

STATE OF NORTH CAROLINA
COUNTY OF NEW HANOVER

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EHR 04806

<p>Sunset South Owners Association Petitioner,</p> <p>v.</p> <p>NC Department of Environmental Quality, Div of Energy Mineral & Land Resources Respondent.</p>	<p>FINAL DECISION SUMMARY JUDGMENT FOR RESPONDENT</p>
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On August 18, 2020, this matter came on for hearing via teleconference by consent of the parties before the undersigned on Respondent's Motion for Summary Judgment.

APPEARANCES

For Petitioner: James L. Conner, II, and Shannon M. Arata, Calhoun, Bhella & Sechrest, LLP, 4819 Emperor Boulevard, Suite 400, Durham, NC 27703

For Respondent: Carolyn McLain, N.C. Department of Justice, Post Office Box 629, Raleigh, NC 27602

ISSUE

Whether Respondent North Carolina Department of Environmental Quality (DEQ), Division of Energy, Mineral, and Land Resources (DEMLR) erred when it transferred State Stormwater Permit SW8 030404 (the Permit) from the Wilmington Housing Authority (WHA) to Petitioner Sunset South Homeowners Owners Association, Inc. (Sunset South) by letter dated July 23, 2019?

STATUTES AT ISSUE

N.C. Gen. Stat. § 143-214.7, Stormwater Runoff Rules and Programs
N.C. Gen. Stat., Chapter 150B, Administrative Procedure Act

EVIDENCE PRESENTED BY THE PARTIES

For Petitioner:

Petitioner's Motion for Preliminary Stay of Agency Action

Petitioner A July 23, 2019 DEMLR Letter Transferring of Permit SW8 030404
Petitioner B July 21, 2017 Letter from Sunset South's Counsel to DEMLR
Petitioner B1 Declarations of Sunset South
Petitioner B2 Articles of Incorporation of HEO
Petitioner B3 December 21, 2016 Letter from Sunset South's Counsel to WHA

Petitioner's Response to DEMLR's Motion for Summary Judgment

Petitioner C Deposition of Georgette Scott
Petitioner D HEO Articles of Incorporation
Petitioner E WHA's First Permit Transfer Application (December 19, 2016)
Petitioner F Respondent's Deficiency Letter to WHA (February 22, 2017)
Petitioner G WHA Permit Applications from 2017
Petitioner H Respondent's Noncompliance Letter to WHA (February 11, 2019)
Petitioner I Respondent's Letter to WHA Confirming Compliance (July 19, 2019)
Petitioner J WHA's Second Permit Transfer Application (December 16, 2018)
Petitioner K Respondent's Letter to Petitioner Communicating the Permit Transfer (July 23, 2019)
Petitioner L WHA's Counsel's Letter to Respondent Requesting Permit Transfer (January 16, 2018)
Petitioner M Parcel Information from New Hanover County GIS
Petitioner N Authenticated Triangle Pond Management Repair Quote
Petitioner O Affidavit of Expert Samuel P. Watts, PG, filed August 13, 2020.
Petitioner P Affidavit of Sunset South Subdivision Resident Emily A. Scott, filed August 14, 2020.

For Respondent:

Respondent's Brief Responding to Petitioner's Motion for Preliminary Stay of Agency Action

Respondent A February 22, 2017 DEMLR Letter Notice of Inspection – Not Compliant
Respondent B July 19, 2019 DEMLR Letter Notice of Inspection – Compliant
Respondent C July 23, 2019 DEMLR Letter Transferring of Permit SW8 030404

Respondent's Motion for Summary Judgment

Respondent D Permit Transfer Application submitted by WHA
Respondent E February 22, 2017 DEMLR Letter Notice of Inspection – Not Compliant
Respondent F July 19, 2019 DEMLR Letter Notice of Inspection – Compliant
Respondent G February 11, 2019 DEMLR Letter Notice of Inspection – Not Compliant
Respondent H Letter from Sunset South to DEMLR dated July 21, 2017
Respondent I Letter from WHA to DEMLR, dated July 31, 2017

Respondent J Letter from DEMLR to Sunset South, dated August 2, 2017
Respondent K July 23, 2019 DEMLR Letter Transferring of Permit SW8 030404
Respondent L Affidavit of Georgette Lewis
Respondent M Declarations of Sunset South

Respondent's Amended Motion for Summary Judgment

Respondent N July 27, 2020 Evaluation of Stormwater Control Measures
Respondent O Affidavit of Daniel Sams, P.E.

Respondent's Motion to Strike, or in the Alternative, Motion in Limine

Respondent P R.R. Friction Prods. Corp. v. N.C. Dep't of Revenue, 2019 NCBC LEXIS 13, at 47-48, aff'd per curiam, 374 N.C. 208, 839 S.E.2d 314 (2020)

FINDINGS OF FACT

Based upon careful consideration of the pleadings, evidence, arguments, and legal briefs received during the contested case hearing, as well as the entire record of this proceeding, including Respondent's motion and amended motion for summary judgment and the responses thereto, the Undersigned finds as follows. In making the findings of fact, the undersigned has viewed all evidence in the light most favorable to the nonmoving party.

Parties

1. Petitioner Sunset South Owners Association is an unincorporated nonprofit association representing residents of the Sunset South neighborhood, located in New Hanover County, North Carolina.

2. Respondent Department of Environmental Quality is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 and is vested with the statutory authority to enforce the State's environmental laws, including laws enacted to regulate stormwater runoff.

Statute at Issue

3. The State Stormwater Program (N.C.G.S. § 143-214.7 *et seq.*) was established by the North Carolina General Assembly "for the purpose of protecting the surface waters of the State." N.C.G.S. § 143-214.7(a). Such "waters" include "any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water." N.C.G.S. § 143-212(6).

4. The Rules specifically "protect surface waters from the adverse impacts of stormwater runoff from development activities." 15A NCAC 02H .1001. "Stormwater" is

“the flow of water which results from precipitation and which occurs immediately following rainfall.” N.C.G.S. § 143-213(16a). “Development” includes “[a]ny land-disturbing activity that increases the amount of built-upon area or that otherwise decreases the infiltration of precipitation into the subsoil.” N.C.G.S. § 143-214.7(a1) (1).

5. N.C.G.S. § 143-214.7(c2) provides requirements for when DEMLR is obligated to transfer a State Stormwater permit. Under N.C.G.S. § 143-214.7(c2),

The Department shall transfer a permit issued under this section for a stormwater management system from the declarant of a condominium or a planned community to the unit owners association, owners association, or other management entity identified in the condominium or planned community's declaration upon request of a permittee if the Department finds that

- (i) common areas related to the operation and maintenance of the stormwater management system have been conveyed to the unit owners association or owners association in accordance with the declaration;
- (ii) the declarant has conveyed at least fifty percent (50%) of the units or lots to owners other than a declarant; and
- (iii) the stormwater management system is in substantial compliance with the stormwater permit issued to the permittee by the Department.

In support of a request made pursuant to this subsection, a permittee shall submit documentation to the Department sufficient to demonstrate that ownership of the common area related to the operation and maintenance of the stormwater management system has been conveyed from the declarant to the association and that the declarant has conveyed at least fifty percent (50%) of the units or lots to owners other than a declarant. For purposes of this subsection, declarant of a condominium shall have the same meaning as provided in Chapter 47C of the General Statutes, and declarant of a planned community shall have the same meaning as provided in Chapter 47F of the General Statutes.

N.C. Gen. Stat. § 143-214.7(c2).

Evidence Presented

6. This matter arose on December 15, 2016, when the WHA, the former permittee under Stormwater Permit SW8 030404, requested that Respondent transfer the Permit to Sunset South pursuant to N.C.G.S. § 143-214.7(c2).

7. Counsel for Sunset South sent a letter to Respondent on July 21, 2017 detailing Sunset South's objections to the permit transfer. (See Petitioner's B) Sunset

South stated that a settlement agreement between itself and WHA dictated that the Permit should not be transferred unless certain terms (contained solely within the settlement agreement) had been satisfied, and those terms had not been met. The only parties to the settlement agreement were WHA and Sunset South. In its letter, Sunset South also stated other reasons why it believed Respondent was prohibited from transferring the Permit. After receiving Sunset South's letter, on July 25, 2017, Respondent sent Sunset South's concerns to WHA outlining Respondent's responses to Sunset South's objection to the transfer of the Permit. On or about July 31, 2017, Respondent received a response letter from WHA's attorney addressing Sunset South's objections in detail. (See Respondent's I)

8. By letter dated August 2, 2017, Respondent answered Sunset South's original July 21, 2017 letter of concern. (See Respondent's J) In such response, Respondent explained that Sunset South's objections stemmed from the terms of the settlement agreement between Sunset South and WHA, to which Respondent was not a party. Accordingly, Respondent stated it would move forward with the modification, renewal, and transfer of the permit pursuant to the applicable North Carolina laws and stormwater regulations, which it is bound to follow.

9. To determine whether the stormwater management system was in "substantial compliance" pursuant to Subsection (iii) of N.C.G.S. § 143-214.7(c2), Respondent performed a compliance inspection on February 14, 2017. (See Respondent's A) The inspection identified three issues with the system:

- 1) unapproved additions of sidewalk within the common area,
- 2) standing water in Basin #4, and
- 3) lack of documentation verifying that no lot had exceeded the built-upon area ("BUA") limit.

Id.

10. On August 16, 2017, Sunset South filed its first contested case in this matter (17 EHR 05445) against Respondent and requested a Temporary and Preliminary Stay of Agency Action from this Tribunal based upon the August 2, 2017 letter DEMLR sent to Sunset South regarding potential transfer of the Permit. (See Respondent's J)

11. On August 28, 2017, OAH granted a Stay of Agency Action.

12. Petitioner filed its Motion for Summary Judgment in the first contested case on January 8, 2018. On January 17, 2018, Respondent filed its Response to Petitioner's Motion for Summary Judgment and its own Motion for Summary Judgment arguing, *inter alia*, that since the Permit has not yet been transferred, there was no final agency action. Petitioner filed a Reply to Respondent's Response to Motion for Summary Judgment on January 24, 2018.

13. On February 22, 2018, this Tribunal issued a Final Decision Order of Dismissal on the first contested case granting Respondent's Motion for Summary Judgment and holding that Respondent had not issued a "Final Agency Determination" on WHA's request for permit transfer. Petitioner did not seek judicial review of the February 22, 2018 Final Decision Order of Dismissal pursuant to N.C. Gen. Stat. § 150B-45.

14. Since filing its request for transfer in 2016 and during the pendency of the first contested case, WHA has worked to bring the stormwater management system into substantial compliance with the stormwater permit requirements, as required pursuant to Subsection (iii) of N.C.G.S. § 143-214.7(c2). To address issues #1 and #3, WHA provided documentation that no lot in the Sunset South community exceeded the maximum permitted BUA limit of 2,500 square feet with the exception of one of 130 lots, Lot 126. Lot 126's owner built an extra patio that exceeded their BUA by 250 square feet. Respondent required a permit modification to address that situation as well as additional sidewalk that had been added within one of the common areas. WHA submitted a proposed modification, which was signed and sealed by a licensed Professional Engineer. Respondent's review of the modified application and sealed design calculations showed that the existing infiltration basin that received this additional runoff had sufficient capacity to accept the additional runoff and thus, the stormwater system could perform as needed. Based upon this determination and assurance, Respondent approved the permit modification on August 1, 2017 allowing for the additional sidewalk and for Lot 126 to have the additional 250 square feet of BUA.

15. To address issue #2, and after conducting a geotechnical investigation of Basin #4, WHA's engineer determined that the basin was excavated improperly when it was constructed, in relation to the seasonal high-water table. With this information, WHA redesigned Basin #4 to bring it into compliance with the State Stormwater rule requirement that it provide a 2-foot separation between the bottom of the basin and the seasonal high-water table. Respondent approved the major modification to the permit upon review of new calculations which ensured the infiltration basin met the required regulatory standards. Once Respondent approved WHA's design, WHA began the physical modification of the basin.

16. During a February 8, 2019 reinspection, Respondent found the system to be "Not Compliant" and identified minor erosion issues, loss of vegetation and maintenance issues at the other three basins. WHA undertook work to resolve these issues. (See Respondent's G)

17. On July 18, 2019, Respondent conducted an inspection of the stormwater management system at Sunset South, including Basin #4, and determined that the entire system was now in compliance with both the previously existing and newly redesigned standards. The inspection, performed by Respondent employees Dan Sams and Linda Lewis, included a visual inspection of the Site and a review of relevant documents in the agency file. The determination that the Site was in compliance was supported by the

sealed report of WHA's engineer, which addressed the applicable standards and showed that the stormwater system complied with all of them. As a result, on July 19, 2019, Respondent issued to WHA a letter indicating that the stormwater management system was now in substantial compliance. (See Respondent's B)

18. Since issuance of Respondent's July 19, 2019 letter and because all of the requirements of N.C.G.S. § 143-214.7(c2) were met, Respondent completed transfer of the Permit from WHA to Sunset South by letter dated July 23, 2019. (See Petitioner's A, Respondent's C)

19. On August 23, 2019, Petitioner Sunset South filed the subject Petition for a Contested Case Hearing and its Motion For Preliminary Stay of Agency Action, arguing that Respondent has acted erroneously, arbitrarily and capriciously, failed to follow proper procedure and law and exceeded its authority by transferring the Permit.

20. In its Motion for Preliminary Stay of Agency Action, Petitioner cited the settlement agreement between itself and WHA, which it acknowledges Respondent is not party to, and argued the status of the settlement agreement "shows the lack of urgency regarding the Permit transfer." (Petitioner's Mtn for Preliminary Stay, ¶ 5) Then, in lieu of substantive argument in its Motion, Petitioner referenced the July 21, 2017 letter from Petitioner's counsel to Respondent (See Petitioner's B), stating that the letter provides the reasoning why the Permit transfer is prohibited and therefore that probable cause existed that Petitioner would prevail on the merits.

21. On September 18, 2019, this Tribunal denied Petitioner's Stay of Agency Action, finding that Petitioner failed to show it would suffer irreparable harm and that Petitioner failed to show that issuance of a Preliminary Injunction was necessary for Petitioner's rights during the pendency of the contested case.

22. The Scheduling Order issued for this case set forth that "[d]iscovery shall be completed on or before December 23, 2019" and that "[d]ispositive motions shall be filed on or before December 30, 2019."

23. On December 20, 2019, prior to the deadline for filing of dispositive motions, Respondent filed its Motion for Summary Judgment. On December 30, 2019, Petitioner filed its Response to Respondent's Motion for Summary Judgment.

24. On July 27, 2020, seven months after the close of discovery, without amendment or supplementation to the pleadings, and the night before the scheduled deposition of Petitioner's expert witness, Petitioner provided an expert report to Respondent prepared by Petitioner's purported expert and dated the same date. (See Respondent's N) Petitioner's expert report was based upon the results from a site visit conducted on May 20, 2020 and data from a Professional Land Survey. A team of three people visited the site on May 20, 2020, one day after a significant rain event, and conducted, among other activities, intrusive borings at each of the four basins.

25. On August 11, 2020, Respondent filed an Amended Motion for Summary Judgment addressing Petitioner's purported expert witness report and deposition. Respondent's review of the report indicated, in particular, that estimated elevations of the Observed Water Table and Seasonal High Water Table were reported with large variations over short distances, and that the report provided no perspective of causation and neglected to report significant rainfalls prior to the inspection date. (See Respondent's O) Respondent concluded that while none of the information in the expert's report was believed to be untrue, the report was incomplete, inconclusive, and represented only a single point in time.

26. In response and without amendment to the pleadings, Petitioner filed two stand-alone affidavits with this Tribunal on August 13, 2020 (Petitioner's O) and August 14, 2020 (Petitioner's P).

27. Respondent filed its Motion to Strike or, in the alternative, Motion in Limine, on August 17, 2020, asking this Tribunal to strike Petitioner's proposed expert witness's testimony and report as well as the two prior filed affidavits. Petitioner filed its Objections to Respondent's Amended Motion for Summary Judgment and Respondent's Motion to Strike on August 18, 2020.

CONCLUSIONS OF LAW

1. This matter is properly before the Office of Administrative Hearings, and the parties received proper notice of the hearing on these Motions for Summary Judgment. 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 their given labels. Peters v. Pennington, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

2. Summary judgment is proper where "there is no genuine issue as to any material fact and [] any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56. A fact is material only "if its resolution would prevent the party against whom it is resolved from prevailing." Bone Int'l, Inc. v. Brooks, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981) (citation omitted). Speculation and conjecture are insufficient to prevent summary judgment. King v. N.C. Dept. of Transp., 121 N.C. App. 706, 708, 468 S.E.2d 486, 489 (1996). In evaluating a motion for summary judgment, the facts are considered in the light most favorable to the non-moving party. Bird v. Bird, 363 N.C. 774, 777, 688 S.E.2d 420, 422 (2010).

3. The proper interpretation of a law or rule is a question of law, and an agency interpretation of a statute or rule is not binding on the Undersigned. Nevertheless, "[i]t is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers so [] long as the agency's interpretation is reasonable and based on a permissible construction of the statute." Canty. of Durham v. N.C. Dept. of Env't. & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998).

**Respondent did not err in its decision to transfer State Stormwater Permit SW8
030404**

4. At the time WHA submitted the Permit application, North Carolina General Statute § 143-214.7(c2) controlled how Respondent reviewed, approved, and otherwise acted upon permit transfers. The proper provision for review is N.C. Gen. Stat. § 143-214.7(c2).

5. The regulations promulgated at 15A NCAC 02H .1045 became effective on January 1, 2017; therefore, permit transfer requests submitted prior to that date are not subject to those regulations. Since WHA submitted the Permit application on December 15, 2016, the rules set forth at 15A NCAC 02H .1045 are inapplicable. Additionally, WHA had the opportunity to choose which regulation Respondent should apply to its permit application and chose N.C. Gen. Stat. § 143-214.7(c2). See N.C. Gen. Stat. § 143-755.

6. Pursuant to N.C.G.S. § 143-214.7(c2), upon request of a permittee, Respondent *shall* transfer a permit to an owners' association or other management entity identified in the planned community's declaration if factors (i) through (iii) are met. N.C.G.S. § 143-214.7 (c2) (emphasis added). The declarant can be, but need not necessarily be, the owner of the permit. In stormwater cases, the declarant can be in control of developing the property for the permittee or be in control of development and own the stormwater permit. (See Respondent's L; N.C. Gen. Stat. 47F-1-103; Scott Depo¹ pp 28-29)

7. In this case, the declarant, HEO, is not the Permittee, which is WHA. HEO is an instrumentality of WHA with the exclusive purpose to develop and operate affordable housing and to promote comprehensive economic development for the City of Wilmington. (See Respondent's L)

8. Pursuant to the plain language of the statute, "upon request of permittee," WHA, as the Permittee, can request the transfer of the permit.

9. Here, Respondent properly transferred the Permit consistent with the plain and unambiguous language of the statute. To determine the meaning of the language in N.C.G.S. § 143-214.7(c2), this Tribunal must apply the basic rule of construction which is to give meaning to the plain language. N.C. State Bar v. Brewer & Honeycutt, 183 N.C. App. 229, 236, 644 S.E.2d 573, 577 (1983). "When the language of a statute is clear and unambiguous, it 'is the duty of [the courts] to give effect to the plain meaning . . . and judicial construction is not required.'" Diaz v. Division of Social Services, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

¹ The depositions of Georgette Scott and Linda Lewis were taken as part of a prior contested case (17 EHR 05445) between the same parties and involving the same facts and circumstances at issue in this case. Additionally, Petitioner here conducted the depositions and had the opportunity to both examine and cross-examine the witnesses. See First Gaston Bank of N.C. v. City of Hickory, 203 N.C. App. 195, 199-200, 691 S.E.2d 715, 719-20 (2010).

10. Reading N.C.G.S. § 143-214(c2) in light of the particular facts and circumstances of this case and giving ordinary meaning and significance to the plain language of this statute, it is clear that the Permittee, WHA, and not HEO has the ability to request the transfer of its own permit. This transfer is consistent with the overarching purpose of the statute, which is to allow a permittee to transfer a permit to a homeowner's association regardless of consent. (See Respondent's L).

11. Respondent's interpretation of N.C.G.S. § 143-214.7(c2) is consistent with its overarching purpose and is therefore reasonable and permissible interpretation and is not erroneous. The purpose behind the Legislature passing N.C.G.S. § 143-214.7(c2) was to avoid the recipient of the transfer from preventing a transfer despite having a stormwater permit in substantial compliance and a majority of the property contained in the permit owned by the recipient or lot owners. (See Respondent's L)

12. When reviewing whether an agency's action is arbitrary and capricious, a reviewing court should not "replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result." See Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977). "[A] reviewing court should defer to the agency's interpretation of a statute it administers so long as the agency's interpretation is reasonable and based on a permissible construction of the statute." County of Durham v. North Carolina Dep't of Env't. & Natural Res., 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998), disc. rev. denied, 350 N.C. 92, 528 S.E. 2d 361 (1999) (citations omitted). In this case, Respondent's interpretation of the statutes and rules they administer and enforce should be given "due deference unless it is plainly erroneous or inconsistent with the regulation." Pamlico Marine Co. v. N.C. Dep't of Natural Resources & Cmty. Dev., 30 N.C. App. 201, 206, 341 S.E.2d 1008, 112 (1986).

13. In 2011, Petitioner executed a settlement agreement with WHA to resolve matters in controversy between them as related to litigation about the Permit. Because Respondent was not a party to the litigation, neither the terms of the settlement agreement nor the purported breach of such settlement have any impact on Respondent's obligation to uphold and enforce the North Carolina General Statutes pertaining to stormwater management systems.

14. Respondent's obligations pursuant to the statutes and regulations for stormwater management inherently require Respondent to evaluate and respond to applicants and permittees in terms of their compliance measures. See N.C. Gen. Stat. § 143-214.7(c2) ("The Department *shall* transfer a permit . . .") (emphasis added). The statute does not contain language indicating that an applicant has only one chance to submit the correct documentation. Nor does the statute allow Respondent to refuse transfer of the permit if the transfer requirements have been met.

15. The goal of every permitted stormwater system is to ensure that the stormwater system has been constructed correctly, is maintained so it functions properly, and that the permitted system complies with the law and regulations. (See Respondent's

L) At times, it is necessary for the permit to be modified in some fashion to allow the project to either maintain compliance, or to return to a state of compliance. (See Lewis Depo pp 37-38) It would be punitive for Respondent to require permittees to comply with the rules, but to deny them the opportunity to modify their permit. Respondent assisted WHA in a similar manner and method that it assists all entities who seek assistance and information to maintain compliance with permit conditions, submitting permit applications, transfers or who otherwise operate and maintain stormwater systems throughout the state. (See Respondent's L)

16. Petitioner has not shown that there is any harm beyond normal maintenance costs which could be anticipated by any holder of a stormwater permit. One of the primary functions of Sunset South owners' association is to own, operate, maintain, and pay for the Permit.

“[i]n addition to the foregoing, the Association has as its purposes *the acceptance of the transfer of the [Stormwater] Permit* from Declarant and to take all actions and pay all fees required to effect such transfer of the Permit, and thereafter to oversee, inspect, manage and, when necessary, repair and replace all Stormwater Management Facilities located within the Common Elements or on individually owned Lots.”

(See Petitioner's B1) (emphasis added).

Petitioner's Untimely and Improper Challenge to “Substantial Compliance”

17. When Petitioner filed its Petition and a Motion for Preliminary Stay of Agency Action on August 23, 2019, it failed to raise the argument whether the stormwater management system at Sunset South was in “substantial compliance.” Neither did Petitioner raise such issue in its Prehearing Statement. Petitioner first indicated that it intended to raise the issue of substantial compliance under N.C.G.S. § 143-214.7(c2), Subsection (iii), in its Response to Respondent's Motion for Summary Judgment, which was filed after the close of discovery and on the date the Tribunal ordered the deadline for filing dispositive motions. (See Pet's Resp. filed December 30, 2019 stating “Respondent, however, ultimately determined that the stormwater system was in compliance on July 19, 2019, although Petitioner challenges this conclusion.”)

18. The North Carolina Supreme Court has held that

Under N.C. Gen. Stat. § 1A-1, Rule 8(a), any pleading which sets forth a claim for relief must contain a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. In a contested case before OAH, the “pleadings” include the petition for contested case and the prehearing statement. A petitioner sufficiently states a claim pursuant to Rule 8(a) if it gives

the other party notice of the nature and basis of the claim sufficient to enable the party to answer and prepare for trial.

R.R. Friction Prods. Corp. v. N.C. Dep't of Revenue, 2019 NCBC LEXIS 13, at 47-48, aff'd per curiam, 374 N.C. 208, 839 S.E.2d 314 (2020). Petitioner has adduced no particular facts or evidence in its Petition or Motion for Preliminary Stay of Agency Action beyond mere speculation and unverified statements regarding the “substantial compliance” of the stormwater management system.

19. Additionally, where a party fails to meet the discovery deadlines, the trial court may, within its discretion, issue an order “prohibiting [the disobedient party] from introducing designated matters in evidence . . .” N.C. Gen. Stat. § 1A-1, Rule 37(b)(2)(b).

20. In R.R. Friction, the North Carolina Supreme Court upheld the ALJ’s decision to exclude claims that the petitioner failed to raise in its pleadings where Petitioner never moved to amend its pleadings, only identified the claims in discovery responses to the State Agency, and only raised the issues for the first time at Summary Judgment. R.R. Friction Prods. Corp., at 47-48. Petitioner’s untimely claim that the stormwater management system was out of “substantial compliance” is improperly before the Tribunal and is rightfully excluded consistent with the ruling in R.R. Friction and with Rule 37(b)(2)(b) of the Rules of Civil Procedure.

21. Finally, Petitioner itself has not offered its purported expert witness report to support its claim that the subject system is out of “substantial compliance.” Instead, Respondent attached the report to its Amended Motion for Summary Judgment. (See Respondent’s N) Petitioner submitted the two affidavits as stand-alone documents. (See Petitioner’s O and P) Assuming, *arguendo*, that Petitioner timely submitted the foregoing report and two affidavits in support of proper briefing(s) or other motion(s) and those briefings were supported by properly amended claims, the Undersigned finds that such do not impact the outcome of this contested case. The report indicates that the majority of the report identifies maintenance issues with the stormwater system at Sunset South; not issues associated with “substantial compliance.” These issues have arisen only after Respondent made its “substantial compliance” determination on July 18, 2019 and transferred the permit to Petitioner. Nothing in the report shows otherwise.

22. The State of North Carolina created the state stormwater program to address non-point runoff of stormwater from construction sites. (See Respondent’s L) Storm Water Control Measures (SCMs) are designed to detain, retain, or infiltrate stormwater that contains suspended solids. It is irrelevant for purposes of permit transfer whether the stormwater management system has, in the past, been out of compliance or subject to violations. So long as the system was in “substantial compliance” on the date of inspection, here evidenced by Respondent’s July 19, 2019 inspection (See Respondent’s B), and the other elements are met, Respondent was obligated to transfer the permit. N.C. Gen. Stat. § 143-214.7(c2).

23. Petitioner's purported expert witness report also alleged that the *estimated* Seasonal High-Water Table is nearer to the bottom of three of the four infiltration basins than permitted by the stormwater rules. However, this allegation does not alter the reasonableness of Respondent's substantial compliance determination. The report is incomplete, inconclusive, and presented only a snapshot in time of the stormwater maintenance system. (See Respondent's N and O) Respondent's substantial compliance determination was rendered, in part, on the basis of the sealed report of an engineer that considered the issue of Seasonal High Water Table and found the infiltration basins to be in compliance with the relevant rules. Respondent relied upon the sealed reports of engineers to aid in its substantial compliance determination and this reliance was reasonable.

Other Issues

24. To the extent Petitioner raised any other challenges to Respondent's decision, the Undersigned has considered those challenges and found them to lack merit.

Summary Conclusions

25. Respondent did not exceed its authority or jurisdiction, act erroneously, fail to use proper procedure, act arbitrarily or capriciously, fail to act as required by law, or otherwise err in transferring State Stormwater Permit SW8 030404 to Petitioner.

26. Based upon the foregoing Findings of Fact and Conclusions of Law, there are no genuine issues of material fact preventing summary judgment, and Respondent is entitled to summary judgment as a matter of law.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby **GRANTS** summary judgment for Respondent and **AFFIRMS** Respondent's decision to transfer State Stormwater Permit SW8 030404 to Petitioner. Each party shall bear its own costs.

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.

This the 25th day of November, 2020.



Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

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This the 25th day of November, 2020.



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