



Soil & Environmental Consultants, PA

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March 5, 2021
S&EC Project # 13962

To: N.C. Division of Water Resources
401 & Buffer Permitting Unit
Attn: Paul Wojoski & Rick Trone
Archdale Building – 9th Floor
512 North Salisbury Street,
Raleigh, NC 27604

From: Bob Zarzecki
Soil & Environmental Consultants, P.A.

Re: **Raleigh-Durham Airport Authority – Enhanced Security Perimeter Fencing
RDU Airport, Wake County, NC
DWR Project No. 2017-1487.v4**

On behalf of the applicant, Raleigh-Durham Airport Authority (“RDU” or the “Authority”), please find attached supplemental information and responses to your letter dated and received via email on February 16, 2021, which asks RDU to provide additional information regarding its application for a Riparian Buffer Authorization pursuant to the Neuse River Riparian Buffer Rules, as submitted to DEQ on October 14, 2020. RDU’s October 14th application requested that DEQ issue an Authorization Certificate for impacts to the 50’ Neuse River Buffers (15A NCAC 02B .0714) for RDU to construct its proposed Enhanced Security Perimeter Fencing project (the “Project”).

Note - Prior to its February 16, 2021 request, DEQ submitted an information request to RDU on December 12, 2020. RDU provided its response to DEQ’s December 12th information request on December 18, 2020. This letter responds to DEQ’s February 16th letter and supplements RDU’s prior responses to DEQ’s requests related to the Project.

DWR Additional Information Requested & RDU Responses/Additional Information:

- 1. Is any portion of the project on “public lands” or is any funding of the project a “significant expenditure of public moneys” as those terms are defined in the State Environmental Policy Act (SEPA)? [G.S. § 113A-9]*

Response: No. The Project will not be constructed on “public lands” and does not involve the “significant expenditure of public moneys,” as those terms are defined by G.S. § 113A-9.

A. The Project is not on “public lands.”

G.S. § 113A-9 of SEPA provides the following definitions (with emphasis added):

- (7) *"Public land" means all land and interests therein, **title of which is vested in the State of North Carolina, in any State agency**, or in the State for the use of any State agency or political subdivision of the State, and includes all vacant and unappropriated land, swampland, submerged land, land acquired by the State by virtue of being sold for taxes or by any other manner of acquisition, or escheated land.*
- (9) *“State agency” includes every department, agency, institution, public authority, board, commission, bureau, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does **not** include **local governmental units or bodies** such as cities, towns, **other municipal corporations** or political subdivisions of the State, county or city boards of education, **other local special-purpose public districts, units or bodies of any kind**, or private corporations created by act of the General Assembly. . . .*

No part of the Project will be located on “public land,” as defined above, because the Project land is not vested in the State of North Carolina or in a State agency. Rather, title to the Project land is vested in the Authority or in the local governmental units that appoint the members of the Authority’s Board, which are the City of Raleigh, the City of Durham, the County of Wake, and the County of Durham (the “Governing Bodies”). As discussed below, neither the Authority nor any of the Governing Bodies fall within the meaning of a “state agency” as defined by G.S. § 113A-9(9) of SEPA.

Section 113A-9(9) of SEPA excludes local government units or bodies from the definition of “state agency.” This exclusion is composed of a non-exclusive list of various types of local governments and bodies. If an entity falls within one or more of the excluded categories of such local governments and bodies – either because it is specifically listed or because it is otherwise covered under the “such as” reference in the exclusion – that entity is excluded from the definition of a “state agency.” The Governing Bodies are explicitly excluded from the definition of a “state agency.”

The Authority is excluded from the definition of a “state agency” because it falls within one or more of the categories of excluded local government units or bodies. The Authority is excluded from the definition of a “state agency” under SEPA both as a “municipal corporation” and as “local special-purpose public . . . unit[] or bod[y].”¹ In fact, in recent litigation over a quarry lease, the Superior Court determined that the Authority “is a municipal corporation established . . . pursuant to Chapter 168 of the Public-Local Laws of 1939.” *Umstead Coal. v. Raleigh-Durham Airport Auth.*, No. 19 CFS 3859 (Wake Co. Sup. Ct., Nov. 8, 2019), *aff’d Umstead Coal. v. Raleigh-Durham*

¹ The reference to “other local special-purpose public districts, units or bodies of any kind” in subsection (9) of G.S. § 113A-9 of SEPA very likely includes a “public authority” under G.S. § 113A-9(8), even though subsection (9) does not use the exact phrase “special purpose unit of local government.” However, it is not necessary to show that this is the case, given that the Authority is excluded by the exclusion’s reference in subsection (9) to “other local special-purpose . . . units or bodies of any kind.”

Airport Auth., No. COA20-129, 2020 WL 7349165, at *6-7 (N.C. Ct. App. Dec. 15, 2020) (confirming the validity of RDU’s original charter, noting that the General Assembly has taken no action to repeal any part of RDU’s charter).

Thus, under the definitions in G.S. § 113A-9 of SEPA, the Authority is properly classified as one or more of the following: a “municipal corporation,” a “local governmental unit or body,” or a “local special-purpose public district, unit or body.” See G.S. § 113A-9(8) & (9). As such, the Authority is specially excluded from the definition of a “state agency” under SEPA.

Given that both the Authority and its Governing Bodies are excluded from the definition of a “state agency” under SEPA, title to the Project land is neither vested in the State nor a State Agency, and the Project does not involve “*public lands*” as that phrase is defined by G.S. § 113A-9 SEPA.

B. The Project does not involve the “significant expenditure of public moneys.”

In addition, the Project likewise does not involve the “significant expenditure of public moneys” as defined in G.S. § 113A-9 of SEPA (with emphasis added):

(7a) *“Significant expenditure of public moneys” means expenditures of public funds **greater than ten million dollars (\$10,000,000)** for a single project or action or related group of projects or actions. For purposes of this subdivision, contributions of funds or in-kind contributions by **municipalities, counties, regional or special-purpose government agencies, and other similar entities created by an act of the General Assembly** and in-kind contributions by a non-State entity shall not be considered an expenditure of public funds for purposes of calculating whether such an expenditure is significant.*

The estimated cost for the installation of this fence is \$5-6 million and therefore does not meet the \$10,000,000 threshold to constitute the “significant expenditure of public moneys” under SEPA.

In addition, the Project is being paid for by the Authority’s funds, and, as noted above, the Authority may be properly classified as one or more of the following: a municipal corporation, a special-purpose government agency, or a similar entity created by an act of the North Carolina General Assembly. As such, the Authority’s funds are not to be considered an expenditure of public funds for purposes of calculating whether such an expenditure is significant.

Consequently, the Project does not involve the “*significant expenditure of public moneys*” as defined in G.S. § 113A-9 of SEPA.

- 2. Section F of your Buffer Authorization Application Form reflects that the project site is in violation of DWR Wetland Rules (15A NCAC 02B .0500), Isolated Wetland Rules (15A NCAC 02B .1300), DWR Surface Water or Wetland Standards, or Riparian Buffer Rules (15A NCAC 02B .0200). As explanation, you cited a February 14, 2020 letter from NCDEQ (signed by Sheila Holman). This communication was not an***

issuance of a Notice of Violation (NOV). The Division is not aware of any NOV's for the subject site. Please clarify if any NOV's have been issued for the subject site. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)]

Response: No Notices of Violations (NOVs) have been issued to RDU associated with the damage to the Neuse River Buffers caused by illegal trespassing, and the construction of bandit trails and structures. However, the referenced letter acknowledges that “DEQ is aware of the activity at the property and the resulting damage to the buffers.”, and that DWR staff was shown “various impacts to stream buffers” during a site visit held on September 25, 2019.

Also, an in-person meeting (pre-pandemic) was held at the NCDEQ Green Square Building on December 4, 2019 between Sheila Holeman (NCDEQ-Assistant Secretary of Environment), Jay Zimmerman (NCDEQ-DWR Section Chief), Drew Hargrove (NCDEQ-Assistant General Counsel), Bill Sandifer (RDU-Senior VP & COO), Crystal Feldman (RDU-VP of Communications, Government & Community Affairs), and me. During this meeting Ms. Holeman stated that DEQ agreed that the trails and associated structures are in violation of the 50’ Neuse River Buffer Rule. She said that they are discussing how best to provide official written notice to RDU as they acknowledged that the violations were the result of trespassers and not that of RDU. She went on to state that while DEQ needs to see that the buffer impacts are remediated they do not foresee the necessity to access a civil penalty fine against RDU for the violations. She said that they anticipate providing the notice to RDU if not by the end of the week (being 12/6/2019), most certainly by the following week. Ms. Holeman, Mr. Zimmerman & Mr. Hargrove all agreed that the first step in remediating the buffer impacts is to prevent the trespassers from accessing the property. Other measures that may be necessary pending the restricted access could include streambank repair & stabilization, and ground cover using adjacent forest floor organic debris or possibly mulch from the fence clearing project. Remediation efforts will be coordinated with DWR staff pending receipt of the DEQ violation notice letter.

It is for these reasons and other communications with DEQ staff that it is the understanding of RDU that the existing bandit trails and structures are in violation of the Neuse River Buffer rules. If this is not the case and the existing trails and structures within the Neuse River Buffers, that were constructed without DWQ authorization, in sections immediately parallel to and along the streams, and their “*resulting damage to the buffers*” are not in violation of the Neuse River Buffer rules, then we request DWR to provide written verification as such to RDU to release them of any associated liability and remediation responsibility.

While such a letter would release RDU from any regulatory liability associated with the Neuse River Buffer rule, the need to prevent access to and use of the property from trespassers still exists in order to protect the property from further damage and RDU from any other potential safety hazards and liabilities. The property remains posted and patrolled by RDU, but this has not successfully stopped trespassers from accessing the property, rebuilding structures and trails and damaging the buffers, streams and property.

3. ***To demonstrate avoidance and minimization, please demonstrate why the project’s purpose “to provide enhanced security of airport property, and prevent trespassers from entering airport property who are causing damage to many riparian buffers” cannot be achieved by designing the fence to terminate before entering the regulated riparian buffer. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G)].***

Response: It seems obvious that any gaps left in the fence, especially those across small 1st and 2nd order streams, would not prevent trespassers from entering the property. On the contrary, leaving these gaps open would encourage continued trespassing and simply funnel the trespassers into a corridor located entirely within a buffer causing significant additional environmental damage. As stated in our previous response, RDU has allowed only one such gap in the fence at location “*Feature 28 (Drawing 17 or 23)*”. While RDU could design a fence to cross this stream, it was avoided to minimize potential impacts to the stream and streambanks given that the stream is very deeply incised with approximately 8-foot tall steep banks. Mr. Wojoski visited this location with me and acknowledged this. The reason why RDU was able to avoid this crossing was due to its location along National Guard Drive and any trespassers going thru the gap would be within sight of the National Guard gatehouse and the location is along a road well-traveled by RDU staff and law enforcement. If in the future it’s discovered that trespassers are utilizing this gap, then RDU may need to come back to DWR with a revised plan to close the gap. If on the other hand NCDEQ would prefer we eliminate this gap, RDU is willing to do so.

4. ***Please provide a vegetation maintenance plan to address how vegetation regrowth will be managed along the fence corridor within the riparian buffer. Please include a description of mechanical or chemical means to be used in vegetation management. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].***

Response: See attached requested “*Draft RDU SOP – Enhanced Security Perimeter Fencing Operation & Maintenance (March 3, 2021)*”. This SOP was updated to include a section on the vegetation management within the buffers and wetlands.

5. ***Please confirm you are not going to operate vehicles in the riparian buffers, streams or wetlands as part of routine patrols. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].***

Response: As stated in Item 2 of our December 18, 2020 additional information response, “*To avoid any potential for additional impacts to the riparian buffer or damage to stream banks and streambeds, patrols along the fence within the Neuse River Buffers and at the stream crossings, will be made on foot only. No vehicles will be used within the Neuse River Buffers to conduct the routine patrols.*” Your previous question in your December 12, 2020 letter did not ask about the “wetlands” crossings, but RDU will only patrol sections of fence that cross wetlands on foot as well and will not use vehicles within the wetlands. As discussed in our virtual meeting with Paul Wojoski and Rick Trone on February 26, 2021, RDU will post signage at the boundary of all Neuse River Buffers and wetlands in the vicinity of the fence which will clearly notify personnel that they are entering a protected buffer or wetland and that no vehicles are allowed in these areas and they are to traverse on foot only.

6. *It remains unclear how fence segments isolated between stream crossings will be patrolled if there are no vehicular crossings of streams. Please clarify. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].*

Response: The only such section of isolated fence that exists is between Haley's Branch Crossing 2 and stream crossing Feature 8, as this section of fencing is isolated by Haley's Branch, Feature 7 and the Umstead State Park Boundary. This section of fence will be patrolled and maintained on foot. If for some reason it is determined that this becomes not practicable, then RDU will certainly notify DWR as such and develop a plan in full compliance with the applicable wetland, stream and Neuse River Buffer regulations, and request any associated authorizations that are required.

7. *How will you ensure steams are protected from sedimentation and bank destabilization from routine foot patrolling of the buffered areas given the steep topography of some of the riparian areas and the potential for accelerated erosion? Will any infrastructure such as foot bridges be provided? [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].*

Response: RDU is not anticipating the need for any foot bridges or other such infrastructure. Small streams will simply be jumped across and larger streams forded on foot. Foot patrols will be infrequent enough that we do not anticipate any indirect formation of bare earth trails/paths, erosion or damage to the buffers, streams, stream banks or riparian areas. We anticipate that ground cover being relatively natural forest floor and vegetation will persist. Future patrols will be similar to the existing patrols, surveys and delineations that have occurred and continue to occur within the property and along the property line. If anything, the patrols and inspections that will occur as defined and stated within the previously provided SOP will help identify any such unanticipated erosion or damage within the riparian area to allow RDU to quickly address and repair as needed. It seems obvious that any unanticipated impacts to the riparian areas would certainly be no worse than the uncontrolled damage to the Neuse River Buffers and streams caused by the trespassers that has been witnessed and acknowledged by DEQ.

The Authority has requested I express to you their desire to expedite the final review of the application and issue an impact authorization. With that in mind if any other information is needed to complete your review of this application, please contact me by phone or email so we can resolve those issues promptly.

Attachments:

1. DWR#17-1487v4, Request for Additional Information, February 16, 2021
2. Draft RDU SOP – Enhanced Security Perimeter Fencing Operation & Maintenance (March 3, 2021)



NORTH CAROLINA
Environmental Quality

February 16, 2021

ROY COOPER

Governor

MICHAEL S. REGAN

Secretary

S. DANIEL SMITH

Director

DWR #17-1487 v4
Wake County

Raleigh-Durham Airport Authority
Attn: Michael Landguth, President
1000 Trade Drive
RDU Airport, NC 27623

(Delivered via email to Michael.Landguth@rdu.com)

Subject: REQUEST FOR ADDITIONAL INFORMATION
Raleigh-Durham Airport Authority-Enhanced Security Perimeter Fencing

Mr. Landguth,

On October 14, 2020, the Division of Water Resources (Division) received your application requesting a Riparian Buffer Authorization pursuant to the Neuse River Riparian Buffer Protection Rules (15A NCAC 02B .0714) from the Division for your project. The Division requested more information on December 12, 2020 and received your response on December 18, 2020. After reviewing the information provided, the Division has determined that your application is incomplete and cannot be processed. **The application is on-hold until the following information is received:**

1. Is any portion of the project on "public lands" or is any funding of the project a "significant expenditure of public moneys" as those terms are defined in the State Environmental Policy Act (SEPA)? [G.S. § 113A-9]
2. Section F of your *Buffer Authorization Application Form* reflects that the project site is in violation of DWR Wetland Rules (15A NCAC 02B .0500), Isolated Wetland Rules (15A NCAC 02B .1300), DWR Surface Water or Wetland Standards, or Riparian Buffer Rules (15A NCAC 02B .0200). As explanation, you cited a February 14, 2020 letter from NCDEQ (signed by Sheila Holman). This communication was not an issuance of a Notice of Violation (NOV). The Division is not aware of any NOV's for the subject site. Please clarify if any NOV's have been issued for the subject site. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)]



North Carolina Department of Environmental Quality | Division of Water Resources
Raleigh Regional Office | 3800 Barrett Drive | Raleigh, North Carolina 27609
919.791.4200

3. To demonstrate avoidance and minimization, please demonstrate why the project's purpose "to provide enhanced security of airport property, and prevent trespassers from entering airport property who are causing damage to many riparian buffers" can not be achieved by designing the fence to terminate before entering the regulated riparian buffer. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G)].
4. Please provide a vegetation maintenance plan to address how vegetation regrowth will be managed along the fence corridor within the riparian buffer. Please include a description of mechanical or chemical means to be used in vegetation management. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].
5. Please confirm you are not going to operate vehicles in the riparian buffers, streams or wetlands as part of routine patrols. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].
6. It remains unclear how fence segments isolated between stream crossings will be patrolled if there are no vehicular crossings of streams. Please clarify. [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].
7. How will you ensure streams are protected from sedimentation and bank destabilization from routine foot patrolling of the buffered areas given the steep topography of some of the riparian areas and the potential for accelerated erosion? Will any infrastructure such as foot bridges be provided? [15A NCAC 02B .0714 and 15A NCAC 02H .0611(b)(1)(G) and (H)].

Pursuant to Title 15A NCAC 02B .0714, the applicant shall furnish all of the above requested information for the proper consideration of the application. Please respond in writing within 30 calendar days of receipt of this letter by sending one (1) copy of all of the above requested information to the 401 & Buffer Permitting Branch, 1617 Mail Service Center, Raleigh, NC 27699-1617 OR by submitting all of the above requested information through this link: <https://edocs.deq.nc.gov/Forms/Supplemental-Information-Form> (note the DWR# requested on the link is referenced above).

If all of the requested information is not received in writing within 30 calendar days of receipt of this letter, the Division will be unable to approve the application and it will be returned. The return of this project will necessitate reapplication to the Division for approval, including a complete application package and the appropriate fee.

Please be aware that you have no authorization under the Water Quality Certification Rules or the Neuse River Riparian Buffer Rules for this activity and any work done within waters of the

state or regulated Riparian Buffers may be a violation of North Carolina General Statutes and Administrative Code.

Please contact Rick Trone at Rick.Trone@ncdenr.gov if you have any questions or concerns.

Sincerely,

DocuSigned by:
Paul Wojoski
949D91BA53EF4E0...

Paul Wojoski, Supervisor
401 and Buffer Permitting Branch

cc: Bob Zarzecki, S&EC via e-mail at bzarzecki@sandec.com
DWR RRO
DWR 401 & Buffer Permitting Unit via Laserfiche

ATTACHMENT A

DRAFT RDU SOP – Enhanced Security Perimeter Fencing Operation & Maintenance DWR Project # 2017-1487.v2 / Additional Information / March 3, 2021

Raleigh – Durham Airport Authority

Standard Operating Procedure (SOP) – Operation & Maintenance of Enhanced Security Perimeter Fence and Gates within 50' Neuse River Riparian Stream Buffers and Wetlands

Standard Operating and Maintenance Procedures for Perimeter Fence and Gates within Stream Buffers

Maintenance and Inspection. Perimeter Security Fences serve an important role in airport security and must be inspected and maintained in order to remain effective. Perimeter Security Fences and Gates within wetlands, stream buffers, and that cross streams shall be visually inspected routinely, no less than monthly and immediately after any storm event triggering a National Weather Service (NWS) flood warning or watch, to ensure fence and gates are secure and functioning properly, and not obstructing stream flow.

Signage shall be installed and maintained to clearly identify the location of the stream buffers and wetlands along the alignment of the security fence. This signage will also provide notification of RDU policy that inspection and maintenance of fencing inside wetlands, buffers and streams shall be done on foot, and that no vehicles or equipment are permitted within these areas without written authorization.

Gates and fences shall be inspected for the following:

- Damage caused by fallen vegetation, wildlife, vandalism, or tapering by potential trespassers and any other signs that repair is needed.
- Areas that have been burrowed or dug under fences
- Entangled debris
- Vegetation such as vines, weeds or trees growing near (within the maintenance corridor), on or through the fence.
- Erosion

Required maintenance and repairs shall be provided frequently and as soon as practical, to ensure fences and gates are maintained and operating properly.

Manual Slide Gates shall be inspected in detail and exercised monthly to ensure each gate is operational and in good working order. During each monthly inspection the gate shall be unlocked and opened into the fully opened position to ensure complete functionality and to check for vegetation that may interfere with gate operation. Vegetation shall be removed and/or trimmed to outside of the maintenance corridor (width may vary) to ensure vegetation does not interfere with functionality of the gate. More frequent inspection and vegetation removal may be required during spring and summer months when vegetation typically grows more quickly.

Manual Gate Operation. Manual Slide Gates at large stream crossings shall be opened prior to any forecasted flood events to allow passage of floodwaters and to prevent building up of debris in the gate. Upon notification of a flood warning or watch issued by the National Weather Service (NWS) RDU will deploy staff to open manual slide gates for a period needed to allow flood waters to pass.

Vegetation Management within Buffers and Wetlands. Vegetation maintenance within the buffer and wetlands will be done by mechanical methods only using hand tools or weed trimmers. Natural vegetation will be removed only as needed to prevent growth into, through or over the security fence. Chemicals shall not be used to control vegetation within the buffers.