

## Burgos, Alexander N

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**From:** Robert El-Jaouhari <rjaouhari@cshlaw.com>  
**Sent:** Wednesday, May 11, 2022 4:21 PM  
**To:** rrc.comments; Everett, Jennifer; Ventaloro, Christopher; Duke, Lawrence  
**Cc:** Patrick Mincey; Taylor Bolebruch  
**Subject:** [External] FW: Correspondence to NC Rules Review Commission regarding 14-Dioxane  
**Attachments:** Letter Comment to RRC.pdf

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Good afternoon all,

As before, I'd like to write to confirm that my notice and request to speak at Thursday's RRC meeting, in the attached comment submitted by the email below, was received, and to include Mr. Duke on my notice and request. Note that the email below included exhibits to the comment, which exhibits I have not re-attached here.

My statement will concern the rules proposed at 15A NCAC 2B .0208, .0212, .0214, .0215, .0216, and .0218. My contact information, as required by 26 NCAC 05 .0105, is:

Name: R. Robert El-Jaouhari  
Address: 5420 Wade Park Blvd., Ste. 300, Raleigh, NC 27607  
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Email: [rjaouhari@cshlaw.com](mailto:rjaouhari@cshlaw.com)

As indicated by my submitted comment, my remarks will be in opposition to the proposed rules.

Many thanks, looking forward to seeing you on the 19th. Let me know if you have questions or further needs in the meantime.

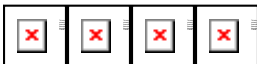
Best,  
Robert

**Robert El-Jaouhari**  
*Attorney at Law*



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**From:** Taylor Bolebruch <tbolebruch@cshlaw.com>

**Sent:** Wednesday, May 11, 2022 4:06 PM

**To:** rrc.comments@oah.nc.gov; Jennifer.everett@ncdenr.gov; christopher.ventaloro@ncdenr.gov

**Cc:** Robert El-Jaouhari <rjaouhari@cshlaw.com>; Patrick Mincey <pmincey@cshlaw.com>

**Subject:** Correspondence to NC Rules Review Commission regarding 14-Dioxane

Good afternoon,

Attached please find letter correspondence from Attorneys Patrick Mincey and Robert El-Jaouhari regarding the above-referenced matter, along with 3 Exhibits. Please note that a hard copy of all documents are being sent to you via First-Class Mail, as well.

If you have any trouble accessing the attachment, or if I can be of further assistance, please let me know.

Thank you,  
Taylor Bolebruch  
Paralegal

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May 11, 2022

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**Via E-Mail and USPS First-Class Mail, to:**

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Raleigh, NC 27609  
[rrc.comments@oah.nc.gov](mailto:rrc.comments@oah.nc.gov)

**Via E-Mail and USPS First-Class Mail, to:**

Jennifer Everett, Rulemaking Coordinator  
North Carolina Environmental Management Commission, Department of  
Environmental Quality  
1601 Mail Service Center  
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[Jennifer.everett@ncdenr.gov](mailto:Jennifer.everett@ncdenr.gov)

**Via E-Mail, to:**

Christopher Ventaloro, Water Quality Standards Coordinator  
North Carolina Department of Environmental Quality  
[christopher.ventaloro@ncdenr.gov](mailto:christopher.ventaloro@ncdenr.gov)

**RE: Comments in opposition to proposed rules to be codified at 15A  
NCAC 2B .0208, .0212, .0214, .0215, .0216, and .0218,  
and request and notice for oral presentation at the May 19, 2022,  
meeting of the Rules Review Commission.**

Members of the Commission, Ms. Everett, and Mr. Ventaloro:

Please allow the remarks below to supplement our Comment delivered to each of you on April 13, 2022, in further opposition to rules proposed by the North Carolina Environmental Management Commission ("EMC") to be codified at 15A NCAC 2B .0208, .0212, .0214, .0215, .0216, and .0218. For your reference, our April 13, 2022, Comment is enclosed as **Exhibit A**.

The above-referenced rules were first reviewed by the North Carolina Rules Review Commission (“RRC”) at its April 21, 2022, meeting. For that meeting, RRC staff recommended rejecting the proposed rules because “when EMC sent the entire regulatory framework, of which these Rules are part, to the Office of State Budget Management (OSBM) for certification, EMC did not comply with the requirements of the APA as to the fiscal impact analysis (“fiscal note”) for the regulation of 1,4-dioxane.” (RRC Staff Opinion p. 1). At the April 21, 2022, meeting, undersigned counsel for the City of Reidsville, R. Robert El-Jaouhari, spoke in favor of RRC Staff and in opposition to the proposed rules. Attorney Sean Sullivan, and attorney to EMC Philip Reynolds, spoke in favor of the proposed rules and against Staff’s recommendation. Eight members of this Commission voted: four voted to adopt Staff’s recommendation, and four voted against Staff’s recommendation. This Commission then tabled this matter for its May 19, 2022, meeting.

The above-referenced rules pertain to EMC’s efforts to regulate discharges of 1,4-dioxane into surface waters. As we outlined for the RRC in our April 13, 2022, Comment, and as Mr. El-Jaouhari discussed with the RRC at its April meeting, these proposed rules neither comport with statutory authority nor rule-making requirements, nor are they reasonably necessary to effectuate a lawful purpose in light of existing EMC rules on this same subject. While undersigned counsel continue to rely on our prior written comments and Mr. El-Jaouhari’s oral presentation, this present Comment will show that EMC indeed did not conduct a fiscal analysis for the proposed 1,4-dioxane rules, will address why EMC’s reliance on pre-existing “target values” cannot excuse EMC’s failure to conduct a fiscal analysis, and will explain why EMC has failed to comply with the N.C. Gen. Stat § 150B and, therefore, fails to satisfy G.S. §150B-21.9(a)(4) of the RRC’s review.

Please allow this letter to serve as request and notice by the undersigned R. Robert El-Jaouhari for an oral statement in opposition to the referenced proposed rules at the Commission’s upcoming May 19, 2022, meeting. Mr. El-Jaouhari’s contact information appears in the above letterhead.

### **The Commission’s Review Authority.**

The RRC’s review authority of an agency’s proposed rule is limited, but multifaceted. The RRC must determine (1) whether the proposed rule is within the agency’s delegated authority, (2) whether the adoption comports with statutory restrictions and requirements for rule-making, and (3) whether a rule is “reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency[,]” in which context “[t]he Commission

shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.” N.C. Gen. Stat. 150B-21.9(a) (emphasis added).

For the following reasons, the proposed rules fail to meet the standards for this Commission’s approval.

**EMC Did Not Perform the Necessary Fiscal Analysis.**

In its well-meaning efforts to control the impact of 1,4-dioxane in North Carolina surface waters, EMC neglects rulemaking requirements meant to control the impact of rulemaking on regulated communities. North Carolina law requires agencies to quantify and analyze the financial impact of proposed rules on regulated communities, but EMC has conceded that it has not done so for its proposed 1,4-dioxane criterion at 0.35 ug/L. The Rules Review Commission’s staff has therefore, unsurprisingly, recommended against adoption of the proposed 1,4-dioxane criterion because “EMC did not comply with the requirements of the APA as to the fiscal impact analysis (“fiscal note”) for the regulation of 1,4-dioxane.” (RRC Staff Opinion p.1). The Commission should indeed reject the proposed 1,4-dioxane rules on account of EMC’s failure to meet statutory rulemaking requirements.

The Rules Review Commission does not need to look behind the economic substance of the fiscal analysis performed by EMC for its Triennial Review, nor substitute its own judgment for EMC’s judgment with regard to the economic substance of that analysis, in order to concur with Staff that EMC “did not comply with the requirements of the APA as to the fiscal impact analysis (“fiscal note”) for the regulation of 1,4-dioxane.” (RRC Staff Opinion p. 1). Instead, the Commission need only recognize what is true from the face of the fiscal analysis EMC today insists it has properly performed—namely, that the fiscal analysis for EMC’s Triennial Review specifically, purposefully, and expressly excludes any fiscal analysis of the economic impacts of the proposed 1,4-dioxane standard at 0.35 ug/L. That exclusion is in breach of statutory rulemaking procedure, and therefore causes the proposed 1,4-dioxane rules to fail the Commission’s review at G.S. § 150B-21.9(a)(4).

Indeed, as Mr. Reynolds argued at this Commission’s April meeting, and as RRC Staff recognizes, EMC did perform a fiscal analysis for the 2020-2022 Triennial Review, of which the 1,4-dioxane rules are a part. (See Regulatory Impact Analysis

(“RIA”), at <https://deq.nc.gov/media/24795/download?attachment>).<sup>1</sup> However, EMC has not equally highlighted for this Commission the express exclusion of any analysis of the economic impacts of the proposed 1,4-dioxane rules from the RIA. That exclusion—and, therefore, EMC’s clear decision not to perform a fiscal analysis for the proposed 1,4-dioxane rules—is apparent merely from the face of the RIA that EMC relies on: in no uncertain terms, the RIA states that “we [EMC] *have not included benefit/cost estimates for 1,4-dioxane in this analysis[,]*” (RIA p. D-4 (emphasis added)), and “we [EMC] *did not attempt to monetize costs or benefits for 1,4-dioxane.*” (RIA p. D-17 (emphasis added)).

EMC, and certain proponents of the proposed 1,4-dioxane rules, believe that this exclusion is permissible because EMC previously used its own agency rules to establish an in-stream target value for 1,4-dioxane in surface waters, and because the proposed rulemaking is a mere codification of that pre-existing requirement. As this argument goes, there would be absolutely no economic impact to regulated local governments from codifying the pre-existing target values because the proposed rules and the pre-existing target value set the same standard: 0.35 ug/L maximum concentrations of 1,4-dioxane in surface water.

Several flaws in this argument show that EMC cannot rely on its prior in-stream target value to avoid statutory rulemaking requirements for a fiscal analysis, that EMC has therefore failed to meet statutory rulemaking requirements for the proposed 1,4-dioxane rules, and that the RRC must therefore reject the proposed rules for failure to satisfy G.S. § 150B-21.9(a)(4).

First, EMC’s position entirely undercuts the purpose and existence of statutory rulemaking requirements. EMC here argues that its own application of its own agency rule, 15A NCAC 02B .0208 (the “Narrative Standard”), makes a fiscal note regarding 1,4-dioxane unnecessary. This position essentially argues that an agency may avoid statutory fiscal analyses so long as its rulemaking is preceded by an internal calculation of the very standard it seeks to codify. But, agency rules cannot override legislative requirements. Such a procedure as EMC proposes is all the more offensive to statutory requirements where, as here, EMC admits every statutory trigger for a fiscal analysis of the proposed 1,4-dioxane rules, but seeks to avoid the resulting analysis by relying on EMC’s own, internal, unenforced, and untested calculations. (See April 13, 2022, comment to RRC by undersigned counsel, pp. 2-5).

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<sup>1</sup> This is the same RIA to which our April 13, 2022, comment cited *passim*.

Regardless of what EMC's own rules purport to permit it to do, the *statutory* requirement for new codifications is clear, and EMC should not be permitted to codify rules with substantial economic impacts that have never had a fiscal analysis performed.

Second, the pre-existing target value EMC relies on is only that—a *target* value. By agreement with EMC reached only six months ago, the City of Greensboro began operating under a Special Order by Consent (“SOC”) limiting 1,4-dioxane concentrations in its wastewater discharge to 35.0, 31.5, and 23.0 ug/L over a three-year period.<sup>2</sup> The SOC replaces a prior SOC entered into by EMC and Greensboro, which had *higher* permissible concentrations of 1,4-dioxane (at 45.0 and 33.0 ug/L over a two-year period), and which was amended to the current SOC following a lawsuit filed against EMC by several environmental organizations and municipal entities. More importantly, the RIA *itself* documents EMC's history of treating this value as merely a target and not a requirement: as of the time of the RIA, EMC admits that there were “no general permits that require monitoring or have limits for 1,4-dioxane[,]” that 17 individual permits have 1,4-dioxane requirements for *monitoring only* but do not have discharge limits, and that only one individual permit in North Carolina has discharge limits for 1,4-dioxane. (RIA p. D-16 (underline in original); see RIA p. D-70 (containing the “Appendix II” cited by EMC on p. D-16 of the RIA)).<sup>3</sup> EMC's own RIA thus indicates that in advance of its current rulemaking there has been no permit or regulatory control document based on the proposed 0.35 ug/L standard for Class WS waters.

Third, EMC relies on a false baseline for evaluating economic impact of the proposed rules, and that false baseline cannot remedy EMC's failure to conduct the required fiscal analysis on the impacts of the proposed 1,4-dioxane standard. As shown above and in EMC's RIA, EMC has used its own agency rule, 15A NCAC 02B

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<sup>2</sup> Greensboro's current SOC is attached here as **Exhibit B** for the Commission's reference.

<sup>3</sup> That single individual permit is identified in the RIA as the permit to Radiator Specialty Company, (RIA p. D-16). The permit limits 1,4-dioxane discharges to 80.0 ug/L—the proposed standard for the Class C waters into which Radiator Specialty Company discharges, which is approximately 228-times higher than the proposed standard of 0.35 ug/L for discharge into Class WS waters. A selection from the Radiator Specialty Company permit (and its re-issuance in 2021 to the new owner at the same site) is enclosed herewith as **Exhibit C** for the Commission's reference.

.0208, the “Narrative Standard,” to set a target value of 0.35 ug/L for 1,4-dioxane, but its use of the Narrative Standard has not resulted in *actual* regulation to 0.35 ug/L. In contrast, the proposed 1,4-dioxane rules would establish a conclusive, codified maximum 1,4-dioxane concentration at 0.35 ug/L. Thus the true regulatory environment pre-existing codification, and therefore the true baseline for a statutory economic impact analysis, is a regulatory environment including (i) 17 of 18 individual wastewater discharge permits containing no 1,4-dioxane limits as of the time of the RIA, (ii) a single individual wastewater permit that included a 1,4-dioxane discharge limit—at 80.0 ug/L—as of the time of the RIA, and (iii) a municipal wastewater discharge permit limit (for the City of Greensboro) varying at different times between 23.0 ug/L and 45.0 ug/L.

Indeed, EMC admits that its infrequent enforcement of in-stream target values—EMC’s purported baseline—has provided it with insufficient data to assess whether its proposed standards will have an economic impact. According to the RIA:

- “North Carolina began adding 1,4-dioxane monitoring requirements to NPDES permits in 2018; as such, there is not a long history of water quality data on which to base a WQBEL[water quality based effluent limit,]” (RIA p. D-16); and
- “[a]s of this writing [the RIA], DEQ is continuing to gather information on costs associated with implementation of 1,4-dioxane ITVs [In-stream Target Values]. This data was not available in time to be included in this document[.]” (RIA p. D-17).

EMC could not be more clear that there is no economic baseline grounded in the current regulatory environment—EMC has not been using the 0.35 ug/L criterion derived from its Narrative Standard to set any actual permit limitations, and so the cost of a 0.35 ug/L criterion is necessarily unknown. As a result EMC ultimately concedes, as it must, that even in light of its artificial baseline EMC is unable to evaluate the economic impact of the proposed 1,4-dioxane rules, noting only “that the ongoing costs and benefits associated with the monitoring and treatment of 1,4-dioxane are likely to be considerable.” (RIA p. D-17).

In addition to each of these specific grounds, EMC’s position on the impact of mere codification is internally inconsistent. Despite EMC’s conclusion that mere codification of in-stream target values has no economic impact, EMC’s RIA simultaneously concluded that such simple codification can have at least *possible* positive impacts for the environment (RIA pp. D-11—D-12 (table summarizing economic and environmental impact of proposed rules, indicating “possible indirect,



long-term benefit[s] to human health.”)). EMC makes this conclusion on the *benefits* of rulemaking comfortably, but in the same table EMC concludes that there are not even *possible* economic impacts following on the proposed rulemaking—and again, does so despite EMC’s several admissions of the substantial economic impacts following implementation of the proposed rules.<sup>4</sup>

EMC’s reliance on its pre-existing target values cannot substitute for statutorily-required fiscal analyses of the 1,4-dioxane rule EMC currently proposes. EMC has clearly elected not to undertake that required fiscal analysis, and as we argued in our April comment, such fiscal analysis is indeed required because EMC recognizes and repeatedly admits the substantial economic impacts the proposed 1,4-dioxane rule will have on local governments and the regulated community. The proposed 1,4-dioxane rules therefore fail to meet statutory requirements and therefore should be rejected for failure to satisfy G.S. § 150B-21.9(a)(4).

### **The Proposed Rules Are Not Reasonably Necessary.**

The RRC should also reject the proposed 1,4-dioxane rules because they are not “reasonably necessary to implement or interpret an enactment of the General Assembly.” G.S. § 150B-21.9(a)(3). In the interest of not multiplying documents before the RRC, undersigned counsel rely on the arguments presented in our April 13, 2022, comment to the RRC. Mr. El-Jaouhari will be prepared to respond to questions of the Commissioners at the RRC’s May 19, 2022, meeting. In this comment, we request the RRC to recognize that the lack of reasonable necessity in the proposed rules is not the result of “legal sleight of hand,”<sup>5</sup> but the result of EMC’s prior rulemaking as to the “best usage” of the State’s various waters, G.S. § 143-214.1, and this Commission’s review of reasonable necessity itself necessarily including the Commission’s evaluation of “the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.” G.S. 150B-21.9(a)(3).

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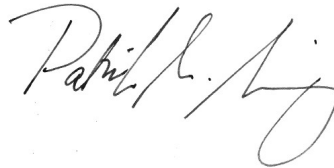
<sup>4</sup> See undersigned counsel’s April 13, 2022, comment to RRC, enclosed herewith as Exhibit A, at pp. 4-5.

<sup>5</sup> See Rebuttal Comments by Mr. Sullivan submitted to the RRC and dated April 20, 2022, p. 4.

**CONCLUSION**

EMC's proposed rules regarding 1,4-dioxane discharges into water supply surface waters is outside EMC's delegated authority, does not meet statutory requirements, and is not reasonably necessary in light of other rules on the same subject previously promulgated by EMC. On these bases the Commission can and should reject approval of EMC's proposed rules to be codified at 15A NCAC 2B .0208, .0212, .0214, .0215, .0216, and .0218.

Sincerely,



Patrick M. Mincey



R. Robert El-Jaouhari

*Counsel to the City of Reidsville*

## Burgos, Alexander N

---

**From:** Duke, Lawrence  
**Sent:** Thursday, May 12, 2022 6:03 PM  
**To:** Robert El-Jaouhari  
**Cc:** Burgos, Alexander N  
**Subject:** RE: [External] FW: Correspondence to NC Rules Review Commission regarding 14-Dioxane

Mr. El-Jaouhari,

Thank you for your letter. You are confirmed for speaking at the May meeting of the RRC.

**Lawrence Duke**

Counsel, NC Rules Review Commission  
Office of Administrative Hearings  
(984) 236-1938

---

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**Sent:** Wednesday, May 11, 2022 4:21 PM  
**To:** rrc.comments <rrc.comments@oah.nc.gov>; Everett, Jennifer <jennifer.everett@ncdenr.gov>; Ventaloro, Christopher <christopher.ventaloro@ncdenr.gov>; Duke, Lawrence <lawrence.duke@oah.nc.gov>  
**Cc:** Patrick Mincey <pmincey@cshlaw.com>; Taylor Bolebruch <tbolebruch@cshlaw.com>  
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Phone: (919)863-8718  
Fax: (919)863-3489  
Email: [rjaouhari@cshlaw.com](mailto:rjaouhari@cshlaw.com)

As indicated by my submitted comment, my remarks will be in opposition to the proposed rules.

Many thanks, looking forward to seeing you on the 19th. Let me know if you have questions or further needs in the meantime.

Best,  
Robert

Robert El-Jaouhari  
Attorney at Law



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**Cc:** Robert El-Jaouhari <[rjaouhari@cshlaw.com](mailto:rjaouhari@cshlaw.com)>; Patrick Mincey <[pmincey@cshlaw.com](mailto:pmincey@cshlaw.com)>  
**Subject:** Correspondence to NC Rules Review Commission regarding 14-Dioxane

Good afternoon,

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If you have any trouble accessing the attachment, or if I can be of further assistance, please let me know.

Thank you,  
Taylor Bolebruch  
Paralegal

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## Burgos, Alexander N

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**From:** Duke, Lawrence  
**Sent:** Thursday, May 12, 2022 6:05 PM  
**To:** Sullivan, Sean  
**Cc:** 'James West'; Burgos, Alexander N; Everett, Jennifer  
**Subject:** RE: [External] Rules Review Commission - Request to Speak regarding Modifications to 15A NCAC chapter 02B

Mr. Sullivan,

Thank you for your letter on behalf of the FPWC. You are confirmed to speak on the EMC rules at the May meeting of the RRC.

**Lawrence Duke**

Counsel, NC Rules Review Commission  
Office of Administrative Hearings  
(984) 236-1938

---

**From:** Sullivan, Sean <SSullivan@robinsonbradshaw.com>  
**Sent:** Wednesday, May 11, 2022 7:23 PM  
**To:** Duke, Lawrence <lawrence.duke@oah.nc.gov>  
**Cc:** 'James West' <James.West@faypwc.com>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Everett, Jennifer <jennifer.everett@ncdenr.gov>  
**Subject:** [External] Rules Review Commission - Request to Speak regarding Modifications to 15A NCAC chapter 02B  
**Importance:** High

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Dear Mr. Duke,

This firm represents the Fayetteville Public Works Commission ("FPWC"). I am writing to request an opportunity to speak to the Rules Review Commission during its May 19, 2022 meeting on behalf of FPWC and in favor of the Environmental Management Commission's proposed modifications to the following regulations:

15A NCAC 02B.0202  
15A NCAC 02B.0208  
15A NCAC 02B.0211  
15A NCAC 02B.0212  
15A NCAC 02B.0214  
15A NCAC 02B.0215  
15A NCAC 02B.0216  
15A NCAC 02B.0218

Would you please confirm your receipt of this request and provide me with instructions regarding the logistics for speaking at the meeting?

Thank you in advance for your assistance with this matter.

Best regards,

---

## Sean M. Sullivan

### Robinson Bradshaw

t : 919.239.2604

434 Fayetteville Street, Suite 1600

Raleigh, NC 27601

[ssullivan@robinsonbradshaw.com](mailto:ssullivan@robinsonbradshaw.com) | [Bio](#)  
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