

BEFORE THE
NORTH CAROLINA SECRETARY OF ADMINISTRATION

THE NORTH CAROLINA COASTAL FEDERATION)	
)	
CAPE FEAR RIVER WATCH)	REQUEST FOR
)	DECLARATORY RULING
Petitioners.)	
)	
)	

Pursuant to N.C. Gen. Stat. § 150B-4 and 01 N.C. Admin. Code 01B.0602 – 01B.0603, the North Carolina Coastal Federation, the Cape Fear River Watch, and PenderWatch & Conservancy (collectively “Petitioners”) submit this Request for Declaratory Ruling to the North Carolina Secretary of Administration (“Secretary”) requesting the following rulings: (a) that the \$4.2 million grant to be paid to Carolinas Cement Company/ Titan America, LLC (“Titan” or “Company”) by New Hanover County and the \$300,000 One North Carolina Fund grant awarded by the Department of Commerce for construction and expansion of its proposed facility is an “expenditure of public moneys”¹ under the North Carolina Environmental Policy Act (“SEPA”), N.C. Gen. Stat. § 113A-4(2); and (b) that the North Carolina Department of Environmental and Natural Resources (“DENR”) must comply with SEPA before taking any agency action involving Titan America’s proposed Portland cement kiln and quarry.

¹ The North Carolina Environmental Policy Act refers to “moneys,” while the Department of Administration’s Environmental Policy Act regulations refers to “monies.” Petitioners use the term “monies” when discussing either the statute or the regulation.

1. Nature of the Request

Titan America has proposed to construct a Portland cement manufacturing facility in and adjacent to sensitive ecosystems in New Hanover County, North Carolina with financial backing from both the Department of Commerce and New Hanover County. Those grants, which total \$4.5 million, were awarded on the premise that they were necessary to induce Titan to construct and operate the facility in the state. Because of the significant environmental impact of the proposed project, multiple state permits are required for the construction and operation of the facility.

The Department of Environment and Natural Resources has determined that these taxpayer-funded grants do not constitute an “expenditure of public moneys” under the N.C. Environmental Policy Act and intend to continue processing Titan’s required state permits without conducting the review required under the Act. DENR’s determination, and its reliance on a 1983 Attorney General’s opinion as its support for that determination, indicates that the application of the Act to this project, specifically the public grants awarded, is unclear. Thus, the North Carolina Coastal Federation and Cape Fear River Watch request a declaratory ruling.

The North Carolina Coastal Federation and Cape Fear River Watch together represent more than 8,000 members, many of whom live in the vicinity of the proposed cement kiln. Both the Coastal Federation and Cape Fear River Watch seek to raise awareness of environmental issues affecting the North Carolina coast, facilitate citizen involvement in environmental permitting, and protect sensitive coastal ecosystems. Their members live, work, and recreate in the area around, and downstream and downwind, of Titan’s proposed facility.

2. Statement of the Facts

a. Titan America proposes to construct and operate a Portland cement manufacturing facility and limestone quarry at 6411 Ideal Cement Road, near Castle Hayne, in New Hanover County. U.S. Army Corps of Engineers, Public Notice, June 6, 2008 (attached as Exhibit 1). The project will require a variety of environmental permits from various state and federal regulatory agencies.

b. Titan's proposed site is bordered by the Northeast Cape Fear River ("NE Cape Fear"), a blackwater river that is a major tributary to the Cape Fear River. Ex. 1 at 2. The NE Cape Fear is identified as a priority area for habitat protection by the North Carolina Wildlife Action Plan Because of its high species diversity, rare and endemic species, and are considered critical to the survival of certain species by providing among other benefits, habitat and spawning areas. Letter from Benjamin, U.S. Fish and Wildlife Service, to Wicker, Corps, of August 6, 2008 (attached as Exhibit 2). The eastern boundary of the site is formed by Island Creek. These riverine systems are tidally influenced and support a wide variety of ecosystem services in addition to human uses.

c. The North Carolina Division of Marine Fisheries has designated the NE Cape Fear as a primary nursery area ("PNA") because it provides essential fish habitat, which is instrumental for the survival and recovery of the many species of fish found in this area which are depleted or endangered. Ex. 2 at 2. Depleted fish species located near Titan America's proposed site include American shad, blueback herring, hickory shad, and striped bass. Letter from Rhode, N.C. Division of Marine Fisheries, to Wicker, Corps, of August 8, 2008 (attached as Exhibit 3). Also found are shortnose sturgeon, which is listed as a federal endangered species and Atlantic sturgeon, which is considered for federal listing. Id.

d. The wetland communities that are located within the proposed facility's footprint include, cypress-gum swamp, mesic mixed hardwood forest, and non-riverine wet hardwood forests. These wetland communities provide habitat, food-chain production, spawning, rearing and resting sites for aquatic and terrestrial species. In addition, these wetlands provide nutrient uptake, stormwater and flood storage, and natural groundwater recharge. Ex. 2 at 5. The U.S. Fish and Wildlife Services has identified two species of migratory birds, the Swainson's warbler and prothonotary warbler, which are listed among the 100 at risk birds in North America, that would be adversely impacted by the proposed site. Ex. 2 at 6. Further, several special status species of bats occur in New Hanover and Pender counties and depend on hollow trees near water, like those found on the proposed site, for roosting.

e. To encourage Titan America to locate its facility in New Hanover County, the County's Board of Commissioners awarded Titan America a \$4.2 million grant that will be paid in seven installments. New Hanover County Contract # 08-0463 (attached as Exhibit 4). The Board of Commissioners authorized the grant pursuant to N.C. Gen. Stat. § 158-7.1, and formalized it in a contract dated May 27, 2008.

f. New Hanover County Contract # 08-0463 contractually obligates New Hanover County to expend \$4.2 million in public funds derived from property and other taxes that will be paid to Titan America once the company obtains required permits and hires 160 employees.

g. The expenditures under New Hanover County Contract # 08-0463 are in support of the proposed Titan facility and will not be used for "processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services." 01 N.C. Admin. Code 25.0108(b)(4).

h. In conjunction with New Hanover County, the Department of Commerce awarded Titan America a \$300,000 One North Carolina Fund Grant. Letter from Easley to Papazoglou, Titan, of May 16, 2008 (attached as Exhibit 5). Pursuant to the grant agreement, those funds may only be used to reimburse Titan for expenses related to:

1. Installation or purchase of new equipment;
2. Structural repairs, improvements or renovations of existing buildings to be used for expansion; and
3. Construction of or improvements to new or existing [utilities] or equipment for existing buildings; or
4. Construction of or improvements to new or existing [utilities] or equipment to serve new or proposed industrial buildings used for manufacturing and industrial operations.

Titan Company Performance Agreement – The One North Carolina Fund, May 16, 2008 at 2 (attached as Exhibit 6).

i. The expenditures under the One North Carolina Fund grant are in support of the proposed Titan facility and will not be used for “processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services.” 01 N.C. Admin. Code 25.0108(b)(4).

j. Before Titan America can commence construction on the cement manufacturing facility, including the limestone quarry, it must obtain a variety of environmental permits, including, inter alia: a Section 404 Clean Water Act permit from the U.S. Army Corps of Engineers (“Corps”); a 401 Water Quality Certification from the Division of Water Quality (“DWQ”); a National Pollutant Discharge Elimination System permit from DWQ; Stormwater Management Permit from DWQ; an Erosion and Sediment Control Plan from the Division of Land Resources, Land Quality Section; a mining permit from the Division of Land Resources,

Land Quality Section; a Prevention of Significant Deterioration (“PSD”) permit from the Division of Air Quality (“DAQ”); and a Special Use Permit from New Hanover County.

k. Titan has applied for a PSD air quality permit from DAQ that would authorize emissions from the cement kiln, the quarry, and related equipment. See Revised Carolinas Cement Company PSD Construction Permit Application, available at http://daq.state.nc.us/permits/psd/docs/titan/CCCRevised_Application_121908.pdf. Those emissions would include particulate matter, PM₁₀, PM₂₅, sulfur dioxide, nitrogen oxides, carbon monoxide, hydrochloric acid, volatile organic compounds, lead, fluorides, arsenic, beryllium, cadmium, chromium, manganese, and mercury.

l. Concurrent with its PSD application, Titan America has initiated planning for a Section 404 permit from the Corps and for a 401 Water Quality Certification from DWQ. See Ex. 1. Because of Titan’s large-scale proposed impacts to wetlands and surface waters, the Corps determined that the project would have a significant effect on the environment and has initiated the development of an EIS under the National Environmental Policy Act (“NEPA”). That EIS will compare alternative sites and designs for the project based on an evaluation of direct, indirect, and cumulative impacts to air, surface water, groundwater, infrastructure, transportation corridors, recreational resources, commercial resources, aesthetic resources, and other resources. Id.

m. DENR has determined that Titan’s project does not require compliance with SEPA and therefore intends to process and issue Titan’s PSD permit before the EIS evaluating the full range of environmental impacts of the project is complete. DENR’s decision rests on three grounds:

- the grant monies will not be used for construction;

- the grants are conditioned on meeting certain requirements; and
- the grant monies will be paid in the future.

See Letter from Freeman, DENR, to Barfield, New Hanover County, of July 10, 2009 (attached as Exhibit 7). Based on these reasons, DENR has “determined that a SEPA document is not necessary in this case.” Id.

3. Petitioners

a. The North Carolina Coastal Federation (“Coastal Federation”) is one of North Carolina’s largest and most effective coastal conservation groups. In 1982, eight grassroots groups joined together to form the environmental education and advocacy organization, and for the last 27 years, the Coastal Federation has worked with citizens to safeguard the coastal rivers, creeks, sounds, and beaches of North Carolina. The organization has been an active participant in coastal management issues in North Carolina has a core interest in facilitating public involvement in governmental decisions affecting the coastal region and promoting sound governmental decision making. From its Wilmington office, the Coastal Federation plays an important role in protecting the quality of the coastal environment that would be directly and indirectly affected by Titan’s proposed cement facility.

The Coastal Federation consists of more than 8,000 members and 150 affiliated organizations. Many of those members live, work, and recreate in the area affected by the Titan’s proposed project. Further, its members are actively involved in efforts to protect the wetlands and surface waters of North Carolina, including those in the Cape Fear River basin. Both the Coastal Federation and its members would be substantially affected by the impacts to the aquatic environment and human health due to the proposed emissions that would be

generated by Titan America's proposed cement manufacturing facility and limestone quarry, in addition to the destruction of wetlands and degradation of water quality that would result from project approval. A declaratory ruling in favor of the Coastal Federation, requiring SEPA review of Titan's proposed project, would redress the harms alleged in this request. Therefore, the Coastal Federation is a "person aggrieved."

b. The Cape Fear River Watch ("River Watch"), is one of 58 nonprofit organizations under the Waterkeeper Alliance umbrella organization. Founded in 1993, River Watch's mission to protect and improve the water quality of the Lower Cape Fear River Basin through education, advocacy, and action. Its Advocacy Committee works on water quality related issues such as environmentally sustainable development, hog lagoon regulations, wetland preservation and restoration, and vegetative wetland retention. River Watch has more than 200 members, many of whom live, work, and recreate in the vicinity of the proposed cement manufacturing facility and quarry. Most of River Watch's members live in New Hanover County, including approximately 60 members that live within a few miles of the proposed facility. River Watch and its members would be substantially affected by the proposed impacts to the aquatic environment and to human health from the proposed Titan America cement manufacturing facility and limestone quarry. A declaratory ruling in favor of the River Watch, requiring SEPA review of Titan's proposed project, would redress the harms alleged in this request. Thus, River Watch is a "person aggrieved."

c. PenderWatch & Conservancy ("PenderWatch") is a grassroots organization that strives to promote responsible environmental solutions. Founded in 1986, PenderWatch takes a multifaceted approach to serving its mission of preserving the environment of Pender County for current and future generations. The organization's *** members work with County officials to

promote environmentally conscious development and land use choices; promote conservation of wetlands, forests, and wildlife; monitor water quality and take action on issues threatening water quality in the region; and promote environmental awareness in the community.

PenderWatch's members live, work, and recreate in the vicinity of Titan's proposed site. Thus, the adverse effects of the proposed facility on local air and water quality will not only substantially affect PenderWatch's organizational efforts to maintain healthy ecosystems and promote sound environmental land use, the proposed project would directly and indirectly affect the organization's membership. Avoidance of comprehensive SEPA review would prevent PenderWatch from performing its organizational purpose of monitoring impacts to Pender County's environment and disseminating information regarding those impacts to the County's residents. Further, it would deprive the organization's members from information that would result from that process regarding the overall impacts of the proposed project. A favorable determination by the Secretary of Administration on this request for declaratory ruling would redress these harms. PenderWatch is a "person aggrieved."

4. Statutory and Regulatory Background.

a. The North Carolina Administrative Procedure Act states that "an agency shall issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency" when requested by a person aggrieved. N.C. Gen. Stat. § 150B-4(a).

b. When a request for declaratory ruling is submitted to the Secretary of Administration, "the Secretary shall issue such declaratory ruling within 60 days of receipt." 01 N.C. Admin. Code 01B.0603.

c. The North Carolina Environmental Policy Act's purpose is "to require agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys or the use of public land." N.C. Gen. Stat. § 113A-2. The N.C. Court of Appeals has interpreted that purpose as meaning: "[i]t is the policy of this State . . . that environmental impacts be considered before major governmental actions involving the expenditure of public funds are taken." Orange County v. N.C. Dep't of Transp., 46 N.C. App. 350, 358, 265 S.E.2d 890, 897 (1980).

d. The statute provides that "the Department of Administration shall adopt rules to implement this Article." N.C. Gen. Stat. § 113A-11(a). In addition, "Administration . . . shall assist state project agencies in ensuring compliance with the NCEPA." 01 N.C. Admin. Code 25.0208.

e. According to Administration's rules, the Act applies to any project where there is: "(1) an expenditure of public monies or use of public land; (2) an action by a state agency . . . ; (3) a potential environmental effect upon either natural resources, public health and safety, natural beauty, or historical or cultural elements of the state's common inheritance." 01 N.C. Admin. Code 25.0108; See also N.C. Gen. Stat. § 113A-4(2). Non-state-sponsored projects require review under the Act even if "the only state involvement is permit granting." 01 N.C. Admin. Code 25.0210.

f. "Public monies" as defined by Administration rules "includes all expenditures in support of the proposed activity by federal, state or local or quasi-public entities from whatever source derived, but does not include resources used solely for processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services." 01 N.C. Admin. Code 25.0108(b)(4).

g. When the three required elements are present, SEPA mandates “a detailed statement” commonly referred to as an environmental assessment or an environmental impact statement to be developed through consultation “with any agency which has either jurisdiction by law or special expertise with respect to any environmental impact involved.” N.C. Gen. Stat. §113A-4(2a). When an EIS is required, “the DENR agency cannot take final action until the environmental documentation is completed and available for use as a decision-making tool.” 15A N.C. Admin. Code 1C.0107(b).

h. DENR’s rules implementing SEPA prohibit it from undertaking any action that “might limit the choice among alternatives or otherwise prejudice the ultimate decision on the issue” while work on an environmental document is in progress. 15A N.C. Admin. Code 1C.0107 (a). Permit approval, by the terms of the rules, “limits the choice among alternatives and shall not be approved until the final environmental document for the action is published.”

Id.

i. North Carolina’s Division of Air Quality, Division of Water Quality, and Division of Land Resources are all subject to the Department of Administration’s SEPA rules because they are divisions under the Department of Environmental and Natural Resources. See 01 N.C. Admin. Code 25.0108(b)(7)(A); See also N.C. Gen. Stat. § 143B-11.

j. New Hanover County’s grant of \$4.2 million to Titan was issued under the authority granted by N.C. Gen. Stat. § 158-7.1. That statute authorizes county governments to “make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises.” N.C. Gen. Stat. § 158-7.1(a). Those grants are “funded by the levy of property taxes . . . [and] other revenues” within the county’s control. Id.

k. In tandem with New Hanover County, the North Carolina Department of Commerce awarded Titan \$300,000 under its One North Carolina Fund program. The One N.C. Fund provides grants to businesses using local governments as an intermediary. See N.C. Gen. Stat. § 143B-437.71, 143B-437.72. Local governments act, pursuant to statutorily required agreements, as an agent for the Department of Commerce to reimburse businesses for expenses related to:

1. Installation or purchase of new equipment;
2. Structural repairs, improvements or renovations of existing buildings to be used for expansion;
3. Construction of or improvements to new or existing [utilities] or equipment for existing buildings;
4. Construction of or improvements to new or existing [utilities] or equipment to serve new or proposed industrial buildings used for manufacturing and industrial operations; or
5. Any other purposes specifically provided by an act of the General Assembly.

N.C. Gen. Stat. § 143B-437.71(b). The statute restricts One N.C. Fund grants to these uses. Id.

5. Argument

The New Hanover County Contract obligating \$4.2 million and the Department of Commerce grant of \$300,000 in support of Titan America's proposed cement kiln constitute expenditures of public monies under the North Carolina Environmental Policy Act. Because the Act requires holistic review of projects that involve public monies, require state permitting, and have a potential impact on the environment, the Titan project must undergo the required SEPA review prior to the state authorization of environmental impacts

- a. Because Titan’s proposed Portland cement manufacturing facility meets the criteria requiring SEPA review, DENR must prepare an EIS before taking any agency action on the project.

Under Administration’s rules, SEPA applies to Titan’s proposed project if “there is: (1) an expenditure of public monies or use of public land; (2) an action by a state agency...; (3) a potential environmental effect upon either natural resources, public health and safety, natural beauty, or historical or cultural elements of the state’s common inheritance.” 01 N.C. Admin. Code 25.0108(a). These regulations were promulgated by Administration, yet they apply to actions by DENR as well as divisions under the DENR umbrella, including the Division of Air Quality. See 1 N.C. Admin. Code 25.0108 (b)(7)(A) (establishing the applicability of this Chapter to include actions by “the Departments listed in G.S. 143B-11”).

- i. *Titan was awarded \$4.5 million in public monies in support of its project.*

The use of public monies in support of a project that also involves state permitting or other action and a potential environmental impact requires review under SEPA. Regulations implementing the Act define public monies broadly. Public monies include “*all expenditures in support of the proposed activity by federal, state or local or quasi-public entities from whatever source derived....*” 01 N.C. Admin. Code 25.0108(b)(4) (emphasis added). Only those uses that involve public monies “used solely for processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services” are exempt from SEPA review of projects supported by public monies. Id.

The Act does not define “involving” or “expenditure,” meaning that those terms carry their common meanings. Involve is “to include or contain as a part” or “[t]o have as an essential

feature.” 584 Webster’s II New College Dictionary 584 (1995). To expend is “[t]o lay out; spend.” Id. at 394. Thus, the definition of a project involving an expenditure of public monies is one that includes or relies upon spending of public money.

Titan’s proposed project involves the expenditure of \$4.5 million of public monies in support of the cement manufacturing facility. Those public monies are divided between two grants, one from New Hanover County and one from the Department of Commerce, but are united by a single purpose – enticing Titan America to construct a Portland cement manufacturing facility in the state and to offset some of the expense of building that facility. See Ex. 4, 6. New Hanover County’s grant of \$4.2 million was awarded specifically to support the “creation and enhancement of a facility in the County.” Ex. 4 at 2. The grant contract obligates the County to pay Titan seven \$600,000 annual installments. The resolution adopted by the Board of Commissioners supporting the grant contract makes clear that Titan was “considering expansion of its business,” the County “desire[d] to encourage such economic growth and development,” and that the \$4.2 million grant was integral in convincing Titan to expand in New Hanover County. Ex. 4 at 1.

Similarly, the \$300,000 granted to Titan by the Department of Commerce constitutes public monies that support the proposed facility. Under the One North Carolina Fund grant, the “proceeds of the Grant may be used only to offset qualifying expenses;” in Titan’s contract, as in the Fund’s enabling statute, the “qualifying expenses” are limited to installation or purchase of equipment; structural repairs for building expansions; and construction or improvement of utilities for new or proposed buildings used for manufacturing and industrial operations. N.C. Gen. Stat. § 143B-437.71(b); Ex. 6 at 2. Not only does this grant facilitate the construction and development of the cement manufacturing facility, it was found to be “necessary” for Titan to

“go forward” with the project. Ex. 6 at 1. In other words, but for the awarding of the One NC Fund grant to reimburse the company for construction costs, Titan would not pursue developing a cement manufacturing facility in Castle Hayne – indeed, One NC Fund grants can only be issued if they are essential to the development of the project.

Titan’s grants are public monies that will not be “used solely for processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services.” 01 N.C. Admin. Code 25.0108(b)(4). Therefore, Titan’s proposed project involves the expenditure of public monies and must undergo SEPA review if it also requires state action and includes a potential environmental effect.

ii. Titan’s proposed project requires extensive state action

Construction and operation of Titan’s proposed Portland cement manufacturing facility, which includes the associated limestone quarry, will require extensive state agency action. Agency action under SEPA “includes ... licensing, certification, permitting....and other similar final agency decisions the absence of which would preclude the proposed activity.” 01 N.C. Admin. Code 25.0108(b)(1). In order for Titan America to implement their proposal they must obtain permits from: the Division of Air Quality; the Division of Water Quality; the Division of Land Resources; to the Division of Waste Management. These divisions are “agencies” within SEPA’s context. N.C. Gen. Stat. § 113A-9(9); 15A N.C. Admin. Code 1C.0103(1) (defining “agency” to include the Divisions and Offices of DENR). Accordingly, extensive agency action is required before Titan America is able to construct the proposed facility. Therefore, Titan’s project involves an expenditure of public monies and state action; it must undergo SEPA review if it includes a potential environmental impact.

- iii. *Titan's proposed project has a potential effect on the environment, the public's health, the natural resources of the state.*

Titan's proposed facility will, by any definition, have a significant environmental impact. Under SEPA, environmental effect "includes direct, indirect, and cumulative impacts for the project or program that may be significant, depending upon the manner in which the activity is carried out." 01 N.C. Admin. Code 25.0108(b)(3). Titan's project includes significant air emissions and direct removal of more than 1,000 acres of wetlands. Those direct impacts will have significant indirect and cumulative impacts on the Northeast Cape Fear River and adjacent environments. Further, the project threatens to expand existing, on-site groundwater contamination and impact an adjacent Superfund site. Not surprisingly, the Corps has already determined that the project will have a "significant effect on the human environment" and has initiated the development of a federal EIS under NEPA. 73 Fed. Reg. 31,072 (May 30, 2008).²

Thus, all three requirements necessary to trigger SEPA review are present in the proposed project, and therefore, DENR must prepare the required "detailed statement" before any of its agencies may proceed with permit review for the proposal. 01 N.C. Admin. Code 25.0401.

- b. Because Titan's proposed project meets all three criteria requiring SEPA review, DENR erred in determining that agency action can proceed before the agency complies with SEPA.

Despite the substantial investment of public monies into a project that would have a significant environmental impact, DENR has determined that compliance with SEPA is not required before taking agency action to promote the project. DENR supports its decision not to apply SEPA on the grounds that:

² The processes under SEPA and NEPA can be coordinated to eliminate duplication and delay. See 01 N.C. Admin. Code 25.0402.

- the grant monies will not be used for construction;
- the grants are conditioned on meeting certain requirements; and
- the grant monies will be paid in the future and therefore no expenditure of public monies has occurred.

Ex. 7. These rationales are unsupported by the grant contracts themselves, the SEPA statute, or Administration or DENR’s respective rules implementing the Act.

When public money supports a project that has a potential effect on the environment or public health, SEPA requires an intensive review of the project or program regardless of when the public money is spent or what phase of the project it is allocated to. DENR’s restriction of the category of public monies that trigger SEPA review to those public monies used for construction is unsupported by the statute or rules implementing it. The statute’s plain language requires review of a project “involving” public monies if that project meets the other statutory criteria. That language casts a broad net, one that exceeds the narrow category of construction expenditures. Administration’s rules echo this broad statutory language, defining the term public monies to “include[] *all expenditures in support of the proposed activity.*” 01 N.C. Admin. Code 25.0108(b)(4) (emphasis added).³

Recognizing this broad reach, Administration’s rules expressly exclude certain uses of public monies from SEPA review that would otherwise be covered, including “resources used solely for processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services.” 01 N.C. Admin. Code 25.0101. North Carolina courts have long held that “[u]nder the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others.” Campbell v. First Baptist

³ The statute also requires review of “programs” supported by public monies. N.C. Gen. Stat. § 113A-4(2). It is not clear that a state program falling under SEPA review would ever have a construction period, making DENR’s reliance on that period as the trigger for the statute specious. Those programs, presumably lacking any construction period, are covered by the plain language of the statute but would never undergo review under DENR’s analysis.

Church, 298 N.C. 476, 482, 259 S.E.2d 558, 562 (1979). Therefore, Administration’s creation of express exceptions to SEPA review for specific uses of public monies implies the exclusion of other exceptions, like DENR’s “construction” and “condition” exceptions, and an embrace of a broad application of SEPA to the use of public monies in support of environmentally significant projects.

i. Titan is required to use grant monies for construction.

But even if SEPA required that public monies be used during construction to trigger review, the public monies granted to Titan meet that threshold. The New Hanover County grant is intended to facilitate the “Company’s *creation and enhancement* of a facility” and requires that that facility include more than \$450 million in construction or capital expenditures. Ex. 4 at 4 (emphasis added). Creation and enhancement required to convert an abandoned, 25-year old cement kiln into the facility Titan has proposed necessarily requires construction. The County’s seven annual payments of \$600,000 will assist Titan in offsetting those construction costs.

Moreover, the One NC Fund grant must be spent on construction activities. As defined in the statute, and included in the grant contract, the \$300,000 awarded to Titan by the Department of Commerce may only legally be applied to:

1. **Installation or purchase** of new equipment;
2. **Structural repairs, improvements or renovations** of existing buildings to be used for expansion; and
3. **Construction of or improvements** to new or existing [utilities] or equipment for existing buildings; or
4. **Construction of or improvements** to new or existing [utilities] or equipment to serve new or proposed industrial buildings used for manufacturing and industrial operations.

Ex. 6 at 2 (emphasis added). Therefore, even under DENR's interpretation of SEPA – which is erroneously restricted – the agency must conduct a SEPA review of the project before taking any agency action. Contrary to DENR's claim that none of the public monies granted to Titan will be used for construction, the contracts that award those monies and the statutes that govern them require Titan to use the money for that very purpose.

ii. Grant conditions do not preclude SEPA review.

The performance conditions in Titan's grants do not, and cannot, exempt the project from review. DENR contends that because the awards of public monies require Titan to meet certain conditions before the State and New Hanover County begin payments to the Company, that the grants do not constitute an expenditure of public monies that require review. The agency does not, however, explain how those performance conditions vary from every other state or local government contract. To be sure, when the Department of Transportation hires a contractor to complete a project, the State's obligation to release contractually obligated public funds is dependent on the project meeting certain standards. Those projects, nonetheless, require SEPA review. See e.g. Highway U.S. 17 Corridor Study (describing Department of Transportation's schedule for evaluating environmental impacts of Hampstead bypass) (attached as Exhibit 8). DENR's position, carried to its logical conclusion, would mean that only those uses of public monies that do not include performance conditions require SEPA review. That position is untenable, conflicts with the State's practice of subjecting other performance-condition-laden projects to SEPA review, and would eviscerate the public monies provision of the Act.

iii. Public grants constitute “actual disbursement” of public monies.

Titan’s \$4.5 million grants are “actual disbursements” for the purpose of the Act and as defined in the Attorney General’s opinion that DENR relies upon. SEPA requires review of projects before they take place, making DENR’s contention that SEPA review is only triggered if public monies have already been paid untenable.

In support of that contention, DENR cites a 1983 Attorney General’s opinion that addressed two issues. See Ex. 7 at 2 (citing the opinion); see also Attorney General’s opinion of May 25, 1983 (attached as Exhibit 9). First, the opinion addressed whether federal funds over which state and local governments have no control or discretion are considered public monies for the purposes of SEPA. See Ex. 9 at 1. Second, the opinion addressed whether tax credits, the waiving of state income, is an expenditure that requires SEPA review. Id. The opinion determined that when neither the State nor a local government has control over the dispensation of federal funds, SEPA review is not required because those federal funds do not constitute “public moneys” under the statute. Id. at 2. The 1983 opinion also determined that the provision of tax credits, foregoing revenue, did not constitute an “expenditure” because that term “connotes the actual distribution or outlay of moneys.” Id. at 3. The opinion does not address the timing of those distributions in relation to SEPA review, but rather concluded that expenditure means an “outlay” of money rather than a waiver of tax revenue.

Neither circumstance addressed in the opinion is relevant here. The \$4.5 million awarded to Titan will be paid from the treasuries of the State and New Hanover County and their respective governmental bodies exercised significant control over the conditions related to those grants. Further, the \$4.5 million awarded to Titan are grants, not tax credits, and each contract agreement specifies the process for transferring taxpayer money to the Company. Both grants

are “outlays” of public monies, not a waiver of taxes, and therefore are clearly expenditures. Thus, the Attorney General’s opinion on which DENR has relied does not support avoidance of SEPA review here. In fact, it makes clear that the grants awarded to Titan are expenditures of public monies.

DENR’s interpretation of the Attorney General’s opinion creates a paradox that “actual distribution” as used in the opinion means that not only must monies be paid out of public resources, rather than taxes waived, but that they must also be spent before SEPA review is initiated. But SEPA review requires the evaluation of numerous factors that can only be considered before the investment of state funds in a project, including:

- significant environmental effects of the project;
- alternatives to the proposed project; and
- any irreversible and irretrievable environmental changes which would be involved in the action.

N.C. Gen. Stat. § 113A-4(2). DENR’s own rules recognize that the SEPA review must be done “before decisions are made and before actions are taken.” 15A N.C. Admin. Code 01C.0101.

To be clear, “[w]hile work on an environmental document is in progress, no DENR agency shall undertake . . . any action which might limit the choice among alternatives.” 15A N.C. Admin.

Code 01C.0107(a) (emphasis added). According to those rules, any action “other than those actions necessary for gathering information needed to prepare the environmental document . . . shall not be approved until the final environmental document for the action is published.” Id.

Simply put, the rules state that no public money may be spent on a project requiring SEPA review for any use other than conducting analyses necessary to complete that review. Therefore, DENR cannot refuse to apply SEPA to the \$4.5 million awarded to Titan on the basis that public

monies, though contractually obligated, have not yet been transferred from public treasuries to Titan.

The error in DENR's position that public monies must be spent before SEPA review is initiated is clarified by the fact that the State does not apply the "actual disbursement" test that DENR has applied here in other contexts. For example, the Department of Transportation ("DOT") is proposing a Highway 17 bypass in Pender and New Hanover counties, the two counties that would be most directly affected by Titan's proposed facility. The DOT has initiated SEPA review because, as stated in DOT's summary, "[t]he proposed project will use state funds. Any state agency proposing a project that uses public funds and may have a detrimental environmental effect must comply with [SEPA]." Ex. 8. The DOT has identified eleven steps in the project development process. The agency's purchase of rights-of-way and construction of the highway, and therefore "actual disbursement of funds" related to construction, do not occur until steps 9 and 11, respectively. Moreover, that construction will not occur until after 2015, and is currently unfunded. Id. Yet DOT has initiated SEPA review on the expectation that the project will be funded by the Legislature and that those funds will be disbursed.

6. Conclusion

Titan's project is supported by public funds, requires state action, and poses a potential environmental effect; by the plain language of SEPA as well as Administration's rules, it must undergo review before any agency action is taken to advance the project. DENR has declined to do so, with misplaced reliance on a 1983 Attorney General's opinion and an unfounded

distinction between construction and non-construction uses of public funds. As discussed above DENR's rationales for bypassing SEPA review of this project do not hold up under scrutiny.

7. Proposed Ruling

Pursuant to N.C. Gen. Stat. § 150B-4(a) and 01 N.C. Admin. Code 01B.0602 – 01B.0603, the North Carolina Coastal Federation, Cape Fear River Watch, and PenderWatch & Conservancy respectfully request that the Secretary issue a ruling declaring that:

a. That the \$4.2 million grant to be paid to Carolinas Cement Company/ Titan America, LLC (“Titan America”) by New Hanover County “for the purpose of aiding and encouraging the location of manufacturing enterprises and locating industrial and commercial plants in the County,” N.C. Gen Stat. §158-7.1, and the \$300,000 One North Carolina Fund grant awarded by the Department of Commerce for construction and expansion of its proposed facility are “expenditure[s] of public moneys” under the North Carolina Environmental Policy Act, N.C. Gen. Stat. § 113A-4(2); and

b. That the North Carolina Department of Environmental and Natural Resources must comply with SEPA before taking any action involving Titan America's proposed Portland cement kiln and quarry so not to “limit the choice among alternative[s] or otherwise prejudice the ultimate decision on the issue.” 15A N.C. Admin. Code 1C.0107(a).

8. Request for Oral Argument

Petitioners request the opportunity for oral argument before the Secretary. The application of SEPA to Titan's proposed project involves complex issues regarding public health, natural resources, and natural beauty that merit a hearing.

Respectfully submitted this _____ day of September 2009.

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