

STATUTES AND RULES AT ISSUE

N.C.G.S. § 150B-23(a)
N.C.G.S. § 113A-50, *et seq.*
15A N.C.A.C. 04A .0105
15A N.C.A.C. 04B .0105
15A N.C.A.C. 04B .0107
15A N.C.A.C. 04B .0113
15A N.C.A.C. 04B .0124(e)
15A N.C.A.C. 04C .0106
15A N.C.A.C. 04C .0108

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact and Conclusions of Law. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

BASED UPON the foregoing and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

FINDINGS OF FACT

1. Petitioner Holmes Development & Realty, LLC is the owner of the Rutledge subdivision near Supply, in Brunswick County, North Carolina, containing approximately 53.8 acres. (Respondent’s Exhibit 3).
2. Respondent, North Carolina Department of Environment and Natural Resources (DENR), is a State agency established under N.C.G.S. Chapter 113A, Article 4, and has been vested with statutory authority to enforce certain of the State’s environmental pollution laws, including laws enacted to control sedimentation damage under the Sedimentation Pollution Control Act as set forth in N.C.G.S. § 113A-50, *et seq.*, and 15A N.C.A.C., Chapter 4.
3. Pursuant to N.C.G.S. § 113A-54.1, Petitioner caused to be filed a “Financial Responsibility/Ownership Form” with Respondent, on or about March 27, 2008. (Respondent’s Exhibit 3).
4. Respondent reviews submitted Sedimentation Plans to assess appropriate erosion control measures, calculations, and placements. Respondent will approve a Sedimentation Plan if there is a “reasonable chance” the plan will work.

5. According to N.C.G.S. § 113A-52(6), a “land-disturbing activity” is “any use of the land by any person in residential...development...that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.”

6. Pursuant to N.C.G.S. § 113A-57, prior to conducting a land-disturbing activity of more than one acre, an “erosion and sedimentation control plan” must be submitted and approved by DENR.

7. Petitioner caused to be filed an erosion and sedimentation control plan (Sedimentation Plan) on or about March 27, 2008. The plan was approved by DENR on April 22, 2008. (Respondent’s Exhibits 2 & 4).

8. Respondent has the authority, pursuant to N.C.G.S. § 113A-61.1, to inspect areas with land-disturbing activities to assess compliance with the filed Sedimentation Plan. Routine inspections are performed by DENR staff to ensure compliance with filed Sedimentation Plans.

9. On April 19, 2011, Respondent conducted an inspection of the Rutledge subdivision to determine compliance with SPCA. Inspections also occurred on June 22, 2011, August 11, 2011, September 13, 2011, September 22, 2011, and October 19, 2011. (Respondent’s Exhibits 5, 6, 9, 12, 14, & 16).

10. Respondent has the authority, pursuant to N.C.G.S. § 113A-64, to assess civil penalties for violations of SPCA, including non-compliance with filed Sedimentation Plans. Civil penalties are not to exceed \$5,000 per day for each day of a continuing violation.

11. Pursuant to its statutory authority, Respondent has established criteria to be considered prior to assessing civil penalties for violations of SPCA under 15A N.C.A.C. 04C .0106. (Respondent’s Exhibits 17 & 18).

12. On October 3, 2011, Respondent issued a Civil Penalty Assessment for Violations of SPCA to Petitioner. (Respondent’s Exhibit 2).

13. The Civil Penalty Assessment lists “Findings of Fact” which demonstrate, in pertinent part, that Petitioner was engaged in a land-disturbing activity, that several inspections revealed that he was in violation of SPCA, and that sedimentation damage had occurred as a result of those violations.

14. The Civil Penalty Assessment alleges the existence of the following violations, totaling ninety-three (93) days, extending from June 22, 2011 through September 22, 2011, at Rutledge:

- Failure to comply with the filed Sedimentation Plan (N.C.G.S. § 113A-57(5))
- Failure to provide adequate ground cover to restrain erosion after completion of construction (N.C.G.S. § 113A-57(3); 15A N.C.A.C. 04B .0107(b))
- Failure to install sedimentation and erosion control devices sufficient to restrain sedimentation generated by land-disturbing activities (N.C.G.S. § 113A-57(3))

- Failure to take all reasonable measures to protect public and private property from damage caused by land-disturbing activities (15A N.C.A.C. 04B .0105)
- Failure to provide a proper buffer zone in proximity to a natural watercourse (N.C.G.S. § 113A-57(1); 15A N.C.A.C. 04A .0105(4))
- Failure to maintain proper angle to allow for vegetative cover or other adequate erosion control devices or structures (N.C.G.S. § 113A-57(2))
- Failure to plant or provide permanent ground cover, devices or structures sufficient to restrain erosion, within 21 days of completion of grading (N.C.G.S. § 113A57(2))
- Failure to install and maintain all erosion and sedimentation control measures pursuant to filed Sedimentation Plan and SPCA (15A N.C.A.C. 04B .0113).

15. Respondent measures the daily amount of civil penalty assessed using the following criteria:

- Number of violations
- Degree and extent of harm caused by violation
- Adherence to Sedimentation Plan/Effectiveness of corrective steps
- Prior record of violations
- Willfulness of violation
- Money saved by violations through non-compliance
- Cost of rectifying damage
- Staff investigative costs

(Respondent's Exhibits 17 & 18).

16. Respondent issued six, ten dollar (\$10) daily penalties for separate violations, a three hundred dollar (\$300) daily penalty for the degree of harm caused, a two hundred dollar (\$200) daily penalty for noncompliance with the plan, and a two hundred dollar (\$200) daily penalty for willful violation. The daily penalties totaled seven hundred sixty dollars (\$760) over a ninety-three (93) day period, for a grand total of seventy thousand, six hundred eighty dollars (\$70,680). (Respondent's Exhibit 18).

17. Francis Nevils is the Section Chief of the Land Quality Section of DENR. In that capacity, he is responsible as the final authority for determining whether to enforce civil penalty actions and for calculating the amount of daily penalty assessed for violations of SPCA.

18. Mr. Nevils testified at the March 23, 2012, hearing that he used established agency criteria to calculate the daily penalty assessed for Petitioner's SPCA violations. He levied ten dollars per day for each of six different statutory and/or rule violations. He levied three hundred dollars per day for "severe" harm caused by the violation, noting that "several inspections" had indicated that degree of damage on-site. He levied two hundred dollars per day for lack of adherence to the sedimentation plan and/or lack of effectiveness of corrective action by Petitioner. Finally, he levied two hundred dollars per day for "willful" violation of SPCA, noting that he had arrived at this figure after consultation with colleagues and that the continuing violations indicated the requisite "knowing" level of intent. (Respondent's Exhibit 18)

19. The “Findings of Fact” contained within the Civil Penalty Assessment make no findings pertaining to the severity or willfulness of Petitioner’s alleged violations of SPCA. (Respondent’s Exhibit 2).

20. The April 19, 2011, September 22, 2011, and October 19, 2011, Sedimentation Inspection Reports indicate a “moderate” level of sedimentation damage. (Respondent’s Exhibits 5, 14, & 17).

21. The September 13, 2011, Sedimentation Inspection Report indicates that no sedimentation damage had occurred since the most recent inspection. (Respondent’s Exhibit 12).

22. The June 22, 2011, and August 11, 2011, Sedimentation Inspection Reports indicate a “severe” level of sedimentation damage. (Respondent’s Exhibits 6 & 12).

23. On or about August 12, 2011, Respondent notified Emily Hughes with the United States Army Corps of Engineers, via email, about Petitioner’s alleged sedimentation damage into adjoining wetland areas. The Corps met with Petitioner and inspected the site on August 24, 2011. On September 9, 2011, Emily Hughes emailed Respondent and advised them that the issues were “[f]airly minor on [the Corps’] part,” and that a Notice of Violation was not necessary.

24. A Sedimentation Inspection Report filed following an inspection on April 19, 2011, indicates violations of SPCA, but lacks details about specific locations, mentioning only “wetlands and natural watercourses,” and the “[e]astern side of the bridge crossing.” The only corrective measures indicated are that “[c]heck dams are not being maintained.” There are multiple check dams listed on the Sedimentation Plan, but none are specified in the Report. (Respondent’s Exhibits 4 & 5).

25. Nick Mills is an inspector for DENR. In that capacity, he conducted inspections of Petitioner’s site on June 22, 2011, and August 11, 2011. During testimony, Mr. Mills indicated that he thought Petitioner had made attempts, albeit insufficient, to correct the areas found to be in violation of SPCA. Mr. Mills testified that he estimated that remediation attempts had occurred in 25 to 40 per cent of the area in violation (Respondent’s Exhibits 6 & 9); (T. pp. 154, 167-8, & 180).

26. Mr. Mills’ June 22, 2011, Sedimentation Inspection Report indicates numerous violations of SPCA but lists no specific areas in violation. Corrective measures are listed, but are not site-specific and merely recite the general statutory provisions enumerated by SPCA. (Respondent’s Exhibit 6).

27. A Notice of Violations was issued on June 27, 2011, as a result of the June 22, 2011, inspection. The Notice lists general allegations of violations and recites the general statutory provisions of SPCA. No specific details of problem areas or corrective measures are provided. Petitioner was given approximately thirty days to correct all violations. (Respondent’s Exhibit 8).

28. Mr. Mills' August 11, 2011, Sedimentation Inspection Report indicates numerous violations of SPCA, but lists no specific areas in violation. Corrective measures are listed, but are not site-specific and merely recite the general statutory provisions enumerated by SPCA. Comments were provided indicating that "some erosion control measures installed since last inspection are improperly installed and failing to retain sediment on site." Specific problem areas were not identified. (Respondent's Exhibit 9).

29. A Notice of Continuing Violations was issued on August 16, 2011, as a result of the August 11, 2011, inspection. The Notice lists general allegations of violations and recites the general statutory provisions of SPCA. No specific details of problem areas or corrective measures are provided. Petitioner was notified that the matter was being referred for enforcement of civil penalties up to \$5,000 per day. (Respondent's Exhibit 11).

30. Petitioner submitted evidence of the potential existence of beaver activity that may have contributed to continuing violations at the Rutledge site. Inspectors Lambe and Mills both acknowledged that Petitioner advised them of this potential mitigating factor. Inspector Lambe acknowledged during his testimony at the contested hearing on March 23, 2012, that beaver activity could possibly have contributed to some of the damage at the Rutledge site. Despite their knowledge, neither inspector included this information in their inspection reports. (T. pp. 58, 187, 211, & 229).

31. Mr. Nevils testified at the contested case hearing on March 23, 2012, that he was not aware of any claims of beaver damage when he calculated and assessed the penalty for Petitioner's alleged violations. (T. p. 59). Mr. Nevils further testified that beaver damage would have mitigated any assessment for a "willful" violation. (T. p. 66).

32. Photographs were taken at the June 22, 2011, and August 11, 2011, inspections which demonstrate areas of sedimentation damage and specific violations of SPCA at Rutledge. While the photographs demonstrate that Petitioner was in violation of SPCA, they do not correlate in any specific way to actual violations as listed in any Notice of Violations, or Sedimentation Inspection Report. (Respondent's Exhibits 7 & 10).

33. Brian Lambe is an inspector for DENR. In that capacity, he conducted inspections of Petitioner's site on September 13, 2011, September 22, 2011, and October 19, 2011. During testimony, Mr. Lambe indicated that he thought Petitioner was trying to make repairs to the areas found to be in violation of SPCA. Mr. Lambe further testified that Petitioner had constructed "emergency measures" not included on approved plan. (Respondent's Exhibits 12 & 14); (T. p. 11).

34. Mr. Lambe issued the September 13, 2011, September 22, 2011, and October 19, 2011, Sedimentation Inspection Reports for Petitioner's site. The Reports offer significant detail as to the specific problem areas, their locations, and how to correct the deficiencies. This level of detail is notably absent in all other Sedimentation Inspection Reports offered in the record. During testimony, Mr. Lambe noted that he understood his role was to help people and the detail provided in his Reports furthered that end. (Respondent's Exhibits 12, 14, & 16); (T. pp. 211-4).

CONCLUSIONS OF LAW

1. Pursuant to 15A N.C.A.C. 04C .0108, 15A N.C.A.C. 01B .0202 and Chapter 150B of the North Carolina General Statutes, all parties are properly before the Office of Administrative Hearings (OAH). OAH has jurisdiction both over the parties and the subject matter at issue.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

3. Petitioner is a “person” within the meaning of N.C.G.S. § 113A-52(8) and under 15A N.C.A.C. 04A .0105.

4. A land-disturbing activity over one acre in size occurred on the Rutledge site within the meaning of N.C.G.S. § 113A-52(6).

5. Respondent has demonstrated, by a preponderance of evidence, that Petitioner failed to precisely follow his approved Sedimentation Plan, in violation of N.C.G.S. § 113A-57(5) and 15A N.C.A.C. 04B .0113.

6. Respondent has demonstrated, by a preponderance of evidence, that Petitioner failed to provide adequate ground cover sufficient to restrain erosion in violation of 15A N.C.A.C. 04B .0124(e).

7. Respondent has demonstrated, by a preponderance of evidence, that Petitioner failed to install sedimentation and erosion control devices sufficient to retain sediment generated by the land-disturbing activity, in violation of N.C.G.S. § 113A-57(2) and (3).

8. Respondent has demonstrated, by a preponderance of evidence, that Petitioner failed to provide an adequate buffer zone, as defined in 15 A N.C.A.C. 04A .0105(4), in proximity to a lake or watercourse, in violation of N.C.G.S. § 113A-57(1).

9. Respondent has demonstrated, by a preponderance of evidence, that Petitioner failed to maintain properly graded slopes at an angle sufficient to support erosion restraining measures, in violation of N.C.G.S. § 113A-57(2).

10. Pursuant to 15A N.C.A.C. 04C .0107(a), Respondent is required to issue a Notice of Violation that “describes the violation with reasonable particularity...” and that it “shall specify the actions to be taken....”

11.. Respondent has failed to provide, with reasonable particularity, descriptions of alleged violations and has also failed to adequately specify the actions to be taken to correct the alleged violations occurring at the Rutledge Subdivision for the period beginning June 22, 2011, and ending September 22, 2011.

12. Pursuant to N.C.G.S. § 113A-64(a) and 15A N.C.A.C. 04C .0103, Respondent has the authority to assess a civil penalty against Petitioner for violations of SPCA.

13. The criteria used by Respondent in calculating the amount of daily penalty assessed to Petitioner for “severity” of sedimentation damage is not entirely supported by the record. Specifically, inconsistent internal assessments of the severity of damage, combined with an outside assessment by the U.S. Army Corps of Engineers categorizing the damage as “fairly minor,” does not support the imposition of “severe” damage actually assessed.

14. The criteria used by Respondent in calculating the amount of daily penalty assessed to Petitioner for “willfulness” of the violation is not entirely supported by the record and is arbitrary. Specifically, Respondent failed to consider evidence of Petitioner’s attempts at repair and compliance, despite an overwhelming lack of specificity with respect to actual areas in violation and corrective measures needed. Additionally, despite investigator knowledge of the potential for beaver activity as a cause of continued violations, the record does not reflect any consideration of the potential contribution of beaver activity as mitigation in determining daily penalty assessment.

15. The North Carolina Court of Appeals has held that, in the context of SPCA violations, willfulness occurs when “DENR put[s] Petitioner on notice of its violation and [gives] Petitioner the opportunity to correct the situation...[and] Petitioner fail[s] to act.” *Clark Stone Co., Inc. v. NCDENR*, 164 N.C.App. 24, 40, 594 S.E.2d 832, 842. Here, Petitioner did, in fact, take action to correct his violations, despite the lack of required specificity and particularity. Petitioner’s actions directly contradict Respondent’s assertions of willful SPCA violations.

DECISION

The evidence in the record demonstrates that Petitioner was in violation of the SPCA both when it conducted a land-disturbing activity while failing to precisely follow its approved Sedimentation Plan and when it failed to adequately maintain its erosion control measures at the Rutledge site. Respondent failed to consider all available evidence when imposing both the severity and the willfulness factors in its daily penalty assessment. The varying opinions of multiple inspectors, combined with a lack of evidence of any off-site sedimentation, or harm to the property of any other entity, indicate that the harm was “slight” to “moderate” by DENR standards. Further, the Respondent did not demonstrate the existence of any egregious factors demonstrating willfulness, and failed to consider evidence of mitigating circumstances surrounding Petitioner’s SPCA violations. Having heard the evidence, and considered all of the factors and circumstances surrounding this case, I find that Petitioner should be, and hereby is, assessed a civil penalty in the amount of three hundred sixty dollars (\$360) per day for a 91 day penalty period, for a total of thirty-two thousand, seven hundred sixty dollars (\$32,760). This penalty includes ten dollars per day for six different statutory and rule violations, one hundred dollars per day for severity of harm caused by the violations, and two hundred dollars per day for failure to adhere to the approved Sedimentation Plan.

NOTICE AND ORDER

The North Carolina Department of Environment and Natural Resources is the agency that will make the final decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), and (b3) enumerate the standard of review and procedures the agency must follow in making its Final Decision, and adopting and/or not adopting the Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. § 150B-36(b)(3) requires the agency to serve a copy of its Final Decision on each party, and furnish a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, NC 27699-6714.

This the 29th day of June, 2012.

Fred G. Morrison Jr.
Senior Administrative Law Judge