

BEFORE THE
NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

CAPE FEAR RIVER WATCH, SIERRA)
CLUB, WATERKEEPER ALLIANCE,)
and WESTERN NORTH CAROLINA)
ALLIANCE)
Petitioners.)
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)
)

REQUEST FOR
DECLARATORY RULING

Pursuant to N.C. Gen. Stat. § 150B-4 and 15A N.C. Admin. Code 2I .0601 et seq., the Cape Fear River Watch, Sierra Club, Waterkeeper Alliance and Western North Carolina Alliance (collectively “Petitioners”) submit this Request for Declaratory Ruling to the North Carolina Environmental Management Commission (“EMC”) for a ruling clarifying application of the EMC’s groundwater protection rule to coal ash lagoons¹ that contaminate groundwater in excess of water quality standards. Specifically, Petitioners request the following rulings:

- a) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take corrective action pursuant to 15A N.C. Admin. Code 2L .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;
- b) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take immediate action to eliminate sources of contamination that cause a concentration of a substance in excess of groundwater quality standards, in advance of their separate obligation to propose and implement a corrective action plan for the restoration of groundwater quality contaminated by those sources; and
- c) Operators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A N.C. Admin. Code 2L .0106(c)

¹ DENR also refers to these large lagoons containing coal combustion waste as coal ash ponds or ash pond treatment systems. For purposes of this Request for Declaratory Ruling Petitioners will simply refer to them as coal ash lagoons.

when they cause an increase in the concentration of a substance in excess of groundwater quality standards.

1. NATURE OF THE REQUEST

Petitioners ask the EMC for a declaratory ruling clarifying application of its groundwater protection rule to coal ash lagoons. Fourteen coal-fired power plants in North Carolina operate unlined coal ash lagoons – impoundments containing a slurry of coal combustion waste and water. DENR has documented groundwater contamination in excess of North Carolina’s groundwater standards around each of those lagoons.² The contaminated groundwater exceeds standards for substances including arsenic, thallium, boron, sulfate, nickel, iron, chromium, manganese, and selenium.³

Groundwater contamination is governed by an EMC rule, 15A N.C. Admin. Code 2L .0101 et.seq. (the “2L Rule”),⁴ that establishes groundwater standards and procedures for “corrective action.” Corrective action requires steps to (1) stop ongoing sources of contamination and (2) restore groundwater contaminated by those sources. To date, DENR has not required any power plant in North Carolina to take corrective action to address groundwater contamination from a coal ash lagoon.

DENR’s efforts to address groundwater contamination from coal ash lagoons have been hampered by three mistaken conclusions about the 2L Rule. First, DENR has concluded that it cannot require corrective action for groundwater contamination around coal ash lagoons until contamination has crossed the “compliance boundary” for each facility. Second, DENR operates under the mistaken impression that coal ash lagoons are not required to eliminate sources of ongoing contamination immediately, but rather as part of the long-term process for proposing,

² See footnote 65, below.

³ Id.

⁴ The full text of the 2L Rule is attached as Attachment 1.

approving and eventually implementing a plan for restoring groundwater contaminated by those sources. Third, DENR has concluded that closed or inactive coal ash lagoons are not subject to the requirements of the 2L Rule. Each of these conclusions is based on a misreading of the unambiguous mandate of the 2L Rule.

First, old coal ash lagoons, with permits issued prior to 1984, must take corrective action if they contaminate groundwater anywhere, whether or not contamination has crossed a compliance boundary around the lagoon. For purposes of corrective action, the 2L Rule distinguishes between activities that have “not been permitted by the Division” (“unpermitted facilities”) and activities “under authority of a permit” (“permitted facilities”).⁵ Permitted facilities are not required to take corrective action unless they cause contamination outside their permit-defined compliance boundaries.⁶ Unpermitted facilities, by contrast, are required to take corrective action when they contaminate groundwater anywhere, without reference to a compliance boundary.⁷

Although coal ash lagoons in North Carolina have been issued NPDES permits as wastewater treatment facilities, those permits were originally issued long ago, when these old, unlined lagoons were first put into operation. Critically, the 2L Rule specifies that facilities “originally issued” permits prior to December 30, 1983 are “deemed not permitted” for purposes of corrective action.⁸ Because old coal ash lagoons are “deemed not permitted,” they must implement corrective action as if they are unpermitted facilities.⁹ Like unpermitted facilities, old

⁵ 15A N.C. ADMIN. CODE 2L .0106(c) & (d) (2012).

⁶ Id. at .0106(d).

⁷ Id. at .0106(c).

⁸ Id. at .0106(e).

⁹ Id. at .0106(e)(4).

coal ash lagoons must take corrective action when they contaminate groundwater anywhere, whether or not the contamination has crossed a compliance boundary.

Second, old coal ash lagoons that are “deemed not permitted” because of their age must “take immediate action to eliminate the source or sources of contamination,” before they undertake the longer process of assessing and restoring contaminated groundwater.¹⁰ Prior to 1993, the Rule required all facilities that contaminated groundwater to develop a consolidated plan to (1) eliminate sources of contamination and (2) restore groundwater contaminated by those sources. In 1993 amendments to the 2L Rule, the EMC specifically required unpermitted facilities to take “immediate action” to eliminate sources of contamination, distinct from their separate obligation to develop a corrective action plan for restoring contaminated groundwater. Because old coal ash lagoons are “deemed not permitted,” they, like unpermitted facilities, must “take immediate action” to eliminate sources of contamination, before they start the protracted process of restoring contaminated groundwater.

Third, inactive and closed coal ash ponds are required to take corrective action as unpermitted facilities. The 2L Rule applies to “all activities or actions” that contaminate groundwater “regardless of any permit issued by a governmental agency.”¹¹ The corrective action requirements of the rule apply to all coal ash lagoons, whether permitted, unpermitted, or “deemed not permitted” because of their age. When an old coal ash lagoon is closed and relinquishes its NPDES permit, it is subject to corrective action as an unpermitted facility because (1) it no longer holds an active permit and (2) the permit it once held was “originally issued” prior to December 30, 1983. The regulatory treatment of closed coal ash lagoons does not change if they are subsequently issued, as DENR staff has proposed, a new permit by the

¹⁰Id. at .0106(c)(2).

¹¹ Id. at .0101(b).

Division of Waste Management (“DWM”) under N.C. General Statutes Chapter 130A as solid waste disposal facilities. Under the 2L Rule, only a holder of an NPDES permit under N.C. General Statutes section 215.1 qualifies as a permitted facility.¹² Closed coal ash lagoons do not hold NPDES permits and they are “deemed not permitted” for purposes of corrective action. As a result, they must implement corrective action for contamination inside their compliance boundary and take immediate action to eliminate sources of contamination.

Because DENR’s misreading of the unambiguous language of the 2L Rule is hampering its current efforts to address groundwater contamination from coal ash lagoons in North Carolina, a declaration from the EMC needed to clarify application of the 2L Rule to coal ash lagoons in the state.

2. PETITIONERS

Petitioners are persons aggrieved and entitled to request a declaratory ruling from the EMC under the North Carolina Administrative Procedures Act (“APA”).¹³ Petitioners are nonprofit conservation organizations with organizational missions that include protecting surface and ground waters from contamination, with the twin goals of protecting future sources of drinking water and ensuring that groundwater contamination does not degrade surface waters. Petitioners have individual members who live near groundwater contaminated by coal ash lagoons and who recreate and work in rivers and lakes at risk because of their connection with contaminated groundwater. Through their staff and volunteers, Petitioners are actively involved in efforts to address contamination from coal ash lagoons in North Carolina, generally, and at Progress Energy’s Sutton and Asheville coal-fired steam plants, in particular. A more complete description of Petitioners can be found in Petitioners’ Demonstration of Person Aggrieved Status

¹² *Id.* at .0106(e)(1).

¹³ N.C. GEN. STAT. § 150B-4(a).

and supporting affidavits of Petitioners' members and staff found at Attachments 2-14 to this motion. As the Demonstration and affidavits confirm, a declaratory ruling in favor of Petitioners would address the substantial interests of the organizations and their members in enforcement of groundwater regulations to require clean up of contamination from coal ash lagoons.

3. STATUTORY AND REGULATORY BACKGROUND

A. The N.C. Administrative Procedure Act.

The APA states that “an agency shall 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” when requested by a person aggrieved.¹⁴ “Person aggrieved” includes groups with a common interest, like Petitioners, whose interests are impacted, even if indirectly, by the requested decision.¹⁵

B. The N.C. Clean Water Act of 1967.

In 1967, the General Assembly directed the EMC to assign water quality classifications to all waters of the state, including groundwater,¹⁶ and to adopt water quality standards that protect the best uses of those waters.¹⁷

C. Development of the EMC's 2L Rule.

The EMC, in compliance with its statutory mandate, developed groundwater quality standards for specific substances and required specific actions to address groundwater contamination. The EMC first adopted groundwater quality standards in 1979 (the “2L Rule”).

¹⁴ N.C. GEN. STAT. § 150B-4(a).

¹⁵ *Id.* at 150B-2(6), (7).

¹⁶ N.C. GEN. STAT. § 143-212(6) (“Waters’ means any . . . water, whether surface or underground, . . . that is contained in, flows through, or borders upon any portion of this State”) (emphasis added).

¹⁷ N.C. GEN. STAT. § 143-214.1(d)(5).

The 1979 2L Rule prohibited contamination of groundwater in excess of “the specified concentrations for each classification.”¹⁸

In 1983, the EMC amended the 2L Rule to require restoration of contaminated groundwater. Facilities were allowed to request a “compliance schedule” of up to five years to restore groundwater “to the level of the standard, or as close thereto as technically feasible.”¹⁹

The 1983 amendments also prohibited issuance of new permits “which would result in the significant degradation of groundwaters whose existing quality is better than the assigned standard.”²⁰ The 1983 amendments also defined new “compliance boundaries” for “new” and “existing” facilities.²¹ The amended regulations took effect December 30, 1983.²²

In 1989, the EMC again amended the 2L Rule, deleting the authority for a compliance schedule and requiring instead “corrective action” to restore groundwater “to the level of standards.”²³ The 1989 regulations distinguished between contamination “as a result of activities not specifically permitted” (“unpermitted facilities”)²⁴ and contamination caused by facilities with state-issued permits (“permitted facilities”).²⁵ Permitted facilities had compliance boundaries and new review boundaries and were required to take corrective action only after

¹⁸ See 15 N.C. ADMIN. CODE 2L .0103 (1979). The 1979 version of the 2L Rule from the June 10, 1979 volume of the North Carolina Administrative Code is attached as Attachment 16.

¹⁹ See 15 N.C. ADMIN. CODE 2L .0103(e) (1983). Petitioners have been unable to obtain an official copy of the 1983 North Carolina Administrative Code. Citations in this motion to the 1983 version of the 2L Rule are taken from the 1988 North Carolina Register (June 15, 1988), attached as Attachment 17 to this motion. The 1988 North Carolina Register at attachment 17 proposed amendments to 15 N.C. ADMIN. CODE 2L published for public comment in 1988. The redlined versions of section .0101 thru .0105 published in the Register contain the original 1983 rule and the text of the 1983 rule can be discerned by ignoring redlined changes in the text which reflect the proposed 1988 amendments (not all of which were subsequently adopted). Petitioners are still working to locate an official copy of the 1983 North Carolina Administrative Code and will supplement this submission when a copy is obtained.

²⁰ Id. at .0103(g) (1983).

²¹ Id. at .0103(h) (1983).

²² 15 N.C. ADMIN. CODE 2L .0103 (1979) (amended December 30, 1983).

²³ 15 N.C. ADMIN. CODE 2L .0106(a) (1989). The 1989 version of the 2L Rule from the July 11, 1989 volume of the North Carolina Administrative Code is attached as Attachment 18.

²⁴ Id. at .0106(c)(1) (1989).

²⁵ Id. at .0106(c)(2) (1989).

contamination crossed their compliance boundary.²⁶ Unpermitted facilities were not provided compliance boundaries and were instead required to “submit a plan for eliminating the source of contamination and for restoration” whenever they caused contamination “in excess of the groundwater standard.”²⁷

In 1993, the EMC overhauled the 2L regulations to implement several key changes. First, unpermitted facilities were allowed the possibility, under certain conditions, of remediating groundwater to a level that would not meet the groundwater standard²⁸ or remediating through the “natural processes of degradation and attenuation.”²⁹ Permitted facilities remained obligated to restore “groundwater quality to the level of the standards.”³⁰ Second, unpermitted facilities were required to “take immediate action to eliminate the source or sources of contamination.”³¹ Permitted facilities were not subject to that requirement. Third, the 1993 amendments clarified that only facilities with permits “originally issued after December 30, 1983” were considered permitted facilities; older facilities were “deemed not permitted” for purposes of corrective action even though they had been issued a permit before that date.³²

²⁶ Id. at .0106(c)(2)(B) (1989).

²⁷ Id. at .0106(c)(1) (1989).

²⁸ 15A N.C. ADMIN. CODE 2L .0106(k) (1993). The 1993 version of the 2L Rule from the October 19, 1993 volume of the North Carolina Administrative Code is attached as Attachment 19.

²⁹ Id. at .0106(l) (1993).

³⁰ 15A N.C. ADMIN. CODE 2L .0106(j) (1993).

³¹ Compare 15 N.C. ADMIN. CODE 2L .0106(c)(1) (1989) with 15A N.C. ADMIN. CODE 2L .0106(c)(1) (1993).

³² The 1993 amendments created three criteria which must be met in order for an activity to be a “permitted” activity. These criteria were:

- 1) a permit has been issued pursuant to G.S. 143-215.1;
- 2) the permit was originally issued after December 30, 1983;
- 3) the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity. All other activities shall for the purpose of this Rule be deemed not permitted by the Division and subject to the provisions of subparagraph (c).

See 15A N.C. ADMIN. CODE 2L .0106(e) (1993).

D. Corrective Action Under the Current 2L Rule

The current 2L Rule requires corrective action when contamination causes an “increase in concentration of a substance in excess of the standards.”³³ Corrective action means “eliminating sources of groundwater contamination” or “achieving groundwater quality restoration,” or both.³⁴

The 2L Rule imposes distinct corrective action requirements on permitted and unpermitted facilities.³⁵ An facility is considered “under the authority of a permit” for purposes of corrective action only if (1) “a permit has been issued pursuant to G.S. 143-215.1” for the discharge of waste to waters of the state, (2) “the permit was originally issued after December 30, 1983,” and (3) “the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity.”³⁶

The corrective action requirements for activities “conducted under the authority of a permit” are determined by the geographical extent of the contamination. Corrective action at “individually permitted” facilities depends on a “compliance boundary”³⁷ and a “review boundary” around those facilities.³⁸ When contamination exceeds groundwater standards at or beyond the “review boundary” of a permitted facility, the facility must provide assurances that

³³ 15A N.C. ADMIN. CODE 2L .0106(c) & (d) (2012), see Attachment 1.

³⁴ Id. at .0102(5) (2012).

³⁵ Id. at .0106(c) & (d) (2012).

³⁶ Id. at .0106(e)(1-3) (2012).

³⁷ “Individually permitted” facilities have compliance boundaries established “at the time of permit issuance” and review boundaries located midway between the edge of the waste area and the compliance boundary. 15A N.C. ADMIN. CODE 2L .0107(c) (2012).

³⁸ Compliance boundary is defined as “a 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.” 15A N.C. ADMIN. CODE 2L .0102(3) (2012). Review boundary is defined as “a boundary around a permitted facility, midway between a waste boundary and a compliance boundary at which groundwater monitoring is required.” Id. at .0102(20) (2012).

standards will not be exceeded at the compliance boundary.³⁹ When contamination exceeds groundwater standards at or beyond the permit-designated compliance boundary, the facility must assess the extent of the violation and “submit . . . a plan and proposed schedule for corrective action.”⁴⁰

The requirements for “an activity which has not been permitted,” however, are not geographically limited.⁴¹ Instead, unpermitted facilities must implement corrective action for any “increase in the concentration of a substance in excess of the standard”⁴² When unpermitted sites contaminate groundwater, they must (1) “immediately notify the Division, (2) “take immediate action to eliminate the source or sources of contamination,” (3) submit a report “assessing the cause, significance and extent of the violation,” and (4) “implement an approved corrective action plan for restoration of groundwater quality”⁴³

4. ARGUMENT

A. The EMC’s 2L Rule Requires Pre-1984 Coal Ash Lagoons to Take Corrective Action for Any Contamination of Groundwater in Excess of Standards, Including Contamination Inside a Compliance Boundary.

The EMC’s 2L Rule distinguishes between activity “under the authority of a permit” (“permitted facilities”) and activity “which has not been permitted” (“unpermitted facilities”) for purposes of correcting groundwater contamination. As explained below, the 2L Rule sets specific criteria for determining which facilities are considered “permitted;” some facilities with permits are nonetheless “deemed not permitted” for purposes of corrective action. When a coal

³⁹ Id. at .0106(d)(1) (2012).

⁴⁰ Id. at .0106(d)(2) (2012).

⁴¹ Id. at .0106(c) (2012). Unlike subparagraph (d), subparagraph (c) explicitly lacks any geographical limitation.

⁴² Id. at .0106(c) (2012). Agricultural operations are specifically excluded from this requirement. See id. (“which results in the concentration of a substance in excess of the standard, other than agricultural operations, shall: . . .”).

⁴³ Id. at .0106(c)(1-4) (2012).

ash lagoon qualifies as “permitted” and contaminates groundwater in excess of standards, the facility is not required to take corrective action until contamination crosses its permit-defined compliance boundary. Unpermitted facilities, however, must take corrective action when they contaminate groundwater in excess of standards anywhere – facilities without permits do not have permit-defined compliance boundaries. Because coal ash lagoons that first received a permit prior to December 30, 1983 are “deemed not permitted,” they must, like unpermitted facilities take corrective action when they contaminate groundwater in excess of standards anywhere, whether or not contamination has crossed their compliance boundary.

i. Unpermitted Facilities Must Implement Corrective Action to Address Groundwater Contamination Inside Their Compliance Boundaries.

The EMC’s 2L Rule imposes separate corrective action requirements on a facility operating “under the authority of a permit” and a facility “which has not been permitted.”⁴⁴

⁴⁴ The full text of 15A N.C. ADMIN. CODE 2L .0106(c) and (d) reads:

(c) Any person conducting or controlling an activity which has not been permitted by the Division and which results in an increase in the concentration of a substance in excess of the standard, other than agricultural operations, shall:

- (1) immediately notify the Division of the activity that has resulted in the increase and the contaminant concentration levels;
- (2) take immediate action to eliminate the source or sources of contamination;
- (3) submit a report to the Director assessing the cause, significance and extent of the violation; and
- (4) implement an approved corrective action plan for restoration of groundwater quality 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 schedule proposed by the person submitting the plan. A report shall be made to the Health Director of the county or counties in which the contamination occurs in accordance with the requirements of Rule .0114(a) in this Section.

(d) Any person conducting or controlling an activity which is conducted under the authority of a permit issued by the Division and which results in an increase in concentration of a substance in excess of the standards:

- (1) at or beyond a review boundary, shall demonstrate, through predictive calculations or modeling, that natural site conditions, facility design and operational controls will prevent a violation of standards at the compliance boundary; or submit a plan for alteration of existing site conditions, facility design or operational controls that will prevent a violation at the compliance boundary, and implement that plan upon its approval by the Director, or his designee.

Section .0106 of the 2L Rule governs corrective action and subsections .0106(c) and .0106(d) provide separate corrective action obligations for unpermitted and permitted facilities, respectively.

The corrective action requirements for a permitted facility are defined by its permit-defined compliance boundary.⁴⁵ When contamination exceeds groundwater standards “at or beyond a review boundary,” the facility must provide assurances that the contamination will not cross its compliance boundary.⁴⁶ But permitted facilities are required to (1) “assess” contamination and (2) implement “a plan and proposed schedule for corrective action” only when they contaminate groundwater “at or beyond a compliance boundary.”⁴⁷

In sharp contrast, subsection .0106(c) of the rule, which defines corrective action required from unpermitted facilities, excludes any reference to a review or compliance boundary. Rather, unpermitted facilities are required to take immediate action to eliminate the source or sources of contamination” and, separately, “implement an approved corrective action plan for restoration of groundwater quality” when they cause any “increase in the concentration of a substance in excess of the standard,” without geographic limitation.⁴⁸ Unlike permitted facilities who must implement corrective action only for contamination outside their permit-defined compliance boundaries, unpermitted facilities must implement corrective action when they contaminate groundwater in excess of standards anywhere.

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- (2) at or beyond a compliance boundary, shall assess the cause, significance and extent of the violation of standards and submit the results of the investigation, and a plan and proposed schedule for corrective action to the Director, or his designee. The permittee shall implement the plan as approved by and 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 schedule proposed by the permittee.

⁴⁵ See 15A N.C. ADMIN. CODE 2L .0106(d) (1)-(2) (2012).

⁴⁶ Id. at (d)(1) (2012).

⁴⁷ Id. at (d)(2) (2012) (emphasis added).

⁴⁸ Id. at .0106(c) (2012).

This distinction drawn, for purposes of corrective action, between permitted and unpermitted facilities is consistent with the overall structure and purpose of the 2L Rule. Under the Rule, facilities that do not have permits issued by DENR do not have compliance boundaries, precisely because they do not have permits. The regulatory definition of “compliance boundary” clarifies that the boundary “only applies to facilities which have received a permit issued under the authority of G.S. 143-215.1 or G.S. 130A.”⁴⁹ The 2L Rule establishes compliance boundaries only for facilities that have been “individually permitted.”⁵⁰ Furthermore, the rule is explicit that the compliance boundary is established by DENR “at the time of permit issuance.”⁵¹

Because facilities that do not have permits issued by DENR do not have compliance boundaries, their obligation to take corrective action is not limited by a compliance boundary. Any other reading would produce absurd results – activities undertaken without a permit would never be required to take corrective action because contamination would never cross their nonexistent compliance boundary. Notably, unpermitted activity includes (but is not limited to) illegal activities that are required to obtain a permit but have failed to do so. The 2L Rule cannot be interpreted to exempt illegal activities from taking corrective action to address sources of groundwater contamination.

The unambiguous wording of 2L .0106(c), the contrast between .0106(c) and (d), and the overall structure and purpose of the 2L Rule all command the same conclusion: unpermitted

⁴⁹ 15A N.C. ADMIN. CODE 2L .0102(3) (2012).

⁵⁰ The full text of 15A N.C. ADMIN. CODE 2L .0107(a) and (b) reads:

(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 waste boundary or at the property boundary, whichever is closer to the source.

(b) For disposal systems individually permitted on or after December 30, 1983, a compliance boundary shall be established 250 feet from the waste boundary, or 50 feet within the property boundary, whichever point is closer to the source.

⁵¹ Id. at .0107(c).

facilities must take corrective action when they cause groundwater to exceed standards anywhere, whether or not the contamination has crossed a compliance boundary.

ii. Coal Ash Lagoons That First Received Permits Prior to December 30, 1983, Are “Deemed Not Permitted” for Purposes of Corrective Action.

In addition to the regulatory distinction between permitted and unpermitted facilities discussed above, the 2L Rule further distinguishes, for purposes of corrective action, between two categories of permitted facilities: facilities that first received a permit after December 30, 1983, and facilities that were first permitted prior to that date. The 2L Rule, subsection .0106(e) provides:

(e) For the purposes of Paragraphs (c) and (d) of this Rule, an activity conducted under the authority of a permit issued by the Division, and subject to Paragraph (d) of this Rule, is one for which:

- (1) a permit has been issued pursuant to G.S. 143 215.1;
- (2) the permit was originally issued after December 30, 1983;
- (3) the substance for which a standard has been exceeded outside the compliance boundary has been released to groundwater as a result of the permitted activity;
- (4) all other activities shall for the purpose of this Rule be deemed not permitted by the Division and subject to the provisions of Paragraph (c) of this Rule.⁵²

The rule is explicit that a facility is “deemed not permitted” and subject to the same corrective action requirements as unpermitted facilities unless its permit was “originally issued after December 30, 1983.”⁵³ Because unpermitted facilities must take corrective action to address groundwater contamination inside their compliance boundaries, facilities that are “deemed not permitted” because they received their first permit prior to December 30, 1983 must

⁵² 15A N.C. ADMIN. CODE 2L .0106(e) (2012) (emphasis added).

⁵³ 15A N.C. ADMIN. CODE 2L .0106(e)(2). The requirements of section (e)(1)-(e)(3) are cumulative – a facility is not considered permitted unless it meets all three tests. Subsection (e)(1) references the issuance of “a permit” and subsections (e)(2) and (e)(3) add conditions that “the permit” previously referenced in (e)(1) must have been issued after December 30, 1983 and that the pollution at issue must have been attendant to “the permitted activity.” Furthermore, the alternative reading, that a facility is “permitted” if it meets any of the conditions under (e)(1)-(3) is nonsensical – the requirement under (e)(2) that a permit be issued after December 30, 1983 would be superfluous and subsumed by the broader requirement under (e)(1) that a permit exist.

do the same. As a result, the corrective action obligations of old facilities “deemed not permitted” are not limited by the compliance boundary, even though they are assigned a compliance boundary for other purposes.⁵⁴ “When the language of regulations is clear and unambiguous” they must be given their “plain meaning.”⁵⁵

The plain wording of the 2L Rule reflects the clear intent of the EMC when it adopted 1993 amendments to the Rule. Prior to 1993, the 2L Rule did not define activity “conducted under authority of a permit.”⁵⁶ In 1993, the EMC added a new subsection .0106(e) to the Rule that had only one purpose – to define facilities first permitted prior to December 30, 1983, as “deemed not permitted” for purposes of corrective action.

The cutoff date chosen by the EMC, December 30, 1983, is significant – it is the effective date of the 1983 amendments to the 2L Rule. The 1983 amendments established the first explicit requirement to remediate groundwater contamination.⁵⁷ Significantly, the 1983 amendments also warned for the first time that the EMC would not approve new permits that would degrade groundwater.⁵⁸

Facilities that were first permitted prior to the effective date of the 1983 amendments were not built to modern standards and had no notice, when they obtained their permit and designed their facilities, that they would be required to remediate contamination they caused. In

⁵⁴ For example, facilities “deemed not permitted” are exempted from civil penalties for contamination within their compliance boundary (but remain subject to injunctive relief to enforce corrective action requirements). See 15A N.C. ADMIN. CODE 2L .0107(j). In addition, the 2L Rule restricts construction of drinking water wells and transfer of land within the compliance boundary. See id. at 0107(d) & (e). Furthermore, groundwater within the compliance boundary carries the supplemental “RS” classification, which “serves as a warning” that groundwater “may not be suitable for use as a drinking water.” See id. at .0104(a) & (b).

⁵⁵ See Britt v. N. Carolina Sheriffs’ Educ. & Training Standards Comm’n, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) (quoting Correll v. Division of Social Serv., 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)).

⁵⁶ See 15A N.C. ADMIN. CODE 2L .0106(d). Section .0106(e) was not enacted until 1993. Compare 15 N.C. ADMIN. CODE 2L .0106 (1989) with 15A N.C. ADMIN. CODE 2L .0106 (1993).

⁵⁷ 15 N.C. ADMIN. CODE 2L .0103(c) (1983).

⁵⁸ 15 N.C. ADMIN. CODE 2L .0103(g) (1983).

addition, permits that would allow degradation of groundwater were not prohibited at that time. For those reasons, contamination of groundwater caused by older facilities is more similar to accidental, unpermitted discharges than contamination caused by modern facilities subjected to stricter permitting requirements after December 30, 1983. With respect to unpermitted facilities, the EMC has taken a balanced approach, (1) requiring “immediate action to eliminate sources of contamination”⁵⁹ from outdated facilities with unregulated designs, but also (2) allowing them flexible options to remediate contaminated groundwater.⁶⁰ In 1993, the EMC chose to apply the same balanced approach to older facilities “deemed not permitted” because their permits were first issued prior to December 30, 1983.

iii. DENR Has Failed to Require Pre-1984 Coal Ash Lagoons to Take Corrective Action for Contamination Inside a Compliance Boundary.

Concurrent with renewed national and North Carolina attention on the hazards of coal ash lagoons, the Aquifer Protection Section asked the North Carolina Attorney General for an advisory opinion regarding application of the 2L Rule to pre-1984 coal ash lagoons.

Specifically, DENR asked:

For ash ponds permitted prior to December 30, 1983, and therefore subject to corrective action under .0106(c), where must standards be met for corrective action to be considered complete? At the compliance boundary, or under the entire site?⁶¹

In contravention of the unambiguous text of the 2L Rule and without citation to any authority, the Attorney General’s office erroneously advised that “[s]tandards for facilities considered non-permitted for purposes of 15A N.C. Admin. Code 2L.0106 must be met at the

⁵⁹15A N.C. ADMIN. CODE 2L .0106(c)(2) (2012).

⁶⁰ See 15A N.C. ADMIN. CODE 2L .0106(k) (allowing “a plan without requiring groundwater remediation to the standards”) and 15A N.C. ADMIN. CODE 2L .0106(l) (allowing “a plan based upon natural processes of degradation and attenuation of contaminants”).

⁶¹ See Attorney General Opinion Letter, October 21, 2009, attached as Attachment 15.

compliance boundary.”⁶² As explained above, that interpretation cannot be squared with the plain wording of the 2L Rule, which treats old coal ash lagoons as “deemed not permitted” and subject to corrective action without reference to a compliance boundary.

Relying on the Attorney General’s mistaken reading of the 2L Rule, DENR has not required pre-1984 coal ash lagoons to take corrective action for contamination inside their compliance boundaries. For example, in response to a 2010 report highlighting groundwater contamination around pre-1984 coal ash lagoons at six power plants,⁶³ DENR reported to EPA:

Overall, the levels of data reported are accurate; however, the data reported was from wells located inside the State Compliance Boundary, with the exception of Sutton Steam Plant. (The State Compliance Boundary establishes the location at which groundwater standards must be met; exceedance of the state groundwater standard can be allowed within the compliance boundary as long as the groundwater standard is met at the boundary.)⁶⁴

DENR has documentation of exceedances of groundwater standards inside the compliance boundaries of fourteen coal-fired power plants in North Carolina with coal ash impoundments permitted prior to 1984, without modern construction techniques and permitting standards.⁶⁵ Groundwater inside the compliance boundaries of those facilities exceeds standards

⁶² Id.

⁶³ See DWQ Responses to February 24, 2010 “Out of Control” Report, attached as Attachment 42. Specifically, the report named the Sutton Steam Plant, Asheville Steam Electric Plant, Lee Steam Plant, Cape Fear Steam Plant, and Belews Creek Steam Plant.

⁶⁴ Id. (emphasis added)

⁶⁵ See Progress Energy, Groundwater Monitoring Report - Asheville Steam Power Plant, January 2010 – July 2012, attached as Attachment 27; Progress Energy, Groundwater Monitoring Report - Sutton Steam Power Plant, January 2010 – July 2012, attached as Attachment 28; Progress Energy, Groundwater Monitoring Report - Lee Steam Power Plant, January 2010 – July 2012, attached as Attachment 29; Progress Energy, Groundwater Monitoring Report – Cape Fear Steam Power Plant, January 2010 – July 2012, attached as Attachment 30; Progress Energy, Groundwater Monitoring Report - Roxboro Steam Power Plant, January 2010 – July 2012, attached as Attachment 31; Progress Energy, Groundwater Monitoring Report - Mayo Steam Power Plant, January 2010 – July 2012, attached as Attachment 32; Progress Energy, Groundwater Monitoring Report - Weatherspoon Steam Power Plant, January 2010 – July 2012, attached as Attachment 33; Duke Energy, Groundwater Monitoring Report - Marshall Steam Power Plant, January 2010 – July 2012, attached as Attachment 34; Duke Energy, Groundwater Monitoring Report - Cliffside Steam Power Plant, January 2010 – July 2012, attached as Attachment 35; Duke Energy, Groundwater Monitoring Report – Belews Creek Steam Power Plant, January 2010 – July 2012, attached as Attachment 36 Duke Energy, Groundwater Monitoring Report – Dan River Steam Power Plant, January 2010 – July 2012, attached as Attachment 37; Duke Energy, Groundwater Monitoring Report - Buck Steam Power Plant,

for multiple contaminants including arsenic, thallium, boron, sulfate, nickel, iron, chromium, manganese, and selenium.⁶⁶ Despite these exceedances, DENR has not required corrective action for contamination inside the compliance boundary of these plants, instead it has advised Duke Energy and Progress Energy that they are no longer required to monitor groundwater inside their compliance boundaries.⁶⁷

At the Asheville Steam Electric Plant, for example, groundwater exceeds standards for multiple contaminants inside the compliance boundary.⁶⁸ In particular, thallium exceeds groundwater standards at monitoring well CB-3, which was, until recently, located on the compliance boundary for the facility.⁶⁹ DENR has not required corrective action, however, because Progress Energy purchased neighboring property, which relocated the compliance boundary such that well CB-3 is now inside the boundary.⁷⁰ Similarly, at Progress Energy's Sutton Plant, adjacent to the Cape Fear River, monitoring well MW-2 has documented arsenic at levels as much as 26 times the groundwater standard.⁷¹ DENR has not required corrective action for arsenic, however, because the well is inside the compliance boundary for the plant.⁷²

January 2010 – July 2012, attached as Attachment 38; Duke Energy, Groundwater Monitoring Report - Riverbend Steam Power Plant, January 2010 – July 2012, attached as Attachment 39; Duke Energy, Groundwater Monitoring Report - Allen Steam Power Plant, January 2010 – July 2012, attached as Attachment 40. Attachments 27 – 40 obtained from public records request to NC DENR.

⁶⁶ Id.

⁶⁷ See Letter from DENR to John Toepfer (January 11, 2010), attached as Attachment 21; Letter from DENR to Brenda Brickhouse (December 18, 2009), attached as Attachment 22.

⁶⁸ See Progress Energy, Groundwater Monitoring Report - Asheville Steam Power Plant, January 2010–July 2012, attached as Attachment 27.

⁶⁹ See Letter to Landon Davidson (July 9, 2012), attached as Attachment 22; Letter to Garry A. Whisnant (August 22, 2012), attached as Attachment 23.

⁷⁰ Id.

⁷¹ See Progress Energy, Groundwater Monitoring Report - Sutton Steam Power Plant, January 2010 – July 2012, attached as Attachment 28.

⁷² Sutton Plant Ash Pond Groundwater Monitoring program (Map), attached as Attachment 41.

The interpretation of the 2L Rule adopted by DENR effectively reads out of the rule subsection .0106(e), which requires pre-1984 facilities to comply with the same corrective action requirements imposed on unpermitted facilities. “In the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute.”⁷³ The same rule applies when construing the language of regulations.⁷⁴

The 2L Rule provides DENR with authority to address contamination within the compliance boundary of pre-1984 coal ash lagoons, and a mandate to do so. Because DENR is operating under the mistaken conclusion that it lacks that authority, DENR and the public need a declaration by the EMC to clarify the correct interpretation of the 2L Rule.

B. Unpermitted Facilities Must “Take Immediate Action” to Eliminate Sources of Contamination, Prior to Implementing a Plan to Restore Contaminated Groundwater.

When an unpermitted facility contaminates groundwater, the corrective action provisions of the 2L Rule require “immediate action to eliminate the source or sources of contamination,” in advance of assessing the contamination or submitting a plan to restore groundwater quality. Because pre-1984 coal ash lagoons are “deemed not permitted” for purposes of corrective action, they too are required to take immediate action to eliminate sources of contamination. Again, despite the clear mandate of the 2L Rule, DENR has not required any coal ash lagoon in the state to take action to eliminate sources of contamination. A declaration by the EMC is required to clarify the obligation of pre-1984 facilities to take immediate action to stop ongoing contamination of groundwater from old, unlined coal ash lagoons.

⁷³ Lafayette Transp. Serv., Inc. v. Robeson County, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973).

⁷⁴ Kyle v. Holston Group, 188 N.C. App. 686, 692, 656 S.E.2d 667, 671 (2008).

i. The EMC Amended the 2L Rule in 1993 Specifically to Require Unpermitted and Pre-1984 Facilities to Take Immediate Action to Stop Ongoing Contamination of Groundwater.

Unpermitted facilities, like their permitted counterparts, are required to “implement an approved corrective action plan” when they contaminate groundwater in excess of standards.⁷⁵ But unpermitted facilities must separately “take immediate action to eliminate the source or sources of contamination.”⁷⁶ This requirement ensures that unmanaged and unpermitted sources of contamination do not continue to degrade groundwater quality during the protracted process of developing, approving and implementing a corrective action plan for restoration of groundwater already contaminated by those sources.

The 2L Rule is unambiguous that the requirement for unpermitted facilities to “take immediate action to eliminate the source or sources of contamination” is separate from a corrective action plan for restoring the groundwater quality. The obligation to eliminate sources of contamination through “immediate action” is enumerated separately from the general mandate for unpermitted facilities to assess contamination and implement a corrective action plan to remediate groundwater.⁷⁷

The obligation to “take immediate action” is the result of an amendment of the 2L Rule by the EMC with the specific purpose of prioritizing control of unpermitted sources of contamination. Earlier versions of the 2L Rule incorporated the requirement to eliminate unpermitted sources of contamination into the process for proposing and implementing a corrective action plan. The 1989 version of the 2L Rule required unpermitted facilities to propose a “corrective action plan and schedule for eliminating the source of contamination and

⁷⁵ See 15A N.C. ADMIN. CODE 2L .0106(c)(4).

⁷⁶ Id. at .0106(c)(2) (emphasis added).

⁷⁷ Id. at .0106(c)(2) and (4).

for restoration of groundwater quality.”⁷⁸ The rule also required DENR to “consider any reasonable schedule” proposed for that plan.⁷⁹

The EMC amended the 2L Rule in 1993 to accelerate the mandate to eliminate sources of contamination. The 1993 amendments deleted the requirement to implement a “plan and schedule” for “eliminating the source of contamination” and substituted a new, separately enumerated obligation, to “take immediate action to eliminate the source or sources of contamination.”⁸⁰ The 1993 amendment still required unpermitted facilities to implement a corrective action plan, but the plan only addressed “restoration of groundwater quality” and no longer dealt with eliminating sources that contaminated the groundwater.⁸¹ As a result of the 1993 amendments, sources of contamination are no longer required to be addressed pursuant to a “reasonable schedule,” but instead must be eliminated “immediately.”⁸²

By contrast, the 1993 amendments did not accelerate the timing for permitted facilities to address sources of contamination. Permitted facilities continue to follow the pre-1993 procedure: first they assess, then they propose a plan and schedule that addresses both eliminating of sources of contamination and restoring contaminated groundwater pursuant to a “reasonable schedule.”⁸³

As explained above, the accelerated timetable for eliminating unpermitted sources of contamination reflects a balance struck by the EMC in its 1993 amendments. Unpermitted

⁷⁸ 15 N.C. ADMIN. CODE 2L .0106(c)(1) (1989) (emphasis added), Attachment 18.

⁷⁹ Id.

⁸⁰ Compare 15 N.C. ADMIN. CODE 2L .0106(c)(1) (1989), Attachment 18, with 15A N.C. ADMIN. CODE 2L .0106(c)(1-4) (1993), Attachment 19.

⁸¹ See 15A N.C. ADMIN. CODE 2L .0106(c)(4) (1993), Attachment 19. The corrective action plan required “restoration of groundwater quality in accordance with a schedule established by the Director, or his designee.” Id.

⁸² Compare 15 N.C. ADMIN. CODE 2L .0106(c)(1) (1989), Attachment 18, with 15A N.C. ADMIN. CODE 2L .0106(c)(2) (1993), Attachment 19.

⁸³ Compare 15 N.C. ADMIN. CODE 2L .0106(c)(2)(B) (1989), Attachment 18, with 15A N.C. ADMIN. CODE 2L .0106(d)(2) (1993), Attachment 19.

activities are allowed flexible options for restoring contaminated groundwater⁸⁴ but are also required to take “immediate action” to eliminate unpermitted sources of ongoing contamination. Because pre-1984 coal ash lagoons are “deemed not permitted” for purposes of corrective action, they too must “take immediate action” to eliminate sources of contamination.⁸⁵

ii. DENR Has Failed to Require Pre-1984 Coal Ash Lagoons to Take Immediate Action to Eliminate Sources of Contamination.

Fourteen North Carolina coal-fired power plants operate pre-1984 coal ash lagoons that have contaminated groundwater in excess of standards.⁸⁶ Nonetheless, DENR has not required any plant to “take immediate action” to stop sources of ongoing contamination. Instead, DENR has initiated a protracted process for assessing contamination and, after assessment, negotiating corrective action plans for future action.

DENR’s failure to require “immediate action” from these facilities is based in part on the Attorney General’s advisory letter which mistakenly conflated the requirement to eliminate sources of contamination with the separate requirement to restore the contaminated groundwater. DENR asked the Attorney General for an interpretation of the requirement for unpermitted facilities to “take immediate action” to control the source of pollution. DENR asked: “Is ‘eliminate the source’ limited to physical removal of the ash pond, or can we take this more broadly, to mean any action that permanently stops further leaching of contamination to the groundwater?”⁸⁷

In response, the Attorney General’s office noted that unpermitted facilities are allowed flexible options for restoring contaminated groundwater and concluded that, as a result, “the

⁸⁴ See 15A N.C. ADMIN. CODE 2L .0106(k) & (l) (1993), Attachment 19.

⁸⁵ 15A N.C. ADMIN. CODE 2L .0106(c)(2) (2012), Attachment 1.

⁸⁶ See Power plant monitoring reports, supra note 65.

⁸⁷ See Attorney General Opinion Letter, October 21, 2009, attached as Attachment 15.

facility has options other than physical removal of the ash pond to comply” with the rule.⁸⁸ The opinion erroneously advised that “the purpose of the corrective action is to correct the standards violation by whatever measures are necessary and feasible, not just by removing the ash pond, but by requiring any action that restores the quality of the groundwater.”⁸⁹

As explained above, the EMC’s 1993 amendments deliberately separated “eliminate[ing] the source” of contamination from the compliance plan process for restoring contaminated groundwater, with respect to unpermitted facilities and facilities “deemed not permitted.” The 1993 amendments to the 2L Rule embraced a balance between allowing outdated facilities more flexible options for restoration of contaminated groundwater, on the one hand, and requiring “immediate action” to stop ongoing sources of contamination, on the other. The Rule unambiguously requires facilities “deemed not permitted” to take “immediate” action to control sources of contamination in advance of the longer process for assessing contamination and remediating contaminated groundwater.

As a result, DENR and the public need a declaration by the EMC to clarify the correct interpretation of the 2L Rule.

C. Inactive and Closed Coal Ash Lagoons Remain Subject to Corrective Action as Unpermitted Facilities if They Contaminate Groundwater in Excess of Standards.

Finally, DENR has misinterpreted its groundwater regulations to exclude coal ash lagoons that are no longer active but are contaminating groundwater. The 2L Rule applies to “all activities or actions, intentional or accidental, which contribute to the degradation of groundwater quality, regardless of any permit issued by a governmental agency.”⁹⁰ There is no

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ 15A N.C. ADMIN. CODE 2L .0101(b) (2012).

category of activity outside the jurisdiction of the groundwater regulations. An activity that contaminates groundwater is either “permitted” or “unpermitted” for purposes of corrective action under the 2L Rule, there is no third option.⁹¹ As a result, all coal ash lagoons, whether actively being used for disposal of coal ash or closed, are subject to the corrective action requirements of the 2L Rule, as either a permitted or an unpermitted activity.

Recently, DENR has struggled to define the regulatory treatment of coal ash lagoons after they are retired from service as wastewater treatment facilities. DENR staff have opined that a closed coal ash lagoon without an active NPDES permit can be reauthorized by DWM under G.S. 130A as a solid waste disposal site.⁹² DENR staff have also concluded that in such a circumstance, the facility be required to meet groundwater standards at, but not inside, a compliance boundary for the facility.⁹³ That interpretation assumes that a closed coal ash lagoon is considered “under the authority of a permit” for purposes of corrective action under the 2L Rule.⁹⁴

The 2L Rule is clear, however, that inactive coal ash lagoons remain subject to corrective action and are “deemed not permitted.” After a coal ash lagoon stops discharging wastewater and relinquishes its NPDES permit, it no longer has a permit “issued pursuant to G.S. 143-215.1” and is therefore subject to corrective action as an unpermitted facility if it contaminates groundwater in excess of standards. Furthermore, a pre-1984 coal ash lagoon that was “deemed not

⁹¹ “[B]ona fide purchaser[s] of property which contains a source of groundwater contamination, who purchased such property without knowledge or a reasonable basis for knowing that groundwater contamination had occurred” are the only parties specifically exempted. See 15A N.C. ADMIN. CODE 2L .0101(b) (2012).

⁹² See DENR Internal Memorandum: “Closure Of Settling Ponds Related To Solid Waste Coal Combustion Product Landfills,” attached as Attachment 24.

⁹³ Id.

⁹⁴ 15A N.C. ADMIN. CODE 2L .0106(e) (2012).

permitted” for purposes of corrective action when it was active will continue to be “deemed not permitted” after it closes.

Even if the site of a closed coal ash lagoon is subsequently issued a permit from DWM as a solid waste disposal site, it is still “deemed not permitted” for purposes of corrective action under the 2L Rule. A permit from DWM under N.C. General Statutes Chapter 130A does not render a site “permitted” for purposes of corrective action because it is not a permit “issued pursuant to G.S. 143-215.1.”

As a result, even after they have been closed and no longer operate under active NPDES permits, pre-1984 coal ash lagoons must (1) take corrective action when they contaminate groundwater in excess of standards inside their compliance boundary and (2) take immediate action to eliminate sources of contamination.

Progress Energy has recently announced the retirement of its coal-fired H.F. Lee power plant near Goldsboro⁹⁵ and the conversion of its L.V. Sutton Plant near Wilmington to a natural gas plant in 2014.⁹⁶ The cessation of coal combustion at these and other facilities highlights the need for clear regulatory treatment of inactive coal ash lagoons that are no longer authorized by active NPDES permits.

5. CONCLUSION

For the reasons stated herein, Petitioners respectfully request that the EMC issue a declaratory ruling clarifying the correct application of its 2L Rule to coal ash lagoons in North Carolina.

⁹⁵ Progress Energy Carolinas press release (September 14, 2012), attached as Attachment 25.

⁹⁶ Progress Energy Carolinas website (October 10, 2012), attached as Attachment 26.

6. PROPOSED RULING

Pursuant to N.C. Gen. Stat. § 150B-4(a), Cape Fear River Watch, Sierra Club, Waterkeeper Alliance and Western North Carolina Alliance respectfully request that the Commission issue a ruling declaring that:

- a) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take corrective action pursuant to 15A N.C. Admin. Code 2L .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;
- b) Operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take immediate action to eliminate sources of contamination that cause a concentration of a substance in excess of groundwater quality standards, in advance of their separate obligation to propose and implement a corrective action plan for the restoration of groundwater quality contaminated by those sources; and
- a) Operators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A N.C. Admin. Code 2L.0106(c) when their activity results in an increase in the concentration of a substance in excess of groundwater quality standards.

7. REQUEST FOR ORAL ARGUMENT

Petitioners request the opportunity for oral argument before the Commission. The application of the 2L Rule to coal ash lagoons in North Carolina involves complex issues regarding public health, natural resources, and natural beauty that warrant a hearing.

Respectfully submitted this 10th day of October 2012.



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