

Agenda Item: 10-52 Presentation of Administrative Law Judge's Recommended Decision, Windy Woods, LLC v. DENR, Division of Water Quality, 09 EHR 4621, OP 2009-005, Brunswick County

Explanation:

The Division of Water Quality, on delegation from the Secretary, assessed Windy Woods, LLC \$20,000.00 in civil penalties for the following activities that occurred between February 26, 2009 and May 7, 2009 on property located on NC 211 in Brunswick County: \$10,000 for unauthorized impacts to wetlands by filling, excavating 2712 linear feet of ditches, and disturbing wetland soil; \$10,000 for failing to secure a 401 Water Quality Certification before placing fill and excavating ditches in wetlands; Enforcement costs of \$512.55 were also assessed.

The both parties filed motions for summary judgment under Civil Procedure Rule 56 which presented the issue of whether, based upon the pleadings, responses to discovery and any affidavits, there was any genuine issue as to any material fact and that any party was entitled to judgment or decision as a matter of law.

The Administrative Law Judge entered a Decision recommending that the EMC grant summary judgment to Windy Woods, LLC and deny summary judgment to DENR because DENR failed to produce evidence showing that either it or the Army Corps of Engineers had performed a wetlands determination in accordance with the US Supreme Court opinion in Rapanos to establish that the wetlands were waters of the United States under rule 15A NCAC 2B .0202(71). The LAJ recommends that the assessment of civil penalties and costs be Reversed as erroneous and a failure to act as required by law or rule.

Recommendation:

Under the APA, for a decision by an administrative law judge granting summary judgment, pursuant to G.S. 1A-1, Rule 56, that disposes of all issues in the contested case, the agency shall make a final decision. If the agency does not adopt the administrative law judge's decision, it shall set forth the basis for failing to adopt the decision and shall remand the case to the administrative law judge for hearing.

Summary judgment is properly granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact and may meet its burden of proof by (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2)

cannot produce evidence to support an essential element of his or her claim, or (3) cannot surmount an affirmative defense which would bar the claim.

When considering a motion for summary judgment, the presented evidence is viewed in the light most favorable to the nonmoving party. All inferences of fact must be drawn against the movant and in favor of the nonmovant. Rule 56(e) provides in relevant part that: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.