

**BEFORE THE
NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION**

EAGLE TRANSPORT CORPORATION,)	
)	
Petitioner,)	PETITION FOR
)	DECLARATORY RULING
v.)	No. _____
)	
N.C. Department of Environmental Quality,)	
)	
Respondent.)	

Petitioner Eagle Transport Corporation (“Eagle”), through its undersigned counsel, hereby petitions the North Carolina Environmental Management Commission (the “Commission”) for 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. This Petition is filed pursuant to G.S. § 150B-4 and 15A N.C. Admin. Code §§ 2L.0601 *et seq.* The statutory basis for this requested ruling is the “third-party” exception to what the General Assembly defined as “unlawful discharges” in the statutes applicable to the accident and spill, in Part 2 of the North Carolina Oil Pollution and Hazardous Substances Control Act (“OPHSCA”). *See* N.C. Gen. Stat. § 143-215.83(b)(2)d. Simply put, since Eagle’s driver indisputably did not cause the accident that in turn caused the spill, but rather the accident and spill were caused by another driver, the third-party exception in OPHSCA applies to Eagle. Consequently, Eagle is not responsible for the discharge (*i.e.*, spill) under any of the provisions of OPHSCA.

Eagle is this day submitting a memorandum in support of this Petition, pursuant to 15A N.C. Admin. Code § 2L.0602(c). That memorandum first includes a statement of the basic,

indisputable facts regarding the cause of the vehicular accident and resulting spill. It then includes a chronology of relevant events and correspondence with Respondent after the accident and spill, followed by a discussion of the legal issues raised by this Petition.

Per the requirements of 15A N.C. Admin. Code § 21.0602(b), Eagle states as follows:

(1) The name and address of Petitioner:

Eagle Transport Corporation
Via its undersigned counsel.

(2) The rule, statute or order upon which a ruling is desired:

The statutory law applicable to the spill is Part 2 of OPHSCA – entitled “Oil Discharge Controls.” *See* N.C. Gen. Stat. § 143-215.83 *et. seq.* Eagle’s memorandum accompanying this Petition in Section III.A. includes a discussion of the relevant provisions in Part 2 of OPHSCA. This Petition is based upon the third-party exception to what the General Assembly defined as “unlawful discharges” in Section 143-215.83(b)(2)d of OPHSCA.

The corrective action provisions in North Carolina’s Groundwater Classification and Standards Rules (“Groundwater Quality Rules”) are also relevant. *See* 15A N.C. Admin. Code §§ 21.0601, 0501 *et seq.* That is because those rules are the purported basis for Respondent acting through its UST Section, Division of Waste Management, issuing two Notices of Regulatory Requirements (the “NORRs” or, individually, a “NORR”) to Eagle regarding the accident and spill. (Copies attached as Exhibits C and D to Eagle’s Memorandum). In each of the NORRs, Respondent, without explanation, stated its determination that Eagle is the responsible party for the corrective action required under the Groundwater Quality Rules in response to the spill, even though Eagle’s driver did not cause the accident or spill.

- (3) A concise statement as to whether the request is for a ruling on the validity of a rule or on the applicability of a rule, order or statute to a given factual situation.

Eagle seeks both. Eagle first, and at a minimum, seeks a ruling on the applicability of a statute to a given factual situation. Specifically, Eagle seeks a ruling on the applicability to Eagle of the third-party exception to what the General Assembly defined as unlawful discharges in Part 2 of OPHSCA in regard to the spill.

In addition, since the NORRs were based upon the corrective action provisions in the Groundwater Quality Rules, Eagle 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 Respondent's determination that Eagle is responsible for the discharge (*i.e.*, the spill). The relevant provisions are 15A N.C. Admin. Code §§ 2L.0106(b)-(c) and 2L.0503. Those provisions are invalid because, in enacting these provisions, the Commission exceeded its statutory authority which was limited to developing and adopting groundwater classifications and standards. *See* N.C. Gen. Stat. ¶ 143-214.1. The Commission was not granted authority by the General Assembly to determine the responsible parties for releases of hazardous substances or oil. *See id.* The General Assembly appropriately addressed that legal subject in OPHSCA. *See* N.C. Gen. Stat. § 143-215.83(a)-(b). Those provisions in the Groundwater Quality Rules referenced above are also flawed because they conflict with, and do not account for, the third-party exception to unlawful discharges in OPHSCA.

- (4) Arguments or data which demonstrate that the petitioner is aggrieved by the rule or statute or its potential application to him.

The NORRs issued to Eagle reflect that it is an aggrieved party. In contravention of the third-party exception to unlawful discharges in Part 2 of OPHSCA, Respondent has in the latest

of the NORRs directed Eagle to, at considerable expense, complete a comprehensive site assessment in response to a spill that it did not cause and for which it is not legally responsible.

(5) A statement of the consequences of a failure to issue a declaratory ruling in favor of the petitioner.

First, Eagle would be required to incur substantial additional costs in assessment and other corrective action for a highway fuel spill that it did not cause.¹

An adverse decision for Eagle would have other far-reaching consequences. This Petition presents significant issues regarding Respondent's legal obligation to comply with the General Assembly's intent regarding statutes and rules applicable to unpermitted discharges of hazardous substances or oil that pose a threat to waters of the State. If the third-party exception to an unlawful discharge in OPHSCA does not apply to Eagle in these circumstances, it is difficult to see when and under what circumstances it could apply, rendering that statutory exemption to what the General Assembly defined as unlawful discharges meaningless. Moreover, there is the issue of the validity of the provisions in the Groundwater Quality Rules by which Respondent has apparently based its determination that Eagle is responsible for corrective action under those rules. The lack of statutory authority to enact and apply the provisions in those rules that identify such responsible parties has been questioned for a long time but has never been addressed. Further, any

¹ None of the grounds of "good cause" for this Commission to decline to hear and rule on Eagle's Petition, set forth in 15A N.C. Admin. Code § 2L.0603(c), are present. Nevertheless, if this Commission were to decline to hear Eagle's Petition pursuant to that rule, that too would have adverse consequences for Eagle, as it could leave Eagle in a position in which no administrative relief is available until it is fined by Respondent. Eagle anticipates Respondent would take the position that subject matter jurisdiction does not exist at this time for a contested case petition to be heard in the Office of Administrative Hearings regarding the issue presented, since to date Eagle has only received NORRs and not yet been the subject of more formal enforcement action. Eagle submits this is the very type of situation and liability issue that the right to seek a declaratory ruling was meant to address.

such rule-making authority to make liability determinations, if it exists, must be consistent with the General Assembly's determinations on that subject.

(6) A draft of the proposed ruling.

A draft of a proposed Declaratory Ruling is attached as Exhibit A.

(7) A statement of whether an oral argument is desired, and, if so, the reasons for requesting it.

Eagle does request oral argument, which is warranted given the legal issues raised by this Petition and the consequences of the outcome of this Petition as discussed in section (5) above.

For the reasons stated herein and in Eagle's accompanying memorandum, Eagle's requests that the Commission grant this Petition and issue a declaratory ruling that Eagle is not responsible for any further assessment or other corrective action in response to the fuel spill that resulted from a vehicular accident caused by a third-party driver occurring on Highway 16 in Lincoln County on January 28, 2020, and involving one of Eagle's tanker trucks; and that as a consequence, the second NORR issued by Respondent to Eagle is null and void, and Eagle has no liability for any further enforcement action that Respondent may take arising from the fuel spill.

This the 15th day of July, 2020.

POYNER SPRUILL LLP

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COUNSEL FOR PETITIONER,
EAGLE TRANSPORT CORPORATION

Certificate of Service

I hereby certify that a copy of the foregoing Petition for Declaratory Ruling was served this
day U.S. Mail to Respondent's counsel listed below:

Jay Osborne, Esq.
Assistant General Counsel
N.C. Department of Environmental Quality
217 West Jones Street
Raleigh, NC 27603
jay.osborne@ncdenr.gov

This the 15th day of July, 2020.

By: /s/Keith Johnson
Poyner Spruill LLP

EXHIBIT A- PROPOSED ORDER GRANTING THIS PETITION
BEFORE THE
NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION

EAGLE TRANSPORT CORPORATION,)	
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v.)	No. _____
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N.C. Department of Environmental Quality,)	
)	
Respondent.)	

This matter comes before this Commission on the Petition for a Declaratory Ruling of Petitioner Eagle Transport Corporation (“Eagle”) that it 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 and involving one of Eagle’s tanker trucks (the “Spill”). The accident and spill occurred on Highway 16 in Lincoln County on January 28, 2020. Upon consideration of the parties’ written submissions and oral arguments, Eagle’s Petition is hereby GRANTED. This Commission finds and declares, pursuant to G.S. § 150B-4, that Eagle is not responsible for any further assessment or other corrective action in response to the above-referenced Spill. Consequently, the last Notice of Regulatory Requirements issued by Respondent to Eagle, on May 13, 2020, is hereby deemed null and void, and Eagle has no liability for any further enforcement action that Respondent may take arising from the Spill.

By: _____
 Dr. A. Stanley Meiburg
 Chairman
 Environmental Management Commission