Mendez, Gayla

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From: Geoff Gisler [mailto:ggisler@selcnc.org]
Sent: Thursday, November 12, 2015 11:01 AM
To: Wilkes, Mary <Wilkes.Mary@epa.gov>
Subject: Appeal information

Mary,
I've attached the superior court order from the Blounts Creek case, our COA brief in the Titan case, and two amici briefs filed in support of our appeal. Thanks,
Geoff

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No. COA 15-1058 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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NORTH CAROLINA COASTAL FEDERATION, CAPE FEAR RIVER WATCH, PENDERWATCH and CONSERVANCY, and SIERRA CLUB,	)	
Petitioners-Appellants,	)	
v.	)	
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, N.C. ENVIRONMENTAL MANAGEMENT COMMISSION,	)	From Wake County
Respondents-Appellees,	)	
CAROLINAS CEMENT COMPANY LLC,	)	
Respondent-Intervenor-Appellee.	)	

APPELLANTS' BRIEF

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No. COA 15-1058 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA COASTAL FEDERATION, CAPE FEAR RIVER WATCH, PENDERWATCH and CONSERVANCY, and SIERRA CLUB,	)
Petitioners-Appellants,	)
v.	)
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, N.C. ENVIRONMENTAL MANAGEMENT COMMISSION,	)
Respondents-Appellees,	)
CAROLINAS CEMENT COMPANY LLC,	)
Respondent-Intervenor-Appellee.	)

APPELLANTS' BRIEF

****

ISSUES PRESENTED

I. DID THE SUPERIOR COURT ERR IN HOLDING THAT CONSERVATION GROUPS' RIGHTS HAD NOT BEEN SUBSTANTIALLY PREJUDICED BY THE DIVISION OF AIR QUALITY'S PERMITTING DECISION, DESPITE HOLDING THAT THEY WERE PERSONS AGGRIEVED BECAUSE THOSE SAME RIGHTS HAD BEEN SUBSTANTIALLY AFFECTED BY THAT DECISION?

II. DID THE SUPERIOR COURT ERR IN DISMISSING CONSERVATION GROUPS' CLAIMS THAT THE DIVISION OF AIR QUALITY VIOLATED REGULATIONS THAT REQUIRE THE AGENCY'S ANALYSIS TO BE BASED ON ACCURATE INFORMATION REGARDING CAROLINAS CEMENT COMPANY'S PROPOSED FACILITY?

STATEMENT OF THE CASE

This matter arises out of the North Carolina Division of Air Quality's ("DAQ") issuance of three successive air quality permits to Carolinas Cement Company ("CCC") for construction of a new cement plant authorizing CCC to emit more than 5,000 tons of air pollution each year. (R pp 215, 3580, 3709). Petitioners-Appellants North Carolina Coastal Federation, Cape Fear River Watch, PenderWatch and Conservancy, and Sierra Club (collectively, "Conservation Groups") challenged each of the air quality permits in the Office of Administrative Hearings ("OAH") on the basis that the permits failed to comply with the North Carolina Air Pollution Control Act, N.C. Gen. Stat. §§ 143-215.105 to 215.114C, and the federal Clean Air Act, 42 U.S.C. §§ 7401–7671q. (R pp 216–26, 3580–89, 3709–18).

Administrative Law Judge Beecher Gray entered orders granting DAQ's and CCC's motions to dismiss certain claims on 24 July 2012, (R p 607), and granting summary judgment on all remaining issues on 23 September 2013, (R pp 3336–37).

The 23 September 2013 Order granted partial summary judgment to Conservation Groups, holding that they are "persons aggrieved" as defined by the Administrative Procedure Act ("APA"), N.C. Gen. Stat. §§ 150B-1 to -64 based on affidavit testimony from organization staff and their members

describing the effect of CCC's approved air pollution on their health, property, quality of life, business interests, and recreational pursuits. (R p 3337). The Order granted summary judgment on all other claims to DAQ and CCC, holding that Conservation Groups had not demonstrated that DAQ had "substantially prejudiced the petitioner[s'] rights" under the APA. *Id.*

The 24 July 2012 Order dismissed Conservation Groups' claims that DAQ erred by estimating emissions from the proposed plant using a quarry plan that CCC had publicly rejected as part of a federal permitting process. The Order granted DAQ's and CCC's motions to dismiss under Rules 12(b)(1) and 12(b)(6). (R p 607).

The Environmental Management Commission ("EMC") affirmed the OAH orders on 8 May 2014.[1] (R pp 3567–73).

On 4 November 2013, Judge Gray entered an order dismissing Conservation Groups' second air permit challenge on identical grounds to those on which he dismissed the first challenge. (R pp 3700–02). Due to an intervening change in the APA, the order on the second air permit challenge was final and not subject to review by the EMC. On 1 July 2014, Administrative

[1] The first permit challenge was filed prior to a change in the APA that eliminated review of ALJ decisions by the EMC. *See* 2011 N.C. Sess. Laws 398, §§ 18, 63, as modified by 2012 N.C. Sess. Laws 187, § 8.1; N.C. Gen. Stat. § 150B-36. The second and third permit challenges were filed after the modification to the APA and were not subject to EMC review.

Law Judge Randolph Ward entered summary judgment for Respondents in Conservation Groups' third air permit challenge on the grounds of collateral estoppel. (R pp 499–95).

Conservation Groups timely petitioned the Wake County Superior Court for judicial review of these decisions on 9 June 2014, 4 December 2013, and 15 July 2014, respectively. (R pp 3–15, 16–27, 28–40).

The superior court granted the Parties' Joint Motion to Consolidate Petitions for Judicial Review on 17 July 2014, consolidating the three petitions for judicial review. (R p 41). On 26 March 2015, Judge G. Bryan Collins entered an order affirming the final decisions and denying each petition for judicial review. (R pp 4496–505).

Conservation Groups timely filed a Notice of Appeal on 27 April 2015. (R pp 4506–07). The Proposed Record on Appeal was timely served on 21 July 2015. (R p 4516). The Record on Appeal was timely filed 23 September 2015, (R p 4527), pursuant to Court order granting a seven day extension of time. (R pp 4521–22).

GROUNDS FOR APPELLATE REVIEW

Judge Collins's order denying the consolidated petitions for judicial review is a final judgment and appeal is therefore proper to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF FACTS

I. CCC'S AIR QUALITY PERMIT

CCC proposes to construct and operate a portland cement manufacturing facility and limestone quarry in New Hanover County near Castle Hayne, North Carolina. (R p 227). The proposed facility would produce cement by extracting limestone from an onsite quarry, crushing that limestone into smaller pieces, heating limestone and other raw materials in a coal-fired kiln, and then grinding the resulting clinker into cement. (R pp 343–44). Each of these processes results in air pollution.

DAQ authorized construction and operation of the proposed facility in three permits, pursuant to authority granted by the U.S. Environmental Protection Agency to implement the Clean Air Act in North Carolina. DAQ initially approved construction of the proposed plant in a permit issued on 29 February 2012. (R p 227). On 21 June 2013, DAQ replaced the original permit with a revised permit. (R p 3590). On 29 August 2013, DAQ replaced the second permit with a third, current permit. (R p 3719). The third permit incorporated the terms of the second, extended the deadline for the facility to commence construction, and increased the approved amount of coarse particle pollution by 10 tons per year and fine particle pollution by 22 tons per year. (R p 3988).

The current permit allows CCC to emit more than 5,000 tons of air pollution each year, including more than 400 tons of sulfur dioxide ("SO_2"), more than 1,500 tons of nitrogen oxides ("NO_x"), more than 250 tons of particulate matter ("PM"), and nearly 200 tons of volatile organic compounds ("VOC"). (R pp 3876, 3891). These emissions levels are "significant" as defined in Clean Air Act regulations and therefore require CCC to obtain a prevention of significant deterioration ("PSD") permit from DAQ. 40 C.F.R. § 51.166(b)(23).

II. CONSERVATION GROUPS' CLAIMS

Conservation Groups brought claims against the permits that fall into three categories. First, Conservation Groups argued that DAQ failed to lawfully apply the best available control technology ("BACT") standard, which requires the agency to set an emission limit "based on the maximum degree of reduction of each pollutant . . . taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3).

Conservation Groups challenged the agency's BACT analysis for SO_2, NOx, PM, and VOC. In challenging DAQ's SO_2 BACT analysis, Conservation Groups objected to, among other things, DAQ's use of nationally applicable standards in place of the "case-by-case" analysis required by BACT. (R pp 652–53, 674–75). Conservation Groups submitted evidence that similar

facilities have significantly lower SO_2 emissions and demonstrated that pollution control vendors would guarantee a greater reduction in SO_2 emissions than required by the permit. (R p 685). That reduction alone would reduce SO_2 emissions by more than 145 tons each year. *Id.* Conservation Groups submitted additional evidence that demonstrated that the permit limit did not reflect the "maximum degree of reduction" of SO_2 achievable at the proposed facility. (R pp 668–93).

In challenging DAQ's NO_x BACT analysis, Conservation Groups objected to, among other things, DAQ's failure to conduct a site-specific assessment of base case emissions and to require achievable pollution reduction. (R pp 694–718). Conservation Groups submitted evidence that DAQ adopted the NO_x limit based on an assumed 50% pollution reduction rather than conducting the case-by-case analysis required by BACT. (R pp 710–12). The agency acknowledged in discovery requests that the proposed pollution controls could achieve NO_x reductions of greater than 80%, and the then-Permit Section Chief testified that he "fully expect[s] this unit to do obviously much better than 50 percent." (R p 712). If incorporated into the permit requirements, such reductions could reduce NO_x pollution from the proposed plant by more than 700 tons per year. (R pp 714–16) (citing similar sources that achieved 50% better pollution control than CCC would have to achieve).

Conservation Groups likewise submitted evidence in support of their claims that DAQ violated the BACT requirement for PM and VOC that demonstrated that a proper BACT analysis would reduce emissions of those pollutants. (R pp 718–29).

In claims that were dismissed pursuant to Rule 12(b)(1) and 12(b)(6), Conservation Groups argued that DAQ violated regulations requiring accurate information regarding CCC's proposed quarry. (R pp 470–71, 3813–14). Those claims alleged that the quarry proposal that served as the basis of the permitting analysis was invalid based on CCC's public announcement of a new, larger quarry proposal that it submitted to the U.S. Army Corps of Engineers. (R p 484, 3824). Conservation Groups argued that CCC was required to amend its application. (R pp 486–91, 3826–31).

Finally, Conservation Groups challenged the DAQ Director's failure to require achievable pollution reductions to protect human health and well-being, as required under state law. (R pp 504–06, 3842–44). Conservation Groups presented evidence of the harmful health effects of each of the pollutants at issue in the case. SO_2 contributes to respiratory illness, particularly in children and the elderly, and aggravates existing heart and lung diseases. (R pp 9(c) 1775–79). NO_x reacts with VOC to form ground-level ozone. Breathing ozone can trigger or worsen a variety of health problems including chest pain, coughing,

throat irritation, congestion, bronchitis, emphysema, and asthma. *Id.* Particle pollution includes two separate categories of regulated pollutants: (1) coarse particles, with diameters between 2.5 micrometers and 10 micrometers ("PM_{10}"); and (2) fine particles ("$PM_{2.5}$"), with diameters that are 2.5 micrometers and smaller. Both forms of particle pollution cause health problems, including irritation of the airways, coughing, or difficulty breathing, decreased lung function, aggravated asthma, development of chronic bronchitis, irregular heartbeat, heart attacks, and premature death. (R pp 9(c) 1764–72). Fine particles pose a particular threat to human health because they can penetrate deep into the lungs and even enter the bloodstream. (R p 9(c) 1783). Although they disputed whether these pollutants would cause health effects at the permitted levels, neither DAQ nor CCC presented evidence refuting the fact that these pollutants are harmful to human health. (R p 1460–81). Instead, CCC presented evidence that the authorized pollution levels would not cause or contribute to a violation of National Ambient Air Quality Standards—a separate permitting requirement that is not at issue in this case and is not relevant to any of Conservation Groups' claims. *Id.*

The decisions below did not reach Conservation Groups' claims regarding DAQ's permitting errors. (R pp 3336–37, 3700–01, 3567–72, 4496–505).

III. CONSERVATION GROUPS

Conservation Groups are four non-profit organizations dedicated to protecting the environment in southeastern North Carolina on behalf of its members. Each filed affidavit testimony from organization staff and members that demonstrated that they represent members who live, work, and recreate near CCC's proposed plant and who would be exposed to its air pollution. The organizations represent a combined 25,000 members in North Carolina and work to protect the Northeast Cape Fear River and the surrounding watershed. (R pp 82–105, 850–56, 863–68, 873–77, 882–87) (affidavits describing organizational purposes, outreach, and member interests). Many of these organizations' members live close to the proposed plant and boat, hike, and fish near the site. (R pp 106–25, 857–62, 869–72, 878–81, 888–93).

ARGUMENT

In this case, the neighbors of a proposed cement plant—who have proven substantial harm to rights protected by the Air Pollution Control Act under the APA and N.C. Supreme Court's well-established person aggrieved standard—were denied a hearing on DAQ's permitting violations based on a finding that they had not demonstrated substantial prejudice to those same rights. The decision below departs from well-established precedent by paradoxically

holding that although Conservation Groups had proven substantial harm to their rights, they had not proven substantial prejudice to those same rights.

Further, the Clean Air Act and Air Pollution Control Act demand that the agency and the company rely on accurate information when issuing an air permit like the one at issue here. Conservation Groups alleged that DAQ and CCC failed to do so, instead relying on outdated information in violation of permitting requirements. Those claims were erroneously dismissed under Rules 12(b)(6), 12(b)(1), and 12(c).

I. THE SUPERIOR COURT ERRED BY DENYING CONSERVATION GROUPS A HEARING ON DAQ'S UNLAWFUL PERMITTING DECISIONS.

This appeal arises from a decision granting contradictory motions for summary judgment. The superior court incorporated by reference the OAH and EMC decisions granting summary judgment to Conservation Groups, finding that they are persons aggrieved whose rights protected by the Air Pollution Control Act are substantially affected by DAQ's permitting decision. (R p 4505). Yet the superior court also granted summary judgment to DAQ and CCC on all other claims, finding that Conservation Groups had not demonstrated that their rights protected by the Air Pollution Control Act are substantially prejudiced. (R pp 4501–02). Neither the OAH decisions nor the EMC decision cited any evidence in the record or legal authorities for the conclusion that

Conservation Groups have not demonstrated substantial prejudice. (R pp 3336–37, 3700–01, 3567–72). The only evidence that the superior court relied on in its decision that Conservation Groups were not substantially prejudiced was evidence that the authorized pollution would not violate National Ambient Air Quality Standards. (R pp 4501–02).

As shown below, the APA and this Court define person aggrieved and substantial prejudice using identical terms, the North Carolina Supreme Court has established how to demonstrate that injury under the laws applicable here, and Conservation Groups' testimony meets the established standard. Therefore, the superior court erred in finding that Conservation Groups must make a separate, heightened showing that they are substantially prejudiced, after proving that they are substantially affected as persons aggrieved. Under the APA, Air Pollution Control Act, Clean Air Act, and binding precedent, Conservation Groups are, therefore, entitled to a hearing on DAQ's permitting decisions.

A. Standard of Review.

A grant of summary judgment is reviewed *de novo*. *York Oil Co. v. N.C. Dep't of Env't, Health and Natural Res.*, 164 N.C. App. 550, 554, 596 S.E.2d 270, 273 (2004)*; see* N.C. Gen. Stat. § 150B-51(c). Summary judgment "is appropriate only when the record shows that 'there is no genuine issue as to any

material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)).

B. The APA and All Prior Court Decisions Describe the Person Aggrieved Standard and Substantial Prejudice Synonymously.

The relevant statute and case law make clear that a person aggrieved has demonstrated that its rights are substantially prejudiced. The APA entitles a party to commence a contested case by filing a petition that "shall state facts tending to establish" that an agency respondent, among other things, "substantially prejudiced the petitioner's rights." N.C. Gen. Stat. § 150B-23(a). That section also states that "[a]ny person aggrieved may commence a contested case." *Id.* N.C. Gen. Stat. § 150B-29(a) provides that petitioners "must establish the facts required by G.S. § 150B-23(a)."

North Carolina courts have never required a person aggrieved to make an additional, heightened demonstration of injury before addressing the alleged errors in an agency action. Instead, as shown below, the APA and case law interpreting it make clear that—as acknowledged by the EMC and DAQ—a person aggrieved has demonstrated that its rights have been substantially prejudiced.

First, the statute requires the injury embodied in both phrases to be substantial. A "person aggrieved" is "affected *substantially* in his or its person, property, or employment" by an administrative action. N.C. Gen. Stat. § 150B-2(6) (emphasis added). Under 150B-23(a) a "petitioner's rights" must likewise be "*substantially* prejudiced."

Second, that substantial injury must be prejudicial under the meaning of both phrases. This is, of course, explicit in the term "substantial prejudice," and the Court has explained that a person aggrieved is a party "prejudiced" by an administrative decision. *Orange Cty. v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 360, 265 S.E.2d 890, 899 (1980) (citing *In re Halifax Paper Co.*, 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963)).

Third, the substantial prejudice must be to legally protected rights. A person aggrieved is one "adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights." *Id.* The "substantial prejudice" required under 150B-23(a) is to "petitioner's rights."

Fourth, the Court has described the injury contemplated by each phrase as concrete, particularized, and actual or imminent. A person aggrieved is one who has suffered an injury in fact. *See, e.g.*, *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 589, 447 S.E.2d 768, 780 (1994) (holding that petitioner was aggrieved because it had shown sufficient injury in

fact); *Orange Cty.*, 46 N.C. App. at 361, 265 S.E.2d at 899 (same); *Cty. of Wake v. Dep't of Env't and Natural Res. ("DENR")*, 155 N.C. App. 225, 236, 573 S.E.2d 572, 581 (2002) (same). An injury in fact is one that is "(a) concrete and particularized and (b) actual or imminent." *Marriott v. Chatham Cty.*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007). The Court has likewise held that the harm to demonstrate substantial prejudice "must be concrete, particularized, and 'actual' or imminent." *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 762 S.E.2d 468, 476 (N.C. Ct. App. 2014), *review denied*, 768 S.E.2d 564 (N.C. 2015).

Fifth, the Court has recognized that the injury required to show person aggrieved status or substantial prejudice cannot be hypothetical. In *Diggs v. N.C. Department of Health and Human Services*, the Court held that the petitioner was not a person aggrieved because the asserted injury was "hypothetical." 157 N.C. App. 344, 348, 578 S.E.2d 666, 669 (2003); *Thompson v. N.C. Respiratory Care Bd.*, 202 N.C. App. 340, 344, 688 S.E.2d 516, 518 (2010) (describing injury required by person aggrieved standard as "distinct and palpable" (citations omitted)). Similarly, the harm demonstrating substantial prejudice cannot be "conjectural or hypothetical." *Surgical Care Affiliates*, 762 S.E.2d at 476.

Critically, the Court has only addressed the question of substantial prejudice in the context of the statute governing Certificates of Need for healthcare facilities, N.C. Gen. Stat. §§ 131E-175 to -192, because under the administrative and judicial review provisions of that statute, petitioners do not have to show that they are persons aggrieved. *See id.* § 131E-188 (providing separate administrative and judicial review procedures for "affected persons," a designation that does not require injury in fact). The Court has never directly addressed the intersection of the two standards.

But, as demonstrated above, this Court has consistently interpreted the person aggrieved and substantial prejudice standards to be substantively identical. As a result, no court has ever found that a petitioner had proven that it was a person aggrieved (and necessarily, therefore, substantially affected), and then required the petitioner to make an elevated showing of harm to prove that it is substantially prejudiced. Instead, courts and the agency have consistently treated the phrases synonymously, as the EMC did in *North Carolina Forestry Association v. DENR*. There, the EMC held that whether an agency action would "affect substantially . . . or otherwise substantially prejudice [petitioners'] rights" is a question of standing, which is "necessary for any judicial body to consider in determining whether it has jurisdiction." 98 EHR 0777, Final Agency Decision at *7–8 (Nov. 5, 1999). (Addendum). North Carolina courts

have, therefore, consistently gone on to address the merits of environmental permit challenges after determining that petitioners were persons aggrieved.

For example, on appeal from the EMC's decision in *N.C. Forestry Association*, the courts reached the merits of the permitting decision after determining that the petitioners were persons aggrieved—without requiring any additional proof of injury. *N.C. Forestry Ass'n v. DENR*, 357 N.C. 640, 644, 588 S.E.2d 880, 882–83 (2003) (holding that petitioners were persons aggrieved and explaining that individuals "adversely affected" by an agency decision "generally have standing to complain that the agency based its decision upon an improper legal ground"); *N.C. Forestry Ass'n*, 162 N.C. App. 467, 470–73, 591 S.E.2d 549, 552–54 (2004) (on remand from Supreme Court, holding, without additional analysis of injury, that the EMC's final agency decision was timely and that delegation of authority to issue general permits was lawful), *overruled on other grounds by DENR v. Carroll*, 358 N.C. 649, 661, 599 S.E.2d 888, 895–96 (2004); *N.C. Forestry Ass'n*, 99 CVS 13044, Memorandum of Decision and Order on Remand at *5–6, 13–14 (Dec. 22, 2004) (Addendum) (on remand from Court of Appeals, ruling on merits of permitting decision without additional analysis of injury); *see also County of Wake v. DENR*, 155 N.C. App. 225, 235–36, 573 S.E.2d 572, 580–81 (2002) (finding that petitioners were persons aggrieved and resolving case on merits of permitting decision).

DAQ even conceded in the present case, in briefing to the Superior Court, that "[t]he sort of evidence that would tend to establish 'person aggrieved' status may also tend to establish 'substantial prejudice' in certain cases." (R p 149) (emphasis added). DAQ did not, however, explain how the present case is distinguishable from "certain cases," nor could it: under the APA and this Court's jurisprudence, the "sort of evidence" that establishes "person aggrieved" necessarily establishes substantial prejudice.

Each of these authorities confirm that Conservation Groups have demonstrated substantial prejudice to their rights by meeting the person aggrieved standard, as described below. The superior court therefore erred by granting summary judgment to DAQ and CCC and by failing to reach Conservation Groups' claims regarding the legal flaws in the agency's permitting decision.

C. Conservation Groups' Affidavit Testimony Proves Injury in Fact to Protected Rights Under the Air Pollution Control Act.

1. *Empire Power establishes the facts required to demonstrate an injury in fact under the Air Pollution Control Act.*

This case arises under the Clean Air Act and the state's implementation of it through the Air Pollution Control Act. The controlling case on injury in fact under the Air Pollution Control Act is *Empire Power*. *See* 337 N.C. at 583, 447 S.E.2d at 777 (the organic statute "defines those rights, duties, or privileges,

abrogation of which provides the grounds for an administrative hearing pursuant to the NCAPA"). In *Empire Power*, the question before our Supreme Court was whether the petitioner was entitled to an administrative hearing on the permitting decision's compliance with the Air Pollution Control Act. *Id.* at 572, S.E.2d at 770. To answer the question, the court analyzed the injury required by the APA to demonstrate injury in fact under the Air Pollution Control Act. The court recognized that "[t]he primary purpose of the NCAPA is to confer procedural rights, including the right to an administrative hearing, upon any person aggrieved by an agency decision; the statutes should be liberally construed together to preserve and effectuate that right." *Id.* at 595, 447 S.E.2d at 783. The court recognized that, like CCC's proposed plant, the power plant at issue in *Empire Power* would "emit tons of harmful air pollutants if constructed and operated in accordance with its air quality permit." *Id.* at 589, 447 S.E.2d at 780. Mr. Clark, the petitioner in *Empire Power*, alleged that the future pollution would cause his family to "suffer injury to their health, the value of their property, and the quality of life in their home and their community." *Id.* The court held that the Air Pollution Control Act was designed to prevent such injuries—citing the legislative intent "*to protect human health, to prevent injury to plant and animal life, [and] to prevent damage to public and private property*." *Id.* (emphasis in original) (quoting N.C. Gen. Stat. § 143-211).

The court then held that "Clark alleged sufficient *injury in fact* to interests within the zone of those to be protected and regulated by the statute." *Id.* (emphasis added). "As an adjacent property owner downwind of the [power plant], Clark may be expected to suffer from whatever adverse environmental consequences the [power plant] might have." *Id.* at 589–90, 447 S.E.2d at 780; *Orange Cty.*, 46 N.C. App. at 361–62, 265 S.E.2d at 899 (holding that plaintiffs were aggrieved because, among other things, they had suffered a procedural injury by virtue of the agency's unlawful action and they had a sufficient geographical nexus to the site of the challenged project such that they could be expected to suffer whatever environmental consequences the project might have). Based on that analysis—finding that Mr. Clark suffered an injury in fact from the permitting decision—the court found that "Clark therefore is a 'person aggrieved' within the meaning and intent of the air pollution control act." 337 N.C. at 590, 447 S.E.2d at 781. As a person aggrieved, the court held that Mr. Clark was entitled to "appeal the [permitting] decision to the OAH" to effectuate "his right under the air pollution control act to have DEHNR issue or deny the air quality permits in accordance therewith." *Id.* at 595, 574, 447 S.E.2d at 772, 784.

2. *Conservation Groups' undisputed affidavit testimony demonstrates injury in fact under Empire Power.*

Conservation Groups alleged the facts required to show injury in fact under *Empire Power* in their petitions and have provided affidavit testimony proving these facts. *See Steel Creek Dev. Corp. v. Smith*, 300 N.C. 631, 639, 268 S.E.2d 205, 210 (1980) (explaining that evidence in support of or in opposition to a motion for summary judgment is demonstrated "often with affidavits"). Each Conservation Group provided affidavit testimony showing that it represents members who live, work, fish, boat, recreate, or otherwise use and enjoy the natural resources in the Cape Fear River Basin that would be affected by air pollution from the proposed plant. (R pp 87, 855) (North Carolina Coastal Federation is devoted to safeguarding the coastal waters of North Carolina, and many of the group's more than 10,000 members use and enjoy the area that would be impacted by pollution from the facility); (R pp 90, 93, 864, 867) (Cape Fear River Watch was founded to protect and restore the Lower Cape Fear River Basin; approximately 10 percent of the group's 600 members live within a few miles of the facility); (R pp 96, 98, 874, 876) (Sierra Club's purposes include exploring and protecting the environment, and many of Sierra Club's approximately 15,000 members live, work, and spend time outdoors in areas that would be exposed to pollution from the facility); (R pp 101–02, 883-84) (PenderWatch and Conservancy's mission is to preserve and

maintain the natural environment near the facility, and more than 95 percent of the group's 450 members live in Pender County or New Hanover County, the two counties that would be most affected by the facility). As this testimony shows, Conservation Groups represent their members' interests in protecting air quality, maintaining quality of life, assuring "continued enjoyment of the natural attractions" through various recreational activities, and "preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources"—interests recognized by the N.C. Supreme Court in *Empire Power*. 337 N.C. at 588–89, 447 S.E.2d at 780 (quoting N.C. Gen. Stat. §§ 143-215.108(b), 143-211).

In uncontested affidavits, Conservation Groups' members testified that they are concerned that they will suffer from the well-established health effects of the pollutants that will be emitted by the plant—including premature death, asthma, respiratory problems, heart attacks, lung disease, and cardiovascular disease—as well as impacts to their property, professions, quality of life, environment, and enjoyment of the area. (R pp 107–110, 889–892) (PenderWatch member Michael Barber lives two miles from the proposed facility, and is concerned about the facility's effects on his property, and on his recreational, personal, health, and aesthetic interests); (R pp 113–14, 870–71) (Cape Fear River Watch member Douglas Springer lives within three miles of

the proposed facility, and is concerned about impacts on his health, boating and sightseeing businesses, quality of life, and property value); (R pp 117–18, 878–80) (Sierra Club member Morris Allison lives 3.5 miles from the proposed facility, and is concerned that its air emissions will adversely affect his property, health, and ability to recreate in the area); (R pp 121–24, 858–61) (Coastal Federation member Dr. Robert Parr lives less than 10 miles from the proposed facility, fishes the Northeast Cape Fear in the vicinity of the proposed plant, and is concerned that the facility will jeopardize his property, his health, and the health of his patients and family).

This testimony proves that Conservation Groups are persons aggrieved by DAQ's issuance of the air quality permits. The Administrative Law Judge stated at the initial hearing in this matter that "[t]here's no question in my mind that there's standing for petitioners in this case. Those folks who live at or near or around that plant have the same standing, I believe that George Clark had in *Empire Power* to get a contested case." (OAH Tr. 82:12-16). The ALJ held that Conservation Groups have demonstrated the injury in fact necessary to have standing as persons aggrieved. (R p 3337). Paradoxically, however, the ALJ then held that although they were persons aggrieved by DAQ's permitting decision, Conservation Groups were not substantially prejudiced thereby. *Id.* But there is no basis in the law for such a distinction. Conservation Groups have

demonstrated a concrete, particularized, actual or imminent injury from DAQ's issuance of these air permits; they are therefore both persons aggrieved by and substantially prejudiced by DAQ's action and are entitled to a hearing on DAQ's permitting errors.

D. The Superior Court Erred in Requiring Conservation Groups to Demonstrate a Violation of the National Ambient Air Quality Standards—a Separate Permitting Requirement—to Prove Substantial Prejudice.

The superior court did not explicitly articulate the basis for its finding that Conservation Groups are not substantially prejudiced. Instead, the Court simply cited three documents related to a single issue: the proposed plant's compliance with the National Ambient Air Quality Standards ("NAAQS"). (R p 4502) (citing (R pp 1481) (asserting that health risks are "*de minimis*" because there is no violation of the NAAQS); (R p 422) (stating that plant would not cause or contribute to violation of the NAAQS); and (R p 3916) (same)). Based on those citations as the only authority for the court's determination that Conservation Groups have not demonstrated substantial prejudice, the superior court order appears to require any party challenging an air pollution permit issued under the Prevention of Significant Deterioration program to demonstrate a violation of the NAAQS. The error in that requirement is plain: compliance with the NAAQS is a permitting requirement separate and distinct from the best available control technology requirements at issue in this case.

The first purpose of the PSD program identified by Congress is "to protect public health and welfare from any actual or potential adverse effect . . . *notwithstanding attainment and maintenance* of all national ambient air quality standards." 42 U.S.C. § 7470(1) (emphasis added). Under the Clean Air Act, all PSD permits must comply with the NAAQS—exceeding the NAAQS is a stand-alone violation. *See* 40 C.F.R. § 51.166(k)(1); 15A N.C. Admin. Code 02D .0530(g) (requiring compliance with 40 CFR 51.166(j) through (o)). In addition to ensuring compliance with the NAAQS in every PSD permit, DAQ must lawfully apply the best available control technology standard. 40 C.F.R. § 51.166(j)(2). Conservation Groups challenged the subject permits based on DAQ's violation of the best available control technology requirements—not the independent permitting requirement that the facility must also comply with the NAAQS. (R p 638). Compliance with the NAAQS is a *permitting* requirement that is not at issue here. It is not a measure of injury, as the superior court interpreted it. Meeting the NAAQS does not entitle DAQ and CCC to summary judgment.

Consistent with this statutory purpose of the PSD program, courts in other jurisdictions have rejected the very requirement apparently created below: "[Intervenor] suggests that because the NAAQS will not be exceeded, petitioner . . . cannot establish the injury requisite for Article III standing. We disagree."

LaFleur v. Whitman, 300 F.3d 256, 270 (2d Cir. 2002). The court explained that "Congress has recognized that there are potentially adverse affects [sic] from air pollution at levels below the NAAQS." *Id.* (emphasis in original).

In addition, the State of North Carolina itself has not only acknowledged that air pollution causes health problems even at levels below the NAAQS, it has forcefully advocated that position in litigation against the Tennessee Valley Authority. (R pp 2913–16). North Carolina argued that "NAAQS are not designed to be fully protective," and "TVA's contention that only a 'handful' of people are affected below the NAAQS ignores the testimony of North Carolina's public health expert, who provided ample evidence to support the court's findings of fact on health impacts at the population level below the NAAQS." *Id.* (citations omitted). The district court agreed, and found that pollutants such as fine particles have "significant negative impacts on human health, even when the exposure occurs at levels at or below the NAAQS." *North Carolina v. TVA*, 593 F. Supp. 2d 812, 821–22 (W.D.N.C. 2009), *rev'd and remanded on other grounds*, 615 F.3d 291 (2010)). TVA did not appeal the district court's factual findings concerning the health effects of pollution, and the court of appeals did not disturb these findings. *North Carolina v. TVA*, 615 F.3d at 298–99, 303–04; (R p 2867) ("Appellants do not controvert any of the court's factual findings.").

The superior court therefore erred in determining that compliance with the NAAQS has any bearing on substantial prejudice from other permitting errors that result in hundreds of tons of additional, unlawful air pollution.

E. Conservation Groups Have Demonstrated Article III Standing Under the Clean Air Act, Which Limits the Harm that They Must Show.

Conservation Groups' right to judicial review of DAQ's errors is not only compelled by the APA and this Court's jurisprudence, it is mandated by the Clean Air Act, which DAQ implements pursuant to authority delegated by EPA. The Act "require[s], at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution." *Virginia v. Browner*, 80 F.3d 869, 876 (4th Cir. 1996) (holding that "limiting availability of review to those persons with 'pecuniary and substantial' interests violates [Title V of the Clean Air Act]").

Consistent with this holding, the EPA has determined that such an opportunity for judicial review of the permitting decision is required for a state to maintain authority to issue Clean Air Act permits. *See* Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia—PSD Program, 61 Fed. Reg. 1880, 1882 (proposed Jan. 24, 1996) (proposing disapproval of state implementation plan because it failed to provide opportunity for judicial review of a PSD permit to "any member of the public

who has participated in the public comment process and meets the threshold standing requirements of Article III of the U.S. Constitution"); Approval and Promulgation of Air Quality Implementation Plans; Texas; PSD; Greenhouse Gas Tailoring Rule Revisions, 79 Fed. Reg. 66,626, 66,635–36 (Nov. 10, 2014) (same); Approval of Air Quality Implementation Plans; California; San Joaquin Valley Unified Air Pollution Control District; PSD, 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012) (same).

Individuals meet Article III standing requirements if (i) they have suffered an injury in fact, which is an actual or imminent injury that is an invasion of a legally protected interest and is concrete and particularized; (ii) such injury is fairly traceable to the agency decision; and (iii) the injury will likely be redressed by a favorable decision by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Sworn statements from members who would be affected by pollution "adequately document[] injury in fact." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice."); *Virginia*, 80 F.3d at 876 ("A

plaintiff need not show 'pecuniary' harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice."). Plaintiffs "need not show . . . that they suffer a bodily injury caused by the pollution. Rather, plaintiffs can demonstrate a cognizable injury by showing that they breathe and smell polluted air." *St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref., LLC*, 354 F. Supp. 2d 697, 702 (E.D. La. 2005) (holding that environmental groups had demonstrated injury in fact through testimony that they live near an emissions source and are concerned about their health). Moreover, plaintiffs do not need to prove that they are or will be exposed to excess air pollution for Article III standing; instead, it is sufficient to show "increased health-related *uncertainty*" about whether an agency's actions expose members to excess air pollution. *N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 326 (2d Cir. 2003) (emphasis in original) ("[T]he distinction between an alleged exposure to excess air pollution and uncertainty about exposure is one largely without a difference since both cause personal and economic harm.").

In a recent federal challenge to rules governing pollution from cement kilns including the CCC facility, the D.C. Circuit found that the very same Conservation Groups who are petitioners in this case satisfied Article III standing based on much of *the same affidavit testimony* from some of *the same*

members regarding the effect of pollution *from the same proposed plant* on their health, property, and quality of life. *See Nat. Res. Def. Council ("NRDC") v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014); (R pp 4382–84). The court held that the petitioners' testimony was sufficient to prove standing:

> EPA's affirmative defense would immunize certain emissions that petitioners contend should be penalized. Some of petitioners' members will suffer from those higher emissions, according to their affidavits. A ruling in their favor would prevent those emissions and help alleviate that harm. That's good enough. Petitioners have shown injury-in-fact, causation, and redressability, and they thus have standing under Article III.

NRDC, 749 F.3d at 1062 (emphasis added). The court's decision confirms that Conservation Groups' testimony in this case is exactly the type of evidence that satisfies the Article III standing requirements, including injury in fact, causation,[2] and redressability.

F. Conclusion.

The facts here are undisputed. Conservation Groups represent members who live, work, and recreate near CCC's proposed plant and will breathe its pollution if the facility is built. The affidavit testimony in the record demonstrates that Conservation Groups have suffered, and will suffer, injuries in

[2] Importantly, the *NRDC* court held that the petitioners had standing to challenge a rule creating an affirmative defense immunizing potential future violations. 749 F.3d at 1062–63. The court determined that irregular permit violations would result in pollution that would harm the petitioners. *Id.* Here, Conservation Groups challenge permit limits that allow CCC's facility to emit avoidable pollution every day for the foreseeable future.

fact that are concrete, particularized, and actual or imminent. Therefore, Conservation Groups have demonstrated that their rights protected by the Clean Air Act and Air Pollution Control Act are substantially prejudiced by the permitting decisions before the Court, and respectfully request that the Court enter summary judgment finding that they are persons aggrieved whose rights have been substantially prejudiced.

II. THE SUPERIOR COURT ERRED IN DISMISSING CONSERVATION GROUPS' CLAIMS THAT DAQ UNLAWFULLY RELIED ON INACCURATE INFORMATION.

The second issue before the Court is the superior court's dismissal of Conservation Groups' claims that DAQ violated permitting requirements related to the proposed quarry. The permits authorize direct emissions from the quarry as well as emissions from the kiln that are dependent on the content of raw materials from the quarry. (R pp 484, 3824). Yet as Conservation Groups alleged in their pleading, the quarry plan that CCC submitted to DAQ is not an accurate representation of the quarry that the company intends to construct and operate. An updated quarry plan later submitted to the U.S. Army Corps of Engineers ("Corps") is substantially different from—and approximately double the size of—the placeholder plan submitted to DAQ. (R pp 485–89, 3825–29). Therefore, the emissions limits in the Permit are based on inaccurate and outdated information about the boundaries and operations of the quarry.

A. Standard of Review

On review of a motion to dismiss under N.C. R. Civ. P. 12(b)(6), "[t]his Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003). When deciding a motion to dismiss under Rule 12(b)(6) or 12(b)(1), petitioners' factual allegations must be "treated as true." *Hunter v. Guardian Life Ins. Co.*, 162 N.C. App. 477, 480, 593 S.E.2d 595, 598 (2004) (citations omitted); *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998).

B. Conservation Groups Properly Claimed that DAQ Erred in Relying On an Obsolete Quarry Plan.

PSD permit applicants must submit "all information necessary to perform any analysis or make any determination required." 40 C.F.R. § 51.166(n); 15A N.C. Admin. Code 02D .0530(g). This includes a determination of proper emission limits for PSD pollutants. 40 C.F.R. § 51.166(j)(2). Changes in baseline information—like a change in the boundaries of CCC's proposed quarry—"could have overarching impacts on the rest of the . . . BACT analysis and consequently on a number of the permit conditions." *In re Desert Rock Energy Co., LLC*, Nos. 08-03, 08-04, 08-05, 08-06, 2009 WL 3126170 at *2 (EPA App. Sept. 24, 2009) (Addendum). For example, the emission limits for

sulfur dioxide and nitrogen oxides in the permits are excessive because they are based on the composition of raw materials from the placeholder quarry.

The requirement that PSD permit applicants submit "all information necessary" also mandates the submission of accurate estimates of potential emissions, 40 C.F.R. § 51.166(b)(4), and accurate emissions modeling, *id.* § 51.166(k), both of which depend on site-specific factors and accurate information about CCC's quarry. DAQ's own modeling guidance requires "[a] detailed, accurate map of the quarry site." Quarry Guidance for Refined Modeling at 3, *available at* http://daq.state.nc.us/permits/mets/quarry1.pdf.

A permit must also reflect an accurate fugitive dust plan, which again depends on the facility's quarry. *See* 15A N.C. Admin. Code 02D .0540(e).

In addition, PSD permit applicants must submit to DAQ any relevant "filings with the State or Federal regulatory authorities." *See* 40 C.F.R. § 51.166(b)(40)(ii). Under state rules, CCC has "a continuing obligation to submit relevant facts pertaining to [its] permit application and to correct incorrect information on [its] permit application." 15A N.C. Admin. Code 02Q .0304(1). CCC submitted a quarry plan to the Corps for the larger quarry that CCC intends to build, but never provided this quarry plan to DAQ. DAQ acted on the application without requiring CCC to provide accurate information regarding the quarry proposal, despite having the authority to do so under 15A

N.C. Admin. Code 02Q .0304(i). As a result, the permit includes emission limits that are based on a quarry plan that materially differs from the quarry that CCC intends to build.

The obligation to base permit limits on accurate information does not cease when the permit is issued, emphasizing the necessity of accurate application information. If DAQ "finds that [a] permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit"—even after DAQ has already issued a final permit—DAQ must reopen and revise the permit. 15A N.C. Admin. Code 02Q .0517(a)(3); *see also id.* 02Q .0504(a), (c)(1) (requiring applicants who choose to obtain a construction and operation permit under section 02Q .0501(c)(2), and who submit an application under section 02Q .0300, to follow the application processing procedures in section 02Q .0500 and 02D .0530).

In addition, the Clean Air Act demands that the public be allowed to "submit written or oral presentations on the air quality impact of [a proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2).

Importantly, the error committed when an agency relies on inaccurate permitting information cannot be cured even if the permittee later submits

corrected information after commencing construction. Allowing a permittee to withhold information until after it has commenced construction would defeat the very purpose of the PSD program, which sets "*preconstruction* requirements." *Id.* § 7475 (emphasis added). "As a practical matter . . . once the plant has been constructed, an agency might be hard-pressed to deny an operating permit or to require modifications that could readily have been accomplished before construction began but would be very costly afterwards." *Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 972 (D. Or. 2006).

Conservation Groups alleged that DAQ relied on the inaccurate quarry proposal included in CCC's application, in violation of the requirements for assessing projected emissions, modeling, and fugitive dust as well as public notice requirements. (R pp 483–91). Conservation Groups therefore pleaded sufficient facts to show that the agency's analysis is erroneous as a matter of law and arbitrary and capricious. *See* N.C. Gen. Stat. 150B-23(a); *see also Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 580, 710 S.E.2d 350, 354 (2011) (stating that agency action is "arbitrary and capricious when it is . . . in disregard of facts or law" (citing *Ward v. Inscoe*, 166 N.C. App. 586, 595, 603 S.E.2d 393, 399 (2004))). The superior court erred in rejecting these well-pleaded claims.

C. Conservation Groups' Rights Are Substantially Prejudiced by DAQ's Issuance of a Permit That Does Not Comply with Applicable Law.

The superior court dismissed Conservation Groups' quarry-based claims under 12(b)(1) based on its determination that the claims should be dismissed under 12(b)(6). (R pp 4500–01). As discussed above, Conservation Groups stated claims upon which relief can be granted and, therefore, properly invoked the jurisdiction of the Office of Administrative Hearings. Likewise, the court's *sua sponte* determination that the claims should be dismissed under Rule 12(c) should be reversed.[3]

CONCLUSION

For the foregoing reasons, Conservation Groups respectfully request that the Court enter summary judgment finding that Conservation Groups are persons aggrieved because their rights under the Air Pollution Control Act have been substantially prejudiced, reverse the dismissal of quarry based claims under Rules 12(b)(1), (b)(6), and (c), and remand the consolidated cases for a hearing in the Office of Administrative Hearings on the Division of Air Quality's compliance with the Clean Air Act, Air Pollution Control Act, and all applicable regulations when issuing the contested permits.

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[3] Although no party filed a motion for judgment on the pleadings under Rule of Civ. P. 12(c), the superior court dismissed Conservation Groups' claims under 12(c) based on the finding that they did not state a claim upon which relief can be granted.

Respectfully submitted this the 2nd day of November, 2015.

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N.C. R. App. P. 33(b) Certification:
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using 14 point proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, appendix, and addendum) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

I certify that on 2nd November 2015, a copy of the foregoing Appellants' Brief was served upon all counsel of record by electronic mail and by depositing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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No. COA 15-1058 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA COASTAL FEDERATION, CAPE FEAR RIVER WATCH, PENDERWATCH & CONSERVANCY, and SIERRA CLUB,	)	
Petitioners,	)	
v.	)	From Wake County
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY, and N.C. ENVIRONMENTAL MANAGEMENT COMMISSION,	)	13 CVS 15906 14 CVS 7436 14 CVS 9199
Respondents,	)	
CAROLINAS CEMENT COMPANY LLC,	)	
Respondent-Intervenor.	)	

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BRIEF OF *AMICUS CURIAE* CLEAN AIR CAROLINA

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BRIEF OF *AMICUS CURIAE* CLEAN AIR CAROLINA

****

ISSUE PRESENTED

WHETHER THE EMISSION OF POLLUTANTS CAN HARM HUMAN HEALTH EVEN WHERE EMISSIONS ARE NOT EXPECTED TO EXCEED THE NATIONAL AMBIENT AIR QUALITY STANDARDS?

STATEMENT OF THE CASE AND FACTS

Amicus curiae Clean Air Carolina adopts the statement of the case and facts in the Brief of Petitioner-Appellants North Carolina Coastal Federation, Cape Fear River Watch, Penderwatch & Conservancy, and Sierra Club.

ARGUMENT

Petitioners should not be prevented from seeking a contested case hearing or judicial review of an air quality permit merely because pollution emissions are not expected to exceed the National Ambient Air Quality Standards ("NAAQS"). Both the U.S. Congress and the Environmental Protection Agency have explicitly recognized that the NAAQS do not prevent all harm to human health. Congress added the Prevention of Significant Deterioration ("PSD") program to the Clean Air Act specifically to address potential health effects from emissions at levels below the NAAQS. Respondents' arguments to the contrary have been addressed and rejected by the U.S. Second Circuit Court of Appeals. *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) ("Cohen has Article III standing even if the ambient level of SO_2 remains within the NAAQS.").

This Court should be particularly sensitive to these arguments in the present case. One of the emissions from Intervenor's proposed cement plant is fine-particulate matter ("$PM_{2.5}$"). During the NAAQS rulemaking process, the EPA concluded that $PM_{2.5}$ is dangerous at any level but that it is impossible for the

NAAQS to create a zero-risk environment. Hence, at an absolute minimum, insofar as $PM_{2.5}$ is concerned, compliance with the NAAQS does not eliminate impacts to human health or the environment.

I. The NAAQS were never designed to, and indeed do not, prevent all harm to human health.

Emissions within the United States are primarily governed by the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* Understanding the broad structure of the Act will help with understanding the implications of compliance with the NAAQS. The Act required the EPA to develop acceptable levels for airborne emissions, "the attainment and maintenance of which . . . are requisite to protect the public health." 42 U.S.C. § 7409(b)(1). These EPA-developed levels for airborne emissions are called National Ambient Air Quality Standards ("NAAQS"), and are subdivided into two parts: Primary NAAQS and Secondary NAAQS. Primary NAAQS protect individuals, and Secondary NAAQS protect the environment. 42 U.S.C. § 7409(b)(1)-(2); *see also* 40 C.F.R. § 50. The EPA developed NAAQS for many types of emissions, including $PM_{2.5}$. 40 C.F.R. § 50.13.

The EPA is not involved with the direct regulation of actual emission sources in those States with approved plans. The Act states "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Hence, the States are responsible for deciding how to meet the NAAQS promulgated by the EPA. 42

U.S.C. § 7410(a)(1). States must create a State Implementation Plan ("SIP") that "provides for implementation, maintenance, and enforcement of [the NAAQS] . . . within such State." *Id.* The SIPs must be approved by the EPA and be consistent with the EPA's regulations. 42 U.S.C. § 7410(a)(1), (k)(2) & (3). Following approval by the EPA, States are required to enforce the limitations created by their SIPs. States must regulate "the modification and construction of any stationary source within the areas covered by the [SIP]." 42 U.S.C. § 7410(a)(2)(C). Stationary sources include any fixed emitter of pollutants, such as power plants or other industrial operations. Further, States must create and run a permit program that governs the amount and types of emissions that a permit holder may discharge. 42 U.S.C. §§ 7661a(d)(1), 7661c(a). No regulated source of emissions may operate without a permit. 42 U.S.C. § 7661a(a).

But the NAAQS are not the exclusive air quality standards within this system. In 1977, Congress added the Prevention of Significant Deterioration ("PSD") program to the Clean Air Act. 42 U.S.C. §§ 7470 *et seq.* Per the Act, the EPA is required to designate areas as "attainment," "nonattainment," or "unclassifiable" based upon whether each area satisfies the NAAQS. 42 U.S.C. § 7407(d). With limited exceptions, the PSD program applies only to emission sources within regions that are in "attainment" or "unclassifiable" areas. 42 U.S.C. §§ 7470 *et seq.*

In attainment areas—that is, areas complying with the NAAQS—the PSD program ensures that air quality is not degraded by new major emitting facilities or by modifications to existing major emitting facilities. 42 U.S.C. §§ 7470-7471, 7475. To guard against significant deterioration in air quality within attainment areas, the PSD program requires that new or modified major emitting facilities obtain a permit prior to construction. 42 U.S.C § 7475. Because NAAQS do not prevent all health risks, PSD program permits for new major emitting facilities require "the best available control technology ["BACT"] for each pollutant subject to regulation." 42 U.S.C. § 7475(a)(4).

The existence of the PSD program is very important to the present case. By enacting the PSD program, "Congress [] recognized that there are potentially adverse affects [sic] from air pollution at levels *below* the NAAQS." *LaFleur v. Whitman*, 300 F.3d 256, 270 (2d Cir. 2002) (emphasis in original). Congress explicitly recognized this fact by defining the purpose of PSD program thusly: "to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media . . . *notwithstanding attainment and maintenance of all [NAAQS]*." 42 U.S.C. § 7470(1) (emphasis added). Hence, by creating the PSD program and its requirement of BACT, Congress recognized that adverse effects to human health may result even where the NAAQS are not exceeded.

Relying upon these statutory mandates, the EPA has acknowledged that "a zero-risk standard [for the NAAQS] is not required by the CAA." EPA, National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3098 (Jan. 15, 2013). Instead, the EPA has interpreted the goal of the PSD program as a recognition that human health can be harmed at emission levels below the NAAQS: "[T]his charge to 'protect public health and welfare'" under the PSD program requires that the EPA "evaluate whether adverse effects may occur as a result of increases in ambient pollutant concentrations *to levels below the NAAQS*." EPA, Prevention of Significant Deterioration for Nitrogen Oxides, 70 Fed. Reg. 59,582, 59,588 (Oct. 12, 2005) (emphasis added). Thus, both Congress and the EPA have unequivocally stated that emissions below the NAAQS do not eliminate human health risks.

Respondents' arguments to the contrary were addressed and rejected by the U.S. Second Circuit Court of Appeals in *LaFleur v. Whitman*, 300 F.3d 256 (2d Cir. 2002). In that case, an intervenor sought to construct and operate a facility for converting municipal waste and sewage sludge into fuel-grade ethanol and carbon dioxide. *Id.* at 259. The petitioners in *LaFleur* sought to compel the EPA to object to the permit issued to the intervenor by the State of New York. *Id.* Strikingly similar to the present case, the intervenor in *LaFleur* challenged the standing of the petitioners because anticipated emissions would not exceed the NAAQS:

> Intervenor Masada challenges the standing of petitioner Cohen, arguing that she has failed to allege that the increase in air pollutant emissions from the facility would affect her negatively in any way . . . [because] even assuming a 'worst case' impact of the facility, *the ambient level of the regulated air pollutant to be released by the facility, namely, sulfur dioxide (SO_2), would be well below the applicable NAAQS.*

Id. at 269 (emphasis added). It is important to note that the EPA did not endorse this argument challenging the petitioner's standing, presumably because the argument was without merit. *Id.* at 269-70.

The Second Circuit in *LaFleur* rejected the exact argument pressed by Respondents in the present case. The Second Circuit held,

> [T]here can be no question that petitioner Cohen is likely to be exposed to emissions from the facility. She has no choice but to breathe the air where she lives and works—air that will undoubtedly contain increased levels of SO_2 whenever the wind blows the facility's emissions in the direction of Campbell Shopping Plaza. . . .
>
> *Petitioner Cohen has Article III standing even if the ambient level of SO_2 remains within the NAAQS.* Indeed, Congress has recognized that there are potentially adverse affects [sic] from air pollution at levels *below* the NAAQS. The CAA states specifically that one of the purposes of the PSD program is "to protect public health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media . . . *notwithstanding attainment and maintenance of all national ambient air quality standards.*" 42 U.S.C. § 7470(1) (emphasis added). . . . Actual exposure to increased levels of SO_2 at one's workplace is certainly something more than an "identifiable trifle," even if the ambient level of air pollution does not exceed the NAAQS.

Id. at 270 (some citations omitted) (emphasis added).

In summary, Congress explicitly recognized that ambient levels below the NAAQS do not eliminate health risks; the EPA explicitly recognized that ambient levels below the NAAQS do not eliminate health risks; and for these reasons, the Second Circuit Court of Appeals rejected the same arguments posed by Respondents in the present case. This Court should do the same.

II. During the rulemaking process, the EPA expressly concluded that $PM_{2.5}$ poses health risks at levels below the NAAQS.

Intervenor's facility is anticipated to emit numerous pollutants governed by the NAAQS, including fine-particle pollution ($PM_{2.5}$). $PM_{2.5}$ are "[a]irborne particles with a nominal aerodynamic diameter of 2.5 micrometers or less." EPA, Air Quality Designations and Classifications for the Fine Particles ($PM_{2.5}$) National Ambient Air Quality Standards, 70 Fed. Reg. 944, 945 (Jan. 5, 2005). These "[f]ine particles in the atmosphere are made up of a complex mixture of components," including sulfate, nitrate, ammonium, elemental carbon, a variety of organic compounds, water, and inorganic material. *Id.*

To promulgate the NAAQS for $PM_{2.5}$, the EPA was required to first conclude that $PM_{2.5}$ "causes or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7408(a)(1)(A). According to the EPA,

> Epidemiological studies have shown a significant association between elevated $PM_{2.5}$ levels and a number of serious health effects, including premature mortality, aggravation of respiratory and cardiovascular

> disease (as indicated by increased hospital admissions, emergency room visits, absences from school or work, and restricted activity days), lung disease, decreased lung function, asthma attacks, and certain cardiovascular problems such as heart attacks and cardiac arrhythmia. Individuals particularly sensitive to $PM_{2.5}$ exposure include older adults, people with heart and lung disease, and children.

EPA, Air Quality Designations and Classifications for the Fine Particles ($PM_{2.5}$) National Ambient Air Quality Standards, 70 Fed. Reg. 944, 945 (Jan. 5, 2005); *see also Am. Trucking Assocs. Inc. v. EPA*, 283 F.3d 355, 359 (D.C. Cir. 2002) ("$PM_{2.5}$ is associated with a range of adverse health effects such as coughing; shortness of breath; aggravation of existing respiratory conditions like asthma and chronic bronchitis; increased susceptibility to respiratory infections; and heightened risk of premature death.").

In addition to harming human health, $PM_{2.5}$ harms the environment. In developing the NAAQS for $PM_{2.5}$, "the EPA recognized that PM produces adverse effects on visibility and that impairment of visibility was being experienced throughout the U.S., in multi-state regions, urban areas, and remote mandatory Federal Class I areas alike." EPA, National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086, 3182 (Jan. 15, 2013). Further, the EPA acknowledged the existence of evidence that $PM_{2.5}$ has negative ecological effects, corrosive effects on building materials, and a link to changes in the climate. *Id.* at 3204 (summarizing evidence of non-visibility environmental impacts but not promulgating new standards due to inconclusiveness of evidence).

$PM_{2.5}$ is especially concerning because there is no level at which it is safe for human health. The EPA concluded that, "evidence- and risk-based approaches using information from epidemiological studies to inform decisions on $PM_{2.5}$ standards are complicated by the recognition that *no population threshold, below which it can be concluded with confidence that $PM_{2.5}$-related effects do not occur, can be discerned* from the available evidence." *Id.* at 3098 (emphasis added). "In the EPA's judgment, . . . PM may be[] a non-threshold pollutant—that is, a pollutant that causes adverse health effects at any non-zero atmospheric concentration." *Am. Trucking Assocs. Inc.*, 283 F.3d at 359-60.

Similar findings were made by the U.S. District Court for the Western District of North Carolina in *State of North Carolina v. Tennessee Valley Authority*, 593 F. Supp. 2d 812 (W.D.N.C. 2009), *rev'd by* 615 F.3d 291 (4th Cir. 2010).* Among other issues, that court was confronted with whether $PM_{2.5}$ poses health risks at levels below the NAAQS. The court held that, "based on the totality of the evidence, the Court finds that, at a minimum, there is an increased risk of

* The district court in *Tennessee Valley Authority* was reversed for reasons not disturbing its findings on the health risks of $PM_{2.5}$. In *Tennessee Valley Authority*, the State of North Carolina filed a lawsuit alleging that permitted facilities within Tennessee constituted a public nuisance. 615 F.3d at 296. The Fourth Circuit Court of Appeals reversed the district court's use of public nuisance law to impose "specific emissions caps and emissions control technologies" on previously permitted facilities. *Id.* However, the court of appeals never questioned or even addressed the district court's findings that $PM_{2.5}$ poses health risks at levels below the NAAQS.

incidences of premature mortality in the general public associated with $PM_{2.5}$ exposure, even for levels at or below the NAAQS." *Id.* at 822.

In the *Tennessee Valley Authority* case, the State of North Carolina argued that the NAAQS do not eliminate all health risks. In its Opening Brief before the Fourth Circuit Court of Appeals, the State of North Carolina acknowledged that the "NAAQS are not designed to be fully protective," and that there is "ample evidence . . . on health impacts at the population level below the NAAQS." Brief of Appellee State of North Carolina at 17, 64 n.27, *State of North Carolina v. TN Valley Auth.*, 615 F.3d 291 (4th Cir. 2010) (No. 09-1623).

Therefore, $PM_{2.5}$ is especially illustrative of the fact that the NAAQS do not prevent all harms to human health.

III. Environmental health organizations play a crucial role in permitting proceedings.

The history of environmental protection in our country, and our State, is that the permit process is the backbone of implementing environmental laws and regulations. It is a well-recognized and integral part of the process to allow individuals and groups affected by permit decisions to participate in permitting deliberations and contested case proceedings stemming from such deliberations. *See, e.g.*, *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res., Div. of Envtl. Mgmt.*, 337 N.C. 569, 447 S.E.2d 768 (1994) (landowner was "person aggrieved" and entitled to hearing before Office of Administrative Hearings to

challenge issuance of air quality permit to power plant); *N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., Div. of Water Quality*, 357 N.C. 640, 588 S.E.2d 880 (2003) (forestry association had standing to commence contested case proceeding to challenge the Division of Water Quality's actions regarding licensing of wood chip mills to operate within the State); *Cnty. of Wake v. Dep't of Env't & Natural Res.*, 155 N.C. App. 225, 573 S.E.2d 572 (2002) (owners of property adjacent to proposed landfill had standing to raise issue of whether town approved location of proposed landfill in matter seeking judicial review of order to withdraw permit to construct municipal solid waste landfill).

Hence, environmental health organizations, such as *amicus* Clean Air Carolina, play a crucial role in permitting proceedings. If the trial court's decision is not reversed, then environmental health organizations will be foreclosed from participating whenever the State unilaterally determines that the NAAQS will not be exceeded.

We implore this Honorable Court to recognize the important legal rights conferred to affected citizens and environmental health organizations that care about the environment and the proper review and issuance of air quality permits. Such permits are at the heart and soul of the environmental programs whose federal and state legal mandates are to be protective of human health and the environment. If these groups and the many citizens who care deeply about these

issues are not allowed to challenge and bring to our State's courts perceived deficiencies in these permits, both our State's environment and the public's right to access the General Court of Justice will be injured.

CONCLUSION

Congress, the EPA, and the State of North Carolina have explicitly stated that the NAAQS do not prevent all harm to human health or the environment. The creation of the Prevention of Significant Deterioration program to address health effects of emissions below the NAAQS confirms that the NAAQS are not designed to be fully protective of human health. In particular, the emission of fine-particulate matter has been found to endanger human health at any level. As such, Petitioners should not be prevented from seeking a contested case hearing or judicial review of an air quality permit merely because pollution emissions are not expected to exceed the NAAQS.

For the foregoing reasons, Clean Air Carolina respectfully requests that this Court reverse the trial court.

Respectfully submitted, this the 2nd day of November, 2015.

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Pursuant to N.C. R. App. P. 28(j)(2)(B), I hereby certify that the word count of the foregoing Brief of *Amicus Curiae* Clean Air Carolina is less than 3,750 words, including footnotes and citations, but excluding the cover page, index, table of authorities, certificate of service, and certificate of compliance.

This the 2nd day of November, 2015.

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The undersigned hereby certifies that on this date the foregoing *Amicus Curiae* Brief of Clean Air Carolina was served on the following parties to this action, pursuant to Appellate Rule 26, by depositing the same in a postpaid wrapper under the exclusive custody of the U.S. Postal Service to:

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NO. COA15-1058 TENTH DISTRICT

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Petitioner-Appellants,	)	
v.	)	
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF AIR QUALITY,	)	FROM WAKE COUNTY 13 CVS 015906 14 CVS 007436 14 CVS 009199
Respondent-Appellee,	)	
CAROLINAS CEMENT COMPANY, LLC,	)	
Intervenor-Appellee.	)	

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INTRODUCTION

The case at bar presents a critically-important issue regarding the enforcement of state laws that protect human health from pollution: whether persons aggrieved by agency action may challenge that action in court. In an opinion that upends more than twenty years of state administrative law, the lower court ruled that petitioners who live, work, and recreate immediately downwind and downstream of a facility that, if built as proposed, would emit thousands of tons of air pollutants each year may not have their grievances heard by the state's courts unless they can prove not only that they are aggrieved by agency action, but also that they are substantially prejudiced thereby.

By telling Petitioners they have the right to file their complaint but not to be heard on the merits, the lower court also runs afoul of minimum federal requirements for judicial review of air pollution control permits by rendering that review meaningless. The North Carolina Division of Air Quality (DAQ) implements the federal Clean Air Act (CAA) through authority delegated by the U.S. Environmental Protection Agency (EPA). The delegation is predicated, in part, on the state's assurance that its laws provide citizens the same right to administrative and judicial review of permitting decisions they would receive if the federal government were implementing the law itself. In short, states like North Carolina that operate their air pollution control programs pursuant to delegated

authority under the CAA may not restrict access to review of air pollution control permits beyond Article III's standing doctrine requirements.

Here, Petitioners sought administrative review of a permit DAQ issued to Carolina Cement Company (CCC) pursuant to the North Carolina Air Pollution Control Act (APCA), the state law implementing the CAA. The permit allows the company to construct a cement manufacturing plant that would emit more than 5,000 tons of air pollution each year on the banks of the Northeast Cape Fear River. Members of the petitioning organizations live, work, and recreate in the shadow of the proposed cement plant and are threatened by the effects of the increased air pollution on their health, economic livelihood, and quality of life. After participating in public hearings and submitting written comments on the draft permit, Petitioners filed a contested case for administrative review of the final permit, alleging it was issued in violation of the APCA and the North Carolina Administrative Procedure Act (NCAPA).

Although the administrative law judge (ALJ) found that petitioners were "persons aggrieved," he interpreted N.C. Gen. Stat. Section 150B-23(a) (Section 150B-23(a)) to require an additional, heightened showing that Petitioners were "substantially prejudiced" by DAQ's decision and dismissed their case before reaching the merits. The Superior Court affirmed the ALJ's decision, upsetting

state legal precedent on standing for environmental claims and violating requirements for state CAA implementation.

Amici are administrative and environmental law professors from several North Carolina law schools who specialize in the legal principles involved in this case. *Amici* disagree with the lower court's ruling and are concerned by its departure from established legal precedent guaranteeing redress for injured parties and ensuring a continued federal-state partnership in the administration of environmental statutes in North Carolina. *Amici* therefore seek to share their unique perspective with the Court.

ARGUMENT

I. The NCAPA, APCA, and CAA Must Be Read *in pari materia.*

The NCAPA provides that any "person aggrieved" by agency action many petition for a contested case hearing. N.C. Gen. Stat. § 150B-23(a). The N.C. Supreme Court acknowledged that the term "person aggrieved" has no technical meaning, and thus determined that it must be read in concert with the organic statute the petitioner seeks to enforce: "Under the NCAPA, any 'person aggrieved' *within the meaning of the organic statute* is entitled to an administrative hearing to determine the person's rights, duties or privileges." *Empire Power Co. v. NC DENR*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994) (emphasis added).

Here, the organic statute is the APCA, the state statute that implements the federal CAA per EPA-delegated authority. Thus, this Court must look to the CAA's and APCA's purposes to determine whether petitioners are "persons aggrieved" by the agency's decision.

II. The CAA and APCA Seek to Protect Human Health and the Environment.

The primary purposes of the CAA, 42 U.S.C. Sections 7401-7671q, are to improve and maintain air quality to protect human health and the environment, and prevent air pollution. *Id.* § 7401(b), (c). To effectuate these goals, Congress directed EPA to set health-based ambient air quality standards and regulate and control emission sources. *Id.* Congress also mandated a process for meaningful, informed public involvement at all stages of an agency's decisionmaking processes. *See, e.g.,id*. § 7607(d)(3). Congress viewed public participation as so fundamental to the statute's aims that it conferred upon citizens the right to file suit to enforce the CAA against the government and regulated entities. *Id.* §§ 7604; 7607(b); 7661d(b)(2). Congress also conditioned receipt of EPA-delegated CAA implementation authority on preserving affected third parties' rights to administrative and judicial review. *See, e.g., id.* § 7661a(b)(6).

The APCA similarly aims to protect human health and the environment by reducing and preventing air pollution and regulating emission sources. N.C. Gen.

Stat. §§ 143-211(a), (c), 107(a)(1), 108(b). Further, the General Assembly intended

> the powers and duties of the Environmental Management Commission and the Department of Environment and Natural Resources be construed so as to enable [them] to qualify to administer federally mandated programs of environmental management and … to accept and administer funds from the federal government for such programs.

Id. § 143-211(c). Consistent with this objective, EPA has granted North Carolina increasing CAA authority, culminating with full approval to implement its operating permit program in 2001. 37 Fed. Reg. 10,842 (May 31, 1972); 41 Fed. Reg. 56,866 (Dec. 30, 1976); 66 Fed. Reg. 45,941 (Aug. 31, 2001).

An interpretation of Section 150B-23(a) that effectuates the legislature's intent—to protect human health and facilitate implementation of federally-delegated programs—is consistent with the statutory language and does not "produce absurd consequences, but rather [has] the most reasonable operation that its language permits." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140-41 (1990). Here, the most reasonable interpretation of Section 150B-23(a) is one that furthers the public participation requirements of the CAA and APCA, including the right to judicial review of the merits of a petitioner's claims consistent with the requirements of Article III, and furthers the legislature's intent to enable the state to implement federally-delegated programs.

III. The CAA Requires Meaningful Public Involvement, Including the Right to Judicial Review.

The CAA establishes a program to control air pollution sources and improve the nation's air quality through "a system of shared federal and state responsibility." *Alaska v. EPA*, 298 F.3d 814, 816 (9th Cir. 2002). Per Title I of the CAA, EPA must establish National Ambient Air Quality Standards (NAAQS) for ubiquitous pollutants, the attainment of which is requisite to protect human health and welfare. 42 U.S.C. § 7409. In setting these standards, EPA must focus exclusively on protection of human health and may not consider cost of attainment. *Whitman v. American Trucking* Ass'n, 531 U.S. 457 (2001). Each state must develop a state implementation plan (SIP) that specifies how it will attain the NAAQS within its boundaries, and submit that plan to EPA for review. 42 U.S.C. § 7410. Among the measures that must be included in the SIP is a pre-construction permit program that meets the CAA's requirements for the prevention of significant deterioration of air quality (PSD). *Id.* § 7410(a)(2)(C), (J). The state's PSD program must, in turn, include "adequate procedural opportunities for informed public participation in the decisionmaking process." *Id.* § 7470(5); *see also* 40 C.F.R. § 51.166(q).

The CAA expressly provides an opportunity for judicial review of PSD permits when EPA is the permitting authority. 42 U.S.C. § 7607(b). EPA interprets the CAA to require delegated program states to provide an opportunity

for judicial review of PSD permits in state courts "in order to ensure an adequate and meaningful opportunity for public review and comment on all issues within the scope of the permitting decision." "Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia – Prevention of Significant Deterioration Program," 61 Fed. Reg. 1880, 1882 (Jan. 24, 1996). EPA asserts that if an interested and affected member of the public is unable to obtain judicial review of a state's alleged failure to comply with its PSD permitting rules, Congress' mandate for vigorous public involvement in the administration and enforcement of the statute "is seriously compromised." *Id.; see also* "Approval of Air Quality Implementation Plans; California; San Joaquin Valley Unified Air Pollution Control District; Prevention of Significant Deterioration," 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012).

In 1990, Congress substantially revised the CAA to enhance its effectiveness. Germane to the case at bar was the addition of a comprehensive operating permit in Title V, modeled after the federal Clean Water Act's (CWA) National Pollution Elimination Discharge System permit requirements, *see* 33 U.S.C. § 1342, that prohibits a major pollution source from operating without a permit or in violation of that permit. 42 U.S.C. § 7661a(a). The permit sets forth all CAA requirements with which the source must comply, serving as a "source-

specific bible for Clean Air Act compliance." *Commonwealth of Virginia v. Browner*, 80 F.3d 869, 876 (4th Cir. 1996).

As with other aspects of the CAA, states with delegated authority are expected to administer and enforce Title V as a matter of state law. 42 U.S.C. § 7661a(b), (d)(1). Specifically, Title V grants the "opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." *Id.* § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x).

EPA and the courts interpret this provision to mean that state administrative review procedures for air pollution permits must provide the same rights as the corresponding federal administrative review procedures. *Browner*, 80 F.3d at 876; 61 Fed. Reg. at 1882. Because the Article III standing doctrine governs access to review of federally-issued air pollution permits, North Carolina's laws governing access to review of state-issued air pollution permits may not be more restrictive than those imposed by Article III.

IV. State Procedures for Administrative and Judicial Review of Permitting Decisions under the APCA Must Be No More Restrictive than Corresponding Federal Procedures.

The CAA "require[s], at a minimum, that states provide judicial review of permitting decisions to any person who would have standing under Article III of

the United States Constitution." *Browner*, 80 F.3d at 876. In *Browner*, the Fourth Circuit held that Virginia's standing requirement of "pecuniary and substantial interest" was more restrictive than Article III's requirements and thus upheld EPA's disapproval of Virginia's application for delegation. *Id*. at 877.

In its 1990 CAA amendments, Congress made explicit this requirement: states with delegated programs must allow broad access to administrative review of permitting decisions by ensuring "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." 42 U.S.C. § 7661(a)(b)(6). EPA promulgated regulations implementing this mandate in provisions governing delegated programs, clarifying that states must ensure access to judicial review for interested parties. *See, e.g*., 40 C.F.R. § 70.4(b)(3)(x).

Although this mandate is contained in Title V, EPA has consistently stated that the same requirements apply to Title I and the PSD provisions, the title and provisions at issue here:

> The EPA believes that Congress intended such opportunity for state judicial review of PSD permit actions to be available to permit applicants and at least those members of the public who can satisfy threshold standing requirements under Article III of the Constitution….

61 Fed. Reg. at 1882 (disapproving Virginia's CAA SIP in part because Virginia's standard for access to administrative review was more restrictive than the Article III standard); Approval and Promulgation of Air Quality Implementation Plans; Commonwealth of Virginia Prevention of Significant Deterioration Program, 63 Fed. Reg. 13,795 (Mar. 23, 1998) (subsequently approving Virginia's SIP because Virginia's "new standard [for access to administrative review] is consistent with the standard for Article III standing articulated by the Supreme Court").

A. North Carolina Certified That State Laws Governing Judicial Review Complied with CAA and Article III Requirements.

In response to North Carolina's request for clarification about the CAA's judicial review requirements, EPA stated unequivocally that "to the extent that a participant in the public comment process would satisfy the federal requirements of standing to appeal a final permit decision, a state's operating permit program must afford that party access to the state judicial review process." Letter from John R. Barker, Regional Counsel, EPA Region IV, to Daniel F. McLawhorn, Special Deputy Attorney General, State of North Carolina 3 (Dec. 29, 1992) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) and *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985)).[1]

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[1] *Amici* move the court to take judicial notice of this document in an accompanying motion.

North Carolina subsequently assured EPA that its procedures for access to judicial review complied with the federal mandate. In the state's proposed Title V Program Plan, North Carolina's Attorney General certified to EPA that "[a]ny provisions of state law which limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution." Attorney General's Opinion, Title V Program Plan, State of North Carolina Department of Environment, Health, and Natural Resources 14 (1993).[2] In fact, the Attorney General assured EPA that the "person aggrieved" standard is "at least as broad as the minimal standing requirements of Article III enunciated by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*," and is "in all likelihood less restrictive." *Id.* at 15. On this basis, EPA approved the state's delegation of authority. Clean Air Act Final Interim Approval of Operating Permits Program; State of North Carolina, *et al.*, 60 Fed. Reg. 57,357 (Nov. 15, 1995); Clean Air Act Final Full Approval of Operating Permit Programs, North Carolina, *et al.*, 66 Fed. Reg. 45,941 (Aug. 31, 2001).

B. Petitioners Satisfy Article III Standing Requirements.

The U.S. Supreme Court has ruled that any party may meet Article III's standing requirements if: (1) they have suffered an injury in fact, (2) such injury is fairly traceable to an agency decision, and (3) the injury will likely be redressed by

[2] *Amici* move the court to take judicial notice of this document in an accompanying motion.

a favorable decision of the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Sworn statements from individuals with a "reasonable concern" that their interests would be affected by pollution "adequately document injury in fact." *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 183 (2000); *see also Browner*, 80 F.3d at 876 ("injury to health or to aesthetic, environmental, or recreational interests will suffice" to demonstrate Article III standing) (internal citation omitted). The Fourth Circuit has held that in environmental cases, "a plaintiff need only show that he used the affected area, and that he is an individual 'for whom the aesthetic and recreational values of the area [are] lessened' by the defendant's activity" to establish standing. *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 263 (4th Cir. 2001) (*citing Laidlaw*, 428 U.S. at 181, and *Sierra Club v. Morton*, 405 U.S. at 735). Similarly, the Eleventh Circuit has held that affidavits claiming "reduced aesthetic and recreational values stemming from concern about pollution" establish injury-in-fact for purposes of Article III standing. *Sierra Club v. Johnson*, 436 F.3d 1269, 1278 (11th Cir. 2006).

Here, Petitioners clearly meet the Article III standing requirements outlined above because they live, work, and recreate on lands and waters adjacent to and downwind of the proposed plant. At a minimum, Petitioners have demonstrated "reasonable concern" that the approval of the CCC permit will increase health risks because the permit will allow extensive increased air pollution in and around their

homes. Petitioners will breathe, smell and see polluted air, and thus have demonstrated injury to their health, aesthetic, recreational, and environmental interests.

In fact, the D.C. Circuit recently held that Petitioners in this case satisfied Article III standing based on substantively similar affidavit testimony from three of the same affiants in this case. *NRDC v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (regarding a challenge to an EPA rule that would allow increased air pollution from the CCC facility and other similar facilities).[3] The court ruled that "petitioners' members will suffer from [] higher emissions… [A] ruling in their favor would prevent those emissions and help alleviate that harm. That's good enough." It is good enough here as well.

V. The Lower Court Erred as a Matter of Law.

Despite a showing sufficient to satisfy Article III's requirements, the lower court denied Petitioners the opportunity for administrative review. In a ruling that violates the principles articulated in *Empire Power*, 337 N.C. 569, the court found that Section 150B-23(a) requires Petitioners to first demonstrate that they are "persons aggrieved," and then to further establish that they were "substantially prejudiced" by agency action. This interpretation renders Section 150B-23(a)

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[3] Article III standing doctrine applies to challenges of both agency rules and permitting decisions. *See, e.g.*, *Sierra Club v. E.P.A.*, 699 F.3d 530, 533 (D.C. Cir. 2012).

impermissibly inconsistent with Article III because it establishes "substantial prejudice" as a higher standard than Article III. The lower court erred as a matter of law. *See, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000) (ruling "[t]he trial court erred … in creating evidentiary barriers to standing that the Constitution does not require and Congress has not embraced").

EPA has made clear that access to review must be meaningful. It is not enough that Petitioners are allowed to file their petition for a contested case; they are entitled to a hearing and decision on the merits of their claims. *Se*e 77 Fed. Reg. at 65,307 (finding that the opportunity provided by [California Law] "to seek review of a PSD permit decision … before the California Supreme Court and to obtain that court's judicial determination on the merits" satisfies the CAA requirement for an opportunity for judicial review under state law for PSD permits). The lower court's decision that "persons aggrieved" have the right to file their contested case but not to be heard on the merits renders that right meaningless. *See Gaston Copper*, F.3d at 155-56 (finding that "the legislative branch has invited precisely the type of suit brought" by the downwind petitioner, and that "[t]he judicial branch is not at liberty to impede its resolution on the merits.") The decision must be overturned.

VI. The Court's Misinterpretation of Section 150B-23(a) Compromises North Carolina's Ability to Implement Federally-Delegated Programs.

Congress envisioned a strong partnership with the public in administering and enforcing the nation's environmental laws. In addition to requirements for public notice, hearings, and opportunities for comment, statutes such as the CAA and CWA authorize citizens to access the courts to enforce the laws directly. To facilitate the role of citizens as "private attorneys general," Congress mandated that states ensure administrative and judicial review consistent with the U.S. Constitution. *See* Michael Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339 (1990).

This partnership is undermined by inconsistencies between state and federal requirements for judicial review. In some states, barriers to judicial review have forced a choice between amending state standing doctrines and forfeiting their right to implement the CAA. *See, e.g.*, Notice of Deficiency for Clean Air Act Operating Permits Program in Oregon, 63 Fed. Reg. 65,783-84 (Nov. 30, 1998) (filing a Notice of Deficiency for Oregon's operating permit program, which is a prerequisite to the withdrawal process); Announcement of a Federal Operating Permits Program Consistent with 40 C.F.R. Part 71; Maryland; Delegation of the Title V Permitting Program, 66 Fed. Reg. 63,236-37 (Dec. 5, 2001) (withdrawing

prior approval of Maryland's operating permits program and establishing a federal operating permits program for the state of Maryland).

Such barriers pose the same problem for federally-delegated programs in North Carolina, including the CAA, CWA and Resource Conservation and Recovery Act (RCRA). These statutes and their associated regulations require that state procedures for judicial review afford citizens the same opportunities they would receive under Article III. *See* CWA, 33 U.S.C. § 1251(e); 40 C.F.R. § 123.30 ("States [implementing the CWA] will meet [the required] standard if state law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit"); RCRA, 42 U.S.C. § 6974(b); 40 C.F.R. § 271.16(d) (requiring right of intervention for "any citizen having an interest which is or may be adversely affected").

The interpretation of Section 150B-23(a) challenged herein would undermine the state's ability to implement these programs as well. This is not idle conjecture: the NCAPA governs judicial review under each of these programs. By creating new legal hurdles for citizens seeking to enforce legislative mandates to protect human health and welfare, the lower court's decision runs afoul of the state's commitments and longstanding tradition of compliance with federal requirements. The lower court's ruling must be reversed to preserve the integrity

of North Carolina's delegated authority to administer federal pollution control programs.

CONCLUSION

Congress granted states the flexibility to implement the CAA on the condition that they guarantee their citizens the same rights to judicial review they would receive if the federal government were the implementing body. North Carolina's legislature intended to meet these federal minimum standards in operating a delegated program. Lawyers for the state certified to EPA that the NCAPA provided review consistent with Article III requirements, a certification our Supreme Court subsequently confirmed.

Because Section 150B-23(a) plays a gatekeeping role for administrative review of state action taken pursuant to federal law, it must be interpreted and applied consistently with Article III's standing doctrine. *Amici* therefore respectfully urge this Court to reverse the lower court's decision.

Respectfully submitted this the 2nd day of November, 2015.

Electronically submitted

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CERTIFICATE OF COMPLIANCE

In accordance with North Carolina Rule of Appellate Procedure 28(i) governing *Amicus Curiae* briefs, the undersigned counsel certifies that this *Amici Curiae* brief contains no more than 3,750 words. According to the automatic word count provided by counsel's word processing software, the text of the brief consists of 3,707 words, inclusive of footnotes and citations.

This the 2nd day of November, 2015.

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STATE OF NORTH CAROLINA

COUNTY OF BEAUFORT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 262

SOUND RIVERS and NORTH CAROLINA COASTAL FEDERATION, Petitioners, v. N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES, Respondent, MARTIN MARIETTA MATERIALS, INC., Respondent-Intervenor.	)	**ORDER ON PETITION FOR JUDICIAL REVIEW**

This matter came before the Court on September 17, 2015 before the Honorable W. Douglas Parsons, Superior Court Judge presiding, on the Petition for Judicial Review filed by Petitioners Sound Rivers, Inc. and North Carolina Coastal Federation, Inc. and the Motion to Dismiss filed by Respondent-Intervenor Martin Marietta Materials. Geoffrey R. Gisler, Blakely E. Hildebrand, and Derb S. Carter, Jr. appeared on behalf of Petitioners. Scott A. Conklin and Asher P. Spiller appeared on behalf of Respondent. George W. House, Alexander Elkan and V. Randall Tinsley appeared on behalf of Respondent-Intervenor. Having considered the Petition for Judicial Review, the Motion to Dismiss, briefs filed by the parties, the official record, and the oral arguments of counsel for the parties, Petitioners' Motion for Summary Judgment with respect to their status as persons aggrieved is GRANTED, Respondent-Intervenor's Motion to Dismiss is

DENIED, the parties respective Motions for Summary Judgment on all other issues before the Court are DENIED, and this matter is REMANDED for further proceedings.

PROCEDURAL HISTORY

On July 24, 2013, the Division of Water Resources ("DWR" or "Agency") issued National Pollutant Discharge Elimination System ("NPDES") permit NC0089168 ("Permit") to Martin Marietta Materials, Inc. ("MMM") pursuant to authority delegated to the Department of Environment and Natural Resources ("DENR") under the Clean Water Act ("CWA"). On September 19, 2013, Petitioners Sound Rivers and North Carolina Coastal Federation ("NCCF" and with Sound Rivers, "Petitioners") challenged the Permit in the Office of Administrative Hearings ("OAH") on the basis that the permit failed to comply with the Clean Water Act and North Carolina's water quality standards regarding biological integrity, pH, and the swamp waters classification. Petitioners and MMM filed cross-motions for summary judgment in OAH on the issue of whether Petitioners are "persons aggrieved" North Carolina Administrative Procedure Act ("APA") and on each of Petitioners substantive claims.

On March 20, 2015, Administrative Law Judge ("ALJ") Philip Berger, Jr. entered a Final Decision granting MMM's motion for summary judgment, finding that Petitioners were not "persons aggrieved" under the APA. Alternatively, the Final Decision granted summary judgment to MMM and DWR on each of Petitioners' substantive claims. Specifically, the Final Decision held that DWR ensured compliance with the biological integrity standard, ensured compliance with the pH water quality standard, and protected the existing uses of Blounts Creek in issuing the Permit. Further, the ALJ found that DWR ensured compliance with state water quality standards by including a reopener condition in the Permit. Petitioners timely petitioned this Court for judicial review of the Final Decision on April 20, 2015, seeking reversal of the ALJ's decision and

entry of summary judgment on each of their claims. MMM timely filed a Response and Motion to Dismiss on May 19, 2015.

STANDARD OF REVIEW

On a petition for judicial review, the reviewing court may "reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusion, or decisions are:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the agency, or administrative law judge;
3. Made upon un lawful procedure;
4. Affected by other error of law;
5. Unsupported by substantial evidence admissible under G.S. 150B-29 (a), 150B-30, or 150B-31 in view of the entire record as submitted; or
6. Arbitrary, capricious, or an abuse of discretion."

N. C. Gen. Stat. § 150B-51(b). Alleged errors of law under subdivisions (1) through (4) are reviewed *de novo*. Id. 150B-51(c). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own judgment for the agency's. *Overcash v. N. C. Dep't of Env't and Natural Res.,* 179 N. C. App. 697 703, 635, S. E. 2nd 442, 446 (2006) (citations and alterations omitted). Petitioners appeal the Final Decision upholding the Permit as unlawful interpretations of the APA, the Clean Water Act, and state water quality regulations, and therefore, the standard of review is *de novo.*

Alleged errors of law under subdivisions (5) and (6) of Section 150B-51 (b) are reviewed under the whole record test. N. C. Gen. Stat. § 150B-51 (c). An administrative decision may be

set aside as arbitrary and capricious if the decision "clearly evinces a lack of fair and careful consideration or want of impartial, reasoned decision making." *Joyce v. Winston-Salem State Univ.*, 91 N. C. App. 153, 156, 370 S. E. 2nd 866, 868, (1988) (captions omitted). Petitioners appeal the Final Decision upholding the Permit as arbitrary and capricious with regard to its application of the biological integrity standard, swamp waters classification, and the pH standard.

"In reviewing a final agency decision allowing...summary judgment...the [superior] court may enter any order allowed by ...Rule 56." N. C. Gen. Stat. §150B-51(d). The Court must determine "whether there are any genuine issues of material fact and whether any party was entitled to judgment as a matter of law." *York Oil Co. v. N. C. Dep't of Env't. Health and Natural Res.,* 164 N. C. App. 550, 555, 596 S. E. 2d 270, 273-74 (2004). The Court looks to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to make its determination. N.C.R. Civ. P. 56 (c).

DECISION

Having considered the Petition for Judicial Review, the Motion to Dismiss, briefs filed by the parties, the official record, and the oral argument of counsel for the parties, the Court concludes that there are no genuine issues of material fact regarding whether Petitioners are "persons aggrieved" and that Petitioners are entitled to judgment as a matter of law as to their status as "persons aggrieved." However, the Court concludes that with respect to all of Petitioners' remaining claims, genuine issues of material fact remain, and that no party is entitled to judgement as a matter of law.

Respondent-Intervenor's Motion to Dismiss is DENIED. Petitioner's Motion for Summary Judgment with respect to their status as "persons aggrieved" is GRANTED. Summary Judgment on all other issues before the Court is DENIED. This matter is REMANDED to the Office of Administrative Hearings for further proceedings, including specifically, a full plenary hearing on DWR's permitting decision. This Court retains jurisdiction over further review of this matter.

ORDERED this 9 day of November, 2015.

Hon. W. Douglas Parsons
Superior Court Judge