STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 06258

City of Durham, Petitioner, v. N.C. Department of Environment Quality, Division of Water Resources, Respondent.	**ORDER DENYING PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

THIS MATTER is before the undersigned on the *Petitioner's Motion for Judgment on the Pleadings (*hereinafter, "*Petitioner's Motion*") and *Respondent's Motion for Summary Judgment (Respondent's Motion)*, with the benefit of *Respondent's Memorandum in Support of Motion for Summary Judgment and in Response to Petitioner's Motion for Judgment on the Pleadings* ("*Respondent's Memo")*, and *Petitioner's Response to Respondent's Motion for Summary Judgment* ("*Petitioner's Response*").

RECITATION OF PERTINENT FACTS

1. This controversy arises from a series of eleven (11) "Sanitary Sewer Overflows" ("SSO's") from the Petitioner City of Durham's storm water drainage system in the first quarter of 2015, three of which resulted in fines imposed by Respondent. See the *Affidavit of Stephen Daniel Smith*, paragraphs 8 and 12, appended to *Respondent's Memorandum* (hereinafter, "*Smith Aff*., § 3 and 8"). Under the federally mandated National Pollution Discharge Elimination System ("NPDES"), such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the water gathered by the system is cleaned at a water treatment plant before being returned to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); 15A NCAC 02U .0101(c); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]").

2. In this instance, approximately 475,000 gallons of untreated liquid reached creeks and rivers flowing into, e.g., Jordan Lake and Falls Lake, due to the three spills ultimately sanctioned, according to Petitioner's "Five-Day Reports."[2] (*Smith Aff*., Ex A.) This name for the reports refers to the requirement of the Petitioner's non-discharge Permit for written self-reporting of all

[1] The Department of Environment and Natural Resources ("DENR") became the Department of Environmental Quality ("DEQ"), effective September 18, 2015, by virtue of legislation that became law on that date, and its Division of Water Quality ("DWQ") was renamed the Division of Water Resources ("DWR"). These names and acronyms are used interchangeably throughout the record.

[2] Officially, "Collection Systems Sanitary Sewer Overflow Reporting Form (Form CS-SSO)."

releases of 1,000 gallons or more of untreated liquid into the environment, and any spill, "regardless of volume, that reaches surface water." (*Smith Aff.*, Ex F, Permit § I.2. and IV.2.) These provisions also require a verbal report "as soon as possible, but in no case more than 24 hours following the occurrence or first knowledge of the occurrence."

3. It appears that Petitioner made all of the required verbal and written reports timely. On May 4, 2015, Respondent sent Petitioner a "Notice of Violation – Notice of Intent to Enforce" ("NOV-NOI"), charting summary information about each of the 11 incidents; requesting that the City describe "the steps you have taken to abate SSO's labeled [in the summary chart] as NOV or NOV-NOI and your efforts to prevent future spills;" and, giving notice that Respondent was "considering an enforcement action with an assessment of civil penalties" for the four SSO's labeled NOV-NOI. *Smith Aff.*, Ex B. Petitioner responded on June 4, 2015 with the seven-page letter, and attached photos and documents. *Smith Aff.*, Ex C.

4. On July 22, 2015, Respondent issued its "Assessment of Civil Penalty" letter, "based upon … review" of Petitioner's Five-Day Reports, which were found to have shown violations of Petitioner's permit, and N.C. Gen. Stat. § 143-215.1(a)(1), which prohibits "any outlets into the waters of the State" without a permit. *Smith Aff.*, Ex E. The "Assessment" letter cites the statutory authority for imposing the civil penalty, and N.C. Gen. Stat §143B-282.1(b), which provides that such penalties "may be based on any one or [a] combination of" eight listed "factors." The assessment lists these statutory factors, verbatim, and states that they were "taken into account." Respondent imposed a total of $3,750.00 in civil penalties for three of the SSO's identified in the "Notice of Violation – Notice of Intent to Enforce" letter, and charged an additional $29.71 for "enforcement cost." The fourth incident listed in the NOV-NOI letter, which Petitioner's June 4, 2015 response attributed to vandalism, did not result in a fine. *Smith Aff.*, Ex C, p 4. While the assessment letter refers to "findings of fact and conclusions of law," the Respondent did not purport to have held an evidentiary hearing on the matter.

MOTION FOR JUDGMENT ON THE PLEADINGS, N.C. GEN. STAT §1A-1, RULE 12(C)

5. The "function" of Rule 12(c) of the North Carolina Rules of Civil Procedure, made generally applicable to contested case hearings by 26 NCAC 03 .0101(a),

> "… is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. … Judgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally

> impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion."

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2nd 494, 499 (1974) (internal cites omitted). N.C. Gen. Stat. § 150B-34(e) specifically provides that an administrative law judge may grant judgment on the pleadings, pursuant to Rule 12(c), disposing of all issues in a contested case.

6. The Petition recites, per N.C. Gen. Stat. § 150B-23(a), that Respondent "exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, [and/] or failed to act as required by law or rule," and thereby substantially prejudiced Petitioner's rights.

7. Specifically, the Petition alleges that the

> … civil penalty assessment … states no facts supporting the assertion that the City violated N.C. Gen. Stat §143-215.1(a)(1) by making an outlet into the waters of the State and … fails to make the requisite findings of fact regarding the eight statutory factors that are set forth in N.C. Gen. Stat §143B-282.1(b) for the calculation of a civil penalty assessment. In addition, the … assessment … Fails to make the requisite finding of fact regarding the affirmative defenses that are provided to the city in paragraph 2 of the collection system permit[.]

(Emphasis Petitioner's.) See the *Petition for a Contested Case Hearing*, section 3.

8. Petitioner's *Motion for Judgment on the Pleadings*, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) of the N.C. Rules of Civil Procedure, suggests that Respondent must show an "affirmative act of 'mak[ing] [an] outlet into the waters of the state'" to impose a fine pursuant to § 143-215.1(a)(1). *Petitioner's Motion*, pgs. 1-2. However, that is not supported by the plain terms of the statute, its purpose of enforcing a non-discharge permits, or the history of its application. See, e.g., *Murphy Family Farms, Inc. v. Dept. of Environment*, 160 NC App. 338, 585 S.E.2d 446, 447-48 (N.C. App., 2003) (corrective action inadvertently causing "lagoon failure" led to a fine of $4,000 pursuant to § 143-215.1(a)(1) affirmed by Superior Court.)

9. Petitioner also faults the Respondent's "Assessment of Civil Penalty" for failing to address the "affirmative defenses" set out in the permit. *Petitioner's Motion*, p. 2; Ex B, Permit § I. 2 a) and b). An "affirmative defense" is "something that the defendant in a civil action [i]s required to plead and prove." *Holbert v. Holbert*, ___ N.C. App. ___, 762 S.E.2d 298 (2014); *Price v. Conley*, 21 N.C.App. 326, 328, 204 S.E.2d 178, 180 (1974). This is not a defect in Respondent's "pleadings," which in fact should not "anticipate a defense and undertake to avoid it." *Exum v. Boyles*, 272 N.C. 567, 579, 158 S.E.2d 845, 855 (1968); *Dunkley v. Shoemate*, 121 N.C.App. 360, 465 S.E.2d 319, 321-22 (1996), *disc. rev. den.*, 342 N.C. 894, 468 S.E.2d 773 (1996).

10. It is also notable that the Respondent's Five-Day Report form, in boxed instructions on page 1, gives brief quotations from the "affirmative defenses" -- recognizable as the common law

"Act of God" and *force majeure* defenses -- and instructs that, "Part II must be completed to provide a justification claim for either of the above situations." Presumably, Petitioner selected and completed all of the pertinent Part II pages, and the forms for all three spills report that the weather was "clear," and no unforeseen circumstances or uncontrollable intervening causes are identified. *Smith Aff.*, Ex A, p 1; Ex F, Permit § I.2. a) and b).

11. Petitioner's primary argument, applicable to all segments of the assessment, is that Respondent has failed to comply with the requirement of N.C. Gen. Stat §143-215.6A(d) that Respondent "shall notify any person assessed a civil penalty of the assessment **and the specific reasons therefor …**," because its July 22, 2015 "Assessment of Civil Penalty" letter did not include "findings of fact" concerning the eight factors listed in N.C. Gen. Stat §143B-282.1(b). (Emphasis Petitioner's.) *Petitioner's Motion*, p. 2. In support of this argument, Petitioner cites *House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, ___ N.C. App. ___, 774 S.E.2d 911 (2015), which affirmed in part, and remanded in part, a decision imposing civil penalties for an industrial facility's discharge of waste into a neighboring natural stream. Petitioner reads this case as holding "that findings of fact … [are] required by law prior to issuing a written civil penalty pursuant to § 143-215.6A." As the City points out, the assessment in *House of Raeford* simply recited that the eight statutory factors were considered, as in the present case. *Id.*, 774 S.E.2d at 919. On this basis, it is argued that judgment on the pleadings should be entered, rescinding the July 22, 2015 Assessment; or failing that, the matter should be "remanded back to DEQ, as the Finder of Fact," to "make specific findings with regard to the eight statutory factors." *Petitioner's Response*, pgs. 8-10.

12. N.C. Gen. Stat § 143-215.6A primarily discusses when the "Secretary may assess a civil penalty," and how much. It also includes the procedure for requests for "remission civil penalties," and the following subparagraph:

> In determining the amount of the penalty the Secretary shall consider the factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

N.C. Gen. Stat § 143-215.6A(c). The statute referenced in this subparagraph, N.C. Gen. Stat § 143B-282.1, is titled, "**Environmental Management Commission – quasi-judicial powers; procedures.**" It sets out procedures for the exercise of the Commission's "final agency decision" authority, hearing appeals from the Office of Administrative Hearings "in accordance with the provisions of Chapter 150B," and considering "remission requests," and includes the "eight factors" that the professional staff also use in assessing civil penalties in subsection (b).

13. While "findings of fact" are specifically required in several instances by Chapter 143, Article 21 "Water and Air Resources," §§ 143-211 *et seq.*, for final decisions on matters such as permits for new storm water drainage systems, environmental standards, and interbasin transfers of water, there is no such stated requirement for issuance of the initial assessment of a civil penalty.

14. There is no showing of a compelling reason to assume an unstated requirement for detailed "findings of fact" in an assessment of a civil penalty. The presence of the "affirmative defenses"

language in the standard permit suggests that a large portion of the SSO's occur during extraordinary weather events, which are likely to affect many storm water systems at once. A more stringent findings requirement would be onerous for the agency in those circumstances. The opportunity to use "[a]ny means of discovery available pursuant to the North Carolina Rules of Civil Procedure" amply guards against prejudice at the hearing stage. 26 NCAC 03 .0112(b). In this case, it appears that Respondent based its assessment entirely on its own permitting and violation history records, and *information supplied by Petitioner*. While the *House of Raeford* case offers a sharp contrast to Petitioner's self-reporting, 774 S.E.2d at 914-15, the nature of municipal storm water systems suggests that Petitioner's reaction is the more common scenario in the investigation of the SSO's.

15. In *House of Raeford*, the Court of Appeals upheld the Superior Court, which had adopted the Administrative Law Judge's opinion, on decisions to allow and disallow the imposition of several fines. *House of Raeford*, 774 S.E.2d at 920-22. However, the appellate Court found that the findings of fact were insufficient to support a conclusion that the fines comported with §143B-282.1(b). While the Court of Appeals commented on the fact that the Respondent's Branch Chief who prepared the assessment had not elaborated on his consideration of the "eight factors," and summarized his testimony, in reviewing the facts in the record, the court did not say the assessment was insufficient for its purpose. The Court's opinion remanded the case "to the Superior Court with instructions to remand **to the finder of fact**, to make specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat §143B-282.1(b) and to formulate the amount of any civil penalty to be imposed." (Emphasis added.) *Id.*, 774 S.E.2d at 920. In this instance, "the finder of fact" is the Environmental Management Commission, which has the option of referring the matter to the Office of Administrative Hearings. *Id.*, 774 S.E.2d at 916; N.C. Gen. Stat § 150B-40(e).

16. The undersigned concludes that Respondent's "Assessment of Civil Penalty" of July 22, 2015 provides Petitioner with due and sufficient notice under the circumstances of this case and the applicable statutes, and is not legally defective.

Consequently, the *Petitioner's Motion for Judgment on the Pleadings* must be, and hereby is, **DENIED**.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, N.C. GEN. STAT §1A-1, RULE 56

17. "Summary judgment simply means that a case can be decided based on undisputed facts without the need for an evidentiary hearing." *In re Estate of Pope*, 192 N.C.App. 321, 328–29, 666 S.E.2d 140, 146 (2008). It is proper only when it is shown that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). 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 non-moving party.[1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202

[1] N.C. Gen. Stat. §150B-25.1, effective for contested cases filed on or after October 22, 2015, places on the state agency, "[i]n a contested case involving the imposition of civil fines or penalties … for violation of the law, the burden

(1986). All evidence must be viewed in the light most favorable to the nonmoving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate with specific evidence that there exists a genuine issue of material fact requiring trial. Rule 56(e); *Steele v. Bowden*, ___ N.C. App. ___, 768 S.E.2d 47, 57 (2014); *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C.App. 215, 217, 293 S.E.2d 215, 216-17 (1982).

18. In its Motion for Summary Judgment, the Respondent correctly points out that, "Petitioner does not contend that it did not violate its permit" and N.C. Gen. Stat §143-215.1(a). *Respondent's Motion*, p. 1. Each of Respondent's pertinent Five-Day Reports describe untreated wastewater flowing from Petitioner's system into "surface waters," in specific violation of N.C. Gen. Stat §143-215.1(a)(6) and the permit. *Smith Aff.*, Ex A; *Smith Aff.*, Ex F, Permit § I.2.; and, *see* paragraph 2, *supra*.

19. Petitioner did raise questions about the applicability of N.C. Gen. Stat §143-215.1(a)(1), and whether Respondent was obligated to address the permit's "affirmative defenses" in the "Assessment of Civil Penalty" -- arguments foreshadowed in the Petition, and elaborated upon in *Petitioner's Motion* -- presenting issues of statutory interpretation and other, related questions of *law*, which have each been resolved in Respondent's favor. *See* paragraphs 7-16, *supra*.

20. While Petitioner's issues, considered in the light most favorable to Petitioner, go to the legitimacy of the Respondent's process of calculating assessments, there are no contradictory allegations of *fact* tending to show that the amounts Respondent calculated -- penalties of $3,750.00, and $29.71 for enforcement cost -- were incorrect. On its face, the Petition raises no questions of fact. This, buttressed by Respondent's *Smith Affidavit* and its attachments, carries the movant's burden of showing that there is no genuine issue as to any material fact.

21. Under some circumstances, the Petition and Prehearing Statement are treated as Petitioner's "pleadings" in a contested case. See, e.g., *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006), *aff'd and remanded sub nom., Lee v. N. Carolina Dep't of Transp.*, 360 N.C. 585, 634 S.E.2d 887 (2006) (reference to discriminatory act in petition, and allegation of discrimination in the prehearing statement, constituted sufficient allegation of a discrimination claim); *but see, Nailing v. UNC-CH*, 117 N.C.App. 318, 327, 451 S.E.2d 351, 357 (1994) (amending prehearing statement not equivalent to the filing a petition to commence a contested case).

22. When setting out the "Issue(s) to be resolved" in its Pretrial Statement, Petitioner reiterated its three issues in bullet points, each beginning with the phrase, "Whether NCDENR

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of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed[.]" The Petition initiating this case was filed on August 25, 2015, and thus at an evidentiary hearing the Petitioner would bear the burden of proving the facts required by G.S. 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a); *Overcash v. Dept. of Env't & Natural Res.*, 179 N.C.App. 697, 635 S.E.2d 442, 448 (2006).

inappropriately assessed a civil penalty against the city without making the requisite findings of fact …". Petitioner's "A brief statement of the facts and reasons supporting the issue(s) in dispute" makes clear that the above phrase was alluding to its contention that Respondent improperly "issued an assessment of civil penalty letter … without making the requisite findings of fact." (Emphasis added.) In response to the query, "Whether you wish to pursue discovery," Petitioner entered: "The City does not anticipate that it will need to pursue discovery," suggesting that no facts material to the issues it raised were in controversy. (Emphasis added.)

23. In his affidavit submitted in support of the Respondent's motion for summary judgment, Stephen Daniel Smith, Regional Supervisor of the Water Quality Operations Section of DWR in the Raleigh regional office, states that the causes Petitioner gave for the three sanction spills "are typical causes of SSO's and are by no means 'exceptional;'" and that the City's submissions "did not demonstrate why the particular SSO's cited in the CPA [civil penalty assessment] could not have been avoided by reasonable preventive measures." *Smith Aff.*, pgs. 6 and 7.

24. In *Petitioner's Response*, it is argued that information provided to the Respondent in Part II of the Five-Day Reports and the City's June 4, 2015 response package proves that it was entitled to the benefits of the "affirmative defenses." *Petitioner's Response*, p 4. However, Petitioner has not produced affidavits or other evidence as required by N.C. Gen. Stat. § 1A–1, Rule 56(e) to controvert Respondent's affidavit.

25. If a movant makes an adequate showing, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A–1, Rule 56(e). "Summary judgment … cannot be evaded by … reliance on pleadings, general assertions or denials without a specific evidentiary basis for the respondent's position, or statements of mere expectations about the evidence." *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir.1981).

Consequently, it appearing that there are no issues of material fact, and that the Respondent is entitled to summary judgment as a matter of law, the Petition must be, and hereby is, **DISMISSED**.

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 9th day of December, 2016.

_____
J Randolph Ward
Administrative Law Judge

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ADMINISTRATIVE HEARINGS
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2. In this instance, approximately 475,000 gallons of untreated liquid reached creeks and rivers flowing into, e.g., Jordan Lake and Falls Lake, due to the three spills ultimately sanctioned, according to Petitioner's "Five-Day Reports."[2] (*Smith Aff*., Ex A.) This name for the reports refers to the requirement of the Petitioner's non-discharge Permit for written self-reporting of all releases of 1,000 gallons or more of untreated liquid into the environment, and any spill, "regardless of volume, that reaches surface water." (*Smith Aff*., Ex F, Permit § I.2. and IV.2.) These provisions also require a verbal report "as soon as possible, but in no case more than 24 hours following the occurrence or first knowledge of the occurrence."

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7. Specifically, the Petition alleges that the

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(Emphasis Petitioner's.) See the *Petition for a Contested Case Hearing*, section 3.

8. Petitioner's *Motion for Judgment on the Pleadings*, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) of the N.C. Rules of Civil Procedure, suggests that Respondent must show an "affirmative act of 'mak[ing] [an] outlet into the waters of the state'" to impose a fine pursuant to § 143-215.1(a)(1). *Petitioner's Motion*, pgs. 1-2. However, that is not supported by the plain terms of the statute, its purpose of enforcing a non-discharge permits, or the history of its application. See, e.g., *Murphy Family Farms, Inc. v. Dept. of Environment*, 160 NC App. 338, 585 S.E.2d 446, 447-48 (N.C. App., 2003) (corrective action inadvertently causing "lagoon failure" led to a fine of $4,000 pursuant to § 143-215.1(a)(1) affirmed by Superior Court.)

9. Petitioner also faults the Respondent's "Assessment of Civil Penalty" for failing to address the "affirmative defenses" set out in the permit. *Petitioner's Motion*, p. 2; Ex B, Permit § I. 2 a) and b). An "affirmative defense" is "something that the defendant in a civil action [i]s required to plead and prove." *Holbert v. Holbert*, ___ N.C. App. ___, 762 S.E.2d 298 (2014); *Price v. Conley*, 21 N.C.App. 326, 328, 204 S.E.2d 178, 180 (1974). This is not a defect in Respondent's "pleadings," which in fact should not "anticipate a defense and undertake to avoid it." *Exum v. Boyles*, 272 N.C. 567, 579, 158 S.E.2d 845, 855 (1968); *Dunkley v. Shoemate*, 121 N.C.App. 360, 465 S.E.2d 319, 321-22 (1996), *disc. rev. den.*, 342 N.C. 894, 468 S.E.2d 773 (1996).

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weather was "clear," and no unforeseen circumstances or uncontrollable intervening causes are identified. *Smith Aff*., Ex A, p 1; Ex F, Permit § I.2. a) and b).

11. Petitioner's primary argument, applicable to all segments of the assessment, is that Respondent has failed to comply with the requirement of N.C. Gen. Stat §143-215.6A(d) that Respondent "shall notify any person assessed a civil penalty of the assessment **and the specific reasons therefor …**," because its July 22, 2015 "Assessment of Civil Penalty" letter did not include "findings of fact" concerning the eight factors listed in N.C. Gen. Stat §143B-282.1(b). (Emphasis Petitioner's.) *Petitioner's Motion*, p. 2. In support of this argument, Petitioner cites *House of Raeford Farms, Inc. v. N.C. Dep't of Env't & Natural Res.*, ___ N.C. App. ___, 774 S.E.2d 911 (2015), which affirmed in part, and remanded in part, a decision imposing civil penalties for an industrial facility's discharge of waste into a neighboring natural stream. Petitioner reads this case as holding "that findings of fact … [are] required by law prior to issuing a written civil penalty pursuant to § 143-215.6A." As the City points out, the assessment in *House of Raeford* simply recited that the eight statutory factors were considered, as in the present case. *Id.*, 774 S.E.2d at 919. On this basis, it is argued that judgment on the pleadings should be entered, rescinding the July 22, 2015 Assessment; or failing that, the matter should be "remanded back to DEQ, as the Finder of Fact," to "make specific findings with regard to the eight statutory factors." *Petitioner's Response*, pgs. 8-10.

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N.C. Gen. Stat § 143-215.6A(c). The statute referenced in this subparagraph, N.C. Gen. Stat § 143B-282.1, is titled, "**Environmental Management Commission – quasi-judicial powers; procedures.**" It sets out procedures for the exercise of the Commission's "final agency decision" authority, hearing appeals from the Office of Administrative Hearings "in accordance with the provisions of Chapter 150B," and considering "remission requests," and includes the "eight factors" that the professional staff also use in assessing civil penalties in subsection (b).

13. While "findings of fact" are specifically required in several instances by Chapter 143, Article 21 "Water and Air Resources," §§ 143-211 *et seq.*, for final decisions on matters such as permits for new storm water drainage systems, environmental standards, and interbasin transfers of water, there is no such stated requirement for issuance of the initial assessment of a civil penalty.

14. There is no showing of a compelling reason to assume an unstated requirement for detailed "findings of fact" in an assessment of a civil penalty. The presence of the "affirmative defenses" language in the standard permit suggests that a large portion of the SSO's occur during extraordinary weather events, which are likely to affect many wastewater[iv] systems at once. A more stringent findings requirement would be onerous for the agency in those circumstances. The

opportunity to use "[a]ny means of discovery available pursuant to the North Carolina Rules of Civil Procedure" amply guards against prejudice at the hearing stage. 26 NCAC 03 .0112(b). In this case, it appears that Respondent based its assessment entirely on its own permitting and violation history records, and *information supplied by Petitioner*. While the *House of Raeford* case offers a sharp contrast to Petitioner's self-reporting, 774 S.E.2d at 914-15, the nature of municipal wastewater[v] systems suggests that Petitioner's reaction is the more common scenario in the investigation of the SSO's.

15. In *House of Raeford*, the Court of Appeals upheld the Superior Court, which had adopted the Administrative Law Judge's opinion, on decisions to allow and disallow the imposition of several fines. *House of Raeford*, 774 S.E.2d at 920-22. However, the appellate Court found that the findings of fact were insufficient to support a conclusion that the fines comported with §143B-282.1(b). While the Court of Appeals commented on the fact that the Respondent's Branch Chief who prepared the assessment had not elaborated on his consideration of the "eight factors," and summarized his testimony, in reviewing the facts in the record, the court did not say the assessment was insufficient for its purpose. The Court's opinion remanded the case "to the Superior Court with instructions to remand **to the finder of fact**, to make specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat §143B-282.1(b) and to formulate the amount of any civil penalty to be imposed." (Emphasis added.) *Id.*, 774 S.E.2d at 920. In this instance, "the finder of fact" is the Environmental Management Commission, which has the option of referring the matter to the Office of Administrative Hearings. *Id.*, 774 S.E.2d at 916; N.C. Gen. Stat § 150B-40(e).

16. The undersigned concludes that Respondent's "Assessment of Civil Penalty" of July 22, 2015 provides Petitioner with due and sufficient notice under the circumstances of this case and the applicable statutes, and is not legally defective.

Consequently, the *Petitioner's Motion for Judgment on the Pleadings* must be, and hereby is, **DENIED**.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, N.C. GEN. STAT §1A-1, RULE 56

17. "Summary judgment simply means that a case can be decided based on undisputed facts without the need for an evidentiary hearing." *In re Estate of Pope*, 192 N.C.App. 321, 328–29, 666 S.E.2d 140, 146 (2008). It is proper only when it is shown that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). 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 non-moving party.[1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202

[1] N.C. Gen. Stat. §150B-25.1, effective for contested cases filed on or after October 22, 2015, places on the state agency, "[i]n a contested case involving the imposition of civil fines or penalties … for violation of the law, the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed[.]" The Petition initiating this case was filed on August 25, 2015, and thus at an evidentiary hearing the Petitioner would bear the burden of proving the facts required by G.S. 150B-23(a) by a

(1986). All evidence must be viewed in the light most favorable to the nonmoving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate with specific evidence that there exists a genuine issue of material fact requiring trial. Rule 56(e); *Steele v. Bowden*, ___ N.C. App. ___, 768 S.E.2d 47, 57 (2014); *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C.App. 215, 217, 293 S.E.2d 215, 216-17 (1982).

18. In its Motion for Summary Judgment, the Respondent correctly points out that, "Petitioner does not contend that it did not violate its permit" and N.C. Gen. Stat §143-215.1(a). *Respondent's Motion*, p. 1. Each of Respondent's pertinent Five-Day Reports describe untreated wastewater flowing from Petitioner's system into "surface waters," in specific violation of N.C. Gen. Stat §143-215.1(a)(6) and the permit. *Smith Aff.*, Ex A; *Smith Aff.*, Ex F, Permit § I.2.; and, *see* paragraph 2, *supra*.

19. Petitioner did raise questions about the applicability of N.C. Gen. Stat §143-215.1(a)(1), and whether Respondent was obligated to address the permit's "affirmative defenses" in the "Assessment of Civil Penalty" -- arguments foreshadowed in the Petition, and elaborated upon in *Petitioner's Motion* -- presenting issues of statutory interpretation and other, related questions of *law*, which have each been resolved in Respondent's favor. *See* paragraphs 7-16, *supra*.

20. While Petitioner's issues, considered in the light most favorable to Petitioner, go to the legitimacy of the Respondent's process of calculating assessments, there are no contradictory allegations of *fact* tending to show that the amounts Respondent calculated -- penalties of $3,750.00, and $29.71 for enforcement cost -- were incorrect. On its face, the Petition raises no questions of fact. This, buttressed by Respondent's *Smith Affidavit* and its attachments, carries the movant's burden of showing that there is no genuine issue as to any material fact.

21. Under some circumstances, the Petition and Prehearing Statement are treated as Petitioner's "pleadings" in a contested case. See, e.g., *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006), *aff'd and remanded sub nom., Lee v. N. Carolina Dep't of Transp.*, 360 N.C. 585, 634 S.E.2d 887 (2006) (reference to discriminatory act in petition, and allegation of discrimination in the prehearing statement, constituted sufficient allegation of a discrimination claim); *but see, Nailing v. UNC-CH*, 117 N.C.App. 318, 327, 451 S.E.2d 351, 357 (1994) (amending prehearing statement not equivalent to the filing a petition to commence a contested case).

22. When setting out the "Issue(s) to be resolved" in its Pretrial Statement, Petitioner reiterated its three issues in bullet points, each beginning with the phrase, "Whether NCDENR inappropriately assessed a civil penalty against the city without making the requisite findings of fact …". Petitioner's "A brief statement of the facts and reasons supporting the issue(s) in dispute" makes clear that the above phrase was alluding to its contention that Respondent improperly

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preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a); *Overcash v. Dept. of Env't & Natural Res.*, 179 N.C.App. 697, 635 S.E.2d 442, 448 (2006).

"issued an assessment of civil penalty letter … without making the requisite findings of fact." (Emphasis added.) In response to the query, "Whether you wish to pursue discovery," Petitioner entered: "The City does not anticipate that it will need to pursue discovery," suggesting that no facts material to the issues it raised were in controversy. (Emphasis added.)

23. In his affidavit submitted in support of the Respondent's motion for summary judgment, Stephen Daniel Smith, Regional Supervisor of the Water Quality Operations Section of DWR in the Raleigh regional office, states that the causes Petitioner gave for the three sanction spills "are typical causes of SSO's and are by no means 'exceptional;'" and that the City's submissions "did not demonstrate why the particular SSO's cited in the CPA [civil penalty assessment] could not have been avoided by reasonable preventive measures." *Smith Aff.*, pgs. 6 and 7.

24. In *Petitioner's Response*, it is argued that information provided to the Respondent in Part II of the Five-Day Reports and the City's June 4, 2015 response package proves that it was entitled to the benefits of the "affirmative defenses." *Petitioner's Response*, p 4. However, Petitioner has not produced affidavits or other evidence as required by N.C. Gen. Stat. § 1A–1, Rule 56(e) to controvert Respondent's affidavit.

25. If a movant makes an adequate showing, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A–1, Rule 56(e). "Summary judgment … cannot be evaded by … reliance on pleadings, general assertions or denials without a specific evidentiary basis for the respondent's position, or statements of mere expectations about the evidence." *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir.1981).

Consequently, it appearing that there are no issues of material fact, and that the Respondent is entitled to summary judgment as a matter of law, the Petition must be, and hereby is, **DISMISSED**.

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 21st day of December, 2016.

_____

J Randolph Ward
Administrative Law Judge

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[i] On the motion of the Respondent, pursuant to R.Civ.Pro. 60(a), paragraphs 1 and 14 were modified to apply the correct nomenclature in references to the Petitioner's wastewater collection system, and to clarify that the segment of the system requiring an NPDES permit is the wastewater treatment plant.

[ii] Replaced "storm water drainage system," with "wastewater collection system."

[iii] Replaced "Under the federally mandated National Pollution Discharge Elimination System ("NPDES"), such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the water gathered by the system is cleaned at a water treatment plant before being returned to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); 15A NCAC 02U .0101(c); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]")," with "Such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the wastewater gathered by the system is treated at a water treatment plant with a National Pollution Discharge Elimination System ("NPDES") permit before being discharged to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]")."

[iv] Replaced "storm water" with "wastewater."

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STATE OF NORTH CAROLINA

COUNTY OF

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 06258

City Of Durham Petitioner, v. N C Department Of Environment And Natural Resources Respondent.	**ORDER DENYING PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT (SECOND AMENDED ORDER[i])**

THIS MATTER is before the undersigned on the *Petitioner's Motion for Judgment on the Pleadings (*hereinafter, "*Petitioner's Motion*") and *Respondent's Motion for Summary Judgment (Respondent's Motion)*, with the benefit of *Respondent's Memorandum in Support of Motion for Summary Judgment and in Response to Petitioner's Motion for Judgment on the Pleadings* ("*Respondent's Memo")*, and *Petitioner's Response to Respondent's Motion for Summary Judgment* ("*Petitioner's Response*").

RECITATION OF PERTINENT FACTS

1. This controversy arises from a series of eleven (11) "Sanitary Sewer Overflows" ("SSO's") from the Petitioner City of Durham's wastewater collection system[ii] in the first quarter of 2015, three of which resulted in fines imposed by Respondent. See the *Affidavit of Stephen Daniel Smith*, paragraphs 8 and 12, appended to *Respondent's Memorandum* (hereinafter, "*Smith Aff*., § 3 and 8"). Such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the wastewater gathered by the system is treated at a water treatment plant with a National Pollution Discharge Elimination System ("NPDES") permit before being discharged to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]").[iii]

2. In this instance, approximately 475,000 gallons of untreated liquid reached creeks and rivers flowing into, e.g., Jordan Lake and Falls Lake, due to the three spills ultimately sanctioned, according to Petitioner's "Five-Day Reports."[2] (*Smith Aff*., Ex A.) This name for the reports refers to the requirement of the Petitioner's non-discharge Permit for written self-reporting of all releases of 1,000 gallons or more of untreated liquid into the environment, and any spill, "regardless of

[1] The Department of Environment and Natural Resources ("DENR") became the Department of Environmental Quality ("DEQ"), effective September 18, 2015, by virtue of legislation that became law on that date, and its Division of Water Quality ("DWQ") was renamed the Division of Water Resources ("DWR"). These names and acronyms are used interchangeably throughout the record.

[2] Officially, "Collection Systems Sanitary Sewer Overflow Reporting Form (Form CS-SSO)."

volume, that reaches surface water." (*Smith Aff.*, Ex F, Permit § I.2. and IV.2.) These provisions also require a verbal report "as soon as possible, but in no case more than 24 hours following the occurrence or first knowledge of the occurrence."

3. It appears that Petitioner made all of the required verbal and written reports timely. On May 4, 2015, Respondent sent Petitioner a "Notice of Violation – Notice of Intent to Enforce" ("NOV-NOI"), charting summary information about each of the 11 incidents; requesting that the City describe "the steps you have taken to abate SSO's labeled [in the summary chart] as NOV or NOV-NOI and your efforts to prevent future spills;" and, giving notice that Respondent was "considering an enforcement action with an assessment of civil penalties" for the four SSO's labeled NOV-NOI. *Smith Aff.*, Ex B. Petitioner responded on June 4, 2015 with a seven-page letter, and attached photos and documents. *Smith Aff.*, Ex C.

4. On July 22, 2015, Respondent issued its "Assessment of Civil Penalty" letter, "based upon … review" of Petitioner's Five-Day Reports, which were found to have shown violations of Petitioner's permit, and N.C. Gen. Stat. § 143-215.1(a)(1), which prohibits "any outlets into the waters of the State" without a permit. *Smith Aff.*, Ex E. The "Assessment" letter cites the statutory authority for imposing the civil penalty, and N.C. Gen. Stat §143B-282.1(b), which provides that such penalties "may be based on any one or [a] combination of" eight listed "factors." The assessment lists these statutory factors, verbatim, and states that they were "taken into account." Respondent imposed a total of $3,750.00 in civil penalties for three of the SSO's identified in the "Notice of Violation – Notice of Intent to Enforce" letter, and charged an additional $29.71 for "enforcement cost." The fourth incident listed in the NOV-NOI letter, which Petitioner's June 4, 2015 response attributed to vandalism, did not result in a fine. *Smith Aff.*, Ex C, p 4. While the assessment letter refers to "findings of fact and conclusions of law," the Respondent did not purport to have held an evidentiary hearing on the matter.

MOTION FOR JUDGMENT ON THE PLEADINGS, N.C. GEN. STAT §1A-1, RULE 12(C)

5. The "function" of Rule 12(c) of the North Carolina Rules of Civil Procedure, made generally applicable to contested case hearings by 26 NCAC 03 .0101(a),

> "… is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. … Judgment on the pleadings is a summary procedure and the judgment is final. Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally

> impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion."

Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2nd 494, 499 (1974) (internal cites omitted). N.C. Gen. Stat. § 150B-34(e) specifically provides that an administrative law judge may grant judgment on the pleadings, pursuant to Rule 12(c), disposing of all issues in a contested case.

6. The Petition recites, per N.C. Gen. Stat. § 150B-23(a), that Respondent "exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, [and/] or failed to act as required by law or rule," and thereby substantially prejudiced Petitioner's rights.

7. Specifically, the Petition alleges that the

> … civil penalty assessment … states no facts supporting the assertion that the City violated N.C. Gen. Stat §143-215.1(a)(1) by making an outlet into the waters of the State and … fails to make the requisite findings of fact regarding the eight statutory factors that are set forth in N.C. Gen. Stat §143B-282.1(b) for the calculation of a civil penalty assessment. In addition, the … assessment … fails to make the requisite finding of fact regarding the affirmative defenses that are provided to the city in paragraph 2 of the collection system permit[.]

(Emphasis Petitioner's.) See the *Petition for a Contested Case Hearing*, section 3.

8. Petitioner's *Motion for Judgment on the Pleadings*, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) of the N.C. Rules of Civil Procedure, suggests that Respondent must show an "affirmative act of 'mak[ing] [an] outlet into the waters of the state'" to impose a fine pursuant to § 143-215.1(a)(1). *Petitioner's Motion*, pgs. 1-2. However, that is not supported by the plain terms of the statute, its purpose of enforcing a non-discharge permits, or the history of its application. See, e.g., *Murphy Family Farms, Inc. v. Dept. of Environment*, 160 NC App. 338, 585 S.E.2d 446, 447-48 (N.C. App., 2003) (corrective action inadvertently causing "lagoon failure" led to a fine of $4,000 pursuant to § 143-215.1(a)(1) affirmed by Superior Court.)

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interbasin transfers of water, there is no such stated requirement for issuance of the initial assessment of a civil penalty.

14. There is no showing of a compelling reason to assume an unstated requirement for detailed "findings of fact" in an assessment of a civil penalty. The presence of the "affirmative defenses" language in the standard permit suggests that a large portion of the SSO's occur during extraordinary weather events, which are likely to affect many wastewater[iv] systems at once. A more stringent findings requirement would be onerous for the agency in those circumstances. The opportunity to use "[a]ny means of discovery available pursuant to the North Carolina Rules of Civil Procedure" amply guards against prejudice at the hearing stage. 26 NCAC 03 .0112(b). In this case, it appears that Respondent based its assessment entirely on its own permitting and violation history records, and *information supplied by Petitioner*. While the *House of Raeford* case offers a sharp contrast to Petitioner's self-reporting, 774 S.E.2d at 914-15, the nature of municipal wastewater[v] systems suggests that Petitioner's reaction is the more common scenario in the investigation of SSO's.

15. In *House of Raeford*, the Court of Appeals upheld the Superior Court, which had adopted the Administrative Law Judge's opinion, on decisions to allow and disallow the imposition of several fines. *House of Raeford*, 774 S.E.2d at 920-22. However, the appellate Court found that the findings of fact were insufficient to support a conclusion that the fines comported with §143B-282.1(b). While the Court of Appeals commented on the fact that the Respondent's Branch Chief who prepared the assessment had not elaborated on his consideration of the "eight factors," and summarized his testimony, in reviewing the facts in the record, the Court did not say the assessment was insufficient for its purpose. The Court's opinion remanded the case "to the Superior Court with instructions to remand **to the finder of fact**, to make specific findings with regard to the eight statutory factors set forth in N.C. Gen. Stat §143B-282.1(b) and to formulate the amount of any civil penalty to be imposed." (Emphasis added.) *Id.*, 774 S.E.2d at 920. In this instance, "the finder of fact" is the Environmental Management Commission, which has the option of referring the matter to the Office of Administrative Hearings. *Id.*, 774 S.E.2d at 916; N.C. Gen. Stat § 150B40(e).

16. The undersigned concludes that Respondent's "Assessment of Civil Penalty" of July 22, 2015 provides Petitioner with due and sufficient notice under the circumstances of this case and the applicable statutes, and is not legally defective.

Consequently, the *Petitioner's Motion for Judgment on the Pleadings* must be, and hereby is, **DENIED**.

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, N.C. GEN. STAT §1A-1, RULE 56

17. "Summary judgment simply means that a case can be decided based on undisputed facts without the need for an evidentiary hearing." *In re Estate of Pope*, 192 N.C.App. 321, 328–29, 666 S.E.2d 140, 146 (2008). It is proper only when it is shown that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of

law." N.C. Gen. Stat. § 1A-1, Rule 56(c). *Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). 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 nonmoving party.[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All evidence must be viewed in the light most favorable to the nonmoving party, taking its asserted facts as true, and drawing all reasonable inferences in its favor. *Kennedy v. Guilford Tech. Community College*, 115 N.C. App. 581, 583, 448 S.E.2d 280, 281 (1994). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate with specific evidence that there exists a genuine issue of material fact requiring trial. Rule 56(e); *Steele v. Bowden*, ___ N.C. App. ___, 768 S.E.2d 47, 57 (2014); *Ind-Com Elec. Co. v. First Union Nat. Bank*, 58 N.C.App. 215, 217, 293 S.E.2d 215, 216-17 (1982).

18. In its Motion for Summary Judgment, the Respondent correctly points out that, "Petitioner does not contend that it did not violate its permit" and N.C. Gen. Stat §143-215.1(a). *Respondent's Motion*, p. 1. Each of Respondent's pertinent Five-Day Reports describe untreated wastewater flowing from Petitioner's system into "surface waters," in specific violation of N.C. Gen. Stat §143-215.1(a)(6) and the permit. *Smith Aff.*, Ex A; *Smith Aff.*, Ex F, Permit § I.2.; and, *see* paragraph 2, *supra*.

19. Petitioner did raise questions about the applicability of N.C. Gen. Stat §143-215.1(a)(1), and whether Respondent was obligated to address the permit's "affirmative defenses" in the "Assessment of Civil Penalty" -- arguments foreshadowed in the Petition, and elaborated upon in *Petitioner's Motion* -- presenting issues of statutory interpretation and other, related questions of *law*, which have each been resolved in Respondent's favor. *See* paragraphs 7-16, *supra*.

20. While Petitioner's issues, considered in the light most favorable to Petitioner, go to the legitimacy of the Respondent's process of calculating assessments, there are no contradictory allegations of *fact* tending to show that the amounts Respondent calculated -- penalties of $3,750.00, and $29.71 for enforcement cost -- were incorrect. On its face, the Petition raises no questions of fact. This, buttressed by Respondent's *Smith Affidavit* and its attachments, carries the movant's burden of showing that there is no genuine issue as to any material fact.

21. Under some circumstances, the Petition and Prehearing Statement are treated as Petitioner's "pleadings" in a contested case. See, e.g., *Lee v. N.C. Dep't of Transp.*, 175 N.C. App. 698, 703, 625 S.E.2d 567, 571 (2006), *aff'd and remanded sub nom., Lee v. N. Carolina Dep't of Transp.*, 360 N.C. 585, 634 S.E.2d 887 (2006) (reference to discriminatory act in petition, and allegation of discrimination in the prehearing statement, constituted sufficient allegation of a

[3] N.C. Gen. Stat. §150B-25.1, effective for contested cases filed on or after October 22, 2015, places on the state agency, "[i]n a contested case involving the imposition of civil fines or penalties … for violation of the law, the burden of showing by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed[.]" The Petition initiating this case was filed on August 25, 2015, and thus at an evidentiary hearing the Petitioner would bear the burden of proving the facts required by G.S. 150B-23(a) by a preponderance of the evidence. N.C. Gen. Stat. § 150B-29(a); *Overcash v. Dept. of Env't & Natural Res.*, 179 N.C.App. 697, 635 S.E.2d 442, 448 (2006).

discrimination claim); *but see, Nailing v. UNC-CH*, 117 N.C.App. 318, 327, 451 S.E.2d 351, 357 (1994) (amending prehearing statement not equivalent to the filing a petition to commence a contested case).

22. When setting out the "Issue(s) to be resolved" in its Pretrial Statement, Petitioner reiterated its three issues in bullet points, each beginning with the phrase, "Whether NCDENR inappropriately assessed a civil penalty against the city without making the requisite findings of fact …". Petitioner's "A brief statement of the facts and reasons supporting the issue(s) in dispute" makes clear that the above phrase was alluding to its contention that Respondent improperly "issued an assessment of civil penalty letter … without making the requisite findings of fact." (Emphasis added.) In response to the query, "Whether you wish to pursue discovery," Petitioner entered: "The City does not anticipate that it will need to pursue discovery," suggesting that no facts material to the issues it raised were in controversy. (Emphasis added.)

23. In his affidavit submitted in support of the Respondent's motion for summary judgment, Stephen Daniel Smith, Regional Supervisor of the Water Quality Operations Section of DWR in the Raleigh regional office, states that the causes Petitioner gave for the three sanction spills "are typical causes of SSO's and are by no means 'exceptional;'" and that the City's submissions "did not demonstrate why the particular SSO's cited in the CPA [civil penalty assessment] could not have been avoided by reasonable preventive measures." *Smith Aff*., pgs. 6 and 7.

24. In *Petitioner's Response*, it is argued that information provided to the Respondent in Part II of the Five-Day Reports and the City's June 4, 2015 response package proves that it was entitled to the benefits of the "affirmative defenses." *Petitioner's Response*, p 4. However, Petitioner has not produced affidavits or other evidence as required by N.C. Gen. Stat. § 1A–1, Rule 56(e) to controvert Respondent's affidavit.

25. If a movant makes an adequate showing, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A–1, Rule 56(e). "Summary judgment … cannot be evaded by … reliance on pleadings, general assertions or denials without a specific evidentiary basis for the respondent's position, or statements of mere expectations about the evidence." *Burst v. Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir.1981).

Consequently, it appearing that there are no issues of material fact, and that the Respondent is entitled to summary judgment as a matter of law, the Petition must be, and hereby is, **DISMISSED**.

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 22nd day of December, 2016

_____

J Randolph Ward
Administrative Law Judge

[i] On the motion of the Respondent, pursuant to R.Civ.Pro. 60(a), paragraphs 1 and 14 were modified to apply the correct nomenclature in references to the Petitioner's wastewater collection system, and to clarify that the segment of the system requiring an NPDES permit is the wastewater treatment plant. This Second Amended Order restores footnote 1, which was inadvertently omitted from the first Amended Order.

[ii] Replaced "storm water drainage system," with "wastewater collection system."

[iii] Replaced "Under the federally mandated National Pollution Discharge Elimination System ("NPDES"), such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the water gathered by the system is cleaned at a water treatment plant before being returned to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); 15A NCAC 02U .0101(c); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]")," with "Such systems are permitted by the Respondent N.C. Department of Environmental Quality, through its Division of Water Resources,[1] on the condition that all the wastewater gathered by the system is treated at a water treatment plant with a National Pollution Discharge Elimination System ("NPDES") permit before being discharged to the natural surface waters. N.C. Gen. Stat. § 143-215.1(b)(1) and (2); *Smith Aff*., Exhibit F, Permit § I. 1. and 2; 33 U.S.C. §1251 (a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated[.]")."

[iv] Replaced "storm water" with "wastewater."

[v] Replaced "storm water" with "wastewater."