

## September 9, 2021 ADI Letter #7

1. *On September 3, 2021, Judge Byrne informed counsel for the Department about an intended ruling in Umstead Coalition v. NC Department of Environmental Quality, 20 HER 03014 that will necessitate revisions to the Crabtree Creek bridge design included in your mining permit application. Please provide any revisions to your bridge design and/or to your method for moving quarried rock from the proposed pit to the processing plant in the existing pit that will be necessary to meet the requirements of the final written order, once issued.*

Wake Stone Corporation received Judge Byrne's FINAL DECISION in 20 EHR 03014 on September 27, 2021. The Administrative Law Judge's order reversed the NC Division of Water Resources June 4, 2020 Neuse River Basin Riparian Buffer Authorization certificate issued for construction of the proposed bridge over Crabtree Creek. Judge Byrne called into question the need for a 60-foot wide bridge in his "Findings of Fact," particularly in item number 40: "The Tribunal is not convinced that the Wake Stone Bridge's width and size is necessary to meet the project purpose, in large part due to the absence of contemporaneous documentary evidence (including the absence of written findings of fact) on this issue and of possible alternatives to minimize the size, scope, and impact of the Wake Stone Bridge project on the Crabtree Creek riparian buffer." However, as a matter of law, Judge Byrne simply concluded that "The Respondent [*sic*] (NCDEQ, DWR) erred in failing to make the finding of fact required by 15A NCAC 02B .0233 prior to issuing the Buffer Authorization." Wake Stone contends that nothing in the final ruling necessitates "revisions to the Crabtree Creek bridge design." Judge Byrne is not an expert in bridge design, nor is he a mining expert with an understanding of safe and efficient surface mine haulage. The final decision is therefore based upon the lack of documented "finding of fact," not on the judge's personal opinion that the proposed bridge is larger than necessary.

Wake Stone Corporation maintains that the bridge design as originally proposed is of the minimum size required for safe and efficient haul truck transport of quarried rock from the Odd Fellows Tract pit to the existing primary crushing station. On October 13, 2021 Wake Stone filed an application with the NC Division of Water Resources for a Buffer Authorization Certificate under 15A NCAC 02B 0714, the revised Neuse River Basin Riparian Buffer Rules, which became effective June 15, 2020. This application requests NCDWR authorization of the same buffer impacts provided for in the previously issued Buffer Authorization Certification. (A copy of the Buffer Authorization Application is attached.) Under the revised Neuse River Basin Riparian Buffer Rules, Wake Stone has provided NCDWR with extensive documentation that demonstrates the need for a 60' bridge to meet the purpose of this project. This documentation includes expert information on safe travel ways for mine haul trucks. Paul Wojoski of the NCDWR conducted a site visit to the Triangle Quarry and Odd Fellows Tract on October 18, 2021. NCDWR is currently processing the Buffer Authorization Certificate application. Wake Stone anticipates receipt of the requested Buffer Authorization Certificate within the statute provided 60-day review period, but no later than December 13, 2021.

2. *Once Judge Byrne's final written order is issued, if Wake Stone intends to take any legal action regarding the order, please inform the Department of your intentions to do so.*

Wake Stone Corporation has no intention of taking any legal action regarding Judge Byrne's order. It is unknown to us whether or not NC Division of Water Resources has any intention of appealing the ALJ decision. As noted in our response to Question 1, we have filed a new Buffer Authorization Application

with the NC Division of Water Resources and anticipate issuance of the Buffer Authorization prior to December 13, 2021.

3. *On July 30, 2021, the US Fish and Wildlife Service’s “final rule that identifies Endangered Species Act protections for the Neuse River waterdog,” *Necturus lewisi*, went into effect. This rule may have an impact on your proposed mine expansion across Crabtree Creek. Please provide any further threatened and endangered species coordination you have conducted with the US Fish and Wildlife Service in response to this final rule.*

Since receiving NCDEMLR’s September 9, 2021 “ADI” letter, Wake Stone Corporation has engaged in on-going informal consultation with John Ellis of the US Fish and Wildlife Service (FWS) concerning *Necturus lewisi*. With no federal permits required for the Triangle Quarry expansion project (“federal nexus”), and no impacts proposed for Crabtree Creek or its tributaries, there is no requirement for Wake Stone to engage in formal consultation with FWS (under Section 7 of the Endangered Species Act). Additionally, at Wake Stone’s request, Joseph Alderman of Alderman Environmental Services, LLC (AES) contacted Mr. Ellis of FWS and relayed information concerning potential waterdog habitat in the subject reach of Crabtree Creek as was determined during AES’s August 2020 freshwater mussel survey. The freshwater mussel survey did not result in the collection of any threatened or endangered mussel species but documented an overwhelming wastewater treatment plant effluent odor emanating from the creek, particularly during substrate disturbance. Wake Stone and Mr. Ellis have independently reviewed historical data concerning documented occurrences of the Neuse River waterdog, including detailed review of the FWS’s February 2021 *Species Status Assessment Report for the Neuse River Waterdog (Necturus lewisi)* (copy attached). **According to FWS sources, the only officially reported recent occurrence of a waterdog specimen in Crabtree Creek was in 1979 near the Ebenezer Church Road bridge.**

The FWS species status assessment (SSA) was prepared by staff of the FWS-Raleigh Field Office/Region 4 with assistance from the Neuse River Waterdog SSA Technical Advisor Team (which includes scientists from the NC Museum of Natural Sciences, the NC Wildlife Resources Commission, the NC Natural Heritage Program, and Alvin Braswell, retired herpetologist from the NC Museum of Natural Sciences). The SSA presents the results of a comprehensive review for *Necturus lewisi*, documents the species’ historical range and provides insight into current and forecast future conditions. The report states that the waterdog is **presumed to be extirpated from 35% of its historical range**. Figure 3-3 on Page 13 of the SSA illustrates 1980s areas of occupancy and likely occupancy. Only one data point occurs in the Crabtree Creek basin (the previously mentioned 1979 occurrence at Ebenezer Church Road?). Figure 3-4 on Page 14 illustrates areas within the Neuse basin that are either occupied, show a gain in occupancy, show a loss in occupancy, or are likely not occupied. **The entire upper Neuse basin falls within the “loss in occupancy” or “likely not occupied” categories, with Crabtree Creek being within the “likely not occupied” category.** Figure 3-6 on Page 16 of the SSA, illustrating 2010s occupancy areas shows Crabtree Creek within the **“not occupied”** category. Figure 3-6 presents the results of occupancy surveys conducted from 2010-2019. Data presented in Figures 3-4 and 3-6 reflect the results of comprehensive surveys (NCWRC 2015) conducted by the NC Wildlife Resources Commission which documented sites where the Neuse River Waterdog *is below detection*.

On October 21, 2021, via email, Wake Stone Corporation contacted Mr. Pete Benjamin, Field Supervisor in the Raleigh office of the USFWS requesting concurrence that the proposed quarry

expansion project *is not likely to affect* the Neuse River waterdog based on no Crabtree Creek impact proposed by the project, the previously noted habitat assessment by AES, no documented occurrence since 1979, and FWS's own Species Status Assessment Report. Wake Stone requested that a copy of such concurrence be forwarded to David Miller of NCDMLR.

**It is of paramount importance to note that the “Critical Habitat Units” identified as suitable for the Neuse River Waterdog do not include Crabtree Creek (see attached Federal Register excerpt identifying Critical Habitat Units). Furthermore, the Endangered Species Act provides that the designation of critical habitat does not affect land ownership or establish a refuge, reserve, preserve, or other conservation area. Additionally, activities on lands designated for critical habitat will not be affected by the species listing, unless such activities are authorized, funded, or carried out by a federal agency. Wake Stone Corporation’s proposed quarry expansion requires no federal permitting, approval, or authorization, and will receive no federal funding, nor does the project propose any impacts to Crabtree Creek or its tributary streams. In short, the July 2020 “threatened status” listing of *Necturus lewisi* has no bearing whatsoever on Wake Stone Corporation’s Triangle Quarry expansion project. It is merely a means by which those in opposition to the project can raise objections and impede the issuance of the requested permit modification.**

4. *Please provide a visual rendering, as it would appear in the winter, of the proposed sound barrier wall design and location from a bird’s eye and ground level perspective at the following locations (see attached figures)”*
  - a. *Looking from William B. Umstead State Park across Foxcroft Lake towards the haul bridge across Crabtree Creek.*
  - b. *Looking from William B. Umstead State Park across Foxcroft Lake towards the sound barrier wall located on the northern boundary of the proposed pit.*
  - c. *Looking from Old Reedy Creek Road/East Coast Greenway towards the proposed quarry site.*

Wake Stone Corporation has contracted with CLH design, p.a. of Cary, NC to generate the requested conceptual visual rendering. The attached renderings are based on actual photography taken as near the requested locations and along the requested orientations as possible. The photograph for “4.b. – Ground Level Exhibit” was taken from a different location (looking across Crabtree Creek from the existing operation a few hundred feet east of the proposed bridge location). This photo was used in place of the exact location and angle because current leaf conditions would prevent any significant visibility of the proposed sound wall (see attached photo “4.b.Original.” The replacement photo is representative of vegetation and topography of the location that was requested during winter months. We believe these exhibits provide a reasonable rendering of how the sound barrier wall will appear along these locations.



4.b.Original