

# SOUTHERN ENVIRONMENTAL LAW CENTER

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## **SENT VIA EMAIL**

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### **Re: Comments Regarding July 18<sup>th</sup> Stay Order in Matter 18 EHR 03161**

Dear Ms. Menard and Ms. Culpepper,

The Southern Environmental Law Center appreciates the opportunity to offer comments on behalf of the Haw River Assembly regarding the discussions currently taking place between the North Carolina Department of Environmental Quality, Division of Water Resources (“DWR”) and the Town of Pittsboro and Chatham Park Investors, LLC pursuant to the July 18<sup>th</sup> Stay Order issued by the Office of Administrative Hearings in matter 18 EHR 03161. The Haw River Assembly represents thousands of North Carolinians who drink, fish, swim, and paddle the Haw River; who place a high value on the quality of Chatham County’s water resources; and who will be adversely affected by the degradation of water quality in the Haw River. The Haw River Assembly commented and participated in the public hearing for the NPDES permit issued in 2010 and has voiced concerns for years that the commitments to mitigation strategies made by the Town of Pittsboro have not been incorporated into the planning and design for the Chatham Park development.

On May 3, 2018, Linda Culpepper, on behalf of DWR, sent a letter to Cindy Perry, the Mayor of Pittsboro, and Paul Messick, Pittsboro’s town attorney, noting that commitments and mitigation strategies included in the 2014 Environmental Impact Statement (“EIS”) for wastewater treatment plant upgrades in the Town of Pittsboro were not being properly implemented and enforced. In response, on June 3 and June 7, 2018 respectively, Chatham Park Investors, LLC and the Town of Pittsboro filed Petitions for a Contested Case Hearing regarding

the letter. On July 11<sup>th</sup>, Chatham Park Investors, LLC and the Town of Pittsboro filed a Joint Motion for a Temporary Stay, which was granted on July 18, 2018 with the stipulation that “The Parties shall submit to the Undersigned a Status Report no later than October 9, 2018 that shall include a brief statement regarding the status of the matter.”

Despite written and oral requests to town officials in Pittsboro, including Mayor Perry, for an update on the Town’s response to the May 3 letter, the Haw River Assembly did not learn of the two contested case petitions until late August, in response to a public records request filed with DEQ on July 27, 2018. By this point, the Temporary Stay was in effect and negotiations were well under way, limiting the time available for HRA to intervene in the matter and to join the discussions in any meaningful way prior to the October 9<sup>th</sup> status report due date. In their motion for a temporary stay, Chatham Park Investors, LLC and the Town of Pittsboro stated “Counsel for Respondent, counsel for Petitioner, and counsel for the Town have been actively engaged in discussions with each other regarding potential settlement of this matter” and that “Counsel for both parties desire additional time to continue their discussions toward the goal of resolving their respective concerns without the need for litigation.” It is these discussions that the Haw River Assembly, through *this letter*, hopes to take part.

It is important to remember that the increase in wastewater capacity that necessitated the State Environmental Policy Act (“SEPA”) review, including the EIS, was necessary for the proposed Chatham Park Development. The mitigation strategies to which the Town of Pittsboro committed, outlined in Section F of the EIS, were intended to offset the significant direct, indirect, and secondary impacts to the environment that would occur with new development, including Chatham Park. To allow Chatham Park to be excused from these mitigation requirements goes against the very purpose of the EIS.

Despite the fact that the mitigation measures in the EIS are not expressly included in the permit, they are binding. As DEQ has correctly asserted in its May 3<sup>rd</sup> letter, all information provided to the agency for the purpose of obtaining a permit is part of the record used to determine whether the permit should issue. The EIS is part of the application, which was approved with the issuance of the permit, and the commitments in it are binding. Any other interpretation would open a door for anyone to backtrack on their application materials, and would render the process meaningless. DEQ would have to duplicate the entire application in the permit, or risk having the promised measures considered void.

The Chatham Park development is adjacent to Jordan Lake, as well as Robeson Creek and the Haw River, which feed into the lake. These three water bodies are already designated as impaired for excessive chlorophyll a and for aquatic life due to high turbidity and pH, impairments that are associated with nutrient over-enrichment and stormwater runoff. The development will likely contribute significant sedimentation, nutrients, and stormwater runoff, which will only exacerbate existing impairments. It is critical that the mitigation strategies

outlined in Section F of the Environmental Impact Statement be implemented to protect these already impaired water bodies.

The Town of Pittsboro should not be allowed to go back on the promises it made to its citizens regarding protection of the Haw River. The following sections of the EIS are the most critical to the protection of the Haw River, Robeson Creek, and Jordan Lake, and should be fully implemented:

**Section F.1, page 217: Floodplains**

Flooding should be of key significance when considering how to best mitigate the impacts of converting nearly 8000 acres of forested land into a new city with large areas of impervious surfaces, including rooftops and pavement. The management of the much heavier rainfalls that are predicted with climate change, and which are already occurring, will depend greatly on wetlands and forests. This section states that "Indirect and Cumulative Impacts to topography and floodplains would occur for new development related to increases in wastewater treatment capacity. These impacts will be mitigated by the implementation of measures in Sections F.2, F.5 and F.10 addressing erosion and sediment control, wetlands and water resources." Thus, it is of critical importance that Sections F.2, F.5, and F.10 be implemented as intended.

**Section F.2, page 218: Soils**

The measures in Section F.2 of the EIS, regarding sediment and erosion control, appear to meet, but not exceed, the Chatham County Local Program for Sedimentation and Erosion Control ordinance, which applies to Pittsboro and thus applies to Chatham Park. Compliance with Chatham County's sedimentation and erosion control ordinance should thus already be included in the Chatham Park Stormwater Element, which the "General Provisions" language of the Element says will govern. Thus, these measures listed in Section F.2 of the EIS should be required of Chatham Park and enforced regardless of the EIS.

**Section F.5, page 221: Wetlands and Streams**

The buffer requirements for the EIS, the Chatham Park Master Plan, and the Chatham Park Open Space Additional Elements are detailed in the table below. The Chatham Park development Master Plan buffers meet the EIS requirements with the exception of perennial streams in Track 1, which should be 200 ft. rather than 150 ft. These larger buffers will protect the streams from higher volume storms and will provide filtration for urban runoff pollution and greater connected areas for wildlife habitat.

Stream	EIS buffer requirements	CP Master Plan buffers	CP Open Space Additional Elements buffers
<b>Track 1.</b>			
Haw River	300 ft	300 to 500 ft	Same
Perennial	200 ft	100 ft	150 ft
Intermittent	100 ft	50 ft	100 ft
<b>Track 2 &amp; 3</b>			
Perennial	100 ft	50ft: NRCS soil streams 100 ft: USGS streams	100 ft: NRCS soil 150 ft: USGS streams
Intermittent	50 ft	50ft	100 ft

**Section F.10, page 226: Water Resources**

Section F.10 is likely the most significant mitigation measure in the EIS. Although the EIS does not detail *how* to achieve these very stringent measures, it clearly states what the outcome should be: much more land will need to be left in a forested natural state in order to mitigate stormwater impacts. It is unclear how the Chatham Park development will include stormwater controls designed to “replicate and maintain the hydrographic condition at the site prior to the change in landscape” for new developments draining to the Haw River (i.e. Tract 1) exceeding 6% imperviousness, but it is critical that the development do so. Additionally, in Tracts 2 and 3 the EIS states new development must limited impervious surfaces to 10% and must "promote[s] sufficient open space to reduce impervious surfaces."

Specifically, the Haw River Assembly recommends the following, in an effort “to replicate and maintain the hydrographic condition at the site” prior to development:

- 1) Preserved forest area of dense mature trees is especially effective at mitigating areas of higher percent imperviousness if located upslope or downslope of more dense development. This is far more effective and protective than simply having grass in the non-built, non-paved area. Location and topography are key. Because it is a Master Plan community, Chatham Park has the potential to group densely developed areas and buffer them with forest, and to ensure that there is more forest than what is proposed in the sparsely replanted Tree Coverage Area.
- 2) Chatham Park should increase storm magnitude for peak runoff flowrates. The minimum should be the 1, 2, and 25-year 24-hour storms that both Chapel Hill and Chatham County require, and not the current proposal by Chatham Park for 1, 2 and 10 year storms. The development could even go a step further and use a 50-year 24-hour storm in order to provide exemplary performance. The higher volume and rate of rainfall that is

happening due to climate change is upending the historical data that predicts storm events. 100-year storms are the new normal and must be anticipated.

- 3) Chatham Park should require runoff volume matching for, at a minimum, a 2-year 24-hour storm to maintain a hydrograph more similar to that of predevelopment conditions.
- 4) The development site should be broken into much smaller basins for analysis of runoff rates and volumes. If this does not occur, it will leave the site's streams open to potential detrimental flows—flashy, incised urban streams, and degraded habitat. One way to achieve this is to consider any point at which flow enters a buffer a point of analysis (thus establishing smaller sub-basins). This will ensure that flows will stay closer to pre-development conditions at all streams and not just the ones outside of Chatham Park.

### **Section F.11, page 229: Forest Resources**

This section of the EIS states: “Native forested plant communities will be maintained within the buffer areas of streams, floodplains and associated wetlands. A closed canopy will be maintained over streams. Emphasis will be placed on trimming, instead of tree removal.” It is unclear whether the Additional Elements for Tree Protection and Landscaping conform to this.

Additionally, Chatham County requires 50 foot buffers around wetlands, and the Chatham Park Master Plan should as well. As the new development built by Chatham Park east of 15-501 was constructed, construction sediment filled in wetlands, in violation of the Chatham County ordinance. Without buffers, we will see that repeated as further construction occurs.

### **Section F.12, page 229: Shellfish, Fish, and their Habitats**

The US Fish and Wildlife Service has submitted several letters to Town of Pittsboro regarding the Chatham Park development. In its October 2014 letter the agency noted that “the proposed project will impact tributaries that flow into the Haw River in the upper Cape Fear River basin. These streams drain directly to occupied habitat for the federally endangered Cape Fear Shiner (*Notropis mekistocholas*). In addition, several at-risk species (Yellow Lampmussle (*Lampsilis cariosa*), Brook Floater (*Alasmidonta varicosa*), and Septima’s Clubtail Dragonfly (*Gomphus septima*)) are also present in the project area. Federal goals for the conservation of trust resources depend explicitly on the sustained integrity of the Haw River ecosystem. The Cape Fear Shiner Strategic Habitat Conservation Planning Team (consisting of federal and state agency staff, University researchers, and other Cape Fear Shiner experts) has identified the Haw River (i.e. the entire length of the Haw River flowing through Chatham County, ending at Jordan Lake) as necessary habitat for the recovery of the species.”

Section F.12 of the EIS makes it clear that the mitigation measures in the EIS must be taken to minimize the indirect and cumulative impacts of new growth in Pittsboro on aquatic life

and their habitat, including those described in sections F.1, F.2, F.5, and F.10. Per Pittsboro Town Board minutes, the Master Plan was changed at the June 9, 2014 Pittsboro Town Board meeting in several ways, at Chatham Park's suggestion, including the addition of this section on page 8:

"For streams flowing to the Haw River within Sections 1.1, 1.2, 1.3 and 1.5, where Federally listed species *currently inhabit this portion of the river and would be protected by the Endangered Species Act of 1973*, perennial streams shall have two hundred foot (200') buffers and intermittent streams shall have one hundred foot (100') buffers, measured from the top of bank. *The applicability of these additional buffers shall be determined at the time of Small Area Plan submittal.*" (Emphasis added)

With this language, Chatham Park seems to have reserved the right to challenge the continued existence of the protected species, and to make these larger buffers contingent on their status under the Endangered Species Act.

This could be a self-fulfilling prophecy, however, because as the US Fish and Wildlife Services stated in their October 2014 letter, "without detailed natural resource-focused stormwater planning and wildlife-friendly zoning, the secondary and cumulative impacts associated with increased development in this area could result in significant degradation of aquatic habitats or extirpation of listed species." This further underscores the importance of implementing sections F.1, F.2, F.5, and F.10 as written.

### **Section F.13, page 230: Wildlife, Natural Vegetation, and Endangered Species**

Chatham Park's Master Plan and "Additional Elements" Mitigation strategies largely do not meet the commitments detailed above, which, if implemented, would provide more wildlife and native plant habitat. Chatham Park not only plans to raze virtually all of the nearly 8000 acres of forest (excepting stream buffers) on the property, but has refused to create additional wildlife corridors that would connect preserved natural areas—not walking trails, but places where at least some of the existing wildlife and plants can continue to exist.

Obtaining a permit based on a misrepresentation, such as committing to mitigation measures and then backing out, is grounds for modifying or revoking a permit under 15A NCAC 02H.0114. If the Town of Pittsboro cannot follow through with the commitments made in the EIS, then the permit should be revoked and the permit process should begin anew. The mitigation strategies outlined in the EIS were intended to offset the significant direct, indirect, and secondary impacts of the Chatham Park development, and they should be implemented in full. We urge DEQ to hold firm on the requirements outlined in sections F.1, F.2, F.5, and F.10.

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and to require strategies that meet the intent of sections F.11, F.12, and F.13. We look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brooks Rainey Pearson', with a stylized flourish extending to the right.

Brooks Rainey Pearson