SOUTHERN ENVIRONMENTAL LAW CENTER

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September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Allen Steam Station in Belmont, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), the Catawba Riverkeeper Foundation and Waterkeeper Alliance (the "Conservation Groups") through their counsel, the Southern Environmental Law Center, give Duke Energy Carolinas, LLC (Duke Energy) notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Conservation Groups plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding High and Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging High Potential Hazard and Significant Potential Hazard coal ash dams at its Allen Steam Station ("Allen") in Belmont, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Allen coal ash dams fail, contact information for responsible personnel when a coal ash disaster occurs at Allen, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its High Potential Hazard and Significant Potential Hazard coal ash dams and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Allen

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Allen dams, Duke Energy is committing open dumping with respect to its Allen coal ash pits. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The High and Significant Potential Hazards Posed by the Coal Ash Dams at Allen

Duke Energy stores over 16 million tons of coal ash in two unlined pits (the Active Ash Basin and the Retired Ash Basin) at Allen on the banks of Lake Wylie and the Catawba River in Belmont, North Carolina. The lake is an important regional recreation and economic resource. Members of the Conservation Groups and others own property on Lake Wylie and the Catawba

River and use the lake and river for swimming, fishing, boating, and waterskiing, among other uses. Communities downstream, including Belmont and Rock Hill, South Carolina, rely upon the Lake Wylie and the Catawba River for drinking water, and Lake Wylie and the Catawba River are important resources for recreation, fishing, industry, agriculture, and tourism. Many families live around and near the Duke Energy coal ash lagoons.

These 16 million tons of coal ash and other pollutants are held back from Lake Wylie and the Catawba River only by two old earthen dams. The Active Ash Basin's dam is 70 feet high and was built almost 45 years ago; the Retired Ash Basin's dam is 50 feet high and was built 60 years ago. In addition, the Active Ash Basin dam has behind it a 158-acre reservoir filled with over 71 million gallons of contaminated water. Apart from the coal ash slurry, groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin, and the coal ash in the Retired Ash Basin also leaches pollutants. Thus, the dams for these lagoons hold back over 16 million tons of coal ash and 71million gallons of coal ash polluted water from Lake Wylie and the Catawba River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-7 (July 12, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-all-annl-imp-2017.pdf?la=en.

According to EPA, the berms at Allen are partially constructed on top of coal ash deposits. A 300-foot long section of the east dike of the Allen coal ash lagoon has failed in the past, as has a section of the north dike. Moreover, a landfill has been constructed over the retired ash basin. A failure of the retired ash basin dam would likely cause not only the contents of the retired ash pond to empty into Lake Wylie, but the retired ash basin landfill as well.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including ash transport water, coal pile runoff, chemical metal cleaning wastes, and low volume waste streams from the Allen facility. These substances contain metals including arsenic, barium, cobalt, iron, manganese, strontium, and zinc. All these wastes and pollutants would be discharged into Lake Wylie and the Catawba River in the event of a failure of the coal ash dams at Allen.

Duke Energy's testing of the coal ash in the Allen pits and the polluted water saturating the ash reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic (over 130 times the standard), barium, beryllium, boron, chloride, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium, zinc, total suspended solids, and total dissolved solids. *E.g.*, Duke Energy; Allen Comprehensive Site Assessment at Tables 7-2, 7-5, 7-6.

At least 16 million tons of these polluting substances and 64 million gallons of water polluted with them are held back from Lake Wylie and the Catawba River only by two old dams, 45 and 75 feet high, built decades ago, with a history of failures.

And these dams leak. Coal-ash polluted water flows out of the dams all along the eastern edge of the Allen coal ash lagoons directly into Lake Wylie, and Duke Energy has even constructed illegal French drain ditches to carry the flow down to Lake Wylie. Sampling by the Conservation Groups has found elevated levels of coal ash contaminants in these dam leaks.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Allen lagoons. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on Dam Breach Analysis and Inundation Mapping conducted in 2012 and verification in 2015 by Duke Energy consultants, Duke Energy published its determination that the Hazard Potential Classification for the Allen Active Basin is High Potential Hazard, and based on the review by Duke Energy consultants in 2014 and 2014, Duke Energy determined that the classification for the Retired Ash Basin is Significant. https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-all-haz-class-aab.pdf and https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-all-haz-class-rab.pdf.

A High Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the both Allen coal ash dams "High" hazard due to the contents of the ponds and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Allen coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Allen 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq*.

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessment for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if it is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life" or a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan

by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Allen coal ash lagoons are High Hazard Potential and Significant Hazard Potential coal ash lagoons, Duke Energy was required to publish by April 17, 2017 Emergency Action Plans for those lagoons that comply with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Allen coal ash lagoons, which purports to address the Active and the Retired Ash Basins, and a revision on June 29, 2017. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-aln-eap-00-0003.pdf?la=en; https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-aln-eap-00-0003-rev6.pdf?la=en. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. These maps are ***the*** essential element of the Emergency Action Plan, because they inform the public of the extent of the risk to the public – including the risk of death -- and natural resources posed by the High Hazard Potential and Significant Hazard Potential coal ash lagoons and lay out what areas will be affected by a failure of the coal ash lagoons..

Duke Energy apparently has prepared such a map for the Active Ash Basin dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). No map at all is included for the Retired Ash Basin and its dam. It is impossible to determine if the Retired Ash Basin is encompassed by the map for the Active Ash Basin dam, because that map is blacked out. Further, Appendix B-4 states that an "Allen Station Inundation Map" is attached to the Emergency Action Plan, but it is not attached to the Plan published on the CCR website, and the Plan provides an electronic link to that map, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7 and S.C. Code § 30-4-45 (B) and Code of Regs. 61-117. But those state statutes give Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its High Potential Hazard and Significant Hazard Potential coal ash lagoons and structures. Those statutes are exceptions to the obligations of North Carolina and South Carolina state agencies to provide materials to the public under North Carolina's Public Records Act and South Carolina's Freedom of Information Act. However, Duke Energy is not a North Carolina or South Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act or the South Carolina Freedom of Information Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina or South Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 5-9) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 24-26). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 58-59). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its

open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and South Carolina by Duke Energy's aging, leaking, and High Hazard Potential and Significant Hazard Potential earthen dams and lagoons at Allen. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Allen is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Allen.

PERSONS GIVING NOTICE

The Catawba Riverkeeper Foundation is a § 501(c)(3) non-profit public interest organization with members in North Carolina and South Carolina and operating in the 24 counties of the Catawba/Wateree River watershed in North and South Carolina. The Catawba Riverkeeper Foundation's mission is to "advocate[] for the health, protection and enjoyment of the Catawba River watershed." The Foundation works to improve water quality through monitoring and conservation advocacy, and to increase public awareness through education and partnerships with other community and conservation groups.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen action on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, lakes and coastlines in the Americas, Europe, Australia, Asia, and Africa.

The Conservation Groups and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Conservation Groups and their members recreate, fish, boat, live, derive drinking water, and own property on Lake Wylie and the Catawba River in the vicinity of and downstream from Duke Energy's Allen coal ash lagoons. They fear contamination of drinking water, wildlife, and river water and the harm to their property and the possible loss of life (including themselves and their families and friends) from failures of Duke Energy's coal ash lagoons and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards,

risks, and dangers of Duke Energy's coal ash lagoons at Allen. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon and other impoundments. They also need to know the impact that the failure of Duke Energy's Allen coal ash lagoons and other structures will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoons, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of Lake Wylie and the Catawba River. In addition, the Conservation Groups themselves and their members gather, analyze, and make use of information concerning the Catawba River and Lake Wylie and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Conservation Groups and their members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Allen; to inform the public and their members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dams, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Sam Perkins
Catawba Riverkeeper Foundation
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Charlotte, NC 28202
(704) 679-9494
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Waterkeeper Alliance
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pharrison@waterkeeper.org

The Conservation Groups believe that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Conservation Groups are prepared to file suit in the United States District Court for the Western District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Jill Westmoreland Rose, U.S. Attorney, Western District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4

Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
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Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Asheville Steam Plant in Buncombe County, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Progress, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), Mountain True and Waterkeeper Alliance, Inc. (the "Conservation Groups"), through their counsel, the Southern Environmental Law Center, gives Duke Energy Progress, LLC (Duke Energy), notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Conservation Groups plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding High Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its High Potential Hazard coal ash dams at its Asheville Steam Station ("Asheville"), on the French Broad River in Buncombe County, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Asheville coal ash dams fail, contact information for responsible personnel when a coal ash disaster occurs at Asheville, and other information concerning an emergency response. Duke Energy has failed to comply with these requirements by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its High Potential Hazard coal ash dams and undercutting the ability of the public to deal with a coal ash disaster if and when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that has failed to release this information, and, to our knowledge, Duke Energy is the only utility in the country that has failed to release this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping At Asheville

Because Duke Energy has violated the Rule by failing to release this emergency information and the risks from its Asheville dams, Duke Energy is committing open dumping with respect to its Asheville coal ash pits. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The High Potential Hazards Posed by the Coal Ash Dams at Asheville

Duke Energy stores over 2.7 million tons of coal ash in unlined pits at Asheville above the French Broad River in Buncombe County, North Carolina. The French Broad River is an important regional recreation and economic resource. Members of The Conservation Groups and others own property on the French Broad River, operate businesses on the French Broad

River, and use the river for swimming, fishing, and boating, among other uses. Pigeon Forge, Tennessee, a downstream community, relies upon the French Broad River for drinking water, and other communities including Asheville, Hot Springs, and Marshall, NC rely on the river as an important resource for recreation, fishing, industry, agriculture, and tourism. Finally, Interstate 26 runs between the High Potential Hazard dams and the river and dam failure would very likely be fatal for anyone traveling on the busy highway.

These 2.7 million tons of coal ash and other pollutants are contained only by one old earthen dam: the 1964 Ash Pond Dam, which is 100 feet high and was built over 50 years ago. In addition, on the site is the 1982 Ash Pond Dam, which is now 58 feet high and was built 35 years ago. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-7 (August 17, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-ash-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also discharged other wastewater streams and wastes into the pits, including ash transport water, coal pile runoff, storm water runoff, various low volume substances (such as boiler blowdown, backwash from the water treatment processes, ash hopper seal water, plant drains), and air preheater cleaning water and chemical metal cleaning wastewater. Additionally, the plant's FGD treatment system is located within the footprint of the 1964 pond. These waste streams commonly contain metals including arsenic, barium, cobalt, iron, manganese, strontium, and zinc. All these wastes and pollutants would be discharged into the French Broad River in the event of a failure of the coal ash dams at Asheville.

Duke Energy's testing of the coal ash in the Asheville pits reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic (over 130 times the standard), barium, boron, chloride, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium, zinc, and total dissolved solids. *E.g.*, Duke Energy, Asheville Comprehensive Site Assessment at Tables 7-4, 7-8. In addition, the coal ash lagoon impoundment contains radioactive pollutants including radium-226 and -228, as well as uranium-238. *Id.* at Table 10-7.

And these dams have leaked. For years, "seeps" of coal-ash polluted water flowed out of the lagoons into tributaries of the French Broad River and/or the river itself. Sampling has found elevated levels of coal ash contaminants in these dam leaks including barium, boron, cobalt, iron, manganese, nickel, molybdenum, chloride, sulfates, and total dissolved solids arsenic, boron, cadmium, chromium, hexavalent chromium, cobalt, lead, nickel, sulfate, and thallium.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Asheville lagoons. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on an Inundation Study and Hazardous Classification Assessment conducted in 2011 and 2015 by Duke Energy consultants, Duke Energy published determinations that the Asheville 1964 Ash Pond and the 1982 Ash Pond both have a High Hazard Potential Classification. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-ash-haz-class-1964.pdf?la=en; https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-ash-haz-class-1982.pdf?la=en.

A High Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." 40 C.F.R. § 257.53.

The state of North Carolina and EPA have rated the Asheville coal ash dams "High" hazard due to the contents of the lagoons and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Asheville coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina, including crimes committed at Asheville. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges, including specifically those flowing from the Asheville coal ash lagoons. 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina (including Asheville), and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." *Id.*

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that fails to disclose essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Asheville coal ash lagoons are High Hazard Potential coal ash lagoons, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan for those lagoons that complies with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Asheville coal ash lagoons. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-asv-eap-00-0002.pdf?la=en. However, that supposed Emergency Action Plan fails to disclose dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. This map is ***the*** essential element of the Emergency Action Plan, because it informs the public of the extent of the risk to the public and natural resources posed by the High Hazard Potential coal ash lagoons and lay out what areas will be affected by a failure of the coal ash lagoons.

Duke Energy apparently has prepared such a map for the Asheville coal ash dams, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). Further, Appendix B-4 states that "the Asheville Steam Station Inundation Maps" are attached to the Emergency Action Plan, but they are not attached to the Plan published on the CCR website, and the Plan provides electronic links to those maps, but the links are blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent reason is a citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoons and structures. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is failing to comply with the law designed to protect public safety, thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 6-9) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 25-27). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 53). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent reason offered by Duke Energy to excuse its violation of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information – including the threat to human life -- to which all citizens are legally entitled.

For the safety and wellbeing of the public and the protection of human life and our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Asheville is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Asheville.

PERSONS GIVING NOTICE

MountainTrue is a § 501(c)(3) non-profit public interest organization with members throughout western North Carolina and the French Broad River watershed. MountainTrue champions resilient forests, clean waters and healthy communities in Western North Carolina. MountainTrue envisions Western North Carolina with thriving communities that are connected to and help sustain a healthy natural environment. To achieve this, MountainTrue will foster and empower advocates throughout the region to be engaged in policy and project advocacy, outreach and education, and on the ground projects. MountainTrue values the integrity of natural systems – air, land, water, and native plants and animals – and believes in protecting and restoring them for the benefit of all generations. MountainTrue values mountain communities that are vibrant, livable, and respectful of their connection to and dependence on the region's natural environment; the unique environment of the Western North Carolina mountains; and citizen and community engagement in principled advocacy. MountainTrue promotes and clean energy – both of which have a high impact on the environmental health and long-term prosperity of our region. Among other things, MountainTrue is the home of the French Broad Riverkeeper program, which advocates for cleaner water, awareness and education, improved access and broadened recreational opportunities within the French Broad River Basin.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen action on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, lakes and coastlines in the Americas, Europe, Australia, Asia, and Africa.

The Conservation Groups and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Conservation Groups and their members recreate, fish, boat, live, operate businesses, and own property on the French Broad River in the vicinity of and downstream from Duke Energy's Asheville coal ash lagoons. They fear contamination of river water and wildlife and the harm to their property and the possible loss of life (including themselves and their families and friends) from the failure of Duke Energy's coal ash lagoons and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoons at Asheville. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoons. They also need to know the impact that the failure of Duke Energy's Asheville coal ash lagoons will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoons, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of the French Broad River. In addition, The Conservation Groups themselves and their members gather, analyze, and make use of information concerning the French Broad River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Conservation Groups and their members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Asheville; to inform

the public and its members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dams, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Julie Mayfield, Co-Director
Mountain True
29 N. Market Street, Suite 610
Asheville, NC 28801
Phone: (828) 258-8737
julie@mountaintrue.org

Pete Harrison
Waterkeeper Alliance
180 Maiden Lane
Suite 603
New York, NY 10038
Phone: (212) 747-0622
pharrison@waterkeeper.org

The Conservation Groups believe that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, The Conservation Groups are prepared to file suit in the United States District Court for the Western District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, The Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Jill Westmoreland Rose, U.S. Attorney, Western District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 919-967-1450

601 WEST ROSEMARY STREET, SUITE 220
CHAPEL HILL, NC 27516-2356

Facsimile 919-929-9421

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Belews Creek Steam Station in Stokes County, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), Appalachian Voices through its counsel, the Southern Environmental Law Center, gives Duke Energy Carolinas, LLC (Duke Energy) notice of its intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, Appalachian Voices plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding High Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging High Potential Hazard coal ash dam at its Belews Creek Steam Station ("Belews") in Stokes County, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Belews coal ash dam fails, contact information for responsible personnel when a coal ash disaster occurs at Belews, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its High Potential Hazard coal ash dam and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Belews

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Belews dam, Duke Energy is committing open dumping with respect to its Belews coal ash pit. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The High Potential Hazards Posed by the Coal Ash Dam at Belews

Duke Energy stores over 12 million tons of coal ash in an unlined pit (the Active Ash Basin) at Belews on the banks of Belews Lake (also known as West Belews Creek) and Little Belews Creek in Stokes County, North Carolina, both of which flow into the Dan River. The creek, the lake, and the river are important resources for recreation, fishing, industry, agriculture, and tourism. Many families live around and near the Duke Energy coal ash lagoons. Members

of Appalachian Voices and others own property on the creek, the lake, and the river, and use these water resources for swimming, fishing, boating, and waterskiing, among other uses. Communities downstream, including Madison and Eden, North Carolina, and Danville and Halifax County, Virginia, rely upon the Dan River for drinking water.

These 12 million tons of coal ash and other pollutants are held back from Belews Lake, Little Belews Creek, and the Dan River only by an old earthen dam. The Active Ash Basin's dam is 135 feet high and was built 46 years ago. In addition, the Active Ash Basin dam has behind it a 300-acre reservoir filled with 3130 acre-feet of contaminated water. Apart from the coal ash slurry, groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin. Thus, the dam for these lagoon holds back over 12 million tons of coal ash and 3130 acre-feet of coal ash polluted water from Belews Lake, Little Belews Creek, and the Dan River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-7 (August 17, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-bc-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including industrial waste streams from the chemical holding pond, power house and yard holding sumps, coal yard sumps, stormwater and remediated groundwater, and treated scrubber wastewater from the Belews facility. These substances contain metals including aluminum, arsenic, barium, boron, bromide, chloride, chromium (total and hexavalent), copper, iron, manganese, mercury, molybdenum, nickel, radionuclides, selenium, sulfate, strontium, TDS, vanadium, and zinc. All these wastes and pollutants would be discharged into Belews Lake, Little Belews Creek, and the Dan River in the event of a failure of the coal ash dams at Belews.

Duke Energy's testing of the coal ash in the Belews pits and the polluted water saturating the ash reveals high levels of toxic pollutants, including aluminum, arsenic, barium, boron, bromide, chloride, chromium (total and hexavalent), copper, iron, manganese, mercury, molybdenum, nickel, radionuclides, selenium, sulfate, strontium, TDS, vanadium, and zinc. *E.g.*, Duke Energy, Belews Creek Comprehensive Site Assessment at Tables 7-2, 7-4, and 7-5.

At least 12 million tons of these polluting substances and 3130 acre-feet of water polluted with them are held back from Belews Lake, Little Belews Creek, and the Dan River only by and old dam, 135 feet high, built decades ago.

And this dam leaks. Coal-ash polluted water flows out of the dam directly into Belews Lake and Little Belews Creek and then into the Dan River, and Duke Energy has even constructed engineered structures to carry these illegal flows out of the dams to surface waters. Sampling by Duke Energy's consultants has found elevated levels of coal ash contaminants in these dam leaks.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

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Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Belews lagoon. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on Dam Breach Analysis and Inundation Mapping conducted in 2012 and verification in 2015 by Duke Energy consultants, Duke Energy published its determination that the Hazard Potential Classification for the Belews Creek Active Basin is High Potential Hazard. https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-bc-haz-class-aab.pdf.

A High Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." 40 C.F.R. § 257.53.

The state of North Carolina and EPA has rated the Belews coal ash dam "High" hazard due to the contents of the lagoon and the potential environmental damage in the event of a failure.

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Duke Energy's operating companies, including the owner and operator of the Belews coal ash lagoon, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Belews 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric

Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq*.

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessment for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if it is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life" or a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or

exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Belews coal ash lagoon is a High Hazard Potential Hazard Potential coal ash lagoon, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan for the lagoon that complies with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Belews coal ash lagoon. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-aln-eap-00-0003.pdf?la=en. A revision of that Plan was published on Duke Energy's CCR Compliance website on June 29, 2017. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-blc-eap-00-0002-rev7.pdf?la=en. That Emergency Action Plan addresses the Belews coal ash lagoon dam and the Pine Hall Road Embankment, which has not been assigned a hazard potential classification. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. These maps are ***the*** essential element of the Emergency Action Plan, because they inform the public of the extent of the risk to the public – including the risk of death -- and natural resources by the High Hazard Potential and Significant Hazard Potential coal ash lagoons and lay out what areas will be affected by a failure of the coal ash lagoons.

Duke Energy apparently has prepared such a map for the Active Ash Basin dam, but has omitted it from the Emergency Action Plan that has been published and made available to the public (p. 2). No map at all is included in the body of the Plan. Further, Appendix B-4 states that a "Belews Creek Steam Station Inundation Map" is attached to the Emergency Action Plan, but it is not attached to the Plan published on the CCR website, and the Plan provides an electronic link to that map, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7 and Virginia Code § 2-2-3705.2 (4). But those state statutes statute give Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its High Hazard Potential coal ash lagoons and structures. That statute is an exception to the obligations of North Carolina and Virginia state agencies to provide materials to the public under North Carolina's Public Records Act and Virginia's Freedom of Information Act. However, Duke Energy is not a North

Carolina state agency or a Virginia state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act or the Virginia Freeman of Information Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina or Virginia state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 6-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 26-28). Duke Energy's revision released June 29, 2017, keeps more information from the public, redacting the name of their dam engineering consultant, AECOM, which was previously visible (pp. 26-28). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 60). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and Virginia by Duke Energy's aging, leaking, and High Hazard Potential earthen dam and lagoon at Belews.

Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Belews is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Belews.

PERSONS GIVING NOTICE

Appalachian Voices is a § 501(c)(3) non-profit public interest organization with members in North Carolina and Virginia, around and downstream of Duke Energy's Belews Creek coal ash site. Appalachian Voices works to protect and restore the integrity of the land, air and water of central and southern Appalachia and to defend the region from harmful energy practices including polluting and dangerous coal ash storage. Appalachian Voices promotes clean energy sources and practices that generate local jobs and community wealth and that sustain Appalachia's incomparable natural heritage. With offices in Boone N.C., Charlottesville and Wise County, Va., and Knoxville, Tenn., Appalachian Voices cultivates a broad citizen movement, connecting people from all walks of life to achieve a common purpose of protecting beloved mountains and rivers, forests and farmland, and our children's future. Combining grassroots organizing, policy advocacy, cutting-edge technical expertise and legal action, and working at all levels of government, Appalachian Voices effects positive change for the region. Its bi-monthly newspaper, The Appalachian Voice, reaches an estimated 150,000 readers across the country with stories of the people who are working to celebrate and protect the region.

Appalachian Voices and its members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. Appalachian Voices and its members recreate, fish, boat, live, derive drinking water, and own property on Belews Lake and the Dan River in the vicinity of and downstream from Duke Energy's Belews coal ash lagoon. They fear contamination of drinking water, wildlife, and river water and the harm to their property and the possible loss of life (including themselves and their families and friends) from failures of Duke Energy's coal ash lagoon and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoon at Belews. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon. They also need to know the impact that the failure of Duke Energy's Belews coal ash lagoon and other structures will have on the resources and property they own, use, enjoy, and cherish. This information will allow

them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failure of Duke Energy's coal ash lagoon, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of Belews Lake and the Dan River. In addition, Appalachian Voices itself and its members gather, analyze, and make use of information concerning Belews Lake, Little Belews Creek, and the Dan River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. Appalachian Voices and its members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Belews; to inform the public and Appalachian Voices members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoon, dams, pollution, and safety practices.

The name, address, and phone number of the person giving notice are:

Amy Adams, North Carolina Programs Manager
Appalachian Voices
589 West King Street
Boone, NC 28607
(828) 262-1500

Appalachian Voices believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, Appalachian Voices is prepared to file suit in the United States District Court for the Middle District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, Appalachian Voices intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Sandra J. Hairston, Acting U.S. Attorney, Middle District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Cliffside Steam Station/Rogers Energy Complex in Mooresboro, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), Mountain True through its counsel, the Southern Environmental Law Center, gives Duke Energy Carolinas, LLC (Duke Energy) notice of its intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, Mountain True plans to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding High Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its High Potential Hazard coal ash dams at its Rogers Energy Complex, formerly known as the Cliffside Steam Station ("Cliffside"), on the Broad River in Mooresboro, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Cliffside coal ash dams fail, contact information for responsible personnel when a coal ash disaster occurs at Cliffside, and other information concerning an emergency response. Duke Energy has failed to comply with these requirements by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its High Potential Hazard coal ash dams and undercutting the ability of the public to deal with a coal ash disaster if and when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that has failed to release this information, and, to our knowledge, Duke Energy is the only utility in the country that has failed to release this information.

Further, there is no basis for Duke Energy to withhold this information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Cliffside

Because Duke Energy has violated the Rule by failing to release emergency information and the risks from its Cliffside dams, Duke Energy is committing open dumping with respect to its Cliffside coal ash pit. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The High Potential Hazards Posed by the Coal Ash Dams at Cliffside

Duke Energy stores approximately 7.4 million tons of coal ash in unlined pits at Cliffside on the banks of Broad River in Mooresboro, North Carolina. The Broad River is an important regional recreation and economic resource. Members of MountainTrue and others own property on the Broad River and use the river for swimming, fishing, and boating, among other uses. Communities downstream, including Shelby, North Carolina, and communities in Cherokee,

Union, Lexington, and Richland Counties in South Carolina rely upon the Broad River for drinking water, and as an important resource for recreation, fishing, industry, agriculture, and tourism. In Cleveland County, NC, an extensive greenway was developed along the river, just downstream from the coal ash pond.

These 7.4 million tons of coal ash and other pollutants are contained only by five old earthen dams: the Active Ash Basin Downstream Dam, which is 120 feet high; the Active Ash Basin Upstream Dam, which is 60 feet above the exterior toe of the dam; the Inactive Ash Basin 1-4 Dam, which is 38 feet high; the Inactive Ash Basin #5 Main Dam, which is 97 feet high; the Inactive Ash Basin #5 Saddle Dam, which is 42 feet high; and the Inactive Ash Basin #5 Roadway Embankment Dike, which is 12 feet high. The dam for Basin 1-4 was built over 75 years ago, and the dams for the other basins were built over 40 years ago. In addition, the old Active Basin dams have behind them an 86-acre reservoir filled with over 309 million gallons of contaminated water. Apart from the coal ash slurry, groundwater and rain water flow into the pits, where the coal ash leaches metals and other toxic pollutants into the waters in the Active Basin reservoir, and where pollutants leach from the coal ash in the other lagoons. Thus, the dams for these lagoons hold back over 7.4 million tons of coal ash and 309 million gallons of coal ash polluted water from the Broad River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 5-10 (June 23, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also discharged other wastewater streams and wastes into the pits, including treated flue gas desulphurization ("FGD") wet scrubber wastewater, metal cleaning waste, chemical metal cleaning wastes, coal pile runoff, ash transport water, domestic wastewater, landfill leachate, cooling tower blowdown, and limestone and gypsum stacking area runoff. These substances contain metals including arsenic, barium, cobalt, iron, manganese, strontium, and zinc. All these wastes and pollutants would be discharged into the Broad River in the event of a failure of the coal ash dams at Cliffside.

Duke Energy's testing of the coal ash in the Cliffside pits and the polluted water saturating the ash reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic (120 times the standard), barium, boron, beryllium, cadmium, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium, zinc, total dissolved solids, and total suspended solids. *E.g.*, Duke Energy, Cliffside Comprehensive Site Assessment at Tables 7-2, 7-4, 7-5.

At least 7.4 million tons of these polluting substances and 309 million gallons of water polluted with them are held back from the Broad River only by old earthen dams, ranging in height from 12 to 120 feet, built decades ago.

In addition, these dams have had serious structural problems. According to the 2016 Annual Surface Impoundment Report, in 2015 and 2016 some of these dams – including the Active Ash Basin dams that held back over 305 gallons of coal-ash polluted water -- had conditions that "represent a threat to the structural integrity of the dam." Duke Energy, Coal

Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 10-12 (July 7, 2016), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-annl-imp-2016.pdf?la=en. According to the most recent Annual Report, while in the past year the coal ash has been removed from behind the Inactive Ash Basin 1-4 Main Dam, there remain multiple threats to the structural stability of the dam. Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 10-12 (June 23, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-annl-imp-2017.pdf?la=en.

And this dam and these impoundments leak. At least 35 "seeps" of coal-ash polluted water flow out of the impoundment directly into the Broad River or its tributaries. Sampling has found elevated levels of coal ash contaminants in these dam leaks including arsenic, boron, cadmium, chromium, hexavalent chromium, cobalt, lead, nickel, sulfate, and thallium.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Cliffside lagoons. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on an Inundation Study and Hazardous Classification Assessment conducted in 2011 and 2015 by Duke Energy consultants, Duke Energy published determinations that the Cliffside Active Basin, the Inactive Units 1-4 Basin, and the Inactive Unit 5 Basin all have a High Hazard Potential Classification . https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-haz-class-aab.pdf?la=en; https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-haz-class-iu14b.pdf?la=en; https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cliff-haz-class-iu5ab.pdf?la=en.

A High Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Cliffside coal ash dams "High" hazard due to the contents of the lagoons and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Cliffside coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Cliffside 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f)(5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." *Id.*

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that fails to disclose essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Cliffside coal ash lagoons are High Hazard Potential coal ash lagoons, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan for those lagoons that complies with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Cliffside coal ash lagoons. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-cls-eap-00-0002.pdf?la=en. However, that supposed Emergency Action Plan fails to disclose dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. This map is ***the*** essential element of the Emergency Action Plan, because it informs the public of the extent of the risk to the public and natural resources posed by the High Hazard Potential coal ash lagoons and lay out what areas will be affected by a

failure of the coal ash lagoon. This is particularly important at Cliffside due to the popular, public greenway just downstream.

Duke Energy apparently has prepared such a map for the Cliffside coal ash dams, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). Further, Appendix B-4 states that "the Rogers Energy Complex Inundation Maps" are attached to the Emergency Action Plan, but they are not attached to the Plan published on the CCR website, and the Plan provides an electronic link to those maps, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent reason is a citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its High Hazard Potential coal ash lagoons. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is failing to comply with the law designed to protect public safety, thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 6-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 26-28). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p.

60). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent reason offered by Duke Energy to excuse its violation of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information – including the threat to human life -- to which all citizens are legally entitled.

For the safety and wellbeing of the public and the protection of human life and our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Cliffside is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Cliffside.

PERSONS GIVING NOTICE

Mountain True is a § 501(c)(3) non-profit public interest organization with members throughout western North Carolina and the Broad River watershed. Mountain True champions resilient forests, clean waters and healthy communities in Western North Carolina. Mountain True envisions Western North Carolina with thriving communities that are connected to and help sustain a healthy natural environment. To achieve this, Mountain True will foster and empower advocates throughout the region to be engaged in policy and project advocacy, outreach and education, and on the ground projects. Mountain True values the integrity of natural systems – air, land, water, and native plants and animals – and believes in protecting and restoring them for the benefit of all generations. Mountain True values mountain communities that are vibrant, livable, and respectful of their connection to and dependence on the region's natural environment; the unique environment of the Western North Carolina mountains; and citizen and community engagement in principled advocacy. Mountain True promotes and clean energy – both of which have a high impact on the environmental health and long-term prosperity of our region. Among other things, Mountain True is the home of the Broad River Alliance, a collection of concerned citizens and organizations advocating for cleaner water, awareness and education, improved access and broadened recreational opportunities within the Broad River Basin.

Mountain True and its members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. Mountain True and their members recreate, fish, boat, live, derive drinking water, and own property on the Broad River in the vicinity of and downstream from Duke Energy's Cliffside coal ash lagoons. They fear contamination of drinking water, wildlife, and river water and the harm to their property and the possible loss of life (including themselves

and their families and friends) from the failure of Duke Energy's coal ash lagoons and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoons at Cliffside. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoons. They also need to know the impact that the failure of Duke Energy's Cliffside coal ash lagoons will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoons, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of the Broad River. In addition, Mountain True itself and its members gather, analyze, and make use of information concerning the Broad River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. Mountain True and its members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Cliffside; to inform the public and its members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dams, pollution, and safety practices.

The names, addresses, and phone numbers of the person giving notice is:

Julie Mayfield, Co-Director
Mountain True
29 N. Market Street, Suite 610
Asheville, NC 28801
Phone: (828) 258-8737
julie@mountaintrue.org

Mountain True believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, Mountain True is prepared to file suit in the United States District Court for the Western District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, Mountain True intends to

seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Jill Westmoreland Rose, U.S. Attorney, Western District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Dan River Steam Station in Eden, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), the Roanoke River Basin Association, Waterkeeper Alliance, and the Southern Alliance for Clean Energy (the "Conservation Groups") through their counsel, the Southern Environmental Law Center, give Duke Energy Carolinas, LLC (Duke Energy) notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Conservation Groups plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging Significant Potential Hazard coal ash dams at its Dan River Steam Station ("Dan River") on Dan River in Eden, N.C. Dan River is the site of the historic catastrophic failure of Duke Energy's coal ash lagoons in 2014, which resulted in the dumping of over 20 million gallons of polluted water and 39,000 tons of coal ash into the Dan River and criminal guilty pleas and fines for Duke Energy.

Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Dan River coal ash dams fail, contact information for responsible personnel when a coal ash disaster occurs at Dan River, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its Significant Potential Hazard coal ash dams and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Dan River

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Dan River dam, Duke Energy is committing open dumping with respect to its Dan River coal ash pit. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The Significant Potential Hazards Posed by the Coal Ash Dams at Dan River

Duke Energy stores 1.6 million tons of coal ash in unlined pits at Dan River on the banks of Dan River in Eden, North Carolina. The Dan River is an important regional recreation and

economic resource. Members of the Conservation Groups and others own property on the Dan River and use the lake and river for swimming, fishing, and boating, among other uses. Communities downstream, including Danville, Virginia Beach, South Boston, Clarksville, and Roanoke Rapids rely upon the Dan River for drinking water, and Dan River and the Dan River is an important resource for recreation, fishing, industry, agriculture, and tourism.

These 1.6 million tons of coal ash and other pollutants are held back from the Dan River only by two old earthen dams. The Primary Basin coal ash dam is 40 feet high and was built almost 50 years ago. In addition, this old dam has behind it a 27-acre reservoir that has been mostly dewatered but contains water mixed with coal ash and other materials. The Secondary Basin coal ash dam is 30 feet high and was built 40 years ago. In addition, this old dam has behind it a 12-acre reservoir containing, as of Duke Energy's last annual report dated August 2, 2017, 9.4 million gallons of water. The coal ash has leached and leaches metals and other toxic pollutants into the waters in the basin. Thus, the dams for these lagoons hold back 1.6 million tons of coal ash and a large quantity of coal ash polluted water from the Dan River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-9 (August 2, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-dr-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including low volume wastes, boiler cleaning wastewater, ash disposal, stormwater, boiler blowdown, and metal washing wastewater. These substances contain metals including antimony, arsenic, boron, iron, manganese, sulfate, and total dissolved solids. All these wastes and pollutants would be discharged into the Dan River in the event of a failure of the coal ash dams at Dan River.

Duke Energy's testing of the coal ash in the Dan River pits and the polluted water saturating the ash reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic (over 40 times the standard), barium, beryllium, boron, cadmium, chloride, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium (over 846 times the standard), zinc, total dissolved solids, and total suspended solids. *E.g.*, Duke Energy, Dan River Comprehensive Site Assessment at Tables 7-2.1, 7-4, 7-5.

At least 1.6 million tons of these polluting substances and a large quantity of water polluted with them are held back from the Dan River only by a two old earthen dams, 40 and 30 feet high, built decades ago.

And these dams leak. Coal-ash polluted water flows out of the dams directly into the Dan River.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Dan River lagoons. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on a dam assessment in 2014 and 2015 by Duke Energy consultants, Duke Energy determined that the Hazard Potential Classifications for the Dan River Primary and Secondary Basins are Significant. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-dr-haz-class-pab.pdf?la=en and https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-dr-haz-class-sab.pdf?la=en.

A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Dan River coal ash dams "High" hazards due to the contents of the lagoon and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Dan River coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina, including several crimes committed at Dan River. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, including Dan River, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Dan River coal ash lagoons are Significant Hazard Potential coal ash lagoons, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan for that lagoon that complies with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Dan River coal ash lagoons. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-mar-plan-dust.pdf?la=en, and on June 29, 2017, Duke Energy published another version of its supposed "Emergency Action Plan" for the Dan River coal ash lagoons, https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-dnr-eap-00-0002-rev6.pdf?la=en. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. This map is ***the*** essential element of the Emergency Action Plan, because it informs the public of the extent of the risk to the public and natural resources posed by the Significant Hazard Potential coal ash lagoon and lay out what areas will be affected by a failure of the coal ash lagoon.

Duke Energy apparently has prepared such a map for the Dan River coal ash dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). Further, Appendix B-4 states that a "Dan River Station Inundation Map" is attached to the Emergency Action Plan, but it is not attached to the Plan published on the CCR website, and the Plan provides an electronic link to that map, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoons. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 7-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 26-28). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 60-61). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and Virginia by Duke Energy's broken, aging, leaking, and Significant Hazard Potential earthen dams and lagoons at Dan River. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Dan River is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Dan River.

PERSONS GIVING NOTICE

The Roanoke River Basin Association is a § 501(c)(3) nonprofit public interest organization with members in North Carolina and Virginia operating in the Roanoke River Basin watershed. Its 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 of Basin residents. 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 the Dan River and lakes and rivers downstream.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen action on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, lakes and coastlines in the Americas, Europe, Australia, Asia, and Africa.

The Southern Alliance for Clean Energy is a § 501(c)(3) non-profit public interest organization that promotes responsible energy choices that create global warming solutions and ensure clean, safe and healthy communities. The Southern Alliance for Clean Energy has worked on coal ash issues across the region for years in a variety of ways to protect communities and water resources from its toxic pollution. The Southern Alliance for Clean Energy partners with and provides education and assistance to communities impacted by illegal coal ash pollution seeking to have current laws enforced to remediate contamination problems. The Southern Alliance for Clean Energy advocates at the state and national level for greater regulatory protections from coal ash waste.

The Conservation Groups and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Conservation Groups and their members recreate, fish, boat, live, derive drinking water, and own property on the Dan River in the vicinity of and downstream from Duke Energy's Dan River coal ash lagoon. They fear contamination of drinking water, wildlife, and river water and the harm to their property and the possible loss of life (including themselves and their families and friends) from the failure of Duke Energy's coal ash lagoons and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoons at Dan River. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoons. They also need to know

the impact that the failure of Duke Energy's Dan River coal ash lagoons will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoons, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of the Dan River. In addition, the Conservation Groups themselves and their members gather, analyze, and make use of information concerning the Dan River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Conservation Groups and their members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Dan River; to inform the public and their members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dam, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

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Roanoke River Basin Association
150 Slayton Avenue
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(434) 766-6727.

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Phone: (212) 747-0622
pharrison@waterkeeper.org

Amelia Shenstone
Southern Alliance for Clean Energy
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(865) 637-6055
amelia@cleanenergy.org

The Conservation Groups believe that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Conservation Groups are prepared to file suit in the United States District Court for the Middle District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Sandra J. Hairston, Acting U.S. Attorney, Middle District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4

Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Progress, LLC
P. O. Box 1771
Raleigh, NC 27602

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its H.F. Lee Steam Plant in Goldsboro, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), Sound Rivers and Waterkeeper Alliance (the "Conservation Groups") through their counsel, the Southern Environmental Law Center, give Duke Energy Progress, LLC (Duke Energy) notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Conservation Groups plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging Significant Potential Hazard coal ash dam at its H.F. Lee Steam Plant ("Lee") in Goldsboro, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused the surrounding community if its Lee coal ash dam fails, contact information for responsible personnel when a coal ash disaster occurs at Lee, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its Significant Potential Hazard coal ash dam and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Lee

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Lee dam, Duke Energy is committing open dumping with respect to its Lee coal ash pits. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The Significant Potential Hazards Posed by the Coal Ash Dam at Lee

At Lee, Duke Energy stores over 4.5 million tons of coal ash in an unlined pit (described in Duke Energy reports as both the Active Ash Basin and the Retired 1982 Ash Basin) on the banks of the Neuse River in Goldsboro, North Carolina. The river is an important regional recreation and economic resource. Members of the Conservation Groups and others own property on the Neuse River and use the river for swimming, fishing, and boating, among other uses. The drinking water intake for the city of Goldsboro's water system is located just a few

miles downstream from the Lee coal ash site, and the Neuse River is an important resource for recreation, fishing, industry, agriculture, and tourism. Families live around and near the Duke Energy coal ash lagoon.

These 4.5 million tons of coal ash and other pollutants are held back from the Neuse River only by an old earthen dam. The dam is 20 feet high and was built 37 years ago. In addition, the dam has behind it a reservoir of over 120 acres. As of the last annual report published by Duke Energy on July 19, 2017, the coal ash pit at Lee was filled with over 52 million gallons of water. Apart from the coal ash slurry, groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basins. Thus, the dam for this lagoon holds back more than 4.5 million tons of coal ash and 52 million gallons of coal ash polluted water from Lee Lake and the Neuse River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-10 (July 19, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-hflee-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including ash transport wastewater, including effluent from a Rotamix System, precipitator and air pre-heater wastewater, combustion turbine wash water, filter plant blowdown and wash water, and stormwater from ash line trench. These substances contain arsenic, cadmium, mercury, lead, boron, chloride, fluoride, sulfate, aluminum, barium, copper, iron, manganese, nickel, selenium, zinc, nitrogen, thallium, and total dissolved solids. All these wastes and pollutants would be discharged into the Neuse River in the event of a failure of the coal ash dam at Lee.

Duke Energy's testing of the coal ash in the Lee pits and the polluted water saturating the ash reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic, barium, beryllium, boron, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium, zinc, total dissolved solids, and total suspended solids. *E.g.*, Duke Energy, Lee Comprehensive Site Assessment at Tables 7-3, 7-7. In addition, the pore water in these pits contains radioactive pollutants including radium-226 and uranium-238. *Id.* at Table 10-4.

At least 4.5 million tons of these polluting substances and 52 million gallons of water polluted with them are held back from the Neuse River only by old earthen dam, 20 feet high, built decades ago.

The Lee facility has a long history of dam safety issues. For example, in 2016, the dam for the cooling lake directly across the river failed and broke open, spilling large quantities of water into the Neuse River. In 2000, the Lee coal ash lagoon suffered "significant interior slope slumping and distress" due to seepage. In 2004, a riser pipe in the Lee lagoon broke off and fell over into the lagoon, causing the water level in the lagoon to drop rapidly. Inspections from 1990 and 2004 reported indications of slope movement on the east berm of the coal ash lagoon.

And the Lee coal ash dam leaks. The Lee coal ash lagoon has had problems with seeps for years, which have caused ongoing maintenance and erosion problems around the coal ash

lagoon. These seeps have been identified by EPA, the Conservation Groups, and even Duke Energy itself.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Lee lagoon. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on an Inundation Study and Hazardous Classification Assessment conducted in 2010 and 2015 by Duke Energy consultants, Duke Energy published its determination that the Hazard Potential Classification for the Lee Active Ash Basin Dam is Significant Potential Hazard. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-hflee-haz-class-aap.pdf?la=en.

A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Lee coal ash dam "High" hazard due to the contents of the ponds and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Lee coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina, including crimes committed at Lee. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. 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 behind coal ash dam and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, including Lee, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq*.

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life" or a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a

physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Lee coal ash lagoon is a Significant Hazard Potential coal ash lagoon, Duke Energy was required to publish by April 17, 2017 Emergency Action Plans for those lagoons that comply with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Lee coal ash lagoon. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-hfl-eap-00-0002.pdf?la=en. However, the supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. These maps are ***the*** essential element of the Emergency Action Plan, because they inform the public of the extent of the risk to the public – including the risk of death -- and natural resources posed by the High Hazard Potential and Significant Hazard Potential coal ash lagoons and lay out what areas will be affected by a failure of the coal ash lagoons.

Duke Energy apparently has prepared such a map for the Active Ash Basin dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (pp. 2-3). Further, Appendix B-4 states that and "Inundation Map" for Lee is attached to the Emergency Action Plan, but it is not attached to the Plan published on the CCR website, and the Plan provides an electronic link to that map, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoon.

That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 7-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 26-28). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 60). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina by Duke Energy's aging, leaking, and Significant Hazard Potential earthen dam and lagoon at Lee. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials

have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Lee is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Lee.

PERSONS GIVING NOTICE

Sound Rivers is a § 501(c)(3) private nonprofit organization that guards the health and natural beauty of the Neuse and Tar-Pamlico River Basins. It partners with concerned citizens to monitor, protect, restore and preserve the watersheds covering 23% of North Carolina's land mass. Its goal to provide clean water to its communities for consumption, recreation, nature preservation and agricultural use. It has three full-time Riverkeepers® to monitor and protect the Neuse and Tar-Pamlico River Basins, serving as scientific experts and educational resources to schools and communities in the watershed. It monitors and protects the Neuse and Tar-Pamlico River watersheds covering nearly one quarter of North Carolina, to preserve the health and beauty of the river basin through environmental justice.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen action on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, lakes and coastlines in the Americas, Europe, Australia, Asia, and Africa.

The Conservation Groups and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Conservation Groups and their members recreate, fish, boat, live, derive drinking water, and own property on the Neuse River in the vicinity of and downstream from Duke Energy's Lee coal ash lagoon. They fear contamination of drinking water, wildlife, and river water and the harm to their property from failures of Duke Energy's coal ash lagoon and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoon at Lee. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon. They also need to know the impact that the failure of Duke Energy's Lee coal ash lagoon will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoon, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the

Rule reduces their use and enjoyment of the Neuse River. In addition, the Conservation Groups themselves and their members gather, analyze, and make use of information concerning the Neuse River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Conservation Groups and their members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Lee; to inform the public and their members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dam, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Matthew Starr
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upperneuserk@soundrivers.org

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Phone: (212) 747-0622
pharrison@waterkeeper.org

The Conservation Groups believe that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Conservation Groups are prepared to file suit in the United States District Court for the Eastern District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
John Stuart Bruce, U.S. Attorney, Eastern District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Carolinas, LLC
526 Church St.
Charlotte, NC 28202

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Marshall Steam Station in Catawba County, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Carolinas, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), the Catawba Riverkeeper Foundation and Waterkeeper Alliance (the "Conservation Groups") through their counsel, the Southern Environmental Law Center, give Duke Energy Carolinas, LLC (Duke Energy) notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Conservation Groups plan to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging Significant Potential Hazard coal ash dam at its Marshall Steam Station ("Marshall") on Lake Norman in Catawba County, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Marshall coal ash dam fails, contact information for responsible personnel when a coal ash disaster occurs at Marshall, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its Significant Potential Hazard coal ash dam and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping At Marshall

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Marshall dam, Duke Energy is committing open dumping with respect to its Marshall coal ash pit. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The Significant Potential Hazards Posed by the Coal Ash Dam at Marshall

Duke Energy stores over 16 million tons of coal ash in an unlined pit at Marshall on the banks of Lake Norman and the Catawba River in Catawba County, North Carolina. The lake is an important regional recreation and economic resource. Members of the Conservation Groups and others own property on Lake Norman and the Catawba River and use the lake and river for swimming, fishing, boating, and waterskiing, among other uses. Communities downstream,

including Huntersville, eastern Lincoln County, Mooresville, Davidson, Cornelius, and the northern portion of Charlotte rely upon Lake Norman and the Catawba River for drinking water, and Lake Norman and the Catawba River are important resources for recreation, fishing, industry, agriculture, and tourism.

These 16 million tons of coal ash and other pollutants are held back from Lake Norman and the Catawba River only by an old earthen dam. The coal ash dam is 90 feet high and was built over 50 years ago by building an earthen dike at the confluence where Holdsclaw Creek historically entered the Catawba River. In addition, this old dam has behind it a 146-acre reservoir filled with over 140 million gallons of contaminated water. Apart from the coal ash slurry, groundwater, rain water, and the headwaters of Holdsclaw Creek flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin. Thus, the dam for this lagoon holds back over 16 million tons of coal ash and 176 million gallons of coal ash polluted water from Lake Norman and the Catawba River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at p. 5 (June 21, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-mar-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including ash transport water, coal pile runoff, chemical metal cleaning wastes, and discharges from the flue-gas desulfurization (FGD) scrubber. These substances contain metals including arsenic, barium, cobalt, iron, manganese, strontium, and zinc. All these wastes and pollutants would be discharged into Lake Norman and the Catawba River in the event of a failure of the coal ash dam at Marshall.

Duke Energy's testing of the coal ash in the Marshall pits and the polluted water saturating the ash reveals high levels of toxic metals and other pollutants, including: aluminum, antimony, arsenic (over 600 times the standard), barium, beryllium, boron, cadmium, chromium, cobalt, copper, iron, lead, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium, zinc, total dissolved solids, and total suspended solids. *E.g.*, Duke Energy, Marshall Comprehensive Site Assessment at Tables 7-2, 7-4, 7-5.

At least 16 million tons of these polluting substances and 176 million gallons of water polluted with them are held back from Lake Norman and the Catawba River only by an old earthen dam, 90 feet high, built decades ago.

And this dam leaks. Coal-ash polluted water flows out of the dam directly into Lake Norman. Sampling by the Conservation Groups has found elevated levels of coal ash contaminants in these dam leaks including boron, arsenic, cobalt, selenium, and thallium.

In addressing another earthen dam at Duke Energy's Mayo facility, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Marshall lagoon. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on a dam assessment report from 2009, a Dam Breach Analysis and Inundation Mapping conducted in 2012, and a verification in 2015 by Duke Energy consultants, Duke Energy determined that the Hazard Potential Classification for the Marshall Active Basin is Significant. https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-mar-haz-class-aab.pdf.

A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Marshall coal ash dam "High" hazard due to the contents of the lagoon and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Marshall coal ash lagoon, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Marshall 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Marshall coal ash lagoon is a Significant Hazard Potential coal ash lagoon, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan for that lagoon that complies with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Marshall coal ash lagoon. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-mar-plan-dust.pdf?la=en. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for either of these coal ash lagoons. This map is ***the*** essential element of the Emergency Action Plan, because it informs the public of the extent of the risk to the public and natural resources posed by the Significant Hazard Potential coal ash lagoon and lay out what areas will be affected by a failure of the coal ash lagoon.

Duke Energy apparently has prepared such a map for the Marshall coal ash dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). Further, Appendix B-4 states that "Marshall Steam Station Inundation Maps" are attached to the Emergency Action Plan, but they are not attached to the Plan published on the CCR website, and the Plan provides an electronic link to those maps, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoon. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 5-9) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 25-27). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 62-63). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and South Carolina by Duke Energy's aging, leaking, and Significant Hazard Potential earthen dam and lagoon at Marshall. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Marshall is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Marshall.

PERSONS GIVING NOTICE

The Catawba Riverkeeper Foundation is a § 501(c)(3) non-profit public interest organization with members in North Carolina and South Carolina and operating in the 24 counties of the Catawba/Wateree River watershed in North and South Carolina. The Catawba Riverkeeper Foundation's mission is to "advocate[] for the health, protection and enjoyment of the Catawba River watershed." The Foundation works to improve water quality through monitoring and conservation advocacy, and to increase public awareness through education and partnerships with other community and conservation groups.

Waterkeeper Alliance is a global movement uniting more than 300 Waterkeeper Organizations and Affiliates around the world, focusing citizen action on issues that affect our waterways, from pollution to climate change. Waterkeepers patrol and protect over 2.5 million square miles of rivers, lakes and coastlines in the Americas, Europe, Australia, Asia, and Africa.

The Conservation Groups and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Conservation Groups and their members recreate, fish, boat, live, derive drinking water, and own property on Lake Norman and the Catawba River in the vicinity of and downstream from Duke Energy's Marshall coal ash lagoon. They fear contamination of drinking water, wildlife, and river water and the harm to their property and the possible loss of life (including themselves and their families and friends) from the failure of Duke Energy's coal ash lagoon and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoon at Marshall. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon. They also need to know the impact that the failure of Duke Energy's Marshall coal ash lagoon will have on the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoon, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of Lake Norman and the Catawba River. In addition, the Conservation Groups themselves and their members gather, analyze, and make use of information concerning the Catawba River and Lake Norman and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Conservation Groups and their members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Marshall; to inform the public and their members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoon, dam, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Sam Perkins
Catawba Riverkeeper Foundation
715 North Church Street
Suite 120
Charlotte, NC 28202
(704) 679-9494
sam@catawbariverkeeper.org

Pete Harrison
Waterkeeper Alliance
180 Maiden Lane
Suite 603
New York, NY 10038
Phone: (212) 747-0622
pharrison@waterkeeper.org

The Conservation Groups believe that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Conservation Groups are prepared to file suit in the United States District Court for the Western District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Jill Westmoreland Rose, U.S. Attorney, Western District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Progress, LLC
P. O. Box 1771
Raleigh, NC 27602

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Mayo Steam Plant in Person County, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Progress LLC.

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), the Roanoke River Basin Association (the Association) through its counsel, the Southern Environmental Law Center, gives Duke Energy Progress, LLC (Duke Energy) notice of its intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Association plans to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging Significant Potential Hazard coal ash dam at its Mayo Steam Station ("Mayo") in Person County, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused the surrounding community if its Mayo coal ash dam breaks, contact information for responsible personnel when a coal ash disaster occurs at Mayo, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its Significant Potential Hazard coal ash dam and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Mayo

Because Duke Energy has violated the Rule by hiding Mayo dam risk and emergency information from the public, Duke Energy is committing open dumping with respect to its Mayo coal ash lagoon. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The Significant Potential Hazard Posed by the Coal Ash Dam at Mayo

Duke Energy stores approximately 6.6 million tons of coal ash in an unlined pit at its Mayo Steam Station ("Mayo") on the banks of Mayo Lake and in and on top of Crutchfield Branch in Person County, North Carolina. Mayo Lake is an important public waterbody and recreational, fishing, and economic resource for North Carolina, the region, and Person County. Families live along the lake, and local residents, people from surrounding communities, and visitors from other areas fish, swim, and boat in and on the Lake. Crutchfield Branch flows

through agricultural lands and becomes part of the Dan River, the location of the 2014 catastrophic failure of another Duke Energy coal ash storage facility. Communities downstream rely upon the Dan River for drinking water, and the Dan River is an important resource for recreation, fishing, agriculture, and tourism.

These 6.6 million tons of coal ash and other pollutants are held back from Mayo Lake, Crutchfield Branch, and the Dan River only by an old 110 foot-high earthen dam built in the middle of Crutchfield Branch more than 30 years ago. In addition to the 6.6 million tons of coal ash, this dam has behind it a 144-acre reservoir filled with 471 million gallons of contaminated water. Apart from the coal ash slurry, groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin. Thus, this single dam holds back 6.6 million tons of coal ash and 471 million of gallons of coal ash polluted water from Mayo Lake, Crutchfield Branch, and the Dan River. *See* Duke Energy, Comprehensive Site Assessment (Sept. 2, 2015) ("CSA"), Figure 1-1, attached hereto as Attachment 1; Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Report at pp. 4-5 (May 17, 2017), available at: https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-may-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pit, including coal pile runoff, storm water runoff, cooling tower blowdown, reverse osmosis wastewater, plant area wash down wastewater, equipment heat exchanger water, and treated domestic wastewater or sewage. All these wastes and pollutants would be discharged into Mayo Lake, Crutchfield Branch, and the Dan River in the event of a failure of the coal ash dam at Mayo.

Duke Energy's testing of the coal ash in the Mayo Lagoon and the polluted water saturating this ash in the lagoon reveals high levels of toxic pollutants, including arsenic (with water concentrations over 100 times the standard), antimony, aluminum, barium, boron (over 13 times the standard), chromium, cobalt, iron, lead, manganese, molybdenum, methane, nitrate, strontium, sulfate, chloride, thallium (over 12 times the standard), vanadium (over 1,046 times the standard), and zinc. *E.g.*, Duke Energy, Mayo Comprehensive Site Assessment at Tables 7-3, 7-4, 7-7.

Millions of tons of these polluting substances and millions of gallons of water polluted with them are held back from Mayo Lake, Crutchfield Branch, and the Dan River only by this old 110-foot high earthen dam.

And this dam leaks. For years, Duke Energy has observed leaks from this old coal ash dam, but has been unable to stop them. Polluted coal ash water flows out of the dam directly into Crutchfield Branch through seeps and engineered drains. Duke Energy, Corrective Action Plan Part 1 (December 1, 2015) ("CAP Pt. 1"), at p. 1-7. In Crutchfield Branch, numerous pollutants have exceeded water quality standards, including aluminum, boron, copper, iron, manganese, thallium, vanadium, and zinc. CAP Pt. 1 at Table 1-3.

In addressing another earthen dam at Mayo, the North Carolina Department of Environmental Quality has warned:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Mayo dam. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on dam breach analyses and inundation mapping conducted in 2010 and 2014 and verified in 2016 by Duke Energy consultants, Duke Energy published its determination that the Hazard Potential Classification for the Mayo dam is Significant. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-may-haz-class-ap.pdf?la=en. A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Mayo coal ash dam a "High" hazard due to the contents of the ponds and the potential environmental damage in the event of a failure.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Mayo coal ash lagoon, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Mayo 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric

Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Mayo coal ash lagoon is a Significant Hazard Potential coal ash lagoon, Duke Energy was required to publish by April 17, 2017 an Emergency Action Plan that complies with the Rule. On April 17, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Mayo coal ash lagoon and for the smaller Mayo FGD Settling Pond and FGD Flush Pond, for which Duke Energy has yet to make a hazard potential classification Assessment. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure." This map is ***the*** essential element of the Emergency Action Plan, because it informs the public of the extent of the risk to the public and natural resources posed by this Significant Hazard Potential coal ash lagoon and lays out what areas will be affected by a failure of the coal ash lagoon. Duke Energy apparently has prepared such a map, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (pp. 2-3). Further, Appendix B-4 states that Inundation/Downstream Hazards Map and Inundation Maps are attached to the Emergency Action Plan, but those maps are ***not*** attached to the Emergency Action Plan posted on the required website, and the electronic link to those maps has been blacked out.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoon. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 7-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 26-28). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 60). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and Virginia by Duke Energy's aging, leaking, and Significant Potential Hazard earthen dam at Mayo. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Mayo is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Mayo.

PERSONS GIVING NOTICE

The Roanoke River Basin Association is a § 501(c)(3) nonprofit public interest organization with members in North Carolina and Virginia operating in the Roanoke River Basin watershed. Its 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 of Basin residents. 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 the Dan River and lakes and rivers downstream.

The Association and its members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. They recreate, fish, live, derive drinking water, and own property in the Roanoke River Basin, including in the vicinity of and downstream from Mayo, including Mayo Lake, Crutchfield Branch, the Dan River, and the waterways into which they discharge and into which their waters flow. They fear contamination of drinking water, wildlife, and river water and harm to their property from failures of Duke Energy's coal ash lagoon and the consequences for individuals, families, communities, property owners, and natural resources. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon and other impoundments. They also need to know the impact that the failure of Duke Energy's Mayo coal ash lagoon will have on the resources and property they own, use, enjoy, and cherish. Duke Energy's violations of the Rule and the Act are reducing the use and enjoyment by the Association and its members of the Roanoke River Basin, Mayo Lake, Crutchfield Branch, the Dan River, and the waterways into which their waters flow. In addition, the Association itself and its members gather, analyze, and make use of information concerning the Roanoke River Basin, Mayo Lake, Crutchfield Branch, and the Dan River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Association and its members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Mayo; to inform the public and Association members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dams, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Michael Pucci, President
Roanoke River Basin Association
150 Slayton Avenue
Danville, Virginia 24540
(434) 766-6727.

The Association believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Association is prepared to file suit in the United States District Court for the Middle District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Sandra J. Hairston, Acting U.S. Attorney, Middle District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Progress, LLC
P. O. Box 1771
Raleigh, NC 27602

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Roxboro Steam Plant in Person County, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Progress LLC.

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), the Roanoke River Basin Association (the Association) through its counsel, the Southern Environmental Law Center, gives Duke Energy Progress, LLC (Duke Energy) notice of its intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Association plans to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Significant Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging Significant Potential Hazard coal ash dams and other structures at its Roxboro Steam Station ("Roxboro") in Person County, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Roxboro coal ash dams and other structures fail, contact information for responsible personnel when a coal ash disaster occurs at Roxboro, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its Significant Potential Hazard coal ash dams and structures and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39..

Duke Energy's Open Dumping at Roxboro

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Roxboro dams and other structures, Duke Energy is committing open dumping with respect to its Roxboro coal ash pits and other structures. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The Significant Potential Hazard Posed by the Coal Ash Dams at Roxboro

Duke Energy stores approximately 19 million tons of coal ash, including toxic pollutants and radioactive substances, in two unlined pits (the East Basin and the West Basin) at Roxboro on the banks of Hyco Lake and Sargents River in Person County, North Carolina. Hyco Lake is managed as a public recreation lake, and the fish and wildlife of Hyco Lake are managed as a public resource by the North Carolina Wildlife Resources Commission. The lake is an important

regional recreation resource, and fishing tournaments are held on the lake frequently. Members of the Association and others own property on Hyco Lake and use the lake for swimming, fishing, boating, and waterskiing, among other uses. Hyco Lake also provides habitat for bald eagles, which forage at the Roxboro coal ash site and are frequently observed in the vicinity. *See* Duke Energy CSA, Appendix I at 9, 11. Sargents River flows into Hyco Lake. The water from both the Lake and the River eventually flow into the Dan River, the location of the 2014 catastrophic failure of another Duke Energy coal ash storage facility. Communities downstream rely upon the Dan River for drinking water, and the Dan River is an important resource for recreation, fishing, agriculture, and tourism.

These 19 million tons of coal ash, radioactive substances, and other pollutants are held back from Hyco Lake, Sargents River, and the Dan River only by two old 70-foot-high earthen dams built more than 30 years ago. In addition, the West Basin is located in the floodplain and its old dam has behind it a 240-acre reservoir filled with over 122 million gallons of contaminated water. Apart from the coal ash slurry, groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin, and the coal ash in the East Basin also leaches pollutants. Thus, the dams for these lagoons hold back 19 million tons of coal ash and over 122 million gallons of coal ash polluted water from Hyco Lake, Sargents River, and the Dan River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-7 (May 17, 2017), https://www.duke-energy.com//_/media/pdfs/our-company/roxboro-annual-surf-imp-16.pdf .

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including ash landfill leachate and runoff, dry-ash handling system wash water, cooling tower blowdown, coal mill rejects and pyrites, sewage treatment plant effluent, low volume waste consisting of boiler blowdown, chemical metal cleaning wastes, reverse-osmosis reject wastewater and floor drains, and overflow from the flue gas desulfurization ("FGD") system blowdown. All these wastes and pollutants would be discharged into Hyco Lake, Sargents River, and the Dan River in the event of a failure of the coal ash dams at Roxboro.

Testing by Duke Energy of the coal ash and the water saturating the ash in the Roxboro lagoons reveals high levels of toxic pollutants, including aluminum, antimony, arsenic (over 97 times the standard), barium, beryllium, boron (over 52 times the standard), chloride, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, methane, molybdenum, nickel, selenium, strontium, sulfate, thallium, vanadium (over 356 times the standard), and zinc. *E.g.*, Duke Energy, Roxboro Comprehensive Site Assessment at Tables 7-3, 7-4, 7-7.

The Roxboro coal ash lagoons also contain radioactive materials, radium-226 and -228, and uranium-238. *Id.* at Table 10-5.

At least 19 million tons of these polluting and radioactive substances and 122 million gallons of water polluted with them are held back from Hyco Lake, Sargents River, and the Dan River only by two old 70-foot high earthen dams.

And these dams leak. Seven engineered drains discharge to the bay of Hyco Lake from the main ash pond dam at the north end of the West Ash Basin. In addition to these engineered

discharges, unengineered seeps and flows of contaminated groundwater also discharge into Sargents River and the bay of Hyco Lake. In addition, on the east side of the East Ash Basin leaking streams of contaminated water, or "seeps," flow from the East coal ash basin into a stream that flows into Hyco Lake.

In addressing another earthen dam at Hyco Lake, the North Carolina Department of Environmental Quality has warned Duke Energy:

> "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).

Attachment 1, at 2.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Roxboro lagoons. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on evaluations conducted in 2011, 2014, and 2015 by Duke Energy consultants, Duke Energy published its determinations that the Hazard Potential Classifications for the Roxboro East and West Basins are Significant. Initial Hazard Potential Classification Assessment Certifications for the Roxboro East and West Basins, https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-rox-haz-class-east.pdf and https://www.duke-energy.com//_/media/pdfs/our-company/ash-management/ccr-rox-haz-class-west.pdf. A Significant Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

The state of North Carolina has rated the Roxboro West Basin coal ash dam a "High" hazard due to the contents of the ponds and the potential environmental damage in the event of a failure.

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Duke Energy's operating companies, including the owner and operator of the Roxboro coal ash lagoon, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. These Clean Water Act crimes included unpermitted coal ash lagoon discharges very much like those flowing from the Roxboro 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 behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

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Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f) (5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must place*** the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum, the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the

CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Roxboro West and East Ash Basins are Significant Hazard Potential coal ash lagoons, Duke Energy was required to publish by April 17, 2017 Emergency Action Plans for those basins that comply with the Rule. On April 17, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Roxboro West Ash Basin and associated structures, which purports to address the West and East Ash Basins. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-rox-eap-f2f-annl-2017.pdf?la=en. The Plan also claims to address three other facilities that are Significant Hazard Potential units, the East and West FGD Settling Ponds and the FGD Forward Settling Pond, as well as the Filter Dike and the Intake Pond, which have not been assigned a dam hazard potential. However, that supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for any of the Significant Hazard potential facilities. These maps are ***the*** essential element of the Emergency Action Plan, because they inform the public of the extent of the risk to the public and natural resources posed by the Significant Hazard Potential coal ash lagoons and structures and lay out what areas will be affected by a failure of the coal ash lagoons and other structures.

Duke Energy apparently has prepared such a map for the West Ash Basin dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (pp. 2-3). No maps at all are included for the other Significant Potential Hazard facilities and dams. It is impossible to determine if those facilities are encompassed by the map for the West Ash Basin dam, because that map is blacked out. Further, Appendix B-4 contains four Inundation/Downstream Hazards" maps, but they are blacked out, and they are not labeled as to which facilities they deal with.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoons and structures. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 7-10) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 28-30). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 65-66). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina and Virginia by Duke Energy's aging, leaking, and Significant Potential Hazard earthen dams, lagoons, and structures at Roxboro. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Roxboro is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Roxboro.

PERSONS GIVING NOTICE

The Roanoke River Basin Association is a § 501(c)(3) nonprofit public interest organization with members in North Carolina and Virginia operating in the Roanoke River Basin watershed. Its 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 of Basin residents. 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 Sargents River, Hyco Lake, the Dan River and lakes and rivers downstream.

The Association and its members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. They recreate, fish, live, derive drinking water, and own property in the Roanoke River Basin, including in the vicinity of and downstream from Roxboro and Sargents River, including Hyco Lake, the Dan River, and the waterways into which they discharge and into which their waters flow. They fear contamination of drinking water, wildlife, and river water and harm to their property from failures of Duke Energy's coal ash lagoons and other impoundments and the consequences for individuals, families, communities, property owners, and natural resources. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon and other impoundments. They also need to know the impact that the failure of Duke Energy's Roxboro coal ash lagoons and other structures will have on the resources and property they own, use, enjoy, and cherish. Duke Energy's violations of the Rule and the Act are reducing the use and enjoyment by the Association and its members of the Roanoke River Basin, the Dan River, Hyco Lake, and the waterways into which their waters

flow. In addition, the Association itself and its members gather, analyze, and make use of information concerning the Roanoke River Basin, Hyco Lake, Sargents River, and the Dan River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Association and its members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Roxboro; to inform the public and Association members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dams, pollution, and safety practices.

The names, addresses, and phone numbers of the persons giving notice are:

Michael Pucci, President
Roanoke River Basin Association
150 Slayton Avenue
Danville, Virginia 24540
(434) 766-6727.

The Association believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Association is prepared to file suit in the United States District Court for the Middle District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Conservation Groups intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,

Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
Sandra J. Hairston, Acting U.S. Attorney, Middle District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

SOUTHERN ENVIRONMENTAL LAW CENTER

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

September 20, 2017

Via Registered Mail – Return Receipt Requested

Hon. Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Mr. Michael S. Regan, Secretary
Mr. Michael Scott, Director, Division of Waste Management
N.C. Department of Environmental Quality
1601 Mail Service Center
Raleigh, NC 27699-1601

Ms. Lynn J. Good, President and Chief Executive Officer
Duke Energy Progress, LLC
P. O. Box 1771
Raleigh, NC 27602

Notice of Intent to Sue
Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Weatherspoon Plant in Lumberton, N.C.: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Progress, LLC

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(A) and (b), Winyah Rivers Foundation (the "Foundation") through its counsel, the Southern Environmental Law Center, gives Duke Energy Progress, LLC (Duke Energy) notice of their intent to file suit for violations of the Resource Conservation and Recovery Act (the Act) and the Coal Combustion Residuals Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, the Foundation plans to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding High Coal Ash Dam Hazards and Safety Information from the Public

In violation of the express requirements of the Rule, Duke Energy is hiding from the public essential information about the risks and dangers of its primitive and aging High Potential Hazard coal ash dam at its Weatherspoon Plant ("Weatherspoon") in Lumberton, N.C. Under the Rule, Duke Energy was required in April of 2017 to publish on its CCR website information describing the harm that will be caused to the surrounding community if its Weatherspoon coal ash dam fails, contact information for responsible personnel when a coal ash disaster occurs at Weatherspoon, and other information concerning an emergency response. Duke Energy is denying the public this essential information by blacking out and omitting key portions of its Emergency Action Plan. Thereby, Duke Energy is concealing the risks and dangers of its High Potential Hazard coal ash dam and undercutting the ability of the public to deal with a coal ash disaster when it occurs. As EPA has explained in the Preamble to the Rule, "the establishment and maintenance of this information . . . on a publicly accessible Internet site" is important because citizens need "access to all of the information necessary to show that the rule has been implemented in accordance with the regulatory requirements." 80 Fed. Reg. 21,302, 21,426. Duke Energy is the only utility in the Carolinas that is hiding this information, and, to our knowledge, Duke Energy is the only utility in the country that is hiding this information.

Further, there is no basis for Duke Energy to withhold information required to be published on Duke Energy's CCR Compliance website by the CCR Rule. As the EPA has explained in no uncertain terms, RCRA, under which the Rule was promulgated, "contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974 (b). 80 Fed. Reg. 21,338-39.

Duke Energy's Open Dumping at Weatherspoon

Because Duke Energy has violated the Rule by hiding from the public emergency information and the risks from its Weatherspoon dam, Duke Energy is committing open dumping with respect to its Weatherspoon coal ash pit. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.").

The High Potential Hazards Posed by the Coal Ash Dam at Weatherspoon

At Weatherspoon, Duke Energy stores over 2.4 million tons of coal ash in an unlined pit (the 1979 Ash Basin) on the banks of the Lumber River in Lumberton, North Carolina. The river is an important regional recreation and economic resource. The Lumber River is designated as both a "Natural and Scenic River" by the North Carolina General Assembly and a National Wild and Scenic River by the United States Department of Interior. The Weatherspoon facility is located upstream from Lumber River State Park, a popular recreation area. Members of the

Foundation and others own property on the Lumber River and use the river for swimming, fishing, and boating, among other uses. Approximately 138,000 people rely on drinking water systems with intakes downstream of the Weatherspoon coal ash site, and the Lumber River is an important resource for recreation, fishing, industry, agriculture, and tourism. Families live around and near the Duke Energy coal ash lagoon.

These 2.4 million tons of coal ash and other pollutants are held back from the Lumber River by an old earthen dam. The dam is 28 feet high and was built 48 years ago. In addition, the dam has behind it a 56-acre basin. As of the last annual report published by Duke Energy on July 11, 2017, the coal ash pit at Weatherspoon contained 4000 gallons of water. Groundwater and rain water flow into the pit, where the coal ash leaches metals and other toxic pollutants into the waters in the basin. Thus, the dam for this lagoon holds back more than 2.4 million tons of coal ash and 4000 gallons of coal ash polluted water from the Lumber River. *See* Duke Energy, Coal Combustion Residuals (CCR) Annual Surface Impoundment Inspection Report at pp. 4-5 (July 11, 2017), https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-wspn-annl-imp-2017.pdf?la=en.

In addition to coal ash and other substances from the burning of coal, Duke Energy has also dumped other wastewater streams and wastes into the pits, including coal pile runoff, stormwater runoff, domestic wastewater, chemical metal cleaning wastewater, and low volume wastewater including reject water from operation of a reverse osmosis wastewater treatment unit. These substances contain arsenic, selenium, mercury, chromium, boron, sulfate, iron, manganese, and total dissolved solids. All these wastes and pollutants would be discharged into the Lumber River in the event of a failure of the coal ash dam at Weatherspoon.

Duke Energy's testing of the coal ash in the Weatherspoon pits and the polluted water saturating the ash reveals high levels of toxic pollutants, including arsenic, boron, chloride, chromium, cobalt, iron, lead, manganese, nickel, selenium, strontium, sulfate, thallium, and vanadium. *E.g.*, Duke Energy, Weatherspoon Comprehensive Site Assessment at Tables 7-3 & 7-7.

At least 2.4 million tons of these polluting substances and water polluted with them are held back from the Lumber River by old earthen dam, 28 feet high, built decades ago.

In 2001, there was a breach of an internal dike at the Weatherspoon Ash Pond which led to an unauthorized release of wastewater into the Lumber River. The Weatherspoon site is also located in an area that is prone to flooding. The cooling pond, which is adjacent to the coal ash pond, sits in the 100-year flood plain. In October of 2016, flood waters resulting from hurricane Matthew overflowed into the cooling pond.

Under the Rule, Duke Energy was required to determine the hazard potential classification assessment for the Weatherspoon lagoon. 40 C.F.R. § 257.73 (a) (2). On October 12, 2016, based on an Inundation Study and Hazardous Classification Assessment conducted in 2011 and 2015 by Duke Energy consultants, Duke Energy published its determination that the Hazard Potential Classification for the Weatherspoon 1979 Ash Basin Dam is High Potential Hazard. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-hfweatherspoon-haz-class-aap.pdf?la=en.

A High Hazard Potential coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life." 40 C.F.R. § 257.53.

Duke Energy's Criminal Convictions

Duke Energy's operating companies, including the owner and operator of the Weatherspoon coal ash lagoons, have pleaded guilty to federal crimes in their operations of coal ash lagoons in North Carolina. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 Clean Water Act coal ash crimes across North Carolina. 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 Foundation, Duke Energy is now required to excavate all the coal ash from behind coal ash dam and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, including Weatherspoon, and all its sites in South Carolina.

The Coal Combustion Residuals Rule

Effective October 19, 2015, the United States Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal combustion residuals (CCR) as a solid waste under subtitle D of the Act. U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); *as amended by* Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

Under the Act, any violation of the requirements of the Rule constitutes illegal open dumping: "Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act." 40 C.F.R. § 257.1(a)(2) (emphasis added). 40 C.F.R. § 257.2 ("Open dump means a facility for the disposal of solid waste which does not comply with this part.").

The guiding principle of the Rule is public access to information about coal ash sites. Under 40 C.F.R. §257.107, Duke Energy and other owners or operators of coal ash lagoons "must maintain a publicly accessible Internet site (CCR Web site) containing the information specified in [the Rule]," "the information required to be posted to the CCR Web site must be made available to the public for at least five years following the date on which the information was first posted to the CCR Web site," and "the information must be posted to the CCR Web site within 30 days of placing the pertinent information required by § 257.105 in the operating record." The Duke Energy CCR Rule website is https://www.duke-energy.com/our-company/environment/compliance-and-reporting/ccr-rule-compliance-data.

The Emergency Action Plan is among the most important documents that the Rule requires to be made public and published on the CCR website. Under 40 C.F.R. § 257.105 (f)(5), "[t]he owner or operator of a CCR unit subject to this subpart [such as Duke Energy] ***must***

place the following information on the owner or operator's CCR Web site: **(5)** The emergency action plan (EAP) specified under § 257.105(f)(6), except that only the most recent EAP must be maintained on the CCR Web site irrespective of the time requirement specified in paragraph (c) of this section" (emphasis added).

Under the Rule, Duke Energy was required by October 17, 2016 to conduct an initial hazard potential classification assessments for every one of its coal ash lagoons (or CCR units) covered by the Rule. 40 C.F.R. §§ 257.73 (a) (2) and (f). Duke Energy was required to label a coal ash lagoon a "high hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation will probably cause loss of human life" or a "significant hazard potential" coal ash lagoon if the coal ash lagoon is "a diked surface impoundment where failure or mis-operation . . . can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. §§ 257.53 and 257.73 (a) (2).

For every "high hazard potential" and "significant hazard potential" coal ash lagoon, Duke Energy was required to prepare and publish on its CCR website an Emergency Action Plan by April 17, 2017. At a minimum the Emergency Action Plan must "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure and a physical description of the CCR unit"; "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." The Emergency Action Plan must also "define the events or circumstances involving the CCR unit that represent a safety emergency, along with a description of the procedures that will be followed to detect a safety emergency in a timely manner" and "Include provisions for an annual face-to-face meeting or exercise between representatives of the owner or operator of the CCR unit and the local emergency responders." 40 C.F.R. § 257.73 (a) (3) (i).

Duke Energy Is Violating the Rule by Hiding Required Dam Safety Information from the Public

Duke Energy is violating the Rule, including 40 C.F.R. §§ 257.107, § 257.105 (f) (5), and 257.73 (a) (3). Duke Energy has prepared and published an Emergency Action Plan that hides from the public essential dam safety information that Duke Energy is required to publish under the Rule. Duke Energy has thus failed to publish on its CCR website the Emergency Action Plan required by the Rule.

Since the Weatherspoon coal ash lagoon is a High Hazard Potential coal ash lagoon, Duke Energy was required to publish by April 17, 2017 Emergency Action Plans for those lagoons that comply with the Rule. On April 19, 2017, Duke Energy published on its CCR website what it labels an "Emergency Action Plan" for the Weatherspoon coal ash lagoon. https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-wsp-eap-00-0001.pdf?la=en. However, the supposed Emergency Action Plan hides from the public dam safety information that the Rule requires to be made public.

First, Duke Energy's published Emergency Action Plan does not "include a map which delineates the downstream area which would be affected in the event of a CCR unit failure" for

either of these coal ash lagoons. These maps are ***the*** essential element of the Emergency Action Plan, because they inform the public of the extent of the risk to the public – including the risk of death -- and natural resources posed by the High Hazard Potential and Significant Hazard Potential coal ash lagoons and lay out what areas will be affected by a failure of the coal ash lagoons.

Duke Energy apparently has prepared such a map for the 1979 Ash Basin dam, but has blacked it out in the Emergency Action Plan that has been published and made available to the public (p. 2). Further, Appendix B-4 states that an "Inundation Map" for Weatherspoon is attached to the Emergency Action Plan, but it is not attached to the Plan published on the CCR website, and the Plan provides an electronic link to that map, but the link is blacked out in the Plan published on the CCR website.

Duke Energy provides no explanation for this blatant failure to comply with its legal obligations to the public under the Rule. Duke Energy's only apparent excuse is a cryptic citation to N.C. Gen. Stat. § 132-1.7. But that North Carolina state statute gives Duke Energy no excuse for its violation of the Rule and its illegal refusal to provide the public information concerning the consequences of the failure of its Significant Hazard Potential coal ash lagoon. That statute is an exception to North Carolina state agencies' obligation to provide materials to the public under North Carolina's Public Records Act. However, Duke Energy is not a North Carolina state agency, and this Emergency Action Plan is not required to be published under the North Carolina Public Records Act but rather under the United States Resource Recovery and Conservation Act and the national Coal Combustion Residuals Rule.

Further, if a North Carolina state statute did somehow purport to exempt Duke Energy from its compliance with this national public safety and environmental requirement, it would be invalid under the Supremacy Clause of the United States Constitution, as Duke Energy and any attorney or student of government in America knows.

Moreover, as set out above, EPA has made it crystal clear that the CCR Rule, enacted under RCRA, does not allow for Duke Energy's maneuver. "RCRA contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 explicitly provides that "[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator." 42 U.S.C. 6974(b). 80 Fed. Reg. 21,338-39.

Consequently, Duke Energy is blatantly flouting a national dam safety and public safety protection and is openly refusing to comply with the law and thereby further endangering the public.

Second, the Rule requires Duke Energy's Emergency Action Plan to "define responsible persons, their respective responsibilities, and notification procedures in the event of a safety emergency involving the CCR unit"; and "provide contact information of emergency responders." Duke Energy's Emergency Action Plan (pp. 6-7) contains a chart of "Incident Command Roles/Assignments," but the names, contact phone numbers, and contact emails of all

responsible personnel have been blacked out. Consequently, members of the public and the press have no idea who to contact in the event of a safety emergency. Names and contact information for "Urgent Dam Failures," "Potential Dam Failures," and "Abnormal Events" have also been blacked out (pp. 23-25). Duke Energy has also blacked out the names and contact information for all the "Record Holders" of "Control Copies" of the Emergency Action Plan (p. 57). All the names and contact information for responsible persons and emergency responders have been blacked out also in Appendix A to the Emergency Action Plan. In Appendix B-1, Duke Energy has blacked out the same information for all contractors who are emergency responders. Once again, the only apparent attempt by Duke Energy to excuse its open flouting of the national safety requirements is a citation to the inapplicable provision of North Carolina's Public Records Act.

These omissions are intentional violations of the Rule and the Act. They deprive the public of essential dam safety information to which all citizens are legally entitled. Duke Energy's obvious motive for this concealment is its fear of public reaction if the public learned the true risks imposed on communities and the clean water of North Carolina by Duke Energy's aging, leaking, and High Hazard Potential earthen dam and lagoon at Weatherspoon. Duke Energy has been repeatedly embarrassed and forced to take action when the public and public officials have learned of Duke Energy's dangerous and irresponsible coal ash management practices. Duke Energy wants to avoid the consequences of public knowledge here, even if it violates the law and deprives the public of important safety information.

Third, the Emergency Action Plan mistakenly labels the 1979 Ash Basin a "low" hazard potential dam. EAP at p. ii. However, Duke Energy's own Hazard Potential Classification published on its website determines that the 1979 Ash Basin and its dam are High Hazard Potential. No Hazard Potential Classification reassessment was published on Duke Energy's website at the time of the publication of the Emergency Action Plan, or since. Under the Rule, the published Hazard Potential Classification governs, and the Emergency Action Plan must treat the 1979 Ash Basin and its dam as High Hazard Potential. 40 C.F.R. §257.73 (a) (2), (a) (3) (iii); § 257.105 (f) (5); § 257.107 (f) (4). This mistake in the Plan is another violation of the Rule and may have affected the design and content of the Plan. This mistake and any consequent failure of the Plan to address the risks to human life from a High Potential Hazard Dam are additional violations of the Rule and RCRA.

For the safety and wellbeing of the public and the protection of our clean water, Duke Energy must be required to comply with the Rule and the Act and make this required information public. To our knowledge, every other utility in the country has done so.

PERSONS RESPONSIBLE FOR VIOLATIONS

Weatherspoon is owned and operated by Duke Energy. Duke Energy is a corporation with its principal place of business in North Carolina. Duke Energy is responsible for all violations at Weatherspoon.

PERSONS GIVING NOTICE

The Winyah Rivers Foundation is a § 501(c)(3) non-profit public interest organization based in Conway, South Carolina. The Foundation has members throughout the Winyah Bay watershed in North and South Carolina, including members who live and recreate on the Lumber River downstream from Weatherspoon. The Foundation's mission is to "protect, preserve, monitor and revitalize the health of the lands and waters of the greater Winyah Bay watershed," including the Lumber River subbasin.

The Foundation and their members have been harmed by Duke Energy's violations of RCRA and the CCR Rule. The Foundation and their members recreate, fish, boat, live, derive drinking water, and own property on the Lumber River in the vicinity of and downstream from Duke Energy's Weatherspoon coal ash lagoon. They fear loss of life (including themselves, their family, and friends), contamination of drinking water, wildlife, and river water and the harm to their property from failures of Duke Energy's coal ash lagoon and the consequences for individuals, families, communities, property owners, and natural resources. They want to have complete information concerning the hazards, risks, and dangers of Duke Energy's coal ash lagoon at Weatherspoon. They also need to know the identities and contact information for responsible persons and emergency personnel so they will be able to take action in the case of a failure of Duke Energy's coal ash lagoon. They also need to know the impact that the failure of Duke Energy's Weatherspoon coal ash lagoon will have on the health and lives of themselves, their families, and friends and the resources and property they own, use, enjoy, and cherish. This information will allow them to better understand those hazards, risks, and dangers, will allow them and others to better prepare for failures of Duke Energy's coal ash lagoon, and will inform them as to what action to take in the event of a failure. Duke Energy's failure to provide the dam safety information required by the Rule reduces their use and enjoyment of the Lumber River. In addition, the Foundation themselves and their members gather, analyze, and make use of information concerning the Lumber River and the threats to these water resources, including specifically information concerning Duke Energy's coal ash storage and pollution. The Foundation and its members need access to the information withheld by Duke Energy to better understand the risks, hazards, and dangers posed by Duke Energy's coal ash storage at Weatherspoon; to inform the public and their members concerning those risks, and to inform their advocacy concerning Duke Energy's coal ash lagoons, dam, pollution, and safety practices.

The name, address, and phone number of the person giving notice are:

Christine Ellis
Winyah Rivers Foundation
P.O. Box 261954 (290 Allied Drive)
Conway, SC 29528-6054
Phone: (843) 349-4007
Christine@winyahrivers.org

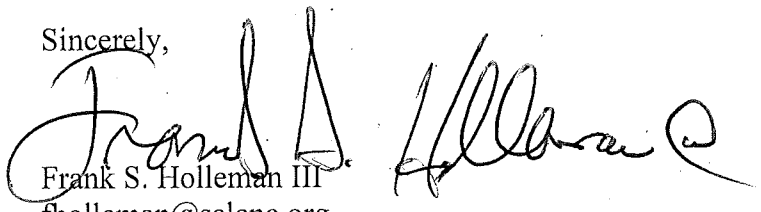
The Foundation believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, the Foundation is prepared to file suit in

the United States District Court for the Eastern District of North Carolina, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (919) 967-1450 (tel.), (919) 929-9421 (fax). During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, the Foundation intend to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,



Frank S. Holleman III
fholleman@selcnc.org

Nicholas S. Torrey
ntorrey@selcnc.org

Leslie Griffith
lgriffith@selcnc.org

Enclosures

cc:
Via certified mail – return receipt requested (w/encl.):

V. Anne Heard, Acting Regional Administrator, U.S. EPA, Region 4
Josh Stein, North Carolina Attorney General
John Stuart Bruce, U.S. Attorney, Eastern District of North Carolina
CT Corporation System, registered agent for Duke Energy Progress

Via e-mail (w/encl.):

Mary Wilkes, U.S. EPA, Region 4
Mark Nuhfer, U.S. EPA, Region 4
Karrie-Jo Shell, U.S. EPA, Region 4
Gina Fonzi, U.S. EPA, Region 4
Matthew Hicks, U.S. EPA, Region 4
Bill Lane, NC DEQ General Counsel

Attachment 1

Mayo Lake Dam Safety Letter re Seeps
6/10/10

North Carolina Department of Environment and Natural Resources
Division of Land Resources
Land Quality Section

James D. Simons, PG, PE
Director and State Geologist

Beverly Eaves Perdue, Governor
Dee Freeman, Secretary

June 10, 2010

NOTICE OF INSPECTION
DAM SAFETY LAW

Mr. Fred Holt
Progress Energy Carolinas, Inc.
Environmental, Health and Safety Services Section
PO Box 1551 PEB 4
Raleigh, NC 27602

RE: Mayo Lake Dam
State ID: PERSO-034
Person County
Watershed: Roanoke

Dear Mr. Holt:

Pursuant to the North Carolina Dam Safety Law of 1967, on March 1, 2010, personnel of the Land Quality Section performed a periodic inspection of the subject high hazard potential dam, which is located on Mayo Creek in Person County. The Dam Safety Law of 1967 provides for the certification and inspection of dams in the interest of public health, safety, and welfare. Our goal is to reduce the risk of failure of such dams, to prevent injuries to persons, damage to property, and to ensure the maintenance of stream flows.

According to the above mentioned visual inspection, the dam appears to be in a stable condition at this time. However, we recommend the following items pertinent to maintenance and operation of the dam:

(1) Continue to remove all trees and thick undergrowth from the embankment. This will serve to (a) prevent the formation of a root system which might significantly increase seepage through the dam which could ultimately result in failure of the structure, (b) reduce the possibility of damage to the dam due to the uprooting of trees by wind or other natural causes, and (c) facilitate inspection and increase the likelihood of early detection of more serious problems connected with the dam. This is particularly important along the abutment contacts where seepage has been evident.

(2) Monitor and control varmint activity on the embankment by backfilling obvious penetrations with crushed stone and/or implementation of other suitable controls.

(3)Maintain a ground cover sufficient to restrain accelerated erosion on all earthen portions of the structure. This will enhance the stability of the structure should these portions become exposed to overflow or other forms of concentrated flow. As discussed with Progress Energy personnel during our visit, it is recommended that you work to achieve a predominantly turf grass cover. Weeping lovegrass and serecia lespedeza should be taken out of the seed mixes used; appropriate clover and Korean or Kobe lespedeza should be added if a legume is desired. The recently proposed SlopeMaster specifications for use at the Cape Fear Plant are considered an acceptable alternative.

(4) Periodically monitor the dam and appurtenant works with respect to elements affecting their safety. This is in light of the legal duties, obligations, and liabilities arising from the ownership and/or operation of a dam. This particularly applies to the evidence of seepage observed at the abutment contacts and along the downstream toe of the embankment as well as the minor erosion observed on the downstream slope of the dam. Monitor the seepage conditions for any evidence of change, and provide suitable backfill and ground cover if erosion begins to threaten a more serious slope failure. Further, the condition of the concrete spillway joints should continue to be monitored and addressed in a timely manner. Your current inspection program, including periodic reviews by your independent consultant, is an appropriate way to address this recommendation.

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 the embankment stability can produce a slide failure of the downstream slope. Please monitor the dam for any changes of this nature.

As a dam owner, you may incur liability should your dam have a problem or fail, if such an event results in loss of life, property damage, or environmental damage downstream. It is therefore requested that you prepare an Emergency Action Plan (EAP) for this dam. The EAP establishes procedures to be followed in events that could adversely impact the dam such as extreme precipitation, seismic activity, excessive seepage, slides, sinkholes, and other natural hazards, and for warning the public downstream in the event of an emergency at the dam. Guidance for preparing an EAP can be found on the Internet at http://www.dlr.enr.state.nc.us/pages/damsafetyprogram.html or by calling Dam Safety Program staff at (919) 733-4574. Two copies of an EAP for this dam should be submitted to the following address:

NC Division of Land Resources
Land Quality Section
Attn: Mr. Steven M. McEvoy, PE
1612 Mail Service Center
Raleigh, NC 27699-1612

Although the inspections by our staff are relatively infrequent and offer no safety guarantees, we hope that you will use the information provided in this letter as you fulfill your obligation to safely maintain and operate your dam. In order to help us keep our records up-to-date and therefore serve you better, please notify us concerning any changes in address or ownership. Your cooperation in this effort is greatly appreciated.

If there are any questions or if we can be of any assistance, please do not hesitate to contact me at (919)791-4200.

Sincerely,

John L. Holley, Jr., PE, CPESC
Regional Engineer
Land Quality Section
Raleigh Regional Office

cc: State Dam Safety Engineer
File

Attachment 1

Lake Hyco Dam Safety Letter re Seeps
6/10/10

North Carolina Department of Environment and Natural Resources
Division of Land Resources
Land Quality Section

James D. Simons, PG, PE
Director and State Geologist

Beverly Eaves Perdue, Governor
Dee Freeman, Secretary

June 10, 2010

NOTICE OF INSPECTION
DAM SAFETY LAW

Mr. Fred Holt
Progress Energy Carolinas, Inc.
Environmental, Health and Safety Services Section
PO Box 1551 PEB 4
Raleigh, NC 27602

RE: Lake Hyco Dam
State ID: PERSO-002
Person County
Watershed: Roanoke

Dear Mr. Holt:

Pursuant to the North Carolina Dam Safety Law of 1967, on February 24 and March 8, 2010, personnel of the Land Quality Section performed a periodic inspection of the subject high hazard potential dam, which is located on the Hyco River in Person County. The Dam Safety Law of 1967 provides for the certification and inspection of dams in the interest of public health, safety, and welfare. Our goal is to reduce the risk of failure of such dams, to prevent injuries to persons, damage to property, and to ensure the maintenance of stream flows.

According to the above mentioned visual inspections, the dam appears to be in a stable condition at this time. However, we recommend the following items pertinent to maintenance and operation of the dam:

(1) Continue to remove all trees and thick undergrowth from the embankment and immediate surrounding area. This will serve to (a) prevent the formation of a root system which might significantly increase seepage through the dam which could ultimately result in failure of the structure, (b) reduce the possibility of damage to the dam due to the uprooting of trees by wind or other natural causes, and (c) facilitate inspection and increase the likelihood of early detection of more serious problems connected with the dam. This is particularly important along the abutment contacts where seepage has been observed.

(2)Maintain a ground cover sufficient to restrain accelerated erosion on all earthen portions of the structure. This will enhance the stability of the dam should these portions become exposed to overflow or other forms of concentrated flow. This particularly applies where erosion was observed at the abutment contacts. As discussed with Progress Energy personnel during our visit, it is recommended that you work to achieve a predominantly turf grass cover. Weeping lovegrass and serecia lespedeza should be taken out of the seed mixes used; appropriate clover and Korean or Kobe lespedeza should be added if a legume is desired. The recently proposed SlopeMaster specifications for use at the Cape Fear Plant are considered an acceptable alternative.

(3) Periodically monitor the dam and appurtenant works with respect to elements affecting their safety. This is in light of the legal duties, obligations, and liabilities arising from the ownership and/or operation of a dam. This particularly applies to the previously described erosion and evidence of seepage observed as well as the condition of the concrete spillway. Your current inspection program, including periodic reviews by your independent consultant, is an appropriate way to address this recommendation.

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 the embankment stability can produce a slide failure of the downstream slope. Please monitor the dam for any changes of this nature.

As a dam owner, you may incur liability should your dam have a problem or fail, if such an event results in loss of life, property damage, or environmental damage downstream. It is therefore requested that you prepare an Emergency Action Plan (EAP) for this dam. The EAP establishes procedures to be followed in events that could adversely impact the dam such as extreme precipitation, seismic activity, excessive seepage, slides, sinkholes, and other natural hazards, and for warning the public downstream in the event of an emergency at the dam. Guidance for preparing an EAP can be found on the Internet at http://www.dlr.enr.state.nc.us/pages/damsafetyprogram.html or by calling Dam Safety Program staff at (919) 733-4574. Two copies of an EAP for this dam should be submitted to the following address:

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If there are any questions or if we can be of any assistance, please do not hesitate to contact me at (919)791-4200.

Sincerely,

John L. Holley, Jr., PE, CPESC
Regional Engineer
Land Quality Section
Raleigh Regional Office

cc: State Dam Safety Engineer
File