

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

February 13, 2018

VIA EMAIL

Mr. Sergei Chernikov
NCDEQ/Division of Water Resources
Water Quality Permitting Section - NPDES
1617 Mail Service Center
Raleigh, NC 27699-1617
Sergei.Chernikov@ncdenr.gov
publiccomments@ncdenr.gov

Mr. Bob Sledge
NCDEQ/Division of Water Resources
1617 Mail Service Center
Raleigh, NC 27699-1617
bob.sledge@ncdenr.gov
publiccomments@ncdenr.gov

**Re: Comments on Draft NPDES Major Modification– Marshall Steam Station,
#NC0004987; and on Duke Special Order by Consent WQ S17-009**

Dear Mr. Chernikov and Mr. Sledge:

On behalf of the Stokes County Chapter of the North Carolina NAACP, Appalachian Voices, and the Roanoke River Basin Association, the Southern Environmental Law Center submits these comments on the proposed Marshall NPDES permit and Special Order by Consent WQ S17-009 (“SOC”). We understand that the Marshall permit and SOC may be used as a template when considering other coal ash sites in North Carolina, including three in the Roanoke River/Dan River Basins: Belews Creek, Roxboro, and Mayo. We recommend to DEQ the comments on the proposed permit and the SOC filed on behalf of the Catawba Riverkeeper Foundation, MountainTrue, the Sierra Club, and the Waterkeeper Alliance, and supply these additional comments.

The waters and communities of the Dan River and Roanoke River Basins have suffered greatly from Duke Energy’s coal ash pollution and DEQ’s failure to adequately control that pollution and enforce the laws that are supposed to protect North Carolina and its clean water. Among other things, these watersheds were the site of the Dan River catastrophe; bromides from Duke Energy’s facilities have caused human carcinogens to appear in public drinking water

supplies; public fishing lakes have been seriously impacted by excessive coal ash pollution; Duke Energy committed crimes in its management of coal ash at the Dan River site, which DEQ never took action against until the intervention of the federal authorities; and many residents in our watersheds have seen their natural resources and their property values harmed by Duke Energy's actions and DEQ's inactions.

We are writing to urge DEQ to protect the waterways and communities of North Carolina from Duke Energy's coal ash pollution and to demonstrate that DEQ is finally willing to put clean water and North Carolina's communities ahead of the wishes of Duke Energy.

DEQ Should Require Duke Energy to Comply with Protections Against Toxic Coal-Fired Plant Water Pollution. In 2015, after years of study and overwhelming evidence of the dangers of toxic pollution from coal-fired plants, the U.S. Environmental Protection Agency ("EPA") finally put in place Effluent Limitation Guidelines ("ELG Rule") which protect against the most toxic pollutants from coal-fired plants like Marshall and those in the Roanoke River and Dan River Basins. The ELG Rule protects clean water and communities specifically from arsenic, mercury, selenium, and nitrates in scrubber wastewater, and, by requiring treatment for those constituents, also protects clean water and communities from other serious pollutants.

Those 2015 Effluent Limitation Guidelines remain in place and are the law today. In the prior version of the Marshall permit, Duke Energy admitted that it could put in place protections to remove these pollutants in compliance with the ELG Rule by 2021 – already three years after the earliest compliance date established by the ELG Rule – and DEQ put that requirement in the permit.

Now, without any relevant change in the law whatsoever, DEQ has removed that requirement, has postponed it to the end of the permit period in 2023, and indicates that it may never require Duke Energy to comply with these important rules. What is the offered reason for this remarkable and destructive retreat? The fact that President Trump and his EPA Administrator, Scott Pruitt, have indicated that they *may* weaken the ELG Rule. And, of course, DEQ has granted Duke Energy's request that DEQ allow Duke Energy to ignore these protections for North Carolina's families and clean water.

In other words, DEQ has cast aside binding legal protections for North Carolina's residents and water based on predictions of what the current federal Administration may do and is treating as a nullity clean water protections that were enacted during the last Administration and that remain the law today.

The only step that the current EPA has actually taken is its rule to postpone the date for utilities to comply with these protections from 2018 to 2020. However, this change is irrelevant to the Marshall permit; the protections at Marshall are supposed to go into effect in 2021, after the existing postponement. The ELG Rule, even after EPA's unlawful attempt to delay it, still requires DEQ to set a deadline for compliance "as soon as possible," and Duke Energy has

already said it can meet the pollution limits by 2021. 40 C.F.R. § 423(g)(1)(i). Thus, even if it is assumed that this attempt by the Trump Administration to delay coal ash pollution protections is valid, the action that EPA has taken to date has no effect on the date of ELG compliance in the Marshall permit.

Moreover, the current EPA leadership's attempt to delay the implementation of the ELG protections is illegal. The Clean Water Act does not allow for such a delay rule, and there is no support for the action the Trump Administration has taken. Lawsuits have been filed in Arizona and in the District of Columbia challenging this action. No such efforts to change or delay the ELG Rule should be even considered by DEQ until after their legality has been decided. The clean water and health of the people of North Carolina should receive the full federal protections against arsenic, mercury, selenium, nitrates, and other toxic substances at least until the legality of the actions of the current Administration have been determined.

North Carolina's DEQ should not rush to undo environmental and public health protections faster and more drastically than the Trump Administration and the Pruitt EPA have done to date. DEQ is proposing to gut our environmental protections based only on speculation about what it thinks the current EPA may do in the future and based on Duke Energy's desires. Instead, DEQ should base its decisions on what is good for North Carolina's clean water and communities.

DEQ Should Not Give Duke Energy Amnesty for Illegal Leaks. The SOC treats so-called unengineered seeps as violations of law, imposes a penalty, and seeks to bring Duke Energy into compliance.

However, inexplicably, the SOC proposes to treat so-called "engineered" seeps differently. DEQ will seek to legalize them by making them permitted outfalls in permits for facilities where Duke Energy has created these illegal discharges – presumably including sites in the Roanoke River and Dan River Basins. In this way, DEQ would make legal what has been illegal in North Carolina since the Clean Water Act was enacted.

It is important to emphasize that this illegal activity is, if anything, worse than the unengineered seeps. An engineered seep is a construction by Duke Energy that gathers and directs coal ash polluted water from the lagoons and dumps it into drinking water reservoirs, lakes, and rivers – directly contrary to the Clean Water Act permit governing the site. This is exactly the kind of illegal activity that formed the basis for Duke Energy's guilty pleas to federal Clean Water Act coal ash crimes at Asheville, Riverbend, and Lee. DEQ never took effective enforcement action to stop Duke Energy's illegal actions in the past, even ignoring engineered seeps at Mayo where the governing permit expressly prohibits them.

Now, DEQ proposes to give Duke Energy amnesty for these known illegal activities by papering over them and labelling them permitted outfalls.

This approach undercuts public confidence in DEQ, which the public had hoped would now set a different example.

There is no apparent reason why the engineered seeps cannot be treated as the unengineered seeps – as violations of the permit which will be addressed and corrected through the process set out in the SOC for the unengineered seeps. In order to work toward regaining the public’s trust, DEQ needs to take this step.

DEQ Should Put in Place Protective Limits for Coal Ash Pollutants if it Will Not Require Chemical/Physical Treatment of the Dewatering and Decanting of Duke Energy’s Coal Ash Lagoons. In order to close its malfunctioning, polluting, and dangerous coal ash lagoons, Duke Energy is going to dump one last large flush of coal-ash polluted water into North Carolina’s waterways and drinking water supplies. It will “decant” the lagoons by dumping out millions of gallons of water – all the contaminated wastewater in the lagoons down to three feet above the coal ash. Then, Duke Energy will dump more large quantities of even more polluted water into North Carolina’s rivers and lakes when it seeks to remove some quantity of the water from the bottom of the lagoons in which the coal ash sits. Under the last administration, the proposed permits for these sites contained a requirement that these last dumps of coal ash polluted water go through chemical or physical treatment before being released into North Carolina’s waterways.

Community groups had strong concerns about whether the proposed permits contained adequate limits for these large flushes of coal ash polluted water, and in response DEQ made assurances that a requirement for chemical or physical treatment would deal with that concern: “All the water from the ash pond will be treated before it is discharged during decanting and dewatering.” http://www.journalnow.com/news/local/residents-to-duke-energy-and-nc-environmental-officials-keep-the/article_5f37fe06-0ba7-5df5-8c1e-6e12a29a0a29.html.

Indeed, Duke Energy installed treatment facilities at Sutton when it removed water from those lagoons, and treatment facilities have been put in place by Dominion in Virginia in removing water from its Bremono and Possum Point facilities.

Now, DEQ is proposing to give Duke Energy a pass on the requirement that it treat this flush of coal ash polluted water through chemical or physical means and has deleted that requirement entirely. Supposedly, the limits in the permit offer protection, but in fact they are not protective of our communities and water. DEQ has removed the treatment requirement without making the limits adequately protective.

In other words, DEQ is now proposing to give North Carolina the worst of both worlds: inadequate limits and no requirement for chemical or physical treatment.

If DEQ is going to remove the requirement for physical or chemical treatment, DEQ should do now what it should have done in the first place: put in place the protective limits, as

was previously requested. DEQ is proposing to require neither adequate limits nor a requirement for treatment.

DEQ Must Set Limits for Bromide Discharges. The Roanoke River and Dan River Basins have been plagued by the bromide pollution from Duke Energy’s coal-fired plants in these watersheds. Public water supplies in these watersheds and other watersheds downstream of Duke Energy’s coal ash have experienced spikes in carcinogens caused by Duke Energy’s bromide pollution.

When bromide mixes with chlorine in treated drinking water supplies, it forms carcinogens known as trihalomethanes.¹ As Duke Energy admitted when it pled guilty to coal ash crimes under the federal Clean Water Act, bromide discharges from its coal ash lagoons have caused these carcinogens to form in drinking water supplies downstream of its Belews Creek coal ash site.² Duke Energy has identified numerous drinking water supplies in the Roanoke and Dan River Basins that are at risk of bromide contamination from Duke Energy’s coal ash, including Eden, Madison, Danville, Halifax County, Clarksville, and Henderson-Kerr Lake.³

At the Marshall coal ash site in particular, Duke Energy has admitted in sworn testimony that the company’s discharges of bromide in recent years have caused trihalomethanes to form in downstream drinking water supplies, including the drinking water supply for the City of Charlotte.⁴ Downstream of Marshall, Duke Energy has identified the following at-risk drinking water supplies that may be affected by its bromide discharges: Mooresville, Lincoln County, Charlotte-Mecklenburg, Gastonia, Mount Holly, and Belmont.⁵ These water supplies collectively serve over 1.2 million people.⁶

Despite this known threat to downstream drinking water supplies, DEQ has not proposed any limits for bromide discharges in the draft Marshall permit. Longstanding Clean Water Act regulations require agencies to establish water quality-based permit limits on bromide if necessary to meet narrative water quality standards, including standards to protect human health.⁷ Under the ELG rule, EPA recognized and reaffirmed that this well-established

¹ EPA, Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, 80 Fed. Reg. 67,838, 67,872, 67,886 (Nov. 3, 2015) (“Bromide discharges from steam electric power plants can contribute to the formation of carcinogenic DBPs [disinfection byproducts, e.g., trihalomethanes] in public drinking water systems,” and “[s]tudies indicate that exposure to THMs [trihalomethanes] and other DBPs from chlorinated water is associated with human bladder cancer.”)

² Joint Factual Statement, *United States of America v. Duke Energy*, No. 5:15-CR-62-H at 52-53 (May 14, 2015).

³ Duke Energy Compliance Officers’ Report at 18-19, *United States v. Duke Energy* (E.D.N.C. Apr. 29, 2016).

⁴ Dep. Tr. of Duke Energy (via Corporate Designee Zachary Hall) at 47:14-48:15 (Feb. 10, 2017) (“Q. Okay. And have discharges from Duke Energy’s ash basin at Marshall contributed to the increases in trihalomethanes at the Charlotte intake? A. They have.”).

⁵ Duke Energy Compliance Officers’ Report at 18-19, *United States v. Duke Energy* (E.D.N.C. Apr. 29, 2016).

⁶ EPA, Safe Drinking Water Information System (SDWIS) (last visited Apr. 28, 2017), *available at* <https://www3.epa.gov/enviro/facts/sdwis/search.html>.

⁷ 40 C.F.R. § 122.44(d)(1)(i) (“Each NPDES permit shall include conditions meeting the following requirements . . . : any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards

requirement applies to bromide, and instructed permitting authorities to develop permit limits on a site-specific basis for bromide when necessary to meet narrative water quality standards.⁸ North Carolina has put in place exactly such narrative criteria for water quality to protect people from unsafe levels of pollutants such as brominated trihalomethanes: “Human health standards: the concentration of toxic substances shall not exceed the level necessary to protect human health through exposure routes of fish tissue consumption, water consumption, or other route identified as appropriate for the water body.”⁹

DEQ must set limits for bromide in the permit sufficient to protect everyone who drinks water downstream, particularly during dewatering and decanting.

Sincerely,

/s/ Frank S. Holleman III

Frank S. Holleman III

fholleman@selcnc.org

Nicholas S. Torrey

ntorrey@selcnc.org

Myra Blake

mblake@selcnc.org

Leslie Griffith

lgriffith@selcnc.org

SOUTHERN ENVIRONMENTAL LAW CENTER

601 West Rosemary Street, Suite 220

Chapel Hill, NC 27516-2356

Telephone: (919) 967-1450

Facsimile: (919) 929-9421

On behalf of the Stokes County Chapter of the North Carolina NAACP, Appalachian Voices, and the Roanoke River Basin Association

under sections 301, 304, 306, 307, 318, and 405 of [the] CWA necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.”).

⁸ 80 Fed. Reg. at 67,886-87 (“[W]ater quality-based effluent limitations for steam electric power plant discharges may be required under the regulations at 40 CFR 122.44(d)(1), where necessary to meet either numeric criteria (e.g., for bromide, TDS or conductivity) or narrative criteria in state water quality standards. . . . These narrative criteria may be used to develop water quality-based effluent limitations on a site-specific basis for the discharge of pollutants that impact drinking water sources, such as bromide.”).

⁹ 15A N.C. Admin. Code 2B .0208(a)(2).