SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450 | 601 WEST ROSEMARY STREET, SUITE 220 CHAPEL HILL, NC 27516-2356 | Facsimile 919-929-9421

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VIA EMAIL AND U.S. MAIL

Mr. S. Jay Zimmerman, Acting Director
DENR Division of Water Resources
Attn. Belews WW Permit
1617 Mail Service Center
Raleigh, N.C., 27699-1617
jay.zimmerman@ncdenr.gov
publiccomments@ncdenr.gov

Re: Draft NPDES Wastewater Permit – Belews Creek Steam Station, #NC0024406

Dear Mr. Zimmerman:

On behalf of Appalachian Voices, the Southern Environmental Law Center submits the following comments on the 2017 draft National Pollutant Discharge Elimination System ("NPDES") permit noticed for public comment by the North Carolina Department of Environmental Quality ("DEQ"), Division of Water Resources ("DWR"), which purports for the first time to allow Duke Energy Carolinas LLC ("Duke Energy") to discharge increased and in many cases unlimited pollution into the Dan River, Belews Lake, and other waters of North Carolina and the United States.

We have previously submitted comments on an earlier draft permit in November 2016, and those comments remain applicable, except as explained below.

As set forth below, the proposed permit violates the Clean Water Act ("CWA") because, among other things: it allows unlimited toxic pollution of the Dan River and Belews Lake; it authorizes a wastewater treatment facility to malfunction and leak wastewater; it illegally turns North Carolina streams into wastewater ditches with no clean water protections; it puts in place excessive and ineffective limits for many toxic pollutants; and it reduces substantially clean water protections that have been contained in NPDES permits for the Belews Creek facility for decades.

This proposed permit tries to allow Duke Energy to dump the water out of its Belews Creek coal ash lagoon into the Dan River and Belews Lake without any protections for numerous toxic substances; to legalize Duke Energy's longstanding violations of the Clean Water Act and North Carolina law which DEQ has allowed to continue without taking effective enforcement

action; and to allow Duke Energy leave its coal ash in an unlined pit which will pollute Stokes County and communities around and downstream of the Belews Creek coal ash site for decades to come.

I. Introduction

Duke Energy stores approximately 12 million tons of coal ash in an unlined pit that discharges into the Dan River, and sits on the banks of Belews Lake and on top of Little Belews Creek. This coal ash extends down 65 feet deep, sitting and leaching in the groundwater that flows through the basin. The coal ash lagoon is over 40 years old, and its waters are held back only by a dike made of earth that leaks. The coal ash lagoon is authorized to discharge wastewater from the lagoon only through a single outfall that empties directly into the Dan River.

The Dan River has already suffered significant contamination from Duke Energy's mismanagement of coal ash. The coal ash catastrophe at the Dan River Site dumped over 20 million gallons of wastewater and 39,000 tons of coal ash into this River. Bromide from Duke Energy's coal ash caused carcinogens to enter drinking water systems downstream of the Belews Creek plant in the towns of Eden and Madison along the Dan River. Contaminants associated with coal ash—including thallium, lead, aluminum, and copper—exceed water quality standards in the Dan River immediately downstream of the Belews Creek coal ash site.

Belews Lake is an important water, recreational, fishing, and economic resource for North Carolina, the region, and Stokes County. Families live along the lake. Local residents, people who live in surrounding communities, and visitors from other areas fish, swim, and boat in and on the lake. Over the years, Belews Lake has been seriously harmed by the pollution from Duke Energy's coal ash lagoon. In 2007, EPA classified Belews Lake a "proven ecological damage case" due to selenium poisoning from leaking coal ash pits at the Belews Creek plant.[1] Selenium contamination from the coal ash pits ultimately eliminated 19 of the 20 fish species present in Belews Lake.[2] Selenium bio-accumulates and persists in the environment, and birds that feed in Belews Lake continue to experience adverse effects from selenium poisoning.[3]

On August 16, 2013, DEQ filed a verified complaint with the Mecklenburg County Superior Court which set out that Duke Energy had intentionally constructed engineered discharges from the Belews Creek coal ash lagoon that discharge into Little Belews Creek and the Dan River. These engineered discharges are not authorized under the Belews Creek NPDES permit and, in fact, are expressly forbidden. Thus, Duke Energy was and is openly and intentionally violating a clear provision of its Belews Creek NPDES permit by polluting the Dan River with coal ash polluted water.

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[1] Attachment 1, USEPA Office of Solid Waste, Coal Combustion Waste Damage Case Assessments 25 (July 9, 2007).

[2] Attachment 2, Rachel Cernansky, National Geographic News, Largest U.S. Coal Ash Pond to Close, But Future Rules Still Undecided (Aug. 9, 2012), *available at* http://news.nationalgeographic.com/news/energy/2012/08/120809-little-blue-run-coal-ash-pond-to-close.

[3] Attachment 3, Barbara Gottlieb et al., Physicians for Social Responsibility and Earthjustice, *Coal Ash: The Toxic Threat to Our Health and Environment*, 12 (Sept. 2010).

DEQ stated—under oath—that Duke Energy's unpermitted engineered discharges at Belews Creek violate state law and that "without . . . taking corrective action," these seeps "pose[] a serious danger to the health, safety and welfare of the people of the State of North Carolina and serious harm to the water resources of the State."[4] As a result, DEQ asked the court to enter a permanent injunction requiring Duke "to abate the violations of N.C. Gen. Stat. § 143-215.1, [and] NPDES Permits" at Belews Creek.[5] Since filing this complaint, however, DEQ has done nothing to require Duke Energy to stop violating the law and its permit at Belews Creek.

Further, it has been discovered that Duke Energy's Belews Creek coal ash lagoon has other leaks that are also illegally flowing into the Dan River and Belews Lake.

Rather than following through on its sworn statements and publicly-announced intention to obtain injunctive relief and corrective action, DEQ's draft permit proposes to paper over the numerous leaks emerging from Duke Energy's coal ash wastewater treatment lagoon.

Duke Energy has faced extensive public pressure and litigation by Appalachian Voices and other community organizations in North Carolina to force Duke Energy to address its primitive unlined and leaking coal ash storage in North Carolina. In May of 2015, Duke Energy operating companies, including the owner of the Belews Creek coal ash lagoon, pleaded guilty 18 times to 9 coal ash crimes across North Carolina. These crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Belews Creek coal ash lagoon. Duke Energy operating companies paid a $102 million fine, and they are under nationwide criminal probation. Under court orders, the criminal plea agreement, statutes, regulatory requirements, and settlement agreements with conservation groups, Duke Energy is now required to excavate all the coal ash from unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina. In addition, in response to this intense public and legal pressure and stronger regulatory requirements, Duke Energy has announced that it will empty the water from all its coal ash lagoons in North Carolina.

However, at Belews Creek and five other coal ash storage sites in North Carolina, Duke Energy has refused to commit itself to remove the ash from its unlined, leaking, polluting, dangerous, and primitive coal ash pits. Instead, Duke Energy hopes to be able to pump the coal ash polluted water out of its leaking lagoons into nearby lakes and rivers and then leave its polluting coal ash in the groundwater in unlined pits near waterbodies where the coal ash will continue to pollute the state's waters forever.

Duke Energy cannot leave its polluting coal ash in place at Belews Creek under the terms of its existing NPDES permit. The Belews Creek coal ash pit leaks, and it pollutes the Dan River and Belews Lake—all in open violation of the Clean Water Act and the NPDES permit.

[4] Attachment 4, Verified Complaint & Motion for Injunctive Relief, *State of North Carolina* ex rel. *N.C. DENR, DWQ v. Duke Energy Progress, LLC*, No. 13 CVS 14661 (Mecklenburg Co., Aug. 16, 2013), at ¶ 197.
[5] *Id.* Prayer for Relief ¶ 2.

DEQ has allowed this illegal pollution to continue without taking any effective action to stop it. Instead, DEQ now proposes to change Duke Energy's NPDES permit to legalize coal ash pollution that has been illegal for decades.

This proposed permit fails to protect the public and public waters and violates the Clean Water Act. DEQ should require that Duke adopt the best available technology to treat the coal ash polluted water before it is dumped into the Dan River, as DEQ has required at other coal ash sites in Wilmington and Charlotte; should require Duke Energy to stop the leaks and discharges of polluted wastewater; and should require Duke Energy remove the coal ash and wastewater from the lagoon, with adequate protections of the Dan River and Belews Lake.

II. Permit Comments

A. The Proposed Permit Violates the Clean Water Act Because It Does Not Protect the Dan River As Water Is Emptied Out Of the Ash Basin.

DEQ proposes to allow Duke Energy to pump all its coal ash polluted water from the Belews Creek coal ash lagoon into the Dan River.[6] Millions of gallons of coal ash polluted water that have been sitting in the ash basin for untold years will be pumped into the Dan River during the so-called "decanting" phase, over a period of weeks or months.[7] Yet the proposed permit provides *no limits at all* during decanting to control pollution from arsenic, selenium, bromide, mercury, chromium, zinc, barium, antimony, or boron.[8]

All of these pollutants are known to be part of coal ash, and past releases of these pollutants at Belews Creek have caused serious harm to surrounding waters. Bromide from Duke Energy's coal ash has mixed in downstream drinking water intakes in the towns of Madison and Eden, forming cancer-causing agents known as trihalomethanes.[9] Selenium discharges from the Belews Creek ash basin wiped out 19 of the 20 fish species once present in Belews Lake.[10] Arsenic, a toxic carcinogen, has been found at levels more than ten times the safety standard in residential drinking wells near Belews Creek.[11]

Yet DEQ's proposed permit for Belews Creek allows Duke Energy to escape any limits for all of these known contaminants as it pumps millions of gallons of water into the Dan River. In fact, Duke is not even required to monitor for some of these pollutants as it pumps the coal ash

[6] Belews Creek Draft NPDES Permit at 5-8, Part I, Sections A. (3.) & (4.).
[7] *Id.* at 5, Part I., Section A. (3.).
[8] *Id*.
[9] Attachment 5, Bertrand Gutierrez, *Discharge from Belews Creek Power Plant Affects Water Quality*, Winston-Salem Journal (Apr. 13, 2014), http://www.journalnow.com/news/local/discharge-from-belews-creek-power-plant-affects-water-quality/article_8e6f8202-a305-580d-a389-d96da37d5629.html.
[10] Attachment 2, Rachel Cernansky, National Geographic News, Largest U.S. Coal Ash Pond to Close, But Future Rules Still Undecided (Aug. 9, 2012), *available at* http://news.nationalgeographic.com/news/energy/2012/08/120809-little-blue-run-coal-ash-pond-to-close.
[11] Attachment 6, DEQ, Comprehensive and Ongoing Groundwater Results from Duke, *available at* http://edocs.deq.nc.gov/WaterResources/Browse.aspx?startid=221202&dbid=0 (Sept. 15, 2016).

water out.[12] As a result, this proposed permit abandons the Dan River to unlimited toxic pollution by Duke Energy and its coal ash polluted water.

In contrast, permits for other Duke Energy coal ash sites have limits for these dangerous pollutants during the decanting phase. For example, the final permits for Duke Energy's Riverbend and Sutton facilities provide common-sense limits to protect people from unsafe levels of arsenic, selenium, and mercury as the water is pumped out of these ash basins.[13] The people living around and downstream of Belews Creek deserve the same protections as the communities near the Riverbend plant in Charlotte and the Sutton plant in Wilmington. Yet DEQ has taken a much more permissive approach at Belews Creek, allowing Duke Energy to discharge these pollutants without limit.

In addition, what few limits are required at Belews Creek during decanting will be difficult to enforce, because Duke Energy is only required to monitor once a month for most of these pollutants.[14] Duke Energy could therefore strategically stagger its sampling to avoid the times when it is releasing the greatest amount of contamination, and might not even have to sample at all while it is pumping the water out of the basin.

Similar fatal defects are present in the section of the permit governing the "dewatering" of the ash, which is the phase that follows decanting and involves removing the "interstitial water"—the most heavily polluted water that is mixed in with the ash or in direct contact with the ash.[15] Yet as with the decanting phase, DEQ once again places no limits on the amount of contamination that can be released during dewatering for the vast majority of dangerous pollutants, including arsenic, bromide, mercury, chromium, zinc, barium, antimony, and boron.[16]

Yet, the permit requires that Duke Energy treat the discharges from the dewatering and decanting of the lagoon through "physical-chemical treatment." Since Duke Energy is required to treat the coal ash polluted water by "physical/chemical treatment," presumably Duke Energy and DEQ believe that the Dan River does need protection from the coal ash lagoon water, and that this treatment will remove coal ash pollution to acceptable levels.

If so, then why does the draft permit not include express limits? The apparent reason is to deny the citizens of North Carolina, and perhaps DEQ itself, the ability to enforce this permit against Duke Energy if its undefined "physical/chemical treatment" malfunctions or does not remove coal ash pollutants to acceptable levels. **DEQ should not adopt a permit that is transparently drafted to deny the rights of North Carolina citizens and to deny even DEQ itself the ability to hold Duke Energy accountable for its pollution of the Dan River**.

[12] Belews Creek Draft NPDES Permit at 5, Part I., Section A. (3.).
[13] Riverbend Final NPDES Permit at 4, Part I, Section A. (2.).
[14] *Id*.
[15] Belews Creek Draft NPDES Permit at 7, Part I, Sections A. (4.).
[16] *Id*.

There is a limit for selenium during the dewatering phase, unlike the decanting phase, but that daily limit for selenium is over 4,700% higher than the limits that DEQ has found to be achievable for other Duke Energy coal ash sites, like the Riverbend site, during dewatering.

In other words, this permit would allow Duke Energy to pump the most toxic and most polluted coal ash brew into the Dan River without meaningful limits on its toxic pollution.

This failure not only betrays the public's interests in the Dan River, it also blatantly violates the Clean Water Act. Under the Clean Water Act, polluters must control their discharges of pollutants using the best available technology economically achievable ("BAT"): "such effluent limitations shall require the *elimination of discharges of all pollutants* if the Administrator finds . . . that such elimination is technologically and economically achievable."[17] The EPA requires that "[t]echnology-based effluent limitations shall be established under this subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants."[18]

In the absence of promulgated effluent limitation guidelines, the NPDES permit writer must use best professional judgment ("BPJ") to determine the BAT standard applicable to the coal ash discharges at Belews Creek.[19] When applying BPJ, "[i]ndividual judgments []take the place of uniform national guidelines, but the technology-based standard remains the same."[20] In other words, the DWR must operate within strict limits when identifying BAT based on BPJ.

The first step in identifying BAT is identifying available technologies. At a minimum, technological availability is "based on the performance of the single best-performing plant in an industrial field."[21] In other words, if the technology is being applied by any plant in the industry, it is achievable.[22] But determination of technological availability is not limited to a single industrial field. "Congress contemplated that EPA might use technology from other industries to establish the [BAT]."[23] International facilities can also be used to define BAT.[24] EPA's NPDES Permit Writers' Manual states that "BAT limitations may be based on effluent reductions attainable through changes in a facility's processes and operations. . . . even when those technologies are not common industry practice."[25] Even pilot studies and laboratory

[17] 33 U.S.C. § 1311(b)(2)(A).
[18] 40 C.F.R. § 125.3(g).
[19] 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3; 15A N.C. Admin. Code 2H .0118.
[20] *Texas Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923 (5th Cir. 1998).
[21] *Chem. Mfrs. Ass'n v. U.S. E.P.A.*, 870 F.2d 177, 226 (5th Cir.) *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989); *see Am. Paper Inst. v. Train*, 543 F.2d 328, 346 (D.C. Cir. 1976) (BAT should "at a minimum, be established with reference to the best performer in any industrial category").
[22] *See Kennecott v. U.S. E.P.A.*, 780 F.2d 445, 448 (4th Cir. 1985) ("In setting BAT, EPA uses not the average plant, but the optimally operating plant, the pilot plant which acts as a beacon to show what is possible").

[23] *Id.* at 453.
[24] *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 132 (D.C. Cir. 1976).
[25] EPA, NPDES Permit Writers' Manual (Sept. 2010) at p. 5-16, *available at:* https://nepis.epa.gov/Exe/ZyNET.exe/P1009L35.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2006+Thru+2010&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C06thru10%5CTxt%5C00000023%5CP1009L35.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-

studies can be used to establish BAT; the technology need not be in commercial use to be considered available.[26]

In sum, BAT requires "***a commitment of the maximum resources economically possible to the ultimate goal of eliminating all polluting discharges***."[27]

There can be no doubt that there are technologies available so that Duke Energy can remove large amounts of pollutants from its coal ash polluted water before it is discharged into the Dan River. In fact, DEQ has already imposed such limits for Duke Energy's "decanting" and "dewatering" of its Sutton (Wilmington) facility and its Riverbend (Charlotte) facility. Duke Energy is using wastewater treatment technologies to achieve those limits at those locations. These same limits and those same technologies can and should be used for Belews Creek.

In addition, Dominion Energy in Virginia has in place wastewater treatment facilities at its Bremo facility on the James River and its Possum Point facility on the Potomac, where it is pumping out water from coal ash lagoons. These facilities are treating coal ash polluted water and meeting tightened standards for coal ash pollutants. Duke Energy can and may use the same or similar technology here.

The same limits that protect the waters of Charlotte and Wilmington should be in this permit to protect the waters of Stokes County, especially the Dan River.

B. The Draft Permit Would Illegally Authorize the Belews Creek Wastewater Treatment Plant to Leak.

The Belews Creek coal ash lagoon is permitted as a wastewater treatment facility. It is required to contain and treat wastewater and to discharge the treated water (presumably with pollutants removed) through a designated outfall. A wastewater treatment facility that leaks is not a properly functioning wastewater treatment facility. Instead, it is a malfunctioning system that discharges untreated, polluted wastewater from undesigned holes in the wastewater treatment plant.

These leaks violate the basic purpose and basic provisions of the existing and all prior permits, even provisions that remain in the proposed permit. The Belews Creek permit authorizes the operation of a wastewater treatment plant, and the Standard Conditions in the permit for that wastewater treatment facility state that "***pollutants removed in the course of treatment*** or control of wastewaters shall be utilized/disposed of in accordance with NCGS 143-215.1 and ***in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States*** except as permitted by the Commission." (known as the "Removed Substances" provision).[28] Of course, a properly

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[26] *See American Paper Inst. v. Train*, 543 F.2d 328, 353 (D.C. Cir. 1976).

[27] *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 74 (1980) (emphasis added).

[28] Attachment 7, NPDES Permit Standard Conditions at 8 (Nov. 9, 2011) (emphasis added).

operated and maintained wastewater treatment plant discharges only as designed and does not spring leaks from its sides and bottom. DEQ's attempt to authorize these polluted seeps is therefore completely at odds with the longstanding prohibition against such releases in the Belews Creek permit's Removed Substances provision, as described more in Section G below.

In other words, a wastewater *treatment* facility cannot operate properly or legally if it receives wastewater and then spews it into the environment, and into the waters of the state and the United States, outside the designed treatment system. By malfunctioning in that way, a wastewater treatment facility would be a wastewater *transmission* facility, leaking and disposing of dirty wastewater into the surrounding environment.

But that is what this proposed permit tries to allow. It tries to legalize defects in the wastewater treatment facility—flows of untreated wastewater containing coal ash pollutants—that are illegal under the current permit.[29] And it even proposes to legalize future failures in the wastewater treatment facility, if it cracks or springs a leak in the future.[30]

There is no justification for these changes. No aspect of Duke Energy's wastewater treatment system requires new outfalls into the Dan River or Belews Lake; on the contrary, its system is leaking in the same way it has illegally leaked for years. DEQ is simply attempting to legalize Duke Energy's ongoing, illegal discharges.

This is as clear an example as possible of a proposed permit that illegally eliminates or reduces the protections of the nation's waters from pollution, in violation of the anti-backsliding requirements of the Clean Water Act. The Clean Water Act's NPDES permitting program is structured around progressive improvements in pollution control over time. The Clean Water Act permit is a National Pollutant Discharge ***Elimination*** System permit that is required to make progress towards Congress's "national goal" of eliminating discharges of pollutants to waters of the United States.[31]

For this reason, the CWA includes anti-backsliding requirements to ensure that the limits and conditions imposed new or modified NPDES permits for a facility are at least as stringent as those in previous permits.[32] As the Clean Water Act regulations make clear, "when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be ***at least as stringent*** as the final effluent limitations, standards, or conditions in the previous permit . . . ."[33] The CWA's anti-backsliding requirements apply to *all* NPDES permit provisions, standards, and conditions, not just effluent limits based on BPJ.[34]

DEQ's efforts to re-write the permit to allow pollution that is prohibited under the existing permit is exactly the sort of backsliding that is illegal under the Clean Water Act. The proposed permit thus violates the anti-backsliding provisions of the Clean Water Act by

[29] Belews Creek Draft NPDES Permit at 10-16, Sections A. (6.) to (12.).
[30] Belews Creek Draft NPDES Permit at 23, Section A. (26).
[31] 33 U.S.C. § 1251(a)(1).
[32] *Id.* § 1342(o).
[33] 40 C.F.R. § 122.44(l)(1).
[34] *Id.*; *In the Matter of Star-Kist Caribe, Inc., Petitioner*, 2 E.A.D. 758 at *3 (E.P.A. Mar. 8, 1989); EPA, NPDES Permit Writers' Manual Chapter 7, § 7.2.2, p. 7-4 (Sept. 2010), *supra* n.25.

eliminating the longstanding protections against unlawful seepage into the Dan River and Belews Lake.

This backsliding is even more egregious because these seeps discharge into the Dan River and the Roanoke River Basin, which have already suffered the most from Duke Energy's coal ash pollution. The Dan River coal ash catastrophe dumped over 20 million gallons and 39,000 tons of coal ash into this River. Bromide from Duke Energy's coal ash caused carcinogens to enter drinking water systems downstream of the Belews Creek plant. The Roanoke River Basin has more leaking Duke Energy coal ash sites than any other part of North Carolina: Belews Creek, Roxboro, Mayo, and Dan River. It is inexcusable for DEQ to remove protections from the Dan River and the Roanoke River Basin that have been in place for decades.

Further, it is transparently obvious why DEQ and Duke Energy have gone so far as to blatantly violate the Clean Water Act in drafting this permit. Duke Energy is currently violating this provision of its Clean Water Act permit openly, and DEQ has done nothing to stop Duke Energy from violating the law. Duke Energy wants to leave its coal ash in this unlined pit next to Belews Lake and the Dan River, and in and on top of Little Belews Creek, burying the Creek forever. Further, Duke Energy's consultants have determined that the Belews Creek coal ash will sit deep in Stokes County's groundwater forever if it is capped in place. It is predictable that Duke Energy's coal ash pit will continue to discharge into the groundwater, Little Belews Creek, the Dan River, and Belews Lake, harming the quality of all of these waters.

The only way that DEQ can let Duke Energy leave its coal ash in an unlined pit in Stokes County, polluting Stokes County's waters, is to wipe out the provisions that have been in place to protect the Dan River for decades.

However, this scheme violates the Clean Water Act. The new Belews Creek permit must contain the protections against seepage that have been contained in all earlier permits. These provisions, if enforced, protect the Dan River, Belews Lake, and the Roanoke River Basin from Duke Energy's coal ash pollution at Belews Creek.

Furthermore, DEQ's attempts to weaken these provisions violates the Clean Water Act requirement that Duke Energy use the best available technology to eliminate its pollution of United States and North Carolina waters, because it does not require excavation of the coal ash. In addition, this approach violates the BAT requirement, in that the draft permit would allow Duke Energy to *avoid* using key components of even its existing, minimal treatment technology of settling out pollutants in the lagoons and skimming discharge water from the top via risers connected to the permitted outfalls. This is an impermissible step backwards from using available treatment technology, and accordingly it violates the CWA's BAT requirements.

This attempt violates the basic requirements of the Clean Water Act and North Carolina law, because it purports to issue a permit for a malfunctioning wastewater treatment facility that leaks in undesigned ways and pollutes the surrounding environment with untreated wastewater, rather than treating wastewater before discharge into the environment.

The lax nature of this permit is underscored by the fact that the permit allows Duke Energy another 180 days, or six months, to show that "the water quality standards in the receiving stream are not contravened." First of all, many of these seeps are themselves "streams," and this provision makes no sense as to them. Moreover, this provision shows that the draft permit would attempt to legalize seeps without even knowing their impact upon the body of water into which they flow. And it underscores that even at this late date, Duke Energy has not collected essential information concerning these illegal discharges and provided it to DEQ.

C. DEQ's Proposed Permit Allows Duke Energy to Use Streams As Its Private Wastewater Disposal Channels, in Violation of the Clean Water Act.

Under North Carolina law, polluters cannot highjack naturally occurring streams for use as "effluent channels," meaning private wastewater disposal channels that are not required to meet water quality standards.[35] North Carolina regulations are clear that effluent channels "shall . . . not contain natural waters," including naturally occurring streams and groundwater.[36] In the proposed Belews Creek permit, DEQ itself recognizes that jurisdictional waters cannot be used as effluent channels, stating that effluent channel requirements "***are not met***" if waters are determined to be jurisdictional waters.[37]

Yet that is exactly what DEQ proposes to allow Duke Energy to do: convert North Carolina's streams into polluted waste chutes filled with coal ash contamination. ***DEQ has no legal authority to convert a stream—a water of the United States and of North Carolina—into a Duke Energy wastewater ditch stripped of clean water protections.***

Instead of abiding by the law, DEQ's proposed permit lets Duke Energy fill Little Belews Creek with ***unlimited*** amounts of coal ash contamination, including bromide, arsenic, selenium, mercury, and hosts of other toxic and damaging pollutants. Little Belews Creek is a naturally occurring, jurisdictional, blue-line stream, and a tributary of the Dan River. Before the headwaters of Little Belews Creek were buried by Duke Energy's coal ash, people enjoyed fishing in Little Belews Creek. As explained above, the law is clear that naturally occurring waters like Little Belews Creek cannot be used as effluent channels that are exempt from water quality standards. And in this proposed permit, DEQ itself recognized that jurisdictional waters cannot be effluent channels. Yet in the same breath, DEQ purports to give Duke Energy a blank check to pollute Little Belews Creek as much as it desires, exceeding water quality standards without consequence. Duke Energy is essentially allowed to use the entirety of Little Belews Creek as a discharge pipe, and DEQ has placed an imaginary "outfall" for Duke at the point where Little Belews Creek discharges into the Dan River. The permit must be rewritten so that Duke Energy is not allowed to pollute Little Belews Creek with abandon.

[35] 15A N.C. Admin. Code 02B .0228.
[36] *Id.* 02B .0228(2).
[37] Belews Creek Draft NPDES Permit at 23, Section A. (27.) ("The effluent channel requirements for seeps S-2, S-6, and S-15 are not met due to the previous Jurisdictional Determinations or presence of side streams.")

Furthermore, recent testing shows that Little Belews Creek is heavily contaminated by unlawful coal ash seepage at the Belews Creek site.[38] The results show alarmingly high levels of bromide—which causes carcinogens to form in downstream drinking water intakes—as well as surface water exceedances in Little Belews Creek for pollutants like selenium, mercury, thallium, cobalt, and chloride. A concrete structure funnels water from the ash pond into Little Belews Creek approximately halfway downstream between the ash pond and the permitted outfall at the Dan River. Upstream of this concrete structure, unpermitted streams of contaminated wastewater discharge from the ash basin into Little Belews Creek. Because these test results are from a sampling location just *downstream* of unlawful seepage coming from the Belews Creek coal ash pond, and *upstream* of the discharge structure into Little Belews Creek, there can be no confusion that these pollutants are caused by unlawful, unintended, unpermitted seeps (as opposed to any permitted discharges from the site). DEQ cannot allow Duke Energy to contaminate Little Belews Creek without limit by falsely calling Little Belews Creek a discharge outfall for Duke Energy.

DEQ makes the same mistake at seven other streams flowing out of Duke Energy's coal ash basin at Belews Creek. For three of these seeps (S-2, S-6, and S-15), DEQ even admits that the seeps are jurisdictional streams and therefore cannot be considered effluent channels.[39] Perplexingly, however, DEQ still attempts to convert these seeps into outfalls for Duke Energy (outfalls 102, 106, and 115). Instead of requiring Duke Energy to meet water quality standards in these known jurisdictional streams, DEQ provides Duke Energy the option to "install a pipe to discharge the seep to the Belews Lake/Dan River."[40]

In other words, instead of holding Duke Energy accountable to the law that applies to everyone else in North Carolina, DEQ has taken the astonishing step of encouraging Duke Energy to install pipes to route these polluted streams more directly and more rapidly into other waters of the U.S.—at which point DEQ will no longer consider Duke Energy to be in violation of water quality standards, no matter how high the pollution levels are in these streams. This approach is contrary to the law and to common sense.

DEQ proposes to treat four other seeps at Belews Creek as "effluent channels" (S-7, S-8, S-9, and S-14), despite providing zero evidence that these seeps are not naturally occurring, just as the other seeps exiting the ash basin are.[41] Furthermore, as noted above, effluent channels cannot include naturally occurring water, with a single exception: waters that "occur in direct response to rainfall events by overland runoff."[42] In other words, an effluent channel can only be designated if that channel would be dry except during rainfall events and as a result of transporting waste water. These seeps that DEQ proposes to treat as effluent channels are fed by groundwater, not just water that occurs as a result of rainfall or transporting waste water. Like the other seeps at Belews Creek, they do not meet the limited circumstances under which waters can be called effluent channels, and therefore bypass water quality standards.

[38] Attachment 8, Pace Analytical Test Results for Project BELEWS J16090796 (Jan. 11, 2017).
[39] *Id*.
[40] Belews Creek Draft NPDES Permit at 23, Section A. (27.)
[41] Belews Creek Draft NPDES Permit at 23, Section A. (27.)
[42] 15A N.C. Admin. Code 2B.0228(2).

Instead of requiring Duke Energy to meet water quality standards in these streams, as the law mandates, DEQ proposes to set lax limits on coal ash pollution that are much higher than water quality standards that apply to all other streams in North Carolina, and in many cases sets no limits whatsoever.[43] For example, where the draft permit does set arsenic limits for the seeps the daily arsenic limits for these streams are 34 times higher than the groundwater and surface water safety standards.[44] And the limits make no sense: they require only monthly testing, and consequently the monthly average and the daily maximum should be the same; instead, the monthly average is 10 ug/L, and the daily maximum is 340 ug/L, limits that are on their face contradictory. For other pollutants, such as bromide, lead, and mercury, there are no limits at all on discharges to these streams.[45] And for two of the known jurisdictional, natural stream (Outfall 115 and 102), there are no limits on any pollutants except total suspended solids, oil, and grease—meaning no limits on mercury, arsenic, thallium, selenium, or any of the other known contaminants associated with coal ash.[46]

The Clean Water Act provides no mechanism to convert 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.'"[47] 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. Coal ash and coal ash wastewater are pollutants regulated under the Clean Water Act. In theory, an "effluent channel" could be a type of point source but only if that effluent channel is not a "water of the United States."[48] In sum, jurisdictional waters cannot be point sources. Instead, water quality standards must be met in the jurisdictional waterbody—here, the streams flowing into the Dan River and Belews Lake.

North Carolina law incorporates the same foundational assumption that a point source cannot be a stream, that is, a water of the United States or of North Carolina. "Effluent channel means a discernible confined and discrete conveyance which is used for transporting treated wastewater *to* a receiving stream or other body of water."[49] Restated, an effluent channel conveys wastewater to a receiving stream or body of water; the effluent channel cannot itself be the receiving stream.

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[43] *See e.g.*, Belews Creek Draft NPDES Permit at 15, Section A.(11.) (for seep S-2, Outfall 102: attempting to authorize Duke Energy to discharge mercury, barium, zinc, arsenic, boron, cadmium, chromium, copper, lead, nickel, selenium, nitrate/nitrite, sulfates, chlorides, TDS, and fluoride without limit); Section A. (6.) (for seep S-6, Outfall 106: attempting to authorize Duke Energy to discharge fluoride, mercury, barium, boron, cadmium, chromium, lead, nitrate/nitrite, sulfates, and TDS without limit, and setting limits much higher than water quality standards for other pollutants like arsenic). Moreover, DEQ's proposed permit also confusingly states that if initial sampling does not show water quality violations in these seeps that are known jurisdictional streams, Duke Energy will simply have to monitor for the parameters in A. (6.). This implies that what few limits are in the permit for these seeps actually carry no force at all.

[44] Belews Creek Draft NPDES Permit at 10-16, Section A. (6.)-(10.).

[45] *Id*.

[46] Belews Creek Draft NPDES Permit at 15-16, Section A. (11.)-(12.).

[47] 40 C.F.R. § 122.1(b)(1) (emphasis added).

[48] *See* 33 U.S.C. § 1362(14) (defining point source as "any discernible, confined and discrete conveyance, including but not limited to . . . [a] channel").

[49] 15A N.C. Admin. Code 2B.0202 (emphasis added).

Furthermore, the draft permit's authorization of the seeps violates the most basic principles of the Clean Water Act. DEQ itself acknowledges in the Riverbend Fact Sheet that "[t]he CWA NPDES permitting program does not normally envision permitting of *uncontrolled releases* from treatment systems" and "[r]eleases of this nature would typically be addressed through an *enforcement action requiring their elimination* rather than permitting" (emphasis added).[50]

Indeed, DEQ has pending an enforcement action against the engineered seeps at Belews Creek—an enforcement action that DEQ has not diligently prosecuted. Yet, in this draft permit, DEQ attempts to legalize what it has already stated, under oath, is illegal and a serious threat to North Carolina's people and their water quality.

There is no doubt that DEQ's proposed permit is illegal under North Carolina and United States law.

D. The Coal Ash Must Be Removed from the Belews Creek Unlined Pit to Prevent Illegal Pollution.

DEQ is engaging in these illegal contortions in the draft permit in an attempt to dodge its basic responsibility to require Duke Energy to stop its coal ash pollution of waters of North Carolina and the United States. Instead of stopping that pollution, DEQ is engaging in awkward and illegal permit drafting to avoid the obvious solution: to stop the ongoing illegal water pollution from the Belews Creek unlined pit, Duke Energy must remove its coal ash to its very nearby lined, modern landfill.

That is the solution that is being implemented at ***every*** utility-owned waterfront coal ash storage site in South Carolina. That is the solution being implemented at eight other Duke Energy coal ash storage sites in North Carolina. Indeed, the Belews Creek site is the ***only*** coal ash storage site that is not being cleaned up where Duke Energy has been forced to admit that the coal ash is causing off-site groundwater standard violations. At Belews Creek, Duke Energy has an existing, onsite, lined landfill (known as the Craig Road Landfill) whose planned capacity would hold the coal ash without any separate landfill construction and with minimal transportation.

Any NPDES permit issued by DEQ for the Belews Creek facility must incorporate the Clean Water Act's requirement of best available technology to eliminate discharges if the facility is capable of achieving such elimination. In this case, all the other utilities in the Carolinas, including Duke Energy itself, are already implementing a guaranteed approach to eliminating their discharges: removal of their unlined coal ash to dry, lined landfill storage or recycling.

1. SCE&G

In South Carolina, SCE&G had unpermitted seeps and groundwater contamination at its Wateree Station facility on the portion of the Catawba River called the Wateree River. Today, SCE&G is in the midst of removing all its coal ash from unlined lagoons at Wateree Station to

[50] Attachment 9, DEQ, Fact Sheet for Riverbend NPDES NC0004961 Renewal at 3 (2015).

safe, dry, lined storage in a landfill away from the Wateree River. SCE&G has already removed over 1 million tons of coal ash from its Wateree facility. In filings with the South Carolina Public Service Commission, SCE&G has publicly stated its commitment to clean up the coal ash at its other facilities in South Carolina as well.[51] SCE&G has also stated publicly that its cleanup has had no effect on customer rates.[52] At the same time, groundwater contamination has dropped by 60 to 90%.

2. Santee Cooper

South Carolina's Public Service Authority utility, known as Santee Cooper, has also committed to excavate its coal ash from unlined lagoons and store it in dry, lined landfills or recycle it for concrete. Santee Cooper's Executive Vice President of Corporate Services described the removal and recycling of the unlined coal ash from the lagoons as "cost-effective" and a "triple win" for the utility's customers, the environment, and the local economy.[53] At last report, Santee Cooper has already removed over 700,000 tons from its Grainger Generating Station in Conway, SC, where unlined coal ash had contaminated the groundwater and adjacent wetlands with arsenic and other pollutants.[54] Santee Cooper is also moving ahead with excavation from its Jefferies Generating Station in Moncks Corner, SC.[55] A concrete recycling facility has been built at its Winyah facility to remove and reprocess ash, and a new modern lined landfill is being built to hold ash that is not recycled.[56] Santee Cooper also states that its actions to eliminate the unlined storage of coal ash will have no effect on its rates.[57]

3. Duke Energy – South Carolina

In April 2015, conservation groups signed an agreement with Duke Energy for Duke to remove all the coal ash from its W.S. Lee facility on the Saluda River in Anderson County, South Carolina.[58] Duke will remove all the coal ash to dry, lined storage away from the river, including the ash from two leaking lagoons and in an ash storage area near the lagoons. In September 2014, the South Carolina Department of Health and Environmental Control entered into a consent enforcement agreement with Duke Energy in which Duke was required to remove coal ash from two other storage areas on the Saluda River's banks at the Lee facility.[59] Since then, Duke Energy has begun removing ash from the site and has permitted a new, lined landfill for removed ash.

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[51] Attachment 10, South Carolina Electric & Gas Company, Integrated Resource Plan (IRP) at 26 (Feb. 28, 2014).
[52] Eric Connor, *Coal ash cleanup: Someone will pay; will it be customers?*, Greenville News (Apr. 28, 2014).
[53] Attachment 11, Santee Cooper Press Release, *Santee Cooper Announces Plans to Recycle Ash for Beneficial Use* (Nov. 19, 2013).
[54] Attachment 12, Santee Cooper, *Grainger Generating Station Ash Removal Report* (July 7, 2016).
[55] David Wren, "Coal ash removal at Santee Cooper's power plants years ahead of schedule," *Post & Courier* (Jan. 26, 2015).
[56] *Id*.
[57] Jim Pierobon, "Smart Utilities Know There Are Responsible Solutions for Their Coal Ash Waste," *The Energy Fix* (Jan. 12, 2015).
[58] Attachment 13, W.S. Lee Steam Station (SC) Settlement Agreement (Apr. 23, 2015).
[59] Attachment 14, SC DHEC and Duke Energy Consent Agreement, W.S. Lee Steam Station (SC) (Sept. 2014).

Duke Energy's other coal ash site in South Carolina is the H.B. Robinson facility on Lake Robinson and Black Creek in Darlington County, SC. On April 30, 2015, after months of public pressure from conservation groups calling for a cleanup, Duke publicly committed to excavating all the coal ash at Robinson and storing it in a dry, lined landfill on site.[60] Duke Energy has moved forward with permitting and constructing a lined landfill to hold the excavated ash.

4. Duke Energy – North Carolina

Duke Energy is now required by court order to remove the ash from seven sites across the state. Recently, after insisting that it had to leave the coal ash in unlined pits at its Buck facility, Duke Energy entered into a settlement agreement with conservation groups requiring it to excavate all the coal ash from the Buck site, either to a lined landfill or to be recycled into concrete.

Duke Energy's excavation of ten sites in two states is proof positive that dewatering and ash removal are achievable as BAT to stop the ongoing discharges of coal ash pollutants from the Belews Creek lagoon. Indeed, ash removal at Belews Creek is even easier than removal at other sites, because there is only one lagoon and Duke Energy has a modern, lined landfill on site that can hold the ash. Accordingly, ash removal should be required in the NPDES permit for Belews Creek in order to ensure the discharges are stopped.

In sum, excavation and dry, lined storage of coal ash formerly stored in unlined, leaking lagoons is already standard practice among all the other major utilities in the Carolinas, and Duke Energy is now required to excavate the ash from 10 of its coal ash sites in the Carolinas – including every other one containing 7 million tons or less. Removal of the ash to dry, lined storage is not only economically achievable but cost effective, according to the utilities putting it into practice. And it eliminates the continuing seepage into groundwater and surface waters, as well as the risk of a catastrophic dam failure or spill, such as Duke Energy's Dan River spill in February 2014.

Accordingly, DEQ must incorporate into the NPDES permit provisions requiring the dewatering and excavation of the unlined coal ash from the leaking unlined pit at Belews Creek, in combination with a reasonable schedule of compliance to achieve the Clean Water Act's goal of eliminating the discharge of pollutants to public waters.

E. DEQ Has Acknowledged That Zero Discharge Is Attainable For Seeps But Fails To Require that Solution or to Impose Corresponding TBELS or Any Schedule Of Completion.

DEQ's fact sheet for another Duke Energy coal ash site, Riverbend, concedes a zero discharge technological solution available to Duke Energy to address coal ash seeps, but DEQ has failed to impose TBELs based on that technology.

[60] Sammy Fretwell, "Duke to clean up toxin-riddled waste pond in Hartsville," *The State* (Apr. 30, 2015).

The Riverbend Fact Sheet acknowledges, with respect to seeps, that "[r]eleases of this nature would typically be addressed through an enforcement action requiring their elimination . . . ."[61] The Fact Sheet further recognizes the availability of a zero discharge solution – collection and "rerouting the discharge" and "discontinuing the discharge" are available solutions for meeting technology-based effluent limits.[62] In the Belews Creek permit itself, DEQ provides the option to Duke Energy of rerouting the seeps.[63] But importantly, Duke Energy does not require Duke Energy to reroute the seeps back into the basin. Instead, DEQ gives Duke Energy the option of installing pipes to route the seeps directly to the Dan River or Belews Lake. As explained above, this absurd proposal accomplishes nothing. It does not project these streams seeping out of the coal ash lagoon, and instead it merely streamlines the discharge of these polluted seeps into the Dan River and Belews Lake. Moreover, for some of the seeps, DEQ simply allows Duke Energy to continue polluting them forever as "effluent channels." This complete disregard of an acknowledged solution to these uncontrolled discharges does not satisfy the requirements of the federal Clean Water Act.

Indeed, DEQ *must* require compliance with the discharge limits achievable by the implementation of the best available technology *now.* EPA defines a compliance schedule as "a schedule of remedial measures, . . . including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) . . . ."[64] Under EPA regulations, DWQ may use compliance schedules to achieve "compliance with CWA [Clean Water Act] and regulations . . . as soon as possible, *but not later than the applicable statutory deadline under the CWA.*"[65] The Clean Water Act requires dischargers of color pollution to comply with BAT-based effluent limits by March 31, 1989.[66] Thus, "a permit writer may not establish a compliance schedule in a permit for TBELs [technology-based effluent limits] because the statutory deadlines for meeting technology standards . . . have passed."[67]

F. DEQ Also Cannot Permit In Advance Unidentified, Unknown Future Discharges.

As set out above, not only does the draft permit attempt to authorize the existing seeps and leaks from the coal ash lagoon, it also attempts to put in place in advance a procedure for seeps that have not yet occurred and whose nature is unknown, what the draft permit calls "new identified seeps."[68] The proposed permit states that the permit must be modified to include the new seep, but it does not specify what public notice and comment procedures, if any, will be used for such "modification." In other words, the draft permit tries to give Duke Energy amnesty in advance for future malfunctions of its unlined Belews Creek coal ash lagoon, no matter how large or how polluted the seeps are that emerge.

This proposal to permit unspecified point source discharges cannot be reconciled with the Clean Water Act, 33 U.S.C. § 1311(a). Under the Clean Water Act, discharges must be

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[61] DEQ, Fact Sheet for Riverbend NPDES NC0004961 Renewal at 3 (2015), *supra* n.49.
[62] *Id.* at Condition A(5) n.4.
[63] Belews Creek Draft NPDES Permit at 23, Section A. (27.).
[64] 40 C.F.R. § 122.2.
[65] *Id.* § 122.47(a)(1)(emphasis added).
[66] 33 U.S.C. §1311(b)(2)(A), (F).
[67] EPA Permit Writers Manual, Section p. 9-8 (2010); *see also* EPA Permit Writers Manual, Section 9.1.3 p. 148 (1996).
[68] Belews Creek Draft NPDES Permit at 23, Section A. (27.).

"*identifiable*" in order to the authorized by an NPDES permit.[69] The Clean Water Act does not authorize an agency to permit future, hypothetical discharges of unknown size, quantity, and location. This is especially true when the unknown discharges could contain level of contamination as high or even higher than the contamination in the numerous existing seeps at the Belews Creek site.

Instead of holding Duke Energy to the Clean Water Act, DEQ's proposal attempts to shield Duke Energy from further legal violations. The proposed permit is essentially a guarantee to Duke Energy that it no longer has to operate its ash basin properly so as to prevent additional leaks from springing up. Future seeps are prohibited under Duke Energy's current NPDES permit, just as the existing seeps are. These "uncontrolled releases" of leaking wastewater should be the subject of an enforcement action requiring their elimination. Indeed, DEQ has filed such an action in state Superior Court for the engineered seeps at Belews Creek, but has failed to diligently prosecute that case. Duke Energy's operating companies have pleaded guilty to criminal violations of the Clean Water Act for exactly such unpermitted discharges.

DEQ's proposed permit purports to legalize these previously illegal discharges with the stroke of a pen, rather than requiring Duke Energy to take any action to remedy the violations. Even more shockingly, DEQ is proposing to grant Duke amnesty for unknown numbers of *future* violations of the Clean Water Act as well. This is nothing more than an attempt to shield Duke Energy from having to comply with the laws it has been violating for years.

Furthermore, the proposed permit's authorization of future seeps violates the CWA's public participation requirements. The proposed permit would allow Duke to evade public notice and comment and the opportunity for a public hearing and for judicial review, along with all the other requirements of the state NPDES permitting program.[70] While the draft permit vaguely states that a new seep would require the permit to be "modified," there is no indication that public notice and comment would be required. Further, the draft permit purports to set out that any new seep would be handled in the same way as the existing seeps—without knowledge as to the nature or circumstances of the new seep.

It is beyond the authority of DEQ to authorize new point source discharges without the full procedures of a modification of the NPDES permit with public comment and EPA oversight. EPA's regulations authorize limited administrative changes to an active permit through minor modifications,[71] none of which condone the administrative addition of a new point source discharge, which must be permitted as an NPDES outfall. Nor can DEQ prejudge the way a new point source discharge would be addressed, by simply adding the seep to a list to be addressed in the same way as it proposes to address the existing seeps. This scheme is inconsistent with the requirements of the Clean Water Act.

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[69] *U.S. v. Tom-Kat Dev., Inc.*, 614 F. Supp. 613, 614 (D. Alaska 1985) (citing 40 C.F.R. § 122.1(b) (1)). *Accord U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *Legal Envtl Assistance Found., Inc. v. Hodel*, 586 F. Supp. 1163, 1168 (E.D. Tenn. 1984); *U.S. v. Saint Bernard Parish*, 589 F. Supp. 617 (E.D. La. 1984)).
[70] 33 U.S.C. § 1342(b).
[71] 40 U.S.C. § 122.63.

The existing permit and all prior ones are the result of the full agency process, public review, public comment, and the procedures required by the Clean Water Act and North Carolina law. These illegal flows of polluted water into the Dan River and Belews Lake, expressly forbidden by the existing permit, cannot be made legitimate by totally changing the permit to allow contaminated water to pop out of this purported wastewater treatment facility and spill into other surface waters. It is inconceivable that a permitted wastewater treatment facility would be allowed to repeatedly open up leaks and discharge polluted water from the supposed wastewater treatment lagoons into a public waterway. This proposed option is not law enforcement or pollution elimination at all, but instead an option for the law enforcement agency to try to find a way to make unlawful and polluting activities "permitted" and avoid dealing with the risks to the public. This stratagem should not be adopted by a state agency that has the responsibility of enforcing the law and protecting the State's natural resources and the public interest.

Instead, this permit should require the implementation of the proven method of eliminating seeps from these defective wastewater treatment systems – movement of the ash to safe, dry lined storage and appropriate dewatering of the lagoons.

G. The Authorization of Seeps In the Proposed Permit Violates the Permit's Longstanding Removed Substances Provision.

As explained above, the Removed Substances requirement in the Belews Creek permit is a common-sense provision to prevent pollutants removed by waste treatment facilities from escaping out into the environment. The Removed Substances provision is an important component of the Clean Water Act's protections, and prevents waters of the United States from being polluted by waste treatment facilities such as the Belews Creek coal ash settling lagoon. Inclusion of the Removed Substance provision "is based on the simple proposition that there is no way one can protect the water quality of the waters of the U.S if the [polluter] is allowed to redeposit the pollutants collected in his settling ponds."[72] Removed Substances provisions ensure that "measures shall be taken to assure that pollutants materials removed from the process water and waste streams will be *retained in storage areas.*"[73]

In the context of the Belews Creek permit, the removed substances provision is also the implementation of a required permit component under the implementing regulations of the Clean Water Act. The implementing regulations for the Clean Water Act require that "[t]echnology-based effluent limitations shall be established under this subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants."[74] Under the existing permit issued to Duke Energy for the Belews Creek plant, DEQ did not set individual TBELs for seeps from the ash basin but rather took the only responsible step of treating zero liquid discharge as the BAT for contaminated seeps from a coal ash impoundment. In other words, consistent with the requirement to set TBELs for pollutants removed by the wastewater treatment ash ponds, the

[72] *In the Matter of: 539 Alaska Placer Miners*, Nos. 1085-06-14-402C & 1087-08-03-402C, 1990 WL 324284 at *8 (EPA 1990)
[73] 40 C.F.R. § 440.148(c) (emphasis added).
[74] *Id.* § 125.3(g).

existing permit prohibits *any* discharge of removed substances to waters of the United States or of North Carolina.

DEQ itself has cited Duke Energy for violating the Removed Substances provision by allowing pollutants to enter waters of the State and navigable waters due to uncontrolled releases from Duke Energy's coal ash lagoons at its Dan River facility. In a February 28, 2014 Notice of Violation, DEQ cites the discharge "of coal combustion residuals from the ash pond to the Dan River, class C waters of the State" as violating the Removed Substances provision: "Failure to utilize or dispose solids removed from the treatment process in such a manner as to prevent pollutants from entering waters of the State (Part II, Section C. 6. of NPDES permit)." Part II.C.6 of the Dan River NPDES Permit contains the Removed Substances permit provision.

There is no indication that DEQ is eliminating the Removed Substances provision from the proposed permit—nor could it, without violating the Clean Water Act's prohibition against backsliding. The Removed Substances provision is part of the standard conditions for all NPDES permits in North Carolina that applies to all wastewater treatment facilities. Consequently, the proposed authorization to discharge removed substances through seeps is directly contrary to the continuing prohibition against those very same discharges in the Removed Substances provision.

DEQ cannot allow pollutants removed in the course of treatment to enter waters of the State and United States via uncontrolled releases that have sprung and that may spring out of the lagoon and start discharging to public waters at any time, when such releases are already prohibited by the current permit and the proposed permit itself.

H. The Draft Permit Threatens the Safety of the Belews Creek Dam.

By allowing seeps to continue, DEQ is threatening the safety of the Belews Creek coal ash dam. The Belews Creek coal ash dam is a high hazard dam.

DEQ itself has previously acknowledged the danger of seeps for earthen dams at Duke Energy's coal ash ponds. In 2010, DEQ issued a dam safety Notice of Inspection for an earthen dam at Duke Energy's Mayo coal ash site, warning that:

> "Two of the more common types of earth dam failures are caused or influenced by excessive seepage. Excessive seepage can produce progressive internal erosion of soil from the downstream slope of the dam or foundation toward the upstream side to form an open conduit or 'pipe.' ***Seepage pressures decrease the strength characteristics of the embankment soil.*** *The resulting reduction in embankment stability* ***can produce a slide failure of the downstream slope***." (emphasis added).

Recent dam safety reports by Duke Energy's own consultants show that seepage is a safety problem for the Belews Creek dam. The report explains that there are "***unacceptable seepage conditions***" at the Belews Creek dam, which "consist of horizontally-flowing seepage exiting on the downstream face of the dike, which is known as an unfiltered exit. This condition

creates a risk for potential internal erosion (piping) and uncontrolled seepage"[75] The report notes that recent attempts to repair the dam "mitigates," but does not eliminate, the unacceptable seepage.[76] And Duke Energy's latest attempts to repair the dam must be viewed with skepticism, given that Duke Energy has been continually attempting to repair this dam and control the unacceptable seepage for decades.[77]

DEQ is ignoring its own warnings and the warning of Duke Energy's own consultants by trying to allow this unacceptable Belews Creek seepage to continue, and by purporting to allow future, unknown seeps, without any knowledge of their future effects on the Belews Creek coal ash dam.

DEQ's proposal to allow unlimited seepage from the dam at Belews Creek also violates another provision of the proposed and existing Belews Creek permit, which requires the facility to meet dam safety requirements under North Carolina law.[78]

I. DEQ Cannot Issue a Permit to a Facility That Is Violating Surface Water Standards.

DEQ's proposed permit is unlawful because it would exacerbate, rather than eliminate, the serious surface water quality standard violations caused by discharges from the Belews Creek coal ash lagoon.

NPDES permits control pollution by setting (1) limits based on the technology available to treat pollutants ("technology based effluent limits") and (2) any additional limits necessary to protect water quality ("water quality-based effluent limits") on the wastewater dischargers.[79] An NPDES permit must assure compliance with all statutory and regulatory requirements, including state water quality standards.[80] Similarly, North Carolina law provides that "[n]o permit may be issued when the imposition of conditions cannot reasonably ensure compliance with applicable water quality standards."[81]

At Belews Creek, Duke Energy is violating not just one, but ***numerous*** surface water quality standards in the Dan River. Duke Energy's own reports show exceedances of aluminum, copper, lead, thallium, total dissolved solids, and chloride directly downstream of the Belews Creek coal ash lagoons.[82] All of these pollutants were found at levels higher than anything

[75] Amec CCR Annual Surface Impoundment Report at PDF 10 (Aug. 18, 2016) (emphasis added).
[76] *Id.*
[77] Attachment 15, CHA, Final Report Assessment of Dam Safety of Coal Combustion Surface Impoundments (Belews Creek) at 6-7 (Dec. 8, 2009).
[78] Belews Creek Draft Permit at 20, Section A. (21.).
[79] 33 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. § 122.44(a)(1), (d).
[80] 33 U.S.C. § 1342(a)(1)(A); 40 C.F.R. § 122.43(a); 15A N.C. Admin. Code 2H .0118.
[81] 15A N.C. Admin. Code 2H.0112(c); *see also* N.C. Gen. Stat. §§ 143-215.6a-c (authorizing civil and criminal penalties and injunctive relief for violations of surface water standards).
[82] Belews Corrective Action Plan Part 2, Table 2-11.

detected in upstream monitoring locations.[83] In addition, boron—a contaminant that Duke Energy has admitted is coming from coal ash at Belews Creek—was detected at levels as high as 8,100 parts per billion in the Dan River downstream of Duke Energy's coal ash site, while no detectable boron was found upstream.[84] These surface water standard violations reveal the magnitude of Duke Energy's coal ash pollution and the harm it is causing, even after it has traveled to and mixed with the Dan River, which has already suffered greatly from Duke Energy's coal ash pollution.

Surface water quality violations are also occurring downstream of the Belews Creek coal ash in Belews Lake, for contaminants like lead, aluminum, and copper, while no exceedances were found upstream for these pollutants.[85]

DEQ can remedy an ongoing violation of surface water quality standards and "ensure compliance with applicable water quality standards" in the Dan River only by requiring that the source of the pollution, the coal ash, be removed from Belews Creek; that the seeps of coal ash polluted water into Belews Creek be stopped; and that the coal ash be removed from the unlined pit, where it contaminates groundwater and the seeps/streams that flow into the Dan River, directly or indirectly. DEQ certainly cannot meet the standards of the Clear Water Act and North Carolina law by eliminating the existing permit protections of the Dan River; permitting the seeps; creating "effluent channels"; and allowing the coal ash to remain in place.

These discharges cannot be permitted as long as surface water quality standards are violated in the Dan River and Belews Lake.

J. The Draft Permit Fails to Account for Discharges of Wastewater Through Hydrologically Connected Groundwater.

The Clean Water Act is a strict liability statute prohibiting the discharge of any pollutant to a water of the United States without a permit.[86] The Belews Creek coal ash pond discharges significant quantities of contaminated wastewater to the Dan River and Belews Lake through groundwater via a direct hydrologic connection to the Lake and the Branch. That discharge is not included in the current permit and attempting to add it now would violate the anti-backsliding provision of the Clean Water Act.[87]

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[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] 33 U.S.C. § 1311(a).
[87] *Id.* § 1342(o); 40 C.F.R. § 122.44(l)(1) ("[W]hen a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit . . . .").

The United States Department of Justice ("DOJ") recently emphasized "EPA's longstanding position [] that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection" comes under the purview of the CWA.[88] As expressed by DOJ, "it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater."[89] The same reasoning applies here. As discharges to the Dan River, Belews Lake, and Little Belews Creek via hydrologically connected groundwater were not authorized and therefore prohibited under the current permit, they cannot be authorized in the draft permit, and they are not in the draft permit.

Consequently, DEQ must require Duke Energy to stop the discharge of contaminated wastewater to the Dan River, Belews Lake, and Little Belews Creek via hydrologically connected groundwater by removing the source of contamination—Duke Energy's coal ash in the unlined Belews Creek pit.

K. The Draft Permit Has Inadequate Monitoring.

During decanting and dewatering, Duke Energy should be required to take daily samples. These activities are not part of the normal operation of the plant because they are not part of its wastewater treatment function. Special care needs to be taken to ensure the limits in the permit are enforced. Some of the limits in the draft permit have only monthly sampling, and many have only weekly sampling. During the dumping of millions of gallons of coal ash polluted water in the Dan River—an important regional water resource—daily sampling is essential for limits to have real meaning.

Indeed, Dominion Energy in Virginia has in place wastewater treatment facilities at its Bremo facility on the James River and its Possum Point facility on the Potomac, where it is pumping out water from coal ash lagoons. These facilities are treating coal ash polluted water and meeting tightened standards for coal ash pollutants. Duke Energy can use the same technology here.

L. The Proposed Permit Violates North Carolina's Groundwater Rules

Because of the groundwater contamination at and beyond the compliance boundary at Belews Creek, the state groundwater rules prohibit DEQ from issuing the proposed NPDES permit for the Belews Creek coal ash lagoon.

[88] *See* Attachment 16, Amicus Brief, *Hawaii Wildlife Fund v. County of Maui* at 5 (No. 15-17447, 9th Cir.).
[89] *Id*. at 16 (quoting *N. Cal. River Watch v. Mercer Fraser Co*., No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005)).

North Carolina's groundwater rules state that "the [Environmental Management] Commission will not approve any disposal system subject to the provisions of G.S. 143-215.1 which would result in a violation of a groundwater quality standard beyond a designated compliance boundary."[90] The draft permit states on its face that it is issued under the authority of "North Carolina General State 143-215.1." The Belews Creek coal ash lagoon is a disposal system for purposes of the 2L groundwater rules, with compliance boundaries set by the rules.[91] Because DEQ issues this permit under authority delegated by the Environmental Management Commission, this prohibition applies to DEQ as well.

There is no question that the disposal system authorized by this permit will result in a violation of a groundwater quality standard at a designated compliance boundary. It already has. There is an extensive history of documented groundwater contamination at Belews Creek. Indeed, DEQ has ordered Duke Energy to undertake assessment activities and filed an enforcement case in Superior Court seeking injunctive relief to abate groundwater contamination at the site. And Duke Energy has admitted that contamination is migrating not only beyond the compliance boundary at Belews Creek, but also past Duke Energy's property boundary.[92] Duke Energy's own studies confirm that it has contaminated the groundwater with elevated levels of pollutants including antimony, arsenic, boron, chromium, cobalt, iron, manganese, total dissolved solids, and vanadium, at levels above both state groundwater standards and Duke Energy's own proposed background concentrations.[93]

The groundwater violations at and beyond the compliance boundary will only continue, in violation of the state groundwater rules, if the ash is allowed to remain in the unlined lagoon where it will continue leaching pollutants into the groundwater. Because this disposal system has already resulted in violations of groundwater quality standards and will continue to do so, DEQ cannot issue the proposed NPDES permit without imposing conditions sufficient to ensure these violations will cease. A requirement for final closure of the Belews Creek coal ash impoundments and removal of the ash to dry, lined storage is the only assured solution to stop ongoing violations of quality standards at the compliance boundary. Accordingly, the permit should require removal of the ash to safe, dry lined storage.

M. The Permit Wrongly Purports to Grant Duke Energy a Variance for Thermal Discharges, Despite Recognizing That There Is Not Sufficient Evidence for One.

DEQ's proposed permit attempts to grant Duke Energy a variance for its thermal discharges from the cooling water outfall that discharges into Belews Lake, despite the fact that DEQ itself recognizes that there is not sufficient evidence showing that a balanced, indigenous population of aquatic life will exist if the variance is granted. The fact sheet for the proposed permit states that "based on the biological study submitted in 2016, the Water Sciences Section of the DWR concluded that the information provided in the latest report ***is insufficient to***

[90] 15A N.C.A.C. 2L .0103(b)(2).
[91] 15A N.C.A.C. 2L .0107.
[92] Attachment 17, HDR, Corrective Action Plan Part 2, Belews Creek Steam Station Ash Basin (Mar. 7, 2016).
[93] Attachment 18, HDR, Corrective Action Plan Part 1, Belews Creek Steam Station Ash Basin (Dec. 8, 2015); DEQ, Comprehensive and Ongoing Groundwater Results from Duke, *available at* http://edocs.deq.nc.gov/WaterResources/Browse.aspx?startid=221202&dbid=0 (Sept. 15, 2016), *supra* n.11.

determine existence of the Balanced and Indigenous population of fish and macroinvertebrates in the receiving stream."[94] Yet the proposed permit attempts to implicitly grant Duke Energy a thermal variance without the necessary evidence, stating that "[i]n order to continue the Thermal Variance beyond the term of this permit the facility shall develop and conduct comprehensive 316(a) studies."[95] To the extent that this statement purports to allow a thermal variance for the duration of this permit term—before any demonstration of a balanced, indigenous population has been made—DEQ is unlawfully putting the cart before the horse.

As the Clean Water Act regulations make clear,

> "Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations ***if the discharger demonstrates to the satisfaction of the director that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community*** of shellfish, fish and wildlife in and on the body of water into which the discharge is made."[96]

Duke Energy has made no such demonstration here, and cannot receive a thermal variance unless and until it meets this requirement. This is especially true given the history of damage to the fish and other aquatic life in Belews Lake that has resulted from Duke Energy's coal ash operations at Belews Creek. In 2007, EPA classified Belews Lake a "proven ecological damage case" due to selenium poisoning from leaking coal ash pits at the Belews Creek plant.[97] Selenium contamination from the coal ash pits ultimately eliminated 19 of the 20 fish species present in Belews Lake.[98] DEQ must abandon its proposal to give Duke Energy a variance for its thermal discharges, without knowing how much this will further decimate the fish population in Belews Lake.

N. DEQ Fails to Exercise Its Best Professional Judgment to Establish Protections for Fish and Other Aquatic Life Harmed by Duke Energy's Cooling Water Intake.

DEQ is permitted to allow Duke Energy until the next permitting cycle to provide sufficient information to establish final impingement mortality and entrainment BTA, but only if "the facility demonstrates that it could not develop the required information by the applicable date for submission."[99] Duke Energy has had over two years since the final rule applicable to the Belews Creek facility was published.[100] Neither the proposed permit nor the fact sheet provides

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[94] Belews Creek Draft NPDES Permit Fact Sheet at 5 (emphasis added).
[95] Belews Creek Draft NPDES Permit at 26.
[96] 40 C.F.R. § 125.73(a).
[97] USEPA Office of Solid Waste, Coal Combustion Waste Damage Case Assessments 25 (July 9, 2007).
[98] Rachel Cernansky, National Geographic News, Largest U.S. Coal Ash Pond to Close, But Future Rules Still Undecided (Aug. 9, 2012), *available at* http://news.nationalgeographic.com/news/energy/2012/08/120809-little-blue-run-coal-ash-pond-to-close.
[99] 40 C.F.R. § 125.95(a)(2).
[100] National Pollutant Discharge Elimination System—Final Regulations To Establish Requirements for Cooling Water Intake Structures at Existing Facilities and Amend Requirements at Phase I Facilities, 79 Fed. Reg. 48,300 (Aug. 15, 2014).

any explanation of why Duke Energy was not able to collect the necessary information during this time. Duke Energy therefore should not receive a blanket, unsupported, five-year extension from DEQ to collect information that the company has already had years to collect.

In addition, DEQ must still "establish *interim* BTA requirements in the permit on a site-specific basis based on the Director's best professional judgment."[101] There is no indication that DEQ has engaged in such analysis in this proceeding. Rather, the Fact Sheet simply states: "The permittee shall comply with the Cooling Water Intake Structure Rule per 40 C.F.R. § 125.95. The Division approved the facility request for an alternative schedule in accordance with 40 C.F.R. § 125.95(a)(2). The permittee shall submit all the materials required by the Rule with the next renewal application."[102] DEQ has had more than sufficient time to assess at least interim BTA for Belews Creek. As such, any final permit must include, at minimum, interim BTA standards based on DEQ's best professional judgment and consideration of the factors and technologies specified at 40 C.F.R. §§ 125.94 and 125.98.

O. Environmental Justice Concerns Further Highlight the Need for Protection from Contamination at Belews.

The proposed permit would increase the burden on the predominantly minority community surrounding the Belews Creek ash site, and fails to comply with the recommendations of the U.S. Commission on Civil Rights for stopping coal ash contamination in this community.

The community next to the Belews Creek ash site, known as the Walnut Tree community, is over 90% African-American. The Walnut Tree community borders the predominantly white town of Walnut Cove in the overwhelmingly white Stokes County.[103] In response to advice from the North Carolina Advisory Committee, the U.S. Commission on Civil Rights recently issued a recommendation that "NCDEQ and EPA should take action that proactively prevents low income communities and communities of color from being disproportionately affected by coal ash disposal."[104] In particular, the Commission recommended that "NCDEQ and EPA should strengthen the regulation(s) on coal ash storage, to ***ensure that the minimum standard for all coal ash storage is in lined, watertight landfills away from drinking water sources***," and that "NCDEQ, EPA, and Duke Energy should look into ***long term solutions to prevent coal ash leakage and contamination*** such as conversion into cement and other waste disposal options which do not risk leakage into the air or water."[105]

DEQ's proposed permit fails to heed this recommendation from the U.S. Commission on Civil Rights. The proposed permit does nothing to ensure that the coal ash at Belews Creek will be stored in lined, watertight landfills away from drinking water sources. And it fails to provide long term solutions to prevent coal ash leakage and contamination. In fact, the proposed permit

[101] *Id*. (emphasis added).
[102] Belews Creek Draft NPDES Permit Fact Sheet at 5.
[103] Stokes County is approximately 94% White and approximately 4% African American. Quick Facts, Stokes County, United States Census Bureau, http://www.census.gov/quickfacts/table/PST045215/37169.
[104] Attachment 19, U.S. Commission on Civil Rights, *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898* at 201 (Sept. 2016).
[105] *Id*.

does just the opposite: it purports to *allow* coal ash leakage and contamination at the Belews Creek site.

Title VI of the Civil Rights Act of 1964 states that "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[106] As a state agency receiving federal funds, the North Carolina Department of Environmental Quality ("NCDEQ"), must comply with Title VI and its regulations. Thus far, the regulatory efforts of the state do not comport with the statute.

The population living in Walnut Tree and living near Belews Creek has a higher percentage of people of color than the state-wide average or the county average. DEQ has harmed citizens of North Carolina and the State's natural resources by failing to properly regulate Duke's coal ash storage at the Belews Creek station. The on-going water contamination near Belews is having a discriminatory impact on the people of color who live near Belews Steam station.

Because DEQ has administered its permitting programs in a way that has a discriminatory effect based on race, color or national origin, in violation of EPA's Title VI Implementing Regulations, DEQ must correct this approach and comply with its Civil Rights obligations or risk loss of federal funding.[107] To do so, it must abandon its current proposal and issue a new permit that ensures the community at Belews Creek will be protected from Duke Energy's coal ash contamination.

P. Duke Energy's New Treatment System Will Pollute the Dan River.

The draft permit sets up a new treatment system to address pollution from the Belews Creek facility after the coal ash lagoon ceases to operate. A new retention basin will be constructed, discharging into the Dan River through new Outfall 003A.[108]

This new retention basin will receive streams of highly polluted water, coal pile runoff, FGD wastewater, and virtually all other industrial wastes from the site. Yet, the draft permit contains no limits for the coal ash and industrial pollutants that this retention basin will dump into the Dan River, other than ammonia, iron, and copper and only during specified times. While the draft permit recognizes that there must be "physical/chemical treatment" of discharges from a coal ash lagoon, it fails to require such treatment of discharges of the same coal ash and industrial wastes from the new retention basin.

Moreover, the 2017 draft permit gives Duke Energy a striking two years before it submits the required and essential Form 2C for NPDES application, which sets out the pollutants that flow into the Dan River from the retention basin.

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[106] 42 U.S.C. § 2000d (2012).
[107] "Non-Discrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency" at 40 C.F.R. Part 7 et. seq.
[108] Belews Creek Draft NPDES Permit at 9.

This permit is an opportunity for Duke Energy and DEQ to set a new path for protecting the Dan River from Duke Energy's coal ash and its operation of the Belews Creek facility. But instead of putting in place protections for the public and the Dan River, once more DEQ and Duke Energy propose to make the Dan River a dumping ground for Duke Energy's coal ash and other pollution, without protective limits for the Dan River's waters.

This failure is particularly conspicuous because no body of water has suffered more from Duke Energy's pollution and DEQ's lax oversight than the Dan River. It has suffered groundwater pollution, direct unlawful discharges of polluted coal ash water, and the largest coal ash spill in North Carolina's history.

This is a recipe for yet another coal ash scandal on the Dan River. After all the failures of DEQ and Duke Energy in their management of coal ash and coal ash pollution, the public has a right to expect that going forward both DEQ and Duke Energy will make every effort to protect North Carolina's waters from coal ash pollution. Instead, the 2017 draft permit would abdicate DEQ's responsibility to put in place protective and meaningful pollution limits, and would also give the public every reason not to trust Duke Energy's handling of this pollution.

For all the reasons given above, the absence of these limits violates the Clean Water Act.

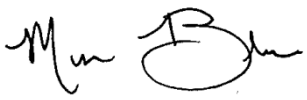
Q. Additional Points.

Section A. (1.) allows Duke Energy to discharge extremely hot water from Outfall 001.[109] But it allows Duke Energy a surprising 180 days to submit Form 2C, which is essential to a meaningful NPDES permit. DEQ's enforcement action has been pending three and a half years, it is three years since Duke Energy's Dan River spill, and the prior version of this draft permit was issued five months ago. There is no apparent reason why Duke Energy should be allowed to obtain this permit without first providing DEQ the required and essential Form 2 C.

Under the Clean Water Act, DEQ and Duke Energy cannot render a portion of a permit unenforceable by citizens by inserting the phrase "State Enforceable Only," as has been done on Attachment 2. That phrase should be deleted.

Thank you for your consideration of these comments.

Sincerely,



Myra Blake
Staff Attorney

[109] Belews Creek Draft NPDES Permit at 3.

cc: Gina McCarthy, EPA Administrator
Heather McTeer Toney, Regional Administrator, Region 4