

Agenda Item: 18-26 Request Approval of Hearing Officer's Report and Issuance of Water Quality Special Order by Consent (SOC) S17-009 to address Non-engineered Seeps from Coal Ash Basins at Duke Energy's Allen, Marshall and Rogers (Cliffside) Steam Stations

Chairman Solomon gave a few points of order to ensure that things moved along in an orderly and effective fashion. He indicated that Jay Zimmerman would be speaking and gave the Commission a summary as a framework for the presentation. There were three levels of questions he advanced in trying to manage the agenda concerning why they are doing this and the EMC's authority. He had heard some specific concerns with the hearing officer's report and other issues, realizing that the assessment of penalties was also part of their purview in this SOC. After Jay spoke, Commissioner Carroll, who was the hearing officer, would speak and staff would be there to support Commissioner Carroll. The Chairman indicated that he wanted to give the EMC some points that he saw as a starting point for discussion of all the issues. Chairman Solomon stated that he had some concerns from a procedural standpoint that would shape whether the EMC move on this issue today or have an alternate path to get to another point.

Commissioner Carroll indicated he did serve as the hearing officer for the Special Order by Consent. He commented that this is all new information to the Commissioner members. He stated that this was an agreement that was entered between the Department and Duke Energy Carolinas without any involvement by the EMC. It was intended to address an issue with so called non-engineered seeps at Duke's coal ash ponds, that's the specific issue. That issue has become a stumbling block in terms of NPDES permitting. Commissioner Carroll indicated there needed to be a way to address these non-engineered seeps so that permitting can begin and this was the way the Department decided was best. Normally the Director would sign the SOC after it was negotiated. In this case it came to the EMC because the Department decided there was enough public interest for this to have a public meeting and solicit public comments at a meeting. Because there was a public meeting and only because there was a public meeting, it comes to this body for final action. That's the only reason. Otherwise, this would have been done by the Department. He mentioned that secondly, as they were thinking about this, try to remember that the subject of the agreement was only one thing. He indicated that the whole subject of the agreement was the non-engineering seeps and how to address them and how to eliminate them. He stated that it didn't have anything to do with NPDES permitting, water quality, groundwater or this, that or the other. It was only how are they going to address the non-engineered seeps. They are a problem and the lack of a good way of addressing them in permitting is causing the entire process to come to, basically, a halt, which is not in the public interest. Commissioner Carroll asked DEQ staff to make a short presentation to the EMC to better understand the issues and the necessity of the agreement, and about why they were there, why they had decided to proceed that way and why it was important. Even before they do that, there's a language change in the agreement that was distributed by Assistant Secretary Holman. This was going to be the new change in the language, which they need to get into the record first prior to the EMC debating the agreement. Commissioner Carroll asked Assistant Secretary Holman to present that information, explain it and put it in the record.

Assistant Secretary Sheila Holman stated that sending them out a letter the night before the full EMC was not the way she wanted to do business. She indicated that they had put a lot of time and energy into

developing this SOC. There had been a tremendous amount of work on the part of the hearing officer, **Commissioner Carroll**, DEQ staff and the Duke Energy staff. But she wanted the EMC to know over the last few days the Department had received a lot of questions about some particular language that was addressed in the letter which was dated March 7, 2018. As they contemplated the concerns and comments that came to them late on March 7, the Dept. decided that their recommendation was to strike the language in the penalty section that talks about not being an admission of guilt and other things on the part of Duke Energy. She commented that given the decision came so late in the process, it was the Department's recommendation only. There was not concurrence yet from Duke Energy but she did think that the agency believes that this was a necessary change and she felt they need to contemplate how best to consider the recommendation in light of other things that the EMC may want to recommend in terms of changes to the terms of the SOC.

Chairman Solomon responded that to just be clear, this needed to be in the discussion but he wanted Counsel Reynolds to tell them their options at the end because this was a Special Order by Consent. Duke would have to agree with anything that the EMC would do and they have a time period. This was only the Department's recommendation. This was not necessarily the record or agreement with Duke. He clarified that the EMC had to consider this just as they would anything else. They now have the final signature authority on the document and he appreciated the Secretary and thought it was proactive, but there were options they can do that with consent or without consent or some other ways. He indicated that this was the Department's recommendation and it would be put in the record then as **Commissioner Carroll** wanted them to.

Commissioner Carroll stated that this was the language of the agreement now. The Department has changed it and Duke has not signed it, but this was the language that was going to be presented to Duke.

Chairman Solomon responded no, Duke had not signed it and Duke had not yet agreed to that the new language. In the record, right now is the agreement signed by Duke dated 1/8 or 1/10. That is what the record is and that is what they expect him to sign as the Chairman. It has not been agreed upon if you vote today to approve what's in the record, which is that he would sign it with the language in it over the Department's objections, because the Department is now trying to change that. But Duke has not agreed to it and there is a process that Counsel Reynolds will tell the EMC about how Duke has a certain period of time to react to this.

Commissioner Carroll indicated his understanding was that DEQ had changed the text that had to go back. If they approve the revised text that is the text and that would go to Duke for their agreement or disagreement. The it would be up to Duke to sign it or not sign it. The EMC approves what they approve and that would be his position.

Chairman Solomon agreed, but he stated that Duke could have easily come in with the same recommendation or different one and the same boundaries would apply. We would have to take it back to the Department for their consent. It doesn't really matter that it is coming from the Department. The two

parties have agreed to this Special Order by Consent theirs is a reaction to that consent. Then there are actions that are taken.

Commissioner Carroll viewed it that there was no agreement because DEQ has changed the language.

Chairman Solomon stated two things; (1) they need an agreement to go to public hearing because if there was no agreement from Duke and the Department and they go out fishing, then Duke could back out of a lot of things before they sign it. Duke has agreed with the Department and in good faith the Department's taking this to hearing based on an agreement. The Department has now asked the EMC to change the agreement with Duke's consent right now.

Commissioner Carroll stated that it wasn't an agreement any more, once that was done. Now you have a proposal from the Department or from the EMC to Duke. Duke can take it or leave it.

Commissioner Carter commented that he mostly agreed with **Commissioner Carroll** because it's not an agreement until it is signed by both parties, formally. He understood once they had the public hearing that kicked the SOC over to the EMC and not the Department. The Department could have signed it before the hearing; now they can't. Now it would be an agreement between the Commission and Duke.

Chairman Solomon clarified that he was saying that Duke could have come up with the same piece of paper and not the Department. Then the EMC would have been in the same position.

Commissioner Carroll stated an editorial comment that the deletion is a great improvement to what otherwise is a good approach to solving a problem. If they adopt this as the new language, give it to Duke. If they sign it everything is great. If they don't then it is back to the drawing board for negotiations.

Commissioner Carter asked why the Department was proposing to delate the language but didn't hear why.

Chairman Solomon stated that he had heard from a lot of people about the authorities and what are the processes that the Commission follows, and there are four SOC's coming. He wanted everyone to understand the context of what they were about to face over the next three months.

Commissioner Carroll wanted to clarify whether his position was correct. His position was that the results of the deletion becomes the document that they are studying and voting on.

Counselor Reynolds stated he was happy to direct Commissioners attention to the rules. What is defined as a Special Order by Consent means a type of special order where the Commission enters into an agreement with the person responsible for water or air pollution to achieve some stipulated actions designed to reduce, eliminate or prevent air or water quality. It would seem at this point as pointed out earlier that this

is not a special order by the Department on behalf of the Commission as it affects the applicant. It's an application for a special order. The earlier agreement was to the terms that would be brought forward for public comment and consideration by the Commission, first by the public, then by the Commission. But ultimately it will be an agreement between the Commission and the applicant in this instance, Duke for the three covered facilities. Mr. Reynolds indicated he'd defer for the substantive issues and the negotiations to Assistant Secretary Holman or Mr. Lane, General Counsel for the Department about what the proceedings have been to this point. But what's in front of the commission is, in fact a recommendation to delete certain language by the Department. It is proper to act on that. If it's a substantive modification, the applicant may choose to consider this or argue that this is no longer a Special Order by Consent. But as to the substantive impact of the change in that language, should the Commission choose to move forward as it's being recommended. He needed a little bit more time to think about that and analyze that.

Assistant Secretary Holman stated that what has happened to date the Department had staff from DWR, the Attorney General's office as well as Bill Lane and herself working with Duke Energy and their staff to craft the SOC that was ultimately signed by Mr. Draovitch on January 8 that went out to public comment. That went to public hearing for which Commissioner Carroll was the public hearing officer. Regarding our request, I interpret that to be a request to the EMC to consider this change. If you do accept that change, then we have to figure out the next step, whether it's asking the Department to go back and renegotiate this along with there being other issues that come up during the deliberations.

Chairman Solomon indicated that **Commissioner Carroll** asked the question of why did the Department do this? There are many other issues that we can talk about after we hear from Mr. Zimmerman.

Assistant Secretary Holman responded that the concerns that were coming up from various sectors had to do with whether this language, in any way might hamstring other considerations by their agencies down the road, in particular, the North Carolina Utilities Commission as it considers rate cases in the future.

Commissioner Carter stated that there was no question about the process. If the EMC agrees with the Department's recommendation, then the only answer to this is they go back and talk to Duke and see Duke will sign a revised SOC.

Chairman Solomon expressed his original plan was to recognize **Commissioner Carroll** after he heard from Jay Zimmerman. He wanted to hear about why they are doing this, the purpose and the background. There's certain statutes, like independent studies had to be done before this got activated to even get to this point. He also wanted to hear all those things from Mr. Zimmerman and how it fitted into the four other public hearings which are coming up and already named hearing officers to go out to the public to have to defend this themselves.

Jay Zimmerman, Environmental Program Manager presented some points that Commissioner Carroll had stated. As some of you know back in October, Mr. Bob Sledge gave the EMC an overview of special orders by consent (SOC). This SOC is being brought before the EMC specifically because there was

a public hearing that was held. There are an average of about a half dozen SOC's, that are entered into any given year, and a dozen SOC's that are now active within the Division of Water Resources. Most of those have no public interest and, therefore the way the rules are written, the delegations would allow the director to sign those SOC's on behalf of the Commission. Because, in this particular case, there was a lot of community and stakeholder interest about coal ash in general, the Department decided that it was in the best interest of the people and residents around the facilities to hold this hearing and get public input. It is simply because they thought that was probably a good idea and a public hearing was held. The Commission must now act on the SOC as opposed to the Director signing it. This SOC includes requirements for Duke Energy to accelerate certain aspects of the Coal Ash Management Act including, most importantly the decanting and removal of water from the impoundments. That's an essential step to closing these impoundments and there are a couple of other things that have to occur before they even get to that process, such as redirecting stormwater and some other things as well as the conversion to dry ash handling. There are some deadlines that are specified in CAMA that Duke's obliged to meet.

This SOC, if signed would allow Duke to accelerate that process ahead of what is stipulated in CAMA. Special Orders are a form of an enforcement, an enforcement action, a tool that the Department uses to implement certain requirements upon a responsible party. These enforcement actions are issued by the EMC under North Carolina General Statute 143.215.2 and our rules under Title 15A of the North Carolina Administrative Code, Subchapter 2H the 1200 rules. An SOC is a specific type of order that is entered into between the Department on behalf of the EMC and a responsible party. It's a voluntary agreement, in order that the two parties may reach and achieve the same goal. In this case, the goal is to accelerate the dewatering of the impoundments. They do extend to some degree an amount of regulatory relief in exchange for binding commitments on the part of the responsible party that's signing the document to perform the work and achieve compliance. Some elements of this SOC include up front penalties and that's typical of a lot of SOC's, up front penalties to existing violations, stipulated penalties for failing to meet certain metrics or deliverables. Certain things that the person entering into the SOC has to do are certain deadlines. If they don't meet them, there are stipulated penalties that are typically daily and then those penalties typically ratchet up to after a certain period of time. That's the norm for SOC's. Also, more aggressive schedules to achieve compliance.

Mr. Zimmerman gave a brief history of this particular SOC. Ms. Holman had mentioned that it was a combination of a lot of work on the part of the Department, staff within the Division of Water Resources, Duke Energy as well as various stakeholders who at various times had provided input into the whole issue of closing out these impoundments. They had been working on the issue of the discharges whether they were engineered-seeps or non-engineered-seeps, since before CAMA came about. It started shortly after the Dan River spill which was in February 2014 about four years ago, and work has continued. Now it is part of the requirement of CAMA. Duke has to conduct assessments regarding impacts to nearby water supply wells and provision of alternate water and filters within a half mile of the compliance boundary that's been established. That's a requirement. The Department had to classify these impoundments based upon a level of risk, whether it be high intermediate or low. That process has been completed and currently all the impoundments are either high or intermediate. Duke Energy had to submit site assessments and corrective action plans to the agency. They have submitted an initial round of site assessment document and corrective action plans, both of which were reviewed by the staff within the Division, and were determined to be

incomplete. Subsequent to that, additional assessments were conducted or are being conducted and we have to date received about nine additional assessment documents that would represent what he would call a much more comprehensive assessment of impacts to groundwater and surface waters. Those are currently under review by the Department at this point.

Chairman Solomon asked Mr. Zimmerman if he could correct him, and stated to start this process there would have to be an independent review. You can cite the statute but it's part of 2H. It has to be an independent assessment done to start this process.

Mr. Zimmerman replied that was correct. **Chairman Solomon** asked if that assessment was done adequately to start this process. Mr. Zimmerman stated that it was and they did receive those documents. Mr. Zimmerman stated that The EMC had not seen the documents but he could get the documents to the EMC. But there was an independent review conducted for those facilities to make sure that the appropriate rules were met in order to begin the process of developing the SOC. **Chairman Solomon** requested for the EMC to see those documents at some point and Mr. Zimmerman's review of those.

Counsel Reynolds stated that he was provided a copy of those documents recently and he had been reviewing them, the third-party reviews and he could provide them.

Chairman Solomon indicated that he wanted to make sure there was a date on the agreement since they took to public hearing and all of that was done before this had happened. Mr. Zimmerman responded yes it was.

Mr. Zimmerman indicated in addition to the site assessments and corrective action plans, many of you are aware that Duke has to submit the surface impoundment closure plans by December 31 of 2019 and completion of ash beneficiation projects that the Division of Waste Management is currently reviewing. Specific to this SOC Duke had to identify all of the seeps and conduct an assessment of these various discharges including maps of where these discharges were, whether they be natural features or non-engineered vs what we're collectively calling engineered features. Once identified they had to implement a corrective action plan according to CAMA to address those discharges. The options they had were to either eliminate the discharge or apply for an NPDES permit to bring those discharges under regulation. There have been a lot of discussions between the agency and Duke with this particular SOC. We've received a lot of guidance and had discussions with the EPA over the past many years just to try and get to this point. EPA guidance was considered by the agency and gave us some direction including the Hanlon memo of June of 2010 as well as a letter dated August of 2016 from the Water Director, Jim Giattina. That particular letter was in response to EPA's review of the Marshall permit. In that particular memo, he cited challenges to permitting these non-engineered discharges because of the transient nature of these features. Sometimes it's just a wet spot or a little bit of water that might have some flow to it, but it's not enough to sample. You get a dry spell and they disappear. Because of some of the challenges associated with monitoring and characterizing the waste that might be in those discharges EPA thought that would represent a challenge. It wouldn't lend itself very well to permitting in the NPDES permit. The suggestion was to use as an alternative,

an enforcement tool that the agency had, which is what the SOC represents as a preferred approach to eliminate discharges.

Additional guidance also included consideration of new effluent limit guidance (ELGs.) That guidance was released in September of 2015 by the EPA. As an agency, we looked at all of the various documents and information that they had available to them as well as conversations they had with the EPA. Ultimately, the Department decided the best course of action was to include the non-engineered seeps into an SOC, accelerate the removal of the water, such that they will disappear and include the ones they had generically referred to as engineered, where there was a pipe or some structure of point source, into the permit as outfalls. Those would be captured in the permit and they would have limits assigned to them and monitoring assigned to it just like some of the seeps. This SOC provides a mechanism to address the non-engineered discharges or seeps. They anticipate, once the decanting begins, that they are going to see an elimination of a lot of those seeps from actually discharging the water. He referenced the Riverbend and Dan River facilities which had already been undergoing some degree of decanting. There has been a marked decrease in a number of seeps that have been discharging if they even show up. They are hoping that trend continues. If they can roll this out with all the other facilities and start getting rid of the water that's in the impoundments, then they should see that a lot of those should disappear. Other aspects that are included in the SOC include the increased monitoring frequency if certain triggers occur, quarterly status reports to their Director, comprehensive surveys to track progress and identify new discharges and a trigger that would require Duke to take a more aggressive action if upon dewatering, some of the seeps were still discharging, and that additional action would be captured in a groundwater corrective action plan. Something that would be more aggressive should the decanting and removal of water not work as anticipated. Mr. Zimmerman summarized that the goal of this SOC is to facilitate an accelerated removal of water from the impoundments to get the closure completed sooner than as otherwise required by CAMA. There are four other facilities that will be coming before the Commission in an SOC in May and four in July. Mr. Zimmerman concluded his presentation.

Chairman Solomon questioned that two of the SOC's had been negotiated as a Department. He asked if those were Dan River and Riverbend. There is some precedence that builds into the SOC that we have here.

Mr. Zimmerman indicated that he had done a fact check on Riverbend and there was no request for public hearings. After the public notice period was satisfied, they moved to sign the SOC. **Chairman Solomon** indicated that what the EMC does now would set the precedence for the next SOC's that are coming to full EMC. Mr. Zimmerman stated the Department had for the reasons the Chairman had mentioned decided to go ahead and just move forward with the public hearing. When they public notice SOC's, if they don't get any comments, then they sign it. If they do get comments requesting a public hearing, then they hold the public hearing and that could effectively delay the process. The Department felt that just because of the interest it was probably best if they just move right into the notice of the public hearing and give people an opportunity to speak up.

Chairman Solomon stated his understanding is whether they take action on this SOC or not, the full Commission needed to realize what they do today with this SOC does set precedence on what to do for the next four that are coming before the EMC. Whatever they do they are going to take it back out to the public and have the public see what they have done with this one and use that to judge them for their future actions. This is important to get this one right.

Dr. Meiburg commented that he had some clarifying questions and part of this came from past experience in the enforcement procedures and then part from the state CAMA, there was a whole set of regulatory provisions that cover this. As he understood the agreement, it was one that was usually when you have an agreement like this, both the state and the responsible party have some interest in common. For the state, the interest in this agreement is to have a schedule that includes defined milestones and you have a set of stipulated penalties that are involved which are certainly an incentive for performance of the actions by the milestones. Further, the one that Mr. Zimmerman had mentioned about dewatering and decanting faster so you could minimize the seeps in the first place, that would be the state's interest. In Duke's case, what their interests are is that it gives them predictability as to what schedule to expect, and perhaps more importantly, it gives them avoidance of potential liability for discharges without a permit which can be the subject of citizen suits in some ways. This would shield them from citizen suits for discharge without a permit, even though as was noted in the letter of August 2016, permitting these seeps is something that's really difficult because it's hard to measure what's actually being discharged, and then to write an appropriate set of permit conditions. Agreements like this are common in the enforcement world and they take different forms depending partly on whether they are administrative or judicial. In both cases sometimes they go out to comment and sometimes they don't. In this particular case is this agreement subject to judicial oversight? If the Commission adopts, is that action itself reviewable to state court?

Counsel Reynolds stated there were certain levels of judicial review available and provided in the rules in the statutes. He referred him to 15A-02H, Section 1200 of your work rules related to Special Orders by Consent as well as the statute 150B-282.2. It does provide for judicial oversight, depending on whether it's a special order by consent or it's a special order implicating and implying that it's without consent. There are different provisions related to judicial review.

The Commissioners continued to ask questions, make comments and suggestions regarding this SOC.

Dr. Meiburg stated the amended language is a section of the order dealing with the penalty amount and in the one before the Commission on the letter of recommendation from the Department, said that the payment of penalty was by itself was not an admission. Part of his question was, which the answer came up earlier that the issue was with respect not so much to the issues involving the Department, but potential collateral activities with respect to the Utilities Commission which has to make certain decisions about what cost are allowable can be built on rate base vs what cost has to be absorbed by the utility. He asked if that was correct.

Mr. Zimmerman stated with respect to the language that was introduced, Assistant Secretary Holman will speak more on that. To some degree a lot of that is boilerplate; it is to advance the process so that there is no admission of guilt. We're not guilty and we're not saying we're not guilty. It's sort of a non-statement but it's intended to advance the process so we can move on with some work.

Counselor Reynolds stated for these points of clarification or additional issues that you want staff to work through, for those that apply to the hearing officer's report, he wanted to be clear that the report is what the report is already, and you are only seeking clarification to some of the responses that were provided in the report. Not to change the report itself.

Chairman Solomon responded, no. The Commission has accepted the report and **Commissioner Carroll** has done the final report. We've accepted it. We just need to get the language worked out. He was concerned more about the report at this point and when it is used again to do four other times, they need to start looking at that to make sure that's aligned.

Commissioner Carroll stated that he had heard a great deal of discussion, suggestions and comments on the text and what was in it, what isn't in and what should be in it. What you have in front of you is the work product of your staff, DEQ who have put this together with the idea of solving a problem and moving the process forward. As far as this particular agreement goes, he hadn't heard anything that persuades him from not proceeding with it, and getting moving on de-ordering those coal ash ponds. It only applies to three sites. This is a limited solution and it's designed to move forward and the process can be refined in moving to the next one. He sees no reason based on what he heard not to go ahead with this request.

Chairman Solomon stated the motion was to approve this action plan with the language stricken by the Department, that one paragraph and leave everything else standing. **Commissioner Carroll** interjected with to take it to Duke for them to accept or reject. **Commissioner Meiburg** seconded the motion. **Commissioners Carroll, Anderson, Carter, Meiburg and Rubin** voted yes. **Chairman Solomon, Commissioners Deerhake, Gillespie, Keen, Lazorick and Puette** voted No. The motion failed six to five.

Commissioner Gillespie made a motion that the EMC direct DEQ to come back to the Commission as soon as they can with recommendations or changes for the Commission to consider. **Commissioner Keen** seconded the motion. The Chairman asked for discussion on this motion. The Chairman asked **Commissioner Gillespie** if he would like to add a time to the motion and he responded that he would let the Chairman amend the motion and he would agree. **Chairman Solomon** stated that this issue be resolved by their next meeting and if the Department tells the EMC they are prepared to go before that time, the EMC would consider to a special meeting. **Commissioner Gillespie** stated he would amend his motion to include that information and **Commissioner Keen** seconded.

Counselor Reynolds indicated to **Commissioner Gillespie** that he intended for the Department to not only to provide information for the Commission, but where changes might be necessary based on the direction of the Commission to consult with Duke to ensure that they would consent with that. That would not prohibit the Commission from proceeding as a special order with consent, but in the event, that Duke would consent to one or two changes in the SOC where that might be necessary. He wanted to ensure that he was allowing them to consider consulting with them. **Commissioner Gillespie** stated that he would leave

that up to hear response from the Department on what they would prefer and see the best way to handle that.

Chairman Solomon stated since they were asking the Department to go back to Duke and facilitate these discussions or these agreements, he felt it appropriate to hear from the Department.

Counsel Reynolds stated that the motion was **Commissioner Gillespie** moved to direct DEQ to come back with recommendations and changes based on the expressed concerns and comments made by the Commission today and to effectively defer action until the next Commission meeting on this matter.

Commissioner Gillespie additionally stated whether, or not to allow DEQ to reach consensus with Duke if they could or not would depend on whether, or not Assistant Secretary Holman would like to do that.

Assistant Secretary Holman responded to be very clear the Department is very interested in taking the concerns of the Commission back and having a discussion and successful negotiation with Duke to bring a revised SOC back to the Commission addressing their issues.

Commissioner Gillespie commented that cleared it up. Therefore, he would amend that also they can consult with Duke and try to bring the Commission back a consensus document. **Commissioner Keen** seconded.

Chairman Solomon stated they have a motion by **Commissioner Gillespie** to basically direct the Department to address all the issues that the Commission that were previously listed in the motion, and not only get information on that for them but to direct them to go out and try to reach consensus with Duke on an agreement and to report back on the status of that by the May EMC meeting, or as amended before if possible where the Commission can consider a special meeting if needed or if they consider appropriate.

All Commissioners voted yes on the amended motion and the motion passed unanimously.