

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
13EHR17906

<p>Nc Coastal Federation, Cape Fear River Watch, Penderwatch and Conservancy, Sierra Club Petitioner v. North Carolina Department Of Environment And Natural Resources, Division of Air Quality Respondent and Carolinas Cement Company LLC Respondent-Intervenor</p>	<p style="text-align: center;">FINAL DECISION</p>
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This contested case is the third of three (3) contested case proceedings filed by Petitioners North Carolina Coastal Federation, Cape Fear River Watch, Penderwatch and Conservancy, and Sierra Club challenging three versions of an air permit issued by Respondent Division of Air Quality to Respondent-Intervenor Carolinas Cement Company LLC related to a proposed cement plant in Castle Hayne, New Hanover County, North Carolina. This matter is before the undersigned Administrative Law Judge on the following Motions: (1) Respondent’s Motion to Dismiss and Motion for Summary Judgment; (2) Respondent-Intervenor’s Motion for Summary Judgment and Motion to Dismiss in the Alternative; and (3) Petitioners’ Motion for Partial Summary Judgment.

Although a final decision granting summary judgment “that disposes of all issues in a contested case need not include findings of fact or conclusions of law,” N.C. Gen. Stat. § 150B-34(e), certain undisputed facts are relevant to the disposition of this matter.

UNDISPUTED FACTS

A. Background

Respondent-Intervenor proposes to construct and operate a Portland cement plant with a quarry in Castle Hayne, New Hanover County, North Carolina. In February 2008, Respondent-Intervenor submitted to Respondent an air quality permit application for the construction and operation of the proposed cement plant and a quarry for the mining of limestone and marl, which are primary raw materials in cement production. Over four years later, on February 29, 2012, Respondent issued Air Quality Permit No. 07300R09 (the “R09 Permit”) to Respondent-Intervenor.

B. The First Contested Case – R09 Permit - 12EHR02850

On April 27, 2012, Petitioners filed a Petition for a Contested Case Hearing challenging Respondent's issuance of the R09 Permit. That Petition initiated contested case number 12EHR02850 (the "R09 Case") in the Office of Administrative Hearings. Petitioners filed a Prehearing Statement in the R09 Case setting forth eighteen (18) claims, referred to throughout the contested cases as Issue 1 through Issue 18, each alleging an error by Respondent in issuing the air permit. On July 24, 2012, Administrative Law Judge Beecher R. Gray granted Respondent and Respondent-Intervenor's motions to dismiss issues 1, 2, 3, and 4, relating to the quarry, for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction.

Thereafter, each party moved for summary judgment on some or all of Petitioners' remaining claims. In their response brief of June 19, 2013, Petitioners withdrew and abandoned their claim with respect to total hydrocarbons ("THC") (Issue 17 of Petitioners' Prehearing Statement). Judge Gray conducted a hearing on the remaining issues addressed by the motions on August 7, 2013. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, as well as the affidavits, memoranda of law (including attachments thereto), and arguments of counsel, Judge Gray granted summary judgment (1) in favor of Petitioners on the issue of whether they were "persons aggrieved" with standing to commence a contested case under N.C. Gen. Stat. § 150B-23(a), and (2) in favor of Respondent and Respondent-Intervenor on all of Petitioners' remaining claims on the ground that the "'agency named as the respondent' did not 'substantially prejudice[] the petitioner[s'] rights,'" an essential element of each of Petitioners' claims. Although the parties had agreed prior to the hearing to withhold argument on Petitioners' claims related to particulate matter emissions limits (referred to by the parties as Issue 14 and Issue 15), Judge Gray included these claims in the Decision Granting Summary Judgment in Favor of Respondent and Respondent-Intervenor because "Petitioners' inability to demonstrate or forecast substantial prejudice" applied to all of their claims.¹

Judge Gray's dismissal of the quarry issues (Issues 1, 2, 3, and 4) and his Decision Granting Summary Judgment in Favor of Respondent and Respondent-Intervenor were reviewed by the Special Air Permit Appeals Committee of the Environmental Management Commission (the "EMC") for a final agency decision. Subsequent to the hearing on March 12, 2014, the EMC entered its Final Agency Decision on May 8, 2014. Upon review of the whole record and the arguments of the parties, the EMC adopted the decisions of Judge Gray and specifically ruled that: (1) Petitioners' Issues 1, 2, 3, and 4 were dismissed for failure to state claims upon which relief could be granted and for lack of subject matter jurisdiction; (2) Petitioners were "persons aggrieved" with standing to commence the contested case; and (3) Respondent did not "substantially prejudice" Petitioners' rights. Accordingly, the Final Agency Decision disposed of all claims in the R09 Case.

C. The Second Contested Case – R10 Permit - 13EHR16148

Subsequent to issuance of the R09 Permit, Respondent made minor technical modifications to the air permit and issued the modified permit as Air Quality Permit No.

¹ Because contested case 12EHR02850 was filed prior to the effective date of S.L. 2011-398 § 18 (making decisions of administrative law judges final agency decisions), the R09 Case went before the EMC for final agency decision.

07300R10 (the “R10 Permit”) on June 21, 2013. On August 5, 2013, Petitioners filed a Petition for a Contested Case Hearing that challenged the R10 Permit. Petitioners did not challenge any of the permit modifications. This second case was assigned contested case number 13EHR16148 (the “R10 Case”). The Petition in the R10 Case was substantially identical to the Petition filed in the R09 Case.

Respondent and Respondent-Intervenor made motions to dismiss Issues 1, 2, 3, and 4, and motions for summary judgment on all other claims. These motions were substantially the same as the respective motions made in the R09 Case. On November 4, 2013, Judge Gray issued a Final Decision in 13EHR16148 in favor of Respondent and Respondent-Intervenor dismissing Issues 1, 2, 3, and 4 and granting summary judgment on all remaining claims in the case. The Final Decision awarded the same relief on the same claims, on the same legal and factual bases, and based on the same evidence as the rulings in R09 Case. Specifically, Judge Gray ruled that: (1) Issues 1, 2, 3, and 4 failed to state claims upon which relief could be granted and lacked subject matter jurisdiction; and (2) Respondent did not “substantially prejudice” Petitioners’ rights. This disposed of all claims in the R10 Case on the same bases as in the R09 Case.

D. The Third Contested Case – R11 Permit - The Present Case

In 2013, Respondent made further modifications to the air permit and issued the modified permit as Air Quality Permit No. 07300R11 (the “R11 Permit”) on August 29, 2013. Petitioners commenced the present case on September 18, 2013 by filing a Petition for a Contested Case Hearing. With the exception of one claim related to particulate matter emissions, the Petition in this case is substantially identical to the Petitions filed in the R09 Case and the R10 Case. Further, the factual allegations and the evidence presented by Petitioners in this case are substantially identical to the factual allegations and the evidence presented in the R09 Case and the R10 Case. All of the parties agreed in this case that they would not engage in any new discovery on issues previously raised in the R09 Case and the R10 Case and further agreed to stay all discovery pending a ruling on summary judgment motions on the issue of whether Respondent substantially prejudiced Petitioners’ rights. *See* Joint Status Report, Motion to Further Amend Scheduling Order, and Motion to Stay Discovery (March 14, 2014).

Petitioners have filed a Motion for Partial Summary Judgment seeking a ruling that their rights were “substantially prejudiced” by Respondent. Respondent and Respondent-Intervenor have filed Motions for Summary Judgment seeking judgment that all of Petitioners’ claims are barred by the principles of collateral estoppel and/or *res judicata*. In the alternative, Respondent and Respondent-Intervenor have moved for summary judgment on the basis that Petitioners have failed to establish a genuine issue of material fact as to whether their rights were “substantially prejudiced” with regard to any of their claims, including their claim related to the modified particulate matter emissions limit first brought forth in the present case.

FINAL DECISION ON SUMMARY JUDGMENT

The doctrine of collateral estoppel “protect[s] litigants from the burden of re-litigating previously decided matters” and “promot[es] judicial economy by preventing needless

litigation.” *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986). The doctrine applies when the following requirements are met:

(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990) (quoting *King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973)). Rulings on summary judgment may be given preclusive effect, *Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55, *aff’d per curiam*, 352 N.C. 666, 535 S.E.2d 356 (2000), as well as dismissals under rule 12(b), *Hill v. West*, 189 N.C. App. 194, 198, 657 S.E.2d 698, 700 (2008). This doctrine applies to administrative decisions just as it applies in other tribunals. *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997). Each prerequisite for the application of collateral estoppel is present in the case at hand.

First, the issues to be concluded in this contested case are the same as those involved in the prior actions. The legal issues of (a) whether Issues 1, 2, 3, and 4 should be dismissed and (b) whether Respondent “substantially prejudiced” Petitioners’ rights are the same legal issues previously litigated and decided by Judge Gray and the EMC in the R09 Case and decided by Judge Gray in the R10 Case. Petitioners’ claims, allegations, and evidence in this contested case are the same as in the prior cases with respect to these legal issues. In the R09 Case, for example, Petitioners presented the affidavits of eight witnesses to support their claims, including the allegation (common to all of their claims) that their rights were substantially prejudiced by Respondent. In the current case, to demonstrate substantial prejudice, Petitioners have presented essentially the same affidavits from the same eight witnesses who make the same allegations that Judge Gray and the EMC have previously concluded were insufficient to demonstrate that Petitioners have been substantially prejudiced. Petitioners present no facts or legal arguments regarding substantial prejudice with regard to any issues in this case that are materially different from the facts and arguments presented in the previous cases. Accordingly, the question of whether the facts and law presented in this case amount to substantial prejudice, including as to Petitioners’ claim regarding particulate matter, has already been decided. While Petitioners do challenge the modification to the particulate matter emissions limit in the R11 Permit, this claim fails in the present case because of the prior rulings in the R09 Case and the R10 Case that Petitioners failed to demonstrate substantial prejudice based on the same evidence presented in this case.

Second, these issues were raised and actually litigated in the prior contested cases. In the prior contested cases, the parties vigorously litigated these issues over the course of more than eighteen months, engaged in extensive discovery, and filed hundreds of pages of briefs on dispositive motions. The EMC’s Final Agency Decision in the R09 Case and Judge Gray’s Final Decision in the R10 Case specifically address and enter judgment on these issues.

Third, these issues were material and relevant to the prior dispositions. Judge Gray and the EMC decided the R09 Case and the R10 Case on the grounds of (a) the failure of Issues 1, 2, 3, and 4 to state claims for which relief could be granted and lack of subject matter jurisdiction and (b) the insufficiency of evidence to demonstrate that Petitioners' rights were "substantially prejudiced" by Respondent. These very issues, raised once again in the present case, were the bases for the disposition of all of Petitioners' claims in both the R09 Case and the R10 Case and, therefore, were material and relevant in the prior proceedings.

Fourth, these issues were necessary and essential to the resulting judgments in the prior cases, as they were the sole grounds for the prior judgments and the disposition of all of Petitioners' claims in the two prior cases.

Therefore, the doctrine of collateral estoppel applies in this contested case and precludes Petitioners from re-litigating issues that were previously litigated and decided in the prior R09 and R10 Permit cases. Collateral estoppel requires this Court to afford Respondent and Respondent-Intervenor the same rights they were awarded in the prior decisions, which involved the same legal issues, the same parties, the same evidence, and the same material facts.

For the reasons discussed above, Respondent's and Respondent-Intervenor's motions for summary judgment on all of Petitioners' claims are GRANTED on the ground that Petitioners are collaterally estopped from re-litigating issues that were fully litigated and were necessary and essential to the final judgments in the two prior contested case hearings. Petitioners' motion is DENIED.

NOTICE

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 the date it was placed in the mail as indicated by the date on 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.

This the 1st day of July, 2014.

J. Randolph Ward
Administrative Law Judge