TATE OF NORTH CAROLINA

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF

15 EHR 01287, 15 EHR 02300

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| County of Durham,<br>Petitioner,<br><br>v.<br><br>NC Department Of Environment And Natural Resources, Division Of Water Resources,<br>Respondent. | **ORDER** |

THIS MATTER is before the undersigned on the *Motion to Dismiss* filed[1] by the Respondent Department of Environmental Quality[2] (hereinafter, "DEQ" or "Respondent"), and the *Motion for Summary Judgment* filed by the Petitioner County of Durham ("Durham" or "Petitioner").[3] The two contested cases represented by the above file numbers, filed on March 2, 2015 and March 27, 2015, respectively, were consolidated by Order entered June 22, 2015.

## *PRELIMINARY MOTIONS*

### INTERVENORS

Preliminarily, the North Carolina Water Quality Association ("NCWQA") -- "a statewide association of public water, sewer, and stormwater utilities serving "a significant majority" of the State citizens served by publicly owned wastewater treatment works ("POTW") -- seeks to intervene[4] "for the limited purpose of submitting [an] . . . *amicus curiae* brief" in support of the Petitioner's position. Neither Petitioner nor Respondent oppose this request. *See N.C. Water Quality Association Unopposed Motion to Intervene to Submit Amicus Brief*, and *N.C. Water Quality Association Amicus Brief 15 EHR02300 & 15 EHR01287*.

The Haw River Assembly ("HRA"), an organization consisting of "approximately 835 dues-paying members, many of whom live, work, and/or recreate in downstream from areas serviced by [Durham] County's wastewater collection system," seek to intervene[5] pursuant to N.C. Gen. Stat. §150B–23(d) "for the limited purpose of filing [an] . . . *Amicus Curiae* brief without acquiring the status of a party." *See Haw River Assembly Motion to Intervene to Submit Amicus*

[1] Filed on October 13 ~~15~~, 2015.
[2] The consolidated Petitions were filed before the then-Department of Environment and Natural Resources became the Department of Environmental Quality, effective September 18, 2015, by virtue of legislation that became law on that date.
[3] Filed on October 16, 2015.
[4] Motion to intervene filed on October 27, 2015.
[5] Motion to intervene filed on November 6, 2015.

*Curiae Brief*. While warning that it is redundant and "self-serving," Petitioner does not oppose acceptance of HRA's brief.

"To intervene with the full rights of a party, the applicant must satisfy the requirements of [N.C. Gen. Stat. §1A-1,] Rule 24. However, an applicant may instead elect to participate to a lesser extent as deemed appropriate by the ALJ, pursuant to N.C.G.S. § 150B–23(d)." *Holly Ridge Associates, LLC v. N.C. Dept. of Env't & Natural Res.*, 361 N.C. 531, 535-37, 648 S.E.2d 830, 834-35 (2007). The second sentence of N.C. Gen. Stat. § 150B–23(d) provides for discretionary intervention broader than the permissive intervention under Rule 24. *State ex rel. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1978).

The motions to intervene of NCWQA and HRA are **GRANTED**, pursuant to 26 NCAC 03 .0117(d)(1), for the limited purpose of accepting the briefs accompanying their timely motions, without otherwise "acquiring the status of [ ] part[ies]." N.C. Gen. Stat. §150B–23(d); *Holly Ridge*, 648 S.E.2d at 837.

**LATE FILING**

The electronically filed copy of Respondent's *Response to Motion for Summary Judgment* and *Respondent's Memorandum in Support of the Response to Petitioner's Motion for Summary Judgment* was initially transmitted on its due date, October 26, 2015, without a supporting affidavit. Shortly after 5:00PM that day, "counsel realized that an affidavit had inadvertently been omitted," and these pleadings were retransmitted with the affidavit. Respondent filed a *Motion to Deem Timely Filed Response to Motion for Summary Judgment Memorandum* on October 28, 2015 and requested that the second transmission be "deemed timely filed."

Since the applicable rule, 26 NCAC 03 .0102(e)(1), creates no right or reasonable expectation that parties served will have time to take action on a pleading during the business day on which it is filed, Petitioner was not prejudiced by Respondent's mistake. It is notable that forums with many years of experience with electronic filing treat filings before midnight on the due date as timely filed. *See, e.g.*, U.S. Eastern District Local Rule 5.1 (a)(1) / Electronic Case Filing System Rule (E)(3); Worker's Compensation Rules of the North Carolina Industrial Commission, Rule 101.

Consequently, the Respondent's *Motion to Deem Timely Filed Response to Motion for Summary Judgment Memorandum* is **GRANTED**. N.C. Gen. Stat. § 1A-1, Rule 6(b).

***DISPOSITIVE MOTIONS***

**MOOTNESS**

On October 13, 2015, Respondent filed a motion to dismiss the contested case denominated 15 EHR 01287 for "[f]ailure to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6) of the N.C. Rules of Civil Procedure, on the jurisdictional grounds that the issue it presents is moot. As the Respondent articulates a genuine mootness argument, the motion is evaluated pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) of the N.C. Rules of Civil Procedure, made applicable to contested case hearings by 26 NCAC 03 .0101(a). *Murray v. University of North Carolina at Chapel Hill*, ___ N.C. App. ___, 782 S.E.2d 531, 537, 2016 WL 787889 (COA15-

375, 1 March 2016) ("mootness is properly raised through a motion under ... Rule 12(b)(1)," citing *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013)).

The Petition initiating 15 EHR 01287 alleges deficiencies in the "System Wide Wastewater Collection System Permit" issued by respondent on January 29, 2015 (hereinafter, the "January permit") – the second permit issued in response to Petitioner's application for renewal. *See* Exhibit 9 to Respondent's *Response to Petitioner's Motion for Summary Judgment* (hereinafter, "R SJ Ex 9.) Respondent argues that the January permit was "withdrawn" and replaced with a third permit, issued on February 27, 2015, thus mooting any issues particular to 15 EHR 01287.

However, as Petitioner correctly argues, before the "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment" of any permit, Respondent must first give "not less than 60 days' written notice to any person affected," and an opportunity to be heard. N.C. Gen. Stat. §§ 143-215.1(b)(4)c.; 150B-2(3); 150B-3(b). Suspension can be accomplished more expeditiously only if "emergency action" is required, and there is no allegation or indication of such a situation in the record. The parties had made progress in negotiations, Respondent expected those talks to continue, apparently did not foresee an immediate objection and, with some encouragement from Petitioner, reissued the first iteration of the new permit on January 29, 2015 to have one in place before the old one expired February 1, 2015. *See Respondent's Memorandum in Support of Motion to Dismiss*, p.2. Deposition of Deborah Gore, pages 63-64 and 80, and Respondent's Exhibits 1 and 5 (hereinafter, "Depo.II[6] p 63:18-64:4 and 80:2-16; R Ex 1 & 5"). **Cite to Motion to Dismiss, not Motion for Summary Judgment.** Petitioner had successfully requested that the first permit be rescinded under somewhat similar circumstances. However, this course of dealing was not so well established that Respondent could rely upon it.

Consequently, Respondent's *Motion to Dismiss* the Petition 15 EHR 01287 must be **DENIED**.

## MOTION FOR SUMMARY JUDGMENT

### *Recitation of Facts*

1. The foregoing facts and conclusions are incorporated herein by reference.

2. Petitioner Durham County operates and maintains a "wastewater collection system" consisting of nearly 95 miles of sewer pipes, and a dozen pump stations, to drain and carry wastewater to a treatment plant that processes and returns the cleaned water to the environment. Respondent's Division of Water Resources issues the "Collection System Permits" under which municipalities operate such "collection systems." That term refers to the "sewer lines, force mains, pump stations or any combination thereof that conveys wastewater to a designated wastewater treatment facility or separately-owned sewer system." 15A NCAC 02T .0402(1).

[6] "II" symbolizes "Volume II" of Ms. Gore's deposition, with pages numbered 1 through 85, taken on the afternoon October 2, 2015. The first volume (pages 1-222), referenced *infra*, taken on October 1st and the morning of October 2, 2015, is symbolized by "I."

3. Respondent's statutory permitting duty, delegated by the N.C. Environmental Management Commission, is set out in a section titled, "Control of sources of water pollution; permits required," and sets these goals:

> (1) The Commission shall act on all permits so as to prevent, so far as reasonably possible, considering relevant standards under State and federal laws, any significant increase in pollution of the waters of the State from any new or enlarged sources. …
> (2) The Commission shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions. *** All permit decisions shall require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.

§ 143-215.1(b)(1) and (2). Deborah A. Gore, Supervisor of Respondent's Collection Systems unit, testified simply that, "Sanitary sewer overflows are prohibited." (Depo. p 53:1.) In correspondence with Respondent, the Regional EPA Chief of NPDES[7] Permitting and Enforcement described the federal and conforming state law as a "strict liability scheme for discharges," which place the "burden … with the permit holder to demonstrate they tried everything to avoid the overflow (and it happened anyway)." (R SJ Ex 8.) A permittee is obligated to notify the Respondent "as soon as possible but no later than 24 hours after occurrence or on the next working day," by telephone and then in writing, of any system failure that causes untreated wastewater to escape into the environment. 15A NCAC 02B .0506 (A) (2).

4. In addition to the collection system permit's integral performance standards, and operation, maintenance and reporting requirements, at least three municipalities had persuaded the Respondent to put in their permits what is referred to throughout the record as the "affirmative defense" language. Other municipalities and their association, NCWQA, while the respondent to put the "affirmative defense" provision in all collection system permits. By the spring of 2014, Respondent was showing willingness to accede to their request. On May 9, 2014, the Director of the Division of Water Resources prepared out a seven-page letter for distribution, outlining anticipated changes to twenty (20) sections of the permit that emerged from meetings and correspondence with permittee representatives, including the following slightly refined version of the "affirmative defense language."

> The Director may take enforcement action against the Permittee for SSOs ["sanitary sewer overflows"] that must be reported to the Division as stipulated in Condition IV (2) unless the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that the SSO was caused by severe natural conditions; there were no feasible alternatives to the SSO, such as the use of auxiliary treatment facilities, retention of untreated wastewater, reduction of inflow and infiltration, use of adequate back-up equipment, or an increase in the capacity of the system. This provision is not satisfied if, in the exercise of reasonable engineering judgment, the Permittee should have installed auxiliary or additional back-up equipment or should have reduced inflow and infiltration.

[7] National Pollutant Discharge Elimination System.

In addition, the Permittee may establish an affirmative defense to any action brought for an SSO if the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence all of the following:

- The cause of the SSO and that the SSO was exceptional, unintentional, temporary and caused by factors beyond the reasonable control of the Permittee
- The SSO could not have been prevented by the exercise of reasonable control, such as proper management, operation and maintenance
- The SSO could not have been prevented bv adequate treatment facilities, collection system facilities or components (*e.g,*. adequately enlarging treatment or collection facilities to accommodate growth or adequately controlling and preventing infiltration and inflow)
- The SSO could not have been prevented bv preventive maintenance
- The SSO could not have been prevented bv installations of adequate back-up equipment
- The Permittee took all reasonable steps to stop, and mitigate the impact of, the discharge as soon as possible.

Where the Permittee believes that SSO meets the criteria of either of the preceding paragraphs, the Permittee shall so inform the appropriate Division Regional Office and submit written Justification for its position. The Permittee may make this submittal together with the report required by Condition IV (2) (i.e., within five business davs: Monday through Friday, excluding State holidays) but in all instances must make the submittal to the appropriate Division Regional Office within 10 business days of the date of receipt of anv Notice of Violation / Notice of Intent to Enforce in order to be considered for immunity from enforcement action or eligible for the affirmative defense. The Permittee has the burden of proof that one of the above conditions has been met.

See Petitioner's *Memorandum in Support of County of Durham's Motion for Summary Judgment*, Exhibit 5 (the last 7 pages). The letter's list of changes was prefaced by the statement that only one of them was already in use, and that "due to the need to meet with DWR regional office collection system inspectors to explain the changes," that it was thought that the rest could be implemented "by the end of the year."

5. On July 8, 2014, Petitioner filed an application with Respondent for renewal of its System-Wide Collection System Permit, which had an expiration date of February 1, 2015. Respondent was obligated to act on the application within 90 days, 15A NCAC 02T .0108, and it issued a renewal permit, with an effective date of February 1, 2015, on August 21, 2014. Petitioner's staff was dismayed that this permit (hereinafter, "the August permit") did not contain precisely the same wording as the so-called "affirmative defense" language in the May 9, 2014 letter, and Petitioner's POTW Director, Joseph R Pierce, Jr., PE, requested that it be "rescinded."

*See* page 3 of Petitioner's Exhibit 6 to the Deposition of Deborah Gore (hereinafter, "Depo. P Ex 6, p 3.)" Respondent withdrew the August permit, with the intention of replacing it before the existing permit's expiration date of February 1, 2015. *See* Petitioner's *Memorandum in Support of County of Durham's Motion for Summary Judgement*, p.3.

6. The Petition in 15 EHR 0287 lists 16 discrete complaints about aspects of the permit issued by the Respondent on January 29, 2015. But in subsequent negotiations, the parties resolved on their differences, other than their disagreement concerning the "affirmative defense" clause, and most of these agreements were incorporated into the permit issued on February 27, 2015. Respondent left all of the "affirmative defense" language out of this third permit. See, *Affidavit of Craig A. Bromby, Deputy General Counsel, N.C. Department of Environmental Quality*. In correspondence with OAH in October 9, 2015, counsel for both parties concurred that the sole remaining issue was whether Petitioner was entitled to have the "affirmative defense" language, as set out in the May 9, 2014 letter, in its permit. In its second petition, Petitioner also suggested that it might be entitled to recover attorneys' fees.

7. The "affirmative defense" paragraphs in the August and January permits differed from the version in the May 9, 2014 letter mainly by omitting that phrase. The sentence was truncated as follows:

> ~~"In addition, the Permittee may establish an affirmative defense to any action brought for an SSO if the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence all of the following:~~
>
> ~~• The cause of the SSO and that the~~ <u>The</u> SSO was exceptional, unintentional, temporary and caused by factors beyond the reasonable control of the Permittee …

The phrase "unless the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that the SSO was caused by severe natural conditions," was retained in the first paragraph.

8. Petitioners have failed to show that its rights have been "substantially prejudiced" by the omission of these words, or forecast evidence in its Petitions and subsequent filings that it can make such a showing. Characterizing the process discussed in this clause as attaining an "affirmative defense" does not endow it with additional weight, or change its demands, including that, "The Permittee has the burden of proof that one of the above conditions has been met." Even without that reminder, the law of this State is that the party asserting an affirmative defense bears the burden of proof. See, *e.g.*, *Price v. Conley*, 21 N.C.App. 326, 328, 204 S.E.2d 178, 180 (1974).

9. Petitioner has presented one affidavit that seeks to show the requisite substantial prejudice. The Petitioner's Utility Division Manager and POTW Deputy Director avers, in pertinent part:

> In 2007, Durham County was penalized for a sewer system overflow (SSO) caused by the act of a user. Specifically, the user jetted a grease plug from their sewer line

> into the Durham County sewer line. This grease plug lodged in a 90° turn in the Durham County sewer and resulted in a sanitary sewer overflow. I was told at a later date by … a NCDENR Raleigh Regional Office staff person, that if Durham County had a collection system permit like Raleigh's with Raleigh's "special language" that Durham County would not have been assessed a penalty.

See, Attachment 1, p.2, to Petitioner's *Reply in Support of Petitioner's Motion for Summary Judgment and in Opposition to Respondent's Motion for Summary Judgment and Motion to Strike*. Respondent properly objected to this affidavit due to the affiant's lack of personal knowledge of the matter he sought to prove. But even accepting all the statements as true, in the light most favorable to the petitioner, leaves fundamental questions unaddressed. Was a right angle in the line a reasonable engineering decision? Was the permittee fulfilling its anti-grease education and deterrence obligations? More fundamentally, this anecdote does not address the subject of the "affirmative defense" clause: "the SSO [which] was caused by severe natural conditions."

10. In the absence of direct evidence, it is not apparent on its face that the "affirmative defense" language, in either form, would impact Respondent's decisions, other than perhaps making the process more efficient. It is basically a "decision tree" for the regulator, with instructions for the permittees supplying information following "Act of God" weather events. It catalogs a series of subjective evaluations of aspects of the collection system and its operation that the regulators might weigh in determining whether to impose a fine for a sanitary sewer overflow ("SSO"). It states that an enforcement action -- generally, a fine in the thousands of dollars -- may be taken against any SSO large enough to require a report to the agency,[8] unless the POTW shows by proper documentation that "the SSO was caused by severe natural conditions," *and* that there were no "*feasible* alternatives" that "in the exercise of *reasonable* engineering judgment" could have been devised to prevent it. Alternatively, the "affirmative defense" can be made out by "contemporaneous operating logs or other relevant evidence" showing that "the cost of the SSO was *exceptional*, unintentional, *temporary* and caused by factors beyond the *reasonable* control of the permittee;" and, that "it could not be prevented by" any of four categories preventative measures: "the exercise of *reasonable* control, such as *proper* management, operation and maintenance" of the system; "*adequate* treatment facilities or collection system facilities or components (e.g., *adequately* enlarging treatment or collection facilities to accommodate growth or *adequately* controlling and preventing infiltration and inflow)" [of occult water into the system]; "preventative maintenance;" or "installations of *adequate* backup equipment." Finally, the permittee's contemporaneous documents or other evidence would have to show that it "took all *reasonable* steps to stop, and mitigate the impact of, the discharge *as soon as possible*." There are no specific quantities, ranges or even examples that might limit the regulators usual discretion. While Petitioner is certainly entitled to equal *application* of law, the effect of having the language included in its permit is too speculative to find that Petitioner is disadvantaged by its absence.

## Conclusions of Law

1. The parties and the cause are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 143-215.1(a) and (e), 150B-1(c), and 150B-23.

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2. To the extent that the foregoing include conclusions of law, or that the conclusions below are recitations of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with N. C. Gen. Stat. § 1A-1, Rule 12(c), or summary judgment, pursuant to N. C. Gen. Stat. § 1A-1, Rule 56, that disposes of all issues in the contested case. N.C. Gen. Stat. § 150B-34(e); 26 NCAC 03 .0105.

4. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure, made applicable to contested case hearings by 26 NCAC 03 .0101(a).

5. A factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to find for the opposing party. *Anderson v. Liberty Lobby*, 477 US 242, 247-48 (1986); *Kessing v. National Mortgage Corp*., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

6. In order to be entitled to summary judgment, the moving party must bear the burden and show that no questions of material fact remain to be resolved. *Floraday v. Don Galloway Homes, Inc.*, 340 N.C. 223, 225-26, 456 S.E.2d 303, 305 (1995).

7. In ruling on such motion, the judge must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, as well as all reasonable inferences that may be drawn from those alleged facts. See *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994); *Robinson v. Acker*, 140 N.C.App. 606, 611, 538 S.E.2d 601, 607 (1996).

8. When an issue can be resolved by determining a question of law, and the question is decided against the moving party, it is appropriate to render summary judgment against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c).

9. Although findings of fact are not appropriate when the issue is a question of law, they may be used to set out the undisputed facts. See, *In re Estate of Pope*, 192 N.C.App. 321, 666 S.E.2d 140, 666 S.E.2d 140, 147 (2008) *disc. rev. den.*, 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).

10. To be entitled relief, a Petitioner must show not only that the Agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), but also must first "establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise

***substantially prejudiced the petitioner's rights***." *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs.*, 231 N.C. App. 1, 3-5, 751 S.E.2d 244, 247-48 (2013); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C.App. 379, 382, 455 S.E.2d 455, 459 (1995)). (Emphasis added.)

11. Petitioner has failed to show by a preponderance of the evidence that its rights have been substantially prejudiced by the issuance, on January 29, 2015, of the "System-Wide Wastewater Collection System Permit, WQCS00038 (Renewal)," dated January 26, 2015 (hereinafter, "the January permit"), and consequently, it cannot be entitled to relief under N.C. Gen.Stat. § 150B–23(a). *Parkway Urology, P.A. v. N.C. Dept. of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 205 N.C. App. 529, 539, 696 S.E.2d 187, 194-95 (2010).

12. Respondent substantially prejudiced the Petitioner's procedural rights to notice and hearing by failing to use the proper procedure set out in N.C. Gen. Stat. §§ 143-215.1(b)(4)c and (e), and 150B-3(b), as required by law, prior to withdrawing the January permit and issuing on February 27, 2015 the "System-Wide Collection System Permit, Permit Number WQCS00038." N.C. Gen. Stat. §§150B-1(b); 150B-23(a)(3) and (5).

13. As there is no genuine issue of material fact bearing on the matter, Respondent is entitled to summary judgment as a matter of law that the January permit is valid and lawful, and such is hereby GRANTED.

14. As there is no genuine issue of material fact bearing on the matter, Petitioner is entitled to summary judgment as a matter of law that the February permit was issued contrary to Respondent's statutory authority, and invalid, and such is hereby GRANTED.

## DECISION

Consequently, it is ORDERED that the "System-Wide Wastewater Collection System Permit, WQCS00038 (Renewal)," dated January 26, 2015, issued January 29, 2015, is and shall remain in effect until its expiration date, unless altered by agreement of the parties, or as provided by law.

## 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 12th day of August, 2016.

_____

J Randolph Ward
Administrative Law Judge

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 01287, 15EHR02300

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| County of Durham<br>Petitioner,<br><br>v.<br><br>N.C. Department of Environmental Quality,[1]<br>Division of Water Resources<br>Respondent. | **ORDER AMENDING FINAL DECISION SUMMARY JUDGMENT** |

Pursuant to 26 NCAC 3.0129, for the purpose of correcting a clerical error, IT IS HEREBY ORDERED that the above-captioned Decision, issued from this Office on August 12, 2016 is amended as follows:

THIS MATTER is before the undersigned on the *Motion to Dismiss* filed by the Respondent Department of Environmental Quality (hereinafter, "Respondent"), the *Motion for Summary Judgment* filed by the Petitioner County of Durham ("Petitioner"), and two procedural motions. The two contested cases represented by the above file numbers, filed on March 2, 2015 and March 27, 2015, respectively, were consolidated by Order entered June 22, 2015. [*This decision amends the "Order" filed August 12, 2016 to correct clerical mistakes and omissions.*[2]]

## ***PROCEDURAL MOTIONS***

### INTERVENORS

Preliminarily, the North Carolina Water Quality Association ("NCWQA") -- "a statewide association of public water, sewer, and stormwater utilities" serving "a significant majority" of the State citizens with publicly owned wastewater treatment works ("POTW") -- seeks to intervene "for the limited purpose of submitting [an] . . . *Amicus Curiae Brief*" in support of the Petitioner's position. Neither Petitioner nor Respondent oppose this request. *See N.C. Water Quality Association Unopposed Motion to Intervene to Submit Amicus Brief*, and *N.C. Water Quality Association Amicus Brief 15 EHR02300 & 15 EHR01287*.

[1] The consolidated Petitions were filed before the then-Department of Environment and Natural Resources became the Department of Environmental Quality, effective September 18, 2015, by virtue of legislation that became law on that date.

[2] Per N.C. Gen. Stat. § 1A-1, Rule 60(a) of the N.C. Rules of Civil Procedure, made applicable to contested case hearings by 26 NCAC 03 .0101(a). The legal effect has not been altered. The undersigned regrets the mistaken filing and any inconvenience it may have caused parties.

The Haw River Assembly ("HRA"), an organization consisting of "approximately 835 dues-paying members, many of whom live, work, and/or recreate in downstream from areas serviced by [Durham] County's wastewater collection system," seeks to intervene pursuant to N.C. Gen. Stat. §150B–23(d) "for the limited purpose of filing [an] . . . *Amicus Curiae* brief without acquiring the status of a party." See *Haw River Assembly Motion to Intervene to Submit Amicus Curiae Brief*. While warning that it is redundant and "self-serving," Petitioner does not oppose acceptance of HRA's brief.

"To intervene with the full rights of a party, the applicant must satisfy the requirements of [N.C. Gen. Stat. §1A-1,] Rule 24. However, an applicant may instead elect to participate to a lesser extent as deemed appropriate by the ALJ, pursuant to N.C.G.S. § 150B–23(d)." *Holly Ridge Associates, LLC v. N.C. Dept. of Env't & Natural Res.*, 361 N.C. 531, 535-37, 648 S.E.2d 830, 834-35 (2007). The second sentence of N.C. Gen. Stat. § 150B–23(d) provides for discretionary intervention broader than the permissive intervention under Rule 24. *State ex rel. Com'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1978).

The motions to intervene of NCWQA and HRA are **GRANTED**, pursuant to 26 NCAC 03 .0117(d)(1), for the limited purpose of accepting the briefs accompanying their timely motions, without otherwise "acquiring the status of [ ] part[ies]." N.C. Gen. Stat. §150B–23(d); *Holly Ridge*, 648 S.E.2d at 837.

## LATE FILING

The electronically filed copy of Respondent's *Response to Motion for Summary Judgment* and *Respondent's Memorandum in Support of the Response to Petitioner's Motion for Summary Judgment* was initially transmitted on its due date, October 26, 2015, without a supporting affidavit. Shortly after 5:00 PM that day, "counsel realized that an affidavit had inadvertently been omitted," and these pleadings were retransmitted with the affidavit. Respondent filed a *Motion to Deem Timely Filed Response to Motion for Summary Judgment Memorandum* on October 28, 2015, and requested that the second transmission be deemed timely filed.

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Consequently, the Respondent's *Motion to Deem Timely Filed Response to Motion for Summary Judgment Memorandum* is **GRANTED**. N.C. Gen. Stat. § 1A-1, Rule 6(b).

## *DISPOSITIVE MOTIONS*

## MOOTNESS

Respondent filed a motion to dismiss the contested case denominated 15 EHR 01287 for "[f]ailure to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6) of the N.C.

Rules of Civil Procedure, on the jurisdictional grounds that the issues it presents are moot. As the Respondent articulates a genuine mootness argument, the motion is evaluated pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) of the N.C. Rules of Civil Procedure, made applicable to contested case hearings by 26 NCAC 03 .0101(a). *Murray v. University of North Carolina at Chapel Hill*, ___ N.C. App. ___, 782 S.E.2d 531, 537, 2016 WL 787889 (COA15-375, 1 March 2016) ("[M]ootness is properly raised through a motion under ... Rule 12(b)(1)," citing *Yeager v. Yeager*, 228 N.C. App. 562, 565, 746 S.E.2d 427, 430 (2013)).

The Petition initiating 15 EHR 01287 alleges deficiencies in the "System Wide Wastewater Collection System Permit" issued by Respondent on January 29, 2015 (hereinafter, the "January permit") – the second permit issued in response to Petitioner's application for renewal. *See* Exhibit 9 to Respondent's *Response to Petitioner's Motion for Summary Judgment*. Respondent argues that the January permit was "withdrawn" and replaced with a third permit, issued on February 27, 2015, thus mooting any issues particular to 15 EHR 01287.

However, as Petitioner correctly argues, before the "suspension, revocation, annulment, withdrawal, recall, cancellation or amendment" of any permit, Respondent must first give "not less than 60 days' written notice to any person affected," and an opportunity to be heard. N.C. Gen. Stat. §§ 143-215.1(b)(4)c.; 150B-2(3); 150B-3(b). Suspension can be accomplished more expeditiously only if "emergency action" is required, and there is no allegation or indication of such a situation in the record. The parties had made progress in negotiations, Respondent expected those talks to continue, apparently did not foresee an immediate objection and, with some encouragement from Petitioner, reissued the first iteration of the new permit on January 29, 2015 to have one in place before the old one expired February 1, 2015. *See Respondent's Memorandum in Support of Motion to Dismiss*, p.2; Deposition of Deborah Gore, Volume II, pages 63-64 and 80, and Respondent's Exhibits 1 and 5 (hereinafter, "Depo.II[3] p 63:18-64:4 and 80:2-16; R Ex 1 & 5"). Petitioner had successfully requested that the first permit be rescinded under somewhat similar circumstances. However, this course of dealing was not so well established that Respondent could rely upon it.

Consequently, Respondent's *Motion to Dismiss* the Petition 15 EHR 01287 must be **DENIED**.

## MOTION FOR SUMMARY JUDGMENT

### *Recitation of Facts*

1. The foregoing uncontroverted facts, and conclusions, are incorporated herein by reference.

2. Petitioner County of Durham operates and maintains a "wastewater collection system" consisting of nearly 95 miles of sewer pipes, and a dozen pump stations, to drain and carry wastewater to a treatment plant that processes and returns the cleaned water to surface waters.

[3] "II" symbolizes "Volume II" of Ms. Gore's deposition, with pages numbered 1 through 85, taken on the afternoon October 2, 2015. The first volume (pages 1-222), referenced *infra*, taken on October 1st and the morning of October 2, 2015, is symbolized by "I."

3. Respondent's Division of Water Resources issues the "Collection System Permits" under which municipalities operate such "collection systems." That term refers to the "sewer lines, force mains, pump stations or any combination thereof that conveys wastewater to a designated wastewater treatment facility or separately-owned sewer system." 15A NCAC 02T .0402(1). Respondent's statutory permitting duty, delegated to it by the N.C. Environmental Management Commission, is set out in a section titled, "Control of sources of water pollution; permits required," which sets these goals:

> (1) The Commission shall act on all permits so as to prevent, so far as reasonably possible, considering relevant standards under State and federal laws, any significant increase in pollution of the waters of the State from any new or enlarged sources. …
> (2) The Commission shall also act on all permits so as to prevent violation of water quality standards due to the cumulative effects of permit decisions. … All permit decisions shall require that the practicable waste treatment and disposal alternative with the least adverse impact on the environment be utilized.

§ 143-215.1(b)(1) and (2). Deborah A. Gore, Supervisor of Respondent's Collection Systems unit, testified simply that, "Sanitary sewer overflows are prohibited." (Depo.I p 53:1.) In correspondence with Respondent, the Regional EPA Chief of NPDES[4] Permitting and Enforcement described the federal and conforming state law as a "strict liability scheme for discharges," which place the "burden … with the permit holder to demonstrate they tried everything to avoid the overflow (and it happened anyway)." (R SJ Ex 8.) A permittee is obligated to notify the Respondent "as soon as possible but no later than 24 hours after occurrence or on the next working day," by telephone and then in writing, of any system failure that causes untreated wastewater to escape into the environment. 15A NCAC 02B .0506(a)(2)(A).

4. In addition to the collection system permit's integral performance standards, and operation, maintenance and reporting requirements, at least three municipalities had persuaded the Respondent to put in their permits what is referred to throughout the record as the "affirmative defense" language. Other municipalities and their association, NCWQA, lobbied the Respondent to put the "affirmative defense" provision in all collection system permits. By the spring of 2014, Respondent was showing a willingness to accede to their request. On May 9, 2014, the Director of the Division of Water Resources prepared a seven-page letter for distribution to interested parties, outlining anticipated changes to twenty (20) sections of the permit that emerged from meetings and correspondence with permittee representatives, including the following slightly refined version of the "affirmative defense language" (with editing marks removed):

> The Director may take enforcement action against the Permittee for SSOs ["sanitary sewer overflows"] that must be reported to the Division as stipulated in Condition IV (2) unless the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that the SSO was caused by severe natural conditions; there were no feasible alternatives to the SSO, such as the use of auxiliary treatment facilities, retention of untreated wastewater, reduction of inflow and infiltration, use of adequate back-up equipment, or an

[4] National Pollutant Discharge Elimination System.

increase in the capacity of the system. This provision is not satisfied if, in the exercise of reasonable engineering judgment, the Permittee should have installed auxiliary or additional back-up equipment or should have reduced inflow and infiltration.

In addition, the Permittee may establish an affirmative defense to any action brought for an SSO if the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence all of the following:

- The cause of the SSO and that the SSO was exceptional, unintentional, temporary and caused by factors beyond the reasonable control of the Permittee
- The SSO could not have been prevented by the exercise of reasonable control, such as proper management, operation and maintenance
- The SSO could not have been prevented by adequate treatment facilities, collection system facilities or components (*e.g,*. adequately enlarging treatment or collection facilities to accommodate growth or adequately controlling and preventing infiltration and inflow)
- The SSO could not have been prevented by preventive maintenance
- The SSO could not have been prevented by installations of adequate back-up equipment
- The Permittee took all reasonable steps to stop, and mitigate the impact of, the discharge as soon as possible.

Where the Permittee believes that SSO meets the criteria of either of the preceding paragraphs, the Permittee shall so inform the appropriate Division Regional Office and submit written Justification for its position. The Permittee may make this submittal together with the report required by Condition IV (2) (i.e., within five business days: Monday through Friday, excluding State holidays) but in all instances must make the submittal to the appropriate Division Regional Office within 10 business days of the date of receipt of any Notice of Violation / Notice of Intent to Enforce in order to be considered for immunity from enforcement action or eligible for the affirmative defense. The Permittee has the burden of proof that one of the above conditions has been met.

See Petitioner's *Memorandum in Support of County of Durham's Motion for Summary Judgment*, Exhibit 5 (the last 7 pages). The letter's list of changes was prefaced by the statement that only one of these changes was already in effect, and that "due to the need to meet with DWR regional office collection system inspectors to explain the changes," that it was thought that the rest would be implemented "by the end of the year."

5. On July 8, 2014, Petitioner filed an application with Respondent for renewal of its System-Wide Collection System Permit, which had an expiration date of February 1, 2015. Respondent was obligated to act on the application within 90 days, 15A NCAC 02T .0108, and it

issued a renewal permit, with an effective date of February 1, 2015, on August 21, 2014. Petitioner's staff was dismayed that this permit (hereinafter, "the August permit") did not contain precisely the same wording as the so-called "affirmative defense" language in the May 9, 2014 letter, and Petitioner's POTW Director requested that it be "rescinded." (Depo. P Ex 6, p 3.) Respondent acceded to this request, and withdrew the August permit with the intention of replacing it before the existing permit's expiration date of February 1, 2015. *See* Petitioner's *Memorandum in Support of County of Durham's Motion for Summary Judgment*, Tab 3, Exhibit 7.

6. The parties entered into negotiations, but had not reached an agreement as the expiration date of the existing permit approached. Respondent reissued the August permit on January 29, 2015. The "affirmative defense" paragraphs in the August and January permits differed from the version in the May 9, 2014 letter mainly by the omission of that label. The sentence was truncated as follows:

> ~~"In addition, the Permittee may establish an affirmative defense to any action brought for an SSO if the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence all of the following:~~
>
> > ~~• The cause of the SSO and that the SSO was exceptional~~ <u>The SSO was exceptional</u>, unintentional, temporary and caused by factors beyond the reasonable control of the Permittee …

The phrase "unless the Permittee demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that the SSO was caused by severe natural conditions," was retained in the first paragraph of this provision.

7. The Petition in 15 EHR 0287 lists 16 discrete complaints about aspects of the permit issued by the Respondent on January 29, 2015. But in subsequent negotiations, the parties resolved their differences, other than their core disagreement concerning the "affirmative defense" clause, and most of these agreements were incorporated into the permit issued on February 27, 2015. Respondent left out all of the "affirmative defense" language out of this third permit. See, *Affidavit of Craig A. Bromby, Deputy General Counsel, N.C. Department of Environmental Quality*, appended to Respondent's *Response to Petitioner's Motion for Summary Judgment*. In correspondence with the Office of Administrative Hearings on October 9, 2015, counsel for both parties concurred that the sole remaining issue was whether Petitioner was entitled to have the "affirmative defense" language, as set out in the May 9, 2014 letter, in Petitioner's permit. In its second Petition, 15 EHR 02300, Petitioner also suggested that it was entitled to recover attorneys' fees.

8. Petitioner has failed to show that its rights have been "substantially prejudiced" by the omission of the excised words. Nor has it forecast evidence in its Petitions and subsequent filings that it can make such a showing. The right to raise an "Act of God" or *force majeure* defense exists independently of any mention in these permits. See, e.g., *Lea Co. v. North Carolina Bd. of Transp.*, 308 N.C. 603, 615-16, 304 S.E.2d 164, 173-74 (1983); *Safeguard Ins. Co. v. Wilmington Cold Storage Co.*, 267 N.C. 679, 687, 149 S.E.2d 27, 34 (1966); *Heatherly v. Hollingsworth Co. Inc.*, 211 N.C. App. 282, 712 S.E.2d 345, 349 (2011). Neither version of this provision purports to require Respondent to exercise its discretion differently, which would violate

its statutory authority. Characterizing the process discussed in this clause as attaining an "affirmative defense" does not endow it with additional weight, or change its demands, including that, "The Permittee has the burden of proof that one of the above conditions has been met." Even without that reminder in the provision, the law of this State is that the party asserting an affirmative defense must bear the burden of proof. See, *e.g.*, *Price v. Conley*, 21 N.C.App. 326, 328, 204 S.E.2d 178, 180 (1974).

9. Petitioner has presented one affidavit that seeks to show the requisite substantial prejudice. The Petitioner's Utility Division Manager and POTW Deputy Director avers, in pertinent part:

> In 2007, Durham County was penalized for a sewer system overflow (SSO) caused by the act of a user. Specifically, the user jetted a grease plug from their sewer line into the Durham County sewer line. This grease plug lodged in a 90° turn in the Durham County sewer and resulted in a sanitary sewer overflow. I was told at a later date by … a NCDENR Raleigh Regional Office staff person, that if Durham County had a collection system permit like Raleigh's with Raleigh's "special language" that Durham County would not have been assessed a penalty.

See, Attachment 1, p.2, to Petitioner's *Reply in Support of Petitioner's Motion for Summary Judgment and in Opposition to Respondent's Motion for Summary Judgment and Motion to Strike*. Respondent properly objected to this affidavit due to the affiant's lack of personal knowledge of the matter he sought to prove. N.C. Gen. Stat. § 1A-1, Rule 56(e). But even accepting all the statements as true, in the light most favorable to the Petitioner, this affidavit on its face, it is not pertinent to this case. This anecdote does not address the subject of the "affirmative defense" clause: "the SSO [which] was caused by severe natural conditions."

10. In the absence of direct evidence, it is not apparent on its face that the "affirmative defense" language, in either form, would impact Respondent's decisions, other than perhaps making the process more efficient. It is basically a "decision tree" for the regulator, with instructions for the permittees supplying information following an "Act of God" weather event. It catalogs a series of subjective evaluations of aspects of the collection system and its operation that the regulators might weigh in determining whether to impose a fine for a sanitary sewer overflow ("SSO"), without restrictions. It states that an enforcement action may be taken against any SSO requiring a report to the agency[5], unless the POTW shows by proper documentation that "the SSO was caused by severe natural conditions," **and** that there were no "*feasible* alternatives" that, "in the exercise of *reasonable* engineering judgment," could have been devised to prevent the SSO. Alternatively, the "affirmative defense" might be made out by "contemporaneous operating logs or other relevant evidence" showing that "the cost of the SSO was *exceptional*, unintentional, *temporary* and caused by factors beyond the *reasonable* control of the permittee;" and, that "it could not be prevented by" any of four categories of preventative measures: "the exercise of *reasonable* control, such as *proper* management, operation and maintenance" of the system; "*adequate* treatment facilities or collection system facilities or components (e.g., *adequately*

[5] "Any failure of a collection system, pumping station or treatment facility resulting in a by-pass without treatment of all or any portion of the wastewater." 15A NCAC 02B .0506(a)(2)(A).

enlarging treatment or collection facilities to accommodate growth or *adequately* controlling and preventing infiltration and inflow)" of occult water into the system; "preventative maintenance;" or, "installations of *adequate* backup equipment." Finally, the permittee's contemporaneous documents or other evidence would have to show that it "took all *reasonable* steps to stop, and mitigate the impact of, the discharge *as soon as possible*." There are no specific quantities, ranges or even examples that might be perceived as limiting the regulators' usual discretion.

**Conclusions of Law**

1. The parties and the cause are properly before the Office of Administrative Hearings. N.C. Gen. Stat. §§ 143-215.1(a) and (e), 150B-1(c), and 150B-23.

2. To the extent that the foregoing includes conclusions of law, or that the conclusions below are recitations of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

3. Although findings of fact are not appropriate when the issue is a question of law, they may be used to set out the undisputed facts. See, *In re Estate of Pope*, 192 N.C.App. 321, 666 S.E.2d 140, 666 S.E.2d 140, 147 (2008) *disc. rev. den.*, 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).

4. An administrative law judge may grant judgment on the pleadings, pursuant to a motion made in accordance with N. C. Gen. Stat. § 1A-1, Rule 12(c), or summary judgment, pursuant to N. C. Gen. Stat. § 1A-1, Rule 56, that disposes of all issues in the contested case. N.C. Gen. Stat. § 150B-34(e); 26 NCAC 03 .0105.

5. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure, made applicable to contested case hearings by 26 NCAC 03 .0101(a).

6. A factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to find for the opposing party. *Anderson v. Liberty Lobby*, 477 US 242, 247-48 (1986); *Kessing v. National Mortgage Corp*., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

7. In order to be entitled to summary judgment, the moving party must bear the burden and show that no questions of material fact remain to be resolved. *Floraday v. Don Galloway Homes, Inc.*, 340 N.C. 223, 225-26, 456 S.E.2d 303, 305 (1995).

8. In ruling on such a motion, the judge must view all evidence in the light most favorable to the non-movant, taking the non-movant's asserted facts as true, as well as all reasonable inferences that may be drawn from those alleged facts. See *Kennedy v. Guilford Tech.*

*Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994); *Robinson v. Acker*, 140 N.C.App. 606, 611, 538 S.E.2d 601, 607 (1996).

9. When an issue can be resolved by determining a question of law, and the question is decided against the moving party, it is appropriate to render summary judgment against the moving party. N.C. Gen. Stat. § 1A-1, Rule 56(c).

10. To be entitled to relief, a Petitioner in a contested case must show not only that the agency exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law, within the meaning of N.C. Gen. Stat. § 150B-23(a), but also must first "establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise ***substantially prejudiced the petitioner's rights***." *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Servs*., 231 N.C. App. 1, 3-5, 751 S.E.2d 244, 247-48 (2013); *Britthaven, Inc. v. N.C. Dep't of Human Res.*, 118 N.C.App. 379, 382, 455 S.E.2d 455, 459 (1995)). (Emphasis added.)

11. Petitioner has failed to plead or allege facts or forecast evidence that would support a finding that its rights have been substantially prejudiced by the issuance, on January 29, 2015, of the "System-Wide Wastewater Collection System Permit, WQCS00038 (Renewal)," dated January 26, 2015 ("the January permit"), and consequently, Petitioner is not entitled to relief pursuant to N.C. Gen. Stat. § 150B–23(a). *Parkway Urology, P.A. v. N.C. Dept. of Health & Human Servs., Div. of Health Serv. Regulation, Certificate of Need Section*, 205 N.C. App. 529, 539, 696 S.E.2d 187, 194-95 (2010).

12. As there is no genuine issue of material fact bearing on the matter, Respondent is entitled to summary judgment as a matter of law that the January permit is valid and lawful, and such is hereby GRANTED.

13. Respondent substantially prejudiced the Petitioner's procedural rights to notice and hearing by failing to use the proper procedure set out in N.C. Gen. Stat. §§ 143-215.1(b)(4)c and (e), and 150B-3(b), as required by law, prior to withdrawing the January permit, and thus by issuing on February 27, 2015 the "System-Wide Collection System Permit, Permit Number WQCS00038," in place of the January permit. N.C. Gen. Stat. §§150B-1(b); 150B-23(a)(3) and (5).

14. As there is no genuine issue of material fact bearing on the matter, Petitioner is entitled to summary judgment as a matter of law that the February permit was issued contrary to Respondent's statutory authority, and invalid, and such is hereby GRANTED.

## DECISION

Consequently, the "System-Wide Wastewater Collection System Permit, WQCS00038 (Renewal)," dated January 26, 2015, issued January 29, 2015, is and shall remain in effect until its expiration date, unless altered by agreement of the parties, or otherwise as provided by law.

**So Ordered**.

## 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 16th day of August, 2016.

_____

J Randolph Ward
Administrative Law Judge