

CASWELL COUNTY WATERSHED REVIEW BOARD

In re: Appeals of Watershed Protection Permits and Special Non-residential Intensity Allocation Permits)
) FOST, SHOFFNER, AND NAACP
) RESPONSE IN OPPOSITION TO THE
) MOTIONS TO DISMISS
) BY CASWELL COUNTY AND
) CAROLINA SUNROCK, LLC
)

COME NOW Anita Foust, Byron Shoffner, and the Day-Holt Chapter of the NAACP (Foust et al) and show the Watershed Review Board the following reasons why the motions to dismiss (MTD) filed by Caswell County (County) and Carolina Sunrock LLC (Sunrock) should not be granted:

BASIS FOR MOTION TO DISMISS

Sunrock asserts the following:

Caswell County UDO Section 10.10.6.1 vests the Watershed Review Board with authority to "hear and decide appeals from any decision or determination made by the Watershed Administrator in the enforcement of Article 10, Part II of the UDO (hereinafter, the "Watershed Protection Regulations"). [See Ex. E] The Watershed Administrator's authority under the UDO similarly is limited to the "administration and enforcement of the Watershed Protection Regulations. [See Ex. F] In other words, the UDO expressly limits the Watershed Administrator's authority to applying and enforcing the Watershed Protection Regulations, and confers upon the Watershed Review Board the limited appellate authority to review decisions made under the Watershed Protection Regulations. Neither the General Statutes nor the Caswell County UDO confer authority on either the Watershed Administrator or the Watershed Review Board to apply or enforce any state or local law or regulation other than the Caswell County Watershed Protection Regulations.

The County's motion echoes this argument. In addition, Sunrock (and the County) argues that that the appeals of Foust et al should be dismissed

to the extent they are premised on the HIDO and NCDEQ regulations because the Watershed Administrator did not make a decision relating to either of those regulations and the Board lacks jurisdiction to interpret those regulations.

In addition, Sunrock (and the County) argue that the appeal of Foust et al should be limited to one issue:

whether the Watershed Administrator misapplied UDO Section 10 as a result of the State of North Carolina's designation of Jordan Lake as a "critical area."

SUMMARY OF REASON TO REJECT THE MOTIONS TO DISMISS

No factual or legal basis is provided for the argument that Foust et al should be limited to the issue as characterized by Sunrock and the County. In fact, the issue before the Watershed Review Board is whether the Watershed Administrator erred in issuing the Watershed Protection Permit (WPP) and the Special Non-Residential Intensity Allocation (SNIA) permits.

Sunrock and the County agree that under the UDO the Watershed Administrator is charged with the "administration and enforcement of the Watershed Protection Regulations" (WPR) which are found in Part II of the UDO. Sunrock MTD, p2. Those regulations provide that federal and state laws and regulations are not affected by the UDO; thus, the UDO and the Watershed Administrator enforcing the UDO cannot allow any use if such use would be prohibited by a State or federal law or regulation. The UDO also incorporates the public water supply watersheds "designated by the NC Division of Environmental Management and adopted by the NC Environmental Management Commission" including the Haw River Watershed, classified as WS-IV in the Cape Fear River

Basin. Finally, if the decision of the Watershed Administrator was improper under the UDO, or any State or federal law or regulation, the Watershed Review Board has the authority to hear appeals under Section 10.10.6.1 of “any decision or determination made by the Watershed Administrator in the enforcement of these regulations” which includes the UDO and any State or federal laws which provide the authority under which the Watershed Administrator makes decisions which affect water quality, which in this case is the granting of the SNIA and the WPP.

ARGUMENT

I. There is no basis to limit the appeals of Foust et al to the issue as stated by Sunrock and the County.

Exhibit D attached to the motion to dismiss filed by Sunrock and adopted by the County explicitly states that Foust et al were asserting that the “Watershed Protection Permit Was Issued Erroneously” and that one basis for the appeal was the fact that the application was not complete until January 2021 and thus the applications should have been considered under the standards in the High Impact Development Ordinance adopted in December 2021. In addition to this issue, Exhibit D also makes it clear that decisions under the County’s watershed regulations must not only comply with those watershed regulations in the UDO, but they must also comply with State and federal law.

II. Sections 10.6, 10.7.1, and 10.7.2 all govern the actions of the Watershed Administrator and under the UDO cannot grant permits for development activity which would violate State or federal law or regulations.

The Watershed Administrator derives any authority s/he has from delegated federal and state law. The UDO only exists because it is authorized by State law. State law is only valid due to a delegation from the federal government.

The Clean Water Act (CWA) was adopted as federal law with a stated purpose “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” U.S. Environmental Protection Agency, “Summary of the Clean Water Act.”¹ The implementation of the CWA is shared between the Environmental Protection Agency (EPA) and state governments and state governments must establish regulatory systems that meet minimum federal requirements. 40 C.F.R. § 131.1 et seq.²

Thus, the State’s delegated authority from the EPA is the source of the protections in place for watersheds in this State, including in Caswell County. As adopted by the General Assembly:

§ 143-211. Declaration of public policy.

(a) It is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources. Furthermore, it is the intent of the General Assembly, within the context of this Article and Articles 21A and 21B of this Chapter, to achieve and to maintain for the citizens of the State a total environment of superior quality. Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best

¹ [https://www.epa.gov/laws-regulations/summary-clean-water-act#:~:text=The%20Clean%20Water%20Act%20\(CWA,quality%20standards%20for%20surface%20waters.](https://www.epa.gov/laws-regulations/summary-clean-water-act#:~:text=The%20Clean%20Water%20Act%20(CWA,quality%20standards%20for%20surface%20waters.)

² 40 C.F.R. § 131.4 entitled “State authority” provides “(a) “States (as defined in § 131.3) are responsible for reviewing, establishing, and revising water quality standards. As recognized by section 510 of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation.” 40 C.F.R. § 131.5 provides that the EPA must review whether State standards “are consistent with the requirements of the Clean Water Act.”

interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare.

(b) It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 1997 Edition) and the statewide antidegradation policy adopted pursuant thereto.

(c) It is the purpose of this Article to create an agency which shall administer a program of water and air pollution control and water resource management. It is the intent of the General Assembly, through the duties and powers defined herein, to confer such authority upon the Department of Environmental Quality as shall be necessary to administer a complete program of water and air conservation, pollution abatement and control and to achieve a coordinated effort of pollution abatement and control with other jurisdictions. Standards of water and air purity shall be designed to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources. ***It is the intent of the General Assembly that the powers and duties of the Environmental Management Commission and the Department of Environmental Quality be construed so as to enable the Department and the Commission to qualify to administer federally mandated programs of environmental management and to qualify to accept and administer funds from the federal government for such programs.*** (1951, c. 606; 1967, c. 892, s. 1; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1979, 2nd Sess., c. 1158, s. 2; 1989, c. 135, s. 1; c. 727, s. 218(102); 1997-443, s. 11A.119(a); 1998-168, s. 1; 2006-259, ss. 31(b), 31(c); 2015-241, s. 14.30(u).)

Thus, Caswell County's watershed regulations are only permitted to be adopted with the authorization of the Environmental Management Commission (EMC) and the Department of Environmental Quality (DEQ). The EMC and DEQ are specifically charged by the legislature to ensure that the State is qualified by the EPA "to administer federally mandated programs of environmental management and

to qualify to accept and administer funds from the federal government for such programs.” The CWA and the EPA and its regulations authorize the State to act, and the State, DEQ, and the EMC authorize the County to act to protect the watersheds in Caswell County. Caswell County can only act consistently with State and federal law.

In section 10.6.1, the UDO states that the “intent of the Water Supply Watershed Protection Regulations is to protect surface water supplies whose watersheds are located wholly or partially within the jurisdiction of Caswell County.” This is consistent with State and federal law and regulations applicable to local governments such as Caswell County.

Under N.C. Gen. Stat. § 143-214.1, the State has assigned to the EMC alone the authority to classify waters and develop water quality standards:

§ 143-214.1. Water; water quality standards and classifications; duties of Commission.

(a) Development and Adoption of Classifications and Standards. - The Commission is hereby directed and empowered, as rapidly as possible within the limits of funds and facilities available to it, and subject to the procedural requirements of this Article:

(1) To develop and adopt, after proper study, a series of classifications and the standards applicable to each such classification, which will be appropriate for the purpose of classifying each of the waters of the State in such a way as to promote the policy and purposes of this Article most effectively;

(2) To survey all the waters of the State and to separately identify all such waters as the Commission believes ought to be classified separately in order to promote the policy and purposes of this Article, omitting only such waters, as in the opinion of the Commission, are insufficiently important to justify classification or control under this Article; and

(3) To assign to each identified water of the State such classification, from the series adopted as specified above, as the

Commission deems proper in order to promote the policy and purposes of this Article most effectively.

Under N.C. Gen. Stat. § 143-214.5, the General Assembly has empowered local governments to administer their own water supply watershed management program cooperatively with the State but only if they are “consistent with minimum statewide management requirements established by the Commission.” The General Assembly has specifically provided that “[i]f a local government fails to adopt a water supply watershed protection program or does not adequately carry out its responsibility to enforce the minimum water supply watershed management requirements of its approved program, the Commission shall administer and enforce the minimum statewide requirements.” Thus, the argument that the Watershed Administrator is not responsible or accountable for acting consistently with State or federal law and regulations is plainly wrong.

Section 10.7.1 of the UDO incorporates by reference State law and regulations and the UDO explicitly recognizes that the UDO cannot preempt or be interpreted to be in conflict with State or federal law or regulations. As section 10.7.2.1 provides:

10.7.2. Exceptions to Applicability

10.7.2.1. *Nothing contained herein shall repeal, modify, or amend any federal or state law or regulation*, or any ordinance or regulation pertaining thereto except any ordinance which these regulations specifically replace; however, the adoption of this Ordinance shall and does amend any and all ordinances, resolutions, and regulations in effect in the County at the time of the adoption of this Ordinance that may be construed to impair or reduce the effectiveness of this Ordinance or to conflict with any of its provisions.

In addition, the UDO incorporates State (and thus federal) laws and regulations into the UDO itself. Specifically, section 10.71.1 provides:

10.7.1. Jurisdiction

The provisions of this part shall apply to all of those unincorporated areas of Caswell County beyond the corporate limits of the Town of Yanceyville which are designated as water supply watersheds by the NC Division of Environmental Management as shown on the map entitled, Caswell County Public Water Supply Watersheds, which is adopted simultaneously herewith. ***The Watershed Map and all explanatory matters contained therein are by express reference thereto incorporated herein as an integral part of this Ordinance.*** The following Public Water Supply Watersheds, designated by the NC Division of Environmental Management and adopted by the NC Environmental Management Commission, are located within Caswell County:

Watershed	Classification	River Basin
Fullers Creek	WS-II	Roanoke
Country Line Creek	WS-II	Roanoke
South Hyco Creek	WS-II	Roanoke
Stony Creek	WS-II	Cape Fear
Hostler Branch	WS-II	Roanoke
Haw River	WS-IV	Cape Fear

The incorporation of the classification of the watershed area and their respective river basins serves implicitly to incorporate the State law and regulations applicable to such classifications and river basins. These State laws and standards are only valid because the EPA has approved them as being consistent with the Clean Water Act, a federal law. Thus, the UDO regulation itself explicitly incorporates applicable State and federal laws and regulations pertaining to watersheds: ***The Watershed Map and all explanatory matters contained therein are by express reference thereto incorporated herein as an integral part of this Ordinance.*** Finally, the UDO itself states explicitly in section 10.10.3.3 that the UDO watershed regulations can not be amended, supplemented, or changed in any way “that would

cause these regulations to violate the watershed protection rules as adopted by the NC Environmental Management Commission.”

This provision in the UDO is again proof that the argument that the Watershed Administrator cannot interpret the State and federal law and regulations is nonsense because the UDO is only permitted to exist if the implementation of it by the Watershed Administration is “consistent with minimum statewide management requirements established by the Commission” as required by N.C. Gen. Stat. § 143-214.5. And the EMC’s adopting the State’s standards are required by 40 C.F.R. § 131.5 to be “consistent with the requirements of the Clean Water Act.” Thus, the Watershed Administrator may not take any action inconsistent with federal or state law. It is beyond dispute that the Watershed Administrator cannot permit a use under the UDO which would violate State or federal law or regulations.

III. Section 10.9 and 10.10 govern the scope of the appeal of Foust et al. that the permits were not issued in compliance with the UDO Article 10 Environmental Regulations.

Under section 10.9. “Public Health Regulations,” the UDO specifically provides that the Watershed Administrator is obligated to ensure that “[n]o activity activity, situation, structure or land use shall be allowed within the watershed which poses a threat to water quality and the public health, safety and welfare.” Section 10.9.1. Examples of “such conditions” include “the improper management of stormwater runoff; or any other situation found to pose a threat to water quality.”

Likewise, under section 10.10 “Administration, Enforcement, and Appeals,” it is the duty of the Watershed Administrator to “administer and enforce the provisions of these regulations” Section 10.10.1 The UDO allows an appeal from “[a]ny order, requirement, decision or determination made by the Watershed Administrator” subject to section 10.10.6. which governs the “Powers and Duties of the Watershed Review Board.”

The Watershed Administrator issued a SNIA permit and a WPP permit which would permit Sunrock to discharge stormwater and process wastewater into the watershed. If the Watershed Administrator erroneously issued this permit in violation of the UDO or State or federal law or regulations, then the decision of the Watershed Administrator should be reversed. Foust et al appealed the decision within 30 days of the decision of the Watershed Administrator.

The development proposed by Sunrock was governed by the regulations found in Section 10.8.3 Stoney Creek-Balance. While development is limited to 12% built-upon area, Sunrock petitioned for a higher density allocation by submitting an application to the Watershed Administrator under 10.8.3.5.1 (Special Non-Residential Intensity Allocation (SNIA) Permits). Section 10.8.3.5 governs the approval of the SNIA. Section 10.8.3.3.2 prohibits the “[s]torage of toxic and hazardous materials unless a spill containment plan is implemented.” Section 10.8.7.1 “Stream Buffer Areas Required” provides that “[a] minimum thirty foot (30') undisturbed buffer, and an additional fifty foot (50') vegetative buffer for development activities is required along all perennial waters” is required. In addition, under

Section 10.8.3.5.2.6 an applicant is required to submit “[e]vidence that the development has, to the extent practicable, been so designed as to minimize storm water runoff offsite.” Section 10.8.3.5.3. provides that “[a]fter verifying that the application is complete,” the Watershed Administrator “shall have not more than fifteen (15) days to review and decide upon the issuance of a SNIA permit.

The Watershed Protection Permit issuance is governed by Section 10.8.11 (Watershed Protection Permit). This section provides that no

building permit [shall] be issued, nor shall any change in the use of any building or land be made until a Watershed Protection Permit has been issued by the Watershed Administrator. No Watershed Protection Permit shall be issued except in conformity with the provisions of this Ordinance.”

Section 10.8.11.2 provides that

Watershed Protection Permit applications shall be filed with the Watershed Administrator. The application shall include the items listed according to the specifications in the County Subdivision Regulations (Article 9, Part VI) and supporting documentation deemed necessary by the Watershed Administrator.

Exhibit 1 indicates that “documentation deemed necessary by the Watershed Administrator” apparently included a “SNIA permit,” DEQ determination” of “on site ponds,” a “spill containment plan,” and an “Environmental Assessment Application” and that the site plan needed to demonstrate a 30’ undisturbed & 70’ vegetative buffer from perennial waters because a SNIA was required. There is no deadline for the issuance of a watershed protection permit like the 15 day deadline for the SNIA permit.

Even though Sunrock submitted its original application for a SNIA on December 20, 2019, and its application for a WPP on December 19, 2019, (Exhibit 1) Sunrock did not submit a site plan showing compliance with the required buffers for the WPP and the SNIA as required by the Watershed Administrator. On January 5, 2021, the Watershed Administrator notified Sunrock on this omission and Sunrock sent in a site plan on January 5, 2021, which showed compliance with the required buffers. (Exhibit 1) After the application for the SNIA and the WPP were deemed complete, the Watershed Administrator approved the SNIA on January 4, 2021, within the 15 day deadline of receipt of the completed application, and the WPP on January 7, 2021. Thus, the appeal of Foust et al is properly before the Watershed Review Board and if Foust et al can show that the permits were issued in violation of the requirements of the UDO, then under section 10.9.2.3. the Board can find noncompliance with the UDO to be “a threat to water quality and the public health, safety and welfare,” and then “institute any appropriate action or proceeding to restrain, correct or abate the condition and/or violation.”

IV. Not only did the issuance of the permits violate the UDO, the issuance of the permits was not in compliance with the High Impact Development Ordinance (HIDO).

The HIDO was adopted on December 21, 2020, prior to the submission of a completed application by Sunrock on January 5, 2021, and the approval of the WPP on January 7, 2021, and the SNIA on January 4, 2021. Thus, the Watershed Administrator was obligated to consider the proposed development and apply the standards set forth in the HIDO. The HIDO was adopted to replace the

Environmental Impact Ordinance (EIO) adopted in 2003 and codified at Article III, Chapter 14, of the County's Code of Ordinances. Under section 14-68, the proposed development was either a Class III or Class IV land use which included certain standards, including but not limited to minimum lot sizes and stream setbacks. In addition, under subsection 1 of Section 14-71 provided that high impact uses must required with "all other applicable County, State, and Federal Regulations" which included but were not limited to watershed protection, stormwater, and water quality regulations.

The HIDO also provided for "[a] use or industry regulated by this ordinance, existing and in current operation upon the date of the initial adoption of this ordinance" which was nonconforming to apply for "Nonconformance Permit" within one year of the adoption of the HIDO. Even if Sunrock felt it was "in operation" or substantially vested by its submission of an incomplete application, it could have submitted an application for a "Nonconformance Permit" under Section 14-72, but it did not. To the extent that the Watershed Administrator issued the SNIA permits and the WPP without considering compliance with the HIDO, Foust et al are entitled to submit evidence and arguments on this basis as well to the Watershed Review Board and the HIDO noncompliance is also a proper basis for the Review Board to grant the appeal and revoke the permits.

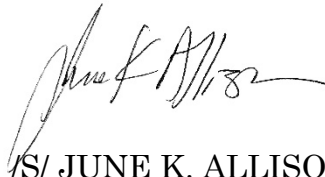
CONCLUSION

For the foregoing reasons, the motions to dismiss by Sunrock and Caswell County should be denied and the appeals of Foust et al that the permits were issued in violation of the applicable laws should be heard by the Watershed Review Board.

Respectfully submitted, this the 28th day of October 2022.

Valerie L. Bateman

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CERTIFICATE OF SERVICE

I hereby certify that I have served the following document on the date below
by the following method on the following person(s):

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This the 28th date of October 2022.

Valerie L. Bateman

Valerie L. Bateman
NEW SOUTH LAW FIRM



CASWELL COUNTY PLANNING DEPARTMENT

144 Main Street, Yanceyville, NC 27379 | Office: 336-694-9731 | Fax: 336-694-5547 | E-Mail: mhoagland@caswellcountync.gov

WATERSHED PROTECTION PERMIT

FEE: \$25.00

Name of Owner: Carolina Sunrock LLC

Mailing Address: 200 Horizon Dr Suite 100, Raleigh, NC 27615

Property Address: 12971 NC Hwy 62, Burlington, NC 27217

Phone: (919) 747-6400 Email: smartino@thesunrockgroup.com

Developer: Carolina Sunrock Phone: (919) 747-6336

Parcel Size (Acres): 84.2 Tax Map & Parcel Number: 0090 027

Watershed: Stoney Creek Balance & Jordan Lake Balance/~~Critical/Protected~~:

Description of Current Development on Property: Residential Use

Description of Proposed Development on Property: Hot Mix Asphalt Plant

NOTICE: A site plan must accompany this application. The Watershed Administrator must be notified of any changes to the approved site plan and specification for the project permitted herein.

[Signature] Applicant 12/5/2019 Date

OFFICE USE ONLY

NOTES: Applicant will need S.N.I.A. Permit since proposed development exceeds 12% max. Need DEQ determination & on-site ponds. Need Spill Containment Plan. Project will need Environmental Assessment Application as well. Site plan needs

DECISION: to demonstrate 30' undisturbed & 70' veg buffer from perennial waters since S.N.I.A. is required

RECEIVED

[Signature] Watershed Administrator DEC 16 2019 19 December 2019 Date

CASWELL COUNTY PLANNING DEPARTMENT

NOTE: Site Plan does not indicate 30 ft. undisturbed AND 70 ft. vegetative buffer around jurisdictional pond and other perennial streams. Notified applicant's representative of this via email on 5 Jan. 2021. Site plan sent via email on Jun. 7th approved (complies w/ Watershed Regulations).

[Signature] **APPROVED** 7 January 2021



CASWELL COUNTY PLANNING DEPARTMENT

144 Main Street, Yanceyville, NC 27379 | Office: 336-694-9731 | Fax: 336-694-5547 | E-Mail: mhoagland@caswellcountync.gov

Special Non-Residential Intensity Allocation (SNIA) Permit Application FEE: \$100.00

Name of Landowner: Carolina Sunrock LLC

Address of Landowner: 200 Horizon Drive Suite 200, Raleigh, NC 27515

Address of Property: 12971 NC Hwy 62 Burlington North, NC 27217

Phone: (919) 747-6400 Email: smartino@thesunrockgroup.com

Tax Map and Parcel Number: 0090 027 Total Tract Acreage: 84.2

Name and Description of Project: Hot Mix Asphalt Plant, Future Shop, Ready mix Concrete Facility and Offices.

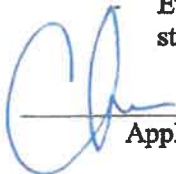
Name & Phone Number of Developer (if different): Carolina Sunrock LLC

Total Acreage of Built Upon Area: 24.0 Watershed Area (if applicable): STONEY CREEK BALANCE: JORDAN LAKE

List of Any Hazardous Materials Which Will Be Stored On-Site: Diesel Fuel, No 4 used oil, and Liquid Asphalt.

Please also provide the following:

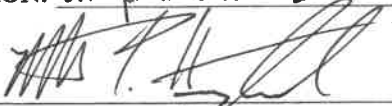
- Blue-prints (3 copies) depicting the built-upon area
- Evidence that the development has, to the extent practicable, been so designed as to minimize storm water runoff offsite.


Applicant Signature

12-20-19
Date

----- OFFICIAL USE ONLY -----

DECISION: Site plans confirm 24 acre built upon area. Sediment & Erosion Control Plan confirms stormwater mgmt.


Watershed Administrator

APPROVED 4 January 2021
Date