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STATE OF NORTH CAROLINA

COUNTY OF CHATHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR 04772

EnvironmentaLee, Chatham Citizens Against Coal Ash Dump, And Blue Ridge Environmental Defense League Inc, Petitioner, v. NC Department of Environment and Natural Resources, Division of Waste Management, and Division of Energy, Mineral and Land Resources, Respondent, and Green Meadow, LLC, and Charah, Inc. Respondent-Intervenors.	**FINAL DECISION**

PROCEDURAL BACKGROUND

On August 6, 2019, Administrative Law Judge ("ALJ") Melissa Owens Lassiter conducted a hearing in this case in Raleigh, North Carolina on remand from the North Carolina Court of Appeals ("Court of Appeals"), in *EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 813 S.E.2d 673 (N.C. Ct. App. 2018). In March of 2017, Superior Court Judge Carl Fox reversed the ALJ's Final Decision "as to areas not already mined or otherwise excavated."

In April of 2018, the Court of Appeals found that the trial court failed to review the ALJ's Final Decision adequately and also found that the ALJ lacked authorization to convert a summary judgment motion into a Rule 41(b) Motion for Involuntary Dismissal. The Court of Appeals reversed the trial court's decision and remanded the matter to the Superior Court for further remand to the OAH to "allow the Department and Permittees the opportunity to present their case. At that time, Petitioners shall be permitted to offer any rebuttal evidence, including any expert testimony that rebuts the Department's and Permittee's contentions." *Id.*, 813 S.E.2d at 680.

On December 7 and 8, 2015, the Undersigned conducted the initial hearing in this matter pursuant to Petitioners' appeal of the Department's issuance of the following permits to Respondent-Intervenors on June 4, 2015:

(1) Division of Waste Management ("DWM") issued Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 5306 to Construct and

Operate a structural fill at the Colon Road mine site in Lee County, North Carolina to Green Meadow, LLC and Charah, Inc.

(2) Division of Waste Management issued Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 1910 for the same purpose at the Brickhaven Mine site in Chatham County, North Carolina to Green Meadow, LLC, and Charah, Inc.

(3) Division of Energy, Mineral, and Land Resources ("DEMLR") issued Modified Mining Permit for Permit No. 53-05 for the operation of a Clay Mine at the Colon Road Mine in Lee County, North Carolina to Green Meadow, LLC and

(4) Division of Energy, Mineral, and Land Resources issued Modified Mining Permit No. 19-25 for the same type of operation at the Brickhaven No, 2 Mine Tract "A" in Chatham County, North Carolina to Green Meadow, LLC.

At the December 2015 hearing, the Undersigned granted Respondent's Motion for Summary Judgment as to Claim D and denied such Motion as to the remainder of Petitioners' claims. Petitioners opted to Voluntarily Dismiss Claim D with prejudice in lieu of an Order for Partial Summary Judgment. After the Undersigned's ruling, Petitioners and Respondent-Intervenors advised the Undersigned that they had reached a settlement as to Claim E regarding the issue of coal dust.

Because the contested case hearings of December 2015 and August 2019 constitute a single case, this Final Decision considers the evidence and arguments presented during both proceedings. On October 30, 2019, the parties filed their respective proposed Final Decisions.

APPEARANCES

For Petitioners: Catherine Cralle Jones and Seth E. Barefoot, Law Office of F. Bryan Brice, Jr. 127 W. Hargett St., Ste 600, Raleigh, North Carolina 27601 (August 6, 2019 hearing on remand only); John D. Runkle, Attorney at Law, 2121 Damascus Church Road, Chapel Hill, North Carolina 27516 (December 7 and 8, 2015 hearing only).

For Respondents: Thomas Hill Davis and Carolyn McLain, Assistant Attorneys General, North Carolina Department of Justice, 114 West Edenton St., Post Office Box 629, Raleigh, North Carolina 27602-0629.

For Respondent-Intervenors: Peter J. McGrath, Jr., and Thomas D. Myrick, Moore & Van Allen, PLLC, 100 North Tryon St., Ste 4700 Charlotte, North Carolina 28202.

ISSUES

1. Whether Respondents met the requirements of the Mining Act of 1971 and the Coal Ash Management Act of 2014 ("CAMA") by permitting the Brickhaven and Colon

Road Mine sites as structural fills to be used for mine reclamation rather than as solid waste landfills (hereinafter "Claim A")?

2. Whether Respondents' requirement for the amount of financial assurance from the permittees met the requirements under the Mining Act of 1971 and the CAMA of 2014 (hereinafter "Claim B")?

3. Whether Respondents appropriately applied the requirements of the CAMA of 2014 by approving the use of an encapsulation liner system, which employed a composite liner utilizing a geosynthetic clay liner, for the containment of coal combustion products as part of the permits pursuant to N.C. Gen. Stat. § 130A-309.220(b)(1) (hereinafter "Claim C")?

4. Whether Petitioners have met their burden of proving that the cumulative impact of the proposed facilities would have a disproportionate adverse impact on the Chatham or Lee County communities under the Solid Waste Management Act, N.C. Gen. Stat. § 130A-294(a)(4) c.9. (hereinafter "Claim F")?

5. Whether Respondents appropriately applied the requirements of the CAMA of 2014 by approving the Toxicity Characteristic Leaching Procedure, pursuant to N.C. Gen. Stat. § 130A-309.219(b)(1)(d), to characterize the toxic constituents of the coal combustion products (hereinafter "Claim G")?

6. Whether Petitioners met their burden of proof to show that Respondents substantially prejudiced Petitioners' rights and either exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule by issuing the structural fill and modified mining permits for the Brickhaven and Colon Road Mine Sites?

STATUTES AND REGULATIONS AT ISSUE

N.C. Gen. Stat. § 130A, Article 9, Solid Waste Management Act and CAMA of 2014
N.C. Gen. Stat. § 74, Article 7, Mining Act of 1971
N.C. Gen. Stat. §§ 150B-22 through 150B-37
15A NCAC 13B .1700 *et seq*.
15A NCAC 05B .0100 *et. seq*.

EXHIBITS RECEIVED INTO EVIDENCE

For Petitioners:

Petitioners 1	Photographs submitted by Terica Luxton
Petitioners 2	Email from Thad Valentine to Judy Wehner, Colon Mine Partial release inspection, April 16, 2014 (for illustrative purposes only)

Petitioners 3 Blue Ridge Environmental Defense League, EnvironmentaLEE, Chatham Citizens Against Coal Ash Dump, and NC WARN: "Joint Comments on Proposed Coal Ash Landfills in Lee and Chatham Counties," May 15, 2015 (for illustrative purposes only – to reflect that comments were submitted only)

Petitioners 4 "Comments on Proposed Disposal of Coal Combustion Ash in Subtitle D Landfill in Clay Mines," G. Fred Lee, PhD, PE, BCEES, FASCE and Anne Jones-Lee, PhD, May 6, 2015 (for illustrative purposes only – to reflect that comments were submitted only)

Petitioners 5 "Technical and Scientific Issues with Coal Ash Structural Fills in North Carolina," A. Dennis Lemly, PhD, Research Associate Profession of Biology Wake Forest University, April 22, 2015 (for illustrative purposes only – to reflect that comments were submitted only)

Petitioners 6 Power point presentation by Don Kovasckitz, Director, GIS Strategic Services, Lee County, given to the Lee County Board of Commissioners on December 15, 2014

Petitioners 7 Power point presentation by Don Kovasckitz, Director, GIS Strategic Services, Lee County, given to the Lee-Sanford Environmental Affairs Board in May 2015. (Except for Slide 3, which was excluded upon the sustaining of an objection based on relevancy and Slide 4, which was excluded upon the sustaining of an objection based on hearsay)

Petitioners 9 Brickhaven Mine Site Overview, dated 11/2014, part of Brickhaven Permit Application (admitted August 6, 2019)

For Respondents:

Respondents 1 Coal Ash Management Act of 2014

Respondents A Permit Documents for Lee County Site (Colon Mine)

A-1 Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 5306 to Green Meadow, LLC and Charah, Inc. to Construct and Operate the Colon Mine Site Structural Fill in conjunction with DEMLR Mine Permit 53-05 issued on June 5, 2015

A-2 Colon Mine Site Structural Fill Permit Application and Addenda – Design Hydrogeological Report includes Water Quality Monitoring (as amended on August 6, 2019)

A-3 Colon Mine Permit No. 53-05 Modification to Green Meadow, LLC to change the method for reclaiming the mine by constructing structural fill using Coal Combustion Byproducts in accordance with the provisions of the Coal Ash Management Act of 2014 and the terms and conditions of the Permit to Construct and Operate Colon Mine Site Structural Fill Permit No. 5306 issued by the DWM, said permit No. 53-05 being issued by the DEMLR on June 5, 2015.

Respondents B Permit Documents for Chatham County Site (Brickhaven Mine)

B-1 Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 1910 to Green Meadow, LLC and Charah, Inc. to Construct and Operate the Brickhaven Mine Site Structural Fill in conjunction with DEMLR Mine Permit 19-25 issued on June 5, 2015

B-2 Brickhaven Mine Site Structural Fill Permit Application and Addenda - Design Hydrogeological Report includes Water Quality Monitoring (as amended on August 6, 2019)

B-3 Brickhaven Mine Permit No. 19-25 Modification to Green Meadow, LLC to change the method for reclaiming the mine by constructing structural fill using Coal Combustion Byproducts in accordance with the provisions of the Coal Ash Management Act of 2014 and the terms and conditions of the Permit to Construct and Operate Brickhaven Mine Site Structural Fill Permit No. 1910 issued by the DWM, said permit No. 19-25 being issued by the DEMLR on June 5, 2015.

Respondents C Financial Assurance Mechanisms for Brickhaven Mine Site

C-1 Performance Bond for Closure, Post-closure, and Potential Assessment and Corrective Action costs in the total amount of $10,200,560.00

C-2 Certificate of Liability Insurance for Sudden and Non-Sudden events in the amount of $4 million per occurrence and $8 million annual aggregate

C-3 Surety Bond Guaranteeing Payment for disaster response costs in the amount of $65,000.00

C-4 $500,000.00 Blanket bond guaranteeing compliance with the Mining Act of 1971

Respondents D Financial Assurance Mechanisms for Colon Mine Site

D-1 Performance Bond for Closure, Post-closure, and Potential Assessment and Corrective Action costs in the total amount of $10,380,470.00

D-2 Certificate of Liability Insurance for Sudden and Non-Sudden events in the amount of $4 million per occurrence and $8 million annual aggregate

D-3 Surety Bond Guaranteeing Payment for disaster response costs in the amount of $65,000.00

D-4 $500,000.00 Blanket bond guaranteeing compliance with the Mining Act of 1971

Respondents E Hearing Officer's Reports and Recommendations

Respondents F Public Comments

F-1 May 16, 2015 Blue Ridge Environmental Defense League public comments

F-2 May 16, 2015 John Wagner's public comments

F-3 April 13, 2015 Public Hearing transcript

F-4 April 16, 2015 Public Hearing transcript

Respondents G October 19, 2000 Environmental Equity Initiative Policy

Respondents H Petitioners' Discovery Responses

H-1 Petitioners' Response to First Set of Interrogatories

H-2 Petitioners' Response to First Request for Admission

PRELIMINARY MATTERS

At the August 6, 2019 hearing, the Undersigned heard arguments from all parties on Respondents' Motion to Dismiss Petitioners' Claims B, C, F-G and the Motion to Dismiss by Green Meadow, LLC and Charah, Inc. ("Respondent-Intervenors"), pursuant to N.C. Rule of Civil Procedure 41(b). The Undersigned took such Motions under advisement and proceeded to Respondent's presentation of its case-in-chief.

The Undersigned also heard Respondents' Motion in Limine seeking to exclude: (1) any evidence or testimony that occurred on or after the date of the applicable permits; (2) the testimony of Elizabeth Werner, permitting Hydrologist (DWM); (3) the testimony of

Thad Valentine, Senior Specialist (DEMLR); and (4) the Water Quality Management portions of the structural fill permit applications for Colon and Brickhaven. The Undersigned granted the Motion as to Items (1) and (2) and limited the scope of testimony by Thad Valentine (Item 3). Respondents withdrew their motion as to Item (4).

FINDINGS OF FACT

Based upon careful consideration of the pleadings, testimony, evidence, arguments, and legal briefs received during the contested case hearing, as well as the entire record of this proceeding, including Petitioners' case-in-chief, Respondents' Motion for Summary Judgment, Respondents' request that Petitioners' case be dismissed at the end of Petitioners' case-in-chief, Respondents' case-in-chief, Petitioners' rebuttal, and Respondents and Respondent-Intervenors' Motion to Dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, the undersigned hereby finds the following:

Parties

1. Petitioners EnvironmentaLEE and Chatham Citizens Against Coal Ash Dump are chapters of the Petitioner Blue Ridge Environmental Defense League Inc. The Blue Ridge Environmental Defense League Inc. ("BREDL") is a non-profit organization focusing on environmental issues.

2. Respondent DWM is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 who is vested with the statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate solid waste. The North Carolina General Assembly mandates that Respondent DWM promote and preserve an environment that is conducive to public health and welfare by establishing a statewide solid waste management program, and mandates that such action be deemed acts of the sovereign power of the State.

3. Respondent DEMLR is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 who is vested with the statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate mining operations. The North Carolina General Assembly mandates that Respondent DEMLR promote and preserve an environment that is conducive to public health and welfare by establishing a statewide mining program, and mandates that such action be deemed acts of the sovereign power of the State.

4. Respondent-Intervenors Green Meadow, LLC and Charah, Inc. hold the solid waste management facility structural fill/mine reclamation permits at the Colon and Brickhaven Mine sites at issue. Respondent-Intervenor Green Meadow, LLC holds the modified mining permits at issue.

5. In its petition, Petitioner alleged Claims A – G as listed above. Regarding Claim A, Petitioners alleged that the proposed sites are solid waste landfills, rather than mine reclamation projects, and "both of the present sites will need extensive amounts of

slate and clay removed before the coal ash can be placed on site." Specifically, Petitioners contended:

> Several of the landfill cells will be excavated on land that has never been mined. Contrary to the permit application for the proposed sites, nothing can be built on top of the finished 'reclamation' sites. The need to keep liners intact and projected height above grade would make these areas unsuitable for any future development.

(Petition).

6. To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

Applicable Statutes and Regulations

Coal Ash Management Act of 2014 (CAMA)

7. On September 20, 2014, the North Carolina General Assembly passed CAMA (N.C. Gen. Stat. § 130A-309.200 *et seq*., Article 9, Part 2I) as a comprehensive management plan for the cleanup of coal ash, and the closure of coal ash ponds. Specifically, Subpart 3 of N.C. Gen. Stat. § 130A, Article 9, Part 2I (N.C. Gen. Stat. § 130A-309.218 *et seq*.,) addresses use of coal combustion products as structural fill by detailing the permitting, construction, operation, and closure of large projects using coal ash as structural fill to reclaim open pit mines in North Carolina.

8. N.C. Gen. Stat § 130A-309.219(a)(2) requires that projects using coal combustion products as structural fill involving the placement of 8,000 or more tons of coal combustion products per acre or 80,000 or more tons of coal combustion products in total per project receive an individual permit from DWM.

9. On April 17, 2015, the Coal Combustion Disposal Rule ("CCR Rule") of the federal Environmental Protection Agency ("EPA") was published in the Federal Register. The purpose of this rule was to establish "nationally applicable minimum criteria for the safe disposal of coal combustion residual in landfills and surface impoundment." 80 Fed. Reg. 74, 21303. The CCR Rule defined a "CCR landfill or landfill" as "an area of land or an excavation that receives CCR and which is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave." 40 C.F.R. § 257.53.

10. The CCR Rule was not effective until October 19, 2015, four months after Respondents issued the subject permits in this contested case. Therefore, the CCR Rule did not apply to the facts and subject permits of this case.

The Mining Act of 1971

11. N.C. Gen. Stat. § 74, Article 7 constitutes the Mining Act of 1971 and regulates mining and reclamation of mined lands in this State. In N.C. Gen. Stat. § 74-47, the General Assembly explicitly provides that:

> . . . finds that the conduct of mining and reclamation of mined lands as provided by this Article will allow the mining of valuable minerals and will provide for the protection of the State's environment and for the subsequent beneficial use of the mined and reclaimed land.

12. N.C. Gen. Stat. § 74-49(7) defines what does and does not constitute "mining." "Mining means any of (i), (ii), or (iii) as listed in §74-49(7)," but:

> 'Mining' does not include: . . .
>
> d. Excavation or grading when conducted solely in aid of on-site farming or of on-site construction for purposes other than mining . . ."

13. N.C. Gen. Stat. § 74-49(12) also defines "reclamation" as "the reasonable rehabilitation of the affected land for useful purposes and the protection of the natural resources of the surrounding area."

December 7 – 8, 2015 Hearing

14. At the 2015 hearing, Petitioners presented testimony of Debbie Hall, Terica Luxton, Judy Hogan, and Sheila Crump. Debbie Hall and Terica Luxton are from Lee County and members of EnvironmentaLEE, while Ms. Hogan and Ms. Luxton are from Chatham County and members of Chatham Citizens Against Coal Ash Dump. All four witnesses live near the respective mine sites and were concerned that there may be environmental impacts from the disposal of coal ash at the mine sites, and that the mine sites may negatively affect their communities.

15. As of the December 2015 hearing, there were about 50 active members of EnvironmentaLEE who met once a month in the Colon Road community in Lee County. The Colon community is located right across the road from the Colon Mine site. Debbie Hall estimated that approximately 30 to 35 EnvironmentaLEE members live:

> [On] the roads that go right around that site – the Osgood community, Colon community—those people that are most closely joined to the site . . . I would say within three and a half to five miles from the site–the majority of the people.

(2015 T. pp. 54-55) Ms. Hall was concerned about the environmental impact [of the proposed coal ash facility at Colon Road] to the surrounding community as many residents in the Colon community use wells to irrigate their gardens they eat from, water

the animals, and eat those animals and eggs. Hall was also concerned about the dust that will be in the air because the Colon community has already been affected by the brick industry that has been in that community for decades. (2015 T. pp. 57-58)

16. At the end of Summer 2015, Ms. Hall saw that a pond had been drained on the proposed coal ash site in Lee County and observed the digging of ditches, displacement of animals such as beavers, truck traffic, land moved, and grading. (2015 T. pp. 61-64) However, Hall acknowledged that "there has been no coal ash spots at the site at this point." (2015 T. p. 62) Ms. Hall has had no training in environmental science, and no personal knowledge of any effects of coal ash that extend three to five miles from where coal ash has been placed. (2015 T. p. 62) She admitted that the brick factory is no longer in operation, and she cannot say how far the closed brick factory is located from the Colon proposed coal ash site. (2015 T. p. 63)

17. Terica Luxton has been involved with EnvironmentaLEE for four years fighting for the environment. She was concerned about the proposed coal ash facility at Colon Road for several reasons. First, Lee County does not have any coal ash. Second, the proposed Colon Road facility is located right on top of the Colon community's largest water shed. Ms. Luxton explained how "[t]he watershed is our life. I mean the bottom line is water – without water you don't have life . . . The people in Colon depend upon those wells." (2015 T. p. 66) Ms. Luxton has researched the history of some people who live and are buried in the Colon community. She believes in fighting to protect the environment for those people. (2015 T. pp. 73-74)

18. In 2015, Judy Hogan was a resident of Moncure, North Carolina, and Chairperson for Chatham Citizens Against the Coal Ash Dump ("Chatham Citizens"). At the time of the 2015 hearing, Chatham Citizens Against the Coal Ash Dump consisted of eighty-four (84) members. Fifty-three (53) of such members lived in Moncure, NC, fourteen (14) of such members lived in Lee County, and ten members lived in other parts of Chatham County or other counties. EnvironmentaLEE and Chatham Citizens groups supported one another. At the time of the December 2015 hearing, Ms. Hogan lived approximately five miles, by air, from the Brickhaven proposed coal ash facility in Moncure, North Carolina on Moncure-Pittsboro Road, a major travel route in the county. (2015 T. p. 77)

19. Beginning around October 23, 2015, Ms. Hogan began seeing trucks hauling coal ash on Moncure-Pittsboro Road toward the Brickhaven coal ash site. Ms. Hogan was aware that residents in the area had notified the Sheriff's Department and the North Carolina Highway Patrol about trucks speeding through Moncure and near the site. (2015 T. p. 79) Ms. Hogan had educated herself about what coal ash looks like. Thus, about three weeks before the December 7, 2015 hearing, Hogan observed coal ash coming off the top and behind an older truck. (2015 T. pp. 80-81) Back in April [of 2015], "people in Brickhaven took photos of coal ash blowing off the old Cape Fear coal ash mines." (2015 T. p. 81) The coal ash appeared grey to black in color and the truck was going fast. (2015 T. p. 81) Ms. Hogan lived near Jordan [Lake] dam and also saw coal ash when she returned from a walk along Jordan Dam Road. (2015 T. p. 81)

20. At the time of the 2015 hearing, Sheila Crump was a Moncure, North Carolina resident who lived six or seven miles from the Brickhaven coal ash site in Chatham County. Ms. Crump was concerned about additional traffic that would be created by trucks driving to and from the coal ash facility, along Moncure-Pittsboro Road and Highway 1. There was existing heavy traffic, especially from log trucks along Old Highway 1, and other main roads in the area. (2015 T. pp. 84-85) Ms. Crump lived next to the railroad tracks and had to drive across the train track to reach Old Highway 1. (2015 T. p. 85) Ms. Crump joined the Chatham Citizens Against the Coal Ash Dump group in June of 2015.

21. Ed Mussler is a licensed Professional Engineer. At the time of the December 2015 hearing, Mr. Mussler had worked as the DWM Permitting Supervisor of the Solid Waste Section ("SWS") for ten years. Mussler worked an additional twelve years as a permitting engineer for the Solid Waste Section. As Permitting Supervisor, Mussler was responsible for the supervision and training of, and consultation with, the professional staff who reviewed SWS permit applications to determine if such applications met the qualifications required to obtain a permit under the CAMA.

22. In November 2014, Respondent SWS received the subject permittees' structural fill permit applications. Mussler and his professional staff conducted a review of such permit applications to ensure the applications met all of the CAMA requirements.

a. Around late November or early December 2014, Mussler visited the Colon Road site and the Brickhaven site. Mussler observed parts of the site had been mined and understood the mine had been mined for a clay-like material to make brick. (2015 T. pp. 94-96)

b. Mussler and his staff reviewed the permit applications. Their review included, but was not limited to, the type of facility to be permitted (structural fill), the type of waste (coal combustion products), the type of liners to be utilized in these structural fills, the type of testing to be employed to characterize the toxic constituents of the coal combustion products, the need for additional mandatory permits (modified mining permits and 401 water quality certification permits), environmental justice concerns, and the financial assurance mechanisms required under the law.

c. The SWS staff and Mussler attended the public comment and hearing process for each proposed facility site. They considered all comments from the public hearing, and reviewed other comments submitted to SWS. Included in those comments were written comments by: (1) Drs. G. Fred Lee and Anne Jones-Lee, two consultants and researchers who commented on the environment, public health issues, and water quality, and (2) Dr. Dennis Lemly, Research Associate Professor of Biology at Wake Forest University who commented on technical and scientific issues with coal ash structural fills.

23. By letter dated December 19, 2014, Mr. Mussler acknowledged receipt of the structural fill applications, and requested additional information from the applicants. Mr. Mussler also notified the applicants that "prior to commencement of operations" applicants would need to: "submit a monitoring report of the four independent background monitoring events for the eight (8) compliance groundwater monitoring wells." (Resp. Ex. A-2 Colon Mine); and (Resp. Ex. B-2 Brickhaven No. 2).

24. The Design Hydrogeological Reports for the Colon Mine and the Brickhaven Mine sites documented that on February 20, 2015, prior to issuance of the permits, staff hydrogeologist, Elizabeth Werner, advised applicants that "only 1 initial independent background groundwater sampling event would be necessary, prior to placement of coal combustions residuals." (Amended Resp. Ex. A-2, Colon Mine Site-Design Hydrogeological Report (Append. P); and Amended Resp. Ex. B-2, Brickhaven No.2 – Design Hydrogeological Report (Append. O)). These Reports also noted:

> A minimum of one background sampling event should be conducted at the two surface water sample locations. The initial background groundwater and surface water monitoring events should be conducted prior to issuance of the Permit to Operate . . .
>
> The eight (8) background monitoring events will be conducted over a 1-year period of time with an approximately 1.5 month spacing commencing immediately following issuance of the Permit to Construct. The initial independent background groundwater sampling event will be conducted prior to issuance of the Permit to Operate and placement of coal combustion residuals.

(Amended Resp. Ex. A-2, Colon Mine Site-Design Hydrogeological Report (Append. P); and Amended Resp. Ex. B-2, Brickhaven No.2 – Design Hydrogeological Report (Append. O))

25. Before Respondents issued the subject permits, Respondent held two public hearings in April 2015 in Lee and Chatham counties, at which more than a hundred individuals attended each meeting (134 and 137 people respectively). (Resp. Ex. E, pp. 3-4).

26. Jason M. Watkins, Field Operations Branch Head with Respondent DWM and SWS, served as the Hearing Officer at both public hearings. On June 5, 2015, Mr. Watkins sent memorandums to Linda Culpepper, Director of DWM detailing the history of the Colon Mine and Brickhaven Mine, the respective public hearings, and public comments made during such hearings.

a. Watkins noted that numerous comments made at the public hearings and in writing objected to the projects being classified as mine reclamation projects rather than as landfills. In addition, he noted that several commenters remarked

that coal ash will be placed in areas of the Colon Mine where product has not been removed yet.

b. Watkins opined that "[u]nder the new federal rule the project will be defined as a landfill. The permit application, under current North Carolina statute is for a structural fill, the beneficial use of which is mine reclamation . . ."

c. Watkins recommended approval and issuance of the applied-for permits at both mines, with specific recommended conditions for the Colon Mine permits.

(Resp. Ex. E.)

27. On June 5, 2015, Mr. Mussler issued a structural fill permit to construct and operate, permit No. 5306-STRUC-2015 for the Colon Mine to Charah, Inc. and Green Meadow, LLC and a structural fill permit to construct and operate, permit No. 1910-STRUC-2015 for the Brickhaven No. 2 Tract "A" Mine to Charah, Inc. and Green Meadow, LLC. Both permits incorporated the applicants' permit applications, which included their respective operating plans.

28. Before CAMA was passed, a "large-scale structural fill" was undefined, and "structural fills" were handled under other environmental rules. Mussler and specifically DWM are required to follow the mandates of CAMA in fulfilling their permitting duties. Mussler may not vary from that mandate, "not if I want to keep my job." (2015 T. pp. 125-126)

29. Mussler had no opinion regarding whether the subject mining sites were "open pit mines," but indicated he saw excavations on both sites (2015 T. p. 94). He understood Brickhaven had been mined for a clay-like material to make brick but could not describe what part of the site had been excavated. (2015 T. pp. 94-96). He had "no idea" how big the actual open pit at the Colon Road site was but could have determined this if he had wanted to know. (2015 T. p. 96).

30. As to Petitioner's Claim A, Mr. Mussler disagreed with Jason Watkins' classification of the projects as landfills because the federal rule classifying the subject projects as landfills ("the CCR Rule") was not released until December [2014] and was not effective until April [2015]. He explained that the CCR Rule is self-implementing and enforceable by citizen lawsuits, and therefore, the CCR Rule has no bearing on decisions made at the State level in terms of issuing permits. (2015 T. p. 119). He opined the proposed coal ash disposal facilities at Brickhaven, and Colon Road are "structural fills," as defined in the North Carolina CAMA statutes that were in effect when the facilities at issue were permitted. (2015 T. p. 119)

31. Mr. Mussler opined that attempting to compare a solid waste landfill to a structural fill is like "comparing apples to oranges" as they each serve a different purpose. The purpose of a landfill is for the ultimate disposal of specific types of waste, such as municipal solid waste, industrial solid waste, construction and demolition debris, or inert

debris, for a specific area of the State. A landfill is an engineered structure whose purpose is to entomb the solid waste and keep it there to protect the public health and environment. (2015 T. p. 127) Most landfills, at least in North Carolina, operate in excess of 20 to 30 years. Whereas, the purpose of a structural fill is for a projected beneficial end use of some material in replacement of another. CAMA specifically provides for structural fill permits using coal combustion products as structural fill in open pit clay mines. In contrast to a landfill, a structural fill project is anticipated to last "probably five to seven years." (2015 T. p. 128)

32. Mussler further noted that the CAMA structural fill requirements in the Brickhaven and Colon Mine sites regarding “a liner system, closure cap system, and groundwater monitoring” were essentially taken directly from the landfill rules. He noted that if this [the projects at issue] was . . . legally under the definition of landfill, they would not have been built any differently. (2015 T. p. 128)

33. As to Claim B, there are financial assurance requirements for solid waste landfills, industrial landfills, and most of the projects Mr. Mussler reviews. (2015 T. p. 123) In this case, there were two sets of financial assurance requirements. There were financial assurances required under the Mining Act, and financial assurances required under CAMA separately for the structural fill. (2015 T. p. 123)

34. The financial assurance required under CAMA for structural fill facilities was more extensive than that required for solid waste landfills.

a. CAMA specifically required financial assurance to cover funding for closure of a facility, post-closure maintenance and monitoring of a facility for thirty years, and any corrective action that DWM may require, which is also required for solid waste landfills. (2015 T. pp. 132-133) The closure and post-closure amounts are the fund amounts it would take a third party to close a structural fill site/facility in the absence of the facility owner being around to close a facility. (2015 T. p. 132) The applicant is required to tell Respondent agencies what they think are the closure and post-closure amounts, and the Respondent agencies review those costs. (2015 T. pp. 132-133)

b. In addition to the requirements for financial assurance for landfills, CAMA also required financial assurance for any potential liability for sudden and non-sudden accidental occurrences, and any subsequent disaster response costs incurred by DWM. At the same time, the CAMA financial assurance provisions do not establish specific amounts of financial assurance that must be required. (2015 T. pp. 132-133)

35. In this case, Mr. Mussler determined the amount of financial assurance required for the permits at issue based upon: (1) his own and his staff's long-term experience with solid waste facilities, including those dealing with coal ash, and (2)

Mussler's consultation with the Hazard Waste Section. DWM determined the following amounts were required for financial assurance under CAMA:

(1) a $10,200,560.00 Performance Bond for closure, post-closure, and potential assessment and corrective action costs for the Brickhaven site,

(2) the $10,380,470.00 Performance Bond for closure, post-closure, and potential assessment and corrective action costs for the Colon site,

(3) the Certificate of Liability Insurance for sudden and non-sudden events for $4 million per occurrence and $8 million annual aggregate for each site, and

(4) the Surety Bond guaranteeing payment for disaster response costs for $65,000.00 for each site.

36. Respondent's SWS staff, of which CAMA is a subset, and Respondent's Mining Section staff discussed the permits at issue and whose responsibility rested in what area. The staff from each section, Mr. Mussler, and Mr. Tracy Davis, head of Respondent's Mining Section, relied upon each other to deal with the aspect of the permits for which each section had expertise. (2015 T. pp. 124-125).

37. Regarding the accidental insurance terms, the SWS sought guidance from other sections in the Division of Waste Management as "that was not something we [SWS] normally did." (2015 T. p. 133) SWS looked at what were typical amounts for what they considered equal risk, for the type of activities, and decided upon the four-million and eight million-dollar numbers. (2015 T. p. 133) To determine the "other number, in terms of reimbursement," Mussler and his staff examined the SWS' activities in responding to the hazardous waste problem that occurred in Apex several years ago, and based that number on the estimate of staff time to oversee the cleanup on site. (2015 T. p. 133)

38. Regarding Claim C, CAMA specifically required encapsulation liner systems based on either a composite liner utilizing a compacted clay liner, or a composite liner utilizing a geosynthetic clay liner. The liner system approved by DWM under the structural fill permits at issue met those requirements. Based upon his own experience and expertise in the permitting of solid waste facilities, and despite Drs. Fred Lee and Dennis Lemly's public comments and opinions, Mussler believed the liner system approved under the subject permits would "efficiently contain, collect, and remove leachate generated by the coal combustion products, as well as separate the coal combustion products from any exposure to surrounding environs" as mandated by CAMA. (Mussler Affidavit dated 11/9/2015, ¶ 10, Resp. Motion for Summary Judgment)

39. Specifically, as to Claim F, Mr. Mussler reviewed Petitioners' written comments, other public comments, and the Environmental Protection Agency's

demographic charts and information regarding these sites. Mussler agreed with the Hearing Officer's Report that the examination of demographics did not support the hypothesis of an unjust or disproportionate impact, especially because the design and monitoring and other environmental safeguards provided within these permits were protective of the population in close proximity to the mines. Mussler was also aware that the applicants were required to acquire an approved 404/401 water quality certification as a condition of the structural fill permits Mussler issued. The applicants were required to provide an environmental justice analysis to the U.S. Army Corps of Engineers for the 404/401 water quality certifications. Mussler opined that if the U.S. Army Corps had denied the 404/401 water quality certifications to the applicants, then the structural fill permits would have been deemed void. (Mussler Affidavit dated 11/9/2015, ¶ 12, Resp. Motion for Summary Judgment).

40. Before issuing the two structural fill permits for the Brickhaven and Colon Mines, Mussler was aware that these projects constituted the only coal ash structural fill projects existing, or proposed, for either Lee or Chatham Counties, and that there were, and currently are, no active or proposed municipal waste landfills, industrial landfills, or construction and demolition landfills located in either County.

41. As to Claim G, CAMA mandated the use of the toxicity characteristic leaching procedure ("TCLP") to characterize the toxic constituents in the coal ash. Mussler thought this mandate was carried out within the structural fill permits as part of the applicants' Operation Plans. Despite Drs. Lee and Lemly's public comments and opinions and based upon his own experiences as a Professional Engineer and in the permitting of solid waste facilities, Mussler opined that the TCLP is a method that achieves the goals of protection of the public health and environment. (Mussler Affidavit dated 11/9/2015, ¶12, Resp. Motion for Summary Judgment)

42. Based on his experience as a Professional Engineer, and with 22 years of experience dealing in the area of solid waste permits, Mussler opined that the terms of the structural fill permits for the Brickhaven and Colon Mines will be protective of human health and the environment. (Mussler Affidavit dated 11/9/2015, ¶ 15, Resp. Motion for Summary Judgment)

43. Tracy Davis is a licensed Professional Engineer. At the time of the December 2015 hearing, Davis had been the Director of DEMLR for three years. Mr. Davis had worked as the Chief Engineer, State Mining Specialist, and/or Assistant State Mining Specialist for DEMLR for twenty-five years. As Director of DEMLR, he was responsible for reviewing mining permit applications to determine if they meet the qualifications required to obtain a permit pursuant to the Mining Act of 1971. Davis has looked over approximately 250 to 300 permits during the 16 years he was directly involved with the mining program. Generally, 50 to 60 new permits of different mineral types are issued by DEMLR each year. (2015 T. p. 140)

44. While the permits at issue were the first ones permitted for coal ash in this State, DEMLR has permitted a handful of landfills in mines throughout the State, including

several in the Winston-Salem area. The landfill would be in the pit itself and could also be on the land adjacent to the pit and in any areas that are disturbed as part of the mining operation. (2015 T. p. 142). "The mine operation is more than just the pit. It's the roads, the processing areas, stockpile areas, plant, parking, shops . . . that's the affected land for a mine has to be reclaimed." (2015 T. p. 142)

45. The Triassic Basin is the geologic area of the subject permits. Mr. Davis has permitted "maybe a handful" of mining permits in the Triassic Basin of which he was directly involved over 16 years. (2015 T. p. 141). However, he has not permitted any new mining permits in the Triassic Basin in recent years. (2015 T. p. 141)

46. Mr. Davis explained that the Mining Act defines that the purpose of reclamation is to "reclaim the mined area and its adjacent areas, anything affected by the mine operation, to a suitable use so that it's stable and it protects groundwater and surface water quality." (2015 T. p. 143) The Mining Act does not say the purpose of reclamation is to "bring the mining area up to grade." (2015 T. p. 143). According to Mr. Davis, DEMLR has had a landfill in other parts of the State go above the nature ground surface. DEMLR also has had "other mines that have been backfilled to above the natural grade to establish a footprint for a commercial or residential construction." (2015 T. pp. 143-144). The Mining Act not only defines "reclamation" but defines the "affected land" which the reclamation definition cross-references. (2015 T. p. 145)

47. In November 2014, Mr. Davis' office received the subject permittees' mining modification applications for the Colon Road and Brickhaven Mine sites. These were not new mining permits, because the sites were already permitted by General Shale Company, who was a brick producer. General Shale's mining permits were modified quite a few times over the years. (2015 T. pp. 150-51, 175)

48. Green Meadow requested permit transfer of those original mining permits to put those permits in Green Meadow's name with the same mining plan, and reclamation plan as originally permitted. Green Meadow also asked for permit modifications to change the reclamation to "beneficial fill with coal ash, to change the footprint slightly, and add additional erosion control measures." (2015 T. p. 149) Green Meadow's mining plan showed a mining boundary extending across the entire site, except for a 50-foot buffer along the permit boundary. There was also an erosion control plan for the mining footprint, and a reclamation plan that showed the beneficial structural fills they were reclaiming in those footprints over time. (2015 T. p. 150)

49. Mr. Davis and his staff reviewed the permit applications at issue to ensure that the permits met all of the requirements of the Mining Act of 1971. The usual practice of Davis' staff is to conduct their own internal review at the central office level as well as at the regional office level. The Raleigh regional office mining staff performs its internal technical review by looking at erosion control and the reclamation aspects of that, buffer zones, reclamation plan and operation plan. That staff drafts a mining permit and then sends it to Davis for review. (2015 T. pp. 150-153) Davis modifies such drafts, as

necessary, based on his experience. (2015 T. pp. 150-153) Such draft permits are then addressed during the public comment and internal hearing process sessions.

50. In this case, Davis and his staff followed the above-cited practice in reviewing the mining permit applications at issue. While Davis was involved throughout that process, Judy Wehner, Assistant Mining Specialist, primarily managed the review of these mining permit applications and modifications. (2015 T. p.152) Davis' staff had several meetings discussing different concerns or issues with the applications regarding the seven statutory criteria, discussed who were the experts on those topics, and which permits would cover those conditions. (2015 T. p. 178)

51. Davis and his professional staff's review of the applications included, but was not limited to, a review of the type of mining operation and its associated potential environmental impacts, review of the applicant's compliance history, the need for additional mandatory permits (structural fill permits and 401 water quality certification permits), and the financial assurance mechanisms required under the Mining Act. DEMLR also requested additional information from the applicant. (2015 T. p. 151)

52. As part of the investigation into the Brickhaven and Colon Road sites, Davis' mining staff also sent the applications to other State agencies such as the Division of Air Quality, the Division of Water Resources, and the NC Wildlife Resources Commission for review and comment based on each staff's expertise. (2015 T. pp. 150-153, 156, 171-172) Both the Division of Water Resources' Groundwater Section, and the Division of Waste Management employ hydrogeologists, while the Wildlife Resources Commission employs biologists. (2015 T. pp. 171-172).

53. DEMLR does not conduct an independent investigation of issues regarding the criteria for N.C. Gen. Stat. § 74-51(d)(2) such as groundwater issues. Instead, the various agencies who have resident experts provide DEMLR with their input and advise DEMLR if those agencies will require the applicant to obtain a permit from those agencies. DEMLR relies upon the other agencies' professional judgment, and conditions issuance of its [DEMLR] permit to the applicant on obtaining the other agencies' permits. (2015 T. pp. 171-173) DEMLR cross-references those other permits in its permit. Davis has confidence in his counterparts at those agencies, and their professional judgments when they say they have looked at all the issues, such as groundwater, leachate detection system and collection system, under that agency's purview. (2015 T. pp. 156-57, 172) DEMLR handles matters within their purview, such as "erosion control, stormwater, vegetation, slope angles, buffers." (2015 T. pp. 171-173). DEMLR followed that same process for the Colon road and Brickhaven Mine sites. (2015 T. p. 172)

54. For air quality, surface water quality, and groundwater quality criteria under N.C. Gen. Stat. § 74-51(d)(3), Davis and his staff reviewed erosion sedimentation control and stormwater measures such as the "engineering design on the sediment basins, diversion ditches, channels, if they're lined or unlined, the capacity of those basins to treat the surface water that it can be released" according to water quality standards." (2015 T. pp. 157-158) Additionally, they:

> [L]ook at the dust control system, such as watering roads for keeping fugitive dust down on roads, sprinkler systems on stockpiles, so, and that was also in the mining permit conditions.

(2015 T. pp. 157-158)

55. Mr. Davis personally did not examine hydrogeology in reviewing the modification of these mining permits, because he and his staff coordinated with the other divisions, primarily Waste Management, who looked at hydrogeology from the structural fill aspect in detail with the monitoring being done before, during, and after the mining activity. DEMLR deferred to DWM's expertise regarding the groundwater issues and sampling wells. Once DWM was okay with that aspect, then DEMLR would accept that under the mining permit as proper reclamation of that footprint. (2015 T. p. 155)

56. Regarding criteria in N.C. Gen. Stat. § 74-51(d)(4), Davis and his staff looked at the erosion sedimentation control plan, stormwater control around the perimeters, buffer zones, final slopes of the reclamation, the mine itself, if there was a pit to remain or a pond, and structural fill final slopes. They also performed a full review of the public health and safety on the mine site, and proper stabilization at reclamation. (2015 T. pp. 155-159)

57. In this particular case, there was a 50-foot buffer setback from the property line or permit boundary into the site before any perimeter roads or erosion control measures. The active mining and reclamation are proposed interior of that. (2015 T. pp. 159-160) Since there was no blasting at the site, there was no concern of any off-site impacts if the erosion sedimentation control retained sediment on the site before it reaches those buffers. (2015 T. pp. 159-160) Based on that, Davis opined that the 50-foot buffer around the mining was adequate protection of public health and safety. (2015 T. p. 160)

58. DEMLR did not consider the "cumulative impacts" with other facilities surrounding or nearby the Brickhaven and Colon Road sites, because the mines are self-contained, and DEMLR's authority is on the mine site. They did not look at neighboring dwellings, house, school, church, hospital, commercial or industrial buildings around the mine sites. DEMLR does not look at the cumulative impacts on any mine site. Instead, they try to deal with the environmental surface aspects of it on the mine through the mining permit. (2015 T. p. 160)

59. In determining the wetland issue, DEMLR generally determines if any streams are located on the property, provide a buffer along those, and provide erosion sedimentation control outside the buffer to keep sediment from going into the streams. Those streams are protected unless the applicant applies for and obtains a 401 and 404 permit to disturb those wetlands or flood plain areas. DEMLR grants a mining permit modification to a mining site in a flood plain only if the applicant has a 401 and 404 permit from the proper authorities. (2015 T. p. 161)

60. Here, DEMLR required the permittee [or permit applicant] to locate any wetlands existing within the mining permit footprint and have a buffer to protect those wetlands. That boundary was also required since the permittee was applying for a (1) 401 Water Quality Certification, and (2) a U.S. Army Corps of Engineers 404 Wetland Permit to disturb the wetlands during the life of the mine site. (2015 T. p. 161) Davis explained that you generally do not have mining in a flood plain or in a creek, unless there is an in-stream mining operation. (2015 T. p. 161) Therefore, as part of that process, DEMLR would only review the impacts in a flood plan if it applies within the mining permit boundary.

61. In this case, Mr. Davis attended both public hearings on these proposed modifications and read the public comments that were emailed to staff in the months before his decision. He also reviewed the file folder that contained all the comments that had been received by DEMLR. Before June 5, 2015, Davis reviewed the Hearing Officer's report, and some of the Hearing Officer's attachments, including the comments and PowerPoint presentation by Don Kovasckitz, the GIS person from Lee County. (2015 T. pp. 161-162)

62. In this case, the permit applicant proposed using backfill with coal ash structural fill in the subject mine pits and "continue to the footprint of what was already left behind from the prior mining." (2015 T. p. 163) From there, DEMLR and DWM conducted the dual permitting process. CAMA allows open pit mine reclamation as an alternative. The Mining Act is very open to types of reclamation that can be done and does not specify any type of structural fill. In fact, it can be any type of beneficial land use that an applicant or mine operator wants to propose. DEMLR may not approve all of them. It is up to the applicant to propose something Respondent feels is reviewable and approvable. (2015 T. pp. 163-64)

63. The Mining Act does not require public notice of a public hearing for permit modifications. However, the expedited permit provisions of CAMA do require permits that involve coal ash undergo the public notice process and a public hearing before a decision is made on the permits. (2015 T. p. 165) The Mining Act does not supersede local zoning regulations, so a mining permit anywhere in this State does not supersede the right for applicable local zoning. (2015 T. p. 165)

64. The timeliness of the permit process depends on whether the application is complete when Respondent receives it. If an application is complete when it comes in, DEMLR has 60 days by statute to decide to grant or deny the permit. The clock resets if DEMLR asks for additional information from the permit applicant. The applicant has 180 days to respond back to the Department. If the applicant does not respond timely, then DEMLR can grant or deny the mining permit based on the information it has in their hands. (2015 T. pp. 166-167)

65. In the final stages of permitting these applications, Mr. Davis checked with Mr. Mussler to confirm that DWM had all the information they needed from the applicant for "groundwater sampling or monitoring before, during and after the mine and

reclamation operation." (2015 T. pp. 179) Once Mussler confirmed he had everything he needed, Davis included a cross-reference in the mining permits requiring the applicant to follow CAMA, the structural fill, and listed the name of the cross-referenced permit so if there's a violation of the solid waste management structural fill permit, then it's a direct violation of the mining permit. (2015 T. pp. 179-180)

66. On June 5, 2015, Mr. Davis issued Respondent-Intervenor Green Meadow, LLC a mining permit modification permit No. 53-05 for the Colon Mine, and a mining permit modification, permit No. 19-25 for the Brickhaven No. 2 Tract "A" Mine. Both permits allowed a change in the method of reclaiming the mines by constructing structural fill from coal combustion by-products in accordance with the provisions of CAMA, and in accordance with the terms and conditions of the permit to construct and operate Colon Mine Structural Fill Permit, No. 5306-STRUC-2015 and the permit to construct and operate Brickhaven No. 2 Tract "A" Mine Structural Fill Permit, No. 1910-STRUC-2015.

67. At the 2015 hearing, Mr. Davis was not directly aware that several landowners around the existing Colon Road Mine site had "Do Not Drink" letters issued by the N.C. Department of Public Health. He was also unaware that Respondent was ever given any information that water contamination occurred while General Shale held their mining permits. However, if there was an allegation of that type, they [DEMLR] would take that matter seriously, talk with their Groundwater Division with Water Resources, and see if it was tied to the mine site itself or if it was some other contaminant source. (2015 T. p. 168)

68. To ensure that these mine sites would be used beneficially, DEMLR needed to make sure the line excavation, and all other aspects of the mining sites that were disturbed or affected by the mining, were stabilized. In Mr. Davis' opinion, "beneficial reuse of coal ash at these sites was an acceptable method of reclamation" for both the Brickhaven and Colon Mine sites. (2015 T. p. 169)

69. As to Claim B, Mr. Davis explained that the financial assurance required under the Mining Act of 1971 for mining permits allows an applicant the option of filing a blanket bond covering all its mining operations within the State for which the applicant holds a permit.

a. Pursuant to the rules regarding bonding requirements, the bond for mine reclamation is calculated at $500 per acre up to $5,000 per acre. (2015 T. p. 170) The Mining Commission uses its rules, a worksheet, and a schedule of costs to calculate the appropriate amount of bond an applicant must provide. (2015 T. p. 170)

b. Once the Mining staff determines the total amount of blanket bond has reached the $500,000 amount, which it did with these permit applications, and if the applicant has a good operating record, then a $500,000 blanket bond is considered a sufficient bond amount. In other words, Respondent's rules mandate that if the applicant has a good operating record, $500,000 is the maximum amount

of blanket bond Respondent could require an applicant to post. (2015 T. pp. 170, 186)

c. The rule also allows one bond to cover multiple sites rather than individual sites, so that a $500,00 bond can be considered a blanket bond covering one or more sites. (2015 T. p. 170)

70. In this case, Respondent accepted Respondent-Intervenor Green Meadow, LLC's required blanket bond of $500,000 since Green Meadow, LLC did not have any civil penalties assessed against it within the previous two years or a consecutive two-year period. (2015 T. pp. 170-171)

71. At the 2015 hearing, Davis opined that the Brickhaven and Colon Road Mine sites were suitable mine reclamation sites. (2015 T. p. 175-76) As a Professional Engineer with 28 years of experience in the area of mining permits, Davis opined that the terms of the modified mining permits for the Brickhaven and Colon Road Mines will be protective of human health and the environment based on several factors. These factors were the design of the facilities, the erosion sedimentation control around the sites, the permit conditions in DEMLR's issued permits, the Waste Management permits, and the 401 Water Resources permits for each site. (2015 T. pp. 175-176)

72. Davis opined that the fact that the Colon Mine was only 38% excavated was not a problem for Green Meadow's mining permit modification. Once Green Shale's mining permit was transferred to Green Meadow "as is," "there was a mining plan to mine the majority of the site beyond just the pits existing at the time of the permit transfer." (2015 T. p. 176) Yet, Davis acknowledged that "the same [mining] footprint was proposed in the modification," so Green Meadow was already at the site "excavating the same depth basically as the existing pits and ponds that were out there." (2015 T. pp. 176-77) Green Meadow was expanding the footprint of the mine and creating the lined cells that were proposed for the structural fill. (2015 T. pp. 176-77)

73. Additionally, the height of each site was shown in the mining permit applications, and on the mine and reclamation maps with cross-sections in the footprint, and on slope angles. Davis opined a height of the site at 50 feet higher than the ground level was not unusual. (2015 T. p. 177)

74. In Petitioner's applications for the structural fill permits at issue, a Slope Stability Analysis, performed by the computer program PCSTABL5M, showed the height of the structural fill site at the Brickhaven Mine and at the Colon Road Mine site was far more than just 50 feet higher than the ground level.

a. The Slope Analysis of the structural fill at the Brickhaven Mine Site showed:

> The cross-section analyzed extends from north to south along the north slope of the structural fill and represents a final CCP fill condition with a maximum elevation a final CCP [coal combustions product] fill condition with

> a maximum elevation of 260 feet at the top of the 4H:1V slope. After this slope break, the top of the structural CCP fill extends at a 2% slope to a maximum elevation of approximately 294 feet at the center of the CCP fill. (Amended B-2, Brickhaven Structural Fill Permit Application, Engineering Plan, p. 5) (Emphasis added)

b. Similarly, the Slope Analysis of the structural fill at the Colon Road Mine Site showed:

> The cross-section analyzed extends from north to south along the north slope of the structural fill and represents a final CCP fill condition with a maximum elevation of 320 feet at the top of the 4H:1V slope. After this slope break, the top of the structural CCP fill extends at a 2% slope to a maximum elevation of approximately 330 feet at the center of the CCP fill. (Amended A-2, Colon Road Structural Fill Permit Application, Engineering Plan, p. 5) (Emphasis added)

75. A preponderance of the evidence established that a mining permit is valid from the day the permit is issued until the day the permit expires. A mining permit is good for up to ten years, and pursuant to the Mining Act, may be renewed within the last two years of that permit's life. (2015 T. p. 181) A mining permit remains valid even if a mine becomes inactive for several months or several years. The permittee could reactivate or resume its mining operations of an inactive mine up until the date the mining permit expires. If a permittee renews its mining permit, then it could continue mining for another ten years. (2015 T. p. 181) Similarly, Respondent can still enforce the conditions of a mining permit on the mine operator if a mine is inactive but still permitted. (2015 T. p. 181)

76. Before November 2014, Respondent granted General Shale's request to release two areas from its mining permit at the Colon Road Mine site. As a result, those two areas were excluded from the Colon Road mining permit boundaries, and no coal ash could be placed on the areas that were released from such permit. (2015 T. p. 183)

77. At the 2015 hearing, Davis opined that Respondent does not see any difference between excavating and mining. (2015 T. p. 184) When Mr. Davis testified in 2015, Green Meadow was expanding the footprint of the previous mining to provide an excavation or open pit to place the cells for beneficial fill. They were also stockpiling material on the site to use for liners, and possibly cover. Per their mining permit, Green Meadow was permitted to haul material off site at any time during the life of that permit. (2015 T. p. 185) In Davis' opinion, Green Meadow's operation was a mining operation, not a structural fill operation. (2015 T. p. 185) Davis acknowledged he had not seen Green Meadow, LLC selling material at the site, although they have a permit to do so. (2015 T. pp. 184-185)

78. As of the 2015 hearing, Therese Vick was the Blue Ridge Environmental League ("BREDL") North Carolina Communities Campaign Coordinator.

EnvironmentaLEE and Chatham Citizens Against Coal Ash are members of BREDL and have representatives on the BREDL Board of Directors. Ms. Vick has worked with EnvironmentaLEE since 2012 and with Chatham Citizens since December 2014. (2015 T. pp. 190-92)

79. At the time of the December 2015 hearing, Ms. Vick's role at BREDL was that of a community organizer. She reviewed the permit applications in this case, quite a bit of EPA guidelines that were released in December 2015, and studies done by experts on environmental justice, leachate treatment, coal ash, and air quality issues. Vick prepared public comments and participated at the public hearings regarding the subject permits. She submitted many public comments, including but not limited to, those written by Dr. Fred Lee and Dr. Dennis Lemly, to Respondent Agencies about the permits at issue.

80. At the 2015 hearing, Ms. Vick voiced concern over the expediency with which Respondent acted in reviewing and issuing the subject permit decisions. However, she conceded that her understanding of how the permit decisions were made in this case was "certainly not clear." (2015 T. 212) Ms. Vick holds an associate degree in Human Services and Psychology, but no expertise in environmental effects on landfills or landfill liners. She solicited and submitted comments in a report from Dr. Lee, Dr. Jones-Lee, and from Dr. Lemly regarding the proposed permits, because she knew those doctors possessed the expertise to look at the issues about which she and the other Petitioners were concerned. (2015 T. pp. 213-216)

81. In 2015, Don Kovasckitz was the Director for the Lee County Geographic Information Services (GIS) Strategic Services. Mr. Kovasckitz's office visualizes data through GIS and looks at "layers, anywhere from street center lines, soils, parcel data, streams, wetlands." (2015 T. p. 227) "If it has any geographical connotation for the [Lee] County," Lee County GIS Strategic Services maps it using the GIS. (2015 T. p. 227) Mr. Kovasckitz is certified by the GISC Council.

82. Pursuant to a request by the Lee County Commissioners, Mr. Kovasckitz reviewed the permit applications for the Colon Road coal ash disposal facility, compiled a PowerPoint presentation, and presented such to the Lee County Commissioners. (Pet. Ex. 6) The purpose of his presentation was to show the County Commissioners the location where the actual mine reclamation would occur on the Colon Road disposal site, and what the reclamation would look like. (2015 T. p. 228) Specifically, Kovasckitz's digital GIS mapping was used to:

(1) determine if Green Meadow's actions on the subject site constituted actual mine reclamation,
(2) show where the reclamation was going to occur, and
(3) demonstrate what the site would look like after all reclamation was complete.

(2015 T. pp. 228 – 232; Pet. Ex. 6) In his presentation, Kovasckitz established how the Colon Mine would be "reclaimed by encapsulating CCPs in a lined containment in order to re-establish the mine contours to a useful design." (Pet. Exs. 6, 7) Kovasckitz also made an updated presentation to the Lee County-Sanford Environmental Affairs Board. (2015 T. p. 229; Pet. Ex. 7)

83. With the GIS mapping, Mr. Kovasckitz explained the history of the mined areas of the Colon Road site since 1950, noting that the Colon Mine closed in 2008. He demonstrated the following opinion regarding the definition of reclamation: (2015 T. p. 231, 234)

a. Mr. Kovasckitz determined that of the total 118-plus acres that will be filled with coal ash at the Colon Road site, 29% has been excavated, and 71% was unexcavated. (2015 T. p. 234)

b. Based on the permittee's reclamation plan and accepted GIS practices, Kovasckitz created a topological map to demonstrate the appearance of Colon Road after reclamation is completed. The site's topology starts at 330 feet above mean sea level, grades down 2% to 320 feet above mean sea level, then grades down 4-to-1 to 270 feet above mean sea level on the east side of the site. (2015 T. pp. 235-36)

c. After Mr. Kovasckitz's presentation to the Lee County Commissioners, Kovasckitz looked at the hydrogeological study, conducted by Buxton Engineering, for the permittee's reclamation plan that was included in the permit application. He compared the permittee's drawings in their facility plan and their reclamation plan with Buxton Engineering's hydrogeological study, the FEMA maps, and his GIS drawing. He examined the well depth, test wells, flood plain, wetlands and streams on the Colon Mine site. Kovasckitz's established how the permittee's drawings failed to show a "finger of the flood plain that extends into a retention pond" in the southwest corner of cell 1. Whereas, the FEMA maps, Kovasckitz' GIS drawing, and the Buxton Engineering hydrogeological study all showed a retention pond in the southwest corner of cell 1. (2015 T. pp. 242-44; Pet. Exh. 7)

84. At hearing, Mr. Kovasckitz admitted he was neither a professional engineer nor a mining specialist. He also acknowledged that he did not submit his comments and presentation to the Respondent agencies during the public comment period for the subject permits. He had no knowledge if Therese Vick said, at this contested case hearing, that she submitted his comments to the Respondent agencies during the public comment period. (2015 T. p. 244)

85. Kovasckitz conceded that the maps/drawings from FEMA, Buxton Engineering, and Kovasckitz, of the Colon Road site, all came from the same source, and therefore, would naturally agree. He also conceded that he did not know the source of the permittee's drawings/maps that were different from the other three drawings. He

agreed he wouldn't be surprised if those drawings were conducted by an actual surveyor on the ground and thus, differed from Kovasckitz's GIS drawings. (2015 T. pp. 252-53)

86. On the morning of Tuesday, December 8, 2015, after approximately one and one-half days of testimony, Petitioners' counsel advised the Undersigned that they "would rest this portion of our case." (2015 T. p. 254) Petitioners' counsel did not explain what he meant by resting "this portion of our case." (2015 T. p. 254)

87. Respondents and Respondent-Intervenors renewed their Motions for Summary Judgment based on the argument that Petitioners had failed to meet their burden of proof and had not presented any evidence to show that they had a right to relief. (2015 T. pp. 258-269) Petitioners responded by oral argument. (2015 T. pp. 269-273).

88. After Petitioner rested its case in part, and in response to the Undersigned's questions, Petitioners' counsel confirmed that the petition for this contested case was filed on July 6, 2015, and the Notice of Hearing, scheduling the hearing in this case for December 7-11, 2015, was mailed to the parties on October 27, 2015. (2015 T. p. 273) The OAH's official record for this case showed Petitioners' counsel received the Notice of Hearing setting the hearing on the merits of the case on October 30, 2015.

89. The Undersigned summarized, for the record, the Prehearing Conference with the parties' counsels at which Petitioners' counsel advised that he was not prepared to go forward on Claims C and G because its two expert witnesses were unavailable to testify, and thus, desired a continuance of the hearing. Petitioners' counsel advised that he was unprepared to go forward that day even after the Undersigned offered Petitioners use of this Tribunal's in-house video/audio conferencing system. Petitioners' counsel replied:

> [W]e haven't contacted them about being available later on this week. We don't know what the cost would be for Dr. Lee. And I mean the reason that they're not here this week is Dr. Lee, was, you know, as an expert traveling across the country, was fairly costly. And before the decisions were made on the motions for summary judgment, we couldn't afford to have him sit around and maybe speak – maybe not testify this week. And Dr. Lemly would need an affidavit and try to work out a time frame.

(2015 T. p. 274).

90. The Undersigned denied Petitioners' request to continue the case until January 2016 to present expert testimony. Petitioner had 39 days' notice that the hearing on the merits of the case would be conducted the week of December 7-11, 2015 and did not file a Motion to Continue the hearing. Neither did Petitioner provide "good cause" why its case should be continued until January 2016.

91. The Undersigned advised the parties that she would take the Motions for Summary Judgment under advisement and decide the case based upon the evidence presented at hearing.

92. On January 11, 2016, thirty-four days after the contested case hearing in this case was concluded, Petitioners filed a Second Motion to Amend Petition, attempting to add a claim based on a January 6, 2016 newspaper article that described discussions between Governor Pat McCrory, a Duke Energy official, and the Secretary of the Department of Environmental Quality that allegedly occurred on June 1, 2015. On January 19, 2016, the Undersigned issued an Order Staying this case and tolling all statutory time-frames, including the Undersigned's issuance of the Final Decision in this case, pending OAH's receipt of Respondent's Responses to Petitioners' Motion.

93. On February 10, 2016, after reviewing Petitioners' Motion and the other parties' responses, the Undersigned denied Petitioners' Second Motion to Amend Petition for being untimely filed and denied Respondents' Motion to Summary Judgment.

94. On May 5, 2016, the Undersigned issued the Final Decision in this contested case. Based upon the stated basis at the hearing, upon which Respondent moved for Summary Judgment, the Undersigned converted Respondents' Summary Judgment Motion to a Motion for Involuntary Dismissal, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, and DISMISSED Petitioners' contested case. The Undersigned ruled that Petitioners failed to meet its burden of proof, in its case-in-chief, to show (1) it had a right to relief, and (2) that Respondent violated the criteria in N.C. Gen. Stat. § 150B-23 in issuing the subject permits.

Contested Case Appealed

95. Petitioners appealed the Undersigned's Final Decision to Chatham County Superior Court, after which Superior Court Judge Carl Fox affirmed the Final Decision relating to use of areas already mined or otherwise excavated but reversed the Final Decision to areas not already mined or otherwise excavated. Upon appeal of Judge Fox's decision to the N.C. Court of Appeals, the Court of Appeals issued an Opinion, on April 3, 2018, remanding this case to the Office of Administrative Hearings to allow Respondents and Respondent-Intervenors an opportunity to present their cases. *See EnvironmentaLEE v. N.C. Dep't of Env't & Nat. Res.*, 813 S.E.2d 673 (N.C. Ct. App. 2018).

96. On November 7, 2018, the Undersigned issued an Order granting Petitioners' Motion to Stay this contested case and granting Petitioners' Request for a Mediated Settlement Conference. The OAH proceedings were stayed until March 1, 2019 to allow the parties an opportunity to engage in mediated settlement discussions and for issuance of a decision by Respondent regarding the closure of remaining coal ash basins in North Carolina which might impact the use of the Colon facility for coal ash disposal.

97. On March 1, 2019, the parties filed a Joint Status Report with OAH requesting a continued Stay of this matter to allow time for DEQ to make certain regulatory

decisions regarding the disposition of coal ash in the State of North Carolina. The undersigned issued an Order Continuing the Stay.

98. On April 1, 2019, DEQ ordered the excavation of all remaining coal ash impoundments in North Carolina. On April 4, 2019, the parties advised the Undersigned that they had reached an impasse such that settlement was not possible at this time and they believed it necessary to proceed with the hearing of this case.

99. On July 3, 2019, Petitioners filed a Motion for Voluntary Dismissal without prejudice. After reviewing such Motion, along with Respondent and Respondent-Intervenor's responses thereto, the Undersigned Denied Petitioner's Motion on July 17, 2019. On July 17, 2019, Respondent-Intervenor filed a Motion for Involuntary Dismissal of this contested case with prejudice.

August 6, 2019 Hearing on Remand

100. On August 6, 2019, the Undersigned resumed the hearing in this contested case at which Respondents presented its case-in-chief, and Petitioners presented rebuttal evidence. Respondent-Intervenors did not present any evidence.

101. Toby Vinson, Chief of Program Operations at DEMLR, testified at this hearing. Mr. Vinson has been Chief of DEMLR's Program Operations since 2014 and had worked for DEMLR's mining program for fifteen years. Mr. Vinson has reviewed hundreds of mining permits during his employment with DEMLR. (2019 T. p. 47) In his current role, Vinson conducts a "summary final review" of all the information staff has received for a mining permit application and a draft permit before such application is sent to the Director for a comprehensive final review. (2019 T. p. 48)

102. Before issuing a mining permit, DEMLR does not look at what a permittee/applicant will ultimately do with the mined materials. Neither is there a requirement in the Mining Act that mined materials be sold for profit. (2019 T. p. 48)

103. While the applicant must file a reclamation plan along with the permit application or modification request, it is not unusual to have a reclamation plan for an area that has not yet been mined. The reclamation plan can change at any time through a mining permit modification but is still required to be filed with Respondents before mining [begins]. (2019 T. p. 52)

104. The area of a mine site that requires reclamation under the Mining Act includes all land affected by the mining activity, all disturbed areas within the permitted boundary, and at least a minimum 50-foot buffer around the affected land. Respondent does not interpret "affected land" to apply only to the excavated area at the mine site. In addition, there is no requirement that reclamation be limited to the excavated areas. (2019 T. pp. 50-51, 56-57) Reclamation is required for all disturbed areas within the permitted boundary. If an operator disturbs land outside the permitted boundary, he is required to submit a modification for that disturbed area or immediately reclaim it. (2019

T. pp. 56-57) The disturbed areas pertaining to mining activity would include the pit that was excavated, stockpile waste, and any processing plants, office areas, roads, erosion-control measures that are left in place. (2015 T. pp. 52-53) "Once a permit is issued for a mine, it's a mine until it's reclaimed." (2015 T. pp. 54-55)

105. DEMLR does not consider the extent of the permitted mine that has been previously excavated, under the old mining permits, to be relevant to modification of the subject mining permits or reclamation plans. Although, DEMLR will look at the previously-excavated areas to determine what will be the final mining and final reclamation [areas]. (2019 T. pp. 57-58, 78) The existence of unmined areas within a permitted mining footprint simply means there remains mineable land under the mining permit. (2019 T. pp. 57-58)

106. During the hearing, Mr. Vinson was asked if certain portions of the structural fill used to reclaim the Colon Mine would be up to 50 feet higher than surrounding grade, then would that have any bearing on Respondent's decision to approve the reclamation plan. Vinson opined that "the only bearing that would have would be to make sure that whatever structures and/or slopes, that final grade was put at are stable . . . and/or can be stabilized." (2019 T. p. 58)

107. Mr. Vinson agreed with Mr. Davis that the Mining Act does not require reclamation of the affected land or restore the land to its original gradient or elevation and that DEMLR has never interpreted reclamation in this way. (2019 T. pp. 58, 63) Instead, restoration means returning the site to a condition where the surface and any slopes are stable to prevent erosion. (2019 T. pp. 58, 63)

108. Vinson opined that an old clay mine is a good place to put structural fill because it will "reduce the permeability of any flow." (2019 T. p. 59). In Vinson's opinion, reclamation by structural fill at issue here was similar to reclamation by landfill that has been approved at other mine sites in North Carolina. (2019 T. pp. 55-56) Vinson also opined that the reclamations associated with the permits at issue meet the reclamation requirements of the Mining Act. (2019 T. p. 59)

109. Nonetheless, Mr. Vinson admitted that he never visited either the Brickhaven or Colon sites before DEMLR issued the mining permits in this case. His primary familiarity with the sites was through hearsay from staff. (2019 T. p. 61)

110. Before DEMLR issued the subject amended mining permits, Vinson reviewed the preliminary erosion control plan for proposed conditions and existing conditions of the mining sites. "Sedimentation and erosion control" are primary responsibilities of Vinson's section. (2015 T. p. 60)

111. Before issuance of the amended mining permits at issue, Vinson did not review the permit applications for the extent of prior excavation at either site (2019 T. p. 77). The Raleigh regional engineer would have completed an in-depth review of existing conditions and proposed conditions with erosion control measure. (2019 T. p. 77)

112. In Vinson's opinion, "surface gradient restoration" would imply that whatever slope is left would be stabilized. It does not mean that a surface would be restored to pre-existing conditions as "[i]t's never been interpreted as that." (2019 T. pp. 62-63) He further noted that "surface gradient" would be the surface of the land at completion of mining and reclamation. Restoration would be to put [land] back in a serviceable condition of stable land, whether that is by vegetation, grass, trees, water, structural fill, retaining wall, or any construction methods that would render a stable final slope to prevent sedimentation and erosion. (2019 T. pp. 62-63)

113. Respondent-Intervenors did not present any evidence at the August 6, 2019 hearing.

114. On rebuttal, Petitioner presented the testimony of Thad Valentine, a DEMLR employee since 2006 who worked in sediment erosion control, mining, dam inspections and reviews, and stormwater. Mr. Valentine conducted an initial inspection of the Brickhaven Mine site in 2015. (2019 T. pp. 90-91) When he visited that site, Valentine observed grading had just started. At one of the inspections, he observed a pond being built, but not yet stabilized. (2019 T. pp. 90-91)

115. Mr. Valentine inspects a couple of hundred of sites each year. At the time of the August 2019 hearing, he had limited recollection of his visit to the Brickhaven Mine site in 2015. (2019 T. pp. 89-94) He could not recall if he inspected that site before or after the issuance of the permits in this case. (2019 T. p. 90) He was unaware of a water supply well on the site. He opined that the presence of a water supply well on the site would not impact his inspection one way or the other for the mining permit. (2019 T. p. 91).

CONCLUSIONS OF LAW

1. All parties are properly before the Office of Administrative Hearings, and the Office of Administrative Hearings has jurisdiction over the parties and the subject matter. All parties have been correctly designated, and there is no question as to misjoinder or non-joinder.

2. To the extent the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

Parties

3. Petitioners EnvironmentaLEE and Chatham Citizens Against Coal Ash Dump are chapters of the Petitioner Blue Ridge Environmental Defense League Inc. The Blue Ridge Environmental Defense League Inc. (BREDL) is a non-profit organization focusing on environmental issues.

4. Petitioners have the burden of proving that the Respondent agencies substantially prejudiced Petitioners' rights and that Respondents either exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily and capriciously, or failed to act as required by law or rule, in violation of N.C. Gen. Stat. § 150B-23, in issuing the permits at issue.

5. Petitioners and Respondent-Intervenors are "persons" as defined by N.C. Gen. Stat. § 130A-2(7).

6. Respondent DWM is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 and vested with the statutory authority to enforce the State's environmental pollution laws, including laws enacted to regulate solid waste. The North Carolina General Assembly mandates that Respondent DWM promote and preserve an environment that is conducive to public health and welfare by establishing a statewide solid waste management program.

7. Respondent DEMLR is a State agency established pursuant to N.C. Gen. Stat. §§ 143B-279.1 through 143B-344.23 and vested with the statutory authority to enforce State's environmental pollution, including regulating mining operations. The North Carolina General Assembly mandates that Respondent DEMLR promote and preserve an environment that is conducive to public health and welfare by establishing a statewide mining program.

Permits Issued

8. On June 5, 2015, DWM issued both Respondent-Intervenors individual permits, pursuant to N.C. Gen. Stat § 130A-309.219(a)(2), to construct and operate a structural fill at the Brickhaven Mine site in Chatham County, and at the Colon Road Mine site in Lee County. Both the Brickhaven and Colon Mine sites consist of projects using coal combustion products as structural fill involving the placement of 8,000 or more tons of coal combustion products per acre, or 80,000 or more tons of coal combustion products in total per project.

9. On June 5, 2015, DEMLR issued Respondent-Intervenors Green Meadow, LLC modified mining permits for the Brickhaven Mine site and the Colon Road Mine site. Both permits changed the mine reclamation method authorized by the mining permits to allow mine reclamation by constructing structural fill using coal combustion byproducts in accordance with the provisions of CAMA and the terms and conditions of the two structural fill permits issued by DWM.

Applicable Statutes and Regulations

Coal Ash Management Act of 2014 (CAMA)

10. On September 20, 2014, the North Carolina General Assembly passed CAMA (N.C. Gen. Stat. § 130A-309.200 *et seq.*, Article 9, Part 2I) as a comprehensive

management plan for the cleanup of coal ash, and the closure of coal ash ponds. Subpart 3 of N.C. Gen. Stat. § 130A, Article 9, Part 2I (N.C. Gen. Stat. § 130A-309.218 *et seq*.,) addresses use of coal combustion products as structural fill by detailing the permitting, construction, operation, and closure of large projects using coal ash as structural fill to reclaim open pit mines in North Carolina.

11. N.C. Gen. Stat. § 130A-309.219(a)(2) requires that projects using coal combustion products as structural fill involving the placement of 8,000 or more tons of coal combustion products per acre or 80,000 or more tons of coal combustion products in total per project receive an individual permit from DWM.

12. N.C. Gen. Stat. § 130A-290(35) defines "solid waste." Excluded from that definition are coal combustion products that are beneficially used, including use for structural fill. See N.C. Gen. Stat. §§ 130A-290(2b) and 130A-309.201(4). Reading this statutory exclusion in combination with the definitions in N.C. Gen. Stat. § 130A-309.201, it is clear and unambiguous that the General Assembly intended that beneficial use of coal combustion products as structural fill is not the same as, and thus, should not be regulated like, solid waste landfills.

13. N.C. Gen. Stat. § 130A-309.201 provides, "Unless a different meaning is required by the context, the definitions of G.S. 130A-290 and the following definitions apply throughout this Part." N.C. Gen. Stat. § 130A-309.201 defines the following terms:

> (1) 'Beneficial and beneficial use' means projects promoting public health and environmental protection, offering equivalent success relative to other alternatives, and preserving natural resources . . .
>
> (11) 'Open pit mine' means an excavation made at the surface of the ground for the purpose of extracting minerals, inorganic and organic, from their natural deposits, which excavation is open to the surface . . .
>
> (14) 'Structural fill' means an engineered fill with a projected beneficial end use constructed using coal combustion products that are properly placed and compacted. For purposes of this Part, the term includes fill used to reclaim open pit mines . . .
>
> (15) 'Use or reuse of coal combustion products' means the procedure whereby coal combustion products are directly used as either of the following:
>
> a. As an ingredient in an industrial process to make a product, unless distinct components of the coal combustion products are recovered as separate end products.

b. In a function or application as an effective substitute for a commercial product or natural resource.

(Emphasis added).

14. N.C. Gen. Stat §§ 130A-309.219(b)(1)d. and (b)(2) further require that projects using coal combustion products as structural fill involving the placement of 8,000 or more tons of coal combustion products per acre or 80,000 or more tons of coal combustion products in total per project provide:

> [A] Toxicity Characteristic Leaching Procedure analysis from a representative sample of each different coal combustion product's source to be used in the project for, at a minimum, all of the following constituents: arsenic, barium, cadmium, lead, chromium, mercury, selenium, and silver.

15. N.C. Gen. Stat § 130A-309.220 describes the design, construction, and siting requirements for projects using coal combustion products for structural fill. N.C. Gen. Stat § 130A-309.220(b) explains the specific requirements for the liners, leachate collection system, cap, and groundwater monitoring system required for large structural fills with (b)(1) specifically requiring a base liner consist of one of two optional designs: "a. a composite liner utilizing a compacted clay liner or b. a composite liner utilizing a geosynthetic clay liner." N.C. Gen. Stat § 130A-309.220(b)(1) a.

16. N.C. Gen. Stat § 130A-309.221 explains the financial assurance requirements for large projects using coal combustion products for structural fill. The applicant for a permit to construct or operate a structural fill must establish:

> [F]inancial assurance that will ensure that sufficient funds are available for facility closure, post-closure maintenance and monitoring, any corrective action that the Department may require, and to satisfy any potential liability for sudden and nonsudden accidental occurrences, and subsequent costs incurred by the Department in response to an incident at a structural fill project, even if the applicant or permit holder becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State.

N.C. Gen. Stat § 130A-309.221(a).

17. N.C. Gen. Stat § 130A-294(a)(4) c.9. requires DWM "deny an application for a permit for a solid waste management facility" if:

> The cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community protected by Title VI of the federal Civil Rights Act of 1964.

N.C. Gen. Stat § 130A-294(a)(4) c.9.

18. On April 17, 2015, the Coal Combustion Disposal Rule ("CCR Rule") of the federal Environmental Protection Agency ("EPA") was published in the Federal Register. The purpose of this rule was to establish "nationally applicable minimum criteria for the safe disposal of coal combustion residual in landfills and surface impoundment." 80 Fed. Reg. 74, 21303. The CCR Rule defined a "CCR landfill or landfill" as "an area of land or an excavation that receives CCR and which is not a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave." 40 CFR § 257.53.

19. Since the CCR Rule was not effective until October 19, 2015, four months after Respondents issued the subject permits in this contested case, the CCR Rule did not apply to the facts and subject permits of this contested case.

The Mining Act of 1971

20. N.C. Gen. Stat. § 74, Article 7 constitutes the Mining Act of 1971 and regulates mining and reclamation of mined lands in this State. In N.C. Gen. Stat. § 74-47, the General Assembly explicitly provides that:

> . . . the extraction of minerals by mining is a basic and essential activity making an important contribution to the economic well-being of North Carolina and the nation. Furthermore, it is not practical to extract minerals required by our society without disturbing the surface of the earth and producing waste materials, and the very character of certain surface mining operations precludes complete restoration of the land to its original condition … (and) finds that the conduct of mining and reclamation of mined lands as provided by this Article will allow the mining of valuable minerals and will provide for the protection of the State's environment and for the subsequent beneficial use of the mined and reclaimed land.

21. N.C. Gen. Stat. § 74-49 defines the terms, as used or referred to in The Mining Act, unless a different meaning clearly appears from the context of The Mining Act. Among those terms, N.C. Gen. Stat. § 74-49(7) defines what does and does not constitute "mining." "Mining means any of (i), (ii), or (iii) as listed in §74-49(7)," but:

> 'Mining' does not include: . . .
>
> d. Excavation or grading when conducted solely in aid of on-site farming or of on-site construction for purposes other than mining . . ."

22. N.C. Gen. Stat. § 74-49(12) defines "reclamation" as "the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area." It further states: "[B]oth the need for and the practicability of reclamation will control the type and degree of reclamation in any specific instance, ..."

23. N.C. Gen. Stat. § 74-49(13) explains that the requirements of a "reclamation plan" must be submitted by the operator and approved by DEMLR before reclamation of the affected land commences. Such plan shall include, but not be limited to:

a. Proposed practices to protect adjacent surface resources;
b. Specifications for surface gradient restoration to a surface suitable for the proposed subsequent use of the land after reclamation is completed, and proposed method of accomplishment;
c. Manner and type of revegetation or other surface treatment of the affected areas;
d. Method of prevention or elimination of conditions that will be hazardous to animal or fish life in or adjacent to the area;
e. Method of compliance with State air and water pollution laws;
f. Method of rehabilitation of settling ponds;
g. Method of control of contaminants and disposal of mining refuse;
h. Method of restoration or establishment of stream channels and stream banks to a condition minimizing erosion, siltation, and other pollution;
i. Maps and other supporting documents as may be reasonably required by the Department; and
j. A time schedule that meets the requirements of G.S. 74-53.

See also N.C. Gen. Stat. § 74-53.

24. N.C. Gen. Stat. § 74-52 lists the basis upon which a mining permit may be modified. N.C. Gen. Stat. § 74-54 and 15A NCAC 05B .0103 explain the requirements for a bond, and the necessary calculations to determine the amount of the bond. Specifically, 15A NCAC 05B .0103(e) requires that once a determination is made that the total amount of a blanket bond has reached the $500,000 amount, and the applicant has a good operating record, then the amount of a $500,000 blanket bond is considered sufficient to reclaim all sites, and "no additional reclamation bond money is needed." 15A NCAC 05B .0103(e).

Structural Fill for Mine Reclamation (Claim A)

25. When Respondents issued the structural fill permits and modified mining permits in this case, "open pit mines" existed within the boundaries of the Brickhaven and Colon Road Mine facilities and were "excavations made at the surface of the ground" and "open to the surface." While CAMA defines the essential terms "open pit mines," "structural fill" and "beneficial use," it does not define the terms "to reclaim open pit mines" or "reclamation" of an open pit mine. Therefore, to determine what is reclamation of open pit mines with coal combustion products as structural fill, we must look to the legislative intent and plain language of CAMA, and The Mining Act's role in that determination.

26. The primary goal of statutory interpretation is to ensure that the legislative intent and purpose of the legislation is achieved. *Electric Supply Co. v. Swain Electrical Co.,* 328 N.C. 651, 403 S.E. 2d 291 (1991). "An analysis using the plain language of the statute and the canons of construction must be done in a manner which harmonizes with the underlying reason and purpose of the statute." *Id.*

27. The court must first look to the plain language of the statute itself and determine whether it is clear and unambiguous. *Fowler v. Valencourt*, 334 N.C. 345, 435 S.E. 2d 530 (1993). If, and only if, the statute is ambiguous on a specific issue, then the court looks at whether the agency's interpretation is a "permissible construction of the statute." *County of Durham v. N.C. DENR,* 131 N.C. App. 395, 507 S.E.2d 310 (1998).

28. Our courts also recognize that "to determine the legislative's intent, statutory provisions concerning the same subject matter must be construed together and harmonized to give effect to each other." *Cape Hatteras Elec. Membership Corp. v. Lay,* 201 N.C. App. 92, 708 S.E.2d 399 (2011).

29. Here, both CAMA and the Mining Act concern the same subject matter of regulating mining and mining reclamation. CAMA and the Mining Act also share common purposes: (1) protection of the general welfare, health, safety, and property rights of the citizens of our State, and (2) providing a subsequent beneficial use of the affected land by mining reclamation. *See* N.C. Gen. Stat. § 130A-309.220(a)(1). *See also* N.C. Gen. Stat. § 74-47 (proper reclamation of mined land is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety, beauty, and property rights of the citizens of the State).

30. While CAMA does not define "reclamation" or "reclaim," The Mining Act explicitly defines "reclamation" as: "the reasonable rehabilitation of the affected land for useful purposes, and the protection of the natural resources of the surrounding area." N.C. Gen. Stat. § 74-49(12). Reclamation can only be performed on "affected land." N.C. Gen. Stat. § 74-49(13). "Affected land" is expressly defined as:

> [T]he surface area of land that is mined, the surface area of land associated with a mining activity so that soil is exposed to accelerated erosion, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plant, stockpiles, nonpublic roads, and settling ponds.

N.C. Gen. Stat. § 74-47(13). Further, N.C. Gen. Stat. § 74-48 explicitly states that "the conduct of mining and reclamation of mined lands as provided by this Article" will allow the mining of valuable minerals and will provide "for the subsequent beneficial use of the mined and reclaimed land."

31. In this case, Respondent DEMLR interpreted "affected land" at the Mine sites to encompass both already excavated areas and not yet excavated areas as existed when Respondent issued the subject permits. (2019 T. pp. 50-51, 56-57). Respondent

DEMLR reasoned that the purpose of reclamation, under the Mining Act, is to "reclaim the mined area and its adjacent areas, anything affected by the mine operation, to a suitable use so that it's stable and it protects groundwater and surface water quality." (2015 T. p. 143) As a result, DEMLR issued the subject permits to allow coal combustion products to be placed not only in the "open pit mine" areas but on top of previously unexcavated areas as part of the "affected land" at both Mine sites.

32. At the time of permitting, only twenty-nine percent (29%) of the Colon Mine site had been an excavated open pit mine and that seventy-one percent (71%) was never excavated. (2015 T. p. 234). Similarly, the site map included in the permit application for the Brickhaven Mine site showed a large previously-excavated area at the time of application along with significant undisturbed areas on that parcel. (Pet. Ex. 9)

33. However, neither DWM nor DEMLR took any steps to determine the size or scope of the excavations "open to the surface." Mr. Vinson never visited either the Brickhaven or Colon sites before DEMLR issued the mining permits. Neither did Vinson review the permit applications, before DEMLR issued the amended mining permits, for the extent of prior excavation at either site. (2019 T. p. 77) His primary familiarity with the sites was through hearsay from staff. (2019 T. p. 61) Similarly, DWM's Mussler could not describe what part of the site had been excavated, and had "no idea" how big the actual open pit at the Colon Road site was but could have determined this if he had wanted to know. (2015 T. p. 96).

34. DEMLR's Davis opined that the fact that the Colon Mine was only 38% excavated was not a problem for Green Meadow's mining permit modification. He opined that once Green Shale's mining permit was transferred to Green Meadow "as is," "there was a mining plan to mine the majority of the site beyond just the pits existing at the time of the permit transfer." (2015 T. pp. 169, 176)

35. North Carolina courts will only defer to an agency's interpretation of a statute that it is authorized to administer if its interpretation is "reasonable and based on a permissible construction of the statute. *Blue Ridge Healthcare Hosps. Inc. v. N. Carolina Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Healthcare Planning & Certificate of Need Section*, 808 S.E.2d 271, 276–77 (N.C. Ct. App. 2017), *review denied sub nom*, *Blue Ridge Healthcare Hosps., Inc. v. NC Dep't of Health & Human Servs., Div. of Health Serv. Regulation, Healthcare Planning & Certificate of Need Section*, 370 N.C. 382, 807 S.E.2d 567 (2017).

36. Here, Petitioners demonstrated by a preponderance of the evidence that Respondents' interpretation of the statutes at issue was unreasonable and not based on a permissible construction of the statutes at issue. First, the legislative intent behind CAMA precludes Respondent's statutory interpretation that "affected land" includes land not previously excavated or mined. CAMA was designed to, among other things, "prohibit construction of new or expansion of existing coal combustion residuals surface impoundments . . ." 2014 N.C. Sess. Laws 122, 2013 N.C. SB 729. A "coal combustion residuals surface impoundment" is a depressed or excavated area that is designed to

hold coal combustion waste. N.C. Gen. Stat. § 130A-309.201(6). CAMA was specifically enacted to prevent the creation of new coal ash waste dumping grounds. Therefore, allowing coal ash as structural fill on areas not previously mined or excavated violates this legislative intent and thus, is an impermissible construction of CAMA.

37. Second, the "affected land" at both Mine sites was not a "reasonable rehabilitation of the affected land for useful purposes" as required by N.C. Gen. Stat. § 74-49(12). Since the permits at issue were the first permits issued for coal ash as structural fill in mine reclamation in North Carolina, neither DEMLR nor DWM had prior experience in actually implementing its interpretation of The Mining Act along with the requirements of CAMA. Although, Mr. Davis had permitted landfills in mines before. In permitting landfills used as mine reclamation, Mr. Davis acknowledged that a height of the [reclaimed] site at 50 feet higher than the ground level was not unusual. (2015 T. p. 177) Mr. Vinson opined that portions of the structural fill used to reclaim the Colon Mine up to 50 feet higher than surrounding grade would only have any bearing on the final grade and stability of the structures or slopes on the Mine sites. (2019 T. p. 58)

38. However, the structural fill areas at the Brickhaven Mine site and the Colon Road Mine site far exceeded the 50-foot height at other sites Respondents have approved. The **maximum elevations** at the Brickhaven Mine site ranged from **260 feet at the top** of the 4H:1V slope to approximately **294 feet** at the center of the structural fill. (Amended B-2, Brickhaven Structural Fill Permit Application, Engineering Plan, p. 5) (Emphasis added). Similarly, the structural fill at the Colon Road Mine Site showed a "final CCP fill condition with a **maximum elevation of 320 feet** at the top of the 4H:1V slope," and after the slope break, "the top of the structural CCP fill extends to a **maximum elevation of approximately 330 feet at the center** of the CCP fill." (Amended A-2, Colon Road Structural Fill Permit Application, Engineering Plan, p. 5) (Emphasis added). Respondents failed to justify how reclaimed land at those heights was (1) a "reasonable rehabilitation" of the affected land or (2) provided for a "subsequent beneficial use of the mined and reclaimed land" other than to dispose of coal ash. Therefore, Respondent's interpretation that "affected land" included land not previously excavated at each Mine site was not reasonable or a permissible construction of N.C. Gen. Stat. §§ 74-49(1) or 74-49(12).

39. Any excavation made on site for the sole purpose of disposing of coal ash, does not constitute structural fill "to reclaim open pit mines" within the meaning of N.C. Gen. Stat. § 130A-309.201(11) and (14).

40. Based on the above reasoning, Respondents substantially prejudiced its rights, and acted erroneously, exceeded its authority or jurisdiction failed to use proper procedure by issuing structural fill permits to reclaim "open pit mines" that included areas that have never been mined by failing to make any assessment of the scope and location of open pit mine excavations on each site at the time of permitting.

41. To the extent that the structural fill permits at issue in this case allow for the placement of coal combustion products in areas excavated solely for the purpose of

disposing of coal combustion products, and not "for the purposes of extracting minerals," DWM exceeded its authority under the statute, and such permits are void.

42. To the extent that the Mining Permits were modified to allowed "reclamation" of areas not previously excavated for, "for the purposes of extracting minerals," DWM exceeded its authority under the statute, and such permits are void as to the areas not previously mined.

Requirements for Financial Assurance (Claim B)

43. N.C. Gen. Stat. § 130A-309.221 sets out the financial assurance requirements for large projects using coal combustion products for structural fill. The applicant for a permit to construct or operate a structural fill must establish:

> [F]inancial assurance that will ensure that sufficient funds are available for facility closure, post-closure maintenance and monitoring, any corrective action that the Department may require, and to satisfy any potential liability for sudden and non-sudden accidental occurrences, and subsequent costs incurred by the Department in response to an incident at a structural fill project, even if the applicant or permit holder becomes insolvent or ceases to reside, be incorporated, do business, or maintain assets in the State.

44. The preponderance of the evidence presented at hearing established that both the Brickhaven and Colon Mine structural fill permits issued by DWM on June 5, 2015 meet these statutory requirements for financial assurance, and Respondent-Intervenors provided the requisite financial assurance mechanisms.

45. N.C. Gen. Stat. § 74-54 and 15A NCAC 05B .0103 establish the requirements for a mining permit bond, and the calculations to be made to determine the amount of the bond. Specifically, 15A NCAC 05B .0103 requires that once a determination is made that the total amount of a blanket bond has reached the amount of $500,000, which it did with these permit applications, and the applicant has a good operating record, which Green Meadow, LLC had, then the amount of a $500,000 blanket bond is considered sufficient to reclaim all sites, and no additional reclamation bond money is needed. The preponderance of the evidence established that Respondent-Intervenor Green Meadow, LLC provided the requisite bond.

Use of Encapsulation Liner system (Claim C)

46. N.C. Gen. Stat § 130A-309.220 establishes the design, construction, and siting requirements for projects using coal combustion products for structural fill. N.C. Gen. Stat § 130A-309.220(b) lists the specific requirements for the liners, leachate collection system, cap, and groundwater monitoring system required for large structural fills with (b)(1); specifically setting out the requirements for a base liner, which is to consist of one of two optional designs: (a) a composite liner utilizing a compacted clay liner or (b) a composite liner utilizing a geosynthetic clay liner. In this case, DWM required that both

the Brickhaven and Colon Mine structural fill permits provide for a liner consistent with these statutory requirements.

Cumulative Impact on Chatham or Lee County Communities (Claim F)

47. N.C. Gen. Stat. § 130A-294(a)(4) c.9. requires DWM to "deny an application for a permit for a solid waste management facility" if:

> [T]he cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community protected by Title VI of the federal Civil Rights Act of 1964.

48. In this case, Petitioners failed to demonstrate by a preponderance of the evidence that the cumulative impact of the Brickhaven and Colon structural fill facilities would have a disproportionate adverse impact on the Lee or Chatham County communities.

Toxicity Characteristic Leaching Procedure (Claim G)

49. N.C. Gen. Stat. §§ 130A-309.219(b)(1)(d) and (b)(2) require that persons proposing projects using coal combustion products as structural fill involving the placement of 8,000 or more tons of coal combustion products per acre, or 80,000 or more tons of coal combustion products in total per project, shall provide to SWM:

> A Toxicity Characteristic Leaching Procedure analysis from a representative sample of each different coal combustion product's source to be used in the project for, at a minimum, all of the following constituents: arsenic, barium, cadmium, lead, chromium, mercury, selenium, and silver.

50. In this case, as required by statute, DWM mandated Respondent-Intervenors provide a Toxicity Characteristic Leaching Procedure analysis consistent with these statutory requirements in both the Brickhaven and Colon Mine structural fill permits. A preponderance of the evidence showed that Respondent-Intervenors complied with such requirement.

Ultimate Conclusions of Law

51. Ed Mussler, a licensed Professional Engineer, and the Permitting Supervisor of the Solid Waste Section of the Division of Waste Management, was properly delegated the authority to issue structural fill permits which meet all of the requirements of CAMA under N.C. Gen. Stat. § 130A, Article 9. Mr. Mussler acted outside his authority and jurisdiction when he issued the structural fill permits for the Brickhaven and the Colon Mine sites to the extent areas of the two sites had never been mined or otherwise excavated. By statute, structural fill can only be used for mine reclamation,

and not for other purposes. Mining does not include excavation solely in aid of purposes other than mining.

52. Petitioners established by a preponderance of the evidence that Mr. Mussler and DWM substantially prejudiced Petitioners' rights, and exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure by issuing a structural fill permit to Charah, Inc. and Green Meadow, LLC for both the Colon and Brickhaven Mine sites to the extent the two sites had never been mined or otherwise excavated.

53. Petitioners established that DWM substantially prejudiced Petitioners' rights, and exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure, issuing a structural fill permit to Charah, Inc. and Green Meadow, LLC for both the Colon and Brickhaven Mine sites to the extent the two sites had never been mined or otherwise excavated.

54. Petitioner failed to present any evidence proving that Respondent was not bound by the statutory and administrative rules in determining the amount of the mining permit bond, and that Respondent was otherwise authorized, or had any discretion, to modify the statutory and regulatory requirements regarding the amount of financial assurance the permittee should post.

55. Petitioners proved that Mr. Davis and DEMLR substantially prejudiced Petitioners' rights and exceeded their authority or jurisdiction, acted erroneously, failed to use proper procedure in following, or failing to follow, the procedural process for issuing modified mining permits to Green Meadow, LLC for the Colon and Brickhaven Mine sites.

56. Even giving due regard to each Respondent agency's demonstrated knowledge and expertise regarding the facts and inferences within the specialized knowledge of the Respondent agencies, Petitioners proved by a preponderance of the evidence that Respondents substantially prejudiced Petitioners' rights, and exceeded Respondents' authority or jurisdiction, acted erroneously, failed to use proper procedure, and failed to act as required by law as noted above.

FINAL DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines:

1. Respondents' and Respondent-Intervenors' Motion for Summary Judgment is hereby **DENIED**.

2. The Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 5306 to Construct and Operate a Structural Fill at the Colon Road mine site in Lee County, North Carolina to Green Meadow, LLC and Charah, Inc., is **AFFIRMED** as

to areas excavated prior to June 6, 2015 and is void as to any areas not excavated prior to June 6, 2015.

3. The Solid Waste Management Facility Structural Fill, Mine Reclamation Permit No. 1910 for the same purpose at the Brickhaven Mine site in Chatham County, North Carolina to Green Meadow, LLC, and Charah, Inc. is **AFFIRMED** as to areas excavated prior to June 6, 2015 and void as to any area not excavated prior to June 6, 2015.

4. For areas not excavated prior to June 6, 2015, the Modified Mining Permit for Permit No. 53-05 for the operation of a Clay Mine at the Colon Mine in Lee County, North Carolina to Green Meadow, LLC issued by the Division of Energy, Mineral, and Land Resources shall be modified to provide for reclamation by means other than as structural fill.

5. For areas not excavated prior to June 6, 2015, the Modified Mining Permit No. 19-25 issued by the Division of Energy, Mineral, and Land Resources issued for the same type of operation at the Brickhaven No, 2 Mine Tract "A" in Chatham County, North Carolina to Green Meadow, LLC shall be modified to provide for reclamation by means other than as structural fill.

6. Respondent and Respondent-Intervenors' Motions to Dismiss Petitioners' Clams B, C, F and G are **GRANTED**.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34. Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**.

In conformity with 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 13th day of December, 2019.

Melissa Owens Lassiter
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This the 16th day of December, 2019.

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