

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
20 EHR 03014

<p>The Umstead Coalition Petitioner,</p> <p>v.</p> <p>North Carolina Department of Environmental Quality Division of Water Resources Respondent.</p>	<p><b>FINAL DECISION</b></p>
--	------------------------------

This contested case was heard by Michael C. Byrne, Administrative Law Judge, at the Office of Administrative Hearings in Raleigh, NC on February 17-19, 2021.

**APPEARANCES**

For Petitioner:

Shannon M. Arata  
James L. Conner  
Calhoun Bhella & Sechrest LLP  
4819 Emperor Boulevard, Suite 400  
Durham, NC 27703

For Respondent:

Francisco Benzoni  
Special Deputy Attorney General  
Elly S. Young  
Assistant Attorney General  
North Carolina Department of Justice  
PO Box 629  
Raleigh, NC 27602

**ISSUES**

Whether Respondent North Carolina Department of Environmental Quality, Division of Water Resources violated N.C.G.S. 150B-23 by issuing a Buffer Authorization under the Neuse River Basin Riparian Buffer Protection Rules for construction of a bridge over Crabtree Creek located within the creek's riparian buffer area.

**WITNESSES**

**For Petitioner**

Paul Wojoski  
Jean Spooner  
Ronald Sutherland  
Ervin Portman.

**For Respondent**

Paul Wojoski  
Samuel Bratton.

**EXHIBITS**

**Admitted for Petitioner:**

A Buffer Authorization  
B Neuse River Basin Buffer Rules  
C Buffer and Bridge Diagrams & Specifics  
D Erosion & Sediment Control Narrative  
E Erosion & Sediment Control Plan  
F Affidavit of David Penrose  
K Staff Review Form with Additional Information  
L Minutes of the Wake County Commissioners  
M Wake Stone Corporation Presentation to Wake County Commissioners  
N Excerpted Mining Permit Application  
Q Paul Wojoski Notes

**Admitted for Respondent:**

2 2020-04-07 Application for Buffer Authorization  
5 2020-04-22 Additional Information Letter  
7 Surrounding Area Maps  
12 2020-04-09 Bob Zarzecki e-mail regarding correct applicant  
13 2020-04-28 Paul Wojoski e-mail response re application correction  
17 Buffer Authorizations – combined  
18 Bridge Traffic Scenarios 1 & 2  
19 Bridge Visualization  
20 NC DEQ Frequently Asked Questions  
21 Crusher System  
22 Bridge photo from Wake Stone Mining Permit

## **RELEVANT PROCEDURAL HISTORY**

This contested case was filed on August 30, 2020. On December 29, 2020, the Tribunal denied Respondent's Motion for Summary Judgment. The case was heard on the merits February 17-19, 2021. Several months of delays in getting hearing transcripts from Word Services, Inc., followed. Full transcripts were finally provided in late July 2021. The Tribunal requested proposed decisions. Subsequently the Tribunal requested amended proposed decisions from the parties.

Based on the testimony of witnesses, the admitted exhibits, the governing law, and all evidence of record, the Tribunal makes the following:

## **FINDINGS OF FACT**

1. This contested case was filed by Petitioner The Umstead Coalition ("Petitioner") in August 2020 challenging Respondent North Carolina Department of Environmental Quality, Division of Water Resources ("Respondent") issuing, on June 4, 2020, an Authorization Certificate under the Neuse River Basin Riparian Buffer Protection Rules ("Buffer Authorization") for construction of a bridge ("Wake Stone Bridge") over Crabtree Creek located within the creek's riparian buffer area.
2. Petitioner is a non-profit membership organization that advocates for preservation of the natural integrity of the William B. Umstead State Park ("Umstead Park"), located in Wake County, North Carolina. While neither Petitioner nor any witness for Petitioner owns land adjacent to Umstead Park, nor property upstream or downstream on Crabtree Creek from the area to be affected by the Buffer Authorization, Petitioner's members regularly make use of Umstead Park and the areas around that area of Crabtree Creek which run through Umstead Park.
3. Respondent is responsible for issuing Buffer Authorizations and, among many other functions, for implementing the Neuse River Basin Riparian Buffer Protection Rules ("buffer rules"). At the relevant time, the buffer rules were codified at 15A N.C.A.C. 02B .0233.
4. There are multiple sets of buffer rules for different watersheds in North Carolina. Crabtree Creek is in the Neuse River Basin, so those rules apply. In the Neuse River Basin, the riparian buffer is a 50-foot-wide area measured on both sides of a stream or stream tributary in a perpendicular fashion from the top of the bank. (Pet. Ex. B). Zone 1 of the buffer is the 30 feet closest to the creek. Zone 2 is the second 20 feet. (1. T. 45-46).
5. A riparian buffer is a vegetated area bordering a body of water. (Res. Ex. 20, p. 5 of 11). Riparian buffers provide a number of functions critical to stream health and water quality, including nutrient removal, temperature regulation of the water bodies, and nutrient and detrital input (organic materials that aquatic life feed on and use for habitat). Riparian buffers also stabilize stream beds and banks and prevent soil erosion or sedimentation of streams and provide a floodplain area for the streams. (1 T. 19-20). The purpose of the buffer rules is to protect water quality by protecting the buffer. *Id.*, see also Pet. Ex. B

and 15A NCAC 2B .0233(1) (“The purpose of this Rule shall be to protect and preserve existing riparian buffers in the Neuse River Basin to maintain their nutrient removal functions.”).

6. Certain uses of the riparian buffer are permissible under the Buffer Rules. Bridges fall within the category of “allowable uses,” uses which “may proceed within the riparian buffer provided that there are “no practical alternatives” to the requested use pursuant to Item (8) of the Buffer Rule: “These uses require written authorization from [DWR] or the delegated local authority.” (1 T. 24-25); (Pet. Ex. B).
7. Before issuing a buffer authorization, Respondent must determine whether “no practical alternatives” for locating a project in the buffer exist and “make a finding of fact” as to whether the buffer rules’ requirements have been met. The primary relevant rule requires:

(8) DETERMINATION OF “NO PRACTICAL ALTERNATIVES.”

Persons who wish to undertake uses designated as allowable or allowable with mitigation shall submit a request for a “no practical alternatives” determination to the Division or to the delegated local authority. The applicant shall certify that the criteria identified in Sub-Item (8)(a) of this Rule are met. The Division or the delegated local authority shall grant an Authorization Certificate upon a “no practical alternatives” determination. The procedure for making an Authorization Certificate shall be as follows:

(a) For any request for an Authorization Certificate, the Division or the delegated local authority shall review the entire project **and make a finding of fact** as to whether the following requirements have been met in support of a “no practical alternatives” determination:

(i) The basic project purpose cannot be practically accomplished in a manner that would **better minimize disturbance, preserve aquatic life and habitat, and protect water quality.**

(ii) The use **cannot practically be reduced in size or density, reconfigured or redesigned to better minimize disturbance, preserve aquatic life and habitat, and protect water quality.**

(iii) Best management practices shall be used if necessary to minimize disturbance, preserve aquatic life and habitat, and protect water quality.

15A NCAC 02B .0233(8)(a) (emphasis supplied).

8. The applicant must certify that the project’s impacts cannot be better minimized, and Respondent must make a finding of fact that this certification is correct before issuing a “no practical alternatives” determination. If Respondent does nothing or remains silent for 60 days after receiving an application for a buffer authorization, a finding of “no practical alternatives determination” is automatically presumed pursuant to 8(b) of the buffer rules which provides that “[f]ailure to issue an approval or denial within 60 days

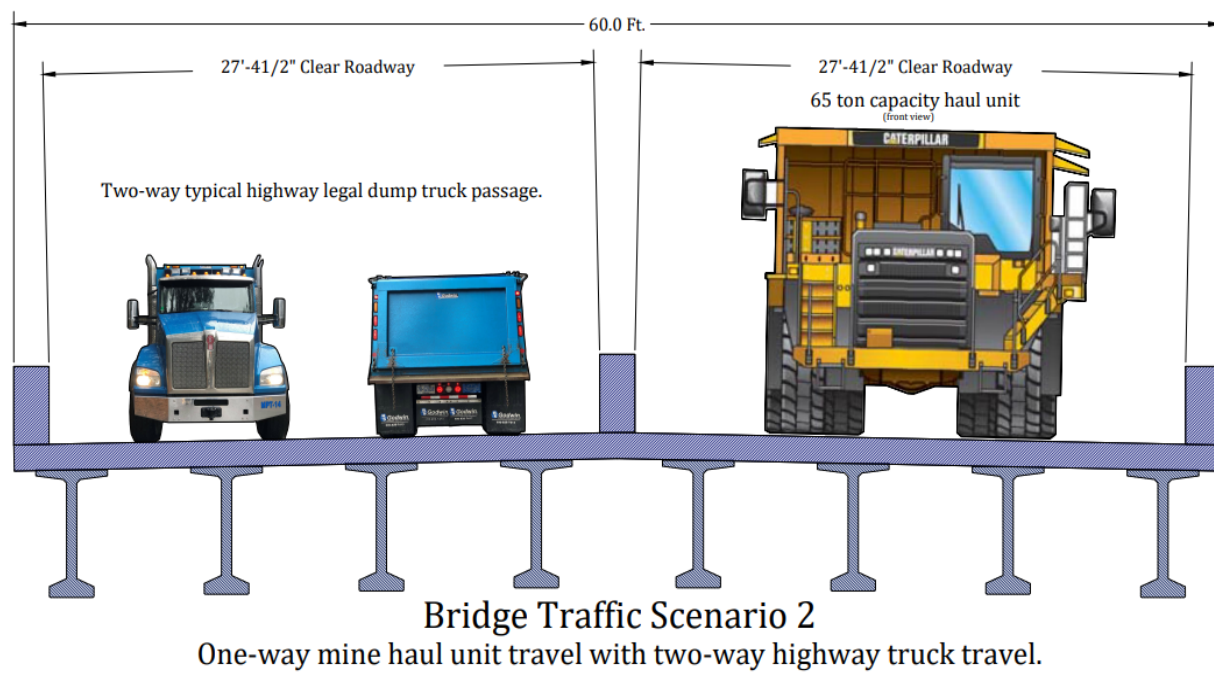
shall constitute that the applicant has demonstrated ‘no practical alternatives.’”15A NCAC 2B .0233 (8)(b))

9. Thus, Respondent’s obligation under the buffer rules was to review the proposed Wake Stone Bridge project and issue an Authorization Certificate for it only after determining that there are “no practical alternatives” to the project. This determination required Respondent to make a finding or findings of fact.
10. The importance of riparian buffers is not in dispute. Witnesses for both Petitioner and Respondent agree that riparian buffers play a critical role in what may be termed the “health” of North Carolina’s waterways. It is likewise not in dispute that the riparian buffer provides habitat for numerous vertebrate and invertebrate aquatic species. The buffer also allows for species to travel through the buffer area and access resources not readily available within a limited range or location.
11. A Buffer Authorization does not in itself permit Wake Stone to build the Wake Stone Bridge or to conduct mining or quarrying operations. (2 T. 427). Such activity is conditioned on Respondent allowing a separate permit (or permit modification) to mine or quarry the area affected.
12. The Buffer Authorization for the Wake Stone Bridge was requested by Wake Stone Corporation (“Wake Stone”).
13. For many years, Wake Stone has conducted quarrying operations directly adjacent to Umstead Park via an operation by the name of “Triangle Quarry.” The President and CEO of Wake Stone is Samuel Bratton (“Bratton”). Bratton testified at the hearing.
14. The affected area of Crabtree Creek, which is at least 20 feet wide at the point relevant to this case (1 T. 49), divides Wake Stone’s Triangle Quarry operation from a tract of land owned by the Raleigh-Durham Airport Authority (“RDU”) known as the “Odd Fellows Tract.”
15. The Odd Fellows Tract is bordered as follows: Umstead Park to the north, Interstate 40 to the south, Triangle Quarry to the east, and Old Reedy Creek Road (a gravel, unimproved road) to the west. (1 T. 91-92). Old Reedy Creek Road has an existing single lane bridge incapable of bearing heavy traffic.
16. The Odd Fellows Tract remains undeveloped woodland and includes a small pond or lake known as Foxcroft Lake.
17. The Odd Fellows Tract also contains rock. Wake Stone wishes to mine that rock through its Triangle Quarry operation. Wake Stone and RDU executed a lease agreement relating to that mining. Wake Stone has applied for a modification to its mining permit to allow it to mine on the Odd Fellows Tract.

18. Neither the lease agreement nor the potential mining permit modification is at issue in this contested case, nor is the desirability or otherwise of mining and quarrying operations in the Odd Fellows Tract, either by Wake Stone or others.
19. On April 7, 2020, Respondent received an application (“Wake Stone Bridge Application”) for a Buffer Authorization to construct the Wake Stone Bridge over Crabtree Creek to connect the Odd Fellows Tract with the Triangle Quarry property, obviously for purposes of projected future mining operations in the Odd Fellows Tract.
20. Wake Stone first proposed a “crusher system” that would crush mined aggregate and, by a system of conveyors, carry the aggregate from the Odd Fellows Tract to the Wake Stone quarry. This proposal resulted in considerable negative community feedback, for among other reasons that it would be noisy and would, at least as proposed, be installed in the middle of Foxcroft Lake (thus destroying the lake). Further, installation of the crusher system as proposed would not remove Wake Stone’s perceived need for a bridge over Crabtree Creek. Wake Stone eventually abandoned the crusher/conveyor proposal in favor of what became the Wake Stone Bridge plan. (3 T. 522).
21. Petitioner engaged in considerable discussion of this proposed crusher system at the hearing, apparently as a potential “practical alternative” to the Wake Stone Bridge. However, this crusher system was never presented to Respondent in lieu of or as an alternative to the Wake Stone Bridge, and the evidence does not show that the proposed crusher system would be a practical alternative, let alone the only practical alternative, to a bridge structure.
22. Paul Wojoski (“Wojoski”), the supervisor of Respondent’s “401 and Buffer Permitting Branch,” was in charge of reviewing the Wake Stone Bridge Application and was the person who issued the Buffer Authorization on behalf of Respondent. Wojoski has issued hundreds of buffer authorizations and reviewed authorizations approved by other colleagues. Petitioner did not present expert testimony to dispute any of Wojoski’s findings in the Wake Stone Bridge matter.
23. On April 22, 2020, Wojoski wrote to Wake Stone (the letter was through clerical error initially addressed to RDU) requesting that Wake Stone “provide a statement that clearly defines the purpose of the proposed bridge.” Wake Stone responded with additional information on April 23, 2020.
24. Subsequently, Respondent issued a Buffer Authorization to Wake Stone. Prior to doing so, Respondent made no written findings of fact that the Wake Stone Bridge project complied with 15A NCAC 02B .0233.
25. The Buffer Authorization to Wake Stone lays out the specific footprint in each of two buffer zones where impacts are allowed. The Buffer Authorization approves 6,404 square feet of “permanent impacts” in Zone 1 of the buffer, and 5,645 square feet of permanent impacts in Zone 2 of the Buffer. (Pet. Ex. A, Buffer Authorization) Of the approximately

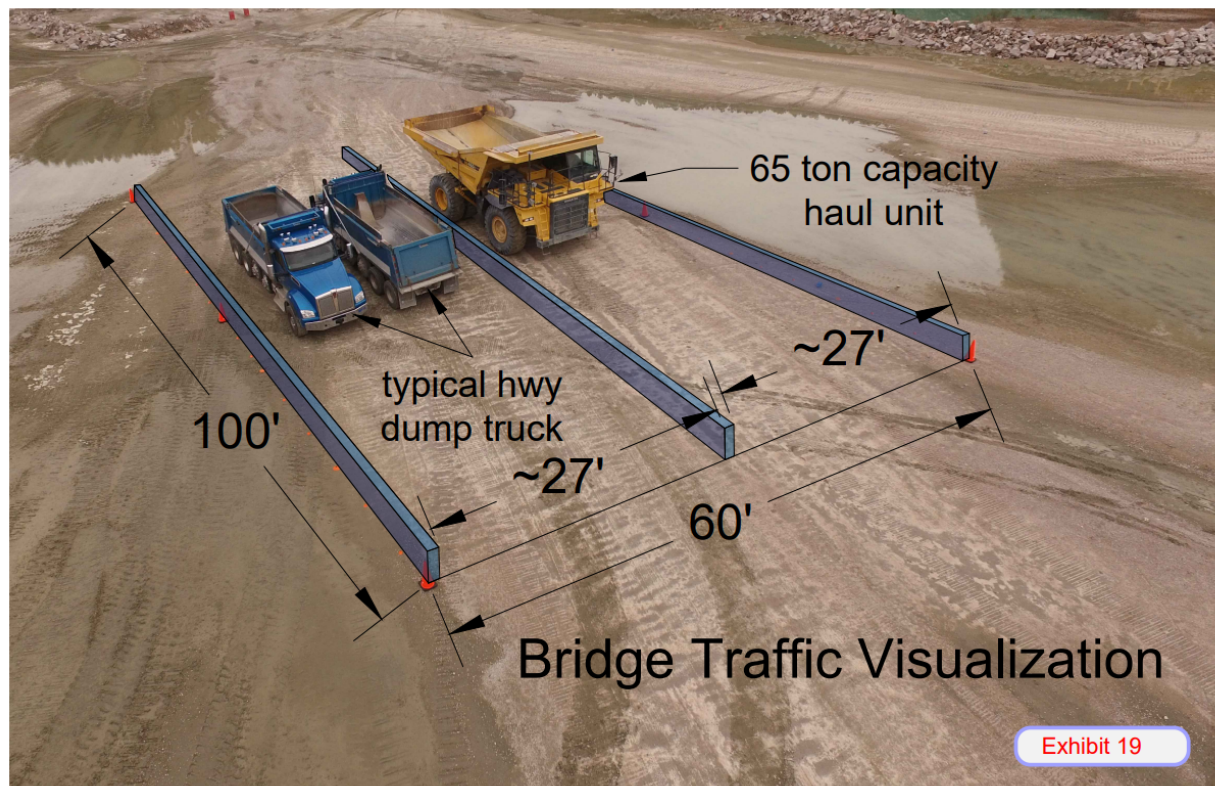
6,142 linear feet of Crabtree Creek buffer within the Odd Fellows Tract, the Buffer Authorization approves buffer impacts along a little over 60 linear feet of the creek. Id.

26. “Permanent impacts,” the Tribunal finds, is a synonym for “destroyed.” The Buffer Authorization as approved, then, would destroy approximately 12,000 square feet of riparian buffer along Crabtree Creek. (3 T. 454).
27. The primary reason for the extent of this destruction, the Tribunal finds, is the size, width, and scale of the Wake Stone Bridge. Res. Ex. 18 and 19 provide visual demonstrations of this issue:<sup>1</sup>



### Exhibit 18

<sup>1</sup> These documents were not submitted to or considered by Respondent as part of the Buffer Authorization approval process and are included herein as illustrative examples of the size and scope of the activities at issue. 3 T. 518.



28. The Wake Stone Bridge was designed by Michael Baker International, a professional engineering firm. (3 T. 519). The bridge is a full 60 feet wide from side to side and its impact on the riparian buffer exceeds even that amount. The bridge allows two-way traffic passage of 65-ton hauler truck units, which are approximately twice the size of normal, road-legal dump trucks. This heavy mining equipment is “massive in size,” capable of carrying “on the order of 50 or 60 tons in weight,” and approximate 20 feet wide. These hauler trucks are not allowed to use public roadways due to their specific size and design. (Tr. Vol. 1 pp. 78-79)
29. Each lane of the Wake Stone Bridge as designed is 27 feet wide. Foundational support for a bridge of this size, sustaining trucks of the size at issue, engaged in two-way traffic, results in the 12,000 square foot destruction of the riparian buffer at Crabtree Creek.
30. The buffer rules required Respondent to make findings of fact that the Wake Stone Bridge project, among other requirements, “cannot be practically accomplished in a manner that would better minimize disturbance, preserve aquatic life and habitat, and protect water quality,” and “cannot practically be reduced in size or density, reconfigured or redesigned to better minimize disturbance, preserve aquatic life and habitat, and protect water quality.”
31. During the Buffer Authorization approval project, Respondent neither asked Wake Stone for an alternative proposal to the submitted Wake Stone Bridge plan nor asked for any changes in it. 3 T. 447. Wojoski testified:



I requested information and questioned Wake Stone on why they proposed that design as meeting the avoidance of minimization criteria, and they responded and told me that that design, they charged an international engineering firm with designing a bridge that would completely span the floodplain that would require no direct impact onto Crabtree Creek, would not discharge any stormwater directly into the stream or the buffer area, and also minimize the impacts of the riparian buffer area given the project purpose to transport the heavy mine trucks with multiple or hundreds of trips per day.

3 T. 447-48<sup>2</sup>

32. However, none of these discussions are documented in the agency file. 3 T. 450. There are also no written findings of fact in the Respondent agency's file regarding there being "no practical alternative" to the width and size of the Wake Stone Bridge as designed.
33. Likewise, there was no documentation of -- and again no written findings of fact on - Respondent's efforts to determine why the Wake Stone Bridge needs to be as large and as wide as proposed, and as destructive to the riparian buffer as proposed. Wojoski testified:

Verbal -- there were verbal conversations [with Wake Stone regarding the width of the bridge]. In addition to that, direct observations of the size of the width of the mining trucks and how large they were, operations of how the -- the -- the quarry traffic is intended to operate there. So that -- there was additional direct observations there.

(3 T. 452). Further, Wojoski relied primarily on Wake Stone itself regarding the perceived need for the width and size of the Wake Stone Bridge as designed:

Q. You didn't have any kind of a -- an opinion or analysis by anyone outside Wake Stone about why it needed to be 60 feet wide, correct?

A. It -- so I understood that the first bridge design was done by an engineering firm, a qualified engineer to design that, and I took that and the weight that comes with that into consideration. I did not seek out additional engineers to evaluate the proposal against what the original engineers have proposed, if that is clear.

(3. T. 453).

34. That professional engineers designed the Wake Stone Bridge does not establish that there are no practical alternatives to that design. (3 T. 454).

35. Bratton testified that the Wake Stone Bridge needed to be 60 feet wide to:

---

<sup>2</sup> The proposed Wake Stone Bridge design does not in fact "completely span the floodplain," but only the 100-year floodplain. (3 T. 478). The proposed bridge does impact the 500-year floodplain.

[A]ccommodate large mine haul truck traffic, along with access for multiple pieces of mine equipment that would cross Crabtree Creek to the Odd Fellows for the mining of that property. The width allows for safe passage. Now, we're talking about hundreds of times a day these trucks are going to be crossing this bridge.

(3 T. 530-531)

36. Bratton stated that a one-way bridge design was “not possible” on the grounds that it was “not safe” for “hundreds of loads a day, hundreds of -- of crossings a day on both lanes.” (3 T. 531-532).
37. What would carry these “hundreds of loads” for “hundreds of crossings” is unclear. Wake Stone owns only six of the oversized mining trucks as of the date of the hearing. (3 T. 533). While Bratton claimed that Wake Stone would purchase additional trucks, it has not contracted for any. (3 T. 534).
38. Confidence in Bratton’s opinions and predictions is not enhanced by his providing evasive answers to the Tribunal’s questions about the impacts of agricultural lime, fertilizer, and superphosphate entering Crabtree Creek as a part of efforts to re-establish vegetation in the buffer area destroyed by the Wake Stone project. (3 T. 550-551).
39. Further, Bratton is an interested party in terms of obtaining approval for the Wake Stone Bridge and the presumptive economic benefit for Wake Stone from mining operations on the Odd Fellows Tract. While being financially interested does not discredit Bratton, the Tribunal will not accept (under these facts) an interested party’s predictions for the future as sufficient to establish a “no practical alternatives” situation for the Wake Stone Bridge as designed, particularly in the absence of documented findings of fact from Respondent determining whether the project could be minimized in size, scope and impact – as the buffer rules require.
40. The Tribunal is not convinced that the Wake Stone Bridge’s width and size is necessary to meet the basic project purpose, in large part due to the absence of contemporaneous documentary evidence (including the absence of written findings of fact) on this issue and of possible alternatives to minimize the size, scope, and impact of the Wake Stone Bridge project on the Crabtree Creek riparian buffer.
41. Petitioner did not prove that Respondent failed to comply with the buffer rules on the other issues Petitioner raised in this case. The evidence showed that there are no practical alternatives to a bridge at the proposed location due to the geographic limitations of the area in question, the lack of existing improved road options, and the existing use of areas otherwise bordering the Odd Fellows Tract (Umstead Park and Interstate 40). (1 T. 76, 80; 2 T. 401-406).

42. Petitioner did not prove that buffer rules require a bridge structure that spans the entire buffer. Bridges are an allowable exception to the buffer rules.
43. Petitioner did not prove that a crusher system as originally raised by Wake Stone was a better or even a feasible alternative to a bridge structure.

### **CONCLUSIONS OF LAW**

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over the parties and over this contested case. The parties received proper notice of the hearing in this contested case.
2. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law may be considered or include findings of fact, they should be so considered without regard to their given labels.
3. The Tribunal need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd per curiam, 335 N.C. 234, 436 S.E.2d 588 (1993).
4. The North Carolina Administrative Procedure Act ("APA") authorizes "[a]ny person aggrieved" to "commence a contested case" to challenge certain final agency actions. 150B-23(a).
5. "Person aggrieved" means "any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (emphasis added).
6. "[W]hether a party is a 'person aggrieved' must be determined based on the circumstances of each individual case." N.C. Forestry Ass'n v. N.C. Dep't of Env't & Nat. Res., 357 N.C. 640, 644, 588 S.E.2d 880, 882 (2003) (citing Empire Power Co. N.C. Dep't of Env't, Health & Nat. Res., 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994)).
7. A membership organization may demonstrate that it is a "person aggrieved" by demonstrating that its members will be substantially affected in their person, property, or employment. Forestry Ass'n, 357 N.C. at 642-44, 588 S.E.2d at 882; Save Our Rivers, Inc. v. Town of Highlands, 113 N.C. App. 716, 440 S.E.2d 334 (1994), rev'd on other grounds, 341 N.C. 635, 461 S.E.2d 333 (1995).
8. APA "confers procedural rights and imposes procedural duties, including the right to commence an administrative hearing to resolve disputes between an agency and a person involving the person's rights, duties, or privileges." Empire Power, 337 N.C. at 583, 588, 447 S.E.2d at 776, 779. A person's rights, duties or privileges arise under the relevant organic statute. See 337 N.C. at 583, 447 S.E.2d at 776-77. Therefore, "any 'person aggrieved' within the meaning of the [controlling] organic statute is entitled to an

administrative hearing to determine the person's rights, duties, or privileges.” 337 N.C. at 588, 447 S.E.2d at 779.

9. The Tribunal concludes as a matter of law that Petitioner is a “person aggrieved” for purposes of the APA with respect to the Buffer Authorization to Wake Stone.
10. Petitioner bears the burden of proving by a preponderance of the evidence that (1) Respondent substantially prejudiced its rights; and (2) Respondent acted erroneously, arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. N.C.G.S. 150B-23(a), 150B-25.1(a) and 150B-29(a); Surgical Care Affiliates, LLC v. N.C. DHHS, 235 N.C. App. 620, 623, 626-31, 762 S.E.2d 468, 471, 473-75 (2014). Overcash v. N.C. Dept. of Env’t & Nat. Res., 179 N.C. App. 697, 703-04, 635 S.E.2d 442, 447 (2006).
11. North Carolina law presumes that a regulatory agency has properly performed duties it has been delegated to perform. In re Broad & Gales Creek Community Assoc., 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980); Adams v. N.C. State Bd. of Registration for Prof. Eng’rs & Land Surveyors, 129 N.C. App. 292, 297, 501 S.E.2d 660, 663 (1998). However, a petitioner may overcome that presumption by showing a material lack of evidence or facts demonstrating that the agency performed those duties in conformance with rules (here, the buffer rules) to which the agency is subject and with which (again as here) the agency must comply in performing that delegated duty.
12. The APA requires that the Tribunal “giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C.G.S. 150B-34(a).
13. That deference, however, does not extend to claims made by either Wake Stone or the engineers who designed the Wake Stone Bridge. Moreover, “due regard” does not mean blanket deference, nor does it mandate lack of inquiry. Courts do not afford an agency deference when the agency fails to engage in required fact finding and consider facts material under the relevant law. AH N.C. Owner LLC v. N.C. Dep’t of Health & Human Servs., 240 N.C. App. 92, 99, 109, 771 S.E.2d 537, 541, 547 (2015).
14. Plain reading of 15A NCAC 02B .0233(8)(a) shows that Respondent was required to “make a finding of fact” that the requirements of the buffer rules had been met with respect to the Buffer Authorization.
15. Respondent argues that the buffer rules do not require findings of fact be expressly memorialized in any manner separate and apart from the agency’s issuance of the Buffer Authorization.
16. The Tribunal disagrees. The Tribunal is well accustomed to making findings of fact. They are always written. Ideas in the judge’s head are not “findings of fact” until they are written down and denominated findings of fact. Findings of fact are written statements that show the thought process of the decisionmaker.

17. When applied to the present case, this means that it was necessary for Respondent to have a documented finding of fact that there was no practical alternative to building a bridge, of this size, of this width, with the corresponding destruction of 12,000 square feet of riparian buffer. In re Rickard, 161 N.C. App. 150, 154, 587 S.E.2d 467, 469 (2003); Gregory v. W.A. Brown & Sons, 363 N.C. 750, 761-62, 688 S.E.2d 431, 439 (2010).
18. This conclusion does not read requirements into the statute that do not exist; rather, it reads the statute using the plain meaning of the words at issue in such a way as avoids making them pointless. A “finding of fact” that is unwritten is as pointless as a Final Decision containing a blank space under its “Findings of Fact” – in both cases, there is no way to determine the fact(s) found, the reasoning behind the finding, or that the finding was made at all.
19. Respondent further argues that its use of “implied” findings of fact has enhanced validity due to this being apparent agency practice for some time. Again the Tribunal disagrees. Practices that fail to comply with the plain language (under plain reading) of the buffer rules do not gain enhanced validity because the same error is made multiple times.
20. The agency record is essentially devoid of evidence that Respondent made findings of fact under the buffer rules with respect to the size and width of the Wake Stone Bridge, or of inquiries regarding alternatives minimizing the size, scope, and impact of the Wake Stone Bridge less destructive to the riparian buffer. The agency record is thus essentially devoid of evidence that Respondent complied with the requirements of the buffer rules.
21. The Respondent erred in failing to make the finding of fact required by 15A NCAC 02B .0233 prior to issuing the Buffer Authorization.
22. Respondent acted erroneously and failed to act as required by law or rule, with respect to its issuance of the Buffer Authorization.

### **FINAL DECISION**

Respondent’s agency action in issuing the June 4, 2020, Buffer Authorization to Wake Stone Corporation is **REVERSED**.

### **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 27th day of September, 2021.



Michael C. Byrne  
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.

Shannon Marie Arata  
Calhoun, Bhella & Sechrest  
sarata@cbsattorneys.com  
Attorney For Petitioner


James L Conner  
Calhoun Bhella & Sechrest LLP  
jconner@cbsattorneys.com  
Attorney For Petitioner

Amy L Bircher  
North Carolina Department of Justice, Office of the Attorney General  
abircher@ncdoj.gov  
Attorney For Respondent

Francisco Joseph Benzoni  
North Carolina Department of Justice  
fbenzoni@ncdoj.gov  
Attorney For Respondent

Elly Steiner Young  
North Carolina Department of Justice  
esyong@ncdoj.gov  
Attorney For Respondent

This the 27th day of September, 2021.



Daniel Chunko  
Paralegal  
N. C. Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh, NC 27609-6285  
Phone: 984-236-1850