

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 02881

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| Environmental Community Action Network and Cape Fear River Watch, Petitioners, v. North Carolina Department of Environmental Quality, Division of Water Resources, Respondent, and Murphy-Brown, LLC, Respondent-Intervenor. | FINAL DECISION |
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THIS MATTER came on for hearing before the Undersigned on December 13, 2022, pursuant to the parties' Cross Motions for Summary Judgment. All parties having been given the opportunity to be heard, the matter is ripe for disposition.

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ISSUES

Pursuant to the Parties' stipulations, the sole issue presented by this contested case is whether in issuing the challenged permit, Respondent was obligated to "require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized" for the subject animal waste management systems under N.C. Gen. Stat. § 143-215.1(b)(2) and 15A N.C.A.C. 2T .0105(f).

UNCONTESTED FACTS

1. Petitioner Environmental Justice Community Action Network ("EJCAN") is a non-profit corporation organized and existing under the laws of the State of North Carolina.
2. Petitioner Cape Fear River Watch ("CFRW") is a non-profit corporation organized and existing under the laws of the State of North Carolina.
3. Respondent North Carolina Department of Environmental Quality, Division of Water Resources ("Respondent") is a state agency that is authorized to administer and implement North Carolina laws and rules for the protection of water quality in North Carolina, including permitting, monitoring, and regulating discharges into waters of the State.

4. Respondent-Intervenor Murphy-Brown LLC (“Murphy-Brown”) is a limited liability company authorized to conduct business in North Carolina. Murphy-Brown owns and operates swine animal operations and utilizes animal waste management systems to treat and manage swine waste at its operations. Murphy-Brown owns and operates farms that have been issued Certificates of Coverage under the general permit that is the subject of this proceeding and has interests in other farms that are expected to apply and qualify for coverage under the same general permit.

5. The Parties entered into certain factual stipulations after the commencement of this contested case. While all parties stipulated that Petitioners’ standing as persons aggrieved would not be challenged, no such agreement was reached as to whether Respondent’s decision not to implement the alternatives analysis substantially prejudiced Petitioners. Petitioners did not offer evidence that showed whether an alternative to the covered, anaerobic digesters proposed by the farms would substantially alleviate the concerns expressed by Petitioners.

6. In 1967, the General Assembly created a broad permitting program to control sources of water pollution in the state. *See* Part 1, Article 21 of Chapter 143 of the North Carolina General Statutes. This program requires permits for facilities that operate “sewer system[s], treatment works, or disposal system[s] within the State,” and includes a section for facilities that discharge to surface water as well as a section for those that do not. N.C. Gen. Stat. §§ 143-215.1(a)-(d).

7. In 1989, the General Assembly amended Part 1 in a Session Law entitled, “An Act to Require Cumulative Impact be Considered Prior to Issuing CAMA Water Pollution Control Permits” to include a requirement in permitting decisions “that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.” (The “alternatives requirement”). S.L. 1989-51; N.C. Gen. Stat. § 143-215.1(b)(2).

8. Respondent subsequently incorporated the alternatives requirement in a regulation:

Designs for facilities permitted under this Section shall use the practicable waste treatment and disposal alternative with the least adverse impact on the environment in accordance with G.S. 143-215.1(b)(2).

15A N.C.A.C. 2T .0105(f).

9. In 1995, the General Assembly amended Article 21 of Chapter 143 to create a separate and distinct Part 1A via Senate Bill 1217, “An Act to Implement Recommendations of the Blue Ribbon Study Commission on Agricultural Waste.” S.L. 1995-626 (eff. June 21, 1996).

10. The new permitting program established under Part 1A was specifically for animal waste management systems at animal feeding operations (the “AFO Program”) and recognized that these operations “provide significant economic and other benefits to this State.” N.C. Gen. Stat. § 143-215.10A. The AFO Program was created to “protect water quality and promote innovative systems and practices while minimizing the regulatory burden.” N.C. Gen. Stat. § 143-215.10A.

11. Part 1A also stated the General Assembly’s desire to encourage the implementation of alternative technologies for the protection of the environment:

The Commission shall encourage the development of alternative and innovative animal waste management technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the prompt implementation of alternative and innovative animal waste management technologies and that are demonstrated to provide improved protection to public health and the environment.

N.C. Gen. Stat. § 143-215.10C(g).

12. Article 21 now provides for permitting animal waste management systems under either Part 1 or Part 1A. N.C. Gen. Stat. § 143-215.1(a)(12).

13. On July 2, 2021, Governor Cooper signed into law Session Law 2021-78. (“2021 Farm Act”) that amended the “Applications and Permits” section of Part 1A. Section 11(d) of the 2021 Farm Act directed Respondent to develop a new general permit by July 2, 2022 for animal operations that intend to utilize anaerobic digesters to capture methane gas for use as a renewable energy source. Section 11(d) further instructed Respondent that the new general permit must include conditions necessary to “describe and authorize the construction, monitoring, and proper operation of farm digester systems” and “the same conditions that are included in the currently existing general permits for animal operations.”

14. The “currently existing general permits” at the time the 2021 Farm Act was enacted was the 2019 Swine Waste Management System General Permit (AWG100000) hereinafter referred to as the 2019 General Permit.

15. Following the enactment of the 2021 Farm Act, Respondent developed a general permit for existing animal operations wishing to utilize an anaerobic digester. In late 2021 and early 2022, Respondent held three stakeholder meetings, conducted community outreach, and developed a draft permit. After the draft permit was released for public notice and comment Respondent held four additional public meetings regarding the permit.

16. Thereafter, Respondent issued the general permit for swine operations with digesters on June 30, 2022, with an effective date of July 1, 2022, and an expiration date of September 30, 2024 (the “2022 General Permit”).

17. Petitioners allege Respondent violated a provision contained in Part 1, Article 21 of Chapter 143. Specifically, Petitioners allege Respondent failed to apply the alternatives requirement under N.C. Gen. Stat. § 143-215.1(b)(2) and 15A N.C.A.C. 2T .0105(f).

18. Respondent conceded that it did not attempt to implement the Alternatives Requirement in the 2022 General Permit. *See* Aug. 31, 2022 Joint Motion to Amend Scheduling Order ¶ 4(c). Respondent contends that the Part 1 Alternatives Requirement is inapplicable to the 2022 General Permit.

19. This Tribunal has had previous occasion to address the applicability of N.C. Gen. Stat. § 143-215.1(b)(2) to individual Part 1A permits. *See* Final Decision, *Env't'l Just. Cmty. Action Network v. N.C. Dep't of Env't'l. Quality*, 21 EHR 02068, 21 EHR 02069, 21 EHR 02070, & 21 EHR 02071 (Jan. 11, 2022) (consolidated cases).

20. The prior case involved permits issued to four farms for the addition of digesters to capture methane from existing animal waste management systems. Those permits were issued before passage of the 2021 Farm Act and before issuance of the 2022 General Permit. In that case, this Tribunal found: (a) the language and structure of Article 21 demonstrate that Part 1A is distinct from Part 1; (b) the General Assembly's careful distinction between Part 1 and Part 1A is not new, especially in reference to Section 143-215.1(b)(2); and (c) the legislative history of the State's AFO Program establishes that Part 1 and Part 1A are, in fact, distinct and do not overlap, except in those limited instances where the General Assembly has explicitly directed it.

21. The Final Decision in that case was appealed to the New Hanover County Superior Court, which upheld the Final Decision without adopting any Findings of Fact or Conclusions of Law. *See* Order, *Env't'l. Just. Cmty. Action Network v. N.C. Dep't of Env't Quality*, 22-CVS-443 (Superior Ct. Div., New Hanover Cnty., Aug. 18, 2022).¹

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. Notice of Hearing was provided to all Parties in accordance with N.C. Gen. Stat. § 150B-23(b).

3. 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).

4. This contested case is subject to disposition on summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure; N.C. Gen. Stat. § 150B-33(b)(3a); and 26 N.C. Admin. Code 3.0105 and .0115.

5. To succeed in a contested case before the Office of Administrative Hearings, Petitioners bear the burden of showing by a preponderance of the evidence (1) that the respondent agency substantially prejudiced its rights; and (2) that the agency exceeded its authority or jurisdiction,

¹ Petitioners appealed the adverse decision of the New Hanover Superior Court to the Court of Appeals, which appeal is currently pending.

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).

6. 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). The moving party may meet this burden by showing an essential element of the opposing party's claim is nonexistent, or that the opposing party will be unable to produce evidence to support an essential element of the claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

7. 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).

8. 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).

9. 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).

10. “[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor the nonmoving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted).

11. The North Carolina Administrative Procedure Act (“APA”) APA, provides that “[t]he Administrative Law Judge shall decide the case based upon a preponderance of the evidence, giving 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. Gen. Stat. § 150B-34(a).

Part 1 vs. Part 1A

12. In 1967, the General Assembly enacted Part 1 of Article 21 of Chapter 143, which governs sources of water pollution. Part 1 contains the generally applicable alternatives requirement under the “Commission’s Power as to Permits.” N.C. Gen. Stat. § 143-215.1(b).

13. In 1995, the General Assembly formed a “Blue Ribbon Study Commission” to study, among other issues, “Methods of disposing of and managing agriculture waste that have fewer adverse impacts than those methods currently in use in this State.” S.L. 1995-542, § 4.1(2).

14. In 1995, the General Assembly also created Part 1A of Article 21 of Chapter 143 which provided for extensive regulation of animal waste management systems by forming a permitting program for “Animal Waste Management Systems.” Part 1A imposes many specific and proscriptive conditions for animal waste management systems at existing farms including the requirement to develop an “animal waste management plan” that includes testing and monitoring requirements. N.C. Gen. Stat. § 143-215.10C. For new or expanded farms, Part 1A provides for extensive review by the agency to ensure compliance with a multitude of new performance standards. N.C. Gen. Stat. § 143-215.10I.

15. Far from ignoring the general alternatives requirement included by the General Assembly in Part 1, the new Part 1A included a more proscriptive procedure for Respondent to follow in implementing alternative and innovative technologies to protect both public health and the environment specifically for animal waste management systems. N.C. Gen. Stat. § 143-215.10C(g).

16. N.C. Gen. Stat. § 143-215.1(a)(12), contained in Part 1 of Article 21, states that no person may “[c]onstruct or operate an animal waste management system, as defined in G.S. 143-215.10B, without obtaining a permit under either this Part or Part 1A of [Article 21 of Chapter 143].”

17. The North Carolina Supreme Court has noted that Part 1A and the Swine Farm Siting Act “are so comprehensive in scope that the General Assembly must have intended that they comprise a ‘complete and integrated regulatory scheme’” for regulating animal waste management systems. N.C. Gen. Stat. §§ 143-215.10A to 143-215.10M. *See also Craig v. Cnty. of Chatham*, 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002)

18. The specific and extensive regulation of animal waste management systems under Part 1A supersede the general requirement of an “alternatives requirement ” given in N.C. Gen. Stat. § 143-215.1(b)(2). *High Rock Lake Partners, LLC v. N.C. Dep’t. of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) (citing *State ex Rel. Utils. Comm’n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 193 (1977)).

19. Where the specific statutory regime is “clear and unambiguous, [Tribunals] are not permitted to engage in statutory construction in any form. This [Tribunal] may not construe the statute *in par materia* with any other statutes, including those that treat the same issue generally.” *High Rock Lake Partners, LLC*, 366 N.C. at 322, 735 S.E.2d at 305.

The Farm Act of 2022 and Farm Digesters

20. The 2021 Farm Act defines a “farm digester system” as “a system, including all associated equipment and lagoon covers, by which gases are collected and processed from an animal waste management system for the digestion of animal biomass for use as a renewable energy resource.” S.L. 2021-78, § 11(d); N.C. Gen. Stat. § 143-213(12a).

21. The 2021 Farm Act set a strict one-year deadline for Respondent to draft and issue the 2022 General Permit. The Act set restrictions on what conditions could be included in the permit. Section 11(d) of the Act mandates that “[i]n addition to conditions required to describe and authorize the construction, monitoring, and proper operation of farm digester systems, the general permit shall contain the same conditions that are included in the currently existing general permits for animal operations.”

22. The 2019 Swine Waste Management System General Permit No. AWG100000 (“2019 Swine General Permit”) was the “currently existing general permit” for swine operations at the time.

23. As required by the 2021 Farm Act, DEQ issued the Swine Farm Digester Waste Management System General Permit No. AWG400000 (“Digester General Permit”) on June 30, 2022. The Digester General Permit is the subject of this contested case.

24. The 2022 General Permit was developed and issued in accordance with the 2021 Farm Act and Part 1A of Article 21. It was not issued under Part 1.

25. The Digester General Permit authorizes farms that receive Certificates of Coverage to construct and operate synthetically-lined and covered anaerobic digesters and related infrastructure at existing animal waste management systems. The anaerobic digesters are designed to capture biogas that is generated from the anaerobic treatment of swine waste.

ANALYSIS

In an effort to harness a renewable energy source, Swine farmers sought, and the General Assembly encouraged them, to harness methane produced by the anaerobic digestion of swine waste. The 2021 Farm Act was passed and signed into law by the Governor to proscribe the permitting procedure that farms seeking to install the necessary equipment to produce the environmentally preferred fuel should use for approval by Respondent. The Act served to amend Part 1A under N.C. Gen. Stat. § 143-215.10C to provide Respondent the permitting conditions to be added to the existing general permits already issued under Part 1A.

While general consensus favored the production of non-fossil fuel based methane as a fuel, Petitioners objected to the issuance of the amended general permits. Opposed to the covering of hog lagoons for the production of the environmentally friendly fuel, Petitioners argue that Respondent failed to implement N.C. Gen. Stat. § 143-215.1(b)(2)—the general alternatives requirement—before granting the General Permit. Respondent freely admits that they did not implement the alternatives analysis under Part 1 arguing that it does not apply.

While all parties stipulated that Petitioners' standing as a person aggrieved would not be challenged, no such agreement was reached as to whether the Respondent's decision not to implement the alternatives analysis substantially prejudiced the Petitioners. Petitioners did not offer evidence that showed whether an alternative to the covered, anaerobic digesters proposed by the farms would substantially alleviate the concerns expressed by Petitioner. Before reaching that determination, however, Respondent moved for summary judgment arguing simply that the alternatives analysis under Part 1 and advocated for by Petitioner does not apply as a matter of law.

The relevant sections of North Carolina's laws covering the prevention of water pollution are contained in N.C. Gen. Stat. § 143-215.1 and passed into law in 1967. Years later and in response to a burgeoning swine industry and the environmental challenges of the industry, Governor Easley and the General Assembly authorized both the creation of (1) a "Blue Ribbon Study Commission" under S.L. 1995-542 to, among other issues, study the anti-pollution technologies that both existed at the time and other methods that would have fewer adverse impacts and (2) a separate permitting program for animal waste management systems under S.L. 1995-626.

No speculation is needed as to the Legislative intent for these actions as the new law was clear: Section 143-215.10A under Part 1A entitled, "Legislative Findings and Intent" stated, *inter alia*, "the General Assembly intends to establish a permitting program for animal waste management systems that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden."

Significantly, rather than rely on language under the existing Part 1, including the alternatives analysis that is required for all permit decisions in that part (advocated for by Petitioner in this case), the General Assembly proscribed a multitude of new requirements under these new permits. These include an extensive animal waste management plan the eight components of which were proscribed in the newly created Part 1A. The law also proscribed a subset of those components for inclusion in permits issued under Part 1A for dry litter operations.

The new law also specifically included the Legislature's desire to encourage "the development of alternative and innovative animal waste management technologies." N.C. Gen. Stat. § 143-215.10C(g). The law even proscribed the process Respondent should follow in considering these alternative technologies:

The Commission shall encourage the development of alternative and innovative animal waste management technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the prompt implementation of alternative and innovative animal waste management technologies and that are demonstrated to provide improved protection to public health and the environment.

N.C. Gen. Stat. § 143-215.10C(g).

These requirements are far more specific and proscriptive than the very general statement given in Part 1 governing all permittees under N.C. Gen. Stat. § 143-215.1(b)(2) that Petitioner argues is subject to all permittees including those covered under Part 1A:

. . . All permit decisions shall require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.

The Tribunal is asked by Petitioner to ignore the reason given in statute for the creation of Part 1A—to provide a permitting program for animal waste management systems and that contains specific requirements and encouragement for the development of alternative technologies more protective of public health and the environment in favor of the older and much more general alternatives requirement of Part 1.

The case before this Tribunal is narrower still. Permitting for farms seeking to install and operate anaerobic digesters is described in changes made to N.C. Gen. Stat. § 143-215.10C, that is, the separate permitting program for animal waste management systems under Part 1A. The General Assembly included this new permitting procedure in Part 1A knowing that N.C. Gen. Stat. § 143-215.1(a)(12) only allows permits for animal waste management systems under Part 1 or Part 1A.

It is unimaginable to think that the very proscriptive nature of Part 1A, including the recent addition to provide for the permitting of anaerobic digesters, and that includes the explicit consideration of alternative and innovative technologies less impactful to public health and the environment should be swallowed up by the much older and far more general alternative requirement of Part 1. As such N.C. Gen. Stat. § 143-215.1(b)(2) does not apply to permits issued under Part 1A. Similarly, 15A N.C.A.C. 2T .0105(f) is void as applied to facilities permitted under Part 1A.

Permitting procedures and requirements under Part 1 and Part 1A are not duplicative. The two permit programs are mutually exclusive. The alternatives requirement sought by Petitioner applies to permits issued under Part 1. Part 1A contains its own alternatives requirement that is intentionally more proscriptive.

DECISION

BASED UPON the foregoing, the Undersigned hereby (1) finds 15A N.C.A.C. 2T .0105(f) is void as applied to facilities permitted under Part 1A; (2) DENIES Petitioners' Motion for Summary Judgment; (3) GRANTS summary judgment in favor of Respondent and Respondent-Intervenors; and (4) AFFIRMS the issuance of the 2022 General Permit.

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 20th day of March, 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 20th day of March, 2023.



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