STATE OF NORTH CAROLINA

COUNTY OF MOORE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09 EHR 2650

QUALITY BUILT HOMES, INC. Petitioner,	)	
v.	)	**EXCEPTIONS TO ALJ DECISION**
N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, Respondent.	)	

NOW COMES Petitioner, Quality Built Homes, Inc. by and through counsel, J. Thomas Neville and Sharon L. Tucker, pursuant to N.C.G.S. §150B-36, and files the following written exceptions to the Administrative Law Judge's Decision in the above-captioned matter, in accordance with the Environmental Management Commission ("Commission") counsel's letter to the parties dated August 25, 2010, and respectfully requests that Petitioner's Proposed Decision be adopted as the Final Decision in this matter.

The Administrative Law Judge's ("ALJ) Decision is set forth in these Exceptions in its entirety. For purposes of the Commission's review, Petitioner does not object to the Commission's adoption of any portion of the ALJ Decision where exception is not taken. Petitioner has noted its exceptions in bold below each finding of fact or conclusion of law that is contested and has included its proposed alternative findings as supported by specific evidence in the record. Petitioner has also included additional findings of fact in bold that were not contained in the ALJ's decision, but are supported by specific evidence in the record. Petitioner

has attached as an Attachment its proposed final decision for consideration by the Commission.

STATE OF NORTH CAROLINA

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IN THE OFFICE OF
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09 EHR 2650

Quality Built Homes Inc. Petitioner,	)	
v.	)	**DECISION**
N.C. Department of Environment and Natural Resources, Division of Water Quality Respondent.	)	

THIS MATTER was heard before Administrative Law Judge J. Randall May on March 29 and 30, 2010 in Carthage, North Carolina. The case involved the appeal of a 401 Water Quality Certification with Additional Conditions.

APPEARANCES

For Petitioner:
J. Thomas Neville, Esq.
Sharon L. Tucker, Esq.
Thorpe, Clarke, Neville & Kirby, P.A.
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For Respondent:
Brenda E. Menard
Assistant Attorney General
N. C. Department of Justice
Environmental Division
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STATUTES AND RULES

N.C.G.S. §§ 143-215.1 *et seq.*
N.C. Admin. Code, Title 15A, Chapter 2H

ISSUES

1. Whether Petitioner met its burden of proof in proving by a preponderance of the evidence that Respondent exceeded its authority, acted arbitrarily, erroneously or capriciously by ordering Petitioner to implement a Stormwater Management Plan?

   Exception: The issue should read as follows: Whether the Respondent has exceeded its authority, acted arbitrarily, erroneously, and capriciously by ordering Petitioner to implement a Stormwater Management Plan.

2. Did Petitioner meet its burden of proof in establishing that Respondent erred in determining that more than one drainage area, as defined in 1 5A NCAC 2H .1002(7), existed at the Savannah's Garden site?

   Exception: The issue should read as follows: Whether the Respondent exceeded its authority, acted arbitrarily, erroneously, and capriciously by determining that more than two drainage areas, as defined in 15A NCAC 2H .1002(7) existed at Savannah's Garden site.

3. Did Petitioner meet its burden of proof in establishing that Respondent erred in determining that the area labeled as Drainage Area 4 in Petitioner's application documents exceeded twenty-four percent (24%) impervious surface cover?

   Exception: The issue should read as follows: Whether the Respondent exceeded its authority, acted arbitrarily, erroneously, and capriciously in determining that the area labeled as Drainage Area 4 exceeded twenty-four percent (24%) impervious surface cover?

4. Did Petitioner meet its burden of proof in establishing that Respondent erred in determining that the wetlands in the center of the Savannah's Garden site were not part of the pervious surface area of Drainage Area 4?

   Exception: The issue as raised at trial should read as follows: Whether the Respondent acted arbitrarily, capriciously, or erroneously in determining that no part of the wetlands located at Savannah's Garden could be used to calculate impervious surface area.

   Exception: Another issue raised should be included as follows:
   5. Whether the Respondent exceeded its authority, acted arbitrarily, erroneously, and capriciously in determining that the wetlands located on Savannah's Garden site could not be included in calculating the "entire area" of the property for purposes of calculating impervious surface cover of the drainage areas.

TESTIFYING WITNESSES

Petitioner:

1. Ron Jackson, Superintendent/Manager, Quality Built Homes, Inc.
2. Scott Matthews, Civil Engineer, Neal Smith Engineering, Inc.
3. Neal Smith, Professional Engineer, Neal Smith Engineering, Inc.
4. Hal Owen, Soil Scientist, Hal Owen & Associates, Inc.

Respondent:

1. Annette Lucas, Professional Engineer, Division of Water Quality ("DWQ"), North Carolina Department of Environment and Natural Resources ("DENR")

2. Cyndi Karoly, Environmental Program Supervisor, DWQ, DENR
3. Kenneth L. Averitte, Environmental Senior Supervisor, DWQ, DENR

Exception: In addition, Respondent presented Jodi Pace as a witness

4. Jodi Pace, Assistant Regional Engineer, DLR, DENR

EXHIBITS RECEIVED INTO EVIDENCE

Petitioner:

Exhibit 1 - 15A NCAC 02H
Exhibit 2 - Water Quality Certification No. 3705, effective November 1, 2007
Exhibit 4 - Letter of Approval dated February 18, 2009 of 401 Water Quality Certification
Exhibit 14 - Letter of Approval dated April 28, 2005 from DLR
Exhibit 24 – Sedimentation and Erosion Control Plan submitted by Seven Lakes Engineering for Savannah's Garden:

a. "Sediment Plan" dated 3/28/2005, sheet 1 of 13, Revision A
b. "Sediment Plan" dated 3/28/2005, sheet 2 of 13
c. "Sediment Plan" dated 3/28/2005, sheet 3 of 13
d. "Sediment Plan" dated 3/28/2005, sheet 4 of 13
e. "Sediment Plan" dated 3/28/2005, sheet 5 of 13
f. "Sediment Plan" dated 3/28/2005, sheet 6 of 13
g. "Sediment Plan" dated 3/28/2005, sheet 7 of 13
h. "Sediment Plan" dated 3/28/2005, sheet 8 of 13
i. "Sediment Plan" dated 3/28/2005, sheet 9 of 13
j. "Sediment Plan" dated 3/28/2005, sheet 10 of 13
k. "Sediment Plan" dated 3/28/2005, sheet 11 of 13
l. "Sediment Plan" dated 3/28/2005, sheet 12 of 13, Revision A
m. "Sediment Plan" dated 3/28/2005, sheet 13 of 13, Revision A

Exhibit 25 – Plans submitted by Neal Smith Engineering regarding Savannah's Garden:

a. Stormwater Wetland Layout dated 1/06/09, revised 2/11/09, sheet Cl of 5
b. Stormwater Wetland Plan and Section View dated 1/06/09, revised 2/11/09, sheet C2 of 5
c. Stormwater Wetland Planting Plan dated 1/06/09, revised 2/11/09, sheet C3 of 5
d. Erosion Control Plan dated 1/06/09, revised 2/11/09, sheet C4 of 5
e. Erosion Control and Site Details dated 1/06/09, revised 2/11/09, sheet CS of *5*

Exhibit 26 – Subject of Guidance: Project Area & Wetlands dated October 5, 2006

Respondent:

DATE	DESCRIPTION	EXH.
4/28/2005	Letter to Quality Built Homes Letter of Approval of Erosion and Sedimentation Control Plan From: The Division of Land Resources, Land Quality Section Enclosure: NPDES Permit	1
6/6/2006	Letter to Quality Built Homes Notice of Violation and Recommendation for Enforcement From: The Division of Water Quality	2
10/3/2006	Quality Built Homes, Savannah's Garden Erosion Control Drawing by Neal Smith Engineering, Inc. Received by Land Quality Section: 10/9/06 Disapproved: 10/16/06	3
4/1/2008	Letter of Transmittal with attachments to Division of Water Quality Wetland and Stream Restoration Plan for Savannah's Garden From: Dr. J. H. Carter Ill & Associates, Inc.	4
4/11/2008	Letter of Transmittal with attachments to Division of Water Quality From: Dr. J. H. Carter III & Associates, Inc.	5
4/25/2008	Letter to Quality Built Homes Request for More Information From: The Division of Water Quality	6
5/12/2008	Letter of Transmittal with attachments to Division of Water Quality From: Dr. J. H. Carter Ill & Associates, Inc.	7
6/17/2008	Letter to Quality Built Homes Request for More Information From: The Division of Water Quality	8

DATE	DESCRIPTION	EXH.
6/24/2008	Letter to Quality Built Homes - Approval of Stream and Wetland Restoration Plan with Additional Conditions From: The Division of Water Quality	9
9/16/2008	Letter of Transmittal with attachments to Division of Water Quality From: Dr. J. H. Carter III & Associates. Inc.	10
9/12/2008	Email to Jennifer Archambault of JFK & Associates From: Annette Lucas of NC DENR, DWQ	11
9/29/2008	Letter with attachments to Division of Water Quality From: Dr. J. H. Carter Ill & Associates, Inc.	12
10/9/2008	Letter to Quality Built Homes - Request for More Information From: The Division of Water Quality	13
11/3/2008	Letter of Transmittal with attachments to Division of Water Quality From: Dr. J. H. Carter Ill & Associates, Inc.	14
11/10/2008	Letter to Quality Built Homes - Request for More Information From: The Division of Water Quality	15
12/8/2008	Letter of Transmittal with attachments to Division of Water Quality From: Dr. J. H. Carter Ill & Associates, Inc.	16
12/9/2008	Letter to Quality Built Homes - Request for More Information From: The Division of Water Quality	17
1/9/2009	Letter of Transmittal with attachments to Division of Water Quality From: Neal Smith Engineering, Inc.	18
1/26/2009	Letter to Quality Built Homes - Request for More Information From: The Division of Water Quality	19
2/13/2009	Letter of Transmittal with attachments to Division of Water Quality From: Neal Smith Engineering, Inc.	20
2/18/2009	Approval of 401 Water Quality Certification with Additional Conditions	21
	Nationwide Permit 29, Residential Developments Effective 3/19/07	22
	General Water Quality Certification No. 3705 Effective 11/01/07	23

DATE	DESCRIPTION	EXH.
	Stormwater Management Plan (SMP) Requirements for Applicants other than the North Carolina Department of Transportation	24
	Resume of Cynthia Bell Karoly	25
	Resume of Annette Lucas, P.E.	26

STIPULATIONS

In the Pretrial Order, the parties agreed to and the undersigned approved the following stipulations:

1. It is stipulated that all parties are properly before the Office of Administrative Hearings ("OAH") and that the OAH has jurisdiction of the parties and of the subject matter.

2. It is stipulated that all parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

3. In addition to the other stipulations contained herein, the parties hereto stipulate and agree with respect to the following undisputed facts:

(a) The Division of Water Quality ("DWQ") is a Division of the Department of Environment and Natural Resources ("DENR"), and is the State agency responsible for statewide regulatory programs in groundwater and surface water protection.

(b) The Division of Land Resources ("DLR") is a Division of DENR and is the State agency responsible for statewide regulatory programs in sedimentation and erosion control.

(c) Petitioner Quality Built Homes, Inc. was incorporated in North Carolina on April 23, 1999. Ron Jackson is a Superintendent/Manager with Quality Built Homes, Inc. Stan Jackson is a Manager with Quality Built Homes, Inc.

(d) Jennifer Archambault (maiden name Jennifer Freeman) is an employee of Dr. J.H. Carter III & Associates, Inc. Dr. J.H. Carter III & Associates, Inc. acted as Petitioner's agent for the purposes of applying for a 401 Water Quality Certification from Respondent.

(e) Scott Matthews is an employee of Neal Smith Engineering, Inc. Neal Smith is President of Neal Smith Engineering, Inc. Neal Smith Engineering, Inc. acted as Petitioner's agent for the purposes of applying for a 401 Water Quality Certification from Respondent.

(f) Petitioner submitted an application to the Division of Land Resources ("DLR") of DENR for approval of a Sedimentation and Erosion Control Plan ("Plan") for the Savannah's Garden site ("Site") on or around April 14, 2005. After one or more revisions, Petitioner's Plan was approved by DLR on April 28, 2005. On or around April 28, 2005, the Fayetteville Regional Office of DWQ received a copy of the approval letter issued by DLR.

(g) Seven Lakes Engineering acted as Petitioner's agent for purposes of submitting a Sedimentation and Erosion Control Plan to the DLR in 2005.

(h) Petitioner began construction of a residential development at the Site in Moore County in 2005.

(i) On June 6, 2006, DWQ issued a Notice of Violation ("NOV") to Petitioner for violations at the Site including Wetlands Standards Violations and Failure to Secure a 401 Water Quality Certification.

(j) Petitioner, through its agent Neal Smith Engineering, submitted an application to the DLR for approval of a Sedimentation and Erosion Control Plan on or around October 9, 2006. After one or more revisions, DLR approved Petitioner's Plan on January 4, 2007. Petitioner submitted another application for approval on July 30, 2007, which DLR approved on July 30, 2007.

(k) On February 7, 2008, Petitioner sold the parcel to the north of lots 9 through 13 of the Site to R&M Commercial Real Estate, LLC, via Warranty Deed registered with the Moore County Register of Deeds in Deed Book 3367 at Page 575-576.

(1) On March 20, 2008, Petitioner sold the parcel across from lots 25 and 26 of the Site to Carthage Farms, LLC, via Warranty Deed registered with the Moore County Register of Deeds in Deed Book 3482 at Page 348-349.

(m) On or around March 28, 2008, Petitioner submitted to DWQ a Wetland and Stream Restoration Plan ("Restoration Plan") for the Site. The Restoration Plan proposed that Petitioner would obtain an after-the-fact 401 Water Quality Certification from Respondent for the permanent wetland impacts on the Site.

(n) Petitioner submitted an application on or around April 9, 2008 for an after-the-fact 401 Water Quality Certification from Respondent.

(o) On June 24, 2008, DWQ approved Petitioner's Restoration Plan with additional conditions. The approval required that Petitioner complete the Restoration Plan no later than December 1, 2008.

(p) Petitioner submitted to Respondent additional information regarding Petitioner's application for an after-the-fact 401 Water Quality Certification on or around the following dates: May 8, September 11, September 29, October 31, and December

3, 2008, and January 8 and February 12, 2009. Petitioner submitted the September 11, 2008 documentation to DWQ by both electronic and physical mail.

(q) On February 18, 2009, Respondent approved Petitioner's application for 401 Water Quality Certification, with conditions.

FINDINGS OF FACT

The Findings of Fact are made after careful consideration of the sworn testimony, whether visual and/or audio, of the witnesses presented at the hearing and the entire record in this proceeding. In making the findings of fact, the undersigned has weighed all the evidence, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

Definitions and Terminology

1. The terms of the GC 3705 provided, *inter alia*, that:

[Al Stormwater Management Plan in accordance with the version of Stormwater Management Plan (SMP) Requirements for Applicants other than the North Carolina Department of Transportation posted on the Division web site at the time of application shall be provided for any project that meets both of the following two criteria:

i. Requires a 404 Permit or Isolated Wetlands Permit (regardless of whether written authorization is required by the Division) AND
ii. Contains one or more drainage areas that are anticipated to have impervious surface cover of equal to or greater than 24 percent.

(Respondent's Exhibit 23)

2. The term "drainage area" is defined in 15A NCAC 2H .1002(7) as "the entire area contributing surface runoff to a single point".

3. "Impervious surface cover" is an area that does not allow water to permeate the ground, such as a concrete driveway or house. (T pp 241-42, 311) By contrast, pervious surface cover allows water to permeate into the ground. An example of pervious surface cover is a grassed lawn. (T p311)

Exception: This definition is incomplete and is contrary to a preponderance of the admissible evidence. This definition is revised to conform to the testimony and new facts are inserted to provide a more in depth definition of impervious and pervious surface cover.

An alternative finding of fact should be as follows: "Impervious surface cover" is an area

that does not allow water to soak into the ground, such as a concrete driveway (T pp241-42, 311). The most common impervious surfaces are man-made, built-upon areas such as paved roads, rooftops, sidewalks, driveways, patios, and the like. (P Exhibit 10; read into evidence at T pp 317). By contrast, pervious surface cover allows water to soak into the ground. A few examples include wooded areas and lawn areas. (T pp 311). Wetlands are also considered pervious surfaces (T pp 145)

4. Respondent interprets the "single point" referred to in the definition of "drainage area" in 15A NCAC 2H .1002(7) to mean the point at which the surface runoff enters a receiving surface water, including a wetland. (T p 381) Because of this interpretation, Respondent does not consider the receiving surface water to be part of the drainage area. (T p 3 18) Therefore, the area of the receiving surface water is not included in calculating the drainage area's impervious surface cover, since it is not a part of the drainage area. (T p 332) However, the area of a surface water could be included when calculating the drainage area's impervious surface cover if the surface water is not receiving stormwater discharge, but rather is contributing runoff to another surface water and therefore is part of the drainage area. (T p 311)

Exception: The definitions provided in this paragraph are incomplete when compared to the evidence presented at hearing. The definitions are also clearly contrary to the preponderance of admissible evidence. An alternative finding of fact is proposed as follows:

Respondent has defined "drainage area" as locations where stormwater runoff comes to a single point and discharges to a surface water (including wetlands) (Petitioner's Exhibit 7, read into evidence at T p. 340). However, "Drainage area" is defined in 15A NCAC 2H .1002(7) as "the entire area contributing surface runoff to a single point." (See Petitioner's Exhibit 1). There is no place in this definition where the statement "discharges to a surface water" or "wetlands" is referenced. (See Petitioner's Exhibit 1, T pp. 335-336). Ms. Annette Lucas acknowledged that the phrase "discharges to a surface water (including wetlands) was not included in the definition of drainage area. (See T. p. 342-342). Instead, Ms. Annette Lucas interprets the term drainage area to include this phrase, which is clearly contrary to the preponderance of admissible evidence.

<u>Factual History</u>

5. Waters of the State, including wetlands, exist at the Savannah's Garden site. (T p 202; Respondent's Exhibit 2) Petitioner discharged dredged or fill material to waters of the State including wetlands on or before May 25, 2006. Petitioner did not apply for a 401 Water Quality Certification from the State prior to these discharges. (Respondent's Exhibit 2) This oversight by Petitioner has led to the conundrum, which has later unfolded.

Exception: Petitioner only takes exception to the last sentence stating "this oversight by Petitioner has led to the conundrum, which has later unfolded." This finding of fact should be stricken since it is clearly contrary to the preponderance of the admissible evidence and does not refer specifically to what the conundrum is or what has later unfolded.

The alternative finding of fact should read as follows "Waters of the State, including

wetlands, exist at the Savannah's Garden site. (T p202; Respondent's Exhibit 2) Petitioner discharged dredged or fill material to waters of the State including wetlands on or before May 25, 2006. Petitioner did not apply for a 401 Water Quality Certification from the State prior to these discharges. (Respondent's Exhibit 2).

6. In its application for an after-the-fact 401 Water Quality Certification on or around April 11, 2008, Petitioner indicated that it was applying for a Nationwide 29, a type of 404 Permit. (Respondent's Exhibit 5*)* The corresponding general certification for the Nationwide 29 in April 2008 was 401 Water Quality Certification Number 3705 ("GC *3705").* (T p 168; Respondent's Exhibit 23)

7. Annette Lucas of the 401 Unit of the Division of Water Quality reviewed Petitioner's application with regard to the stormwater requirements, and made the relevant determinations. (T pp 232, 326-27) Annette Lucas is a public official charged with conducting such reviews and making such determinations as part of her duties. (T p 171)

Exception: This finding of fact is incomplete since Cyndi Karoly, Ken Averitte, and other staff members at DWQ also corresponded with Petitioner about Petitioner's application and reviewed Petitioner's application. Thus, it is contrary to the preponderance of the admissible evidence. An alternative finding of fact is proposed as follows: Annette Lucas and Cyndi Karoly of the 401 Unit of the Division of Water Quality reviewed Petitioner's application with regard to the stormwater requirements, and made the relevant determinations as to Petitioner's application (See T pp 232, 326-327, See Respondent's Exhibit 7, 8, 9).

8. **New finding of fact inserted. There was no finding of fact made as to the qualifications of Neal Smith, Scott Matthews, or Hal Owen, all of whom were qualified as experts at the hearing. That is contrary to the preponderance of the admissible evidence. An alternative finding of fact is proposed as follows:**

Scott Matthews is an engineer for the engineering firm Neal Smith Engineering and is experienced and familiar with the requirements in 401 certification applications. (See T p. 64) Scott Matthews is also experienced calculating impervious surface area and mapping drainage areas. (See T p. 64) Neal Smith is an engineer and works for the engineering firm Neal Smith Engineering and is experienced and familiar with the requirements in 401 certification applications. (See T p. 107) Neil Smith is also experienced calculating impervious surface area and mapping drainage areas. (See T. p 107) Hal Owen is a soil scientist who has worked with the 401 Water Quality Certification process since its inception. (See T pp. 130). He is a consultant who identifies wetlands, delineates the wetlands and their boundaries, and consults with engineers who are calculating the impervious surface calculation in relation to the wetlands. (See T pp. 136-137)

8. In its application for an after-the-fact 401 Water Quality Certification on or around April 11, 2008, Petitioner provided the percentage of impervious surface cover by phases, rather than by drainage areas. Petitioner stated that the total impervious surface cover of the Savannah's Garden development would be 18.81%. An aerial photograph was included in the application showing the site, including approximately 16 lots already built in Phase I.

(Respondent's Exhibit *5;* T p 268) The photograph appeared to show impervious surface cover of greater than 24% in Phase I. (T p 269)

Exception: This finding of fact is incomplete about what was submitted by Petitioner on April 11, 2008 and is contrary to the preponderance of admissible evidence. It further mischaracterizes how Petitioner provided the percentage of impervious surface cover, implying that there was no consideration as to drainage areas at this time. As shown by testimony of Scott Matthews and Neal Smith, the entire property only contains two drainage areas that are less than 24% impervious surface area (See T p 82).
An alternative finding of fact is as follows: Petitioner submitted an application on or around April 11, 2008 for an after-the-fact 401 Water Quality Certification. (See Respondent's Exhibit 5). Petitioner submitted that impacts had occurred to .48 acres of wetlands on Lots 12, 13, and 42 in Phase I of building the subdivision. (See Respondent's Exhibit 5, See T p. 43). Phase II was designated as future development. (See Respondent's Exhibit 5, See T p 43). Petitioner submitted that the total impervious acreage (existing and proposed) in Phase I and Phase II was 13.48 acres, or 18.81% of the total area of the site. (See Respondent's Exhibit 5).

9. On or around April 25, 2008, Respondent sent a letter to Petitioner requesting additional information. The letter requested that Petitioner provide site plans showing "all stormwater inlets and outfalls" and "an inventory of proposed project imperviousness area based on the estimated built-out conditions". (Respondent's Exhibit 6) This information was requested in order to allow Respondent to determine the drainage areas on the Savannah's Garden site along with their respective impervious surface cover percentages. (T pp 270-71) Based on Petitioner's application materials including the aerial photograph, Respondent considered the site to be high density, and therefore requested plans for stormwater management devices as required under GC 3705. (T p 270; Respondent's Exhibit 6)

Exception: This finding of fact is incomplete about what was sent to Petitioner on April 25, 2008 and mischaracterizes the evidence. Nowhere in this letter does it indicate that Petitioner's property is high density. Further, this letter indicates that the review process was incomplete, showing that at this point in time it was too early to determine whether or not this property was high density. As a result, this finding of fact is clearly contrary to the preponderance of the admissible evidence.
An alternative finding of fact is as follows: On or around April 25, 2008, Respondent sent a letter to Petitioner requesting additional information since Petitioner's application was incomplete. The letter requested, among other things, for Petitioner to "indicate all stormwater inlets and outfalls on the site plan," to provide "an inventory of proposed project imperviousness area based on the estimated built-out conditions," and "to provide information regarding impacts in future phases." (See Respondent's Exhibit 6). This letter was signed by Cyndi Karoly of DWQ. According to Annette Lucas, Respondent already considered the site to be high density, despite plans submitted by Neal Smith Engineering indicating otherwise and despite Petitioner's application being incomplete. (See T p. 42; 271; Respondent's Exhibit 6). Respondent did not inform Petitioner of the percentage of impervious surface area in this letter. (See Respondent's Exhibit 6).

10. On or around May 12, 2008, Petitioner submitted a response to DWQ's April *25,*

2008 letter. The response stated that the impervious surface area would be 24.20% for Phase I and 19.37% for Phase II, with a project total of 23.41% impervious surface area. (Respondent's Exhibit 7) Petitioner's original application of April 11, 2008 indicated the project's total impervious surface cover would be 18.8 1%. (Respondent's Exhibit *5)* Petitioner's May 12, 2008 response did not provide an explanation for the increase in total impervious surface cover. (Respondent's Exhibit 7; T p 275) Petitioner did not submit plans showing all stormwater inlets and outfalls as requested by Respondent. (Respondent's Exhibit 7; T p 274)

Exception: This finding of fact is incomplete about what was submitted on May 12, 2008 by Petitioner, mischaracterizes the admissible evidence, and is clearly contrary to the preponderance of admissible evidence. Exhibit 7 shows that Petitioner clearly did submit plans on May 12, 2008 and provided a response for all of the information that was requested by Respondent in its April 28, 2008 request for more information.
An alternative finding of fact is provided as follows: On or around May 12, 2008, Petitioner submitted a response to DWQ's April 25, 2008 letter. Petitioner submitted revised full-sized plans showing impervious surface area at a total of 23.41%. (See Respondent's Exhibit 7). In response to Respondent's request for more information, Petitioner stated "as requested in questions 1, 4, 6, and 7…the enclosed plans depict stormwater infrastructure, the existing Phase I lot layout and the proposed lot layout design for future construction." (See Respondent's Exhibit 7). "Regarding questions 2, 3, and 5, please see the revised impervious area calculations. The revised calculations list the total impervious area as 23.41%. Since the impervious area is expected to be under 24% (as outlined in GC 3705), questions 2 and 3 were not addressed." (See Respondent's Exhibit 7). The calculations submitted on May 12, 2008 "assumed that many (worst case) of the proposed lots would be built using a dwelling design that had a larger than average impervious footprint." (See Respondent's 10, p. 3)

11. Respondent sent a second letter to Petitioner requesting additional information on or around June 17, 2008. The letter stated, "[b]ased on the proposed size of the lots and the footprint of the roads in this subdivision, the DWQ has determined that the drainage areas in this project exceed 24 percent impervious." (Respondent's Exhibit 8) This determination was based on Petitioner's application materials and the best professional judgment of Respondent's staff (T p 277) The letter provided the definition of a "drainage area" from the relevant regulations: "the entire area contributing surface runoff to a single point". (Respondent's Exhibit 8)

Exception: This finding of fact is incomplete about what was sent to Petitioner on June 17, 2008. Thus, it is contrary to the preponderance of the admissible evidence. A new finding of fact is necessary to supplement the above statement and paint an accurate picture of what was sent to Petitioner at this time.
An alternative finding of fact is provided as follows: On June 17, 2008, Respondent sent a letter to Petitioner to request more information. This letter was signed by Cyndi Karoly. In that letter, Respondent provided as follows, "based on the proposed size of the lots and the footprint of the roads in this subdivision, the DWQ has determined that the drainage areas in this project exceed 24% impervious." (See Respondent's Exhibit 8). Respondent did not provide what they believed the impervious calculation was in this letter (See Respondent's Exhibit 8). Instead, Respondent states "this project is subject to Stormwater Management Plan (SMP)…which requires an SMP for any drainage area that exceeds 24

percent impervious." (See Respondent's Exhibit 8). Further, Respondent states "a drainage area is defined as the entire area contributing surface runoff to a single point." (See Respondent's Exhibit 8).

12. Petitioner submitted additional information by mail on or around September 16, 2008, including revised impervious surface cover calculations. (Respondent's Exhibit 10)

Exception: This finding of fact is incomplete and fails to mention what Petitioner submitted to Respondent on or around September 16, 2008. This is contrary to the preponderance of the admissible evidence. A new finding of fact is necessary to supplement the above statement and paint an accurate picture about what Petitioner submitted to Respondent at this time.
An alternative finding of fact is provided as follows: On September 16, 2008, Petitioner sent a response to Respondent's June 17, 2008 letter. Petitioner informed Respondent it was working with Neal Smith Engineering, and DWQ personnel in Fayetteville and Raleigh to resolve the issue of impervious area on the site. (See Respondent's Exhibit 10). Petitioner informed Respondent that its calculation of 23.42% total impervious area was "calculated using worst case built-out conditions, including a greater percentage of high impervious dwellings and generous driveways and sidewalks." Petitioner further informed Respondent that "we never got a clear explanation of how [the impervious calculation exceeding 24%] was made." Petitioner again made revisions to the project design and informed Respondent that Neal Smith Engineering had visited the site and actually measured the driveways, sidewalks, and dwelling footprints. Accordingly, Petitioner offered new proposed impervious calculations with a total proposed impervious area of 22.49%. (See Respondent's Exhibit 10). Accordingly, this project falls below the 24% impervious surface cover threshold so a Stormwater Management Plan would not be required. Neal Smith Engineering reached 22.49% by applying the plain meaning of the definition of drainage area as defined in 15A NCAC 02H .1001(7). (See Petitioner's Exhibit 1, T pp 90-91).

13. Respondent responded with a communication by electronic mail reiterating the need for Respondent to see the proposed stormwater discharge points and their associated drainage areas as originally requested in Respondent's April 25, 2008 additional information request letter. (Respondent's Exhibit 11; T pp 281-82)

Exception: This finding of fact mischaracterizes and incorrectly states the contents of the electronic mail sent by Annette Lucas and is contrary to the preponderance of the admissible evidence. It further mischaracterizes the contents of Respondent's April 25, 2008 letter to Petitioner since Respondent did not request stormwater discharge points or associated drainage areas in that April 25, 2008 correspondence. (See Respondent's Exhibit 11).
An alternative finding of fact is provided as follows: Respondent sent Petitioner a communication by electronic mail stating that "there are still two remaining issues on this project (as explained in the June 17, 2008 Request for More Information):…2. Determination of whether the project contains high or low density areas." (See Respondent's Exhibit 11). Respondent further informed Petitioner that a drainage area is defined as "locations where stormwater runoff comes to a single point and discharges to a

surface water (including wetlands)." (See Respondent's Exhibit 11). However, a "Drainage area" is defined in 15A NCAC 2H .1002(7) as "the entire area contributing surface runoff to a single point." (See Petitioner's Exhibit 1). There is no place in the statutory definition where the statement "discharges to a surface water" or "wetlands" is referenced. (See Petitioner's Exhibit 1, T pp. 335-336). Annette Lucas acknowledged that the phrase "discharges to a surface water (including wetlands) was not included in the definition of drainage area. (See T. p. 342-342). Respondent further informed Petitioner that Petitioner's revised site plans "must show all of the proposed stormwater discharge points and their associated drainage areas" in accordance with Respondent's interpretation of drainage area. (See Respondent's Exhibit 11).

According to Respondent's interpretation of drainage area, a drainage area is every single point of discharge into a surface water or a wetland. (See Respondent's Exhibit 11, See T p. 113). Under Respondent's definition, Respondent could interpret an infinite number of drainage areas at their discretion for any project that has sheet flow (See T p. 113-114). This is contrary to the plain meaning of drainage area as defined in 15A NCAC 2H .1002(7). (See T. pp. 113-114).

13. Exception: Based on the above evidence, a new finding of fact inserted as follows: "Respondent informed Petitioner that a drainage area is defined as "locations where stormwater runoff comes to a single point and discharges to a surface water (including wetlands)." (See Respondent's Exhibit 11). "Drainage area" is defined in 15A NCAC 2H .1002(7) as "the entire area contributing surface runoff to a single point." (See Petitioner's Exhibit 1). There is no place in the statutory definition where the statement "discharges to a surface water" or "wetlands" is referenced. (See Petitioner's Exhibit 1, T pp. 335-336). Respondent applied a different definition of drainage area to Petitioner than what is provided in 15A NCAC 02H .1002.

14. Exception: Based on the above evidence, a new finding of fact inserted as follows: "Neal Smith Engineering determined that two drainage areas were located at Savannah's Garden Site by applying the plain meaning of the definition of drainage area as found in 15A NCAC 2H .1002(7) (See T pp. 78, 111). Both drainage areas contained less than 24% impervious surface cover (See T pp. 78, 101).

15. Exception: Based on the above evidence, a new finding of fact inserted as follows: Neal Smith Engineering was required by Respondent to revise the site plans to show additional drainage areas on Savannah's Garden Site (See Respondent's Exhibit 11, T pp. 87-88). According to Respondent's Exhibit 11, Petitioner "must show all of the proposed stormwater discharge points and their associated drainage areas." (See Respondent's Exhibit 11)

14. On or around September 30, 2008, Petitioner submitted additional information including revised site plans showing the proposed stormwater discharge points and their associated drainage areas. The impervious surface cover shown for the area labeled Drainage Area # 1 ("Drainage Area 1") was 23.7%. The impervious surface area shown for Drainage Area 4 was 23.9%, and the impervious surface areas for Drainage Areas 5 and 7 were 23.6% and 23.9%, respectively. (Respondent's Exhibit 12).

Exception: This finding of fact mischaracterizes what Petitioner submitted on September 30, 2008, is incomplete, and is contrary to the preponderance of the admissible evidence. An alternative finding of fact is provided as follows:
On or around September 30, 2008, Petitioner submitted additional information including revised site plans, as required by Respondent to conform to Respondent's definition of a drainage area. As a result, those revised site plans show stormwater discharge points and their associated drainage areas, as required by DWQ. The impervious surface cover shown for area labeled Drainage Area #1 ("Drainage Area 1") was 23.7%. The impervious surface area shown for Drainage Area 4 was 23.9%, and the impervious surface areas for Drainage Areas 5 and 7 were 23.6% and 23.9%, respectively. (Respondent's Exhibit 12).

15. Respondent sent a request for additional information to Petitioner on or around October 9, 2008. In the letter, Respondent requested an explanation regarding the substantial drop in the estimated average square footage of the homes in the second phase of the Savannah's Garden development. (Respondent's Exhibit 13) Given the large difference in square footage between the first and second phases, Respondent determined that the impervious surface cover may have been underestimated, and that drainage areas 1, 4, 5, and 7 were likely greater than 24% impervious. (Respondent's Exhibit 13; Tp 285)

Exception: This finding of fact mischaracterizes what Respondent sent to Petitioner on October 9, 2008, is incomplete, and is contrary to the preponderance of the admissible evidence. An alternative finding of fact is provided as follows:
Respondent sent a request for additional information to Petitioner on or around October 9, 2008. In the letter, Respondent was "concerned about the significant difference in the average square footage of the homes that are already built in Phase I (1987 square feet) versus the estimated average square footage of the future homes (1298 square feet)" and requested Petitioner to explain the difference. Based only on the reduction in the square footage from Phase 1 to Phase 2, Respondent arbitrarily continued to believe that drainage areas 1, 4, 5, and 7 were greater than 24% impervious surface cover and required a Stormwater Management Plan. (See Respondent's Exhibit 13, See T pp. 355-356).

16. Petitioner submitted additional information on or around November 3, 2008. Petitioner stated in its cover letter that it had revised its development plans to remove at least one home from each drainage area of concern except Drainage Area 4. No changes were made to Drainage Area 4, which contained only five lots that were not yet completed. (Respondent's Exhibit 14)

Exception: This finding of fact mischaracterizes what Petitioner submitted to Respondent on November 3, 2008, is incomplete regarding the information that Petitioner submitted, and does not portray an accurate picture of all of the materials submitted by Petitioner at this time. As a result, this finding of fact is clearly contrary to the preponderance of the admissible evidence. An alternative finding of fact is proposed as follows:
Petitioner submitted additional information on or around November 3, 2008. Petitioner first addressed Respondent's concern in its October 9, 2008 letter regarding the difference in square footage of homes between Phase 1 and Phase 2. Petitioner stated that "many two story homes were proposed for future construction (ie. Phase 2)…because DWQ expressed

much concern over previously proposed impervious area" and Petitioner was attempting to lower this percentage by building smaller homes. (See Respondent's Exhibit 14, T pp. 94-95). Petitioner also addressed Respondent's October 9, 2008 letter regarding drainage areas 1, 4, 5, and 7 being over 24% impervious surface area and included the specific changes made to each drainage area.

Specifically, Petitioner proposed the following explanation for each drainage area that Respondent identified (See Respondent's Exhibit 14):

a) Drainage area 1: 1 home and 1 lot were removed, reducing proposed impervious area to 21.5%

b) Drainage area 4: The total projected area is 23.9%. No changes were made. This calculation is based on actual measurements from existing dwellings, driveways and roads and is therefore indisputable. We propose deed restrictions for the remaining 5 lots (lots 14, 15, 16, 17, and 42) to restrict impervious area to 23% of the lots' respective total areas in order to ensure the drainage area does not exceed 23.9% impervious.

c) Drainage area 5: Road 3 was shortened and 3 houses and lots were removed reducing proposed impervious area to 22.4%

d) Drainage area 7: The roads were redesigned…and lots were removed, reducing the proposed impervious area to 20.5%.

(See Respondent's Exhibit 14).

Neal Smith Engineering calculated drainage area 4 by taking the entire area of the watershed area draining to a single point in compliance with the plain meaning provided in 15A NCAC 02H .1002(7) (See T pp 97, 78). Neal Smith Engineering also actually surveyed all the roadways and all the homes there to calculate actual indisputable measurements. (See T p. 97) For the lots that had not been built upon, Neal smith Engineering proposed smaller homes than had been originally provided. (See T p. 97, Respondent's Exhibit 14).

17. On or around November 10, 2008, Respondent sent Petitioner a request for additional information. (Respondent's Exhibit 14) Respondent again expressed that Drainage Area 4 appeared to be high density, meaning that it appeared to be over 24% impervious surface cover, and therefore stormwater treatment was necessary. (Respondent's Exh. 15; T pp 314-15)

Exception: This finding of fact is incomplete, mischaracterizes was sent to Petitioner on November 10, 2008 and is contrary to the preponderance of the admissible evidence. An alternative finding of fact is proposed as follows:
On or around November 10, 2008, Respondent sent Petitioner a request for additional information (Respondent's Exhibit 15). Respondent stated that Drainage Area 4 had four separate stormwater discharge points and also defined a drainage area as "the entire area contributing surface runoff to a single point. Respondent further requested an analysis of the imperviousness of each of the separate drainage areas Respondent contended were located on Petitioner's property. (See Respondent's Exhibit 15). Respondent further

stated that it believed Petitioner's property was high density. (See Respondent's Exhibit 15). No explanation was provided as to why Respondent believed Petitioner's property was high density (See Respondent's Exhibit 15). No explanation was provided as to how Respondent calculated four separate stormwater discharge points within Drainage Area 4. (See Respondent's Exhibit 15). Respondent further indicated to Petitioner that "Petitioner could not use deed restrictions as a condition of a 401 Water Quality Certification" (See Respondent's Exhibit 15).

18. New finding of fact is inserted. This finding of fact is necessary to paint an accurate picture of the correspondence between Petitioner and Respondent and shows that Respondent acted arbitrarily toward Petitioner in requiring Petitioner to implement a Stormwater Management Plan. It is supported by a preponderance of the admissible evidence. New finding of fact is provided as follows:
Scott Matthews spoke with Annette Lucas about Drainage area 4. In that conversation, Annette Lucas indicated that 23.9% was "so close" that if they added anything to it, it would put it over 24% impervious surface cover. (See T pp. 101, 356-357).

19. New finding of fact is inserted. This finding of fact is necessary to show that Respondent told Petitioner that they could not use deed restrictions, but let others who are similarly situated to Petitioner use deed restrictions in calculations. This is supported by a preponderance of the admissible evidence. A new finding of fact is provided as follows:
A deed restriction prohibits an owner from taking certain action on that property. (See T p. 357). Petitioner was told by Respondent that Petitioner "could not use deed restrictions as a condition of a 401 Water Quality Certification" (See Respondent's Exhibit 15). When asked about deed restrictions, Respondent stated that an acceptable way to control impervious calculation was through a deed restriction (See p. 357-358). Respondent arbitrarily and erroneously did not allow Petitioner to use deed restrictions at Savannah's Garden Site (See Respondent's Exhibit 15).

20. Exception: Based on the above explanations and findings of fact, a new proposed finding of fact is as follows: Drainage area 4 contains less than 24% impervious surface cover. (See T pp. 101, 356-358).

21. Exception: Based on the above explanations and findings of fact, a new proposed finding of fact is as follows: A Stormwater Management Plan is not required for Drainage area 4 since it contains less than 24% impervious surface cover. (See T pp. 101, 356-358).

18. Petitioner submitted additional information on or around December 8, 2008. Petitioner's revised plans still listed Drainage Area 4 as 23.9% impervious. (Respondent's Exhibit 16).
Exception: This finding of fact is incomplete and mischaracterizes what Petitioner submitted to Respondent on December 8, 2008. This finding of fact is contrary to the preponderance of the admissible evidence. An alternative finding of fact is proposed as follows:
On December 8, 2008, Petitioner submitted additional information to Respondent in response to Respondent's November 10, 2008 letter. Petitioner provided maps and

informed Respondent that for Drainage Area 4, "all the surface runoff flows to the existing roadside drainage channel." Petitioner further responded that "the existing impervious surfaces were surveyed by a Professional Land Surveyor to verify its accuracy. Neal Smith Engineering is confident that "Drainage Area 4" is low density." (See Respondent's Exhibit 16). Petitioner's site plans indicate that Drainage Area 4 contains 23.9% impervious surface cover.

19. Respondent sent another request for additional information to Petitioner on or around December 9, 2008. The letter explained that the plans submitted by Petitioner included a pervious area as part of Drainage Area 4 that should not be included, since that area did not drain to the same point as the rest of Drainage Area 4. (Respondent's Exhibit 17) Therefore, once that pervious area was removed, Drainage Area 4 would be greater than 24% impervious surface cover. (Respondent's Exhibit 17; T pp 29 1-92)

Exception: This finding of fact is incomplete and mischaracterizes what was sent to Petitioner on or around December 9, 2008 and the contents of that letter. The letter does not state that Petitioner included a pervious part of Drainage Area 4, nor does it state that the area did not drain to the same point as the rest of Drainage Area 4. This finding of fact is contrary to the preponderance of admissible evidence. An alternative finding of fact is proposed as follows:
Respondent sent a request for information to Petitioner on or around December 9, 2008. This letter states that "DWQ remains unconvinced that Drainage Area 4 is low density." Respondent further stated that the open space to the left of Drainage Area 4 should not be considered as part of Drainage Area 4. Respondent did not include a reason as to why Respondent found that the open space to the left of Drainage Area 4 should not be included in the impervious surface calculation. (See Respondent's Exhibit 17).

20. Petitioner submitted additional information on or around January 9, 2009, including a stormwater management plan for Drainage Area 4. In one of Petitioner's site plans for Drainage Area 4, the percent of impervious surface cover was listed as 26%. (Respondent's Exhibit 18)

Exception: This finding of fact mischaracterizes the evidence and implies that Petitioner freely listed 26% impervious surface as the imperviousness for Drainage Area 4. Instead, this was listed because Respondent required Petitioner to revise its site plans so that they indicated impervious surface area above 24%. An alternative finding of fact is proposed as follows:
Petitioner submitted additional information on or around January 9, 2009. Petitioner submitted site plans to comply with the requirements imposed on it by Respondent. These site plans included a stormwater management plan for Drainage Area 4, due to Respondent's refusal to accept previous site plans listing drainage area 4 at 23.9% impervious surface area. (See T pp.114-119, 126, Respondent's Exhibit 13, 15, 17).

21. New finding of fact inserted. Based on the above evidence shown in Tpp. 114-119, 126, and Respondent's Exhibit 13, 15, 17), a new finding of fact is proposed as follows: Petitioner was required by Respondent to submit a Stormwater Management Plan, despite showing that all drainage areas on Petitioner's property were below 24%

impervious surface area. (See T pp. 114-119, 126, and Respondent's Exhibit 13, 14, 15, 16, and 17).

21. On or around January 26, 2009, Respondent sent a request for additional information concerning the technical details of the stormwater plan. (Respondent's Exhibit 19) The requested information was addressed in Petitioner's next submission of additional information on or around February 13, 2009. (Respondent's Exhibit 20; T p 303)

22. On or around February 18, 2009, Respondent sent to Petitioner an Approval of 401 Water Quality Certification with Additional Conditions. (Respondent's Exhibit 21)

23. After a thorough review of Petitioner's initial application and additional information submitted during the review process, Respondent determined that multiple drainage areas existed on the Savannah's Garden site. (T p 275) Pursuant to DWQ's interpretation of GC 3705, the wetland receiving the runoff from Drainage Area 4 was not to be included as part of Drainage Area 4, and therefore was also not to be included when calculating the impervious surface cover percentage of that drainage area. (T p 333)

Exception: This finding of fact is incomplete, mischaracterizes the admissible evidence, and is contrary to the preponderance of the admissible evidence. The plain meaning of a drainage area was applied by Neal Smith Engineering in calculating impervious surface area for the Site. Further, as shown above, nowhere in the definition of drainage area does it say 'discharging to a surface water' or include the word 'wetlands' as the term drainage area was defined by Respondent. (See Respondent's Exhibit 11). Further, testimony from Hal Owen shows that a portion of the wetlands are used in calculating impervious surface area for other applicants applying for 401 certification. (See Petitioner's Exhibit 26, See T pp. 136-140). An alternative finding of fact is as follows.

Respondent determined that Petitioner's Drainage Area 4 contained more than 24% impervious surface cover. (See Respondent's Exhibit 17). Respondent reached that determination by applying the term "drainage area" to mean "locations where stormwater runoff comes to a single point and discharges to a surface water (including wetlands)." (See Respondent's Exhibit 11). Respondent further determined that Petitioner could not include the wetlands in determining the "entire area" when determining the boundaries of Drainage Area 4. (See T p. 92). Respondent further informated Petitioner that Petitioner could not include the wetlands in calculating impervious surface area. (See T. pp. 92, 136-137). A guidance document provided by the Stormwater Section of the Division of Water Quality allows a one hundred foot wetlands strip to be included when calculating impervious surface area of a drainage area (See Petitioner's Exhibit 26, T pp. 137-138, 386). This Guidance document is used in projects similar to Petitioner's and in the 401 Certification process (See Petitioner's Exhibit 26, T pp. 139, 386). Such projects include the Forest Ridge subdivision, Cabin Branch subdivision, and also government sponsored projects that are "higher profile and are looked at with more scrutiny" than Petitioners (See T pp. 140-141).

24. New finding of fact inserted. Based on the exhibits and testimony outlined above, a new finding of fact is proposed as follows: Petitioner was denied by Respondent

from including a portion of the wetlands area in its impervious surface calculation for each drainage area. (See T pp. 137-141)

24. New finding of fact inserted. Based on the exhibits and testimony outlined above, a new finding of fact is proposed as follows: Petitioner was denied by Respondent from including a portion of the wetlands area in its impervious surface calculation, despite other developers being similarly situated with Petitioner being allowed to include wetlands in their impervious surface calculations and total area calculations. (See Petitioner's Exhibit 26, See T pp. 137-141, 386).

25. New finding of fact inserted. Based on the exhibits and testimony outlined above, a new finding of fact is proposed as follows: Despite being denied the ability to include a portion of the wetlands area in Petitioner's impervious surface calculations, Drainage Area 4 still contained impervious surface area of 23.9%, less than 24%. (See T pp. 114-117, 119, 137-141). Therefore, a Stormwater Management Plan should not have been required. (See T. p. 119).

24. Drainage Area 4 drains to a wetland at the center of the Savannah's Garden project. (Respondent's Exhibit 16)

Exception: This finding of fact should be struck in its entirety since it is contrary to the preponderance of the admissible evidence, mischaracterizes the evidence, and is incorrect. An alternative finding of fact is proposed as follows:
Petitioner's property at Savannah's Garden site contains two drainage areas, both of which are less than 24% impervious surface area. (See T. 82). Respondent required Petitioner to submit revised plans showing additional drainage areas, including drainage area 4. (See Respondent's Exhibit 11, T pp. 87-88). Petitioner identified Drainage Area 4 as containing less than 24% impervious surface cover. (See T pp. 114-117, 119). Petitioner calculated its impervious surface area in accordance with the plain meaning of the term drainage area, as defined in 15A NCAC 02H .1002(7). (See T p. 114). Thus, Petitioner should not be required to implement a Stormwater Management Plan for Drainage Area 4. (See T pp. 114-117, 119).

25. Based on Petitioner's application documents, DWQ determined that Drainage Area 4 exceeded 24% impervious surface cover. Therefore, Petitioner was required to submit a stormwater management plan.

Exception: This finding of fact should be struck in its entirety since it mischaracterizes the evidence and is contrary to the preponderance of admissible evidence.
An alternative finding of fact is proposed as follows:
Petitioner's property at Savannah's Garden site contains two drainage areas, both of which are less than 24% impervious surface area. (See T. 82). Respondent required Petitioner to submit revised plans showing additional drainage areas, including drainage area 4. (See Respondent's Exhibit 11, T pp. 87-88). Petitioner identified Drainage Area 4 as containing less than 24% impervious surface cover. (See T pp. 114-117, 119). Petitioner calculated its impervious surface area in accordance with the plain meaning of the term drainage area, as defined in 15A NCAC 02H .1002(7). (See T p. 114). Thus, Petitioner should not be

required to implement a Stormwater Management Plan for Drainage Area 4. (See T pp. 114-117, 119).

26. In addition to the 401 stormwater program implemented by the 401 Unit, the State of North Carolina also has other post-construction stormwater programs. (T p 245) These other programs are implemented by the Division's Stormwater Unit. (T pp 245-46) The Stormwater Unit is separate from the 401 Unit. (T p 246) Guidance documents provided by the Stormwater Unit do not necessarily apply to the 401 stormwater program. (T pp 252, 321, 373-74)

Exception: This finding of fact mischaracterizes the evidence, is incomplete and is contrary to the preponderance of admissible evidence. It is irrelevant what other State stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. An alternative finding of fact is proposed as follows:

The Guidance document marked as Petitioner's Exhibit 26 applies to the 401 certification process. (See Petitioner's Exhibit 26, T p. 386). This guidance document is routinely used in projects that result in 401 applications and certifications. (See T p. 385). This guidance document would allow Petitioner to use 100 feet of the wetland in calculating impervious surface area. (See Petitioner's Exhibit 26, p. 387). Petitioner was not allowed to include 100 feet of the wetlands in calculating its impervious surface calculation for its drainage areas. (See T pp. 92, 136-137).

27. State stormwater programs other than the 401 stormwater program include coastal, Phase II, and Water Supply Watershed stormwater programs. (T pp 246, 370-71) These programs are similar to the 401 stormwater program in that each program seeks to determine whether an area is "high density" or "low density". An area that is considered "high density" under any State stormwater program must treat post-construction stormwater through a Stormwater Management Plan. (T pp 3 69-70)

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

28. In an area of North Carolina where a State stormwater program applies, a 401 applicant may submit an approval under the relevant stormwater program as part of its 401 application. The 401 Unit will accept that approval rather than requiring an additional approval under the separate 401 stormwater program. For example, a Phase II stormwater approval may be obtained from a certified local government program. That Phase II stormwater approval may be submitted as part of a separate 401 application, in which case the applicant need not also meet the requirements for approval under the 401 stormwater program. As long as the applicant meets the applicable requirements of the Phase II stormwater program, the 401 Unit will count that as sufficient to meet the 401 stormwater requirements. (T pp 396-97)

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

29. However, if a project requiring a 401 is located in an area where no other State stormwater program applies, the 401 stormwater program applies. The 401 application will therefore be evaluated to determine whether the project meets the requirements of the 401 stormwater program. (T p 397)

30. No other State stormwater program applies to the Savannah's Garden site. (T pp 397-98) Therefore, the 401 stormwater program applies.

31. The other State stormwater programs use different language from the 401 stormwater program for determining whether an area is high density. None of the other State stormwater programs use the term "drainage area" to calculate impervious surface cover percentage. (T p 250) Instead, these programs use the term "built-upon area" to calculate impervious surface cover percentage. (T pp 249-50)

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

32. For purposes of the Coastal stormwater program, "built-upon area" is defined as "that portion of a project that is covered by impervious or partially impervious surface". (T p 249) Projects using this definition, or one of the similar definitions of "built-upon area" in the other State stormwater programs, therefore use the entire project area in calculating the impervious surface percentage, since the word "project" is a part of the definition of built-upon area.

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

33. By contrast, the GC 3705 uses the term "drainage area" with regard to how to calculate the impervious surface. (Respondent's Exhibit 23) The definition of "drainage area" does not use the word "project". 15A NCAC 2H .1002(7).

34. State stormwater programs other than the 401 stormwater program also require the use of primarily vegetated conveyances in order for the project to be considered low density (and thereby avoid the requirement to treat post-construction stormwater). (T pp 248-50, 331). Using primarily vegetated conveyances does not include using a stormwater collection system, or piped drainage system. Therefore, any project using a piped drainage system is considered high density under the State stormwater programs other than the 401 stormwater program, regardless of the project's impervious surface cover. (T p331)

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

35. The Savannah's Garden site uses a piped drainage system, and therefore does not use primarily vegetated conveyances. (T pp 25 *5-56)* The entire Savannah's Garden site would therefore be considered high density under State stormwater programs other than the 401 stormwater program. (T pp 255-56, 37 1-72)

Exception: This finding of fact should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program applicable regulations thereunder are those solely related to the 401 Stormwater Program. This finding of fact is clearly contrary to the preponderance of the admissible evidence.

Based upon careful consideration of the testimony and evidence presented at the hearing, the documents and exhibits received into evidence, and the entire record of this proceeding, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case because it is a dispute over an agency action, specifically the issuance of an Approval of 401 Water Quality Certification with Additional Conditions pursuant to N.C. Gen. Stat.~ 150B-23 *et seq.* All necessary parties have been joined and have received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of law are Findings of Fact, they should be so considered without regard to the given labels. All parties have been correctly designated, and there is no question as to misjoinder or nonjoinder of parties.

1. Petitioner bears the burden of proof in this contested case. Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006) ("[T]he burden of proof rests on the petitioner challenging an agency decision."). Petitioner has alleged that Respondent exceeded its authority or acted erroneously, arbitrarily or capriciously. **Exception: Petitioner takes exception to this sentence since it is incomplete and is contrary to the preponderance of admissible evidence. "Petitioner has alleged that Respondent exceeded its authority, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law."** Petitioner must prove these allegations by a preponderance of the evidence. N.C.G.S. § 150B-29. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." Id.

2. It is presumed that Respondent acted in accordance with the law. Albemarle Electric Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972); accord Housing Authority v. Wooten, 257 N.C. 358, 126 S.E.2d 681 (1962); accord In re Housing Authority of

the City of Charlotte, 233 N.C. 649, 65 S.E.2d 761 (1951). Petitioner carries the burden to present evidence sufficient to overcome this presumption. See Huntley v. Potter, *255* N.C. 619, 628, 122 S.E. 2d 681, 686-87 (1961). **Exception: Petitioner takes exception since this paragraph is not complete and is contrary to the preponderance of admissible evidence. It should also state the following case law: "It is presumed, in absence of evidence to contrary, that acts of a public official within sphere of his official duty, and purporting to be exercised in an official capacity and by public authority, are within scope of his authority and in compliance with controlling statutory provisions; that presumption, however, is one of law, and not of fact, and may be rebutted or overthrown by competent evidence." See Civil Service Board of City of Charlotte v. Page, 162 SE 2d (1968).**

3. If the agency's construction of its regulations is not "plainly erroneous or inconsistent with the regulation", the agency's construction should be upheld. Morrell v. Flaherty, 338 N.C. 230, 237-38, 449 S.E.2d 175, 179-80 (1994). Morrell, the North Carolina Supreme Court stated:

> "It is well established that an agency's construction of its own regulations is entitled to substantial deference." Martin v. OSHRC, 499 U.S. 144, 150-51, 113 L. Ed. 2d 117, 127, 111 S. Ct. 1171(1991) (quoting Lyng v. Payne, 476 U.S. 926, 939, 90 L. Ed. 2d 921, 934, 106 S. Ct. 2333 (1986)).
>
> > Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation". [Udall v. Taliman, 380 U.S. 1, 16-17, 13 L. Ed. 2d 616, 625-26, 85 S. Ct. 792 *(1965)* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 1702, *65* 5. Ct. 1215 *(1945).]* In other words, we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Gardebring v. Jenkins, 485 U.S. 415, 430, 99 L. Ed. 2d *515*, 108 S. Ct. 1306, [528] (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 697, 115 L. Ed. 2d 604, 111 S. Ct. 2524, [624] (1991). Thomas Jefferson Univ. v. Shalala, U.S. ., 129 L. Ed. 2d 405, 415, 114 S.Ct. 2381 (1994) (approving the Secretary of HHS's interpretation of certain Medicare regulations). Id. at 237-38, 449 S.E.2d at 179-80.

Exception: Petitioner takes exception with this paragraph in that additional case law should be included and is contrary to the preponderance of admissible evidence. In addition to what is shown above, Petitioner would also insert the following: Ordinarily, administrative agency's interpretation of its own regulation is to be given due deference by courts unless it is plainly erroneous or inconsistent with regulation. However, any law, ordinance or regulation adopted pursuant to police power of State which restricts free use of private property is to be construed by court strictly in favor of free use of that

property." See Pamlico Marine Co. Inc, v. NCDENR, 80 N.C. App 201 (1986.

4. The State's stormwater programs are complex and highly technical regulatory programs. Therefore, as stated in Morrell, Respondent's interpretation of its own regulations on this technical matter is given deference. Morrell, 338 N.C. at 238, 449 S.E.2d at 180.

Exception: Petitioner takes exception to this conclusion of law in that it does not include a complete summary of what the law is in this area and is contrary to the preponderance of admissible evidence. The alternative conclusion of law is provided as follows:
The State's stormwater programs are complex and highly technical regulatory programs. Therefore, as stated in Morrell, Respondent's interpretation of its own regulations is given deference. Ordinarily, an administrative agency's interpretation of its own regulations is to be given due deference by the courts unless it is plainly erroneous or inconsistent with regulation. Deference is given "unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." See Morrell, 338 N.C. at 238.

5. The rules of statutory construction apply not only to statutes but also to administrative regulations such as 15A NCAC 2H .1002(7). See Kyle v. Holston Group, 188 N.C. App. 686, 692, 656 S.E.2d 667, 671 (2008).

6. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished. Legislative purpose is first ascertained from the plain words of the statute." Electric Supply Co. v. Swain Electrical Co., 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citations omitted).

7. In this contested case, the relevant language is as follows: "Drainage Area or Watershed' means the entire area contributing surface runoff to a single point." I5A NCAC 2H .1002(7). The term "point" is defined by American Heritage College Dictionary as, *inter a/ia,* "[a] narrowly particularized and localized position or place; a spot". American Heritage College Dictionary 1055 (3d ed. 1997).

Exception: Petitioner takes exception to using the American Heritage College Dictionary to define a term found in agency regulations since it it contrary to the preponderance of admissible evidence. An alternative conclusion of law is as follows:
In this contested case, the relevant language is as follows: "Drainage area or watershed" means the entire area contributing surface runoff to a single point. 15A NCAC 2H .1002(7)

8. The area where the wetlands drain off the Savannah's Garden site is not a "point" in the plain meaning of that term for purposes of the definition of "drainage area" in 15A NCAC 2H .1002(7), since it is a wetland. (T p 379).

Exception: Petitioner takes exception to this conclusion of law as contrary to the preponderance of the admissible evidence. An alternative conclusion of law is proposed as follows:
Under the plain meaning of drainage area, a drainage area means the entire area contributing surface runoff to a single point. This definition does not include "discharging

to a surface water" or "wetlands" within the plain meaning of this term. (See Respondent's Exhibit 11).

9. The plain language of 15A NCAC 2H .1002(7) is unambiguous, and Respondent's interpretation of the term "drainage area" as used in GC 3705 is in keeping with the plain language of that term. Therefore, the issue of whether the rules of statutory construction also support Respondent's interpretation need not be reached. However, in the event that this conclusion that the plain language of 15A NCAC 2H .1002(7) is unambiguous is not accepted, the undersigned will address the additional question of whether or not the rules of statutory construction support the Respondent's interpretation.

Exception: Petitioner takes exception to this conclusion of law since it is contrary to the preponderance of admissible evidence. The alternative conclusion of law should read as follows:
The plain language of 15A NCAC 2H .1002(7) is unambiguous, and Respondent's interpretation of the term "drainage area" as used in GC3705 is not in keeping with the plain language of that term. Under Respondent's definition, Respondent could interpret an infinite number of drainage areas at their discretion for any project that has sheet flow (See T p. 113-114). This is contrary to the plain meaning of drainage area as defined in 15A NCAC 2H .1002(7). (See T. pp. 113-114).

10. If the plain language at issue is ambiguous, the court may next turn to the rules of statutory construction. Electric Supply Co., 328 N.C. at 656, 403 S.E.2d at 294.

11. One source of authority for the State's stormwater regulations is N.C.G.S. § 143-214.7. Pursuant to N.C.G.S. § 143-214.7(a), the purpose of the State's stormwater programs is "protecting the surface waters of the State".

Exception: This conclusion of law is incomplete and contrary to the preponderance of admissible evidence in that it should also state as follows: Pursuant to N.C.G.S. 143-214.7(a) "The statewide plan shall be applied evenhandedly throughout the State to address the State's water quality needs."

12. Respondent's interpretation of "drainage area" is protective of water quality because it allows the agency to more accurately depict the stormwater impacts on the receiving waters and ensure that those impacts are adequately addressed. (T p 308) Petitioner's interpretation of "drainage area" is not as protective of water quality as Respondent's. (T p 308)

Exception: This conclusion of law is contrary to the preponderance of admissible evidence. An alternative conclusion of law is as follows: Petitioner applied the plain meaning of the term drainage area in calculating impervious surface area at Savannah's Garden Site. Petitioner's application was consistent with the plain meaning of the term drainage area, and is protective of water quality (T p. 114, p. 145-146).

13. "Courts also ascertain legislative intent from the policy objectives behind a statute's passage 'and the consequences which would follow from a construction one way or

another". Electric Supply Co., 328 N.C. at 656, 403 S.E.2d at 294 (citation omitted).

14. If considered under the State stormwater programs other than the 401 stormwater program, the entire Savannah's Garden site would be considered high density and Petitioner would be required to submit a Stormwater Management Plan, due to the site's use of a piped drainage system.

Exception: This conclusion of law should be struck in its entirety since it is irrelevant what other State Stormwater program standards are. The only stormwater program applicable regulations thereunder are those solely related to the 401 Stormwater Program. This conclusion of law is clearly contrary to the preponderance of the admissible evidence.

15. As interpreted by Respondent, the language of GC 3705 and 15A NCAC 2H. 1002 would require Petitioner to treat stormwater from the area labeled Drainage Area 4. Under Petitioner's interpretation, Petitioner would not be required to treat any construction stormwater on the Savannah's Garden site. The latter result would be incongruous with the purpose of the State's stormwater programs as stated in N.C.G.S. § 143-214.7(a), especially given that if considered under any other State stormwater program, the Savannah's Garden site would be considered high density and therefore would be required to treat stormwater from the entire site.

Exception: This conclusion of law should be struck in its entirety since it mischaracterizes the evidence and is incorrect. It is also irrelevant what other State Stormwater program standards are. The only stormwater program and applicable regulations thereunder are those solely related to the 401 Stormwater Program. This conclusion of law is clearly contrary to the preponderance of the admissible evidence. An alternative conclusion of law is proposed as follows:

Respondent has defined drainage area as locations where stormwater runoff comes to a single point and discharges to a surface water (including wetlands). (See Respondent's Exhibit 11). This interpretation is not in keeping with the plain language of the definition of drainage area as found in 15 NCAC 02H .1002(7). Petitioner should not be required to implement a stormwater management plan since Petitioner's property does not contain a drainage area that is more than 24% impervious surface area. Petitioner has put a wetland restoration project in place to treat the water flowing off of Petitioner's property in accord with the wetlands natural filtering ability. (See T p. 145).

16. Respondent's interpretation of the relevant language of GC 3705 and 1 5A NCAC 2H .1002(7) is not plainly erroneous or inconsistent with the state's water quality regulations, and therefore controls. Respondent's interpretation is in keeping with the plain language meaning of the provisions at issue, and is in keeping with the purpose and intent of the State's water quality laws, which is to protect the State's valuable water resources.

Exception: This conclusion of law is clearly contrary to the preponderance of the admissible evidence. An alternative conclusion of law is proposed as follows:
Respondent's interpretation of the relevant language of GC 3705 and 15A NCAC 2H .1002(7) is plainly erroneous and inconsistent with the state's water quality regulations.

Respondent's application of drainage area would allow Respondent to find an infinite number of drainage areas on any project site, and allowing it to be arbitrarily applied by Respondent. (See T pp. 113-114).

17. Therefore, Respondent properly interpreted the provisions of GC 3705 and 1 5A NCAC 2H .1002(7). Petitioner has not met its burden to show that Respondent erred in determining:

a. that multiple drainage areas existed on the Savannah's Garden site;
b. that Drainage Area 4 exceeded 24% impervious surface cover;
c. that the wetlands at the center of the site were not a part of Drainage Area 4 and therefore were not to be counted in calculating the impervious surface cover percentage of Drainage Area 4.

Exception: This conclusion of law is clearly contrary to the preponderance of admissible evidence. An alternative conclusion of law is provided as follows:
The Respondent has exceeded its authority, and the actions of the Respondent were arbitrary, capricious, and erroneous as follows:

a. arbitrarily, capriciously, and erroneously denying Petitioner's proposals and revised site plans without an explanation from Respondent and without any calculation as to what Respondent claimed the impervious surface calculation percentage was for the property.

b. arbitrarily, capriciously, and erroneously applying a different definition of "drainage area" to Petitioner than what is provided by 15A NCAC 02H .1002(7).

c. arbitrarily, capriciously, and erroneously defining a "drainage area" as locations where stormwater runoff comes to a single point and discharges to a surface water (including wetlands).

d. arbitrarily, capriciously, and erroneously applying that definition to Petitioner to determine Petitioner's property had nine drainage areas.

e. arbitrarily, capriciously, and erroneously applying that definition to Petitioner to determine Petitioner's property exceeded 24% impervious surface area.

f. arbitrarily, capriciously, and erroneously determining that Petitioner's property contained impervious surface cover greater than 24%.

g. arbitrarily, capriciously, and erroneously determining that Drainage Area 4 contained impervious surface area greater than 24%, despite Petitioner submitting plans based on actual measurements of dwellings, driveways, and roads showing the impervious surface calculation for Drainage Area 4 at 23.9%.

h. arbitrarily, capriciously, and erroneously determining that 23.9% was too close to 24% and thus requiring Petitioner to submit a Stormwater Management Plan.

i. arbitrarily, capriciously, and erroneously denying Petitioner the right to use deed restrictions despite other 401 applicants being able to do so;

j. arbitrarily, capriciously, and erroneously denying Petitioner the right to include wetlands in impervious surface calculations, despite other 401 applicants being able to do so;

k. arbitrarily, capriciously, and erroneously requiring Petitioner to implement a Stormwater Management Plan to be maintained in perpetuity.

18. The North Carolina Supreme Court has provided that the essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially. Hawkins v. M. & J. Finance Corp., 238 N.C. 174, 177-178 (1953).

19. Petitioner has failed to meet its burden to prove the essential elements of estoppel. Therefore, Respondent is not estopped from requiring a Stormwater Management Plan from Petitioner.

20. Petitioner has failed to meet its burden of proof in this matter. Petitioner has failed to show any error in Respondent's actions in reviewing Petitioner's application, requiring a stormwater management plan, and issuing approval of Petitioner's 401 application with additional conditions. Because Petitioner has failed to show any improper conduct by Respondent, it has not overcome the presumption set forth by law that the Respondent's official actions in reviewing and approving the 401 application were lawful and correct. Petitioner further failed to show that the agency exceeded its authority, acted erroneously, failed to follow proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in reviewing and approving the 401 with additional conditions.

Exception: This conclusion of law is clearly contrary to the preponderance of the admissible evidence. The alternative conclusion of law is provided as follows:
Petitioner has met its burden of proof in this matter. Petitioner has showed that Respondent's actions in requiring Petitioner to implement a stormwater management plan were arbitrary, capricious, and erroneous, were a failure to follow proper procedure, and were a failure to act as required by law or rule.

21. There is a preponderance of substantial evidence to support the agency action of issuing the Approval of 401 Certification with Additional Conditions. N.C.G.S. § 150B-34.

Exception: This conclusion of law is clearly contrary to the preponderance of the admissible evidence. An alternative conclusion of law is as follows:
The Approval of 401 Certification with Additional Conditions should not require Petitioner to implement a Stormwater management plan.

22. In issuing the Approval of 401 Certification with Additional Conditions, Respondent did not exceed its authority, did not act erroneously, used proper procedure, did not act arbitrarily or capriciously, and acted as required by law or rule.

Exception: This conclusion of law is clearly contrary to the preponderance of the admissible evidence. An alternative conclusion of law is as follows:
Respondent has exceeded its authority, acted erroneously, used improper procedure, and acted arbitrarily or capriciously, and has not acted as required by law or rule by requiring Petitioner to implement a Stormwater Management Plan.

Based on the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

Respondent's decision to issue an Approval of 401 Certification with Additional Conditions to Petitioner on February 18, 2009 is AFFIRMED. Petitioner has not demonstrated by a preponderance of the evidence that Respondent exceeded its authority, erred in its decision, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

Exception: This Decision is clearly contrary to the Preponderance of the admissible evidence.
Petitioners have met their burden of proof in showing that Respondent exceeded its authority, acted arbitrarily, erroneously, and capriciously by ordering Petitioners to implement a Stormwater Management Plan. Based on the foregoing findings of fact and law, Respondent's decision to require Petitioner to implement a Stormwater Management Plan is reversed.

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Environmental Management Commission.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 15OB-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately, and in detail, the evidence in the record relied upon by the agency in making the finding of fact.

This the 22 day of July, 2010.

A copy was mailed to:

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This the 22nd day of July, 2010.

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