

Howard E. Manning, Jr.
Superior Court Judge
Wake County Courthouse
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WAKE COUNTY, C.S.C.
BY _____

MEMORANDUM OF SERVICE OF MDO & JUDGMENT

March 16, 2015

From: Judge Howard E. Manning, Jr. 

To: Robert C. Stephens, Jr. at bob.stephens@nc.gov
General Counsel to the Governor

John R. Wester at jwester@rbh.com
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K&L Gates LLP

Alexander McC. Peters at apeters@ncdoj.gov Attorneys for Defendants

Re: McCrory, et al. v. Berger, et al. 14 CVS 015201 Wake County Superior Court

Subject: Three Judge Panel Memorandum of Decision and Judgment

Counsel:

This memorandum is being sent via e-mail and the enclosed MDO and Judgment containing the 3 Judge Panel's decision on the motions for judgment on the pleadings is attached. **This memorandum is the certificate of service of this MDO and Judgment on counsel for the parties.**

The members of the panel commend counsel for all parties in this matter for their professionalism and hard work in this case including, but not limited to, the memoranda, briefs, and oral arguments.

Cc: The Honorable Wilton Russell Duke via e-mail
The Honorable Yvonne Mims Evans via e-mail

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14-CVS-015201

Patrick L. McCrory, individually and in his
official capacity as GOVERNOR OF THE
STATE OF NORTH CAROLINA; James
B. Hunt, Jr.; and James G. Martin,

Plaintiffs,

v.

Philip E. Berger, in his official capacity as
PRESIDENT PRO TEMPORE OF THE
NORTH CAROLINA SENATE; Timothy K.
Moore, in his official capacity as
SPEAKER OF THE NORTH CAROLINA
HOUSE OF REPRESENTATIVES; and, in
their official capacities as members of the
Coal Ash Management Commission,
Harrell Jamison Auten III; Tim L. Bennett;
D. Allen Hayes; Scott Flanagan; Rajaram
Janardhanam; and Lisa D. Riegel,

Defendants.

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MEMORANDUM OF DECISION AND JUDGMENT

THIS MATTER is before the Court upon the plaintiffs' ("the Governors") and the defendants' ("the Legislature") cross motions for judgment on the pleadings pursuant to Rule 12(c), North Carolina Rules of Civil Procedure. This action filed on November 13, 2014, challenges the constitutionality of certain aspects of the Energy Modernization Act and the Coal Ash Management Act. Because of the direct challenges to the constitutionality, the Chief Justice of the North Carolina Supreme Court, pursuant to G.S. 1-267.1(b1) and G.S. 1-81.(1)(a1) assigned this matter to a Three-Judge Panel ("the Court") with venue in the Wake County Superior Court by Order dated December 4, 2014.

Procedural Background:

On January 26, 2015, the Legislature, by and through counsel, filed Answer and Affirmative Defenses to the Governors' Complaint for Declaratory Judgment, Injunctive Relief and Relief in the nature of *Quo Warranto*. In addition, the Legislature filed a motion for judgment on the pleadings pursuant to Rule 12(c), North Carolina Rules of

Civil Procedure and a Request for Judicial Notice in support of their motion for judgment on the pleadings.

Following the Legislature's answer and motion, the Court met with counsel for an administrative and scheduling conference.

On February 20, 2015, the Governors filed a motion for judgment on the pleadings pursuant to Rule 12(c), North Carolina Rules of Civil Procedure. At this point, both sides in this dispute have requested the Court to rule on their claims and defenses pursuant to the pleadings in the case.

Brief description of the case and positions of both sides.

Governors' Positions:

In the complaint, Patrick L. McCrory, Governor of the State of North Carolina, along with two former Governors, James B. Hunt, Jr. and James G. Martin, challenge the Legislature's mandate for the appointment of commissioners for three new commissions and two collateral provisions of the Coal Ash Management Act. In 2014, the Legislature created the Oil and Gas Commission, the Mining Commission, and the Coal Ash Commission, the members of which are appointed by the Governor and the Legislature.

Contending that the appointment of the members of these commissions by the Legislature violates the North Carolina Constitution, the Governors request that the Court invalidate the Legislature's appointment powers and grant the Governor the power to appoint every member of each commission.

In particular, the Governors submit that certain statutory provisions relating to three newly created executive branch commissions violate the Separation-of-Powers Clause, Executive Power Clauses, and Appointments Clause of the North Carolina Constitution. N.C. Const. Art. I, sec. 6; Art. III, sec. 1, Art. III, sec. 5(4), Art. III, sec. 5(8).

The Governors contend that under the statutory provisions at issue, the Legislature (1) vested itself with the power to appoint members of commissions that perform executive functions, (2) created a commission that performs executive functions that is expressly "independent" of the executive branch, and (3) compelled the Governor to issue an executive order. The Governors contend that the Legislature, through each of these provisions, usurps a power constitutionally reserved to the executive branch.

In addition to challenging the appointments provisions of these enactments, the Governor challenges the Legislature's determination that the Coal Ash Commission should be an "independent" agency of the State, and the Legislature's statutory direction that the Governor issue an executive order specifying the criteria for determining whether persons eligible to serve on the Coal Ash Commission have and should disclose conflicts of interest.

The Legislature's Positions.

The Legislature contends that its challenged legislation and actions are constitutional in all respects. The Legislature contends that the Legislature may vest itself with any power that is not an “*exclusive[ly]*” and “*expressly delegated*” constitutional duty of another branch of government.” The Legislature contends that the Legislature may order the Governor to issue an executive order because the Constitution does not expressly enumerate “executive orders” as within the province of the Governor and that the Legislature is entitled to ‘absolute freedom of discretion’ in determining the manner in which to effectuate legislation. Specifically, the Legislature contends that the case should be dismissed for the following reasons:

First, the Governor in his official capacity lacks standing to pursue the claims asserted. The Governor did not veto either challenged bill—indeed he signed one of them into law.

Second, North Carolina’s century’s long practice of having agency and commission members appointed by both the Governor and the Legislature does not violate any provision of the North Carolina Constitution. In the nineteenth century, North Carolina voters specifically amended the Constitution to restore the power of legislative appointment, and therefore the legislative appointment of certain commission members does not violate the Separation-of-Powers and Appointments Clauses. The plain meaning of the Constitution, the North Carolina courts’ interpretation of the Constitution, as well as analogous cases from other jurisdictions demonstrate that the Legislature undoubtedly possesses the constitutional authority to specify the method of appointment for the commissions at issue.

Third, the North Carolina Constitution authorizes the Legislature to create independent executive agencies. The Legislature acted well within its constitutional mandate when it created the Coal Ash Commission and did not improperly intrude upon or otherwise interfere with power of the executive branch.

Finally, the Legislature possesses the authority to direct the Governor to address conflicts of interest for officers of the Executive Branch. The Coal Ash Management Act’s requirement that the Governor issue an executive order to clarify the standards for conflicts of interest and to require disclosure of such conflicts does not violate the Separation-of-Powers Clause.

Reduced to essentials, the Legislature contends that the Legislature has properly exercised its Constitutional authority and this case should be dismissed.

The March 5, 2015 Hearing on the Governors’ and Legislature’s Motions for Judgment on the Pleadings.

The hearing on the motions for judgment on the pleadings was held in the Campbell University Law School in Raleigh on March 5, 2015. At the conclusion of the hearing, the Court took the motions under advisement.

The Court has now had time to consider the motions, the briefs, the arguments, the case law and statutory authorities submitted. This matter is ripe for disposition and the Court's decision(s) on the issues raised by the pleadings follow:

Standing. As a first defense to this action, the Legislature contends that Governor McCrory lacks standing to challenge the constitutionality of the Commissions in his official capacity because he did not veto the Energy Modernization Act or Coal Ash Management Act.

In assessing a litigant's standing, the key question is "whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008). To demonstrate standing, a plaintiff must establish:

(1) "injury in fact"—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 460, 646 S.E.2d 418, 423 (2007) (quotation omitted).

The Governors have alleged that the Legislature has usurped certain powers and prerogatives—such as the duty to faithfully execute the laws and the power to issue executive orders—that are reserved by the Constitution to the Governor. The alleged usurpation of Executive power is a cognizable injury under the law. Further, these injuries are alleged to be directly attributable to the General Assembly's inclusion of the provisions at issue in the Energy Modernization Act and Coal Ash Management Act.

The Legislature further contends, in this same vein of argument, that Governor McCrory somehow waived his official-capacity standing by deciding not to veto the Energy Modernization Act and Coal Ash Management Act and thereafter appointing members to the Coal Ash Commission.

The Court finds these contentions to be borderline specious. The undisputed facts in the record clearly show that Governor McCrory, through counsel and in writing, objected to the Legislature's creation of the Commissions in question as executive branch commissions, endowing the commissions with power to execute the laws and then maintain control over the commissions by granting itself with majority control by legislative appointment of the majority of the commissions' membership.

After the Energy Modernization Act was enacted, the Governor and his staff expressed concern to then-Speaker of the North Carolina House of Representatives Thom Tillis (“Speaker Tillis”), President Berger, and to their staffs, that provisions in proposed and ratified legislation—most significantly, provisions authorizing the Legislature to appoint members of executive branch entities responsible for administering the laws, like the Oil & Gas and Mining Commissions—infringed on powers the Constitution reserves to the Governor.

In particular, on July 1, 2014, General Counsel to the Governor Robert C. Stephens testified before the House Environment Committee regarding Governor McCrory’s concerns that several statutes under consideration violated separation-of-powers principles.

On July 17, 2014, Stephens sent a letter, at the direction of Governor McCrory to counsel to President Berger and Speaker Tillis. This letter outlined Governor McCrory’s views regarding the General Assembly’s encroachment on executive authority. The letter specified the provisions authorizing legislative appointments to the Oil & Gas Commission, Mining Commission, and Coal Ash Management Commission.

Despite Mr. Stephens’ testimony and letter advancing Governor McCrory’s views, the Legislature moved forward with legislation vesting the Legislature with powers which the Governor contends were constitutionally reserved to the Governor, including several of the bills identified above.

It is undisputedly clear from the foregoing that the Legislature was on notice of Governor McCrory’s objections and concerns over the separation of powers and appointments issues. The Legislature brushed the objections aside like a knife through hot butter. There was no requirement or need to veto the legislation when the Legislature held a veto proof majority in both houses. The law does not require a party to do a vain act.

This Court can imagine no individual with greater standing to raise the issues in this case. The Governor is elected and empowered by the Constitution to execute the laws of North Carolina. Who better to question the constitutionality of Legislative action which is alleged to encroach on the powers of another branch of government?

The Court concludes, as a matter of law, that the Governors have standing to bring this action and that Governor McCrory has not waived his right to do so by not vetoing the objectionable legislation or by exercising the Governor’s appointment power in appointing some members of the Coal Ash Commission. The lack of standing defense is rejected and this case may proceed.

Power to Appoint:

Martin v. Mellott, 320 N.C. 518 (1987) is the prevailing case on the subject of the Legislature’s power to appoint members to commissions. Three justices ruled in that case that the people of this State by enactment of the 1970 North Carolina Constitution,

authorized the General Assembly to place appointment power in someone other than the Governor. Two justices concurred in the result but differed in their reasoning.

The *Martin* court determined it was not necessary to address the question of whether the appointment of the Director of the Office of Administrative Hearings by the Chief Justice of the Supreme Court was an appointment to the Executive Branch. Rather, the Court declared that “appointment of someone to execute the laws does not require the appointing party to execute the laws.” *Id.* at 523. This statement was not supported by any precedent.

Nevertheless, this Court is bound by the decision in *Martin* with respect to the authority of the Legislature to appoint; however we go beyond that issue to address the separation of powers issue, which we believe *Martin* did not address directly or sufficiently to control the separation of powers issues in this case.

Separation of Powers Issues:

The Court, in respect to the issues regarding whether the three (3) commissions established and/or reorganized by the Legislature in the Energy Modernization Act and The Coal Ash Management Act, violate the Separation of Powers provision contained in Section 6, Article I of the Constitution; regarding the appointment of members of commissions established by the legislation by the Legislature, is governed by the North Carolina Supreme Court’s unanimous decision in *Wallace v. Bone*, 304 N.C. 591(1982).

In *Wallace v. Bone*, the statute amended by the Legislature related to the Environmental Management Commission (“EMC”). This statute changed the membership of the EMC from 13 to 17 by adding 4 members who were to be members of the legislature, two appointed by Speaker and two appointed by President of Senate. Pursuant to this amendment to the EMC, two members of the House and two members of the Senate were appointed to the EMC and took office as members of the EMC in 1981.

Wallace v. Bone followed and the issue was whether the statute which appointed 4 members of general assembly to the EMC violated the separate of powers provision of the NC Constitution?

The NC Supreme Court unanimously held that Section 6 of Article I of the Constitution which provided: Separation of powers: The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other. “We hold that the challenged enactment of the General Assembly violates this section of the state constitution and that the judgment appealed from must be reversed.”

Pertinent excerpts from Wallace v. Bone follow:

[3] There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal government.

[607] – The Environmental Management Commission exists pursuant to G.S. 143B-282:

Its purpose is stated: There is hereby created the Environmental Management Commission of the Department of Natural Resources and Community Development with the power and duty to promulgate rules and regulations to be followed in the protection, preservation and enhancement of the water and air resources of the State.

Within the limitations of GS 143-215.9 concerning industrial health and safety, the EMC has the power and duty, among other things, to grant and revoke permits with regard to controlling sources of air and water pollution; to issue special orders pursuant to certain statutes to any person whom the commission finds responsible for causing or contributing to any pollution of water within a watershed or pollution of the air for which standards have been established; to conduct and direct that investigations be conducted pursuant to certain statutes; to conduct public hearings; institute actions in superior court, and agree upon and enter into settlements, to halt dam constructions; to have jurisdiction and supervision over the maintenance and operation of dams; to have jurisdiction and supervision over all pollution pursuant to G.S. 143B-282(1).

The EMC is also given the power and duty to establish standards and adopt rules and regulations for air quality standards, [608] emission control standards, and classifications for air contaminant sources..... for water quality standards and classifications pursuant to certain statutes, to implement the issuance of permits for water use within capacity use areas and for the protection of sand dunes... Prior to 1979, the EMC consisted of 13 members, all appointed by the Governor. The statute also sets forth certain vocational qualifications for members of the commission.

[4] It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in Greer that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.

*For the reasons stated, we conclude that Section 6 of Chapter 1158 of the 1979 Session Laws [codified as section (d) of [609] G.S. 143B-283] violates Section 6 of Article I of the North Carolina Constitution. Consequently, the judgment appealed from is **Reversed.**"*

The Energy Modernization Act and The Coal Ash Management Act.

The Commissions created and/ or reorganized by the Energy Modernization Act and the Coal Ash Management Act all perform similar regulatory functions and duties as the

EMC. A brief discussion of the Acts, their functions and powers and their individual commissions follow:

The Energy Modernization Act.

The Energy Modernization Act comprehensively revised North Carolina's approach to developing and regulating the State's energy resources. It became law on June 4, 2014. 2014 Session Law 4. Effective as of July 31, 2015, the Energy Modernization Act provided for creation of the Oil & Gas Commission and the North Carolina Mining Commission ("Mining Commission"). 2014 Session Law 4, §§ 5-6, codified at N.C. Gen. Stat. §§ 143B-290, 143B- 293.1(a).

Oil & Gas Commission

The Oil & Gas Commission has authority to facilitate and regulate the development of North Carolina's oil and gas resources, in accordance with the Oil and Gas Conservation Act. N.C. Gen. Stat. § 143B-293.1(a). In particular, it is endowed with the power to perform numerous executive functions, including to: (1) "adopt rules necessary to administer the Oil and Gas Conservation Act pursuant to G.S. 113-391" and (2) "to make determinations and issue orders pursuant to the Oil and Gas Conservation Act to (i) regulate the spacing of wells and to establish drilling units as provided in G.S. 113-391; (ii) limit and prorate the production of oil or gas, or both, from any pool or field for the prevention of waste as provided in G.S. 113-394; (iii) classify wells for taxing purposes; and (iv) require integration of interests as provided in G.S. 113-393." § 143B-293.1(b). The Oil & Gas Commission also has the authority to overrule environmental penalties imposed by the Department of Energy and Natural Resources ("DENR"). § 143B-293.6. Among other reasons, the Commission may overrule penalties imposed by DENR if it disagrees with DENR's application of statutory factors in imposing such penalties. § 143B-293.6.

Membership of Oil & Gas Commission.

The Legislature appoints six of the nine members of the Oil & Gas Commission: three members upon recommendation of the President Pro Tempore of the Senate and three members upon recommendation of the Speaker of the House of Representatives. § 143B293.2(a1). The Governor appoints the remaining three members. *Id.* The Governor may remove members only "for misfeasance, malfeasance, or nonfeasance," as those terms are used in Section 143B-13 of the North Carolina General Statutes. § 143B-293.2(c)(1). Except for vacancies that arise when the General Assembly is not in session, vacancies on the Oil & Gas Commission are filled by the authority making the original appointment of the vacating member. § 143B-293.2(c)(1)-(2).

Mining Commission

The Mining Commission likewise performs executive functions, implementing statutes governing the development and regulation of North Carolina's mining resources. §

143B-290. In particular, it has the power to (1) “act as the advisory body to the Governor pursuant to Article V(a) of the Interstate Mining Compact;” (2) “hear permit appeals, conduct a full and complete hearing on such controversies and affirm, modify, or overrule permit decisions made by [DENR] pursuant to G.S. 74-61”; and (3) “promulgate rules necessary to administer the Mining Act of 1971, pursuant to G.S. 74-63 [and] the Control for Exploration for Uranium in North Carolina Act of 1983, pursuant to G.S. 74-86.” § 143B-290(1).

Membership of Mining Commission.

Like the Oil & Gas Commission, the Legislature appoints a majority of the members of the seven-member Mining Commission, which includes the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee, two individuals appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, two individuals appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and two individuals appointed by the Governor. § 143B-291(a1). The Governor may remove members of the Mining Commission only “for misfeasance, malfeasance, or nonfeasance.” § 143B-291(d). Vacancies on the Mining Commission are filled by the authority making the original appointment of the vacating member. G.S. 143B-293.2(b)-(c).

Prior to passage of the Energy Modernization Act, the responsibilities of the Oil & Gas and Mining Commissions primarily were housed in DENR, the Mining Commission, which, until 2012, was composed of eight gubernatorial appointees and the Chair of North Carolina Minerals Research Lab Advisory Committee, or the Environmental Management Commission, which, until 2013, was composed of thirteen gubernatorial appointees. 2013 Session Law 360, § 14.23.(a); 2012 Session Law 143, §§ 1.(a), 1.(b), 2.(c), 2.(h). Before the passage of the Energy Modernization Act, Executive appointees performed the responsibilities of the Oil & Gas and Mining Commissions.

Coal Ash Management Act

On August 20, 2014, the last day of the General Assembly’s 2014 legislative session—the General Assembly passed the Coal Ash Management Act. 2014 Session Law 122, codified at N.C. Gen. Stat. § 130A-309.200, *et seq.* This statute established a comprehensive plan for managing coal combustion residuals. *Id.*

Among other provisions, the Coal Ash Management Act created the Coal Ash Management Commission (the “Coal Ash Commission”) to oversee the management of coal combustion residuals and the closure and remediation of coal combustion residuals surface impoundments. § 130A-309.202. The statute declares the Coal Ash Commission “shall be administratively located in the Division of Emergency Management of the Department of Public Safety. The Commission *shall exercise all of its powers and duties independently and shall not be subject to the supervision, direction, or control of the Division or Department.*” § 130A-309.202(n) (emphasis added).

The Coal Ash Commission has two primary powers: (1) it reviews and approves or rejects classifications of coal ash residuals surface impoundments drafted by DENR, which prioritize such impoundments for purposes of closure and remediation, § 130A-309.211(c), and (2) it reviews and approves or rejects plans for closure of coal combustion residuals surface impoundments submitted by the owners of such impoundments and initially reviewed by DENR, § 130A-309.212(d). The commission must exercise these powers in accordance with criteria set forth in the Coal Ash Management Act. §§ 130A-309.211(c) and -309.212(d).

Like the Oil & Gas and Mining Commissions, legislative appointees control the nine member Coal Ash Commission, as six are appointed by the Legislature. § 130A-309.202(b). The Governor may remove members of the Coal Ash Commission only “for misfeasance, malfeasance, or nonfeasance.” Vacancies on the Coal Ash Commission occurring as a result of resignation, dismissal, death or disability are filled by the authority making the original appointment of the vacating member. See § 130A-309.202(d).

. § 130A-309.202(j) directs the Governor to issue an executive order, specifically stating “[t]he Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons” to serve on the Coal Ash Commission.

Without Governor McCrory’s signature, the Coal Ash Management Act became law on September 20, 2014. In a public statement released on September 9, 2014, Governor McCrory summarized his views on the legislation, including his belief that it violated the Separation-of-Powers Clause of the North Carolina Constitution. Once the bill became law, the Senate, upon the recommendation of President Berger, and the House of Representatives, upon the recommendation of Speaker Tillis, named the Appointee Defendants to the Coal Ash Commission.

The Court has examined the powers and duties and functions of the Energy Modernization Act and its two (2) commissions, to wit: The Oil and Gas Commission and The Mining Commission as well as the Coal Ash Management Act and the Coal Ash Commission. While each Act, and the commission(s) established thereunder possesses various quasi-legislative, quasi-executive and quasi-judicial duties and functions under its umbrella of powers and regulatory authority, it is clear that The Oil and Gas Commission, The Mining Commission and The Coal Ash Commission, like the EMC, are each administrative or executive in character. This Court finds that these commissions, like the EMC, have no relation to the function of the legislative branch of government, which is to make laws. *Wallace v. Bone, supra. 608.*

It is beyond any reasonable doubt the nature of the powers and duties to be exercised by the three (3) commissions at issue, and their members, are primarily administrative or executive in character, and not legislative or judicial.

As a result, the statutes creating these commissions, enacted by the Legislature, provide for legislative appointment of some of the members, thereby constituting an impermissible commingling of the legislative power and executive power and an impermissible encroachment by the legislative branch of government on the executive branch of government in violation of Section 6 of Article I of the North Carolina Constitution that provides: "The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

DECISION:

Section 6 of Article I of the Constitution of the State of North Carolina provides: "*Separation of Powers*. The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

We hold that each of the three challenged enactments of the Legislature at issue in this case violate Section 6 of Article I of the Constitution of this State. In arriving at this conclusion, we have considered, in addition to the decision of our Supreme Court in *Wallace v. Bone, supra*, as well as the history of the separation of powers in our state and nation, other decisions of our Supreme Court and the decisions of other jurisdictions in this country respecting the principle of separation of powers and the specific provisions of our constitution and the statutes involved.

It is a foundational principle of our government that the principal supreme power is possessed by the people of this state as Sovereign and derived, inferior and delegated power is possessed by the servants that they employ. To restrain this inferior power delegated to those servants, our Constitution provides that this derived inferior power shall be divided into three branches, to wit: the power of making laws, the power of executing the laws and the power of judging. "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *Wallace v. Bone, supra*. 600.


With respect to the Coal Ash Commission, we hold that the Legislature cannot constitutionally create that commission as an independent instrumentality of the state, independent of each of the three branches of government. We further hold that the Legislature cannot constitutionally force or direct the Governor to issue an executive order to implement ethical and conflict of interest rules for the commission. To require the Executive Branch to do so would be a direct encroachment into the Executive Branch and a direct violation of the principle of the separation of powers and Article 1, Section 6 of the North Carolina Constitution.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The provisions of NCGS 143B-293.2(a1) providing for the appointment of members of the North Carolina Oil and Gas Commission by the Legislature are in violation of Article I, Section 6 of the North Carolina Constitution.
2. The provisions of NCGS 143B-290(a1) providing for the appointment of members of The North Carolina Mining Commission by the Legislature are in violation of Article I, Section 6 of the North Carolina Constitution.

3. The provisions of NCGS 130A-309.202(b) providing for the appointment of members of The Coal Ash Management Commission by the Legislature are in violation of Article I, Section 6 of the North Carolina Constitution.
4. The provisions of NCGS 130A-309.202(n) providing that the Coal Ash Management Commission exercise its powers independently and without supervision, direction or control of the Governor, are in violation of Article I, Section 6 of the North Carolina Constitution.
5. The provisions of NCGS 130A-309.202(j) of the Coal Ash Management Act requiring the Governor to issue an executive order to execute provisions of the Coal Ash Management Act with respect to ethics/conflict of interest regulations and rules, are in violation of Article I, Section 6 of the North Carolina Constitution.
6. *The Quo Warranto* claim brought by the Governors, in light of the foregoing rulings of this Court, is dismissed without prejudice.
7. The costs of this action are taxed against the Legislature.

This the 16th day of March, 2015.



Wilton Russell Duke
Superior Court Judge



Yvonne Mims Evans
Superior Court Judge



Howard E. Manning, Jr.
Superior Court Judge