

FILED

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ASHE COUNTY

2018 MAY 11 A 10:22

18 CVS 155

ASHE COUNTY, NORTH CAROLINA, C.S.C.
AND ASHE COUNTY WATERSHED
ADMINISTRATOR

Petitioners,

v.

ASHE COUNTY WATERSHED REVIEW
BOARD AND APPALACHIAN
MATERIALS, LLC,

Respondents.

VERIFIED PETITION FOR WRIT OF
CERTIORARI WITH SUPERSEDEAS
AND FOR JUDICIAL REVIEW

Petitioners Ashe County, North Carolina (the "County") and Ashe County Watershed Administrator (the "WA"), by and through counsel, petitions this Court to issue a Writ of Certiorari with Supersedeas to the Ashe County Watershed Review Board (the "WRB"), ordering the WRB to file in the Superior Court the record of the WRB's proceedings in the matter of *In Re: Appalachian Materials, LLC's Appeal of the Watershed Administrator's Final Order, Requirement and Decision dated July 7, 2017* (the "Administrative Appeal").

The WRB signed a document styled Order dated April 26, 2018. (the "Order"¹). The Order reversed the WA's Final Order, Requirement and Decision (the "FORD"), and instructed the WA to issue, without conditions, a Watershed Protection Permit to Respondent Appalachian Materials, LLC ("AM"), allowing the operation of a hot-mixed asphalt plant in a watershed especially protected by State and County law.

¹ A copy of the Order is attached as Exhibit A.

Under State and County law, the Petitioners have a right to appeal the Order to the Ashe County Superior Court within 30 days, but, contrary to this right of appeal, the Order instructed the WA to issue a Watershed Protection Permit within fifteen (15) days of the entry of the Order.

On May 7, 2018, the Ashe County Board of Commissioners (the "Board of Commissioners") reviewed the Order and unanimously directed appeal of the Order to Ashe County Superior Court and to take such other steps and actions as are appropriate or necessary.

Upon the WRB's delivery to Superior Court of the full and complete record of the Administrative Appeal, the Petitioners request the Court to conduct a Judicial Review of the record and reverse the Order for the reasons stated in the Petition.

In support of its Petition and request for Judicial Review, the County and the WA, allege and say as follows:

PARTIES, STANDING, JURISDICTION AND VENUE

1. Petitioner County is a body politic formed and operated by virtue of the laws of the State of North Carolina and having such powers as are granted to it by the State. The County is one of the North Carolina counties, as defined by State law.

2. Petitioner WA is the Watershed Administrator of the Ashe County Watershed Protection Ordinance (WPO)². The WA was a party in the Administrative Appeal and the Order reversed the WA's FORD.

3. The County granted the WA authority to administer and enforce the provisions of the WPO, exercising the full police power of the County, including the authority to make orders, requirements, decisions or determinations. WPO §§ 155.65-155.66. Additionally, when the County receives an application for issuance of a Watershed Protection Permit, County staff

² A certified copy of the WPO is attached as Exhibit B.

possess authority to request the person seeking such a permit to provide such information as County staff determines is necessary. *See, e.g. WPO § 155.37(C).*

4. The WA's powers, duties and responsibilities are established by the WPO and the Order has and will continue to substantially and wrongfully interfere with the WA's powers, duties and responsibilities.

5. The WA has suffered and will suffer special damages as a result of the Order.

6. During its review of the Order, the Board of Commissioners determined that the Order was substantially inconsistent with the correct interpretation and application of the WPO and other applicable laws. The Board of Commissioners further determined that the Order improperly granted AM variances from the requirements and standards of the WPO.

7. During its review of the Order and after weighing the interests of County citizens, the Board of Commissioners concluded that the Order is contrary to the public's interests and the orderly administration of County government. The County will suffer special damages as a result of the Order.

8. Upon information and belief, Respondent AM has been, at some points in time, a limited liability company organized under the laws of the State of Tennessee, with its principal office located at 5605 Bamboo Road, Boone, North Carolina 28607.

9. The Respondent WRB is the administrative board established by the Board of Commissioners in the WPO to hear and decide appeals from the WA's final orders, requirements, decisions or determinations. In the WPO, the Board of Commissioners designated the Ashe County Planning Board to act as the WRB.

10. State law and the WPO provide for appeals from the WRB decisions to be filed with Superior Court within 30 days. WPO § 155.72. The decisions by the Superior Court will be in the manner of certiorari. Id.

11. This Court has jurisdiction to issue the Writ of Certiorari with Supersedeas and to conduct a judicial review of the Administrative Appeal. Ashe County is the proper venue.

LEGAL BACKGROUND AND PROVISIONS OF THE WPO

12. The County is mandated by State law to adopt and implement a watershed protection ordinance that, at the very least, must comply with minimum requirements of State law. See N.C.G.S. § 143-214.5; WPO § 155.01; *Cary Creek Limited Partnership v. Town of Cary*, 203 N.C. App. 99, 690 S.E. 2d 549 (2010), *rev. denied*, 364 N.C. 200 (2010).

13. The Board of Commissioners has not adopted a zoning or unified development ordinance. State law authorizes the County to adopt the WPO using its general police powers. N.C.G.S. § 143-214.5(d)(ii); N.C.G.S. § 153A-121. The Board of Commissioners adopted the WPO exercising the County's general police powers. WPO § 155.01.

14. The WPO is one of the most technical and complex ordinances in County law. Among other matters, the WPO regulates and limits (A) all subdivisions of land in this protected watershed, WPO §§ 155.15-155.19; (B) all uses in this protected watershed, WPO § 155.31; and (C) density and built-upon limits of development, WPO § 155.31.

15. The WPO imposes an affirmative obligation to establish vegetative buffers along perennial waters. WPO § 155.33.

16. The WPO prohibits nonresidential development where storage of toxic and hazardous materials will occur unless a spill containment plan is implemented. WPO § 155.31(B)(1)(d).

17. The WPO prohibits any building or built-upon area erected, moved, enlarged or structurally altered in this protected watershed until a Watershed Protection Permit is issued. WPO § 155.37(A).

18. The WPO prohibits any change in the use of any building or land in this protected watershed until a Watershed Protection Permit is issued. Id.

19. The WRB had not heard a matter arising under the WPO before this Administrative Appeal.

CHRONOLOGY OF EVENTS

Pre-Evidentiary Hearing Events

20. AM devised a plan to locate a hot-mixed asphalt plant on the side of a mountain next to a perennial stream that flows down the mountain under Glendale Springs Road into the South Fork of the New River.

21. AM did not voluntarily seek a WPO Permit. In connection with seeking a permit under another County ordinance, the Ashe County Planning Director, who is also the WA, informed AM on June 12, 2015, that the location proposed for AM's future hot-mixed asphalt plant was in the watershed protected by the WPO.

22. On June 12, 2015, the WA ruled that:

- a. A request for a Watershed Protection Permit will need to be made;
- b. A site plan showing the proposed development and total built-upon area (BUA) of the site will be required;
- c. A spill containment plan will be required if there is storage of toxic or hazardous materials and a list of materials stored on site is required; and
- d. A 35-foot buffer will be required along the perennial stream.

23. On June 15, 2015, AM submitted a Watershed Protected Areas Submittal.
24. In February 2016, AM requested issuance of a Watershed Protection Permit.
25. In October 2016, in a separate appeal, AM requested the Ashe County Planning Board to order issuance of a Watershed Protection Permit. The Ashe County Planning Board declined to order issuance of a Watershed Protection Permit.
26. In January 2017, the First Set of Comments prepared by County staff was delivered to AM (the "First Set of Comments").
27. AM provided responses to the First Set of Comments in February 2017. The WA reviewed AM's responses and determined that AM's responses did not contain a site plan showing the proposed development and were incomplete or non-responsive to many of the requests made in the First Set of Comments.
28. From February 2017 to June 2017, the WA continued to request the documents and information requested in June 2015 and in the First Set of Comments.
29. On June 15 2017, the WA set a deadline for AM to agree to submit a site plan showing the proposed development and to provide the documentation and information requested by the WA. The WA notified AM of the deadline on that date. The deadline was June 28, 2017.
30. AM did not provide or agree to provide a site plan showing the proposed development or the other documentation and information requested by the WA in June 2015 and in the First Set of Comments.
31. On July 7, 2017, the WA concluded that an impasse had occurred and issued his Final Order, Requirement and Decision (the "FORD"). The FORD determined that processing of AM's request for a Watershed Protection Permit would be suspended until AM provided the information and documentation requested in June 2015 and the First Set of Comments.

32. AM could have resolved and removed the FORD by providing the information requested by the WA in June 12, 2015 and in the First Set of Comments.

33. Instead, AM appealed the FORD to the WRB.

Evidentiary Hearing

34. The WRB conducted a hearing concerning AM's appeal.

35. At the hearing, the WA testified but his testimony was limited and interfered with by rulings by the WRB. The WA objected to these rulings which were prejudicial.

36. In addition to the WA's testimony, the WA presented testimony by three owners of property in the vicinity of the proposed hot asphalt plant, Ms. Randy Brown, director of Camp New Hope, Mr. Harry Corpening and Mr. Pat Constandine, regarding their personal knowledge of land grading without a Watershed Protection Permit where the hot-mixed asphalt plant is proposed to be located, ongoing water quality problems in the perennial stream, and water flowing across Glendale Springs Road toward the South Fork of the New River.

37. In addition to the WA's testimony and the testimony of three property owners, the WA presented testimony by a licensed North Carolina attorney, John B. "Jak" Reeves, and a licensed North Carolina land surveyor, Jason Herman, that the lease exhibited by AM as evidence of its ownership of land located in Ashe County was void because the legal description was patently ambiguous.

38. In addition to the WA's testimony, the testimony of three owners of property in the vicinity of the proposed asphalt plant, the testimony of a licensed North Carolina attorney lawyer and a licensed North Carolina land surveyor, the WA presented testimony by Forrest Westall, P.E., a person qualified in the evidentiary hearing as an expert in the field of North Carolina state and local watershed regulatory program, in the field of the North Carolina NPDES

regulatory program and in the field of regulations administration, enforcement practices and procedures of water protection laws in North Carolina.

39. Mr. Westall is a licensed North Carolina professional engineer and a principal in McGill and Associates, a private engineering firm. Mr. Westall was employed by the North Carolina Division of Natural Resources for over 25 years, including as the head of the Asheville office of the North Carolina Division of Natural Resources. Mr. Westall is a former member of the State Environmental Management Commission, a former member of the State Mining Commission and a recipient of numerous awards and recognitions. The copy of Mr. Westall's resume that was introduced at the evidentiary hearing is attached as Exhibit C.

40. Mr. Westall testified that the information and documentation requested by the WA in June 2015 and in the First Set of Comments was appropriate and within the WA's authority. He testified that the documentation and information provided by AM to the WA did not satisfy the WPO or was insufficient in detail to authorize issuance of a Watershed Protection Permit, and the additional documents and information introduced by AM at the evidentiary hearing continued to not satisfy the WPO and continued to be insufficient in detail to authorize issuance of a Watershed Protection Permit.

41. AM presented testimony by a licensed North Carolina land surveyor, Derek Goddard, one of the people who prepared documentation for AM's request for a Watershed Protection Permit. Mr. Goddard admitted that the document described as being a survey in the lease by which AM claimed to own land in Ashe County was not a survey. Mr. Goddard expressed various opinions about the WPO and state regulatory programs and about the documents he and others prepared on behalf of AM and submitted to the County when seeking a Watershed Protection Permit.

42. AM presented testimony by a licensed North Carolina lawyer, Nathan Miller, the lawyer who prepared the lease. Mr. Miller testified that the asphalt plant company and the quarry company were different companies and setting up different companies was intentional because their operations were different. He testified that the description in the lease was latently ambiguous but could not identify a written document that would cure the ambiguity.

43. AM presented testimony by a licensed North Carolina civil engineer, Mr. David Wasiela. Mr. Wasiela is a senior project engineer with the engineering firm of ERM, Inc. Mr. Wasiela was qualified at the evidentiary hearing as an expert in the requirements for spill prevention, control and countermeasure plans under federal regulations and best management practices for the storage and use of fuel products. Mr. Wasiela provided various opinions about these matters and a letter he had written to AM's manager.

44. AM, through affidavit, presented testimony of its manager about AM's dissolution by the State of Tennessee during the Administrative Appeal and its oral agreement as to the description of property in the document by which AM claimed to own in the County.

45. None of the witnesses presented by AM had any experience in administration or enforcement of any law by any government.

46. The evidentiary hearing was closed and final arguments were made on February 15, 2018.

Deliberations and the Order

47. The WRB began its deliberations on March 1, 2018 and on that date voted upon all matters it deemed necessary. The WRB requested the attorneys representing the WA and AM to prepare findings and conclusions supporting the portion of the WRB's votes consistent with their client's positions.

48. On March 29, 2018, counsel for the WA submitted proposed findings and conclusions to the Chair of the WRB.

49. On April 3, 2018, counsel for AM submitted an entire proposed order and two new documents to the entire WRB.

50. On April 12, 2018, the WRB reconvened. The WA objected to consideration of the new documents tendered by AM on April 3, 2018, after the close of the evidentiary hearing. By a vote of 3 to 2, the WRB changed the motions it had adopted on March 1, 2018.

51. Thereafter, AM's legal counsel prepared a new proposed order in reliance upon the majority of the WRB accepting and approving the new documentation presented after the evidentiary hearing had closed.

52. AM's legal counsel submitted its new proposed order to the new Chair of the WRB on April 25, 2018, the prior Chair of the WRB having resigned as Chair the day after the 3-2 vote was taken.

53. On April 26, 2018, the WRB, by a 3-2 vote, made its decision by adopting the second order proposed by AM's legal counsel (the "Order"). The Order directed the WA to issue a Watershed Protection Permit within fifteen (15) days of the date the Order was entered.

Board of Commissioners' Review of the Order

54. County law establishes a thirty (30) day time period for parties to appeal the WRB's decision to Superior Court.

55. The Board of Commissioners reviewed the Order on May 7, 2018 and unanimously directed appeal of the Order to Ashe County Superior Court and to take whatever action is necessary and appropriate, including filing a motion to stay the Order, if necessary.

GROUND ON WHICH THE PETITIONERS CONTEND THE WRB ERRED

First Ground

56. State Law establishes standards and requirements that apply to all water supply watersheds in North Carolina. The Order improperly grants AM variances from the state-wide required standards and requirements and the Order is inconsistent with the proper interpretation of the WPO, including, but not limited to:

- a. The Order misinterprets and misapplies the subdivision requirements contained in the WPO and grants AM a variance from these requirements contrary to law;
- b. The Order misinterprets and misapplies the spill containment plan requirements contained in the WPO and grants AM a variance from these requirements contrary to law;
- c. The Order misinterprets and misapplies the built-upon requirements contained in the WPO and grants AM a variance from these requirements contrary to law; and
- d. The Order misinterprets and misapplies the stream buffer requirements contained in the WPO and grants AM a variance from these requirements contrary to law.

Each of the above mandatory standards and requirements constitute a separate basis for reversal of the Order.

Second Ground

57. AM owned no interest in the land upon which it proposes to build the proposed hot asphalt plant and had no standing to appeal the FORD. Separately, AM was administratively dissolved while its appeal was pending before the WRB.

Third Ground

58. The majority of the WRB accepted new written evidence presented outside of the evidentiary hearing of the Administrative Appeal after the evidentiary hearing had closed, over the WA's objection and such acceptance was prejudicial to the Petitioners. The Order was based upon this new written evidence and is error.

Fourth Ground

59. The WRB exceeded the authority and jurisdiction granted to it by the Board of Commissioners when it instructed the WA to issue a Watershed Protection Permit before he had made a final decision regarding issuance of a Watershed Protection Permit.

Fifth Ground

60. The WA had ruled in June 2015 that a site plan showing the proposed development was required and this determination was not appealed by AM. AM has not provided the WA a site plan showing the proposed development and the Order overruled a determination over which the WRB had no authority or jurisdiction. Separately ordering issuance of the Watershed Protection Permit without the County being provided a site plan was error.

Sixth Ground

61. The WRB unfairly and unequally interfered with the WA's presentation of its defense by controlling the presentation of the WA's testimony and evidence, but without imposing similar controls on testimony of AM's representatives. Such interference was prejudicial to the WA.

Seventh Ground

62. The Order misinterprets, misapplies and grants variances from the WPO to AM not authorized by law, such as not upholding the County staff's authority to request

documentation and information from a person seeking County staff to issue a Watershed Protection Permit. Additionally, where the undisputed evidence shows development and change of use of land without a Watershed Protection Permit, the Order misinterprets, misapplies and grants variances from the WPO not authorized by law by prohibiting County staff from requesting information under oath as to such prior development activities.

Eighth Ground

63. The findings of fact in the Order are unsupported by substantial competent evidence in view of the entire record of the Administrative Appeal.

Ninth Ground

64. The conclusions of law in the Order are unsupported by the findings of fact in the Order because, among other reasons, no matter the number of findings of fact in the Order, the WRB is powerless to grant variances from the standards and requirements contained in the WPO contrary to law.

Tenth Ground

65. The Order is inconsistent with procedures specified in State law and/or in the WPO because, no matter the number of findings of fact and conclusions of law in the Order, the WRB is powerless to grant variances from the procedures in State law and/or in the WPO.

Eleventh Ground

66. The Order is in excess of the authority conferred upon the WRB by the WPO.

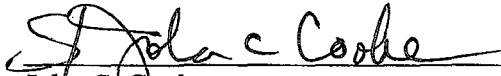
Twelfth Ground

67. The Order is arbitrary or capricious.

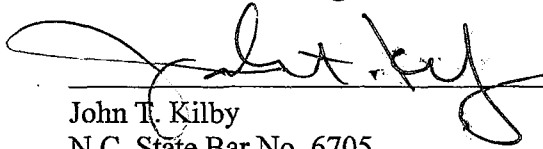
WHEREFORE, the County and the WA requests the Court:

1. Issue the Writ of Certiorari with Supersedeas attached as Exhibit D to this Petition and direct the Clerk to the WRB to prepare and file a complete record of the Administrative Appeal in the office of the Ashe County Clerk of Superior Court on or before the date specified in the Writ;
2. Conduct a Judicial Review of the record of the Administrative Appeal;
3. Reverse the Order and uphold the FORD;
4. Grant the County and the WA such other and further relief as is just and proper; and
5. Tax the costs of this judicial review against AM.

This the 11th day of May, 2018.



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NORTH CAROLINA

ASHE COUNTY

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AND ASHE COUNTY WATERSHED
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ASHE CO., C.S.C.

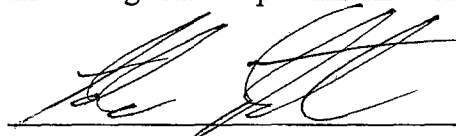
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

VERIFICATION

I, Adam Stumb, Ashe County Watershed Administrator, being first duly sworn, depose and say as follows:

That I have read the foregoing Verified Petition for Writ of Certiorari with Supersedeas and for Judicial Review; that I know and have personal knowledge of the contents thereof; that the same is true of my own knowledge except to those things stated upon information and belief, and as to those, I believe them to be true.

Sworn to and subscribed before me,
this the 11th day of May, 2018

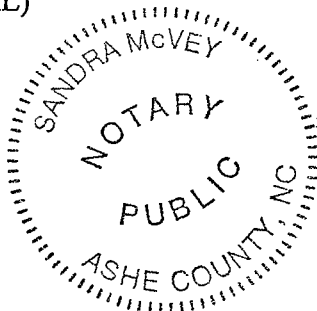

Adam Stumb,
Ashe County Watershed Administrator

Sandra McVey (SEAL)
Notary Public

Sandra McVey
Printed Name of Notary

My commission expires:

10-4-2019



NORTH CAROLINA

ASHE COUNTY

BEFORE THE PLANNING BOARD
SITTING AS THE WATERSHED
REVIEW BOARD AND ACTING AS
BOARD OF ADJUSTMENT

IN RE: APPALACHIAN MATERIALS,
LLC'S APPEAL OF WATERSHED
ADMINISTRATOR'S JULY 7, 2017 FINAL
ORDER, REQUIREMENT AND DECISION

ORDER

INTRODUCTION

Appalachian Materials, LLC ("Appalachian") timely filed an appeal requesting this Board review the County Watershed Administrator's (the "Administrator") "Final Order, Requirement and Decision" issued to Appalachian, dated July 7, 2017 (the "Decision"). At issue is whether Appalachian is required to obtain a permit for its proposed asphalt operations under Ashe County's Watershed Protection Ordinance ("WPO"), and if so: (i) has it submitted to the Administrator all necessary information for its request for such a permit to be processed and a decision made, and (ii) have the criteria for issuance of such a permit been met. Appalachian's request for a watershed permit has been pending with the Administrator since June 2015.

The Decision was issued approximately five months after the Administrator issued a set of written comments on January 24, 2017, regarding Appalachian's request for a permit. In those comments, the Administrator made various requests for further information from Appalachian or its affiliates. In the Decision, the Administrator asserted that all his requests for more information have not been met, though he did not identify the information he requested that had not been provided by the time the Decision was issued. In the Decision, the Administrator communicated his decision to cease processing Appalachian's application any further until the "information requested" in his January 2017 comments is provided to him. *See* Decision, p. 3.

On appeal, Appalachian first contends that it is not required to get a permit under the WPO. Alternatively, Appalachian asserts that all necessary information has been provided and requests that this Board find that the criteria for such a permit have been met and order the Administrator to issue a watershed permit to Appalachian.

EXHIBIT

A

Appalachian's appeal was timely filed July 27, 2017, and came before the Ashe County Planning Board, sitting as the Watershed Review Board and acting as a Board of Adjustment ("Board"), pursuant to County Code Section 153.04(J) and N.C. Gen. Stat. §§ 153A-345.1 and 160A-388(b1). This Board held extensive quasi-judicial hearings on October 5, 2017, October 9, 2017, October 30, 2017, December 6, 2017, December 8, 2017 and February 15, 2018.

During deliberations occurring on March 1, 2017, and based upon all the evidence and legal memoranda and arguments presented, the Board resolved certain issues by majority votes. A copy of the issue sheet prepared by Gene Hafer, Board Chair at the time of deliberations, is attached as Exhibit A to this Order.

On April 12, 2018, the Board met to consider adopting a written decision memorializing its deliberations from March 1, 2017 and entering a final order with instructions to the Watershed Administrator. The Board considered proposed findings of fact and conclusions of law submitted by the parties in advance of the April 12, 2018 meeting. By a majority vote of 3-2, the Board adopted a motion instructing the Watershed Administrator to issue to Appalachian a watershed protection permit within fifteen (15) days of receiving a sealed survey demonstrating the limits of Appalachian's proposed asphalt production operations and that the approved coordinates for the asphalt production equipment under its state air quality permit are located within those limits. Pursuant to N.C. Gen. Stat. § 160A-388(e2)(1), this Order is entered setting forth findings of fact and conclusions of law, consistent with the Board's determination of the above-referenced issues and the motion adopted by the Board majority on April 12, 2018.

Pursuant to N.C. Gen. Stat. § 160A-388(b1)(8), this Board "may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made." N.C. Gen. Stat. § 160A-388(b1)(8) further provides that this Board "shall have all the powers of the official who made the decision."

FINDINGS OF FACT

Procedural Background and History

1. On or about June 5, 2015, Derek Goddard of Blue Ridge Environmental Consultants ("BREC") submitted materials to the Ashe County Planning Director, Adam Stumb, (hereinafter "Planning Director" or "Watershed Administrator") for a permit for Appalachian Materials ("AM") under the County's Polluting Industries Development ("PID") Ordinance. See AM Exh. 7.

2. Appalachian's proposal was for the operation of portable asphalt production equipment (a nonresidential use under the WPO) on a portion of property leased by Appalachian, having a parcel identification number of 12342-016 and located off Glendale School Road in Ashe County (the "Tract"). The Tract is owned by an affiliate of Appalachian, Radford Properties, Inc. ("Radford Properties"), and contains an existing rock quarry (also a nonresidential use under the WPO) that has been operated by Appalachian's parent company, Radford Quarries, Inc. ("Radford Quarries") for more than a decade. WA Record, Ex. 7; Cecile Aff., ¶¶ 2 and 5.

3. On June 12, 2015, the Planning Director responded by e-mail, indicating he had a few comments before he could issue that [PID] permit, noting he did not believe any of his comments were "deal breakers." *See* AM Exh. 7. In that email, the Planning Director noted the proposed site was in a Class IV watershed which requires all new development that requires an erosion and sediment control plan to meet the requirements of the WPO. *Id.* The Planning Director indicated a request for a watershed permit will need to be made. *Id.*

4. Section 155.37(b) of the WPO provides that watershed protection permits shall be filed with the Building Inspector. It provides the application shall include a completed application form (see Appendix A) and supporting documentation deemed necessary by the Building Inspector.

5. There is, however, no application form, in an Appendix A or elsewhere in the WPO. Nor is there any checklist for use by applicants for such permits in the WPO.

6. In his June 12, 2015 email, the Watershed Administrator identified three things that needed to be included with a watershed permit application: (a) a site plan showing the proposed development did not exceed 24% built-upon area, (b) a spill containment plan if there will be storage of toxic or hazardous materials, and (c) a showing that buffer requirements will be met given there was a small stream on the Tract. *See* AM Exh. 7. Neither in this email nor in any other correspondence prior to issuance of his "First Set of Comments" dated January 24, 2017 to Goddard did the Watershed Administrator indicate anything else was needed in support of a watershed permit application.

7. The N.C. Department of Environmental Quality ("DEQ") provides guidance to local governments regarding implementation and enforcement of local watershed protection ordinances. DEQ has produced a Watershed Protection Permit Plan Checklist. *See* AM Exh. 6.

8. In the absence of an application form or checklist in the WPO, Goddard referred to that DEQ checklist for guidance on what must be included in a watershed permit application. According to uncontradicted testimony from AM's consultant, AM's submittal to the Watershed Administrator was consistent with the items on that State checklist. *See* Testimony Derek Goddard.

9. BREC submitted an original "watershed protected area" submittal to the Watershed Administrator on behalf of AM on or about June 15, 2015. *See* AM Exh. 9.

10. In an article published in the Ashe Mountain Times on June 19, 2015, the Planning Director is reported to have said he couldn't think of any limitations that would prevent the construction of AM's proposed asphalt production plant. *See* AM Exh. 10.

11. In communications with DEQ representatives and the County Manager, the Planning Director stated that Appalachian's plans met the requirements of the County's ordinances, including the WPO. *See* Stumb Testimony, p. 9; AM Exh. 15.

12. On August 5, 2015, the Watershed Administrator by email asked Goddard about the materials that would be stored at the asphalt plant. On August 6, 2015, Goddard responded with information about the fuel and liquid asphalt tank capacities. Goddard said let me know if you need any more information to go ahead and issue the watershed permit. *See* AM Exh. 11. These were the only substantive comments or questions communicated by the Watershed Administrator about AM's watershed permit application prior to his comments issued on January 24, 2017.

13. On August 13, 2015, in response to a request by the Watershed Administrator, Goddard submitted a Spill Prevention and Response Plan for AM to the Watershed Administrator. *See* AM Exh. 13.

14. On September 2, 2015, the Watershed Administrator responded to an August 31, 2015 email from Goddard. By this point, there was some public opposition to AM's proposed asphalt production operations. In his response, regarding the watershed permit application, the Watershed Administrator indicated he would not issue a watershed permit for a use that has not been permitted or approved [under the Polluting Industries Development ("PID") Ordinance]. Therefore, he said the PID permit will be issued before the watershed permit. *See* AM Exh. 13. The Watershed Administrator effectively put AM's watershed permit application on hold, but testified that had he needed any additional information for the watershed permit at that time, he would have followed up with Appalachian. *See* Stumb Testimony, p. 7.

15. On December 1, 2016, this Board entered an Order reversing the Planning Director's administrative decision made in April 2016 to deny AM's PID application.¹

16. On January 20, 2017, AM through counsel requested that the Watershed Administrator make a formal determination that no watershed permit was needed for its proposed operation since no sedimentation and erosion control permit was needed, or alternatively, that he issue the watershed permit, based upon AM's 2015 submittals for that permit. *See* WA Record, Exh. 25. The Watershed Administrator, through new legal counsel, refused to make a formal determination as to whether AM was required to obtain a watershed protection permit for its proposed operations. *See* WA Records, Exh. 26.

17. On January 24, 2017, the Watershed Administrator issued a "First Set of Staff Comments" on AM's watershed permit application (the "Comments"). *See* AM Exh. 16. In those Comments, he cited a number of what he determined were deficiencies and inadequacies in AM's 2015 submittals for a watershed permit, none of which had been communicated to AM or BREC in 2015 when those submittals were made.

¹ A condition of this Board's Order issuing Appalachian's PID permit requires that Appalachian, prior to placing any asphalt equipment on the Tract, must stake the limits of the asphalt plant site as shown in its application, provide to the Planning Department a sealed survey showing the location of the stakes and provide the Planning Department a reasonable opportunity to inspect the staked limits of the asphalt plant to ensure it complies with the limits of the asphalt plant as shown in Appalachian's PID application. *See* AM, Exh. 15, Conclusion of Law 27.

18. The Watershed Administrator's expectations for a sufficient "site plan" expanded from what he communicated to Goddard was needed in June 2015. See AM Exh. 8. In his Comments, he asked for "separate detailed layouts" of the quarry and the asphalt plant that includes all aspects of each development, including internal streets and drives, vehicle parking, storage and stacking areas, and all quarry expansions.

19. In his Comments, the Watershed Administrator also raised a number of additional requirements before a watershed permit would be issued that he had not communicated would be required in 2015. He raised for the first time whether prior expansions of the existing mining operations on the Tract required a watershed permit, and threatened to issue a notice of violation of the WPO. He requested an affidavit from the owner of the tract that existing development on the tract complied with the WPO and "all federal, state and county laws." *Id.*, pp. 2-3

20. The Watershed Administrator also expanded upon the information he contended was needed in support of a watershed permit application from what he originally communicated to Goddard on June 12, 2015. In addition to requirements for BUA, buffers and spill plans, the WPO contains abatement provisions in Sections 155.50-51, "Health Regulations." Section 155.50 provides that no activity or land use shall be allowed in a watershed which poses a risk to water quality and the public health, safety and welfare. Section 155.51 provides the Building Inspector shall monitor land use activities in a watershed that may pose a threat to water quality, and report findings to the Planning Board, which has the authority to institute appropriate remedies when it finds such a threat exists. In his Comments, the Watershed Administrator cited as a deficiency in AM's 2015 submittals the lack of any discussion about Section 155.50 (in addition to addressing BUA, buffers and a spill plan).

21. In his Comments, the Watershed Administrator indicated that unless the County received supplementary materials from AM by February 13, 2017, AM's watershed permit request would be denied.

22. AM was subsequently instructed that any further communications needed to be made through legal counsel. See Cooke email dated Feb. 28, 2017, AM Exh. 20. Accordingly, the common direct dialogue between a permit applicant and their consultant, with administrative staff reviewing the permit request, was forbidden.

23. Following the Comments, AM made a series of submittals in response, as well as to additional requests made by the Watershed Administrator's legal counsel, which are described in more detail below.

24. On February 27, 2017, AM through counsel responded by letter to the Comments, and submitted a Supplemental Watershed Protected Area Submittal, a Spill Prevention, Control and Countermeasure ("SPCC") Plan, and a letter from Mr. David Wasiela of EMR. See AM Exh. 18, WA Record, Exh. 35.

25. On May 4, 2017, AM through counsel submitted the last versions of its Supplemental Watershed Protected Area Submittal and SPCC Plan. See AM Exh.'s 22-24, 24A.

At the conclusion of that submittal, AM's counsel asked that the Watershed Administrator let them know if there are any remaining staff review comments or questions.

26. Prior to that May 4, 2017 submittal, there was an email exchange between the parties' counsel over what needed to be included in plans submitted in support of the watershed permit application. *See* Cooke-Essick email exchange, April 6-11, 2017, AM Exh. 21.

27. After that May 4, 2017 submittal by AM, there followed several correspondence between counsel for the parties leading up to the Watershed Administrator's Decision at issue in this proceeding. On June 7, 2017, the Watershed Administrator's legal counsel indicated the County was investigating the activities on the Tract and reviewing AM's watershed permit application. The Watershed Administrator's legal counsel indicated that investigation and review had been delayed by AM not providing information requested by the County, but he did not identify what information was missing. *See* Cooke email to Essick, June 7, 2017, AM Exh. 25.

28. On June 15, 2017, the Watershed Administrator's legal counsel in an email stated that in light of AM's objections to provide information and documentation requested by County staff, "we have reached an impasse." The Watershed Administrator's legal counsel, however, did not identify what information and documentation County staff had requested that had not been submitted. *See* AM, Exh. 26.

29. On June 27, 2017, AM through counsel responded by letter, summarizing the submittals made in February and May in response to the Comments. *See* AM, Exh. 27. AM's counsel stated in that letter:

We understood from our phone call on June 9, 2017 that you would confer with your client and let us know if there was any further information or detail about the plans [the Watershed Administrator] contends he needs, with an explanation for why any such information or detail is required under the WPO. We received no such communication. Instead, we got your email on June 15, 2017, claiming AM has refused to provide a site plan for over two years and declaring we are at an impasse. You also request that we let you know if our client prefers to provide "this information and documentation" without any reference to what information or documentation you or [the Watershed Administrator] are referring to. *Id.*, p. 2

30. AM's counsel asked that if the Watershed Administrator had any specific questions about the supplemental plans (submitted in May 2017) or something is still not clear to him on those plans, please let AM know. AM's counsel indicated it would be happy to arrange a meeting to answer his questions, and provide any additional, relevant information. *Id.*

31. AM's counsel again asked (*see e.g.* May 4, 2017 email) that if the Watershed Administrator contends there is information or detail missing in the site plans that is required

under the WPO that he or his counsel tell AM: (i) what information or detail he contends is missing from the site plan, and (ii) what provision in the WPO he contends requires the information in order to determine compliance with the WPO. *Id.*, p. 3.

32. On July 7, 2017, the Watershed Administrator issued the Decision that is the subject of this appeal. *See* WA Record, Exh. 56.

33. Prior to issuing that Decision, the Watershed Administrator or his legal counsel did not respond to AM's offer to coordinate a meeting, or otherwise respond to AM's counsel's letter dated June 27, 2017.

34. Prior to issuing that Decision, the Watershed Administrator did not provide AM with the results of the County's investigation into the activities on the tract or any chance to respond, as the Watershed Administrator's legal counsel had indicated would occur in his June 7, 2017 email. *See* AM, Exh. 25.

35. Prior to issuing the Decision, the Watershed Administrator did not request an opportunity to inspect the Tract.

36. The Record upon which the Watershed Administrator made his decision contains a number of emails from third-parties, Facebook posts, photographs, correspondence with state officials and inspection reports. None of these were provided to AM prior to issuance of the Watershed Administrator's Decision, nor was AM provided any opportunity to respond to the materials or answer any questions the Watershed Administrator had.

37. In the Decision, the Watershed Administrator indicated the watershed permit application filed in June 2015 would not be processed further until the family owning AM and its parent company accurately and fairly provide "the information" requested in the Comments. *See* Decision, p. 3.

38. This is inconsistent with what the Watershed Administrator said in his Comments, where he indicated if the additional information being requested was not provided, AM's watershed permit application would be denied. *See* Comments, p. 1, AM Exh. 16.

39. While the Decision made multiple references to "the information" the Watershed Administrator requested in his Comments, the Watershed Administrator did not identify in the Decision what information he requested in his Comments that was missing from AM's subsequent submittals to him.

40. On July 27, 2017, AM gave notice of its appeal of the Decision, reserved its argument that no watershed permit is required for AM's proposed operations since no sedimentation and erosion control permit was needed, and requested the Watershed Administrator be ordered to issue the watershed permit.

41. On September 28, 2017, the Watershed Administrator served on AM a Motion to Dismiss Appeal alleging that Appalachian did not have standing to appeal the Decision.

Facts Concerning Appalachian's Standing

42. Appalachian is one of several affiliated, private companies owned by Dr. Danny James Cecile, Jr. and his family, including Radford Properties and Radford Quarries.

43. Dr. Cecile is an officer or manager of Appalachian, Radford Properties and Radford Quarries. *See Cecile Aff.*, ¶¶2-3.

44. The Tract is owned by Radford Properties.

45. The mining operations on the Tract are conducted by Radford Quarries.

46. Radford Properties has authorized Radford Quarries to obtain certain permits and conduct mining operations on the Tract. Radford Quarries has conducted mining operations on the Tract since at least 2008, including certain grading and land disturbing activities in accordance with its state mining permit. *See Cecile Aff.*, ¶5.

47. Radford Quarries has a valid mining permit that includes a total permitted acreage of 77.0 acres, including the entire Tract as well as adjoining parcels, and is currently permitted to disturb 18.7 acres under that mining permit. *See WA Ex.*, 85. The 18.7 acres includes a portion that is leased by Appalachian, and grading of area leased by Appalachian was done by Radford Quarries prior to Appalachian entering into the Lease. *See AM, Exh. 37, Finding of Fact No. 37.*

48. Appalachian is a separate limited liability company formed to operate the contemplated asphalt production operations. Appalachian is a wholly owned subsidiary of Radford Quarries and, with the permission of Radford Quarries and Radford Properties, has obtained state and local permits for Appalachian to conduct asphalt production operations on the Tract.

49. Appalachian is a limited liability company formed under the laws of the State of Tennessee on July 13, 2011, is in good standing with the State of Tennessee and is authorized to do business in North Carolina. *See Cecile Aff.*, ¶3-4. Due to a mailing address error that resulted in the administrative dissolution of Appalachian on August 6, 2017, an Application for Reinstatement was submitted by Appalachian and approved by the State of Tennessee on September 29, 2017.

50. Pursuant to a lease agreement dated June 1, 2015 (the "Lease"), AM leases a portion of the Tract from Radford Properties. *See AM, Exh. 15, Finding of Fact No. 2²; Cecile Aff.*, ¶5.

51. The portion of the Tract leased by Appalachian for purposes of its proposed asphalt production operations is depicted on Exhibit A to the Lease (the "Leased Premises"). The

² This is a finding of fact previously made by this Board and was affirmed by the Ashe County Superior Court as being supported by competent, substantial and material evidence. The Superior Court held that the County conceded this at the hearing before the Superior Court. *See Superior Court Order*, p. 4, ¶ 1.

remainder of the Tract is used by Radford Quarries (AM's parent company) for its mining and quarry operations. *See* Cecile Aff., ¶5.

52. The reference to Parcel Identification Number 12345-016 in the Lease is a scrivener's error and Radford Properties, Radford Quarries and Appalachian all agree it should have reflected the correct Parcel Identification Number of 12342-016. *See* Testimony of Nathan Miller, Cecile Aff., ¶2.

53. Appalachian, Radford Quarries and Radford Properties all agree that the property depicted on Exhibit A to the Lease is reasonably identifiable, not ambiguous and there is no question among the parties as to the property leased by AM. *See* Testimony of Nathan Miller, Cecile Aff., ¶6.

54. Radford Properties and Radford Quarries have authorized and consented to Appalachian's use of the Lease Premises for the production of asphalt products. AM has received numerous state permits issued by NCDEQ to conduct asphalt production operations on the Leased Premises, including a stormwater permit and air quality permit. Appalachian has also received approval from this Board for a permit under the County's PID Ordinance to operate its proposed asphalt production operations on the Leased Premises.

55. As Dr. Cecile testified, the Watershed Administrator's Decision and refusal to process and approve Appalachian's watershed permit application has directly affected Appalachian's ability to commence its proposed asphalt production operations on the Leased Premises and has resulted in Appalachian incurring damages unique to Appalachian as the permit applicant and lessee of the Leased Premises, including but not limited to lost profits and additional expenses. Cecile Aff., ¶ 10-11.

WPO Requirements and Appalachian's Supplemented Watershed Plans and Application

A. Limitation on the amount of "built upon area" on the Tract and 30-foot buffer.

56. Appalachian's supplemented watershed plans submitted in February and May 2017, after the Watershed Administrator issued his Comments, include calculations of the built upon area ("BUA") for both Radford Quarries' existing mining operation and Appalachian's proposed asphalt production operation. *See* WA Record, Exh. 35; AM Exh.'s 22-24A.

57. In making those calculations, Appalachian's consultants at BREC calculated the percentage of BUA on the entire 31.912 acre tract of land where the proposed asphalt production operations would be co-located with the existing mining operations, consistent with Section 155.31(B)(2)(b) of the WPO.

58. AM's plans and communications made after the Watershed Administrator issued his Comments indicate it intends to use existing gravel roads on the Tract for truck traffic to and from the asphalt production equipment, and that equipment will be located on an existing, graded "middle" tier that is part of the mining operation. *See e.g.*, AM Exh. 24-24A.

59. Those plans indicate the BUA associated with the existing mining operation is 8.4% of the acreage of the Tract. The subset of that BUA that will be associated with the asphalt production operations is 3.8% of the acreage of the Tract.

60. The existing BUA associated with the mining operation, including that portion that will be associated with the asphalt production operations, therefore, is well below the 24% "low density" threshold in the WPO. Thus, a 30 foot, not a 100 foot, buffer applies to the stream that traverses the Tract, under Section 155.33(A) of the WPO.

61. In response to the Watershed Administrator's Comments, AM also submitted a signed and sealed letter from Mr. David Wasiela, P.E., of ERM. Mr. Wasiela audited BREC's BUA calculations submitted to the Watershed Administrator, and indicated in his firm's opinion those calculations were correctly done and were accurate. *See* Wasiela Letter dated Feb. 24, 2017, AM Exh. 19, pp. 2-3.

B. Appalachian's Spill Containment Plan.

62. The WPO requires submission of a "spill containment plan" for any nonresidential development in Class IV waters if any storage of toxic or hazardous materials is anticipated. *See* Section 155.31(B)(1)(d).

63. As indicated to the Watershed Administrator, Appalachian intends to store and use diesel fuel and liquid asphalt used in its operations. The fuel and liquid asphalt will be stored in two above-ground, double-walled tanks, each with a 30,000 gallon capacity. *See* Goddard Aug. 6, 2015 email to Stumb, AM Exh. 11.

64. What constitutes a sufficient "spill containment plan" is not defined in the WPO, and no standard for such plans is referenced or incorporated in the WPO.

65. In August 2015, the Watershed Administrator sought guidance from a DEQ official on what is the intent of a containment plan. He was advised it was intended to be a plan that would outline spill response measures as well as inventory of physical containment measures, but that the state model ordinance deleted this requirement because it was duplicative of existing state and federal regulations. Nonetheless, since Ashe County's WPO still had the requirement, the DEQ official suggested he ask the owners of the plan to provide a copy of their Spill Prevention, Control and Countermeasure ("SPCC") Plan, if they are required to have one. *See* Stumb-Ventaloro email thread, Aug. 12, 2015, AM Exh. 12.

66. The Watershed Administrator did not communicate there was any deficiency in the original Spill Prevention and Response Plan BREC submitted in August 2015, *see* AM Exh. 13, until he issued his Comments in January 2017.

67. In those Comments, the Watershed Administrator stated that 2015 plan did not satisfy the requirements under the WPO. *See* WA Record, Exh. 26, p. 4. The Watershed Administrator indicated AM must submit a "robust and detailed" plan, but again did not cite any standard for such plans as guidance or that he would use for evaluating a revised plan.

68. In subsequent correspondence, Appalachian through counsel noted the lack of any definition or standard for such plans under the WPO, but noted federal regulations provide ample guidance regarding the contents of SPCC plan, codified in 40 Code of Federal Regulations (“CFR”) Part 112. Appalachian through counsel indicated it presumed a SPCC plan that meets those federal requirements would also meet the requirements for a “spill containment plan” under the WPO. Appalachian through legal counsel asked the Watershed Administrator to confirm that is correct, and if that is not correct, asked that the Watershed Administrator explain why and identify the alternative rule, regulation or guidance document that describes a spill containment plan that he would be using to evaluate the sufficiency of Appalachian’s plan in this case. *See* Essick-Cooke Feb. 3-6, 2017 email exchange, AM Exh. 17.

69. In response, the Watershed Administrator, through legal counsel, did not agree that a plan that meets the federal standards would be sufficient, and did not cite any alternative standard he would use in evaluating the sufficiency of AM’s plan. Through legal counsel, he indicated AM can take whatever position it decides as to whether federal law controls or informs the meaning of “spill containment plan” under the WPO. *See id.*

70. In February 2017, in response to the Comments and the position taken by the Watershed Administrator’s legal counsel, BREC on behalf of AM submitted a SPCC Plan. Justin Church, P.E. with BREC, certified he was familiar with the requirements of 40 C.F.R. Part 112 and that SPCC plan for the proposed asphalt plant had been prepared in accordance with good engineering standards and the requirements of 40 C.F.R. Part 112. Church indicated once the facility is constructed, he or his agent would inspect the facility to determine if it complies with this plan as constructed, and will issue an additional certification upon finding it complies with the SPCC plan. *See* SPCC Plan (Feb. 2017), in WA Record, Exh. 35.

71. Appalachian’s SPCC plan and watershed plans (blueprints) submitted in February 2017 reflect that fuel and liquid asphalt will be stored in double-walled above-ground storage tanks, located inside a concrete dike that is considered “secondary” (or tertiary) containment. That containment area as designed consists of a six inch deep concrete pad, with concrete block walls above the containment area floor.

72. As BREC indicated in its February 23, 2017 cover letter and Sheet C900 of the watershed plans (blueprints), the total storage capacity of the diked containment will be sized to meet federal regulations.

73. As BREC indicated in its cover letter, this capacity meets the requirements for secondary containment of oil or oil products set by EPA under 40 CFR Part 112 for facilities where oil or oil products over 1,320 gallons are stored.³

³ Secondary containment and a SPCC plan are also required of AM under the applicable general stormwater permit issued by DEQ. *See* General Stormwater Permit for Asphalt Paving Mixtures and Blocks, AM Exh. 3.

74. In his above-referenced letter dated February 24, 2017, Mr. Wasiela, P.E. of ERM also addressed the SPCC Plan prepared for AM by BREC. Mr. Wasiela referenced the detailed standards for such plans promulgated by the U.S. Environmental Protection Agency ("EPA") under the Federal Water Pollution Control Act, codified at 40 C.F.R. Part 112. Mr. Wasiela indicated that SPCC plans prepared in accordance with these federal regulations and sealed by a licensed engineer is the accepted standard for spill prevention and containment plans for on shore facilities where oil or oil products over 1,320 gallons are used or stored, including asphalt plants. *See* Wasiela Letter dated Feb. 24, 2017, AM Exh. 19, p. 3.

75. Mr. Wasiela indicated ERM had reviewed the SPCC Plan (Feb. 2017) for AM prepared by BREC, and in ERM's opinion, that plan meets or exceeds the requirements for such plans in 40 CFR Part 112. *Id.*

76. Mr. Wasiela further indicated in his firm's opinion that SPCC Plan also meets or exceeds what should be commonly understood as a complete and sufficient "spill containment plan" – the general term used in the WPO. *Id.*, pp. 3-4.

77. Mr. Wasiela further indicated, in his firm's opinion, assuming the asphalt production facility is constructed as designed, and the SPCC Plan is implemented as written, AM will be utilizing industry accepted best management practices and available measures to prevent fuel or liquid asphalt from reaching surface waters. *Id.*, p. 4.

78. Subsequently, in response to further comments from the Watershed Administrator's legal counsel, AM submitted another version of its SPCC Plan and watershed plans (blueprints). On May 4, 2017, counsel for AM sent a cover email to the Watershed Administrator's legal counsel, responding to a prior email identifying certain items the Watershed Administrator or his counsel believed were necessary or would be helpful for review of AM's watershed permit application and supporting materials. *See* AM Exh. 22. Mr. Essick indicated AM had reviewed again the requirements of the WPO and evaluated whether, out of an abundance of caution, any further supplement to AM's plans (submitted in February 2017) were warranted, particularly as they regard on-site transportation, off-loading and storage of fuel. Mr. Essick indicated AM had determined no further revisions or supplement to the SPCC Plan and watershed plans (blueprints) as necessary as they pertain to off-loading and storage of fuel and liquid asphalt cement.

79. Regarding on-site transportation of diesel fuel, Mr. Essick indicated AM was, out of an abundance of caution, proposing an additional site modification. That modification is to enhance an existing berm that runs on the west side of the unnamed tributary that traverses the tract by increasing its height to three feet, and to extend the berm on both sides of the tributary crossing that would be used for truck traffic to and from the asphalt production equipment. Mr. Essick indicated this enhanced and extended berm would serve as an additional measure to prevent or mitigate the impacts in the unlikely event of an on-site spill of fuel or liquid asphalt cement or product on water quality.

80. Attached to Mr. Essick's May 4, 2017 transmittal was a revised set of watershed plans (blueprints), showing the enhanced and extended berm. *See* AM Exh. 24, 24A. Mr. Essick indicated this was the only change to the version of those plans submitted in February 2017.

81. Mr. Essick also indicated the SPCC Plan was being supplemented for the sole purpose of accounting for the enhanced and extended berm. That May 2017 version of the SPCC Plan was subsequently submitted to the Watershed Administrator. *See* AM Exh. 23.

82. AM's revised plans reflect that the secondary containment dike for the above-ground tanks is located 180 feet from the unnamed tributary. *See* C100, Supplemental Watershed Protected Area Submittal, AM Exh. 24-24A. The evidence and testimony of Derek Goddard indicate there are other "best management practices" in place between the secondary containment dike and the tributary that are intended to prevent discharges of oil or other substances to surface waters, namely: berms, including one on the tier where the asphalt equipment would be located, rock-lined ditches that run to a sediment basin, with a vegetative buffer between that basin and the stream. *See id.*, AM Exh's 40A (picture of berm), and Slide 6 in AM Exh. 41; Testimony of Derek Goddard.

CONCLUSIONS OF LAW

1. Section 153.04(J) of the Ashe County Code (the "Code") states that "[t]he Planning Board shall act as the Board of Adjustment for *all* land usage ordinances in the Ashe County Code of Ordinances (Title XV: Land Usage)" and "*shall act and hold hearings in accordance with G.S. § 153A-345.1*" (emphasis added).

2. Pursuant to Title XV of the Code, the WPO is identified as a land usage ordinance.

3. Therefore, in reviewing this appeal, this Board is acting as a Board of Adjustment and is subject to state law governing Boards of Adjustment. *See* G.S. § 160A-388, applicable to counties via G.S. § 153A-345.1 cited in Section 153.04(J). *See also* Order Denying Relief Requested in Ashe County's Petition for Writ of Certiorari and Affirming the Order of the Ashe County Planning Board, Ashe County 16 CVS 514 ("Superior Court Order").

A. Appalachian Has Standing to Appeal the Decision and Watershed Administrator's Motion to Dismiss Should Be Denied.

4. Pursuant to Tennessee law, if an administratively dissolved limited liability company is reinstated, the reinstatement relates back to the time of dissolution, and it is as though the dissolution never occurred. *See* Tenn. Code. Ann. § 48-249-606. Reinstatement of the entity renders any actions that may have been taken during the period of dissolution valid as though the entity was never dissolved. *See, e.g., Wynn v. La Maruja Realty Corp.*, 2009 Tenn. App. LEXIS 619 (Sep. 15, 2009) (holding that contract entered into by corporation during period of dissolution could be enforced after corporation was reinstated).

5. The dissolution and reinstatement of Appalachian has no impact on the Notice of Appeal filed by Appalachian on July 27, 2017 or its standing or ability to pursue its appeal.

6. Pursuant to G.S. § 160A-388(b1)(1), “[a]ny person who has standing under G.S. § 160A-393(d) may appeal a decision to the board of adjustment.”

7. G.S. § 160A-393(d) confers standing on, among others, those with a leasehold interest, an applicant and any other person who will suffer damages as the result of the decision being appealed.

8. Appalachian has a leasehold interest in a portion of the Tract that is the subject of this appeal and, therefore, has standing under North Carolina law.

9. Regardless of whether Appalachian has a leasehold interest, Appalachian is the permit applicant which confers upon Appalachian automatic standing and Appalachian is clearly a person who will suffer special damages as the result of the Watershed Administrator’s decision.

10. In addition to the fact that state law confers standing on Appalachian to appeal the Decision by virtue of Appalachian’s leasehold interest, its status as the permit applicant and the fact it will suffer special damages, Appalachian is also a person “directly affected” by the Decision and has standing to appeal pursuant to Code Section 154.04(J)(3)(a).

11. The Board concluded by unanimous vote that Appalachian has standing to appeal the Decision. *See* Exhibit A, Issue #1. Therefore, the Watershed Administrator’s Motion to Dismiss this appeal on standing grounds is accordingly **DENIED**.

B. Appalachian is Required to Obtain a Watershed Permit for its proposed asphalt production operations.

12. The Board concludes by a unanimous vote that Appalachian is required to obtain a watershed protection permit for its proposed asphalt production operations. *See* Exhibit A, Issue #2.

C. Appalachian’s Use of a Portion of the Tract for its Asphalt Production Operations is Not an Application for a “Subdivision” as Described in the WPO and Does Not Require the Tract to be Subdivided.

13. Pursuant to Chapter 155.03 of the WPO, the term “subdivision” is defined as “[a]ll divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future)....”

14. This definition is virtually identical to the definition of “subdivision” that is contained within the planning and development statutes for counties in North Carolina. *See* N.C. Gen. Stat. § 153A-335.

15. The lease by Appalachian of a portion the Tract to operate asphalt equipment does not trigger a requirement that a separate legal parcel be created.

16. There is no "division" of the Tract proposed, and there is no law in North Carolina or zoning ordinances in Ashe County that prohibit a portion of property from being leased to operate more than one type of use on the Tract.

17. Regardless, the activities proposed by Appalachian and that are existing on the Tract are not for the purpose of "sale or building development."

18. "Lot," under the WPO, is a parcel of land occupied *or capable of being occupied by a building or group of buildings devoted to a common use*, together with the customary accessories and open spaces, and includes "tract." WPO § 155.03 (emphasis added). Nothing in this definition requires that a lot be limited to a single or common use.

19. The Tract, of which AM leases a portion, meets that definition. It is a parcel of land occupied or capable of being occupied by structures devoted to a common use. Whether that "tract" is used for one purpose or five purposes, it is still a "tract" or "Lot."

20. Nothing in the WPO requires subdivision of a "tract" or "Lot" to allow for multiple uses.

21. The Board concluded by unanimous vote that this application is not for a "subdivision" as described in Chapter 155 of the WPO. *See Exhibit A, Issue #3.* Accordingly, Appalachian is not required to subdivide the Tract in order to obtain a watershed protection permit.

D. Appalachian's proposed asphalt production operations are a "development" activity as described in the WPO.

22. The Board concludes by a vote of 3-2 [Hafer, Carter and Phillips voting it the affirmative and Cox and Dillard voting in the negative] that Appalachian's proposed asphalt production operations is a "development" activity as set forth in the WPO. *See Exhibit A, Issue #4.*

E. The Spill Containment Plan provided by Appalachian is Adequate to Meet the Requirements of the WPO.

23. WPO Section 155.31(B)(1)(d) requires a spill containment plan to be implemented for any nonresidential use that stores toxic and hazardous materials.

24. Based on Findings of Fact 62-82, the Board concluded by a vote of 4-1 [Hafer, Cox, Phillips and Dillard voting in the affirmative and Carter voting in the negative] that the Spill Containment Plan submitted by Appalachian is adequate and satisfies the requirement contained in Section 155.31(B)(1)(d) of the WPO. *See Exhibit A, Issue # 5.*

F. Built Upon Area is Calculated Using the Entire Acreage in the Tract and Appalachian has Demonstrated BUA for the Tract is less than 24%; thus, a 30-foot, not 100-foot, buffer is applicable to the unnamed stream.

25. The WPO requires certain minimum buffers be maintained along perennial surface waters. The amount of required buffer depends upon whether the "low density option" will be exceeded by a new development activity. For development activities that qualify as "low density," the minimum stream buffer is 30 feet. For all other new development activities, the minimum stream buffer is 100 feet. *See* Section 155.33(A) of the WPO.

26. The amount of density for a development activity depends upon the amount of "built upon area" ("BUA") created by the activity. The BUA is the portion of a development project that is covered by impervious or partially impervious cover including buildings, pavement, gravel roads, recreation facilities, etc. *See* Section 155.03 of the WPO.

27. The Tract lies in a designated Class-IV watershed, which are generally in moderately to highly developed watersheds. *See* AM Exh. 1. In a Class IV watershed, a new development activity qualifies as "low density" provided the BUA does not exceed 24%. *See* Section 155.31(B) of the WPO.

28. The question raised is whether the BUA for this activity (development of an asphalt facility) should be calculated based upon the land comprising the entire Tract, as Appalachian contends; or based upon the portion of the Tract Appalachian will use for its operation, as the Watershed Administrator contends.

29. Pursuant to Section 155.31(B)(2)(b), "[f]or the purpose of calculating built-upon area, total project area shall include total acreage *in the tract on which the project is to be developed.*" (emphasis added).

30. The Board concluded by a vote of 4-1 [Cox, Phillips, Dillard and Carter voting together and Hafer voting against] that the built upon area as described in the WPO should be calculated using the entire 31.912 acre Tract and the built upon area calculation should not be limited to the area leased by Appalachian. *See* Exhibit A, Issue #6.

31. In reaching this conclusion, the majority of the Board also put weight in the fact that the entire Tract and the existing and proposed operations on it are under common ownership and control, and testimony from the consultants that this is the customary approach to calculating BUA.

32. In this case, the total acreage in the Tract on which the project is to be developed is 31.912 acres. The total proposed built-upon area for the Tract is 2.68 acres or 8.40% of the Tract.

33. The total proposed built-upon area for the Tract meets the "low density" criteria of Section 155.31(B)(2).

34. Since the built-upon area for the Tract is less than 24%, the Board further concludes that a 30-foot, not 100 foot, buffer is required along the unnamed perennial stream that is located on the Tract for any new development activities and the plans submitted by Appalachian demonstrate the limits of the asphalt production operations are outside of that 30-foot buffer and no equipment or structures are located within that buffer.

G. Appalachian is Not Required to Certify Under Penalties of Perjury that Alleged Past Violations Have Occurred or Admit to Violations Which Have Not Resulted in Enforcement Actions by the County.

35. The Board concluded by unanimous vote that Appalachian is not required to provide the Watershed Administrator any affidavits or sworn statements regarding past activities or compliance on the Tract or otherwise admit to alleged violations which have not resulted in any enforcement actions by the County. *See Exhibit A, Issue #7.*

36. The Board further concludes that, while not previously or specifically requested by the Watershed Administrator, to provide assurances regarding the location of the asphalt equipment on the Tract, Appalachian shall submit a sealed survey (including metes and bounds) showing the limits of the area to be used by Appalachian for its asphalt production operations (the "PID Boundary") and identifying the location of the asphalt production equipment within that area as approved by DEQ in Appalachian's air quality permit. Submission of this sealed survey by Appalachian is the only remaining item necessary for a determination to be made on Appalachian's request for a watershed permit.

Board Instructions to Appalachian and Watershed Administrator

Based upon the findings of fact and conclusions of law set forth above and the Board's determination that Appalachian has satisfied all requirements of the WPO and that the existing and proposed conditions on the Tract comply with the WPO, the Board sets forth below the following instructions to Appalachian and the Watershed Administrator by a vote of 3-2 [Cox, Dillard and Phillips voting in the affirmative and Hafer and Carter voting in the negative]:

1. Appalachian shall produce to the Watershed Administrator an official signed and sealed survey showing the PID Boundary, with verification of accuracy by the property owner or the surveyor and no material deviations from the boundary shown by Appalachian in its application for its PID permit or request for a watershed permit. The sealed survey shall indicate the precise scope of the location within the surveyed area where the portable asphalt production equipment is to be located as required by the coordinates contained in Appalachian's air quality permit. Such a survey is the only additional supporting documentation this Board deems necessary under Section 155.37(B) of the WPO for issuance of Appalachian's watershed protection permit. Appalachian is not required to obtain a watershed protection occupancy permit since the use of the Tract will continue to be nonresidential and no buildings are proposed for the Tract.

2. Upon receipt of a sealed survey by Appalachian demonstrating: (a) the PID Boundary is consistent with the boundary shown in Appalachian's submittals for its PID permit

and watershed protection permit; and (b) the approved coordinates for the asphalt production equipment as required under Appalachian's air quality permit are fully located within the PID Boundary, the Watershed Administrator shall issue to Appalachian a watershed protection permit for its proposed asphalt production operations within 15 days of receiving such a sealed survey or within 15 days of the entry of this Order, whichever is later.

This the 26 day of April, 2018

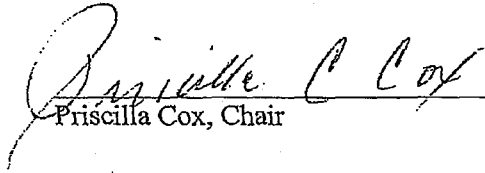

Priscilla Cox, Chair

EXHIBIT A

ISSUES:

1. Does Appalachian Materials have standing to appeal the Watershed Administrator's July 7, 2017, Final Order, Requirement and Decision?

_____ YES _____ NO

2. Is Appalachian Materials required to obtain a watershed protection permit for its proposed asphalt production operations?

_____ YES _____ NO

3. Is this application for a "subdivision" as described in Ordinance Chapter 155?

_____ YES _____ NO

4. Is this application for a "development" activity as described in Ordinance Chapter 155?

_____ YES _____ NO

5. Has Appalachian Materials submitted an adequate spill containment plan?

_____ YES _____ NO

6. Should the built-upon area as described in Ordinance Chapter 155 use the area leased by Appalachian Materials as the project size to determine the buffer distance?

_____ YES _____ NO

7. Should the permit application process require this applicant to certify under penalties of perjury that past violations of identified county ordinances have not occurred or in the alternative admit to violations which have not yet resulted in enforcement actions by the county?

_____ YES _____ NO

STATE OF NORTH CAROLINA

CLERK'S CERTIFICATE

ASHE COUNTY

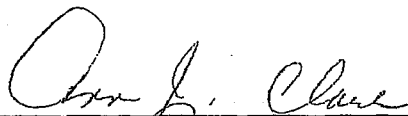
I, Ann J. Clark, Clerk to the Ashe County Board of Commissioners, pursuant to N.C.G.S. §§153A-50 and 160A-79, do hereby certify as follows:

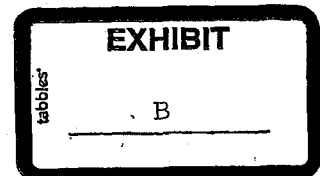
1. The Watershed Protection Ordinance was adopted on December 20, 1993 by the Ashe County Board of Commissioners and set out in the minutes of the Board of Commissioners in Book 6, Pages 473 through 477 and later codified in the Code of Ashe County as Title XV, Chapter 155 of the Code of Ashe County.
2. The attached being a true and accurate copy of Chapter 155: Watershed Protection Ordinance as codified on April 20, 2016.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of Ashe County, North Carolina, this the 15th day of May, 2017.

Official Seal:




Ann J. Clark, MMC, NCCCC
Clerk to the Board of Commissioners



CHAPTER 155: WATERSHED PROTECTION

Section

General Provisions

- 155.01 Authority and enactment
- 155.02 Exceptions to applicability
- 155.03 Definitions

Subdivision Regulations

- 155.15 General provisions
- 155.16 Subdivision application and review procedures
- 155.17 Subdivision standards and required improvements
- 155.18 Construction procedures
- 155.19 Transferring lots in unapproved subdivisions

Cross-reference:

Residential subdivisions, see Ch. 156

Watershed Area Use and Development

- 155.30 Establishment of watershed areas
- 155.31 Watershed areas described
- 155.32 Cluster development
- 155.33 Buffer areas required
- 155.34 Rules governing the interpretation of watershed area boundaries
- 155.35 Application of regulations
- 155.36 Existing development
- 155.37 Watershed protection permit
- 155.38 Building permit required
- 155.39 Watershed protection occupancy permit

Public Health Regulations

- 155.50 Public health in general
- 155.51 Abatement

Administration and Enforcement

- 155.65 Watershed Administrator; duties
- 155.66 Appeal from the Watershed Administrator
- 155.67 Changes and amendments to the watershed protection ordinance

- 155.68 Public place and hearing required
- 155.69 Planning Board to act as Watershed Review Board
- 155.70 Rules of conduct for members
- 155.71 Powers and duties of the Planning Board
- 155.72 Appeals from the Planning Board

- 155.98 Remedies
- 155.99 Penalty

GENERAL PROVISIONS

§ 155.01 AUTHORITY AND ENACTMENT.

The Legislature of the State of North Carolina has, in G.S. Chapter 153A, Article 6, Section 121, General Ordinance Authority; and in Chapter 143, Article 21, Watershed Protection Rules, delegated the responsibility or directed local governmental units to adopt regulations designed to promote public health, safety and general welfare of its citizenry. The Governing Board of the county does hereby ordain and enact into law the following chapter as the watershed protection ordinance of the county.

(Ord. passed 12-20-93)

§ 155.02 EXCEPTIONS TO APPLICABILITY.

(A) Nothing contained herein shall repeal, modify, or amend any federal or state law or regulation, or any chapter or regulation pertaining thereto except any chapter which these regulations specifically replace; nor shall any provision of this chapter amend, modify, or restrict any provisions of the code of ordinances of the county; however, the adoption of this chapter shall and does amend any and all ordinances, resolutions, and regulations of effect in the county at the time of the adoption of this chapter that may be construed to impair or reduce the effectiveness of this chapter or to conflict with any of its provisions.

(B) It is not intended that these regulations interfere with any easement, covenants or other agreements between parties. However, if the provisions of these regulations impose greater restrictions or higher standards for the use of a building or land, then the provision of these regulations shall control.

(C) Existing development, as defined in this chapter, is not subject to the requirements of this chapter. Expansions to structures classified as existing development must meet the requirements of this chapter, however, the built-upon area of the existing development is not required to be included in the density calculations.

(D) If a nonconforming lot of record is not contiguous to any other lot owned by the same party, then that lot of record shall not be subject to the development restrictions of this chapter if it is developed for single-family residential purposes.

(Ord. passed 12-20-93; Am. Ord. passed - -97)

§ 155.03 DEFINITIONS.

For the purpose of this chapter, the following definitions shall apply unless the context clearly indicates or requires a different meaning. Words in the present tense include the future tense. Words used in the singular number include the plural, and words used in the plural number include the singular, unless the natural construction of the wording indicates otherwise.

AGRICULTURAL USE. The use of waters for stock watering, irrigation, and other farm purposes.

ANIMAL UNIT. A unit of measurement developed by the U.S. Environmental Protection Agency that is used to compare different types of animal operations.

BEST MANAGEMENT PRACTICES. structural or nonstructural management base practice used singularly or in combination to reduce non-point source inputs to receiving waters in order to achieve water quality protection goals.

BUFFER. An area of natural or planted vegetation through which stormwater runoff flows in a diffuse manner so that the runoff does not become channelized and which provides for infiltration of the runoff and filtering of pollutants. The buffer is measured landward from the normal pool elevation of impounded structures and from the bank of each side of streams or rivers.

BUILDING. Any structure having a roof supported by columns or by walls, and intended for shelter, housing or enclosure of persons, animals or property. The connection of two buildings by means of an open porch, breezeway, passageway, carport or other structure, with or without a roof, shall not be deemed to make them one building.

BUILDING INSPECTOR. An official or designated person of the county responsible for administration and enforcement of this chapter.

BUILT-UPON AREA. Built-upon areas shall include that portion of a development project that is covered by impervious or partially impervious cover including buildings, pavement, gravel roads, recreation facilities (e.g. tennis courts), etc. (Note: wooden slatted decks and the water area of a swimming pool are considered pervious).

CLUSTER DEVELOPMENT. The grouping of buildings in order to conserve land resources and provide for innovation in the design of the project. This term includes nonresidential developments as well as single-family residential subdivisions and multifamily developments that do not involve the subdivision of land.

COMPOSTING FACILITY. A facility in which only stumps, limbs, leaves, grass and untreated wood collected from land clearing or landscaping operations is deposited.

CRITICAL AREA. The area adjacent to a water supply intake or reservoir where risk associated with pollution is greater than from the remaining as extending either one-half mile from the normal pool elevation of the reservoirs in which the intake is located or to the ridgeline of the watershed (whichever comes first); or one-half mile upstream from the intake located directly in the stream or river (run-of-the-river), or the ridgeline (whichever comes first). Local governments may extend the critical area as needed. Major landmarks such as a highway or property lines may be used to delineate the outer boundary of the critical area if these landmarks are immediately adjacent to the appropriate outer boundary of one-half mile.

CUSTOMARY HOME OCCUPATIONS. Any use conducted entirely within a dwelling and carried on by the occupants thereof, which use is clearly incidental and secondary to the use of the dwelling for residential purposes and does not change the character thereof. Provided further that no mechanical equipment is installed or used except as is normally used for domestic or professional purposes, and that not over 25% of the total floor space of any structure is used for the occupation. No home occupation shall be conducted in any accessory building except for the storage and service of a vehicle that is driven off site, such as a service repair truck, delivery truck, etc.

DEVELOPMENT. Any land disturbing activity which adds to or changes the amount of impervious or partially impervious cover on a land area or which otherwise decreases the infiltration of precipitation into the soil.

DISCHARGING LANDFILL. A facility which requires a National Pollution Discharge Elimination System (NPDES) permit.

DWELLING UNIT. A building or portion thereof, providing complete and permanent living facilities for one family.

EXISTING DEVELOPMENT. Those projects that are built or those projects that at a minimum have established a vested right under North Carolina zoning law as of the effective date of this chapter based on at least one of the following criteria:

- (1) Substantial expenditures of resources (time, labor, money) based on a good faith reliance upon having received a valid local government approval to proceed with the project, or
- (2) Having an outstanding valid building permit as authorized by G.S. § 153A-344.1 and G.S. § 160A-385.1, or
- (3) Having an approved site specific or phased development plan as authorized by the General Statutes (G.S. 153a-344.1).

EXISTING LOT (LOT OF RECORD). A lot which is part of a subdivision, a plat of which has been recorded in the Office of the Register of Deeds prior to the adoption of this chapter, or a lot described by metes and bounds, the description of which has been so recorded prior to the adoption of this chapter.

FAMILY. One or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage or adoption, no such family shall contain over five persons, but further provided that domestic servants employed or living on the

premises may be housed on the premises but being counted as a family or families.

HAZARDOUS MATERIAL. Any substance listed as such in: SARA section 302, Extremely Hazardous Substances, CERCLA Hazardous Substances, or section 311 of CWA (oil and hazardous substances).

INDUSTRIAL DEVELOPMENT. Any nonresidential development that requires an NPDES permit for an industrial discharge and/or requires the use or storage of any hazardous material for the purpose of manufacturing, assembling, finishing, cleaning or developing any product or commodity.

LANDFILL. A facility for the disposal of solid waste on land in a sanitary manner in accordance with G.S. Chapter 130A, Article 9. For the purpose of this chapter this term does not include composting facilities.

LOT. A parcel of land occupied or capable of being occupied by a building or group of buildings devoted to a common use, together with the customary accessories and open spaces belonging to the same. Includes the words "plot," "parcel," or "tract."

MAJOR VARIANCE. A variance from the minimum statewide water supply watershed protection rules that results in any one or more of the following:

- (1) The relaxation, by a factor of more than 10%, of any management requirement that takes the form of a numerical standard;
- (2) The relaxation of any management requirement that applies to a development proposal intended to qualify under the high density option.

MINOR VARIANCE. A variance from the minimum statewide watershed protection rules that results in a relaxation, by a factor of up to 10%, of any management requirement under the low density option.

NONCONFORMING LOT OF RECORD. A lot described by a plat or a deed that was recorded prior to the effective date of this chapter (or its amendments) that does not meet the minimum lot size or other development requirements of this chapter.

NONRESIDENTIAL DEVELOPMENT. All development other than residential development, agriculture and silviculture.

PLAT. A map or plan of a parcel of land which is to be, or has been subdivided.

RESIDENTIAL DEVELOPMENT. Buildings for residence such as attached and detached single-family dwellings, apartment complexes, condominiums, townhouses, cottages, etc., and their associated outbuildings such as garages, storage buildings, gazebos, etc., and customary home occupations.

SHALL. Is mandatory.

SINGLE FAMILY RESIDENTIAL. Any development where: no building contains more than one dwelling unit, every dwelling unit is on a separate lot, and where no lot contains more than one dwelling unit.

STREET (ROAD). A right-of-way for vehicular traffic which affords the principal means of access to abutting properties.

STRUCTURE. Anything constructed or erected including but not limited to buildings, which require location on the land or attachment to something having permanent location on the land. Includes the word "building".

SUBDIVIDER. Any person, firm or corporation who subdivides or develops any land deemed to be a subdivision as herein defined.

SUBDIVISION. All divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose of sale or building development (whether immediate or future) and shall include all division of land involving the dedication of a new street or a change in existing streets; but the following shall not be included within this definition not be subject to the regulations authorized by this chapter.

- (1) The combination or recombinations of portions of previously subdivided and recorded lots where the total number of lots is not increased and the resultant lots are equal to or exceed the standards of this chapter;
- (2) The division of land into parcels greater than ten acres where no street right-of-way dedication is involved;
- (3) The public acquisition by purchase of strips of land for the widening or opening of streets;
- (4) The division of a tract in single ownership whose entire area is no greater than two acres into not more than three lots, where no street right-of-way dedication is involved and where the resultant lots are equal to or exceed the standards of this chapter;

(5) The division of a tract into plots is used as a cemetery.

TOXIC SUBSTANCE. Any substance or combination of substances (including disease causing agents), which after discharge and upon exposure, ingestion, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, has the potential to cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions or suppression in reproduction or growth) or physical deformities in such organisms or their off spring or other adverse health effects.

VARIANCE. A permission to develop or use property granted by the Planning Board relaxing or waiving a water supply watershed management requirement adopted by the Environmental Management Commission that is incorporated into this chapter.

WATER DEPENDENT STRUCTURE. Any structure for which the use requires access to or proximity to or citing within surface waters to fulfill its basic purpose such as boat ramps, boat houses, docks and bulkheads. Ancillary facilities such as restaurants, outlets for boat supplies, parking lots and commercial boat storage areas are not water dependent structures.

WATERSHED. The entire land area contributing surface drainage to a specific point (e.g. the water supply intake.)

WILL. Is mandatory.

(Ord. passed 12-20-93; Am. Ord. passed --97)

SUBDIVISION REGULATIONS

§ 155.15 GENERAL PROVISIONS.

(A) No subdivision of land within the Public Water Supply Watershed shall be filed or recorded by the Register of Deeds until it has been approved in accordance with the provisions of this subchapter. Likewise, the Clerk of Superior Court shall not order or direct the recording of a plat if the recording of such plat would be in conflict with this subchapter.

(B) The approval of a plat does not constitute or effect the acceptance by the county or the public of the dedication of any street or other ground, easement, right-of-way, public utility line, or other public facility shown on the plat and shall not be construed to do so.

(C) All subdivisions within public water supply watersheds shall conform with the mapping requirements contained in G.S. § 47-30.

(D) All subdivisions of land within public water supply watershed falling under the jurisdiction of Ashe County after the effective date of this chapter shall require a plat to be prepared, approved, and recorded pursuant to this chapter.

(Ord. passed 12-20-93)

§ 155.16 SUBDIVISION APPLICATION AND REVIEW PROCEDURES.

(A) All proposed subdivisions shall be reviewed prior to recording with the Register of Deeds by submitting a vicinity map to the Building Inspector to determine whether or not the property is located within the designated public water supply watershed. Subdivisions that are not within the designated watershed area shall not be subject to the provisions of this chapter. Subdivisions within the designated watershed area shall comply with the provisions of this subchapter and all other state and local requirements that may apply.

(B) Subdivision applications shall be filed with the Building Inspector. The applications shall include a completed application form, two copies of the plat and supporting documentation deemed necessary by the Building Inspector or the Planning Board (see Appendix A).

(C) The Building Inspector shall review the completed application and submit recommendations to the Planning Board for further review and final action. The Planning Board shall either approve, approve conditionally or disapprove each application by a majority vote of the members present and voting. First consideration of the application shall be at the next regularly scheduled meeting of the Board after the application is submitted. The Board shall take final action within two regularly scheduled meetings of its first consideration. The Building Inspector or the Board may provide public agencies an opportunity to review and make recommendations. However, failure of the agencies to submit their comments and recommendations shall not delay the Board's action within the prescribed time limit. Said public agencies may include, but are not limited to, the following:

- (1) The district highway engineer with regard to proposed streets and highways.
- (2) The Director of the Health Department with regard to proposed private water system or sewer systems normally approved by the Health Department.
- (3) The State Division of Environmental Management with regard to proposed sewer systems normally approved by the Division, engineered storm water controls or stormwater management in general.
- (4) Any other agency or official designated by the Building Inspector or Planning Board.

(D) If the Planning Board approves the application, such approval shall be indicated on both copies of the plat by the following certificate and signed by the chairman or other authorized member of the Board:

"Certificate of Approval for Recording

I certify that the plat shown hereon complies with the watershed protection chapter and is approved by the Planning Board for recording in the Register of Deeds office.

Date Chairman, Planning Board

Notice: This property is located within a Public Water supply watershed - development restrictions may apply."

(E) If the Planning Board disapproves or approves conditionally the application, the reasons for such action shall be stated in writing for the applicant and entered in the minutes. The subdivider may make changes and submit a revised plan which shall constitute a separate request for the purpose of review.

(F) All subdivision plats shall comply with the requirements for recording of the County Register of Deeds.

(G) The subdivider shall provide the Building Inspector with evidence the plat has been recorded with the Register of Deeds within five working days of its being recorded.

(Ord. passed 12-20-93)

§ 155.17 SUBDIVISION STANDARDS AND REQUIRED IMPROVEMENTS.

(A) All lots shall provide adequate building space in accordance with the development standards contained in §§ 155.30 through 155.39. Lots which are smaller than the minimum may be developed using built-upon area criteria in accordance with § 155.31.

(B) For the purpose of calculating built-upon area, total project area shall include total acreage in the tract on which the project is to be developed.

(C) The application shall be accompanied by a description of the proposed method of providing storm water drainage. The subdivider shall provide a drainage system that diverts storm water runoff away from surface waters and incorporates best management practices to minimize water quality impacts.

(D) The application shall, where required, be accompanied by a written statement that a sedimentation and erosion control plan has been submitted to and approved by the local agency administering a sedimentation and erosion control ordinance approved by the State Division of Land Quality.

(E) Where possible, roads should be located outside of critical areas and watershed buffer areas. Roads constructed within these areas shall be designated and constructed so to minimize their impact on water quality.

(Ord. passed 12-20-93; Am. Ord. passed --97)

§ 155.18 CONSTRUCTION PROCEDURES.

(A) No construction or installation of improvements shall commence in a proposed subdivision until a subdivision plat has been approved by the Planning Board.

(B) No building or other permits shall be issued for erection of a structure on any lot not of record at the time of adoption of this

chapter until all requirements of this chapter have been met. The subdivider, prior to commencing any work within the subdivision, shall make arrangements with the Building Inspector to provide for adequate inspection.

(Ord. passed 12-20-93) Penalty, see § 155.99

§ 155.19 TRANSFERRING LOTS IN UNAPPROVED SUBDIVISIONS.

Any person who, being the owner or agent of the owner of any land located within a public water supply watershed falling within the jurisdiction of the county, thereafter subdivides his land in violation of this chapter or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under this chapter and recorded in the office of the register of deeds, shall be guilty of a misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from this penalty. The county may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with this chapter.

(Ord. passed 12-20-93) Penalty, see § 155.99

WATERSHED AREA USE AND DEVELOPMENT

§ 155.30 ESTABLISHMENT OF WATERSHED AREAS.

- (A) The purpose of this subchapter is to list and describe the watershed areas herein adopted.
- (B) For purposes of this chapter the county is hereby divided into the following areas, as appropriate:
 - (1) WS-IV-CA (Critical Area)
 - (2) WS-IV-PA (Protected Area).
 - (3) Reddies River WS-II-PA (protected area) in Wilkes County, NC.

(Ord. passed 12-20-93; Am. Ord. passed - -97)

§ 155.31 WATERSHED AREAS DESCRIBED.

- (A) *WS-IV Watershed Areas - Critical Area (WS- IV-CA)*. Landfills and residuals application sites are specifically prohibited.

- (1) *Allowed uses.*

(a) Agriculture subject to the provisions of the Food Security Act of 1985 and the Food, Agriculture Conservation and Trade Act of 1990. Agricultural activities conducted after January 1, 1993 shall maintain a minimum ten-foot vegetative buffer, or equivalent control as determined by the Soil and Water Conservation Commission, along all perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic maps or as determined by local government studies. Animal operations greater than 100 animal units shall employ Best Management Practices by July 1, 1994 recommended by the Soil and Water Conservation Commission.

- (b) Silviculture, subject to the provisions of the Forest Practices Guidelines Related to Water Quality (15 NCAC II.6101-.0209).

- (c) Residential.

- (d) Nonresidential development, excluding landfills and land application of residuals or petroleum contaminated soils.

- (2) *Density and built-upon limits:*

(a) *Single-family residential.* Development shall not exceed two dwelling units per acre, as defined on a project by project basis. No residential lot shall be less than one-half acre, except within an approved cluster development.

(b) *All other residential and nonresidential.* Development shall not exceed 24% built-upon area on a project by project basis. For the purpose of calculating built-upon area, total project area shall include total acreage in the tract on which the project is to be developed.

(B) *WS-IV Watershed Areas-Protected Area (WS-IV-PA).* Only new development activities that require an erosion/sedimentation control plan under state law or approved local government program are required to meet provisions of this chapter when located in the WS-IV watershed. In order to address a moderate to high land use intensity pattern, single-family residential uses are allowed at a maximum of two dwelling units per acre. All other residential and nonresidential development shall be allowed 24% built-upon area. A maximum of three dwelling units per acre or 36% built-upon area is allowed for projects without a curb and gutter street system.

(1) *Allowed uses.*

(a) Agriculture, subject to the provisions of the Food Security Act of 1985 and the Food Agricultural, Conservation and Trade Act of 1990.

(b) Silviculture, subject to the provisions of the Forest Practices Guidelines Related to Water Quality (15 NCAC II.6101-.0209).

(c) Residential development.

(d) Nonresidential development, excluding the storage of toxic and hazardous materials unless a spill containment plan is implemented.

(2) *Density and built-upon limits:*

(a) *Single-family residential.* Development shall not exceed two dwelling units per acre, as defined on a project by the project basis. No residential lot shall be less than one-half acre, or one-third acre for projects without a curb and gutter system, except within an approved cluster development.

(b) *All other residential and nonresidential.* Development shall not exceed 24% built-upon area on a project by project basis. For projects without a curb and gutter street system, development shall not exceed 36% built-upon area on a project by project basis. For the purpose of calculating built-upon area, total project area shall include total acreage in the tract on which the project is to be developed.

(c) *The 10% - 70% provision.* In addition to the development allowed under (a) and (b) above, new development and expansions to existing development may occupy up to 10% of the protected area with up to 70% built-upon area on a project by project basis, when approved as a special intensity allocation (SIA). The Watershed Administrator is authorized to approve SIA's consistent with the provisions of this section. Projects must, to the maximum extent practicable, minimize the built-upon area, direct stormwater away from surface waters, and incorporate Best Management Practices (BMP) to minimize water quality impacts. For the purpose of calculating built-upon area, total project area shall include the total acreage in the tract on which the project is to be developed.

(C) *WS-II Watershed Areas-Protected Area (WS-II-PA).*

(1) *Allowed uses.*

(a) Agriculture, subject to the provisions of the Food Security Act of 1985 and the Food Agricultural, Conservation, and Trade Act of 1990.

(b) Silviculture, subject to the provisions of the Forest Practices Guidelines Related to Water Quality (15 NCAC II.6101-.0209).

(c) Residential Development of one dwelling unit per acre. No residential lot shall be less than one acre.

(d) All other non-residential and residential development shall not exceed 12% built-upon area.

(Ord. passed 12-20-93; Am. Ord. passed 4-23-97; Am. Ord. passed - -97)

§ 155.32 CLUSTER DEVELOPMENT.

Clustering of development is allowed in all watershed areas (except WS-I) under the following conditions:

(A) Minimum lot sizes are not applicable to single-family cluster development project; however, the total number of lots shall not exceed the number of lots allowed for single-family detached developments in § 155.31. Built-upon area or stormwater control requirements of the project shall not exceed that allowed for the critical area or balance of watershed, whichever applies.

(B) All built-upon area shall be designed and located to minimize stormwater runoff impact to the receiving waters and minimize concentrated storm-water flow.

(C) Title to the open space area shall be conveyed to an incorporated homeowners association for management; to a local government for preservation as a park or open space; or to a conservation organization for preservation in a permanent easement.

(Ord. passed 12-20-93; Am. Ord. passed - -97)

§ 155.33 BUFFER AREAS REQUIRED.

(A) A minimum 100-foot vegetative buffer is required for all new development activities that exceed the low density option; otherwise, a minimum 30-foot buffer for development activities is required along perennial waters indicated on the most recent versions of U.S.G.S. 1:24,000 (7.5 minute) scale topographic. Desirable artificial streambank or shoreline stabilization is permitted.

(B) No new development is allowed in the buffer area, except water dependent structures such as flag poles, signs, and security lights which result in only diminutive increases in the impervious area, and public projects such as road crossings and greenways where no practical alternative exists. These activities should minimize built-upon surface area, direct runoff away from the surface waters and maximize the utilization of stormwater Best Management Practices.

(Ord. passed 12-20-93; Am. Ord. passed - -97)

§ 155.34 RULES GOVERNING THE INTERPRETATION OF WATERSHED AREA BOUNDARIES.

Where uncertainty exists as to the boundaries of the watershed areas, as shown on the watershed map, the following rules shall apply:

(A) Where area boundaries are indicated as approximately following either street, alley, railroad or highway lines or centerlines thereof, such lines shall be construed to be said boundaries.

(B) Where area boundaries are indicated as approximately following lot lines, such lot lines shall be construed to be said boundaries. However, a surveyed plat prepared by a registered land surveyor may be submitted to the county as evidence that one or more properties along these boundaries do not lie within the watershed area.

(C) Where the watershed area boundaries lie at a scaled distance more than 25 feet from any parallel lot line, the location of watershed area boundaries shall be determined by use of the scale appearing on the watershed map.

(D) Where the watershed area boundaries lie at a scaled distance of 25 feet or less from any parallel lot line, the location of watershed area boundaries shall be construed to be the lot line.

(E) Where other uncertainty exists, the Watershed Administrator shall interpret the watershed map as to location of such boundaries. This decision may be appealed to the Planning Board.

(Ord. passed 12-20-93)

§ 155.35 APPLICATION OF REGULATIONS.

(A) No building or land shall hereafter be used and no development shall take place except in conformity with the regulations herein specified for the watershed area in which it is located.

(B) No area required for the purpose of complying with the provisions of this chapter shall be included in the area required for another building.

(C) Every residential building hereafter erected, moved or structurally altered shall be located on a lot which conforms to the regulations herein specified, except as permitted in § 155.36.

- (D) If a use or class of use is not specifically indicated as being allowed in a watershed area, such use or class of use is prohibited.
- (Ord. passed 12-20-93) Penalty, see § 155.99

§ 155.36 EXISTING DEVELOPMENT.

Any existing development as defined in this chapter, may be continued and maintained subject to the provisions provided herein. Expansions to structures classified as existing development must meet the requirements of this chapter, however, the built-upon area of the existing development is not required to be included in the density calculations.

- (A) *Occupied lots.* This category consists of lots occupied for residential purposes at the time of the adoption of this chapter.
- (B) *Uses of land.* This category consists of uses existing at the time of adoption of this chapter where such use of the land is not permitted to be established hereafter in the watershed area in which it is located. Such uses may be continued except as follows:
- (1) When such use of land has been changed to an allowed use, it shall not thereafter revert to any prohibited use.
 - (2) Such use of land shall be changed only to an allowed use.
 - (3) When such use ceases for a period of at least one year, it shall not be reestablished.

(C) *Reconstruction of buildings or built-upon areas.* Any existing building or built-upon area not in conformance with the restrictions of this chapter that has been damaged or removed may be repaired and/or reconstructed, except that there are no restrictions in single-family residential development, provided:

- (1) Repair or reconstruction is initiated within 12 months and completed within two years of such damage.
- (2) The total amount of space devoted to built-upon area may not be increased unless storm- water control that equals or exceeds the previous development is provided.

(Ord. passed 12-20-93) Penalty, see § 155.99

§ 155.37 WATERSHED PROTECTION PERMIT.

(A) Except where a single family residence is constructed on a lot deeded prior to the effective date of this chapter, no building or built-upon area shall be erected, moved, enlarged or structurally altered, nor shall any building permit be issued nor shall any change in the use of any building or land be made until a watershed protection permit has been issued by the Building Inspector. No watershed protection permit shall be issued except in conformity with the provisions of this chapter.

(B) Watershed protection permit applications shall be filed with the Building Inspector. The application shall include a completed application form (see Appendix A) and supporting documentation deemed necessary by the Building Inspector.

(C) Prior to issuance of a watershed protection permit, the Building Inspector may consult with qualified personnel for assistance to determine if the application meets with the requirements of this chapter.

(D) A watershed protection permit shall expire if a building permit or watershed occupancy permit for such use is not obtained by the applicant within 12 months from the date of issuance.

(Ord. passed 12-20-93)

§ 155.38 BUILDING PERMIT REQUIRED.

Except for a single-family residence constructed on a lot deeded prior to the effective date of this chapter, no permit required under the North Carolina' State Building Code shall be issued for any activity for which a watershed protection permit is required until that permit has been issued.

(Ord. passed 12-20-93)

§ 155.39 WATERSHED PROTECTION OCCUPANCY PERMIT.

(A) The Building Inspector shall issue a watershed protection occupancy permit certifying that all requirements of this chapter have been met prior to the occupancy or use of a building hereafter erected, altered or moved and/or prior to the change of use of any building or land.

(B) A watershed protection occupancy permit, either for the whole or part of a building, shall be applied for coincident with the application for a watershed protection permit and shall be issued or denied within ten days after the erection or structural alterations of the building.

(C) When only a change in use of land or existing building occurs, the Building Inspector shall issue a watershed protection occupancy permit certifying that all requirements of this chapter have been met coincident with the watershed protection permit.

(D) If the watershed protection occupancy permit is denied, the Building Inspector shall notify the applicant in writing stating the reasons for denial.

(E) No building or structure which has been erected, moved, or structurally altered may be occupied until the Building Inspector has approved and issued a watershed protection occupancy permit.

(Ord. passed 12-20-93)

PUBLIC HEALTH REGULATIONS

§ 155.50 PUBLIC HEALTH IN GENERAL.

No activity, situation, structure or land use shall be allowed within the watershed which poses a threat to water quality and the public health, safety and welfare.

(Ord. passed 12-20-93)

§ 155.51 ABATEMENT.

(A) The Building Inspector shall monitor land use activities within the watershed areas to identify situations that may pose a threat to water quality.

(B) The Building Inspector shall report all findings to the Planning Board. The Building Inspector may consult with a public agency or official and request recommendations.

(C) Where the Planning Board finds a threat to water quality and the public health, safety and welfare, the Board shall institute any appropriate action or proceeding to restrain, correct or abate the condition and/or violation.

(Ord. passed 12-20-93)

ADMINISTRATION AND ENFORCEMENT

§ 155.65 WATERSHED ADMINISTRATOR; DUTIES.

The county shall appoint a Watershed Administrator, who shall be duly sworn in and be issued an identification badge. It shall be the duty of the Watershed Administrator to administer and enforce the provisions of this chapter as follows:

(A) The Watershed Administrator shall issue watershed protection permits and watershed occupancy permits as prescribed herein. A record of all permits shall be kept on file and shall be available for public inspection during regular office hours of the Administrator.

(B) The Watershed Administrator shall serve as clerk to the Watershed Review Board.

(C) The Watershed Administrator shall keep records of all amendments to the local water supply watershed protection ordinance and shall provide copies of all amendments upon adoption to the Water Quality Section of the Division of Environmental Management.

(D) The Watershed Administrator shall keep records of the jurisdiction's use of the 10% - 70% provision of the non-critical area of the county's WS-IV watershed. Records shall include the total acres of non-critical watershed area, total acres eligible to be developed under this provision, total acres approved for this development option, and individual records for each project with the following information: location, number of developed acres, type of land use, and storm water management plan, if applicable.

(E) The Watershed Administrator is granted the authority to administer and enforce the provisions of this chapter, exercising in the fulfillment of his responsibility the full police power of the county. The Watershed Administrator, or his duly authorized representative, may enter any building, structure, or premises, as provided by law, to perform any duty imposed upon him by this chapter.

(F) The Watershed Administrator shall keep a record of variances to the local water supply watershed protection ordinance. This record shall be submitted for each calendar year to the Water Quality Section of the Division of Environmental Management on or before January 1 of the following year and shall provide a description of each project receiving a variance and the reasons for granting the variance.

(Ord. passed 12-20-93; Am. Ord. passed 4-23-97)

§ 155.66 APPEAL FROM THE WATERSHED ADMINISTRATOR.

(A) Any order, requirement, decision or determination made by the Watershed Administrator may be appealed to and decided by the Watershed Review Board.

(B) An appeal from a decision of the Watershed Administrator must be submitted to the Watershed Review Board within 30 days from the date the order, interpretation, decision or determination is made. All appeals must be made in writing stating the reasons for appeal. Following submission of an appeal, the Watershed Administrator shall transmit to the Watershed Review Board all papers constituting the record upon which the action appealed from was taken.

(C) An appeal stays all proceedings in furtherance of the action appealed, unless the officer from whom the appeal is taken certifies to the Watershed Review Board after the notice of appeal has been filed with him, that by reason of facts stated in the certificate, a stay would in his opinion cause imminent peril to life or property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Watershed Review Board or by a court of record on application of notice of the officer from whom the appeal is taken and upon due cause shown.

(D) The Watershed Review Board shall fix a reasonable time for hearing the appeal and give notice thereof to the parties and shall decide the same within reasonable time. At the hearing, any party may appear in person, by agent or by attorney.

(Ord. passed 12-20-93; Am. Ord. passed 4-23-97)

§ 155.67 CHANGES AND AMENDMENTS TO THE WATERSHED PROTECTION ORDINANCE.

(A) The County Governing Board may, on its own motion or on petition, after public notice and hearing, amend, supplement, change or modify the watershed regulations and restrictions as described herein.

(B) No action shall be taken until the proposal has been submitted to the Planning Board for review and recommendations. If no recommendation has been received from the Planning Board within two regularly scheduled meetings after submission of the proposal to the Chairman of the Planning Board, the County Governing Board may proceed as though a favorable report had been received.

(C) Under no circumstances shall the County Board adopt such amendments, supplements or changes that would cause this chapter to violate the watershed protection rules as adopted by the State Environmental Management Commission. All amendments must be filed with the State Division of Environmental Management, North Carolina Division of Environmental Health, and the State Division of Community Assistance.

(Ord. passed 12-20-93)

§ 155.68 PUBLIC NOTICE AND HEARING REQUIRED.

Before adopting or amending this chapter the County Governing Board shall hold a public hearing on the proposed changes. A notice of the public hearing shall be given once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published for the first time not less than ten nor more than 25 days before the date fixed for the hearing.

(Ord. passed 12-20-93)

§ 155.69 PLANNING BOARD TO ACT AS WATERSHED REVIEW BOARD.

The County Planning Board shall act as the Watershed Review Board on all subdivision regulation and zoning ordinance matters.

(Ord. passed 12-20-93)

§ 155.70 RULES OF CONDUCT FOR MEMBERS.

Members of the Board may be removed by the County Governing Board for cause, including violation of the rules stated below:

(A) Faithful attendance at meetings of the Board and conscientious performance of the duties required of members of the Board shall be considered a prerequisite to continuing membership on the Board.

(B) No Board member shall take part in the hearing, consideration, or determination of any case in which he is personally or financially interested. A Board member shall have a "financial interest" in a case when a decision in the case will:

(1) Cause him or his spouse to experience a direct financial benefit or loss, or

(2) Will cause a business in which he or his spouse owns a 10% or greater interest, or is involved in a decision-making role, to experience a direct financial benefit or loss. A Board member shall have a "personal interest" in a case when it involves a member of his immediate family (i.e. parent, spouse, or child).

(C) No Board member shall discuss any case with any parties thereto prior to the public hearing on that case; provided, however, that members may receive and/or seek information pertaining to the case from the Building Inspector or any other member of the Board, its secretary or clerk prior to the hearing.

(D) Members of the Board shall not express individual opinions on the proper judgement of any case prior to its determination on that case.

(E) Members of the Board shall give notice to the chairman at least 48 hours prior to the hearing of any potential conflict of interest which he has in a particular case before the Board.

(F) No Board member shall vote on any matter that decides an application or appeal unless he had attended the public hearing on that application or appeal.

(Ord. passed 12-20-93)

§ 155.71 POWERS AND DUTIES OF THE PLANNING BOARD.

(A) *Administrative review.* The Planning Board shall hear and decide appeals from any decision or determinations made by the Building Inspector in the enforcement of this chapter.

(B) *Variances.* The Planning Board shall have the power to authorize, in specific cases, minor variances from the terms of this chapter as will not be contrary to the public interests where, owing to special conditions, a literal enforcement of this chapter will result in practical difficulties or unnecessary hardship, so that the spirit of this chapter shall be observed, public safety and welfare secured, and substantial justice done. In addition, the county shall notify and allow a reasonable comment period for all other local governments having jurisdiction in the designated watershed where the variance is being considered.

(1) Applications for a variance shall be made on the proper form obtainable from the Building Inspector and shall include the following information:

(a) A site plan, drawn to a scale of at least one inch to 40 feet, indicating the property lines of the parcel upon which the use is

proposed; any existing or proposed structure; parking areas and other built-upon areas; surface water drainage. The site plan shall be neatly drawn and indicate north point, name and address of person who prepared the plan, name and address of person who prepared the plan, date of the original drawing, and an accurate record of any later revisions.

(b) A complete and detailed description of the proposed variances together with any other pertinent information which the applicant feels necessary considering the application.

(c) The Building Inspector shall notify in writing each local government having jurisdiction in the watershed. Such notice shall include a description of the variance being requested. Local governments receiving notice of the variance request may submit comments to the Building Inspector prior to a decision by the Planning Board. Such comments shall become a part of the record of proceedings of the Planning Board.

(2) Before the Planning Board may grant a variance, it shall make the following three findings, which shall be recorded in the permanent record of the case, and shall include the factual reasons on which they are based.

(a) There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance. In order to determine that there are practical difficulties or unnecessary hardships, the Board must find that the five following conditions exist:

1. If he complies with the provisions of the ordinance, the applicant can secure no reasonable return from, nor make reasonable use of, his property. Hereby proving that the variance would permit a greater profit to be made from the property will not be considered adequate to justify the Board in granting a variance. Moreover, the Board shall consider whether the variance is the minimum possible deviation from the terms of the ordinance that will make possible the reasonable use of his property.

2. The hardship results from the application of the ordinance to the property rather than from other factors such as deed restrictions or other hardship.

3. The hardship is due to the physical nature of the applicant's property, such as its size, shape, or topography, which is different from that of neighboring property.

4. The hardship is not the result of the actions of an applicant who knowingly or unknowingly violates the ordinance, or who purchases the property after the effective date of the ordinance, and then comes to the Board for relief.

5. The hardship is peculiar to the applicant's property, rather than the result of conditions that are widespread. If other properties are equally subject to the hardship created in the restriction, then granting a variance would be a special privilege denied to others, and would not promote equal justice.

(b) The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit.

(c) In the granting of the variance, the public safety and welfare have been assured and substantial justice has been done. The Board shall not grant a variance if it finds that doing so would in any respect impair the public health, safety, or general welfare.

(3) In granting the variance, the Board may attach thereto such conditions regarding the location, character, and other features of the proposed building, structure, or use as it may deem advisable in furtherance of the purpose of this chapter. If a variance for the construction, alteration or use of property is granted, such construction, alteration or use shall be in accordance with the approved site plan.

(4) The Planning Board shall refuse to hear an appeal or an application for a variance previously denied if it finds that there have been no substantial changes in conditions or circumstances bearing on the appeal or application.

(5) A variance issued in accordance with this section shall be considered a watershed protection permit and shall expire if a building permit or watershed occupancy permit for such use is not obtained by the applicant within six months from the date of the decision.

(6) If the application calls for the granting of a major variance, and if the Planning Board decides in favor of granting the variance, the Board shall prepare a preliminary record of the hearing with all deliberate speed. The preliminary record of the hearing shall include:

(a) The variance application;

(b) The hearing notices;

(c) The evidence presented;

(d) Motions, offers of proof, objections to evidence, and rulings on them;

(e) Proposed findings and exceptions;

(f) The proposed decision, including all conditions proposed to be added to the permit.

(7) The preliminary record shall be sent to the Environmental Management Commission for its review as follows:

(a) If the Commission concludes from the preliminary record that the variance qualifies as a major variance and that the property owner can secure no reasonable return from, nor make any practical use of the property unless the proposed variance is granted, and the variance, if granted, will not result in a serious threat to the water supply, then the Commission shall approve the variance as proposed or approve the proposed variance with conditions and stipulations. The Commission shall prepare a Commission decision and send it to the Planning Board. If the Commission approves the variance as proposed, the Board shall prepare a final decision granting the proposed variance. If the Commission approves the variance with conditions and stipulations, the Board shall prepare a final decision, including such conditions and stipulations, granting the proposed variance.

(b) If the Commission concludes from the preliminary record that the variance qualifies as a major variance and that the property owner can secure a reasonable return from or make a practical use of the property without the variance or the variance, if granted will result in a serious threat to the water supply, then the Commission shall deny approval of the variance as proposed. The Commission shall prepare a Commission decision and send it to the Planning Board. The Board shall prepare a final decision denying the variance as proposed.

(C) *Subdivision approval.* See §§ 155.15 through 155.19.

(D) *Public health.* See §§ 155.50 and 155.51.

(Ord. passed 12-20-93)

§ 155.72 APPEALS FROM THE PLANNING BOARD.

Appeals from the Planning Board must be filed with the Superior Court within 30 days from the date of the decision. The decisions by the Superior Court will be in the manner of certiorari.

(Ord. passed 12-20-93)

§ 155.98 REMEDIES.

(A) If any subdivision, development and/or land use is found to be in violation of this chapter, the County Governing Board may, in addition to all other remedies available either in law or in equity, institute a civil penalty in the amount of \$___, action or proceedings to restrain, correct, or abate the violation; to prevent occupancy of the building, structure, or land; or to prevent any illegal act, conduct, business, or use in or about the premises. In addition, the North Carolina Environmental Management Commission may assess civil penalties in accordance with G.S. § 143-215.6(a). Each day that the violation continues shall constitute a separate offense.

(B) If the Building Inspector finds that any of the provisions of this chapter are being violated, he shall notify in writing the person responsible for such violation, indicating the nature of the violation, and ordering the action necessary to correct it. He shall order discontinuance of the illegal use of land, buildings or structures; removal or illegal buildings or structures, or of additions, alterations or structural changes thereto; discontinuance of any illegal work being done; or shall take any action authorized by this chapter to ensure compliance with or to prevent violation of its provisions. If a ruling of the Building Inspector is questioned, the aggrieved party or parties may appeal such ruling to the Planning Board.

(Ord. passed 12-20-93)

§ 155.99 PENALTY.

Any person violating any provisions of this chapter shall be guilty of a misdemeanor and, upon conviction, shall be punished in accordance with G.S. § 14-4. The maximum fine for each offense shall not exceed the maximum allowed under G.S. § 14-4. Each day that the violation continues shall constitute a separate offense.

(Ord. passed 12-20-93)



Forrest Westall, PE Principal

Forrest Westall provides professional and expert advice, information and support for a variety of clients and internal personnel. He utilizes technical and procedural knowledge of State and Federal regulatory agencies in assuring full compliance with all laws and regulations. He also provides professional services to public and private organizations and individuals for the application of appropriate engineering and environmental technologies to development projects, public management needs, industrial activities, commercial endeavors and all human activity involved with the use of or impact on natural resources. He extends and applies water quality knowledge, communication and facilitation skills, administrative and technical management abilities as necessary for effective client and project management at all levels and within every kind of professional relationship required to successfully complete projects. He serves as the primary interface for regulatory and resource agencies for McGill Associates. Forrest has been on the forefront of North Carolina water quality issues for many years as a leader in many organizations. Since January 2012, Forrest has served as the Executive Director of the Upper Neuse River Basin Association, where guides the organization to preserve the water quality of the Upper Neuse River Basin.

PROFESSIONAL BACKGROUND:

2005 – Present: *Principal, McGill Associates P.A.*

Forrest Westall advises and assists local governments and private clients with civil, environmental, water and wastewater projects throughout the Southeast.

2012 – Present: *Executive Director, Upper Neuse River Basin Association (UNRBA)*

Forrest Westall was named Upper Neuse River Basin Association Executive Director in January 2012. As Executive Director, he provides technical and operational management of the organization, which includes the 14 member local government organizations. He guides the organization to provide an ongoing forum for cooperation on water quality protection and water resource planning and management within the 770-square-mile Upper Neuse River watershed. The UNRBA works to preserve the water quality of the Upper Neuse River Basin through innovative and cost-effective pollution reduction strategies, and to constitute a forum to cooperate on water supply issues within the Upper Neuse River Basin.

2000 – 2004: *Assistant Section Chief for Information Management, N.C. Dept. Environment and Natural Resources (DENR), Division of Water Quality (DWQ)*

At the same time he served as Surface Water Protection Regional Supervisor, Forrest was appointed Assistant Section Chief for Information Management at the N.C. Department of Environment and Natural Resources (DENR) Division of Water Quality (DWQ). Forrest accepted the responsibility of directing the Division's database consolidation effort because of problems in the completion of the project. He was asked to provide leadership and direction to the project beginning in 2000. The development of the Basinwide Information Management System (BIMS) was a multi-year software and data development effort involving 10 contractors and five State employees. Aimed at building a data management system for the major program components of the agency, total project cost was in excess of \$9 million. These duties included extensive time working with the BIMS team, Departmental IT Management, Department leadership, the State Office of Information Technology Systems, and as Chair of the Agency oversight committee for the BIMS effort.

EXHIBIT

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1984 – 2005: *Surface Water Protection Regional Supervisor, N.C. Dept. Environment and Natural Resources, Division of Water Quality, Water Quality Program*

The position included responsibility for the organization, management, direction and supervision of 14 technical and professional positions. Backgrounds of the staff included engineering, chemistry, biology, environmental science, wastewater treatment and field water quality sampling. Other duties included position management, work planning, merit raise determinations and staff development. Every water quality delivery program aspect is carried out in the Regional Office. Among many others are administrative order negotiations, enforcement action initiation, emergency response, compliance inspections, permit action staff recommendations, 401 certification reviews, stream reclassification studies, hearings, ambient monitoring, wastewater treatment operator training and certification, NPDES public hearings, and public compliance and input coordination. A major communication responsibility was dealing day to day with officials and representatives of the regulated community (private and public).

1982 – 1984: *Head, Operations Branch, N. C. Department of Natural Resources and Community Development, Division of Environmental Management, Water Quality Program*

A reorganization of the Water Quality Program in March 1982 consolidated all operational aspects of the program into the Operations Branch. Consisting of 60 positions, the management of the Branch involved the direction and supervision of clerical positions, technicians (various levels), engineers, biologists, chemists, and environmental scientists. Management functions also included position management, branch organization, merit evaluations, employee monitoring and motivation.

Program responsibilities included those noted in the 1981-1982 position and all water quality permitting functions. This position had review and signature authority for all Division of Environmental Management Water Quality Permits and approval documents (401 Certification, approval letters, etc.). In addition to line management of all activities and budget approval in the Branch, the position worked directly with the regulated community and public.

1981 – 1982: *Head, Monitoring and Technical Services Branch, N.C. Department of Natural Resources and Community Development, Division of Environmental Management, Water Quality Program*

The Monitoring and Technical Services Branch was responsible for ambient and intensive studies monitoring, water quality modeling (computer simulations, etc.), special studies project management, compliance oversight (Discharge Permit Program), wasteload allocation development, and pretreatment assistance and direction for public wastewater treatment facilities. There were 40 positions in the Branch, including clerical positions, technicians, scientists and engineers. The branch head was responsible for the supervision and management of the personnel, budget and resources. The branch also managed several research contracts for the Water Resources Research Institute.

1979 – 1981: *Head, Technical Services Branch, N.C. Department of Natural Resources and Community Development, Division of Environmental Management, Water Quality Program*

Job responsibilities included general supervision of the Branch's 33 people, budget and personnel management, organization adjustments, Branch work planning and technical direction. Program responsibilities included water quality, air quality and groundwater.

1978: *Group Leader/Unit Supervisor, Point Source Water Quality Modeling Group, N.C. Department of Natural Resources and Community Development, Division of Environmental Management*

This position supervised a 13-person unit. The technical portion of the work involved the use of engineering and scientific knowledge to examine environmental impacts from discharges of treated wastewater. Analysis methods in all cases involved the use of modeling and often water quality monitoring and intensive survey data.

1976 – 1978: *Environmental Engineer I, N.C. Department of Natural Resources and Community Development, Division of Environmental Management*

This position was as a staff analysis engineer in the Water Quality Modeling Group noted above.

During the time Mr. Westall served in the Department of Environment and Natural Resources, he was asked to take on many special assignments, including:

- » Hearing Officer for the first land application public hearing: Alpha Cellulose operation
- » Hearing Officer NPDES Permit Hearing for Texas Gulf (now PCS Phosphate) mining operation
- » Hearing Officer: NC Global Transpark 401 Hearing
- » Hearing Officer Mitchell River Outstanding Resource Waters hearing
- » Hearing Officer for NC's Coastal Stormwater Rules adoption process
- » Hearing Officer for Federal Paperboard's (Wilmington area) Special Order request dealing with its treatment system
- » Hearing Officer for several wastewater treatment systems throughout NC
- » Lead Departmental negotiator for the Champion Paper/Blue Ridge Paper Mill (Canton, NC) permit involving the company, EPA, Tennessee and several environmental groups (1987-2004)
- » Facilitation of and Hearing Officer for NC NPDES and State permitting programs for animal waste

EDUCATION:

Master of Civil Engineering, *North Carolina State University, Raleigh, North Carolina.*

Bachelor of Science Degree in Civil Engineering, *North Carolina State University, Raleigh, North Carolina*

SCHOLASTIC HONORS:

- » Several scholarships
- » EPA Graduate Fellowship
- » Graduated with high honors (BS and MCE)
- » Elected to the following honor societies: Chi Epsilon, Tau Beta Pi, and Phi Kappa Phi
- » Dean's list each semester in college

PROFESSIONAL REGISTRATION:

North Carolina Professional Engineer, 009033

Tennessee Professional Engineer, 109877

Certified Public Manager

SPECIALIZED TRAINING:

- » North Carolina State University Natural Resources Leadership Institute
- » Completed Level I, II and III of Rosgen Stream Restoration Classes
- » NCSU's Stream Restoration Institute – all levels
- » NC's Stream Identification Course
- » U.S. Army Corps of Engineers and NC DENR wetlands assessment/identification programs for wetlands
- » State Public Managers Training Program
- » Several courses have been completed on subjects including environmental law, computer languages, modeling, compliance monitoring and related areas

BOARDS, ADVISORY GROUPS + PROFESSIONAL ORGANIZATIONS (Past and Present):

- » Commission Member, NC Environmental Management Commission
- » Commission Member, NC Mining Commission
- » Board Member, Pigeon River Fund Board
- » Chair, BIMS Oversight Committee, Division of Water Quality
- » Board member, DENR's Information Resources Management Board
- » Board member, Celo Health Center/Arthur Morgan School, Yancey County
- » Advisory Board Member, Little Tennessee Watershed Association
- » Advisory Board Member, Upper Cullasaja Watershed Association
- » Advisory Board Member, Land of the Sky Regional Council.
- » Advisory member, EPA's Pulp and Paper guidelines development effort
- » Member, Environmental Science Technology Advisory Committee, Blue Ridge Community College
- » Member, Technical Review Workgroup Blue Ridge Paper Mill Permit Process
- » Member, Water Environment Federation
- » Member, NC Nutrient Scientific Advisory Board
- » Member, NC Water Environment Association
- » Member, National Water Environment Federation

PUBLICATIONS + PRESENTATIONS:

Numerous professional papers, guidance documents, reports and presentations presented at the State and national workshops/conferences. Examples (additional available upon request):

- » "The Effects of Tightening Regulations on Small Plants in Western North Carolina," Forrest R. Westall and David Honeycutt, Western Regional Training Day, AWWA/WEA, June 23, 2011.
- » "The Challenges of Developing New Surface Water Supplies," Forrest R. Westall, ASCE Spring Technical Seminar, April 29, 2011.
- » "Britton Creek Stormwater Master Plan – City of Hendersonville," Forrest R. Westall and Brendan Shanahan, March 4, 2011.
- » "Managing Municipal Watersheds: Should Forest Management be an Option?" SAMAB (Southern Appalachian Man and the Biosphere) Fall Conference, November 16-18, 2004, Forrest R. Westall.
- » "The Role of Modeling and Analysis in North Carolina's Water Quality Management Program," presented at the May 21-22, 2004 National Environmental Modeling and Analysis Center (NEMAC) Conference, UNC-A, Forrest R. Westall.
- » "Final Report on the Activities and Findings of the Division of Water Quality Animal Feeding Operation Non-Discharge General Permit Advisory Group," February 16, 2004 (presented to the NC General Assembly's Environmental Review Commission), Forrest R. Westall and Tom Reeder, DWQ.
- » Process Modifications at a North Carolina Pulp and Paper Facility Directed at Achieving Results Beyond BAT, presented at the Industrial Wastewater and Best Available Treatment Technologies: Performance, Reliability and Economics Conference, February 25-28, 2003, Forrest R. Westall.
- » White Paper: "Basinwide Information Management System (BIMS)", 4/2001 (basic description paper for the BIMS effort), Forrest R. Westall and Claude Monnier.
- » "North Carolina Global Transpark 401 Water Quality Certification Public Hearing Process Report," March 18, 1998 (this report is used as a 401 hearing report guidance document for DWQ), Forrest R. Westall.

AWARDS + RECOGNITION:

- » Friend of the River Award for Career Contribution to Clean Water in the French Broad River Basin and NC, 2011
- » Order of the Long Leaf Pine, 2005
- » Leadership Award, Division of Water Quality, 2001
- » Outstanding employee, Asheville Regional Office, 1998
- » Department of Natural Resources Distinguished Service Award, 1989
- » Department of Natural Resources and Community Development Outstanding Service Award, 1983

REFERENCES:

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NORTH CAROLINA

ASHE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

18 CVS _____

ASHE COUNTY, NORTH CAROLINA
AND ASHE COUNTY WATERSHED
ADMINISTRATOR,

Petitioners,

v.

ASHE COUNTY WATERSHED REVIEW
BOARD AND APPALACHIAN
MATERIALS, LLC,

Respondents.

**WRIT OF CERTIORARI WITH
SUPERSEDEAS**

THIS MATTER having been considered by the undersigned on Ashe County and Ashe County Watershed Administrator's (the "Petitioners") Verified Petition for Writ of Certiorari with Supersedeas and for Judicial Review (the "Petition") and the Court finds that (1) the Petitioners have filed the Petition appealing the Order of the Ashe County Watershed Review Board signed on April 26, 2018 (the "Order"); (2) State and County law grant the Petitioners a right to appeal the Order with the Superior Court within thirty (30) days of the date of the Order and decisions in Superior Court will be in the manner of certiorari, and (3) there is just cause for the Court to issue the Writ of Certiorari with Supersedeas requested by the Petitioners.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Clerk of the Ashe County Watershed Review Board shall prepare a full and complete record of the proceedings in the matter styled by Ashe County Watershed Review Board as *In Re: Appalachian Materials, LLC's Appeal of the Watershed Administrator's Final Order, Requirement and Decision dated July 7, 2017* (the "Administrative Appeal").

EXHIBIT

D

IT IS FURTHER ORDERED that the Clerk of the Ashe County Watershed Review Board shall certify and deliver to this Court a full and complete record of the Administrative Appeal within sixty (60) days of the issuance of this Writ of Certiorari, including, without limitation, the record filed by the Ashe County Watershed Administrator with the Ashe County Watershed Review Board upon which the Ashe County Watershed Administrator made his administrative decision, all documentary evidence and exhibits introduced during the Administrative Appeal, various communications between counsel for the parties and the Watershed Review Board in connection with the Administrative Appeal, and transcripts of the proceedings of the Administrative Appeal, including testimony, presentations and rulings on motions and requests, deliberations and the Order.

IT IS FURTHER ORDERED that the Petitioners are directed to serve the Petition and this Writ of Certiorari with Supersedeas upon each of the Respondents named in the Petition in the manner provided for in the North Carolina Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Order is stayed during the pendency of the Petitioners' appeal of the Order. Wheeler v. Thabit, 261 N.C. 479, 135 S.E. 2d 10 (1964).

IT IS FURTHER ORDERED that a copy of this executed Writ of Certiorari with Supersedeas shall be filed with the Ashe County Superior Court.

SO ORDERED, this the ____ day of May, 2018.

Superior Court Judge