

NC DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES
DIVISION OF LAND RESOURCES
RALEIGH, NORTH CAROLINA

IN RE:)	
)	
REQUEST FOR DECLARATORY)	COMMENTS ON REQUEST
RULING BY LAKE TOXAWAY)	AND
COUNTRY CLUB)	REQUEST FOR ORAL HEARING
)	

PURSUANT TO G.S. 150A-4, now come Nancy Hensley, Diane Kent and Clean Water for North Carolina, the Petitioners in *Hensley et al. v. NCDENR and Mountain Air*, 03 EHR 2069, by and through the undersigned counsel, with comments on the Request for a Declaratory Ruling by the Lake Toxaway Country Club ("LTCC") and a request to be heard if this matter comes before the NC Sedimentation Control Commission (the "Commission"). The comments are as follows:

1. 15A NCAC 04E.0503(f) states that "the Commission will ordinarily refuse to issue a declaratory ruling (4) where there has been a similar controlling factual determination in a contested case . . . ; or (5) where the subject matter of the request is involved in pending litigation in any state or federal court in North Carolina." In the rule, the Commission clearly states that it will refuse to issue a declaratory ruling such as this one in that the Commission intends to rule on the *Mountain Air* case on the same day it intends to consider the Request. The legal issue of whether the declaratory ruling in the *Mountain Air* case was properly decided is the same issue raised in this Request. Like the proposed land-disturbing activity at the Mountain Air Development, LTCC proposes to permanently remove

the natural vegetated buffer adjacent to a trout stream and convert it permanently into a golf fairway. This is neither temporary or minimal under the provisions of G.S. 113A-57(1).

2. As described in the Request at ¶ 12, the Director denied the variance request of LTCC. After the submitting a variance request and additional information, LTCC was notified by the Director that he would not grant the variance based on the ruling in the *Mountain Air* case, pursuant to the Order of Summary Judgment, January 12, 2006. ATTACHED. The only avenue available to LTCC to appeal the decision not to issue the variance was to file a petition for contested case hearing with the Office of Administrative Hearings. G.S. 150A-23. Under Commission rules and the NC Administrative Procedures Act, there is a 60-day period in which the appeal is required to be brought and LTCC did not bring its appeal in a timely manner. It is evident that LTCC is trying to bring an appeal to the Commission without following proper administrative procedure.

3. The contested case hearing process would develop a record upon which the Commission could assess the facts or make conclusions of law to make a final agency decision. The Request on the other hand does not provide the Commission with testimony or evidence, nor does it allow aggrieved third-parties or even the agency staff to comment on the plans or analysis of the statutes governing trout buffer variances. The attachments to the Request do not include the application for the trout buffer variance or other documents that would be helpful to the Commission.

4. The relief requested by LTCC is beyond the scope of G.S. 150A-4 which is limited to the issuance of "a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." LTCC has requested in its prayer for relief that the Commission directs "the Director of the Division of Land Quality to approve the work in the trout buffer requested by" LTCC. At most, the Commission can interpret the governing statutes and rules, but it is up to the Director to issue or deny the variance for activities in the trout buffer based on the statute and rules, and just as important, after the Staff's review of the application.

5. Hensley *et al.* believe that the Request was submitted to influence the Commission's decision in the *Mountain Air* so that parties who had not intervened in that proceeding or who had missed deadlines to file contested case hearings could comment on the validity of the Administrative Law Judge's Order of Summary Judgment. The ability of the Commission to limit its review of the *Mountain Air* case on the record may be severely compromised if LTCC or anybody else can provide comments on the merits of that case to the members of the Commission, even in the guise of a request for a declaratory ruling.

6. Surprisingly, LTCC's Request does not address the statutes that govern the issuance of a trout buffer variance but only complains in ¶ 12 that it had submitted its application for the variance prior to having it denied by the Director and that in following the decision in the *Mountain Air* case, it was somehow unfair to LTCC. Hensley *et al.* argue that if the Director had granted a variance to LTCC

for activities that were neither temporary nor minimal, as appears to be the case given the Request, that this would have been contrary to the statutes.


7. The statute allowing an erosion plan for activities in a trout buffer is based on the Division's mandate to regulate land-disturbing activity in proximity to streams and rivers. See the Order of Summary Judgment, Section 3. G.S. 113A-57 starts out by emphasizing that "no *land-disturbing activity* subject to this Article shall be undertaken except in accordance with the following mandatory requirements . . ." (emphasis added). This is further reflected in 15A NCAC 04B .0125(c) "when a temporary and minimal disturbance is permitted as an exception by G.S. 113A-57(1), *land-disturbing activities* in the buffer zone adjacent to designated trout waters . . ." (emphasis added). G.S. 113A-57(1) states that land-disturbing activities within the 25-foot trout buffer zone may only be allowed "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal." G.S. 113A-57(1) states further that there can be no "land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse."

8. Staff's review of any variance request, including that of LTCC, should be based on determining whether the land-disturbing activities are both temporary and minimal. Although the entire LTCC application was not submitted, LTCC's proposed land-disturbing activities are neither temporary nor minimal; the native vegetation is proposed to be permanently removed in the trout buffer area and the existing stream is proposed to be relocated to accommodate a fairway. As a

result, the impact of the construction project on the trout stream will be permanent and perpetual, and significant and substantial.

THEREFORE, in light of the above, the Request for Declaratory Ruling should be summarily denied. If any person is granted oral argument in this request, counsel for Hensley *et al.* moves that he also is allowed to address the Commission.

This is the 21st day of October, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing COMMENTS ON REQUEST AND REQUEST FOR ORAL HEARING by hand delivery or depositing in the U.S. Mail, postage prepaid, upon the following:

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Land Quality Section
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This is the 27th day of October, 2006.



Attorney at Law

FILED
OFFICE
JAN 12 2006

STATE OF NORTH CAROLINA
COUNTY OF NEW YANCEY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 EHR 2069

Nancy Hensley, Diane Kent and Clean)
Water for North Carolina,)
)
 Petitioner,)
)
 v.)
)
 NC Department of Environment and)
 Natural Resources, Division of Land)
 Resources,)
)
 Respondent,)
)
 and)
)
 Mountain Air Development Corporation.)
)
 Respondent-Intervenor.)

ORDER OF
SUMMARY JUDGMENT

This Contested Case comes before the undersigned on Petitioners' Motion for Partial Summary Judgment filed July 19, 2004 and Respondent's and Respondent-Intervenor's Motion for Summary Judgment filed July 26, 2004. The parties filed various Responses, Affidavits, Supplemental Affidavits, and other papers in support of their various positions. On August 4, 2004, I held a hearing on the motions at which counsel for all three parties argued the Motions. At the close of that hearing, I took the Motions under advisement, and instructed the parties to file stipulations of uncontested fact upon which I might base a ruling on summary judgment. On January 11, 2006, the parties filed those Stipulations, and the Motions are ripe for decision.

I adopt by reference the "Joint Stipulations of All Parties" filed January 11, 2006, holding that the facts stated therein are settled for this case and that the taking of evidence on those issues is unnecessary.

I will take the issues presented for summary judgment one at a time:

1. The assertion that N.C. Gen. Stat. §113-57(1) prohibits certain land-disturbing activity.

The cited statutory section limits land-disturbing activity "in proximity to a lake or natural watercourse," primarily by requiring buffers along those watercourses. The last sentence

of the section states as follows in full: "This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse." The plain meaning of this sentence is that buffers are not required for the activities named in the sentence. This comports with common sense: one cannot provide a buffer between development and a watercourse if the development is in the watercourse. An obvious example is a dock. There can be no buffer between a dock and the watercourse in which it is located. (Though vertical separation between certain over-water structures and the surface of the water is required under CAMA (which presumably does not apply here), this is a different subject from the horizontal buffers required in N.C. Gen. Stat. §113-57(1)).

The last sentence of N.C. Gen. Stat. §113-57(1) does not prohibit anything. There are other statutes and regulations that may limit or even prohibit some development in watercourses, but this sentence does not do so.

Therefore, summary Judgment is DENIED to Petitioners and GRANTED to Respondent and Respondent-Intervenor (hereinafter, collectively, "Respondents") on this point.

2. The contention that Respondent and Respondent-Intervenor have failed to show that relocation of the stream is "an essential part of the proposed activity" pursuant to 15A NCAC 04B.0112.

I find that genuine issues of material fact remain on this issue. The Joint Stipulations do not address it. The other factual presentation of the parties on this issue amount to opposing assertions that would require me to find facts to resolve the disagreement. This is not proper on summary judgment.

Going forward, the standard that will apply in this case is as follows. "Essential" means "basic or indispensable, necessary." American Heritage Dictionary, 2nd College Ed., p. 465. It is distinctly different from "convenient" or "requiring less expense." Hence, in order to prevail on this point, Respondent must show that relocation and piping of the stream is necessary and indispensable to the very existence of this project, namely the new golf course. Merely showing that the project has been designed in this way, or that it will save money to do it this way, will not be sufficient. It must be shown that if the stream cannot be relocated and piped, the golf course cannot be built. This will be a difficult standard to meet. On the other hand, it is not necessary under the wording of the regulation that it be shown that this activity is essential in a more general sense, that is, to life itself, or to civilized society, or some such. So, the fact that this project is a golf course, a mere recreational facility, duplicative of many other golf courses around the area, does not defeat Respondents' position on this issue. The wording of the regulation is quite clear: the relocation and piping must be essential *to the project*.

Summary judgment is DENIED on this point.

3. The question whether the project complies with the requirement of N.C. Gen. Stat. §113-57(1) that land-disturbing activities within the trout stream buffer may only be approved "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal".

I will start with a couple of observations about this language. First, land-disturbing activities in trout stream buffers are not generally allowed at all, as set forth in the earlier sentences of N.C. Gen. Stat. §113-57(1). So the quoted language states the conditions under which an applicant may be given special dispensation to do what all others are prohibited from doing. These special dispensation clauses are to be interpreted strictly. Second, there are two separate requirements stated: one regarding duration and one regarding extent. They are stated in the conjunctive, and both conditions must be met for the variance or exception to be approvable.

Since the construction phase of all projects is temporary, the requirement that the “duration of said disturbance . . . be temporary”—clearly designed to be a limit on when this special dispensation may be granted—must mean something more than Respondents argue. That is, the fact that the construction phase does not continue indefinitely on any project does not mean that every project meets the requirement that the “duration of said disturbance . . . be temporary.” Nor does the statutory language apply only to the duration of the sedimentation, as Respondents argue, instead of the duration of the land-disturbing activity itself. (Resp. Brief at 11). The statutory language is quite clear on this: land-disturbing activities may only be approved when the “duration of *said disturbance* would be temporary”. (Emphasis supplied.) Though the drafters did not repeat the phrase “land-disturbing activity” twice in the same sentence, the use of the phrase “said disturbance” is a clear reference to the earlier use in the same sentence of “land-disturbing activity”.

So, in order to determine whether the disturbance would be temporary, it is necessary to determine what part of the project is the “disturbance.” “Land-disturbing activity” is defined to mean “any use of the land by any person . . . that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.” This is quite a broad definition. “Uses of the land” proposed by Respondent-Intervenor that will result “in a change in the natural cover or topography” within the buffer include, *inter alia*, altering the course of the stream, piping the stream, tree canopy removal, and individual tree removal. All of these also “may cause or contribute to sedimentation”.

So, at least the following are land-disturbing activities: altering the course of the stream, piping the stream, removing the tree canopy, and individual tree removal. None of these is temporary, with the possible exception of altering the course of the stream, to the extent this is done temporarily while the piping is installed. Given, however, that this sort of temporary stream diversion is needless unless the stream is to be piped, it is largely immaterial whether such a diversion is allowable.

Respondents protest that such an interpretation would prohibit all development within the buffers of trout streams. I have worried over this concern and given it a lot of thought. There are several responses, and I am, in the end, satisfied that these responses adequately address the concern, given the clarity of the statutory language set out above. First, prohibition of development in trout stream buffers is exactly the intent of the statute, with the narrow exceptions talked about herein. The Preamble to the Act does say that “development of this State [is] to continue with the least detrimental effects from pollution by sedimentation.” (This

follows several sentences describing in very strong terms the deleterious effects of sedimentation and erosion). However, the fact that development of the State is to continue does not necessarily mean that development must be allowed on every square foot of the State. In fact, the statute goes on to be quite clear that in order to protect the public, there are areas—such as trout stream buffer zones—that are not to be developed, except in exceptional circumstances.

Second, all development is not prohibited in buffers. As discussed above, the last sentence of N.C. Gen. Stat. §113-57(1) saves “facilities to be located on, over, or under a lake or natural watercourse” from the requirement for buffer protection. So docks and other water dependent structures are not limited by the above analysis. Third, this same analysis also exempts bridges over protected streams—and the roads leading to them—from the effects of N.C. Gen. Stat. §113-57(1). The bridge is exempted because it is “over” the watercourse, and the road leading to it is exempted because the statute exempts “land-disturbing activity *in connection with*” the facility to be located over the watercourse. Since a bridge is pointless without a road or path leading to it, the road or path is certainly in connection with the bridge. Needless to say, this analysis applies only to the language of N.C. Gen. Stat. §113-57(1), and not to any other laws restricting or regulating the construction of roads and bridges or regulating sedimentation or erosion.

So, the straightforward interpretation of N.C. Gen. Stat. §113-57(1) that I have set out above not only gives the terms of the statute their most natural and direct meaning, it also carries forward the intent of the statute. Development is prohibited in the buffer zones except in exceptional circumstances: truly temporary and minimal incursions that are approved by the Commission (such as travel across the buffer by heavy equipment for staging purposes, with appropriate protections to assure that the sedimentation is minimal); facilities located on, over, or under a watercourse, which cannot logically have a buffer (such as docks and bridges); and land-disturbing activity in connection with the latter (such as roads leading to bridges).

Summary Judgment is GRANTED to Petitioner on this point: the project does not comply with the requirement of N.C. Gen. Stat. §113-57(1) that land-disturbing activities within the trout stream buffer may only be approved “when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal,” and on this ground the Respondent acted erroneously, exceeded its authority, and acted arbitrarily when it granted the variance and approved Respondent-Intervenor’s plan.

4. All other issues remain for evidentiary hearing, including allegations §(c), (d), (e), and (f) of the Petition. All motions for summary judgment regarding those claims are denied on the ground that genuine issues of material fact remain for hearing.

It is so ORDERED.

Since this Order does not dispose of all issues in the case, no appeal rights attach. *Cf.* N.C. Gen. Stat. §150B-36(d).

This the 11th day of January 2006.

A handwritten signature in black ink, consisting of several overlapping loops and a final horizontal stroke.

James L. Comer, II
Administrative Law Judge

A copy of the foregoing was mailed to:

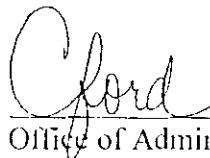
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This the 12th day of January, 2006.



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STATE OF NORTH CAROLINA

BEFORE THE
SEDIMENTATION CONTROL
COMMISSION

COUNTY OF WAKE

IN RE:)
)
REQUEST FOR DECLARATORY RULING BY) **FINAL AGENCY DECISION**
LAKE TOXAWAY COUNTRY CLUB, INC.)

THIS MATTER came before the Sedimentation Control Commission at its regularly scheduled meeting on November 16, 2006, in Concord, North Carolina, upon the request for declaratory ruling submitted by Lake Toxaway Country Club, Inc. on August 18, 2006 regarding the application of the statutory trout buffer variance standard, N.C. Gen. Stat. § 113A-57(1), to the stream restoration, vegetation removal and stream piping activities in the reconstruction of three holes on Lake Toxaway's existing golf course.

The Lake Toxaway Country Club was represented by William Clarke, Esq., of Asheville, North Carolina, and the North Carolina Department of Environment and Natural Resources was represented by Mary Penny Thompson, Esq., General Counsel, of Raleigh, North Carolina.

On 13 October 2006 the Lake Toxaway Country Club agreed to an extension until Wednesday, 22 November 2006, of the time provided in N.C.G.S. §150B-4 for a decision on the request for a declaratory ruling. On November 9, 2006, the attorneys for the parties agreed on stipulations of facts and issues for decision.

After fully considering the request for declaratory ruling, the comments received from the public, the stipulations of the parties, the staff recommendation, and the briefs and oral arguments of the parties, the Sedimentation Control Commission, upon motion duly made and seconded, and on majority vote, adopted the following declaratory ruling pursuant to N.C.G.S. §150B-4:

ISSUES PRESENTED

1. Whether the Sedimentation Control Commission's Final Agency Decision in the contested case of *Hensley v. N.C. Dep't of Env't and Natural Res.*, 03 EHR 2069, constitutes a similar controlling factual determination such that this declaratory ruling request should be denied?
2. Whether the lack of additional evidence that may be obtained through a contested case constitutes good cause to find a ruling undesirable such that this declaratory ruling request should be denied?
3. Whether stream restoration constitutes land-disturbing activity of temporary duration and minimal extent of disturbance when the land-disturbing activity will improve the conditions and reduce permanent impacts within the trout buffer and stream?

4. Whether piping of a portion of a stream constitutes land-disturbing activity of temporary duration and minimal extent of disturbance when the activity has been permitted by the proper water quality authorities and is limited to the amount necessary to construct a new green on an existing hole where the existing green already impacts the trout buffer?
5. Whether removal of trees constitutes land-disturbing activity of temporary duration and minimal extent of disturbance when the removal of trees will be done by hand cutting and picking up, rather than dragging, trees and is limited to those trees blocking the direction of play while smaller trees and vegetation in the understory will remain?

FACTS

1. The Lake Toxaway Country Club ("LTCC") is located at 4366 West Club Boulevard, Lake Toxaway, Transylvania County, North Carolina 28747. LTCC is an existing country club and golf course in Transylvania County. Several small streams flow through the golf course and into Lake Toxaway, a privately owned, 640 acre lake. Lake Toxaway itself is classified as trout waters. Portions of the golf course are and have been located within twenty-five feet of the streams running through the golf course for the life of the course.
2. The North Carolina Sedimentation Control Commission and the North Carolina Department of Environment and Natural Resources, both primarily located in Raleigh, Wake County North Carolina, are state agencies charged with implementing the Sedimentation Pollution Control Act, N.C. Gen. Stat. §§ 113A-50 *et seq.* including "the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C. Gen. Stat. § 113A-51.
3. In particular relevance to this declaratory ruling request, the Sedimentation Pollution Control Act requires natural watercourse buffers of sufficient width to confine visible siltation within the first twenty-five percent (25%) of the buffer nearest the land-disturbing activity. N.C. Gen. Stat. § 113A-57(1). In the case of trout streams, the buffers also must be at least 25 feet wide. N.C. Gen. Stat. § 113A-57(1). The Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal." N.C. Gen. Stat. § 113A-57(1). The watercourse buffer provision does not apply to a land-disturbing activity on, over, or under a lake or natural watercourse. N.C. Gen. Stat. § 113A-57(1).
4. In 2005, LTCC developed a plan for renovation of the golf course. The first phase of the renovation involved improvements to and reversing the direction of play and renumbering the existing front nine as the back nine. The second phase will involve improvements to and renumbering of the existing back nine. The pristine environmental conditions of Lake Toxaway and its tributaries are an important asset to LTCC.

5. On March 9, 2005, Appalachian Environmental Services, on behalf of LTCC, applied for an erosion and sedimentation control plan for the project. On April 7, 2005, the plan was disapproved for excessive encroachment on the trout buffer, inadequate details and calculations, and a lack of phasing of the project. On August 18, 2005, LTCC resubmitted a plan and, on the same day, the erosion and sedimentation control plan for work outside the trout buffer was approved with modification. Copies of letters between Appalachian Environmental Services and the Division of Land Resources, Land Quality Section, are attached hereto as Exhibit 1 and incorporated herein by reference.
6. On the 4th day of January 2006, the North Carolina Department of Environment and Natural Resources, Division of Water Quality issued a 401 general water quality certification granting conditional approval to relocate 149 linear feet of streams, stabilize 796 linear feet of shoreline, and fill 0.29 acres of ponds in connection with the project. The 401 general water quality certification required erosion and sedimentation control measures. A copy of the certification is attached hereto as Exhibit 2 and incorporated herein by reference.
7. On the 1st day of February, 2006, the U.S. Army Corps of Engineers issued a Section 404 general permit authorizing LTCC to relocate 149 linear feet of streams, restore 796 linear feet of streams, and fill 0.29 acres of ponds as part of the project. A copy of the 404 general permit is attached hereto as Exhibit 3 and incorporated herein by reference.
8. LTCC requested approval from the Division of Land Resources, Land Quality Section for the work in the trout buffer pursuant to N.C. Gen. Stat. § 113A-57 and Title 15A NCAC 4B.0125. LTCC responded to requests for information and to comments by the Land Quality Section on its application. Copies of correspondence between consultants working for LTCC, and Gray Hauser, an employee of the Division of Land Resources, are attached hereto as Exhibit 4 and incorporated herein by reference.
9. The proposed work within the trout buffer on the new 18th hole includes a stream restoration project. An existing man-made lake will be deleted and a stream channel constructed through the old lake bed, restoring it a natural channel. As plans for the golf course evolved, the existing cart path was relocated to an area outside of the trout buffer and original plans to remove trees within the trout buffer along the right-hand side of the fairway were dropped.
10. The most significant disturbance is on the new 17th hole, where eighteen existing trees in excess of five inches in diameter in the trout buffer area blocking the direction of play from the tee to fairway will be removed. Ten trees in excess of five inches in diameter will be removed from the trout buffer to allow for ball flight from the fairway to the new green. All of the trees will be hand-cut so that they fall away from the stream, cut into logs and removed from the buffer area by hand. The stumps will not be removed. All trees will be replaced with smaller shrubs. In order to construct the new green on the same hole, it will be necessary to pipe a portion of the stream. The existing green on the 17th hole is actually within the trout buffer of the stream to be piped. The original plan for this hole was to make the stream into a pond. Subsequent plans called for relocation

of the stream, and a permit was obtained from the U.S. Army Corps of Engineers and a 401 Certification from the North Carolina Division of Water Quality for the relocation. Based on LTCC's understanding of conversations with representatives of the Division of Land Resources, the decision was made to pipe the stream, and permits were obtained from the U.S. Army Corps of Engineers and a certification from the North Carolina Division of Water Quality for this work. Copies of the Permit, the certification and the detail of the reconnection to the existing creek are attached hereto as Exhibit 5 and incorporated herein by reference. Although LTCC's current request includes piping of the stream, LTCC is willing to relocate the stream as a condition of a declaratory ruling or the Division of Land Resources review of its plans.

11. Work on the 15th hole involves only removal of eight trees in excess of five inches in diameter directly in front of the tee box. The trees will be hand-cut so that they fall away from the stream, cut into logs and removed by hand from the trout buffer. The stumps will not be removed.
12. Documents describing the scope of the project and the construction sequence are available for review at the Division of Land Resources' office in Raleigh.
13. On the 12th day of January, 2006, a decision was entered in *Hensley v. NC Dep't of Env't and Natural Res. and Mtn. Air Dev. Corp*, 03 EHR 2069. Administrative Law Judge Connor, ruling on Motions for Summary Judgment in a case challenging a decision by the Director of the Division of Land Resources to allow certain work in the trout buffer in connection with the expansion of the Mountain Air golf course, interpreted the phrase "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal," N.C.G.S. § 113A-57(1). The administrative law judge's interpretation was substantially different than the Division of Land Resources' interpretation. Particularly, the administrative law judge concluded that the statutory standard applied to all impacts (both construction and post-construction), where the Division of Land Resources had interpreted the provision to apply only to construction impacts.
14. In response to the administrative law judge's ruling and upon advice of legal counsel, the Division of Land Resources suspended approving land-disturbing activity within trout buffers under its interpretation. Currently, on a case-by-case basis, plans are reviewed for conformity with the administrative law judge's interpretation. On a number of occasions, personnel with the Division of Land Resources indicated to Lake Toxaway and consultants employed by Lake Toxaway, that the requested work in the trout buffer, on this and other projects, could not be approved pending resolution of the issues raised in the *Mountain Air* decision.
15. The Division of Land Resources took no formal action on LTCC's request for work in the trout buffer due to the decision in the *Mountain Air* case.

16. The *Mountain Air* summary judgment order was calendared for review and a Final Agency Decision by the Sedimentation Control Commission at its November 16, 2006 meeting.
17. No plans for golf course development involving land disturbing activities in trout buffer areas have been approved by the Division of Land Resources since the issuance of the *Mountain Air* decision.
18. The decision by the Division of Land Resources to not issue approvals for work done in the trout buffer, based on the ruling in the *Mountain Air* case, has already resulted in delay to the LTCC project in the trout buffer areas. Land-disturbing activity outside of the trout buffer areas has proceeded according to an approved erosion and sedimentation control plan. Even if the work in the trout buffer is approved, no work can be done in the buffer from October until April, which may result in further delay, cost and expense for the project.
19. As part of the Division of Land Resources' investigation regarding the declaratory ruling request, comments were received from the public. Two (2) comments were submitted on behalf of various organizations, all in opposition to the request. The comments are summarized here and attached as exhibits:
 - a. Environment North Carolina, the Pamlico-Tar River Foundation, the Neuse River Foundation, the North Carolina Wildlife Federation, Headwaters, Ltd., the Habitat and Wildlife Keepers, and Trout Unlimited – North Carolina State Council submitted comments requesting that the declaratory ruling be denied on the bases that road paving activities do not meet the definition of temporary and minimal as interpreted in *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, and produce impacts that have detrimental effects to the trout waters that have been protected by a supplemental water quality classification under State regulation. The comments are attached hereto as Exhibit 6 and incorporated herein by reference.
 - b. Nancy Hensley, Diane Kent and Clean Water for North Carolina submitted comments requesting that the declaratory ruling be denied on the bases that their contested case, *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, would control the factual determination and deals with the same subject matter at issue in the declaratory ruling; that LTCC failed to pursue its proper administrative remedies by initiating a contested case; that a declaratory ruling is an improper forum for a decision on a trout buffer variance because it does not have all the evidence before it that would be available through a contested case; that the Sedimentation Control Commission cannot direct the Division of Land Resources to issue variances inconsistent with staff's review of an application; that the declaratory ruling improperly influences the consideration of the *Hensley* contested case; and that the declaratory ruling improperly characterizes the suspension of variance approvals by DLR as unfair. The comments are attached hereto as Exhibit 7 and incorporated herein by reference.

CONCLUSIONS OF LAW

1. A declaratory ruling is a quasi-judicial determination. It exercises the judicial function of interpreting a statute. "It is the function of the judiciary to construe a statute when the meaning of a statute is in doubt." *Clark Stone Company, Inc. v. N.C. Dep't of Env't and Natural Resources*, 164 N.C. App. 24, 35 (2004), citing *Sunscript Pharmacy Corp. v. N.C. Bd. of Pharmacy*, 147 N.C. App. 446 (2001), disc. review denied, 355 N.C. 292 (2002).
2. Neither the Sedimentation Pollution Control Act nor the rules that implement it define the standard of temporary and minimal. In the context of a project that ultimately removes sedimentation impacts from a trout buffer and stream by deleting a lake and creating a channel through the old lake bed to restore a stream; the statutory language is ambiguous. Therefore, it is proper for the Sedimentation Control Commission to issue a declaratory ruling.
3. The issues in the contested case of *Hensley v. N.C. Dep't of Env't and Natural Res.*, 03 EHR 2069, differ from the issue in this declaratory ruling in respect to stream restoration. Where *Henley* examines the impacts of new development on undisturbed areas, this declaratory ruling examines the impacts of redisturbance of existing development. In addition, an aspect of the development results in net benefits to the environment through stream restoration. Therefore, *Hensley* does not constitute a similar controlling factual determination in regards to stream restoration.
4. *Hensley* does constitute a similar controlling factual determination in regards to piping a portion of a stream and selective tree removal since facts regarding stream piping and selective tree removal were also present in the *Hensley* case.
5. Unlike a contested case, a declaratory ruling is not a fact-finding proceeding. Rather, a declaratory ruling provides clarification of the applicability of a statute to a given set of facts. The parties' stipulated facts are sufficient to provide a basis for interpretation. Therefore, it is unnecessary to proceed through a contested case in order for the Sedimentation Control Commission to give clarification on how the standard applies.
6. In interpreting a statute, the intent of the Legislature must be taken into account. Also, the statute must be interpreted *in pari materia*. The Sedimentation Pollution Control Act seeks to balance development with curbing the effects of sedimentation. This balancing intent and the 'temporary and minimal' standard are met when (1) stream restoration reduces erosion and sedimentation impacts from a trout buffer and stream; (2) impacts are avoided, remaining impacts minimized, and the area restored to the extent practical upon completion of construction; and (3) best management practices are used during and after construction.

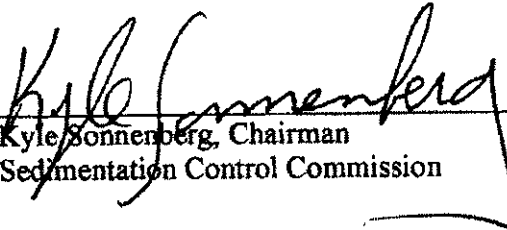
FINAL AGENCY DECISION

IT IS THEREFORE ORDERED:

1. That the 'temporary and minimal' standard applies to stream restoration when (1) stream restoration reduces erosion and sedimentation impacts from a pre-disturbed area; (2) impacts are avoided, remaining impacts minimized and the area restored to native vegetation characteristic of an undisturbed buffer to the extent practical upon completion of construction; and (3) best management practices are used during and after construction.
2. That where the *Hensley* contested case controls factually similar circumstances in this declaratory ruling, the Sedimentation Control Commission's vote on November 16, 2006 to issue a final agency decision that reversed the administrative law judge and affirmed the Division of Land Resources' interpretation and procedures existing prior to January 12, 2006 should apply to the land-disturbing activities outside of stream restoration in this matter.

Pursuant to the Administrative Procedure Act, a Final Agency Decision on a request for declaratory ruling is subject to judicial review in the same manner as an order in a contested case. N.C. Gen. Stat. § 150B-4. To obtain judicial review of this Final Agency Decision, the person seeking review must file a petition in the Superior Court of Wake County or in the superior court of the county where the person resides within 30 days after the person is served with a written copy of the decision. N.C. Gen. Stat. § 150B-45.

This the 21 day of November, 2006.



Kyle Sonnenberg, Chairman
Sedimentation Control Commission

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Final Agency Decision on the parties listed below in the manner indicated:

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This the 21 day of November, 2006.

ROY COOPER
ATTORNEY GENERAL

Edwin Lee Gavin II

Edwin Lee Gavin, II
Assistant Attorney General
North Carolina Department of Justice