

Still Fighting For Clean Water:

An overview of N.C.'s updated coal ash regulation and ongoing citizen legal actions

Hannah Petersen

When it's time for Amy Brown's children to brush their teeth, they know to immediately reach for the 20-ounce water bottle sitting adjacent to the sink.¹ The young boys know that turning on the faucet could expose them to a slew of toxins leaching into their water from the Allen coal ash impoundment down the road. Two years ago, the Brown family received a letter telling them that their water was unsafe to drink and cook with.² Shortly after the receipt of the letter, the water deliveries from Duke Energy began. Even when the do-not-drink letter was rescinded a few months later, the energy company continued to deliver bottled water to the families around the coal ash impoundment.³ The bottles will continue to pile up until Duke Energy fulfills its duty of providing permanent water to the Brown's neighborhood in compliance with new state regulation. Until then, the children will continue to take quick showers. Until then, holiday dinners will continue to require nearly a hundred water bottles. Until then, Amy Brown will continue to worry about her children's health.

The fear of families like Amy Brown's has extended for years, but over the past couple and into 2017, many citizens took matters into their own hands. Legal actions have opened doors for citizen advocacy and have created pressure on Duke Energy to clean up the coal ash. However, the citizens are up against a major utility and the road to clean up will be long.

¹ Phone Interview with Amy Brown, resident of Belmont, NC (Oct. 4, 2017).

² *Id.*

³ *Id.*

I. Introduction to Coal Ash

Coal ash is the toxic byproduct of burning coal to produce electricity.⁴ The ash contains heavy metals such as arsenic, lead, mercury, chromium, selenium and boron as well as known toxins like thallium and antimony.⁵ Traditionally, the ash is mixed with water and stored in unlined pits, called impoundments. These toxins have serious health effects on those who come in contact with the ash. Those who live near the ash experience general health ailments, cancer and premature death at a higher rate than those who do not.⁶ Nearly 140 million tons of coal ash are created and stored across the country each year; and nearly 70 percent of the ash is being kept in impoverished areas.⁷ In North Carolina alone there are fourteen coal facilities that annually generate nearly 5.5 million tons of coal ash.⁸ Between these facilities, there are over 30 coal ash ponds and most of them are located next to waterways.⁹ Collectively, the North Carolina ponds store over 100 million tons of coal ash.¹⁰ The majority of the ponds are unlined and consequently the ash easily leaches into the ground and surface water.¹¹

The EPA has classified coal ash as solid, rather than hazardous waste, which allows the states freedom to choose how they dispose of the ash without direct federal oversight.¹² The

⁴ Barbara Gottlieb, Steven Gilbert, & Lisa Evans, *Coal Ash: The toxic threat to our health and environment*, EARTHJUSTICE AND PHYSICIANS FOR SOCIAL RESPONSIBILITY, Sept. 2010, at 5.

⁵ *Id.* at 5

⁶ *Coal Ash – Background*, APPALACHIAN VOICES, <http://appvoices.org/coalash/background/> (last visited Oct. 27, 2017).

⁷ *The Coal Ash Problem*, EARTH JUSTICE, <https://earthjustice.org/features/the-coal-ash-problem> (last visited Oct. 27, 2017).

⁸ *North Carolina: Coal Ash Disposal, Damage, and Regulation*, EARTHJUSTICE, <http://earthjustice.org/sites/default/files/nc-coal-ash-factsheet-1112.pdf>.

⁹ *North Carolina's Toxic Tragedy: Coal Ash is America's Largest Unregulated Waste Stream*, SOUTH EAST COAL ASH, <http://www.southeastcoalash.org/wp-content/uploads/2014/01/NCCoalAshFactSheet.pdf>.

¹⁰ *Inventory of Duke Energy Coal Ash Ponds*, N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, (2014), <https://files.nc.gov/ncdeq/Water%20Quality/NPDES%20Coal%20Ash/Inventory%20of%20Duke%20Energy%20Coal%20Ash%20Ponds.pdf>.

¹¹ SOUTH EAST COAL ASH, *supra* note 6.

¹² *Disposal of Coal Combustion Residuals from Electric Utilities*, 80 Fed. Reg. 74, 21303 (Apr. 17, 2015) (codified at 40 C.F.R. 257).

EPA's Coal Combustion Residuals ("CCR") Rule lays out minimum criteria that each coal producing utility should meet when disposing of their coal ash and sets minimum dates for closure.¹³ However, because the waste isn't classified as hazardous, the standards are not enforceable and states aren't required to adopt any recommendations.¹⁴

While the chemical composition and potential health effects of coal ash were well known to people in the industry for years, it wasn't until the 2008 Kingston Tennessee Valley Authority ("TVA") spill that the threat to people and the environment was comprehended on a national level. This spill resulted in the EPA's CCR Rule and elevated attention to the threat of the toxic substance across the country.¹⁵

On December 22, 2008, over a billion gallons of coal ash sludge spilled into the Clinch and Emory Rivers as a result of a dam failure at TVA's Kingston Fossil Plant in Harriman, Tennessee.¹⁶ The coal ash spread over 300 acres and damaged homes, clogged waterways and destroyed species of fish.¹⁷ While the environmental impacts were clear, no one truly seemed to understand the health threat of the ash. Employees of Jacob's Engineering were called to clean up the ash with little to no education on the health risks they would be exposed to.¹⁸ The employees were denied masks and special clothing to wear when cleaning it up,¹⁹ and they were

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/coalash/coal-ash-rule#summary> (last visited Oct. 27, 2017).

¹⁶ *EPA Response to Kingston TVA Coal Ash Spill*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/tn/epa-response-kingston-tva-coal-ash-spill> (last visited Oct. 27, 2017).

¹⁷ *Coal Ash Disasters*, APPALACHIAN VOICES, <http://appvoices.org/coalash/disasters/> (last visited Oct. 27, 2017).

¹⁸ Jamie Satterfield, *Kingston coal ash spill workers treated as 'expendables,' lawsuit by sick and dying contends*, KNOX NEWS (July 21, 2017, 6:00 AM), <http://www.knoxnews.com/story/news/2017/07/21/kingston-coal-ash-spill-workers-treated-expendables-lawsuit-sick-and-dying-contends/451537001/>.

¹⁹ Jamie Satterfield, *Safety manager in Kingston coal ash spill cleanup admits workers denied respirators, masks*, KNOX NEWS (Aug. 12, 2017, 10:36 AM), <http://www.knoxnews.com/story/news/crime/2017/08/12/safety-manager-kingston-coal-ash-spill-cleanup-admits-workers-denied-respirators-masks/551620001/>.

told the ash was perfectly safe.²⁰ The workers didn't receive special training and therefore, didn't have reason to expect risk.²¹ Nine years later, over 50 of the employees are suing Jacob's Engineering for unsafe working conditions after 17 of the employees have died for health failure.²²

II. Environmental Justice Impacts of Coal ash

People of color and low-income communities experience the effects of coal ash at a higher rate than the average American.²³ Across the country, the mean income of people living within a kilometer of a coal ash impoundment is three-fourths the amount of the national average.²⁴ Further, the percentage of non-white populations that fall within a mile of an impoundment is 30 percent higher than the national average.²⁵ In North Carolina, at the Belews Creek facility, over 60 percent of the population living immediately surrounding the facility is non-white.²⁶

In 2016, The U.S. Commission on Civil Rights concluded that 30 percent of coal ash landfills are located in areas where the minority population exceeds national average.²⁷ In North Carolina, the statistics aren't much different and the North Carolina State Advisory Committee to the U.S. Commission on Civil Rights found that 69 percent of all African American individuals

²⁰ Satterfield, *supra* note 15.

²¹ *Id.*

²² Satterfield, *supra* note 16.

²³ *Hearing Before the Comm. on Energy and Commerce*, 111th Cong. 9 (2009) (Testimony of Lisa Evans, Senior Administrative Counsel, Earthjustice).

²⁴ *Id.* at 9

²⁵ *Id.* at 9

²⁶ *Notice of Intent to Sue Clean Water Act Section 505 - 33 U.S.C. § 1365*, Figure 3, SOUTHERN ENVIRONMENTAL LAW CENTER (Oct. 3, 2017), https://www.southernenvironment.org/uploads/audio/2017-10-03_SEL_C_Appalachian_Voices_NAACP_-_Belews_Creek_NOI.pdf.

²⁷ *Environmental Justice: Examining the Environmental Protection Agency's Compliance and Enforcement of Title VI and Executive Order 12,898*, U.S. COMMISSION ON CIVIL RIGHTS, Sept. 2016, at 16.

in the state live within 30 miles of power plants.²⁸ Despite these statistics, the U.S. Commission for Civil Rights determined that there is not a disproportionate amount of risk for communities of color or low income when it comes to the effects of the EPA's Final CCR Rule.²⁹ However, in its 2016 Environmental Justice report, it was determined that these communities do in fact face larger challenges when it comes to actual enforcement of the rule.³⁰

Because the EPA CCR Rule is self-enforced and not imposed upon states from the federal level, citizen lawsuits and individual state government oversight are required to enforce the recommendations upon utility companies. The EPA predicted that states with larger minority communities are less likely to adopt the CCR Rule in the first place and communities of low-income are less likely to be able to comprehend and investigate the violations that may be occurring, much less afford actual legal representation in a lawsuit.³¹ Families that live below the poverty line cannot afford daily necessities and the civil litigation required to enforce the CCR Rule.³² Despite the fact that the EPA didn't find a direct Environmental Justice issue between the communities experiencing the effects of coal ash, enforcement comes at a cost that disproportionately affects minorities and low income families leading to larger environmental justice implications.

²⁸ *Id.* at 13

²⁹ *Id.* at 79

³⁰ *Id.* at 85

³¹ *Id.*

³² *Id.*

III. North Carolina's Coal Ash History

Compared to many other states, North Carolina has adopted a robust management plan for coal ash.³³ However, the road to get to clean-up has been tumultuous and current regulations still leave citizens unprotected.

Duke Energy (“Duke”) is the main electricity provider for the state and is one of the largest energy providers in the entire country.³⁴ Duke reaches over 7 million customers providing coal, natural gas and renewable based energy. The utility company owns 14 coal plants across North Carolina that collectively have 33 coal ash storage impoundments.³⁵

The third largest coal ash spill in the nation occurred at Duke’s Dan River Coal Plant, in North Carolina.³⁶ On February 2, 2014, a storm water pipe running underneath a retired coal ash pond in Eden, North Carolina, burst spilling over 39,000 tons of coal ash and 27 million gallons of contaminated waste water into the Dan River.³⁷ Coating the waterway and wildlife with ash, the toxins were found more than 70 miles downstream from the spill.³⁸ Duke had known that the storm water pipe served as a threat since 1981, when the N.C. Utilities Commission warned the company of the rust prone metal and weight of the polluted water.³⁹ The warnings continued for years and no changes were made. After the pipe burst, federal prosecutors scrutinized the relationship between Duke and the North Carolina governor and the Department of

³³ Hannah Petersen & Elizabeth Payne, *Cleaning up a mess: Coal ash across Appalachia*, THE APPALACHIAN VOICE (Aug. 12, 2016), <http://appvoices.org/2016/08/12/cleaning-up-a-mess-coal-ash-across-appalachia/>.

³⁴ *About us*, DUKE ENERGY, <https://www.duke-energy.com/our-company/about-us> (last visited Oct. 20, 2017).

³⁵ *Proposed Classifications Chart*, DUKE ENERGY (May 18, 2016), http://portal.ncdenr.org/c/document_library/get_file?p_l_id=1169848&folderId=26884096&name=DLFE-125496.pdf.

³⁶ *Coal Ash Disasters*, APPALACHIAN VOICES, <http://appvoices.org/coalash/disasters/> (last visited Oct. 27, 2017).

³⁷ *Id.*

³⁸ *Id.*

³⁹ Taft Wireback, *Dan River Coal Ash Disaster: A lack of oversight let flaws go undetected*, NEWS & RECORD (Feb. 1, 2015) http://www.greensboro.com/news/dan_river/dan-river-coal-ash-disaster-a-lack-of-oversight-let/article_3d232f38-f288-5080-af4c-fb2c1f26668a.html.

Environmental Quality (“DEQ”).⁴⁰ The Governor at the time, Pat McCrory, had worked for Duke for 28 years and many members of DEQ had experience with the company or had received funding from the company.⁴¹

The Dan River spill resulted in scrutiny of the state government and led to the passing of the Coal Ash Management Act (“CAMA”) of 2014, a body of law that lays out the requirements Duke must fulfill to close the ash ponds and clean up the contamination.

CAMA required that by the beginning of 2015, both groundwater and drinking water sampling should begin as a part of a comprehensive water quality analysis for the communities living around the coal ash impoundments.⁴² The initial round of testing completed by the state’s Department of Health and Human Services showed elevated levels of coal ash toxins in the wells of over 400 residents across the state.⁴³ In March of 2015, residents received a letter telling them that it was unsafe to drink their water.⁴⁴ After a year of living off bottled water, in March of 2016, the letter was rescinded based on an adjustment of standards, not a change in the water quality.⁴⁵ The state adjusted the allowable levels of compounds in the water to be more lenient and even though state health officials disagreed on the safety, the new letter informed the communities that their water was as safe as any other state or federal water.⁴⁶

⁴⁰ Trip Gabriel, *Ash Spill Shows How Watchdog Was Defanged*, THE NEW YORK TIMES (Feb. 28, 2014) <https://www.nytimes.com/2014/03/01/us/coal-ash-spill-reveals-transformation-of-north-carolina-agency.html>.

⁴¹ *Id.*

⁴² 2016 N.C. Sess. Laws 95.

⁴³ *DEQ flip-flops on drinking water safety*, APPALACHIAN VOICES (March 8, 2016, 3:26 PM), <http://appvoices.org/2016/03/08/deq-flip-flops-on-drinking-water-safety/>.

⁴⁴ Catherine Clabby, *Health Officials Clashed Over Well-Water Letters, Testimony Shows*, NORTH CAROLINA HEALTH NEWS (March 17, 2016), <https://www.northcarolinahealthnews.org/2016/05/17/health-officials-clashed-over-well-water-letters-testimony-shows/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

CAMA also required DEQ to survey the impoundments across the state and assess their risk to public safety, health and welfare of the communities around them.⁴⁷ There was controversy in the communities when proposed classifications were released and showed that thirteen of the impoundments were low or low to intermediate risk meaning that clean-up wouldn't be required and the impoundments could simply be capped in place.⁴⁸ However, the final classifications released in May, 2016 dictated twenty-five intermediate risk and six high risk impoundments requiring that each be excavated and closed in accordance to CAMA's procedures that were updated with the passing of House Bill 630.⁴⁹

IV. House Bill 630: Clean-up and Water Provision

a. Closure and Recycling

With the passing of House Bill (“HB”) 630 as an amendment made to CAMA, Duke is required to begin clean-up efforts and to provide water to the communities in the form of either public water connections or home filters. The majority of the impoundments are intermediate risk which allows the utility company to submit closure plans by December 31, 2019 and complete closure by December 31, 2024.⁵⁰ Duke is required at the minimum to dewater and close the intermediate risk impoundments by converting the impoundment to an industrial landfill with a leachate collection system and a composite liner system with both an upper and lower component.⁵¹ In the process, they must comply with Subchapter L of Chapter 2 of Title 15A of the North Carolina Administrative Code, which established ground water risk

⁴⁷ 2016 N.C. Sess. Laws 95.

⁴⁸ *Proposed Classifications Chart*, N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY (May 18, 2016), http://portal.ncdenr.org/c/document_library/get_file?p_1_id=1169848&folderId=26884096&name=DLFE-125496.pdf.

⁴⁹ *Id.*

⁵⁰ N.C. GEN. STAT. § 130A-309.214(a).

⁵¹ N.C. GEN. STAT. § 130A-309.214(a)(2).

assessments and quality standards⁵², in order to preserve the health and safety of the communities around the impoundment.⁵³ The six high risk impoundments must be closed by December 31, 2019 and must comply with the same requirements of the intermediate ones.⁵⁴

As for the closure process, HB 630 also requires that some of the ash be recycled for beneficial reuse.⁵⁵ The ash from at least three sites must be used for as cement products and be processed at a facility capable of processing at least 300,000 tons of ash.⁵⁶ The deadline for selecting the sites for the first two recycling center was January 1, 2017, and the third was selected on July 1, 2017. Pursuant to those deadlines, Duke has announced that it will build a recycling facility at three locations: the Cape Fear Plant in Moncure, North Carolina; Buck Steam Station in Salisbury, North Carolina; and H.F. Lee Plant in Goldsboro, North Carolina.⁵⁷

While these deadlines are straightforward, there is a variance section in HB 630 that allows a utility to apply for a variance a year in advance of the original deadline.⁵⁸ The Secretary of Environmental Quality may decide based on the feasibility for the utility to comply given best technology currently available and whether the variance would create hardships without equal or greater benefits to the public at large.⁵⁹

⁵² *Id.*; Subchapter L of Chapter 2 of Title 15A of the North Carolina Administrative Code details groundwater classifications and standards for areas across the state. Section .0202 establishes groundwater quality standards that Duke Energy will be required to comply with as they clean up and close coal ash impoundments across the state. 15A N.C. Admin. Code 2L.0202.

⁵³ N.C. GEN. STAT. § 130A-309.214.

⁵⁴ *Id.*

⁵⁵ N.C. GEN. STAT. § 130A-309.216.

⁵⁶ 2016 N.C. Sess. Laws 95.

⁵⁷ John Downey, *Duke Energy meets state deadline for choosing third coal-ash recycling site*, CHARLOTTE BUSINESS JOURNAL (June 30, 2017, 1:31PM), <https://www.bizjournals.com/charlotte/news/2017/06/30/duke-energy-meets-state-deadline-for-choosing.html>.

⁵⁸ 2016 N.C. Sess. Laws 95.

⁵⁹ *Id.*

Even if Duke were to comply with their deadlines, it would take over 130 years to recycle all of the ash with the three recycling plants they currently propose.⁶⁰ While the ultimate timeline isn't ideal for the communities, the proposal of the recycling centers is considered a success for environmental advocates across the state.⁶¹

b. Water Provision

HB 630 also lays out the requirements for Duke to provide permanent water supplies to residents who have a drinking water well located within a one-half mile of a coal ash impoundment as soon as practicable and no later than October 15, 2018.⁶² Some of these residents have been living on bottled water for over 800 days since the State Health Department told them not to drink or cook with their well water in 2015.⁶³ The law allows for Duke to either provide home filters or connections to public water supply.⁶⁴ Permanent connections to public water supplies will be offered as preference over filters except for when the running water lines to the house would be cost-prohibitive or the family requests a filtration system.⁶⁵

For communities in Roxboro, Semora, and Belews Creek, North Carolina, the cost of building the infrastructure and running the water lines to each individual house is cost-prohibitive and would create avoidable technical challenges including how to filter and treat water over such an expanse of land.⁶⁶ These communities will receive filters that perform at

⁶⁰ Rhiannon Fionn, *How North Carolina law could make it harder to recycle coal ash*, SOUTHEAST ENERGY NEWS (Nov. 7, 2016), <http://southeastenergynews.com/2016/11/07/how-north-carolina-law-could-make-it-harder-to-recycle-coal-ash/>.

⁶¹ Elizabeth Payne, *Could Concrete Help Get Coal Ash Out of Neighborhoods?*, THE APPALACHIAN VOICE (Feb. 10, 2017), <http://appvoices.org/2017/02/10/could-concrete-help-get-coal-ash-out-of-neighborhoods/>.

⁶² 2016 N.C. Sess. Laws 95.

⁶³ Compl. at 22, Brown, et al. v. Duke Energy Carolinas LLC, (2017) (17-CV-010341), <http://www.salisburypost.com/wp-content/uploads/2017/08/coal-ash-file-stamped-complaint-without-exhibits.pdf>.

⁶⁴ 2016 N.C. Sess. Laws 95.

⁶⁵ *Id.*

⁶⁶ *Duke Energy works to offer permanent water solutions to eligible plant neighbors*, DUKE ENERGY, <https://news.duke-energy.com/releases/releases-20161207>, (last visited, Oct. 27, 2017).

standards at or above the federal requirements for removing major toxins including: arsenic, barium, total chromium, and selenium.⁶⁷ The filter system works by moving untreated water through a treatment system that will remove or reduce the presence of contaminants through an ion exchange and will maintain the pH balance of the water.⁶⁸ The filters will be assessed for performance annually as well as maintained throughout the year at no cost to the resident.⁶⁹ However, if the homeowner wishes to keep their well, they must pay for the maintenance and upkeep to that source of water.⁷⁰

The remainder of the communities will receive the offer of permanent public water supply.⁷¹ While Duke will be responsible for the costs of installation to the water connections, the residents will be responsible for the monthly water bill.⁷² Community members will be permitted to opt out of the water provision, and if enough members of the community do not select this option, Duke may be forced to provide filters rather than public water access.⁷³ The public water connections are mandated by the EPA and Duke will pass on enforcement of those standards to the local municipality once the connections are made.⁷⁴

Should community members select the public water connections, they will have the option of accepting a financial supplement from Duke to ease the transition to a public water

⁶⁷ Letter from S. Jay Zimmerman, P.G., Director, Division of Water Resources, to Paul Draovitch, Sen. V. P., Environmental, Health, & Safety, Duke Energy (June 14, 2017) (available at: https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/duke-energy-perf-standards-061417.pdf).

⁶⁸ *Permanent Water Supply Frequently Asked Questions*, DUKE ENERGY (Mar. 28, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/permanent-water-supplies-faq.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Duke Energy Works to offer permanent water solutions to eligible plant neighbors*, DUKE ENERGY (Dec. 7, 2016) https://news.duke-energy.com/releases/releases-20161207?_ga=2.265599882.423982147.1507591963-1241707760.1507470333.

⁷² 2016 N.C. Sess. Laws 95.

⁷³ DUKE ENERGY, *supra* note 65.

⁷⁴ *Id.*

connection.⁷⁵ In the supplement, Duke promises that the homeowners' property value will not be harmed and agrees to pay each household a 5,000 dollar stipend for their transition to having to pay for a water bill as well as 25 year stipend for monthly water use of 5,000 gallons.⁷⁶ In exchange for this offer, Duke requires the community member to sign a release claiming that Duke has compensated the individual household for any harm and that the homeowner, their heirs, successors and assigns will not bring legal action against Duke relating to "contamination of well water damage to [their] property allegedly caused by Duke Energy's coal combustion residual impoundments."⁷⁷ Many individuals receiving these water connections cannot afford a monthly water bill, and this offer would make a substantial impact on their financial situation; however, the release of legal action has led to worry and a lawsuit.

V. Citizen Lawsuits in 2017

Over the past couple of years, Duke has faced lawsuits from nonprofit organizations, legal counsel to community members, and the United States Government.⁷⁸ Without the lawsuits of the private parties enforcement of the EPA CCR Rule, as well as CAMA, likely would not have yielded the relatively productive results. Because of the self-enforcement format of the EPA CCR Rule, these lawsuits have been the backbone of coal ash progress in North Carolina, but they come at a cost that limits claims and likely will lead to settlement rather than performance.

⁷⁵ *Duke Energy moving forward with permanent water solutions; details financial supplements*, DUKE ENERGY (Jan. 13, 2017), https://news.duke-energy.com/releases/duke-energy-moving-forward-with-permanent-water-solutions;-details-financial-supplements?_ga=2.60524397.134960625.1509109069-1241707760.1507470333.

⁷⁶ *Sample: Authorization for enrollment and acceptance of Duke Energy Financial Supplement*, DUKE ENERGY, https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/financial-supplement-agreement-and-release.pdf, (last visited Oct. 27, 2017).

⁷⁷ *Id.*

⁷⁸ See *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428 (2015); *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, (2017); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798 (2014); *United States v. Duke Energy Corp.*, 2014 U.S. Dist. LEXIS 129805.

a. Class Action Complaint and Petition for Declaratory Relief

In response to the release that Duke requires for the financial supplement, on August 23, 2017, nine community members from across the state filed a class action lawsuit.⁷⁹ The suit alleges that Duke mismanaged their coal ash impoundments, contaminated the communities' water, and required that the plaintiffs waive their right to sue in order to receive the relief that the state requires Duke to provide.⁸⁰ In their complaint, the plaintiffs state that the contract language would prohibit them from filing a lawsuit against Duke even if medical testing would be able to link potential health threats to the coal ash in Duke's impoundments.⁸¹ They claim detrimental reliance, private nuisance, and negligence in an attempt to eliminate the waiver.⁸²

According to the complaint, the plaintiffs are confused by Duke's contradicting statements that claim the coal ash is not the reason for their well water contamination, but then requires them to not take legal action.⁸³ Many of the plaintiffs live near impoundments that are ranked with an intermediate risk, which means that the ash does not have to be removed until 2024.⁸⁴ This means that the communities will continue to live near a coal ash impoundment that lowers their property value and threatens their health for 6 years before the ash impoundment is closed. By signing the waiver, the community members would not be able to take any action during and beyond that time-period even though the risks associated with clean up are unknown. In their complaint, the plaintiffs state that the health risks associated with coal ash are just now

⁷⁹ Compl. at 1, *Brown, et al. v. Duke Energy Carolinas LLC*, (2017) (17-CV-010341), <http://www.salisburypost.com/wp-content/uploads/2017/08/coal-ash-file-stamped-complaint-without-exhibits.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.* at 3.

⁸² *Id.* at 37-40.

⁸³ *Id.* at 37.

⁸⁴ *Id.* at 4.

being recognized and that there is no way to predict the results that science will be able to connect in the future.⁸⁵

Their complaint states that the release language violates public policy because courts have previously stated that a public utility cannot force consumers to release their rights to claims of future negligence.⁸⁶ The financial supplement release statement says that the plaintiffs agree that by accepting the money, they have been compensated for any past, present or future harm.⁸⁷ If enforced, this statement would arguably fall into the category of future negligence.⁸⁸ The money offered to the community members was advertised as a way to ease the transition of being forced to connect to water, but the language of the release establishes it as a remediation for harm.⁸⁹ Plaintiffs allege that because state law requires Duke to carry the cost of providing permanent water to the communities, the utility should not be allowed to waive the rights to sue for future harm.⁹⁰ If they are required to provide this compensation, it shouldn't be viewed as a promise with obligations for both parties.

The plaintiffs bring individual reasons for filing the complaint. Amy Brown, one of the plaintiffs, is worried about the health of her children and acknowledges that the language in the contract binds their children to the agreement for an indefinite period of time.⁹¹ Eric Washam is concerned about his property, which he had hoped to leave to his family as a valuable asset.⁹² Geneva Shade has used her well for over 60 years and is physically incapable of managed the

⁸⁵ *Id.* at 19.

⁸⁶ *Id.* at 17.

⁸⁷ “Yet, the release requires the person who signs to “ACKNOWLEDGE THAT DUKE ENERGY HAS FULLY COMPENSATED ME FOR ANY HARM OR LOSS THAT I HAVE SUFFERED, OR MAY SUFFER, AS A RESULT OF ANY CONTAMINATION IN MY WELL WATER.” *Id.* at 17.

⁸⁸ *Id.* at 19.

⁸⁹ DUKE ENERGY, *supra* note 73.

⁹⁰ Compl. at 17, Brown, et al. v. Duke Energy Carolinas LLC, (2017) (17-CV-010341), <http://www.salisburypost.com/wp-content/uploads/2017/08/coal-ash-file-stamped-complaint-without-exhibits.pdf>.

⁹¹ *Id.* at 22.

⁹² *Id.* at 28.

weight of bottled water because she is over 80 years old.⁹³ Deborah Graham is worried about the health of her family who grew up drinking the well water and has lost the peace of mind that should come with living in her own home.⁹⁴

While each of the plaintiffs have varied reasons for filing the complaint, they all seek to enforce the financial offer without releasing their right to file suit.

b. Notice of Intent to Sue – Clean Water Act Section 505

Another citizen action commenced on October 3, 2017 in response to alleged violations of state in national law made by Duke at their Belews Creek Steam Station.⁹⁵ The action is an intent to sue under the Clean Water Act and specifically for violations of effluent standards and limits required by 33 U.S.C. § 1365(f).⁹⁶ The action was brought by Appalachian Voices, the North Carolina Conference of the National Association for the Advancement of Colored People (“NAACP”) Branches, and the Stokes County Branch of the NAACP through the counsel of the Southern Environmental Law Center. The Clean Water Act requires a notice period of sixty days and the notice must be served to the alleged violator, the state in which the alleged violation occurs and the Administrator of the U.S. EPA.⁹⁷

The intent to sue states that Duke has contaminated the drinking water of the Belews Creek community by allowing the pollutants in the coal ash to leach out of the impoundment at multiple unpermitted points.⁹⁸ The intent also states that the utility is polluting Little Belews Creek, a water source that connects to the Dan River, by using it as a private wastewater

⁹³ *Id.* at 27.

⁹⁴ *Id.* at 24.

⁹⁵ SOUTHERN ENVIRONMENTAL LAW CENTER, *supra* note 23.

⁹⁶ *Id.* at 1.

⁹⁷ 33 USCS § 1365(b)(1)(A).

⁹⁸ SOUTHERN ENVIRONMENTAL LAW CENTER, *supra* note 23 at 5.

discharge stream.⁹⁹ The utility doesn't have a permit to use Little Belews Creek and has misrepresented how their wastewater is treated at the Steam Station in their permit application.¹⁰⁰ The main action of the intent is to call attention to the fact that, "Duke Energy is illegally using a segment of this jurisdictional water as part of its private coal ash wastewater system."¹⁰¹

This isn't the first time that an environmental advocacy group has brought allegations of violations of the Clean Water Act against Duke. The 2014 case, *Cape Fear River Watch, Inc. V. Duke Energy Progress, Inc.* resulted in the court ruling that Duke could not use permits to turn jurisdictional waters into their own personal property that would be able to be treated how the company felt fit.¹⁰² Duke argued that their permit would allow them to discharge into the lake next to their Sutton coal ash facility as a part of their production process, but the court ruled that the permit itself may have violated the Clean Water Act.¹⁰³ Duke had to treat the discharges into the lake as a result of the lawsuit.¹⁰⁴

The intent to sue claims that Duke is directly violating their own wastewater permit by allowing pollutants to enter State or navigable waters of the United States.¹⁰⁵ However, it's notable that there is another aspect to the intent that discusses the groundwater contamination's effects on the community around the Belews Creek facility. The community lives downstream from the coal ash impoundment and the contaminants that have leaked out have reacted with the chlorine in their water treatment processes creating the carcinogens known as trihalomethanes.¹⁰⁶ The EPA has previously ruled that people should not have been exposed to these carcinogens

⁹⁹ *Id.* at 2.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.* at 5.

¹⁰² *Id.* at 7.

¹⁰³ *Id.* at 29.

¹⁰⁴ *Id.* at 30.

¹⁰⁵ *Id.* at 8.

¹⁰⁶ *Id.* at 23.

and Duke has already admitted in a plea agreement that their coal ash resulted in the formation of the trihalomethanes, yet Duke has not taken action to prevent this from occurring.¹⁰⁷ Water sources downstream from the coal ash facility serve approximately 90,000 people, according to the intent, and the levels of trihalomethanes have been found as high as 139 parts per billion.¹⁰⁸

At the time of this writing, the sixty-day notice period is underway and the requested action of the intent is for Duke to settle. However, the groups filing the intent are prepared to undergo litigation in pursuit of injunctive relief, monetary penalties, and fees and costs of litigation.¹⁰⁹

VI. Conclusion

While state policy in North Carolina has proven to be more progressive than in years past, the communities that live near coal ash impoundments are still facing very real threats to their health, peace of mind and rights as citizens. There is proof that citizen lawsuits yield results in enforcing the EPA's CCR rule, other federal rules and even state clean up requirements; however, these actions are not always possible for those who need them most. There is a very real discrepancy between who can feasibly afford to bring a legal claim against a company as large as Duke. Because the EPA's CCR Rule is self-enforced and North Carolina has a history of mixing politics with coal ash clean-up, legal support should be given to the communities affected so that they are able to protect themselves from the contamination in their own yards.

¹⁰⁷ *Id.* at 24.

¹⁰⁸ *Id.* at 24.

¹⁰⁹ *Id.* at 44.