Agenda Item: 10-10 Presentation of Administrative Law Judge's Decision, NC WARB, Appalachian Voices, et al v. DENR & Duke Energy Carolinas,

LLC, 08 EHR 0771, 0779, 0835, 0836

Explanation:

The Division of Air Quality issued a prevention of significant deterioration (PSD) permit, Permit No. 04044T28, to Duke Energy authorizing the construction of a coal fired generating facility in Cliffside, NC near Shelby. Appalachian Voices and NC WARN filed motions for partial summary judgment on several issues with respect to BACT requirements and the length of the permit, respectively.

The Administrative Law Judge entered a Decision recommending that the EMC deny the motions for summary judgment and, in accord with Rule 56 of the Rules of Civil Procedure, there being no issues of material fact and the respondents are entitled to judgment as a matter of law, grant summary judgment on these issues to DENR/DAQ and Duke Energy.

Recommendation:

Under the APA, the Commission shall adopt the ALJ's decision unless it demonstrates that the ALJ's decision is clearly contrary to the preponderance of the admissible evidence; modify the decision or reject the decision with a statement of reasons and corresponding findings of fact that are supported by a preponderance of the evidence.

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). 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 decision maker must view the presented evidence in a light most favorable to the nonmoving party.