STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 00093

CAPE FEAR RIVER WATCH, SIERRA CLUB, WATERKEEPER ALLIANCE and WESTERN NORTH CAROLINA ALLIANCE,	)	
Petitioners	)	
v.	)	**ORDER ON PETITION FOR JUDICIAL REVIEW**
NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION,	)	
Respondent	)	
DUKE ENERGY CAROLINAS, LLC and DUKE ENERGY PROGRESS, INC.,	)	
Intervenors	)	

THIS MATTER comes before the Court upon the Petition of Cape Fear River Watch, Sierra Club, Waterkeeper Alliance and Western North Carolina Alliance ("the Petitioners") seeking judicial review of a declaratory ruling issued by the North Carolina Environmental Management Commission ("EMC"). Petitioners contend that the EMC misconstrued North Carolina's groundwater protection rule, 15A N.C. Admin. Code 2L .0101 *et seq.* (commonly referred to as "the 2L Rule"), as it applies to industrial wastewater ponds that store coal ash ("coal ash lagoons" or "coal ash ponds").

Procedural History and Factual Context

The declaratory ruling that is the subject of this judicial review was issued by the EMC in response to a request of the Petitioners filed October 10, 2012, wherein the Petitioners requested a ruling clarifying the application of the EMC's groundwater protection rules to coal ash lagoons that contaminate groundwater in excess of water quality standards. Groundwater contamination

is governed by the EMC's 2L Rule, which establishes groundwater standards and procedures for "corrective action."

In connection with the request for a declaratory ruling, Petitioners and the North Carolina Department of Environment and Natural Resources ("DENR") agreed upon certain facts that framed the issues before the EMC and now frame the issues for the Court. Petitioners and DENR agreed, among other things, that fourteen coal-fired power plants in North Carolina operate unlined coal ash ponds for treatment of coal combustion residue produced in the generation of electricity.[1] All of these power plants were originally issued National Pollutant Discharge Elimination System ("NPDES") permits by DENR prior to December 30, 1983.[2]

In December 2009, DENR requested that Progress Energy and Duke Energy, the permittees of the coal ash lagoon sites, install groundwater monitoring wells at the compliance boundaries for all of the fourteen facilities.[3] A "compliance boundary" is a boundary around a disposal system at and beyond which groundwater quality standards may not be exceeded.[4] Prior to that date, Progress Energy and Duke Energy had voluntarily installed monitoring wells within the compliance boundary, but DENR found those wells were not suitable for determining compliance at the compliance boundary.[5]

Groundwater samples taken from monitoring wells located both inside and at the compliance boundary indicated the presence of some constituents in excess of the relevant standards established for them.[6] For example, each groundwater sample reported to DENR from monitoring well CB-3 at the Asheville Steam Plant in 2010, 2011 and 2012 shows that the

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[1] *Request for Declaratory Ruling Factual Stipulations* (hereinafter "*Stipulations*") ¶ 1 (Record pp. 506-512).
[2] *Stipulations* ¶ 2.
[3] *Stipulations* ¶ 3.
[4] 15A NCAC 02L .0102. The distance of a compliance boundary from the disposal system is determined by reference to 15A NCAC 02L .0107.
[5] *Stipulations* ¶¶ 3-4
[6] *Stipulations* ¶¶ 5-8.

constituent thallium exceeded groundwater standards.[7] Thallium is a substance associated with coal ash waste, and was not detectable in control samples taken from a well that DENR considers the "background" well at the site.[8] Monitoring well CB-3 was located on the compliance boundary of the facility.[9] Groundwater monitoring wells inside the compliance boundary of the Asheville Plant detected multiple constituents in excess of groundwater standards.[10] DENR and the Petitioners stipulated that groundwater samples taken from monitoring wells at all fourteen facilities indicate the presence of some constituents in excess of the relevant groundwater standards established for them.[11] These constituents include: arsenic, thallium, boron, sulfate, nickel, iron, chromium, manganese and selenium.[12]

In the Petitioners' Request for a Declaratory Ruling to the EMC, Petitioners requested clarification of certain provisions of the EMC's 2L Rule, and in particular, those portions of the 2L Rule that require corrective action when groundwater quality has been degraded. The Petitioners requested that the EMC's 2L Rule be clarified so as to require the following:

> 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

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[7] *Stipulations* ¶ 7.
[8] *Stipulations* ¶ 7.
[9] *Stipulations* ¶ 7. On July 9, 2012, Progress Energy informed DENR that it had purchased additional property which resulted in a slight shift of the compliance boundary for the Asheville Plant and that CB-3 was no longer on the newly defined compliance boundary. A replacement groundwater monitoring well, CB-3R, was install a short distance away from CB-3. (Record pp. 197-199).
[10] *Stipulations* ¶ 7.
[11] *Stipulations* ¶ 5.
[12] *Stipulations* ¶ 5.

c) Operators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A NC. Admin. Code 2L .01016(c) when they cause an increase in the concentration of a substance in excess of groundwater quality standards.

The EMC, in its Declaratory Ruling issued December 18, 2012, disagreed with the Petitioners on their first and second requested clarifications.[13] The EMC did not directly address the third requested clarification. The Petitioners timely filed notice of a Petition for Judicial Review to the Superior Court, and this Court, having considered the arguments of counsel and all matters of record, finds and concludes as follows.

Standing and Jurisdiction

1. The Court finds and concludes that the Petitioners have standing to bring this Petition for Judicial Review, that all parties are property joined, and that the Court has jurisdiction over this matter.

Standard of Review

2. Judicial review of an administrative agency's declaratory ruling is governed by Article 4 of Chapter 150B. *High Rock Lake Ass'n v. N.C. Envtl. Mgt. Comm'n,* 51 N.C. App. 275 (1981). As such, when a petitioner alleges that an agency's decision is based upon an error of law, a *de novo* review is required. *De novo* review requires this court "to consider a question anew, as if not considered or decided by the agency . . . [and] . . . [t]he court may 'freely substitute its own judgment for that of the agency.'" *Friends of Hatteras Island v. Coastal Resources Comm.*, 117 N.C. App. 556, 567 (1995).

3. When a petitioner alleges that an agency's decision, findings of fact, or conclusions of law are unsupported by substantial admissible evidence or arbitrary or capricious,

[13] Record p. 868-880.

the "whole record" test is applied. *Overcash v. N.C. Dep't of Env't & Natural Res.*, 179 N.C. App. 697 (2006). Under whole record review, "a court must examine all the record evidence – that which detracts from the agency's findings and conclusions as well as that which tends to support them – to determine whether there is substantial evidence to justify the agency's decision." *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 659 (2004).

4. Petitioners, in their Petition for Judicial Review, assert that the EMC's Declaratory Ruling contains errors of law, which are identified in Sections I, II and III of the Petitioner's Brief submitted March 11, 2013 in support of its Petition for Judicial Review. To these assignments of error, the Court applies the *de novo* standard of review. Petitioners also assert, in their Brief, Section IV, that the EMC's ruling was, in part, arbitrary and capricious and unsupported by substantial evidence. As to this assignment of error, the Court applies the whole record standard of review.

Assignments of Error

Issue I – Compliance Boundaries

5. Petitioners, in their Request for a Declaratory Ruling to the EMC, first asked the EMC to interpret the 2L Rule so as to require that "[o]perators 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, <u>whether or not groundwater quality standards have been exceeded at or beyond a compliance boundary</u> around the lagoon." [Emphasis added].

6. In its Declaratory Ruling, the EMC, citing 15A NCAC 02L .0106(e), found that permittees who were issued their permits prior to December 30, 1983 are "deemed unpermitted." [Declaratory Ruling, ¶ 16]. Because each of the fourteen coal plants at issue in this Petition obtained their NPDES permits prior to December 30, 1983, each is deemed, as a matter of law, to be "unpermitted" for the purposes of the application of the 2L Rule. [Record, p. 506, 512].

7. Petitioners urged the EMC, and now the Court, to declare that because the fourteen coal plants were deemed unpermitted, those portions of the 2L Rule that established a compliance boundary were inapplicable because, the Petitioners argued, compliance boundaries are only established for "permitted" facilities. Hence, Petitioners urged, corrective action should be required when activity at any of the fourteen coal plants results in an increase in the concentration of a substance in excess of groundwater quality standards, regardless of whether detected inside or outside of the compliance boundary.

8. In its Declaratory Ruling, the EMC disagreed, and found instead that "for purposes of corrective action as provided in 15A NCAC 2L .0106(c), coal ash ponds permitted . . . prior to December 30, 1983, have compliance boundaries . . . even though the facilities are deemed unpermitted under 15A NCAC 2L .0106(e)(4)" and that "[o]perators 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." [Record p. 876].

9. While Petitioners' appeal of this ruling was pending before the Superior Court, the North Carolina General Assembly enacted Session Law 2013-413, entitled "*An Act to Improve and Streamline the Regulatory Process in Order to Stimulate Job Creation, to Eliminate Unnecessary Regulation, to Make Other Various Statutory Changes and to Amend Certain*

Environmental and Natural Resources Laws." This Session Law was signed by the Governor and became law, effective immediately, on August 23, 2013.

10. Included in Session Law 2013-413's provisions were amendments to N.C. Gen. Stat. § 143-215.1 [statutory authority for the EMC's 2L Rule], which, first, clarified that "nothing in this subsection shall be interpreted to require a revision to an existing compliance boundary previously approved by rule or permit" and second, that the EMC shall require corrective action within a compliance boundary only when certain enumerated conditions are present, such as, e.g., an imminent hazard or a violation of any standard occurring in an aquifer. [Emphasis added].

11. All of the parties to this Petition for Judicial Review have acknowledged that this newly-enacted legislation has rendered moot the Petitioners' first request in its Request for a Declaratory Ruling. [*See, Memoranda of Supplemental Authority* filed by Petitioners (August 27, 2014), Respondent DENR (filed August 30, 2014) and Respondent-Intervenors (filed August 26, 2014)].

12. The Court likewise concludes that, as a result of superseding legislation, the Petitioner's first request is moot, and therefore the relief sought by the Petitioner as to this request is DENIED.

Issue II – Immediate Action to Eliminate Sources of Contamination

13. Petitioners next requested the EMC to declare 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 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." [Emphasis added].

14. The EMC, in its Declaratory Ruling, did not address this issue in the decretal portion of its ruling. It did, however, in the "Findings and Conclusions" of the Commission, include three paragraphs that appear to disagree with the request of the Petitioners. The EMC found and concluded that:

> [c]orrective 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). [Record, p. 876 at ¶ 24].

The Commission further found and concluded that:

> The corrective action requirement 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. [Record p. 874 at ¶ 17].

Further, the Commission found and concluded that:

> The specific corrective actions enumerated in 15A NCAC 2L .0106(f)(1) through (4) that are required to be undertaken, including a site assessment and a corrective action plan for the abatement, containment or control of migration of any contaminants, require a reasonable amount of time to accomplish. The "immediate action" contemplated by 15A NCAC 2L .0106(c)(2) is action appropriate to the circumstances evaluated in the context of the 2L Groundwater Rules. [Record p. 875 at ¶ 18].

15. Whereas Session Law 2013-413, as discussed above, resolved the issue of whether corrective action must be taken when an increase in a substance in excess of groundwater quality standards is detected *within* a compliance boundary of an unpermitted facility, Session Law 2013-413 does not alter the corrective action that must be taken by an unpermitted facility when a substance in excess of standards is noted *at or beyond* the

compliance boundary. Therefore, this second issue, as it relates to corrective action triggered by conditions at or beyond the compliance boundary, is not moot and remains justiciable.

16. Administrative Rule 15A NCAC 02L .0106 establishes the corrective actions that must be taken where groundwater quality has been degraded, and distinguishes between corrective actions that must be taken at sites that are not permitted, and sites that are permitted. Subsection (c) of § .0106 applies to "[a]ny 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." [Emphasis added]. Corrective actions that are required of persons conducting an activity *under the authority of a permit* are set out in Subsection (d) of § .0106.

17. For the purposes of determining whether an activity is conducted under the authority of a permit or not, 15A NCAC 02L .0106(e) deems any activity permitted prior to December 30, 1983 to be "not permitted." All of the fourteen coal plants referenced in the Petitioners' Request for Declaratory Ruling obtained their permits prior to December 30, 1983, and therefore all are deemed to be "not permitted." [*See,* 15A NCAC 02L .0106(e) and Declaratory Ruling, Record p. 874 at ¶ 16.]

18. According to § .0106(c), when an activity that is not permitted results in an increase of the concentration of a substance in excess of the standard, the person controlling the activity must:

> (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 the 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. [Emphasis added].

19. This itemization of obligations, as set forth in § .0106(c) is clear and unambiguous.

20. By their plain wording, the first two requirements under § .0106(c) compel immediate action. *Id.* at .0106(c)(1) and (2).

21. By contrast, the requirements to submit a site assessment and to a submit corrective action plan for restoration of groundwater quality are not required to be "immediate," but rather, in the case of the corrective action plan, is permitted to follow a "reasonable schedule." [*Compare* 15A NCAC 2L .0106(c)(3) and (4) with .0106(c)(2)].

22. Nothing in the 2L Rule suggests that the requirement for "immediate" action means anything other than its customary definition. Although requirements for assessing contamination and implementing corrective action plans to restore water quality are elaborated by other sections of the 2L Rule [*See, e.g.* §§ .0106(g) – (m)], nowhere does the 2L Rule lessen or ameliorate the requirement of § .0106(c)(2) to take "immediate action" to eliminate the source or sources of contamination.

23. The separately enumerated obligations for facilities under § .0106(c), namely unpermitted facilities and facilities deemed not permitted, to eliminate sources of contamination through "immediate action" is distinct from and in advance of the mandate to develop a corrective action plan for restoring contaminated groundwater. *See* § .0106(c)(2) and (4). In

contrast, permitted facilities subject to § .0106(d) follow a more deliberate procedure. Section .0106(d) imposes no separate obligation on permitted facilities for "immediate action" to control sources of contamination, but only requires a "plan and proposed schedule for corrective action." *See* § .0106(d)(2). This distinction suggests a conscious policy decision of the drafters of the 2L Rule to impose a greater sense of urgency upon unpermitted facilities and older facilities deemed not permitted when groundwater contamination is detected.

24. The EMC, in its Declaratory Ruling, relied upon § .0106(f)(1-4) to temper the "immediate action" requirement of § .0106(c)(2). Respondent and Intervenors urge reliance upon these subsections as well. The Court concludes, however, that the provisions of § .0106(f)(1-4) apply to circumstances more general and often distinct from the circumstances described in § .0106(c), although at times, those circumstances may overlap. Section .0106(f) deals with "discovery of the unauthorized release of a contaminant to the surface or subsurface of the land." Section .0106(f) applies without reference to groundwater standards – it is a rule of general applicability to all contaminant releases to the surface or subsurface of the land. By contrast, § .0106(c) pertains to the more limited and specific circumstance, and presumably the more serious circumstance in the context of the 2L Rule, of an activity that adversely impacts groundwater.

25. By combining the remedies of § .0106(c) and § .0106(f), and declaring, in essence, that the remedies of the latter temper the former, the EMC elevates the more general rule, § .0106(f), over the more specific, § .0106(c). That, however, would be contrary to a fundamental rule of statutory construction, namely the rule embodied in the Latin maxim: *generalia specialibus non derogant.* This rule of statutory construction has been explained by the United States Supreme Court to mean that:

> Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict.

Rodgers v. United States, 185 U.S. 83 (1902). Applying this rule of construction, § .0106(c) must be viewed as the more "special and particular" rule – because it deals only with those releases adversely impacting groundwater quality standards – and § .0106(f) must be viewed as the more "general" – because it deals with all releases. Thus, § .0106(c) must be viewed as an exception to § .0106(f) that proscribes certain obligations that arise when the circumstances described in § .0106(c) exist – namely groundwater contamination. Rather than treating § .0106(c) as an exception to § .0106(f), the EMC impermissibly conflates the two rules, thereby diminishing the specifically enumerated remedies required by § .0106(c).

26. The text of § .0106(f) itself is consistent with the foregoing construction and inconsistent with the EMC's ruling. The text of § .0106(f) acknowledges that there may be circumstances where a release onto the surface or subsurface of the land also triggers application of § .0106(c) or (d) because groundwater standards are also exceeded. In those instances, the language of § .0106(f) instructs that the requirements of § .0106(f) must be completed "prior to or concurrent with" the site assessment requirement of § .0106(c) or (d). In other words, the requirements of the more general § .0106(f) do not supplant the obligations under the more specific § .0106(c)(2) to "take immediate action to eliminate the source or sources of contamination," but rather, the § .0106(f) obligations are additional obligations that cannot be viewed as altering or diminishing the "immediacy" requirement of § .0106(c)(2).

27. The EMC also suggests, in its Declaratory Ruling, that the requirement for "immediate action" is further tempered by § .0106(g) and (h). [Record p. 876 at ¶ 24]. However, by its plain terms, § .0106(g) pertains to the obligation to provide a "site assessment," which is an obligation found in § .0106(c)(3), not in § .0106(c)(2). Likewise § .0106(h) pertains to the obligation to provide a "corrective action plan," which is an obligation found in § .0106(c)(4) and, again, not in § .0106(c)(2). As such, § .0106(g) and (h) in no way lessen the requirement of § .0106(c)(2) for "immediate action."

28. Finally, with respect to this issue, the Respondent and Intervenors argue that this Court, in conducting *de novo* review of the EMC's ruling, should defer to the agency's interpretation of its own rules. Indeed, it is not the Court's role to "decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Morrell v. Flaherty*, 338 N.C. 230, 237 (1994).

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 Petitioners' 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 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," 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.

Issue III – Closed and Inactive Coal Ash Lagoons

31. Petitioners further requested that the EMC declare that "[o]perators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A NC. Admin. Code 2L .01016(c) when they cause an increase in the concentration of a substance in excess of groundwater quality standards." The Declaratory Ruling of the EMC does not respond to this request directly either in the decretal portion of its Ruling or in its Findings and Conclusions.

32. In this request, Petitioners sought to have the EMC issue a declaratory ruling as to the applicability of a rule administered by the agency (namely § .0106(c)) of a given state of facts (closed and inactive coal ash lagoons). Requests of this sort are specifically authorized by N.C. Gen. Stat. § 150B-4(a), which authorizes aggrieved persons to seek declaratory rulings from agencies. N.C. Gen. Stat. § 150B-4(a1)(4) provides that if any agency fails to issue a declaratory ruling within 45 days, the failure shall be deemed a denial on the merits, and the person aggrieved may seek judicial review.

33. Petitioners urge that because this third request was not addressed directly by the EMC in its Declaratory Ruling, it should be deemed a denial on the merits.

34. In conducting a review of the record under the whole record standard of review, the Court discerns very little evidence offered to the EMC on this issue. Specifically, the Court notes, the record on this topic merely consists of (1) a "DENR internal memorandum" dated June

25, 2007 describing a proposed statutory change and a discussion about circumstances under which the Division of Water Quality ("DWQ") might close an existing coal combustion product pond for DWQ purposes if solid waste coal combustion product landfills were installed over the settling ponds and permitted as a solid waste landfill [Record p. 204-205]; and (2) two press releases from 2012 announcing the closing of the coal-fired H.F. Lee power plant and further "fleet modernization" plans that include the closing for four coal-fired units in North Carolina by 2014. There is no evidence of record of any closed or inactive coal ash lagoons.

35. The Stipulated Facts agreed upon by Petitioners and DENR shed no further light on facts relevant to the Petitioners' third request. The Stipulated Facts do reveal, however, that each of the fourteen coal plants at issue in the Petitioners' Request for Declaratory Ruling was permitted prior to December 30, 1983.

36. The EMC, in its Declaratory Ruling, applied the 2L Rule uniformly to all coal ash lagoon sites, distinguishing only between sites permitted prior to December 30, 1983, (deemed non-permitted), and those permitted after December 30, 1983 (deemed permitted). Nothing in the EMC's Ruling suggests any further distinction between operating lagoons and closed lagoon sites permitted prior to December 30, 1983. Indeed, in the final paragraph of the Declaratory Ruling, the EMC ruled that "[o]perators 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." [Record p. 876]. Notably, the EMC's conclusion makes no distinction between a lagoon that is operating or one that is closed or inactive.

37. Because the EMC's Declaratory Ruling draws no such distinction, it must be presumed that, based upon the limited facts in the record, the EMC agrees with the Petitioners

that operators of the coal ash lagoons located at the fourteen coal plants identified in the Stipulated Facts – being deemed non-permitted -- must comply with § .0106(c) regardless of whether the lagoons are active or closed.

38. Because the Court finds that the EMC's Declaratory Ruling grants the relief sought by the Petitioners in its Request, albeit limited to the facts contained in the record, the Petitioners are not aggrieved thereby and therefore Petitioners' appeal of this issue is not permitted under N.C. Gen. Stat. § 150B-4 and § 150B-43. The appeal on this third issue must therefore be DISMISSED.

Based upon the forgoing, it is ORDERED that:

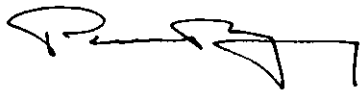
1. As to the question set out in the Petition for Judicial Review of the EMC's Declaratory Ruling on whether operators of coal ash lagoons with NPDES permits first issued on or before December 30, 1983, must take corrective action pursuant to 15A N.C. Admin. Code 2L .0106(c) when their activity results 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, the appeal of the Petitioners as to this issue is DISMISSED AS A CONSEQUENCE OF HAVING BEEN MADE MOOT by the superseding Session Law 2013-413;

2. As to the question set out in the Petition for Judicial Review of the EMC's Declaratory Ruling on whether 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, the Court finds and concludes that the

EMC erred as a matter of law, and as to this issue, the Declaratory Ruling of the EMC is REVERSED to the extent that it denied the Petitioners' requested declaratory ruling; and

3. As to the question set out in the Petition for Judicial Review of the EMC's Declaratory Ruling on whether operators of closed and inactive coal ash lagoons must implement corrective action as unpermitted activities pursuant to 15A NC. Admin. Code 2L .01016(c) when they cause an increase in the concentration of a substance in excess of groundwater quality standards, the Court finds that the EMC's Ruling concurs with this interpretation, albeit limited to the facts before it, and therefore the Court concludes that the Petitioners are not aggrieved by the EMC's final decision on this issue, and as such, Petitioners' appeal on this issue is DISMISSED.

SO ORDERED, this the 6th day of March, 2014.



Paul C. Ridgeway, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties on the date set out below by e-mail:

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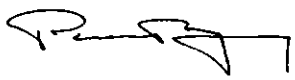
This the 6th day of March, 2014.