



North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

John E. Skvarla, III
Secretary

August 28, 2014

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**Re: 60 Day Notice of Intent to Sue Letters
Cape Fear Steam Electric Plant
H.F. Lee Steam Electric Plant
Buck Steam Station**

To Whom It May Concern:

On July 2, 2014, the North Carolina Department of Environment and Natural Resources (“DENR”) received three Notice of Intent to Sue letters for alleged Clean Water Act violations at Duke Energy’s Cape Fear, Lee, and Buck facilities. Before addressing these NOI letters it is important to provide a summary of the enforcement efforts DENR has made since this administration took office in January 2013. Within 90 days of coming into office, under the leadership of Secretary John E. Skvarla and through the vigorous efforts of DENR engineers and scientists, this administration has undertaken enforcement action to address the long-ignored environmental problems associated with coal ash ponds in the State of North Carolina. These problems, ranging from unauthorized discharges to groundwater contamination, have been well known and well documented for decades, yet virtually no initiative was undertaken by any non-governmental organization or governmental agency to address these problems until quite recently. This DENR Administration, under Secretary Skvarla’s leadership, has taken seriously its obligation to protect the public health and environment

while providing for responsible economic growth. The actions described below provide a brief summary of just some of DENR's efforts to address the concerns you now raise in the Notice of Intent to Sue letters.

Civil Actions

DENR requested that the N.C. Attorney General initiate a civil action on the behalf of the State of North Carolina against Duke Energy Progress, Inc. (Duke Energy) (pursuant to N.C. Gen. Stat. 143-215.6C), for violations of environmental regulations at Duke Energy's Asheville facility located in Buncombe County. The action was filed on March 22, 2013. *See Attachment A.*

DENR requested that the N.C. Attorney General initiate a civil action on the behalf of the State of North Carolina against Duke Energy Inc. (Duke Energy) (pursuant to N.C. Gen. Stat. 143-215.6C), for violations of environmental regulations at Duke Energy's Riverbend facility located in Gaston County. The action was filed on May 24, 2013. *See Attachment B.*

DENR requested that the N.C. Attorney General initiate two more companion civil actions on behalf of the State of North Carolina against Duke Energy (pursuant to N.C. Gen. Stat. 143-215.6C) for violations of environmental regulations at Duke Energy's Asheville facility located in Buncombe County for violations of state environmental regulations at Duke Energy's 12 other North Carolina facilities, viz.: Cliffside Steam Station in Rutherford County; Buck Steam Station in Rowan County; Allen Steam Station in Gaston County; Belews Creek Steam Station in Stokes County; Dan River Station in Rockingham County; Marshall Steam Station in Catawba County; Cape Fear Electric Generating Plant in Chatham County; H.F. Lee Steam Station in Wayne County; Mayo Steam Electric Station in Person County; Roxboro Electric Generating Station in Person County; L. V. Sutton Electric Plant in New Hanover County; and the Weatherspoon Station in Robeson County. The actions were filed on August 16, 2013. *See Attachments C and D.*

Since DENR's filing of the above civil enforcement actions, several special-interest groups represented by the Southern Environmental Law Center ("SELC") have moved to intervene in North Carolina's injunction cases. DENR made no effort to oppose, or in any way "block" these

parties from joining the State's legal actions. The table below lists some of the special-interest groups who are now part of the State's civil enforcement actions against Duke Energy.

North Carolina's Civil Action Facility	Intervening Party	DENR Position in Motion to Intervene	Motion Disposition
Asheville	Sierra Club Waterkeeper Alliance Western North Carolina Alliance	Did not oppose	Granted
Riverbend	Catawba Riverkeeper	Did not oppose	Granted
G.G. Allen Steam Station	Waterkeeper Alliance Catawba Riverkeeper	Did not oppose	Granted
Marshall Steam Station	Waterkeeper Alliance Catawba Riverkeeper	Did not oppose	Granted
Belews Creek Steam Station	Appalachian Voices	Did not oppose	Granted
Buck Steam Station	Yadkin Riverkeeper, Waterkeeper Alliance	Did not oppose	Granted
Cliffside Steam Station	Western North Carolina Alliance	Did not oppose	Granted
Dan River Combined Cycle Station	Dan River Basin Association, Roanoke River Basin Association, Southern Alliance for Clean Energy, Waterkeeper Alliance	Did not oppose	Granted
L.V. Sutton	Cape Fear River Watch Sierra Club Waterkeeper Alliance	Did not oppose	Granted

Following the Courts' granting of motions to intervene, the attorneys representing some of these special-interest groups announced that their clients would now be full parties to North Carolina's lawsuits against Duke Energy. For example, press releases stated that the Catawba Riverkeeper would be a "full party" in North Carolina's actions against Duke Energy's Allen and Marshall facilities; and others stated that the Cape Fear River Watch, the Sierra Club, and Waterkeeper Alliance would be "full parties" in the North Carolina's action against the Duke Energy Sutton facility. *See Attachment E.*

Duke Energy has denied legal liability in all enforcement actions thereby creating the possibility of protracted litigation for the lawsuits covering all 14 coal ash facilities.

See, e.g., Attachment L.

DENR, in an effort to accelerate the environmental assessment and corrective action needed at the Riverbend and Asheville sites, negotiated a proposed consent order which would require Duke Energy to take action. The proposed order would have mandated Duke Energy to complete groundwater assessments, drinking water surveys, and document all unauthorized discharges. To ensure public involvement, DENR published a public notice inviting the public's comments on the proposed consent order terms. *See Attachment F.* Based on the public comments received, DENR revised the terms of the proposed consent order to tighten timelines for corrective action and expand monitoring provisions. *See Attachment G.* DENR submitted the revised proposed consent order to the Court and requested the Court approve the order.

On March 6, 2014, in a separate lawsuit to which DENR was not a party, an Order was issued reversing a 2012 Declaratory Ruling by the North Carolina Environmental Management Commission's ("EMC") interpreting the State's groundwater regulations. The 2012 Declaratory Ruling was based on a 2009 informal opinion by the Attorney General's office and consistent with DENR's application of the groundwater regulations for more than 20 years. *See Attachment H.* Because the October 2013 proposed consent order in the Riverbend and Asheville cases was based on the 2012 Declaratory Ruling – a ruling subsequently determined to be erroneous by a Superior Court judge to be erroneous –DENR decided to withdraw the proposed consent order and proceed with litigation against Duke Energy. *See Attachment I.* These cases are now proceeding through the discovery phase.

Enhanced Inspections

This administration is committed to ensuring the continued safety of the public health and the environment through a continual and comprehensive safety and environmental inspection regime at all of Duke Energy's 14 plants with coal ash ponds. Aside from DENR's constant presence during

the Dan River spill, DENR has, from January 2013 to the present, performed more than 75 inspections of coal ash impoundments at Duke Energy's 14 coal ash sites.

The Dan River spill served to heightened DENR's interest in any piping, corrugated metal or concrete, associated with any of the 33 coal ash impoundments located at Duke Energy's 14 coal ash facilities. On March 5, 2014, DENR sent a letter to Duke Energy requiring Duke to conduct a video inspection of all piping at all 33 coal ash impoundments. *See* Attachment J. Duke Energy completed the video inspections and provided the video footage to DENR. DENR made these videos publically available by posting on YouTube:

<https://www.youtube.com/playlist?list=PLfOCSqIVwaq5lyZJ2Q0QATM8VNz2A32NM>

After DENR's review of the video inspections, DENR found no evidence of any immediate structural concern. However, DENR did identify several deficiencies that needed to be corrected by Duke Energy. In June 2014, DENR sent 13 Notice of Deficiency ("NOD") letters to Duke Energy requiring the company to retain the services of professional engineers to review the video and provide an assessment of the piping. *See* <http://portal.ncdenr.org/web/guest/dan-river-spill>. In addition, in June 2014 DENR sent 10 Notice of Inspection ("NOI") letters to Duke Energy requesting additional information.

In response to the NODs and NOIs issued by DENR, Duke Energy provided the requested information to DENR. A number of the responses proposed specific actions to correct the deficiencies. Currently, DENR is in the process of reviewing and authorizing the proposed actions. In the case of the NOI responses, DENR has reviewed the responses and has found no evidence of any immediate structural concern. DENR did, however, identify several deficiencies that needed to be corrected by Duke Energy. In August 2014, DENR issued eight additional NODs based on the information it received from Duke Energy in response to DENR's NOIs. *See* <http://portal.ncdenr.org/web/guest/dan-river-spill>.

Reopening NPDES Permits

On February 24, 2014, DENR issued a notice of reopening for cause to Duke Energy for the Dan River NPDES permit. On March 14, 2014, DENR issued notices of reopening for cause to Duke Energy for its Riverbend, Asheville, and Sutton NPDES permits. *See* Attachment K. DENR sent these letters to Duke Energy for the purpose of revising the Duke Energy facilities' NPDES permits to include additional protective terms and conditions, including enhanced monitoring where necessary, to ensure elimination of all unauthorized discharges.

In order to revise the NPDES permits to eliminate the unauthorized discharges, DENR needed to collect additional technical information and therefore initiated a vast and unprecedented effort to identify *each and every potential seep*, engineered or otherwise, that existed at each of the 33 coal ash impoundments. The complexity of this effort was compounded by the general engineering of earthen impoundment dams which, in many cases, are designed with engineered seeps to maintain structural integrity. Moreover, the seasonal nature of groundwater movement throughout North Carolina makes many seeps ephemeral and difficult to identify consistently from season to season. Each potential discharge had to be located, identified, sampled (where there was sufficient flow), catalogued and analyzed to determine the cause of the potential discharge. DENR staff, through countless hours of work including on-site inspections, sampling and analysis developed a comprehensive data set. Hundreds of water samples were taken and analyzed. This comprehensive data set, including the location of the potential discharge, the flow rate, the constituent characteristics based on sampling, is being shared with the public as well as with our federal EPA partners.

On May 19, 2014, Duke Energy submitted to DENR an application for a revised NPDES wastewater permit for the Riverbend facility. Duke's application included a similar comprehensive review of potential discharges based on information collected by Duke. The data gathered by Duke, along with the comprehensive data set developed by DENR staff, is currently under review and being used to revise the Riverbend facility NPDES permit. Part of this revision process includes running an environmental impact model referred to as the Reasonable Potential Analysis ("RPA") model that predicts the impact of discharges. DENR is currently developing monitoring conditions

that will be placed in a draft permit to ensure that there will be no adverse impact from the permitted discharges. When DENR completes its review process, a draft permit will be made available for public comment and EPA review. Such public comment and EPA review will help further ensure the revised permit appropriately includes any and all discharges required to be included as part of the NPDES permit.

On July 31, 2014, Duke submitted to DENR applications for revisions to wastewater NPDES permits for its Dan River, Asheville, Sutton, Cliffside, Cape Fear, and Belews Creek facilities. DENR intends to process these applications in the same manner as described above for Duke's Riverbend facility. The revised permits are expected to correct the unauthorized discharges at these facilities.

Governor's Plan

In March 2014, Duke Energy filed the aforementioned answer to DENR's civil enforcement action complaints in which Duke Energy denied the substantive allegations of environmental violations set out in DENR's complaints. *See, e.g.*, Attachment L. Recognizing the potential for protracted litigation and thus the delay in closing coal ash ponds through existing regulatory authority and litigation, Governor McCrory charged DENR with the task of developing a comprehensive set of proposed statutory and regulatory changes that, if enacted, would grant the Governor the authority necessary to require the closure of all of Duke Energy's coal ash ponds. Scientists and engineers inside DENR helped develop the Governor's Comprehensive Coal Ash Action Plan. On April 16, 2014, Governor McCrory announced a thorough, science-based plan to address coal ash ponds and strengthen environmental and health regulations. The Governor's plan, if enacted, would have required closure of all of Duke Energy's coal ash ponds, closed loopholes in state law to strengthen the State's ability to regulate coal ash ponds, eliminated special exemptions for utilities and increased regulatory authority to ensure dam safety and protect water quality. The Governor noted that "since taking office in January 2013, my administration has discovered a number of long-standing shortcomings in state law that hamper our ability to adequately protect public health and the environment in addition to dealing with emergencies when they happen. We need to close these

loopholes and give our regulators the tools they need to solve this more than 60-year-old coal ash problem.” *See* Attachment M.

Governor McCrory’s Executive Order No. 62

The Governor’s Plan described above was made available to the N.C. General Assembly and formed the foundation for legislative proposals. However, on August 1, 2014, the General Assembly signaled that it was unable to agree on a final coal ash bill and deferred taking further action. Given the legislative impasse, Governor McCrory immediately issued Executive Order 62, requiring DENR to implement all existing authorities that would help 1) expeditiously assess coal combustion products impoundments at public electric utilities; 2) immediately initiate a survey of drinking water wells to determine any contamination from coal combustion products impoundments; 3) take appropriate action to halt any violations of the law where necessary; 4) mandate remediation plans for all facilities where violations are found; 5) continue prosecuting active lawsuits in furtherance of the Order. *See* Attachment N.

DENR reviewed the status of all coal ash efforts to date as well as existing regulatory authorities and on August 13, 2014, consistent with Executive Order 62, sent four letters to Duke Energy requiring that Duke provide to DENR: 1) excavation plans, including dewatering plans, for Riverbend and Asheville; 2) groundwater assessment plans within 45 days; and 3) drinking water surveys, identifying all private and public wells within one-half mile of each facility within 60 days. In addition, DENR’s letters requested that Duke immediately begin weekly inspections of all coal ash impoundments, annual third party comprehensive structural assessments, and reopen NPDES permits for cause for the seven plants for which Duke had not yet submitted applications to address and eliminate unauthorized discharges from their coal ash ponds. *See* Attachment O. Presently, DENR’s civil enforcement action cases filed against Duke for its 14 coal ash facilities are in the discovery phase of litigation.

Joint North Carolina and EPA Enforcement

On March 14, 2014, Secretary Skvarla sent a letter to the U.S. Environmental Protection Agency (“EPA”) inviting the EPA to partner with DENR in a potential enforcement action against Duke

Energy for Clean Water Act violations at Duke's Dan River facility as well as at Duke's 13 other coal ash facilities. *See* Attachment P. On March 17, 2014, EPA agreed to partner with North Carolina to pursue and resolve complex enforcement actions at Duke's 14 coal ash facilities. As noted in its response letter, EPA stated it was aware of DENR's current enforcement actions against Duke Energy and looked forward to working with the State. *See* Attachment Q. DENR believes that by partnering with EPA the combined expertise of both the federal and state agencies will help to assess comprehensively Duke's continued noncompliance with the Clean Water Act.

Since establishing the joint enforcement partnership, DENR and EPA have worked collaboratively to assess the extent of Duke's non-compliance with the Clean Water Act. Under the authority of Section 308 of the federal Clean Water Act, the EPA sent Duke Energy a letter requiring that Duke provide specific information related to unauthorized discharges at all its facilities. The EPA sent Duke a second Section 308 letter requesting specific information related to the Cape Fear pumping violation. The EPA and DENR will review Duke's response to help inform an appropriate additional enforcement response, including penalties, for all Clean Water Act violations.

Natural Resources Damage Claim

In May of 2014, North Carolina announced it would serve as one of three trustees in a Natural Resource Damages ("NRD") claim against Duke Energy to address damage to the environment resulting from the Dan River coal ash spill. North Carolina, along with its co-trustees, have initiated the Natural Resource Damage Assessment and Restoration ("NRDAR") to begin evaluating how best to restore fish and wildlife resources affected by the Feb. 2, 2014, Dan River coal ash spill. *See* Attachment R. North Carolina's participation as a trustee will ensure that Duke Energy is held accountable for the damages to North Carolina's environmental resources and will work to require Duke Energy to fund projects that directly restore the damages caused by the spill.

North Carolina Coal Ash Management Act

On August 20, 2014, the North Carolina legislature voted to approve the nation's first comprehensive coal ash legislation based on Governor McCrory's April 2014 plan discussed above.

July 1, 2014 Notice of Intent to Sue Letters: Clean Water Act Violations

On July 1, 2014, DENR received Notices of Intent to Sue letters for violations and alleged violations at the Buck Steam Station in Rowan County, Cape Fear Electric Generating Plant in Chatham County, and the H.F. Lee Steam Station in Wayne County. As described in this letter, DENR has been addressing all violations at coal ash ponds at these three locations, as well as at Duke Energy's other 11 facilities, before receiving the three Notice of Intent to Sue letters. For each of the facilities in the notice letter, DENR has addressed all unauthorized discharges as follows:

- Buck Plant: "A seep or discharge from the Ash Basin, the Ash Settling Ponds or any other part of the Buck Steam Station that is not included in the Buck Steam Station NPDES permit is an unpermitted discharge in violation of N.C. Gen. Stat. § 143-215.1(a)(1) and (a)(6)." *See* Attachment C; Complaint at ¶ 81.
- Cape Fear Plant: "A seep or discharge from the Ash Ponds or any other part of the Cape Fear Steam Electric Plant that is not included in the Cape Fear Steam Electric Plant NPDES permit is an unpermitted discharge in violation of N.C. Gen. Stat. § 143-215.1(a)(1) and (a)(6)." *See* Attachment D; Complaint at ¶ 112.
- Lee Plant: "A seep or discharge from the Ash Ponds or any other part of the Lee Steam Electric Plant that is not included in the Lee Steam Electric Plant NPDES permit is an unpermitted discharge in violation of N.C. Gen. Stat. § 143-215.1(a)(1) and (a)(6)." *See* Attachment D; Complaint at ¶ 138.

The four pending state court enforcement cases seek injunctive relief for unpermitted discharges at all of Duke Energy's North Carolina coal ash facilities. Therefore, the unpermitted discharges at the Buck, Cape, Fear and Lee plants, which are identified in the Notice of Intent to Sue letters are already part of the pending enforcement actions filed about one year ago. The Cape Fear Notice of Intent to Sue letter also referenced the pumping activity at Cape Fear's 1985 ash pond. North Carolina took enforcement in the form the issuance of a Notice of Violation as well as adding this violation to the EPA-DENR joint enforcement discussed above.

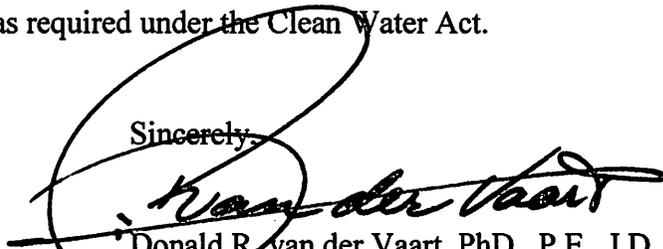
Conclusion

It is clear that prior to January 2013 when this Administration took office, Duke Energy was allowed to operate coal ash impoundments resulting in groundwater contamination that potentially threatens North Carolina's environment and public health. As you noted in your Notice of Intent to Sue letter for the Lee facility, "Since at least 2007, elevated levels of pollutants from these coal ash ponds have been documented in groundwater under, at, and around the Lee facility." See Lee Notice of Intent to Sue letter at 7.

As early as 2007, then it was known that there were exceedances of environmental standards at many of these coal ash sites. However, until very recently, no serious action was taken by anyone, including citizens groups, to assess the situation or require remediation. Beginning in 2013, the actions taken by DENR demonstrates our commitment and resolve to protecting public health and the environment. While contamination resulting from coal ash impoundments is not unique to this state, North Carolina has clearly demonstrated by its actions that this state is, and will continue to be, a national leader in environmental protection of its citizens and natural resources. As DENR moves forward to address this long-ignored problem that took more than 60 years to create, we will continue to rely on our dedicated staff of scientists and engineers to assess and monitor the elimination of coal ash contamination. We will remediate our natural resources in a responsible manner as expeditiously as practicable, and we will hold Duke Energy responsible and accountable as required by law.

Based on the above, it is clear that no further additional filings are required or necessary since 1) all Clean Water Act Claims raised in the Notice of Intent to Sue letters are covered by North Carolina's previous actions and the ongoing EPA-DENR joint enforcement, and 2) DENR is diligently discharging its responsibilities as required under the Clean Water Act.

Sincerely,



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N.C. Department of Environment and Natural Resources