FILED
OFFICE OF ADMINISTRATIVE HEARINGS
05/08/2020 1:35 PM

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF ADMINISTRATIVE HEARINGS
19 EHR 02739, 19 EHR 02740, 19 EHR 02741

North Carolina Farm Bureau Federation Inc, Petitioner, v. NC Department of Environmental Quality, Division of Water Resources, Respondent.	**ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of the North Carolina Department of Environmental Quality ("Department"), Division of Water Resources ("Division") Respondent's Motion for Partial Summary Judgment filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure filed with the Office of Administrative Hearings ("OAH") on March 20, 2020, with accompanying brief and attachments. Also, under consideration is North Carolina Farm Bureau Federation, Inc. ("NCFB") Petitioner's Motion for Partial Summary Judgment filed pursuant to Rule 56 of the North Carolina Rules of Civil Procedure also filed with OAH on March 20, 2020, with accompanying brief and documentation, as well as Petitioner's Supplemental Brief filed with OAH on March 23, 2020. Subsequent filings also being considered are: Respondent's Response to the Petitioner's Motion for Partial Summary Judgment filed with OAH on April 13, 2020; Petitioner's Brief in Opposition to Respondent's Motion for Summary Judgment filed with OAH on April 13, 2020; Third Party Intervenor's Response to the Cross-Motions for Summary Judgment filed with OAH on April 17, 2020; Respondent's Reply Regarding Cabarrus County filed with OAH on April 24, 2020; Respondent's Third Affidavit for Lawson filed with OAH on April 24, 2020; Respondent's Motion to Strike with accompanying Brief filed with OAH on April 24, 2020; and Petitioner's Response in Opposition to Respondent's Motion to Strike filed with OAH on May 4, 2020.

STANDARD OF REVIEW

The purpose of summary judgment is to bring litigation to an expeditious and efficient decision on the merits "where only a question of law on the indisputable facts is in controversy." McNair v. Boyette, 282 N.C. 230, 234-35, 192 S.E.2d 457, 460 (1972). The test is whether there is any genuine issue of any material fact.

Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. See Lee v. Shor, 10 N.C. App. 231, 178 S.E. 2d 101 (1970). To entitle one to summary judgment, the movant must conclusively establish a legal bar to the non-movant's

claim or complete defense to that claim. See Virginia Elec. And Power Co. v. Tillett, 80 N.C. App. 383, 343 S.E. 2d 188, cert. denied, 317 N.C. 715, 347 S.E. 2d 457 (1986).

Summary judgment is only proper under Rule 56 of the North Carolina Rules of Civil Procedure if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. The North Carolina Rules of Civil Procedure apply to proceedings in the Office of Administrative Hearings ("OAH") unless otherwise specified. 26 NCAC 03 .0101(b).

> A motion for summary judgment "shall be" granted "if the pleadings, depositions, answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

Estate of Williams v. Pasquotank County Parks & Rec. Dep't, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

The burden is on the movant to establish the lack of a triable issue of fact. Boudreau v. Baughman, 322 N.C. 331, 338 S.E. 2d 849 (1988). The non-movant does not have a burden of coming forward until the movant produces sufficient evidence which negates the claims of the non-moving party to the degree of necessary certainty required. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

In this contested case, Respondent and Petitioner have filed motions for partial summary judgment. The parties have acknowledged in their pleadings that there is no genuine issue of material fact and that this matter should be disposed by partial summary judgment as to the issue of whether the Animal Waste Permits at issue herein should have been developed and comply with the North Carolina Administrative Procedure Act ("APA"), set forth in N.C. Gen. Stat. § 150B *et. seq.*, including the requirements for the adoption of generally applicable rules.

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well settled law that Findings of Fact are not required, and are in fact surplusage, in an Order for Summary Judgment. The following mixed Findings of Fact and Conclusions of Law are not intended as a full discourse to address all factual assertions from the submissions of the parties. The following mixed Findings of Fact and Conclusions of Law address the principle legal issues before this Tribunal in the cross-motions for partial summary judgment.

The issue for consideration by this Tribunal in the cross motions for partial summary judgment is whether the General Assembly intended to relieve Respondent from the necessity of compliance with the rulemaking provisions contained in the Administrative Procedure Act in adopting General Permits including three special conditions ("special conditions" or "conditions") within the General Permits, which are Phosphorus Loss Assessment Tests (PLAT evaluations), ground-water monitoring, and annual reporting.

From the outset, it is important to note that the General Assembly, in enacting the applicable organic statues at issue, stated its intentions and ultimate goal in its "Legislative Findings and Intent." N.C. Gen. Stat. § 143-215.10A. It was of critical importance to the General Assembly to protect water quality and, in order to do so, enact prudent environmental safeguards based on the General Assembly's finding "that animal operations provide significant economic and other benefits to this State." N.C. Gen. Stat. § 143-215.10A. Balancing the benefits to the State of "animal operations" with environmental concerns, the General Assembly found it of vital concern to balance the growth of animal operations with environmental concerns. To address these concerns, the General Assembly stated its intention was to "establish a permitting program for "animal waste management systems" that will protect water quality and promote innovative systems and practices while minimizing the regulatory burden." N.C. Gen. Stat. § 143-215.10A (emphasis added). N.C. Gen. Stat. § 143-215.1, entitled "Control of Sources of Water Pollution; Permits Required," further illustrates the importance of controlling water pollution at the heart of this permitting process.

The issues presented in these three consolidated contested cases address how best to procedurally accomplish the intentions of the General Assembly.

I. Rulemaking: General Applicability

In its Motion, Petitioner seeks summary judgment on the issue of whether certain conditions appearing in the Swine General Permit ("Swine Permit"), the Cattle General Permit ("Cattle Permit"), and the Wet Waste Poultry General Permit ("Poultry Permit") (collectively "Ag Permits" or "the Permits") constitute rules under the North Carolina Administrative Procedure Act and whether Respondent had authority to include these conditions in the Ag Permits without having secured appropriate authorization to do so through the APA's rulemaking procedures. In particular, Petitioner contests the requirement for the three special conditions that are contained in the three General Ag Permits.

Conversely, Respondent contends that the Ag Permits are not "rules," that the Division correctly concluded that the APA's rulemaking procedures did not apply to the Permits, and that judgment should be rendered for Respondent on the "rules" issues.

N.C. Gen. Stat. § 150B-1(a) sets forth the over-arching purpose of the General Assembly in enacting the Administrative Procedure Act ("APA"). It states that the purpose of the APA is to establish "a uniform system of administrative rule making and adjudicatory procedures for agencies," getting away from the sometimes archaic procedures used prior to its enactment. N.C. Gen. Stat. § 150B-1(b) makes an important point that the APA "confers procedural rights" on those to whom the Act applies.

N.C. Gen. Stat. § 150B-1(c) very specifically sets out the agencies that are granted a full exemption from all aspects of the APA in stating that "[t]his Chapter applies to every agency except . . . ." Only five agencies are listed. Respondent is not included in that list.

N.C. Gen. Stat. § 150B-1(d) very specifically lists the agencies that are exempt from rulemaking. It states, "Exemptions for Rule Making—Article 2A of this Chapter does not apply

to the following . . . ." Twenty-three agencies are specifically enumerated. Respondent is not included in that list. Article 2A is entitled "Rules." Since Respondent is not listed in either N.C. Gen. Stat. § 150B-1(c) or § 150B-1(d), then it must be determined if Respondent is otherwise exempted from rulemaking.

A "rule" is defined in N.C. Gen. Stat. § 150B-2(8a) as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency." The General Permits, and more particularly the three special conditions, are agency regulations or standards that implement an enactment of the General Assembly.

Based upon the statutory definition, an initial question is whether the permits are of "general applicability." It is worth noting that the first line of the Swine General Permits in effect from October 1, 2014 until September 30, 2019 states that the "General Permit . . . may apply to any swine facility in the State of North Carolina" as defined by statute and meets particular criteria, indicative of general applicability.

N.C. Gen. Stat. § 143-215.10A, as referenced above, uses specific terminology, which is defined by statute. "Animal operation" is defined in part as

> [a]ny agricultural feedlot activity involving 250 or more swine, 100 or more confined cattle, 75 or more horses, 1,000 or more sheep, or 30,000 or more confined poultry with a liquid animal waste management system, or any agricultural feedlot activity with a liquid animal waste management system that discharges to the surface waters of the State.

N.C. Gen. Stat. § 143-215.10B(1).

"Animal waste management system" is defined by statute to mean "a combination of structures and nonstructural practices serving a feedlot that provide for the collection, treatment, storage, or land application of animal waste." N.C. Gen. Stat. § 143-215.10B(3).

N.C. Gen. Stat. § 143-215.10C(a) states:

> No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations . . . without first obtaining an individual permit or a general permit under this Article. The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number of animals, and other relevant factors.

(Emphasis added)

Thus, when the General Assembly stated its intention in N.C. Gen. Stat. § 143-215.10A was to "establish a permitting program" for "animal waste management systems" that will protect water quality, it was speaking to a very specific and well defined group of entities. All that fit within the definitions of "animal operations" with "animal waste management systems" are required to be permitted either by a general permit or by an individual permit. N.C. Gen. Stat. § 143-215.10C(a). The General Assembly's stated intention was that most would be by General Permit, but all will be permitted. N.C. Gen. Stat. § 143-215.10C(a). Individual permits are generally issued to a particular entity with the terms of the permit tailored to specific activities of the entity.

In its brief, Respondent acknowledges that individual permitting may be administratively inefficient where substantial numbers of entities are engaged in similar activities requiring permitting. See Resp.'s Brief, p. 3. In other words, it makes sense to cover as many as possible with General Permits. The General Assembly stated that its intent and preference was that most animal waste management systems would be permitted under a general permit, but nevertheless, all will be permitted. N.C. Gen. Stat. § 143-215.10C(a).

The General Assembly gave the EMC discretion to require some systems to be permitted under an individual permit. N.C. Gen. Stat. § 143-215.10C(a) It is acknowledged that an applicant always has some discretion to apply for individual permits. Respondent correctly notes that an operator may opt out of the General Permit; indeed, theoretically, every operator could opt out of the General Permit, but such would completely circumvent the intent and purpose of the General Assembly and the General Permitting process. There is no prohibition to these same questioned conditions being added to the individual permit.

Petitioner contends that the three special provisions being included in the General Permits are the product of a tainted process derived from a Settlement Agreement reached by Respondent from a Title VI lawsuit filed in federal court. The complainants in that lawsuit had filed suit in federal court rather than challenge the 2014 Ag Permits. The genesis of the terms of the special conditions under review are part of the Settlement Agreement reached in order to end the Title VI lawsuit.

Petitioner does not contend that all general permits for animal waste management systems should be adopted through the rulemaking process. It is the three special conditions that came from the Settlement Agreement that Petitioner contends contain substantive conditions and requirements that are generally applicable and should be adopted through rulemaking in accordance with the APA.

Respondent contends that the holding of Cabarrus Cty. Bd. of Educ. v. Bd of Trustees Teachers and State Employees' Ret. Sys., No. 371PA18, 2020 WL 1650903 (N.C., Apr. 3, 2020) does not apply to these consolidated cases. In Cabarrus Cty, the issue before the court concerned the applicability of a salary cap factor which applies to every retiree from state government service. Under the facts of Cabarrus Cty, every retiree's salary may be subject to a salary cap factor, although it is recognized that the cap factor will only actually apply to and affect a very small percentage of retirees. Similarly, in this instant case, permitting will be applied to every animal operation meeting the statutory definition, requiring an animal waste management

system. Most will be through the General Permitting process, but all will be permitted. The actual numbers of farm operations to which the three conditions may apply may be relatively small, but such a fact is similar to the application of the salary cap in Cabarrus Cty. The actual numbers of applicability of the three conditions are not known but being relatively small does not negate the applicability of rulemaking. Just as in Cabarrus Cty, the conditions apply to all but do not affect all.

Based on the foregoing, it is concluded that statutes applicable to the three contested cases at issue herein are clear and unambiguous. It is further concluded that, indeed, the three special conditions are substantive conditions, which are agency regulations or standards that implement an enactment of the General Assembly. It is further concluded that the three conditions under review for inclusion in the General Permits are of "general applicability" and therefore meet the statutory definition of a "rule."

II. Rulemaking: Exemption

Respondent contends that Cabarrus Cty does not apply to these consolidated cases since there was no issue in that case concerning if the cap factor was a rule, but only an issue of implicit exemption from the rulemaking provisions of the APA. Cabarrus Cty. Bd. of Educ. v. Bd of Trustees Teachers and State Employees' Ret. Sys., No. 371PA18, 2020 WL 1650903 (N.C., Apr. 3, 2020). It is true that the Superior Court concluded in Cabarrus Cty that the cap factor meets the definition of rule and that conclusion is not disturbed by either the Court of Appeals or the North Carolina Supreme Court. However, Respondent's argument that since there is an issue in these cases as to whether the permit conditions are rules, then the rest of Cabarrus Cty does not apply is without merit. It is illogical to ignore the holding of the North Carolina Supreme Court in addressing an implicit exemption from rule. In this contested case, an issue to be determined is whether the special conditions meet the definition of rule so that the provisions of rulemaking in the APA apply to the conditions as discussed above. Having a separate issue does not negate the applicable provisions of the North Carolina Supreme Court decision in Cabarrus Cty.

The North Carolina Supreme Court observed that the sole issue for its determination was "whether the General Assembly intended to relieve the Board of Trustees from the necessity for compliance with the rule making provisions contained in the Administrative Procedure Act." Cabarrus Cty, p. 25. The Court further refined the issue as whether the facts of that case established that the General Assembly clearly intended that there was an implicit exemption from the rulemaking provisions of the APA.

Likewise, in this consolidated contested case, the inquiry does not end with a determination of general applicability and a determination that the conditions within the General Permits are rules. The further inquiry is to determine whether the Respondent is exempt from the APA.

The provisions of Chapter 150B are very clear about explicit exemption from rulemaking. It is without question that the General Assembly did not explicitly exempt Respondent from the Administrative Procedure Act in N.C. Gen. Stat. § 150B-1. Therefore, in

this matter, it must be determined if the General Assembly intended to implicitly exempt Respondent from the APA just as in Cabarrus Cty.

The North Carolina Supreme Court "has consistently refused to recognize the existence of any implicit exemption from the provisions of the Administrative Procedure Act in the absence of a clearly stated legislative intent to the contrary." Cabarrus Cty, p. 29. The Court has made clear that implicit exemptions are "very much the exception rather than the rule and should only be recognized in the event that it is abundantly clear that the General Assembly intended such a result . . ." Cabarrus Cty, p. 25.

Respondent makes the point that the General Assembly is capable of expressly and specifically requiring an agency to be exempt from the provisions of the APA. While the Court in Cabarrus Cty agrees with that premise as far as it goes, the Court's decision is contrary to the contention of Respondent that it is exempt because the General Assembly did not avail itself of the opportunity to specifically exempt Respondent. The Court held conversely that had the General Assembly intended for Respondent to have been excluded from the APA, then the General Assembly would have inserted a specific provision in the statutes expressly stating that intention. Cabarrus Cty, p. 28-29.

The Court further observed in Cabarrus Cty "that 'implied amendments cannot arise merely out of supposed legislative intent in no way expressed, however necessary or proper it may seem to be,' and that '[a]n intent to amend a statute will not be imputed to the legislature unless such intention is manifestly clear from the context of the legislation.'" Cabarrus Cty, p. 26 (quoting Empire Power Co. v. N.C. Dep't of Env't, Health and Nat. Res., 337 N.C. 569 at 591, 447 S.E.2d 768 at 781 (1994)). Thus, the intent should be abundantly clear from the four corners of the legislation itself.

Empire is the seminal case in administrative law for the State of North Carolina. The North Carolina Supreme Court in Empire describes the relationship between statutes of specific application, or "organic" statutes, versus statutes of general application such as the APA.

In reconciling the provisions of the Administrative Procedure Act with "organic" statutes, the North Carolina Supreme Court held that it will adopt the construction of organic statutes that harmonize with the APA and will reject such statutes only where the terms of the statutes are "so repugnant . . . that they cannot stand together." Cabarrus Cty, p. 27. This is consistent with the holding in Empire which held that when an agency's organic statute can be read in *pari materia* with the APA, then the Court must give effect to both. Empire, at p. 569.

In Cabarrus Cty, the Court refers often to Bring v. N.C. State Bar, 348 N.C. 655, 501 S.E.2d 907 (1998). In Bring the North Carolina State Bar stands as a lone example of an agency to which the rulemaking provisions of the Administrative Procedure Act do not apply. The Court observed that the procedures for the State Bar are "distinct, thorough, complete and self-contained" and that the dictates of the applicable statute were so complete that there was no necessity to apply the APA. Cabarrus Cty, p. 9, 28.

Thus, the question in the instant contested cases becomes whether the procedure set forth by the Respondents for the General Permits is sufficient so that the Respondent is implicitly exempt and the substantive and procedural safeguards of the APA should not apply.

The organic statutes at issue herein are N.C. Gen. Stat. §143-215.10A, -215.10B, -215.10C as discussed briefly above, as well as § 143-215.1. That General Permits may be issued under rules adopted in accord with Chapter 150B is established in N.C. Gen. Stat. §143-215.1(b)(3). That statute goes further to state that "[s]uch rules may provide that minor activities may occur under a general permit issued in accordance with conditions set out in such rules." N.C. Gen. Stat. §143-215.1(b)(4)d directs the Commission to consider various factors prior to determining what activities are "minor activities" for which a general permit may be issued.

The rules properly promulgated pursuant to N.C. Gen. Stat. §143-215.1 are in 15A NCAC 02T entitled "Waste Not Discharged to Surface Waters." 15A NCAC 02T .0101 et. seq. The rule establishing the conditions for issuing General Permits is 15A NCAC 02T .0111. Thus, it is these organic statutes and accompanying rules which must be read in *pari materia* and harmonized with the APA, giving effect to both, to determine if the Respondent is impliedly exempt from rulemaking.

The process set forth in 15A NCAC 02T .0111 bears some resemblance to procedures set forth in the APA. For example, 15A NCAC 02T .0111 provides for notice similar to the notice requirement for rulemaking in the APA. However, the notice requirements of 15A NCAC 02T .0111 are not as extensive as the requirements of the APA. The rule provides for public hearings as well, similar to the requirements of APA.

The process used by Respondent in this contested case allows for considerable public input from public hearings and both oral and written comments. The public input provides the Respondent with considerable information in making its decisions concerning the General Permits, in this instance for consideration of the proposed special conditions within the General Permits. In fact, during this process, Respondent received 6,500 written comments compared to 6 (six) written comments received during the previous review cycle. The General Permits were then issued approximately one month later, which begs the question of whether the agency considered "fully all written and oral comments received" as required in N.C. Gen. Stat. § 150B-21.2(f). Rhetorically, was there a meaningful review and to what degree was any credence given to the comments received; was there abuse of discretion—issues which are not before this Tribunal for determination at this juncture and are yet to be resolved. The numbers may in fact be entirely meaningless, the value of which would be determined as a matter of fact in a hearing on the merits.

The North Carolina Supreme Court observed in Cabarrus Cty that the discretionary decision made in that case should not be treated as though it is a ministerial decision. Cabarrus Cty, p. 37. Likewise, in these Animal Waste General Permits, the decision to add special conditions are not ministerial decisions.

In trying to reconcile the organic statutes and rules with the more general provisions of the APA, a remaining issue is the financial impact caused by the three questioned conditions within the General Permit.

Respondent correctly observes that there is no requirement under current law as interpreted by the agency for it to have prepared a fiscal note or any amount of detailed financial impact on the farmers. Under the controlling statutes and promulgated rules in effect, there is no requirement to prepare a fiscal note or produce financial impact such as required in the APA.

There is information of record that Respondent has provided some information on the impact on farmers subject to the three questioned conditions in the General Permit. It is not determined if the financial information that the Respondent has offered is sufficient and meaningful, but it is not necessary to do so in order to determine summary judgment. It is obvious from the matters of record that the financial information is not equivalent to the financial and economic impact information that would be determined if following the APA and preparing a fiscal note. The absence of meaningful financial impact information is a major deviation from the provisions of APA.

As the North Carolina Supreme Court noted in Cabarrus Cty, the use of the rulemaking procedures in considering the economic impact causes the ultimate decision-maker to give serious consideration to the consequences of the rulemaking. Cabarrus Cty, p. 23. Thus, rulemaking makes a more definitive and certain determination of the financial impact.

It is not necessary to further dissect the organic statutes and applicable rules to determine how they equate with the safeguards of the APA. The provision of more detailed notice and the need for the financial impact are examples of how the organic statues and rules do not provide the substantive and procedural safeguards necessary to stand alone and not abide by the safeguards of the APA. 15A NCAC 02T .0111 does not equate with the substantive and procedural safeguards in rulemaking provisions of APA.

The North Carolina Supreme Court held in Cabarrus Cty that "[a]s long as there is 'a fair and reasonable construction of the organic statute that harmonizes it with the provisions of the [Administrative Procedure Act,] . . . it is our duty to adopt that construction.'" Cabarrus Cty, p. 27. (citing Empire at p. 593). Empire also holds that if the more specific organic agency statute can be read in *pari materia* with the more general statutes of the APA, then the Court "must give effect to both if possible." In these contested cases, there is a fair and reasonable construction of the statutes that harmonizes with the APA. The more specific statutes of the Respondent agency can be read in *pari materia* with the APA and both can be given effect. The two can peacefully coexist.

The General Assembly did not express or in any way make manifestly clear an intent to not apply the rulemaking provisions of the APA to the General Permits and the three special conditions. As addressed in Empire, in these contested cases, there is no such repugnancy between the organic statutes at issue and the APA to create an implied exemption from the APA rulemaking provisions. Empire, p 591. The organic statutes can indeed stand together with the APA. There is nothing in the organic statutes that suggests or implies that the General Assembly intended to dispense with the necessity for compliance with the rulemaking provisions of the APA. Cabarrus Cty, p. 30.

Further, the organic statutes in these contested cases are not sufficiently detailed such as in Bring to suggest that the General Assembly intended to create an implicit exemption from rulemaking. Cabarrus Cty, p. 32.

The process used by Respondent in issuing the General Permits with these special conditions does not suffice to provide those who may be affected with the substantive and procedural protections that are inherent in APA-compliant rulemaking proceedings.

It is noted that the fact that the process for General Permits has been used by Respondent for quite some time and is perhaps the Respondent's interpretation of applicable statutes and rules, is not controlling. "It is ultimately the duty of courts to construe administrative statutes." State ex rel. Utils. Comm'n Staff, 309 N.C. 195, 306 S.E.2d 435 (1983).

Based upon the foregoing, it is not "manifestly clear" that the General Assembly intended that there is an implied exemption from rulemaking. Therefore, it is concluded that the provisions upon which Respondent relies in support of their argument for an implicit exemption lacks the substantive and procedural safeguards that are present in the rulemaking provisions of the Administrative Procedure Act. Cabarrus Cty, p. 36 (citing Bring at N.C. 659, S.E.2d at 91). The organic statutes and rules at 15A NCAC 02T .0101 et. seq. also lacks the procedural detail to recognize an implicit exemption from the rulemaking provisions of the APA. Cabarrus Cty, p. 36.

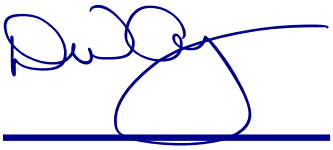
It is therefore concluded that the General Assembly did not clearly intend that Respondent was implicitly exempt from the rulemaking provisions of the APA. The General Assembly did not intend to relieve Respondent from the necessity to comply with the rulemaking provisions contained in the Administrative Procedure Act.

Now, therefore, the rulemaking provisions of the Administrative Procedures Act apply to Respondent and before any conditions may be added to the Animal Waste General Permits, Respondent shall submit such conditions to rulemaking pursuant to the Administrative Procedures Act.

DECISION

Now, therefore, it is hereby ORDERED that Petitioner's Motion for Partial Summary Judgment is **ALLOWED**. The three conditions at issue in the three consolidated cases that are contained in the General Permits are rules, and Respondent is not exempt from rulemaking. Respondent erred by not adopting those conditions as rules as a matter of law. It is further ORDERED that Respondent's Motion for Partial Summary Judgment is **DENIED**.

SO ORDERED, this the 8th day of May, 2020.



Donald W Overby
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 NCAC 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 who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Christopher Richard McLennan
North Carolina Department of Justice
cmclennan@ncdoj.gov
Attorney For Intervenor

Stephen A Woodson
PO Box 27766
Raleigh NC 27611
Attorney For Petitioner

Philip Jacob Parker
North Carolina Farm Bureau Federation
jake.parker@ncfb.org
Attorney For Petitioner

Marc D Bernstein
NC Department of Justice
mbernstein@ncdoj.gov
Attorney For Respondent

Phillip Timothy Reynolds
NC Department of Justice
preynolds@ncdoj.gov
Attorney For Respondent

Taylor Hampton Crabtree
North Carolina Department of Justice
tcrabtree@ncdoj.gov
Attorney For Respondent

(This space intentionally left blank.)

This the 8th day of May, 2020.

Jerrod Godwin
Administrative Law Judge Assistant
N.C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 919-431-3000