

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
CASE NO. 15 EHR 02581

DUKE ENERGY PROGRESS, INC.,  
Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF  
ENVIRONMENT AND NATURAL  
RESOURCES, DIVISION OF WATER  
RESOURCES,

Respondent.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITIONER'S MOTION FOR  
SUMMARY JUDGMENT**

Petitioner Duke Energy Progress, Inc. (now Duke Energy Progress, LLC and herein referred to as "Duke Energy") submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment, filed pursuant to N.C. Gen. Stat. § 150B-34(e) and Rule 56 of the North Carolina Rules of Civil Procedure.

In recognition of these ongoing assessment efforts, in early 2011, officials from DENR met with personnel from Duke Energy and Progress Energy to develop a protocol for addressing known groundwater exceedances reported at the utilities' coal-fired power plant properties. [See Ex. 8 (NCDWR089611-12); Ex. 9 (Dep. Ex. 129); Ex. 19 (Dep. Ex. 130).] At the time, the potential for groundwater issues relating to coal ash had only recently caught DENR's attention [Ex. 11 (R. Smith Tr.) at 11:3-16], and DENR decided that the prudent approach would be to encourage the utilities to continue their assessments and, if necessary, to mandate that the utilities undertake corrective action to address noted trends. [Ex. 12 (Sullins Tr.) at 145:9-146:4.] DENR's established approach specifically contemplated that corrective action would precede any enforcement and would be in lieu of monetary penalties. [See *id.*]

On June 17, 2011, DENR issued its "Policy for Compliance Evaluation of Long-Term Permitted Facilities with No Prior Groundwater Monitoring Requirement" (hereinafter, the "Policy for Compliance Evaluations"). [See Ex. 13 (Dep. Ex. 47); see also Ex. 1 (DENR's Responses to RFAs) at No. 22 (describing adoption of written policy).] DENR has confirmed, in court filings and in discovery in this case, that the Policy for Compliance Evaluations applies to the Sutton Plant. [See Ex. 15 (Aug. 16, 2013 DENR Complaint, Dep. Ex. 208) ¶¶ 3, 37-39; Ex. 14 (DENR's Responses to RFAs) at No. 22; Ex. 16 at NCDWR112499 (May 13, 2014 DENR email stating the Policy for Compliance Evaluations is "applicable to" Duke Energy coal plants).] Indeed, on June 20, 2011, Debra Watts of DENR's Central Office sent the finalized Policy for Compliance Evaluations to Duke Energy for its records. [Ex. 17 (Dep. Ex. 132); Ex. 18 (Toepfer Aff.) ¶ 12.]

The Policy for Compliance Evaluations includes a detailed flow chart dictating the steps to be taken by DENR and the utilities upon the identification of a groundwater exceedance near a coal ash pond. Those steps include, but are not limited to: (1) verifying the accuracy and significance of the results of the groundwater testing; (2) determining whether and to what extent the identified substance could be naturally occurring; and (3) evaluating other possible sources of the identified substance. [Ex. 13 (Dep. Ex. 47) at 3.] After these steps are completed, and it is determined that a particular exceedance may be caused by migration of water from coal ash ponds, the Policy for Compliance Evaluations dictates that the parties work together to develop a corrective action plan in accordance with 15A N.C.A.C. 2L .0106. [*Id.*]<sup>2</sup> This deliberate approach recognizes that DENR's mission is to preserve and protect the environment, not to issue fines and raise revenue. *Mission Statement*, N.C. DEP'T OF ENVIRON. AND NATURAL RESOURCES, available at <http://portal.ncdenr.org/web/guest/mission-statement> (last visited Sept. 3, 2015)("[DENR's] mission is to protect North Carolina's environment and natural resources.".)<sup>3</sup>

The Policy for Compliance Evaluations confirms that it is only *after a failure to undertake corrective action when directed to do so* that DENR would consider pursuing enforcement:

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<sup>2</sup> In the case of an immediate or urgent situation, such as a spill, DENR can mandate immediate corrective action. 15A N.C.A.C. 2L .0106. Neither party contends this was the case here.

<sup>3</sup> A screen shot of the Mission Statement from DENR's website is attached as Exhibit 19 hereto.