

NORTH CAROLINA
 WAKE COUNTY

BEFORE THE ENVIRONMENTAL
 MANAGEMENT COMMISSION

IN THE MATTER OF:)
)
 REQUEST FOR A DECLARATORY)
 RULING BY EAGLE TRANSPORT)
 CORPORATION)

**ORDER DENYING
 PETITION FOR RULEMAKING**

THIS MATTER came before the North Carolina Environmental Management Commission (“EMC” or “the Commission”) at its regularly scheduled meeting on November 19, 2020, in Raleigh, North Carolina as a request for a declaratory ruling pursuant to N.C.G.S. § 150B-4 and 15A NCAC 2I .0601, *et seq.*, submitted by Petitioner Eagle Transport Corporation (“Eagle” or “Petitioner”).

Through its Petition, Eagle seeks a ruling on the applicability to Eagle of the third-party exception Petitioner requests the Commission to determine the ruling of the statutory law applicable to the fuel spill issue on the basis of a “third-party” exception to what the General Assembly defined as “unlawful discharges” in the statutes applicable to the accident and spill, entitled “Oil Discharge” in Part 2 of the North Carolina Oil Pollution and Hazardous Substances Control Act (“OPHSCA” or “the Act”). The Petition “also seeks a ruling that the provisions in those rules identifying the responsible parties for releases of hazardous substances or oil in groundwaters or in proximity thereto are an invalid legal basis for [the Department of Environmental Quality, Division of Waste Management’s] determination that Eagle is responsible for the discharge (i.e., the spill).” At the hearing, Petitioner noted that it no longer wished to pursue the second issue in its petition related to the Commission’s rules, and it is deemed abandoned.

The Petitioner’s Request for Declaratory Ruling was received by the Commission on July 22, 2020, and subsequently deemed complete by the Chair. A briefing schedule was established

for additional filings, and the Division of Waste Management of the Department of Environmental Quality (“DEQ” or “Department”) was invited to file a response to the Petition. The Department filed its Response and the Petitioner filed an “Additional Prehearing Statement” related to the Department’s Response.

By agreement of the Petitioner, the matter was calendared for hearing at the Commission’s November 19, 2020 regularly scheduled meeting. When the item was called for hearing before the Commission, Mr. Glenn Dunn and Mr. Keith Johnson, attorneys for the Petitioner, presented on behalf of the Petitioner. Mr. Michael Bulleri, Assistant Attorney General, appeared on behalf of the Department.

Upon review of the record documents and oral presentations, the Commission makes the following findings and conclusions, including applicable facts, statutes, and regulations relied on by the Commission. The Findings and Conclusions contained herein should be considered without regard to given labels.

FINDINGS AND CONCLUSIONS

1. Eagle Transport Corporation is a corporation engaged in the commercial transportation of petroleum products and is a “Person” as defined by N.C. Gen. Stat. § 143-215.77(13).

2. On January 28, 2020, a collision between an Eagle tanker truck carrying diesel fuel and gasoline (collectively referred to as “fuel”) and another vehicle occurred on Highway 16, in Lincoln County, outside Denver, North Carolina. The collision caused the tanker truck to overturn and come to a rest on its side on Highway 16.

3. As a result of the accident, fuel leaked from the overturned tanker truck and down the highway embankment and into storm drains, ultimately reaching a creek.

4. The fuel at issue meets the definition of “Oil” as provided in N.C. Gen. Stat. § 143-215.77(8), and the fuel leak is considered a “Discharge” as the term is defined by N.C. Gen. Stat. § 143-215.77(4).

5. Emergency management personnel, including local fire departments and emergency medical services, were contacted after the collision occurred.

6. The local fire departments responded to the accident and applied aqueous firefighting foam (“AFFF”) over the truck and site, but a spark caused the fuel to catch fire and burn over several hours. (Exhibit B, Petitioner’s Memorandum in Support, p 22)

7. Also on January 28, 2020, Eagle contacted Shield Engineering, Inc. for the handling of emergency actions to contain the spill and to undertake the subsequent abatement and remediation of the spill.

8. DEQ and other authorities were also notified of the spill.

9. On January 29, 2020, representatives of various parties, including Eagle, Respondent and Shield Engineering, met on site to assess the situation. (See Petitioner’s Memorandum in Support, Initial Assessment, Sec. 1.3.)

10. Also 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.*

11. 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. (DEQ Response, p 5)

12. 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.

13. The tanker truck driver did not survive the accident. According to the accident report, the driver of the other vehicle, Ms. Karen Hally, was determined to have been at fault for failing to yield. She was charged with misdemeanor death by motor vehicle. See Accident Report. (Petitioner's Memorandum in Support, p 2)

14. Eagle also filed a claim against Ms. Hally's insurance carrier, which accepted liability for the accident. (Pet's Additional Prehearing Statement, p 2)

15. Though the Department asserts that the question of causation for the accident remains open pending the outcome of the criminal charges against Ms. Hally, it does not assert that Eagle caused the spill and has not assessed civil or criminal penalties against Eagle for causing the discharge at issue.

16. In determining whether to issue a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4 it is not appropriate for an agency to resolve factual disputes. *See In Re Ford*, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981) (noting that the former N.C.G.S. § 150B-17, with the identical language regarding 'a given state of facts' "clearly [did] not contemplate an evidentiary proceeding").

17. There has been no assertion that Eagle caused the accident in either the accident report or by the Department and the Commission's decision is not predicated on such assertion. For the purposes of this matter it is sufficient for the Commission to accept as true the Petitioner's assertions that it did not cause the discharge at issue and that the discharge was caused by the actions of a third-party. These assumptions by the Commission are not intended to be – and should

not be interpreted as – a binding conclusion of law or fact for any other purposes, including as it pertains to any other hearing related to liability for damages related to the discharge at issue .

18. Petitioner requests the Commission to issue a declaratory ruling that “Eagle is not responsible for any further assessment or other corrective action in response to a fuel spill that resulted from a highway accident caused by a third-party driver which involved one of Eagle’s tanker trucks.” (Petition, p 1)

19. “Specifically, Eagle seeks a ruling on the applicability to Eagle of the third-party exception [provided in N.C. Gen. Stat. § 143-215.83(b)(2)d.] to what the General Assembly defined as unlawful discharges in Part 2 of OPHSCA in regard to the spill.” (Petition p 3)

20. Eagle asserts that, because the fuel spill at issue falls within the third-party exception provided in N.C. Gen. Stat. § 143-215.83(b)(2)d., the discharge was not a “prohibited discharge” for the purposes of N.C. Gen. Stat. § 143-215.84(a), which requires immediate action to collect and remove the discharge and to restore the affected area. (*See* Petitioner’s Memorandum in Support, p 7)

21. The Department interprets N.C. Gen. Stat. § 143-215.84(a) to apply to Eagle because it was in possession of the fuel immediately prior to the spill, irrespective of whether Eagle caused the discharge. (DEQ Response, p 9)

22. The Department asserts further that the exceptions provided in N.C. Gen. Stat. § 143-215.83(b) apply to shield a person, like Eagle, from being assessed civil or criminal penalties related to the act of discharging, but that the discharge is nevertheless one made in violation of the Act.

23. North Carolina General Statute Section 143-215.84 provides, in relevant part:

(a) Person Discharging. -- Except as provided in subsection (a2) of this section, 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.

N.C. Gen. Stat. § 143-215.84(a) (emphasis added).

24. In pertinent part, “Having control over oil or other hazardous substances” is defined as:

“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. Gen. Stat. § 143-215.77(5) (emphasis added)

25. The applicability of Section 143-215.84(a) does not depend on the “person in having control over the oil” causing the discharge; instead, it only requires the presence of a discharge made “in violation of this Article.” Where such a discharge has occurred, the statute expressly places the responsibility for the requirements of Section 143-215.84(a) on the person having control over the substance *immediately prior to its discharge*.

26. In relevant part, General Statute Section 143-215.83(a) makes it 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).

27. While Section 143-215.83(b)(2)d. provides an exception for “any person subject to liability under this Article [to] prove[] that [the] discharge was caused by . . . the acts or omission of a third party . . .,” the exception does not operate so as to convert an unlawful discharge to a lawful one. In other words, the discharge remains unlawful or otherwise prohibited, even where a person, like Eagle, is not liable for civil or criminal penalties for the acts causing the discharge.

28. Before a discharge covered by OPHSCA is lawful or permissible, the “person who desires or proposes to discharge oil or other hazardous substances onto the land or into the waters of this State *shall first make application for and secure [a] permit required by G.S. 143-215.1.*” N.C. Gen. Stat. § 143-215.83(c) (emphasis added).

29. Petitioner stipulates that the fuel spill at issue is a “discharge” as that term is defined in N.C. Gen. Stat. § 143-215.77(4), and does not assert that the discharge was made in compliance with a properly obtained permit.

30. The Petitioner argues that “[s]ince the third-party exception to an unlawful discharge in G.S. § 143-215.83(b) applies to Eagle, the requirements in G.S. § 143-215.84 regarding a prohibited discharge cannot be applied to Eagle.” (Petitioner’s Memorandum in Support, p 7).

31. However, nothing in the plain language of the relevant statutes or in the statutory framework supports the Petitioner’s asserted application of the exemptions listed in Section 143-215.83(b).

32. First, Section 143-215.83(b) does not expressly extend the exceptions to the Act, generally, or to other specific sections of OPHSCA. Instead, it limits the application to “this section.” N.C. Gen. Stat. § 143-215.83(b) (“*This section shall not apply to discharges of oil or other hazardous substances in the following circumstances....*”)

33. The requirements contained in Section 143-215.84(a) do not require a determination that a person caused the unlawful discharge; instead, it only requires the existence of a prohibited discharge. Where such a discharge has occurred, the requirements of the section apply to the person having control over the oil or other hazardous substance *immediately prior* to its discharge (i.e. before the discharge has even occurred).

34. Second, nothing in the plain language of Section 143-215.84(a) or in the notice requirements contained in Section 143-215.85(a), both of which apply to the person having control over the oil and require immediate action, provide an exception predicated on Section 143-215.83(b), either expressly or by reference. *See* N.C. Gen. Stat. §§ 143-215.84(a) and -215.85(a).

35. By contrast, General Statute Section 143-215.93 (“Liability for damage caused”) provides: “Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry, *subject to the exceptions enumerated in G.S. 143-215.83(b).*” N.C. Gen. Stat. § 143-215.93 (emphasis added).

36. Finally, neither the statutory definition of the terms “discharge” or “having control over oil or other hazardous substances” contain an exemption predicated on the exceptions contained in Section 143-215.83(b), either expressly or by reference.

37. “Discharge is defined broadly to include, *inter alia*, “any ... spillage,” and contains several exclusions, none of which are applicable here. Similarly, the definition of “Having control over oil or other hazardous substances” includes three express exemptions, which also do not apply to the factual situation presented. N.C. Gen. Stat. §§ 143-215.77(4) and (5).

38. Had the General Assembly intended the exceptions contained in Section 143-215.83(b) to apply either generally throughout the Act, or specifically to the requirements contained in Section 215.84(a), it could have done so. Instead, the General Assembly included a statutorily defined term in allocating responsibility for the requirements contained in Section 143-215.84(a), and did not make any reference to the exceptions contained Section 143-215.83(a).

39. Additionally, Section 143-215.84(a) requires immediate action to address the discharge and relates back to the circumstances immediately prior to the discharge. By contrast,

Section 143-215.83(b) allows a person subject to liability to “prove” that they are entitled to an exception.

40. Interpreting the statutes in the manner asserted by the Petitioner would render meaningless the language “in possession immediately prior to a discharge,” as contained in definition of “having control over oil or other hazardous substances” by requiring the Department to first make a determination as to the events at the time the discharge occurred.

41. It would also reverse the order of events such that it would require an initial determination of liability, the opportunity for the person to “prove” the existence of an exception, and then, only in the absence of an exception, would the person be required to “immediately” undertake” action to collect and remove the discharge, as required by Section 143-215.84(a).

42. Such a reversal is not supported by the plain language of the applicable statutes and is not consistent with the purpose of the Act, which 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. Gen. Stat. § 143-215.76.

DECISION

BASED UPON THE FOREGOING FINDINGS AND CONCLUSIONS, the North Carolina Environmental Management Commission **DECLINES** for good cause to issue the requested declaratory ruling, finding that no genuine controversy exists as to the application of the statutes at issue to the specific factual situation presented, as provided in 15A NCAC 02I .0603(d)(3). Petitioner’s request is, therefore, **DENIED**.

In reaching the decision memorialized in this Order, the Commission has complied with the requirements of the North Carolina Administrative Procedure Act, N.C.G.S. Chapter 150B, and has not exceeded its authority or jurisdiction, has not acted erroneously, has not failed to use proper procedure, has not acted arbitrarily or capriciously, and has not failed to act as required by law or rule.

This the 21st day of January 2021.

ENVIRONMENTAL MANAGEMENT COMMISSION



Dr. A. Stanley Meiburg, Chairman
Environmental Management Commission

CERTIFICATE OF SERVICE

This is to certify that the foregoing Order was served this day upon counsel for the parties by placing copies in the United States Mail, first-class postage prepaid, and addressed as follows:

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This the 21st day of January, 2021.

/s/ Phillip T. Reynolds
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Special Deputy Attorney General
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