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VIA U.S. MAIL AND EMAIL

Ms. Lisa Palmer
N.C. Department of Environment and Natural Resources
Division of Water Quality
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Re: Draft Consent Order, *State of North Carolina ex rel. N.C. DENR, Division of Water Quality v. Duke Energy*, 13 CVS 4061 (Wake County) and 13 CVS 9352 (Mecklenburg County)

Dear Ms. Palmer:

Please accept these comments on behalf of the Sierra Club, the Western North Carolina Alliance, and Waterkeeper Alliance ("Conservation Groups") in response to the Draft Consent Order ("proposed settlement") noticed for public comment on July 15, 2013, by the North Carolina Department of Environment and Natural Resources ("DENR"), Division of Water Quality ("DWQ"). The settlement proposes to resolve DENR's enforcement action against Duke Energy Progress ("Duke") for unlawful pollution from the coal ash lagoons at the Asheville Steam Electric Generating Plant ("Asheville Plant").¹

The Conservation Groups are nonprofit organizations with missions that include protecting surface and ground waters from contamination, including protection of drinking waters and ensuring groundwater does not degrade surface water. The areas near and downstream of the Asheville coal ash lagoons are used, enjoyed, and depended upon by these organizations and their members for recreation, fishing, aesthetic enjoyment, and other uses.

On January 24, 2013, the Conservation Groups notified DENR and Duke of their intent to commence a civil action in federal court against Duke for violations of the Clean Water Act ("CWA") caused by the leaking coal ash lagoons.² The violations have resulted in the illegal

¹ The State commenced its original action against Duke under its former name, "Carolina Power and Light Company d/b/a Progress Energy Carolinas, Inc." On May 17, 2013, then Progress Energy noticed the change of its name to "Duke Energy Progress, Inc."

² See Conservation Groups' Notice of Intent to Sue, Re: Progress Energy Asheville Steam Generating Electric Plant, Arden, North Carolina (NPDES Permit No. NC0000396) (dated January 24, 2013), on file with DENR.

pollution of the adjacent French Broad River and its tributaries and contamination of nearby groundwater that flows to the river. On March 22, 2013, the State of North Carolina initiated this enforcement action against Duke, seeking injunctive relief for pollution from coal ash ponds at the Asheville Plant, based on the unpermitted seeps and groundwater contamination. According to DWQ's statements to the press, its lawsuit marked the first time that DWQ took legal action against a utility over its handling of ash.³

Less than four months later, and without input from the Conservation Groups that prompted the enforcement action, DENR and Duke have announced a proposed settlement. The quickly negotiated settlement falls short in numerous respects and is unsatisfactory to meet DENR's mandate to prevent unlawful contamination of groundwater and surface waters.

In sum, the proposed settlement does not achieve the fundamental purpose of enforcement: it fails to require Duke to stop the ash lagoons from acting as a source of future contamination in violation of law. Instead, it relies on a series of studies and indefinite timetables to confirm what is already known – that the Asheville lagoons are currently contaminating groundwater and unlawfully leaking into streams and the French Broad River. Neither does the proposed settlement mandate action to remediate existing contamination caused by decades of storing wet coal ash in the unlined lagoons. Indeed, the settlement is built around the flawed premise that confirmed violations at the Asheville plant are now “potential” infractions. Nearly seven years of groundwater monitoring data from the Asheville facility confirms illegal contamination of groundwater. Furthermore, DENR's own internal documents confirm that the agency has known of seeps from the Asheville coal ash impoundments for years, and DENR's verified complaint confirms that it has already documented illegal discharges from the Asheville Plant to tributaries of the French Broad River. Am. Complaint ¶¶ 80, 82, 103. Nonetheless, the settlement fails to require Duke to halt ongoing violations of law.

We urge DENR to withdraw the proposed settlement and instead to require Duke to take action to remedy the source of ongoing surface and groundwater contamination at Duke's Asheville facility – its antiquated, unlined coal ash lagoons.

A. The Asheville Plant Coal Ash Lagoons

The Asheville Plant sits above the French Broad River, approximately seven miles upstream from the City of Asheville. The Plant's two unlined coal ash lagoons stretch over 90 acres and store up to 2,780 acre-feet of coal ash. The newer lagoon, constructed in 1982, is reported to hold up to 450 million gallons of coal ash.⁴ The older 1964 ash lagoon has a surface area of approximately 45 acres. It was removed from service and drained in 1982. The lagoons are between Lake Julian and the River, and the impoundments abut Interstate 26 and a residential

³ See Bruce Henderson, *N.C. water quality agency sues Duke over Asheville coal ash pollution*, CHARLOTTE OBSERVER, available at <http://www.charlotteobserver.com/2013/03/22/3933272/nc-water-quality-agency-sues-duke.html>.

⁴ See, e.g., Nanci Bompey, *Asheville area coal ash pond part of safety debate*, ASHEVILLE CITIZEN-TIMES, available at <http://www.citizen-times.com/article/20100912/LIVING/309120044/Asheville-area-coal-ash-pond-part-safety-debate>.

neighborhood. Both impoundments that hold back decades worth of ash have been rated “High Hazard” by EPA because of the likely loss of human life if they were to fail.⁵

The ash lagoons have contaminated groundwater and are leaking pollutants into streams and the French Broad River, in contravention of the facility’s discharge permit and federal and state law. Years’ worth of sampling by Duke of monitoring wells around the perimeter of the lagoons reveals violations of groundwater standards for boron, iron, manganese, selenium, thallium, chloride, sulfate and total dissolved solids.⁶ Sampling by the Conservation Groups of tributaries draining to the River below the impoundments revealed elevated levels of barium, boron, cobalt, iron, manganese, and nickel.⁷ None of these locations sampled are the permitted outfall (Outfall 001) for the discharge of ash pond effluent.⁸

Duke’s own sampling of seepage from the ash impoundments as recently as 2010 reported barium, cobalt, iron and manganese, as well as molybdenum, chloride, sulfates and total dissolved solids escaping the impoundments. Public records show DENR and Duke have been aware of seepage occurring from the coal ash lagoons for at least three decades, and rates of seepage have been as high as an estimated one million gallons per day. *See* CWA Notice at 6.

In addition to polluting groundwater and streams, these ailing, unlined lagoons pose structural concerns. The settlement alludes to “dewatering of the 1982 dam”, “[s]tructural improvements to the 1964 dam,” and installation of a drainage system to “ensure stability of the 1964 dam” as remedial maintenance measures. Draft Consent Order ¶ 22. However, the settlement fails to disclose the nature of the problems that necessitated repairs. In October 2012, for example, a large internal dike that divides the 1982 lagoon unexpectedly failed, causing a 60-foot-wide breach and necessitating emergency dewatering within the 1982 lagoon through installation of 82 wells and sump pumps. Investigation revealed the internal dike had been floating on ash, according to DLR records.⁹

At a fundamental level, the proposed settlement ignores structural concerns with the coal ash lagoons and assumes, without inquiring, that the ash lagoons are actually a safe and reliable means of storing coal ash into the future. However, a recent dam inspection by DENR found “wetness” on the slope of the 1982 impoundment and explained, “[e]xcessive wetness/seepage

⁵ *See, e.g.*, Coal Combustion Waste Impoundment Dam Assessment Report, Progress Energy Carolinas, at 2-2 (June 2009) (“CCW Impoundment Report”), *available at* http://www.epa.gov/osw/nonhaz/industrial/special/fossil/surveys2/pec_asheville_finall.pdf.

⁶ *See* Progress Energy Asheville Steam Power Plant, Well Sampling Permit Analytes Spreadsheet (updated through August 2012, showing groundwater sampling results from November 2010, April 2011, July 2011, November 2011, April 2012, July 2012), and Groundwater Quality Monitoring: Compliance Report Form, Asheville Steam Electric Plant (dated December 10, 2012, showing sampling results from November 2012), on file with DENR.

⁷ *See* Conservation Groups’ Notice of Intent, and map and table summarizing sampling, attached thereto.

⁸ Progress Energy is authorized to discharge wastewater from its Asheville Plant according to the terms of National Pollutant Discharge Elimination System (“NPDES”) Permit No. NC0000396, effective January 1, 2006. The NPDES Permit authorizes a single discharge point from the “Ash Pond Treatment System” to the French Broad River through Outfall 001. *See* Permit, Supplement to Permit Cover Sheet.

⁹ *See* Email from Laura Herbert, DLR, to Tracy Davis *et. al* (October 3, 2012)-(on file with DENR).

can cause failure of the dam” (April 19, 2013).¹⁰ The Plant’s Emergency Action Plan (“EAP”) recognizes changes in “seepage” and new areas of wetness among indicators of potential dam failure.¹¹ Notably, after the internal dam failure DLR asked Duke to update its EAP, but according to public records, Duke has refused to do so.¹² Duke also refused to provide inspection reports for the ash pond that DLR requested after the internal failure, claiming they were “trade secrets, not subject to public disclosure.”¹³ DENR is fully aware of this, yet the proposed settlement fails to grapple with the structural significance of multiple seeps, a recent history of internal dam failure, and Duke’s resistance to update its emergency response procedures. The 2008 TVA coal ash spill in Kingston, Tennessee and 2010 coal ash collapse at the Oak Creek Power Plant in Milwaukee County, Wisconsin – as well as recent smaller-scale spills at Duke facilities in North Carolina – illustrate the dangers of unexpected, catastrophic failure of coal ash impoundments.

Rather than evaluate the reliability of the coal ash impoundments at Asheville for future wet storage, the settlement proposes to allow Duke to commit to a future of wet storage. The settlement remarkably lists “removal of the ash from the 1982 pond to increase storage capacity” as a remedial effort to upgrade its lagoon. However, emptying ash in order to keep using an unlined lagoon will not remedy contamination – it will exacerbate it. In addition, the removal of ash from the Asheville plant to serve as fill at the airport (a lined site with a leachate collection system) has been in place for years, and has nothing to do with the enforcement action. The settlement could have, but does not, require Duke to line the impoundment already being emptied, in order provide a barrier to groundwater infiltration and abate seeps. Similarly, although the settlement calls for Duke to study dry ash handling and “submit a report to DWQ,” it stops short of actually requiring Duke to transition away from the wet storage of ash in the unlined 1982 lagoon. In other words, the proposed settlement would miss a sensible and unique opportunity to do something to actually address the source of the contamination, obsolete coal ash lagoons, and to abate future contamination of groundwater and surface water at the Asheville Plant.

B. DENR’s Proposed Settlement Fails to Halt Ongoing Contamination of Groundwater, As Required By Law.

There can be no dispute about the underlying violations of law that prompted this enforcement action against Duke’s Asheville facility. Duke’s own groundwater monitoring reports document contamination at each monitoring well installed around the compliance boundary of the coal ash ponds since monitoring began. This contamination includes

¹⁰ See DLR, 1982 Dam Inspection Report (April 19, 2013) (on file with DENR).

¹¹ Emergency Action Plan, Asheville Steam Plant (November 2010), at 21-22, on file with DENR.

¹² See, e.g., Letter from Steven McEvoy, DLR, DENR to Kimberlee Hutchinson, Duke Energy Carolinas (April 18, 2013) (requesting an approved EAP “as soon as possible for review” and explaining an “EAP’s function as an essential, and in fact, a primary tool in protecting the public welfare during dam emergency”); Letter from Laura Herbert, DLR, DENR, to Kimberlee Hutchinson, Duke Energy Carolinas (April 19, 2013) (requesting an update of the EAP); Email from John Toepfer, Duke Energy, to Laura Herbert & Steven McEvoy, DLR, DENR (May 10, 2013) (claiming submittal of an updated EAP is not required), all on file with DENR.

¹³ See Email from Tim Russell, Duke Energy, to Laura Herbert, DLR, DENR (Oct. 8, 2012), on file with DENR.

constituents such as boron, iron, manganese, selenium, thallium, chloride, sulfate and total dissolved solids, all of which are common to coal ash. The data, submitted to DENR since 2006, is more than sufficient to confirm groundwater contamination statistically greater than background concentrations. Sampling from monitoring well "CB-3," on the southern boundary of the 1982 ash pond, as an example, has consistently detected thallium in excess of groundwater standards since at least 2010. DENR knows these facts to be true, as demonstrated by its verified complaint which alleges that Duke's "exceedences of the groundwater standards . . . at the compliance boundary of the Asheville Steam Electric Plant Ash Pond are violations of the groundwater standards as prohibited by 15A NCAC 2L.0103(d)." See Am. Complaint ¶ 101.

Despite documented contamination and confirmed violations, the "compliance activities" imposed by the proposed settlement merely reiterate monitoring requirements already required of Duke and disregard a legal mandate for affirmative action to stop known sources of contamination. For example, the order "requires" Duke to "continue to conduct groundwater monitoring," (Draft Consent Order ¶ 32) a preexisting obligation which Duke must honor whether or not a settlement is entered. See 15A N.C. Admin. Code 2L .0106(c); .0110. The order also asks Duke to identify the "naturally occurring concentration of substances in the site's groundwater" even though DENR already has years of data from background wells and has already conducted statistical analysis of data generated by those wells.

Instead of bringing Duke into compliance with the law, the "compliance activities" required by the proposed settlement weaken existing obligations by facilitating indefinite delay of corrective action through duplicative study and assessment. The proposed settlement imposes no concrete time limits other than deadlines for submitting "plans" or "proposals" for additional study. See Draft Consent Order ¶ 33 (giving Duke 45 days to submit a "proposed site assessment"); ¶ 34 (giving Duke 60 days to "submit to DWQ a proposal" to determine naturally occurring concentrations of substances); ¶¶ 35-36 (requiring certain activities based on completion of the "proposal" in ¶ 34 which has no completion deadline); ¶ 37 (requiring Duke to "submit to DWQ a plan to conduct a site assessment" based on the findings of ¶ 36 which has no completion deadline). The proposed settlement sets no end point for these studies and allows the possibility of perpetual study.

For example, the order requires Duke to "submit to DWQ a proposed site assessment [] and schedule for the completion and submission of a site assessment report in accordance with 15A NCAC 2L .0106(g)." Draft Consent Order ¶ 33. Duke is already required to complete a site assessment pursuant to 2L .0106(c) and (g). Instead of setting an enforceable timetable during which Duke must complete the assessment, the proposed order only requires Duke to submit a proposal for the assessment, without actually starting it, within 45 days. This agreement eventually to complete the site assessment required by 2L .0106(g) fails to "assure current and future compliance with . . . the North Carolina Groundwater Standards contained in 15A NCAC Subchapter 2L." *Id.* ¶ 18. Similarly, the settlement asks Duke to submit a "proposal and schedule" for studying naturally occurring substances in groundwater, but specifies no timeline for implementation. See *id.* ¶¶ 34, 52. The agreement requires Duke to "comply with the corrective action requirements" only at the end of these unconstrained and undefined timelines for study and assessment. See *id.* ¶¶ 33, 55. These indefinite timelines are especially striking in light of DENR's demand in its original complaint that both these steps be completed within 120 days of judgment. Complaint ¶ 17.

Furthermore, the proposed agreement settles for future completion of “compliance activities” by Duke that DENR knows *it has already competed*. The draft order acknowledges that Duke has already prepared a “site conceptual model” and submitted that model to DWQ in April 2013. Draft Consent Order ¶ 25. This report was completed in response to DWQ’s request to complete “assessment activities,” presumably the same 2L .0106(g) “assessment activities” the proposed order is now asking Duke to repeat.¹⁴ The term in the proposed settlement asking Duke to determine a naturally occurring concentration of substances in the site’s groundwater is also unnecessary. Duke has monitored groundwater at the Asheville facility for years, providing more than enough data to assess naturally occurring concentration levels. Moreover, Duke has identified and monitored DENR-approved “background wells” which have been sampled for the explicit purpose of determining “naturally occurring concentration levels” of contaminants. Lastly, the State’s verified complaint alleges not only exceedances of the 2L Rules but violations, confirming that those exceedances are above the naturally occurring concentration for each substance. See Am. Complaint ¶ 89.

The most troubling failure of the proposed settlement’s approach to “assur[ing] current and future compliance” (Draft Consent Order ¶ 18) is DENR’s apparent agreement to waive minimum requirements mandated by law when groundwater violations occur. North Carolina law requires Duke to now remove, or treat and control, the source of ongoing groundwater pollution.

There is no question about the remedial obligations that arise from these violations. The Conservation Groups recently petitioned the Environmental Management Commission (“EMC”) for a declaratory ruling affirming the plain wording of a rule mandating that violators like Duke “shall . . . take immediate action to eliminate the source or sources of contamination.” 15A N.C. Admin. Code 2L .0106(c)(2). The EMC declined to ascribe any meaning to that text, concluding instead that “[c]orrective action for a violation found at or beyond a compliance boundary incorporates measures found in” 15A NCAC 2L .0106(f), among others.¹⁵ Declaratory Ruling at 24, 18. Section .0106(f), in turn, mandates that: “[c]orrective action required . . . prior to or concurrent with the assessment required in Paragraphs (c) and (d) of this Rule, shall include, but is not limited to . . . [r]emoval, or treatment and control of any primary pollution source such as buried waste, waste stockpiles or surficial accumulations of free products . . .” 15A N.C. Admin. Code 2L .0106(f) (emphasis added).

Section .0106(f) not only mandates specific action—removal, or treatment and control, of pollution sources—it also dictates a specific timeframe for implementation. As explained by the EMC’s brief defending its ruling on appeal, “corrective action following discovery of an unauthorized release of a contaminant includes those measures set forth in subsection 15A

¹⁴ The Conservation Groups sought to obtain this and other public records via a public records request submitted three months ago, on May 14, 2013. Despite repeated requests for production of the documents, the Conservation Groups have only received one document. That document, the April 2013 site conceptual model, was received on August 14, 2013, the day these comments were due. The Conservation Groups did not have adequate time to review the site conceptual model prior to submitting these comments.

¹⁵ The EMC’s decision is binding on all parties to the declaratory ruling (including Duke and DENR), unless and until it is altered or set aside. See N.C.G.S. § 150B-4(a).

NCAC 2L.0106(f). . . . Such measures are to be implemented ‘*prior to or concurrent with the assessment required in subsection (c).*’” See 13-CV-000093, Brief for Respondent Environmental Management Commission, at 17-18 (emphasis added). DENR’s settlement with Duke ignores the EMC’s ruling. It requires “assessment” of past contamination at the Asheville facility, but not action to address ongoing sources of pollution as required by .0106(f), *prior to or concurrent with* that assessment. See Draft Consent Order ¶¶ 33, 37, 55.

The proposed settlement picks and chooses which elements of the 2L Rule to enforce against Duke’s proven violations. For example, the proposed order does not require Duke to comply with the corrective action requirements of 2L .0106(c), until completion of site assessment required by 2L .0106(g). But the 2L Rule requires completion of the site assessment required by 2L .0106(g) *as part of the requirements of 2L .0106(c).* See 15A N.C. Admin. Code 2L .0106(c)(3). DENR has chosen to enforce a requirement under 2L .0106(c) to assess past groundwater contamination at the same time that it selectively ignores a separate obligation under 2L .0106(c) to remove, or treat and control, ongoing sources of future groundwater contamination.

Furthermore, the proposed settlement ignores the plain intent and meaning of the handful of provisions DENR has decided to enforce against Duke. For example, the order requires Duke to study “natural concentrations” of substances in the site’s groundwater at three areas, the 1964 ash pond, the 1982 ash pond and the French Broad River floodplain. See Draft Consent Order ¶ 35. “Natural Conditions” are defined in the 2L Rules as “conditions which occur naturally,” not conditions in a waste disposal site. See 15A N.C. Admin. Code 2L .0102(16).

The proposed order also conflates the monitoring/compliance requirements for surface water and groundwater. It would allow Duke to analyze surface water samples at the compliance boundary to determine “compliance with applicable water quality standards” when the compliance boundary itself is located under a surface body of water. Draft Consent Order ¶ 46. Compliance with the 2L Rule mandates cannot be established without analysis of the *ground water*, sampling of *surface* water alone is not a substitute.

Finally, as part and parcel of an approach that treats established violations as open questions, the proposed order asks Duke to comply with certain requirements *if* coal ash contamination is found in water supply wells. Draft Consent Order ¶ 47. Inexplicably, DENR ignores water supply well sampling that it has already conducted that confirms violations of 2L standards. Aquifer Protection Section Staff inspected and sampled private water supply wells on Bear Leah Trail, located between the coal ash ponds and the French Broad River, in October and December of 2012. See Letter from Ted Campbell, Aquifer Protection Section, to Kent Mottinger (Feb. 25, 2013) (on file with DENR). The sampling found violations of the 2L standards for both iron and manganese in the private water supply wells. Without explanation, the proposed settlement presumes that Duke will not be required to remedy that contamination, requiring only that Duke provide “alternate water for those impacted wells pursuant to 15A NCAC 2L .0106(b)” if violations are confirmed. Draft Consent Order ¶ 47. Although we have no objection to providing an alternative drinking water supply to land owners impacted by Duke’s contamination of their wells, North Carolina law requires Duke to remediate contaminated groundwater, and it cannot avoid that obligation simply by providing an alternative drinking water supply. As Duke and the State have mentioned on numerous occasions,

compliance with the 2L Rules requires compliance with multiple sections and cannot be confined to one requirement based on one section of the Rule.

C. DENR's Proposed Settlement Does Not Require Duke to Stop Unpermitted Discharges From the Ash Lagoons.

The settlement's purported resolution of unpermitted seeps that are draining from the coal ash lagoons to the French Broad River and its tributaries is similarly fraught with problems and does not satisfy the CWA. The proposed settlement relies upon indefinite and protracted timetables, seeks information that is already established, and does not require Duke to halt unpermitted discharges, particularly by any specific compliance date. This falls short of the "vigorous" enforcement required of the state's federally delegated CWA program, which must achieve compliance with the CWA "with interim milestones" towards a "final compliance date." *See, e.g.,* North Carolina NPDES MOA with EPA, Sec. III (A)(6); *see also* Sec. XI (A)(2)(c).

First, the settlement proposes an unnecessarily prolonged plan for investigation and includes information that already exists. Draft Consent Order ¶¶ 39-49. As an example, paragraph 39 gives Duke 180 days to provide a topographic map of the location of the toe drains from Asheville's two ash impoundments, along with monthly flow measurements and information regarding whether flow is continuous or intermittent. DENR staff already know the location of toe drains, the frequency of measurement, and have described the flow and other seepage features of the dams.¹⁶ It is unclear why six months is needed to gather this information.

Similarly, the settlement provides Duke 180 days after entry of the Order to *submit a plan* to determine *whether* toe drains or seeps have reached surface waters of the French Broad River basin *and* are causing water quality violations. *Id.* ¶ 41. Sworn allegations of the complaint, public records, and sampling by Conservation Groups (shared with DENR and Duke) already confirm that the discharges from toe drains and seeps from the coal ash lagoons are unpermitted discharges reaching surface waters in violation of law. *See, e.g.,* Am. Complaint ¶¶ 80, 82, 103; Notice of Intent and public records cited therein (on file with DENR). Indeed, DENR itself asserts on March 11, 2013, DWQ staff "observed several seeps from the facility discharging into surface waters adjacent and flowing to the French Broad River." Am. Complaint ¶ 80. Yet, the proposed settlement leaves it up to Duke to determine if any seeps or discharges reach surface waters. *See* Draft Consent Order ¶¶ 39-41, 58-59. Once Duke submits this plan to determine whether seeps are reaching surface waters *and* are causing water quality violations, at some unspecified point DWQ determines whether or not a law is being violated. Duke then has *another* 180 days from the unspecified date of the DWQ determination to take a number of steps, which may not abate the unpermitted discharge. *See id.*

DENR's proposed approach contravenes law for several reasons. First, the timetable for compliance is illusory; there is no specific compliance date. And this shortcoming is not cured by the settlement's requirement for Duke, within 12 months of entry of the Order, to submit

¹⁶ *See, e.g.,* DLR 1982 Dam Inspection Report (April 19, 2013) (noting location of weir box, type of drainage device, and flow measurements from toe drain); DLR, 1982 Dam Inspection Report (Feb. 22, 2012) (including a drawing of toe of dam, flow measurement); DLR April 19, 2013, 1964 Dam Inspection Report (drawing of new toe drain system, showing 2 toe drains in box culvert "measured by Duke monthly"), all on file with DENR.

information “necessary to request that DWQ incorporate the *process* described in ¶¶ 38-44 into the Asheville Plant’s NPDES permit,” as that very process is open-ended and lacks a compliance date.¹⁷ See Draft Consent Order ¶ 45 (emphasis added).

Second, unpermitted discharges must be halted or permitted under the CWA *even if they do not violate water quality standards*. Section 301 of the CWA prohibits “the discharge of any pollutant” into “the navigable waters of the United States” except pursuant to and in compliance with permits issued under the Act. 33 U.S.C. § 1311(a). For all unpermitted discharges, no matter the amount, the CWA requires such discharges to either be stopped or permitted under the NPDES program.¹⁸ Language in the proposed settlement construed to allow these discharges to continue without a permit is unlawful.

Next, DENR offers a third option to Duke to address seeps, besides stopping or permitting the discharge: Duke may “address” the seeps using undefined “BMPs” or “best management practices.” Draft Consent Order ¶ 42 (c).¹⁹ The abstract BMP language is unclear and leaves open the possibility of continuing violations of the CWA and N.C. Gen. Stat. § 143-215.1(a)(1). For example, the proposed settlement directs Duke to develop BMPs “designed to prevent unpermitted discharges of *unpermitted* pollutants to surface waters.” Draft Consent Order ¶ 43 (emphasis added). By stating that only unpermitted discharges of “unpermitted” pollutants would be prevented, the ambiguous language implies that unpermitted discharges of certain “permitted” pollutants could somehow be authorized by BMPs; again, this would violate the CWA, which requires a permit for each discrete conveyance.

In addition to these shortcomings, the seep sampling required by the settlement is also inadequate. First, it limits testing to an overly narrow set of parameters. Draft Consent Order ¶¶ 39, 41. Sampling by the French Broad Riverkeeper of tributaries and Progress Energy’s own sampling of seeps leaving the toe drains have detected substances that would not be included in sampling under the proposed settlement, like cobalt and molybdenum. The sampling must be broad enough to capture pollutants known to be escaping the impoundments. Moreover, the proposed settlement leaves open the possibility that some seeps will not be tested at all and, presumably, not addressed, based upon infeasibility of sampling. *Id.* at ¶ 39. There is no apparent reason why testing a seep would be infeasible and no exception under the CWA or state law for seeps that are infeasible to sample.

¹⁷ See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470, 489 (D.S.C. 1995) (consent order that allowed extended noncompliance with NPDES Permit “for an indefinite period into the future” held inadequate enforcement); *Ohio Valley Environmental Coalition, Inc. v. Maple Coal Co.*, 808 F. Supp. 2d 868, 886 (S.D. W. Va. 2011) (state prosecution of NPDES permit violations that seeks relief that is “prospective and nonspecific” held inadequate); N.C. Gen. Stat. § 143-215.6C (“court shall grant relief necessary to prevent or abate the violation”).

¹⁸ The “statute clearly covers all additions – no matter how small – rather than merely net additions.” *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 166-67 (4th Cir. 2010).

¹⁹ BMPs are authorized only to manage *non-point* sources such as stormwater runoff, not channelized point source discharges: “Best Management Practice (BMP) means a structural or nonstructural management-based practice used singularly or in combination to reduce *nonpoint source inputs* to receiving waters in order to achieve water quality protection goals.” 15A N.C. Admin. Code 2B.0202(7) (emphasis added).

Finally, although the proposed settlement is correct to assume new seeps are likely to emerge, the plan it lays out for identifying and addressing new seeps is infirm. By providing for incorporation of a plan to identify and address new seeps into the NPDES Permit process, the proposed settlement tries to legitimate future, unknown seeps with a permit. Draft Consent Order ¶¶ 44 -45. However, it is unclear on what basis DENR could even permit yet-as-of-discovered point sources and allow them to unpredictably discharge polluted water from a wastewater treatment lagoon. Modifications to NPDES permits to allow additional discharge points are subject to public notice and comment procedures, which cannot be subverted through an open-ended catchall for future seeps.

For all of these reasons, the settlement's purported resolution of unpermitted seeps at the Asheville Plant cannot be squared with requirements of the CWA or state law.

D. The Proposed Settlement Improperly Attempts to Paper Over An Illegal Permit Modification.

The 1964 lagoon was drained and removed from service in 1982, when Duke began using the 1982 lagoon.²⁰ The Plant's current NPDES Permit authorizes discharges from the 1982 ash lagoon, also referred to as "the ash pond treatment system," through Outfall 001 to the French Broad River. Both the NPDES Permit fact sheet and renewal permit application (dated June 11, 2010) refer to the 1982 ash lagoon as the Plant's sole active ash lagoon discharging to Outfall 001.

However, the settlement proposes that Duke's inactive 1964 lagoon also "can discharge to Outfall 001." Draft Consent Order ¶ 13(a). Far from innocuous, that provision attempts to retroactively validate an illegal modification of Duke's discharge permit. Duke originally applied to add a new waste stream from its inactive 1964 ash pond to the Outfall 001 that discharges to the French Broad River as part of its NPDES permit renewal application. That application is still pending, and the Asheville Plant is operating under an extension of a permit that had an expiration date of December 31, 2010. When it became clear a new permit would be delayed, Duke requested, and DWQ purported to grant, administrative approval in May 2011 for Duke to relocate its Outfall 001.²¹ Commensurate with that relocation, Duke also built a new pipe connecting a new waste stream from a pond internal to the inactive 1964 lagoon, which contains selenium, nickel, and zinc, among others, to Duke's permitted discharge.

However, DENR's administrative approval allowing the above modification was defective because CWA permits cannot be modified after their initial expiration date. Here, the Asheville Plant's permit had an expiration date of December 31, 2010, and could not be modified in May 2011, except through a permit renewal process. *See Ohio Valley Envtl. Coalition, Inc. v. Maple Coal Co.*, 808 F. Supp. 2d 868, 876 (S.D. W. Va. 2011).²² Even if

²⁰ "Progress Energy-Asheville Power Station," Response to EPA Information Request, *available at* <http://www.epa.gov/wastes/nonhaz/industrial/special/fossil/surveys/progress-asheville.pdf>

²¹ *See* Letter from Roger Edwards to Gary Whisnant (May 13, 2011) (on file with DENR).

²² *See also* 40 C.F.R. § 122.6 (allowing existing state-issued permit to "continue" until effective date of new permit); N.C. Gen. Stat. § 150B-3(a) (upon timely re-application "existing" permit does not expire until a decision on the application).

DENR did have the power to modify a permit after its original expiration date, it could not do so administratively; this new waste stream is a “major” modification requiring public notice and comment, not merely “administrative approval.” See 40 C.F.R. §§ 124.10, 122.62, 122.63; 15A N.C. Admin. Code 2H. 0114(b). After learning of this new, improperly permitted waste stream, the Conservation Groups gave notice of their intent to sue under the Clean Water Act. Notice of Intent at 8. DENR’s enforcement action has been silent about the addition of this pollution at the Asheville Plant.

DENR’s assertion in the settlement that the 1964 pond “can discharge to Outfall 001,” however, effectively seeks to paper over an otherwise invalid permit modification. This settlement cannot be used to circumvent the permit revision process required to include additional polluted waste streams.

E. Other Deficiencies of the Proposed Settlement

In addition to the inadequacies described above, which deal with how the settlement is ineffectual to address unlawful contamination from the coal ash lagoons, the proposed settlement is deficient in several other respects.

First, the penalty imposed for the Asheville Plant, \$60,200.24 (\$8,700.24 of which is reimbursement for DWQ expenses), does not match the magnitude of the violations, which have been occurring for decades. Penalties are imposed in water pollution enforcement cases to “deter the violator and others from committing future violations.” *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 352 (E.D. Va. 1997) *remanded on other grounds by United States v. Smithfield Foods, Inc.*, 191 F.3d 516 (4th Cir. 1999). Penalties only have a deterrent effect however if they are severe enough to force a violator or potential violators to recalibrate their plans in light of a potential fine. The inadequacy of the fine is apparent when compared to potential fines under the CWA of up to \$37,500 per day, for each violation. See 33 U.S.C. §§ 1319(d), 1365(a); 40 C.F.R. § 19.4.²³ The nominal fine imposed for the Asheville Plant (equivalent to less than two days of CWA violations) is immaterial to Duke, the largest utility in the United States. Such a small fine is inadequate to have a deterrent effect and more likely encourages violations by sending a signal that DENR will tolerate longstanding violations of water quality laws and then, once forced to act, will fine a violator only a nominal amount. See Draft Consent Order ¶ 29.

Not only does the settlement allow a nominal fine, it offers Duke an avenue to settle its legal claims without having to accept responsibility for its behavior. The proposed settlement concludes that it is entered into “without admission of the non-jurisdictional allegations in the Complaints.” Draft Consent Order at 2. DENR has made sworn statements acknowledging that Duke has violated the law and has done so for years. Additionally, when a violator is allowed to enter into a deal to resolve its legal violations without suffering the maximum penalty, normally a violator must acknowledge its illegal activity and take responsibility for the consequences of its

²³ For unpermitted discharges alone, conservatively estimating that there have been two seeps at the Asheville facility for only ten years, Duke would be liable for a maximum penalty of approximately \$ 251,260,000 under the Clean Water Act. 40 C.F.R. § 19.4.

illegal actions. To resolve these violations, Duke should at least be required to acknowledge its wrongdoing.

Finally, unrelated to the claims in the enforcement action, the proposed settlement seeks to set a mercury limit for Duke's primary Outfall 001 for its upcoming NPDES Permit renewal, purportedly to achieve compliance with the state's new mercury total maximum daily load ("TMDL"). It states, "Duke Energy Progress shall accept a limit for total mercury annual average at Outfall 001 of 0.1 µg/l when NPDES Permit No. NC0000396 is renewed." Draft Consent Order ¶ 50. However, compliance with the mercury TMDL is irrelevant for purposes of addressing the unlawful groundwater contamination and unpermitted seeps at issue in the state's enforcement action. Duke will have to comply with the TMDL even if any proposed settlement is never entered. DENR therefore cannot frame a future promise by Duke to comply with the statewide TMDL, which is non-negotiable, as a negotiation term for which Duke should get credit in this settlement. In addition, the proper time to develop terms of a NPDES permit is during the renewal process, incorporating comments based on public review, not in an unrelated legal proceeding. The terms of a renewed NPDES permit must be published in a draft permit for public review and comment. *See* 40 C.F.R. § 123.25.

In any event, it is not clear that the "limit for total mercury annual average at Outfall 001 of 0.1 µg/l" even complies with the requirements of the TMDL. DENR's "Mercury Post-TMDL Permitting Strategy" calls for existing industrial facilities with mercury monitoring requirements to comply with the technology-based "Level Currently Achieved" (LCA). DENR, Mercury Post-TMDL Permitting Strategy (Sept. 4, 2012). The technology-based LCA is 47 ng/l or .047 µg/l. The settlement proposes an effluent mercury limit (0.1 µg/l) that is approximately double what is required by the TMDL (0.47 µg/l). The proposed settlement cannot be used to circumvent either the mercury TMDL or the required permit renewal process.

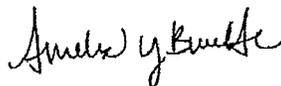
F. Conclusion

The proposed settlement fails to require compliance with state and federal law and does not address the fundamental problems of wet storage of coal ash in unlined lagoons. DENR and Duke cannot, by consent agreement, bargain their way around legal mandates. Moreover, such a favorable outcome for Duke would encourage, rather than discourage, it and other polluters to pollute now and pay later, rather than accept responsibility and cleanup past and ongoing contamination of public resources.

For all of these reasons, DENR should withdraw the settlement and instead take steps to require Duke's prompt, definite compliance with all applicable requirements of state and federal law, including the prohibition on unpermitted point source discharges and the immediate action requirements of the 2L groundwater rules. Furthermore, DENR and Duke should include all parties to the pending enforcement action, including the Conservation Groups, in development of the terms of any proposed settlement moving forward.

Finally, pursuant to N.C. Gen. Stat. § 143-215.2 (a1)(2), the Conservation Groups request a public hearing in Asheville on the Draft Consent Order, and request to receive notice of any subsequent drafts or final versions of the Consent Order and any additional opportunities for public comment.

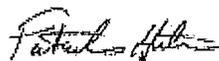
Sincerely,



Amelia Y. Burnette
Senior Attorney



Austin D.J. Gerken
Senior Attorney



Patrick Hunter
Associate Attorney

cc: Matthew Hicks, U.S. EPA (via U.S. Mail)
Hon. Roy Cooper, N.C. Dept. of Justice (via U.S. Mail)
Julie Mayfield, Western North Carolina Alliance (via email)
Hartwell Carson, French Broad Riverkeeper (via email)
Kelly Martin, Sierra Club (via email)
Donna Lisenby, Waterkeeper Alliance (via email)

