BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION

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| In Re: REQUEST FOR DECLARATORY RULING ON THE INTERPRETATION OF 15A NCAC § 2L.0106(c) WITH RESPECT TO COAL ASH LAGOONS<br><br>CAPE FEAR RIVER WATCH, SIERRA CLUB, WATERKEEPER ALLIANCE, and WESTERN NORTH CAROLINA ALLIANCE,<br>Petitioners. | **MEMORANDUM SUBMITTED ON BEHALF OF INTERVENORS SUPPORTING AFFIRMATION OF DENR'S INTERPRETATION AND APPLICATION OF THE 2L RULES** |

This memorandum is submitted on behalf of Duke Energy Carolinas, LLC and Carolina Power & Light Company d/b/a Progress Energy Carolinas, Inc. (the "Intervenors"), which are direct and indirect subsidiaries, respectively, of Duke Energy Corporation. This is provided in response to the Request for Declaratory Ruling, dated October 10, 2012 (the "Request"), filed by the Cape Fear River Watch, Sierra Club, Waterkeeper Alliance and Western North Carolina Alliance (the "Petitioners").

Intervenors urge the Commission to issue a ruling upholding the current interpretation and application by the Department of Environment and Natural Resources ("DENR") of its groundwater rules as codified at 15A NCAC 2L (the "2L Rules") and the supporting interpretation of those 2L Rules by the Office of the Attorney General (the "AG"). This memorandum discusses the nature and adverse impacts of the declaratory ruling, if it were to be issued in the form requested by the Petitioners. It also discusses why the Petitioners' suggested interpretation of the 2L Rules is not supported by the text, purpose, or a history of the relevant language of the 2L Rules, and also includes Intervenors' specific objections to this declaratory

ruling proceeding. Finally, this memorandum concludes with suggested language that the Commission could adopt that would confirm DENR's current interpretation and application of the 2L Rules, but notes that, if the Commission believes changes in that interpretation are needed, it should do so through the rule-making process.

1. **The Request advances a significant change in the rules with effects beyond coal ash lagoons**

Petitioners characterize the Request as "a ruling clarifying application of the EMC's groundwater protection lagoons,"[1] apparently as a way of making the Request suitable for a declaratory ruling. However, the Request is, in substance, an attempt to force a significant change in DENR's interpretation and application of those rules.[2] If successful, it will have implications and adverse consequences for Intervenors' operation of their coal ash lagoons,[3] as well as for other entities and facilities other than those dealing with coal ash.

The fact that this is not really an effort to "clarify" the 2L Rules is apparent from Petitioners' attack on "DENR's misreading of the unambiguous language" of the 2L Rules[4] and the claim that DENR is "hampered by three mistaken conclusions about the 2L Rules."[5] Petitioners elsewhere refer to an alleged "misreading of the unambiguous mandate of the 2L Rules,"[6] and assert that DENR has "misinterpreted" its own 2L Rules.[7] Petitioners also assail the

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[1] Request, p. 1 (emphasis added).

[2] The reference to "clarification" in the declaratory ruling provision in G.S. 150B-4 of the Administrative Procedure Act ("APA") typically refers to a situation where there is no clear meaning to how a rule is to be applied to a given set of facts, so it provides a way that an aggrieved person can request a "clarification" to remove the uncertainty. Here, by contrast, Petitioners are not really seeking a "clarification," since the 2L Rules are clear as currently interpreted and applied, but are, instead, seeking to challenge and change that interpretation and application of the 2L Rules by DENR.

[3] *See* affidavit of Jeffrey J. Lyash, Executive Vice President of Energy Supply with supervisory responsibility for operations at Intervenors Duke Energy and Progress Energy, including their coal ash ponds (Attachment A) (the "Intervenors' Affidavit").

[4] Request, p. 5.

[5] *Id.*, p. 2.

[6] *Id.* p. 3.

"Attorney General's mistaken reading of the 2L Rules,"[8] in which, Petitioners claim, the AG "mistakenly conflated" various provisions of the Rules and "erroneously advised" DENR as to the purposes of the 2L Rules.[9] Ultimately, Petitioners allege that DENR was "operating under the mistaken conclusion that it lacks [the necessary] authority" under the 2L Rules to take the actions. Petitioners' goal is not to resolve uncertainty associated with the 2L Rules, but is rather to force DENR to change its existing practices.

Petitioners' requests, if granted, would mandate significant changes to the groundwater management and corrective action programs at coal ash lagoons,[10] and it is likely that these significant changes would not be limited to coal ash facilities. If the Commission accepts Petitioners' reading of the 2L Rules, DENR will either have to apply the same reading to all other facilities regulated under the rules or read into the rules a special provision for coal ash lagoons that does not currently exist. Accordingly, there is significant concern on the part of the operators of other facilities that this will lead to similar disruptions to the groundwater management and corrective action programs applicable to those facilities, as reflected in the statements from other industries and associations that are attached to this memorandum.

Specifically, this memorandum attaches and incorporates statements from the North Carolina League of Municipalities,[11] the North Carolina Chamber,[12] the Manufacturers and Chemical Industry Council of North Carolina,[13] the City of Raleigh,[14] the North Carolina Farm

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[7] *Id.*, p. 25.

[8] *Id.*, p. 14.

[9] *Id.* pp. 22-23.

[10] See Intervenors' Affidavit, fn. 3 above.

[11] *See* letter from Ellis Hankins, Executive Director of the North Carolina League of Municipalities, addressed to the Commission Chair, dated November 26, 2012, attached hereto as Attachment B.

[12] *See* letter from S. Lewis Ebert, President and CEO of the North Carolina Chamber, addressed to the Commission Chair, dated November 27, 2012, attached hereto as Attachment C.

[13] *See* letter from A. Preston Howard, Jr., P.E., President of the Manufacturers and Chemical Industry

Bureau,[15] and the North Carolina Pork Council.[16] Each of these groups or entities owns and/or operates facilities that are subject to the 2L Rules. Although none of them own or operate coal ash lagoons, they note that the logic and bases of Petitioners' arguments in the Request create very real risks and concerns that their facilities could be subjected to the same threat of changed treatment under the 2L Rules. In substance, each of these statements speak to how they believe the Request – if it were to be granted in the form requested by Petitioners – would not be limited to just coal ash lagoons and would potentially impact the facilities that they own and/or operate, in that the interpretation would require changes in the actions that they would be required to take to address exceedances of groundwater standards within the compliance boundary of a facility permitted by DENR prior to December 30, 1983. Consequently, DENR would be required to dramatically alter the ways in which it regulates those facilities or operations. Each of these various organizations has expressed support for DENR's current interpretation and application of the 2L Rules.

If adopted, the Request would also likely have significant impacts on the groundwater management policies applied by DENR's Division of Waste Management ("DWM") to solid waste landfills. Those solid waste facilities have their own requirements in 15A NCAC 13B.1630 through .1637, which govern the groundwater monitoring, assessment, and corrective action for all municipal solid waste landfills and incorporate the 2L Rules by reference.[17]

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Council of North Carolina, addressed to the Commission Chair, dated November 21, 2012, attached hereto as Attachment D.

[14] *See* letter from J. Russell Allen, Raleigh City Manager, addressed to the Commission Chair, dated November 21, 2012, attached hereto as Attachment E.

[15] *See* letter from Larry B. Wooten, President of the North Carolina Farm Bureau, addressed to the Commission Chair, dated November 21, 2012, attached hereto as Attachment F.

[16] *See* letter from Deborah M. Johnson, Chief Executive Officer of the North Carolina Pork Council, Inc., addressed to the Commission Chair, dated November 27, 2012, attached hereto as Attachment G.

[17] 15A NCAC 13B.1630(a).

2. **The Interpretation advanced by the Petitioners is not supported by the language or history of the rules**

Petitioners have requested three separate declaratory rulings,[18] all of which are based on their very narrow reading of 15A NCAC 2L.0106. Petitioners focus almost entirely on the distinction in the 2L Rules between facilities that first received permits before December 30, 1983 ("pre-1984 facilities) and those that first received permits after that date. As explained further below, Petitioners' narrow reading of §.0106(c) is contrary to accepted standards for interpreting rules, because it fails to take into account other relevant provisions of the 2L Rules and is also based on a misinterpretation of the 2L Rules' history.

A. The 1st Suggested ruling incorrectly suggests that the 2L Rules Mandate that DENR require Immediate Corrective Action, regardless of whether the Groundwater Contamination is Outside of the Facility's Compliance Boundary

Petitioners' first requested ruling would force DENR to require "[o]perators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983" to take corrective action immediately under §.0106(c) "when their activity results in an increase in the concentration of a substance in excess of groundwater quality standards, whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary around the lagoon."[19] Historically, DENR has only required corrective measures when a violation of a 2L standard is measured at the compliance boundary.[20] Petitioners' claim that their ruling can be supported based on the "plain meaning" of §.0106(c) is incorrect and contrary to the applicable standards used to interpret and apply regulations.

In fact, properly read as a whole, the language of the 2L Rules generally, and the

[18] Request, p. 1.

[19] Request, pp. 1, 10-19.

[20] See "Response of NC DENR, Division of Water Quality in Opposition to Petitioners' Request for Declaratory Ruling," filed and served in this matter on November 2, 2012 ("DENR's Initial Memo"), p. 6. Intervenors support, adopt and incorporate by reference the arguments and reasoning in DENR's Initial Memo.

reference to "immediate action" in §.0106(c) specifically, do not mandate the rigid approach urged by Petitioners, but instead provide DENR flexibility in determining the timing of corrective action.

First, it should be noted that there is no "plain language" in §.0106(c) requiring that corrective measures be begun based on the presence of groundwater contamination in anywhere inside the compliance boundary, contrary to Petitioners' arguments. That is, although Petitioners read the word "anywhere" into §.0106(c), the term is not used in the Section.

More generally, the 2L Rules provide that a regulated party must "implement an approved corrective action plan for restoration of groundwater quality in accordance with a schedule established by" DENR. 15A NCAC 2L.0106(c)(4). That same provision goes on to note that, in establishing the schedule for this corrective action, DENR is to "consider any reasonable schedule proposed by the person submitting the plan." Petitioners argue that DENR is forced to require immediate initiation of corrective measures, regardless of whether there is any groundwater exceedance at or beyond the compliance boundary, based on their reading of the "overall structure and purpose of the 2L Rules."[21] However, Petitioners fail to take into account the specific statements of policy and purpose in §.0103 of the 2L Rules, which provide, among other things, that:

> It is the intent of these [2L] Rules to protect the overall high quality of North Carolina's groundwaters to the level established by the standards and to enhance and restore the quality of degraded groundwaters where feasible and necessary to protect human health and the environment, or to ensure their suitability as a future source of drinking water. (Emphasis added.)

DENR is allowed and expected to make decisions based on what is "feasible and necessary," not on some arbitrary trigger point, as argued by Petitioners. These provisions provide DENR ample

[21] Request, p. 11.

authority and flexibility to respond to groundwater conditions and the facts of the situation in an appropriate fashion.

Petitioners' argument fails to accord proper meaning to the compliance boundary which §.0107(a) of the 2L Rules ***explicitly provides for these very facilities***. A compliance boundary is defined in §.0102(3) as "a boundary around a disposal system at and beyond which groundwater quality standards may not be exceeded . . . ." Although Petitioners' reading of the 2L Rules gives some meaning to a compliance boundary for these facilities, it would deny the compliance boundary the very purpose for which it is explicitly defined: to define those areas outside of which groundwater standards should not be exceeded. As §.0107(a) explicitly states, "[f]or disposal systems individually permitted prior to December 30, 1983, the compliance boundary is established at a horizontal distance of 500 feet from the waste boundary or at the property boundary, whichever is closer to the source."

If Petitioners were correct, there would be no reason for the 2L Rules to include §.0107(a) and its explicit definition of a compliance boundary for facilities individually permitted prior to December 30, 1983. Petitioners try to bolster the argument by claiming that the pre-1984 facilities are "more similar to accidental, unpermitted discharges" than the newly permitted facilities (although it is worth noting that Petitioners admit in the same paragraph that these supposedly similar unpermitted discharges are allowed "flexible options to remediate contaminated groundwater."). [22] However, the history of the 2L Rules as discussed below indicates that the fact that §.0107(a) has remained in the 2L Rules since its inclusion means that its specific grant of a compliance boundary to pre-1984 facilities must be given some meaning, which Petitioners' first suggested ruling would not do.

[22] Request, p. 15.

### i. Standards for Interpreting the Language of the 2L Rules

In interpreting the 2L Rules, Intervenors respectfully suggest that the Commission should be guided by the standards of statutory interpretation employed by courts when confronted with similar questions. Generally, when the language of a rule is clear, it should be given its plain meaning. However, the plain meaning of a rule is not properly elicited by a reading which ignores other, equally clear and equally pertinent provisions of the same rule. Petitioners have erroneously sought to persuade the Commission that the language of the 2L Rules is clear and unambiguous by ignoring or failing to mention other equally applicable provisions.

In reality, the 2L Rules contain sections that can be read to be internally inconsistent. However, DENR and the AG's office have appropriately resolved that inconsistency in a manner that that gives a clear meaning to all of its provisions and effectuates the intent of the 2L Rules. The applicable standard of regulatory construction here is that the interpretation and meaning of a rule is to be found in the wording of the rule, taking into account (and giving meaning to) all of its terms, as well as its purpose and intent, structure and history.[23] Under these standards of regulatory construction, a rule should be read as a whole.[24] The rules should not be interpreted in a manner that makes a provision meaningless.[25] Petitioners admit the applicability of these standards of regulatory construction in their arguments.[26] However, their arguments fail to follow these principles and often ignore important provisions of the 2L Rules and fail to look at the overall purpose and intent of the Rules. In that regard, it should be noted that the AG based

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[23] *Proposed Assessments v. Jefferson-Pilot, Ins.*, 589 S.E. 2d 179, 181 (N.C. Ct. App. 2003); *Electric Supply Co. v. Swain Elec. Co.*, 403 S.E. 2d 291 (N.C. 1991).

[24] 589 S.E.2d at 181.

[25] *HCA Crossroads Residential Centers, Inc. v. N.C. Dep't of Human Resources*, 327 N.C. 573, 398 S.E.2d 466, 470 (1990).

[26] *See* Request pp. 10 ("consistent with the overall structure and purpose of the 2L Rules" and avoiding a reading that "would produce absurd results"), p. 15 ("clear intent" of the entire rule), p. 19 (should avoid an interpretation that "reads out of the rule" a specific section).

its opinion on the correct interpretation of the 2L Rules squarely on these principles, giving effect to many of the provisions of the 2L Rules that Petitioners either minimize or chose to ignore in giving a "broad reading" of the 2L Rules, giving effect to the purpose of the corrective action standards and provisions in the Rules.

Petitioners argue that their interpretation of the 2L Rules "is consistent with the overall structure and purpose of the 2L Rules" and that "[a]ny other reading would produce absurd results."[27] It is correct that regulations should be interpreted in accordance with their overall structure and purpose and in a manner that avoids absurd results.[28] Rules relating to the same subject should be construed *in pari materia*, in such a way as to give effect, if possible, to all provisions without destroying the meaning of the statutes involved.[29] It was precisely these principles that the AG relied on and that Intervenors' arguments in this memo are based on. The AG Opinion correctly interpreted the 2L Rules, relying squarely on these principles, giving effect to the wording and purpose of the corrective action standards and other provisions in the 2L Rules[30] which Petitioners either minimize or chose to ignore. In fact, it is Petitioners' arguments that are not consistent with the overall structure and purpose of the 2L Rules and would produce absurd results, when the 2L Rules are properly read as a whole, giving meaning to all of its terms.

ii. **History of the 2L Rules**

Petitioners also argue that the history the 2L Rules supports a conclusion that disposal systems permitted prior to December 30, 1983, are required to immediately undertake corrective

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[27] Request, p. 11.

[28] See, *e.g.*, *Allen v. Town of Reidsville*, 178 N.C. 513, 101 S.E. 267 (1919); *State ex rel. Wilson v. Jordan*, 124 N.C. 683, 33 S.E. 139 (1899).

[29] *Carolina Truck & Body Co. v. GMC*, 102 N.C. App. 262, 402 S.E.2d 135, cert. denied, 329 N.C. 266, 407 S.E.2d 831 (1991).

[30] *See* the last paragraph on page 3 of the Opinion of the Attorney General, dated October 21, 2009, attached as Attachment 15 to the Request (the "AG Opinion").

action to remedy any contamination in excess of groundwater standards, irrespective of whether the exceedance of groundwater standards has been measured outside a compliance boundary,[31] inside a compliance boundary, or even within the waste boundary.[32] However, the history of the development of the 2L Rules does not create such a direct path as Petitioners would have it seem, and their analysis requires that some other provisions of rules be ignored, rewritten, or invented.[33]

The 2L Rules were initially promulgated in 1979, comprising two sections,[34] and representing the initial classification and assignment of quality standards for groundwaters. The 2L Rules were amended in 1983 and 1984. The 1984 amendments[35] that provided a host of definitions, including definitions for "perimeter of compliance,"[36] and "point of compliance."[37] The 1984 amendments acknowledged that permits had been and could be issued for discharges to the land surface, which would contribute contaminants to underlying groundwater. Perimeters of compliance were assigned to both the already permitted facilities (existing facilities) and to facilities permitted after the date of the rule, December 30, 1983 (new facilities).[38] The perimeter of compliance for existing facilities was set at the lesser of 500 feet from the point of discharge or the property boundary and for new facilities at the lesser of 250 feet from the point of discharge or 19 feet within the property boundary.[39] Except in certain instances involving

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[31] 15A NCAC 2L .0102(3).

[32] 15A NCAC 2L .0102(26).

[33] Intervenors understand that DENR is providing a complete discussion and analysis of the history of the 2L Rules, which Intervenors endorse and incorporate by reference herein.

[34] 15A NCAC 2L .0100 and .0200.

[35] Petitioners ascribe these changes to the 1983 amendments. Request, p. 7. However, they were actually adopted as a part of the 1984 amendments to the 2L Rules.

[36] 15A NCAC 2L .0102(25) (September 1, 1984).

[37] 15A NCAC 2L .0102(24) (September 1, 1984).

[38] 15A NCAC 2L .0103(h) (September 1, 1984).

[39] *Id.*

imminent hazard or actual or projected migration to adjoining classified groundwaters, exceedances of groundwater standards within the perimeter of compliance would not be subject to penalties under N.C. Gen. Stat. §143-215.6(1)a.[40]

The 1989 amendment changed the term "perimeter of compliance" to "compliance boundary."[41] The dimensions of the compliance boundaries were unchanged from those in the 1984 version of the 2L Rules. A review boundary was also mandated halfway between the compliance boundary and the "waste boundary."[42] In addition, the 1989 amendment deleted Subsection .0103(h), addressing the issue of compliance boundaries in the new Rule .0107. There was no relevant substantive change between the provisions of the 1983 Rule .0103(h) and the 1989 Rule .0107.

Perhaps the most significant change effected by the 1989 amendment was the adoption of §.0106, which required certain responses to detections of exceedances of groundwater standards outside the compliance boundary, within the compliance boundary, and within the review boundary.[43] It also required remedial action for exceedances of groundwater standards resulting from unpermitted activities.[44] The rule further addressed the assessment and review of required response or remedial actions.[45]

The 2L Rules again were amended effective November 1, 1993. This amendment left substantively unchanged the definition of the term "compliance boundary," and continued the acknowledgment that exceedances of groundwater standards could be authorized under the 2L

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[40] *Id.*

[41] 15A NCAC 2L .0107 (August 1, 1989).

[42] 15A NCAC 2L .0108 (August 1, 1989). The reference to "point of discharge" was deleted in favor of a "waste boundary," defined as the perimeter of the permitted waste disposal area. 15A NCAC 2L .0102(15) (August 1, 1989).

[43] 15A NCAC 2L .0106(c)(2) (August 1, 1989).

[44] 15A NCAC 2L .0106(c)(1) (August 1, 1989).

[45] 15A NCAC 2L .0106(d), (e), (f) (August 1, 1989).

Rules.[46] Again the most extensive revisions were to Rule .0106. In this amendment, the Rule distinguished between responses required for exceedances of groundwater standards resulting from unpermitted activities and those resulting from permitted activities.[47] The confusion was caused by the very curious wording of §.0106(e). Petitioners assert that "[t]he EMC amended the 2L Rules in 1993 to accelerate the mandate to eliminate sources of contamination,"[48] as the culmination of a progression from a determination in 1983 "that the EMC would not approve new permits that would degrade groundwater,"[49] to treating permitted waste disposal facilities like unpermitted discharges.[50] The permits that were issued by DENR prior to December 30, 1983, in connection with power generating facilities utilizing coal ash disposal facilities had durations of five years or less.[51] That is, such permits issued pursuant to N.C. Gen. Stat. §143-215.1 in 1983 would expire no later than 1988. Those permits would again expire no later than 1993. The Commission would have had 10 years and no fewer than two permit cycles to implement their "plan" to treat the pre-1984 permitted facilities the same as unpermitted activities. But nothing in the intervening 10 years and the amendment in 1989 gave any hint to this progressive plan. It defies common sense that the "balanced approach" conjured by Petitioners would involve a requirement for the immediate removal of waste accumulated for over 10 years pursuant to the terms of a lawfully issued permit, which would have been renewed no fewer than two times in the intervening decade.

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[46] 15A NCAC 2L .0103(d) (November 1, 1993).

[47] 15A NCAC 2L .0106 (c) and (d) (November 1, 1993).

[48] Request, p. 23 (October 10, 2012).

[49] *Id.* at p. 15.

[50] *Id.*

[51] N.C. Gen. Stat. §143-215.1(c)(5).

B. The 2nd Suggested ruling incorrectly suggests that the 2L Rules Mandate that DENR must require a pre-1984 facility to take immediate action to eliminate sources of contamination that cause a concentration of a substance in excess of groundwater quality standards, regardless of whether the Groundwater Contamination is Outside of the Facility's Compliance Boundary

Petitioners' second requested ruling would alter DENR's interpretation of §.0106(c) to force the agency to require "[o]perators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983" to take "immediate action to eliminate sources of contamination that cause an increase in the concentration of a substance in excess of groundwater quality standards . . . ."[52] Since this second requested ruling further specifies that this would be "in advance of their separate obligations to propose and implement a corrective action plan," it must be assumed that this second requested ruling also incorporates the first ruling that these obligations are required "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary around the lagoon."[53] Petitioners say that this ruling is needed to correct DENR's "mistaken impression that coal ash lagoons are not required to eliminate sources of ongoing contamination immediately, but rather as a part of the long-term process for proposing, approving and eventually implementing a plan for restoring groundwater contaminated by those sources."[54]

Petitioners base their arguments on selective citations of isolated provisions in the 2L Rules and, in so doing, fail to take into account other equally applicable provisions of the Rules that apply to corrective measures in the event of groundwater contamination. Intervenors believe

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[52] Request, p. 1.

[53] This argument that the 2L Rules require action by DENR "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary" is only explicitly stated in the first request, as discussed in Section 2.A. above. However, it is clear that the other two requested rulings are triggered off of this event, and so they are also based on this faulty premise that action is required "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary." This 2nd requested ruling addresses actions that Petitioners contend must be taken prior to taking corrective measures.

[54] *Id.*, pp. 2-3.

that a correct reading of the 2L Rules should look at all of its provisions, including such terms as the Policy provisions in §.0103, the provisions in §§.0106(f)(3) and .0106(*l*)(1) that allow for treatment and control, the other provisions in .0106 providing for corrective action alternatives, and the provisions in §.0114 as to the terms of notice. It is worth noting that corrective actions at facilities subject to §.0106(c) can be conducted under the provisions of 106(f), (g), (h), (i), (j), (k), (l), (m) and (o), each of which provides the sort of flexibility that Petitioners claim is not present in the 2L Rules. Petitioners simply fail to account for what these provisions provide (or do not provide).

Here, Petitioners' arguments[55] again fail the very tests they recite, namely that the correct interpretation of a rule should look at all of its provisions, giving meaning to all of its terms, and avoiding an interpretation that makes any of its provisions meaningless. Petitioners point to §.0106(e)(4) which requires that a covered source must "take immediate action to eliminate the source or sources of contamination." 15A NCAC 2L.0106(c)(4) (emphasis added). Petitioners imply that this requirement to "eliminate" the contamination means that all such sources have to be immediately removed. That, of course, that is not the "plain meaning" of the rule: the word "eliminate" is not the same as "remove."

More importantly, the real meaning of "eliminate" is provided by looking at §.0106(f)(3) and §.0106(*l*)(1) of the 2L Rules. Both of those provisions clearly allow treatment and control as alternatives to such immediate removal of sources of pollution. Clearly, §.0106(f)(3) and §.0106(*l*)(1) apply to the facilities that are the focus of the Request.[56] However, Petitioners offer

[55] *See, id.* pp. 19-23.

[56] Section .0106(f)(3) specifically refers to an "assessment required in Paragraphs (c) or (d) of this Rule," which is referring to .0106(c) and .0106(d). Likewise, §.0106(*l*)(1) notes that it applies to "[a]ny person required to implement an approved corrective action plan for a non-permitted site pursuant to this Rule . . . ." This reference to a "non-permitted site" is referring to a site covered by §.0106(c), either because it "has not been permitted by the Division" per the terms of §.0106(c), or because §.0106(e)(4) says it is "deemed not permitted by the Division and

no explanation or interpretation as to why the 2L Rules contain these two provisions, both of which provide for treatment and control as alternatives to such immediate removal of sources of pollution, and, in fact, act as though those provisions are not even contained in the Rules. Thus, Petitioners' argument would result in an interpretation of the 2L Rules where §§ .0106(f)(3) and .0106(*l*)(1) would have no meaning. By contrast, rules are to be read in a way that gives meaning to all applicable provisions.

In summary, Petitioners' second request would make §§.0106(f)(3) and .0106(*l*)(1) of the 2L Rules meaningless, thereby "writing them out of the rules," which would violate the well-accepted standards of regulatory interpretation and, thus, should not be accepted.

C. The 3rd Suggested ruling incorrectly suggests that the 2L Rules Mandate that DENR must require a Closed or Inactive Coal Ash Lagoon to implement Corrective Measures when it causes a concentration of a substance in excess of groundwater quality standards, regardless of whether the Groundwater Contamination is Outside of the Facility's Compliance Boundary

Petitioners' third requested ruling would force DENR to interpret and apply §.0106(c) to require operators of "closed and inactive coal ash lagoons" to "implement corrective action as unpermitted activities" under §.0106(c) "when they cause an increase in the concentration of a substance in excess of groundwater quality standards."[57] This third requested ruling presumably also incorporates the first ruling that these obligations are required "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary around the lagoon." Petitioners say that this ruling is needed to correct DENR's third "mistaken conclusion" "that

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subject to the provisions of [§.0106(c)] of this Rule." Therefore, §§.0106(f)(3) and .0106(*l*)(1) apply to the unpermitted or deemed-unpermitted facilities that are the focus of the Request.

[57] Request, pp. 1-2. As was true for the 2nd requested ruling (see footnote 53 above), this 3rd requested ruling is also triggered, "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary." The implication, then, is that this third request would also require action "whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary."

closed or inactive coal ash lagoons are not subject to the requirements of the 2L Rules."[58]

Petitioners apparently believe that "DENR has misinterpreted its groundwater regulations to exclude coal ash lagoons that are no longer active but are contaminating groundwater."[59] To the best of Intervenors' knowledge, DENR has not taken the position that these facilities are "excluded" from the 2L Rules. Petitioners' third requested ruling should be rejected on the same grounds as have been discussed above for their first two requested rulings.

What Petitioners are really complaining about is that "DENR staff have opined that a closed coal ash lagoon with an active NPDES permit can be reauthorized by DWM under G.S. 130A as a solid waste disposal site" and that such a site need only meet groundwater standards at or beyond the compliance boundary it is assigned in its solid waste permit.[60] Once permitted as solid waste facilities, presumably these facilities would be governed by the solid waste disposal facility rules, which explicitly incorporate the 2L Rules by reference.[61]

3. **Objections to the particular petition and proceeding**

Intervenors believe that there is ample basis for the Commission to decline to adopt the very substantial changes in DENR's long-standing interpretation and application of the 2L Rules and have, thus, focused much of this memorandum on the errors and deficiencies in Petitioners' arguments, as well as the problems that the changes would create. However, there are several issues that Intervenors must note for the record.

A. Petitioners have not established standing as "persons aggrieved"

Intervenors do not concede that Petitioners have established that they have sufficient

[58] Request, p. 3.

[59] *Id.*, p. 25 (emphasis added).

[60] *Id.*, p. 26.

[61] 15A NCAC 13B.1630(e).

standing to bring the Request, as Intervenors noted in their original memorandum.[62] Given the limited periods of time for reply and for argument, as well as the nature of the arguments and the legal nature of the determinations involved,[63] Given the absence of any showing of contamination above groundwater standards at or beyond the compliance boundary for the coal ash facilities, Petitioners have not established that their activities – which take place outside of these compliance boundaries – are sufficient to meet Petitioners' burden of proof to show that they are "persons aggrieved" within the meaning of the APA. If this matter is reviewed by a court pursuant to Article 4 of the APA, Intervenors will address this issue in great detail before the court.[64]

B. The factual stipulation contains errors and was not agreed to by Intervenors and is, therefore, not binding on Intervenors or their Facilities

As part of this proceeding, Petitioners and DENR entered into a set of factual stipulations (the "Stipulations").[65] Although Intervenors' motion to intervene had already been granted by that point, Intervenors were not provided a copy of any draft of the Stipulations, nor were Intervenors provided a copy of the signed Stipulations before they were filed with the Commission. Some of the Stipulations are out-of-date or incomplete in certain respects. For example, paragraph 4 mentions that monitoring wells have been approved for installation at or beyond the compliance boundary, but fails to note that the Company has already installed ten groundwater monitoring wells at the compliance boundary and four wells outside the compliance

[62] See Intervenors' Memorandum Supporting Denial of the Request for Declaratory Ruling, submitted November 2, 2012 ("Intervenor Original Memo"), p. 3, fn. 1.

[63] It does not appear that Petitioners have demonstrated that their or their members' personal rights or interests, nor any rights or interests properly attributable to them in a cognizable representative capacity, were or are affected, either directly or indirectly, by DENR's interpretation and application of the 2L Rules. *See, e.g., In re Wheeler*, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

[64] Whether one has standing to obtain judicial review of an administrative decision is a question of subject matter jurisdiction. *Carter v. North Carolina State Bd. of Registration*, 86 N.C. App. 308, 357 S.E.2d 705 (1987).

[65] See "Request for Declaratory Ruling Factual Stipulations," signed on behalf of Petitioners and DENR on November 2, 2012, and filed with the Commission.

boundary, and is now monitoring those wells. Likewise, paragraph 7 fails to note that Progress Energy has installed monitoring well CB-312 at the compliance boundary and is monitoring it.

Furthermore, a declaratory ruling involving a stipulated set of facts is only binding on the parties that enter into the stipulation, which Intervenors have not been asked to do. Intervenors would not agree to the facts in the form of the Stipulation and object to the entry of any ruling on the basis of the Stipulations and do not believe they are bound by any ruling based on these Stipulations.

Finally, the issues with the Stipulations demonstrate that the Request was not the appropriate mechanism for resolving Petitioners' concerns, for the reasons described in Intervenors First Memorandum and the document that DENR filed that similarly argued that the Commission should decline to issue a ruling. The hearing before the Commission on November 8, as well as the order by the Commission that it would issue a ruling, do not provide a sufficient basis to demonstrate that the Request falls within any of the purposes for which a declaratory ruling can be issued under G.S. 150B-4(a), and that the Commission erred in doing so. Intervenors continue to believe that the more appropriate process is and would be rule-making. Nevertheless, even at this point, the Commission can issue a ruling that does not disturb DENR's long-standing and consistent interpretation and application of the 2L Rules. If, by contrast, the Commission believes that substantial change is needed, then the rule-making process is the appropriate process to use for the reasons discussed in the following section.

C. The issues raised in the Request would be better handled through Rule-making

By seeking to overturn a well settled interpretation of the rule and to substitute an interpretation that invalidates a portion of the rule, the Petitioners are actually seeking a new rule rather than a clarification of the existing rule. This type of change goes beyond the type of declaration contemplated by § 150B-4. Rulemaking, with its opportunity for notice and public

comment under less constraining time requirements,[66] is the appropriate process for considering the issues raised by the Request. Petitioners could – and should – have requested the initiation of rule-making under G.S. 150B-20 of the APA; of course, the Commission can initiate such a rule-making process without a petitioner.

Both the text and the legislative intent behind the adoption of the APA's declaratory ruling provisions make clear that it was not intended – and is not appropriate – for complex subjects having potentially broad implications outside of the specific set of facts. If Petitioners' reading of the 2L Rules were correct, there would be other facilities that would be required to undertake precipitous, unplanned and potentially expensive and indefensible actions to address groundwater contamination that has been addressed consistently since the adoption of the 2L Rules.

As stated above, the modifications to the 2L Rules' corrective measures provisions in §.0106 will have implications for a wide array of stakeholders. Rulemaking is the only way that the Commission can solicit and incorporate those interests into any sort of significant change to the 2L Rules' corrective measure provisions. DENR has consistently interpreted and applied the 2L Rules over the years. As discussed below, Intervenors contend that this interpretation and application of the Rules has been consistent with the wording, purposes and history of the Rules, as was expressed in the 2009 opinion from the Office of the North Carolina Attorney General, which was just reconfirmed. This consistent interpretation and application does not necessarily mean that the interpretation and application is correct.[67] As discussed in Section 2.A.ii. above

[66] On November 2, 2012, Intervenors filed an initial memorandum with the Commission ("Intervenors' Initial Memo") which provided reasons why a ruling need not issue. In order to minimize repeating relevant sections from that Intervenors' Initial Memo, this memorandum incorporates that document by reference herein and will utilize references to relevant pages, rather than repeat the substance of the text here.

[67] It was noted during the Commission discussion of this matter on November 8, one could have a rule that had been consistently interpreted in an incorrect manner, with the example of a rule that contained a unambiguous

(as well as the Request itself), the 2L Rules have been developed over time and, as a result, various provisions of the 2L Rules do not always fit well together and are even inconsistent in some respects. While the consistent interpretation and application of a rule does not necessarily mean that the interpretation and application is necessarily correct, it is still significant, especially under the circumstances of the 2L Rules. It is worth recalling that DENR is not only the agency charged with applying the 2L Rules – DENR[68] also served as staff to the Commission for the adoption of the 2L Rules. The consistent interpretation and application of the Rules means that the 2L Rules have a clear meaning, which should not be disturbed without a very clear showing of error, which has not been shown here.

D. Intervenors and others have been prevented from contacting EMC members, in violation of the APA and US and NC constitutional provisions

On November 20, 2012, counsel for the Commission informed counsel for all parties that "the Commission considers requests for declaratory rulings as quasi-judicial in nature and subject to the no ex parte communication standard. Please have all the interested parties keep this in mind as we approach December 3, 2012." Intervenors have complied with this directive to the best of their ability, but respectfully submit that this directive was in error and has prejudiced the rights of Intervenors and other parties that might have an interest in the matter; such a directive violates the APA and the North Carolina and United States Constitutions.

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applicable numerical standard, but the agency was applying a different numerical standard. DENR's consistent interpretation and application of the 2L Rules is not, in Intervenors' view, clearly incorrect in that manner. To the contrary, given the period of time over which that DENR has adhered to and consistently applied its interpretation, it should be presumptively correct, at the very least, and Petitioners bear a significant burden to show otherwise.

[68] The 2L Rules were originally promulgated in 1979 by the Commission, which was a part of the North Carolina Department of Environment, Health and Natural Resources ("DEHNR"), a predecessor agency to DENR, through the Department's administrative section dealing with water quality and particularly its aquifer protection section ("APS"). DENR currently contains a Division of Water Quality ("DWQ"). Although not necessarily pertinent to the issues here, DENR has reorganized groundwater remediation efforts such that most are now handled by the DWM.

The provisions in G.S. 150B-35 of the APA that prohibit *ex parte* communications apply only to "contested cases." However, the APA explicitly states that declaratory rulings are not included in the definition of "contested cases." G.S. 150B-2(2). A declaratory ruling does not involve an evidentiary process involving findings of fact and conclusions of law that require an impartial third party decision maker; rather, it is more like an extension of the EMC's policy making function—a role that requires the EMC hear from a variety of interests in order to make an informed decision. Compare G.S. 150B-21.2 with G.S. 150B-3(a). Intervenors respectfully submit that they should have been able to contact members of the Commission about this matter.

In addition, the vague admonition that "all the interested parties" were to "keep this in mind as we approach December 3, 2012" left both Intervenors and any potential "interested parties" uncertain as to what restrictions or obligations were being placed on them. The directive was too ambiguous to definitively convey its meanings, but it had the effect of creating concerns and impediments to participation by interested third parties. As noted in the previous section, these problems could have been avoided if the Commission had used the rulemaking process to examine these issues, with its full opportunity for notice and comment.

4. **Conclusion and proffered rulings that would confirm current interpretation and application of the 2L Rules**

The Commission should confirm the long-standing and consistent interpretation and application of the 2L Rules by DENR in accordance with the guidance provided by the AG. Intervenors suggest that the Commission issue rulings in a form substantively similar to the following:

- DENR's consistent and long-standing interpretation and application of the 2L Rules, including the corrective action provisions in §.0106(c) of the Rules, is consistent with the wording, structure, history and intent of the 2L Rules and also consistent with the advice of the Attorney General's office.
- Operators of coal ash lagoons with NPDES permits first issued on or before

December 30, 1983 are only required to take corrective action when the activity results in an violation of the 2L standards at or beyond any compliance boundary established under §.0107(a) of the 2L Rules or other applicable statutes, rules, or provisions of a permit or order.

- Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983 are not always forced by §.0106(c)(2) of the 2L Rules to remove the source of contamination and, instead, DENR may approve the alternative approach of treating and controlling such contamination under §.0106(f)(3) and §.0107(l)(1) of the 2L Rules, regardless of whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary around the lagoon.
- Corrective actions at closed and inactive coal ash lagoons are bound by the same provisions in the 2L Rules as the corrective measures for coal ash lagoons with NPDES permits first issued on or before December 30, 1983.

If the Commission instead believes that some change is required in the wording, interpretation or application of the 2L Rules, or if further clarification of the 2L Rules is needed, Intervenors urge the Commission to pursue that goal through rulemaking.

Respectfully submitted this the 27th day of November, 2012.

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CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing **MEMORANDUM SUBMITTED ON BEHALF OF INTERVENORS SUPPORTING AFFIRMATION OF DENR'S INTERPRETATION AND APPLICATION OF THE 2L RULES** to be served on the following individuals by depositing a copy of the same in the United States mail, first class, postage prepaid, and by electronic mail, addressed as follows:

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This the 27th day of November, 2012.