanent Rules Requiring Permits for Impacts to Isolated Wetlands and Surface Waters (N.C.A.G. Sept. 5, 2001) [attached as Ex. A].

In another situation, a federal district court entered a preliminary injunction prohibiting the hunting of coyotes in a five-county red wolf recovery area with limited exceptions. The

Wildlife Resource Commission ("WRC") adopted a temporary rule required by the court order. As stated in its Findings of Need submitted to the Rules Review Commission: "In order to fully comply with the injunction and enforce its restrictions, the WRC must pursue rule-making." Wildlife Resources Commission, Temporary Rule-Making Findings of Need (July 10, 2014) (emphasis added) [attached as Ex. B].

The situation in which the IC finds itself is clearly distinguishable from the temporary rules promulgated by the EMC and the WRC. The IC's proposed temporary rule is not required to ensure activities can still occur in the worker's compensation system. Injured workers can still file claims, those claims can still be paid, ASCs can still treat injured workers, and ASCs can still be reimbursed for such treatment. Unlike the WRC preliminary injunction, the Superior Court Decision does not halt any activity until temporary rules are adopted.

The IC also does not need a temporary rule in order to fully comply with and enforce the Decision. The Decision requires the IC to enforce the prior lawfully adopted ASC fee schedule, which was used—without problem—for two years. The temporary rule is an attempt by the IC to avoid full compliance and enforcement of the Decision.

**The IC Also Fails to Show That Permanent Rulemaking Would be Contrary to the Public Interest.**

The IC also has failed to show how it would be contrary to the public interest to amend its rules using the permanent rulemaking process set forth in the APA as required under N.C. Gen. Stat. § 150B-21.1. In its Findings of Need Statement addressing this standard, the IC cites the Superior Court Decision as resulting in the pre-April 1, 2015 fee schedule continuing to be effective. There is no discussion of the public interest being harmed by following the permanent rulemaking process.

The IC is using temporary rulemaking in an attempt to avoid the Wake County Superior Court Decision and bypass the important process in N.C. Gen. Stat. § 150B-21.2 for adopting a permanent rule.

**CONCLUSION**

For the reasons set forth above, the IC has failed to show that its temporary rulemaking meets the standards of N.C. Gen. Stat. § 150B-21.1. Surgical Care Affiliates will be filing supplemental comments addressing the other requirements and standards that have not been met by the IC's temporary rulemaking.

This the 7th day of December 2016.

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*Attorneys for Surgical Care Affiliates, LLC*

# EXHIBIT A

NORTH CAROLINA
DEPARTMENT OF JUSTICE
ATTORNEY GENERAL **ROY COOPER**

REPLY TO: James C. Gulick Environmental Division jgulick@mail.jus.state.nc.us Telephone: 919/716-6600 Fax: 919/716-6767

September 5, 2001

Dr. Charles H. Peterson Vice Chairman Environmental Management Commission 232 Oakleaf Drive Pine Knoll Shores, North Carolina 28512

Ms. Coleen Sullins Water Quality Section Division of Water Quality 1617 Mail Service Center Raleigh, North Carolina 27699-1617

**RE: Advisory Opinion: Authority of the Environmental Management Commission to Adopt Temporary and Permanent Rules Requiring Permits for Impacts to Isolated Wetlands and Surface Waters. Dear Dr. Peterson and Ms. Sullins: )**

You have requested, on behalf of the Water Quality Committee of the Environmental Management Commission, an opinion as to (1) whether the Commission is presently authorized to adopt rules requiring permits for impacts to isolated wetlands and surface waters; and (2) whether the recent decision of the Supreme Court of the United States in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 148

L. Ed. 2d 576. 121 S. Ct. 675 (2001) provides a basis to adopt rules regulating impacts to isolated wetlands and surface waters as temporary rules under N.C.G.S. §150b-21(a)(5). In our opinion, the short answer to both questions is "yes."

(1) As an administrative agency created by the legislature, the Environmental Management Commission's authority is both derived from and defined and limited by statute. *State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980);

N.C.G.S. §150B-19(1). The legislature has given the Commission the authority and duty to grant, revoke or deny permits pursuant to N.C.G.S. §143-215.1 regarding the controlling of sources of water pollution, including the direct or indirect discharge of waste to the waters of the State in violation of water quality standards. N.C.G.S. §143B-282(a)(1)(a); §143-215.1(a)(6).

N.C. Gen. Stat. § 143-212(6) provides:

"'Waters' means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway; or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction."

[Emphasis supplied] It is hard to imagine a broader, more all-encompassing definition of "waters" than this. That this definition includes "wetlands" is amply supported by the United States Supreme Court's conclusion that the Army Corps of Engineers acted reasonably in interpreting "waters of the United States" to include "wetlands" adjacent to other "waters of the United States."*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-139, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985). The application of § 143-212(6) to "isolated" wetlands is in no way undermined by the Supreme Court's recent, narrower ruling in *Solid Waste Agency v.*

*United States Army Corps of Eng'rs*, 531 U.S. 159, 148 L. Ed. 2d 576, 121 S. Ct. 675 (2001), which rejected the Corp's regulatory interpretation of the Clean Water Act to include *isolated* wetlands having no nexus to "navigable" waters. Unlike the federal law, North Carolina's statutory definition is not constrained by inclusion of the word "navigable." Nor does the State, unlike the federal government, have constitutional restrictions on the scope of its purely local regulations. Finally, interpretation of § 143-212(6) to permit regulation of isolated wetlands serves to effectuate the public policy of the State to conserve and protect wetlands:

*It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry*, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, *to control and limit the pollution of our air and water*, to control excessive noise, *and in every other appropriate way to preserve as a part of the common heritage* of this State its forests, *wetlands*, estuaries, beaches, historical sites, openlands, and places of beauty.

North Carolina Constitution, Art. XIV, Sec. 5 [Emphasis supplied] "It is . . . well settled that every statute is to be considered in light of the State Constitution and with a view to its intent." *Faulkner v. New Bern-Craven County Bd. Of Educ.*, 311 N.C. 42, 58, 316 S.E. 2d 281 (1984).

Waste is defined in N.C.G.S. §143-213(18) to include refuse, sediment and other fill materials. The discharge of fill material into the State's waters, when done to any significant degree, will violate State water quality standards for both surface waters and wetlands. See, e.g., 15A N.C.A.C. 2B .0211, .0220, .0231. Thus, the discharge of fill material into waters of the State in violation of water quality standards is lawful only when done pursuant to a permit issued by the Commission. In addition, the Commission is authorized to adopt rules implementing the N.C.G.S. §143-215.1 permit programs and to charge permit fees. N.C.G.S. §143-215.3(a). Thus, the Commission is enabled to adopt rules on this subject. N.C.G.S. §150B-19(1).

Therefore, we are of the opinion that the Commission has been granted specific authority by the Legislature to require permits for activities having impacts on isolated wetlands within the State's definition of waters, which would include filling for purposes of development.[1]

(2) The second question to be addressed is whether the recent decision of the Supreme Court of the United States in the case of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* provides the Commission with a basis under N.C.G.S. §150B-21(a)(5) for the immediate adoption of temporary rules establishing a permit program for regulating impacts to isolated wetlands and surface waters. In *Solid Waste Agency*, the Supreme Court invalidated the Corps of Engineers' "migratory bird rule," which the Corps of Engineers had used as a basis for asserting jurisdiction over isolated, intrastate waters, including wetlands, under Section 404 of the federal Clean Water Act.

Permanent and temporary rules establishing a permit program to regulate impacts to isolated wetlands and surface waters must be adopted using the procedures set forth in Article 2A of the Administrative Procedure Act, N.C.G.S. §150B-21.1 to 21.7. The Administrative Procedure Act allows the adoption of a temporary rule when the agency finds that adherence to the notice and hearing requirements for permanent rules would be contrary to the public interest and that immediate adoption is required by one or more of the following:
(1
A serious and unforeseen threat to the public health, safety, or welfare.
(2)
The effective date of a recent act of the General Assembly or the United States Congress.
(3)
A recent change in federal or State budgetary policy.
(4)

A federal regulation.
(5)
A court order.

[1] The Commission is no doubt aware of the pending lawsuit, *N.C. Homebuilders, et al. v. Environmental Management Commission*, Wake County File 99 CVS 11706, challenging the EMC's authority to make its wetlands rules. This case has been argued to Judge Donald Stephens and is pending decision in Superior Court.

(6) The need for the rule to become effective the same date as the State Medical Facilities Plan approved by the Governor, if the rule addresses a matter included in the State Medical Facilities Plan.

N.C.G.S. §150B-21.1(a).

The six listed actions or events that will support the adoption of a temporary rule share the common characteristic of being initiated or triggered by an entity other than the agency adopting the rule. The Supreme Court's recent decision invalidating the Army Corps of Engineers' jurisdiction over the discharge of fill into isolated waters is the action or event triggering the need for adoption of a State program for permitting impacts to isolated waters. Until this decision changed the law of the land, the Corps of Engineers' §404 permit was required before the discharge of fill into isolated waters could occur. The State did not duplicate the federal permitting of discharges in such waters; it only provided certification pursuant to Section 401 of the Clean Water Act regarding the impact on State water quality standards by the proposed activity.

With the Corps of Engineers' loss of jurisdiction, the federal program that allowed limited filling or alteration of isolated wetlands is no longer available to land owners wanting to develop their properties. The State alone retains jurisdiction over activities impacting isolated, intrastate waters. Until a permit program is codified in the Commission's rules, no activities involving the discharge of waste into isolated waters in violation of water quality standards can occur in this State. Although the immediate necessity for proceeding with temporary rules is evident, it must be ascertained whether "a court order" under N.C.G.S. §150B-21.1(a)(5) includes a decision of the Supreme Court of the United States.

The "primary rule of statutory construction is that the intent of the Legislature controls the interpretation of the statute." *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). That intent is ascertained by "consider[ing] the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id.* When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E. 2d 874 (1999).

We find little difficulty in determining that "court" includes federal as well as state courts, in view of the General Assembly's concern about federal as well as state acts in this section. It would also make no sense that we can fathom to interpolate a limitation between trial and appellate courts. Why would the legislature make authority to adopt a rule depend on the issuance of an order of a trial court, but not the Supreme Court?

The final query is whether "order" has a narrow or broad meaning. We are aware of at least some circumstances where our appellate courts have distinguished "orders" from "judgments." For example, in *State v. Williamson*, 61 N.C. App. 531, 532, 301 S.E.2d 423, (1983), in which there was an issue arising out of different wording between an "order" and the "judgment" entered in the same case, the North Carolina Court of Appeals stated:

"An order is distinguishable from a judgment. [A]n order has been defined . . . as being every direction of a court or judge made in writing and not included in a judgment." 46 Am. Jur. 2d Judgments § 3 at p. 315 (1969). A judgment is "a final determination of the rights of the parties in an action." Id. at § 1, p. 314. We hold,

therefore, that when there is a conflict between the language or interpretation of an order and a judgment on the same subject matter, the judgment shall control."

On the other hand, our legislature has used "order" to refer to "judgments" as well as "orders." See, e.g. N.C. Gen. Stat. § 110-129(1), part of North Carolina's child support enforcement law which provides this definition: "'Court order' means any judgment or order of the courts of this State or of another state."

With this in mind, it is clear to us that the term "court order," as used by our General Assembly, is flexible enough to include decisions of the Supreme Court of the United States. It is our opinion that the legislature intended that decisions issued by both State and federal courts at any level provide a basis for the adoption of temporary rules under N.C.G.S. §150B-21.1(a)(5) when the public interest would be served by the immediate adoption of the rule. We can think of no reason that the General Assembly would have intended that temporary rules be permissible as a result of orders as distinguished from judgments or final decisions. Also, since the enumerated bases for adopting a temporary rule include a recent act of the United States Congress, a recent change in federal budgetary policy, and a federal regulation, the legislature must have intended that decisions by federal courts, including the Supreme Court of the United States, would be encompassed within the court orders that support the adoption of temporary rules under N.C.G.S. §150B-21.1(a)(5).

In conclusion, we are of the opinion that the Environmental Management Commission is authorized by statute to implement through rules a program of permits to regulate activities impacting isolated wetlands and surface waters in the State. In addition, it is our opinion that the recent decision of the Supreme Court of the United States invalidating the Army Corps of Engineers exercise of jurisdiction over such isolated waters is a court order under N.C.G.S. §150B-21.1(a)(5) and supports the immediate adoption of temporary rules.

We trust that this advisory opinion will be of assistance to the Commission as it carries out its duties with respect to isolated waters, including wetlands.

Sincerely,

Dr. Charles H. Peterson
Ms. Coleen Sullins
September 5, 2001
Page 6

James C. Gulick
Senior Deputy Attorney General

Francis W. Crawley
Special Deputy Attorney General

ep/49156

North Carolina Department of Justice / Roy Cooper, Attorney General (919) 716-6400

# EXHIBIT B

# TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

July 10, 2014

| OAH USE ONLY |
|---|
| VOLUME: |
| ISSUE: |

1. **Rule-Making Agency:**
N. C. Wildlife Resources Commission

2. **Rule citation & name:**
15A NCAC 10B .0106 Wildlife Taken for Depredations

3. **Action:** ☐ Adoption ☒ Amendment ☐ Repeal

4. **Was this an Emergency Rule:** ☐ Yes ☒ No **Effective date:**

5. **Provide dates for the following actions as applicable:**

a. **Proposed Temporary Rule submitted to OAH:** May 23, 2014

b. **Proposed Temporary Rule published on the OAH website:** June 2, 2014

c. **Public Hearing date:** June 19, 2014

d. **Comment Period:** June 2, 2014 to June 23, 2014

e. **Notice pursuant to G.S. 150B-21.1(a3)(2):** http://www.ncwildlife.org/ProposedRegulations.aspx

f. **Adoption by agency on:** July 10, 2014

g. **Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]:** August 1, 2014

h. **Rule approved by RRC as a permanent rule:**

6. **Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.**

☐ **A serious and unforeseen threat to the public health, safety or welfare.**
☐ **The effective date of a recent act of the General Assembly or of the U.S. Congress.**
**Cite:**
**Effective date:**
☐ **A recent change in federal or state budgetary policy.**
**Effective date of change:**
☐ **A recent federal regulation.**
**Cite:**
**Effective date:**
☒ **A recent court order.**
**Cite order:** U.S. Dist. Court for the Eastern District of N. C.'s order number 2:13-CV-60-BO
☐ **State Medical Facilities Plan.**
☐ **Other:**

**Explain:**

A recent federal court injunction prohibits hunting of coyotes in Dare, Hyde, Washington, Tyrrell, and Beaufort counties and places other restrictions on take of coyotes in these counties. In order to fully comply with the injunction and enforce its restrictions, the Wildlife Resources Commission must pursue rule-making.

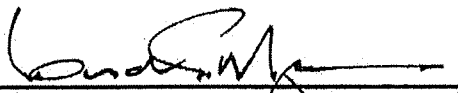
**7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?**

The permanent rule-making process would unduly delay the implementation of the judge's order so the Commission initiated temporary rule-making

**8. Rule establishes or increases a fee? (See G.S. 12-3.1)**

☐ Yes
Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

| | |
|---|---|
| **9. Rule-making Coordinator:** Erica Garner<br>**Phone:** 919-707-0014<br>**E-Mail:** erica.garner@ncwildlife.org | **10. Signature of Agency Head*:**<br>  <br>* If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.<br>**Typed Name:** Gordon S. Myers<br>**Title:** Executive Director |
| **Agency contact, if any:** Kate Pipkin<br>**Phone:** 919-707-0065<br>**E-Mail:** kathryn.pipkin@ncwildlife.org | |

| RULES REVIEW COMMISSION USE ONLY | |
|---|---|
| Action taken:<br><br>☐ Date returned to agency: | Submitted for RRC Review: |