STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS ______

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES, PETITIONER, v. WAKE STONE CORPORATION, RESPONDENT.	**PETITION FOR JUDICIAL REVIEW** **N.C. Gen. Stat. § 150B-43**

NOW COMES Petitioner North Carolina Department of Environmental Quality ("Department"), Division of Energy, Mineral and Land Resources ("Division" or "DEMLR"), by and through counsel, pursuant to N.C. Gen. Stat. §§ 150B-43, -45, and -46, and files this petition for judicial review of the Final Decision issued by the Honorable Administrative Law Judge ("ALJ") Donald R. van der Vaart in the contested case Wake Stone Corp. v. North Carolina Dept. of Env. Quality, Div. of Energy, Mineral, and Land Resources, 22 EHR 0092 (N.C. Off. of Admin. Hr'gs, Aug. 11, 2023) (the "Final Decision"). A copy of the Final Decision is attached as Exhibit A.

NATURE OF THE CASE

1. This case involves a challenge by Wake Stone Corporation ("Wake Stone") to the denial by the Division of the mining permit modification application it submitted on April 8, 2020 to develop and expand its quarrying operations to the Odd Fellows tract (the "Site"). The Site is located on the west side of Crabtree Creek adjacent to Wake Stone's existing Triangle Quarry (operating pursuant to Mining Permit No. 92-10) off Harrison Avenue in Cary, Wake

County. The Site abuts both the William B. Umstead State Park ("the Park") and the East Coast Greenway in Wake County.

2. As set forth in the denial letter (the "Denial Letter") issued by the Division on February 17, 2022, the Division determined that Wake Stone's proposed operation "will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area[.]" N.C. Gen. Stat. § 74-51(d)(5). Specifically, the Division Director concluded that the proposed quarry expansion would have a significant adverse effect on the purposes of Umstead Park due to noise, visual, and traffic impacts. Pursuant to the Mining Act of 1971, this is one of seven findings on which an application can be denied.

3. Wake Stone filed a contested case petition at the Office of Administrative Hearings alleging that the Division, in denying the mining permit modification application, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23.

4. The ALJ presided over a seven-day trial, conducted February 14–16 and February 19–22, 2023, during which both parties put forward evidence and offered testimony of, *inter alia*, expert witnesses.

5. Almost a month after the trial on the merits concluded, the ALJ, *sua sponte*, ordered the Division to "file a valid delegation of authority for Brian Wrenn, the signatory on the February 17, 2022 Denial of Mining Permit Modification Application." Pursuant to the Mining Act, the Department of Environmental Quality exercises the authority to issue or deny a permit. N.C. Gen. Stat. § 74-51(d), -(e). The Department acts through the Secretary of Environmental Quality, but the Secretary may delegate the authority to deny a permit to an employee of the Department. Id. § 74-49(4).

6. Prior to the ALJ's order to file a "valid delegation" the petitioner had never questioned the propriety of the Director's action on the ground of the validity of the Secretary's delegation in any pleading, motion, brief, argument, or other manner. Nevertheless, the ALJ requested that both parties provide supplemental briefing on the matter and conducted a hearing on the issue on April 12, 2023, approximately two months after the hearing on the merits.

7. Proposed orders were submitted by the parties on May 25, 2023, and the Final Decision was issued by the ALJ on August 11, 2023.

8. In the Final Decision, the ALJ ruled against the Division, finding that:

a. The Division violated the terms of the Mining Act by failing to issue its decision within the 30-day period "mandated by the Mining Act." (Final Decision, p 50) The ALJ further concluded that the Division's failure to act within the specified time period "mandates the approval of the application by operation of the Mining Act." Id.

b. The Division Director, Brian Wrenn, was not delegated the authority or otherwise not authorized to act on the application and therefore the Division failed, again, to act within the 30-day timeline set forth by the Mining Act. (Final Decision, p 50)

c. The ALJ ruled that, even assuming that the Division had acted within the appropriate timeline, Wake Stone met its burden to show that the Division substantially violated Wake Stone's rights by acting erroneously, acting arbitrarily and capriciously, using improper procedure, and failing to act as required by law. (Final Decision, p 50)

d. The ALJ ultimately determined that "Director Wrenn misinterpreted the proposed operation's effects on the purposes of the Park. The small area of the Park

potentially affected by the proposed operation would not, due to the prohibition against visitors in the area, affect anything at all." (Final Decision, p 50)

9. As a result of the above findings and conclusions, the ALJ ordered the Division "to grant the modified Permit 92-10, within thirty days from the date of this decision, incorporating the proposed sound wall as mitigation and all other site and erosion control plans as last agreed to by [Wake Stone]." (Final Decision, p 50)

10. The ALJ, in finding that the Division acted arbitrarily and capriciously, awarded reasonable attorneys' fees to Wake Stone, and ordered that an affidavit with supporting documentation be filed within thirty days of issuance of the Final Decision.

11. The Division moved the ALJ to stay the Final Decision to preserve the status quo so that the Division would not have to issue the permit while this Petition for Judicial Review was pending and the propriety of the Division's actions remained under review. The ALJ took no action on this motion, instead notifying the parties that the motion must be filed with the Superior Court in the first instance.

PARTIES, JURISDICTION AND VENUE

1. Petitioner DEMLR is a division of the North Carolina Department of Environmental Quality, which is an Executive Branch agency of the State of North Carolina. The Department enforces the State's environmental laws, including the Mining Act of 1971, N.C. Gen. Stat. § 74-46 *et seq.*, and the rules promulgated thereunder and codified in subchapters 5B, 5C, and 5F of title 15A of the North Carolina Administrative Code ("the Rules") (collectively, "the Mining Act"). The Department, through the Division, administers the Mining Act.

2. Respondent Wake Stone is a North Carolina corporation with its principal place of business in Knightdale, North Carolina. Wake Stone was the petitioner in the proceedings before the ALJ.

3. As indicated below, the Division was a party to a contested case in which a final decision was issued; the Division has no other remedies available to it except for judicial review pursuant to the North Carolina Administrative Procedure Act ("APA"); and this petition was filed within thirty days of the Division receiving written notice of the Final Decision. Therefore, this Court has jurisdiction. N.C. Gen. Stat. §§ 150B-43, -45.

4. Venue is proper in this court pursuant to N.C. Gen. Stat. § 150B-45.

THE DIVISION'S EXCEPTIONS TO THE ALJ's FINAL DECISION

Pursuant to N.C. Gen. Stat. §§ 150B-43, -45, and -46, the Division identifies the following errors in the ALJ's Final Decision:

1. The ALJ erred when he concluded that the Mining Act of 1971 requires that a mining permit be issued if the Division fails to either issue or deny the permit by the statutory deadlines found in N.C Gen. Stat. § 74-51(b).

Under the Mining Act, "[t]he Department shall grant or deny" a permit application within the time periods set forth in the act. The Department may deny a permit upon making any one of seven statutory findings. "In the absence of" one of the seven "finding[s]" "a permit shall be granted." N.C. Gen. Stat. § 74-51(b)–(e). As to how that language is implemented, analogous statutes specify, for example, that the Department's "failure" to "act" on an application by a statutory deadline "shall automatically approve the application." N.C. Gen. Stat. § 113-229. But the Mining Act lacks a similar remedial directive.

The APA includes a default remedy for when an agency fails to act and the governing statute fails to specify a remedy. Under the APA, "[i]f an agency fails to take any required action within the time period specified by law" a party may "commence a contested case" under the APA. N.C. Gen. Stat. § 150B-23(a4). The only remedy in such a proceeding is "an order that the agency take the required action within a specified time period." Id. Therefore, the ALJ erred when he concluded that, upon failure of the Division to take regulatory action within the statutorily established time period, the mining permit application was by default "approved pursuant to governing law." (Final Decision, p 40, ¶ 19) The ALJ only had the authority to order the Division to act, but not to order what that action must be.

The Division challenges the following Conclusions of Law and other statements in the Final Decision:

a. Conclusion of Law 19 - The ALJ incorrectly interpreted the Mining Act when he stated that "[a]fter the actual February 4, 2022, deadline passed without any action taken on the Application, the Tribunal holds that the Application was approved pursuant to the governing law." (Final Decision, p 40, ¶ 19) As discussed above, under the Mining Act, the agency's failure to act by the applicable deadline allows the applicant to petition an ALJ for an order requiring the agency to act. It does not result in the automatic approval of the application.

   The ALJ erred further by stating that "[a]ny interpretation of the Mining Act that would require returning the application to Respondent for another review after its failure to act by the deadline (e.g., remand) contradicts the statutory scheme established by the General Assembly and would thus render the statutory timing mandate a nullity." (Final Decision, p 40, ¶19) If, as the ALJ concluded,

the agency never in fact acted, then the matter would not be returned for "another review" as the original review was never completed. The "timing mandate" is not a "nullity" because it permits the applicant to secure a remedy.

b. Conclusion of Law 28 – For the reasons discussed above, the ALJ's conclusion that "due to the failure of Respondent to act on the Application, the permit must be granted by operation of law" was erroneous. The agency's failure to act does automatically grant the mining permit.

c. "Decision" - For all of the reasoning set forth above, the ALJ erred by stating in the "Decision" section of the Final Decision when he wrote that "[t]he failure of Respondent to act within the statutory deadline mandates the approval of the application by operation of the Mining Act" and that the agency's alleged "failure [to act] mandates approval of the application by operation of the Mining Act." (Final Decision, p 50)

2. The ALJ erred when, as a remedy for the agency allegedly improperly denying the mining permit modification application, he ordered the agency to "grant the modified Permit 92-10, within thirty days from the date of this decision, incorporating the proposed sound wall as mitigation and all other site and erosion control plans as last agreed to by Petitioner." (Final Decision, p 50)

The ALJ lacks authority and jurisdiction to order the Division to issue a mining permit because the powers of the ALJ are set forth in statute and limited in nature. An ALJ is not an agency decision maker. Instead, an ALJ reviews decisions of the agencies to determine if the agency committed one of the five errors set forth in § 150B-23(a). Raleigh Radiology LLC v. N.C. HHS, Div. of Health Serv. Regulation, Health Planning & Certificate of Need, 266 N.C.

App. 504, 509, 833 S.E.2d 15, 20 (2019) ("[T]he ALJ on appeal of an Agency decision . . . does not engage in a de novo review of the Agency decision, but simply reviews for correctness of the Agency decision, pursuant to N.C. Gen. Stat. § 150B-23(a)."). If the ALJ concludes that an error was made, it is for the agency to determine the path forward in compliance with the law. Cf. Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20 (1952) ("[T]he guiding principle . . . is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). The agency remains in the best position to assess its options upon a ruling from the ALJ. As shown above, the limited equitable powers devolved to ALJs do not include the authority to order the agency as to what course of action it must take in response to an ALJ's decision. E.g., N.C. Gen. Stat. § 150B-33. The appropriate remedy should have been for the ALJ to have remanded the decision to the Division without ordering the Division to issue the permit or specifying, in part, the terms that the Division is to include in the permit.

3. The ALJ concluded that Director Wrenn was not properly delegated the Secretary's authority to deny the permit application. The ALJ erred when he raised this issue *sua sponte*, after the hearing on the merits, when neither party pled, argued, or briefed any of these claims at any point prior. The ALJ further erred by concluding that Director Wrenn was not properly delegated this authority.

In order to properly raise an issue for hearing a party must plead the issue with sufficient specificity to provide an adverse party with notice. N.C. R. Civ. P. 8(a); e.g., Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 286, 291, 517 S.E.2d 401, 404 (1999). Absent proper pleading, if an issue is tried with the consent of the parties it is treated as if it were properly pleaded. N.C. R. Civ. P. 15(a). Otherwise, the claim is "not before the trial court." Shell

Island, 134 N.C. App. at 291, 517 S.E.2d at 404, and no relief may be granted, e.g., N.C. Nat'l Bank v. Carter, 71 N.C. App. 118, 121, 322 S.E.2d 180, 183 (1984); R.R. Friction Prods. Corp. v. N.C. Dep't of Revenue, 2019 NCBC 12, 2019 NCBC LEXIS 13, *47 (affirming dismissal of claim in OAH due to failure to plead), aff'd, 374 N.C. 208, 839 S.E.2d 314 (2019) (per curiam). Moreover, Wake Stone litigated this entire case on the theory that the Director denied its application as a matter of fact and that this denial legally affected its rights. Accordingly, the issue was never properly raised and no relief was available on this claim.

The ALJ also erroneously concluded that Director Wrenn lacked authority to approve or deny the mining permit application under the Mining Act because the ALJ determined that a memorandum from the Secretary of NC DEQ recusing herself from the Wake Stone matter (and two other matters) was a delegation of permitting authority to Assistant Secretary Masemore. Instead, the memorandum recused the Secretary from these matters and assigned only the Secretary's "oversight" responsibilities to Ms. Masemore. Ms. Masemore testified—without contradiction—that the memorandum did not delegate to her any authority to decide Wake Stone's permit application and that permitting authority remained with the Division Director.

Furthermore, the ALJ may have concluded (although it is not clear that he did conclude) that a delegation of authority from a prior Secretary, Michael Regan, to the Director of DEMLR became ineffective when Secretary Regan left office. (See Final Decision, p 41, ¶¶ 25–28) This is legally incorrect. Any delegation made by Secretary Regan was made by the Secretary and not Mr. Regan personally. Because the Secretary of Environmental Quality persisted even after Mr. Regan left that post, so did the delegation. E.g., Morton Salt Co. v. United States, 382 U.S. 44, 15 L. Ed. 2d 36 (1965) (per curiam), aff'g, 216 F. Supp. 250, 2565 (D. Minn. 1962) (holding that if an official makes a valid delegation and "thereafter resigns, dies, or is otherwise separated

from his office, the authority to act under the authorization is not terminated"); United States v. Wyder, 674 F.2d 224, 227 (4th Cir. 1982) (holding that a delegation by the Attorney General remained in effect under a new Attorney General because "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked or altered by their successors in office").

Finally, the ALJ erred when, after determining that Director Wrenn lacked authority to take action under the Mining Act, "[imputed] Director Wrenn's actions to Respondent" (Final Decision, p 41 n.5) If, as the ALJ concluded, the Director's "denial of the Application . . . ha[d] no legal effect," then no decision was made on Wake Stone's application, and Wake Stone's application remains pending. The ALJ's follow-on conclusion that "the permit must be granted by operation of law" (Final Decision, p 41, ¶ 28) because the Division missed a deadline is erroneous for the reasons set forth above.

Accordingly, the Division challenges the following Findings of Fact, Conclusions of Law, statements, and other actions:

a. Findings of Fact 268 and 269 - The ALJ's factual determinations that "Secretary Biser delegated to Mr. Nicholson the responsibility for this matter" (¶ 268) and that Secretary Biser "assigned her authority to Assistant Secretary Masemore" (¶ 269) are incorrect and inconsistent with the record, as discussed above.
b. Finding of Fact 270 - The ALJ's statement that "Respondent failed to produce any evidence that Secretary Biser ever issued a proper delegation of authority to Director Wrenn or the Division Directly, as required by the Mining Act and the Executive Organization Act" is incorrect and predicated on the ALJ's incorrect interpretation of law. In fact, the ALJ ordered the Division to "file a valid

delegation of authority for Brian Wrenn" and the Division did file the delegation. There was no dispute that this delegation was valid when issued. The ALJ's findings and conclusions that this delegation later became invalid or was superseded are erroneous, as discussed above.

c. Conclusions of Law 24–25 - In these two Conclusions of Law, as discussed above, the ALJ erred when he concluded Secretary Biser, in her recusal memoranda, delegated or assigned the Secretary's authority to grant or deny the Wake Stone application to Mr. Nicholson or Ms. Masemore.

d. Conclusion of Law 26 - The ALJ incorrectly concludes that "Secretary Biser's February 14, 2022, delegation to Masemore for the Wake Stone permitting process was precisely the type of subsequent action referred to in *Wyder*, above, that extinguished previous delegations for this matter." The ALJ incorrectly made this conclusion on the erroneous factual determination that Secretary Biser's recusal memorandum delegated any permitting authority to Ms. Masemore.

e. Conclusions of Law 28–29 - Consistent with the reasoning set forth above, the ALJ incorrectly concluded that Director Wrenn lacked authority to take action pursuant to the Mining Act and, because of that, "the governing law resulted in a denial of the Application that has no legal effect" and therefore that, in conjunction with the arguments raised in Section 1 above, the "permit must be granted by operation of law." The purported facts on which this conclusion rests are incorrect and the legal conclusions upon which the ALJ's determination was made misinterpret the Mining Act, the APA, and the relevant case law.

f. Statement at Final Decision, p 41 n.5 - The ALJ stated that, notwithstanding the ALJ's conclusion that Director Wrenn lacked authority, Director Wrenn's actions are "imputed to Respondent." The ALJ cites to nothing to support this statement, which is in itself internally inconsistent within the Final Decision. Because the ALJ concluded that Director Wrenn lacked authority, then no decision on the mining permit modification application was made and the denial by Director Wrenn could therefore not have been arbitrary or capricious. By the ALJ's logic, the application is still pending before the Division and the remedy would be for Wake Stone to file a contested case consistent with N.C. Gen. Stat. § 150B-23(a4). The ALJ's imputation of Director Wrenn's allegedly non-authorized actions to the Division is illogical and wholly inconsistent with the rest of the Final Decision.

g. Conclusions of Law 34, 53, 72 - In these conclusions of law, the ALJ explicitly states that the decision made by Director Wrenn as to noise, visual, and traffic impacts to the Park, are arbitrary and capricious. Because the ALJ previously determined that Director Wrenn was not authorized to make a determination, it would be impossible for Director Wrenn to have made a decision that was arbitrary and capricious.

h. Conclusions of Law 50–51 - The ALJ's statements here regarding Director Wrenn's findings pertaining to noise impacts are nonsensical: he first states that "[t]his Tribunal acknowledges that, had Director Wrenn been properly delegated the authority to make the decision on the Application, he could have disagreed with his highly experienced staff." But then the ALJ states that "[h]owever, this

Tribunal's review must be based on the record developed during Respondent's entire evaluation of the Application." Taken together, the two sentences do not make sense, especially when read in conjunction with the ALJ's imputation of Director Wrenn's actions to the Respondent in Footnote 5. That Director Wrenn may or may not have disagreed with his staff is irrelevant when the ALJ has previously determined that Director Wrenn lacked authority under the Mining Act. The existence of the record, by that same logic, as showing arbitrary and capricious actions taken by the Division, is irrelevant. The conclusions which the ALJ purports to support his determination that the decision to deny the mining permit was arbitrary and capricious lack logical reasoning. For these reasons, the ALJ's conclusion in paragraph 51 that the decision, with respect to noise impacts, was arbitrary and capricious.

i. Conclusion of Law 62 - Consistent with the reasoning stated above, the ALJ's statement that Director Wrenn could have disagreed with his staff had he been properly authorized to take action pursuant to the Mining Act as it pertains to visual impacts, along with the ALJ's subsequent conclusion in the next sentence that Director Wrenn's presumably unauthorized determination was arbitrary and capricious and not supported by relevant or substantive evidence, is illogical. The ALJ's conclusion here is flawed and internally inconsistent.

j. Conclusion of Law 72 - As it pertains to impacts from traffic, the ALJ again is internally inconsistent when he determined that Director Wrenn's purportedly unauthorized decision "lacked fair and careful consideration, rending Respondent's reliance on traffic impacts as part of the denial of the Application

arbitrary and capricious under N.C.G.S. § 150B-23(a)(4).” The ALJ’s reasoning is illogical and constitutes error.

k. “Decision” - Consistent with the reasoning stated above, the ALJ’s determination that Director Wrenn was not authorized to act on the mining permit application and therefore that the permit application was approved by operation of law, is incorrect, unsupported by the relevant facts, and based upon misapplication and misstatements of the relevant law. The ALJ’s determination that Respondent acted arbitrarily and capriciously, despite the fact that the ALJ determined that Director Wrenn was not authorized to do so, is unsupportable as a matter of law.

l. Order for Delegation of Authority (Mar. 9, 2023) – By this order, as discussed above, the ALJ required the Division to “file a valid delegation of authority for Brian Wrenn.” The Division objected to the order. For the reasons set forth above regarding the Wake Stone’s failure to properly raise the issue of the validity of the delegation to Director Wrenn, the ALJ lacked authority to raise this issue *sua sponte*, order the Division to submit documents that were not offered into evidence during the hearing and not even requested in discovery, and decide the case on this issue.

4. Regarding whether the Division was arbitrary or capricious in its finding that the proposed quarry operation would significantly adversely affect the purposes of Umstead Park, the ALJ erred in finding facts that were unsupported by the evidence, failing to find relevant facts that were proven without contradiction, and making incorrect conclusions of law. Based on these errors, the ALJ’s conclusion that the Division acted arbitrarily or capriciously was erroneous.

a. Issues related to the use of the Park[1]

i. Finding of Fact 144 – The ALJ found that 60% of the Yellow Dot Trail is not on Park property and the use of that portion of the trail is trespassing. This finding is based on a survey that was improperly admitted into evidence because it: (1) is hearsay; (2) lacked proper foundation; (3) was not properly authenticated; and (4) was never produced in discovery. Regardless, the evidence showed, without contradiction, that if users were barred from wandering on to non-park property, they would re-establish the trail on park property in the same general area. (T4 pp 795–99)

ii. Finding of Fact 145 - The ALJ's statement that "[t]he Yellow Dot Trail is not mentioned in the agency record" and that "Respondent did not raise the existence of the Yellow Dot Trail until its summary judgment briefing in this contested case" is demonstrably false. (Final Decision, p 22, ¶ 145). The Director discussed the Yellow Dot Trail in his Denial Memorandum on February 17, 2022. He stated: "During a field visit to the area in question, DEMLR staff also observed worn recreational trails along the Park boundary." (Div. Ex. 19 at 5) Although he did not call the trail by its colloquial name, there is no question he was referring to the Yellow Dot Trail. (T6 pp 1316–17)

iii. Findings of Fact 146–148 - The ALJ's findings regarding the enforcement of certain rules at the Park were erroneous. The ALJ's findings imply that

[1] These headings are for organizational purposes only and are not intended to limit the scope of any assertion of error.

the Park users are not permitted to recreate in the area of the Park near the proposed quarry. The Park Superintendent testified that he is aware of the uses by the public in the area of the proposed quarry and those uses are allowed. (T4 pp 789–90) Indeed, those uses have been ongoing for such duration that the public has worn a path through the area and given it a common name—the Yellow Dot Trail. Id. The Park Superintendent testified, without contradiction, that "there's no enforceable rule that says you have to stay on trails." (T4 p 888) He also testified that the alleged rules on which the ALJ relied were only "a general safety statement." (T4 p 888) The ALJ's finding that "the veracity of Mr. Letchworth's testimony on this point . . . is undermined by photos of various signs from the Park asking visitors to stay on designated hiking trails" (Final Decision, p 23, ¶ 148) is unsupported by the evidence. The evidence showed that these signs were not in the location of the Yellow Dot Trail and that although the Park prohibits "social trails" in some areas, it does not do so in all areas. (T4 pp 830–31)

iv. Conclusions of Law 76–77 - In these two paragraphs, the ALJ concludes that potential impacts to the Park from noise and visual impacts are not possible simply because Park rules strictly prohibit visitors in the area of the Yellow Dot Trail. (Final Decision, p 49, ¶ 76) The ALJ further concludes that because visitors are not allowed in the area, they "cannot recreate." (Final Decision, p 49, ¶ 77) These erroneous conclusions are

predicated on incorrect Findings of Fact 146–48 and are therefore unsupported by the facts.

v. The ALJ's conclusion that the Division was arbitrary and capricious in denying the modified permit modification application is predicated on the ALJ's arbitrary and capricious determination of how the Park implements its own rules. The ALJ decision that "[t]he small area of the Park potentially affected by the proposed operation would not, *due to the prohibition against visitors in that area*, affect anything at all" (Final Decision, p 50 (emphasis added)) is manifestly incorrect. The evidence showed only that visitors are not prohibited in that area (as discussed above) and that "there's quite a few people that walk" in that area. (T4 p 832) The ALJ's finding and/or conclusion in the Decision section is erroneous.

b. Issues related to the noise study and mitigation

i. Finding of Fact 100 - The ALJ incorrectly found that the proposed sound wall would reduce sound levels in the Park. The ALJ found as a fact: "WSP revised its acoustical modeling to show the reduction in noise levels that would be achieved by the proposed sound wall." (Final Decision, p 19, ¶ 100) The evidence showed that the sound wall would reduce noise at a private, nearby residence that was irrelevant to the issues in the case by over 5 decibels. (Div. Ex. 7 at 4; T5 pp 1226–27) (See also, Final Decision, p 18, ¶ 98, ". . . and the Dunns' residence, which is not in the Park.") With regard to the relevant location—Umstead Park—the

evidence showed that the sound wall reduces noise at some locations in the Park by no more than 0.4 decibels but increases noise in the Park in at least one location by 0.7 decibels. The author of this report testified that he would normally report such values as zero because such changes are imperceptible, but that he reported these tenths of a decibel only because he had been asked to do so. (T3 pp 693–700) Thus, the overall effect on the Park—the area relevant to the agency action under review—was, according to the author of the report, zero.

ii. Findings of Fact 218, 220, and Conclusion of Law 46–49 - The ALJ concluded that the Director acted arbitrarily and capriciously by using a 55 dB standard. In the research that WSP provided to the Division specifically "[i]n order to determine the noise criteria applicable to parklands," of the eight absolute standards WSP listed, half of them used 55-decibels as the standard (or the maximum of a range). (Div. Ex. 6 at 8) One uses a lower value, and three use a higher value. (Id.) The Director's 55-decibel standard was the most common standard reported by WSP, and was neither the highest nor the lowest. (Id.) The ALJ failed to find this as a fact although the evidence was undisputed. The evidence showed that the Director's use of a 55 dB Leq standard was objectively reasonable.

iii. Findings of Fact 220–22- The ALJ concluded that the standard from the study on which the Director relied used a 55 dB Ldn standard but that the Director inappropriately compared modeled Leq levels to this Ldn standard. In fact, the Director did not use an Ldn standard. He testified that

he was aware of the difference between Ldn and Leq and used a 55 dB Leq standard and not an Ldn standard. (T6 pp 1361–62) Moreover, the evidence showed, without contradiction, that noise levels near the quarry already exceeded 55 db Ldn. (T3 pp 604–05; Div. Ex. 6 at 12–14) Therefore, it would have been impossible for Wake Stone to comply with the Ldn standard anyway.

iv. Findings of Fact 46, 214–15, 218 - The Director did not act arbitrarily or capriciously in using an absolute standard in addition to a relative standard. The research submitted by WSP for the Division to rely on showed that most of the applicable standards use an absolute standard exclusively or in addition to a relative standard. (Div. Ex. 6 at 8, Table 1) Moreover, the source from which WSP adapted is a proposed relative standard but also used an absolute standard, which both WSP and the ALJ arbitrarily ignored.

v. The evidence showed that WSP, in an effort to secure the business of Wake Stone, in August 2020 made a proposal to Wake Stone as to how it would evaluate Wake Stone's noise impacts on the park. (See T2 p 428) With regard to the criterion that WSP would use to evaluate Wake Stone's impact, WSP offered that its "proposed criteria [would] be selected to allow Wake Stone to continue operation without overbearing restrictions." (Div. Ex. 3 at WAKE_STONE-0004539) Wake Stone's expert testified that he wrote this language. (T2 pp 428–29) The evidence showed that WSP's intent was to develop a standard with which Wake Stone could

comply “without overbearing restrictions.” There was no evidence in contradiction. The ALJ erred by not finding this fact and failing to take this bias into account.

c. Issues related to the character and nature of the Park

   i. The ALJ failed to find, despite the undisputed evidence, that the area of the Park that would be affected by the proposed quarry is unique. The evidence also showed that the public values this unique area of the Park. As the Park Superintendent testified, and as the Park’s management document indicates, the Park’s purposes of recreation and conservation combine to preserve an area within a growing urban setting so that the urban population has the opportunity to experience that natural setting. (T4 p 781) The area is also readily accessible, ensuring that it provides the public the opportunity the General Assembly desired. (T4 pp 799–800) Indeed, the public has made this area its own by creating a rustic trail through it and coining a name for it. (T4 pp 789–90) The area also has no designated trails. (Id.) It retains the natural setting described in the park’s management documents. Both the Park Superintendent and the Director described the high quality of the area that is inherent to its natural setting. (T4 pp 790–93, 799–800; T6 pp 1318–20, 1327, 1344) The photographic and video evidence showed this as well. (Div. Ex. 109–12; WS Ex. 101–03) This area is “particularly scenic” and provides a ready sanctuary for city dwellers because of its “remote feeling” but easy access. (T4 p

800:13–19; Id. at 801:11–12 ("[I]t's like you're in a completely different place. . . .")

ii. The ALJ erred as a matter of law by concluding that the impact to the Park would not be significant by considering the size of the impacted area but not the special characteristics of the area. In Clark Stone Co. v. N.C. Dep't of Env't & Nat. Res., 164 N.C. App. 24, 27, 594 S.E.2d 832, 834 (2004), the impacted area was, relatively speaking, similarly small compared to the impacted area of Umstead Park. Yet, the Court of Appeals affirmed the Division's finding of significant impact due in part to the importance of the area to park users. The ALJ failed as a matter of law to take this into account.

iii. The ALJ erred as a matter of law by failing to find that the area of the Park adjacent to the proposed operation is a dedicated natural preserve under the Nature Preserves Act. (T4 p 788; Div. Ex. 108, at 5) The Park Superintendent testified that this designation "gives some additional protections to an area that's considered to be more sensitive, more in need of protection, has some type of natural importance." (Id.) The ALJ failed to find that the Nature Preserves Act requires heightened protection of designated areas, as it provides:

> The continued population growth and land development in North Carolina have made it necessary and desirable that areas of natural significance be identified and *preserved before they are destroyed*. * * * * It is important to the people of North Carolina that they retain the opportunity to maintain contact with these natural communities and environmental systems of the earth and to benefit from the scientific, aesthetic, cultural, and spiritual values they possess.

N.C. Gen. Stat. § 143B-135.252, (*emphasis added*).

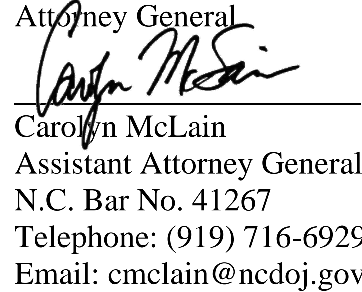
The ALJ erred as a matter of law by failing to take into account this critical and statute-driven information.

PRAYER FOR RELIEF

Therefore, the Division respectfully requests that this Court enter an order reversing the ALJ's Final Decision on the basis that the Final Decision is in excess of the statutory authority or jurisdiction of the ALJ, made upon unlawful procedure, unsupported by substantial evidence and arbitrary, capricious, or an abuse of discretion pursuant to N.C. Gen. Stat. § 150B-51.

Respectfully submitted,

JOSHUA H. STEIN
Attorney General

By: 
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September 6, 2023

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petition for Judicial Review has been served on all parties listed below by FedEx and/or certified mail as follows:

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Knightdale, NC 27545

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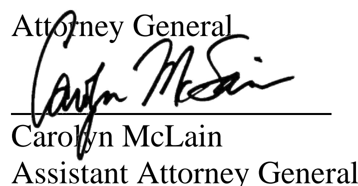
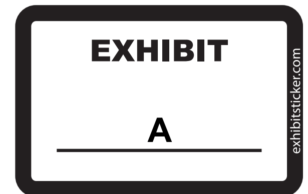
Attorney General

By: 
Carolyn McLain
Assistant Attorney General

September 6, 2023



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OFFICE OF ADMINISTRATIVE HEARINGS
08/11/2023 2:21 PM

STATE OF NORTH CAROLINA — IN THE OFFICE OF ADMINISTRATIVE HEARINGS

COUNTY OF WAKE — 22 EHR 00952

Wake Stone Corporation Petitioner, v. North Carolina Department of Environmental Quality, Division of Energy Mineral & Land Resources Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before the Undersigned, Donald van der Vaart, Chief Administrative Law Judge, on February 14-16 and February 19-22, 2023, at the Office of Administrative Hearings in Raleigh, North Carolina.

APPEARANCES

Petitioner: A. Charles Ellis, Esq.
Hayley R. Wells, Esq.
Ward and Smith, P.A.
Post Office Box 8088
Greenville, North Carolina 27835

Respondent: Marc Bernstein, Esq., Special Deputy Attorney General
Carolyn McLain, Esq., Assistant Attorney General
Kyle Peterson, Esq., Assistant Attorney General
North Carolina Department of Justice
9001 Mail Service Center
Raleigh, North Carolina 27699-9001

ISSUES

1. Whether Respondent substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule in denying Petitioner's application to modify Mining Permit 92-10.

2. Whether Respondent substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, and/or failed to act as required by law or rule in failing to appropriately delegate

the Secretary's authority under the Mining Act of 1971 to Brian Director Wrenn to grant or deny Petitioner's application to modify Mining Permit 92-10.

3. Whether Respondent substantially prejudiced Petitioner's rights and acted arbitrarily or capriciously, thus entitling Petitioner to an award of reasonable attorneys' fees under N.C. Gen. Stat. § 150B-33(b)(11).

APPLICABLE STATUTES AND CASES

N.C. Gen. Stat. § 150B-2 *et seq.*
N.C. Gen. Stat. § 74-46 *et seq*.
N.C. Gen. Stat. § 143B-10(a)
Stark v. N.C. Dept of Env't and Natural Res.
Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, Div. of Water Res.
Westmoreland v. High Point Healthcare, Inc.
Lewis v. N.C. Dep't of Human Res. Godfrey v. Zoning Bd. of Adjustment
Sanchez v. Town of Beaufort
State of N.C. v. Hudson
Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjustment Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.
Appalachian Voices v. U.S. Dep't of Interior Amanini v. N.C. Dep't of Human Res.
Yarborough v. Hughes Praxair, Inc. v. Airgas, Inc.
Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.
Sun Suites Holdings, LLC v. Bd. of Aldermen of Garner

EXHIBITS

Petitioner: The following exhibits were admitted by Petitioner into evidence at the hearing:

Pet. Ex. 1	Notice of Taking Deposition – David Miller
Pet. Ex. 2	NC Mining Act, N.C.G.S. §§ 74-46 *et seq.*
Pet. Ex. 3	NC Surface Mining Manual
Pet. Ex. 4	Mining Program Public Hearing Presentation
Pet. Ex. 5	Modification Application
Pet. Ex. 6	2020.04.23 Email thread re Wake Stone info request and D. Miller's response of no violations recorded
Pet. Ex. 7	2020.05.07 Email thread between D. Miller and Judy Wehner re: joining the interviews
Pet. Ex. 8	Email from Brian Director Wrenn to Sheila Holman re approximate timelines for 2 scenarios and Attachment to 2020.04.15 Email from Brian Director Wrenn re Time Frames for Review
Pet. Ex. 9	2020.07.23 Additional Information Request (ADI) Pet.
Pet. Ex. 10	Response to ADI Request letter dated 2020.07.23
Pet. Ex. 11	Response to Item #20 ADI Request letter dated 2020.07.23
Pet. Ex. 12	2020.09.22 Email from D. Miller re "Wake Stone noise study, my propose (sic) reply to the Park"

Pet. Ex. 13 2020.09.11 Email from Brian Strong to D. Miller re Noise Study for Wake Stone

Pet. Ex. 14 2020.12.02 Email from D. Miller re draft timeline for Wake Stone and Attachment Draft Timeline

Pet. Ex. 15 2020.11.04 DEMLR approval of Wake Stone noise study protocol with additional conditions and, Email from D. Miller to S. Bratton re transmittal of noise study letter

Pet. Ex. 16 2021.02.12 Email from D. Miller to T. Vinson re transmittal of final Wake Stone Quarry Expansion Acoustical Study (2-11-21) and Attachment (Final Report on Triangle Quarry expansion)

Pet. Ex. 17 2021.02.10 Additional Information Request (ADI)

Pet. Ex. 18 2021.02.25 Letter from D. Miller to S. Bratton re Triangle Quarry Draft Noise Study

Pet. Ex. 19 2021.02.25 Email from David Lee to D. Miller re Wake Stone Triangle Quarry Expansion Acoustical Study (2-11-21) (report illustrated as draft)

Pet. Ex. 20 2021.03.22 Letter to D. Miller from Wake Stone re supplemental information to pending Mining Permit Modification Application and attachment of Wake Stone Triangle Quarry Expansion Acoustical Study

Pet. Ex. 21 2021.05.13 Email from D. Miller to C. Atkins re noise study questions plus some other little things

Pet. Ex. 22 2021.03.26 Letter from Noral D. Stewart, Ph.D. on behalf of Umstead Coalition to B. Director Wrenn and David Miller re comments on noise of Wake Stone Quarry Expansion at Umstead Park – draft Wake Stone Triangle Quarry Expansion Acoustical Study

Pet. Ex. 23 2021.04.14 Additional Information Request (ADI)

Pet. Ex. 24 2021.04.30 Wake Stone response to ADI Request dated 2021.04.14

Pet. Ex. 25 2021.05.24 Additional Information Request (ADI) Pet.

Pet. Ex. 26 2021.05.25 Memorandum to B. Director Wrenn from E. Thalheimer (WSP) re Wake Stone Quarry Noise

Pet. Ex. 27 2021.07.06 Additional Information Request (ADI)

Pet. Ex. 28 2021.07.26 Additional Information Request (ADI)

Pet. Ex. 29 2021.08.12 Wake Stone Response to ADI Requests dated 2021.05.24; 2021.07.06; and 2021.07.26

Pet. Ex. 30 2021.09.09 Additional Information Request (ADI)

Pet. Ex. 31 2021.11.01 Wake Stone Response to ADI Request dated 09.09.2021

Pet. Ex. 32 2022.01.21 Letter to D. Miller from D. Lee enclosing 2 printed copies of Neuse River Waterdog Survey Report and attachment (Neuse River Waterdog Survey)

Pet. Ex. 33 2021.01.07 [sic] Letter to Brian Director Wrenn from Pete Benjamin (USFWS) re consultation complete on Neuse River Waterdog

Pet. Ex. 34 2022.01.11 Email thread between D. Miller and Josh Kastrinsky re comments to DEMLR re Neuse River Waterdog and proposed expansion

Pet. Ex. 35 DEMLR Weekly Update dated 01.05.2022

Pet. Ex. 36 2022.01.17 Email from D. Miller to D. Lee re RDU clock

Pet. Ex. 37 2022.01.18 Email from J. Ellis to D. Lee and D. Miller Fwd RDU clock

Pet. Ex. 38	2022.01.18 Email from A. Parr to D. Miller re 92-10 Triangle Quarry Mod – FWS Letter
Pet. Ex. 39	2022.01.20 Email from B. Director Wrenn to John Ellis re FWS comments to DEMLR re Neuse River Waterdog and proposed exp. of Triangle Quarry
Pet. Ex. 40	Draft permit dated April 2021; Parr listed as author
Pet. Ex. 41	2021.05.14 Email from D. Miller to B. Director Wrenn re Wake Stone draft permit is in the Mining doc. section of Teams, under 92-10
Pet. Ex. 42	2021.05.19 Email from D. Miller to D. Lee re does the South pit at Triangle / RDU have a name?
Pet. Ex. 43	2021.08.25 Email from D. Miller to T. Vinson re permit review
Pet. Ex. 44	Analysis re application of a safety factor
Pet. Ex. 45	2021.09.08 Draft permit
Pet. Ex. 46	2021.09.07 Email from D. Miller to J. Kastrinsky re For Review: Wake Stone decision release
Pet. Ex. 47	2021.09.07 Email from J. Kastrinsky to D. Miller re Review of Wake Stone decision release and Attachment: Draft press release – 2021.09.10 DEMLR issues modification for Wake Stone Quarry permit
Pet. Ex. 48	2022.01.18 Chat between D. Miller and B. re draft permit conditions
Pet. Ex. 49	2020.05.08 Letter from Dwayne Patterson of Div. of Parks and Rec. to B. Director Wrenn re Wake Stone expansion
Pet. Ex. 50	2022.02.17 Denial Letter
Pet. Ex. 51	2022.02.17 Attachment to Denial Letter – Memo from Brian Director Wrenn re Modification Application Denial
Pet. Ex. 52	2020.06.23 D. Miller draft letter re Mining Act jurisdiction
Pet. Ex. 53	Umstead State Park Map
Pet. Ex. 54	Umstead State Park Map with notation by D. Miller
Pet. Ex. 55	Printout from North Carolina State Parks' website regarding Park Rules
Pet. Ex. 56	D. Miller visibility "study" on Wake Stone's proposed "North pit at RDU" conducted 2022.01.04
Pet. Ex. 57	2022.01.05 Email from D. Lee to D. Miller re Umstead Coalition "rendering"
Pet. Ex. 58	2022.01.20 DEMLR PPT Report – Wake Stone Triangle Quarry
Pet. Ex. 59	2020.04.23 Email from J. Wehner to D. Miller re DOT contact
Pet. Ex. 60	2020.04.23 Email from J. Wehner to B. Director Wrenn re DOT contact
Pet. Ex. 61	Mining Review from June 2021; 2021.08.25 cover email from D. Miller to T. Vinson re Permit Review
Pet. Ex. 62	2022.02.25 Mining Review
Pet. Ex. 63	2021.08.20 Email from B. Director Wrenn to D. Miller re request DEQ action on unanswered ADI comments from Wake Stone and request to add these comments to the public record
Pet. Ex. 64	2022.01.28 Email from D. Miller to B. Director Wrenn re Mining Permit Application 92-10: formal complaint
Pet. Ex. 65	2022.02.10 Email from K. Summers to D. Miller re Wake Stone inspection report 02.02.2022 and Attachment: Mine Inspection Report
Pet. Ex. 66	2020.05 Draft letter from J. Wehner re Mining Act jurisdiction

Pet. Ex. 67	2020.10.13 Email from B. Director Wrenn to Chris Rivenbark re noise study expert
Pet. Ex. 68	2020.10.13 Email from C. Rivenbark to B. Director Wrenn re noise study expert
Pet. Ex. 69	2020.10.13 Email from B. Director Wrenn to Missy Pair re noise study review
Pet. Ex. 70	2020.10.15 Email from M. Pair to B. Director Wrenn re noise study review
Pet. Ex. 71	2021.09.01 DEMLR leadership meeting notes
Pet. Ex. 72	2021.09.02 Public Affairs meeting notes
Pet. Ex. 73	2021.09.07 Email from J. Kastrinsky to B. Director Wrenn re For Review: Wake Stone decision release
Pet. Ex. 74	2021.09.27 Email from D. Miller to Bill Denton re Wake Stone Permit concerns
Pet. Ex. 75	2022.01.20 Email from B. Director Wrenn to T. Vinson re Mining Permit Application 92-10, Formal Complaint
Pet. Ex.75A	Respondent's Supplemental Response to Petitioner's First Set of Discovery Requests to Respondent
Pet. Ex. 76	2022.01.18 Email from A. Parr to D. Miller re 92-10 Triangle Quarry Mod – FWS Letter
Pet. Ex. 77	2021.07.01 Email from A. Parr to D. Miller re Wake Stone ADI Items
Pet. Ex. 78	2022.01.06 Email from G. Johnson to B. Director Wrenn re Permit Modification 92-10 Wake Stone
Pet. Ex. 79	Noral D. Stewart CV, Page 1
Pet. Ex. 80	Noral D. Stewart – Trial and Deposition Testimony Experience
Pet. Ex. 81	NC DOJ Expert Services Agreement
Pet. Ex. 82	2020.07.13 Letter from N. Stewart Acoustical Consultants to Brian Director Wrenn and Daniel Sams re comments on noise of Wake Stone Quarry Expansion at Umstead Park
Pet. Ex. 88	2020.07.02 Applicant Statement from Wake Stone including 1999.08.06 Letter from the Umstead Coalition re Wake Stone
Pet. Ex. 89	2021.03.12 Wake Stone Acoustical Study
Pet. Ex. 90	Erich Thalheimer CV
Pet. Ex. 91	William B. Umstead State Park General Management Plan
Pet. Ex. 92	Conceptual Bird's Eye Perspective Maps (Zac Pierce Dep Ex. 29)
Pet. Ex. 93	Survey – Yellow Dot Path Pet. Pet. Ex. 96 Map of General Area
Pet. Ex. 97	2020.09.02 Email re Noise Study Protocol with attachment Memorandum
Pet. Ex. 98	Triangle Quarry Mining Permit No. 92-10 Modification Application Site Plans and E&SC Plan
Pet. Ex.100	Samuel Telfair Bratton CV Pet. Pet. Ex.101 Video 1 – IMG_5675.MOV Pet. Pet. Ex.102 Video 2 – IMG_5676.MOV Pet. Pet. Ex.103 Video 3 – IMG_5677.MOV
Pet. Ex.111	Wake Stone Corporation Awards and Honors
Pet. Ex.112	2022.02.15 Letter from S. Bratton to B. Director Wrenn re Mining Permit Modification Application
Pet. Ex.113	Photo – Restricted Area Sign

Pet. Ex.117	Photo – What Would a Million Trails Through the Park Look Like
Pet. Ex.118	Map of William B. Umstead Park and informational text
Pet. Ex.120	Map of North Carolina Mining Permits
Pet. Ex.121	2022.01.03 Email from D. Lee to S. Bratton re Triangle Quarry Crabtree Creek Bridge Buffer Authorization

Respondent: The following exhibits were admitted by Respondent into evidence at the hearing:

Resp. Ex. 3	Email from Will Letchworth, WSP USA, Inc. to Sam Bratton, Wake Stone, et al (Aug. 19, 2020)
Resp. Ex. 6	WSP USA, Inc., Wake Stone Triangle Quarry Expansion Acoustical Study (Mar. 12, 2021) (color version)
Resp. Ex. 7	Memo from Erich Thalheimer, WSP USA, Inc. to Sam Bratton, Wake Stone (Aug. 9, 201) (color version)
Resp. Ex. 8	WSP USA, Inc., Wake Stone Triangle Quarry Expansion Acoustical Study (Feb. 11, 2021)
Resp. Ex. 9	USDOT FHA, Highway Traffic Noise: Analysis and Abatement Guidance (Dec. 2010)
Resp. Ex. 10	US EPA, Office of Noise Abatement and Control, Information on Levels of Environmental Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety (Mar. 1974)
Resp. Ex. 11	FERC Guidance Manual for Environmental Report Preparation (Feb. 2017) (Excerpt)
Resp. Ex. 13	NC DOT Traffic Noise Manual (Oct. 6, 2016)
Resp. Ex. 14	Mass DEP Code of Massachusetts Regulations, 310 C.M.R.7.00, 7.09 (excerpted)
Resp. Ex. 15	Commonwealth of Massachusetts, Department of Environmental Quality Engineering, Division of Air Quality Control Policy (No. 90-001) on noise regulations, (Feb. 1, 1990)
Resp. Ex. 17	Email from Jacob Poling, WSP, to Erich Thalheimer, WSP (Mar. 1, 2021)
Resp. Ex. 18	Quarry Site Isopleth Sound Difference Contours (color version)
Resp. Ex. 19	Memo from Brian Director Wrenn, NC Div. of Energy, Mineral & Land Resources, to Wake 92-10 Triangle Quarry Permit File (Feb. 17, 2022)
Resp. Ex. 33	Wake Stone Corp. Triangle Quarry – RDU Tract Expansion, Required Operating Permits And Environmental Approvals
Resp. Ex. 34	Email from David Lee, Wake Stone, to Cole Atkins, Wake Stone (Jan. 5, 2020), with attachment
Resp. Ex. 41	WSP USA, Inc., Wake Stone Triangle Quarry Expansion Acoustical Study (Mar. 12, 2021)
Resp. Ex. 43	Email from Cole Atkins, Wake Stone, to Erich Thalheimer, WSP, et al. (Feb. 8, 2021,1:33:29PM)
Resp. Ex. 46	Email from Cole Atkins, Wake Stone, to Erich Thalheimer, WSP, et al., (Mar. 11, 2021)
Resp. Ex. 50	Email from Cole Atkins, Wake Stone to Erich Thalheimer, WSP, et al. (Jul. 9, 2021)

Resp. Ex. 55 Raleigh-Durham Airport Authority & Wake Stone, Option and Lease Agreement (Mar. 1, 2019)
Resp. Ex. 56 Email from David Lee, Wake Stone, to Sam Bratton, Wake Stone (Feb. 19, 2019)
Resp. Ex. 58 Sound Meter Readings of Triangle Quarry Perimeter Resp. Ex. 60 Email from David Lee, Wake Stone, to Sam Bratton Wake Stone (Jan. 5, 2020)
Resp. Ex. 61 Email from Sam Bratton, Wake Stone to Al Parker, Wake Stone, et al. (Apr. 7, 2020)
Resp. Ex. 62 Email from Sam Bratton, Wake Stone, to Ted Bratton, Wake Stone, et al. (Jul. 23, 2020)
Resp. Ex. 63 Email from Tracy E. Davis, ATS Env. Solutions, to Sam Bratton, Wake Stone, et al. (Jul. 9, 2020)
Resp. Ex. 75 Letter from David Miller, DEMLR, to Sam Bratton, Wake Stone (Feb. 25, 2021)
Resp. Ex. 79 Email from Tracy Davis, ATS Envtl. Solutions, PLLC to Sam Bratton, Wake Stone (Jan. 19, 2022)
Resp. Ex. 86 Curriculum Vitae, Erich Thalheimer, WSP
Resp. Ex. 91 Email from Erich Thalheimer, WSP to Cole Atkins, Wake Stone, et al. (Jan. 14, 2021)
Resp. Ex. 92 Email from Erich Thalheimer, WSP to Cole Atkins, Wake Stone, et al. (Mar. 11, 2021)
Resp. Ex. 93 Wake Stone Triangle Quarry Expansion Acoustical Study with Track Changes
Resp. Ex. 94 Email from Erich Thalheimer, WSP to Sam Bratton, Wake Stone, et al. (Feb. 7, 2021)
Resp. Ex. 108 William B. Umstead State Park General Management Plan (Nov. 2017) (color)
Resp. Ex. 115 Stewart Dep. Ex. 4: Letter from Noral D. Stewart, Stewart Acoustical Consultants, to Brian Director Wrenn, DEMLR (Jul. 13, 2020)
Resp. Ex. 116 Stewart Dep. Ex. 6: Letter from Noral D. Stewart, Stewart Acoustical Consultants to Brian Director Wrenn, DEMLR (Mar. 26, 2021)
Resp. Ex. 117 Publications and Presentations by Noral D. Stewart (May 2022)
Resp. Ex. 118 Quarry Site Isopleth Sound Difference Contours (color version) (with additional detail)
Resp. Ex. 119 Wake Stone Permit Modification Application (Apr. 8, 2020)
Resp. Ex. 120 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (July 23, 2020)
Resp. Ex. 121 Memo from Erich Thalheimer, WSP to Samuel Bratton, Wake Stone, re Wake Stone Quarry Noise Study Protocol (Sep. 2, 2020)
Resp. Ex. 122 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Noise Study Protocol (Nov. 4, 2020)
Resp. Ex. 123 Wake Stone Response to July 23, 2020 ADI (Nov. 12, 2021)
Resp. Ex. 124 Email from David Miller, DEMLR to Douglas Ansel, OGC re COA ruling (Dec. 15, 2020)
Resp. Ex. 125 Cover Letter from Wake Stone to David Miller, DEMLR re Supplemental Information (Jan. 11, 2021) (excerpt)

Resp. Ex. 126 Letter from David Miller, DEMLR to David Lee, Wake Stone re extension granted (Jan. 12, 2021)
Resp. Ex. 128 Wake Stone Triangle Quarry Acoustical Study (Feb. 11, 2021)
Resp. Ex. 129 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (Feb. 25, 2021)
Resp. Ex. 130 Letter from Wake Stone to David Miller, DEMLR re Supplemental Information (Mar. 22,2021) and Final Wake Stone Triangle Quarry Acoustical Study (Mar. 12, 2021) (excerpt)
Resp. Ex. 131 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (Apr. 14, 2021)
Resp. Ex. 132 Letter from Wake Stone to David Miller, DEMLR containing combined response to ADI 3 (Apr. 30, 2021) including Mar. 12, 2021, Acoustical Study with highlighted changes and comments (excerpt)
Resp. Ex. 133 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (May 24, 2021)
Resp. Ex. 134 Memo from Erich Thalheimer, WSP to Brian Director Wrenn, DEMLR (May 25, 2021)
Resp. Ex. 135 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (July 6, 2021)
Resp. Ex. 136 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone re Additional Information (July 26, 2021)
Resp. Ex. 137 Letter and Combined Responses from Wake Stone to DEMLR (Aug. 12, 2021) (excerpt)
Resp. Ex. 138 Letter from David Miller, DEMLR to Samuel T. Bratton, Wake Stone, re Additional Information (Sep. 9, 2021)
Resp. Ex. 139 Letter and Combined Responses from Wake Stone to DEMLR (Nov. 1, 2021) (excerpt)
Resp. Ex. 142 Director Wrenn Aff. Ex. 6: Visibility Study conducted by David Miller (c. Jan. 4, 2022) (color version)
Resp. Ex. 143 Director Wrenn Aff. Ex. 8: Letter from Dwayne Patterson, N.D. Div. of Parks & Recreation, to Brian Director Wrenn, DEMLR (Feb. 10, 2022)
Resp. Ex. 144 Deposition Transcript of Sam Bratton (condensed) with signed errata sheet
Resp. Ex. 145 Deposition Transcript of Cole Atkins (condensed) with signed errata sheet
Resp. Ex. 146 Deposition Transcript of David Lee (condensed) with signed errata sheet
Resp. Ex. 147 Deposition Transcript of Erich Thalheimer (condensed)
Resp. Ex. 148 Deposition Transcript of Brian Director Wrenn (condensed) with signed errata sheet
Resp. Ex. 149 Deposition Transcript of David Miller (condensed) with signed errata sheet
Resp. Ex. 150 Deposition Transcript of Noral Stewart (condensed) with signed errata sheet
Resp. Ex.152 Email from David Miller to David Lee, et al re has Wake Stone met all outstanding elements concerning ADIs (Nov. 30, 2021)

WITNESSES

For Petitioner:	Sam Bratton, Wake Stone Corporation Cole Atkins, Wake Stone Corporation Erich Thalheimer, WSP USA, Inc. David Lee, Wake Stone Corporation
For Respondent:	Dr. Noral Stewart, Stewart Acoustical Consultants Scott Letchworth, North Carolina Division of Parks and Recreation Brian Wrenn, formerly of Division of Environmental Quality, Division of Energy Mineral and Land Resources

INTRODUCTION

The Mining Act of 1971 (the "Mining Act") sets forth the legislature's desire to provide for the economic benefits of the mining industry while protecting the environment during the mining process and ensuring the restoration of the environment after mining has ceased.

As many environmental statutes do, the Act utilizes a permitting system implemented by the Department of Environmental Quality ("Respondent" or "DEQ") to meet these goals. The application process in the Mining Act describes criteria DEQ must consider when evaluating an application for a mining permit. It lists specific findings that must be made before DEQ may deny an application. The Mining Act is a somewhat unusual environmental law in that it mandates the granting of the permit if the specified findings are not made.

The Mining Act also includes compliance mandate DEQ must implement subsequent to permit approval. The enforcement of the permit even includes a process whereby the permit may be revoked by DEQ. The use of this process was clarified in *Clark Stone Mining Co. v. N.C. Department of Environment and Natural Resources*, 359 N.C. 322, 603 S.E.2d 878 (2004). That case made clear that, *inter alia*, the very same criteria DEQ must consider if a permit is to be denied can also be the basis of a subsequent revocation.

The Mining Act approach to permit approval is well designed. The processing of an application is necessarily a prospective analysis. In this contested case, for example, DEQ considered one of the statutory criterion for possible denial of an application by Wake Stone, Inc., *.i.e.*, whether the mining operation would, if approved, "have a significantly adverse effect on the purposes of" nearby William B. Umstead Park State Park. Such an analysis involves trying to predict the possible adverse effects on the Park *a priori*. The hearing revealed, for example, that sophisticated noise modeling techniques were used in an attempt to help predict the noise effect of the mining operation on the Park.

Clark Stone Mining showed that even after the granting of a permit, the Act provides for a retrospective inquiry of the same criterion made after the initiation of construction and operation that can be the basis of revocation of the permit. Obviously, retrospective inquiry benefits from hindsight.

THE FOLLOWING Findings of Fact are made after careful consideration of the sworn testimony, the Joint Stipulation of Facts, the exhibits, and the entire record in this proceeding. In making these Findings of Fact, the Undersigned has weighed all of the evidence, or the lack thereof, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility including, but not limited to, the demeanor of the witness; any interest, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. This matter came to be heard pursuant to Petitioner's Petition for a Contested Case Hearing filed in the Office of Administrative Hearings on March 15, 2022.

2. Petitioner Wake Stone Corporation is a North Carolina corporation with a principal place of business in Knightdale, North Carolina. (Joint Stip., ¶ 1)

3. Petitioner operates five quarries, four in North Carolina and one in South Carolina. It produces aggregate to use, among other things, in constructing roadways and producing asphalt and concrete. (T. pp. 1.41–42; Joint Stip., ¶ 8)

4. Respondent North Carolina Department of Environmental Quality is the state agency tasked with administering the Mining Act. (T. p. 6.1377; Joint Stip., ¶ 3)

5. Brian Wrenn is the former[1] Director of the Division of Energy Mineral & Land Resources ("Division") within DEQ. (T. p. 5.1137)

6. David Miller, PE is the Division's State Mining Engineer. (Joint Stip., ¶ 5)

7. Petitioner operates the Triangle Quarry in Cary pursuant to Mining Permit 92–10, issued by Respondent in 1981 and renewed three times without issue. (T. pp. 1.47, 1.63; Joint Stip., ¶ 12)

8. For each renewal, Respondent investigated Petitioner's mining operations and found them satisfactory. (T. p. 1.63; Joint Stip., ¶ 14)

9. Beginning in 2017, Petitioner was no longer required to obtain renewal of the Triangle Quarry mining permit because mining permits were converted to "life of mine" permits. (Joint Stip., ¶ 13)

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[1] Director Wrenn's employment with Respondent terminated in 2022, and he is now employed in the private sector. (T. p. 6.1347).

10. Respondent initially denied Petitioner's mining permit application in 1981. Following Respondent's denial of that application, Petitioner appealed to the Mining Commission, which reversed the denial and Permit 92–10 was issued to Petitioner. (Joint Stip., ¶ 10)

11. Triangle Quarry is located on North Harrison Avenue in Cary between Raleigh-Durham International Airport ("RDU Airport"), William B. Umstead State Park (the "Park"), and Interstate 40. (T. p. 1.48)

12. The current Triangle Quarry property comprises approximately 223 +/- acres, with a quarry pit located on the property. The current pit comprises 90.25 +/- acres. (Joint Stip., ¶ 15)

13. Petitioner's standard hours of operation are 7:00 a.m. to 5:00 p.m., Monday through Friday, excluding holidays. (T. p. 1.61; Joint Stip., ¶ 25)

14. The reserves at Triangle Quarry are "winding down." (T. p. 1.60). Petitioner plans to close the Triangle Quarry pit in the near future and, if a revise permit is granted, transition to mining only the Odd Fellows pit. (*Id.*)

15. The Park is a North Carolina state park located in Wake County. It is bordered to the west by Triangle Quarry, a parcel of land known as the Odd Fellows tract, and RDU Airport. (Pet. Ex. 96; T. pp. 1.50–53). It is bordered to the south by Interstate 40 (an eight– lane interstate highway) and to the north by Highway 70 (a four–lane highway). (*Id.*). Commercial and residential development surrounds the Park. (Pet. Ex. 96; T. p. 1.55)

16. The Park comprises approximately 5,600 acres. (Joint Stip., ¶ 23; T. p. 4.866)

17. The number of visitors to the Park has increased by 300% during the 40+ years that Triangle Quarry has operated adjacent to the Park. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 412:12–15)

18. The busiest times at the Park are on weekends, after work hours on weekdays, and holidays. (T. p 4.902; www//ncparks.gov/william-b-umstead-park)

19. The purposes of the Park are conservation, recreation, and education. (T. p. 4.781)

20. The Umstead Coalition is a nonprofit organization with a stated mission of protecting the Park, including from external sources of degradation caused by traffic, noise, and water pollution. (Pet. Ex. 88)

21. In August 1999, the Umstead Coalition chair, Jean Spooner, issued a statement that the Umstead Coalition's experience with Petitioner had been positive, that she had "never heard a complaint about Wake Stone's operation next to Umstead" in the ten years she had been a Coalition member, and that Petitioner was "willing to participate in activities to protect Umstead State Park." (Pet. Ex. 88)

22. In 2016, Raleigh Durham International Airport Authority ("RDUAA") published its Vision 2040 plan, which is the airport's long-range plan. (T. p. 1.64)

23. As part of the Vision 2040 plan, the Odd Fellows tract, adjacent to the existing Triangle Quarry, was designated by RDUAA as an industrial or mining use property. (T. p. 1.65)

24. From 1985 through 2016 (when RDUAA published its Vision 2040 Plan), Petitioner received no complaints about the noise, visual, or traffic impacts of its operations at Triangle Quarry from the Park, the Umstead Coalition, the North Carolina Division of Parks and Recreation ("DPR"), the Umstead Park Advisory Committee, Wake County, the Town of Cary, the City of Raleigh, any businesses in the area, or Respondent. (T. pp. 1.65–68, 1.73, 1.81–82)

25. Following the publication of the Vision 2040 plan, various complaints were made about the Triangle Quarry, none of which were validated or resulted in the issuance of a Notice of Violation. (T. p. 1.73)

26. In the 40-plus years of the Triangle Quarry's operation under Mining Permit 92- 10, there has never been a Notice of Violation issued related to the Permit. (T. p. 1.73)

27. A mining operator's track record and previous history should be considered when reviewing a permit modification application. (Joint Stip., ¶ 17)

28. In recent months, RDUAA announced plans to expand its park and ride facilities adjacent to the Park and to expand a runway to allow larger cargo jets to utilize the airport. (T. pp. 1.52–53)

29. Aside from Triangle Quarry, there are a number of other rock quarries in close proximity to the Park. (T. pp. 1.53–55; Pet. Ex. 96)

30. The Embassy Suites Hotel off Harrison Avenue is the closest occupied structure to the Triangle Quarry, located at a distance of approximately 1,100 feet from the current pit. (T. pp. 1.55–56) The Umstead Hotel is located approximately 1,300 feet from Triangle Quarry. (T. p. 1.56) Neither hotel has ever complained about Petitioner's operations. (T. pp. 1.66-67, 1.81–82)

31. In 2019, Petitioner entered into a written Option and Lease Agreement (the "Agreement") to lease the Odd Fellows tract from RDUAA. (Resp. Ex. 55, Joint Stip., ¶ 18)

32. The Odd Fellows tract is immediately adjacent to Triangle Quarry and the Park. (Joint Stip., ¶ 18)

33. The sole purpose of the Agreement is to allow Petitioner to conduct mining operations within the Odd Fellows tract. (Resp. Ex. 55)

34. The Odd Fellows tract is 106 +/- acres, with a proposed pit of approximately 55 acres. (T. pp. 1.56–57)

45. At the time the Application was submitted, Director Wrenn had occupied the position of Division Director for approximately 2 months. (T. p. 6.1374) Prior to assuming the position, Director Wrenn had no relevant mining industry experience. (*Id.*)

46. Although State Mining Engineer Miller is still employed by Respondent, Respondent did not call him as a witness at the contested case hearing. However, Petitioner introduced Miller's complete deposition transcript. (Resp. Ex. 149)

47. State Mining Engineer Miller confirmed that he had never reviewed a more thorough and detailed modification application than the Application. (Resp. Ex. 149, Miller Dep. Vol. I, 89:25–90:7)

48. State Mining Engineer Miller created an internal mining permit review document (the "Mining Review"), which he and other Respondent staff updated as the review of the Application progressed. (T. pp. 6.1425–1426; Resp. Ex. 149, Miller Dep. Vol. I, 129:23-130:6–21). The purpose of a mining review document is to show how the reviewer of the mining application "got from point A to point B," so that Respondent's analysis and actions are clear. (T. pp. 6.1425–1426; Joint Stip., ¶ 32)

49. DEQ leadership, including Director Wrenn and legal counsel, had access to the Mining Review through SharePoint. (T. p. 7.1539. This access allowed them to add comments to and edit the Mining Review throughout the evaluation process, which they did. (T. p. 6.1426; Pet. Ex. 62 at 6-20)

50. The Mining Review described the Application as "a very good and complete application." (T. p. 6.1299; Pet. Ex. 61)

51. Respondent conducted two public hearings on the Application because of the high volume of public comments received. (Joint Stip., ¶¶ 27–28)

52. Respondent issued seven formal requests for additional information ("ADIs") to Petitioner, to which Petitioner responded fully. (T. p. 1.106)

53. Petitioner and Respondent engaged in extensive communications throughout the pendency of the Application, including a series of requests from Respondent and proposals by Petitioner regarding potential strategies for noise and visual mitigation. (Joint Stip., ¶ 30; Pet. Ex. 9, 29)

54. Respondent continued to receive and accept public comments and comments from various state agencies for the entire 681-day period during which the Application was under review. Specifically, DPR and the Department of Natural and Cultural Resources ("DNCR") provided five letters opposing the Application; the most recent letter was dated February 10, 2022. (T. p. 6.1393; Resp. Ex. 143)

55. State Mining Engineer Miller testified at a deposition that the letters from DPR were not worth the paper they were written on. (Resp. Ex. 149, Miller Dep. Vol. III, 569:14–18)

56. In the first ADI, issued following the two public hearings, Respondent required Petitioner to perform a noise study (the first in the mining program's 52-year history) using a protocol approved by Respondent to analyze the potential noise effects of the proposed mining expansion on the Park. (T. pp. 1.106–108, 1.227–228; Pet. Ex. 9)

57. Petitioner engaged WSP USA, Inc. ("WSP") to develop a protocol for and ultimately conduct this acoustical study (the "Acoustical Study"). (T. pp. 1.108, 1.228)

58. Petitioner spent in excess of $130,000 on the Acoustical Study and follow-up reports. (T. p. 1.108)

59. Prior to Petitioner performing the Acoustical Study, Respondent approved the protocol proposed by WSP. (T. pp. 1.108, 2.438; Pet. Ex. 15)

60. Respondent also conferred with DPR on the Acoustical Study protocol, which that agency approved. (T. pp. 1.108, 5.1186)

61. Prior to WSP performing the Acoustical Study, Respondent also investigated and approved WSP. (T. pp. 1.108, 5.1186; Resp. Ex. 149, Miller Dep. Vol. I, 126:21–127:7; 138:15– 139:3; 142:22–24)

62. WSP's Erich Thalheimer, a board-certified acoustical engineer for over 20 years, was the lead engineer on the Acoustical Study. (T. p. 2.409-411; Pet. Ex. 90)

63. Mr. Thalheimer serves as the National Technical Specialist for Acoustics and Vibration at WSP. (T. p. 2.405-408). He worked as an acoustical engineer on approximately 300–400 projects, including the Big Dig in Boston. (T. pp. 2.409, 2.416–417)

64. This Tribunal accepted Mr. Thalheimer as an expert witness in acoustical engineering, noise control, and noise modeling. (T. p. 2.424)

65. This Tribunal finds Mr. Thalheimer to be credible and extremely experienced in the field of acoustics.

66. The protocol provided that WSP would submit a draft of the acoustical study to Respondent for its comment before the study was finalized. (Pet. Ex. 15, 97)

67. The Acoustical Study protocol, approved by Respondent, provided that WSP would conduct a literature search for purposes of defining and quantifying the criteria of "significantly adverse effect" used in the Mining Act. (T. p. 2.430; Pet. Ex. 97)

68. The protocol reflected that WSP would place noise monitors at certain identified locations in the field, including within the Park, to collect noise measurements. (T. pp. 2.431–432; Pet. Ex. 97; Joint Stip., ¶ 40)

69. The protocol further reflected that WSP would model current and future noise conditions at various discrete receptors (predefined locations) using the CadnaA program. (T. pp. 2.432–433; Pet. Ex. 97) The CadnaA program also allowed WSP to calculate isopleth contours to visually depict how sound flows or radiates in different locations. (T. p. 2.433)

70. Mr. Thalheimer explained that sound isopleths do not indicate whether sound will be perceptible in a given area, but merely are intended to demonstrate how sound flows. (T. pp. 3.562–564)

71. WSP performed the Acoustical Study required by Respondent using the protocol that Respondent approved. (Joint Stip., ¶ 39)

72. The Acoustical Study involved WSP placing six long-term noise monitors in the Park at different sites for a one-week period (two more were eventually added) and short-term monitors (taking 15-minute measurements) at four different sites for two weeks. (*Id*. ¶ 40; Pet. Ex. 97)

73. These monitors recorded ambient noise—that is, Petitioner's mining operations and the surrounding airport, highway, traffic, park users, nature sounds, and commercial noises. (T. p. 2.457; Pet. Ex. 89) The ambient noise measurements revealed a sound level of 55 dBA Leq (1 hr) during daytime working hours at the monitor location nearest to the Odd Fellows tract. (Pet. Ex. 89)

74. After gathering this data, WSP modeled the sound levels produced only by Petitioner through its existing quarry operations and the proposed quarry expansion. WSP then calculated the relative sound increases, which reflect the difference between the modeled sound levels for the projected quarry expansion compared to the modeled sound levels for the existing quarry. (Joint Stip., ¶ 60)

75. Mr. Thalheimer explained that a relative standard as opposed to an absolute standard is the appropriate way to evaluate whether quarry noise would have a significantly adverse effect on the purposes of the Park because Petitioner can only control its noise sources, not all noise sources. (T. pp. 2.451–452)

76. A relative standard is also appropriate because Petitioner has been an existing noise source in the area for over 40 years and therefore is part of the Park's ambient noise. (T. p. 2.453) Mr. Thalheimer explained that: "The question was not whether Petitioner's existing noise was a problem. It wasn't. The question was is future noise going to be a problem." (T. p. 2.453:10–12)

77. WSP's CadnaA noise model incorporated "conservative worst-case noise assumptions," including: (1) all equipment on site operating simultaneously; (2) less absorptive ground factors for areas not covered with foliage; (3) blasting every hour (instead of the actual one to two times per week); (4) no sound attenuation for foliage (*i.e.*, always winter); and (5) the wind always blowing from the noise source toward each receptor. (T. pp. 2.446–448; Pet. Ex. 89)

78. WSP determined that a 10 decibel ("dBA") or more relative increase in future noise was the appropriate measure of determining whether a noise increase constituted a "significantly adverse" noise effect on the Park. (T. p. 2.482)

79. Mr. Thalheimer explained that noise increases become perceptible at 5 decibels, but that perceptible does not mean significantly adverse. He further testified that it is common in the acoustics field to use a 10 dBA increase to determine whether a noise increase is significant or substantial. (T. p. 2.483)

80. WSP based its recommended measure of significantly adverse effect in large part on the North Carolina Department of Transportation's Traffic Noise Policy. This policy also uses a 10 dBA threshold to determine a substantial noise increase for highway construction adjacent to residential areas, including at night. (T. pp. 2.482–483; Pet. Ex. 89; Resp. Ex. 13)

81. The protocol provided that as part of the Acoustical Study, WSP reviewed the noise analysis that was performed in the 1980s when Petitioner's original permit was initially considered by Respondent. (T. pp. 2.486–488; Pet. Ex. 97)

82. Given the rapid advancements in the field of acoustics since then, the analysis performed in the 1980s is inapplicable to sound modeling performed today. (T. p. 2.487)

83. As required by the protocol, Petitioner submitted the acoustical report in draft form to Respondent to give it an opportunity to comment before the draft was finalized and accepted. (T. p. 2.284; Joint Stip., ¶ 44)

84. Respondent made suggested modifications to the draft acoustical report and requested additional information. WSP provided additional information responsive to Respondent's requests. (T. pp. 1.113–114, 2.533–544; Pet. Ex. 18)

85. Petitioner then submitted the final report with the additional information and Respondent accepted it on March 12, 2021. (T. pp. 1.113–114, 6.1491; Pet. Ex. 89)

86. At no time did Respondent ever suggest or require that WSP or Petitioner use any other standard for "significantly adverse effect" or require that WSP or Petitioner model anticipated quarry noise against some alternative standard, including an absolute standard. (T. pp. 2.280, 2.304, 4.732)

87. Respondent never required or requested that WSP or Petitioner use a decibel threshold other than 10 dBA for determining if noise constituted a significantly adverse effect. Nor did Respondent explicitly reject WSP's use of a 10 dBA standard. (T. p. 2.282)

88. Before Respondent accepted the final report from the Acoustical Study, Respondent asked Petitioner and WSP to "justify" the use of the 10 dBA threshold in evaluating whether noise constitutes a significantly adverse effect. (T. pp. 2.285, 3.711; Pet. Ex. 18)

89. Petitioner provided the requested justification. (T. p. 2.285; Pet. Ex. 24 at 12). Respondent never told Petitioner or WSP that the justification that they provided regarding the use of this standard was insufficient. (T. p. 3.711)

90. At no time did Respondent ever identify for Petitioner or WSP what Respondent contended was the appropriate measure of significantly adverse effect with respect to noise increases. (T. p. 3.709)

91. The final Acoustical Study recommended that a 10 dBA relative increase be used as the measure of significantly adverse with respect to noise impacts on the Park. (Pet. Ex. 89). It also confirmed that all projected increases in noise levels were modeled to be well below 10 dBA and that the vast majority of the Park would experience a noise increase of less than 3 dBA, which is below what acousticians consider to be the "onset threshold of audible changes." (Pet. Ex. 89; T. pp. 2.291–292, 2.531–532)

92. The Acoustical Study concluded that "expansion of [Petitioner's] operations into Pit 2 will not pose a ″significantly adverse [noise] effect on the purposes of a publicly owned park, forest or recreation area [in Umstead State Park].″ (Pet. Ex. 89; T. pp. 2.291–292)

93. Mr. Thalheimer testified that, in his opinion, the modeled noise levels associated with the expanded operation contemplated by the Application would not have a significantly adverse effect on the purposes of the Park. (T. p. 2.488). Mr. Thalheimer's conclusion has not changed since March of 2021, but rather has been reinforced by a recent visit to the Park. (T. p. 2.532)

94. WSP modeled data shows one small area of the Park east of Foxcroft Lake (measuring approximately 1.24 acres or .02% of the total Park area) as experiencing an increase of between 6 and 7 dBA during the overburden stripping phase of the proposed expansion. (Pet. Ex. 89, T. pp. 3.598–599)

95. This area remains well below the defined threshold of 10 dBA increase (Pet. Ex. 62 at 18; T pp. 4.789, 7.1613)

96. Mr. Thalheimer expressed the opinion that based on his experience, knowledge, and observations, an increase of approximately 5 dBA in a 1.24 acre area of a 5,600 acre park would not in any way constitute a significantly adverse effect on the purposes of the Park. (T. p. 3.599)

97. The quality and character of the noise that is expected to be generated by mining on the Odd Fellows tract is exactly the same as the quality and character generated by the Triangle Quarry. (T. p. 7.1687)

98. On May 24, 2021, Respondent issued an ADI to Petitioner regarding its concerns over noise levels at two specific points—the area of the Park east of Foxcroft Lake, where WSP modeled the noise increase to be between 6 and 7 dBA, and the Dunns' residence, which is not in the Park. (T. p. 2.310; Joint Stip., ¶ 43; Pet. Ex. 25)

99. After Respondent accepted WSP's final report, it also sent an ADI dated July 6, 2021, asking for limited explanations regarding several aspects of the report. (T. p. 2.311; Pet. Ex. 27)

100. To address Respondent's concerns over noise at the two sites raised in the May 24, 2021 ADI, Petitioner amended its site design to further mitigate any potential noise and visual impacts at these areas. As part of these design changes, Petitioner proposed building a decorative DOT–style sixteen–foot sound wall rather than an earthen berm. (Joint Stip., ¶ 44). WSP revised its acoustical modeling to show the reduction in noise levels that would be achieved by the proposed sound walls. (T. pp. 2.312–315; Pet. Ex. 29)

101. Petitioner submitted its response to Respondent's May 24 and July 6 ADIs by memorandum dated August 12, 2021, which response includes an August 9, 2021, memorandum by WSP with updated modeling incorporating the proposed sound walls. (Pet. Ex. 29)

102. The parties stipulated to the results of Table 1 in WSP's August 9, 2021, memorandum. (Joint Stip., ¶ 66). Table 1 shows the modeled absolute noise levels from the proposed expansion for a worst-case 280 feet production scenario at twelve receptor sites, incorporating the proposed sound walls. (Pet. Ex. 29). The Table 1 results show that only two receptors are modeled to have absolute noise levels slightly above 55 Leq(h) dBA with the proposed sound walls—Foxcroft Lake (55.4) and Foxcroft property line (56.7). (*Id.*)

103. WSP's August 9, 2021 response contained updated isopleth contour maps. (Pet. Ex. 29)

104. Mr. Thalheimer cautioned that these isopleth contour maps were simply an estimate to provide a visual representation of how noise flows. They are not specific calculations of what a listener will be able to hear at any discrete point. (T. pp. 2.433–436).These maps also do not take into account the masking of noise that would occur, which directly impacts whether a modeled noise increase will be perceptible in a given area. (T. p. 7.1680)

105. Director Wrenn is unfamiliar with the concept of masking in acoustics and its effect on the perceptibility of a noise increase. (T. p. 7.1522-1523)

106. Director Wrenn did not have any acoustical training on which to base his decision that the 10 dBA standard was not appropriate. (T. p. 6.1493).

107. After Petitioner provided the supplemental information in August 2021, Respondent did not request any further information or noise modeling from Petitioner or WSP. (T. p. 2.365)

108. Respondent did not perform any independent noise analysis or modeling. (T. p. 6.1415; Resp. Ex. 149, Miller Dep. Vol. III, 547:2–5) Respondent intended to rely on the Acoustical Study results for purposes of evaluating the Application. (T. p. 6.1491) Director Wrenn has no reason to doubt the results of the Acoustical Study. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 274:19–275:3)

109. The Acoustical Study's modeling shows that the relative noise increase at all discrete receptor sites is well below 10 dBA. (T. pp. 2.504, 3.598; Pet. Ex. 89)

110. The Acoustical Study's modeling shows that the relative noise increase at all discrete receptor sites is below 8.5 dBA. (T. pp. 3.592, 3.598; Pet. Ex. 89)

111. No area of the Park would experience a noise increase of 8.5 dBA or more. (T. pp. 3.598, 5.1069)

112. The Acoustical Study concluded that moving extraction operations to Pit 2 (on the Odd Fellows tract) "should be a noise benefit (*i.e.,* reduction) … because the majority of [the Park's] fixed sites (picnicking and camping)" are located closer to Triangle Quarry than the Odd Fellows tract. (Pet. Ex. 89) The Park's designated trails are closer to Triangle Quarry than the Odd Fellows proposed pit. (T. pp. 1.194, 1.196–200)

113. The stationary equipment currently at Triangle Quarry (conveyors, crushers, and screens) would not move to the proposed new pit if the Application were granted. (T. pp. 1.59– 60) This equipment would remain in place, below grade, and would be used to process the deposits from the new pit at their current location. (*Id.*). Only mobile equipment (trucks, excavators, wheel loaders) would be on the Odd Fellows tract. (T. pp. 1.59, 1.101)

114. Respondent accepted the WSP Acoustical Study and its results, as supplemented, and intended to rely on the Acoustical Study in evaluating the Application. (T. pp. 6.1485– 1486, 6.1489–1491)

115. The Tribunal finds that Director Wrenn was evasive when questioned about whether Respondent accepted the Acoustical Study results and intended to rely on them, but the record makes clear the results were accepted by Respondent and that Respondent relied on them. (T. pp. 6.1489–1491)

116. Although Respondent has the ability to hire experts and consultants, it did not hire its own acoustical engineer while the Application was pending, but rather relied on the analysis performed by WSP. (T. pp. 6.1415–1416)

117. Respondent did engage a sound expert after it denied the Application and did so for purposes of supporting this litigation. (T. pp. 6.1416–1417).

118. Respondent engaged Dr. Noral Stewart, an expert in acoustics and noise control, and the Tribunal accepted him as an expert witness in these subjects. (T. p. 4.957)

119. Prior to Respondent engaging Dr. Stewart, he was engaged by the Umstead Coalition to oppose the Application. (T. pp. 5.1045–1046)

120. During the time the Application was under review, Dr. Stewart, on behalf of the Umstead Coalition, submitted two letters to Respondent opposing the Application, one of which was submitted before any acoustical study was performed. (T. pp. 5.1046–1048; Resp. Ex. 115, 116)

121. Dr. Stewart also opposed the Application at one of the two public hearings. (T. pp. 5.1046–1047)

122. Dr. Stewart remained on retainer by the Umstead Coalition, throughout the time he was engaged by Respondent in this matter. (T. p. 5.1051)

123. Dr. Stewart was engaged by Respondent at the suggestion of counsel for the Umstead Coalition. (T. p. 5.1051)

124. Dr. Stewart conducted no field measurements, calculations, or sound modeling of noise in the Park. (T. pp. 4.943, 5.1056)

125. Dr. Stewart has never been to the Odd Fellows tract, never been to the area of the Park adjacent to the Odd Fellows tract, and could not remember the last time he visited the Park, although he believes it was in the 1990s. (T. pp. 5.1079–1080)

126. Although Dr. Stewart indicated that WSP's use of the CadnaA model was appropriate, he has never conducted any CadnaA or SoundPLAN modeling. He has never been trained to conduct noise modeling using either the CadnaA or SoundPLAN system and could not explain the differences between the two programs. (T. pp. 5.1040–1041)

127. Dr. Stewart has never validated results from a CadnaA sound model and does not know what WSP did to validate its model, although he believed validation occurred. (T. pp. 5.1041–1042)

128. The last time that Dr. Stewart personally conducted any noise modeling was in 2016 or before. (T. pp. 5.1043–1044).

129. The Tribunal finds that Dr. Stewart lacks impartiality.

130. Despite that, Dr. Stewart agrees that the vast majority of the Park will experience an increase of 3 decibels or less if the Application is approved. (T. p. 5.1070)

131. Respondent never asked Dr. Stewart for any information or consulted with him during its review of the Application. (T. pp. 5.1087–1088; Resp. Ex. 148, Director Wrenn Dep. Vol. II, 446:18– 447:20)

132. The unsolicited opinions that Dr. Stewart provided to Respondent in the form of two letters while Respondent was reviewing the Application did not influence Director Wrenn's decision to deny the Application. (T. pp. 5.1087–1088; Resp. Ex. 148, Director Wrenn Dep. Vol. II, 452:1–6)

133. Dr. Stewart is not familiar with the Mining Act and although he has heard of it, he has not read it in detail. (T. p. 5.1074) At the time that Dr. Stewart sent his criticisms of WSP and its noise study protocol and results to Respondent, he had never read the Mining Act. (T. p. 5.1075)

134. Dr. Stewart is unfamiliar with the purposes of the Park. (T. p. 5.1078)

135. Dr. Stewart has never been to Triangle Quarry. (T. p. 5.1078)

136. Dr. Stewart has never been to the Odd Fellows tract. (T. p. 5.1079)

137. Dr. Stewart's opinion is that the majority of the Park will not experience a significantly adverse effect from the proposed expansion. (Resp. Ex. 150, Stewart Dep., 129:20–22)

138. Director Wrenn's only visit to the Park during the 681 day evaluation process was on February 9, 2022. (T. 7.1607-1608) During this visit, Director Wrenn never went to the ridge on the east side of Foxcroft Lake or stood on the Park border to look back towards the Odd Fellows tract. (T. pp. 6.1321, 7.1560) Despite never having been to the ridge in question, Director Wrenn believes that the expanded mining operation would have a significantly adverse effect on the purposes of the Park because a Park user standing at the Park border on the ridge on the east side of Foxcroft Lake could potentially see into the pit area of the proposed expansion. (T. pp. 6.1366–1367)

139. Any mining activity that might be visible from the Park property line near Foxcroft Lake would occur only during the initial "overburden" removal period, when Petitioner would remove some 60 feet of dirt to reach the stone to be quarried. (Resp. Ex. 149, Miller Dep. Vol. I, 162:16–163:9; Pet. Ex. 20)

140. Someone standing at that spot might be able to see a void (absence of trees) where the perimeter road is located. (Resp. Ex. 149, Miller Dep. Vol. III, 498:15-23, 504:13-505:12)

141. The vast majority of Foxcroft Lake is located on the Odd Fellows tract, which is private property. (T. p. 1.58)

142. Foxcroft Lake is not open for recreation to Park users and is not used for recreation except by the occasional trespasser. (T. p. 1.211)

143. The area east of Foxcroft Lake contains no designated trails. (T. p. 7.1613; Pet. Ex. 20)

144. This area does contain an undesignated pathway that crosses back and forth between the Odd Fellows tract and the Park, colloquially known as the Yellow Dot Trail. (T. pp. 1.263–270, 4.795; Pet. Ex. 101-103; Letchworth Aff., ¶ 5) Sixty percent of the trail is on the Odd Fellows tract, and most people access the trail through private property north of the Dunn residence. (T. pp. 1.250, 1.259; Pet. Ex. 93) Thus, users of the Yellow Dot Trail are trespassing when not on the Park portion of the trail. (*Id.*)

145. The Yellow Dot Trail is not mentioned in the agency record. Respondent did not raise the existence of the Yellow Dot Trail until its summary judgment briefing in this contested case. (Respondent’s Response to Petitioner’s Motion for Summary Judgment, p. 33)

146. The Rules and Regulations published by the DPR state that hikers should "stay on designated trails and hiking areas" for their own safety and to protect "rare plants" that "live on

155. State Mining Engineer Miller contacted David Lee of Wake Stone and specifically asked if Petitioner would be willing to plant several staggered rows of evergreen trees to assist with visual mitigation in the Foxcroft Lake area. (T. pp. 7.1660–1661) Mr. Lee made clear to Mr. Miller during that phone call and in a subsequent email that Petitioner was "willing to consider the addition of vegetative screening near the head end of the lake, the one area where the potential exists for minimal view of the quarry expansion from Umstead State Park." (T. pp. 7.1660–1664; Pet. Ex. 57, 121; Resp. Ex. 149, Miller Dep. Vol. III,517:19–518:8)

156. Mr. Lee made clear that Petitioner would be willing to add additional vegetative screening and to discuss with State Mining Engineer Miller and Respondent what Respondent required for visual screening, but Miller and Respondent never followed up with Petitioner on this offer. (T. pp. 7.1663–1664; Pet. Ex. 121; Resp. Ex. 149, Miller Dep. Vol. III, 520:3–11)

157. Respondent did not request further visual screening because State Mining Engineer Miller acknowledged it was not obvious that it would even be necessary–but Miller noted that Petitioner was offering more screening if it became clear that it was necessary. (T. p. 7.1563-1564)

158. Director Wrenn lacked any experience with respect to conditioning a permit on visual or vegetative screening. (T. pp. 6.1405–1406)

159. DNCR requested that Director Wrenn and Division staff visit the area near Foxcroft Lake on February 9, 2022, so that DNCR and DPR could express their concerns as to the Application. (T. p. 6.1313) This site visit was a major factor in Director Wrenn's decision to deny the Application. (Joint Stip., ¶ 46)

160. Director Wrenn did not actually climb to the ridgeline on the east side of Foxcroft Lake. (T. pp. 6.1321–1322, 7.1635) Based on his view from the valley below the ridgeline, Director Wrenn concluded that a Park user standing on the ridgeline on the Park boundary (that he never stood on) would be able to see into the proposed operation on the Odd Fellows tract. (T. pp. 6.1321–1322, 6.1324)

161. Director Wrenn testified that he believed that the portions of the mining operation would be visible from the Park boundary where the maintenance road that goes around the perimeter of the pit, clearing of trees, and the wall on the far side of the pit (rock). (T. p. 7.1566) Director Wrenn could not quantify the size of the Park area from which these sites would be visible. (T. pp. 7.1566–1567)

162. Director Wrenn has no photos or documentation to reflect what he observed that day. (T. p. 7.1548) Mr. Letchworth has taken photos of the area, but Respondent failed to introduce them at trial. (T. pp. 4.851–852)

163. Respondent opposed Petitioner's request for a site view of this area. (*See* Respondent's Opposition to Petitioner's Motion for Site Visit filed February 10, 2023)

164. Petitioner presented three videos taken from the "Yellow Dot Trail," including two from the ridge in question. Respondent objected to the introduction of these videos into evidence. (T. pp. 1.262–264; Pet. Ex. 101, 102, and 103)

165. The videos were admitted into evidence and the Tribunal finds that the videos do not support Respondent's conclusion that a Park visitor would be able to see the proposed mining operation from the Foxcroft Lake area.

166. Immediately following his site visit with DNCR, Director Wrenn met on-site at the Odd Fellows tract with a number of Petitioner's employees, including Sam Bratton, David Lee, and Cole Atkins, to discuss surface waters delineations on the site. (T. pp. 6.1315, 7.1620–1621, 6.1330) Director Wrenn did not mention what he saw or concluded during his Park visit that same day, even though it was a pivotal factor in Director Wrenn's decision to deny the Permit. (T. pp. 7.1620– 1621)

167. Following this site visit (only eight days before he issued his denial), Director Wrenn failed to give Petitioner the opportunity to address his personal concerns or to offer mitigation as to the potential visual impacts. (T. p. 7.1621)

168. Early in the review process, Respondent asked for the Department of Transportation's ("DOT's") expert recommendation regarding traffic at the proposed expansion. (T. pp. 6.1456–1457; Resp. Dep. 149, Miller Dep. Vol. III, 538:15–16, 541:2–6) DOT reported that it was satisfied with the entrance to the quarry and opined that the traffic flow there was good. (T. pp. 6.1456–1457; Resp. Ex. 149, Miller Dep. Vol. III, 544:2–11)

169. In his December 2, 2020 Mining Review, State Mining Engineer Miller stated that "DOT is good with the intersection." (Pet. Ex. 14; Resp. Ex. 149, Miller Dep. Vol. I, 135:18–20)

170. None of the ADIs requested any information about traffic or mitigation of traffic concerns. (T. p. 1468). Respondent performed no traffic study or analysis. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 390:6–10) Director Wrenn's January 20, 2022 PowerPoint presentation to DEQ leadership contained no discussion about traffic. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 365:10–12)

171. None of the various iterations of the Mining Review reflect any issues with traffic other than to note that traffic is outside the scope of the permit and that truck volume is not expected to increase. (Pet. Ex. 14 at 11, 61, 62)

172. Director Wrenn did not identify any issues with traffic until he heard from Park staff during his February 9, 2022, site visit, eight days before he issued the denial of the Application. (T. p. 6.1468) Director Wrenn did not ask the State Parks Division if it planned on expanding the Park's parking lots to alleviate any queuing concerns. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 398:24–399:1)

173. Director Wrenn and State Mining Engineer Miller both admitted that truck traffic volume is not expected to increase if the Application is granted. (T. p. 6.1457; Resp. Ex. 149, Miller Dep. Vol. III, 537:20-538:4)

174. Traffic was not a "reasonable criteria" upon which to deny the Application. (Resp. Ex. 149; Miller Dep. Vol. III, 537:15-23). Director Wrenn acknowledged that traffic was an adverse effect on the purposes of the Park, but not a significantly adverse effect. (T. p.6.1467)

175. Respondent provided Petitioner no opportunity to propose mitigation with respect to any perceived traffic concerns. (Resp. Ex. 149, Miller Dep. Vol. III, 539:1–9)

176. In December 2020, Miller State Mining Engineer stated in the Mining Review that "the Park and Quarry have existed side by side for about 40 years, with little impact to the Park." (Pet. Ex. 14)

177. As of June 2, 2021, the Mining Review contained evaluations of the noise and visual impacts of the proposed expansion. As to visual impacts, the Mining Review stated that the photographs submitted by Petitioner showed "adequate visual screening" for the Foxcroft Lake area. (Pet. Ex. 61; Resp. Ex. 149, Miller Dep. Vol. III, 545:11–23, 547:6–548:11, 548:25–549:4)

178. As for noise, State Mining Engineer Miller relied on Petitioner's Acoustical Study, concluding that:

- the noise attributable to the expansion "will not have a significant adverse effect on the park" under N.C. Gen. Stat. § 74-51(d)(5) because: (1) the current mining operation showed only a one to three decibel impact to the Park; (2) in its worst-case scenario, the proposed expansion would have an additional one to two decibel impact; and (3) the total impact to the Park would be, at a maximum, five decibels; and
- the noise would be considered an adverse effect if the proposed expansion were in a rural environment but "since this park lies in an urban environment with a major interstate just South of the proposed expansion, another multiple lane highway to the north of the Park, an airport to the West, and two additional quarries near the park, the ambient occurring noise caused by man's activity is a far greater impact." (Pet. Ex. 61)

179. State Mining Engineer Miller's August 12, 2021, entry on the Mining Review states that Petitioner had changed the proposed screening buffers on the Odd Fellows tract to a "highway type sound wall." (Resp. Ex. 149; Miller Dep. Vol. III, 552:24–553:5; Pet. Ex. 62) The Mining Review concluded that "by making these changes, the Company's Noise model shows the noise impact to the park has been sufficiently mitigated." (Resp. Ex. 149, Miller Dep. Vol. III, 552:19–553:15; Pet. Ex. 62)

180. On August 30, 2021, State Mining Engineer Miller prepared an internal document analyzing the noise impact on the Park. (T. pp. 7.1528–1532; Pet. Ex. 44) Miller decided, based on his "personal belief," that the 10 dBA threshold recommended by WSP was not reasonable for

an "urban park." (Pet. Ex. 44; Resp. Ex. 149, Miller Dep. Vol. I, 152:3–153:10) Thus, he applied a 15% "safety factor" to the 10 dBA threshold to lower it to 8.5 dBA. (Pet. Ex. 44)

181. State Mining Engineer Miller incorrectly arrived at 8.5 dBA by applying a linear percentage reduction (15%) to a logarithmic decibel quantity (10 dBA). As Mr. Thalheimer stated, "That just doesn't work mathematically well at all." (T. pp. 3.572:24–573:6)

182. Director Wrenn knew the mathematical calculations performed by State Mining Engineer Miller in applying the safety factor were incorrect. (T. p. 7.1529)

183. Despite the mathematical errors, State Mining Engineer Miller found that "all predicted amounts" in the Park were below this new 8.5 dBA threshold, even the area east of Foxcroft Lake where the noise increase was the greatest. (T. pp. 7.1528–1533; Pet. Ex. 44) Mr. Miller concluded that "because this is a low use area with no maintained trails," the impact to the Park was "minimum" and the proposed pit would not present an adverse effect. (*Id.*)

184. Director Wrenn is not aware of how many Park visitors use this area. (T. p. 7.1534) State Mining Engineer Miller determined that it is a low use area. (T. pp. 7.1533–1534)

185. In April 2021, State Mining Engineer Miller began modifying Petitioner's previous permit to create a draft permit for the Application. (Joint Stip., ¶ 35) Mr. Miller notified Director Wrenn that he put the draft permit in the "Teams" software program so others could edit it. (Joint Stip., ¶ 36) Director Wrenn also worked on the draft permit. (T. p. 7.1572; Pet. Ex. 45, 48; Resp. Ex. 149, Miller Dep. Vol. II, 362:18–363:2; 370:25–372:12.)

186. On September 8, 2021, Josh Kastrinsky, Respondent's public information officer, drafted a press release announcing Respondent's decision to approve the Application, which he "intend[ed] to get … out on 9/10." (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 315:11–317:22; Pet. Ex. 47)

187. As of that date, Respondent had received all photos requested of Petitioner of the Foxcroft Lake area from both summer and winter months, and State Mining Engineer Miller had documented in the Mining Review that, based on those photos, the area would be adequately screened. (T. p. 7.1572) Respondent had also received and accepted the Acoustical Study. (T. pp. 7.1572–1573)

188. Respondent did not issue a decision on the Application in September 2021. (T. p. 7.1573). Respondent took no steps at that time to prepare a denial memo or letter but continued to work on draft permit conditions. (*Id.*).

189. Respondent did not approve the Application in September of 2021 because it learned that Petitioner's Neuse River Buffer Authorization was going to be reversed. (T. p. 7.1574)

190. On September 9, 2021, Respondent issued its seventh and final ADI to Petitioner. (Pet. Ex. 30; Joint Stip., ¶ 49)

191. On January 20, 2022, Director Wrenn gave a PowerPoint presentation to Respondent's leadership, including Assistant Secretary Sushma Masemore, to provide an update on the Application. (T. p. 6.1305) Based on the Acoustical Study and Miller's August 30, 2021, noise analysis document, Director Wrenn informed Respondent's leadership on that date that "[a]ll predicted noise levels were below the 8.5 dBA level of increase." (T. pp. 6.1305, 6.1308; Pet. Ex. 58) Director Wrenn also concluded and informed Respondent's leadership that Petitioner's proposal to build a sound barrier wall would "provide adequate visual screening for the park." (T.p. 6.1309)

192. State Mining Engineer Miller had "multiple conversations" with Director Wrenn during the Application review process in which Mr. Miller "told him that I felt there was good reason to grant the application." (Resp. Ex. 149, Miller Dep. Vol. III, 452:8–22).

193. The Mining Review was edited by a few individuals over the course of many months. State Mining Engineer Miller consistently recommended that the Application be approved and the modified permit issued. (Pet. Ex. 14, 61, 62)

194. Director Wrenn was able to and did access and edit the Mining Review. (T. pp. 6.1426, 7.1540–1544)

195. State Mining Engineer Miller last edited or revised the Mining Review on February 10, 2022. (Joint Stip.,¶ 33) Director Wrenn edited the Mining Review on February 14, 2022, three days before he denied the Application. (T. p. 7.1544; Joint Stip., ¶ 33). Neither State Mining Engineer Miller's nor Director Wrenn's final edits changed or removed the recommendation that the Application be approved. (T. p. 7.1639; Pet. Ex. 62)

196. As of February 17, 2022, the date Director Wrenn denied the Application, the Mining Review last edited by Director Wrenn stated:

- "[T]he threshold established by the denial criteria 74-51(d)(5) has not been met." (Pet. Ex. 62)
- "The noise created by this [proposed] expansion will not have a significant adverse effect on the purposes of Umstead State Park." (*Id*)
- "I recommend modifying the Wake Stone-Triangle Quarry mining permit, Permit Number 92-10, by adding the Odd Fellow tract to the mine permit." (*Id.*)

197. Director Wrenn did not remove any of these conclusions. (T. pp. 7.1540–1544, 7.1639)

198. Director Wrenn claims that, shortly before Respondent denied the Application, Director Wrenn asked State Mining Engineer Miller to revise the Mining Review to make it consistent with Director Wrenn's denial. (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 199:3–200:19) Mr. Miller did not do so. (T. pp. 7.1639–1640)

199. Respondent did not call State Mining Engineer Miller to testify at the contested case hearing.

200. At State Mining Engineer Miller's deposition, he made several sworn statements adverse to Respondent's position in this contested case. These statements include the following:

- Miller had never reviewed a more thorough and detailed modification application than Petitioner's (Resp. Ex. 149, Miller Dep. Vol. I, 90:4);
- Miller had "multiple conversations" with Director Wrenn during the review process in which he "told him that I felt there was good reason to grant the application." (Resp. Ex. 149, Miller Dep. Vol. III, 452:8–22);
- Director Wrenn never discussed using a 55 dBA Ldn standard with Miller (Resp. Ex. 149, Miller Dep. Vol. III, 474:17-475:9);
- only the access road and the void caused by the clearing activity would potentially be visible from the Foxcroft Lake area, not the mining pit (Resp. Ex. 149, Miller Dep. Vol. III, 504:13–506:4);
- although vegetation at the ridge top could mitigate a potential visibility issue, DEMLR should not require Wake Stone to incur this expense when "[t]here is a marginable [sic] chance that that area would not be necessarily that visible once construction starts." (Resp. Ex. 149, Miller Dep. Vol. III, 518:17–519:2);
- Miller did not think the quarry expansion would have an adverse impact on traffic and "did not consider that a reasonable criteria" to deny the Application. (Resp. Ex. 149, Miller Dep. Vol. III, 537:15–23);
- Miller told Mr. Erv Portman that DPR's letter requesting that the Application be denied was "not worth the paper it's written on." (Resp. Ex. 149, Miller Dep. Vol. III, 569:13–18);
- Miller told Erv Portman that "this site is the best place for a new quarry," testifying in his deposition that the Odd Fellows tract was the best site for a "modification of the existing quarry." (Resp. Ex. 149, Miller Dep. Vol. III, 570:21–571:7); and
- Miller told Mr. Sam Bratton; immediately after the February 9 site visit; that the State Parks was "looking for cumulative adverse effect, but that Wake Stone had good science on its side." (Resp. Ex. 149, Miller Dep. Vol. III, 459:13–18)

201. Director Wrenn relied on State Mining Engineer Miller to provide recommendations to him as to mining applications and he was required, as Division Director, to review the most recent mining review before denying an application. (T. pp. 6.1420–1421; Resp. Ex. 148, Director Wrenn Dep. Vol. I, 195:18–197:2) Mr. Miller is a licensed mine engineer and has handled hundreds of applications. (Resp. Ex. 149, Miller Dep. Vol. I, 15:22-16:6, 25:23-26:16)

202. Director Wrenn acknowledged that there was "quite a bit of [internal] documentation" contradicting his decision to deny the Application. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 403:3– 404:16)

203. Director Wrenn has no engineering degree, no graduate degree, no mining experience, and no licenses or certifications. (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 9:14–18; 20:15–21:4; 32:19– 33:10) He had been the Division Director for only two months when the Application was submitted and only two years when he rejected State Mining Engineer Miller's recommendation. (*Id.*)

204. There are 750 permitted mines in North Carolina. (T. p. 6.1379, Pet. Ex. 120)

205. Director Wrenn is familiar with four mining permits that have been denied in the 53-year history of Respondent's Mining Program. (T. pp. 6.1382–1383) Of those four denials, three occurred when Director Wrenn was serving as Division Director, a position he held for less than three years. (T. pp. 6.1383–1386)

206. The only denial not made by Director Wrenn was the 1980 denial of Petitioner's Triangle Quarry application, which was ultimately reversed by the North Carolina Mining Commission. (T. p. 6 . 1383)

207. Director Wrenn denied the Application by letter dated February 17, 2022. (Pet. Ex. 50) The denial letter states that "[t]he proposed quarry is located and designed such that normal operation would have significantly adverse effects on the purposes of the Park through noise, visual, and traffic impacts." (*Id.*) It also states that "as the current configuration of the pit is proposed, the Department is not aware of modifications which would mitigate all significantly adverse effects on the purposes of the Park." (*Id.*)

208. The denial letter attached a memorandum drafted by Director Wrenn that provides the basis for his denial of the Application. (Pet. Ex. 51)

209. As to noise impacts, Director Wrenn's denial memorandum rejected both the conclusion of the Acoustical Study and the recommendation of the State Mining Engineer, Mr. Miller, that noise would not have a significantly adverse impact on Park purposes. (Pet. Ex. 51)

210. Director Wrenn rejected the Acoustical Study's recommended 10 dBA relative threshold and State Mining Engineer Miller's lowered 8.5 dBA threshold. (T. p. 7.1513; Pet. Ex. 51) Director Wrenn's denial memorandum focused on the noise impact on the small area of the Park east of Foxcroft Lake, which would experience a "predicted worst case scenario" 6–7 dBA increase in noise. (Pet. Ex. 51) Director Wrenn admitted that no designated trails were located in the Foxcroft Lake area and that he had never observed any recreational activity on Foxcroft Lake. (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 69:13–70:3; Vol. II, 422:10–423:2)

211. Director Wrenn's denial memorandum said that noise would increase 3-5 dBA further into the Park. (Pet. Ex. 51. This erroneous statement was based on the isopleth maps prepared by WSP. (T. p. 7.1519) The maps do not indicate whether the noise depicted by the isopleth maps would

232. Director Wrenn was unaware of any "interactions" or wrecks between any Park users and Wake Stone dump trucks leaving the Triangle Quarry. (T. pp. 6.1454–1455). There have been no traffic accidents involving trucks entering or leaving Triangle Quarry. (T. p. 1.120)

233. Director Wrenn acknowledged that traffic would not constitute a significantly adverse effect on the purposes of the Park. (T. p. 6.1448–1449)

234. Director Wrenn is unaware of the last time the Park expanded its parking lot. (T. pp. 6.1451–1452)

235. Respondent issued its final request for additional information to Petitioner on September 9, 2021 ("7th ADI"). (Joint Stip., ¶ 49; Pet. Ex. 30)

236. The 7th ADI requested four categories of information. (Pet. Ex. 30) Two categories related to Neuse River Buffer Authorization, one category requested that Petitioner engage in consultation with the USFWS regarding the presence of the Neuse River Waterdog, and the final category was a request for visual renderings from various vantage points including from a bird's eye perspective. (Pet. Ex. 30)

237. The request for information specific to USFWS stated, in relevant part, "Please provide any further threatened and endangered species coordination you have conducted with the US Fish and Wildlife Service in response to this final rule." (Pet. Ex. 30) Respondent asked that Petitioner forward two copies of the requested information to Respondent "[i]n order to complete the processing of your application." (*Id.*)

238. Petitioner provided a narrative response to the final ADI on November 1, 2021. (Pet. Ex. 31; Resp. Ex. 139; Joint Stip., ¶ 50)

239. Petitioner's response completely answered the four requests contained in the 7th ADI. (Pet. Ex. 31; Resp. Ex. 139). Petitioner's cover letter enclosed "duplicate copies of [its] responses to your request for additional information," as Respondent had requested. (Pet. Ex. 31). The letter also stated that "we believe these additional data will provide you with the final information you need to move forward to permit issuance." (*Id.*)

240. Regarding the request for USFWS consultation, on November 1, 2021, Petitioner responded that since receiving the 7th ADI, Petitioner had engaged in on-going consultation with USFWS. (Pet. Ex. 31). Petitioner's response also stated that since there were no federal permits required for the expansion onto the Odd Fellows tract ("federal nexus") and with no impacts proposed to Crabtree Creek or its tributaries, there was no need for Petitioner to engage with USFWS for formal consultation under the Endangered Species Act. (Pet. Ex. 31)

241. Petitioner's environmental engineers and USFWS's species status assessment both confirmed that the Neuse River Basin likely is not occupied by the Neuse River waterdog, and that the last one identified was seen in 1979 in an area near Ebenezer Church Road. (Pet. Ex. 31) Although formal consultation was not required, Petitioner contacted Mr. Pete Benjamin, field

supervisor for USFWS, requesting concurrence that the proposed quarry expansion is not likely to affect the Neuse River waterdog based on no Crabtree Creek impact proposed by the project, the previously noted habitat assessment of Petitioner's environmental consultant, no documented occurrence since 1979, and USFWS's own species status assessment report. (Pet. Ex. 31) Petitioner's response to Respondent stated that it had requested that Mr. Benjamin send that concurrence directly to State Mining Engineer Miller. (Pet. Ex. 31; Joint Stip., ¶ 51)

242. On January 7, 2022, Mr. John Ellis, on behalf of Mr. Benjamin, sent directly to State Mining Engineer Miller USFWS's concurrence that there is no federal nexus to the proposed expansion and that the Neuse River waterdog is not present in the relevant portion of Crabtree Creek. (Pet. Ex. 33; Joint Stip. ¶ 52) (Mr. Benjamin' letter is hereinafter referred to as the "USFWS Letter.") Director Wrenn also received a copy of this letter at that time. (T. pp. 7.1585–1586; Joint Stip., ¶ 53)

243. As is evident from Petitioner's Exhibit 33, the USFWS Letter from was on USFWS letterhead and bore an electronic signature. (Pet. Ex. 33)

244. Respondent did not issue or deny the modification of the permit sought by the Application within 30 days of receiving the USFWS Letter. (T. p. 7.1588)

245. Director Wrenn confirmed in a weekly update in early January that "USFWS provided the official consultation determination on letterhead for our files on January 7, 2022." (Pet. Ex. 35; Joint Stip., ¶ 54; T. pp. 6.1289–1291) Director Wrenn stated in this update that Respondent's 30-day review period under N.C. Gen. Stat. § 74-51(b) began that day, and a decision was due by Respondent on the Application by February 6 (a Sunday, which Director Wrenn stated "had traditionally" defaulted to the last business day before the deadline, which was February 4). (Pet. Ex. 35)

246. Respondent published the USFWS Letter to Respondent's website on January 11, 2022. (T. p. 7.1589; Pet. Ex. 34)

247. Respondent did not issue or deny the modification of the permit sought by the Application within 30 days of posting the USFWS Letter to Respondent's website. (T. pp. 7.1589–1590)

248. On January 14, 2022, (7 days after Respondent received the USFWS Letter), State Mining Engineer Miller informed Petitioner that Respondent, and specifically Director Wrenn, was going to require Petitioner to submit a "hard copy" of Mr. Benjamin's letter to Respondent before the "30-day clock" to make a decision on the Application would start. (T. pp. 7.1592–1593; Pet. Ex. 37)

249. On January 18, 2022, Mr. Ellis of USFWS wrote to Respondent and informed Respondent that the USFWS letter emailed from him to State Mining Engineer Miller and Director Wrenn was the "official" correspondence" of USFWS and that USFWS was not issuing "hard copies" of its letters due to a Covid lockdown. (T. pp. 7.1592–1593; Pet. Ex. 37)

250. On January 18, 2022, Petitioner printed out the emailed USFWS Letter from and hand-delivered it to Respondent. (T. p. 7.1593) Only at that time did Respondent consider the Application complete and ripe for decision. (T. p. 7.1593)

251. On this same date, Respondent was drafting language for the modified permit. (T. pp. 7.1594–1596; Pet. Ex. 48)

252. Respondent did not issue its decision denying the Application until February 17, 2022, well after 30-days from January 7, 2022, the date Respondent originally received the USFWS Letter. (Pet. Ex. 50)

253. Director Wrenn did not know what the consequence was of Respondent failing to take action on the Application by the deadline prescribed by the Mining Act, although he did seek a legal opinion on the question. (T. p. 6.1388-1389)

254. Respondent publishes a Surface Mining Manual on its website that is considered Respondent's recommended procedures and best practices. (T. p. 6.1458; Resp. Ex. 149, Miller Dep. Vol. I, 50:4–25; Pet. Ex. 3) The Surface Mining Manual serves as a guideline for permit applicants and is used by Respondent staff as a protocol in evaluating permit applications under the Mining Act. (T. p. 6.1458)

255. With respect to public hearings, the Surface Mining Manual states, "Note: comments must be relevant to the seven criteria listed under G.S. § 74-51 of the Mining Act of 1971. The Mining Act does not address truck traffic, noise, property values or aesthetics." (T. p. 6.1459; Pet. Ex. 3, §§ 3–7, 8–4)

256. Director Wrenn, during his tenure as Director, never instructed anyone within the Division to revise the Surface Mining Manual and post it on the Division's website. (T. pp. 6.1459–1460)

257. In accordance with the Surface Mining Manual, State Mining Engineer Miller instructed the audience at both public hearings on the Application that "offsite truck traffic on public roads, noise, and potentially negative impacts on property values are not within the jurisdiction of the Mining Act of 1971. These items are more properly addressed through local zoning ordinances." (Resp. Ex. 149, Miller Dep. Vol. I, 74:6–25; T. p. 6.1460; Pet. Ex. 4) Mr. Miller acknowledged that he agreed with this statement at the time of the public hearings and didn't know when he changed his mind. (Resp. Ex. 149, Miller Dep. Vol. I, 75:14–77:10)

258. The Surface Mining Manual does not make an exception to this guideline for applications being considered under N.C.G.S. § 74-51(d)(5). (T. pp. 6.1461–1462)

259. Director Wrenn reviewed the comments that State Mining Engineer Miller delivered at the public hearings prior to the hearings and did not instruct Miller to revise the comments to reflect that truck traffic and noise are within the jurisdiction of the Mining Act. (T. pp. 6.1462–1464) Director Wrenn also did not correct Miller on this point during either public hearing. (T. pp. 6.1463–1464) Director Wrenn took no steps after the hearing to clarify that truck traffic and noise are within the jurisdiction of the Mining Act. (T. p. 6.1464)

260. Respondent also sent communications to the local press prior to the public hearings, stating: "G.S. § 74-51 lists seven denial criteria that can be considered by the Department in making its decision to grant or deny a mining permit. Please note that the Act does not have jurisdiction over offsite truck traffic, noise, and potential impacts to property values." (T. pp. 6.1465–1466; Pet. Ex. 52; Resp. Ex. 149, Miller Dep. Vol. III, 447:22–449:3)

261. The Mining Review stated that the issue of "truck traffic" was "outside the scope of the permit." (Resp. Ex. 149, Miller Dep. Vol. I, 134:17–135:9; Pet. Ex. 14; Pet. Ex. 62 at 6)

262. Despite that, Director Wrenn considered and relied upon the impacts of truck traffic and noise on the purposes of the Park in his decision to deny the Application. (T. p. 6.1467; Pet. Ex. 19)

263. Michael S. Regan was DEQ Secretary from January 2017 through March 2021.[2]

264. Danny Smith was appointed Interim Division Director effective December 1, 2018.[3]

265. On January 29, 2019, shortly after Smith's appointment, Secretary Regan signed a "Delegation of Authority" under N.C. Gen Stat. § 143B-10 for the Division Director to "administer the regulatory provisions" of the Mining Act and to sign on behalf of the DEQ, all instruments reasonably necessary to exercise the delegated authority. (*See* Respondent's Notice of Response and Objections, Ex. 1)

266. In February of 2020, Brian Wrenn became Director of the Division. (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 18:6-18)

267. In June of 2021, Elizabeth S. Biser became DEQ Secretary and is the current Secretary.[4]

268. By letter dated July 14, 2021, to DEQ Chief Deputy Secretary John Nicholson, Biser removed herself from participating in three DEQ matters, one of which was Petitioner's Application. (Sushma Masemore Apr. 14, 2023 Aff., Ex. A) Secretary Biser specifically recused herself from participating in "applications, permits … deliberative processes, or final agency actions" pertaining to the excluded matters. (*Id.*) Secretary Biser delegated to Mr. Nicholson the responsibility for this matter. (*Id.*)

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[2] *See* https://www.deq.nc.gov/about/leadership/michael-s- regan#:~:text=Governor%20Roy%20Coope%20r Michael,Carolina's%20environment%20and%20natural%20resources; https://www.epa.gov/aboutepa/epa-administrator.

[3] *See* *https://www.myncma.org/ncdeq-announces-organizational-staffing-decisions/*

[4] *See* https://www.deq.nc.gov/about/leadership/elizabeth-s-biser#:~:text=Biser,-Secretary&text=Governor%20Roy%20Cooper%20named%20Elizabeth,Environmental%20Quality%20in%20 June%202021.

269. After Mr. Nicholson left DEQ in January 2022, Secretary Biser issued an almost identical letter, dated February 14, 2022, to DEQ Assistant Secretary Sushma Masemore. (Masemore Aff., Ex. B) Secretary Biser again recused herself from participating in, among other things, "final agency actio'ns" with respect to the Application and assigned her authority to Assistant Secretary Masemore. (*Id.*)

270. Respondent failed to produce any evidence that Secretary Biser ever issued a proper delegation of authority to Director Wrenn or the Division Director, as required by the Mining Act and the Executive Organization Act.

CONCLUSIONS OF LAW

I. Introduction

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and the subject matter pursuant to Chapter 150B-23, et seq. of the North Carolina General Statutes. All necessary parties have been joined and have received proper notice of the hearing in this matter. Notice of Hearing was provided to all parties in accordance with N.C. Gen. Stat. § 150B- 23(b) and (c).

2. In this contested case, Petitioner bears the burden of proving by a preponderance of the evidence that: (1) the agency substantially prejudiced its rights; and (2) the agency acted erroneously, arbitrarily or capriciously, used improper procedure, or failed to act as required by law or rule. N.C. Gen. Stat. §§ 150B-23(a), 150B-25.1(a); *Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, Div. of Water Res.*, 271 N.C. App. 674, 686-87, 845 S.E.2d 802, 811-12 (2020).

3. Respondent concedes that its denial of the Application has substantially prejudiced Petitioner. Accordingly, the Undersigned holds that Respondent substantially prejudiced Petitioner's rights under the substantial prejudice element of N.C.G.S. § 150B-23(a) by denying the Application.

4. To the extent that the findings of fact contain conclusions of law or the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *See Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

5. North Carolina's Mining Act of 1971, N.C. Gen. Stat. § 74-46 *et seq.*, governs the permitting process for mining operations in the State. The Mining Act recognizes that, although it is "not practical to extract minerals required by our society without disturbing the surface of the earth," mining can be conducted to "minimize its effects on the surrounding environment." N.C. Gen. Stat. § 74-47. Accordingly, the Mining Act allows for mining while requiring "reasonable provisions" to protect the surrounding environment to the "greatest practical degree." N.C. Gen. Stat. § 74-48.

6. The Mining Act mandates that Respondent "*shall* grant or deny the permit requested as expeditiously as possible." N.C. Gen. Stat. § 74-51(b) (emphasis added). If a public hearing is

held, the decision must be made "within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department." *Id.*

7. Respondent issued seven ADI's for additional or supplemental information to Petitioner over the 681 days that the Application was under review.

8. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith" or "whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgement." *Lewis v. N.C. Dep't of Human Res.*, 92 N.C. App. 737, 740, 375 S.E. 2d 712, 714 (1989). An arbitrary or capricious agency decision is one that "lacks a rational basis—where there is no substantial relationship between the facts disclosed by the record and conclusions reached by the [agency]." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 60, 344 S.E.2d 272, 278 (1986); see also *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580, 710 S.E.2d 350, 354 (2011) (defining arbitrary or capricious as "not supported by substantial evidence"). In applying an arbitrary or capricious standard, the court must determine whether the agency made a good faith judgment, "after considering all relevant factors, including possible alternative or mitigative measures." *State of N.C. v. Hudson*, 731 F. Supp. 1261, 1268 (E.D.N.C. 1990), aff'd, 940 F.2d 58 (4th Cir. 1991).

9. An agency's denial of a permit is arbitrary or capricious where it is based on "[s]peculative assertions" or "mere opinion evidence" rather than competent substantial evidence. *Weaverville Partners, LLC v. Town of Weaverville Zoning Bd. of Adjustment*, 188 N.C. App. 55, 654 S.E.2d 784 (2008). An agency's permit denial also is arbitrary or capricious where the agency applies a factually unsupported or unreasonable standard. *See Sanchez*, 211 N.C. App. at 581–83, 710 S.E.2d at 355–56.

II. Respondent Failed to Act on the Application Within the Statutory Deadline

10. The Mining Act mandates that, if a public hearing is held, the decision to grant or deny the permit must be made "within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department." N.C. Gen. Stat. § 74-51(b).

11. DEMLR's final ADI sought information from the U.S. Fish & Wildlife Service (USFWS) concerning the project's potential impact on the Neuse Waterdog. On January 7, 2022, the USFWS sent a letter (the "USFWS Letter") via e-mail to Director Wrenn stating that a Section 7 [Endangered Species Act] consultation was not required. (Pet. Ex. 33)

12. Upon receipt of the USFWS Letter, Director Wrenn informed DEQ Senior Management about the statutory significance of this letter. (Pet. Ex. 35) (T 6.1290). Director Wrenn wrote, "On January 7th USFWS provided the official consultation determination on letterhead for our files. DEMLR's 30-day review period has begun. A decision to approve, deny, or request additional information must be made by Sunday February 6th. When the deadline falls on a weekend or holiday, the Mining Program has traditionally defaulted to the last business day before the deadline which would be February 4th."

13. On January 11, 2022, four days after receipt, DEMLR posted the USFWS Letter on its public-facing website.

14. In contradiction of Director Wrenn's clear statement establishing the February 4th deadline, David Miller, the State's Mining Engineer, sent an email to Petitioner on Friday, January 14, 2022, at 6:00 pm, stating that "he was informed that your clock stops when Brian [Director Wrenn] receives the hard copy of Pete Benjamin's [USFWS] letter on the Neuse River Waterdog. Brian said he hasn't seen it yet." Respondent then told Petitioner that until a hard copy of the USFWS Letter was received by Director Wrenn, the 30-day clock would not start. (Miller Dep. Vol. II, 330). This is the USFWS Letter that was addressed to Director Wrenn, received by him on January 7, 2002, posted on the public website by DEMLR on January 11, 2022, and relied upon by Director Wrenn to inform Senior Management at DEQ that the deadline to make a decision on the application was February 4, 2022.

15. Petitioner contacted USFWS to obtain the hard copy of the USFWS Letter for Respondent. In response to this request, on January 18, 2022, USFWS sent an e-mail to Petitioner and Respondent stating that, due to COVID, the agency officials were not physically in the office and that no hard copy was mailed or forthcoming. (Pet. Ex. 37)

16. Respondent accepted from Petitioner a printed hard copy of the website document in fulfillment of its request. (Pet. Ex. 38) According to the Respondent, it was only the receipt of a printed version of the USFWS Letter - the same letter Respondent had already received via e-mail on January 7, 2022, - that would start the statutory 30-day clock.

17. This Tribunal finds that State Mining Engineer Miller's January 14, 2022, request to Petitioner to provide a hard copy of the USFWS Letter was a pretext to avoid the actual 30-day deadline of February 4, 2022. The only plausible explanation for this attempt to reset the clock is that, late in the process, Respondent decided to deny the Application but needed more time to devise a reason for the denial. This last-minute attempt to reset the clock is a quintessential example of bad faith and unlawful tactic to circumvent the statutory timelines for processing applications.

18. Not only was Respondent's request for a hard copy of the USFWS Letter already in its possession a transparent attempt to evade a statutorily-mandated deadline, the request was not authorized under N.C. Gen. Stat. § 74-51(b). This section requires that "[t]he Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department." The last-minute, Friday evening request for a hard copy of the USFWS Letter was not "relevant" or "reasonably" required and, therefore, cannot be the basis for delaying the February 4, 2022, deadline to act. Respondent already possessed the information (i.e., the USFWS Letter), posted it on its website, and Director Wrenn had already relied on it when he established the February 4, 2022, deadline to act. Moreover, Respondent never did receive what State Mining Engineer Miller originally requested, i.e., a hard copy of the

USFWS Letter from USFWS, settling instead, for a simple printout of the document from Respondent's own website.

19. After the actual February 4, 2022, deadline passed without any action taken on the Application, the Tribunal holds that the Application was approved pursuant to the governing law. The Mining Act differs from various environmental and statutory regulatory permitting schemes in that the Mining Act specifies that "a permit shall be granted" if Respondent does not make an adverse finding under N.C. Gen. Stat. § 74-51(e). Respondent's attempt to reset the February 4, 2022, deadline was ineffectual. Any interpretation of the Mining Act that would require returning the application to Respondent for another review after its failure to act by the deadline (e.g., remand) contradicts the statutory scheme established by the General Assembly and would thus render the statutory timing mandate a nullity.

III. Director Wrenn Did Not Have the Authority to Deny the Application

20. In the Mining Act, the North Carolina General Assembly granted sole authority to Respondent, when acting within the proper deadlines, to approve or deny mining permits. *See* N.C.G.S. § 74-51(a) ("Any operator desiring to engage in mining shall make written application to the Department for a permit"); N.C. Gen. Stat. § 74-51(d) ("The Department may deny the permit upon finding …"); N.C. Gen. Stat. § 74- 49(4) (defining "Department" to mean "the Department of Environmental Quality").

21. The Mining Act states that "whenever in this Article the Department is assigned duties, they may be performed by the Secretary or an employee of the Department designated by the Secretary." N.C. Gen. Stat. § 74-49(4).

22. The Executive Organization Act of 1973 allows the "the head of each principal State department" to "assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department." N.C. Gen. Stat. § 143B-10(a).

23. In January of 2019, then DEQ Secretary Michael Regan signed a "Delegation of Authority" under N.C. Gen. Stat. § 143B-10 for the DEMLR Director to administer the Mining Act provisions. (Respondent's Notice of Response and Objections to Order for Delegation of Authority, Ex. 1). Director Wrenn became DEMLR's Acting Director in February of 2020. (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 18:6-18)

24. Secretary Elizabeth Biser replaced Mr. Regan as DEQ Secretary in June of 2021. By letter dated July 14, 2021, to DEQ Chief Deputy Secretary John Nicholson, Secretary Biser removed herself from participating in three DEQ matters, one of which was the Application. (Sushma Masemore Aff., Ex. A). In this letter, Secretary Biser specifically recused herself from participating in "applications, permits … deliberative processes, or final agency actions" pertaining to the excluded matters. (*Id*.). After Mr. Nicholson left DEQ, Secretary Biser issued an almost identical letter, dated February 14, 2022, to DEQ Assistant Secretary Sushma Masemore. (Masemore Aff., Ex. B). Secretary Biser again recused herself from participating in, among other things, "final agency actions" with respect to the Application, assigning her authority to Assistant Secretary Masemore. (Masemore Aff., Ex. B)

25. Secretary Biser delegated the permitting authority for the Wake Stone application to DEQ Assistant Secretary Masemore. *See* February 14, 2022 letter from Secretary Biser to Assistant Secretary Masemore. ("As Assistant Secretary, you will be responsible for the oversight of any issues that arise concerning [Wake Stone: Triangle Quarry Mining Permit].")

26. The case law cited by Respondent in its response to this Tribunal's request for supplemental briefing on the issue of delegation supports the conclusion Directory Wrenn did not have the authority to approve or deny the Application. Specifically, even assuming, *arguendo*, Secretary Regan's delegations remained in effect, they were valid only until subsequent changes are made by the new office holder. *See United States v. Wyder,* 674 F.2d 224, 227 (4th Cir. 1982) (holding that a delegation by the Attorney General remained in effect under a new Attorney General because "[t]he acts of administrative officials continue in effect after the end of their tenures until revoked *or altered by their successors* in office") (emphasis added). That is precisely what occurred in this case. Secretary Biser's February 14, 2022, delegation to Masemore for the Wake Stone permitting process was precisely the type of subsequent action referred to in *Wyder,* above, that extinguished previous delegations for this matter.

27. Director Wrenn had no authority to approve or deny the Application. Accordingly, Respondent failed to use proper procedure and failed to act as required by law under N.C. Gen. Stat. § 150B- 23(a)(3) and (5).

28. This Tribunal holds that Respondent's failure to delegate authority in adherence to the governing law resulted in a denial of the Application that has no legal effect. Consequently, Respondent did not meet the statutory deadline. As discussed above in Conclusion of Law number 19, due to the failure of Respondent to act on the Application, the permit must be granted by operation of law.

IV. Respondent's Denial of the Application Was Arbitrary or Capricious[5]

29. Under the Mining Act, a mining operator may apply to modify an existing mining permit to add neighboring land. N.C. Gen. Stat. § 74-50(a). Respondent "may deny" the permit application upon finding one of seven denial criteria that cannot be sufficiently mitigated. N.C. Gen. Stat. § 74-51(d), (e). A permit "shall be granted" if Respondent finds none of these criteria to be applicable or if the applicant mitigates any "adverse effects" found "as determined necessary by the Department." N.C. Gen. Stat. § 74-51(e).

30. N.C. Gen. Stat. § 75-51(d)(5) permits denial of a mining permit application if the Respondent determines that the mining operation "will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area" that cannot be mitigated as determined necessary by Respondent. N.C. Gen. Stat. § 74-51(d)(5).

31. The Mining Act does not define "significantly adverse effect."

[5] Notwithstanding the Conclusions of Law contained in Section III., above, that Director Wrenn was without the authority to deny the Application, the following discussion imputes Director Wrenn's actions to Respondent.

32. The Application was pending before Respondent for 681 days before Director Wrenn issued a written decision denying the Application. (T. pp. 1.131, 6.1447; Pet. Ex. 50)

33. Director Wrenn denied the Application because he determined that the "proposed quarry is located and designed such that normal operation would have significantly adverse effects on the purposes of the Park through noise, visual, and traffic impacts." (Pet. Ex. 50)

34. Director Wrenn's denial of the Application on the grounds that the proposed expansion would have a significantly adverse effect on the purposes of the Park through noise, visual, and traffic impacts was arbitrary or capricious, as follows:

A. Noise

35. Early in the process Respondent identified a need for more expertise to determine the impact the noise generated by the proposed mine pit might have on the Park. Petitioner agreed to engage an expert, WSP, who would perform an acoustical study. WSP developed a protocol for the acoustical study and Respondent approved that protocol. Included in the approved protocol were two important conditions. First, Petitioner would submit a draft of the acoustical study to Respondent for comment before the study was finalized. Second, Petitioner would conduct a literature search for the purpose of defining and quantifying the criterion of "significantly adverse effect" used in the Mining Act. (T. p. 2.430; Pet. Ex. 97)

36. As required by the protocol, Petitioner submitted the Acoustical Report in draft form to provide Respondent an opportunity to comment before the draft was finalized and accepted. (T. p. 2.284; Joint Stip., ¶ 44)

37. Respondent made suggested modifications to the draft Acoustical Report and requested additional information. WSP provided additional information responsive to Respondent's requests. (T. pp. 1.113–114, 2.533–544; Pet. Ex. 18)

38. Before Respondent accepted the final Acoustical Report, Respondent requested additional justification for the selection of the 10 dBA threshold. Petitioner provided the requested information. Petitioner then submitted the final Acoustical Report with the additional information to Respondent and Respondent accepted it on March 12, 2021. (T. pp. 1.113–114, 6.1491; Pet. Ex. 89)

39. At no time did Respondent suggest or require that WSP or Petitioner use any threshold other than 10 dBA for determining if noise constituted a significantly adverse effect. Nor did Respondent reject WSP's use of a 10 dBA threshold. (T. p. 2.282)

40. Respondent decided internally to apply a 15 percent safety factor to the 10 dBA threshold. The basis for the 15 percent safety factor was unrelated to any noise or acoustic study. Instead, the safety factor came from the state's dam construction program where a 15 percent safety factor is applied to engineering calculations dealing with dam construction, the catastrophic failure of which could result in potential serious harm to life and/or property.

41. Not only does the safety factor have no basis in noise or acoustical engineering, in applying the factor Respondent found that the 15 percent reduction in noise only corresponded to a reduction to 9.82 dBA due to the logarithmic nature of the dBA scale. This adjustment concerned Respondent, not because the 15 percent reduction had no basis in science or acoustical engineering, but because Respondent believed that the public would think the 9.82 dBA threshold would not appear low enough. State Mining Engineer Miller explained, “If you told the public that we reduced the noise level by 15 percent to come up for a level, and we throw out that number, I’m sure I would be hearing howling all over the place.” and that an “…0.18 decibels drop, energy speaking, I might be [scientifically] correct, but that would not be a good optic for the situation.” (Miller Dep. Vol. II, 357)

42. Rather than making the scientifically appropriate calculation to develop a new threshold, Respondent simply assumed a linear scale and deducted 15 percent from the 10 dBA threshold which brought the new threshold to 8.5 dBA. Apparently, the result was more palatable to the public in Respondent’s eyes. Mr. Miller admitted that, because of the logarithmic form of the dBA scale, the reduction to 8.5 dBA was a massive 3160 percent reduction in noise rather than the 15 percent “safety factor” borrowed from the dam safety program. (Miller Dep. Vol. II, 358)

43. Respondent's application of a safety factor lacked any scientific or acoustical engineering justification, rendering the application of the safety factor arbitrary. Respondent then took this arbitrary standard and deliberately misapplied the 15 percent reduction solely to mitigate potential public comments, assuming that either the public would be unable to understand the intricacies of a logarithmic noise scale, or that the public would not grasp the rationale behind the reduction.

44. Respondent, having now moved the goalpost, then compared the results of the Acoustical Study against the new and arbitrarily calculated 8.5 dBA threshold. The study demonstrated that the proposed transfer of the mining pit would not exceed this new threshold and, therefore, would not lead to a significantly adverse effect.

45. On January 20, 2022, 652 days into a 681-day Application review process, Director Wrenn gave a PowerPoint presentation to Respondent's leadership, including Assistant Secretary Sushma Masemore, to provide an update on the Application. (T. p. 6.1305). Based on the results of the Acoustical Study, Director Wrenn informed Respondent's leadership that "[a]ll predicted noise levels were below the 8.5 dBA level of increase." (T. pp. 6.1305, 6.1308; Pet. Ex. 58)

46. On February 17, 2022, Respondent moved the goalpost again. In his memorandum attached to his denial letter (Pet. Ex. 51), Director Wrenn ignored the use of the Acoustical Study’s recommended 10 dBA threshold and the safety-factor adjusted threshold of 8.5 dBA. Director Wrenn, a person with no engineering degree, no graduate degree, no mining experience, and no licenses or certifications, applied a new absolute threshold of 55 dBA. (Pet. Ex. 51). He chose this threshold because it was the standard used in the 1980 noise impact analysis done for Petitioner's original permit, based in turn on the standard used in a 1970 analysis of noise impacts to the Everglades National Park from the proposed Everglades Jetport (the "Everglades Study").

47. Director Wrenn never discussed the use of the Everglades Study noise threshold with the public or Petitioner. (Resp. Ex. 149, Miller Dep. Vol. III, 474:17-475:9) Director Wrenn never discussed the use of the Everglades Study with State Mining Engineer Miller–a professional engineer and the lead technical reviewer assigned to evaluate the Application.

48. Director Wrenn used the Everglades Study without any meaningful engineering or scientific analysis as to whether it was appropriate to use the Everglades Study for the Application. That Director Wrenn had no reasonable scientific understanding of the Everglades Study was evident when he applied the Everglades Study. He was unconcerned that the Everglades Study was based on a different acoustical measurement (a day and night Ldn measurement) than the Acoustical Study models submitted under an approved protocol by Petitioner (based on a Leq measurement for working hours only, because Petitioner does not operate at night) (T. pp. 3.589–590, 7.1688–1689).

49. Director Wrenn ignored a carefully developed and fully vetted study, created and submitted under an approved protocol, by Petitioner's expert in acoustical engineering. Director Wrenn ignored the work of his own staff performed over the first 652 days of the Application review. Very late in the review process, Director Wrenn arbitrarily selected a new noise threshold based on a "1970 analysis [52-year-old study] of the noise impacts to the Everglades National Park from the proposed jetport." Director Wrenn then made fundamental scientific errors when attempting to apply the study to the Application. Even Respondent's noise expert Dr. Stewart was critical of Director Wrenn's noise analysis.

50. This Tribunal acknowledges that, had Director Wrenn been properly delegated the authority to make the decision on the Application, he could have disagreed with his highly experienced staff. However, this Tribunal's review must be based on the record developed during Respondent's entire evaluation of the Application. Director Wrenn's memorandum does not even attempt to explain how or why the scientific studies and evidence produced during the entire review period, including ones shared with the public, were incorrect or inapplicable. These are the same scientific studies that Respondent required Petitioner to produce and that Director Wrenn himself relied on when he made a presentation to his Senior Management on January 20, 2022, saying that "All predicted noise levels were below the 8.5 dBA level of increase."). These are the same scientific studies that led State Mining Engineer Miller to tell Petitioner on February 9, 2022 – eight days before the denial – that "good science was on its [the Petitioner's] side." Several paragraphs of unsupported statements riddled with basic errors, written on the day of the denial, cannot overcome the record of careful and scientifically supported analysis showing that there would be no significant adverse noise effects.

51. This Tribunal finds that it would be difficult to imagine a set of facts more demonstrative of an arbitrary and capricious government action. The abrupt and unsupported finding with respect to noise is precisely the type of governmental action that the statutory and regulatory application review process was designed to prevent, and the Administrative Procedures Act was enacted to correct. Thus, Respondent's denial of the Application was arbitrary and capricious under N.C. Gen. Stat. § 150B-23(a)(4).

B. Visual Impacts

52. Respondent denied the Application because it determined that the "proposed quarry is located and designed such that normal operation would have significantly adverse effects on the purposes of the Park through noise, visual, and traffic impacts." (Pet. Ex. 50)

53. While the Application review and subsequent record for the visual impacts is less extensive than the noise issue discussed above, the Undersigned holds that Director Wrenn's findings with respect to visual impacts were no less arbitrary and capricious.

54. On February 10, 2021, Respondent issued an ADI requesting, *inter alia*, "information regarding [visual] screening. In March of 2021, Petitioner submitted to Respondent photos of the Foxcroft Lake area taken in the summer and winter, which Respondent concluded showed that the density of tree vegetation provided satisfactory visual screening for this location. (Resp. Ex. 149, Miller Dep. Vol. I, 161:19–162:13; Pet. Ex. 20) Petitioner later proposed a DOT-style wall to provide both noise buffering and further visual screening. (T. pp. 2.306–308; Pet. Ex. 58)

55. Following the submittal of this information, Respondent received visual renderings of the Foxcroft Lake area from the Umstead Coalition that brought into question whether the proposed operations at Wake Stone would be visible from this area. Director Wrenn admitted that the visual renderings were not accurate and were misleading, but relied on them, nonetheless.

56. In January 2022, State Mining Engineer Miller conducted a non-scientific visibility analysis in an attempt to resolve this purported conflict in renderings. (Resp. Ex. 149, Miller Dep. Vol. III, 499:12–21; 506:13–14; Pet. Ex. 56) He took pictures on his cell phone as he walked up the ridge above Foxcroft Lake to see if cardboard he had placed at certain intervals near the proposed land disturbance could be seen in the photos. (Resp. Ex. 149, Miller Dep. Vol. III, 501:3–10; Pet. Ex. 56) Based on the cardboard being visible in some of the photos, State Mining Engineer Miller concluded that Petitioner "should propose additional means to reduce visibility of the disturbance or the effect of the disturbance." (Pet. Ex. 56)

57. State Mining Engineer Miller contacted David Lee of Wake Stone and specifically asked if Petitioner would be willing to plant several staggered rows of evergreen trees to assist with visual mitigation in the Foxcroft Lake area. (T. pp. 7.1660–1661). Mr. Lee made clear to Miller during that phone call, and in a subsequent email, that Petitioner was "willing to consider the addition of vegetative screening near the head end of the lake, the one area where the potential exists for minimal view of the quarry expansion from Umstead State Park." State Mining Engineer Miller stated "there is a marginable chance that the area would not be necessarily that visible once construction starts. Why should the State require the company to make an expenditure that may not be necessary? If it becomes obvious it is necessary, the company is agreeing to do it." (T. pp. 7.1660–1664; Pet. Ex. 57, 121; Resp. Ex. 149, Miller Dep. Vol. III, 517:19–518:8)

58. On February 9, 2022, Director Wrenn made a site visit to the Park, which according to the Director, was a major factor in his decision to deny the Application. However, during the visit Director Wrenn did not climb the ridgeline near Foxcroft Lake and instead made his observations from the valley below the ridgeline. Director Wrenn simply guessed that a park visitor standing

on the ridgeline would be able to see the proposed operation at Wake Stone. Not surprisingly, having not actually climbed the ridge, Director Wrenn could not quantify the size of the Park area from which he guessed the Wake Stone operations would be visible. Director Wrenn took no photos to support his guess. Director Wrenn's statement that someone standing on the ridge could see the operations was unsupported by substantial evidence.

59. Furthermore, in his February 17, 2022, memorandum supporting his denial, Director Wrenn made a conclusory statement, without providing supporting evidence, that "[a]dditional screening would likely have little mitigating effect on the visual impacts to the purposes of the park." Director Wrenn provided no discussion or evidence as to what, if any, "additional screening" he considered. He provided no discussion or evidence as to "mitigating effect" the "additional screening" strategies he considered might have had. Finally, he simply concluded that "additional screening" would be "unlikely" to mitigate the visual impacts he guessed would be present. This "unlikely" standard is arbitrary and capricious in that it "indicate[s] a lack of fair and careful consideration or fail[s] to indicate any course of reasoning and the exercise of judgement." *Lewis v. N.C. Dep't of Human Res*., 92 N.C. App. 737, 740, 375 S.E. 2d 712, 714 (1989).

60. The Mining Act specifically anticipates some level of visual impact resulting from mining operations and provides that a permit may include "a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds screening to be feasible and desirable." N.C. Gen. Stat. § 74-51(f). Director Wrenn's conclusory statements provided no information related to the technical feasibility, economic feasibility, regulatory feasibility, or timeline and resource feasibility. This approach stands in stark contrast to State Mining Director Miller's approach, which included a discussion with Petitioner about the possibility of planting staggered rows of evergreen trees to address visual concerns in the Foxcroft Lake Area based on State Mining Engineer Miller's cardboard test.

61. Director Wrenn simply guessed that there would be a visual impact, then failed to explain what if any mitigation strategies he considered, and finally assumed without any supporting evidence that the unidentified strategies would not be likely to mitigate supposed impact. Director Wrenn's "finding" with respect to visual impact rests entirely on unsupported assertions. Against these unsupported assertions is Director Wrenn's own statement on January 20, 2022, in a presentation to senior management that the Petitioner's sound barrier wall proposal "will provide adequate visual screening for the Park…" (Pet. Ex. 58).

62. As this Tribunal noted with respect to the noise discussion above, had Director Wrenn been duly authorized to make the final decision on the Application, he could have changed his mind or disagreed with his highly trained engineering staff. However, his decision must be supported by substantive and relevant evidence. It was not. On January 20, 2022, Director Wrenn concluded that there would be adequate screening for the Park. Then, 18 days later, on February 17, 2022, Director Wrenn reversed his finding based on no substantial evidence. Director Wrenn's decision to deny the Application lacked a rational basis, was not supported by substantial evidence, lacked fair and careful consideration, and was based on speculative assertions without

factual or quantitative support. Thus, Respondent's denial of the Application was arbitrary and capricious under N.C. Gen. Stat. § 150B-23(a)(4).

C. Traffic

63. Respondent denied the Application because Respondent determined that the "proposed quarry is located and designed such that normal operation would have significantly adverse effects on the purposes of the Park through noise, visual, and traffic impacts." (Pet. Ex. 50)

64. For the first 652 days of the review process, there was little discussion related to traffic impacts on the Park and any information that was submitted and reviewed confirmed that any changes in traffic resulting from the project would not adversely impact the Park. None of the ADI's requested any information about traffic or mitigation of traffic concerns. (T. p. 1468) Respondent performed no traffic study or analysis. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 390:6–10) At Respondent's request, the North Carolina Department of Transportation reported that it was satisfied with the entrance to the quarry and opined the traffic flow there was good. (T. pp. 6.1456–1457; Resp. Ex. 149, Miller Dep. Vol. III, 544:2–11) Director Wrenn's January 20, 2022, PowerPoint presentation to DEQ leadership contained no discussion about traffic. (Resp. Ex. 148, Director Wrenn Dep. Vol. II, 365:10–12)

65. Respondent's own Surface Mining Manual states that, with respect to public hearings, "Note: comments must be relevant to the seven criteria listed under G.S. § 74-51 of the Mining Act of 1971. The Mining Act does not address truck traffic, noise, property values or aesthetics." (T. p. 6.1459; Pet. Ex. 3, §§ 3–7, 8–4).

66. In accordance with the Surface Mining Manual, State Mining Engineer Miller instructed the audience at both public hearings on the Application that "offsite truck traffic on public roads, noise, and potentially negative impacts on property values are not within the jurisdiction of the Mining Act of 1971. These items are more properly addressed through local zoning ordinances." (Resp. Ex. 149, Miller Dep. Vol. I, 74:6–25; T. p. 6.1460; Pet. Ex. 4)

67. Respondent also sent communications to the local press prior to the public hearings, stating: "G.S. § 74-51 lists seven denial criteria that can be considered by the Department in making its decision to grant or deny a mining permit. Please note that the Act does not have jurisdiction over offsite truck traffic, noise, and potential impacts to property values." (T. pp. 6.1465–1466; Pet. Ex. 52; Resp. Ex. 149, Miller Dep. Vol. III, 447:22–449:3)

68. The Mining Review prepared by State Mining Engineer Miller stated that the issue of "truck traffic" was "outside the scope of the permit." (Resp. Ex. 149; Miller Dep. Vol. I, 134:17–135:9; Pet. Ex. 14; Pet. Ex. 62 at 6) Director Wren ultimately denied the Application based, in part, on traffic, an impact Respondent specifically instructed the public they could not comment on.

69. Despite 652 days of review demonstrating that traffic was not a concern, on the 681st day, Director Wrenn stated in his memorandum in support of his denial that the "proposed expansion would extend the timeline for truck traffic and would result in negative impacts on the purpose

of the Park through public interaction with quarry traffic." The Undersigned holds that this is an unsupported conclusion.

70. While Director Wrenn characterized the project as an expansion, he admitted that truck traffic volume was not expected to increase if the Application were granted. (T. p. 6.1457; Resp. Ex. 149; Miller Dep. Vol. III, 537:20-538:4). Director Wrenn's conclusion that the project would "expand the timeline" is contradicted by his acknowledgment that traffic volume was not expected to increase and DOT's conclusion that existing traffic flow was good.

71. In his memorandum, Director Wrenn also cites a statement made by Umstead Park Superintendent Scott Letchworth that traffic at the Harrison Road entrance has increased dramatically with visitors queuing outside the entrance waiting for parking spots to open up. Any change in interactions with truck traffic would not be the result of the project, as Director Wrenn agreed there is no expected increase in truck volume, but rather because of existing mismanagement of parking facilities.

72. This Tribunal finds that Director Wrenn's conclusion regarding the negative impact of the project on the Park due to traffic is entirely unsupported and contradicted by the evidence. His decision lacked fair and careful consideration, rendering Respondent's reliance on traffic impacts as part of the denial of the Application arbitrary and capricious under N.C.G.S. § 150B-23(a)(4).

V. The Denial of the Application was Unlawful

73. Notwithstanding the arbitrary and capricious denial of the Application, Respondent erred in applying the Mining Act.

74. "[T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform." *High Rock Lake Partners, LLC v. N.C. DOT*, 366 N.C. 315 (2012*); In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980) (citing *Garvey v. Freeman*, 397 F.2d 600 (10th Cir.1968)); *see also Wells v. Consol. Jud'l Ret. Sys. of N.C.*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) ("[I]t is ultimately the duty of courts to construe administrative statutes; courts cannot defer that responsibility to the agency charged with administering those statutes."). In making this determination, this Tribunal applies the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise. *In re Broad & Gales*, 300 N.C. at 280, 266 S.E.2d at 655. This Tribunal gives great weight to an agency's interpretation of a statute it is charged with administering, *e.g.*, *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999); *Wells*, 354 N.C. at 319–20, 553 S.E.2d at 881; however, "an agency's interpretation is not binding," *Lee*, 365 N.C. at 229–30, 717 S.E.2d at 358 (citations omitted), and, "[u]nder no circumstances will the courts follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *Watson Indus., Inc. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952) (citations omitted).

75. In this case, Director Wren recognized that both noise and visual effects impacted the sub-area of the Park just east of Foxcroft Lake. That sub-area is very small with respect to the Park as a whole, but more importantly, no mapped trails are located in this area. The Park officially

prohibits visitors from straying off designated trails for good reasons. The Park lists those reasons to include "for the safety and protection" of the visitors themselves, but also for the protection of the "many rare plants [that] live on thin soils and wet rocks, [which] are vulnerable to damage from climbing, trampling and scalping." (Resp. Ex. 148, Director Wrenn Dep. Vol. I, 69:13–70:3; Vol. II, 422:10–423:2, T. p. 7.1523-1525)

76. In seeking a balance between protecting the purposes of North Carolina parks and the benefits of the mining industry, the Mining Act limits denial of permit applications to those operations that will have "a significantly adverse effect on the purposes of a…park…" The purposes of the Park were given as conservation, recreation, and education. The noise and visual impacts on the extremely small area of the Park in which visitors are not allowed to traverse cannot be adverse to the purposes of the Park. According to the Park's own rules, unauthorized visitors trampling on rare plants is adverse to the conservation of those rare plants. Insofar as fostering a habitat for those rare plants could lead to their study, their loss would be adverse to possible educational opportunities as well. Finally, recreation in an area that is prohibited from visitors is not possible. (T. p. 7.1523-1525)

77. This is not to say the purposes of the Park do not apply to this small area. To make a finding that the proposed operation would significantly adversely affect the purposes of the Park, those purposes must be served in that area. People are not intended to be in this area, so they cannot recreate. Far from the purposes of conservation and education being served in this area, the trampling by visitors there would do the opposite. There was no evidence given that noise and visual impacts would adversely affect that which the Park's prohibition against visitors there was intending to protect. If, however, dust from the proposed operation were predicted to reach this same small area in an amount that would represent a significantly adverse effect on certain rare plants in the area, Respondent could consider this in making its decision.

78. In sum, the Mining Act seeks to provide for the coexistence of mining and a public park. Pursuant to the Mining Act, Respondent was wrong to deny the Application. Director Wrenn erred in interpreting the Mining Act when he stated that the purposes of the Park, in a small area, were significantly adversely affected by the proposed mining operation. Unless the purposes of the Park are significantly adversely affected by the mining operation, the Mining Act is clear, "a permit shall be granted."

VI. Attorneys' Fees

79. N.C. Gen. Stat. § 150B-33(b)(11) permits an administrative law judge to order that reasonable attorneys' fees be imposed against the respondent state agency where the administrative law judge holds that the agency has "substantially prejudiced the petitioner's rights and has acted arbitrarily or capriciously." Respondent substantially prejudiced Petitioner's rights by denying the Application and did so in an arbitrary or capricious manner, as set forth above. Accordingly, Petitioner is entitled to an award of reasonable attorneys' fees, witness fees, and costs.

80. An agency's actions "must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

In determining whether the agency made an error, the reviewing body may look only "to the agency's contemporaneous justifications for its actions." *Appalachian Voices v. U.S. Dep't of Interior*, 25 F.4th 259, 269 (4th Cir. 2022). The basis articulated by the agency must be the "administrative record, not subsequent litigation rationalizations." *Id.* at 274 (citation omitted). *See also Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 681, 443 S.E.2d 114, 122 (1994) (courts may not accept counsel's "*post hoc* rationalizations for agency action") (citation omitted).

DECISION

Respondent's decision to deny the Application to modify Mining Permit 92-10 is **REVERSED.**

Respondent violated the Mining Act by failing to issue its decision on the Application as expeditiously as possible and not within the 30-day period mandated by the Mining Act. The failure of Respondent to act within the statutory deadline mandates the approval of the application by operation of the Mining Act.

As an alternative and independent ground warranting reversal, Director Wrenn was not appropriately authorized to act on the Application; thus, Director Wrenn acted without authority to deny the Application and thus Respondent failed to act on the Application within the time prescribed by the Mining Act. Again, this failure mandates approval of the application by operation of the Mining Act.

Even if Respondent had acted within the statutory deadline, Petitioner met its burden of showing, by a preponderance of the evidence, that Respondent substantially prejudiced Petitioner's rights and that Respondent acted erroneously, arbitrarily or capriciously, used improper procedure, or failed to act as required by law or rule. *See* N.C. Gen. Stat. § 150B-25.1(a).

The agency record contains substantial and overwhelming evidence that Respondent had neither established a credible finding that Petitioner's proposed mining operation would have a significantly adverse effect on the purposes of the Park nor that Petitioner could not mitigate any such adverse effects were they found to exist. The hearing record, consistent with the agency record, leads to the same conclusion. Respondent errored by failing to approve the Application in the absence of the findings required by N.C. Gen. Stat. § 74-51(d)(5). *See* N.C. Gen. Stat. § 74-51(e).

Finally, not only did Respondent act arbitrarily and capriciously by failing to act within the statutory deadline mandated by the Mining Law, Respondent erred in applying an additional aspect of the Mining Law. Director Wrenn misinterpreted the proposed operation's effects on the purposes the Park. The small area of the Park potentially affected by the proposed operation would not, due to the prohibition against visitors in that area, affect anything at all.

Respondent is hereby ordered to grant the modified Permit 92-10, within thirty days from the date of this decision, incorporating the proposed sound wall as mitigation and all other site and erosion control plans as last agreed to by Petitioner. Respondent also is ordered to pay Petitioner's reasonable attorneys' fees. Petitioner shall submit an affidavit with documentation necessary to

allow the Undersigned to determine the amount of those fees within 30 days of the date of this Order.

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 to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 11th day of August, 2023.

Donald R van der Vaart
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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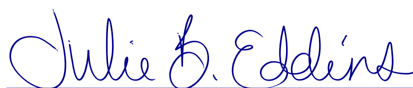
This the 11th day of August, 2023.



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