

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
19 EHR 02404

DUKE ENERGY PROGRESS, LLC,)
)
Petitioner,)
)
v.)
)
STATE OF NORTH CAROLINA *ex rel.*)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENTAL QUALITY,)
)
Respondent.)
_____)

MOTION TO INTERVENE

N.C.G.S. § 1A-1, Rule 24
N.C.G.S. § 150B-23
26 N.C.A.C. 3.0117

The Roanoke River Basin Association (“the Association”), pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, N.C.G.S. § 150B-23(d), and 26 N.C.A.C. 3.0117, hereby moves this Court for leave to intervene in the above-captioned matter as Respondent-Intervenor. The Association files this motion after conferring with counsel for Petitioner and Respondent. Respondent consents to the Association’s intervention as a full party. Petitioner indicated that it would state its position in its response to this motion.

In support of this motion, the Association shows the Court the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. The Association seeks to intervene in this action to participate fully as a party to the challenge filed by Duke Energy Progress, LLC (“Petitioner” or “Duke Energy”) to the Coal Combustion Residuals Surface Impoundment Closure Determination (the “Closure Determination(s)”), announced by the North Carolina Department of Environmental Quality (“DEQ”) on April 1, 2019 for the Mayo coal ash site in Person County, NC. The Closure Determination requires Duke Energy to submit closure plans to excavate all the coal ash it stores

in the unlined, leaking pit at its Mayo site. *See* North Carolina Department of Environmental Quality, *DEQ Orders All Coal Ash Excavated*, <https://deq.nc.gov/news/key-issues/deq-orders-all-coal-ash-excavated> (last accessed May 3, 2019).

2. Duke Energy owns and operates 14 coal ash sites across North Carolina. By orders of the N.C. Superior Court, Duke Energy's criminal plea agreement with the United States, and a Clean Water Act settlement agreement with other conservation groups, Duke Energy is already required to fully excavate the coal ash from its unlined lagoons at eight of its North Carolina sites. Excavation of several ash basins is complete already, and is underway at many of these sites.

3. The remaining six sites are those at issue in the contested cases before OAH. At these six sites, Duke Energy stores over 79 million tons of coal ash in leaking, unlined pits. At every one of these sites, the coal ash is saturated deep beneath the groundwater within the impoundments, where it is leaching and will continue to leach pollutants into nearby groundwater and surface waters outside the ash basins. Contaminated wastewater also leaks through their earthen dams into nearby waterways. As a result, the coal ash in these pits has contaminated groundwater and streams, lakes, rivers, and drinking water reservoirs for decades with pollutants including arsenic, lead, mercury, and selenium. Duke Energy documents show that coal ash will remain saturated in groundwater if these pits are covered with a synthetic cap under Duke Energy's preferred "cap-in-place" or "hybrid" closure methods, and will continue to leach pollutants into the surrounding waters for centuries to come.

4. In 2013, DEQ (then called DENR) filed enforcement actions in Superior Court regarding Duke Energy's unlawful groundwater pollution and leaks of wastewater from its coal ash pits. *State of North Carolina ex rel. N.C. DENR v. Duke Energy Carolinas, LLC*, 13 CVS

9352 & 13 CVS 14661 (Mecklenburg Co.); *State of North Carolina ex rel. N.C. DENR v. Duke Energy Progress, Inc.*, 13 CVS 4061 & 13 CVS 11032 (Wake Co.). Local conservation groups including the Association (“the Community Groups”) moved to intervene in that action as Plaintiff-Intervenors, and the Superior Court granted all of those motions. These Community Groups have been participating as full parties in the state litigation concerning the coal ash sites at issue in these contested cases.

5. In addition, the Association is the plaintiff in currently-pending federal litigation in the Middle District of North Carolina against Duke Energy for violations of the Clean Water Act and Duke Energy’s Clean Water Act discharge permits at the Mayo and Roxboro coal ash sites, which are at issue in these contested cases. *Roanoke River Basin Ass’n v. Duke Energy Progress, LLC*, No. 1:16-cv-607 (M.D.N.C.) (regarding Clean Water Act violations at Mayo); *Roanoke River Basin Ass’n v. Duke Energy Progress, LLC*, No. 1:17-cv-452 (M.D.N.C.) (regarding Clean Water Act violations at Roxboro). After DEQ announced the Closure Determinations, the federal court stayed the Clean Water Act cases pending a status conference in early August, at which the court will be updated on the status of these OAH challenges and Duke Energy’s closure plans, and will lay out the next steps for those cases.

6. Under the Coal Ash Management Act, N.C. Gen. Stat. § 130A-309.200 *et seq.*, “[a]t the election of the Department” of Environmental Quality, Duke Energy must close the ponds at these six sites in one of three ways: (1) by removing all the ash from the pits and moving it to a lined landfill or recycling it for concrete, (2) by leaving the ash in place with a cap over it, or (3) in compliance with the federal coal combustion residuals rule. *Id.* § 130A-309.214(a)(3). Consistent with DEQ’s election of closure method, Duke Energy must submit coal ash impoundment closure plans for these six sites to DEQ for the agency’s approval. *Id.*

The General Assembly recognized in CAMA that excavation of coal ash is the most effective way to close failing unlined coal ash impoundments and subjected cap-in-place closure to restrictive limitations. *Id.* §§ 130A-309.213(d)(1); 130A-309.214(a)(3)b, (c).

7. DEQ stated the schedule for evaluating closure options for each site in correspondence with Duke Energy in the fall of 2018. Under that schedule, Duke Energy would submit closure options reports and other materials for each site to DEQ by November 15, 2018. DEQ hosted a series of public meetings in communities near each of the coal ash sites during January 2019. And DEQ accepted written comments from the public through February 15, 2019. The Association participated in the public meetings and submitted written comments, including additional comments submitted after February 15 in response to late submissions by Duke Energy to the agency. As it had informed Duke it would do, DEQ completed its evaluation of the closure options by April 1, 2019.

8. On April 1, 2019, DEQ announced its Closure Determinations, requiring Duke Energy to submit closure plans by August 1, 2019, to excavate the coal ash from its unlined lagoons at these six sites. On April 26, Duke Energy filed a Petition for a Contested Case Hearing to dispute the Closure Determinations.

The Respondent-Intervenor

9. The Association seeks to intervene and participate with the full rights of a party as to the Mayo site.

10. The Roanoke River Basin Association (“the Association”) is a § 501(c)(3) nonprofit organization whose mission is to establish and carry out a strategy for the development, use, preservation, and enhancement of the resources of the Roanoke River basin in the best interest of present and future generations. The Association believes that basin resource

conservation can co-exist with managed economic growth. The Association's membership includes local governments, non-profit, civic and community organizations, regional government entities, businesses and individuals. As part of its mission, the Roanoke River Basin Association monitors activities that might negatively impact the quality of the water resources within the basin, including illegal pollution from the Mayo coal ash pond.

11. The Association and its members have been harmed by Duke Energy's coal ash pollution at the Mayo site. Members of the Association live near and use the waters in the vicinity of Duke Energy's leaking, unlined coal ash pit. These members fear damage to the waterways, wildlife, and the natural environment they use and enjoy, as well as contamination of groundwater that flows into streams, lakes, and rivers, as a result of the ongoing and potential future leaks of pollution from Duke Energy's unlined coal ash lagoons, which contain toxic pollutants including arsenic, mercury, and many other harmful contaminants. Many members are also concerned by the impact these discharges and the possibility of a catastrophic spill could have on property values.

12. For years, the Association and its members have been actively engaged in public hearings, meetings, and forums to urge state leaders and Duke Energy to take appropriate action to halt the ongoing, unlawful coal ash pollution at Mayo. The Community Groups and their members, including the Association and its members, have submitted written comments and participated in public meetings and hearings hosted by DEQ as part of the CAMA process since the law was enacted in 2014. Members of the Community Groups have also addressed the U.S. Commission on Civil Rights and the NC DEQ Secretary's Environmental Justice and Equity Board about the importance of cleaning up these coal ash sites.

13. Copies of affidavits demonstrating the interests of the Association and its members are attached as Exhibit 1.

ARGUMENT

14. With this motion, the Association seeks to intervene in this contested case to ensure the unsafe, polluting storage of coal ash in Duke Energy's unlined, leaking coal ash lagoons is fully removed, just as is being done at Duke Energy's eight other coal ash sites in North Carolina already.

15. Under the North Carolina Administrative Procedure Act ("APA"), citizens can intervene in contested cases. Rule 24 of the North Carolina Rules of Civil Procedure authorizes intervention as of right upon "timely application" when the applicant "claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." N.C. R. Civ. P. 24(a)(2); *see also* 26 N.C.A.C. 3.0117. Section 150B-23(d) of the APA provides that "any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24." N.C. Gen. Stat. §150B-23(d). As explained below, the Association meets all these requirements and is entitled to intervene in this proceeding as a full party.

The Association Is Entitled to Intervention With All Rights of a Party.

16. The Association may intervene as a full party because it has a longstanding interest, already recognized by multiple courts, in protecting the waters in its communities from Duke Energy's unsafe and polluting coal ash lagoons. The coal ash Duke Energy stores in these leaking, unlined pits is contaminating the surface waters and groundwater the Association and its members depend on and work to protect.

17. The Community Groups and their members, including the Association and its members, have worked for years to clean up Duke Energy's coal ash lagoons. In 2013, several of the Community Groups sent Clean Water Act notices of intent to file citizen enforcement actions against Duke Energy for unlawful pollution at multiple coal ash sites in North Carolina; in response, DEQ filed state actions against Duke Energy. In those state actions, the North Carolina Superior Court recognized that these groups were entitled to intervention with the full rights of parties to protect their interests in protecting their communities and waterways from Duke Energy's leaking coal ash lagoons. The Superior Court permitted individual Community Groups to intervene in the State's coal ash enforcement cases against Duke Energy as to the sites they represent. *See* Exhibit 2, Orders Granting Motions to Intervene (Nov. 18, 2013, Aug. 9, 2013, May 3, 2014), *State of North Carolina ex rel. N.C. DENR v. Duke Energy Carolinas, LLC*, 13 CVS 9352 & 13 CVS 14661 (Mecklenburg Co.); *State of North Carolina ex rel. N.C. DENR v. Duke Energy Progress, Inc.*, 13 CVS 4061 & 13 CVS 11032 (Wake Co.). After these orders were entered, Duke Energy stipulated to the intervention of the Association, which the Superior Court also approved. Exhibit 3, Stipulation Regarding Roanoke River Basin Association's Motion to Intervene, *State of North Carolina ex rel. N.C. DENR v. Duke Energy Progress, Inc.*, 13 CVS 11032 (Wake Co., Oct. 17, 2014). Thus, the Association's right to participate as a full party in litigation concerning these coal ash sites and their long-term fate has been recognized already by the Superior Court.

18. The Association also has filed federal citizen suits against Duke Energy for its violations of the Clean Water Act and its Clean Water Act discharge permits in North Carolina. The Association filed Clean Water Act suits against Duke Energy in 2016 and 2017 over the

Mayo and Roxboro coal ash sites in Person County; the Court recently stayed those suits pending an August status conference on the progress of this litigation in OAH.

19. Thus, the Association has a direct and substantial interest in participating in these proceedings to protect the waters surrounding the Mayo site by ensuring that Duke Energy removes its ash from the unlined ash basin, where it is sitting in the groundwater and leaking pollutants into groundwater and surface waters. The Association therefore has an interest in the status of DEQ's Closure Determinations, which require that Duke Energy prepare closure plans to excavate the ash. Whether these excavation Closure Determinations are upheld will directly affect the ability of the Association's members to protect and enjoy the waters in their communities. 26 N.C.A.C. 3.0117(a). The Association has advocated for cleanups of these sites in comment periods and public meetings under the N.C. Coal Ash Management Act since it was enacted in 2014. Most recently, the Association participated in the series of CAMA public meetings DEQ held in each of the communities around the six coal ash sites at issue in these challenges. Members of the Community Groups, including members of the Association, attended and made oral and written comments, and the Community Groups themselves submitted extensive written comments and expert analyses of the shortcomings of Duke Energy's submissions to the state. Exhibit 4. These groups also submitted comments to the North Carolina Environmental Justice Advisory Board; the board subsequently urged DEQ to require excavation at all six sites to protect the communities nearby.

20. Resolving these challenges without the Association's participation would impair its ability to protect its interests in protecting their communities and waterways from these coal ash sites. Duke Energy has filed these challenges to attempt to undermine DEQ's decision and gain approval for less-protective cap-in-place or hybrid closure methods at these sites. These

options would leave all the coal ash within the unlined ash basins and saturated in groundwater rather than removing it to dry, lined landfill storage or recycling—threatening the Association’s members’ interests in clean water for decades to come.

21. Without intervention, these contested cases would also impair the Association’s longstanding rights and interests in the progress and outcome of the ongoing state and federal litigation in which it is a party. As discussed above, the federal court has stayed the Association’s Clean Water Act litigation pending a status conference to focus efforts on these administrative challenges. In addition, the Superior Court has stated that it will take account of the CAMA administrative process in resolving the state enforcement actions; on April 29, the court stated that it would revisit the issue in an early August status conference. Thus, the duration and outcome of Duke Energy’s challenges to DEQ’s closure determinations may affect the Association’s rights and interests in the course of the currently-pending state enforcement actions and federal citizen suits in which the Association is a party.

22. Moreover, a prior OAH proceeding by Duke Energy without the participation of the Association and the other Community Groups has already impaired their interests, and illustrates the harms that result from excluding the Community Groups from coal ash dispute resolution. In 2015, Duke Energy attempted to transform a challenge to a penalty at a single coal ash site, which Duke filed in OAH, into a global settlement that purported to settle all the groundwater claims pending in the separate Superior Court enforcement actions covering all of Duke Energy’s North Carolina coal ash sites, including the six sites at issue here. To protect their interests, the Community Groups were forced to seek Superior Court review of the OAH order approving that overbroad settlement. Only as a result of the Community Groups’ involvement, the OAH order was subsequently modified to confine it to the proper scope of the

penalty challenge. Accordingly, the Association and the other Community Groups must be allowed to participate in the current Duke Energy challenges and any potential mediation or settlement efforts to ensure that any resolution of these challenges does not harm these groups or their members' interests.

23. In addition to the Association's unique interests in protecting these coal ash sites, the Association will provide valuable information. The Association's experts have evaluated the hydrology and geochemistry of these coal ash sites and can present important information to OAH about Duke Energy's coal ash pollution and about the computer modeling Duke Energy has prepared in an attempt to justify the less-protective cap-in-place and hybrid closure methods. The Association submitted the conclusions of those experts to DEQ, and they are part of the administrative record of DEQ's decision. By participating as an intervenor, the Association can present and explain those important issues.

24. The Association and the other Community Groups also may play a useful role in resolving claims and reaching agreement where possible. In the state enforcement actions, Community Group intervenors and Duke Energy worked together to develop a framework for resolving claims at seven of the 14 coal ash sites at issue. Under the partial summary judgment orders that the Superior Court entered as a result (in some cases over the objection of DEQ), Duke Energy is required to excavate the ash from those seven sites. In these proceedings, allowing the Association and the other Community Groups to intervene as parties will allow them to protect their interests in resolving claims through any potential settlement.

25. Respondent DEQ does not adequately represent the Association's interests in this matter, and has consented to the Association's intervention. As an agency of the State, DEQ represents a different and much less focused set of interests than the Association, including those

of Duke Energy (a state-regulated utility), and has wide-ranging responsibilities, including issuing permits to industrial applicants, such as the environmental permits for Duke Energy's facilities. The Association, however, represent its members, who live and own property near and downstream from Duke Energy's unlined, leaking coal ash lagoons and who use the adjacent lakes, rivers, and streams. The Association is focused on protecting specific communities and waters from pollution.

26. Moreover, while DEQ has now determined that excavation is required at the Mayo coal ash site, as the Association has long advocated, in the past DEQ has acted in direct opposition to the Community Groups regarding coal ash. For years, DEQ failed to enforce water pollution and dam safety laws at these coal ash sites, despite clear documentation of leaks in the earthen dams and increasing contamination of groundwater and surface water; DEQ subsequently filed state court actions in 2013 to attempt to block Clean Water Act citizen suits in response to notice letters sent by some of the Community Groups; DEQ proposed a settlement of several of these enforcement cases that would have imposed only a token fine and more study, a proposal it was forced to withdraw after the Dan River coal ash spill and the announcement of a federal grand jury investigation into Duke Energy's coal ash practices; DEQ attempted to stay and dismiss its own state enforcement actions multiple times; DEQ entered into the 2015 OAH settlement that purported to eliminate pending groundwater claims from the state enforcement actions; and DEQ opposed Superior Court orders requiring coal ash cleanups at other sites in North Carolina. Thus, DEQ's interests regarding these coal ash sites are not directly aligned with the Association, and all parties would benefit from the Association's participation.

27. In sum, to advance the Association's interests in protecting the lakes, rivers, streams, and groundwater their members use and rely on, and in ensuring that Duke Energy

excavates the coal ash at these sites in order to eliminate the long-term risks posed by its unlined, leaking lagoons, the Association must be allowed to intervene as a full party in this action.

28. For these reasons, the Association is entitled to intervene in this proceeding as of right pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure and as a party pursuant to 26 N.C.A.C. 3.0117(d)(2).

29. In the alternative, the Association also is entitled to permissive intervention pursuant to Rule 24(b)(2) of the North Carolina Rules of Civil Procedure and Section 150B-23(d) of the North Carolina Administrative Procedure Act. A moving party seeking to intervene under Rule 24(b)(2) shall be permitted to intervene in an action “when an applicant’s claim or defense and the main action have a question of law or fact in common.” N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). The Association is a party to currently-pending state and federal litigation concerning Duke Energy’s coal ash pollution of groundwater and surface waters at Mayo and Roxboro, and is seeking removal of the ash from Duke Energy’s lagoons in those proceedings in order to stop the ongoing, unlawful pollution. The issues in this proceeding, which impact the Association’s abilities to fulfill their missions to protect the people and the water in their communities, involve common questions of law and fact. For example, the CAMA reports and data collected by Duke Energy and submitted to DEQ form the primary basis for the expert reports and testimony by all parties in the state enforcement actions in which the Association is participating as a party, as well as in the pending Clean Water Act citizen suits brought by the Association. And the state actions in which the Association is an intervenor are enforcing the state’s 2L groundwater rules, which are also at issue in these CAMA contested cases.

30. Respondent DEQ consents to the relief requested under Rule 24(b). Petitioner Duke Energy has not yet taken a position on this motion. However, on April 29, Duke Energy

urged the Superior Court not to proceed with the pending enforcement actions, arguing that the public has a right to be involved in these OAH challenges first. Moreover, in the state enforcement actions, after unsuccessfully opposing intervention by several of the Community Groups, Duke Energy eventually stipulated to intervention by the Association as to the Mayo and Roxboro coal ash sites. Exhibit 3. Subsequently, Duke Energy joined with the Community Groups in moving for partial summary judgment to enter binding cleanup orders for seven of its coal ash sites in North Carolina. And recently, Duke Energy argued to the federal court that the Association's pending Clean Water Act enforcement actions should be stayed on the grounds that "DEQ's determination illustrates that Plaintiff's request for excavation will be dealt with through the administrative process." Exhibit 5 at 4. Thus, Duke Energy has argued to the federal court that the Association's interests are very much at stake in this proceeding. Duke Energy cannot credibly argue that the Association should not participate fully in these cases.

The Motion to Intervene is Timely.

31. The Association's Motion to Intervene satisfies the timeliness requirement of Rule 24. The Association's Motion to Intervene likewise satisfies the timeliness requirement of 26 NCAC 03 .0117, which states that "Timeliness will be determined by the administrative law judge in each case based on circumstances at the time of filing."

32. To determine whether a motion to intervene is timely, the court looks to "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (quoting *Procter v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999)). In practice, "a motion to intervene is rarely denied

as untimely prior to the entry of judgment.” *Taylor v. Abernathy*, 149 N.C. App. 263, 267-68, 560 S.E.2d 233, 236 (2002) (quoting *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859-60 (2001)).

33. The Association’s Motion to Intervene is timely. The Association moved to intervene within seven days after Duke Energy filed its contested case petition on April 26, 2019. Upon information and belief, prehearing statements have not been filed, no discovery has been conducted by Petitioner or Respondent, and mediation has not been conducted. No hearing on the merits has taken place, let alone any entry of judgment.

34. Because intervenors have moved to intervene as early as possible in this matter, before discovery or motions practice has gotten underway, the proposed intervention will not unduly delay this litigation, nor will it unduly delay or prejudice the adjudication of the rights of the existing parties.

35. Finally, the Association will be prejudiced if this motion is denied because, as detailed above, it will be unable to protect its and its members’ interests in ensuring these ash ponds are closed safely. The Association needs to participate now to protect its interests in securing a speedy resolution to this challenge and ensuring these cleanups in its members’ communities move forward properly and as promptly as possible.

36. Furthermore, the Association needs to participate in these proceedings to prevent prejudice to its pending state and federal litigation.

37. Accordingly, for the reasons set forth above, this motion to intervene is timely.

Conclusion

38. For the reasons given above, the Association requests that the Court grant its Motion to Intervene as respondent-intervenor with all the rights of a party in this matter.

39. The Association has not attached a responsive pleading as the OAH Rules do not require responsive pleadings to accompany a Motion to Intervene. *See* 26 N.C.A.C. 3.0117. Following receipt of an Order allowing the Motion to Intervene, the Association will file a Prehearing Statement according to the schedule set by the Court. The Association respectfully submits a Proposed Order granting intervention, which is attached hereto as Exhibit 6.

This 3rd day of May, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the foregoing Motion to Intervene was sent to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

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This 3rd day May, 2019.

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