

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13EHR16148

<p>North Carolina Coastal Federation Cape Fear River Watch Penderwatch And Conservancy Sierra Club, Petitioners,</p> <p>v.</p> <p>North Carolina Department Of Environment And Natural Resources, Division of Air Quality, Respondent,</p> <p>and</p> <p>Carolina Cement Company LLC, Respondent Intervenor.</p>	<p style="text-align: center;">FINAL DECISION</p>
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Petitioners commenced the above-entitled matter by the filing of a contested case Petition in the Office of Administrative Hearings on August 5, 2013. Petitioners alleged that Respondent substantially prejudiced Petitioners' rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule by issuing Air Permit No. 07300R10 ("Air Permit R10") to Respondent-Intervenor.

Air Permit R10 is a modification of a previous air quality permit issued to Respondent-Intervenor, Air Permit No. 07300R09 ("Air Permit R09"). Petitioners previously filed a contested case petition regarding the issuance of Air Permit R09 by Respondent, which contested case has OAH Case Number 12 EHR 02850. On July 24, 2012, Administrative Law Judge Beecher R. Gray entered an order dismissing certain of Petitioners' claims in Case 12 EHR 02850, and on September 23, 2013, Administrative Law Judge Beecher R. Gray entered a Decision Granting Summary Judgment in Favor of Respondent and Respondent-Intervenor in Case 12 EHR 02850, which disposed of all remaining claims in that case.

All of Petitioners' allegations in the contested case petition in the present case are the same as the allegations asserted by Petitioners in Case 12 EHR 02850. On September 24, 2013, Respondent and Respondent-Intervenor each filed a Motion to Dismiss and Motion for Summary Judgment in the present case. The legal and factual basis for such motions was the same legal and factual basis asserted to support the motions to dismiss and motions for summary judgment filed by Respondent and Respondent-Intervenor in Case 12 EHR 02850. Petitioners filed a

Response to the referenced motions in the present case on September 26, 2013. The Parties have agreed that the hearing on summary judgment motions held on August 7, 2013 in Case 12 EHR 02850 shall be treated as the hearing on Respondent's and Respondent-Intervenor's Motions for Summary Judgment in this case.

Based on consideration of the pleadings on file, as well as the memoranda of law, including the documents referenced therein and attachments thereto, and including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, briefs, and arguments of counsel provided in Case 12 EHR 02850 (which are hereby incorporated by reference and relied on in connection with the present motion), the undersigned Administrative Law Judge finds that (1) Respondent's and Respondent-Intervenor's Motions to Dismiss claims related to Respondent-Intervenor's proposed quarry (the "Quarry Claims," pp. 6-8 of the Petition for Contested Case) for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted (N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(b)(6), respectively) should be granted; (2) there are no genuine issues of material fact regarding the issue of whether Petitioners are "persons aggrieved" with standing to commence this contested case; and (3) judgment is warranted as to all of Petitioners' other claims, as there are no genuine issues of material fact regarding whether Petitioners were "substantially prejudiced." N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly:

1. Respondent's Motion to Dismiss and Respondent-Intervenor's Motion to Dismiss are ALLOWED. The Quarry Claims are DISMISSED.
2. Petitioners are "persons aggrieved" with standing to commence this contested case. *See* N.C. Gen. Stat. § 150B-23(a); *Empire Power Co. v. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994).
3. Respondent's Motion for Summary Judgment and Respondent-Intervenor's Motion for Summary Judgment are GRANTED as to all remaining issues on the ground that the "agency named as the respondent" did not "substantially prejudice[] the petitioner[s]' rights." N.C. Gen. Stat. § 150B-23(a). The undersigned Administrative Law Judge has not ruled on the alternative bases for summary judgment set out in the motions of Respondent and Respondent-Intervenor given that the ruling that Petitioners have not been substantially prejudiced by the agency's action is dispositive of all claims and makes it unnecessary to reach the alternative bases for summary judgment raised by Respondent and Respondent-Intervenor.

NOTICE

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

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 Wake County or in the Superior Court of the county in which the party resides. 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. N.C. Gen. Stat. § 150B-45(a). 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. N.C. Gen. Stat. §150B-47. 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.

This the 4th day of November, 2013.

Beecher R. Gray
Administrative Law Judge