

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 00952

Wake Stone Corporation
Petitioner,

v.

North Carolina Department of Environmental
Quality, Division of Energy, Mineral, and
Land Resources
Respondent.

**RESPONDENT’S MOTION
TO COMPEL**

Pursuant to Rule 37 of the N.C. Rules of Civil Procedure, Respondent Division of Energy, Mineral, and Land Resources (hereinafter “the Division”) moves the administrative law judge to compel the disclosure of documents by Petitioner Wake Stone Corporation in order to establish a deadline by which the documents owed must be produced. This motion continues the fundamental dispute that was the subject of the Division’s motion to continue - that Wake Stone deliberately and unjustifiably redacted and/or declined to disclose its internal corporate documents without prior agreement and in contravention to the North Carolina Rules of Civil Procedure when it deemed them “irrelevant”.

The Division has been diligently attempting to work with Wake Stone to produce these documents, which were properly requested by the Division well over four months ago. The ongoing dispute came to a head when Wake Stone filed its Motion for Summary Judgment on August 22, 2022, wherein several of Wake Stone’s arguments are premised on the facts (and – presumably – documents containing and providing those facts) which it had previously deemed “irrelevant”. See Am. Tel. & Tel. Co. v. Griffin, 39 N.C. App. 721, 727, 251 S.E.2d 885, 888 (1979), review denied, 297 N.C. 304, 254 S.E. 2d 921 (1979) (“To permit a party to refuse to

disclose relevant factual information in this type of situation would serve to reinject the ‘sporting element’ into trials and would utterly defeat the purposes for which the . . . discovery rules were enacted.”) As an example, the Division sought documents pertaining to estimates of production and reserves of stone from Wake Stone’s existing Triangle Quarry, which Wake Stone refused to provide as Wake Stone determined that information “irrelevant”. Subsequently, Wake Stone, in its Motion for Summary Judgement, asserted the following:

Wake Stone has also **greatly slowed its production** and sales at the Triangle Quarry, which has dwindling aggregate reserves, to avoid laying off any employees there. If DEMLR had granted Wake Stone's Application in February 2022, work could have begun on the new quarry. This slowdown in production and sales to keep the Triangle Quarry operational is hugely inefficient, with Wake Stone incurring approximately \$100,000 per month in excess costs. These costs would not have been incurred but for DEMLR's denial of the Application. These financial burdens will continue until this contested case is resolved.

Wake Stone’s Motion for Summary Judgment, at p. 10 (citations omitted)(emphasis added).

On this basis, the Division moves the ALJ to set a date by which these documents must be produced and requests that the ALJ modify the time by which the Division must respond to Wake Stone’s Motion for Summary Judgement to seven (7) business days after receipt of those documents. In support, the Division shows:

1. On April 4, 2022 the Division served discovery on Wake Stone and included the following requests:

- a) The Division’s interrogatory #1 asked Wake Stone to “state the procedure that Wake Stone alleges the Division failed to use and state the manner in which Wake Stone alleges the Division failed to use that procedure.” (See Ex. 1 at p. 6) The Division’s document request #1 required the production of all documents that were required to be

identified in response to any interrogatory. Thus, the Division's discovery required Wake Stone to produce all documents "created . . . by Wake Stone" on this topic.

b) The Division's interrogatory #4 specifically asked Wake Stone to "[i]dentify each document created . . . by Wake Stone . . . regarding" each of three topics: "[n]oise," "[v]isual impacts," and "[v]ehicular traffic issues." (See Ex. 1 at pp. 7–8) The Division's document request #1 required the production of all documents that were required to be identified in response to any interrogatory. Thus, the Division's discovery required Wake Stone to produce all documents "created . . . by Wake Stone" on these three central topics. All bases and data supporting technical studies, including the acoustical studies and visual renderings here, are necessarily fundamental to understanding that technical study and are therefore relevant and responsive.

2. On May 24, 2022, Wake Stone produced documents responsive to the Division's discovery. On June 13, 2022, Wake Stone's counsel indicated that the May 24 production represented its entire response to the Division's document requests. (See Ex. 2 at p. 1)

3. On June 23, 2022, counsel for the Division emailed Wake Stone's counsel and asked if Wake Stone had produced its internal corporate documents. (See Ex. 3 at p. 5)

4. On June 28, 2022, Wake Stone responded that it had not produced its internal documents. (See Ex. 4 at p. 1)

5. On or about June 30, 2022, the two parties entered into discussions regarding how and when Wake Stone would produce the requested documents. That same day, the Division sent two proposed e-discovery searches to Wake Stone. These two searches have become known between the parties as Search #1 and Search #2. Search #2 includes all terms in Search #1, but adds additional limitations, making Search #2 much narrower than Search #1. (See Ex. 5 at p. 1)

6. Due to technical limitations with Wake Stone's system, Wake Stone could not promptly complete the searches. Instead, on July 3, 2022, Wake Stone recommended that discovery be limited to four custodians that they named, and a time period of April 2020 to February 2022, which corresponded to the period when Wake Stone's application was pending before the Division. The Division immediately agreed to that proposal, but only as a starting point. (See Ex. 6 at p. 1)

7. On July 5, 2022, Wake Stone reported search results for their four-custodian / two-year search. (See Ex. 7 at p. 1)

8. On July 6, 2022, the Division requested that Wake Stone run Searches #1 and #2 with an expanded scope. First, the Division asked that the date range extend back to 2016. This date was chosen because Wake Stone's petition for this contested case hearing indicated that their analysis to support their permit application began in 2016. Second, the Division asked that ten custodians be included. The Division had repeatedly asked Wake Stone for information regarding corporate personnel in order to narrow down the list of custodians. Wake Stone never offered to provide any such information. Therefore, the Division selected the ten custodians based primarily on the individuals' job descriptions on Wake Stone's website. (See Ex. 8 at p. 1) It is worth noting that the Division produced documents from two dozen custodians using no starting date limitation. Wake Stone did not provide any results regarding these searches until July 11, 2022.

9. Also on July 11, 2022, the Division specifically requested that Wake Stone begin reviewing for production the records of three specific custodians for the date range April 2020 to February 2022. Indeed, there had not been any dispute for some time that these records would be part of any agreed-upon production. However, due in no small part to the technical limitations of

Wake Stone's e-discovery platform, the process of running test searches in order to develop a reasonable document set for review was—in the Division's counsel's experience—extraordinarily slow and cumbersome. (See Ex. 9 at p. 1) Because of Wake Stone's purported technical issues with running discovery searches, the document total (10,624) for the potential review set was not identified by Wake Stone until July 18, 2022. (See Ex. 10 at p. 1)

10. Wake Stone made an initial production of 647 documents on Friday, July 20, 2022. (See Ex. 11 at p. 1)

11. Wake Stone made a second production of documents on July 22, 2022, and in the cover letter of that production stated: “[p]lease note that we have applied redactions to various internal reports that contain confidential and commercially sensitive information about unrelated mining operations conducted by Wake Stone Corporation or aspects of the Triangle Quarry operations beyond that requested by Interrogatory No. 4, which is therefore irrelevant.” (See Ex. 12 at p. 1) Wake Stone had not sought or received agreement from the Division to withhold or redact any documents for reasons other than privilege or trial preparation. An example of a redacted document is provided. (See Ex. 13) The document is a Memorandum titled “Triangle Quarry Expansion Meeting Update and Questions from January 6th Meeting” and is dated January 11, 2020, several months before Wake Stone submitted the mining permit modification at issue here, and within the redacted area likely includes information responsive to the Division's discovery requests and relevant to the matter pending before this Court. The total number of documents produced as a result of Wake Stone's internal review of the original 10,624 document set was 1,094.

12. On July 28, 2022, the Division provided notice to Wake Stone that 1) the Division was not aware of authority which allowed redaction of documents for non-privilege purposes

(e.g., relevance) **without prior agreement** or protective order, and 2) that in an effort to move forward, the Division could agree to a protective order and could even agree that information to other quarries owned by Wake Stone could be redacted. (See Ex. 14 at p. 1) In response, Wake Stone on August 1, 2022 indicated that it would not produce information other than that related to “noise, visual or traffic impacts”. (Id.) Wake Stone did not respond to the Division’s offer to seek entry of a protective order.

13. Wake Stone’s intentionality in deliberately **not seeking prior agreement** to redact documents for non-privilege reasons can be inferred because the Division had sought and received prior agreement from Wake Stone to redact its own documents on the basis of responsiveness earlier on in the discovery process. Specifically:

a) During a May 5, 2022 conference, the Division first raised the idea of redacting a certain set of documents to Wake Stone, identified as the “Weekly Updates” provided to the North Carolina Department of Environmental Quality’s secretary’s office, for responsiveness. As agreed during that conference, the Division followed up in an email on May 11, 2022 to Wake Stone, outlining the exact approach and providing an example of the document wherein the redaction of the document excluded headings, allowing Wake Stone to see for itself that the portions of the document below were entirely unrelated to the current contested case. (See Ex. 15) The Division also provided additional information about the document itself, stating that there were approximately 1,500 of these documents responsive to Wake Stone’s discovery requests.

b) Wake Stone, on this basis, agreed to that the Division could proceed with that set of documents in the manner previously set forth by the Division. (See Ex. 16 at p. 1) With

that prior agreement, the Division moved forward with redacting those documents and producing them in a timely manner consistent with the parties' overall discovery plan.

14. As a result of the previously extended discovery period, the Division deposed Wake Stone's witnesses beginning August 1, 2022 through August 15, 2022. The following occurred:

a) The Division deposed Mr. Samuel Bratton on August 9, 2022. During that deposition, the Division inquired about information which Wake Stone thought would be commercially sensitive, including asking Mr. Bratton about the potential reserves at the Triangle Quarry and what quantities of stone has been produced from the Triangle Quarry during the lead-up to the mining permit modification application. During that line of questioning, at the request of Wake Stone's counsel, the Division stipulated that "[t]he testimony that Mr. Bratton is giving is commercially sensitive business information. It is confidential information and that this testimony will not be shared with the public or outside of this proceeding. And before it is submitted to the court, that there will be an opportunity for a protective order to be entered so this information can be sealed from the public record." (See Ex. 17, Excerpt of Deposition of Samuel Bratton, at p. 28) Wake Stone appears to have now provided information similar to Mr. Bratton's testimony to this Court without entry of a protective order and cannot now seek to withhold that information from the Division on that basis or on the basis of relevance. (See Wake Stone's Motion for Summary Judgment, p. 10)

b) Wake Stone's employees testified that – contrary to Wake Stone's prior assertion that only noise, visuals and traffic were relevant - that the acoustical analysis conducted by Wake Stone was based in part upon production estimates of the current pit at the Triangle Quarry. As stated in Wake Stone's acoustical study provided to the Division during the

permit application period, existing noise measurements from the production of stone from the current pit was necessary for the acoustical study to “(1) to document actual existing noise conditions at selected locations throughout the park, and (2) to serve as a measured noise level against which modeled existing noise levels could be compared to ensure the model was performing as expected.” (See Ex. 18 at p. 10) Mr. Cole Atkins confirmed this in his deposition testimony.

Q: ...[d]id you provide that production data to WSP as part of their—the information that they requested and required [for their] noise study?

A: Yes, I believe we did.

Q: ...Do you recall what amount—approximately how many hours—or the duration, as you referred to, of how long the plant was running with respect to the noise duration?

A: I don’t recall exact numbers, but I do recall that we compared the production records and rates to make sure that they were within the parameters of similar to typical operating scenario.

Q: Okay. “Similar to typical operating scenario,” where would you put that in terms of high production, low production? Which is to say, you know, if the quarry is operating, you know, low-market requirements versus high-market requirements, where would you put that production data?

A: I would say it was typical. Typical production.

(See Ex. 19, Excerpt of Deposition of Cole Atkins, at p. 108)

Despite this, Wake Stone has consistently stated to the Division that information and documents pertaining to production of stone from the current Triangle Quarry pit, as well as future production of stone from the proposed pit, are “irrelevant”. The Division understands that documents pertaining to these concepts have been either withheld or otherwise redacted by Wake Stone.

c) Wake Stone has asserted from the beginning of this contested case that the Division erred procedurally in that the amount of time the Division took to process the mining permit modification application was improperly long. (See Wake Stone’s Petition for

Contested Case, Exhibit B, at pp. 4-6) The Division understand that documents pertaining to Wake Stone's understanding of the procedures and expectations for the mine permit application have either been withheld or were otherwise redacted by Wake Stone on the basis of "relevance".

15. After depositions ended, the Division reached out – again – to Wake Stone on August 16, 2022 seeking production of documents previously withheld or otherwise redacted upon their determination of relevance or confidential business information/trade secret, etc. (See Ex. 20, at p. 2) On August 19, 2022, Wake Stone declined to provide those documents. (Id., at p. 1)

16. The Division also sought review of hard-copy files located within Wake Stone's offices. As part of that review, Wake Stone on July 15, 2022 provided the Division a picture of the file folders available for review. (See Ex. 21 at pp. 4-5) Upon review, however, the Division noted that a significant amount of folders had been removed and that also that a significant amount of the paper documents from within certain folders had been removed. (See Photograph of hard-copy files available for review taken by Kyle Peterson on July 21, 2022, Ex. 22) Comparing the photographs in Exhibit 21 with the photograph in Exhibit 22 it appears that approximately 75% of the hard-copy documents had been removed prior to the Division's in-person file review.

17. As of this date, the Division does not know how many documents Wake Stone has improperly withheld. To the Divisions knowledge, Wake Stone has produced approximately 31 documents which were redacted.

18. The allegations in Wake Stone's filing for Summary Judgment suggest that their prior claims - that the previously withheld and/or redacted documents were "irrelevant" - were

not made in good faith and were inconsistent with Wake Stone's subsequent determination of "relevance".

19. The Division has in good faith conferred or attempted to confer with Wake Stone in an effort to secure the information or material without court action but, due to Wake Stone's continued failure to provide the information, now seeks redress through this Court.

Therefore, the Division has demonstrated good cause and respectfully requests that the administrative law judge order Wake Stone to produce—no later than 5:00 p.m. on August 31, 2022, all electronic documents (email, word processing, pdf, etc.) that are responsive to the Divisions' discovery requests, and that Wake Stone make available for review responsive hard-copy documents no later than five (5) business days of entry of an order. The Division further requests that the administrative law judge modify the time by which the Division must respond to Wake Stone's Motion for Summary Judgement to seven (7) business days after receipt of both the electronic and hard-copy documents. In an effort to streamline this process, the Division further states that:

- 1) To the extent that Wake Stone asks for and this Court determines that entry of a protective order is appropriate and necessary in conjunction with resolution of this motion, the Division remains willing to enter into such a protective order.
- 2) To the extent that Wake Stone seeks to redact or otherwise withhold documents pertaining to its other quarries (Nash, Moncure, Knightdale, or Myrtle Beach, SC quarries), the Division is willing to consent to such in the context of an agreed-upon Order issued by this Court.

Respectfully submitted, this the 24th day of August 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Respondent's Motion to Compel has been served on all parties through by electronic mail using the following addresses:

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This the 24th day of August 2022.

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By: /s/ Carolyn McLain
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