

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 09 CVS 24628

NORTH CAROLINA COASTAL
FEDERATION, CAPE FEAR RIVER
WATCH, and PENDERWATCH &
CONSERVANCY,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT
OF ADMINISTRATION and NORTH
CAROLINA DEPARTMENT OF
ENVIRONMENT AND NATURAL
RESOURCES,

Respondents,

and

CAROLINAS CEMENT COMPANY,
LLC,

Respondent-Intervenor.

BY _____

ORDER

ORDER ON PETITION FOR JUDICIAL REVIEW

This matter came before the Court on a Petition for Judicial Review of a declaratory ruling issued by the North Carolina Department of Administration ("DOA"). The undersigned judge heard oral arguments on April 5 and April 14, 2010. Appearing for the North Carolina Coastal Federation and Cape Fear River Watch were Derb S. Carter, Jr. and Geoffrey R. Gisler of the Southern Environmental Law Center. Appearing for PenderWatch and Conservancy was Michelle B. Nowlin of the Duke Environmental Law and Policy Clinic. Appearing for DOA was Special Deputy Attorney General Donald R. Teeter, Sr. Appearing for the North Carolina Department of Environment and Natural Resources ("DENR") were Assistant Attorneys General

Elizabeth J. Weese and Amy L. Bircher. Appearing for Titan America/Carolinas Cement Company, LLC ("Carolinas Cement") were Eric M. Braum and Stanford D. Baird of K & L Gates, LLP.

The Court has fully and carefully reviewed the declaratory ruling, the record before DOA, the Petition for Judicial Review ("Petition"), and the briefs and oral arguments of the parties, and has determined that the DOA's action should be and is reversed.

The Department of Administration's declaratory ruling was based on undisputed facts and Petitioners' administrative appeal is based on the agency's interpretation of the N.C. Environmental Policy Act, N.C. Gen. Stat. § 113A-1, *et seq.* In administrative appeals, the APA provides that the reviewing court may "reverse or modify the agency's decision" if the agency's determination is:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the agency;
3. Made upon unlawful procedure;
4. Affected by other error of law;
5. Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
6. Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b), *High Rock Lake Ass'n, Inc. v. N.C. Env'tl. Mgmt. Comm'n* 51 N.C. App. 275, 277, 276 S.E.2d 472, 474 (1981).

Administrative appeals of questions of law receive *de novo* review. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004). When applying the *de novo* standard of review, "the trial court 'considers the matter anew[] and freely substitutes its own judgment for the agency's.'" *Id.* at 659, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002)).

Findings of Fact

1. The North Carolina Coastal Federation, Cape Fear River Watch, and Pender Watch and Conservancy ("Petitioners") filed a request for a declaratory ruling with the Department of Administration on September 10, 2009, which was received by DOA on September 11, 2009.

(R. p. 4). Petitioners collectively represent nearly 10,000 members, many of whom live, work, and enjoy the natural resources in the vicinity of Carolinas Cement's proposed project. (R. pp. 18-21).

2. The subject of the request for declaratory ruling was the application of the North Carolina Environmental Policy Act ("SEPA" or "Act") to Carolinas Cement's proposed Portland cement manufacturing facility. Petitioners alleged that the project met each of SEPA's threshold criteria, that it (1) involved an expenditure of public money, (2) required state action, and (3) had the potential to significantly affect the environment.

3. Carolinas Cement has proposed to construct and operate a Portland cement manufacturing facility, including a cement kiln and limestone quarry, at 6411 Ideal Cement Road, Castle Hayne, North Carolina. Carolinas Cement's application for a prevention of significant deterioration ("PSD") air quality permit is currently pending before the Division of Air Quality, a division of DENR. Based on this application, the Division of Air Quality has issued a draft PSD permit. The PSD air quality permit would allow construction of the cement kiln and operation of the facility until the company applies for and receives a Title V air quality permit authorizing continued operation. The proposed facility will require numerous other permits, including wetlands and surface water permits, coastal area management permits, and stormwater and wastewater permits.

4. On May 16, 2008, the North Carolina Department of Commerce awarded

Carolinas Cement a \$300,000 grant through the One North Carolina Fund, pursuant to N.C. Gen. Stat. § 143B-437.71. The grant will be paid in four installments to reimburse costs authorized by N.C. Gen. Stat. § 143B-437.71(b), including purchase and installation of equipment, construction of utilities, and renovations to existing structures. (R. p. 75).

5. On May 27, 2008, New Hanover County awarded Carolinas Cement a \$4.2 million grant pursuant to authority granted by N.C. Gen. Stat. § 158-7.1. The grant will be paid in 7 installments of \$600,000. The first payment will be made on July 1 of the year that Carolinas Cement secures a certificate of occupancy for the facility, obtains required permits and authorizations, and hires a minimum of 160 employees. The remaining payments will be made on July 1 of the following six years. (R. pp. 66-74).

6. The proposed project would be located on the banks of the Northeast Cape Fear River in northern New Hanover County. (R. p. 14). The Northeast Cape Fear River is a blackwater river that has been recognized as a primary fishery nursery area and a priority area for habitat conservation. *Id.* The proposed site also includes hundreds of acres of tidally influenced wetlands. (R. p. 15).

7. Based on these facts, DOA issued a declaratory ruling on November 9, 2009 finding that SEPA does not apply to Carolinas Cement's proposed cement manufacturing facility. DOA concluded that the proposed project would require state action and had the potential to significantly affect the environment. DOA determined that the grants awarded by the Department of Commerce and New Hanover County had not been disbursed and that therefore no expenditure of public moneys had occurred. Consequently, DOA ruled that SEPA did not apply to the project.

8. Petitioners timely filed this Petition for Judicial Review on December 9, 2009.

On January 11, 2010, DENR filed a motion to dismiss based on Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Carolinas Cement filed a motion to intervene on January 25, 2010, which was granted on January 26. Carolinas Cement filed a Rule 12(f) motion to strike and a Rule 12(b)(6) motion to dismiss on February 8, 2010.

Conclusions of Law

1. This Court has jurisdiction to hear this case pursuant to Articles 1 and 4 of the Administrative Procedure Act ("APA"), which entitle Petitioners to appeal DOA's declaratory ruling to this Court. N.C. Gen. Stat. §§ 150B-4, 150B-43, *et seq.* This Petition arises from a declaratory ruling issued by DOA under the authority granted by the APA. *See* N.C. Gen. Stat. § 150B-4(a). The APA provides for judicial review of declaratory rulings issued by agencies by filing a petition for judicial review in this Court pursuant to the procedures found in N.C. Gen. Stat. § 150B-45. *See* N.C. Gen. Stat. §§ 150B-4(a), 150B-43. North Carolina courts have consistently found that declaratory rulings represent an exhaustion of administrative remedies that are entitled to judicial review. *See High Rock Lake Assoc. v. N.C. Envtl. Mgmt. Comm'n*, 51 N.C. App. 275, 276, S.E.2d 472 (1981), *Porter v. N.C. Dep't of Ins.*, 40 N.C. App. 376, 253 S.E.2d 44 (1979). Petitioners are legally bound by DOA's declaratory ruling. *See* N.C. Gen. Stat. § 150B-4(a). No party has identified any case in which a North Carolina court has held that a party bound by an agency's declaratory ruling has failed to exhaust its administrative remedies, and this Court is not aware of any case in which a party bound by a declaratory ruling has been prevented from seeking judicial review of that ruling. Therefore, the Court finds that DOA's decision to issue a declaratory ruling entitles Petitioners to the right of judicial review provided under the APA. Petitioners timely filed this Petition for Judicial Review and therefore this Court has jurisdiction to hear this case.

2. Respondents and Respondent-Intervenor have alleged that N.C. Gen. Stat. § 113A-13 precludes review of DOA's declaratory ruling because it requires review of environmental documents to be done in conjunction with review of an agency's final action on a pending permit. That section of SEPA is inapplicable to this Petition. DENR and DOA have determined that SEPA does not apply and that no environmental document will be prepared; therefore, Petitioners are not challenging the adequacy of any environmental document. That distinction is fundamental in this Petition.. Each of the cases cited by Carolinas Cement addresses a challenge to the adequacy of an environmental document, not a declaratory ruling holding that no environmental document is required. In this case, DOA's declaratory ruling is the final agency action, it is binding on Petitioners, and no environmental document exists. Therefore, N.C. Gen. Stat. § 113A-13 does not apply and this Petition is properly before the Court.

3. All parties are properly before the Court. Petitioners are "persons aggrieved" by DOA's declaratory ruling and have standing to bring this Petition. As the party issuing the declaratory ruling that is the subject of the Petition and the agency charged with administering SEPA, DOA is properly designated as a Respondent. Carolinas Cement sought intervention and therefore is properly designated as Respondent-Intervenor. DENR, as the party that will be responsible for preparing an EIS to inform its permitting decisions, is properly joined as a necessary party and properly designated as Respondent.

4. SEPA "declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony." N.C. Gen. Stat. § 113A-3. It carries out that purpose by requiring "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.” *Id.* § 113A-2.

5. Agencies must comply with the Act when a project involves an expenditure of public money, requires state action, and has the potential to significantly affect the environment. *Id.* § 113A-4(2). SEPA may apply to projects where the only state action is permitting. 01 N.C. Admin. Code 25.0210(b). The Act applies to both public and private projects that meet these criteria. *See id.* (establishing procedures for non-state projects, including private projects), 15 N.C. Admin. Code 01C.0103(14) (defining “non-state entity” to include “individuals or corporations to whom [SEPA] may apply”).

6. The environmental document prepared to comply with SEPA must be part of an application or other request for state action on a proposed project. N.C. Gen. Stat. § 113A-13. Therefore, the evaluation of the threshold criteria must occur when the project is in its initial phases. Taking the project as proposed, the agency must ask whether it will involve an expenditure of public money, will require state action, and will have the potential to affect the environment.

7. DOA is statutorily charged with overseeing agency compliance with SEPA and is obligated to promulgate rules to implement the Act. N.C. Gen. Stat. § 113A-11(a). DOA’s rules reflect this oversight authority by defining terms applicable to all agencies applying the Act, including the public moneys definition at issue in the declaratory ruling and this Petition. 01 N.C. Admin. Code 25.0108(b)(4). DOA’s declaratory ruling applies its rules to Carolinas Cement’s proposed project, a project with an application currently pending before DENR. Because the General Assembly has authorized DOA to ensure agency compliance with SEPA, that declaratory ruling is binding on DENR.

8. All parties agree that Carolinas Cement's proposed facility will require state action and will affect the environment. DOA held that both of those criteria were met in its declaratory ruling and those holdings have not been disputed in this Petition. Therefore, the dispositive issue in this case is whether Carolinas Cement's project involves the expenditure of public moneys and meets SEPA's third criterion.

9. SEPA is broadly worded to apply to projects "involving expenditure of public moneys." N.C. Gen. Stat. § 113A-4(2). DOA, as the agency responsible for implementing SEPA, has defined public money broadly to 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). Our Court of Appeals has recognized that a plan to spend public money on a proposed project requires SEPA review if the other threshold criteria are met. *In re: Appeal from the Env'tl. Mgmt. Comm'n*, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

10. If its Portland cement manufacturing facility is built as proposed, Carolinas Cement will receive \$4.5 million of taxpayer-funded grant moneys. Even if Carolinas Cement fails to completely meet the conditions of the grants, the public funding will be awarded pro rata by the terms of the grant contracts.

11. Moreover, both grants were awarded on the premise that they are essential to the development of the facility. The \$300,000 grant that the Department of Commerce awarded to Carolinas Cement can be given only if it is necessary for a project to be built in North Carolina. Indeed, Carolinas Cement stated in its application to the Department of Commerce that the grant was necessary for it to build its project in the State. The \$4.2 million grant awarded by New Hanover County states that it was a "necessary inducement for the Company to locate its Facility in the County." Therefore, as proposed, Carolinas Cement's project relies on and is supported by

planned expenditures of public money and is a project "involving the expenditure of public money." Thus, the proposed project meets each of the three threshold criteria for SEPA review.

12. Contrary to DOA's declaratory ruling, the Court of Appeals' decision in *Boneno v. State* supports this Court's holding to the extent it is applicable to SEPA. In *Boneno*, the court held that payment of public money pursuant to a contract would be an expenditure of public money. 54 N.C. App. 690, 691, 284 S.E.2d 170, 170-71 (1981). Based on that holding, the payment of the public grants awarded to Carolinas Cement will be expenditures of public money when they are paid. Therefore, Carolinas Cement's proposed project involves an expenditure of public money.

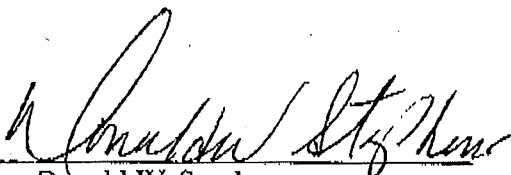
13. DOA's declaratory ruling reached the opposite conclusion because it asked whether public money had been spent, not whether public money will be spent. DOA concluded that "[a]s there has been no disbursement of public monies by New Hanover County or the Department of Commerce, there can be no expenditure of public monies by them."

14. SEPA does not ask whether there has been an expenditure of public money, but whether the project will involve an expenditure of public money. This is the only interpretation of the Act that gives meaning to its language and purpose. The Legislature could not have intended for companies to build a project, receive previously committed public grant money, and only then conduct the SEPA review of the project's potential environmental impact and proposed alternatives. An environmental review prepared after a project has been completed and begun operation would fail to meet the Act's stated purpose of informing the State's decision. See N.C. Gen. Stat. § 113A-2; 01 N.C. Admin. Code 25.0601; 15A N.C. Admin. Code 01C.0104(b). DOA's failure to take the statutorily mandated prospective view of Carolinas Cement's grant awards was an error of law that requires reversal.

15. Carolinas Cement's proposed project will involve the expenditure of public money, will require state action through numerous permits, and will significantly affect the environment if it is carried out. Thus, the project meets each of the three criteria for SEPA review. That review must be conducted before any state action is taken to advance the project, including the issuance of any permits by DENR.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED, AND DECREED that Respondent N.C. Department of Environment and Natural Resources' Motion to Dismiss is DENIED; Respondent-Intervenor Carolinas Cement Company, LLC's Motion to Dismiss is DENIED; Petitioners are entitled to the relief sought in their Petition for Judicial Review; the declaratory ruling of DOA is REVERSED; and DENR is ENJOINED from taking any action on Carolinas Cement's proposed Portland cement manufacturing facility without first complying with the North Carolina Environmental Policy Act.

This the 30 day of April, 2010.


Hon. Donald W. Stephens
Senior Resident Superior Court Judge

*It is further ordered that Carolinas
Cement Company, LLC's Motion to
Strike is also denied.*