

STATE OF NORTH CAROLINA
COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT
COMMISSION

In Re PETITION FOR DECLARATORY)
RULING by AVX CORPORATION)
)

RESPONSE OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

The Department of Environmental Quality (“DEQ”), by and through its undersigned counsel, hereby submits this response to the Environmental Management Commission (“Commission”) in opposition to Petitioner AVX Corporation’s Petition for Declaratory Ruling regarding AVX’s property located at 3900 Electronics Drive, Raleigh, North Carolina (“the Site”).

As set forth below, DEQ requests that the Commission refuse to issue a declaratory ruling in the above-captioned matter. Good cause to refuse the declaratory ruling exists for at least three separate reasons. First, the relief requested by AVX is improper. In its petition, AVX is asking the Commission to direct DEQ in the exercise of DEQ’s enforcement discretion against a third party, Corning. This is not the purpose of a declaratory ruling. Second, the crucial facts in AVX’s petition are contested. Third, AVX is presently suing Corning in federal court regarding liability for environmental cleanup at the Site that is the subject of this petition for declaratory ruling. Each one of these three reasons, on its own, provides good cause to refuse to issue a declaratory ruling in this matter.

If the Commission nevertheless considers the substance of AVX’s petition, DEQ requests that the Commission issue a declaratory ruling that DEQ, and not AVX or this Commission, has the sole authority to enforce the rules at issue in this matter.

STATEMENT OF FACTS

The Site was formerly owned by Corning Glass Works, which manufactured electronic components. In November of 1987, Corning sold the Site to AVX. As part of the property transaction, an on-site injection well was closed, and environmental testing at the time identified levels of hazardous chemicals at concentrations above then-applicable soil and groundwater standards. By letter dated December 9, 1987, DEQ acknowledged that Corning Glass Works had “accepted responsibility for the release and disposal of hazardous waste into an injection well at the Raleigh site.” DEQ requested that Corning provide additional groundwater quality data and hydrogeological site characterization, among other things, and notified Corning that DEQ would be responsible for oversight of the ongoing assessment and remediation at the Site. Since then, Corning has been engaged in ongoing remedial evaluation and action at the Site, including, but not limited to, removal of contaminated soils and the installation and operation of a pump-and-treat system to address the plume of groundwater contamination at the Site.

The Registered Environmental Consultant (“REC”) Program provides a mechanism for privatizing DEQ’s oversight role at lower risk voluntary remedial action sites. On October 8, 2015, DEQ entered into a REC Administrative Agreement with Corning Inc. (“Corning”) to continue to perform voluntary remedial actions at a portion of the Site. Specifically, Corning agreed to perform cleanup activities at an 11-acre outparcel of the Site, which was contaminated by release of chemicals associated with, but not limited to, an injection well, floor drains, and a solvent storage shed. Constituents of concern at the Site include volatile organic compounds (VOCs) such as trichloroethene (TCE).

DEQ is currently engaged in tiered enforcement action at the Site, based upon the submission of a Site Cleanup Questionnaire dated November 1, 2013 as part of Corning’s

application for admission to the REC Program. Specifically, both a Corning representative and Corning's environmental consultant certified responses to fifteen questions on the Questionnaire, including certifications that there were no surface water impacts and that there was no off-site groundwater contamination resulting from the identified contamination at the Site. However, upon review of file documents showing surface water impacts and potential off-site groundwater contamination, DEQ determined that these two particular certifications were false and were in violation of certain REC Program rules.

DEQ became aware of these false certifications in the summer of 2017 as a result of depositions in federal litigation between Corning and AVX. As a result of the answers certified in the Site Cleanup Questionnaire, DEQ has since taken the following actions:

- a. Compliance Order with Administrative Penalty: On November 9, 2017, DWM sent Corning's consultant, AMEC Foster Wheeler Environment and Infrastructure, Inc. a letter titled "Compliance Order with Administrative Penalties for Violations of REC Program Rules, Corning Glass Works Site, Raleigh, Wake County, NC, NCD003195161" ("Administrative Penalty").¹ This enforcement action resulted in a \$6,500 penalty collected by DEQ and also resulted in AMEC Foster Wheeler providing information on how the company has changed internal policies and procedures to ensure that the violations alleged in the Administrative Penalty are not repeated in the future.
- b. Disqualification Order: On November 9, 2017, DWM sent Dan Shields, a Registered Site Manager and former employee at AMEC Foster Wheeler, a letter titled "Disqualification Order for Violations of REC Program Rules, Corning Glass

¹ This Administrative Penalty is included as Exhibit A to this Response.

Works Site, Raleigh, Wake County, NC, NCD003195161” (“Disqualification Order”).² This enforcement action resulted in the complete disqualification of Mr. Shields as a RSM in the REC Program.

- c. Notice of Violation: On May 10, 2019, DWM sent Corning, Inc., a letter titled “Registered Environmental Consultant (REC) Program Project Audit – Notice of Violation, Corning Glass Works Site, Raleigh, Wake County, NC, Site ID No. NCD003195161” (“NOV”).³ The status of this enforcement action is currently pending. DEQ and Corning representatives met on October 28, 2019 to discuss the substance of and Corning’s response to the NOV, and Corning remains in the process of gathering and providing additional information to DEQ.

During the same time period, AVX claimed that Corning should be removed from the REC program because the contamination at the Site posed a higher-risk to nearby residential properties than initially understood. In response, DEQ required that Corning evaluate and assess the off-site risk of potential vapor intrusion of VOCs into nearby residential properties and to further delineate the extent of groundwater contamination on and adjacent to the Site. In November 2017, DEQ hired its own contractor to split samples with Corning’s consultant as part of this evaluation. The results were presented to DEQ in a report dated February 2, 2018, and showed that—contrary to the claims of AVX—there were no risks to off-site sources, including the adjacent residential areas, that would warrant reevaluation of the Site’s risk level.

In the summer and fall of 2016, AVX demolished and removed the former plant building and basement at the Site, including the concrete slab foundation, against the recommendation of

² This Disqualification Order is included as Exhibit B to this Response.

³ This NOV is included as Exhibit C to this Response.

both DWM and EPA. Both DWM and EPA notified AVX, by correspondence dated June 2, 2016, that demolition and slab removal activities could expose areas of contamination and cause the spread of contamination.

On May 28, 2019, DWM issued a letter to AVX,⁴ notifying it that after or due to demolition activities, the area of the former building was graded in such a manner that storm water now collects and ponds in the area. Because directing and draining storm water in this area can increase the rate of contaminant leaching from soils to groundwater, this action could advance the spread of the associated groundwater plume both laterally and vertically. As such, DWM requested that AVX immediately regrade or backfill the area of the former building so that storm water drains away from the areas of known soil and groundwater contamination. AVX and DEQ continue to communicate on this matter, which is still pending.

DEQ currently remains in the process of evaluating Corning's response to the NOV and AVX's response to the storm water concerns identified in its May 28, 2019 letter.

On October 15, 2015, AVX Corporation filed suit against Corning in U.S. District Court seeking a declaratory ruling that Corning is liable for ongoing environmental assessment and remediation at the Site as well as injunctive relief requiring Corning to do such assessment and remediation at the Site. The federal litigation is ongoing and active, with a trial tentatively slated for May 2020.

While DEQ is not a party to this federal litigation, DEQ's enforcement actions feature prominently in the case. The Disqualification Order, Compliance Order and NOV have all been submitted to the federal court as part of various motions and are argued extensively by the parties. Additionally, the May 28, 2019 letter sent from DEQ to AVX requiring regrading of the

⁴ This letter is included as Exhibit D to this Response.

former building area due to storm water drainage concerns is the subject of AVX's request for a temporary restraining order and preliminary injunction against Corning filed October 17, 2019.

POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

DEQ requests that the Commission deny AVX's petition and refuse for good cause to issue a declaratory ruling. The relief requested by AVX is improper, the crucial facts in AVX's petition are disputed, and AVX and Corning are currently suing each other in federal court regarding liability for environmental cleanup at the Site. In the alternative, DEQ requests that the Commission issue a declaratory ruling that the REC program rules and statutes do not mandate any specific enforcement action on the part of DEQ—such enforcement action being properly left to DEQ's discretion. After providing a brief overview of the statute and rules relevant to declaratory rulings generally, this brief will address each of these issues in turn.

I. Background on Declaratory Rulings

Declaratory rulings are authorized by the North Carolina Administrative Procedure Act pursuant to N.C.G.S. § 150B-4. Using this process, a “person aggrieved” may request that an agency “issue a declaratory ruling . . . as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.” N.C.G.S. § 150B-4(a). This declaratory ruling provision requires that all relevant facts be settled. In Re Ford, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981) (noting that the former N.C.G.S. § 150B-17, with the same language regarding “a given state of facts,” “clearly [did] not contemplate an evidentiary proceeding”). Our Court of Appeals has recognized that if the facts are unsettled or in dispute, a declaratory ruling is not appropriate, and the matter is best addressed through the courts.

The declaratory ruling statute also allows each agency to “prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be used.” N.C.G.S. § 150B-4(a). As allowed by this statute, the Commission has promulgated rules in Section .0600 of Title 15A, Subchapter 2I of the North Carolina Administrative Code governing “the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued.” N.C.G.S. § 150B-4(a). Pursuant to the declaratory ruling statute and the relevant rules, the Commission may refuse to issue a declaratory ruling “[w]henver the Commission believes for ‘good cause’ that the issuance of a declaratory ruling is undesirable.” N.C.G.S. § 150B-4(a).

II. “Good Cause” Exists for the Commission to Refuse to Issue a Declaratory Ruling

There is good cause to refuse the requested declaratory ruling in this matter, for three reasons: (1) the relief requested by AVX is improper, (2) the crucial facts in AVX’s petition are contested, and (3) AVX is presently suing Corning in federal court regarding liability for environmental cleanup at the same site that is the subject of this petition for declaratory ruling.

A. Good Cause for Denying the Petition Exists Because the Matter is not the Proper Subject of a Request for Declaratory Ruling to this Commission

In its petition, AVX asks the Commission to order DEQ to take specific enforcement action against a third party, Corning. This is not the proper subject of a petition for declaratory ruling. Enforcement authority regarding the REC program is vested solely in the Department of Environmental Quality and its Secretary, not the Commission. N.C.G.S. § 130A-22 (“The Secretary of Environmental Quality may impose an administrative penalty on a person who violates Article 9 of this Chapter, [or] rules adopted by the Commission pursuant to Article 9”); N.C.G.S. § 130A-310.9(c) (“The Department may revoke its approval of the oversight of a voluntary remedial action by a private environmental consulting or engineering firm and assume

direct oversight of the voluntary remedial action . . .”). Where a rule or statute vests enforcement with a particular Department, our Supreme Court has held that third parties such as AVX “do not have a right of action for declaratory relief under these provisions.” Sykes v. Health Network Sols., Inc., __ N.C. __, __, 828 S.E.2d 467, 475 (2019); see also Holly Ridge Assocs., LLC v. N.C. Dept. of Env’t & Natural Res., 61 N.C. 531, 540, 648 S.E.2d 830, 837 (2007) (holding that third parties were not proper participants in a case regarding a DEQ enforcement action against a different party).

In the Sykes case, decided this year by the North Carolina Supreme Court, a group of chiropractors sought a declaratory ruling that agreements between a network of chiropractors and insurance companies were illegal under North Carolina’s Insurance Laws, Chapter 58 of the General Statutes, because plaintiffs did not like their pricing and coverage arrangements. 828 S.E.2d at 468-70, 474-475. However, our Supreme Court noted that the legislature had “vested enforcement of the requirements of the statutory sections identified by plaintiffs in the Commissioner of Insurance.” 828 S.E.2d at 475. Since the law gave enforcement authority to a specific state agency, the Supreme Court held that it would be improper “to substitute a court’s judgment for that of a regulatory agency to which the legislature has entrusted enforcement.” Id. For this reason, our Supreme Court held that the plaintiffs had no right to declaratory relief. Id.

Similarly, in the Holly Ridge case, the Supreme Court held that the North Carolina Shellfish Growers Association and the North Carolina Coastal Federation (“third parties”) should not have been allowed to participate in a case regarding a civil penalty assessed by DEQ’s predecessor (the Department of Environment and Natural Resources) against a coastal landowner. The Court reasoned that because the third parties “could not have imposed a civil penalty, they . . . [were] not properly participants in the case.” 361 N.C. at 540, 648 S.E.2d at 837.

Here, AVX is asking the Commission to require specific enforcement action from DEQ, which our courts have discouraged. As the Supreme Court held in Sykes, AVX cannot seek a declaratory ruling from the Commission regarding the exercise of DEQ's enforcement authority, because this authority is vested by the legislature solely with DEQ. And as in Holly Ridge, AVX's request is improper because it seeks enforcement action against a third party, Corning. AVX cannot enforce against Corning on its own, and because of this it has no right to a declaratory ruling requiring enforcement by DEQ against Corning.

This conclusion is buttressed by the declaratory rulings statute itself, which states that a "declaratory ruling is binding on the agency and the person requesting it." N.C.G.S. § 150B-4. Notably absent from this statute is any mention of the ability of a declaratory ruling to bind a person who is not a party to the action, such as Corning.

Practically, if the Commission were to entertain declaratory rulings regarding DEQ's exercise of its enforcement authority, many more petitions for declaratory rulings would likely be filed than at present. Any party who disagrees with a DEQ decision to enforce, or to enforce in a particular way, or not to enforce, would be able to file petitions with the Commission in addition to any challenge available in the Office of Administrative hearings. This is not the intent of the declaratory rulings statute.

In sum, DEQ is vested with sole enforcement authority over the REC program, and there is no legal basis for AVX to seek an order from this Commission mandating a particular exercise of that authority against Corning, a third party. For this reason, good cause exists for the Commission to refuse to issue a declaratory ruling on AVX's petition.

B. Good Cause for Denying the Petition Exists Because the Relevant Facts are In Dispute

Because the relevant facts are in dispute, good cause exists for refusing to issue a declaratory ruling in response to AVX's petition. In Re Ford, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981). As found by our Court of Appeals, when the relevant facts are disputed, a court is the appropriate venue for resolving the dispute. Id. A petition for declaratory ruling before the EMC is not an evidentiary proceeding, and a hearing on a declaratory ruling lacks many of the fact-finding tools of a trial, such as discovery, presentation of sworn testimony by witnesses, and the right to cross-examination.

In the present case, many relevant facts are disputed among the parties, including (1) the extent of Corning's reliance on its environmental consultant when signing the certification, and (2) whether Corning intended to deceive DEQ in signing the certification. Resolution of factual issues such as these cannot occur in the context of the present petition for declaratory ruling. For this reason, good cause exists to refuse to issue a declaratory ruling.

C. Good Cause Exists for Denying the Petition Because this Matter is Currently Being Litigated in Federal Court

Pursuant to the Commission's rules regarding declaratory rulings, good cause to refuse to issue a ruling includes a "finding that the matter is the subject of a pending contested case hearing or litigation in any North Carolina or federal court." 15A NCAC 2I .0603(d)(2). Further, where a party has sought a declaratory ruling from an agency on a matter being litigated in the courts, the North Carolina Court of Appeals has held that the agency was correct to refuse to issue a declaratory ruling.

For instance, in the case of Equity Solutions of the Carolinas, Inc. v. N.C. Dep't of State Treasurer, 232 N.C. App. 384, 394, 754 S.E.2d 243, 251 (2014), the Court of Appeals held that "it

would be a waste of administrative resources” for an agency to issue a declaratory ruling on a matter that was the subject of pending litigation, and affirmed the agency’s decision to refuse a declaratory ruling on the matter.

Here, AVX similarly seeks a declaratory ruling on an issue that is already the subject of litigation in federal court. In that federal case, AVX and Corning are disputing liability for environmental remediation of the property, a subject that is closely related to AVX’s petition for declaratory ruling before this Commission. For this reason, good cause exists for the Commission to refuse to issue a ruling on AVX’s petition.

III. If the Commission Issues a Ruling on the Merits of AVX’s Petition, the Petition Should Be Denied

If the Commission chooses to issue a declaratory ruling addressing the merits of AVX’s petition, AVX’s requested relief should be denied. The language of all of the statutes and rules cited by AVX is discretionary, not mandatory:

- N.C.G.S. 130A-310.9(c) states, “The Department may revoke its approval” and “The Department may require the owner, operator, [or] other responsible party” to take any action necessary to ensure compliance with applicable environmental regulations.
- 15A NCAC 13C .0302 states that “Any person who violates any provision of this Section . . . shall be subject to enforcement.”
- 15A NCAC 13C .0307 states that “the Department may terminate a site’s eligibility for the voluntary remedial action program . . . and take any other applicable enforcement action” based on audit findings.

Every one of the provisions cited above leaves enforcement to the discretion of DEQ. Although a party who violates the rules is “subject to” enforcement, the ultimate decision about whether to

enforce and what type of enforcement is left to the discretion of DEQ. In the present matter, DEQ has already taken enforcement action against Corning by issuing the NOV. DEQ is currently working through its tiered enforcement process to determine what further action, if any, is appropriate.

For this reason, should the Commission choose to issue a declaratory ruling in this matter, DEQ respectfully requests that AVX's petition be denied, and that a declaratory ruling be entered in DEQ's favor finding that enforcement decisions under the REC program are within the discretion of DEQ.

CONCLUSION

For the foregoing reasons, DEQ respectfully requests that the Commission refuse for good cause to issue a declaratory ruling in this matter. In the alternative, DEQ requests that AVX's petition be denied, and that a declaratory ruling be entered in DEQ's favor finding that enforcement decisions under the REC program are within the discretion of DEQ.

Respectfully submitted this the 7th day of November, 2019.

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EXHIBIT LIST FOR THE DEPARTMENT OF ENVIRONMENTAL QUALITY

Compliance Order with Administrative Penalties for Violations of REC Program Rules issued to AMEC Foster Wheeler Environment and Infrastructure, Inc.	Exhibit A
Disqualification Order for Violations of REC Program Rules issued to Dan Shields	Exhibit B
Registered Environmental Consultant Project Audit – Notice of Violation issued to Corning, Inc.	Exhibit C
Letter to AVX Corporation regarding storm water issues	Exhibit D

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing RESPONSE OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY was served on the Environmental Management Commission and counsel for Petitioner and Corning, Inc., by electronic mail, as follows:

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This the 7th day of November, 2019.

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