

MEMORANDUM

Date: February 1, 2021

To: Honorable NC Governor Roy Cooper
Darryl Childers, Policy Advisor, Office of Governor Roy Cooper

Subject: Request for NC to Correct a Grave Public Wrong

From: Erv Portman, prior Wake County Commissioner, Cary Town Councilor, and Cary Planning Board

Cc: Dr. Jean Spooner, Chair, The Umstead Coalition
James L. Conner II, Partner, Calhoun Bhella and Sechrest

Forty Years ago, DEMLR denied Wake Stone's permit application to build a rock quarry near William B Umstead State Park. There was a public outcry against the proposed quarry, and public leaders including Governor James Hunt and Attorney General Rufus Edmiston made public statements opposing it. The applicant appealed the decision, and the Mining Commission ordered the quarry be permitted. State leaders then worked hard to protect the park from the adverse effects of mining, and issued a permit with significant protections for the State Park.

Two key protections were:

- Large, protective, undisturbed Buffers
- A 50 year time limit on quarry operations – the Sunset Clause

Wake Stone accepted the Permit with these conditions; it did not appeal, and the Permit became final.

After decades of mining and several permit renewals, all containing the Sunset Clause, Wake Stone first tried to get the 50-year Sunset Clause removed from the permit in 2011. The experienced leaders at DEMLR, who had been involved from the beginning, rebuffed these efforts. However, in 2018, after the retirement and or death of the long-term leaders, Wake Stone made asked again the same question to less inexperienced replacements at DEMLR. The requested was approved almost immediately, and purported to remove the Sunset Clause from the permit based upon an email exchange with Wake Stone; there was no permit modification application, no public involvement, and no record from which the public could appeal. DEMLR first called this a "permit modification," then when questions were raised, produced a back-dated memo claiming this gutting of the most important protections for the Park and the people of North Carolina was a "ministerial act." This change was illegal and ill-advised. Wake Stone, thereby emboldened, requested several other changes to the permit, some of which lessened buffer protections, again based upon informal contacts with DEMLR rather than the proper, transparent, public procedures called for in the law, and DEMLR staff granted them almost immediately, again with no proper process.

In addition to finagling these changes to the permit, Wake Stone has not honored the protective conditions of the permit; for example, it has violated the buffer requirements early and often.

Now, Wake Stone has a permit modification application pending to roughly double the size of the quarry by extending operations into the Oddfellows Tract, and further erode the existing buffers in the original site, both immediately adjacent to Umstead State Park.

We ask the Governor to be sure the Mining Act, the Administrative Procedures Act, and due process of law are respected by:

- Directing DEMLR to reverse the "ministerial acts" from 2018 that illegally gutted the protections contained in the permit, specifically the removal of the Sunset Clause and the damaging changes to buffer requirements.

- Requiring Wake Stone to restore the damaged buffers with proper mitigation.
- Investigating the pattern of misleading information provided by Wake Stone, and if warranted seek both civil and criminal penalties.
- Ensuring the citizen and park complaints sent to DEQ are investigated prior to any expansion permit decision. There is a long history of them being ignored.

A rock quarry next to a state park was a bad idea 40 years ago; expanding it today is even worse. The permit modification application to expand the quarry should be held until the issues raised in this memo and supporting documents are resolved.

Former Attorney General Rufus Edmisten has reviewed the 2018 Removal of the Sunset clause, and he writes it was not a typographical error, in fact the word SOONER, invoking the 50-YEAR SUNSET clause may well have been the only reason DEMLR issued the permit. He knows, he was a part of the decision. This along with other documents from the State Archives confirm that the information provided by Wake Stone to support the removal of the Sunset clause was both Incomplete and omitted key information.

The attached statement (Attachment 2), “Sunset Clause and Permanent Buffers Should Be Restored” provides additional detail, including references to documents from the State Archives.

Attachments:

Attachment 1. Rufus Edmisten, January 14, 2021 written statement that the Sunset Clause “sooner” was correct

Attachment 2. Statement: Sunset Clause and Permanent Buffers (measured from top of stream bank) Should be Restored (Portman, February 1, 2021)

Attachment 3. What was missing from the documents Wake Stone provided DEMLR in 2011 and 2018 with their requests to remove the 50 year Sunset Clause (Source: State Archives)

Attachment 4. Denial of Permit Application (Conrad, August 22, 1980)

Attachment 5. Sunset Clause in the original Mining Permit (May 13, 1981)

Attachment 6. 1981 Approved 1st Wake Stone Mining Permit (May 13, 1981)

Attachment 7. Assistant Attorney General Daniel Oakley letter of options to appeal Wake Stone quarry (January 30, 1981, Source: State Archives)

Attachment 8. Departmental Strategy for Wake Stone Permit issue in Umstead State Park, Memo from Griggs to Secretary Lee (February 4, 1981, Source: State Archives)

Attachment 9. Director Conrad Memo to Citizen explaining he will use all legal options to protect the Park (March 25, 1981, Source: State Archives)

Attachment 10. Secretary Lee Letter to Governor Hunt outlining options to consider regarding Mining Commission Issue (February 2, 1981, Source: State Archives)

Attachment 11. Mining Commission Documents (January 27, 1981 and April 3, 1981, Source: State Archives)

Attachment 12. Mining Permit Draft review by NC State Parks on May 11, 1981 (the cover letter is in the Mining Permit file, but not the attached draft permit confirming “**Sooner**” is correct). (Source: NC State Parks Archive).

Attachment 13. Cover letters and History of Accepted 92-10 Permit Renewals and Modifications with Sunset Clause and buffers (complete record available in Mining Permit 92-10 file at DEQ)

Attachment 14. Wake Stone Mining Permit 92-10 and its Impacts to William B. Umstead State Park and to Protected Buffers required by the Permit-photo overview

Attachment 2

Sunset Clause and Permanent Buffers (measured from top of stream bank) Should be Restored

January 30, 2021. Prepared by Erv Portman, supported by DEQ Website, State Archives documents, and Wake IMAPs Aerial Photos from 1981-2020.

“Sooner” vs “Later” – “Sooner” is the Sunset Clause. Voiding it was a Violation of 1971 Mining Act

The Mining Permit issued on May 13, 1981 contained the 50-year Sunset Clause. This first permit includes a cover letter that includes: “Please review the permit and notify this office of any objection or question concerning the terms of the permit.” The 1981 permit and the permit renewals and modifications issued over the next 37 years (April 15, 1986; April 1, 1991; February 5, 1992; October 11, 1996; April 20, 2001; November 24, 2010; March 20, 2011, and December 2017) contained the following 5B “Sunset Clause” under the “Reclamation Conditions”:

*(Under Reclamation Conditions) “5.B. If all quarryable stone is not removed, the right of the State to acquire the quarry site shall accrue at the end of 50 years from the date quarrying commences or 10 years after quarrying operations have ceased without having been resumed, whichever is **sooner**, and notices shall be exchanged at that time in the same manner and with the same time limitations as set forth in paragraph A above.”*

This one word “**sooner**” is the basis of a 50 year sunset clause, the one word change to “**later**” in haste in 2018 has no time limit on the mine. That change takes away the rights of the State, and substantially changes the Reclamation Conditions.

The NC State Parks and the Community depended upon the Sunset Clause to protect its popular Park entrance and expand recreational and conservation protection for William B. Umstead State Park. The change from “**sooner**” to “**later**” in 2018 after 37 years is a violation of the rights that had been given to NC State Parks and the people of North Carolina.

Wake Stone also offered a misleading narrative to further support a permit change after 37 years that the Mining Act of 1971 does not allow. The change from “**sooner**” to “**later**” is a direct violation of **G.S. 74-52 (c) Permit modifications:**

“... and that the modifications would be generally consistent with the bases for issuance of the original permit.”

The change from “**sooner**” to “**later**” is not only inconsistent with the basis of the original permit, it could be easily understood the original permit would have never been issued without the word “**sooner**,” and the Sunset clause it evoked. (See letter from Former Attorney General Rufus Edmisten attached).

Background

- The approval of a rock quarry next to William B. Umstead State Park was as controversial 40 years ago, as it still is today.
- On August 22, 1980 DEQ-DEMLR (then NRCD-LR), **denied** the Wake Stone Corporation (Wake Stone) application for a quarry next to William B Umstead State Park, "*on the basis of having an adverse effect upon the park, G.S. 74-51(5)*" (see Conrad, August 22, 1980).

analyses and several discussions with the staff. Based on this evaluation, I find that the proposed quarry operation would have a significantly adverse effect on the purposes of a publically owned park, forest, or recreation area and your permit application is hereby denied. (G.S. 74-51 (5)).

The combined effects of noise, sedimentation, dust, traffic and blasting vibration associated with the proposed quarry operation would produce primary impacts on William B. Umstead State Park in the form of noise intrusion and deterioration of visual resources. Our evaluation of your permit application further indicates there are no feasible modifications that can be made to the application that would make it acceptable.

- Wake Stone appealed to the Industry-friendly Mining Commission, which overturned the denial and ordered the permit be issued) (Dated April 3, 1981, based on its Findings of Fact, Conclusions and Decision issued January 27, 1981).
- The dispute between January 27, 1981 and May 13, 1981 had three key points:
 - The state opposed a quarry next to William B Umstead State Park due to the significant adverse effects on the Park and forest.
 - Wake Stone opposed any time limit on mining (50 Year sunset clause)
 - Wake Stone preferred to minimize the protected buffers; the State demanded permanent buffers
- For much of February through May 1981, DEMLR (NRCD-LR at the time) worked hard to find a way to both issue the permit and protect the park. DEMLR and the NC Attorney General Office (under Rufus Edmisten) were poised to Appeal the Mining Commission's Decision to grant the permit unless more protections for the Park were included in the Mining Permit.
- The dispute ended on May 13, 1981 when DEMLR Director Stephen G. Conrad issued the permit, with two key protections to mitigate the significant adverse effects of allowing a crushed rock quarry next to a park and forest:
 1. Large protected buffers of undisturbed natural forested vegetation that could not be developed or disturbed (for decades the permit required **buffers measure**

from top of Crabtree Creek bank – not centerline or property line asserted by Wake Stone in its 2018 modification request).

2. A 50-year limit on mining, to set a date when blasting and impacts would stop and the land could become a part of the park.
- Wake Stone accepted the permit in 1981 and did not object to the conditions included in it, to both protect the park with permanent buffers and cease blasting in 50 years, [offering the option to donate the site to become part of the park.](#)

- Unfortunately, Wake Stone has not respected either of the conditions, having disturbed the protected natural vegetated buffers it promised to protect, and now having mislead DEQ to remove the 50-year Sunset clause and substantially decrease the width of the protected buffers.
- ***Both of the hard fought safeguards the state required have been compromised or removed. They must be restored.***

Incomplete and Misleading Documentation in Mining Permit Files

The documents provided by Wake Stone in 2011 and again in 2018 were incomplete omitting importation information that, if provided to DEQ would have raised doubt on the merits of the Wake Stone requests.

To convince DEQ staff to approve the removal of the Sunset clause Wake Stone provided DEQ the Mining Commission documents issued on January 27, 1981 and April 3 1981. Disturbingly, the official version of the Mining Commission documents were ***missing from the DEQ files. Furthermore, other key documents supporting the Sunset Clause and Permanent Buffers are missing from the DEQ files.***



DEMLR Director James Simons, and his two predecessors Charles Gardner and Stephen Conrad all had first-hand knowledge of the 1981 dispute and Permit. Wake Stone waited until Simons had retired, and Conrad and Gardner had died to try to get out of the 50 year Sunset Clause that was always a part of the permit they accepted for 37 years, from 1981 to 2018. Director Simons rejected the Wake Stone argument in 2011, as he knew the details around the original permit issued in 1981.

How to know what really happened so long ago, many of the leaders involved have passed on or retired, unable to speak to the work they did so long ago.

In order to seek clarity on the department's action after the Mining Commission ruled on April 3, 1981 and before the permit was issued 5 weeks later on May 13, 1981, I searched the State Archives.

There is no indication in the record that DEQ attempted to find official versions or question/confirm if the versions supplied by Wake Stone were final and complete. In Fact, the Final Decision provided by Wake Stone, references the ***as amended and corrected version*** of the Mining Commission Findings of Fact, Conclusion and Decision, ***which was not provided.*** Other documents, like the Mining Commission

Public Hearing Transcripts, are known to have existed but remain missing (see photo of Archive box for Mining Commission files indicating an unusually thin file for the Wake Stone case as compare to other cases, despite the enormous public outcry and extensive news reporting).



This photo shows the State Archives file containing Administrative hearings before and after the Wake Stone appeal in 1980. The hearings both before and after the Wake Stone Case include a thick black bound hearing transcript. That document is missing for the Wake Stone appeal.

The Archives search confirmed the missing information Wake Stone did not provide.

Wake Stone provided incomplete documents to DEQ along with a misleading narrative to convince less experienced DEQ staff in 2018 to make the change DEMLR Director Simons previously rejected in 2011. Wake Stone offered no new information to justify asking DEQ to remove the Sunset Clause in 2018 compared to the request the department rejected in 2011. It is also noteworthy that Wake Stone after requesting it be changed, accepted the 2011 Permit with “sooner” Sunset Clause without objection.

Waiting for People to Die – not a reason to harm public lands

For 37 years, with employees with first-hand knowledge in DEMLR and NC State Parks still living, the Sunset Clause Remained. Only after they all died, did Wake Stone succeed in getting the DEQ staff to remove the Sunset clause.

Wake Stone asserted and in 2018 DEMLR accepted the assertion that Director Conrad must have made a one word typographical mistake inserting the word “**sooner**” when it should have said “**later**.”

But the audacity of the Wake Stone request is exceptional.

It implies that Director Conrad, Director of State Parks Jim Stevens, Secretary Lee, Attorney General Edmisten, Governor Hunt did not know what the permit said, did not know it was different from the Mining Commission Final Decision they all read on January 27, 1981 and April 3, 1981.

To accept this theory one would have to conclude the State leaders were either sloppy or made a typo or disobedient to the law by offering conditions different. Given the intense scrutiny by the State and Wake Stone at the time, especially regarding the conditions of the donation to the State, such a mistake is implausible.

Supporting “Sooner” is correct; we found a copy of the attachment to the cover letter from NC State Parks Director Jim Stevens that shows a marked up copy of the draft permit 2 days prior to its May 13, 1981 issuances (see attached). The Cover letter from NC State Parks refers to the Sunset Clause section is in the Mining Permit file, but the insightful attachment is missing. Yes, “**sooner**” was in the permit review draft 2 days prior to issuance.

In 2011, Director James Simons knew better, he worked the permit in 1981, and knew the details of how the department arrived at the decision to not appeal the Mining Commission decision but rather issue a permit, with the conditions Wake Stone accepted.

Forty years ago is a long time, it is hard to ascertain who did what and why, it is for that reason that usually such old documents are not revised after so many years. The concept is that the Mining Permit document as issued on May 13, 1981, must speak for itself, because those who wrote it are no longer here to defend their work.

The Missing... Documents Provided by Wake Stone were incomplete (partial)

Fortunately, the State of North Carolina has an excellent State Archives, and I was able to reach back 40 years to find the real story of what was done by DEMLR after the Mining Commission issued its Final Decision on April 3, 1981 and before the department agreed to issue the Permit 92-10 (May 13, 1981). Here is what I learned from the archives, copies attached.

1. Director Conrad did not make a typo with the Sunset clause on May 13, 1981 when he issued the permit. In fact he did not want to issue the permit at all, he denied it a year earlier, and opposed the decision of the **Mining Commission**. He only agreed to issue it when the permit contained the conditions he felt were sufficient to protect the Park.
2. What Wake Stone did not tell DEQ staff in April 2018 was the following facts that have now been confirmed by the documents attached from the Archives:

The January 27, 1981 **Mining Commission** Findings of Fact, Conclusions and Decision sent to the Mining Permit File by Wake Stone was NOT the as AMENDED AND CORRECTED decision, issued April 3, 1981. Missing was the following critical section from the official version:

This decision is not final. In no more than 45 days, unless the Commission grants an extension, the Division and Wake Stone shall, at a public hearing, present to the Commission the plans outlined above. At the hearing the Commission will not hear new evidence. At least 5 days before this hearing the parties shall deposit the plans with B. R. French for distribution to the Commission. Following the hearing the Commission shall render a final decision, from which the parties may appeal pursuant to NCGS 150A-1 et seq.

Date of original decision: January 27, 1981.

As amended and corrected, this the ^{APR} 3 1981, 1981.

Original signed by

Dr. Henry B. Smith, Chairman
North Carolina Mining Commission

The actual document is attached, (Mining Commission from State Archives) and it shows the January 27, 1981 decision **was NOT FINAL and it was subject to appeal by either Wake Stone or the DEMLR, to Superior court (which was the Appeal option in 1981 per the Mining Act).** This fact, left out, was key to the narrative Wake stone offered DEQ that the Mining Commission decision from April 3 must overrule the conditions of a permit offered five weeks later on May 13, 1981. Had Wake Stone disclosed this important fact DEQ staff would have understood both DEMLR and Wake Stone were both free to accept alternatives of they wanted to, or alternatively if they did not either could have appealed the decision to Superior Court. In fact that's exactly what Director Conrad said he would do in a letter to a concerned citizen sent on March 25, 1981 Director Conrad wrote to a citizen Ms. Gaynell Watson and explained his intentions, letter attached:

As you know, the Mining Commission has completed the hearing process on Wake Stone's appeal of the Department's decision to deny the permit. We expect the Mining Commission to render its final decision in this matter within the next few days. At that time, the Department will consider the alternatives available to it and base its decision on what is the best course of action to provide maximum, long term protection to William B. Umstead State Park.

This letter confirms that Conrad was dedicated to do all he could to prevent significant adverse effects of a quarry on the park and forest.

Assistant Attorney General Daniel C. Oakley confirmed in his January 30, 1981 memo (attached) that DEMLR could appeal the final decision of the **Mining Commission** if they disagreed with it:

I hope this memorandum is helpful. I will be glad to discuss it further with you at your convenience. The decision on whether to appeal needs to be made expeditiously so that we can prepare and file the necessary documents within thirty days of the date the decision was served.

And finally, the exact strategy of the department was well documented in the February 4, 1981 Memo from Neil Grigg (representing NC State Parks) to Secretary Lee, (attached) confirming that they should either appeal the Mining Commission decision or try to establish more significant protections for the park. If significant protections could be obtained, they allow the permit to be issued, if not, then proceed to appeal the Mining Commission decision to Superior Court.

The Division of Land Resources begin to discuss with Wake Stone what conditions would be satisfactory to both the Department and the company. If satisfactory conditions can be developed which would obviously protect the park and which could be supported by the public, we feel the

permit could be issued and the matter would be terminated. If no satisfactory agreement on conditions can be reached, we would refer the matter back to the Mining Commission with the recommendation that the permit be denied. At that time, if there was still not agreement between the Department and the Commission, the Department would evaluate and might choose to pursue other legal remedies such as an appeal.

3. NC State Parks Reviewed the Draft Permit on May 11, 1981 with a detailed mark-up. The Memo cover pages are included in the Mining Permit file, and it implied "sooner" is correct. The attached, marked-up draft permit to this memo confirms all parties expected "**sooner**" to be correct. This is not a "typo." We found the memo and its attachments in the NC State Park's Archive files (attached)

These letters provide a clear context to what DEMLR Director Conrad was doing when he issued the permit in 1981, the recent assertions from Wake stone are laid bare as lacking any credibility and confirm a pattern of actions that offered incomplete and misleading information to permit requests in direct violation of the Mining Act of 1971.

The Protected Buffers – Severely Diminished and Degraded

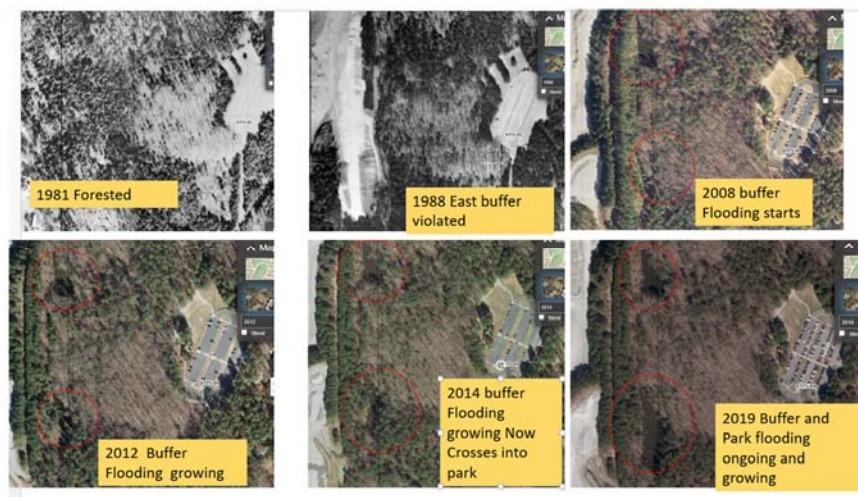
Wake Stone has violated the protected buffers early and often. Now 40 years later we can see clearly how what was promised has not occurred. Protected permanent buffers have been destroyed. The 2018 Permit Modification substantially reduced the buffer width, in conflict with the previous 37 years of commitments. The current permit Application proposes to gut the remaining buffers.

The 1981 permit required buffers of **undisturbed vegetated** land free from encroachment between the Mine and the park and the *“top edge of the bank of Crabtree Creek...”* The missing page of the Mining Commission Final Decision issued on April 3, 1981 clearly indicates the buffers are intended to be “permanent” or undisturbed (attached).

Wake stone violated the buffers to the West, North and East of the pit.

There are buffer violations in eastern boundary along the Park, northern boundary with the Park and Crabtree Creek, and to the west along Crabtree Creek.

In just the east here is the result; **Flooded Buffers and Dead trees that has now crossed into the park itself, flooding parkland and killing trees.**



As these buffers were being violated North Carolina State Parks was objecting, citizens were objecting, unfortunately DEQ took no action, issued no notice of violations and today we have significantly adverse impacts on the park and Wake Stone contends they are a good neighbor to the park and have a perfect record with no violations.



This is what happens when those we trust to protect the public and regulate industry instead protect the industry and deflect the public concerns. (William B. Umstead State Park, May 22, 2020)

As a specific and real example, at the Public Hearing conducted in July 2020 by DEQ-DEMLR on the Wake Stone expansion there were many complaints from the public about these very issues of killing trees within William B. Umstead State Park and flooding the buffers. DEQ took no action to require Wake Stone to mitigate the damages they were given proof had occurred.

This buffer issue is not complicated nor difficult to understand, the attached PowerPoint shows what has happened to the promise of protections, and how over time every buffer has been violated. Wake IMAPS offers evidence, clear aerial photos over the 40 years. It's hard to hide the fact that these are willful violations of the permit, and unfortunately, DEQ has failed to enforce the hard fought conditions put in place when this permit was issued.

What good are buffers if they are never enforced?

To the western boundary along Crabtree Creek, Wake Stone encroached the undisturbed buffer. In 1992 Wake Stone blasted too close to the stream, and caused a massive buffer collapse that resulted in 90 percent blockage of Crabtree Creek. DEQ initially calls this a “violation” but later changed to a “deficiency.” Still today, the streambank is not fully vegetated and the undisturbed buffer width is narrow. To add to this insult, Wake Stone convinced DEQ to reduce the buffer even more in 2018 and proposes to further decrease the buffer protections along Crabtree Creek with their current Expansion Mining Permit Application, as well only minimal buffers on the other side of Crabtree Creek. Imagine: Crabtree Creek suspended above two pits more than 400 feet deep with extremely narrow buffers!

In 2018, eight (8) modifications were made to the permit, just 23 minutes after they were requested by Wake Stone. Those eight (8) changes included the largest reduction on buffers in the 40-year life of the mine. Wake Stone falsely asserted there was no impact, just a map clean up, and misrepresented the fact that all prior permits measured the buffers from the property line, not stream **top of bank** (which is standard for any stream buffer). Instead, Wake Stone tried to misrepresent the property boundary to be the start of the buffer width (which is the **centerline of Crabtree Creek**). This was not a “map clean-up” or GIS error; this was a MAJOR change in buffer width. Furthermore, Wake Stone asked (and was granted) that the buffer protective language within the Permit be removed and just described in the Site Plan Map which Wake Stone controls, subject to state review and approval. The 2018 Site Plan map was modified to indicate the substantial buffer width reduction and changed the designation on the Site Plan from “**undisturbed vegetative buffers**” to “**buffer from property boundary**.” Note: in the 2020 proposed Application, Wake Stone now asks for many of the undisturbed buffers to be changed to “unexcavated buffers.” Unexcavated buffers allow deforestation, stock piling, berms, roads, pit perimeter roads, crushers, sorters, almost anything except for digging a mine pit. The buffer changes in the 2018 and proposed in 2020 Expansion are gutting of the buffers and an obvious transition to their lack of protection for William B. Umstead State Park.

The misleading and willfully misrepresentation of facts and information by Wake Stone in their request for the 2018 Permit Modification to change the buffers is a direct violation of the Mining Act of 1971.

What needs to be done now is fix the mistakes DEQ made in blindly trusting the information offered by Wake Stone

1. Set aside the permit modification issued in 2018 and restore the permit to the Mining Permit conditions in place in 2010.
2. Demand that DEQ [enforce its obligations under](#) the Mining Act of 1971 and enforce the permit condition that require Wake Stone to protect the buffers, and mitigate all damages they have done.
3. Investigate the actions of DEQ Mining Staff around the 2018 Permit modification made, then (retroactively, a year later) DEQ decided the Sunset Clause removal was a “ministerial correction” and not a modification, and if the facts warrant consider both civil and criminal penalties as required by 74-64 (b) and 74-64 5(b) when an applicant or operator willfully misrepresents any fact in any action taken pursuant to this article, or willfully gives false information in any application or report required by this article.
4. Request DEQ-DEMLR expand their incomplete “Request for Additional Information” to ask Wake Stone to address the numerous concerns raised by NC Division of Park and Recreation, citizens and affected local governments, where were part of the public hearing that to date DEQ-DEMRL has ignored.

I know the Governor Cooper has a strong record as Governor and Attorney General to protect our states environment and be sure the law is fully respected. I hope he will demand these issues be investigated and resolved to protect the good work of Governor Hunt, Attorney General Edmisten, Secretary Lee and DEMLR Director Conrad four decades ago.

These documents from the Archives provide a more complete context to what state leaders were thinking as they worked this issue in 1981. With the passing of time it's clear they were correct, a rock quarry next to a state park is not a good idea. Expanding it today is even worse.

Attachment 3

What was missing from the Mining Commission Documents Wake Stone provided to DEQ DEMLR staff in 2011 and 2018 to Support their request to remove the 50 year Sunset clause.

January 30, 2021. Prepared by Erv Portman, supported by State Archives documents

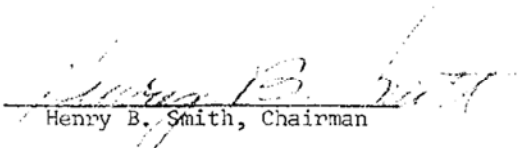
1. Mining Commission Final Decision, April 3, 1981

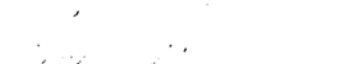
In the Matter of Denial of)
Permit Application of the)
Wake Stone Corporation)

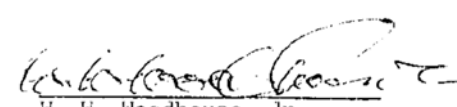
Amendment to the
Final Decision

The 250' buffer area shown on the northern boundary and the 100' buffer area on the eastern boundary of Wake Stone's property is considered by the Commission the permanent buffer zone.

This the 3rd day of April 1981.


Henry B. Smith, Chairman


T. W. Tysinger


W. W. Woodhouse, Jr.

This page of the Mining Commission Final decision was not provided to DEMLR but was included in the 1981 Wake Stone Request for a Special Use Permit from Wake County. The missing page confirms that the two area east and north on the site were designated by the Mining Commission as Permanent Buffer.

Wake Stone Violated both buffers early and often.

Another fact Wake Stone did not disclose is the fact that the Original Permit issued by DEMLR on May 13, 1981 added a buffer condition on the west of the site, not included in the Mining Commission final decision. Wake Stone implied that the one word later which was in the Mining Commission Final Decision, but was “sooner” in the Permit was a mistake that needed to be changed. They failed to mention there were several differences between the Final decision of the Mining Commission and the permit conditions they accepted with the Permit.

2. Mining Commission Findings of Fact, Conclusions and Decision, January 27, 1981

The Second document Wake Stone Provided DEMLR to support the removal of the Sunset clause was the Mining Commission Findings of Fact, Conclusions and Decision dated January 27, 1981

They did not provide the same document as amended and corrected on April 3, 1981.

The “As amended and corrected” version is referenced in the Mining Commission Final Decision of the same date they did provide and DEMLR reviewed.

BEFORE THE MINING COMMISSION

In the Matter of Denial of
Permit Application of
Wake Stone Corporation

FINAL DECISION

In accordance with this Commission's initial Findings of Fact, Conclusions, and Decision of January 27, 1981, as amended and corrected, and with the March 12, 1981 Agreement of Wake Stone Corporation and the Division of Land Resources, Department of Natural Resources and Community Development, concerning the Conditions enumerated below as 1, 2, 4, and 5; and upon consideration of the supplementary arguments of the parties concerning Condition 3, *infra*, the Mining Commission hereby orders that the Division of Land Resources grant to Wake Stone Corporation the permit applied for with the following conditions:

DEMLR staff overlooked the fact that they did not have the as amended and corrected version referred to in the document they used to justify the modification of the permit, 37 years after it was issued, and 7 years after their department Direct James Simons rejected the exact same request as having no merit.

What Wake Stone did not provide was the following as amended and corrected statement;

This decision is not final. In no more than 45 days, unless the Commission grants an extension, the Division and Wake Stone shall, at a public hearing, present to the Commission the plans outlined above. At the hearing the Commission will not hear new evidence. At least 5 days before this hearing the parties shall deposit the plans with B. R. French for distribution to the Commission. Following the hearing the Commission shall render a final decision, from which the parties may appeal pursuant to NCGS 150A-1 et seq.

Date of original decision: January 27, 1981.

As amended and corrected, this the ^{APR} 3^{day of} 1981, 1981.

Original signed by

Dr. Henry B. Smith, Chairman
North Carolina Mining Commission

The significance of this omission was key to the Wake Stone request to remove the Sunset Clause. This paragraph would have confirmed to DEMLR staff that the January 27, 1981 decision was NOT FINAL, and that either party could appeal the April 3 Final Decision if they did not agree with the Mining Commission decision.

Director Conrad was clear that he felt the Mining Commission decision to overturn the permit application denial was a mistake, and that he said so in his communications to the Commission chair, and spoke against the decision. He was convinced the location next to a state park was inappropriate for a crushed rock quarry. That's why he worked so hard to find a way to protect the park if he was going to issue the permit. That's why he placed the conditions for the buffers and the Sunset clause that both went above the Mining Commission decision.

Wake Stone accepted the permit with those conditions, it could have appealed the permit conditions if it wanted to, and they did not.

Director Conrad knew what he was doing and he negotiated what he felt was a better deal to protect the park. He was clear that if he could not he would appeal the Mining Commission decision to Superior Court.

Wake Stone was also on record in 1981 saying the life of the mine was 50 years.

To now imply 37 years after the fact, and after he died, that Director Conrad made a mistake is just not credible. If the DEMLR staff had bothered to check with former Director Simons he would have explained the same, that is why he rejected the assertion as having no merit in 2011.

Rather than dig deeper and consider they may have been deceived DEMLR staff defended the action despite serious questions on motive that were raised. Going to far as to “paper the file “ with a new characterization 18 months after the permit was modified, saying it really was not a modification at all, but really a ministerial correction of a one word error made 37 years earlier and to dramatically decrease the buffers.

The reason for the change of story is the 2018 permit change violated the Mining Act of 1971 in two key ways.

§ 74-52. Permit modifications.

(a) Any operator engaged in mining under an operating permit may apply at any time for modification of the permit. The application shall be in writing upon forms furnished by the Department and shall fully state the information called for. The applicant must provide the Department with any additional information necessary to satisfy application requirements. In addition, the applicant may be required to furnish any other information as may be deemed necessary by the Department in order adequately to enforce the Article.

(b) Repealed by Session Laws 2017-209, s. 13(c), effective October 4, 2017.

(c) A modification under this section may affect the land area covered by the permit, the approved reclamation plan coupled with the permit, or other terms and conditions of the permit. A permit may be modified to include land neighboring the affected land, but not other lands. The reclamation plan may be modified in any manner, so long as the Department determines that the modified plan fully meets the standards set forth in G.S. 74-53 and that the modifications would be generally consistent with the bases for issuance of the original permit. Other terms and conditions may be modified only where the Department determines that the permit as modified would meet all requirements of G.S. 74-50 and [G.S.] 74-51.

(d) No modification of a permit shall become effective until any required changes have been made in the performance bond or other security posted under the provisions of G.S. 74-54, so as to assure the performance of obligations assumed by the operator under

- 1. There was never a formal permit modification form filed for the modification.**
- 2. The change to modify the Reclamation plan by changing the Sunset clause changing the word “Sooner to Later” can only be allowed if the change is consistent with the basis for the issuance of the original permit. This change is not only inconsistent with the basis of the original Permit, according to former Attorney General Rufus Edmisten the word Sooner may be the only reason the permit was ever issued.**

In addition the law provides 30 days (it was 60 days in 1981) for the applicant to request a modification to a permit Condition, Wake Stone did not request any changes to the Permit in 1981, nor at any other time over the next 37 years.

§ 74-61. Administrative and judicial review of decisions.

An applicant, permittee, or affected person may contest a decision of the Department to deny, suspend, modify, or revoke a permit or a reclamation plan, to refuse to release part or all of a bond or other security, or to assess a civil penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after the Department makes the decision. Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision of the Commission. (1971, c. 545, s. 16; 1973, c. 1262, s. 33; 1977, c. 771, s. 4; 1979, c. 252, s. 3; 1987, c. 827, s. 86; 1993 (Reg. Sess., 1994), c. 568, s. 9; 2011-398, s. 30.)

It was too late for them to request such a change to the conditions they had long ago accepted.

Now Given what we have learned about the misleading and incomplete information provided by Wake Stone to DEMLR it seems the agency needs fully investigate how these changes have occurred and consider both Civil and Criminal penalties as required by the Mining Act of 1971 when an operator provides inaccurate or misleading information to the department.

§ 74-64. Penalties for violations.

(a) Civil Penalties.

- b. Any permitted operator who violates any of the provisions of this Article, any rules adopted under this Article, or any of the terms and conditions of the mining permit shall be subject to a civil penalty of not more than five hundred dollars (\$500.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any civil penalty, written notice of the violation shall be given. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violation, and shall state that failure to correct the violation within that period may result in the assessment of a civil penalty.
- c. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by the noncompliance, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with this Article.

(b) Criminal Penalties. - In addition to other penalties provided by this Article, any operator who engages in mining in willful violation of the provisions of this Article or of any rules promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article shall be guilty of a Class 3 misdemeanor and, upon conviction thereof, shall only be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense. (1971, c. 545, s. 19; 1979, c. 252, s. 2; 1981, c. 787, ss. 7, 8; 1987, c. 246, s. 1; c. 827, s. 85; 1989 (Reg. Sess., 1990), c. 1024, s. 16; 1993, c. 539, s. 555; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 568, s. 10; 1998-215, s. 42.)