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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 EHR 02311

The Umstead Coalition Petitioner, v. NC Department of Environmental Quality, Division of Energy Mineral & Land Resources Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before the Undersigned on June 18-20, 2024, June 24, 2024, June 26, 2024, and July 1, 2024, pursuant to this Tribunal's May 23, 2024, Notice of Hearing, June 26, 2024, Notice of Rescheduled Hearing, and verbal agreement on the record of the Undersigned and counsel for the parties during the contested case hearing. All parties have been given the opportunity to be heard and the matter is ripe for disposition.

SUMMARY OF DECISION

This contested case arises from Petitioner Umstead Coalition's challenge to two 2018 modifications made by the North Carolina Department of Environmental Quality, Division of Energy, Mineral & Land Resources ("DEMLR"), to a mining permit issued to Wake Stone. The first modification involved buffer conditions, which was minor in scope by any reasonable measure. As detailed below, Petitioner failed to establish that the buffer modifications resulted in substantial prejudice or that DEMLR erred procedurally in making the changes.

The second modification concerned the permit's so-called land "donation" provision, a misleading term that belies the nature of the transaction. Petitioner failed to articulate a cognizable right at stake or demonstrate substantial prejudice resulting from the change. Petitioner failed to establish that DEMLR erred procedurally in modifying the provision.

More significant, however, is Umstead Coalition's allegation that DEMLR "exceeded its authority or jurisdiction" in modifying the "donation" provision. The extensive historical evidence produced by the Petitioner leads this Tribunal to the unavoidable conclusion – one dictated not by sentiment or policy preference - that the original land "donation" provision, contained in the 1981 permit, was and remains an extra jurisdictional exertion of regulatory power, ultra vires in its conception and unenforceable in any manifestation. The "donation" was no act of public benefaction toward Umstead Park but rather a negotiated exchange. Moreover, the land "donation" condition was included in the 1981 permit under the guise of the legally required Reclamation Plan and thus obfuscated what was, in form and substance, a negotiated transaction—land offered as consideration for the permit's issuance. Its inclusion, framed as compliance with the Mining Act, has no legitimate foundation in the statute but instead functions as a contractual bargain.

The "donation" provision directly contravened the explicit directive of Governor James B. Hunt, who, despite his misgivings about the mining project, prudently directed DEMLR to evaluate the permit strictly within the environmental framework of North Carolina's Mining Act. DEMLR took it upon itself to transcend its statutory limitations by engaging in an act of regulatory adventurism that this Tribunal cannot and shall not countenance.

Accordingly, the matter of whether this "donation" provision is triggered "sooner" or "later" is a question rendered entirely academic. The provision was never enforceable at any moment in time, and it shall not be endowed with legitimacy now.

APPEARANCES

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ISSUES

1. Whether Petitioner's claims are barred by the doctrine of laches?
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 by modifying Condition 3 (the "Buffer Boundaries") in the 2018 Modifications of Mining Permit No. 92-10.
3. 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 by modifying Reclamation Plan Condition 5B (the "Donation to State" or "Donation Clause") in the 2018 Modifications of Mining Permit No. 92-10.

PROCEDURAL HISTORY

1. Petitioner The Umstead Coalition (the "Coalition") filed a contested case petition on May 11, 2023, challenging two modifications made to Wake Stone Corporation's ("Wake Stone's") Mining Permit No. 92-10 (the "Permit") by Respondent North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources.

("DEMLR").

2. Respondent filed a motion to dismiss on June 9, 2023, arguing that the Coalition's contested case was untimely under the North Carolina Administrative Procedure Act and that sovereign immunity barred the Coalition's claims.

3. This Tribunal granted the motion to dismiss on June 21, 2023. The Coalition appealed to Wake County Superior Court. By Order filed on January 8, 2024, Wake County Superior Court Judge John W. Smith reversed and remanded this Tribunal's Final Decision dismissing the Coalition's contested case petition, and this contested case was reopened on February 28, 2024.

4. DEMLR filed a second motion to dismiss and a motion for summary judgment on March 22, 2024, this time arguing that the Coalition's contested case was barred by the doctrine of laches and because it was moot as a result of a later permit being issued. The Tribunal denied both these motions by Order filed April 18, 2024.

FINDINGS OF FACT

Upon consideration of the sworn testimony of the witnesses presented at the hearing, and the documents and other exhibits received and admitted into evidence, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of each witness, 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 credible evidence in the case.

I. Parties and Relevant Persons and General Considerations

1. Petitioner, the Coalition, is a special interest nonprofit membership corporation that has worked since 1972 to protect and preserve William B. Umstead State Park ("Umstead Park" or the "Park"), a North Carolina State Park located in Wake County, North Carolina. The Coalition works closely with the North Carolina Division of State Parks regarding the Park's management, conservation, recreational opportunities, and fundraising for real property acquisitions. Historically, the Coalition has engaged with private parties and government agencies, including Respondent, regarding development proposals that would affect the Park, its users, and the Coalition's members.

2. Some of the Coalition's members live and/or own property near the Park and Wake Stone Corporation's Triangle Quarry, and an adjacent tract of land known as the Odd Fellows Tract. Its members also regularly visit and recreate within the Park, including the part of Crabtree Creek accessible in the Park.

3. Wake Stone Corporation ("Wake Stone") is a North Carolina corporation and aggregate mining company that currently operates the Triangle Quarry located at 222 Star Lane, Cary, North Carolina, 27513.

4. The Triangle Quarry is adjacent to a section of the southern boundary of Umstead Park. Operated by Wake Stone, the quarry is authorized by Mining Permit No. 92-10 ("Permit"). (See Resp. Ex. 38)

5. Wake Stone is not a party to this contested case.

6. Respondent North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources ("DEMLR") is an agency of the Executive Branch of the State of North Carolina. The Division of Land Resources was the name of DEMLR's predecessor Division. For simplicity, DEMLR, the acronym for the Division's current name, will be used to reference the Respondent in its current and previous forms.

7. DEMLR is charged with implementing the Mining Act of 1971 (the "Mining Act"), N.C. Gen. Stat. §§ 74-46 to 74-68, and associated regulations, 15A NCAC 05A .0101 et seq.

8. DEMLR's responsibilities under the Mining Act include reviewing and granting or denying applicant requests for new mining permits and for modifications of existing mining permits. See N.C. Gen. Stat. § 74-50(a).

9. The North Carolina Mining Commission ("Commission") is the state agency that heard appeals of mining permit decisions in 1980-1981 pursuant to the Mining Act. At the time the original permit was issued the Mining Act provided that, on appeal, "[t]he [Mining] Commission…may affirm, affirm with modifications, or overrule the decision of the Department [DEMLR] and may direct the Department [DEMLR] to take such action as may be required to effectuate its decision." N.C. Gen. Stat. § 74-61 (1980).

10. Mr. Rufus Edmisten testified as the former Attorney General of North Carolina from 1974 to 1984. (T2 pp 377-378) Mr. Edmisten became familiar with Wake Stone's efforts to obtain a mining permit on property adjacent to Umstead Park. (T2 p 378)

11. Mr. Toby Vinson testified as the current Interim Director of DEMLR. Mr. Vinson was first employed by DEMLR from 1994 to 2001 and served in various roles during that time, including stints as a Sedimentation Education Engineer, Assistant Regional Engineer, and Regional Engineer. (T4 p 724) His duties in those roles included permitting, permitting review, and inspection compliance enforcement for DEMLR's sedimentation and erosion control program, mining programs and dam safety program. (*Id.*) He returned to the Department in 2012 as Chief Engineer for DEMLR and also served as a Section Chief before being promoted to his current role as Interim Director of DEMLR. (T4 pp 725-726)

12. Mr. Vinson's experience with the DEMLR's Mining Program includes everything from inspections compliance to permit review, analysis, and recommendations. (T4 p 726) He has reviewed hundreds of mining permit applications and permit. (*Id.*)

13. Mr. Paul Wojoski was tendered and accepted as an expert in site plan review, permitting, and buffers on behalf of DEMLR. (T5 pp 1055-1056) Mr. Wojoski has a degree in Biology with an emphasis in Computational Science from Wofford College. (T5 pp 1042-1043) He has taken various continuing education courses, including the North Carolina Surface Water Course, the EPA Water Quality Standards Academy, and EPA instructor courses on fluvial geomorphology. (T5 p 1043) He has previously served as supervisor of the Department's 401 and Buffer Permitting Program and is currently the supervisor of the Division of Water Resources' Classification and Standards Branch. (T5 p 1044) In his role with the Department, he has reviewed numerous buffer applications, mining permit applications, and mining site plans. (T5 pp 1044-1046) He has also participated in the development of rules and regulations relating to buffers, isolated and non-jurisdictional wetlands, the classification and uses of surface waters, and water quality standards and

criteria. (T5 p 1047)

14. Mr. John R. Bratton testified as an employee of the Wake Stone corporation. Mr. Bratton began his employment with Wake Stone in 1970 and was involved in the permitting process for Wake Stone's Triangle Quarry in 1980 and 1981 in his position as quarry superintendent. (T5 p 967)

15. An administrative law judge does not need to make findings as to every fact that arises from evidence and only needs to find those facts that are material to the settlement of the dispute. *See Flanders v. Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, *aff'd per curiam*, 335 N.C. 234, 436 S.E.2d 588 (1993).

16. An administrative law judge also must resolve conflicts in facts and evidence, state his inferences drawn from the evidence, and state the findings supported by competent evidence. *Carolina Mulching Co. LLC v. Raleigh-Wilmington Investors II, LLC*, 272 N.C. App. 240, 246, 846 S.E.2d 540, 544-45 (2020) (citations omitted); *see also Matter of J.C.D.*, 265 N.C. App. 441, 448, 828 S.E.2d 186, 191 (2019).

II. History of Wake Stone Triangle Quarry Permit and Donation Provision

17. On February 4, 1980, Wake Stone made a proposal for the development of the Triangle Quarry to the State of North Carolina. Wake Stone, through its attorney, sent a letter to Mr. J.K. Sherron, Director of the State Property Office, at the North Carolina Department of Administration. The letter sought to address potential concerns related to the development of the quarry to be located in close proximity to Umstead Park.

18. The February 4, 1980 letter contained information related to the mining activity proposed for the Triangle Quarry, but also included a proposal "concerning the use and disposition" of the property on which Wake Stone proposed to operate the quarry. With respect to this issue, the letter provided:

> Whenever the quarrying of stone on our property is completed, my client will have no further need for the quarry area. At that time, my client will donate to the State for use as a part of Umstead Park all of those tracts of land shown on the enclosed map which are encompassed by an orange line and which consist of approximately 75 acres. We would provide that this gift would occur at the end of 50 years or 10 years after quarrying operations have ceased without having been resumed, whichever is later.

And later,

> The creation of the buffer zones and the obligation to make the gift of the property as above outlined would be provided for in a binding contract between the property owner and the State of North Carolina. This contract would be recorded and would run with the land whereby it would bind all subsequent owners of the property. Conditions for the creation of the buffer zones will be the acquisition of the property by me or my client and the rezoning of the property to an industrial classification. A condition of the gift will be the development of the property as a quarry.

19. Under N.C. Gen. Stat. § 74-50 "[n]o operator shall engage in mining without having first obtained from [DEMLR] an operating permit that covers the affected land…" The last sentence in the above excerpt conditions the donation on the "development of the property as a quarry." Under N.C. Gen. Stat. § 74-50 a permit is required to develop a quarry. The February 4, 1980 letter contemplates an exchange of land for a mining permit.

20. On March 21, 1980, Wake Stone applied for a mining permit to operate its Triangle Quarry. (Resp. Ex. 1) Under N.C. Gen. Stat. § 74-51(a) a Reclamation Plan was included in the application.

21. Four days before Wake Stone submitted the application, North Carolina Governor James B. Hunt wrote a memorandum to Secretary Howard Lee (overseeing DEMLR) regarding the quarry. Governor Hunt was "disturbed" that the Wake County Commissioners approved the quarry project and told Secretary Lee to "see that this is carefully examined by our appropriate officials." (Resp. Ex. 84)

22. Eighteen (18) days after the application was submitted, on April 8, 1980, Governor Hunt again wrote to Secretary Lee urging him to rule on the application quickly but noted that the State "…*can only stop it if it fails to meet environmental conditions*…" [*emphasis added*] (*Id.*)

23. On August 22, 1980, DEMLR denied Wake Stone's mining permit application. (Pet. Ex. 85)

24. The denial was based exclusively on the finding that the proposed quarry would have a "significantly adverse effect…" on the park pursuant to N.C. Gen. Stat. § 74-51(5). The effects cited were "noise, sedimentation, dust, traffic, and blasting vibration…" that would impact the Park "in the form of noise intrusion and deterioration of visual resources." (Resp. Ex. 40)

25. The denial made no mention of a land donation nor was there mention of a deficiency in the proposed Reclamation Plan. (*Id.*)

26. On September 16, 1980, consistent with the appeal procedures in place at that time, Wake Stone appealed DEMLR's denial to the North Carolina Mining Commission. (Resp. Ex. 1 p. 4)

27. On December 31, 1980, during the pendency of the appeal process, Ms. Becky French, counsel to the Mining Commission, wrote a memorandum to the Mining Commission. The memorandum stated that Wake Stone "…has shown a willingness to deed to the State of North Carolina 78 acres which adjoin the park at the end of 50 years *if it obtains the permit*." [*emphasis added*] (Pet. Ex. 1)

28. The 50-year period was Wake Stone's estimate for the life of the quarry based on the size of the tract of land, the proven reserves which Wake Stone had not completely determined at that time, and an estimate of market conditions. (T5 p 973)

29. The remainder of the memorandum discussed legal options to ensure the State receives the land. Ms. French recommended the State's interests would be "best protected if it owns the land in fee simple absolute and Wake Stone has the right to a profit a prendre in stone for

a term of years and on condition subsequent."[1] She noted that the State should grant Wake Stone the profit a prendre as consideration for conveyance by Wake Stone of the land to, in her words, "…help to ensure the enforceability of covenants that Wake Stone makes as part of the transaction." (Pet. Ex. 1)[2]

30. On January 27, 1981, the Mining Commission issued Findings of Fact, Conclusions, and Decision on Wake Stone's appeal in which the Commission reversed DEMLR's 1980 denial of Wake Stone's permit application. (Resp. Ex. 1)

31. In reversing DEMLR's denial, the Commission stated that the only issue was "whether the proposed quarry would have a significantly adverse effect on the purposes of the park." N.C. Gen. Stat. § 74-51(5) Specifically, the Commission addressed the "only contested matters" as stipulated by Respondent and Wake Stone. These were "blasting, dust, traffic, noise, and visibility." (*Id.*)

32. The Commission made the following conclusions:

    i. "[B]lasting will not have a significant adverse effect on the purpose of the park."

    ii. "[D]ust from the quarry and roads will not have a significant adverse effect on the purposes of the park."

    iii. "[T]raffic generated by the quarry would not have a significant adverse effect on the purposes of the park."

    iv. "[N]oise from the quarry machinery and traffic will not have a significant adverse effect on the purposes of the park."

    v. "[V]isibility will not have a significant adverse effect on the purposes of the park."

    The Commission provided clear and detailed reasons for each of the conclusions listed above. (*Id.*) None of its reasons included the impact (beneficial or otherwise) donation of the property after the quarried stone had been removed would have on the five contested matters. (*Id.*)

33. The Mining Commission instructed DEMLR to include five terms and conditions in the permit to Wake Stone as follows:

    vi. "[U]tilization of state-of-the-art techniques to minimize noise, dust, and other possible adverse effects on the park."

    vii. "[A] plan for the optimum location of processing and stockpiling facilities and roads to minimize possible effects on the park."

    viii. To "develop an adequate buffer zone plan for the area between the quarry

[1] A profit a prendre is a property right that allows the holder to enter another one's land to extract specific resources such as stone.

[2] The contractual validity of Ms. French's proposal was flawed. Granting Wake Stone the right to mine the stone from the land it would have conveyed to the State does not constitute valid consideration. Under Ms. French's proposal, Wake Stone already owned the rights to the stone before transferring the land to the State. Returning a portion of a gift to the donor does not meet the legal standard for consideration.

and the park."

ix. Construction of "a berm or berms between the quarry and the park."

x. That Counsel to the Commission, a representative from the Department of Justice and Wake Stone meet to come to an agreement on the "best method to transfer the land pursuant to Wake Stone's proposal that, as part of its reclamation plan,[3] it donate the quarry to the State for park use on termination of the operation." (*Id.*)

34. The fifth condition that the Mining Commission required - related to the donation of land – was, by the Commission's admission not an issue for the appeal. No mention of the donation appeared in DEMLR's denial of the permit and therefore had no relationship to the appeal of that denial. (Pet. Ex. 85) According to Mr. Edmisten, NC Attorney General at time, Governor Hunt, as well as other top State officials were considering appealing the Mining Commission decision after the Mining Commission reversed the DEMLR denial of the permit application and directed that the permit be granted, (T2 p 381)

35. Whether DEMLR had a right of action against the Mining Commission was discussed in a January 30, 1981 memorandum from DOJ attorney Dan Oakley to Maria Spaulding of the Administration. The Mining Act at the time gave clear authority to the Commission over the DEMLR to "overrule the decision of the Department and may direct the Department to take such action as may be required to effectuate its decision." N.C. Gen. Stat. § 74-62, (1980) Nevertheless, DOJ Attorney Oakley argued, "while there has been varying debate over this question" the "consensus" was that the Department could bring a petition as a "person aggrieved" under the North Carolina Administrative Procedures Act. (Pet. Ex. 3)

36. In an affidavit and in the hearing former Attorney General Rufus Edmisten testified that Wake Stone and members of the state government discussed the conditions pertaining to the donation. He stated that "[i]n the end, an agreement was reached to include verbiage to require a cessation of mining operations and trigger exercise of the State's option to acquire the quarry property in at most 50 years, i.e., a 50-year sunset provision. In return for Wake Stone's agreement, DEQ and [DOJ] would refrain from appealing or otherwise challenging the Mining Commission's decision." (Pet. Ex. 79)

37. The effect of agreeing not to appeal the Mining Commission's Final decision was to agree with the Mining Commission's decision to approve Wake Stone's permit.

38. Mr. Edmisten opined in testimony that it was "common" for parties to negotiate a compromise after "a decision by a commission" to agree to something different than what "a commission" ruled. This statement was made without reference to the Mining Commission and after Mr. Edmisten stated his involvement throughout this permit was through his staff. (T2 pp 387-388). This Tribunal is unconvinced that Mr. Edmisten's statement is based on any expertise in the Mining Act, the Mining Commission, or in post-decision negotiations of the Commission as it was authorized under the Mining Act at the time of the 1981 permit.

[3] There is no mention in the Wake Stone February 4, 1980 letter of using the Reclamation Plan in the mining permit as a means of enforcing the conveyance of the land. Similarly, there is no mention of using the Reclamation Plan as a means of enforcing the conveyance in Ms. French's December 31, 1980 memorandum. The first written record of this use of the Reclamation Plan was in the January 27th, 1981, Mining Commission document. (Resp. Ex. 1)

39. Mr. Edmisten did not personally conduct the negotiations on the terms of the original 1981 Permit. (T2 p 387) Nor did he communicate directly with Wake Stone or the Department. (*Id.*) Rather, he testified that Dan Oakley had the lead role in negotiating the permit on behalf of the Attorney General's Office. (T2 pp 387-388)

40. On February 2, 1981, Secretary Lee (overseeing DEMLR) wrote a memorandum to Governor Hunt regarding Umstead Park and the Wake Stone Permit. In this memorandum the Secretary apprised the Governor of the Department's "current thinking on [the] issue." The memorandum listed three alternatives including (a) appealing the Mining Commission's reversal of the DEQ's denial, (b) placing "very stringent conditions on the permit," and (c) other legal options including challenging the Wake County Commissioners' zoning decision. No mention of the land donation was made in this memorandum. (Pet. Ex. 4)

41. On February 10, 1981, the Director of DEMLR at that time, Mr. Stephen G. Conrad, wrote to Wake Stone inviting the company to prepare proposals for meeting the five conditions given in the Mining Commission's January 27th decision. (Resp. Ex. 2)

42. On February 17, 1981, Wake Stone responded. With respect to the land donation condition, Wake Stone explained that they would need to maintain title to the property to secure loans for the business… so that "…it will be necessary to provide that the obligation to make a gift of the property to the State is subordinate to any bona fide encumbrances to which the property may be subjected from time to time." (Resp. Ex. 3) In other words, Wake Stone made it clear that in order to develop and operate the quarry the company would need title of the land to secure working capital.

43. Also in this response was the following,

> "While I would not expect that it is necessary to make the point, I am inclined out of an abundance of caution to state that our proposal to donate the property contemplates that Wake Stone *will be permitted to extract all quarryable stone which is on the property* and which is outside of the mutually agreed upon buffered areas, *without interference from the State, Wake County, any municipality or court order*." [*emphasis added*] (*Id.)*

44. Wake Stone's response of February 17, 1981, also addressed the "enforceability" of Wake Stone's "donation" of land. Rather than rely on a contractual arrangement for enforcement as Wake Stone had suggested in its February 4, 1980 letter, Wake Stone now suggested the conveyance be made part of the Reclamation Plan so it would be enforceable just as any other provision in the Reclamation Plan. (*Id.*)

45. In a document dated February 26, 1981 Wake Stone's proposal included the following statement, "A formal agreement incorporating the foregoing terms shall be executed and recorded in the Wake County Registry immediately following the acquisition by Wake Stone of the property on which it proposes to develop a quarry *and the final granting by all appropriate authorities of all permits required for the development of a stone quarry*." (Resp. Ex. 4) [*emphasis added*]

46. On March 12, 1981, DEMLR and Wake Stone cosigned a letter sent to the Mining Commission stating that the two parties had agreement on terms attached to the letter pursuant to the Commission's directives in their January 27th decision. The letter noted that

they were unable to "agree completely on some items and w[ould] address those concerns separately." (Resp. Ex. 7)

47. However, one of the conditions where agreement was reached was with respect to "Donation of Quarry to the State" labeled as "condition 5." The agreement included a March 12, 1981 memorandum from Wake Stone to DEMLR's attorney that detailed the method and conditions of the donation including that the donation be part of the Reclamation Plan. The memorandum also specified the timing of the conveyance to be the later of fifty years or ten years of inactivity. At least as of March 12, 1981, DEMLR had agreed with Wake Stone and had represented to the Mining Commission that they agreed with Wake Stone that the donation provision should use the "whichever is later" language. (Resp. Ex. 7)

48. In addition to the March 12th letter, both DEMLR and Wake Stone sent individual responses to the Commission. DEMLR's response was dated March 12, 1981, while Wake Stone's response was dated March 13, 1981. Both responses confirmed that agreement with respect to the land "donation" has been reached. What remained was disagreement concerning the construction of certain berms. (Resp. Ex. 8)

49. The "whichever is later" condition of the land donation was agreed to by both Respondent and Wake Stone. (T5 pp 981-982)

50. On April 3, 1981, the Mining Commission issued its "Final Decision." In this decision the Mining Commission "…hereby orders that the Division of Land Resources [DEMLR] grant to Wake Stone Corporation the permit applied for with the following conditions:…" The conditions that were listed included the donation condition the terms of which provided that (a) when all of the quarryable stone was removed the State would be given notice to elect conveyance of the land to the State, or (b) if all quarryable stone had not been removed the State would be noticed to elect conveyance of the land to the State if 50 years had passed or ten years after mining had ceased *whichever was later*. (Resp. Ex. 10) [*emphasis added*]

51. To summarize, on April 3, 1981 the Commission ordered DEMLR to include the "whichever was later" language in the permit and DEMLR and Wake Stone, on multiple occasions had agreed to this language.

52. On May 13, 1981 DEMLR issued the Permit to Wake Stone. (Resp. Ex. 13) However, in the Permit, the language in the Donation Clause (Reclamation Plan Condition 5. B) was changed to read: "If all quarryable stone is not removed, the right of the State to acquire the quarry site shall accrue at the end of 50 years from the date quarrying commences or 10 years after quarrying operations have ceased without having been resumed, whichever is *sooner* . . ." (Resp. Ex. 10, 13) (*emphasis added*)

53. The substitution of the word "sooner" for "later" in the donation clause was in direct contravention of the Mining Commission's final decision and Order to DEMLR. (T1 p 155)

54. Condition 5 of the Reclamation Plan included in the Permit was entitled "Donation to State" and stipulated *inter alia,* the manner by which the quarry land would be conveyed to the State. It mandated the initial conveyance of an option to the property to the State, and provided that Wake Stone would not be prohibited by the U.S. Government, State of

North Carolina, Wake County, any municipality having jurisdiction, or by any court from quarrying all of the quarryable reserves.

55. Reclamation Condition 5 states, in pertinent part:

> The method by which the quarry site may be donated to the State is as follows: Upon acquisition of the land by Wake Stone Corporation (by the exercise of its options to purchase), Wake Stone Corporation will grant to the State an option which, if exercised by the State, will require that Wake Stone Corporation convey a fee simple title to the quarry site to the State. The State shall have no obligation to exercise its option to accept a conveyance of the quarry site.
>
> The right of the State to exercise its option shall be subject to:
>
> A. Wake Stone Corporation not being prohibited by the U.S. Government, State of North Carolina, Wake County, any municipality having jurisdiction, or by any court from removing Wake Stone Corporation's property all quarryable stone which is outside the buffer zone referred to in condition 3, page 4. The requirements by the State that Wake Stone Corporation comply with laws and rules and regulations generally applicable to stone quarries shall not be deemed a prohibition of quarrying for the purpose of the option agreement.
>
> B. The operation of a quarry on Wake Stone Corporation's property for a minimum period of five years.

56. Wake Stone would have never agreed to the "sooner" language because they had not yet determined whether the quarriable stone could be mined within the 50-year period. (T5 p 976)

57. Wake Stone knew if they appealed the 1981 permit that the Permit would have been stayed pending resolution. (T5 p 1037)

58. Except for the Permit, the current Director of DEMLR has never seen a land donation provision included as part of a mining permit Reclamation Plan. (T4 p 940)

59. The current Director of DEMLR considered a donation of land to be an odd part of a Reclamation Plan (T4 p 941)

60. On April 1, 1991, the DEMLR renewed the Permit for another 10-year period (the "1991 Permit"). No changes were made to the "Donation" provision. (Resp. Ex. 18)

61. On April 20, 2001, the DEMLR renewed the Permit for another 10-year period (the "2001 Permit"). No changes were made to the "Donation" provision (Resp. Ex. 21)

62. On November 24, 2010, the DEMLR modified the Permit in a manner unrelated to the issues in this case. No changes were made to the "Donation" provision. (Resp. Ex. 29, p 4)

63. In 2011, during the permit renewal process, Wake Stone requested that DEMLR modify the land "donation" provision in the 2011 Permit to change the word "sooner" to "later" in 2011. DEMLR renewed the permit but did not modify the land "donation" provision as requested by Wake Stone. (Pet. Ex. 72) (Resp. Ex. 29)

64. On February 26, 2018, Wake Stone requested a modification of the Permit to adjust the site plan buffers to be consistent with the property boundaries. (Resp. Ex. 36)

65. On March 16, 2018, Mr. David Lee of Wake Stone emailed Ms. Judy Wehner, DEMLR, requesting that in addition to modification of the buffers, the Permit be modified to revise the land "donation" provision in Condition 5.B from "whichever is sooner" to "whichever is later," to be consistent with the Mining Commission's April 1981 Final Decision. A copy of the Final Decision was attached to the email. (Resp. Ex. 50)

66. Mr. Vinson, Director of DEMLR, personally reviewed information brought to him by Wake Stone and by his staff. That information included the Mining Commission's April 1981 Final Decisions to DEMLR to issue the 1981 Permit to Wake Stone with the "whichever is later" language. (T4 pp 730-731)

67. Mr. Vinson found no information to explain why the 1981 Permit had been issued with the "whichever is sooner" language which was in direct conflict with the Commission's decision. Mr. Vinson believed the Mining Commission's order was superior to DEMLR's authority. As a result, he reasonably concluded that the change from "later" to "sooner" was a discrepancy that should be corrected through an administrative change to properly reflect the Mining Commission's 1981 order. (T4 pp 733-741)

68. Mr. Vinson confirmed that administrative changes are made to mining permits and he has used the same procedure many times in the past. The administrative procedure does not require a fee to be paid and does not require public notice of the change. (T4 pp 784-787)

69. In March 2018 DEMLR modified the buffer conditions and the land "donation" provision in the Permit (the "2018 Permit Modifications") in ways that are at issue in this case. DEMLR made the changes using administrative modification procedures. (Resp. Ex. 34, 79)

III. The Buffer Provisions

70. The 1981 Permit established a permanent buffer along the northern and eastern mine site boundaries as shown in the 1981 Site Plan, and a 10-year undisturbed buffer area of existing natural vegetation between any mining disturbance and Park property and between any mining disturbance and the top edge of the bank of Crabtree Creek within the 10-year permit area.

71. The 1991 Permit contained similar buffer zone conditions but added a 100-foot minimum buffer along the western side of the mine site between Crabtree Creek and any mining activity, a 250-foot minimum buffer along the northern side of the mine site between Crabtree Creek and any mining activity, a 100-foot minimum buffer between any mining activity and the Park along the eastern side of the mine site, and a 100-foot buffer between any mining activity and adjoining property along the southern side of the mine site. The 1991 Permit included the condition that an "undisturbed buffer zone of existing natural vegetation" be maintained "between the top edge of Crabtree Creek and any mining disturbance within the 10-year permit area" of "sufficient width to prevent offsite

sedimentation and to preserve the integrity of the natural watercourse" that meets "the U.S. Corp of Engineers requirements for Crabtree Creek Watershed." The 1991 Permit also added conditions providing that sufficient buffer must be maintained between any affected land and any adjoining waterway to prevent sedimentation of that waterway from erosion of the affected land and to preserve the integrity of the natural watercourse and that any mining activity affecting wetlands must comply with the requirements and regulations promulgated by the U.S. Army Corps of Engineers.

72. The 2001 Permit included a modified requirement that an "undisturbed buffer zone of existing natural vegetation" be maintained "between the top of the bank of Crabtree Creek and any mining disturbance within the 10-year permit area" of "sufficient width to prevent offsite sedimentation and to preserve the integrity of the natural watercourse" that meets "the U.S. Corp of Engineers requirements for Crabtree Creek Watershed." The 2001 Permit retained the permanent buffer, the 250-foot minimum buffer along the northern side of the mine site between Crabtree Creek and any mining activity, the 100-foot minimum buffer zone between mining activity and the Park along the eastern side of the mine site and between any mining activity and adjoining property along the southern side of the mine site. The 2001 Permit revised the western buffer zone to require a minimum 100-foot buffer between a new pit expansion and Crabtree Creek and added a 50-foot buffer between Crabtree Creek and the outer edge of a perimeter haul road that ran along the western edge of the quarry pit as it existed at the time. The 2001 Permit added the condition that "all buffer zones shown on the 2001 Site Plan Map shall be maintained to protect adjoining property" and specified that these buffers must remain undisturbed subject to specified exceptions. The 2001 Permit retained the requirement that sufficient buffer be maintained between any affected land and any adjoining waterway or wetland to prevent sedimentation of that waterway or wetland from erosion of the affected land and to preserve the integrity of the natural watercourse or wetland. The 2001 Permit replaced a 1991 wetland protection condition with the requirement that "any mining activity affecting waters of the State, waters of the U.S., or wetlands shall be in accordance with the requirements and regulation[s] promulgated and enforced by the N.C. Environmental Management Commission."

73. Most pertinent to this matter are Respondent's 2018 Permit modifications of the buffer zones in Permit Condition 3 from those in the prior 2011 Permit.

74. The 2011 Permit removed prior references to Crabtree Creek buffer zone conditions in the 10-year permit area. However, the 2011 Permit included textual buffer zone conditions that required a 250-foot minimum buffer zone along the northern side of the mine site between Crabtree Creek and any mining activity, a 100-foot minimum buffer zone between mining activity and the Park along the eastern side of the mine site, and a 100-foot buffer zone between any mining activity and adjoining property along the southern side of the mine site. The 2011 Permit included the condition that "all buffer zones shown on the Site Plan Map dated February 4, 2011 shall be maintained to protect adjoining property" and specified that these buffers must remain undisturbed subject to specified exceptions. Also contained in the 2011 Permit buffer zone conditions were protections for adjoining waterways and wetlands.

75. The 2018 Permit retained the 2011 Permit conditions protecting adjoining waterways and wetlands. However, the 2018 Permit condensed the buffer zone conditions contained in the

text of the 2011 Permit by substituting a reference to "[a]ll buffer zones shown on the Site Plan Map dated February 4, 2018," for the 2011 Permit textual description of the minimum 250-foot northern buffer between mining activity and Crabtree Creek, the minimum 100-foot eastern buffer between mining activity and the Park, and the 100-foot minimum southern buffer between mining activity and adjacent property. The February 4, 2018, Site Plan, in relevant part, shows a 250-foot buffer zone north of the mine site running to the Quarry/Park property boundary line in the middle of Crabtree Creek, a 100-foot buffer zone west of the mine site running to the Quarry/Odd Fellows Site property boundary line in the middle of Crabtree Creek, and a 100-foot buffer zone east of the mine site running to the property line between the Quarry and the Park.

76. All of these buffers are wider than required by North Carolina riparian buffer rules for the river basin in which the quarry is located. (T3 p 676)

77. In dispute is whether Respondent followed the appropriate permit modification procedures when it modified the permit in 2018 to effectively reduce some of the buffer widths by defining them from the centerline of the creek instead of the creek edge. The Respondent characterized the 2018 permit modification to the buffers as administrative. The Petitioner believes the changes were not administrative and therefore required additional procedures including notification of the public and charging of application fees.

78. N.C. Gen. Stat. § 74-49 defines "affected land" to mean "the surface area of land that is mined, the surface area of land associated with a mining activity so that soil is exposed to accelerated erosion, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plan, stockpiles, nonpublic roads, and settling ponds."

79. N.C. Gen. Stat. § 74-50(b)(3) defines "permitted area" as "affected land and all other land used for or designated as buffers or reserves, or used for other purposes, as delineated in a mining permit or an application for a mining permit."

80. Administrative permit modification procedures are not allowed when new land is added to the permitted area of a mine. *see* N.C. Gen. Stat. § 74-50; 15A NCAC 5B .0112(b); The 2018 Buffer Modifications did not add or allow any change to permitted land in the permit. As a result, the areas that were previously defined as buffers are still wooded and undisturbed.

81. There was no evidence presented in this case that the 2018 Buffer Modifications had any actual adverse environmental impact.

82. A reduction of buffer width does not necessarily result in a linear or proportional reduction in the effectiveness of the buffer. (T5 p 1073). Rather, a reduction in the efficiency of a buffer is related to the specific purpose for which it was established. (*Id.*)

83. A reduction of the 250-Foot Buffer on the northern tract of the property by approximately thirty feet – that is the change in measuring from the centerline of the creek as compared to the edge of the creek - would not adversely impact Crabtree Creek. (T5 pp 1075-1076)

84. A reduction of the 100-Foot Buffer on the western tract of the property by approximately thirty feet – that is the change in measuring from the centerline of the creek as compared to the edge of the creek - would not adversely impact Crabtree Creek. (T5 pp 1077-1078)

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, the petitioner, Coalition, 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. Dept. of Env't Quality, Div. of Water Res*., 271 N.C. App. 674, 686-87, 845 S.E.2d 802, 811-12 (2020).

3. 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).

4. The Mining Act of 1971 (the "Mining Act"), 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.

5. The Mining Act lists seven criteria under which "[t]he Department may deny [a] permit." N.C. Gen. Stat. § 74-51(d). If the Department finds that none of the denial criteria are triggered, "or if adverse effects are mitigated by the applicant as determined necessary by the Department," the Department must issue the permit. N.C. Gen. Stat. § 74-51(e).

6. An operator who holds a mining permit may apply at any time for modification of the permit. N.C. Gen. Stat. § 74-52(a). A mine's reclamation plan may be modified in any manner, so long as the modified reclamation plan meets the standards for reclamation plans set forth in N.C. Gen. Stat. § 74-53, and the modification is consistent with the bases for issuance of the original permit. N.C. Gen. Stat. § 74-52(c). Other permit terms and conditions may be modified when the Department determines that the modified permit would meet all requirements of N.C. Gen. Stat. §§ 74-50, 74-51.

7. Only when a modification increases the permitted mining area is DEMLR required to provide notice of a modification to specified owners of land adjoining the permitted mine, the chief administrative officer of each county and municipality in which any part of the permitted area is located, and various government agencies. N.C. Gen. Stat. §§ 74-50(b1), 74-50(b3). Where a modification does not increase the permitted area under the mining permit, notice to these persons and entities is not required prior to issuance of the modified permit. (*Id*.)

8. Pursuant to N.C. Gen. Stat. § 74-51(c),

> [if] the Department determines, based on public comment relevant to the provisions of this Article, that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit *or for a modification of a mining permit to add land to the permitted area*, as defined in G.S. 74-50(b). The hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. The public hearing shall be held within 60 days of the end of the 30-day period within which any requests for the public hearing shall be made. A public hearing shall not be required for a modification of a mining permit to extend the duration of the permit to a life-of-site, or life-of-lease, pursuant to G.S. 74-50(d) or (d1), respectively.

(emphasis added)

9. After a modification is approved, the time limit for a person aggrieved to file a contested case begins to run once DEMLR provides written notice of the agency action to all persons aggrieved that are known to DEMLR. N.C. Gen. Stat. § 150B-23(f). This notice must set forth the agency action and inform the persons of the right, the procedure, and the time limit to file a contested case petition. Id. The time limit for filing a contested case petition under the Mining Act once such notice is received is thirty days. N.C. Gen. Stat. §§ 74-61, 150B-23(f).

II. Laches

10. This Tribunal does not have equitable jurisdiction. Consequently, the Undersigned does not have subject-matter jurisdiction to consider Respondent's claim that Petitioner's contested case is barred by the equitable doctrine of laches.

11. Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it. . . . Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act. . . . ." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006).

12. North Carolina Courts have held that "laches is an equitable defense and is not available in an action at law." *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. 533, 537, 513 S.E.2d 335, 338 (1999) (citations omitted), *disc. rev. denied, appeal dismissed*, 350 N.C. 826, 537 S.E.2d 815 (1999); *Cater v. Barker*, 172 N.C. App. 441, 448, 617 S.E.2d 113, 118 (2005).

13. Section 1 of Article IV of our North Carolina Constitution vests the State's judicial power in a Court for the Trial of Impeachments and in the General Court of Justice*, "except as provided in Section 3" of Article IV,* and expressly dictates that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article." N.C, Constitution art. IV, §1 (*emphasis added*)

14. Section 3 of Article IV of our North Carolina Constitution provides, in pertinent part, that "[t]he General Assembly may vest in administrative agencies established pursuant to law

"*such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.*" N.C. Const. art. IV, §§ 1, 3 (*emphasis added*); *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act etc*., 324 N.C. 373, 377, 389 S.E.2d 30, 33 (1989); *Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, Comm'r of Ins.*, 16 N.C. App. 381, 383, 192 S.E.2d 57, 58 (1972).

15. The General Assembly has conferred upon the Office of Administrative Hearings the power to determine a person's rights, duties, or privileges through a contested case proceeding. N.C. Gen. Stat. § 150B-2. An administrative agency does not have the inherent powers of a court, particularly those of a court of equity. *Charlotte Liberty Mutual Ins. Co. v. State, ex rel. Lanier, Comm'r of Ins*., 16 N.C. App. at 385, 192 S.E.2d at 59.

16. Consequently, the undersigned Administrative Law Judge does not have subject-matter jurisdiction to consider Respondent's laches defense.

III. Substantial Prejudice

17. A "person aggrieved" can commence a contested case. A person aggrieved is "any person or group of persons of common interest directly or any person indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6). While a showing that a petitioner is a "person aggrieved" is sufficient to file a petition, the petitioner must demonstrate by a preponderance of the evidence that the agency has, *inter alia*, "substantially prejudiced the petitioner's rights" and that the agency has erred. N.C. Gen. Stat. §§ 150B-23(a), -29(a). Petitioners bear the burden of proof. N.C. Gen. Stat. § 150B-29(a); *Overcash v. N.C. Dep't of Env't & Natural Res*., 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 642 S.E.2d 445 (2007).

18. The distinct nature of this phrase, "substantially prejudiced," is even more clear when seen through the lens of N.C. Gen. Stat. § 150B-29(a), which requires that a petitioner prove "the facts required by N.C. Gen. Stat. § 150B-23(a) by a preponderance of the evidence" for each of the required elements.

19. More specifically, Petitioner must prove by a preponderance of the evidence that an agency respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner's rights and that the agency did any of the following:

    (1) Exceeded its authority or jurisdiction.

    (2) Acted erroneously.

    (3) Failed to use proper procedure.

    (4) Acted arbitrarily or capriciously.

    (5) Failed to act as required by law or rule.

    N.C. Gen. Stat. § 150B-23(a).

20. Since Petitioner has not alleged that it was deprived of property or was ordered to pay a fine or civil penalty, Petitioner must demonstrate that one or more of its rights were substantially prejudiced by the 2018 Modifications.

21. In cases involving "groups of common interest" such as membership organizations like the Coalition, the petitioner or petitioners must offer evidence that the organization and/or membership will endure the impacts of the permitting decision, including impacts to current recreational uses of natural resources. *Sound Rivers, Inc. v. N.C. Dept. of Env't Quality, Div. of Water Res*., 271 N.C. App. 674, 691, 845 S.E.2d 802, 814 (2020).

22. Petitioner argues Respondent made modifications to the Buffer Boundaries in the 2018 Mining Permit for Wake Stone without following appropriate procedures. Petitioner also argues Respondent changed the donation provision wording in the 2018 Permit in a significant way so as to violate the Mining Act.

Substantial Prejudice and the 2018 Buffer Boundary Modifications

23. Petitioner asserts that the 2018 Permit Modifications of Buffer boundaries moved quarry activities closer to the Park thereby substantially prejudicing Petitioner.

24. Although Petitioner challenges the 2018 modifications of the 250-foot buffer along Crabtree Creek on the Northern side of the Quarry property and 2018 modifications of the 100-foot buffer along Crabtree Creek on the Western side of the Quarry property, only the 250-foot Buffer Boundaries on the Northern side of the Quarry are adjacent to Park property. At the time of the 2018 Modifications, the 100-foot Buffer Boundaries were adjacent to property owned by the RDU Airport Authority.

25. The 2018 Modification of the Buffer Boundaries did not result in moving the Quarry property closer to the Park because the property boundary between the Quarry and the Park along Crabtree Creek ran to the middle of Crabtree Creek prior to the 2018 Modifications. Consequently, the geographical nexus of the Park and the Quarry property remained the same.

26. The 2018 Modifications of the Buffer Boundaries did not move quarrying activities closer to the Park because the 2018 Modifications did not increase the affected land under the Permit. (T4 p 776).

27. The "permitted area" was not increased as a result of the 2018 Modification.

28. Since the 2018 Modifications did not increase "permitted area" Wake Stone thereby was not allowed to develop the land that was previously included in the buffer zone. (T4 pp 771, 776) These areas would remain wooded and undisturbed as a result. (T4 pp 771-772) Wake Stone would have to submit another modification application to add affected land to the Permit. (T4 p 776).

29. For those buffers that border the Park, the Petitioner assumes that narrowing the width of the buffers would increase the adverse effect of the quarrying operation through increased noise, dust, or visible impacts. Nothing in the record supports this assumption.

30. Petitioner has failed to show that the 2018 Modification of the Buffer Boundaries have harmed or will harm Crabtree Creek. Even with the 2018 Modifications, the Permit Buffer Boundaries are greater than or equal to those required under North Carolina's riparian buffer rules.

31. In sum, the Petitioner failed to present any evidence or fact to support their conclusion that they were harmed in any way or substantially prejudiced by the 2018 Modifications of the Buffer Boundaries.

Substantial Prejudice and the 2018 Donation Clause Modification

32. Petitioner also asserts that the 2018 Permit modification of the "Donation" Clause substantially prejudiced the Coalition because Respondent's substitution of "whichever is later" for "whichever is sooner" in the Reclamation Plan potentially (1) exposes the Coalition to the Quarry for a longer amount of time, i.e., beyond 50 years after quarrying operations first began, and (2) delays when the Park might be able to acquire the property.

33. The effect of the changed language describing the conveyance of the quarry land from Wake Stone to the State of North Carolina from "sooner" to "later," will be that the land may, depending on other variables including the State's willingness to accept the conveyed land, be transferred significantly later into the future than had the language not be changed. The delay could be approximately thirty years.

34. First, to the extent that the mere extension of the quarry's existence constitutes substantial prejudice to Petitioner's rights, Petitioner has presented no evidence to support that it has rights in this matter. Presumably, the right it seeks to invoke is the right to prevent the Wake Stone quarry from existing altogether or at least beyond the 50 years period established under the pre-modified "donation" provision. Petitioner possesses no such right and, in fact, to the extent that a right exists, that right is Wake Stone's to the continued operation of the mine. The North Carolina General Assembly specifically recognized the importance of mining to the state and established the right for quarries to exist and operate—a right enshrined in the NC Mining Act. The Act requires the issuance of a mining permit except in situations where DEMLR makes one of the findings listed under N.C. Gen. Sta. § 74-51(d). No such findings have been made in the case of the Wake Stone quarry and, in the original 1981 Permit, DEMLR stated that "[t]he application for a mining permit for the Cary Quarry in Wake County has been found to meet the requirements of N.C. Gen. Stat. § 74-51 of The Mining Act of 1971." (Resp. Ex 13)

35. Second, to the extent that Petitioner claims the quarry's operation and its extension substantially prejudices its rights, there is no evidence to support this assertion. The 2018 modification of the "donation" provision did not alter the quarry's permitted operations, except to potentially extend its duration. DEMLR determined that Wake Stone was in compliance with the Mining Act when issuing the original 1981 permit, and the quarry has operated continuously for approximately 40 years without any permit violations. The 2018 modification did not affect the way the quarry operates and therefore did not result in substantial prejudice to the petitioner.

36. Finally, the petitioner is not a party to the "donation" provision in the Permit. Once the land donation option vests—whether "sooner" or "later"—it is the State, not the Petitioner, that has the authority to exercise it. Petitioner has no role, and thus no right, in deciding whether to decline, assign, or renegotiate the option. As discussed below, the "Donation" provision is *ultra vires*. Even if it were enforceable, however, the right to exercise the option rests solely with the State. All property options mentioned are speculative and pertain solely to ownership of the land, a matter in which Petitioner has no legal interest.

37. Petitioner has failed to identify any right it possesses and has further failed to show such right, if it existed, was substantially prejudiced by the 2018 Modifications to the Donation Clause.

IV. Petitioner has failed to demonstrate that Respondent Followed Improper Procedures

38. Assuming *arguendo* Petitioner was substantially prejudiced by the changes in the Buffer Boundary conditions in the 2018 Permit, that Petitioner had a right related to the donation of the quarry land and that Petitioner was substantially prejudiced by the modification of the Donation clause in the 2018 Permit, Petitioner has not demonstrated that Respondent failed to follow proper procedures such as prior notice, public hearing, use of specific forms, or payment of fees, in making any of the 2018 Modifications.

Modifications to Buffer Conditions

39. The 2018 buffer modifications did not add land to the permitted area. Consequently, DEMLR was not required to give notice to affected persons and entities or to the public *prior* to making the 2018 Modifications.

40. The Mining Act only imposes specific notice requirements on an applicant for a new mining permit or for a permit modification that adds land to the permitted area. N.C. Gen. Stat. § 74-50(b1- b3).

41. The 2018 Modifications of the Buffer Boundaries did not add land to the permitted area. These modifications effectively narrowed the width of the buffers by removing several feet of land near the pit area outside of the "250-foot" and "100-foot" buffer zones. The result was moving some permitted land from within a buffer to outside a buffer. N.C. Gen. Stat. § 74-50(b)(3)

42. DEMLR has the authority to adjust or modify buffers in mining permits. The Coalition has not established that these 2018 Buffer Boundary Modifications were contrary to the denial criteria of N.C. Gen. Stat. § 74-51, contrary to any of the requirements of N.C. Gen. Stat. §§ 74-50 - 74-52, or contrary to any other relevant portions of the Mining Act or Administrative Procedure Act.

Modification of Donation Clause

43. Petitioner argues that the substitution of the "whichever is sooner" Donation Clause wording in the 1981 Permit Reclamation Plan, in lieu of the "whichever is later" wording ordered by the Mining Commission, was intentional. Petitioner further argues that the substitution of "sooner" for "later" in the 1981 Permit was the result of a negotiated agreement between Wake Stone and Respondent that occurred after the April 3, 1981, Mining Commission Final Decision and prior to the issuance of the 1981 Permit.

44. The evidence shows that the North Carolina Department of Justice, the North Carolina Parks Division, and the DEMLR all opposed Wake Stone's initial application for its quarry project. In 1980, DEMLR denied the application under the provisions of the Mining Act. Wake Stone appealed to the Mining Commission which reversed Respondent's denial and ordered Respondent to issue a mining permit to Wake Stone with certain conditions. The General Assembly, through the NC Mining Act that was in effect in 1981, granted the Mining Commission the ultimate decision making authority – not DEMLR.

45. Not only was the Mining Commission authorized to reverse decisions DEMLR's 1980 denial, but it was also authorized to dictate the explicit terms of the final Permit.

46. The Mining Commission's Final Decision did provide for certain items to be agreed to

through discussions between the Respondent and Wake Stone. The condition of the Donation to State conveyance of the Quarry site was not one of those.

47. Petitioner did argue that Wake Stone should have challenged the 1981 Permit if it believed Respondent's modification of the Donation Clause option condition was erroneous. By this argument Petitioner would have this Tribunal place the job of correctly implementing and enforcing State law on the permittee. While the law certainly provides the permittee the right to challenge a permit, it is not its duty. The Tribunal chooses instead to place that job on the agency charged with doing so by the North Carolina General Assembly.

48. Based on the evidence given in this hearing, the Undersigned finds that when Respondent issued the Permit in 1981 with the timing of the conveyance tied to the sooner of 50 years from the date quarrying commenced or 10 years after quarrying operations ceased, Respondent directly defied the Mining Commission's authority. This change is made more egregious because it came after DEMLR told the Commission in writing that they had agreed to the "donation" language that included "later."

49. DEMLR, faced with the choice of either appealing the Mining Commission's decision in Superior Court, a legal option that NCDOJ said it was debatable as to whether DEMLR could challenge the Mining Commission's final decision, or simply defying the Commission's order, Respondent chose the latter and modified the donation provision to "whichever is sooner."

50. The Donation Provision was placed in the 1981 Permit as part of the Reclamation Plan which would, if such a placement were proper, allow Respondent to modify the Reclamation Plan "in any manner, so long as the Department determines that the modified plan fully meets the standards set forth in N.C. Gen. Stat. § 74-53 and that the modifications *would be generally consistent with the bases for issuance of the original permit*. See N.C. Gen. Stat. § 74-52(c) (Emphasis added)

51. The 2018 Modification of the timing of the Donation to State did not add land to the permitted area.

52. In modifying the Donation Clause wording in the Permit Reclamation Plan in 2018 from "whichever is sooner" to "whichever is later," DEMLR reasonably revised and corrected the 1981 Donation Clause wording to make it consistent with the bases for issuance of the original 1981 Permit because the Mining Commission had ordered the inclusion of the Donation Clause with the "whichever is later" clause.

V. "Donation" Provision as Part of the Reclamation Plan

53. In an effort to find a mechanism by which the donation of the quarry land would be enforceable, the parties agreed to place the donation provision in the Reclamation Plan of the permit.

54. However, simply including a land donation condition in a Reclamation Plan does not make it part of the Reclamation Plan. Labels do not control the legal meaning of a provision—its function does. (e.g., see *Guy v. Bullard*, 178 N.C. 228, 230 ("The construction put upon the contract by the parties is entitled to consideration in determining its true meaning, but they cannot, by giving a name to it, change its legal effect."). *Trust Co. v. Creasy*, 301 N.C. 44, 53, 269 S.E.2d 117, 123 (1980)("it is appropriate to regard the substance, not the form, of a transaction as controlling, and we are not bound by the labels which have been

appended to the episode by the parties.")).

55. The Mining Act defines "Reclamation" as "the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area." Although both the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, the basic objective will be to establish on a continuing basis the vegetative cover, soil stability, water conditions and safety conditions appropriate to the area." N.C. Gen. Stat. § 74-49

56. The Mining Act further provides that a "Reclamation Plan" shall include the operator's proposed practices and methods "to protect adjacent surface resources", to restore "surface gradient," specification of "revegetation or other surface treatment of the affected areas," "method of prevention or elimination of conditions that will be hazardous to animal or fish life in the adjacent area," "method of compliance with State air and water pollution laws," rehabilitation of settling ponds, contaminant control and mining refuse disposal, "restoration or establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution," "maps and other supporting documents as may be reasonably required by the Department," and "a time schedule that meets the requirements of G.S. 74-53." N.C. Gen Stat. § 74-49(13); *see also* N.C. Gen. Stat. § 74-53 (establishing minimum standards for an approved Reclamation Plan).

57. The statutory elements listed above are not the exclusive components of a Reclamation Plan. However, any additional elements or conditions must still align with the statutory definition and fall within the same category or class as the listed elements. This approach follows the statutory interpretive principle known as the "ejusdem generis" rule, which means "of the same kind or class." This rule applies where there is a list of non-exclusive specific items in a statute; under it, the addition of an item must be properly interpreted to include only items of the same type as the specified items. Notably, land ownership—whether during reclamation activities or upon their completion—has no bearing on the content or requirements of the Reclamation Plan. Land ownership is unlike the listed elements. It is not surprising that DEMLR's Director had, with the exception of this case, never seen a land conveyance in a Permit's reclamation plan

58. The "Donation" Provision, even if enforceable, has no place in a Reclamation Plan and therefore DEMLR did not act in accordance with the Mining Act when it included the "Donation" Provision in the Permit's Reclamation Plan.

VI. Donation to State – an Unauthorized "Land Swap for Permit"

59. In addition to the Petitioner's allegations of procedural error with respect to the "donation" provision addressed above, the Petitioner's specifically allege that the Respondent "exceeded its authority or jurisdiction." See Petition for Contested Case Hearing.

60. The evidence is clear that the parties ultimately exchanged the mining permit for the land "donation."

61. The parties were concerned over the enforceability of the donation provision for good reason. It is longstanding law that a prospective agreement to make a gift is not enforceable prior to completion of the gift by delivery because gifts lack consideration. See *Picot v Sanderson* 12 NC 309, 309 (1827). Here, the fact that both parties sought to enforce the "donation" meant the conveyance of land was part of a contract. The State would have an

option for the conveyance while Wake Stone would receive a mining permit.

62. The Tribunal agrees with the Petitioner's allegation with respect to Respondent acting outside its statutory authority. The inclusion of the "Donation" Provision in the Permit exceeded the authority of DEMLR. As a State agency, the DEMLR "is a creature of the Legislature," and "may exercise only such authority as is vested in by statute." *State ex rel. Utilities Commission v. Thurston Motor Lines, Inc*., 240 N.C. 166, 168, 81 S.E.2d 404, 406 (1954).

63. The scope of DEMLRs authority is circumscribed by the Mining Act. The Act grants the recipient a privilege to which it would not otherwise be entitled. See N.C. Gen. Stat. § 74-48 (providing that "no mining shall be carried on in the State unless plans for such mining include reasonable provisions for protection of the surrounding environment and for reclamation of the area of land affected by mining); N.C. Gen. Stat. § 74-50 (providing that "no operator shall engage in mining without having first obtained from the Department an operating permit that covers the affected land and that has not been terminated, revoked, suspended for the period in question, or otherwise become invalid"). The contemplated conveyance of the Quarry site to the State as documented in the Mining Permit was not a "donation." "Donations" are not donations when they are enforceable bargains made for consideration.

64. Due to the economic benefit of mining, the General Assembly has made a policy decision to award mining permits conditioned on the recipient's compliance with various conditions designed to minimize the impacts of mining on the surrounding environment and the proper reclamation of the mined land to prevent undesirable land and water conditions detrimental to the welfare, health, safety, beauty, and property rights of the citizens of the State. See N.C. Gen. Stat. § 74-47.

65. While the addition of quarried land would undoubtedly enhance Umstead Park,[4] the Mining Act does not grant the State authority to condition the issuance of a mining permit on an agreement to 'donate' something of value to the State—in this case, the donation of land in exchange for the Permit. This Tribunal finds that the General Assembly did not vest DEMLR with the authority to obtain title to land as condition of the issuance of a mining permit. This "Donation" Provision bears no relationship to the stated goals and purposes of the Mining Act. Wake Stone's "donation" of the quarry site when quarrying operations ceased could not be construed to alleviate the otherwise significantly adverse effects the Quarry would have for more than 50 years. The fundamental question remains unchanged: either the proposed quarry would have a significantly adverse impact on the Park, in which case the permit cannot be issued, or it would not. No prospect of land conveyance decades in the future does not alter the immediate or long-term impacts, if any, to Umstead Park. Who owns the land after mining and reclamation has no impact on the activities (mining and reclamation) regulated under the Mining Act. The "Donation" Provision is therefore ultra vires, rendering the Donation to the State provision void ab initio.

66. In addition to the lack of legal authority for the "Donation" Provision in the permit, the actions of the DEMLR, the Mining Commission, and Wake Stone in 1981 in developing this "Donation" Provision raise serious concerns about public trust. The Mining Act was

[4] The contemplated decision was to be subject to approval by the Council of State.

intended to regulate mining operations, safeguard public resources, and ensure appropriate oversight—not to be used as leverage to extract or enforce land "donations" regardless of the willingness of the parties involved or the perceived benefits of such an arrangement. By enabling a transaction in which a company may secure mining rights in exchange for promises of future land donations, DEMLR and the Mining Commission strayed far from their duty to uphold the integrity of the permitting process. This negotiation undermined the core principles of transparency, fairness, and accountability that the public expects from regulatory bodies. Allowing such a condition in a permit risks setting a dangerous precedent, whereby state agencies could use—or be perceived as using—their permitting authority to compel "donations" under the guise of environmental protection. Such actions erode public trust in government institutions and may ultimately compromise both the environmental and economic welfare of North Carolinians.

67. Even the mere perception that a permit can be obtained through the conveyance of land or the establishment of a mitigation fund undermines the integrity of environmental laws. Approving environmental permit applications based on consideration provided by the permittee to the State, rather than on assurances of environmental compliance, is fundamentally contrary to public policy.

68. Finally, this Tribunal observes that just days after the original application was submitted, Governor James B. Hunt, despite his concerns about the project, commendably directed DEMLR to assess the application carefully but reminded DEMLR that the application could only be denied based on its environmental merits. Regrettably, his prudent counsel was disregarded, and the Permit was conditioned not on the environmental merits, but on a "donation" of land.

69. The land "Donation" provisions contained in the 1981 permit and any subsequent permit is void and unenforceable because the Respondent has no legal authority to include such a condition in a Mining Permit. The Mining Act as written by the General Assembly, unlike the 1981 Permit, conditions the issuance of a Permit *solely* on a permit recipient's compliance with applicable environmental laws, regulations, and rules, and with Mining Act provisions designed to protect surrounding property and the environment and to ensure proper reclamation of the affected land. See for e.g., N.C. Gen. Stat. §§ 74-47, 74-51, 74-52, 74-55 (emphasis added).

70. Since the Mining Act does not authorize inclusion of the Donation to State in the Permit or in the Permit Reclamation Plan the Donation to State is **VOID** and **UNENFORCEABLE**.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned concludes:

(1) This Tribunal does not have jurisdiction to consider Respondent's laches defense,

(2) that Petitioner has failed to meet its burden to show that it was substantially prejudiced by the 2018 Modifications,

(3) in the alternative, assuming arguendo that Petitioner was substantially prejudiced by the 2018 Modifications, Petitioner has failed to prove by the preponderance of the evidence that Respondent followed improper procedures in making the 2018 Modifications, and

(4) The Donation to State set forth in Condition 5 of the Reclamation Plan in the Wake Stone Permit is *ultra vires* and therefore unenforceable.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of N.C. Gen Stat. § 150B-45, any party wishing to appeal this Final Decision must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved 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 for Judicial Review within 30 days after being served with a written copy of this Final Decision. This Final Decision was served on the parties as indicated by the attached Certificate of Service pursuant to 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. Gen. Stat § 1A-1, Article 2.

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of that 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. The appealing party must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings at the time the appeal is filed.

STAY OF FINAL DECISION

This Final Decision remains in effect until the person aggrieved moves the reviewing Court for a Stay of the Final Decision and the reviewing Court grants the Stay pursuant to N.C. Gen. Stat. § 150B-48.

IT IS SO ORDERED.

This the 21st day of February, 2025.

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 N.C. Admin. Code 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 which will subsequently place the foregoing document into an official depository of the United States Postal Service.

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This the 21st day of February, 2025.

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