

The second exemption applies when a dam “is less than 25 feet in height or . . . has an impoundment capacity of less than 50-acre feet.” *Id.* § 143-215.25A(a)(6). Regarding this exemption, the question before the Commission is how to calculate impoundment capacity. Iluka is asking the Commission to rule that, for a dam built within a pit, the impoundment capacity of the dam does not include the volume that is impounded by the pit itself.

For both exemptions, Iluka is asking the Commission to state how the exemption should be applied, not to apply it to any particular dam. Iluka will not begin to build dams until its mining permit is approved and excavation has begun. Before building any dam, Iluka will submit information about the dam to the Department of Environment and Natural Resources (“DENR”), which has the responsibility of determining whether that particular dam fits within one of the exemptions.¹ A decision by the Commission on this request will not bypass that process. Instead, it will provide guidance to DENR regarding how the exemptions should apply when DENR is presented with the particular information discussed here.

II. Facts²

Iluka is developing a mining and reclamation facility to extract titanium and zircon mineral sands in Halifax County, North Carolina (the “Aurelian Springs Project”). The Aurelian Springs Project will be located on land that Iluka is leasing under a series of “mining leases.” The mining process will involve the excavation of mineral sands, resulting in the formation of a pit. After the mineral sands are processed to remove the valuable minerals, the remaining “tailings,” consisting of clay, quartz sands, and gravel, will be sluiced back into the pit, where

¹ In addition to the issues discussed here, both exemptions require that the dam not pose a threat to human life. Iluka is not asking the Commission to rule on that part of either exemption. Regardless of the Commission’s decision in this matter, no dam will be exempt unless DENR determines, based on site-specific conditions, that the dam will not pose a threat to human life.

² Iluka and DENR have stipulated to a set of facts for the purposes of this declaratory ruling, which are restated here with minor edits to improve readability.

they will settle and be dewatered. At the completion of the mining process, the pit will be filled with tailings material. Iluka will then undertake additional activities to reclaim the mining site, in accordance with a reclamation plan approved by DENR.

In order to begin disposing of tailings before mining in the pit is complete, Iluka will construct dams within the pit to isolate sections that can be used as active tailings ponds while mining takes place elsewhere. These “interior” dams will be arranged so that the failure of any dam constructed for that purpose would result only in redistribution of tailings within the pit. It would not result in the discharge of tailings outside the pit.³

Before beginning construction on any dam within the pit, Iluka will submit to DENR the forms titled “Data Needed to Determine if a Dam is Governed by the Dam Safety Law of 1967 (as Amended)” and “Dam Hazard Classification Data Form.” DENR will use the information submitted by Iluka on the forms to determine whether the dam is exempt because it meets the criteria of N.C. Gen. Stat. § 143-215.25A(a)(5) or (a)(6).

III. Background on Iluka’s Use of Dams

As employed by Iluka at the Aurelian Springs Project, the use of dams for in-pit tailings ponds is a modern mining practice that is good for the environment. By returning mine tailings to the pit, Iluka avoids the need to dispose of them offsite and avoids leaving an empty pit once operations are complete. This could be accomplished without building any dams within the pit;⁴ however, the dams serve two important purposes. First, they allow Iluka to start returning

³ In addition to the interior dams, the Aurelian Springs Project may involve dams built on the perimeter of the pit, with a portion of the dam inside the pit and a portion outside. These dams will hold water and tailings within the pit, and failure of a perimeter dam could result in discharge outside of the pit. However, this type of dam is not at issue in this matter.

⁴ See, e.g., Office of Solid Waste, U.S. Env’tl. Prot. Agency, EPA530-R-94-038, Technical Report: Design and Evaluation of Tailings Dams 14 (1994), *available at* <http://www.epa.gov/osw/nonhaz/industrial/special/mining/techdocs/tailings.pdf> (“The design initially eliminates the need for dike construction.”).

tailings to the dam before mining is complete, thereby minimizing the time that tailings are stored aboveground and amount of tailings stored aboveground at any one time.⁵ Second, they allow Iluka to return more tailings to the pit. After soil and rock is excavated and processed to remove minerals, the volume of the mine tailings will be somewhat larger than the volume of the material removed. Over time, the tailings will dry and settle. In the interim, a dam along the perimeter of the pit expands the capacity of a tailings pond to accommodate the additional volume. Over the life of the Aurelian Springs Project, Iluka will likely build dozens of dams within the pit as necessary to accomplish these two purposes.

Iluka generally prefers to build smaller tailings ponds, which requires the construction of more dams. Among other reasons, smaller cells can be brought into use more quickly and present less of a risk if a dam were to fail. However, Iluka incorporates the time and cost of the dam permit process into its planning. If every in-pit dam must go through the full permit process, Iluka will be more likely to implement its operation with fewer, larger dams.

IV. Argument

Iluka is asking the Commission to apply the two exemptions from the Dam Safety Law in a way that is consistent with the law's language and purpose. "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009). When the language of a statute is clear, it is the best source of legislative intent, but when a statute is ambiguous, it may be necessary to look to the purpose of the statute for additional clarity. *Applewood Props., LLC v. New South Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013).

⁵ Temporary storage of tailings aboveground will be part of the Aurelian Springs Project and is not inherently problematic. However, material stored aboveground is not contained in the same way as material returned to the pit. The dams that will be used to create the aboveground impoundments are not at issue here.

The Dam Safety Law was enacted “to reduce the risk of failure of dams; to prevent injuries to persons, damage to downstream property and loss of reservoir storage; and to ensure maintenance of minimum stream flows of adequate quantity and quality below dams.” N.C. Gen. Stat. § 143-215.24. “When viewed in context, it is clear that the evils which the act seeks to prevent are evils which ensue from dam failure.” *Wells v. Benson*, 40 N.C. App. 704, 708, 253 S.E.2d 602, 605 (1979).

A. A Dam that Functions Only to Hold Tailings Within a Portion of a Pit Provides Protection Only to Land or Other Property Under the Same Ownership for the Purposes of § 143-215.25A(a)(5).

Both the language and the purpose of the Dam Safety Law demonstrate that a dam built within a pit “provides protection only to land or other property under the same ownership.” This is true even when, as here, the dam owner is mining the land pursuant to a mining lease and does not hold legal title. This point can be ascertained by examining the property to which the dam is providing protection and determining who is an “owner” for the purposes of the statute.

On the first point, the dams at issue will not “provide protection” to property owned by any person other than Iluka. If one of these dams were to fail, the only consequence would be the redistribution of tailings within the mining pit. Such an event would not harm the pit. To the contrary, placement of tailings within the pit is part of the reclamation process. There is no harm to the title holders’ interests since they have given Iluka permission to use the land on which mining is taking place, and the pit would not exist without the mining operation. As a result, the dams are not protecting anything belonging to the title holders. Thus, the dams are not providing protection to property belonging to any other owner.

The only property the dams are protecting is Iluka's mining operation.⁶ The right to mine another person's land is a form of property. "The right to enter another's land and take away minerals, or other things of value such as timber or game, is a profit a'prendre."⁷ *In re Lee*, 85 N.C. App. 302, 304, 354 S.E.2d 759, 761 (1987). A profit a'prendre is a type of property that is owned by the person who holds the right. *See id.* at 305, 354 S.E.2d at 762 (holding that the holder of a profit a'prendre was an owner of property). Thus, to the extent that the dams protect Iluka's profit a'prendre, that property is under the same ownership.

Additionally, it could be said that Iluka is an "owner" of the pit by virtue of the mining lease. When a statute refers to ownership, the term can be broader than a reference to a legal title holder. *See, e.g., Pete Wall Plumbing Co. v. Sandra Anderson Builders, Inc.*, 215 N.C. App. 220, 228-29, 721 S.E.2d 663, 669 (2011) (interpreting the term "owner" in N.C. Gen. Stat. § 44A-9 to include a lessee); *In re Appalachian Student Hous. Corp.*, 165 N.C. App. 379, 388, 598 S.E.2d 701, 706 (2004) (holding that an apartment complex "belonged to" Appalachian State University for tax exemption purposes, even if legal title was held by another party); *see also, e.g.,* N.C. Gen. Stat. § 40A-2 (defining an owner as "any person having an interest or estate in the property). The term is not explicitly defined in the Dam Safety Act, leaving the definition ambiguous. However, the purposes of the statute indicate a broader definition. One of the purposes of the Dam Safety Law is to protect downstream property in the event of dam failure. The dam permit requirement gives DENR and the Commission the power to make sure that dam

⁶ At some times, Iluka employees will be working in portions of the pit. These people are not land or property and are therefore not part of the determination of the property to which the dam provides protection. However, as stated above, the exemption only applies to dams that "do[] not pose a threat to human life . . . below the dam." N.C. Gen. Stat. § 143-215.25A(a)(5). A dam will not exempt unless DENR concludes that the dam does not pose a threat to the lives of these employees.

⁷ "Profits a'prendre are closely analogous to easements in most respects and the principles applicable to one are generally applicable for the other." *Builders Supplies Co. of Goldsboro v. Gainey*, 14 N.C. App. 678, 682, 189 S.E.2d 657, 660 (1972) (quoting James Webster, *Real Estate Law in North Carolina* 374 (1971)).

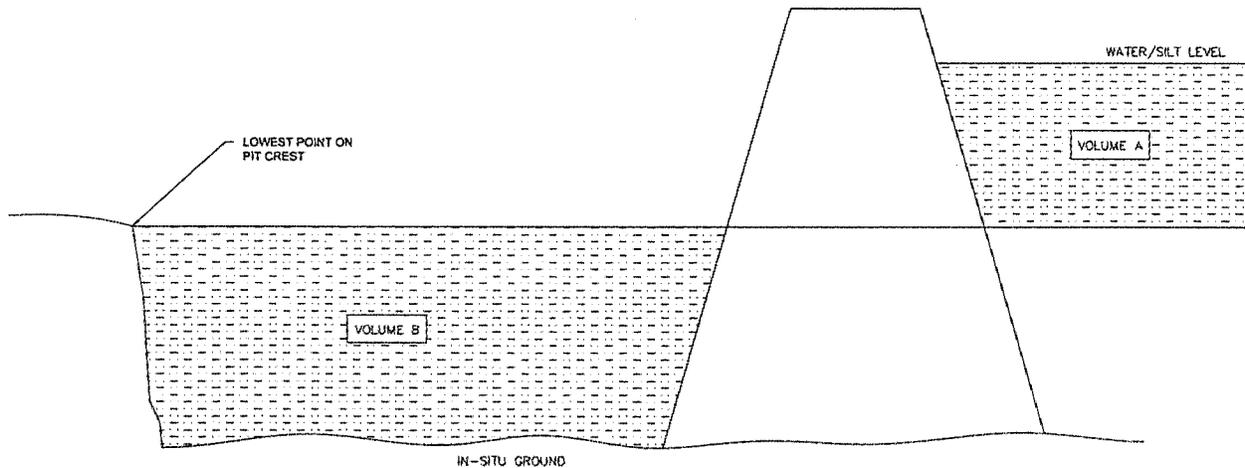
owners are protecting the rights of downstream property owners who could be damaged by a dam failure. The exemption for dams protecting property under the same ownership allows a dam owner to assume the risk of damage to its own property. When, as here, a dam owner has exclusive control of the “downstream” property by virtue of a long-term lease, and that control will last the lifetime of the dam, the dam owner should be considered an owner of the land for the purpose of the exemption.

B. For a Dam Built in a Pit, the Impoundment Capacity of the Dam Should Not Include the Impoundment Capacity of the Pit for the Purposes of § 143-215.25A(a)(6).

Both the language and purpose of the Dam Safety Law also support a conclusion that the impoundment capacity of a dam within a pit should not include the impoundment capacity attributable to the pit. Subsection (A)(6) applies to small dams—dams less than 25 feet in height or with an impoundment capacity of less than 50 acre-feet. These dams do not present the same risk to downstream property that is presented by larger dams because, in the event of failure, the release would not be as substantial.

Similarly, dams built in a pit do not present the same risk as surface dams of comparable size. If an in-pit dam were to fail, it would not result in the entire contents of the impoundment escaping the pit and impacting downstream property owners. Some of the contents would remain in the pit. For example, in the figure below, if the dam were to fail, some of the water on the right side of the dam would move to the left. Because the left side is already full, some of the water would leave the pit; however, not all of the water would leave—only the water that the pit could not hold. Given this, assigning the dam the same impoundment capacity as a surface dam of the same height does not provide a good description of the role the in-pit dam is actually performing. A better description can be obtained by determining the impoundment capacity

using the difference in elevation from the pit crest to the top of the dam (labeled as “Volume A”).



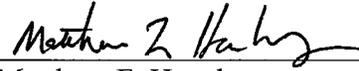
The term “impoundment capacity” is not defined in either the statute or by regulation. The regulations provide only that “storage capacity” should be determined using the elevation at the highest point on the crest of the dam. 15A N.C. Admin. Code 2K.0223(b). This provision does not preclude a determination that impoundment capacity should be limited to that provided by the dam, itself. This reading of the exemption gives effect to the intent of the statute and to the existing regulation.

V. Conclusion

For these reasons, Iluka requests that the Commission issue the rulings as set out in the May 5 Request for Declaratory Ruling.

Respectfully submitted on June 27, 2014.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing PETITIONER'S MEMORANDUM IN SUPPORT OF REQUEST FOR DECLARATORY RULING by depositing a copy in the United States mail, first class, postage prepaid, and by electronic mail, addressed as follows:

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