

North Carolina Department of Revenue

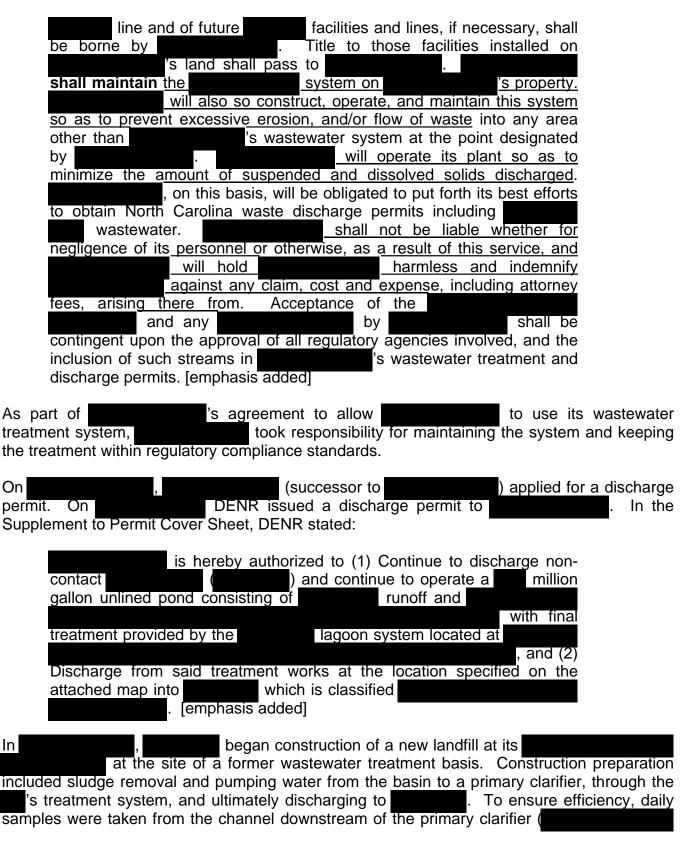
Beverly Eaves Perdue Governor David W. Hoyle Secretary

February 17, 2012

Re: Private Letter Ruling Request FID:
Dear :
This letter is in response to your letter dated North Carolina Department of Revenue ("Department") issue a private letter ruling stating your client, will not be denied William S. Lee (Article 3A) and the Article 3J tax credits (hereinafter referred to collectively as ("Credits"), due to a Notice of Violation issued from the North Carolina Department of Environment and Natural Resources ("DENR") dated
The statement of facts submitted for the Department's consideration is as follows:
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On pursuant to which entered into a General Service Contract with accepted wastewater:
will allow to discharge to]'s wastewater treatment system. No other water streams, with the exception of rainfall, shall be discharged by to's propertyThe cost of the initial P.O. Box 871, Raleigh, North Carolina 27602-0871 State Courier 51-71-00 Website: www.dornc.com An Equal Opportunity Employer

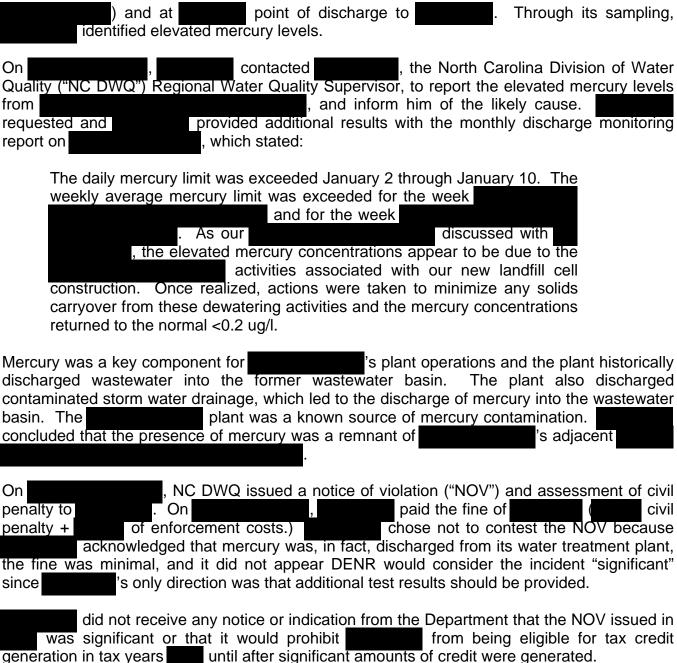
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Issue:

Whether or not the Department considers the incident (i.e. the discharge of mercury from Taxpayer's water treatment plant in a not "significant" as defined in North Carolina General Statute 105-129.4(b3) such that Taxpayer is eligible to utilize Credits generated in the 2003-2008 tax years.

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Department's Response:

North Carolina General Statutes, Chapter 105, Article 3A provided various tax credits for new and expanding businesses in the State. Prior to its repeal, in order to qualify for an Article 3A tax credit, a business was required to satisfy all of the general eligibility requirements of G.S. § 105-129.4 and the requirements of each tax credit. Pursuant to G.S. § 105-129.7, the burden was placed on the taxpayer to prove its eligibility for claiming Article 3A tax credits.

One of the general eligibility requirements appeared in G.S. § 105-129.4(b3) and denied tax credits if the taxpayer had a significant violation of any program implemented by the North Carolina Department of Environment and Natural Resources ("DENR"). Specifically, a taxpayer was considered "eligible" for tax credits only if the taxpayer certified that, at the time the taxpayer first claimed the credit, the taxpayer had no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by DENR and had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by DENR within the last five years.

On Control of Civil Penalty" ("NOV") to Taxpayer for violations concerning "discharge limitations and/or monitoring requirements found in occurred at Taxpayer's facility in Lax and the civil penalty. DENR closed the enforcement case.

Pursuant to G.S. § 105-129.4(b3), the Department received annual notification from DENR of persons that had pending administrative, civil, or criminal enforcement action based on an alleged significant violation of any program implemented by DENR, and had a final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of DENR within the last five years. Because of the violation, Taxpayer's name was included on the DENR report. The Department used the DENR report in determining Taxpayer's eligibility for Article 3A tax credits.

Although you contend that Taxpayer's violation "[did] not rise to the level of 'significant'", DENR is the State agency responsible for administering environmental regulations and is the authority on what constitutes a "significant violation". Since DENR included Taxpayer's name on its list of environmental violations for tax year , Taxpayer did not satisfy all of the general eligibility requirements needed to qualify for Article 3A tax credits. As such, the Department finds that Taxpayer is not eligible to utilize Article 3A tax credits generated in the 2003 through 2006 tax years.

¹ Article 3A was, with certain exceptions set out in G.S. 105-129.2A, repealed for business activities occurring in taxable years beginning on or after January 1, 2007 (section 1.3 of S.L. 06-252, as amended by section 5 of S.L. 07-515).

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As you know, effective for taxable years beginning on or after January 1, 2007, the General Assembly created Article 3J tax credits. Article 3J tax credits effectively replaced Article 3A tax credits. As was with Article 3A tax credits, taxpayers must satisfy general eligibility requirements, including having a good environmental record.²

During the 2010 legislative session, the General Assembly rewrote G.S. § 105-129.83(e), to modify the circumstances under which a taxpayer becomes ineligible for Article 3J tax credits due to violations of programs administered by DENR. Specifically, effective for tax credits claimed for taxable years beginning on or after January 1, 2007, a taxpayer becomes ineligible for Article 3J tax credits if there had been a final determination unfavorable to the taxpayer with respect to an environmental disqualifying event as defined in G.S. § 105-129.81.

G.S. § 105-129.81 defines an "environmental disqualifying event" as any of the following occurrences:

- a. During the tax year in which the activity occurred for which a credit is being claimed, a civil penalty was assessed against the taxpayer by the Department of Environment and Natural Resources for failure to comply with an order issued by an agency of [DENR] to abate or remediate a violation of any program administered by the agency.
- b. During the tax year in which the activity occurred for which a credit is being claimed or in the prior two tax years, any of the following:
 - A finding by the Department of Environment and Natural Resources that the taxpayer, knowingly and willfully committed a violation of any program implemented by the Department of Environment and Natural Resources.
 - 2. An assessment for damages to fish or wildlife was made against the taxpayer.
 - 3. A judicial order for injunctive relief was issued against the taxpayer in connection with a violation of any program implemented by an agency of the Department of Environment and Natural Resources.
- c. During the tax year in which the activity occurred for which a credit is being claimed or in the prior four tax years, a criminal penalty was imposed on the taxpayer in connection with a violation of any program

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² G.S. 105-129.83(e) **Environmental Impact**.

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implemented by an agency of the Department of Environment and Natural Resources.

Based on the information supplied by you in your letter, Taxpayer may be eligible for Article 3J tax credits for qualifying investments made in tax years 2007 and 2008 if Taxpayer satisfies all the general eligibility requirements of G.S. § 105-129.83 and the requirements of each specific Article 3J tax credit.

Finally, we note your contention that "it would be contrary to public policy to treat taxpayers incurring penalties prior to the revision of [G.S.] § 105-129.81 and 105-129.83 differently than those incurring penalties after the revision." However, the Department does not have the statutory authority to retroactively apply the 2010 legislative changes made to G.S. § 105-129.83 (Article 3J tax credits) to G.S. § 105-129.4 (Article 3A tax credits).

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if there are other facts that were not disclosed that might cause the Department to reach a different conclusion, then the taxpayer requesting this ruling may not rely on it. A letter ruling is not equivalent to a Technical Advice Directive that generally affects a large number of taxpayers. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Sincerely,

