

STATE OF NORTH CAROLINA
COUNTY OF YANCEY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
03 EHR 2069

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

FINAL AGENCY DECISION
(N.C.G.S. §150B-36(c))

This contested case came on for hearing before the North Carolina Sedimentation Control Commission at its regularly-scheduled meeting held on 16 November 2006 for making of a Final Agency Decision pursuant to N.C.G.S. §150B-36 with regard to those rulings of Administrative Law Judge James L. Conner contained in an Order of Summary Judgment entered 11 January 2006.

The Commission has reviewed and considered the record of the proceedings in the Office of Administrative Hearings, including the motions for summary judgment and supporting affidavits filed by the parties and their joint stipulations of fact; the parties' exceptions to the subject Order of Summary Judgment; and their written and oral arguments presented to the Commission in support of their respective positions.

The Commission hereby makes the following Final Agency Decision:

With regard to petitioners' claims set forth in paragraph 8(b) of the petition for contested case hearing, essentially contending that no development may be allowed on, over, or under a natural watercourse, ALJ Conner correctly determined that there existed no genuine issue of material fact and that the respondent ("DLR") and respondent-intervenor (Mountain Air) were entitled to entry of judgment in their favor as a matter of law. The Commission therefore adopts that ruling as its decision on this issue.

With regard to petitioners' claims set forth in paragraph 8(a) of the petition for contested case hearing, essentially contending that the project proposed by Mountain Air was not "temporary" or "minimal" and that DLR could not approve Mountain Air's request for a variance from the trout buffer requirements set forth in N.C.G.S. §113A-57(1), ALJ Conner erred in ruling that petitioners were entitled to entry of summary judgment in their favor as a matter of law and that ruling is not adopted by the Commission. As ALJ Conner determined, this matter does not present any genuine issue of fact. However, the Commission concludes that DLR and Mountain Air, not the petitioners, are entitled to entry of judgment in their favor as a matter of law for reasons set forth below.

The General Assembly's expressly stated purpose for enacting the Sedimentation Pollution Control Act (the "Sedimentation Act") was to "permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C.G.S. §113A-51. North Carolina courts have consistently ruled that the purpose of the Sedimentation Act is the control of sedimentation, not the control of land uses. In implementing the trout buffer statute, DLR has consistently granted variances when the impact from sedimentation would be "temporary and minimal". This view of the agency is to be given great consideration when interpreting this statute.

The Sedimentation Act does not prohibit all development around trout waters, as the Petitioners and ALJ Connor conclude. Instead, the Sedimentation Act regulates the effects of sedimentation on such waters, and imposes requirements to ensure that those sedimentation effects are temporary and minimal.

This conclusion is not only consistent with the General Assembly's expressly stated intent and DLR's historic interpretation but is also required by the definition of "land-disturbing activity," which is limited to those activities that cause a change in natural cover or topography *and* which *may cause or contribute to sedimentation*. In other words, because the trout buffer requirement applies only to "land-disturbing activities," it must apply to only those activities that may cause or contribute to *sedimentation*. Therefore, when the Sedimentation Act requires that land-disturbing activities in a trout buffer area be "temporary" and "minimal," it must logically be requiring that *the effects of any sedimentation* be temporary and minimal.

This conclusion is also required by the plain meaning of the Sedimentation Act, which states that the buffer requirements, including the trout buffer, apply "during periods of construction or improvement to land." This is the time period when sediment is generated and the time period regulated by the Sedimentation Act. The plain language of the statute, therefore, requires that the words "temporary" and "minimal" relate to the work with the potential to cause sedimentation, not to the overall land use of the project.

ALJ Connor's decision misses these crucial points. He instead concludes that the Sedimentation Act requires that the overall project must leave the trout buffer undisturbed in perpetuity, regardless of its long-term sedimentation effects. In doing so, he impermissibly rewrites the definition of "land-disturbing activity" to include any land uses that disturb a trout

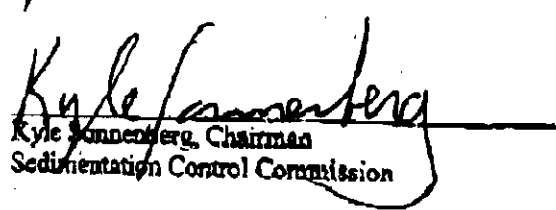
buffer in any way. Again, a land use activity with no continuing sedimentation effects is *not* a "land-disturbing activity" regulated by the Sedimentation Act.

Because the Sedimentation Act, and the Commission's jurisdiction, extends only to the effects of sedimentation, ALJ Connor's decision applying it to activities without regard to sedimentation must be rejected.

Rejecting ALJ Connor's decision on Paragraph 3(u) will not have long-term detrimental effects on the health of trout waters. The requirements imposed in the Trout Buffer Variance in this case are particularly stringent and ensure that *sedimentation effects* are not harmful. As required by the Sedimentation Act, the sedimentation effects at Mountain Air are truly temporary and minimal. To the extent that Petitioners raise general water quality or related concerns arising from work in and around trout buffers, other programs administered by the Department of Environment and Natural Resources ("DENR") regulate those matters. This Commission should limit the application of the Sedimentation Act to the matters intended by the Legislature -- sedimentation -- and not extend it to other laws and other areas and issues regulated by other divisions within DENR.

Having found that DLR and Mountain Air are entitled to entry of summary judgment in their favor on this issue, this case must be remanded to the Office of Administrative Hearings for determination of those issues not resolved by this decision.

This the 19 day of January, 2007.


Kyle Sonnenberg, Chairman
Sedimentation Control Commission

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing final agency decision in the case of *Hensley, Kent, and Clean Water for North Carolina, Inc. v. N.C. Department of Environment and Natural Resources, Division of Land Resources and Mountain Air Development Corporation* (03 OSP 2069) on the following persons by causing it to be enclosed in a suitable wrapper, bearing sufficient postage, and deposited in the care and custody of the United States Mail, Certified Mail, and addressed as follows:

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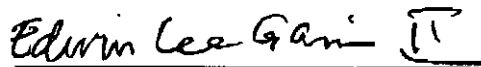
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This the 19 day of January 2007.



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