

BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION

In Re: REQUEST FOR)	
DECLARATORY RULING ON THE)	
INTERPRETATION OF 15A NCAC)	
§ 2L.0106(c) WITH RESPECT TO)	
COAL ASH LAGOONS)	MEMORANDUM SUPPORTING
)	DENIAL OF THE
CAPE FEAR RIVER WATCH, SIERRA)	REQUEST FOR DECLARATORY RULING
CLUB, WATERKEEPER ALLIANCE,)	
and WESTERN NORTH CAROLINA)	
ALLIANCE,)	
Petitioners.)	
_____)	

This memorandum (“Memo”) is submitted on behalf of Duke Energy Carolinas, LLC and Carolina Power & Light Company, direct and indirect subsidiaries, respectively, of Duke Energy Corporation, (“Intervenor-Respondents”), which were allowed to intervene in this matter by order dated October 26, 2012. Intervenor-Respondents submit this Memo to urge that the Commission deny the Request for Declaratory Ruling, dated October 10, 2012 (the “Request”), as filed by the Cape Fear River Watch and other entities (the “Petitioners”). The Intervenor-Respondents do not believe that any action is needed in response to the Request. However, if the Commission believes that action is needed with respect to the Response, the Intervenor-Respondents believe that the rule-making process, with its opportunity for notice and public comment under less constraining time requirements, is the more appropriate process for considering the issues raised by the Request.

1. **Introduction**

The Request raises certain issues regarding the application and/or interpretation of the North Carolina Groundwater Rules, as codified at 15A NCAC 2L (the “2L Rules”) in regard to coal ash ponds in North Carolina. Because of the two-phase nature of the decision-making

process under § 150B-4 of the Administrative Procedure Act in Chapter 150B of the General Statutes (“APA”), this Memo addresses only the first step under that process, i.e., whether the Commission should “grant or deny the request.” G.S. 150B-4(a1)(1). For the reasons stated below, Intervenor-Respondents believe there are good reasons why the Commission should not issue a declaratory ruling on this issue and, thus, urges the Commission to deny the Request (i.e., to not issue a ruling). However, should the Commission decide to issue a ruling on the Request, Intervenor-Respondents anticipate filing further written statements on the substance of any ruling.

The Request argues in favor of a regulatory approach that would require operators of coal ash ponds that received discharge permits prior to December 30, 1983 (“pre-1983 facilities”) to initiate corrective action whenever the concentration of contaminants in groundwater attributable to discharges from the ponds exceeds groundwater quality standards at any location. It relies on an interpretation of 15A NCAC 2L.0106, which deals with corrective action in the event of groundwater contamination. As stated on the face of the Request, this interpretation of the regulation is contrary to the settled interpretation of the Department of Environment and Natural Resources (“DENR”), as approved by a legal interpretation from the Attorney General’s office. Additionally, as explained further below, the Request’s characterization of section 2L.0106 is unsupported in the context of other provisions of Section .0100 of Subchapter 2 L. Because DENR is already implementing the regulation in a manner that satisfies all of the regulatory language, there is no genuine controversy regarding the application of the regulation, and the Request should be denied for good cause, as authorized by § .0603(e)(3) of the Commission’s rules codified as 15A NCAC 2I.0600 (“EMC DJ Rules”).

2. **The Request should be denied**

There are several reasons why the EMC should decline to issue a Ruling in this matter.¹

A. The Request seeks to modify the long-standing interpretation of the 2L Rules

The Request seeks to overturn DENR's interpretation of the regulation that is both well-settled and based on the language of the regulation. Petitioners have requested a declaratory ruling stating that DENR's Aquifer Protection Section has misunderstood its authority under 15A NCAC 2L.0106 and misapplied that provision to pre-1983 facilities. As the section of DENR charged with implementing the rule and with expertise in the area, the Aquifer Protection Section is entitled to deference in its interpretation of the regulation. This deference is strengthened by the settled nature of the interpretation. The Aquifer Protection Section has applied the rule in the manner to which the Petitioners object at least since 2009, as demonstrated by Attachment 20 to the Request.

In fact, the Aquifer Protection Section has never applied the regulation in the manner suggested by the Petitioners, meaning that adopting the Petitioners' reading of the rule would upset the settled expectations of both the regulatory agency and the regulated community. Deference to the Aquifer Protection Section's interpretation is further strengthened by the concurrence from Special Deputy Attorney General Kathryn Jones Cooper, found at Attachment 15 to the Request. Ms. Cooper reviewed the requirements of the regulation and issued an informal advisory memorandum (the "Advisory Memorandum") concurring with the approach adopted by the agency. Although the Advisory Memorandum is not decisive on the issue of regulatory interpretation, it does reflect the professional opinion of a government attorney whose

¹ Respondent-Intervenors are not certain that Petitioners have demonstrated that they are aggrieved persons under the APA, but do not believe that it is necessary or appropriate to raise that issue at this point.

job responsibilities include advising the agency on water quality issues and should be given weight accordingly.

Given the deference to which the Aquifer Protection Section's interpretation is entitled, Petitioners must make a compelling case for why the agency's interpretation is impermissible and should be declared invalid. However, the Request does not confront the reasoning of either the agency's position or the Advisory Memorandum. Rather, the Petitioners repeatedly seem to suggest that the agency and Advisory Memorandum have no basis at all.² By failing to acknowledge that there is a reasoned and rational basis behind the Aquifer Protection Section's interpretation, the Request also fails to explain why that basis is invalid. As such, the Request only seeks to substitute the opinion of the Petitioners for that of the judgment of the agency section charged with implementing the regulation.

B. The Request, in essence, is requesting the modification or adoption of a new rule

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. This objective would be more appropriately accomplished through a rulemaking, with accompanying opportunity for notice and public comment.

Furthermore, a careful reading of the regulation demonstrates that the interpretation applied by the Aquifer Protection Section better accounts for all of the provisions of the

² Throughout the Request, the Petitioners state their belief that the Aquifer Protection Section was "mistaken" (see Request at page 2) or has misread an "unambiguous mandate" (Request at Page 3). The Request describes the Attorney General's Advisory Memorandum as being "[i]n contravention of the unambiguous text of the 2L Rule and without citation to any authority." (Request at page 16.)

regulation than that advanced by the Petitioners. The Petitioners' analysis is predicated almost entirely on a reading of 15A NCAC 2L.0106. As Petitioners correctly note, 15A NCAC 2L.0106(c)-(e) provide different instructions for activities resulting in discharges to groundwater, depending on whether those activities are permitted or unpermitted. However, the regulation contains additional relevant provisions.

First, it is not correct to conclude that facilities permitted prior to December 30, 1983 have no compliance boundaries. In fact, the next section of the regulation, 15A NCAC 2L.0107, explicitly states that “[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.”

Second, the fact that pre-1983 facilities are explicitly assigned compliance boundaries leads to the conclusion that groundwater quality should be monitored at the compliance boundary for the purposes of corrective action. The term “compliance boundary” is defined in 2L.0102(3) as the “boundary around a disposal system at and beyond which groundwater quality standards may not be exceeded and only applies to facilities which have received a permit issued under the authority of G.S. 143-215.1 or G.S. 130A.” The Petitioners' interpretation effectively nullifies the purpose of the compliance boundary. A better reading of the regulation that takes into account all of these provisions is that groundwater standards do not apply within the compliance boundary, subject to the other constraints of the rule. This in fact, is how DENR's Aquifer Protection Section has consistently interpreted the regulation, thus giving effect to the entire regulation.

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

By seeking to overturn the well-established interpretation of the 2L Rules (as supported by the AG's informal advisory opinion), the Request is seeking in substance to amend or modify the rule, something that is more appropriately accomplished through rule-making under Article 2 of the APA. Petitioners can request the initiation of that process under G.S. 150B-20 of the APA. Although that section also has time limits for the Commission to decide whether to move forward, the process for consideration is much more appropriate for considering the nature of the issues raised in the Request, if the Commission decides that it should do so. Whereas the declaratory ruling provision of the APA only allows a maximum of 45 days for the Commission to make a ruling, the rule-making process allows for notice and opportunity for public comment in a way that the declaratory ruling process does not.

The modifications to the 2L Rules' corrective measures provisions in § .0106 will have implications for a wide array of stakeholders. Rule-making is really 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.

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.

While the declaratory ruling provisions of the APA are not limited to emergency or time-sensitive situations, Petitioners should provide some explanation why the Commission should be compelled to review this complicated set of issues that have potentially wide-ranging implications via a declaratory ruling, rather than through the more appropriate rule-making process, that allows broad notice of the desired changes to the 2L Rules, along with the opportunity to comment on those proposals, and the Commission's ability to have them vetted through the committee process, all of which are not possible under the time constraints imposed by the Request.

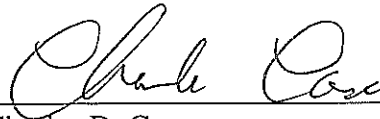
D. The Request would compel previously unrequired and unjustified actions of the Intervenor-Respondents

As noted in the motion to intervene, the declaratory ruling sought in the Request ("Proposed Ruling") could compel the immediate commencement of corrective action, or the implementation of corrective action in advance of appropriate and prescribed timeframes, by the Intervenor-Respondents (not to mention numerous other unidentified companies with concerns other than coal ash), thereby exposing them to the unnecessary expense of premature and unnecessary remedial corrective measure, and also potentially subject them to enforcement action, in the event increases in the concentration of substances in excess of groundwater quality standards occurred in the vicinity of coal ash lagoons operated by Intervenor-Respondents. The Proposed Ruling would significantly and negatively affect the obligations of Intervenor-Respondents pursuant to their lawfully issued permits and the administration of their programs for corrective action for groundwater containing concentrations of substances in excess of groundwater quality standards, where such substances are or may be associated with coal ash lagoons, many of which have existed for decades and were properly and lawfully permitted at the time of their construction.

3. **Conclusion**

For the foregoing reasons, Intervenor-Respondents respectfully request that the EMC either deny the Request for good cause or deny the Request on its merits.

Respectfully submitted this the 2nd day of November, 2012.



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CERTIFICATE OF SERVICE

This is to certify that I caused a copy of the foregoing MEMORANDUM SUPPORTING DENIAL OF THE REQUEST FOR DECLARATORY RULING 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 2nd day of November, 2012.