SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 828-258-2023 | 22 SOUTH PACK SQUARE, SUITE 700 ASHEVILLE, NC 28801-3494 | Facsimile 828-258-2024

March 8, 2016

Via Electronic Mail

Rules Review Commissioners and Commission Staff
NC Office of Administrative Hearings
6714 Mail Service Center
Raleigh, NC 27699-6700

Re: 15A N.C. Admin. Code 2L .0106 Revision Comments

Dear Commissioners and Commission Staff:

The Southern Environmental Law Center submits these comments on behalf of Cape Fear River Watch, MountainTrue, Sierra Club and the Waterkeeper Alliance. We appreciate the opportunity to comment on the Rules Review Commission's (the "Commission's") review of the Environmental Management Commission's ("EMC's") proposed changes to North Carolina's groundwater protection rules, specifically the corrective action provisions of 15A N.C. Admin. Code 2L .0106 ("§ .0106").

Our organizations have longstanding interests in maintaining and preserving the quality of North Carolina's groundwater and advocating for the thousands of North Carolinians who rely on groundwater as a source of drinking water. In our view, the proposed changes to the groundwater rules are unwise as they significantly weaken North Carolina's groundwater protection standards, making it more difficult to prevent, arrest, and remediate groundwater contamination. But setting aside the wisdom of these revisions, these specific changes must be rejected because they go beyond the authority delegated to the EMC by the General Assembly, they are ambiguous, and because the EMC did not comply with notice and comment procedures required of permanent rule makings. The Commission must object to the rule as written and return it to the EMC for further clarification and consistency with the mandates of the General Assembly.

Standard of Review

All permanent rules must be reviewed by the Commission before they become effective. N.C. Gen. Stat. § 150B-21.8(b). Upon review, the Commission can: "(1) [a]pprove the rule, if the Commission determines that the rule meets the standards for review [;] (2) [o]bject to the rule, if the Commission determines that the rule does not meet the standards for review[; or] (3) [e]xtend the period for reviewing the rule, if the Commission determines it needs additional information on the rule to be able to decide whether the rule meets the standards for review." N.C. Gen. Stat. § 150B-21.10.

In reviewing a rule, the Commission must determine whether a rule meets four "standards." Rules which do not meet the standards for review cannot be approved. To be approved, a rule must be:

(1) "within the authority delegated to the agency by the General Assembly;"
(2) "clear and unambiguous;"
(3) "reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency;" and
(4) "adopted in accordance with Part 2 of this Article."

N.C. Gen. Stat. § 150B-21.9(a). Here, the rule cannot be approved because the revisions are not "within the authority delegated to the agency by the General Assembly, " are not "clear and unambiguous," and have not been "adopted in accordance with Part 2 of [the] Article" applicable to rule making.

The Proposed Revisions are Not Within the Authority Delegated to the EMC by the General Assembly

a. The EMC Cannot Vary Corrective Action Requirements Based on the Date a Facility was First Permitted

Session Law 2014-122 (the "Coal Ash Management Act") amended the requirements applicable to facilities which have caused an exceedance of groundwater standards at or beyond a compliance boundary. Specifically, Section 12(a) revised N.C. Gen. Stat. § 143-215.1 to read: "[w]here operation of a disposal system permitted under this section results in exceedances of the groundwater quality standards at or beyond the compliance boundary the [EMC] shall require the permittee to undertake corrective action, *without regard to the date that the system was first permitted,* to restore the groundwater quality . . . ." Session Law 2014-122 § 12(a) (codified at N.C. Gen. Stat. § 143-215.1(k))(emphasis added).

The 2L Rules have always distinguished between facilities with permits and facilities without permits for purposes of corrective action requirements, and at the time the Coal Ash Management Act was enacted, the 2L Rule further distinguished between two categories of facilities with permits, based on the date that a system was first permitted. Facilities which received a permit prior to December 30, 1983 had different corrective action requirements than those which received permits after December 30, 1983. *Compare* § .0106(c) *with* § .0106(d).[1] Moreover, all facilities with permits were required to take corrective action using the "best available technology for restoration of groundwater quality to the level of the standards" whereas "non-permitted sites" were afforded less stringent site-specific standards and options. *Compare* § .0106(j) *with* §§ .0106(k), (l), (m), (r) and (s).

Recognizing the different approach required by revised N.C. Gen. Stat. § 143-215.1(k), which requires corrective action "without regard to the date that the system was first permitted," the legislature directed the EMC to "review the compliance boundary and corrective action provisions of Subchapter 2L of Title 15A of the North Carolina Administrative Code for clarity

[1] Unless indicated, citations to 2L Rule provisions are to the unrevised text.

and internal consistency." Session Law 2014-122 §12(c). These proposed revisions are the result of that directive. *See* Hearing Officer's Report at 1.

But contrary to the legislature's express mandate, these proposed revisions nonetheless vary corrective action requirements based on when a facility was first permitted. Proposed § .0106(d) contains certain corrective action requirements for facilities "under the authority of a permit initially issued by the Department *on or after December 30, 1983*" and proposed § .0106(e) contains separate and different requirements for facilities "under the authority of a permit initially issued by the Department *prior to December 30, 1983*." This approach cannot be reconciled with the legislature's clear direction to "require the permittee to undertake corrective action, *without regard to the date that the system was first permitted*." Session Law 2014-122 § 12(a) (emphasis added). By attempting to differentiate corrective action requirements based on permit date the EMC has not only exceeded the authority delegated to it by the General Assembly to revise the rules but defied the express intent of the legislature.

This is not just a clerical error – the revised corrective actions required of facilities permitted before or after December 30, 1983 have substantive differences. For instance, as part of corrective action, facilities with a permit "initially issued by the Department prior to December 30, 1983" have an independent requirement to "within 24 hours of discovery of the violation, notify the Department of the activity that has resulted in the increase and the contaminant concentration levels." Proposed § .0106(e)(1). Facilities with a permit "initially issued by the Department on or after December 30, 1983" lack that requirement altogether. Similarly, facilities with a permit "initially issued by the Department prior to December 30, 1983" "shall" submit a report "to the Health Director of the county or counties in which the contamination occurs." Proposed § .0106(e)(4). Facilities with a permit "initially issued by the Department on or after December 30, 1983" also appear to lack that requirement. Finally, the revision requires newer permitted facilities under revised § .0106(d) to take corrective action when contamination is found at a review boundary, but imposes no comparable requirement (see discussion in next section) on facilities with older permits regulated under revised .0106(e).

Furthermore, in direct contravention of the legislative mandate that facilities with permits should "undertake corrective action, without regard to the date that the system was first permitted, to restore the groundwater quality," the proposed revision creates two tiers of corrective action responsibility, based on the age of a facility's permit. Newer facilities first permitted after December 30, 1983 (regulated under revised § .0106(d)) must "use the best technology for restoration of groundwater quality to the level of the standards." Revised § .0106(j). Facilities with older permits, first issued prior to December 30, 1983 (regulated under revised § .0106(e)), by contrast, are allowed an exception from that requirement under revised § .0106(k) (allowing restoration to less than the standard), revised § .0106(l) (allowing restoration through natural attenuation), or revised § .0106(m) (allowing termination of corrective action without achieving the standard). *See* Revised § .0106(j).

The undersigned organizations (in addition to Duke Energy) advised the EMC of this conflict with the legislature's explicit direction in Section 12(a) of the Coal Ash Management Act that permitted facilities undertake corrective action "without regard to the date that the system was first permitted." The Hearing Officer's Report did not remedy the conflict. Instead,

it sidesteps this contradiction by answering the wrong question: whether a permit was "initially issued" pursuant to a specific statutory authority. *See* Hearing Officer's Report at 2. Specifically, the Hearing Officer's Report suggests that the EMC's revision complies with the statute because all facilities with a permit "initially issued by the Department *pursuant to G.S. 143-215.1 or G.S. 130A-294*" undertake the same corrective action. *See* Hearing Officer's Report at 2. But the General Assembly was not concerned about regulatory discrimination between facilities permitted under G.S. 143-215.1, G.S. 130A-294, or a different permitting authority. By longstanding definition, a "permitted" facility under the 2L Rule is a facility with a permit under either "G.S. 143 215.1 or G.S. 130A." *See* § .0102(3). That was not a problem in need of a legislative fix. Rather, the regulatory distinction rejected by the legislature, the distinction the EMC's revision perpetuates, is differences in corrective action expected from different facilities with permits (whether issued under G.S. 143-215.1 or G.S. 130A-294), based on the age of the permit.

The EMC does not have the authority to contradict the mandate of the Coal Ash Management Act. By attempting to differentiate corrective action requirements by permit date the EMC has violated the legislature's clear direction to "require the permittee to undertake corrective action, without regard to the date that the system was first permitted." Session Law 2014-122 § 12(a). Because the proposed revision goes beyond the authority delegated the EMC by the General Assembly, the Rules Review Commission must object to the rule and return it to the EMC.

b. The EMC Cannot Expand Risk-Based Remediation to Facilities Regulated Under the Coal Ash Management Act

Currently when facilities with active permits cause exceedances of groundwater standards at or beyond a compliance boundary they must remediate groundwater quality to the level of the standards in the 2L Rules. Unpermitted facilities are not required to remediate groundwater to the same degree but can instead implement a risk-based remediation approach that relies on natural attenuation to achieve appropriate levels of groundwater quality. The proposed revisions to the 2L Rule would make facilities permitted before December 30, 1983 also eligible for risk-based remediation and natural attenuation. But that sweeping change conflicts with the legislature's clear intent, expressed in Session Law 2015-286 to prohibit certain facilities regulated under the 2014 Coal Ash Management Act from being eligible for risk-based remediation. At a minimum, the proposed revisions must be returned to the EMC for clarification that certain facilities are not eligible for risk-based remediation.

Prior to these proposed revisions any facility – with or without a permit – had to implement a corrective action plan when it caused exceedances of groundwater standards at or beyond its compliance boundary. *See* §§ .0106(h),(i), & (j). The corrective action plan required use of "the best available technology for restoration of groundwater quality to the levels of the standards" unless that facility could meet the requirements of §§ .0106(k), (l), (m), (r), and (s) which provided an exception. § .0106(j). Paragraphs (r) and (s) apply to underground storage tanks whose regulatory status appears largely unchanged by these proposed revisions. Paragraphs (k), (l), and (m) specifically applied to only to "[a]ny person required to implement an approved corrective action plan for a *non permitted site*." *See* §§ .0106(k), (l), and

(m)(emphasis added). In other words, only facilities *without* actual permits were allowed to take advantage of relaxed corrective action requirements in paragraphs (k), (l), and (m), all other facilities had to remediate groundwater to meet groundwater standards regardless of risk.

For the first time, the EMC now proposes to make a class of *permitted* facilities also eligible for the relaxed remediation requirements. The EMC's proposed revision would expand application of the relaxed remediation provisions of paragraphs (k), (l), and (m) from "non permitted site[s]" only, to also include "site[s] subject to Paragraph (c) or (e) of this Rule." *See* Proposed §§ .0106(k), (l), and (m). Paragraph (c) of the revised rule continues to apply to unpermitted facilities. Paragraph (e) however applies to any facility with "a permit initially issued by the Department prior to December 30, 1983." Proposed § .0106(e). The revision expands the exception for "using the best available technology for restoration of groundwater quality to the levels of the standard" from non-permitted sites only, to include permitted sites that initially received a permit prior for December 30, 1983.

At least some of the sites with permits issued before December 30, 1983 and regulated under revised paragraph (e) are coal ash ponds which are also regulated under the 2014 Coal Ash Management Act. The proposed revision would make these sites eligible for risk-based remediation pursuant to revised paragraphs (k), (l), and (m) of the 2L Rule for the first time.

In 2015 the North Carolina General Assembly revised the state's risk based environmental remediation statute. In revising the definition of "contaminated industrial site" the legislature expanded the number of sites eligible for risk-based remediation of groundwater. Session Law 2015-286 § 4.7(a) (codified at N.C. Gen. Stat. § 130A-310.65(4)). Sites subject to remediation "pursuant to" "[t]he groundwater protection corrective action requirements" of the 2L Rules which previously did not qualify for risk-based remediation became eligible. *Id.* (codified at N.C. Gen. Stat. § 130A-310.67(a)(5)). But the General Assembly did not extend this eligibility to all industrial facilities. The legislature was explicit that the risk-based remediation statute "shall not apply to contaminated sites subject to remediation pursuant to . . . [t]he Coal Ash Management Act of 2014." *Id.* (codified at N.C. Gen. Stat. § 130A-310.67(4)). To rephrase, recognizing the importance of appropriately remediating groundwater at these sites, the legislature removed sites subject to remediation under the Coal Ash Management Act (which incorporates the 2L Rules) from eligibility for risk-based remediation of groundwater.

The EMC's sweeping revision of the 2L Rule goes too far. By purporting to extend risk-based remediation under the 2L Rules to all sites with permits issued before December 30, 1983, including sites regulated under the 2014 Coal Ash Management Act, the EMC has acted contrary to the express intent of the General Assembly. The EMC is without authority to promulgate rules outside the authority delegated the EMC by the legislature, including rules which contradict the clear intent of the General Assembly. Because the proposed revision exceeds the authority delegated to the EMC, the Commission must object to the rule and return it to the EMC for further clarification.

The Proposed Revisions are Impermissibly Ambiguous

Only rules that are "clear and unambiguous" may be adopted by the Commission. *See* N.C. Gen. Stat. § 150B-21.9(a)(2). Here, the proposed revision is unclear and ambiguous on numerous fronts.

First, prior to the proposed revisions, § .0106(c) included an immediacy requirement for two discrete actions. Entities subject to § .0106(c) had to take "immediate action to eliminate the source or sources of contamination" and had to "immediately notify the Division" when an activity resulted in the increase of a substance in excess of the groundwater standard. In its proposed revisions the EMC has clarified these requirements. The requirement to "immediately" notify the Division has been replaced with a requirement to notify the Department "within 24 hours." The requirement to take "immediate" action has been replaced with a requirement to "respond in accordance with Paragraph (f) of this Rule." But the EMC has ignored a similar immediacy requirement in § .0106(b) to "take immediate action to terminate and control the discharge" when an activity results in the discharge of a waste or hazardous substance or oil to the groundwaters of the state. It is unclear what "immediate" means in this third context. Moreover, as the EMC has clarified that the requirement to "take immediate action to eliminate the source or sources of contamination" now only equates to a requirement to comply with another existing provision, "Paragraph (f) of this Rule," it is unclear what a requirement to "take immediate action to terminate and control the discharge" may mean. The differences between taking immediate action to eliminate a source of contamination, taking immediate action to terminate and control a discharge, and complying with subparagraph (f) are ambiguous. We assume that despite the similarity in wording the requirement to "take immediate action to terminate and control the discharge" has independent meaning beyond simply having to comply with "Paragraph (f) of this Rule" but the contours of that requirement remain unclarified.

Second, the Secretary's authority to approve corrective action plans in revised paragraphs (c), (d), and (e) is unclear. Paragraphs (c) and (e) require entities to "implement an approved corrective action plan for restoration of groundwater quality [ ] in accordance with a schedule established by the Secretary." Proposed §§ .0106(c) & (e). Paragraph (d) requires an entity to "implement the [corrective action] plan *as approved by* and in accordance with a schedule established by the Secretary." Proposed § .0106(d)(emphasis added). Do facilities subject to paragraph (d) have to seek the Secretary's approval for both the substantive elements of the corrective action plan and the implementation schedule, while facilities subject to paragraphs (c) and (e) only have to seek the Secretary's approval for a plan's implementation schedule? What is the relationship of these requirements with paragraph (h) which appears to include substantive requirements for all corrective action plans but does not mention Secretary approval?

Third, the requirement to remove, treat, or control primary pollution sources under paragraph (f) is unclear and must be defined. Defining these terms is critical since the proposed revision replaces the clear requirement to take "immediate action to eliminate" sources of contamination with a requirement only to comply with paragraph (f), including its remove, treat, or control provisions. *See* § .0106(c)(2). Moreover, revised paragraph (f) discusses removal, treatment, and control of sources of pollution as "or" requirements. In other words, an entity would have an obligation to remove *or* treat *or* control sources of pollution – not all three. The

difference between, for instance, treating and controlling a source of pollution is unclear. Additionally, when is a source of pollution sufficiently "treated" or "controlled" to achieve compliance with paragraph (f)? Given the emphasis on paragraph (f) under the revised rule these terms must be defined and explained.

Fourth, the relationship between revised paragraphs (g) and (f) is unclear. Paragraph (g) requires all facilities to complete a site assessment which much include an assessment of "any imminent hazards to the public health and safety and actions taken to mitigate them *in accordance with Paragraph (f)* of this Rule." Proposed § .0106(g)(2)(emphasis added). Paragraph (f) does not mention "imminent hazards." Are "imminent hazards" under paragraph (g) defined in the context of paragraph (f)? The sequencing of activities under revised paragraphs (g) and (f) is also unclear. In using the past tense, paragraph (g)(2) seems to assume that paragraph (f) has been completed. But paragraph (g) only requires, for instance, an *assessment* of the "source and cause of contamination" while paragraph (f) potentially requires *removal* of the source of contamination. How will the Department determine the sequence of these various requirements?

Fifth, the requirement to use "best available technology" to restore groundwater quality is vague and undefined. Revised paragraph (j) requires all facilities to utilize the "best available technology for restoration of groundwater quality to the level of the standards" unless the facility meets certain exceptions. Proposed § .0106(j). That requirement is only meaningful if there is a clear understanding of what constitutes "best available technology." For instance, are technologies evaluated specific to certain industries? The Clean Water Act also relies on implementation of the "best available technology" but unlike the 2L Rules, the Clean Water Act provides some guidance in determining what constitutes "best available technology": "Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(2)(B). Paragraph (j) should be similarly clarified to explain what constitutes "best available technology."

The requirement to use "best available technology" is particularly unclear when compared to other paragraphs in § .0106 that reference "readily available and economically reasonable technologies." *See* Proposed § .0106(n). Presumably, "best available technology" and "readily available and economically reasonable technologies" are two different standards, but the differences are unclear. The regulation should be revised to more clearly define these terms.

Sixth, the EMC abrogated its responsibility to provide clarity as to what is required at review boundaries for facilities which received permits prior to Dec. 30, 1983, making the rule impermissibly vague. All facilities with permits, regardless of the date that permit was issued, have review boundaries. *See* 15A N.C. Admin. Code 2L .0108; .0102(20). Those review boundaries have certain corrective action requirements. For years, the requirements applicable to facilities which received a permit prior to Dec. 30, 1983 were unclear. Facilities regulated under

§ .0106(c)(unpermitted facilities and facilities with pre-Dec. 30, 1983 permits) prior to the proposed revision lacked explicit review boundary requirements. Facilities regulated under § .0106(d)(facilities with post-Dec. 30, 1983 permits) were required to "demonstrate, through predictive calculations or modeling, that natural site conditions, facility design and operations controls will prevent a violation of standards at the compliance boundary" when there was an exceedance of a substance in excess of the relevant groundwater standard at the review boundary. § .0106(d)(1). This requirement served the critical step of requiring action before groundwater contamination spread off property, into waterways, and triggered additional, more aggressive corrective action requirements.

Now the EMC proposes to create a new section § .0106(e) specific to facilities "with a permit initially issued by the Department prior to December 30, 1983" but fails to clarify the requirements applicable to those facilities when an exceedance is measured at the review boundary. When alerted to this problem as part of this rule making process, the EMC only "recognized that consistent responses to exceedances at a review boundary regardless of permit date may be appropriate." Hearing Officer Report at 2. In other words, the EMC recognized the lack of review boundary requirements as problematic but refused to address that issue instead stating that it is "outside the scope of the EMC's intent for this rule revision." *Id.* That justification falls flat. First, by failing to deal with this ambiguity the EMC is furthering a lack of understanding of what is required at review boundaries for facilities with pre-Dec. 30, 1983 permits, leaving the rule impermissibly unclear in violation of the statute governing rule making. *See* N.C. Gen. Stat. § 150B-21.9(a). There is no loophole to allow the EMC to fail to correct a recognized unclear issue during rule revision because the EMC did not originally "intend" to clarify that specific issue. Second, the legislature charged the EMC with "review[ing] the compliance boundary and corrective action provisions of Subchapter 2L of Title 15A of the North Carolina Administrative Code for clarity and internal consistency." Session Law 2014-122 § 12(c). Review boundary requirements are part of the corrective action provisions of the 2L Rule. The ambiguous application of these requirements is exactly what the EMC was charged with clarifying.

Although the proposed revision addresses what corrective action is required under the 2L Rule in a few discrete ways, viewed in its entirety, the revision only makes the rule less clear. The Commission must object to the rule as unclear and ambiguous and return it to the EMC for further clarification.

The EMC Has Not Complied with the Procedures for Adopting a Permanent Rule

"Before an agency adopts a permanent rule, the agency must . . . [p]ublish a notice of text in the North Carolina Register." N.C. Gen. Stat. § 150B-21.2(a). "An agency shall not adopt a rule that differs substantially from the text of a proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule." *Id.* at § 150B-21.2 (g). "An adopted rule differs substantially from a proposed rule if it . . . [p]roduces an effect that could not reasonably have been expected based on the proposed text of the rule." *Id.* Here, the text of the proposed rule submitted to the Commission differs substantially from the text of the proposed rule published in the North Carolina Register, by removing any requirement to deal with

unauthorized releases of a contaminant to the surface of subsurface of land. This change produces an effect that could not have been reasonably expected based on the text of the proposed rule in the North Carolina Register. As a result, the EMC must republish the rule for additional public comment, which the EMC has not done. Because the rule was not adopted in accordance with the procedures for adopting a permanent rule this Commission must object to the proposed revision. *See* N.C. Gen. Stat. § 150B-21.9(a)(4).

Prior to these proposed revisions there were two triggers for corrective action under the § .0106. Corrective action could be triggered if there was "an increase in the concentration of a substance in excess of the standard" under paragraphs (c) and (d). In other words, corrective action was triggered under those paragraphs only when groundwater standards were exceeded. Corrective action could also be triggered if there was an "unauthorized release of a contaminant to the surface or subsurface of the land" under paragraph (f). The latter trigger did not require an exceedance of groundwater standards but only an "unauthorized release" to the surface *or* subsurface of land. Logically, these two different triggering events led to different corrective action requirements. *Compare* §§ .0106(c) & (d) *with* (f).

The text of the proposed revisions in the North Carolina Register retained this distinction; corrective action could still be triggered either by an unauthorized release or by an exceedance of groundwater standards. The revision more closely aligned the specific corrective action requirements required under each scenario by cross referencing revised paragraph (f) in revised paragraphs (c) and (e) but retained the separate triggering events. After publication in the North Carolina Register however the EMC rewrote paragraph (f) to no longer apply to an "unauthorized release" but instead only apply when groundwater standards are exceeded under revised paragraphs (c), (d), and (e). The effect of that change was to remove any corrective action requirement following an "unauthorized release of a contaminant to the surface or subsurface of the land." That last-minute change is significant. It removes corrective action requirements from a host of situations and may make it more difficult for the Department of Environmental Quality to require corrective action before groundwater standards have been exceeded. More to the point, the change could not have been reasonably expected based on the text of the proposed rule in the North Carolina Register and deserves public disclosure and vetting. The EMC must re-notice the proposed text of the rule in order to comply with the procedures for adopting a permanent rule and, as the EMC has not followed those procedures, this Commission is barred from approving the proposed revisions.

We appreciate the EMC's efforts to bring clarity to provisions of the 2L Rule. Unfortunately, these proposed revisions miss that mark. The Commission must object to the rule because the revisions exceed the authority delegated to the EMC by the General Assembly to revise the rule, are unclear and ambiguous, and were not adopted according to required rule making procedures. Please do not hesitate to contact us if you have questions about our concerns.

Sincerely,

Austin DJ Gerken