

STATE OF NORTH CAROLINA
 COUNTY OF WAKE

BEFORE THE
 SEDIMENTATION CONTROL
 COMMISSION

IN RE:)
)
 REQUEST FOR DECLARATORY RULING BY) **FINAL AGENCY**
 N.C. DEPARTMENT OF TRANSPORTATION) **DECISION**

THIS MATTER came before the Sedimentation Control Commission at its regularly scheduled meeting on November 16, 2006, in Concord, North Carolina, upon the request for declaratory ruling submitted by the North Carolina Department of Transportation on October 2, 2006 regarding the application of the statutory trout buffer variance standard, N.C. Gen. Stat. § 113A-57(1), to paving and improvement of secondary roads.

The North Carolina Department of Transportation was represented by Lisa C. Glover, Assistant Attorney General, of Raleigh, North Carolina, and the North Carolina Department of Environment and Natural Resources was represented by Mary Penny Thompson, General Counsel, of Raleigh, North Carolina.

On November 1, 2006, the attorneys for the parties submitted stipulations of facts and issues for decision.

After fully considering the request for declaratory ruling, the comments received from the public, the stipulations of the parties, the staff recommendation, the briefs of the parties and the oral arguments of the parties, the Sedimentation Control Commission, upon duly made motion and vote adopted the following:

ISSUES PRESENTED

1. Whether the statute is clear on its face and constitutes good cause to find a ruling undesirable such that this declaratory ruling request should be denied?
2. Whether the Sedimentation Control Commission's Final Agency Decision in the contested case of *Hensley v. N.C. Dep't of Env't and Natural Res.*, 03 EHR 2069, constitutes a similar controlling factual determination such that this declaratory ruling request should be denied?
3. Whether the lack of identification of a specific project and lack of variance request materials for a specific project constitutes good cause to find a ruling undesirable such that this declaratory ruling request should be denied?
4. Whether the paving and improvement of secondary roads within the trout buffer constitutes land-disturbing activity of temporary duration and minimal extent of disturbance when best management practices are used to control erosion and sedimentation during and after

Post-It Fax Note	7671	Date	12-15-06	# of pages	9
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construction and the disturbance is limited to the amount that must occur within the trout buffer in order to meet road safety, right of way or topographical constraints?

FACTS

1. The North Carolina Department of Transportation (hereinafter "NCDOT"), primarily located at 1 South Wilmington Street, Raleigh, Wake County, North Carolina, is a state agency charged with providing "for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided by law." N.C.G.S. § 143B-346.
2. The North Carolina Sedimentation Control Commission and the North Carolina Department of Environment and Natural Resources, both primarily located at 512 N. Salisbury Street, Raleigh, Wake County North Carolina, are state agencies charged with implementing the Sedimentation Pollution Control Act, N.C.G.S. §§ 113A-50 *et seq.* including "the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation." N.C.G.S. § 113A-51.
3. Of particular relevance to this declaratory ruling request, the Sedimentation Pollution Control Act requires natural watercourse buffers of sufficient width to confine visible siltation within the first twenty-five percent (25%) of the buffer nearest the land-disturbing activity. N.C.G.S. § 113A-57(1). In the case of trout streams, the buffers must also be at least 25 feet wide. N.C.G.S. § 113A-57(1). The Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal." N.C.G.S. § 113A-57(1). The watercourse buffer provision does not apply to a land-disturbing activity on, over, or under a lake or natural watercourse. N.C.G.S. § 113A-57(1).
4. In implementing the statutory trout buffer provision, the Sedimentation Control Commission promulgated rules addressing land-disturbing activity along trout waters. First, the Sedimentation Control Commission set out that where a temporary and minimal disturbance is permitted, land-disturbing activities in the buffer zone shall be limited to a maximum of ten percent of the total length of the buffer zone and no more than 100 linear feet of disturbance in each 1,000 linear feet of buffer zone. N.C. Admin. Code tit. 15A, r. 4E.0125(b). Larger amounts may be disturbed with written approval of the Director. N.C. Admin. Code tit. 15A, r. 4E.0125(b). In addition, land-disturbing activity that will cause adverse temperature fluctuations are prohibited in the buffer zone adjacent to designated trout waters. N.C. Admin. Code tit. 15A, r. 4E.0125(c).
5. NCDOT is committed to "planning, designing, constructing, maintaining and managing an interconnected transportation system while striving to preserve and enhance our natural and cultural resources . . ." See NCDOT Environmental Stewardship Policy attached as Exhibit 1 and incorporated herein by reference.

6. NCDOT is required by statute to study all unpaved secondary roads in the state and prioritize them for paving, and to develop criteria for improving and maintaining secondary roads. See N.C.G.S. §§ 136-44.5, 136-44.7. Pursuant to 19A NCAC 2C .0108, property owners must dedicate, at no cost to NCDOT, the right of way required for improving or paving unpaved secondary roads. If one or more property owners refuse to dedicate the right of way necessary for paving, NCDOT may allow the remaining property owners to post a bond to cover NCDOT's condemnation costs, and NCDOT may then condemn the necessary right of way.
7. From 1993 through 2005, NCDOT and the Division of Land Resources implemented a process by which NCDOT applied for trout buffer variances. As part of the process, NCDOT first planned its projects so as to avoid encroachment in the trout buffer. When construction in the buffer could not be avoided, NCDOT applied for a variance from the Division, provided maps of the location, a plan view of the project showing erosion control measures, cross sections within the buffer zone, and a description of the slope protection treatment. In addition, before applying for the variance, NCDOT solicited and received comments from the District Wildlife Resources Commission Fisheries Biologist, whose comments were forwarded to the Division as part of the variance package. Further, if any permits were required under the Clean Water Act, those permits were secured and provided to the Division of Land Resources. See Guidelines for Construction of Highway Improvements Adjacent to or Crossing Trout Waters in North Carolina attached hereto as Exhibit 2 and incorporated herein by reference.
8. On January 12, 2006, Administrative Law Judge James L. Conner, II, issued an Order of Summary Judgment in the case of *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, interpreting the phrase "when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal," N.C.G.S. § 113A-57(1). The administrative law judge's interpretation was substantially different than the Division of Land Resources' interpretation. Particularly, the administrative law judge concluded that the statutory standard applied to all impacts (both construction and post-construction), whereas the Division of Land Resources had interpreted the provision to apply only to construction impacts.
9. In response to the administrative law judge's interpretation, the Division suspended the trout buffer variance procedure described above, replaced it with a case-by-case review, pursued legislation to clarify the statute, and suspended all review of variance requests made by NCDOT from July through September 2006, after the legislative effort failed. Currently, the Division reviews NCDOT projects on a case-by-case basis and has decided that it may approve projects which are limited to stream restoration, stabilization of failing banks or other urgent public safety measures, and paving of unpaved roads that need no widening or are widened away from the trout stream. No projects have been approved since July 1, 2006.
10. A secondary road paving and improvement project constitutes a land-disturbing activity that typically requires a trout buffer variance. In many cases, unpaved secondary roads run parallel to trout streams, and the travelways may be partially or even entirely within the 25-foot trout buffer.

11. These unpaved secondary roads have been on the State Highway System for decades. NCDOT, pursuant to its legislative mandate, is paving these roads on a priority basis. For Fiscal Year 2007, DOT estimates that 75 secondary road paving or improvement projects will be affected by restrictions on land-disturbing activities in the trout buffer. Typically, only small sections of each project encroach into the trout buffer, and impacts to the trout buffer are not continuous throughout the length of the project. Widening away from the buffer is not always feasible, and without the variance process, entire projects remain on hold even though trout buffer impacts are limited to certain sections of the project. Widening the road toward the stream may be required in cases where right of way or topography constraints prevent widening of the road away from the stream.
12. Because secondary roads in areas near trout streams are often narrow, winding, mountain roads, paving within the width of the existing travel lanes may not be sufficient to address safety concerns. When paving a secondary road, NCDOT strives to pave 10-foot travel lanes, so that trucks and school buses can safely pass on the road, creating a 20-foot paved travelway. Shoulders are not paved. NCDOT also tries to improve the safety of the facility by making horizontal and vertical improvements (straightening curves and flattening hills) to meet current safety standards while exercising context sensitive designs to minimize impacts to environmental features. Context sensitive designs may include an 18-foot travelway instead of a 20-foot travelway in order to minimize impacts to environmental features.
13. When NCDOT paves, or widens and paves, an unpaved secondary road, best management practices are used to control erosion and sedimentation, such as the installation of appropriate site-specific erosion and sedimentation control devices, timely establishment of ground cover, and preservation of existing vegetation within the buffer.
14. Typical sections and plan views of secondary road paving projects are attached hereto as Exhibit 3 and incorporated herein by reference. Photographs of secondary road paving projects, both prior to and after completion, are attached hereto as Exhibit 4 and incorporated herein by reference.
15. Paving an unpaved road stabilizes an unstable surface and reduces erosion and sedimentation from the road bed. Studies have identified unpaved roads as a primary source of sediment in forested watersheds. In comparing different types of road surfaces, paved surfaces have the least off-road sediment movement as compared to improved gravel, routine maintenance gravel, and unimproved graveled road surfaces. Unpaved road surfaces produce total suspended solids levels considerably greater than background levels, while paved roads produce only slightly greater than background levels. Another key factor in reducing sedimentation from roadways is the proper installation and maintenance of control structures and best management practices. See Clinton, Barton D.; Vose, James M; 2003; Differences in Surface Water Quality Draining Four Road Surface Types in the Southern Appalachians Southern Journal of Applied Forestry, Vol. 27, No. 2, May 2003. pp. 100-106; downloaded from the United States Department of Agriculture, Forest Service web site at <http://www.trcesearch.fs.fed.us/pubs/5454>, attached hereto as Exhibit 5 and incorporated herein by reference.

16. As part of the Division of Land Resources' investigation, comments were received from the public regarding the NCDOT declaratory ruling request. Three (3) comments were submitted on behalf of various organizations, all in opposition to the request. The comments are summarized here and attached as exhibits.
- a. Environment North Carolina, the Pamlico-Tar River Foundation, the Neuse River Foundation, the North Carolina Wildlife Federation, Headwaters, Ltd., the Habitat and Wildlife Keepers, and Trout Unlimited - North Carolina State Council submitted comments requesting that the declaratory ruling be denied on the bases that road paving activities do not meet the definition of temporary and minimal as interpreted in *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, and produce impacts that have detrimental effects to trout waters that have been protected by a supplemental water quality classification under State regulation. The comments are attached hereto as Exhibit 6 and incorporated herein by reference.
 - b. Nancy Hensley, Diane Kent and Clean Water for North Carolina submitted comments requesting that the declaratory ruling be denied on the bases that their contested case, *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, will control the factual determination and deals with the same subject matter at issue in the declaratory ruling; that NCDOT failed to pursue its proper administrative remedies by initiating a contested case; that a declaratory ruling is an improper forum for a decision on a trout buffer variance because it does not have all the evidence before it that would be available through a contested case; that the Sedimentation Control Commission cannot direct the Division of Land Resources to issue variances inconsistent with staff's review of an application; that the declaratory ruling request is hypothetical and speculative; that the declaratory ruling improperly influences the consideration of the *Hensley* contested case, that the declaratory ruling improperly limits the statutory provision to sedimentation impacts, and that the declaratory ruling should be decided on a specific fact pattern rather than a typical activity. The comments are attached hereto as Exhibit 7 and incorporated herein by reference.
 - c. Through the Southern Environmental Law Center, the North Carolina Chapter of Trout Unlimited and the Western North Carolina Alliance submitted comments requesting that the declaratory ruling be declined on the bases that the contested case of *Hensley v. NC Dep't of Env't and Natural Res.*, 03 EHR 2069, is a similar controlling factual determination; that the declaratory ruling request does not address a "given state of facts," but rather a set of open-ended facts; that the declaratory ruling request provides insufficient specifics about the projects affected; and that the statute is clear on its face and does not need further interpretation. The comments are attached hereto as Exhibit 8 and incorporated herein by reference.

CONCLUSIONS OF LAW

1. A declaratory ruling is a quasi-judicial determination. It exercises the judicial function of interpreting a statute. "It is the function of the judiciary to construe a statute when the meaning of a statute is in doubt." *Clark Stone Company, Inc. v. N.C. Dep't of Env't and Natural Resources*, 164 N.C. App. 24, 35 (2004), citing *Sunscript Pharmacy Corp. v. N.C. Bd. of Pharmacy*, 147 N.C. App. 446 (2001), disc. review denied, 355 N.C. 292 (2002).
2. Neither the Sedimentation Pollution Control Act nor the rules that implement it define the standard of temporary and minimal. In the context of a project that ultimately removes sedimentation impacts from a trout buffer and stream by stabilizing a pre-disturbed, exposed, and unstable road surface; the statutory language is ambiguous. Therefore, it is proper for the Sedimentation Control Commission to issue a declaratory ruling.
3. The issues in the contested case of *Hensley v. N.C. Dep't of Env't and Natural Res.*, 03 EHR 2069, differ from the issue in this declaratory ruling. Where *Henley* examines the impacts of new development on undisturbed areas, this declaratory ruling examines the impacts of redisturbance of existing development that results in stabilizing an exposed and unstable road surface. Therefore, *Hensley* does not constitute a similar controlling factual determination.
4. Unlike a contested case, a declaratory ruling is not a fact-finding proceeding. Rather, a declaratory ruling provides clarification of the applicability of a statute to a given set of facts. The NCDOT projects of paving of secondary roads involve a common set of facts that are sufficient to provide a basis for interpretation. Therefore, it is unnecessary to have a specific trout buffer waiver request before the Sedimentation Control Commission in order for the Sedimentation Control Commission to give clarification on how the standard applies.
5. In interpreting a statute, the intent of the Legislature must be taken into account. Also, the statute must be interpreted *in pari materia*. The Sedimentation Pollution Control Account seeks to balance development with curbing the effects of sedimentation. This balancing intent and the 'temporary and minimal' standard are met when (1) paving reduces erosion and sedimentation impacts from an existing unpaved road; (2) impacts are avoided, remaining impacts minimized, and the area restored to the extent practical upon completion of construction; (3) best management practices are used during and after construction; and (4) the disturbance is limited to the amount that must occur within the trout buffer in order to meet safety, right of way, and topographical constraints.

FINAL AGENCY DECISION

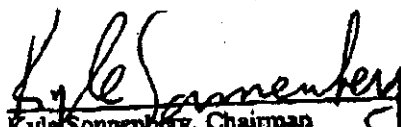
IT IS THEREFORE ORDERED:

That the temporary and minimal standard for a trout buffer waiver encompasses the paving and improvement of secondary roads when NCDOT ultimately removes erosion and sedimentation impacts from the area by stabilizing an unstable, eroding road surface; avoids and minimizes impacts; restores the area to native vegetation characteristic of an undisturbed buffer to the extent practical upon completion of construction; uses best management practices during

and after construction; and limits disturbance to the amount necessary within the trout buffer in order to meet safety, right of way, and topographical constraints.

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

This the 1st day of December, 2006.


Kyle Sonnenberg, Chairman
Sedimentation Control Commission

CERTIFICATE OF SERVICE

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

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This the 1 day of December, 2006.

ROY COOPER
ATTORNEY GENERAL

Edwin Lee Gavin II

Edwin Lee Gavin, II
Assistant Attorney General