SOUTHERN ENVIRONMENTAL LAW CENTER

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May 24, 2018

Via Email and U.S. Mail
Mr. Bob Sledge
N.C. Division of Water Resources
1617 Mail Service Center
Raleigh, N.C. 27699-1617
publiccomments@ncdenr.gov

Re: Buck & Belews Creek SOC

Dear Mr. Sledge:

The Southern Environmental Law Center, on behalf of itself, Yadkin Riverkeeper, Waterkeeper Alliance, Appalachian Voices, the North Carolina State Conference of the NAACP, and the Stokes County Branch of the NAACP, submits these comments on the proposed Special Order by Consent ("SOC") for Duke Energy's Buck coal ash site located in the Yadkin River Basin, and its Belews Creek coal ash site in the Dan River Basin. This SOC is not written to give the maximum protection to these important water resources and communities but instead is written to benefit Duke Energy.

1. **Schedule and Conditions for Safely Decanting.**

We recognize decanting is a necessary step toward stopping the outdated practice of sluicing wet ash through massive unlined basins beside North Carolina's waterways. We support the fastest timetable possible that also protects the receiving water and integrity of the structure of the dams.

The SOC itself does not specify particular conditions for decanting and dewatering, but it premises its own accelerated schedule upon no requirement by DEQ "to implement physical / chemical treatment during decanting, ***except as required by an NPDES permit***." SOC p. 7 (emphasis added).

In the draft modification of the Buck permit, DEQ qualifies the requirement for physical/chemical treatment, perhaps to the point of meaninglessness. DEQ has now added the qualifier that physical-chemical treatment is required "if necessary, to ensure state Water Quality Standards are not contravened in the receiving stream," and doubtless will propose the same approach for Belews Creek. This modification makes dilution the solution to pollution. DEQ is not requiring Duke Energy to remove coal ash pollution as long as the flows in the Yadkin River are enough to dilute the pollution below Water Quality Standards. The harms to surrounding waterways should not be compounded during the decanting of these lagoons.

Further, this qualification is indefinite and unexplained. Will treatment be required only if violations are found as a result of once-a-month testing? Or has DEQ already made a determination based on modeling that treatment will not be necessary, but is not disclosing that determination in the permit? Also, with infrequent monitoring, physical/chemical treatment will only occur after the waters have already been harmed.

DEQ is not requiring Duke Energy that Duke Energy implement known, available, and entirely feasible technology to control and monitor pollution. Duke Energy has used treatment technologies at Riverbend and Sutton, and Dominion has used such technologies in Virginia. For this dramatic pollution event, DEQ should require physical-chemical treatment of Duke Energy's dumping, and not make water pollution treatment dependent upon a vaguely described contingency. This requirement should apply at both Buck and Belews Creek.

We have already seen at Riverbend that Duke Energy's pumping and dumping of coal ash polluted water from its lagoon is dangerous and requires treatment. At Riverbend, Duke Energy's dumping resulted in spikes of arsenic pollution in Mountain Island Lake, a waterbody already polluted with arsenic from Duke Energy's coal ash lagoon. After the spikes occurred, a treatment mechanism was installed. This unnecessary pollution event underscores that Duke Energy's dumping and pumping of coal ash polluted water requires treatment from the outset to prevent pollution of North Carolina's waterways.

2. **DEQ's SOC Gives Duke Energy Amnesty Going Forward for Illegal Flows of Pollution into Public Waters**.

The SOC recognizes that at Buck and Belews Creek, Duke Energy has gone so far as to actually build illegal structures, such as pipes and channels, which direct flows of coal ash polluted water into the Yadkin River, the Dan River, and Belews Lake. These flows pollute these waters and their tributaries and surrounding wetlands. They are not authorized outfalls in Duke Energy's permits for the Buck and Belews Creek sites and therefore are illegal.

Indeed, Duke Energy's practice of building illegal discharges into neighboring waterways formed the basis of criminal charges brought against Duke Energy companies and their guilty pleas to coal ash crimes in 2015 at the Asheville, Lee, and Riverbend sites.

Yet, in this SOC and the accompanying permit, DEQ proposes for the first time to legalize these illegal structures going forward and permit them – and not treat them as ongoing violations of law in this SOC.

Correctly, DEQ's SOC treats the so-called non-constructed flows or seeps as ongoing violations of law. The SOC fines Duke Energy for those flows of polluted water and requires that they be eliminated or that they be addressed subsequently if they are not eliminated by the "decanting" of the coal ash lagoons, the removal of some of the water in the coal ash lagoons. The SOC rightly recognizes that these seeps "cause[] or contribute[] to pollution of waters of this State." SOC ¶ 1.n. But the same is true of the illegal flows of water collected and conveyed by Duke Energy's illegal structures.

There is no reason why the constructed violations of law should be treated differently. In anything, the constructed flows are even more illegal because Duke Energy has gone so far as to build illegal structures to facilitate the flow of coal ash polluted water into lakes, rivers, and streams.

The constructed flows or seeps should be treated the same as the non-constructed seeps, as legal violations—in the past, now, and going forward—that Duke Energy must correct and be held accountable for. DEQ should not grant Duke Energy amnesty going forward for some of its most blatant violations of its permits and the Clean Water Act.

Indeed, since Duke Energy has collected illegal flows of coal ash polluted water by building structures to gather and direct those flows, these flows through Duke Energy's structures should be the easiest to remediate. Duke Energy should be required to gather those flows before they reach lakes, rivers, and streams and either direct them to a treatment facility or return them to the lagoons. In no instance is there a justification for giving Duke Energy a permit to continue directing coal ash polluted water through structures that it has illegally built into North Carolina's lakes, rivers, and streams.

3. **Corrective Action Must Ensure That Polluted Discharges Through Seeps Are Eliminated.**

Following decanting, DEQ states "Duke Energy must take appropriate corrective action" for seeps that remain. This corrective action requirement attaches, as it should, to engineered *and* non-engineered seeps that remain once decanting is concluded. SOC ¶ 2(d) (further corrective action). However, there are several problems embedded within the current proposal, which could effectively allow seeps impacted by coal ash to evade corrective action. To be an effective enforcement instrument, the SOC must be revised to close any loopholes that allow coal-ash contaminated seeps to keep flowing indefinitely.

First, under "additional compliance measures," the SOC describes a process for Duke Energy to have seeps "dispositioned." SOC ¶ 2(c)(3). Dispositioned seeps are those that do not need further corrective action. SOC ¶ 2(d). If dispositioned simply meant eliminated, this would make sense. But the SOC includes off-ramps that, as proposed, would allow coal-ash contaminated seeps to keep flowing. These off-ramps seem to reflect fundamental misunderstandings of the scope of the Clean Water Act.

For example, category 3 under paragraph 2(c)(3) allows the Director of the Division of Water Resources to make a discretionary determination that a seep has been dispositioned by using "best professional judgment." This provision allows an administrative and political determination to decide when Duke Energy no longer needs to address its illegal flows of coal ash pollution into North Carolina's streams, rivers, and lakes. This gaping loophole for Duke Energy's continued pollution should be eliminated. In the past, DEQ has allowed Duke Energy to continue polluting through seeps even though DEQ was well aware of the seeps, even though Duke Energy's conduct was open and obvious and could be seen from Google maps, even though Duke Energy's constructed seeps were subsequently determined to be criminal, and even though conservation groups had given DEQ official notice of the seeps through Notice of Intent

to sue under the Clean Water Act. The cessation of Duke Energy's illegal pollution should not be dependent upon the discretion of a government official.

Instead, the determination should be based on an objective fact. In short, if contaminants in the seeps exceed the proven background levels, Duke Energy continues to pollute and its seep has not been dispositioned. No government official should or can have the discretion to avoid this simple fact.

Any other decision would result in DEQ allowing Duke Energy to pollute in violation of the Clean Water Act, with no end in sight. There is no exception under the Clean Water Act for unpermitted discharges of pollutants, and the Director of DWR cannot grant one. The Clean Water Act concerns itself with *any* point source pollutant discharges and does not exempt discharges of pollutants that the Director of DEQ may choose to allow. "The term 'discharge of a pollutant' . . . means *any* addition of *any* pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added); 40 C.F.R. § 122.2. As recognized by the 4th Circuit Court of Appeals, the statute clearly covers all additions, "no matter how small." *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 166-67 (4th Cir. 2010). Therefore, seep sampling and dispositioning must be evaluated against legitimate surface water background samples that are unimpacted by Duke Energy's pollution.

As an example of a straightforward requirement to eliminate coal ash seeps, EPA ordered TVA to "eliminate the discharge of ash pond seepage" from its leaking coal ash lagoons at the Kingston facility by a date certain. *See* Tenn. Dept. of Public Health, Administrative Order No. 88-188 (Mar. 22, 1985), attached as Exhibit 1. NC DEQ should apply the same common-sense approach here and require that any remaining unlawful discharges of pollutants be eliminated promptly.

In addition, category 2 allows a seep that "does not constitute" or "flow to" waters of the United States to be deemed dispositioned. To the extent "flow to" means via a surface water connection, the SOC proposes to excuse seeps that appear to terminate before connecting with a stream, wetland, river or lake. Yet this would allow seeps that connect to adjacent waterbodies via short groundwater hydrologic connections to continue.

The CWA is a strict liability statute prohibiting the discharge of any pollutant to a water of the United States without a proper permit. 33 U.S.C. § 1311(a). Duke Energy cannot evade the CWA by discharging pollutants to streams and rivers through short, hydrological groundwater connections. EPA has stated repeatedly that the CWA applies to such hydrologically-connected groundwater discharges. *E.g.*, 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001) ("EPA is restating that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water."); *accord* 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) (announcing stormwater runoff rules and explaining that discharges to groundwater are covered by the rule where there is a hydrological connection between the groundwater and a nearby surface water body). In addition to EPA, "[t]he majority of courts have held that groundwaters that are hydrologically connected to surface waters are regulated waters of the United States, and that unpermitted discharges into such groundwaters

are prohibited under section 1311." *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) (citations omitted).

This principle continues to be affirmed by the courts, and has been applied to Duke's facilities. *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) ("This Court agrees with the line of cases affirming CWA jurisdiction over the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as a conduit between the point source and the navigable waters."); *see also Hawai'i Wildlife Fund v. Cty. of Maui*, No. 15-17447, 2018 WL 650973, at *9 (9th Cir. Feb. 1, 2018) ("The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions").

DEQ possesses no authority to ignore polluted seeps that are traveling short distances through groundwater and discharging into the adjacent rivers, lakes and streams.

In addition, if the SOC is to provide any meaningful evaluation of seeps during and after decanting, it should include all of the relevant coal ash constituents. To do this, the list of pollutants to be monitored in Attachment B of the SOC should, at a minimum, reflect the pollutants actually escaping the lagoons. Currently, it does not. Missing from the list are hexavalent chromium, vanadium, aluminum, molybdenum, strontium, iron, manganese, radium-226 and -228, and cobalt, all of which are contaminating surrounding groundwater and surface waters from Duke's coal ash lagoons, many at levels hundreds of times the applicable standards, as Duke's own sampling data make clear.

4. **DEQ Cannot Treat a Jurisdictional Water as A Seep**.

Seeps that are jurisdictional waters of the United States cannot themselves be permitted as channels to convey pollutants. The Clean Water Act provides no mechanism to convert such jurisdictional waters *into* point source discharges. The Clean Water Act "requires permits for the discharge of 'pollutants' *from* any 'point source' *into* 'waters of the United States.'" 40 C.F.R. § 122.1(b)(1) (emphasis added). By definition, a "point source" cannot be a "water of the United States;" a point source conveys pollutants *to* a water of the United States. In sum, jurisdictional waters cannot be point sources; instead, water quality standards must be met *in* the jurisdictional waterbody, meaning in the so-called seep.

However, the Buck and Belews Creek SOC includes as "non-engineered seeps" acknowledged waters of the United States.

Attachment A for Belews Creek identifies as "seeps" multiple jurisdictional tributaries that are being illegally polluted by Duke Energy with unpermitted discharges of coal ash pollutants. For example, DEQ has recognized that the flows identified here as seeps S-2 (which flows into the Dan River), S-6 (which flows into Belews Lake), and S-15 (which flows into Little Belews Creek) are actually jurisdictional waters. DEQ, Belews Creek Draft Wastewater Permit Fact Sheet, at 2 (Jan. 15, 2017). In addition, Duke Energy describes seeps S-1 through S-11 as waterbodies with "continuous" flow, many of which are "tributar[ies]" and "well defined

stream[s]," and most of which range from three to six feet in width. Duke Energy, NPDES Permit Modification, Belews Creek Steam Station Application, tbl.1 (July 29, 2014). These waterways appear to be jurisdictional waters as well.

Tributaries of navigable waterways are not seeps, but waters of the United States. They must receive all the protections of the waters of the United States and not be treated as seeps.

Similarly, Attachment A for Buck identifies seep flows that appear to be jurisdictional tributaries of the Yadkin River: they are described as streams, such as S-02, S-03, S-06, S-07, and S-10; and channels of one or more feet in width, such as S-01, S-04, and S-08, all of which have continuous flow according to Duke Energy. Duke Energy, NPDES Permit Application (Oct. 14, 2014).

Attachment A for Buck states that S-1 is a seep that flows into an unnamed tributary of the Yadkin River. However, the monitoring point is not where the seep S-1 flows into this tributary stream, but at an unspecified point downstream, "prior to entering Yadkin River." Thus, the SOC appears to be attempting to convert the stream into an effluent channel or a point source and provides it no protection from the flow from the seep itself. Again, this stream must receive all the protections of the Clean Water Act and not be converted by DEQ and Duke Energy into part of Duke Energy's coal ash lagoon wastewater system.

For this additional reason, engineered seeps that are jurisdictional waters cannot be co-opted into permits. DEQ must expand the SOC to include these engineered seeps and must measure water quality compliance in the first jurisdictional water encountered by the seep.

Thank you for your consideration of these comments.

Sincerely,

/s/ Nicholas S. Torrey
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On behalf of Yadkin Riverkeeper, Waterkeeper Alliance, Appalachian Voices, the North Carolina State Conference of the NAACP, and the Stokes County Branch of the NAACP

EXHIBIT 1

EPA Order re Tennessee Valley Authority
Kingston Seeps
1985

~~Electric~~

MAR 2 2 1985

REF: 4WM-FP

Mr. D. Elmo Lunn, Director
Division of Water Quality Control
Tennessee Department of Public Health
T.E.R.R.A. Building, 2nd Floor
150 Ninth Avenue, North
Nashville, Tennessee 37203

Re: Tennessee Valley Authority
Kingston Steam Plant
NPDES No. TN0005452
Roane County, Tennessee
Administrative Order No. 85-188(WMRP)

Dear Mr. Lunn:

Pursuant to Section 309(a) of the Clean Water Act, I have determined that the above referenced facility is in violation of its NPDES permit. As a result, I have issued an Administrative Order, a copy of which is enclosed for your reference. The Order is presently being served.

Sincerely,

Frank J. Silva

Frank J. Silva, Acting Director
Water Management Division

Enclosure

DLankford/GMiller/3973/3-22-85

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR 2 2 1985

REF: 4WM-FP

Mr. Martin E. Rivers
Assistant Manager of Natural Resources
(Environment)
Tennessee Valley Authority
Office of Natural Resources
Knoxville, Tennessee 37902

Re: Tennessee Valley Authority
Kingston Steam Plant
NPDES No. TN0005452
Roane County, Tennessee
Administrative Order No.

Dear Mr. Rivers:

Pursuant to Section 309(a) of the Clean Water Act, the Director, Water Management Division, Region IV, United States Environmental Protection Agency (EPA), has determined that the above named facility is in violation of its NPDES permit. As a result, the Director has issued a Section 309 Order which is enclosed.

Any person who violates a Section 309 Order shall be subject to a civil penalty not to exceed $10,000 per day of such violation pursuant to Section 309(d) of the Clean Water Act.

If you have any questions concerning the enclosed Order, please contact Douglas K. Lankford, Chief, South Carolina/Tennessee Unit, Compliance Section, Water Management Division at 404/881-3973.

Sincerely,

John T. Marlar, Chief
Facilities Performance Branch
Water Management Division

Enclosure

cc: D. Elmo Dunn

DLANKFORD:kmv:3973:3/20/85

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF TENNESSEE VALLEY AUTHORITY KINGSTON STEAM PLANT ROANE COUNTY, TENNESSEE NPDES PERMIT NO. TN0005452	)))))	ADMINISTRATIVE ORDER NO. 85-188(WWRP)

ORDER PURSUANT TO SECTION 309 CLEAN WATER ACT

Pursuant to the authority of Section 309 of the Clean Water Act (the "Act"), 33 U.S.C. §1319, which has been delegated to me, I hereby make the following Findings of Fact and Violations, and Order:

FINDINGS OF FACT

1. The Tennessee Valley Authority (hereinafter, the Permittee) operates a facility in Roane County, Tennessee which discharges pollutants into the Clinch River, a water of the United States.

2. The facility has been issued and is subject to the provisions of National Pollutant Discharge Elimination System (NPDES) Permit Number TN0005452.

3. At a routine Compliance Evaluation Inspection conducted on October 24, 1984, a discharge of seepage from the facility's ash pond, and contaminated stormwater runoff from the ash pond dikes into waters of the United States, was observed. Said discharge is not authorized under the facility's NPDES permit.

4. Section 301(a) of the "Act" prohibits the discharge of pollutants into waters of the United States except as in compliance with a NPDES permit issued pursuant to Section 402 of the "Act."

5. At a conference call on March 14, 1984, the Permittee provided to EPA a schedule for interim treatment of the discharge, for installation of temporary facilities for eliminating the discharge, and for providing plans and a schedule for constructing permanent facilities to eliminate the discharge.

VIOLATIONS

6. The Tennessee Valley Authority has violated Section 301(a) of the "Act" in that it has discharged pollutants to waters of the United States through a point source discharge not authorized in its NPDES permit.

ORDER

Based upon the foregoing Findings of Fact and Violations, and pursuant to the provisions of Section 309(a) of the "Act", it is hereby ordered:

1. That interim measures to control the pH of the ash pond seepage and contaminated stormwater runoff from the ash pond dikes, consisting of a limestone filter, be in place by March 28, 1985.

2. That interim pumping facilities to eliminate the discharge of ash pond seepage and of contaminated stormwater runoff from the ash pond dikes be in place and operating by April 15, 1985.

3. That a proposal for the construction of permanent facilities to eliminate the discharge of ash pond seepage, and to either permanently eliminate or prevent the contamination of stormwater discharge from the ash pond dike, and a reasonable schedule for implementation of said facilities be submitted by July 1, 1985.

4. That within fifteen (15) days after the dates in paragraphs 1 and 2 above, the Permittee shall verify compliance by letter to EPA and the State of Tennessee.

5. That the Permittee shall immediately notify EPA and the State of Tennessee upon receipt of any information indicating a delay in the above schedule.

6. Nothing in this order shall be construed to prevent further enforcement in response to the violations stated herein.

7. That the information required by this Order shall be sent by registered mail or its equivalent to the following addresses:

Frank J. Silva, Acting Director
Water Management Division
United States Environmental
Protection Agency, Region IV
345 Courtland St., NE
Atlanta, Georgia 30365

D. Elmo Lunn, Director
Division of Water Quality Control
Tennessee Department of Public Health
T.E.R.R.A. Building, 2nd Floor
150 Ninth Avenue, North
Nashville, Tennessee 37203

MAR 2 2 1985
Date

Frank J. Silva, Acting Director
Water Management Division