

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 00917

Matthew and Jessica Schumaker, Petitioners, v. N.C. Department of Environmental Quality, Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before Chief Administrative Law Judge Donald R. van der Vaart on August 16, 2022 at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

For Petitioners: Randy Herman
B.A. Folk, PLLC
PO Box 90426
Raleigh, NC 27675

For Respondent: Taylor H. Crabtree, Assistant Attorney General
Ashton H. Roberts, Assistant Attorney General
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602

BACKGROUND

Petitioners Matthew and Jessica Schumaker are homeowners in Cary, North Carolina. In 2021, Petitioners built a “pump track,” or a series of jumps and ramps made out of shaped clay and dirt in their backyard for recreational BMX or dirt bikes. Respondent, North Carolina Department of Environmental Quality (DEQ), Division of Water Resources, received an anonymous complaint about the Schumaker property. The complaint alleged that the pump track impermissibly encroached on the riparian buffer of two streams traversing the Schumaker property. DEQ inspectors visited the property which resulted in a Notice of Violation (NOV) being sent to the Schumakers for violations of the Neuse River Riparian Buffer Protection Rules. The Schumakers applied for an authorization certificate (after-the-fact) from Respondent that would allow the pump track, as well as a drainage ditch that the Schumakers had dug in their backyard. Respondent denied the application. Petitioners have appealed the denial, arguing (1)

one of the streams traversing their property is not subject to the Neuse River Riparian Buffer Protection Rules; (2) their pump track is an allowable use under the Neuse River Riparian Buffer Protection Rules; and (3) the drainage ditch in their backyard is an allowable use under the Neuse River Riparian Buffer Protection Rules.

ISSUES

1. Whether Respondent, North Carolina Department of Environmental Quality (“Respondent”), acted erroneously or arbitrarily or capriciously when it denied Petitioners’ application for a Neuse River Riparian Buffer Authorization Certificate for a dirt bike “pump track”;

2. Whether “Stream B,” a drainage ditch on Petitioners’ property, is subject to the Neuse River Riparian Buffer Protection rules; and

3. Whether Respondent acted erroneously or arbitrarily or capriciously when it determined that a drainage ditch located on Petitioners’ property was not an allowable use under the Neuse River Riparian Buffer Protection Rules?

STATUTES AND RULES AT ISSUE

1. The procedural statutory law applicable to this contested case is the North Carolina Administrative Procedure Act, N.C. Gen. Stat. § 150B-1, *et seq.*

2. The substantive statutory law applicable to this contested case is Article 21 of Chapter 143 of the North Carolina General Statutes.

3. The substantive administrative regulations applicable to this contested case are the North Carolina Neuse River Riparian Buffer Protection Rules, 15 N.C. Admin. Code 2B .0700, *et seq.*

WITNESSES

For Petitioners:

Matthew Schumaker, Petitioner
Stephanie Goss, North Carolina Department of Environmental Quality, Division of
Water Resources

For Respondent:

Stephanie Goss, North Carolina Department of Environmental Quality, Division of
Water Resources
S. Daniel Smith, North Carolina Department of Environmental Quality, Division
of Energy, Mineral, and Land Resources

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioners:

Petitioners' Exhibit A, 2011 Survey of Petitioners' Property
Petitioners' Exhibit B, 1970 Wake County Soil Survey
Petitioners' Exhibit C, 1973 Final Plat, Greenwood Forest, Section II, Part "H"
Petitioners' Exhibit D, Undated Topographic Map of Property
Petitioners' Exhibit E, 1972 Preliminary Flat, Greenwood Forest, Section II, Part "H"
Petitioners' Exhibit F, 01/19/2022 Denial Letter of Neuse River Riparian Buffer Authorization Application
Petitioners' Exhibit G, Wake County Soil Survey Key
Petitioners' Exhibit H, 08/16/2022 Photograph of Ditch Located on Property

For Respondent:

Respondent's Exhibit A, 08/31/2021 Photograph of Pump Track
Respondent's Exhibit B, 08/31/2021 Photograph of Pump Track and Chain-link Fence
Respondent's Exhibit C, Notice of Violation
Respondent's Exhibit D, 01/05/2022 Photograph of Stream B
Respondent's Exhibit E, Riparian Buffer Authorization Application
Respondent's Exhibit F, E-mails Between Stephanie Goss and Petitioner Matthew Schumaker and Petitioners' Counsel
Respondent's Exhibit G, Letter from Petitioners' Counsel to Stephanie Goss
Respondent's Exhibit H, 01/05/2022 Photograph of Bank of Stream B
Respondent's Exhibit I, 01/05/2022 Photograph of Corrugated Pipe
Respondent's Exhibit J, Undated Topographic Map of Petitioners' Property, notating Stream A

FINDINGS OF FACT

Upon consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness, including but not limited to, the demeanor of the witness; any interest, bias or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witnesses is reasonable; and whether the testimony is consistent with all other credible evidence in the case.

Parties

1. Petitioners Matthew and Jessica Schumaker (“Petitioners”) own a single-family residence on Cindy Street, in Cary, North Carolina (the “Property” or “Petitioners’ Property”). Their property is traversed by two water bodies (“Stream A” and “Stream B”).

2. Respondent, North Carolina Department of Environmental Quality (“Respondent”), is a State agency charged with promulgating and enforcing riparian buffer protection rules.

Procedural and Factual Background

3. Petitioners’ Property was platted in 1973. (T p 24). Petitioners’ residence, located on Cindy Street in Cary, North Carolina, was built in 1974-1975. (T p 21).

4. Petitioners purchased the Property in 2011. (T p 18). In the course of purchasing the property, Petitioners hired a professional surveyor, who produced a survey of the backyard. The professional survey was introduced as Petitioners’ Exhibit A.

5. Petitioners’ Property has a downward slope that causes rain and surface water to collect in Petitioners’ backyard. (T p 17). The Property is enclosed by a wood and chain-link fence, which is displayed on the 2011 survey. (Pet. Ex. A; T p 19). There is a drainage easement along the chain link fence that runs through the southwestern part of the Property. (T p 19; Pet. Ex. A).

6. The drainage easement contains a ditch (Stream B). Lynn Creek (Stream A) crosses the Property beyond the ditch to the southwest. (T p 20). The ditch, which Respondent identified as Stream B, is a “straight line . . . [that] you can stand in.” (T p 20). The ditch typically does not have standing water. (T p 20). The creek, identified as Stream A, “typically only has water during rainstorms.” (T p 20-21).

7. Stephanie Goss (“Goss”), an Environmental Program Respondent for Respondent, stated that according to the 1970 Wake County Soil Survey (Pet. Ex. B), the two streams identified by Respondent as Streams A and B meet to the north of Petitioners’ property line. (T p 46). “Stream A,” otherwise known as Lynn Branch, is not at issue in this contested case. The parties agree that Stream A is subject to the Neuse River Buffer Protection Rules, and that Petitioners have encroached upon the riparian buffer of Stream A. (T p 41).

8. Running along the back of Petitioners’ chain-link fence on the west side of the Property is a 30-foot drainage easement. (T p 19). Stream B is located within the drainage easement. (Pet. Ex. A).

9. Despite the drainage easement, Petitioners’ Property regularly collected standing water.

10. In 2021, due to the collection of standing water in Petitioners’ backyard, Petitioners investigated cost-effective solutions to maintain their Property. While Petitioners were investigating the issue of standing-water, Petitioners’ children began participating in BMX riding. (T p 17).

11. Petitioners elected to build “some jumps” designed for BMX riding (otherwise known as a “pump track”) and a drainage ditch in their backyard, inside their fence line. (T p 17-18). The drainage ditch located within the fence on Petitioners’ Property flows into Stream B, which is the “ditch” located on the outside of the fence line. (T p 39).

12. Petitioners contacted the City of Cary before modifying the Property. The City of Cary informed Petitioners that the pump track and drainage ditch were acceptable so long as it did not affect the neighboring residential properties. (T p 17-18).

13. The BMX pump track is made out of shaped clay and dirt and is used by adolescents in Petitioners’ neighborhood to practice riding bicycles on trails “so they can ride mountain bikes kind of better or safer.” (T p 26-27).

14. On August 31, 2021, Respondent conducted a site inspection of Petitioners’ property because Respondent received an anonymous tip that Petitioners’ pump track and drainage ditch located inside the fence line violated the Neuse River Riparian Buffer Protection Rules (“Buffer Rules”).

15. On September 1, 2021, after the site inspection, Respondent issued a Notice of Violation for the removal of vegetation, grading, and fill of approximately 1,500 square feet of Zone 1 and approximately 1,000 square feet of Zone 2 of the riparian buffer. (Res. Ex. C). According to the Notice, there were two streams traversing Petitioners’ Property: Stream A, identified as Lynn Branch; and Stream B, an unnamed tributary to Lynn Branch.

16. The Notice was signed by S. Daniel Smith (“Smith”), former Director of the Division of Water Resources (“DWR”). Smith has been employed by Respondent for approximately 30 years, primarily in DWR. (T p 148).

17. In the Notice the Respondent stated that “The stream labeled as Stream B on Attachment 1 is depicted on the Wake County Soil Survey”

18. On or about October 12, 2021,¹ Petitioners applied for an after-the-fact Neuse River Buffer Authorization Certificate (“Buffer Authorization”), seeking a certificate from Respondent allowing their pump track and drainage ditch. (Res. Ex. E).

19. Throughout his tenure at Respondent, Smith had not seen an application for a Buffer Authorization where it was determined that a dirt bike track or pump track was “playground equipment.” (T p 150).

20. On December 2, 2021, Respondent requested additional information from Petitioners, specifically seeking an explanation as to whether these activities were allowable uses under the Buffer Rules on December 2, 2021. (Res. Ex. F).

¹ It appears Petitioner Matthew Schumaker signed and dated the application form on October 4, 2021. However, the application form was not received by Respondent until October 12, 2021.

21. Included in this request Respondent stated, “Based on the 1970 Wake County NRCS Soil Survey the survey depicts two mapped features. The stream features A and B *were determined to be subject* on August 31, 2021 by Stephanie Goss [referencing the September 1, 2021 NOV].” [emphasis added].

22. Petitioners responded on December 22, 2021, asserting that the pump track located in their backyard was an allowable use under the Buffer Rules because a “pump track” is “playground equipment.” (Res. Ex. F).

23. Also in their December 22, 2021 response Petitioners stated, “According to the maps you have provided, Stream B flows into Lynn Branch (Stream A) upstream of the subject property boundary. Therefore . . . no additional delineation is necessary.”

24. Respondent denied Petitioners’ Buffer Authorization Application on January 19, 2022.

25. In the denial letter, Respondent stated that Petitioners did not “depict “Stream B . . . on the impact map as requested on December 2, 2021. The impact map provided with the application depicts Stream B as a drainage ditch. On September 1, 2021, this feature was determined to be a perennial stream by DWR staff and is thus subject to the riparian buffer rules.”

26. On March 9, 2022, Petitioners filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings, appealing Respondent’s denial of the Buffer Authorization Application.

27. Petitioners’ pump track encroaches into Zone 2 of the riparian buffer of Stream A. (T p 40). At issue in this contested case is (1) whether Stream B is subject to the Buffer Rules; (2) whether the pump track is an allowable use under the Buffer Rules; and (3) whether the drainage ditch dug by the Petitioner is an allowable use upon authorization from Respondent.

Neuse River Riparian Buffer Protection Rules

28. North Carolina has adopted certain riparian buffer protection rules. The Buffer Rules are designed to “maintain and protect existing riparian buffers in the Neuse River Basin.” 15A N.C. Admin. Code 2B .0714(1).

29. A riparian buffer “is a 50-foot vegetated area” that starts on the top of a bank and extends 50 feet landward. (T p 90). The riparian buffer should be vegetated to “remove nutrients, remove nitrogen [and] phosphorous,” and to help prevent erosion. (T p 90).

30. The Buffer Rules apply “to all landowners . . . conducting activities within the riparian buffer[]” of a waterbody that is “approximately shown” on map approved by Respondent. 15A N.C. Admin. Code 2B .0714(2)-(3). Respondent does not have a definition of the term “approximately shown.” (T p 57).

31. The Buffer Rules apply to activities conducted within a 50-foot wide riparian buffer directly adjacent to a waterbody subject to the rules. 15A N.C. Admin. Code 2B .0714(3)(b).

32. The 50-foot buffer of any waterbody subject to the Buffer Rules is divided into two zones. 15A N.C. Admin. Code 2B .0714(8). Zone 1 begins at the most landward limit of the top of the bank and extends landward 30 feet on all sides of the stream. 15A N.C. Admin. Code 2B .0714(8)(a)(i). Zone 2 is comprised of a vegetated area that remains undisturbed by activities unless they are deemed approvable by the Buffer Rules and the Division of Water Resources. Zone 2 begins at the outer edge of Zone 1 and extends landward 20 feet. 15A N.C. Admin. Code 2B .0714(8)(a)(ii); 15A N.C. Admin. Code 2B .0714(8)(b).

33. The Buffer Rules enumerate certain “allowable uses” of the riparian buffer of a waterbody subject to the rules. (T p 91). These allowable uses can be found in the “Table of Uses” located in 15A N.C. Admin. Code 2B .0714(11). If an activity or project is not one of the “allowable” the uses in the Table, it would require the issuance of an Authorization Certificate by Respondent. (T p 92, 152); 15A N.C. Admin. Code 2B .0714(10)(a)(ii).

Site Determination

34. On August 31, 2021, Stephanie Goss (“Goss”) inspected the Property. (T p 43). Goss has been employed with Respondent’s Division of Water Resources (“DWR”) for approximately 15 years. Goss is presently employed as an Environmental Program Consultant in DWR’s Raleigh Regional Office and has been employed in this role since May 2016. (T p 43, 87-88).

35. One of Goss’s job responsibilities is conducting buffer determinations. (T p 88). Goss conducts approximately 10 buffer authorizations and 20 to 30 stream determinations each month. (T p 88).

36. Goss has a bachelor’s degree in environmental science and has been certified to conduct buffer determinations since 2016. (T p 44, 89). Goss has not been trained to conduct a professional survey. (T p 44).

37. Goss determined that Stream A and Stream B, the waterbodies that traverse Petitioners’ Property, were subject to the Buffer Rules. (T p 43-45).

38. In making this determination, Goss reviewed the United States Geologic Survey (“USGS”) topographic map and the 1970 Natural Resources Conservation Survey (“NRCS”) Soil Survey (the “1970 Soil Survey”). (T p 44). The 1970 Soil Survey is the most recent paper book for Wake County, North Carolina. (T p 44).

39. Under 15A N.C. Admin. Code 2B .0714(3), a surface water that is “proximately shown on” either the USGS topographic map or the 1970 Soil Survey “shall be subject” to the Buffer Rules.

40. Under 15A N.C. Admin. Code 2B .0714(4), “[w]hen a landowner or other affected party believes that the maps listed in . . . this Rule have inaccurately depicted surface waters or the specific origination point of a stream, or the specific origination point of a stream is in question or unclear, he or she shall request the Authority to make an on-site determination.”

41. Disputes over on-site determinations shall be referred to the Director of DWR in writing within 60 calendar days of written notification from the Authority. 15A N.C. Admin. Code 2B .0714(4).

42. The 1970 Soil Survey was published prior to the platting of the Property. Petitioners' Property was not platted until 1973. (T p 24).

43. The 1970 Soil Survey does not depict approximately 100 feet of Cindy Street, including the cul-de-sac on which Petitioners reside. (T p 23-24).

44. Despite a portion of Cindy Street not existing in 1970, Goss used the 1970 Soil Survey map to determine the approximate location of Petitioners' Property. (T p 44-46).

45. Petitioners had a professional survey conducted when they purchased the Property. According to the survey, Stream B is located within a 30-foot drainage easement. (Pet. Ex. A).

46. After Goss determined the approximate location of Petitioners' Property, she determined that Stream A and Stream B were subject to the Buffer Rules based on her observations during the inspection. (T p 51).

47. Whether the waterbodies in this case are subject to the Buffer Rules was solely dependent on the site determination. (T p 51).

48. Goss determined Stream B was subject to the Buffer Rules after looking at "geomorphology, hydrology, and biology." (T p 51).

49. When looking at the geomorphology of a particular waterbody, Respondent uses "a number of indicators," including the continuity of bed and bank; streambed substrate; the presence or absence of riffles or pools; the structure of the stream; and sinuosity. (T p 52, 107).

50. When looking at hydrology, Respondent looks for "the presence of base flow, is there water flowing. [Respondent] look[s] at leaf litter, is there any leaf litter in the - - in that stream feature because if you have constant water, you're not going to have that leaf litter." (T p 109). Respondent also looks for an indication of "rack lines," which is "when the water is flowing, and there could be . . . a root or a limb" that obstructs the water flow. (T p 109-10).

51. Biology is examined through the presence of "fibrous roots within the stream channel, within the streambed, macroinvertebrates . . . [and] amphibians." (T p 110).

52. When comparing natural streams with manmade drainage ditches Goss noted ditches "would not have geomorphology," though they "could have hydrology" and "potentially" biology. (T p 52-53). More specifically, a ditch would not have streambed substrate, riffles, "pools and cobble." (T p 53).

53. Goss did not review the history of the Property in determining whether Stream B was a man-made drainage ditch or a waterbody subject to the Buffer Rules. (T p 54).

54. Goss determined Stream B was approximately shown on the 1970 Soil Survey because of the topography of the site. (T p 57).

55. Photographic evidence as well as other maps demonstrated that Stream B was substantially straight and therefore did not have the geomorphological characteristic of sinuosity.

56. Stream B is located within the drainage easement and follows the substantially straight geometry of the easement. (T p 171 and Pet. Ex. A).

Pump Track Determination

57. The Buffer Rules allow certain activities with a Neuse River Buffer Authorization Certificate. One such use is “playground equipment.” 15A N.C. Admin. Code 2B .0714(11)(q).

58. Based on the site inspection, Goss determined Petitioners’ pump track was not “playground equipment.” (T p 61). In making this determination, Goss applied the “ordinary meaning” of the term “playground equipment.” (T p 125).

59. Respondent does not have a definition of “playground equipment” in the Buffer Rules, but Goss determined that a pump track did not meet the definition because it “is not a slide, a jungle gym, swings,” or another apparatus generally observed on a playground. (T p 62, 125).

60. Goss was unaware of any other pump track or similar apparatus that has been an approved use of a riparian buffer by Respondent. (T p 63). Smith, the former director of DWR (T p 145), was unable to recall any instance where a pump track was deemed an allowable use under the Buffer Rules. (T p 149).

Dispersed Flow

61. The Buffer Rules allow certain types of stormwater runoff, including drainage conveyances, so long as the runoff meets the dispersed flow requirement as defined in 15A N.C. Admin. Code 2H .1002. (T p 66); 15A N.C. Admin. Code 2B .0714(9). Drainage conveyances include drainage ditches. *Id.*

62. “Dispersed flow” refers to how stormwater flows over the ground in a sheet-like manner. (T p 66). Stormwater runoff does not meet the “dispersed flow” requirement where it is channelized. (T p 66).

63. Goss determined that the drainage ditch Petitioners constructed within the fenced-in portion of the Property was not an allowable use under the Buffer Rules. (T p 67-68). Drainage ditches are not a permissible use if they erode through the riparian buffer. 15A N.C. Admin. Code 2B .0714(9).

64. During the site inspection, Goss observed sediment and erosion around the drainage ditches. (T p 71).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder and the notice of hearing was proper.

2. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the 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. A court “need not make findings as to every fact which arises from the evidence and need only find those facts which are material to the settlement of the dispute.” *Brewington v. N.C. Dep’t of Public Safety, State Bureau of Investigation*, 254 N.C. App. 1, 23, 802 S.E.2d 115, 131 (2017) (citation omitted).

4. Petitioners timely filed their petition for a contested case hearing.

5. Petitioners bear the burden of proof on each element of their case. *Overcash v. N.C. Dep’t of Env’t & Nat. Res.*, 179 N.C. App. 697, 704, 635 S.E.2d 442, 447-48 (2000); *see also* N.C. Gen. Stat. § 150B-25.1(a).

6. Pursuant to N.C. Gen. Stat. § 150B-23(a), in a contested case hearing, “the ALJ is to determine whether the petitioner has met its burden in showing that the agency substantially prejudiced petitioner’s rights, and that the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.” *Presbyterian Hosp. v. N.C. Dep’t of Health & Hum. Servs.*, 177 N.C. App. 780, 784, 630 S.E.2d 213, 215 (2006) (citation omitted).

7. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to the facts and inferences within the specialized knowledge of the agency. N.C. Gen. Stat. § 150B-34(a). The burden of persuasion placed upon a petitioner is the “greater weight of the evidence.” *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C. App. 704, 712, 513 S.E.2d 823, 828 (1999).

8. Petitioners raise three claims:

- a. Respondent erred when it determined that the pump track was not “playground equipment,” an allowable use under the Buffer Rules;
- b. Respondent erred when it determined Stream B was an unnamed tributary subject to the Buffer Rules; and

- c. Respondent erred when it determined that the drainage ditch located on Petitioners' property was an unallowable use under the Buffer Rules.

Allowable Uses under the Neuse River Riparian Buffer Protection Rules

9. The purpose of the Buffer Rules is “to maintain and protect existing riparian buffers in the Neuse River Basin . . .” 15A N.C. Admin. Code 2B .0714(1). Riparian buffers provide a number of functions crucial to stream health and water quality, including nutrient removal and temperature regulation of the waterbodies they surround. (T p 90-91). Riparian buffers also stabilize stream beds and banks and prevent soil erosion or sedimentation of streams. (T p 90).

10. The Buffer Rules apply “to all landowners and other persons . . . conducting activities within the riparian buffers.” 15A N.C. Admin. Code 2B .0724(2).

11. The Buffer Rules set out certain activities which are “allowable,” or “allowable upon authorization” of Respondent. 15A N.C. Admin. Code 2B .0714(10)-(11). “Allowable” uses may occur within the riparian buffer and shall be designed and maintained to minimize vegetation and soil disturbance and to provide the maximum water quality protection practicable. 15A N.C. Admin. Code 2B .0714(10)(a)(i). “Allowable upon authorization” uses require a written Authorization Certificate from Respondent for impacts within the riparian buffer. 15A N.C. Admin. Code 2B .0714(10)(a)(ii).

12. “Playground equipment” located on a single-family residential property where installation or use results in the removal of vegetation is an “allowable upon authorization” use of the riparian buffer. Constructing, maintaining, and using such equipment requires an Authorization Certificate from Respondent. *Id.*; 15A N.C. Admin. Code 2B .0714(11)(q)(ii).

13. The Buffer Rules do not define “playground equipment.”

14. “Statutory interpretation properly begins with an examination of the plain words of the statute.” *Cole v. N.C. Dep’t of Public Safety*, 253 N.C. App. 270, 278, 800 S.E.2d 708, 714 (2017) (citation omitted).

15. Where a term included within a statute or rule is undefined, the term is given its “ordinary meaning determined according to the contested in which [the term] is ordinarily used.” *Parkdale America, LLC v. Hinton*, 200 N.C. App. 275, 278-79, 684 S.E.2d 458, 461 (2009) (citation omitted).

16. The Merriam-Webster dictionary defines “playground” as “a piece of land used for and usually equipped with facilities for recreation especially by children.”

17. The dictionary further defines “equipment” as “the set of articles or physical resources serving to equip a person or thing: such as (1) the implements used in an operation or activity: Apparatus/sports equipment (2): all the fixed assets other than land and buildings of a business enterprise.”

18. Thus, “playground equipment” is a physical apparatus or apparatuses, other than land or a fixed building, used for recreation, especially by children.

19. Examples of “playground equipment” can be found in the Amusement Device Safety Act of North Carolina, and include “swings, seesaws, slides, stationary spring-mounted animal features, jungle gyms, rider-propelled merry-go-rounds, and trampolines.” N.C. Gen. Stat. § 95-111.3.

20. Respondent applies the “ordinary meaning” of the term “playground equipment.” (T p. 125). Respondent, however, has yet to include this definition in its Buffer Rules.

21. Respondent did not act erroneously or arbitrarily or capriciously when it determined that Petitioners’ pump track, made out of shaped clay and dirt, does not meet the ordinary definition of “playground equipment,” because it is shaped land, not a “slide, swing, seesaw,” or other playground apparatus typically observed at a recreational area for children.

Stream B’s Classification

22. The Buffer Rules apply to “all landowners and other persons . . . conducting activities within the riparian buffers as described in” 15A N.C. Admin. Code 2B .0714(3). 15A N.C. Admin. Code 2B .0714(2).

23. A water body is subject to the Buffer Rules if it is “approximately shown on”:

- a. The most recent version of the published manuscript of the soil survey map that shows stream layers prepared by the Natural Resources Conservation Service of the United States Department of Agriculture;
- b. The United States Geology Survey’s (USGS) National Map, available online; or
- c. Other maps approved by the Environmental Management Commission.

15A N.C. Admin. Code 2B .0714(3)(a).

24. The Buffer Rules do not prohibit the use of other maps or evidence to ascertain whether the sources approved under 15A NCAC 2B .0714(3)(a) are accurate in making a buffer applicability determination.

25. The latest or most recent version of the Natural Resources Conservation Service soil survey map that is accessible by Respondent was published in 1970 (the “1970 Soil Survey”). Goss compared the 1970 Soil Survey to most recent version of the USGS National Map in determining that Stream B was subject to the Buffer Rules despite finding that the 1970 map showed that Stream B had merged with Stream A prior to entering the Property.

26. The USGS map contains a topographic line indicating the possible presence of a stream located between Kathryn Street and Cindy Street in Cary, North Carolina.

27. Goss visually ascertained that Stream B was the water body indicated by the topographic line. Goss did not undergo any type of geolocating to ensure that Petitioners' Property was located where she believed it to be. (T p 104).

28. Goss used the 1970 Soil Survey to ascertain where "Stream B" was approximately located. Petitioners' lot was not platted until 1973, after the 1970 Soil Survey was published.

29. When Petitioners' lot was platted, Cindy Street was lengthened by over 100 feet. The extension of Cindy Street is not reflected in the maps used by Respondent.

30. Stream B could not be approximately shown on the maps approved for use in determining water bodies subject to the Buffer Rules. Under 15A N.C. Admin. Code 2B .0714(4) a site determination would be required to make Stream B subject to the Buffer rules. (T p 51)

31. Goss admitted that Stream B had merged with Stream A prior to entering the Property (at least according to an approved 1970 map) and also that a now separate Stream B flowed through the Property according to the site determination.

32. Stream B is located within Petitioners' drainage easement, raising the question whether the stream was actually a manmade ditch or a subject stream. The determination required Respondent to distinguish between a manmade ditch and a stream.

33. Petitioner Matthew Schumaker believed that the 1970 map was inaccurate and that no further delineation was necessary (Petitioner's Ex. E in Response to MSJ.)

34. Respondent failed to follow its own rules by insisting that the maps under 15A N.C. Admin. Code 2B .0714 determined that Stream B was subject to the riparian buffer rules (Res. Ex. C. and Petitioners' Ex. E in Response to MSJ) rather than to perform a site determination.

35. Had Respondent completed a site determination as required by their own rules, Petitioners would have had an opportunity to challenge that determination in this Tribunal as provided in 15A N.C. Admin. Code 2B .0714(4).

36. Respondent later admitted that the 1970 Soil Survey could not be used for the determination and that a site determination under 15A N.C. Admin. Code 2B .0714(4) would be required to make Stream B subject to the Buffer rules. (T p 51)

37. There is no record that Respondent performed a site determination under Rule .0714(4) prior to either sending the Notice of Violation.

38. Site determinations are made on three factors: biology, hydrology, and geomorphology. A site determination to distinguish a manmade drainage ditch from a natural stream would necessarily rely only on geomorphology as the two water bodies could potentially share biology and hydrology. (T p 53).

39. Based on the evidence presented, the geomorphology of “Stream B” was essentially straight and followed the drainage easement—therefore lacking the curviness of a natural stream.

40. Based on contradictory information concerning the merger and then separation of Stream B, it is more likely that Stream B was manmade after 1970.

41. The origin and lack of distinguishing geomorphology indicates Stream B is manmade. Therefore, Respondent’s determination that Stream B is subject to the Buffer Rules is hereby REVERSED.

Dispersed Flow and Petitioners’ Drainage Ditches

42. The Buffer Rules allow drainage ditches to be constructed within a riparian buffer so long as the ditches do not contribute to the erosion of the buffer. 15A N.C. Admin. Code 2B .0714(9) (“The following stormwater conveyances through the riparian buffer are either deemed allowable or allowable upon authorization . . . provided that they do not erode through the riparian buffer and do not cause erosion to the receiving waterbody.”).

43. During the site visit, Goss observed erosion of the buffer. (T p 71).

44. The drainage ditch constructed within Petitioners’ fence line did not contain riprap. (T p 36, 72). Although Petitioners intended to place riprap within the ditch as a form of “armorant,” Petitioners did not do so. (T p 36).

45. Because Goss observed “sediment and erosion” and the absence of riprap, Respondent did not err in finding the drainage ditches were an unallowable use under the Buffer Rules. 15A N.C. Admin. Code 2B .0714(9).

46. To the extent that Petitioners’ drainage ditches affect the riparian buffer around Stream A, Respondent did not err in finding they were an unallowable use under the Buffer Rules. However, as Stream B is not subject to the rules, the alleged impacts to the buffer of Stream B are erroneous. 15A N.C. Admin. Code. 2B .0714(9).

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby:

- 1) AFFIRMS Respondent’s determination that Petitioners’ pump track does not constitute playground equipment under the meaning of the Buffer Rules.
- 2) FINDS Petitioners carried the burden of proof that Streams A and B merged before entering the Property and that Respondent failed to follow their rules when making its determination both for the purposes of the Notice of Violation and the Denial of Petitioners’ application for Authorization. Additionally, Petitioners carried their burden of proof that the onsite determination did not determine that Stream B was subject to the Buffer Rule.

THEREFORE Respondent's classification of Stream B as a tributary subject to the Neuse River Riparian Buffer Protection Rules is hereby REVERSED.

- 3) To the extent that Petitioners' drainage ditches affect the riparian buffer around Stream A, Respondent did not err in finding they were an unallowable use under the Buffer Rules. However, as Stream B is not subject to the rules, the alleged impacts to the buffer of Stream B are erroneous.

NOTICE OF APPEAL

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 as indicated by 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.

IT IS SO ORDERED.

This the 20th day of October, 2022.

A handwritten signature in blue ink, reading "Donald R. van der Vaart", is written over a horizontal blue line.

Donald R. van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center which subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 20th day of October, 2022.



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