



North Carolina Department of Environment and Natural Resources

MEMORANDUM



March 25, 2014

From: Mitch Gillespie
Assistant Secretary for the Environment

To: Mary Lucasse, Esq.
Special Deputy Attorney General, N.C Department of Justice
Counsel for North Carolina Environmental Management Commission

Re: Impact of Order Issued in the Matter of 2012 NCEMC Declaratory Ruling

On March 6, 2014 Superior Court Judge Paul Ridgeway issued an Order finding that a declaratory ruling issued in 2012 by the Environmental Management Commission ("EMC") was, in part, in error. Specifically, the Order states that the EMC's "Findings and Conclusions" related to the interpretation of the State's groundwater regulation (15A N.C. Admin. Code 2L .0101 et seq. ("2L Rule")) were in error.

29. Here, however, the Court concludes that it is plainly erroneous and inconsistent with the regulation for the EMC to interpret the 2L Rule to require or permit anything other than "immediate action to eliminate the source or sources of contamination" when a non-permitted person conducts an activity resulting in an increase in the concentration of a substance in excess of the standard.

30. Therefore, with respect to the Petitioner's Second Request, wherein the Petitioners sought a declaration that "[o]perators 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 standard, in advance of their separate obligation to propose and implement a corrective action plan for restoration or groundwater plan for the restoration of groundwater quality contaminated by those sources," the Court finds and concludes that the EMC, in its Declaratory Ruling, erred as a matter of law to the extent that it denied this request, and therefore, the Declaratory Ruling on this issue is REVERSED.

Order on Petition for Judicial Review (Cape Fear River Watch v. North Carolina Environmental Management Commission, 13 CVS 00093).

NCDENR has identified two Divisions that will be impacted by this decision: the Division of Water Resources (DWR) and the Division of Waste Management (DWM). However, the extent of the impact cannot be fully accessed until there is further clarification of the operative phrase "immediate action to eliminate the source or sources of contamination." 2L .0106(c)(2).

Division of Water Resources

DWR has identified facilities that are considered "not permitted" under 2L .0106 and therefore could be affected by the Judge Ridgeway decision if a violation of a standard is found at or beyond the compliance boundary.

Discharge		Number of Potentially Affected Sources
	Domestic Discharge < 1MGD – Treatment systems for private and public facilities that treat less than 1MGD of domestic waste (e.g. wastewater from schools, residential developments, churches, and other small facilities)	226
	Industrial & Commercial Wastewater – Treatment systems for private and public facilities associated with commercial and industrial operations. Also includes institutional facilities that treat wastewaters (e.g. laundries, food service)	148
	Municipal Wastewater Treatment Plants – POTWs greater than >1 MGD	226
	Water Plants and Conditioning Discharge – systems that treat water from ground/surface in order to produce water suitable for human consumption or industrial use	45
Non-Discharge		
	Wastewater Irrigation – treated wastewater applied to land (includes single family residence)	41
	Land Application – Application of residuals left over from the wastewater treatment (e.g. municipal wastewater lease land from farmers where residuals are applied)	11
	Reclaimed Water – wastewater cleaned to higher level that required for wastewater irrigation and then used for cooling water, toilet flush water, etc.	3

Division of Waste Management

Division of Waste Management Programs	Number of Potentially Affected
Non-UST Petroleum Releases – open incidents regulated by 2L.0106(c). Current requirement is to remove free product and highly contaminated soil. Source material found during assessment is addressed when corrective action plan is developed. However, this assessment phase may be inconsistent with Judge Ridgeway's Order if immediate action is interpreted to mean immediate removal. Note that current staffing only allows 329 of the 2020 open incidents to be worked on and therefore if immediate action means immediate removal the compliance status of these sites is not known.	2020
Solid Waste Permits – because these permits are issued under N.C. Gen Stat. 130A, not 143-215.1 – these sites would not be considered "not permitted" and therefore it does not appear they are affected by Judge Ridgeway's Order.	n/a
Hazardous Waste Permits – Unaffected because 2L regulations are only Alternative Concentration Limited for purposes of response required under hazardous waste rules.	n/a
Petroleum Contaminate Soil Permits – Permits issued post 1983 and groundwater regulated at	n/a

compliance boundary. No impact expected	
UST Petroleum Releases – Remediation under 2L .0400 (Risk-Based Assessment and Corrective Action) and not subject to 2L .0600. No impact expected.	n/a
UST Hazardous Substance Releases – Immediate removal of free product and highly contaminated soil is standard response for these incidents. Limited affect except that there may be delay in removing source not found during initial removal.	Limited
Inactive Hazardous Sites – Remediated under N.C. Gen Stat 130A. 2L is used for groundwater standards.	Limited
Landfills Pre-1984 – Regulated under N.C. Gen Stat. 130A (not 143-215.1) these sites would not be considered “not permitted” and therefore it does not appear they are affected by Judge Ridgeway’s Order.	n/a
Dry Cleaners – Regulated under risk-based cleanup in accordance with N.C. Gen. Stat. 143-215.104 and therefore not affected.	n/a
CERCLA w/ Superfund support – clean up follows National Contingency Plan	n/a

In addition to the impacts described above, on March 13, 2014, Duke Energy submitted a “Motion for Stay During Appeal Period” asking the Court to “confirm that the status quo [2012 EMC decision] will be maintained during the time within which Duke Energy or the North Carolina Environmental Management Commission (“EMC”) has to determine whether to appeal the Order.” NCDENR took no position on this motion. The Court denied the motion. The Motion included a summary of the impact Duke Energy believes the Ridgeway decision will have on coal ash disposal. See Motion Paragraph 6, (pages 3-4). The Motion also referenced letters contained in the Record of the 2012 Declaratory Ruling that were submitted by industry groups expressing concern about the impact on their members. See Motion Paragraph 7, (page4). NCDENR takes no position with respect to any statements contained in the Motion but is attaching the Motion as information the EMC may find to be relevant to this matter.

If you have any question regarding this information please contact me at 919-707-8619 or mitch.gillespie@ncdenr.gov



Enclosure: Duke Energy Carolina’s Motion for Stay During Appeal Period, March 13, 2014

cc: John C. Evans
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