

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 01337

<p>The Umstead Coalition Petitioner,</p> <p>v.</p> <p>North Carolina Department of Environmental Quality Division of Water Resources Respondent.</p>	<p>SECOND AMENDED FINAL DECISION</p>
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THIS MATTER is before the undersigned, Donald van der Vaart, Chief Administrative Law Judge, upon this Tribunal's March 22, 2023 Order for Supplemental Briefing and later *sua sponte* Motion for Summary Judgment. A hearing on the supplemental briefing was held on April 18, 2023 via Webex. The Undersigned, having considered the record in this matter, finds that the Motion is ripe for disposition.

APPEARANCES

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ISSUE

The sole issue presented and considered at this hearing was whether Respondent's 401 and Buffer Permitting Branch Supervisor was legally authorized to issue the contested Riparian Buffer Authorization ("Buffer Authorization") pursuant to the Neuse River Basin Riparian Buffer Rules ("Buffer Rules"). 15A NCAC 02B .0610-.0612, .0714.

UNCONTESTED FACTS

1. Petitioner, The Umstead Coalition (“Petitioner”), is a non-profit corporation organized and existing under the laws of the State of North Carolina. Petitioner’s mission is to protect and preserve William B. Umstead State Park, which shares a border with Wake Stone Corporation’s (“Wake Stone’s”) existing quarry and with an undeveloped parcel known as the Odd Fellows Tract.
2. Respondent North Carolina Department of Environmental Quality, Division of Water Resources (“Respondent”), is the state agency that is authorized to implement and enforce North Carolina’s statutes and rules for the protection of water quality in North Carolina, including the Buffer Rules.
3. Per the Buffer Rules, persons wishing to engage in certain activities that will disturb land within the Neuse riparian buffer must apply to the Respondent to receive an authorization to do so. 15A NCAC 02B .0611.
4. The Buffer Rules state that “[p]ersons who wish to undertake uses designated in the applicable riparian buffer protection rule of this Section, as allowable upon authorization or allowable with mitigation upon authorization, shall submit an application requesting an Authorization Certificate from the Authority.” *Id.* .0611(b).
5. The Buffer Rules define “Authority” as “either the Division or a local government that has been delegated pursuant to this Section to implement a riparian buffer program,” 15A NCAC .0610(3), and confirm that “Division” means the Division of Water Resources of the North Carolina Department of Environmental Quality, i.e., the Secretary. *Id.* .0610(13).
6. These Rules, as amended by Respondent and readopted by the North Carolina Environmental Management Commission, became effective on June 15, 2020.
7. 15A NCAC 02A .0105(a)(1) states, “N.C. Environmental Management Commission therefore resolves that: (1) Whenever in these resolutions and rules there exists a delegation of authority to the Director, Office of Water and Air Resources (now the Division of Environmental Management), it shall become and read as a delegation of authority to the Secretary of the Department of Environment, Health, and Natural Resources to act on behalf of the N.C. Environmental Management Commission.”
8. The contested Buffer Authorization was issued on February 10, 2022, by Mr. Paul Wojoski, the 401 and Buffer Permitting Branch Supervisor within Respondent’s Division.
9. Petitioner filed this contested case on April 11, 2022, challenging the Respondent’s issuance of the Buffer Authorization to Wake Stone Corporation (“Wake Stone”) for the construction of a bridge across Crabtree Creek to connect Wake Stone’s existing quarry property with the undeveloped Odd Fellows Tract, where it is seeking permission to expand the mine, and located within the riparian buffer. Petitioner alleged *inter alia* that the Respondent had exceeded its authority and failed to act as required by law in issuing the challenged Buffer Authorization.
10. Respondent filed with this Tribunal a May 11, 2021 Memorandum from then-Division Director Danny Smith to various supervisors within the Division that purportedly delegates the Director’s signature authority to the Memorandum’s recipients for various purposes. Among

those recipients was the 401 and Buffer Permitting [Branch] Supervisor, who was delegated the authority to “Sign Buffer Authorizations and including Authorizations with Minor Exception. The Director retains authority to rescind or deny.” Mem. Line Item # 28. The Memorandum does not cite to any statutory or regulatory authority for this delegation, or to any controlling case law.

11. To the extent that any portion of the following Conclusions of Law include Uncontested Facts, such are incorporated by reference into these Uncontested Facts.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and there is no question as to misjoinder and nonjoinder.
2. To the extent the Uncontested Facts contain Conclusions of Law and the Conclusions of Law contain Findings of Fact, they should be so considered regardless of their given label. *See Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citations omitted); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (citations omitted).
3. This Tribunal is authorized to grant summary judgment. N.C. Gen. Stat. § 150B-34(e).
4. To succeed in a contested case before the Office of Administrative Hearings, Petitioner must demonstrate (1) that the respondent agency substantially prejudiced its rights; and (2) that the agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23(a).

Summary Judgment

5. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. rev. denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). An issue is material only if its resolution would prevent the party against whom it is resolved from prevailing. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981). The party moving for summary judgment has the burden of showing a lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 448, 491, 329 S.E.2d 350, 353 (1985).
6. Although findings of fact are not appropriate when the issue is a question of law, an order may employ a recitation of the undisputed facts to explain the resolution of the issue. *In re Estate of Pope*, 192 N.C. App. 321, 330, 666 S.E.2d 140, 147 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 129 (2009); *Krueger v. N. Carolina Criminal Justice Educ. & Training Standards Comm’n*, 198 N.C. App. 569, 578, 680 S.E.2d 216, 222 (2009).
7. The purpose of summary judgment is to bring litigation to an expeditious and efficient conclusion on the merits where only a question of law on the indisputable facts is in controversy. Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if

“there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C. Admin. Code 3 .0101(b).

8. Summary judgment “is an extreme remedy and should be awarded only where the truth is quite clear.” *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970). “[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

9. 15A NCAC 02A .0105 (a)(1) states that the Environmental Management Commission delegated the authority to sign Buffer Authorization to the Secretary.

10. N.C. Gen. Stat §143B-10 provides that the Secretary “may assign or reassign any function vested in him.”

11. In a May 11, 2021 memorandum, Subject Line “Delegation of Signature Authority,” (2021 Subdelegation Memo), the Director of Division of Water Resources attempted to delegate his authority for Buffer Authorization to a Supervisor. In addition to delegating these authorities, the 2021 Subdelegation Memo contained the following statement “Unless specifically prohibited in this delegation or in the Environmental Management Commission rules, these authorities may be re-delegated or sub-delegated when deemed appropriate.”

12. While N.C. Gen. Stat §143B-10 authorized the Secretary to delegate authorities vested in him to others, this provision does not authorize the delegate to further subdelegate this authority (i.e., subdelegate).

13. In *Bottomly Evergreen & Farms, and Bottomly Properties NC LLC v. NC Department of Environmental Quality* (22 EHR -1759) the judge, quoting in part a NC Attorney General's Opinion (1979 N.C. AG LEXIS 43), found that in non-ministerial matters one who is delegated authority to perform specific duties cannot further delegate that authority to another person absent specific statutory authority to do so.

14. This case involves the issuance of an authorization to disturbed land in the buffer area that is otherwise protected from disturbance as a means to protect a nutrient impaired water body. The decision to issue such an authorization is inherently discretionary. It is not a ministerial act and one that cannot be vested in literally any person “deemed appropriate” by any number of subdelegates.

15. Where there is no express authority for the delegate to subdelegate, an attempt to read into N.C. Gen. Stat §143B-10 such authority effectively abrogates the provision itself by collapsing the practical and legal distinction between ministerial acts which can be subdelegated, either expressly or impliedly, and discretionary acts, for which subdelegation must be expressly authorized by law in either statute or regulation.

16. The Undersigned is cognizant that this decision granting summary judgment is based on what could be perceived as a procedural issue. However, the Undersigned is equally cognizant that the General Assembly has vested tremendous power in the DEQ Secretary, and concomitant with that grant of power, is the responsibility to act in accordance with the circumscribed limits of that power. The authorization to disturb land designated as a buffer for the protection of impaired water bodies is a significant and highly discretionary action and, therefore, the official assessing a civil penalty must be authorized to do so. In this instance, the official authorizing such disturbance was not properly authorized to do so and this Tribunal may not uphold this agency action.

FINAL DECISION

BASED UPON the foregoing Uncontested Facts and Conclusions of Law, the Undersigned hereby **GRANTS** Summary Judgement for the Petitioner and **VACATES** the Buffer Authorization.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.**

In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 11th day of May, 2023.



Donald R van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 11th day of May, 2023.



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