



North Carolina
Department of Administration

Beverly Eaves Perdue, Governor
Britt Cobb, Secretary

W. Kevin McLaughlin, Jr.
Chief Operating Officer &
General Counsel

November 9, 2009

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**Re: Request for a Declaratory Ruling received by the Department of Administration
on September 11, 2009**

Dear Mr. Gisler and Ms. Nowlin:

I have been designated to respond to your Request for a Declaratory Ruling received by the Department of Administration on September 11, 2009 (the "Request"). Please allow this letter to serve as the agency's official response¹.

As required by N.C. Gen. Stat. § 113A-11, the Department of Administration has adopted rules to implement the North Carolina Environmental Policy Act of 1971 (the "Act"). Pursuant to such rules, the Department of Administration assists state project agencies in ensuring compliance with the Act and, among other things, serves as a clearinghouse to receive and circulate environmental documents for review and comment.

¹ It has been determined that none of facts identified in 01 NCAC 1B.0603(c) are present. Notwithstanding, given the concerns of the Petitioner, this matter has been deemed appropriate for the issuance of this declaratory ruling.

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As an example, before the Department of Crime Control and Public Safety used public monies to construct a new office building, the Department of Administration would notify the public and certify and circulate the appropriate environmental documents among the appropriate Divisions of the Departments of Environment and Natural Resources and Cultural Resources. However, the Department of Administration is not an environmental agency, and these rules do not instill the Department of Administration with any authority to impinge on the statutory responsibilities that have been given to other cabinet agencies or boards and commissions within those agencies.

Here, Petitioners request that the Department of Administration find that the Department of Environment and Natural Resources (DENR) inappropriately determined that the particular construction project described below fell outside the scope of the Act and that, as a consequence, DENR should require that the appropriate environmental documents be drafted and circulated.

It is my understanding Carolina Cement Factory (Titan America) ("Carolina Cement") is in the process of applying or has already applied for the necessary environmental permits for the construction of a cement manufacturing facility on its property within New Hanover County. These environmental permits must be reviewed and issued by the appropriate environmental regulatory agency. It is my further understanding that Carolina Cement may receive certain economic incentives from New Hanover County pursuant to an Incentive Agreement between Carolina Cement and New Hanover County executed on or about May 27, 2008. This agreement required that no grant payment can be issued until Carolina Cement "secures a certificate of occupancy for the capital construction for [Carolina Cement] facilities, together with all prerequisite environmental, administrative and legal permits, approvals and authorization, and hires up to a minimum of 160 new employees." It is my further understanding that Carolina Cement may benefit from certain economic incentives offered pursuant to a One North Carolina Fund grant agreement between New Hanover County and the Department of Commerce which shall not be disbursed until Carolina Cement has "obtained all required environmental permits." Last, it my understanding that Carolina Cement has not met its performance benchmarks, and New Hanover County and the Department of Commerce have not provided it with any public monies.

01 NCAC 25.0108(a) provides that the Act covers those situations where there is:

- (1) an expenditure of public monies or use of public land²; and

² N.C. Gen. Stat. § 113A-4(2) describes the scope of the Act similarly: "Every State agency shall include in every recommendation or report on any action involving *expenditure of public moneys or use of public land for projects* and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official . . ." [Emphasts Added]

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- (2) an action by a state agency subject to this Chapter; and
- (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.

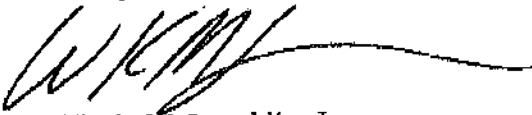
For a matter to fall within the scope of the Act, all three criteria must be present. For the purposes of responding to this Request, the Department of Administration finds that the required environmental permits to be issued by DENR will meet the requirement of "an action by a state agency" and that this construction project does have the required "potential environmental effect." Thus, the second and third criteria have been met.

The remaining question is whether this project meets the first criteria: an expenditure of public monies or the use of public land. As there is no evidence that this construction project uses public land, for the Department of Administration to grant Petitioners the relief they seek, it must find that the agreements between Carolina Cement, New Hanover County, and the Department of Commerce are "expenditures of public monies."

In 1983, the North Carolina Attorney General issued an opinion on this very issue. It is the same opinion relied upon by DENR and attached by Petitioners as Exhibit 10 to their Request. In the opinion, the Attorney General stated the following: "The use of the word 'expenditure' in G.S. 113A-4(2) connotes the actual distribution or outlay of moneys. See, *Boneno v. State*, 54 N.C. App. 690 (1981)." *Boneno*, the Court of Appeals decision cited by the Attorney General, is even more definitive and is controlling of the instant issue. Like the Petitioners, the plaintiffs in *Boneno* argued that the incurring of a contractual obligation constituted an expenditure. The Court disagreed and held "that an expenditure occurs only when funds are disbursed."

As 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. Thus, the first criteria required for this construction project to fall within the Act cannot be met, and therefore, the Department of Administration finds that DENR appropriately determined that the particular construction project addressed herein fell outside the scope of the Act.

Sincerely,



W. Kevin McLaughlin, Jr.
Chief Operating Officer and General Counsel