STATE OF NORTH CAROLINA

COUNTY OF WAKE

ENVIRONMENTAL MANAGEMENT COMMISSION

In Re PETITION FOR DECLARATORY RULING by EAGLE TRANSPORT CORPORATION	)))))

RESPONSE 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 refuse to issue a declaratory ruling in this matter or to, in the alternative, issue a declaratory ruling affirming Eagle's obligation to conduct an assessment and take corrective action.

Pursuant to 15A NCAC § 2I .0603(c) good cause to refuse the declaratory ruling exists because there is no genuine controversy as to the application of a statute, order, or rule to the factual situation presented. There is no good cause to hear this matter because the Oil Pollution and Hazardous Substances Control Act of 1978 ("OPHSCA"), N.C.G.S. § 143-215.75 *et seq.* applies to Eagle and does not absolve them from responsibility for the clean-up. OPHSCA states that those in immediate possession of the oil prior to its discharge are responsible for clean-up regardless of liability, while shielding them from civil and criminal penalties if they did not cause the spill.

Specifically, Eagle is attempting to use the 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, it is contrary to legislative intent and public interest, and would work a substantial shift in responsibility for the cleanup of the full scale of hazardous releases in North Carolina. Additionally, Eagle's claim that North Carolina's Groundwater Classification and Standards Rules ("Groundwater Quality Rules") are an invalid legal basis for DEQ's determination that Eagle is responsible for the discharge is incorrect. These reasons provide good cause to refuse to issue a declaratory ruling in this matter.

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. OPHSCA authorized the State to create an oil pollution control program (N.C.G.S. § 143-215.78), and conduct inspections and investigations to determine compliance with, and violations of, OPHSCA (N.C.G.S. § 143-215.79). Additionally, 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 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. (emphasis added), s*ee, generally*, N.C.G.S. § 143-215.88A (Enforcement procedures: civil penalties); N.C.G.S. § 143-215.88B (Enforcement procedures: 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.* 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). Thus, where OPHSCA excepts certain parties from civil or criminal penalties related to discharges, it does not extend the same protections when it comes to cleaning up those discharges.

Such a responsible party, however, is not without recourse. 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 into the waters of the State." 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). Upon information and belief, at the time of this filing, the charges against the driver were still pending in Lincoln County Court.

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, amongst other things, a determination of its obligations under OPHSCA. In support of its Petition, Eagle submitted to the Commission a Memorandum with various supporting documentation. The provided documents include a report[1] prepared by the State Highway Patrol summarily describing the accident events (Pet's Memo pp 16-17), an "Initial Assessment Report and Work Plan For Soil Removal" prepared by Eagle's environmental consultant (Pet's Memo pp 18-39), and a flash drive containing video of the accident recorded from the tanker.[2]

POSITION OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY

DEQ requests that the Commission deny Eagle's petition and refuse for good cause to issue a declaratory ruling. There is good cause to deny the ruling requested by Eagle, and the claims Eagle is making are incorrect. After providing a short overview of the statute and rules relevant to declaratory rulings generally, this brief addresses each of Eagle's claims in turn.

[1] The report notes that it "is for the use of the Division of Motor Vehicles," and that "[d]eterminations of 'fault' are the responsibility of insurers or of the State's Courts." (Pet's Memo p 15)

[2] After filing its petition, Eagle emailed an affidavit to counsel for the Commission stating that the insurance company for the driver accepted that she "was liable for causing the accident."

I. Background on Declaratory Rulings

The North Carolina Administrative Procedure Act authorizes declaratory rulings. N.C.G.S. § 150B-4. A "person aggrieved" may request that an agency "issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency." N.C.G.S. § 150B-4(a). This declaratory ruling provision requires that all relevant facts be settled. *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 same language regarding "a given state of facts," "clearly [did] not contemplate an evidentiary proceeding"). Our Court of Appeals has recognized that if the facts are unsettled or in dispute, a declaratory ruling is not appropriate, and the matter is best addressed through the courts.

The Legislature directed the Commission to "prescribe in its rules the procedure for requesting a declaratory ruling and the circumstances in which rulings shall or shall not be issued." N.C.G.S. § 150B-4(a). Pursuant to 2I .0603(c), "the Commission may refuse to issue" a declaratory ruling for "good cause." "Good cause" includes: (1) finding of a similar determination in a previous case or declaratory ruling; (2) finding that the matter is the subject of a pending contested case in any North Carolina or federal court; (3) finding that no genuine controversy exists as to the application of a statute or rule to the factual situation; or (4) finding that the factual situation of the declaratory ruling was specifically considered when the rule was being adopted.[3] 15A NCAC 2I .0603(d).

[3] Proposed amendments to 15A NCAC 2I .0603 provide the same basis for denying a request to issue a declaratory ruling as are discussed in this response. Specifically, under the proposed rule, the commission may deny a request if it finds that "the matter is the subject of [] pending . . . litigation in any North Carolina . . . court;" or "no genuine controversy exists as to the application of a statute, order or rule to the specific factual situation present." 15A NCAC 2I .0603(4) & (5) (proposed).

II. Eagle's "Given Factual Situation" Does Not Present an Appropriate Basis for the Commission to Issue the Requested Declaratory Ruling.

The Commission can refuse to issue the requested declaratory ruling because it does not present an appropriate factual basis upon which to rule. The basis of Eagle's argument is that they "did not *cause* the vehicular accident or the resulting spill." (Pet's Memo p 1) (emphasis added) To the extent Eagle has raised causation as a relevant fact, their state of facts is not given. First, the facts presented by Eagle are the subject of a pending criminal action in State court. Second, and contrary to Eagle's assertions, the facts presented are neither "indisputable," nor are they appropriate for determination before the Commission.

Cause for denying a petition for a declaratory ruling includes "finding that the matter is the subject of . . . litigation in any North Carolina" court. 15A NCAC 2I .0603(d)(2). In *Equity Solutions of the Carolinas, Inc. v. N.C. Dep't of State Treasurer*, 232 N.C. App. 384, 754 S.E.2d 243 (2014), the North Carolina Court of Appeals' upheld the denial of a petition for declaratory ruling where "the same subject matter" formed the basis for a separate action that was pending in Wake County Court. *Id.* at 393, 754 S.E.2d at 250-51. Our Court of Appeals noted that "[i]t would be a waste of administrative resources for the State Treasurer to issue a ruling on a matter that would likely be judicially determined during the course of pending litigation."

Here, Eagle alleges that it is "indisputable" that the driver's act of causing the accident absolves them of responsibility under OPHSCA. In this matter, the North Carolina State Highway Patrol charged the driver with failing to yield in violation of N.C.G.S. § 20-155(a). N.C.G.S. § 20-155(a), requires drivers to ascertain that they can turn left or right from a straight line safely, before doing so. *Wiggins v. Ponder*, 259 N.C. 277, 279, 130 S.E.2d 402, 404 (1963). Evidence that the driver failed to do so presents a "*prima facie* case of actionable negligence." *Id.* Therefore, resolution of this charge, necessarily impacts a finding of the driver's negligence. Because this

charge was still pending in Lincoln County Court at the time of filing, and resolution of that matter will potentially impact the Commission's determination, cause exists to refuse to grant the petition.

Because certain of Eagle's "given state of facts" are in dispute[4], cause exists for refusing to issue a declaratory ruling in response to Eagle's petition. *In Re Ford*, 52 N.C. App. 569, 572, 279 S.E.2d 122, 124 (1981). As found by our Court of Appeals, when the relevant facts are disputed, a *court* is the appropriate venue for resolving the dispute. *Id.* A petition for declaratory ruling before the Commission is not an evidentiary proceeding, and a hearing on a declaratory ruling lacks many of the fact-finding tools of a trial, such as discovery, presentation of sworn testimony by witnesses, and the right to cross-examination. Refusing to grant the petition would be in accord with *Equity Solutions*¸ where the Court of Appeals reasoned that the State Court would have the benefit of a "fully developed factual record." *Equity Solutions*, 232 N.C. App. at 394, 754 S.E.2d at 251.

III. "Good Cause" Exists for the Commission to Refuse to Issue a Declaratory Ruling Because There is No Genuine Controversy as to the Application of a Statute or Rule to the Factual Situation Presented.

There is good cause to refuse the requested declaratory ruling in this matter because no genuine controversy exists as to the application of OPHSCA to this specific factual situation. Under OPHSCA, Eagle is liable for the assessment, collection, and removal of the discharge that occurred when their tanker truck released petroleum, regardless of who caused the accident.

Eagle's arguments that OPHSCA absolves it of all responsibility fail to create a genuine controversy for a number of reasons. First, OPHSCA is clear: transporters are always responsible for the cleanup of petroleum released from their vehicles. Second, Eagle's arguments defeat one

[4] DEQ does not dispute that, at the time of the accident, Eagle was a "carrier" who had "control over oil or other hazardous substances immediately prior to a discharge" pursuant to N.C.G.S. § 143-215-77(5) & (10).

of OPHSCA's stated purposes: providing "maximum protection for the public interest." N.C.G.S. § 143-215.94. Issuing Eagle's proposed ruling would take clean up out of the hands of operators who are prepared and capable of potential cleanup and would *increase* the burden on the public who has little to no knowledge of the process. Third, Eagle bases its argument on a misinterpretation of OPHSCA's third-party exception, N.C.G.S. § 143-215.83(b). Finally, OPHSCA is consistent with, and complements, the applicable provisions of federal laws and laws other states have adopted clearly limiting the application of third-party exceptions, similar to the one found in N.C.G.S. § 143-215.83(b), upon which Eagle relies.

A. OPHSCA is Clear: Eagle's obligation to clean up the release exists regardless of whether it is responsible for the discharge

Under OPHSCA, the transporter of the petroleum is strictly liable for the cleanup of the released petroleum whether the transporter caused the discharge or not.

Both OPHSCA's Removal of Prohibited Discharge provision, N.C.G.S. § 143-215.84, and Notice provision, N.C.G.S. § 143-215.85, direct "any person having control over oil or other hazardous substances" to engage in cleanup activities, regardless of fault. The Legislature defines "having control over oil or other hazardous substances" to mean "any person, using, transferring, storing, or transporting oil or other hazardous substances *immediately prior* to a discharge." N.C.G.S. § 143-215.77(5) (emphasis added). Eagle acknowledges that they had control over the oil immediately prior to the discharge. (Def's Memo, p 2)

N.C.G.S. § 143-215.84(a) directs "any person *having control over oil or other hazardous substances* discharged in violation of [OPHSCA to] 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.G.S. § 143-215.85 directs "[a] person who . . . has control over petroleum that is discharged into the environment [to] immediately take measures to collect

and remove the discharge." Neither of the foregoing contain exceptions that would absolve Eagle of its obligations.

In this case, Eagle was transporting the oil "immediately prior to [the] discharge" and thus is the party "having control over [the] oil." As the person having control over the oil, Eagle is strictly liable.

B. Holding Eagle strictly liable for the removal of the discharge is consistent with the intent behind OPHSCA and other North Carolina statutes.

The purpose of OPHSCA 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. OPHSCA does so by imposing strict liability when oil or hazardous substances are discharged, creating both civil and criminal enforcement procedures, and describing the process by which a spill must be cleaned up. N.C.G.S. § 143-215.93; N.C.G.S. § 143-215.88A-88B; N.C.G.S. § 143-215.84. Additionally, DEQ has promulgated the Groundwater Quality Rules explaining who is responsible and the steps that must be taken when a spill occurs. *See, e.g.,* 15A NCAC 2L .0106, .0503. The final goal of the Groundwater Quality Rules is the "restoration to the level of the standards, or as closely thereto as is economically and technologically feasible as determined by the Department." *Id.*

Although Eagle maintains that these administrative rules are improper and inconsistent with the Legislature's intent, their analysis ignores the body of law to the contrary. First, OPHSCA allows for joint and several liability, which indicates that the Legislature intended for Eagle to be strictly liable even if another party also contributed to the discharge. Secondly, the Legislature requires transporters of oil or hazardous substances to demonstrate additional financial responsibility and insurance beyond that required of ordinary motorists.

1. OPHSCA allows for joint and several liability between parties, including those "having control over the oil or other hazardous substances." N.C.G.S. § 215.94.

Holding Eagle responsible for the removal of the discharge in this matter is consistent with OPHSCA's provision on joint and several liability, N.C.G.S. § 215.94. "In order to provide maximum protection for the public interest," OPHSCA creates joint and several liability between parties responsible for cleanup costs. N.C.G.S. § 215.94 states that such an action can "be brought against 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). Eagle's arguments fail to create a genuine controversy for a number of reasons.

First, 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.

Second, notably absent from the joint and several liability provision of OPHSCA are the exceptions codified in N.C.G.S. § 215.83(b). This omission indicates the Legislature's intention to limit the exceptions to criminal and civil penalties for the act of discharging the oil, not the responsibility for removing the discharge.

Third, Eagle's interpretation of OPHSCA renders meaningless the plain language of N.C.G.S. § 215.94. If the party "having control over the oil or other hazardous substance" did not have the responsibility to clean up the release, there would be no purpose behind the law that other parties are jointly and severally liable for such costs. Accordingly, Eagle's interpretation should be rejected.

Finally, Eagle's argument defeats the stated purpose of N.C.G.S. § 215.94: "to provide maximum protection for the public interest." For the above stated reasons, absolving a transporter

of liability for cleaning up a release under these facts would not protect the public – it creates uncertainty and shifts the burden to the public. N.C.G.S. § 143-215.94 affirms the fact that both the driver and Eagle Transport are jointly and severally liable for the removal of the spill. By allowing for joint and several liability, the Legislature extended liability to the maximum number of responsible parties. Doing so ensures that the maximum amount of resources is made available for the removal of the release. Ultimately, holding all parties jointly and severally liable is the best way to protect the water and public of North Carolina.

2. The Legislature's requirement that transporters of oil and other hazardous substances meet substantial levels of financial responsibility evidences its intent for transporters to cleanup discharges.

The North Carolina Motor Vehicle Code provides further evidence that the Legislature intended for the transporters of oil and other hazardous substances to be responsible for cleanup following discharges. N.C.G.S. § 20-309(a1) requires owners of commercial motor vehicles to meet the minimum financial responsibility for the operation of the motor vehicle as required by federal regulation. Under the relevant federal regulation, for-hire carriers are required to carry substantially more financial responsibility than individual drivers. 49 C.F.R. § 387.9.

By requiring for-hire commercial transporters, such as Eagle, to carry higher amounts of insurance coverage, the Legislature is signaling that they anticipate holding these drivers to a higher standard than the ordinary, non-commercial, driver – the higher financial responsibility evidences the greater risk and greater obligation that results from that risk (*i.e.*, cleanup of discharges).

Further, the Legislature intended that companies like Eagle who profit from the transport of dangerous chemicals should be responsible for clean up when things go wrong. Not only did Eagle engage in an inherently dangerous activity, they are the ones best situated to financially

cover the removal of the discharge. It would be unfeasible to hold individual drivers liable for the removal of oil discharges and doing so would mean that these discharges would never be cleaned up. The Legislature knew this and intended for the party engaging in the dangerous action of transporting oil, Eagle, to be strictly liable for the removal. Issuing Eagle's proposed declaratory ruling would mean that ordinary drivers (with their ordinary insurance coverage) would suddenly be responsible for covering the cost of cleaning up oil and hazardous substance discharges. When that ordinary insurance coverage inevitably failed to cover the cost of the cleanup, the burden would shift to the State.

Holding Eagle liable for the removal of the discharge fulfills both the plain meaning of OPHSCA and the intent of the Legislature.

C. Eagle's analysis misunderstands OPHSCA's third-party exception.

Eagle interprets OPHSCA's third party exception, N.C.G.S. § 143-215.83(b)(2)(d), to completely relieve them of any liability for the discharge *and* for removal. N.C.G.S. § 143-215.83 reads, in full:

> (a) Unlawful Discharges. -- 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.
>
> (b) Excepted Discharges. -- This section shall not apply to discharges of oil or other hazardous substances in the following circumstances:
> (1) When the discharge was authorized by an existing rule of the Commission.
> (2) When any person subject to liability under this Article proves that a discharge was caused by any of the following:
> a. An act of God.
> b. An act of war or sabotage.

> c. Negligence on the part of the United States government or the State of North Carolina or its political subdivisions.
> d. An act or omission of a third party, whether any such act or omission was or was not negligent.
> e. Any act or omission by or at the direction of a law-enforcement officer or fireman.

N.C.G.S. § 143-215.83. Simply put, section (a) bans discharging oil or other hazardous substances in most circumstances. Again, "discharge" is the act of releasing the oil or other hazardous substance. N.C.G.S. § 143-215.77(4). Section (b)(2)(d) then absolves parties who are otherwise "subject to liability under" OPHSCA, from being deemed to have committed an "unlawful" discharge, where they prove the discharge resulted from a third party's act or omission.

Contrary to Eagle's position, successfully invoking N.C.G.S. § 143-215.83(b)(2)(d) does not render the discharge itself *lawful* with respect to all parties, nor does it remove the discharge from regulation under OPHSCA. Rather, the party invoking the third party exception proves only that the unlawful discharge is attributable to the act or omission of a third party, *i.e.*, the third party is the party that acted unlawfully. The discharge was still unlawful under N.C.G.S. § 143-215.83(a) because the discharge meets the definition of "unlawful discharge" therein, and the third party is not subject to any exception in N.C.G.S. § 143-215.83(b). Thus, the unlawful discharge is still subject to regulation under OPHSCA and the discharge is a violation of OPHSCA's requirements, regardless of whether Eagle or a third party is at fault.

Such an interpretation does not render the third party exception meaningless as Eagle argues. In fact it provides parties like Eagle significant statutory protections under, *inter alia*, N.C.G.S. §§ 143-215.88A and -215.88B, the civil and criminal enforcement provisions of OPHSCA. Such an application of OPHSCA is not just meaningful, it is logical: the Legislature made clear that innocent parties are not subject to penalties resulting from the unlawful acts of third parties.

Such an interpretation also gives meaning to additional language throughout OPHSCA that Eagle's misconstruction would render meaningless. If a party like Eagle was not subject to liability elsewhere in OPHSCA, there would be no point in adding the language "[w]hen *any person subject to liability* under this Article" (emphasis added) to the preface to the third party exception. N.C.G.S. § 143-215.83(b)(2). Inclusion of the foregoing language makes clear that liability for otherwise excepted parties exists throughout OPHSCA.

Similarly, Eagle's misconstruction that successful application of the third party exception renders a discharge *lawful* renders meaningless language in OPHSCA. Specifically, and most germane to their petition, Eagle argues that OPHSCA's removal provision, N.C.G.S. § 143-215.84, does not apply to them because the discharge was not a "prohibited discharge." *See* Pet. Memo p 7. As stated above, N.C.G.S. § 143-215.84(a) states:

> 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.

(emphasis added) Eagle's argument renders meaningless the provision that "any person having control over the oil or other hazardous substances" bears the burden of cleanup under N.C.G.S. § 143-215.84(a). If the Legislature had intended to only apply cleanup obligations on parties that caused the discharge of oil or other hazardous substances, it could have not included the foregoing provision. N.C.G.S. § 143-215.84(a) would then read as Eagle erroneously claims it does: "any person discharg[ing] oil or other hazardous substances in violation of [OPHSCA] shall immediately undertake to collect and remove the discharge." Eagle's liability derives from its status as the party "having control over the oil or other hazardous substance." Thus, inclusion of that language gives meaning to N.C.G.S. § 143-215.84(a).

Eagle raises the same argument with respect to OPHSCA's "Required Notice" provision, further shifting the burden for responding to oil and other hazardous substance releases in a manner inconsistent with the Legislature's intent. N.C.G.S. § 143-215.85. *See* Pet. Memo p 8. N.C.G.S. § 143-215.85 states, in relevant part:

> (a) . . . every 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,
> . . .
> (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.

Eagle again disregards the import of the term "having control over oil or other hazardous substance," in a manner that would render inclusion of that term meaningless. Simply put, why would the Legislature include such language in provisions across OPHSCA if it did not intend for parties who "had control over oil or other hazardous substances" to have the statutorily imposed obligations? Here, Eagle ignores the fact that they had control over the oil prior to the discharge. Rather they argue that they are not responsible for cleaning the discharge up or even notifying DEQ of the discharge. Instead of a transporter who carries added insurance and participates in a highly regulated industry being responsible for the simple task of notifying DEQ of a discharge, Eagle argues the Legislature intended that burden to fall on an ordinary driver. Such a conclusion is untenable and should be rejected.

D. Relevant federal and state statutes indicate that holding Eagle liable for removal is proper under OPHSCA.

The Legislature intended OPHSCA to "complement applicable provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. section 1251, *et seq.*, as amended, and the National Contingency Plan for removal of oil." N.C.G.S. § 143-215.76. Federal courts have held that defenses in environmental protection statutes must be interpreted narrowly so as to not frustrate the purpose of protecting public health and the environment. *See Westfarm Associates Ltd. V. Washington Suburban Sanitary Com'n*, 66 F.3d 669, 677 (4th Cir. 1995). Accordingly, federal statutes and regulations, and relevant Federal statutes and case law affirm the Legislature's intention to hold parties like Eagle strictly liable for the removal of discharges.

Federal courts have held that CERCLA and the Clean Water Act were intended to impose strict liability for the removal of oil discharges. *U.S. v. Monsanto Co.*, 858 F.2d 160, 167-68 (4th Cir. 1988). When applying CERCLA, federal courts have held that while joint and several liability is not mandated, it is permitted when appropriate. *Id.* at 171. However, the existence of a potentially responsible third-party does not mean that the party having control of the hazardous substance can avoid the primary duty and responsibility for the removal. *See id.* at 172. Federal courts have held that the party who had control of the oil or hazardous substance should not be able to avoid liability for the removal, even where a third party defense may apply. *See, e.g., U.S. v. P/B STCO 213,* 756 F.2d 364, 368-69 (5th Cir. 1985) (holding the owner or operator responsible for remediation "even before an adjudication of liability – if its defense . . . is that the sole cause of the discharge was the act or omission of a third party.") . Although federal statutes allow the company in control of the hazardous substance to later make a claim for contribution of costs from a third-party, the courts have held that Congress's purpose was to hold these companies responsible in the first place. *U.S. v. P/B STCO 213*, 756 F.2d at 369-70.

Here, holding Eagle and the driver jointly and severally liable maintains the Legislature's purpose of protecting the environment from oil and other hazardous substance discharges. By designating both parties liable for the removal, the Legislature is ensuring that funds will be available to complete the removal in an efficient manner. As previously stated, if the statute was written to only hold individual drivers liable for removal, oil discharges would never be cleaned up due to lack of funding. By allowing the party in control of the oil or hazardous substance, Eagle, to be held jointly liable, the Legislature is ensuring that there is adequate funding available for removal. Given the existence of strict liability in these cases, this is consistent with the other statutes on the same subject.

Similar to North Carolina's Oil or Other Hazardous Substances Pollution Protection Fund, N.C.G.S. § 143-215.87, federal environmental statutes and regulations provide public funding to help pay for the removal of oil and hazardous substances. *See generally*, 33 U.S.C. § 1321; 40 C.F.R. § 264.150. However, federal courts have repeatedly held that the existence of available federal funds does not absolve responsible parties of their obligations related to the remediation of oil discharges. *See, e.g., U.S. v. P/B STCO 213*, 756 F.2d at 368-69. In *United States v. Tibbitts*, the court held that the polluter "indifferently standing idle while its oil spill is neutralized at public expense . . . offers a compelling example of unjust enrichment." 607 F.Supp. at 542-43. Finally, courts have held that the availability of the federal public fund does not relieve the company in control of the hazardous substance of their responsibility for removal. *U.S. v. P/B STCO 213*, 756 F.2d at 369.

Although Eagle maintains that the public fund was created for situations such as these, federal case law shows otherwise. If Eagle and other companies transporting oil across the state, and more broadly across the nation, were able to rely upon public funds any time they were not

solely responsible for a discharge, the public fund would quickly become depleted. This fund is only to be used in circumstances where there is no available responsible party who is capable of the removal. Eagle is available and capable of removal, thus the use of this fund would be improper.

Eagle's interpretation of OPHSCA is also inconsistent with state environmental protection statutes that are similar to OPHSCA. While nearby states have statutes that echo the purpose and language of the Federal Water Pollution Control Act and CERCLA, no other state around North Carolina has a third-party exception to a statute similar to OPHSCA that is as broad as Eagle calls for here. *See, e.g.,* Va. Code § 62.1-44.34:18(G); *see also* Md. Code Ann., Envir. § 4-401. Nearby states have maintained narrow readings of their exceptions and North Carolina should be no different.

OPHSCA is modelled after federal statutes, which call for narrow interpretations of such defenses. Eagle's broad understanding of the third-party exception would be improper and inconsistent with the larger statutory scheme.

IV. 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 argument, Eagle contends 15A NCAC 02L .0503 and 15A NCAC 02L .0106 create, without statutory authority, an "independent, [im]proper basis" for determining responsible parties. (Pet's Memo p 10) 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." (Pet's Memo p 12)

OPHSCA's discharge removal provision, an authorizing statute for 15A NCAC .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 (emphasis added); *see also* N.C.G.S. § 143-215.104AA (implementing risk based cleanup of releases from aboveground storage tanks and other sources). As discussed above, the discharge removal provision 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 .0503 notes that the requirements of Section .0500 apply to "any person determined to be responsible for assessment and cleanup of a discharge or release from a non-UST petroleum source, including any person who has conducted or controlled an activity that results in the discharge or release of petroleum or petroleum products." By citing N.C.G.S. § 143-215.84, the rule makes clear that OPHSCA *determines* responsibility, and that the .0500 rules apply to those held responsible thereunder. The rule does not create nor does it provide 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. 15A NCAC 2L .0102 gives "any word or phrase used in [the] rules" the same meaning as given in N.C.G.S. § 143-213. N.C.G.S. § 143-213(9) defines "discharge" as including "spillage, leakage, pumping, placement,

emptying, or dumping into waters of the State." 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 refuse for good cause to issue a declaratory ruling in this matter or, in the alternative, issue a ruling affirming Eagle's obligation to conduct an assessment and take corrective action.

Respectfully submitted this the 23rd day of October, 2020.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing RESPONSE 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:

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This the 23rd day of October, 2020.

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