STATE OF NORTH CAROLINA

COUNTY OF CARTERET

FILED 2017 DEC 20 P 12: 16 CARTERET CO., C.S.C. BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16-CVS-1272

SOUND RIVERS, INC. and NORTH CAROLINA COASTAL FEDERATION, INC.,

Petitioners,

v.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES,

Respondent,

and

MARTIN MARIETTA MATERIALS, INC.,

Respondent-Intervenor.

ORDER ON PETITION FOR JUDICIAL REVIEW

THIS MATTER was heard by the Court on October 13, 2017, the Honorable Joshua W. Willey, Jr., Superior Court Judge presiding, pursuant to Petitioners' Petition for Judicial Review and the judicial review provisions of the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-43, *et seq.* Mr. Geoffrey R. Gisler, Ms. Blakely Hildebrand, and Ms. Jean Zhuang of Southern Environmental Law Center appeared as counsel for Petitioners Sound Rivers, Inc. and North Carolina Coastal Federation, Inc. (collectively, "Petitioners"); Mr. Scott A. Conklin and Mr. Asher Spiller of the North Carolina Attorney General's office appeared as counsel for Respondent North Carolina Department of Environmental Quality, Division of Water Resources ("DWR"); and Mr. Alexander Elkan, Mr. George W. House, and Mr. Matthew B. Tynan of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP appeared as counsel for the Respondent-Intervenor Martin Marietta Materials, Inc. ("Martin Marietta").

The Court, having reviewed and considered the Petition for Judicial Review, the parties' responses and motions, the administrative record submitted by the Office of Administrative Hearings ("OAH"), the briefs of the parties, and the other documents and materials in the Record in this case, and having heard and considered the arguments of counsel, rules as follows.

BACKGROUND AND PROCEDURAL HISTORY

On July 24, 2013, Respondent DWR issued National Pollutant Discharge Elimination System Permit No. NC0089168 (the "Permit") to Respondent-Intervenor Martin Marietta for its proposed Vanceboro Quarry in Beaufort County, North Carolina. The Permit authorizes Martin Marietta to discharge up to a maximum of 12 million gallons per day of commingled stormwater and groundwater from two settling basins into the upper reaches of Blounts Creek.

On September 19, 2013, Petitioners filed a Petition for Contested Case in the OAH challenging DWR's issuance of the Permit. On March 20, 2015, Administrative Law Judge ("ALJ") Philip E. Berger, Jr. entered summary judgment in favor of DWR and Martin Marietta, upholding the Permit and finding that Petitioners had failed to show they were "persons aggrieved" under N.C. Gen. Stat. § 150B-23(a) (the "ALJ Summary Judgment Order").

On April 20, 2015, Petitioners filed a petition for judicial review of the ALJ Summary Judgment Order in Beaufort County Superior Court. On November 9, 2015, the Beaufort County Superior Court entered an order reversing the ALJ Summary Judgment Order, and holding that Petitioners were "persons aggrieved'" and that, "with respect to all of Petitioners' remaining claims, genuine issues of material fact remain, and … no party is entitled to judgment as a matter of law." The matter was remanded to OAH "for further proceedings, including specifically, a full plenary hearing on DWR's permitting decision."

On remand to OAH, from May 31, 2016, through June 9, 2016, ALJ Berger presided over a hearing at which the parties presented arguments and evidence, including the testimony of five lay witnesses, two expert witnesses, and three DWR witnesses, and the introduction of documentary exhibits.

On November 30, 2016, the ALJ issued a Final Decision entering judgment in favor of DWR and Martin Marietta, holding that Petitioners had failed to prove by a preponderance of the evidence that DWR, in issuing the Permit, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. The ALJ also held that the rights and interests of the Petitioners were public trust rights which could only be enforced by the State and that Petitioners had failed to prove by a preponderance of the evidence that their rights had been substantially prejudiced by DWR's issuance of the Permit.

On December 27, 2016, Petitioners filed in Carteret County Superior Court a Petition for Judicial Review of the ALJ's Final Decision (the "Petition"), alleging that the ALJ committed errors in the Final Decision. On January 27, 2017, DWR filed a Response asserting that the ALJ properly upheld DWR's issuance of the Permit and also asserting that the Final Decision contained legal errors regarding Petitioners' rights and interests that may be asserted and proven to establish that their rights are substantially prejudiced under the APA. On February 16, 2017, Martin Marietta filed a Response to the Petition in which Martin Marietta asserted that the Final Decision should be upheld in all respects.

On January 30, 2017 Martin Marietta filed a motion to dismiss the petition as being untimely and subsequently on February 16, 2017 filed a motion to dismiss pursuant to Rule 12 (b)(6), North Carolina Rules of Civil Procedure. On February 27, 2017 Judge Parsons heard Martin

Marietta's January 30 motion and Petitioners' motion for extension of time. In open court Judge Parsons denied Martin Marietta's January 30 motion, granted Petitioners' motion, and recused himself. After Judge Parsons' death this Court, pursuant to Rule 63, North Carolina Rules of Civil Procedure and Rule 2.1 of the General Rules of Practice for the Superior and District Courts, entered a written order memorializing Judge Parsons' ruling from the bench. This Court subsequently denied Martin Marietta's Rule 12(b)(6) motion.

On October 13, 2017, the Petition was brought on for hearing in this Court.

ISSUES PRESENTED

I. Did the ALJ err in admitting, considering, or determining the credibility or weight of evidence?

II. Did the ALJ err in upholding DWR's issuance of the Permit as reasonably ensuring compliance with:

   A. The swamp waters supplemental classification and antidegradation rule;

   B. The water quality standard for pH; and

   C. The water quality standard for biological integrity?

III. Did the ALJ err in holding that the Permit's monitoring and reopener provisions further reasonably ensure compliance with state water quality standards?

IV. Did the ALJ err in holding that Petitioners failed to prove their rights were substantially prejudiced?

STANDARD OF REVIEW

Under the North Carolina Administrative Procedure Act, a court reviewing a final decision of an administrative law judge:

> may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;

> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.
>
> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(b)-(c).

With respect to questions of law, the reviewing court employs a *de novo* review. When applying *de novo* review, the court may freely substitute its judgment for that of the agency. *In re Appeal of N.C. Sav. & Loan League,* 302 N.C. 458, 465-66, 276 S.E.2d 404, 409 (1981); *Stark v. N.C. Dep't of Env't & Natural Res.,* 224 N.C. App. 491, 496, 736 S.E.2d 553, 558 (2012). "However, even when reviewing a case de novo, courts recognize the long-standing tradition of according deference to the agency's interpretation." *Cnty. of Durham v. N.C. Dep't of Env't & Natural Res.*, 131 N.C. App. 395, 396-97, 507 S.E.2d 310, 311 (1998). Thus, "a reviewing court should defer to the agency's interpretation of a statute it administers so long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Id.* Interpretations that conflict with the clear intent and purpose of the law are not entitled to deference. Burgess v. Your House of Raleigh Inc., 326 N.C. 205, 388 S.E.2d 134 (1990) Likewise, "an agency's interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation's plain language." *WASCO LLC v. N.C. Dep't of Env't & Natural*

Res., 799 S.E.2d 405, 409 (N.C. Ct. App. 2017) (citing *N.C. Sav. & Loan League,* 302 N.C. at 465-66, 276 S.E.2d at 409-10).

The Court reviews claims that a final decision is arbitrary, capricious, or an abuse of discretion or unsupported by substantial evidence under the "whole record" test. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659-60, 599 S.E.2d 888, 895 (2004); *Stark*, 224 N.C. App. at 508, 736 S.E.2d at 564. When a reviewing court applies the whole record test, it "must examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by substantial evidence." *Mann Media v. Randolph*, 356 N.C. 1, 14, 565 S.E.2d 9, 17 (2002) (internal quotation marks omitted). "'Substantial evidence' means relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c); *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 52, 625 S.E.2d 837, 841 (2006). It falls to the "'administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence, if any.'" *Carroll,* 358 N.C. at 672, 599 S.E.2d at 902 (quoting *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982)). As a result, a reviewing court may not replace the administrative body's judgment as between two "reasonably conflicting views," even if the court might have justifiably reached a different conclusion under de novo review. *Mann Media,* 356 N.C. at 14, 565 S.E.2d at 17-18. Petitioners bore the burden of proof on all issues before the OAH. N.C. Gen. Stat. § 150B-23(a), 150B-29(a); *Overcash v. N.C. Dep't of Env't & Nat. Res.*, 179 N.C. App. 697, 704-05, 635 S.E.2d 442, 447-48 (2006), *disc. review denied,* 361 N.C. 220, 642 S.E.2d 445 (2007).

ANALYSIS

I. Evidentiary Issues

Petitioners argue that the ALJ erred in admitting and considering certain evidence, which Petitioners assert is hearsay, and in determining the credibility and weight to be afforded certain evidence. The Court disagrees.

A. Petitioners' Hearsay Objections

In a contested case hearing, the ALJ has broad discretion to admit probative evidence. N.C. Gen. Stat. § 150B-29(a); 26 NCAC 03 .0122(1); *N.C. Dep't of Pub. Safety v. Ledford*, 786 S.E.2d 50, 66 (N.C. Ct. App. 2016); *Stark*, 224 N.C. App. at 500, 736 S.E.2d at 560. As to the admission of purported hearsay, after failing to present hearsay objections to the ALJ, Petitioners now object to the ALJ's consideration of documents Petitioners themselves introduced in evidence and to other documents and testimony. The Court rejects Petitioners' arguments.

As an initial matter, Petitioners object to the admission and consideration of their own exhibits, P-14 and P-27, which were admitted into evidence by the ALJ on Petitioners' motion, and to Respondent's exhibit R-13, the entirety of which was included in Petitioners' exhibit P-14 and therefore may also be considered as admitted into evidence by Petitioners. Petitioners sought to admit these exhibits without limitation. A party may not object to exhibits that the party itself introduced into evidence. *Stark*, 224 N.C. App. at 497, 736 S.E.2d at 558; *Craven Reg'l*, 176 N.C. App. at 53-54, 625 S.E.2d at 842. The Court concludes the ALJ properly admitted these documents into evidence.

In addition to Exhibits P-14, P-27, and R-13, Petitioners object to the ALJ's admission and consideration of evidence of opinions and input provided during the permitting process by DWR staff who did not themselves testify at the OAH hearing. However, the exhibits as well as the challenged testimony were properly admitted and relied upon by the ALJ as evidence of DWR's

decision-making process and as such were not hearsay. *See, e.g., Follum v. N.C. State Univ.*, No. COA09-1466, 2010 N.C. App. LEXIS 928, at *27-28 (N.C. Ct. App., June 1, 2010) (unpublished) (citing and quoting *State v. Jones,* 347 N.C. 193, 216, 491 S.E.2d 641, 655 (1997)), *disc. review denied and appeal dismissed,* 364 N.C. 615, 705 S.E.2d 363 (2010).

Even if this evidence were hearsay, the ALJ did not abuse his discretion in considering it. N.C. Gen. Stat. § 150B-29(a), 26 NCAC 03 .0122; *Ledford*, 786 S.E.2d at 66 (recognizing that the ALJ had discretion to consider hearsay evidence with probative value and holding that he did not abuse his discretion in doing so).

The Court concludes the evidence to which Petitioners object as hearsay was properly admitted and considered competent evidence by the ALJ.

B. Petitioners' Exceptions Concerning ALJ Findings as to Witness Credibility and Weight of Evidence

As to the credibility of witnesses, the Court reviews the ALJ's findings under the whole record test, with a recognition that the credibility of witnesses and the probative value of particular testimony have been considered by our appellate courts to be the province of the ALJ. *City of Rockingham*, 224 N.C. App. at 239, 736 S.E.2d at 771; *Carroll*, 358 N.C. at 662, 672-74, 599 S.E.2d at 896, 902-04.

The Final Decision states that the ALJ

> assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to, the demeanor of the witness, any interests, 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 such testimony is consistent with all other believable evidence in the case.

Final Decision at 9. The Final Decision describes at length the testimony offered by each of Petitioners' two expert witnesses and three lay witnesses and the ALJ's consideration of that testimony. *See, e.g.*, Final Decision Findings of Fact ("FOF") ¶¶ 158-310.

Petitioners' expert witnesses

The Final Decision describes and summarizes the testimony of Petitioners' expert witnesses, Dr. Bean and Dr. Overton, along with other record evidence that the ALJ determined contradicted, undercut, or called into question their opinions, including certain inconsistent statements by the witnesses. Final Decision FOF ¶¶ 178, 184-87, 200-01, 206-08, 217-18, 227-30, 232-36, 241-47. The ALJ found that that Petitioners' experts were not credible or not persuasive in the testimony they offered. The Court has reviewed the findings of the Final Decision regarding the testimony of Dr. Bean and Dr. Overton, the transcript of their testimony and related exhibits, and the other supporting and countervailing evidence in the record, and determines the ALJ's findings are supported by substantial evidence cited by the ALJ in the Final Decision and in the record as a whole. The Court will not disturb the findings of the ALJ, who had the opportunity to observe the witnesses' demeanor while testifying, *see Carroll*, 358 N.C. at 662, 672-74, 599 S.E.2d at 896, 902-04, regarding the credibility and weight to be afforded to Petitioners' expert witnesses' testimony. All such findings are affirmed and upheld.

Petitioners' lay witnesses

Petitioners presented the testimony of five lay witnesses: Ms. Deck, Mr. Miller, Dr. Larkin, Mr. Daniels, and Mr. Boulden. The ALJ assessed the testimony of these lay witnesses, including in relation to other record evidence, and determined the credibility and weight of that testimony. The Court concludes the ALJ's findings are supported by substantial evidence in the record as a whole. The Court will not disturb the findings of the ALJ, who had the opportunity to observe the witnesses' demeanor while testifying, regarding the credibility and weight to be afforded to Petitioners' lay witnesses' testimony. *Carroll*, 358 N.C. at 662, 672-74, 599 S.E.2d at 896, 902-04.

The Court concludes that the ALJ properly found Petitioners' lay witnesses were not competent to testify regarding predicted physical, chemical, and biological impacts of the permitted discharge on Blounts Creek. Final Decision FOF ¶¶ 268-72, 288-93, 297, 299-300, 302-05, 309-11. To the extent these witnesses testified regarding the future impacts of the discharge on such characteristics as flow rates, flooding, pH, salinity, fish assemblages, and other technical matters, the ALJ correctly characterized these non-expert witnesses' opinions as speculation. In so concluding, however, the Court does not interpret the Final Decision as holding—and this Court does not hold—that Petitioners' lay witnesses were not competent to testify regarding their "concerns" about impacts of the discharge on the creek and the basis for their concerns.

C. Petitioners' Arguments Regarding the Proposed Orders of the Parties

Petitioners argue that the ALJ improperly relied on proposed orders submitted by DWR and Martin Marietta in drafting the Final Decision. The Court disagrees. "It is the accepted practice in North Carolina for the prevailing party to draft and submit a proposed order that the decision-making body may then issue as its own – with or without amendments." *N.C. State Bar v. Sutton,* 791 S.E.2d 881, 896 (N.C. App. 2016), *appeal dismissed,* 797 S.E.2d 296 (N.C. 2017). The ALJ's consideration and incorporation of proposed findings submitted by the parties in preparing the Final Decision, is proper and not an error of law, an abuse of discretion, or otherwise improper or unlawful. *See* 26 NCAC 03 .0120(f) and .0127(a)(4); *United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 633, 666 S.E.2d 504, 510 (2008).

The Final Decision findings and conclusions with respect to admission and consideration of evidence to which Petitioners object are supported by substantial evidence based on review of the whole record, and were proper and not an abuse of discretion, an error of law, or otherwise improper or unlawful. All findings, determinations, and conclusions by the ALJ with respect to evidence to which Petitioners object are affirmed and upheld.

II. Petitioners' Substantive Claims

Petitioners argue that DWR erred in issuing the Permit. The permit applicant has the burden of "providing [to DWR] sufficient evidence to reasonably ensure that the proposed [discharge] will comply with all applicable water quality standards and requirements." 15A NCAC 02H .0112(c). DWR may issue a permit only when "the imposition of conditions" can "reasonably ensure compliance with applicable water quality standards and regulations." *Id.* In the contested case proceeding, Petitioners bore the burden to prove that DWR, in issuing the Permit, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. N.C. Gen. Stat. §§ 150B-23(a), 150B-29(a).

Petitioners argue that in issuing the Permit DWR failed to reasonably ensure compliance with: (1) the swamp waters supplemental classification, 15A NCAC 02B .0202(62), .0101(e)(2), and the antidegradation rule, 15A NCAC 02B .0201 (the "Swamp Waters Claim"); (2) the water quality standard for pH, 15A NCAC 02B .0211(3)(g) (2013) (the "pH Claim"); and (3) the water quality standard for biological integrity, 15A NCAC 02B .0202(11), .0211(2) (the "Biological Integrity Claim").

A. Petitioners' Swamp Waters Claim

North Carolina's water quality regulations protect North Carolina's surface waters by: (1) establishing surface water classifications based primarily on the "best uses" of surface waters, *see* 15A NCAC 02B .0101; N.C. Gen. Stat. § 143-214.1(b); (2) establishing water quality standards that protect assigned uses of "primary classifications," *see, e.g.,* 15A NCAC 02B .0211 (water quality standards for Class C waters); and (3) assigning classifications to individual segments of

surface waters throughout the State, *see* 15A NCAC 02B .0201 *et seq.* Some segments are also assigned "supplemental classifications," which may alter water quality standards otherwise applicable. *See* 15 NCAC 02B .0101(e). The state antidegradation rule provides that "[e]xisting uses ... and the water quality to protect such uses shall be protected by properly classifying surface waters and having standards sufficient to protect these uses." 15A NCAC 02B .0201(b).

The Permit authorizes Martin Marietta to discharge commingled stormwater and groundwater from two settling basins at its proposed quarry into the upper reaches of Blounts Creek. The parties do not dispute the primary classification and supplemental classifications assigned to Blounts Creek. Blounts Creek from its source to Herring Run (referred to by the parties as "upper Blounts Creek") is assigned the primary classification of Class C and the supplemental classifications of Swamp Waters ("Sw") and Nutrient Sensitive Waters ("NSW").

Petitioners argue that assignment of the swamp waters supplemental classification to upper Blounts Creek affixed "swamp water habitat" as a "special use" of that portion of the Creek; in turn, Petitioners argue, the antidegradation rule requires DWR to protect certain "natural characteristics" of swamp waters such as "low flow," "low velocity," and "dark color."

The ALJ rejected Petitioners' argument, concluding that the swamp waters supplemental classification does not provide any additional protections to swamp waters beyond the water quality standards for protecting the uses of Class C waters. The ALJ concluded the only effect of the swamp waters supplemental classification is to make the water quality standards for pH and dissolved oxygen less stringent than otherwise required for Class C waters. Final Decision Conclusion of Law ("COL") ¶ 93.

The Court reviews the ALJ's conclusions of law and statutory and regulatory interpretations *de novo* and findings of fact under the whole record test.

"Swamp waters" are defined as "those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography," 15A NCAC 02B .0202(62), or "waters which have low velocities and other natural characteristics which are different from adjacent streams." 15A NCAC 02B .0101(e)(2). DWR interprets state water quality rules to require no additional protection for water segments assigned the swamp waters supplemental classification (beyond the protections required by the standards for the primary water quality classification, which in this case is Class C), an interpretation the ALJ considered *de novo* and upheld as reasonable and consistent with the plain language of North Carolina's water quality standards. Final Decision COL ¶¶ 88-90, 98.

The Court reviews this regulatory interpretation issue *de novo* and affirms the ALJ conclusion.

Interpretation of administrative regulations "properly begins with the plain words" of the regulation. *Cole v. N.C. Dep't of Pub. Safety*, 800 S.E.2d 708, 714 (N.C. Ct. App.), *disc. rev. denied,* 803 S.E.2d 156 (2017). The Court's *de novo* review of the antidegradation rule and rules governing the swamp waters supplemental classification shows that no "plain words" identify or protect a swamp waters "use" or identify or protect swamp waters "characteristics." 15A NCAC 02B .0202(62), .0101(e)(2), .0211(6), .0211(14), .0220(5), .0220(12), .0301(c).

The Court's *de novo* review of the water quality rules as a whole indicates that if the North Carolina Environmental Management Commission ("EMC") intends to protect a particular attribute or condition or use of surface waters, it does so in the text of its rules. With respect to *uses* of a surface water, the rules explicitly identify the uses associated with primary surface water classifications and, in some cases, supplemental classifications, and state narrative and numeric

water quality standards to protect such uses. *See, e.g.*, 15A NCAC 02B .0101(c)-(e), .0211(1), .0212(1), .0214(1), .216(1), .0218(1), .0219(1), .0220(1), .0221(1), .0222(1), .0231(a). There is no such identification of uses for the swamp waters supplemental classification and no effect on applicable water quality standards except to make *less stringent* the standards for pH and dissolved oxygen that would otherwise apply. The plain language and structure of the water quality rules indicates there is no intent to protect any alleged "use" particular to the swamp waters supplemental classification. *See, e.g., Mangum v. Raleigh Bd. of Adjustment*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009) ("One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another.").

Similarly, with respect to *characteristics* of a water body, the rules show that the EMC knows how to protect a specific characteristic if it so desires. For example, the water quality rules establish explicit flow requirements for high quality waters. 15A NCAC 02B .0224(1)(v) (setting maximum volume of wastewater discharge into high quality waters). There is no text in the swamp waters supplemental classification rules (or elsewhere in the water quality rules) requiring protection of particular "swamp water characteristics." With the exception of "low velocity," the characteristics cited by Petitioners – "periods of low or no flow, low velocity, low pH, low dissolved oxygen, and high tannin levels" – do not appear in any water quality rule. References in the rules to "low velocity" pertain only to a quality that swamp waters "generally have," 15A NCAC 02B .0202(62), not to a quality those waters <u>must</u> have. Significantly no rules protect or assure that waters with the swamp waters supplemental classification will have low velocity, periods of low or no flow, or high tannin levels. The Court is not vested with rule making authority. The water quality standards for pH and dissolved oxygen applicable to Class C waters are made

less stringent for water bodies with the swamp waters supplemental classification, and this appears to the Court to be the only effect of that supplemental classification. 15A NCAC 02B .0211(3)(b), (g) (2013).

Even if Petitioners' interpretation of the swamp waters and antidegradation rules could be characterized as reasonable, DWR's interpretation nonetheless is reasonable and is affirmed. The Court notes that, as found by the ALJ, and supported by substantial evidence in the record as a whole, DWR's interpretation is longstanding and consistent with the plain language and the structure of the water quality rules. The Court gives deference to DWR's interpretation that the water quality rules do not create special protections for characteristics such as "low flow, low velocity, and dark color," or otherwise.

The Court also notes that the state's water quality rules provide a means by which the EMC may classify waters as High Quality Waters or classify unique and special surface waters of the state as Outstanding Resource Waters, and thereby provide a means of protecting certain characteristics of those waters that are not otherwise protected by water quality standards. 15A NCAC 02B .0225(a)(2). The record evidence does not show that Petitioners have sought such regulatory protections for Blounts Creek. 15A NCAC 02B .0225.

The Court is not persuaded that *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), supports Petitioners' Swamp Waters Claim. Petitioners have not shown that there is any designated use associated with the "swamp waters" supplemental classification that is required to be maintained or protected under North Carolina's water quality rules or otherwise.

The Court has reviewed the Final Decision findings in relation to Petitioners' Swamp Waters Claim, *see, e.g,* Final Decision FOF ¶¶ 119-126, 158-202, and based on its review of the whole record, the Court concludes that substantial evidence supports these findings. These

findings support the ALJ's conclusion that Petitioners failed to carry their burden before OAH to prove DWR acted erroneously or arbitrarily or otherwise unlawfully in determining that the Permit reasonably ensures compliance with all applicable water quality standards, including the swamp waters supplemental classification and the state antidegradation rule.

The Final Decision findings of fact and conclusions of law and holding that Petitioners failed to carry their burden and that the Permit reasonably ensures compliance with the swamp waters supplemental classification and the state antidegradation rule are affirmed and upheld.

B. Petitioners' pH Claim

At the time the Permit was issued, the pH standard for Class C waters applicable to upper Blounts Creek read as follows:

> pH: shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions.

15A NCAC 02B .0211(3)(g) (2013).

In their pH Claim, Petitioners argue that the rule required DWR to undertake site-specific sampling to determine what "normal" pH is for the receiving waters in the area of the proposed discharge, which, in turn, must be maintained. Petitioners argue that: DWR did not determine "normal" pH for upper Blounts Creek; the Permit pH limit of 5.5 to 8.5 allows the permitted discharge to cause upper Blounts Creek to exceed its "normal" pH; and the Permit therefore fails to reasonably ensure compliance with the pH standard.

DWR interprets the pH standard as setting a maximum allowable pH of 9.0 and a minimum allowable pH of 6.0, except that the lower limit may be as low as 4.3 in swamp waters, if pH below 6.0 is the result of natural conditions. DWR interprets the rule as not requiring site-specific sampling or testing. Based on its interpretation of the pH rule, DWR established a Permit limit for pH of the discharge effluent of 5.5 to 8.5.

The ALJ concluded that DWR's interpretation is reasonable and consistent with the plain language of the rule, and rejected Petitioners' pH claim because the Permit's pH limits reasonably ensure compliance with the pH standard.

The Court reviews the ALJ's factual determinations under the whole record test and asserted legal errors and interpretation of rules *de novo*.

The Court is not persuaded that the pH rule creates or requires a site-specific standard for pH in receiving waters. First, the interpretation of administrative regulations "properly begins with the plain words" of the regulation. *Cole*, 800 S.E.2d at 714. The "plain words" of the pH rule do not require a site-specific standard or site-specific sampling to determine a site-specific standard. The rule states that pH "shall be normal for the waters in the area," and then provides that: (a) "normal for the waters in the area" "generally shall range between 6.0 and 9.0," and (b) a lower pH may be allowed (to a minimum of 4.3) "if it is the result of natural conditions." DWR interprets the rule itself to define what "normal" pH is for a stream segment that has been assigned the classifications Class C-Sw: 6.0 to 9.0, or 4.3 to 9.0 if the lower pH results from natural conditions.

Second, as noted in the Final Decision, this interpretation is supported by the EMC's 2014 technical amendment, which deleted the words "generally shall" from the pH standard. 15A NCAC 02B .0211(14) (2015). This technical amendment further clarifies that "normal for waters in the area" is defined by the numerical range set forth in the text of the rule. Moreover, the current text of the pH rule is consistent with the language of other water quality standards that explicitly state the numeric limits required. *See, e.g.*, 15A NCAC 02B .0211(3), (5), (6), (9), (11). The only exception to the applicable pH range is in swamp waters, where the lower limit may be decreased – made less stringent – if low pH is the result of natural conditions.

Third, the state's water quality standards make clear that site-specific standards are the exception, not the norm, and are explicitly set forth where they exist. *E.g.*, 15A NCAC 02B .0110 (requiring site-specific strategies for waters providing habitat for federally listed threatened and endangered species), .0211(11) (allowing creation of site-specific standard for metals), .0226 (providing that "site-specific water quality standards may be granted by the Commission on a case-by-case basis"). No site-specific standards for pH are described or required in the water quality rules applicable here.

Fourth, even if Petitioners' proposed interpretation of the pH standard were reasonable, in reviewing agency regulatory interpretations, the Court agrees with the ALJ's determination that DWR's interpretation is reasonable and consistent with the plain language of the regulation. The Court accords deference to that interpretation.

Based on the Court's *de novo* interpretation of the pH rule, the Court upholds DWR's interpretation of the pH rule and declines to accept Petitioners' claim that the rule requires site-specific assessment.

The Court has reviewed the Final Decision findings in relation to Petitioners' pH Claim, *see, e.g.*, FOF ¶¶ 90, 104-118, 145-151, 164-170, and based on its review of the whole record, the Court concludes that substantial evidence supports these findings, and that Petitioners failed to carry their burden before OAH to prove DWR acted erroneously or arbitrarily or otherwise unlawfully in determining that the Permit reasonably ensures compliance with the pH standard.

The Final Decision findings of fact and conclusions of law and holding that Petitioners failed to carry their burden and that the Permit reasonably ensures compliance with the pH standard are affirmed and upheld.

C. Petitioners' Biological Integrity Claim

Class C waters must be "suitable for aquatic life propagation and maintenance of

biological integrity" among other uses. 15A NCAC 02B.0211(2) The term "Biological Integrity" is defined by 15A NCAC 02B.202(11) as "the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions".

The rules do not define the terms "species composition", "diversity", "population densities" or "functional organization". Dr. Overton was offered and accepted by the ALJ as an expert in the field of fisheries ecology, larval fish ecology, fisheries management, and fish sampling methods and analysis. He testified that species composition counts the number of species in a system. Species diversity counts the number species present and the relative abundance of each species. Population density describes how many individuals are in a defined area and functional organization describes the organization of biological community.

Tom Reeder with DWR testified that he did not know if there was such a thing as a biological integrity analysis; that he had never really heard of such a thing. He further testified that no statutes or rules set forth numeric standards or explicit methods or metrics by which DWR must make a determination that a NPDES permit reasonably ensures compliance with the biological integrity standard. Rather, the standard requires DWR to exercise its discretion, expertise and professional judgment to determine whether the anticipated impacts of a proposed discharge are such that the discharge will preclude the ability of an "aquatic ecosystem" to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization "similar" to that of "reference conditions". DWR staff conceded that the agency did not evaluate species composition, diversity, population,density, or functional organization in Blounts Creek. Mr.

Reeder justified the failure to evaluate these metrics by saying that he considered the impact of the permitted discharge to be *de minimus*. In essence the agency reached the ultimate conclusion that the impact of the permitted discharge was *de minimus* first, without evaluating species composition, diversity, population density, and functional organization, and then used the ultimate conclusion to conclude that evaluation of the metrics was unnecessary.

With respect to questions of law, the reviewing court employs a *de novo* review. When applying *de novo* review, the Court may freely substitute its judgment for that of the agency . In re Appeal of N. C. Sav. & Loan League, 302 N. C. 458 (1981) Incorrect statutory interpretation is an error of law which allows the court to apply a *de novo* review. Brooks v. Rebarco, 91 N.C. App. 459 (1988) However even when reviewing a case *de novo* courts recognize the longstanding tradition of according deference to an agency's interpretation of its rules. A reviewing Court should defer to agency's interpretation of a statutes or rules it administers so long as the agency interpretation is reasonable and based upon a permissible construction of the statute or rule. County of Durham v. N.C. Dep't of Env't and Natural Res., 131 N.C. App. 395 (1998). Interpretations that conflict with the clear intent and purpose of the law are entitled to no deference. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205 (1990) An agency's interpretation of its own regulations will be in enforced unless clearly erroneous or inconsistent with the regulation's plain language. WASCO LLC. V. N.C. Dep't of Env't & Natural Res., 799 S.E. 2nd 405 (2017)

The terms "species composition, diversity, populations densities, and functional organization" used in the biological integrity standard must be given meaning. Kyle v. Holston Group, 188 N.C. App. 686 (2008) The standard requires DWR to maintain the indigenous biological community by insuring that the post discharge "species composition, diversity,

population densities, and functional organization are similar to that of reference conditions" determined before the discharge is permitted. The rule is clear that referenced conditions must be evaluated on the basis of and as defined in those terms. Yet the DWR staff conceded that they did not measure any of the biological integrity metrics in Blounts Creek when evaluating the permit's compliance with the standard. Thus, DWR failed to determine the base line metrics required by 15A NCAC 02B.0202(11) and could not, therefore, ensure reasonable compliance with the biological integrity standard.

The Biological integrity standard is clear; DWR must protect the indigenous community by determining reference conditions in terms of an evaluated impacts on the community's species composition, diversity, population density and functional organization. Reference conditions must be specific enough to allow the agency to apply the biological integrity standard properly. DWR failed to apply the plain language of the biological integrity standard. Therefore DWR did not "reasonably ensure compliance with" the biological integrity standard. Consequently the agency exceeded its authority and erred as a matter of law when issuing the permit. Based upon a *de no*vo review of the biological integrity standard rules and related definitions the Court concludes that DWR's interpretation of the rule is not reasonable and is contrary to the language of the standard and definitions.

Conclusions of law 51 through 53, 61, 62, 64 through 67,70, 75, 77 through 80, 110 through 112 are reversed.

III. Effect of the Permit Monitoring and Reopener Provisions

Petitioners argue that the ALJ erred in citing and considering the Permit's monitoring and reopener provisions because, they contend, the potential impacts predicted by DWR constitute violations of water quality standards. The Court reviews factual issues under the whole record

test and legal issues *de novo*. As addressed above with respect to Petitioners' substantive claims, the potential impacts of the proposed discharge predicted by DWR, found by the ALJ and supported by substantial evidence in the record, do not constitute violations of water quality standards. The Court considers *de novo* the legal effect of the monitoring and reopener conditions, and concludes that the ALJ did not err in concluding that the monitoring and reopener provisions constitute "substantial and competent evidence that, in the event water quality standards were actually threatened, the State could impose additional restrictions to avoid" water quality violations. *Deep River Citizens' Coal. v. N.C. Dep't of Env't & Natural Res.*, 165 N.C. App. 206, 213, 598 S.E.2d 565, 569 (2004).

The Court has reviewed the Final Decision findings in relation to Petitioners' assertions on judicial review that the ALJ erred with respect to findings concerning the Permit monitoring and reopener provisions. *See, e.g.*, FOF ¶¶ 145-157. Based on its review of the whole record, the Court concludes that substantial evidence supports these findings.

The Final Decision findings of fact and conclusions of law and holding that the Permit monitoring and reopener provisions further ensure compliance with water quality standards in the event of impacts in excess of those predicted by DWR are affirmed and upheld.

IV. Substantial Prejudice

In the Final Decision, the ALJ held that Petitioners could not rely on certain interests in fishing, boating, and recreation to prove that their rights have been substantially prejudiced. However, earlier in the case proceedings, the Beaufort County Superior Court granted summary judgment to Petitioners as to their status as "persons aggrieved" after Petitioners asserted that these same interests were harmed as a result of Respondent's issuance of the Permit. This Court determines that the Superior Court held that Petitioners' claimed interests in fishing, boating, and

recreational activities are legal rights that are cognizable under the APA and, therefore, may form the basis of a finding of substantial prejudice. Accordingly, the ALJ's holding that Petitioner's asserted interests were not cognizable under the APA was barred by the law of the case doctrine because it is contrary to the Beaufort County Superior Court's ruling. Further the ALJ erred as a matter of law in reaching the unprecedented conclusion that the interests asserted by Petitioners are public trust rights which may only be asserted by the State. The Final Decision is therefore reversed as to that holding because the Superior Court's holding is the law of case.

Further the ALJ holding is not supported by the law of this state. Recreational uses such as those claimed by the Petitioners are within the zone of uses and interest protected by the organic statute. Pertinent North Carolina statutes and administrative rules protect water quality for recreational uses.

The ALJ found that the petitioners failed to prove by preponderance of the evidence "that the permitted discharge will cause impacts to Blounts Creek that substantially prejudice Petitioners' claimed uses of and interest in Blounts Creek". Final decision COL paragraph 114 (a). Accordingly the ALJ also held that the petitioners failed to meet their burden of proving that their rights were substantially prejudiced as required by NCGS 150B-23 and 150B-29. Because this court concluded that the ALJ erred by holding that DWR had properly applied the biological integrity standard this Court will reach the issue of whether the ALJ erred in concluding the petitioner's failed to prove that their rights were substantially prejudiced.

Petitioners have the burden of proving by the preponderance of the evidence that respondent has substantially prejudiced their rights in issuing the permit. NCGS 150B-23(a), 150B-29.

The rights of a petitioner in a contested case are established by the organic statute at issue. Empire Power Co. v. N.C. Dep't of Env't and Natural Resources, 337 N.C.569 (1994)

The organic statutes from which Petitioner's rights arise are the federal Clean Water Act and the state laws and regulations implementing the Act. Courts have recognized that impairment of recreational, aesthetic, and environmental uses of waters is a legally cognizable injury under the Clean Water Act. Friends of the Earth, Inc. v. Laidlaw Envtl. Services, 528 U.S. 167 (2000), Sierra Club v. Cedar Point Oil Co. Inc., 73 F.3d 546 (5th Cir. 1996) North Carolina's statutes and rules implementing the Clean Water Act protect the Petitioner's recreational, aesthetic, and economic interest –as they must under the federally delegated program.

"The harm required to establish substantial prejudice cannot be conjectural or hypothetical. It must be concrete, particularized, and 'actual' or imminent." Surgical Care Affiliates, LLC v. N.C. Dept. of Health and Human Services 235 N.C. App. 620 (2014), reviewed denied, 368 N.C. 242 (2015). The U.S. Supreme Court has held that under the Clean Water Act, which is the controlling law here, testimony that a fisherman would like to fish in the river at a specific spot he used to as a boy, but that he would not do so now because of his concerns about pollution established an injury in fact that is both concrete and particularized and actual imminent, not conjectural or hypothetical. Friends of the Earth. The North Carolina Court of Appeals has recognized that under the Clean Water Act, environmental petitioners demonstrate "injury in fact when they claim that they used the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." Neuse River Foundation, Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110 (2002) When one interprets the phrase "substantial prejudice" within the meaning of the organic statue as required under Empire Power Petitioners' testimony regarding their reasonable concerns demonstrates substantial prejudice by a preponderance of the evidence. Petitioners' witnesses have demonstrated that they use and enjoy Blounts Creek and that their concerns about the impact of the Permit on the creek are reasonable and supported by a preponderance of the evidence. Accordingly Petitioners' have carried their burden of establishing by a preponderance of the evidence that Respondent has substantially prejudiced their rights.

Conclusions of law 114 through 124 are reversed.

CONCLUSION

After careful consideration of written and oral arguments of counsel and a review of the record in accordance with NCGS 150B-51, and based upon the findings of fact and conclusions of law set forth above, the Court makes the following findings:

1. The Division of Water Resources did not ensure reasonable compliance with the biological integrity standard as set forth in 15A N.C.A.C 02B .211(2), 0220(2), and 0202(11).
2. Petitioners are substantially prejudiced by the issuance of the Permit and are entitled to the relief sought.

WHEREFORE, for the reasons set forth above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Petition for Judicial Review is GRANTED, and:

1. The Final Decision of the Administrative Law Judge is reversed; and
2. Permit NC0089168 is vacated.

This the 18th day of December, 2017.

The Honorable Joshua W. Willey, Jr.
Superior Court Judge Presiding