

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT  
COMMISSION

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In Re PETITION FOR DECLARATORY )  
RULING by EAGLE TRANSPORT )  
CORPORATION )  
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**POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY**

The Department of Environmental Quality (“DEQ”), by and through its undersigned counsel, hereby submits this response to the Environmental Management Commission (“the Commission”) in opposition to Petitioner Eagle Transport Corporation’s (“Eagle”) Petition for Declaratory Ruling regarding Eagle’s responsibility for assessment and corrective action in response to a fuel spill from one of Eagle’s tanker trucks. As set forth below, DEQ requests that the Commission issue a declaratory ruling affirming Eagle’s obligation to conduct an assessment and take corrective action.

The Oil Pollution and Hazardous Substances Control Act of 1978 (“OPHSCA”), N.C.G.S. § 143-215.75 *et seq.*, applies to Eagle and charges it with responsibility for the cleanup in this case. OPHSCA states that those in immediate possession of oil prior to its discharge are responsible for cleanup regardless of liability, while shielding these same parties from other civil liabilities and civil and criminal penalties if they did not cause the spill.

Specifically, Eagle is attempting to use the third-party discharge exception of OPHSCA – which shields parties like Eagle from criminal and civil penalties related to the act of *discharging* petroleum under certain circumstances – to absolve it of any and all responsibility to clean up the fuel that spilled from Eagle’s tanker truck. Such a reading of OPHSCA is simply wrong – it ignores the clear language of the statute, is contrary to legislative intent and public interest, and

would work a substantial shift in responsibility for the cleanup of hazardous releases in North Carolina. Additionally, Eagle's claim that North Carolina's Groundwater Classification and Standards Rules are an invalid legal basis for DEQ's determination that Eagle is responsible for the discharge is incorrect. For these reasons, and as set forth more fully below, DEQ respectfully requests that the Commission issue a declaratory ruling in its favor.

### **REGULATION OF OIL AND HAZARDOUS SUBSTANCE RELEASES UNDER OPHSCA**

OPHSCA's purpose is to "promote the health, safety, and welfare of the citizens of this State by protecting the land and the waters over which this State has jurisdiction from pollution by oil, oil products, oil by-products, and other hazardous substances." N.C.G.S. § 143-215.76. Among other things, OPHSCA regulates the discharge of oil and hazardous substances through a series of Oil Discharge Controls codified at N.C.G.S. Chapter 143, Article 21A, Part 2.

OPHSCA defines "discharge" as "any emission, spillage, leakage, pumping, pouring, emptying, or dumping of oil or other hazardous substances into waters of the State . . . or upon land in such proximity to waters that oil or other hazardous substances is reasonably likely to reach the waters." N.C.G.S. § 143-215.77(4).

OPHSCA creates strict liability for cleanup of discharges like the one by Eagle that is the subject of this petition for declaratory ruling. Under OPHSCA, it is unlawful "for any person to discharge, or cause to be discharged, oil or other hazardous substances into or upon any waters . . . or lands within this State . . . *regardless of the fault of the person having control over the oil or other hazardous substances.*" N.C.G.S. § 143-215-83(a) (emphasis added); *see also Ellison v. Gambill Oil Co.*, 186 N.C. App. 167, 650 S.E.2d 819 (2007), *aff'd*, 363 N.C. 364, 677 S.E.2d 452 (2009) (finding N.C.G.S. § 143-215-83 creates strict liability). Accordingly, any person who

*discharges* oil in violation of OPHSCA is subject to civil or criminal penalties. *See* N.C.G.S. § 143-215.88A (civil penalties); N.C.G.S. § 143-215.88B (criminal penalties).

However, OPHSCA specifically excepts certain discharges from being characterized as “unlawful discharges” under N.C.G.S. § 143-215.83(a). When “any person subject to liability under [OPHSCA] proves that a discharge was caused by . . . [a]n act or omission of a third party, whether any such act or omission was or was not negligent,” OPHSCA does not consider the discharge unlawful *with regards to the blameless party*. N.C.G.S. § 143-215.83(b). The discharge is, nonetheless, still in violation of OPHSCA as the person that actually caused the discharge is not eligible for the protections of N.C.G.S. § 143-215.83(b). *See BSK Enters. Inc. v. Beroth Oil Co.*, 246 N.C. App. 1, 21, 783 S.E.2d 236, 250 (2016) (holding, generally, “OPHSCA holds polluters strictly liable for damages resulting from contamination of waters within the State.”).

Under OPHSCA, any person who possessed oil *immediately prior* to a discharge is responsible for the cleanup – whether they caused the discharge or not. N.C.G.S. § 143-215.84. “[A]ny person *having control over oil or other hazardous substances* discharged in violation of [OPHSCA] shall immediately undertake to collect and remove the discharge and to restore the area affected by the discharge.” *Id.* (emphasis added). OPHSCA defines “having control over oil or other hazardous substances” as “any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, and specifically shall include carriers and bailees of such oil or other hazardous substances.” N.C.G.S. § 143-215.77(5). N.C.G.S. § 143-215.84 does not contain the exceptions codified at N.C.G.S. § 143-215.83(b). Nevertheless, OPHSCA shields parties who did not cause a spill from civil or criminal penalties related to discharges, and from certain other civil liabilities such as damages to public and private property.

OPHSCA also provides recourse for the party charged with the immediate clean up. Any party held liable for cleanup costs under N.C.G.S. § 143-215.84 is statutorily authorized to “recover such costs in part or in whole from any other person causing or contributing to the discharge of oil or other hazardous substances . . . .” N.C.G.S. § 143-215.89.

### **STATEMENT OF FACTS**

Eagle is a corporation engaged in the commercial transportation of petroleum products. On January 28, 2020, an Eagle truck carrying fuel collided with another vehicle on the northbound side of NC-16 near Denver, North Carolina. After the accident, diesel and gasoline flowed from the tanker, down the highway embankment and into storm drains, ultimately reaching a creek. The spill resulted in soil contamination, and DEQ requested that Eagle sample for groundwater contamination. The driver of the truck died in the accident. State Troopers charged the driver of the other vehicle with failing to yield in violation in violation of N.C.G.S. § 20-155(a), and misdemeanor death by motor vehicle in violation of N.C.G.S. § 20-141-4(a2).

On January 29, 2020, DEQ issued an initial Notice of Regulatory Requirements (“NORR”), identifying Eagle as a responsible party required to conduct the initial response and abatement action pursuant to the Groundwater Quality Rules codified at 15A NCAC § 2L .0101, *et seq.* Eagle complied with these requirements by conducting the initial response and abatement of the discharge. Eagle submitted an Initial Work Report and Work Plan for Soil Removal, which DEQ reviewed and approved. On May 13, 2020, DEQ issued a second NORR notifying Eagle of its responsibility for assessment, collection, and removal of the discharge and restoring the area affected by the discharge pursuant to OPHSCA and the Groundwater Quality Rules.

Eagle submitted its Petition after issuance of the second NORR seeking, among other things, a determination of its obligations under OPHSCA. By an order dated January 21, 2021,

the Commission denied Eagle's request for a declaratory ruling without considering the merits of the petition, finding that there was no genuine controversy as to the application of the law to the facts of the case. Eagle then filed a petition for judicial review with the Nash County Superior Court. On August 20, 2021, that Court issued an order remanding this matter to the Commission for consideration of Eagle's petition "on the merits." In doing so, the Court did not express any opinion on the underlying merits of Eagle's petition.

### **ARGUMENT**

#### **I. PURSUANT TO N.C.G.S. § 143-215.84(a), EAGLE IS REQUIRED TO CLEAN UP THE OIL DISCHARGED FROM ITS TANKER TRUCK.**

N.C.G.S. § 143-215.84 obligates transporters of oil and other hazardous substances, like Eagle, to clean up any spills that occur as a result of their commercial activities. In particular, that statute states as follows:

**§ 143-215.84. Removal of prohibited discharges.**

(a) Person Discharging. – Except as provided in subsection (a2) of this section,<sup>1</sup> any person having control over oil or other hazardous substances discharged in violation of this Article shall immediately undertake to collect and remove the discharge and to restore the area affected by the discharge as nearly as may be to the condition existing prior to the discharge.

Pursuant to this statute, therefore, a liable party must "immediately undertake to collect and remove the discharge [of oil or other hazardous substance]" and "to restore the area affected by the discharge as nearly as may be to the condition existing prior to the discharge."

The question in the present case is a basic one: who is the person that must perform this cleanup? And the answer is provided in this same statute, as quoted above: A person is liable for cleanup under this provision if (1) they are a "person having control over" the oil or hazardous substance, and (2) the oil or hazardous substance was "discharged in violation of this Article."

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<sup>1</sup> Subsection (a2) concerns "Discharges of Mineral Oil From Electrical Equipment" and is thus inapplicable to the facts of this case.

N.C.G.S. § 143-215.84(a). In the present case, Eagle was the person who had control over the oil immediately prior to the discharge, and the oil was discharged in violation of OPHSCA. Eagle is thus the party responsible for conducting the cleanup in this case.

**A. Eagle Had Control Over the Oil Discharged In this Case.**

In regards to the first criteria identified in N.C.G.S. § 143-215.84(a), Eagle was the “person having control over oil or other hazardous substance discharged in violation of [OPHSCA].”

Pursuant to the statutory definitions set forth in OPHSCA,

“Having control over oil or other hazardous substances” shall mean, but shall not be limited to, any person, using, transferring, storing, or transporting oil or other hazardous substances immediately prior to a discharge of such oil or other hazardous substances onto the land or into the waters of the State, *and specifically shall include carriers and bailees of such oil or other hazardous substances. . . .*

N.C.G.S. § 143-215.77(5) (emphasis added). “Carrier” is defined in this same statute as “any person who engages in the transportation of oil or other hazardous substances for compensation.”

N.C.G.S. § 143-215.77(10).

In the present case, there is no dispute that Eagle was a carrier and was the person transporting the oil immediately prior to the discharge that occurred following the vehicle collision. Eagle was thus the person having control over the oil that was discharged, and Eagle is therefore responsible for cleaning up the discharge so long as the second criteria is also met, i.e., that the oil was discharged in violation of OPHSCA.

**B. The Discharge In this Case Was In Violation of OPHSCA.**

As state above, the second prerequisite for requiring that a person such as Eagle clean up spilled oil is that the oil or other hazardous substance be “discharged in violation of this Article [i.e., OPHSCA].” N.C.G.S. § 143-215.84(a). Here again, there can be no dispute that the oil in this case was discharged in violation of OPHSCA. N.C.G.S. § 143-215.83(a) provides that:

It shall be unlawful, except as otherwise provided in this Part, for any person to discharge, or cause to be discharged, oil or other hazardous substances into or upon any waters, tidal flats, beaches, or lands within this State, or into any sewer, surface water drain or other waters that drain into the waters of this State, regardless of the fault of the person having control over the oil or other hazardous substances, or regardless of whether the discharge was the result of intentional or negligent conduct, accident or other cause.

In the present case, the discharge occurred without a permit and was to the lands and/or waters of this State. The discharge was thus unlawful and in violation of OPHSCA. The second criteria is therefore met, and Eagle is responsible for the cleanup since Eagle was the transporter and carrier with control of the oil immediately prior to the discharge.

Although Eagle points to the exception in N.C.G.S. § 143-215.83(b)(2)(d.), which states that a discharge is not unlawful as to a particular person where that person can show that the discharge was caused by an “act or omission of a third party”, that exception does not alter Eagle’s responsibility to perform the cleanup in this case. The discharge in the present case was still unlawful, because, at a minimum, the driver of the other vehicle caused the oil to be discharged. Assuming the driver of the other vehicle was at fault for the collision rather than Eagle, none of the exceptions in § 143-215.83(b) apply as to her, and the discharge thus remains unlawful under OPHSCA.

Because the driver of the other vehicle does not qualify for any of the exceptions contained in § 143-215.83(b), the discharge itself is thus in violation of OPHSCA, and pursuant to N.C.G.S. § 143-215.84(a), the party having control over the oil (i.e., the transporter, such as Eagle here) is the party responsible for the cleanup. Nothing in the language of N.C.G.S. § 143-215.84(a) conditions the transporter’s responsibility to perform the cleanup on a determination that the transporter was at fault for the spill. All that is required is that the spill itself be a discharge in

violation of OPHSCA. Eagle is thus the party responsible for the cleanup, regardless of whether Eagle or another party is at fault.

**C. The Department's Interpretation of N.C.G.S. § 143-215.84 Does Not Render the Exceptions of N.C.G.S. § 143-215.83(b) Meaningless.**

Although the third party exceptions of N.C.G.S. § 143-215.83(b) do not absolve Eagle of its responsibility for cleaning up the spill in this case, this does not render these exceptions meaningless. In fact, the third party exceptions of N.C.G.S. § 143-215.83(b) provide parties like Eagle significant statutory protections under, *inter alia*, (1) N.C.G.S. § 143-215.88, requiring payment to State agencies for expenses incurred in performing cleanup; (2) N.C.G.S. §§ 143-215.88A and -215.88B, the civil and criminal enforcement provisions of OPHSCA; (3) N.C.G.S. § 143-215.90, establishing liability for damage to public resources; and (4) N.C.G.S. § 143-215.93, establishing liability for damage caused to public and private property.

Of note, N.C.G.S. §§ 143-215.88 and -215.93 specifically incorporate the third party exceptions of N.C.G.S. § 143-215.83(b). N.C.G.S. § 143-215.88 (party not responsible for paying the State's response costs if "the discharge occurred due to any of the reasons stated in G.S. 143-215.83(b)"); N.C.G.S. § 143-215.93 (party responsible for damages to public or private property caused by a discharge, "subject to the exceptions enumerated in G.S. 143-215.83(b)"). By specifically incorporating the N.C.G.S. § 143-215.83(b) exceptions in these statutes, the Legislature showed that it was capable of doing so where appropriate. The fact that the Legislature did not include such a provision in N.C.G.S. §§ 143-215.84 or -215.85 shows that this choice was deliberate, and that the Legislature intended parties, like Eagle, who profit by having "control over oil or other hazardous substances" to be responsible for their cleanup in the event of a discharge.

The wording of N.C.G.S. § 143-215.90(a) is also instructive as to legislative intent. That statute states:



*Any person who discharges oil or other hazardous substances in violation of this Article . . . and in the course thereof causes the death of, or injury to fish, animals, vegetation or other resources of the State or otherwise causes a reduction in the quality of the waters of the State below the standards set by the Commission, shall be liable to pay the State damages.*

(emphasis added). The italicized portion of the statute quoted above clearly ties liability for damages to public resources to fault, as liability is premised on a finding that the person was responsible for discharging the oil or other hazardous substances in violation of OPHSCA. Importantly, this is also the reading that Eagle advocates for N.C.G.S. § 143-215.84(a), but the language of that statute is notably different. N.C.G.S. § 143-215.84(a) puts the responsibility for cleanup on “*any person having control over oil or other hazardous substances* discharged in violation of this Article.” (emphasis added). Responsibility for cleanup under § 143-215.84(a) is therefore premised not on fault, but on control prior to the discharge. The wording of N.C.G.S. § 143-215.90 shows that the Legislature knew how to premise liability on fault. That the Legislature did not do so in N.C.G.S. § 143-215.84(a) was thus deliberate, and the Commission should give heed to this legislative intent.

**D. Eagle Was Also Required to Take the Actions Mandated by N.C.G.S. § 143-215.85.**

N.C.G.S. § 143-215.85 requires “every person owning or having control over oil or other substances,” such as Eagle here, to provide notice and take remedial action following a discharge to the environment. In particular, the notice provisions of N.C.G.S. § 143-215.85(a) state:

[E]very person owning or having control over oil or other substances discharged in any circumstances other than pursuant to a rule adopted by the Commission, a regulation of the U.S. Environmental Protection Agency, or a permit required by G.S. 143-215.1 or the Federal Water Pollution Control Act, upon notice that such discharge has occurred, shall immediately notify the Department, or any of its agents or employees, of the nature, location and time of the discharge and of the measures which are being taken or are proposed to be taken to contain and remove the discharge. . . .

The same party is also charged to take immediate action to remedy the discharge, pursuant to the terms of N.C.G.S. § 143-215.85(b):

A person who owns or has control over petroleum that is discharged into the environment shall immediately take measures to collect and remove the discharge, report the discharge to the Department within 24 hours of the discharge, and begin to restore the area affected by the discharge in accordance with the requirements of this Article . . . .

Notably, neither of these provisions has any language tying the responsibility to provide notice or perform cleanup to a determination of fault for the discharge. Instead, as with N.C.G.S. § 143-215.84(a), the responsibility falls on the “person owning or having control over the oil or hazardous substance.”

**E. A “Bright-Line” Rule Comports with Legislative Intent.**

A “bright-line” rule requiring transporters and carriers of oil and other hazardous waste to clean up when a spill occurs best effects the Legislature’s intent, as evidenced in the applicable statutes. Holding transporters and carriers liable for spills from their trucks, regardless of fault, allows for cleanup of affected areas to proceed expeditiously, without having to await a determination of fault. If cleanup were premised solely on fault, parties could spend years litigating fault, and refuse to perform any cleanup until liability was judicially established and all appeals were exhausted. In the meantime, the oil or other hazardous substances would be contaminating soil and water and negatively impacting public health and the environment. Moreover, determinations of fault for automobile accidents are not the province of DEQ, and are best left to our court system.

That the Legislature specifically intended to avoid such a scenario is shown not only by the language of N.C.G.S. § 143-215.84(a), but also by N.C.G.S. § 143-215.94, which creates joint and several liability for “cleanup costs” between “any one or more of the persons having control

over the oil or other hazardous substances *or* causing or contributing to the discharge.” (emphasis added). The use of “or” in the foregoing makes clear what is already obvious from N.C.G.S. § 143-215.84: the party having control over the oil or other hazardous substance is responsible for cleanup costs regardless of whether they caused or contributed to the discharge.

This joint and several liability provision is also directly contrary to Eagle’s interpretation of N.C.G.S. § 143-215.84. If a party is only liable for cleanup if the party is responsible for the discharge, then there would be no need to include “the persons having control over the oil or other hazardous substances” in this joint liability provision. If that had been the Legislature’s goal, the Legislature would have just made all parties “causing or contributing to the discharge” jointly and severally liable, without reference to parties like Eagle who “hav[e] control” over the oil prior to discharge.

What’s more, the Legislature’s stated intent for this joint and several liability provision is “to provide maximum protection for the public interest.” N.C.G.S. § 143-215.94. Holding transporters and carriers of oil and other hazardous substances responsible for cleanup of spills does just this. Carriers have greater insurance requirements, are better able to pass-on the costs of the inherent risk to customers, have expertise in both transport and cleanup, and have greater financial resources than the typical individual driver. In fact, N.C.G.S. § 20-309(a1) requires owners of commercial motor vehicles to carry substantially more financial responsibility than individual drivers. By requiring for-hire commercial transporters, such as Eagle, to carry higher amounts of insurance coverage, the Legislature is signaling that it anticipates holding these drivers to a higher standard than the ordinary, non-commercial, driver.

In contrast, it would be infeasible to hold individual drivers liable for the removal of oil discharges, and doing so would in effect mean that these discharges would never be cleaned up,

absent expenditure of public resources. Ordinary drivers, with ordinary insurance limits, do not have the resources nor the expertise to clean up a spill such as the one in this case. When that ordinary insurance coverage inevitably fails to cover the cost of the cleanup, the burden would shift to the State.

#### **F. Conclusion**

N.C.G.S. §§ 143-215.84 and -215.85 require those “having control over oil or other hazardous substances” to perform the necessary cleanup when there is a discharge, irrespective of fault. This interpretation is clear from the plain language of these statutes. This interpretation is also apparent when comparing these statutory provisions to other parts of OPHSCA, which do premise liability on fault or expressly incorporate fault-based exceptions. The Legislature was thus capable of incorporating fault-based language and exclusions when intended, and the fact that the Legislature did not do so in §§ 143-215.84 and -215.85 is further support for DEQ’s position that Eagle must perform the cleanup in this case. Requiring transporters of oil and hazardous substances to bear the costs of cleanup is also good policy: such transporters profit from these activities, can price the associated risks into the costs of their business, and must maintain larger insurance policies than ordinary individuals. A transporter may also offset such cleanup costs by seeking recovery from any other responsible party pursuant to N.C.G.S. § 143-215.89.

#### **II. SECTIONS .0106 AND .0503 OF THE GROUND WATER QUALITY RULES, PROMULGATED BY THIS COMMISSION, VALIDLY IMPLEMENT STATUTORY REQUIREMENTS ENACTED BY THE LEGISLATURE.**

As an alternative or supplemental argument, Eagle contends that 15A NCAC 02L .0503 and 15A NCAC 02L .0106 create, without statutory authority, an “independent, [im]proper basis” for determining responsible parties. Eagle is incorrect.

First, Section .0500 of the Ground Water Quality Rules (“Section .0500”) implements the risk-based assessment and corrective action of petroleum discharges from “non-UST petroleum tank[s], stationary or mobile,” as required by OPHSCA. 15A NCAC 2L .0503. The rules are not, as Eagle contends, “used to determine who is responsible for complying with them.”

As stated above, OPHSCA’s discharge removal provision, an authorizing statute for 15A NCAC 2L .0503, imposes the requirements of Section .0500 on “any person having control over oil or other hazardous substances discharged in violation of [OPHSCA].” N.C.G.S. § 143-215.84; *see also* N.C.G.S. § 143-215.104AA (implementing risk based cleanup of releases from aboveground storage tanks and other sources). It is this statutory discharge removal provision that determines responsibility under OPHSCA. Far from creating an “independent, [im]proper basis” for determining responsibility, the rule Eagle challenges implements this provision of OPHSCA. 15A NCAC 2L .0503 makes this clear by citing to N.C.G.S. § 143-215.84 as the authority for the rule. The rule neither creates nor provides an independent basis for determining responsibility.

Similarly, the Corrective Action Provision, 15A NCAC 02L .0106, does not create an independent basis for determining responsibility, but also implements statutory requirements. 15A NCAC 2L .0106(b) requires any “person conducting or controlling an activity that results in the *discharge* . . . take action upon discovery to terminate and control the *discharge*, mitigate any hazards resulting from exposure to the pollutants and notify the Department.” (emphasis added) Based on the foregoing, a party’s obligation to comply with the Corrective Action Provision is based on the act of discharging, not whether the party violated the standards. N.C.G.S. § 143-215.1 bans the unpermitted discharge of wastes into the waters of the State. “Waste” includes, amongst other things, “toxic waste” and oil. *See* N.C.G.S. § 143-213(18)(c) and (d). Thus, the Corrective Action Provision does not determine responsibility for cleanup of a discharge, N.C.G.S.

§ 143-215.1 does. 15A NCAC 2L .0106(c) implements the obligation imposed by N.C.G.S. § 143-215.1, stating “[a]ny activity not permitted pursuant to G.S. 143-215.1 . . . shall . . . be deemed not permitted by the Department and subject to the provisions of this Paragraph.” Thus, 15A NCAC 2L .0106 validly implements and interprets the requirements of N.C.G.S. § 143-215.1.

### **CONCLUSION**

For the foregoing reasons, DEQ respectfully requests that the Commission issue a declaratory ruling in this matter affirming Eagle’s obligation as the “person having control over oil or other hazardous substances” to conduct an assessment and take corrective action to remediate the discharge of oil in this case, pursuant to the provisions of OPHSCA, including N.C.G.S. §§ 143-215.84 and 143-215.85.

Respectfully submitted this the 21st day of December, 2021.

JOSHUA H. STEIN  
Attorney General

By: /s/ T. Hill Davis, III  
T. Hill Davis, III  
Assistant Attorney General  
N.C. State Bar No. 38121

N.C. Department of Justice  
Environmental Division  
Post Office Box 629  
Raleigh, NC 27602-0629  
(919) 716-6600  
(919) 716-6766 (Fax)  
hdavis@ncdoj.gov  
*Attorney for DEQ*

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY was served on the Environmental Management Commission and counsel for Petitioner Eagle Transport Corporation, by electronic mail, as follows:

Glenn Dunn  
Poyner Spruill LLP  
hgdunn@poynerspruill.com

Keith Johnson  
Poyner Spruill LLP  
kjohnson@poynerspruill.com  
*Attorneys for Eagle Transport Corporation*

Phillip T. Reynolds  
N.C. Department of Justice  
preynolds@ncdoj.gov  
*Attorney for the Environmental Management Commission*

Lois Thomas  
N.C. Department of Environmental Quality  
lois.thomas@ncdenr.gov  
*Clerk to the Environmental Management Commission*

This the 21st day of December, 2021.

/s/ T. Hill Davis, III  
T. Hill Davis, III  
Assistant Attorney General