



State of North Carolina

Department of Justice

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December 20, 2012

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CERTIFIED MAIL

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CERTIFIED MAIL

Re: Request for Declaratory Ruling on the Interpretation of 15A NCAC 2L .0106(c)

Dear Counsel:

You will find enclosed the Declaratory Ruling of the Environmental Management Commission regarding the application of regulation 15A NCAC 2L .0106(c) to coal ash ponds at electricity generating power plants. According to North Carolina General Statutes §150B-4 and §150B-45, your clients may seek judicial review of the Commission's declaratory ruling in the Superior Court by filing a petition within 30 days of receipt of a written copy of the final agency decision. A copy of the judicial review petition must be served on the Environmental Management Commission's agent for service of process at the following address:

William P. H. Cary, General Counsel
Dept. of Environment and Natural Resources
1601 Mail Service Center
Raleigh, N. C. 27699-1601

If you file a petition for judicial review, I request that you also serve a copy of the petition for judicial review on me at the above address. If you have any questions, please feel free to contact me.

STATE OF NORTH CAROLINA

BEFORE THE ENVIRONMENTAL
MANAGEMENT COMMISSION

COUNTY OF WAKE

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

DECLARATORY RULING

THIS MATTER came before the Environmental Management Commission at its special called meeting on December 3, 2012, in Raleigh, North Carolina as a request for a declaratory ruling pursuant to G.S. § 150B-4 and 15A NCAC 2I .0602, et seq., by Petitioners Cape Fear River Watch, Sierra Club, Waterkeeper Alliance, and Western North Carolina Alliance. On or about October 10, 2012, Petitioners filed their Request for Declaratory Ruling with the Director of the Division of Water Quality on behalf of the Commission requesting the Commission clarify the application of rule 15A NCAC 2L .0106 to coal-fired electric generating facilities with coal ash ponds permitted prior to December 30, 1983, as described in the given factual situation set forth in the Petitioners' Request for Declaratory Ruling and in the Factual Stipulations filed jointly on November 2, 2012 by Petitioners and the Division of Water Quality.

On October 26, 2012, pursuant to 15A NCAC 2I .0602(d), the Chairman granted the motion to intervene by Duke Energy Carolinas, LLC and Carolina Power & Light Company, an indirect subsidiary of Duke Energy Corporation, d/b/a Progress Energy Carolinas.

detected in monitoring wells located within the compliance boundary or to take immediate action to eliminate a source or sources of exceedances within the compliance boundary.

7. The Commission established a series of classifications and standards applicable to groundwaters of the State in Subchapter 2L of Title 15 of the Administrative Code in 1979. Title 15 of the Administrative Code was renumbered as Title 15A in 1989.

8. The rules in Subchapter 2L were amended in 1984 and 1989. The 1989 amendments included new sections for Corrective Action, 2L .0106, and Compliance Boundary, 2L .0107, and a definition for Compliance Boundary, 2L .0102(3). Rule 2L .0107(a) and (b) provide specific compliance boundaries for disposal systems permitted prior to and after December 30, 1983:

9. Sections 2L .0106 Corrective Action and 2L .0107 Compliance Boundary were amended again in 1992. The Corrective Action rule was changed by removing the SOC requirement from 2L .0106(c)(1) and (c)(2)(B) and adding authorization of a corrective action plan and schedule approved by the Director with input from the person or permittee submitting the plan. Rule 2L .0107 Compliance Boundary was amended to modify the compliance boundary requirements to allow permittees to maintain fixed environmental compliance boundaries after subdivision or conveyance of property within the compliance boundary.

10. Rule 2L .0106 Corrective Action was amended substantially in 1993 and section 2L .0106(e) was added. The revised rule is the current version, which is applicable to this Request for Declaratory Ruling, and provides in pertinent part:

.0106 CORRECTIVE ACTION

- (a) Where groundwater quality has been degraded, the goal of any required corrective action shall be restoration to the level of the standards, or as closely thereto as is economically and technologically feasible. In all cases involving requests to the Director for approval of corrective action plans, or termination of corrective

- (f) Corrective action required following discovery of the unauthorized release of a contaminant to the surface or subsurface of the land, and prior to or concurrent with the assessment required in Paragraphs (c) and (d) of this Rule, shall include, but is not limited to:
 - (1) Prevention of fire, explosion or the spread of noxious fumes;
 - (2) Abatement, containment or control of the migration of contaminants;
 - (3) Removal, or treatment and control of any primary pollution source such as buried waste, waste stockpiles or surficial accumulations of free products;
 - (4) Removal, treatment or control of secondary pollution sources which would be potential continuing sources of pollutants to the groundwaters such as contaminated soils and non-aqueous phase liquids. Contaminated soils which threaten the quality of groundwaters must be treated, contained or disposed of in accordance with applicable rules. The treatment or disposal of contaminated soils shall be conducted in a manner that will not result in a violation of standards or North Carolina Hazardous Waste Management rules.
- (g) The site assessment conducted pursuant to the requirements of Paragraph (c) of this Rule, shall include:
 - (1) The source and cause of contamination;
 - (2) Any imminent hazards to public health and safety and actions taken to mitigate them in accordance with Paragraph (f) of this Rule;
 - (3) All receptors and significant exposure pathways;
 - (4) The horizontal and vertical extent of soil and groundwater contamination and all significant factors affecting contaminant transport; and
 - (5) Geological and hydrogeological features influencing the movement, chemical, and physical character of the contaminants.Reports of site assessments shall be submitted to the Division as soon as practicable or in accordance with a schedule established by the Director, or his designee. In establishing a schedule the Director, or his designee shall consider any reasonable proposal by the person submitting the report.
- (h) Corrective action plans for restoration of groundwater quality, submitted pursuant to Paragraphs (c) and (d) of this Rule shall include:
 - (1) A description of the proposed corrective action and reasons for its selection.
 - (2) Specific plans, including engineering details where applicable, for restoring groundwater quality.
 - (3) A schedule for the implementation and operation of the proposed plan.
 - (4) A monitoring plan for evaluating the effectiveness of the proposed corrective action and the movement of the contaminant plume.

11. Rule 2L .0107 Compliance Boundary also was amended in 1993. The revised rule is the current rule and provides in pertinent part:

.0107 COMPLIANCE BOUNDARY

- (a) For disposal systems individually permitted prior to December 30, 1983, the compliance boundary is established at a horizontal distance of 500 feet from the

which groundwater contamination that exceeds the groundwater standard is subject to the enforcement authority of the Director, which includes civil penalties, clean-up orders or injunctions.

14. The contemporaneous adoption of 2L .0106 Corrective Action and 2L .0107 Compliance Boundary in 1989 and the contemporaneous amendments to both rules in 1993, evidence no intent of the Commission to remove compliance boundaries for facilities permitted prior to December 30, 1983.

15. Subsection 2L .0106(d) of the Corrective Action rule sets forth requirements for corrective action applicable to persons conducting or controlling activities under authority of a permit where groundwater contamination exceeds the standards at the compliance boundary. Subsection 2L .0106(e)(1) through (3) in the Corrective Action rule specifies for corrective action required by 2L .0106(d) that a permitted activity is one which meets the requirements of 2L .0106(e), including the permit having been originally issued after December 30, 1983. 15A NCAC 2L .0106(e)(2).

16. Activities that do not meet the requirements of 2L .0106(e), including those permitted prior to December 30, 1983, are deemed unpermitted and are subject to the requirements of 2L .0106(c) applicable to persons conducting or controlling an activity (other than agricultural operations) that has not been permitted and which results in an increase in the concentration of a substance in excess of the standard.

17. The corrective action requirements in 2L .0106(c)(1) through (4) are not prioritized, and the immediate action to eliminate the source or sources of contamination requires responsible parties and the Division to follow the detailed procedures set forth in the entirety of the 2L Groundwater Rules.

23. For purposes of corrective action for facilities permitted prior to December 30, 1983, 15A NCAC 2L .0106 is silent on the issue of whether an exceedance of groundwater standards within the compliance boundary triggers the requirements of 15A NCAC 2L .0106(c). Reading the provisions of 15A NCAC 2L .0106 and 15A NCAC 2L .0107 together, groundwater standards must be met at the compliance boundary for enforcement and corrective action purposes, unless one or more of the conditions identified in 15A NCAC 2L .0107(k) is present.

24. Corrective action for a violation found at or beyond the compliance boundary incorporates measures found in 15A NCAC 2L .0106(c), (f), (g) and (h). It is not limited to the action in section 2L .0106(c)(2).

25. The Division of Water Quality has, over time, consistently interpreted and uniformly applied the term "compliance boundary" across the rules in 15A NCAC 2L .0100, et seq.

Based upon the foregoing Findings and Conclusions, the North Carolina Environmental Management Commission makes the following:

DECLARATORY RULING

For purposes of corrective action as provided in 15A NCAC 2L .0106(c), coal ash ponds permitted pursuant to N.C.G.S. § 143-215.1 prior to December 30, 1983, have compliance boundaries as provided by 15A NCAC 2L .0107(a), even though the facilities are deemed unpermitted under 15A NCAC 2L .0106(e)(4).

Operators of coal ash ponds permitted on or before December 30, 1983, are not required to take corrective action pursuant to 15A NCAC 2L .0106(c) until their activity results in an increase in a substance in excess of groundwater quality standards at or beyond the facility's compliance boundary.

CERTIFICATE OF SERVICE

This is to certify that this day the foregoing Declaratory Ruling was served upon the parties by placing a copy in the United States Mail, Certified Mail postage prepaid, or by Hand Delivery addressed to counsel of record as follows:

D. J. Gerkin, Esq.
J. Patrick Hunter, Esq.
22 South Pack Square, Suite 700
Asheville, N. C. 28801-3494

CERTIFIED MAIL
RETURN RECEIPT

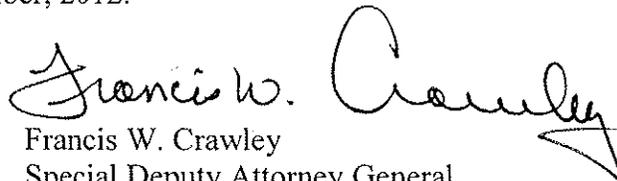
Charles D. Case, Esq.
Craig A. Bromby, Esq.
P. O. Box 109
Raleigh, N. C. 27602

CERTIFIED MAIL
RETURN RECEIPT

Kathryn J. Cooper, Esq.
Donald W. Laton, Esq.
NC Department of Justice
114 W. Edenton Street
Raleigh, N. C. 27602

HAND DELIVERY

This the 20th day of December, 2012.


Francis W. Crawley
Special Deputy Attorney General
Commission Counsel