

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13 CVS 11032

STATE OF NORTH CAROLINA *ex. rel.*)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENT AND NATURAL)
RESOURCES,)
)
Plaintiff,)
)
v.)
)
DUKE ENERGY PROGRESS, INC.,)
)
Defendant.)
)
)
)

**MOTION TO INTERVENE
RULE 24 N.C.R.C.P.**

NOW COMES the Roanoke River Basin Association (“RRBA”) pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, and hereby moves this Court for leave to intervene as Plaintiff-Intervenor in the above-captioned matter with respect to the coal ash lagoons at Defendant’s Mayo Steam Electric Generating Plant and Roxboro Steam Electric Generating Plant. In support of this motion, RRBA shows the Court the following:

1. RRBA seeks to intervene in this action with the full rights of participation as a party in the State’s enforcement of N.C. GEN. STAT. § 143-215.1(a)(1) and (a)(6); National Pollutant Discharge Elimination System (“NPDES”) Permit Nos. NC0038377 and NC0003425; and the North Carolina groundwater standards codified at 15A N.C. Admin. Code 2L.0101 *et seq.* (the “2L Rules”) against Defendant Duke Energy Progress, Inc., for pollution of groundwater and surface water from coal ash ponds at the Mayo Steam Electric Generating Plant

(“Mayo”) in Person County, North Carolina and the Roxboro Steam Electric Generating Plant (“Roxboro”) in Person County, North Carolina.

Mayo Steam Electric Generating Plant

2. Pursuant to authority delegated to the State from the Environmental Protection Agency (“EPA”), under § 402(b) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(b), the North Carolina Division of Water Quality (“DWQ”) issued NPDES Permit No. NC0038377 (“Mayo NPDES Permit”) to Progress Energy for the Mayo facility on July 12, 1982. The Mayo NPDES Permit has been renewed subsequently. The current Mayo NPDES Permit was re-issued on October 14, 2009, with an expiration date of March 31, 2012. On September 28, 2011, Progress Energy submitted a renewal application to the DWQ, which is currently pending. Defendant continues to operate the Mayo facility pursuant to the Mayo NPDES Permit under N.C. Gen. Stat. § 150B-3, as Defendant timely applied for re-issuance of the Mayo NPDES Permit within 180 days prior to the permit’s expiration date.

3. The Mayo NPDES Permit authorizes one unlined coal ash lagoon (“Mayo Coal Ash Lagoon”) to discharge directly into the Mayo Reservoir from Outfall 002. The Mayo Coal Ash Lagoon receives ash transport water, coal pile runoff, storm water runoff, cooling tower blowdown and various low volume wastes such as boiler blowdown, oily waste treatment, wastes/backwash from the water treatment processes including Reverse-Osmosis wastewater, plant area wash down water, equipment heat exchanger water, and treated domestic wastewater. In addition, Internal Outfall 008 discharges cooling tower blowdown into the Mayo Coal Ash Lagoon. The Mayo site also includes additional coal ash landfills near the active Mayo Coal Ash Lagoon. The Mayo Reservoir is in the Roanoke River Basin.

Roxboro Steam Electric Generating Plant

4. Pursuant to its delegated authority, DWQ issued NPDES Permit No. NC0003425 (“Roxboro NPDES Permit”) to Progress Energy for the Roxboro facility on June 30, 1981. The Roxboro NPDES Permit has been renewed subsequently. The current NPDES Permit was re-issued on April 9, 2007, with an expiration date of March 31, 2012. On October 10, 2011, Progress Energy submitted a renewal application to the DWQ. Defendant continues to operate the Roxboro facility pursuant to the expired Roxboro NPDES Permit under N.C. Gen. Stat. § 150B-3, as Defendant timely applied for re-issuance of the Roxboro NPDES Permit within 180 days prior to the permit’s expiration date.

5. The Roxboro NPDES Permit authorizes a coal ash lagoon (“Roxboro Coal Ash Lagoon”) to discharge from Internal Outfall 002 to the heated water discharge canal system and ultimately into Hyco Lake through Outfall 003. The Roxboro Coal Ash Lagoon receives chemical metal cleaning wastes, ash transport water, low volume wastewater, runoff from the ash landfill, dry flyash handling system washwater, coal pile runoff, silo washwater, stormwater runoff, cooling tower blowdown, and domestic sewage plant effluent. The site includes four additional coal ash storage facilities near the active Roxboro Coal Ash Lagoon. Hyco Lake is in the Roanoke River Basin.

Roanoke River Basin Association Seeks to Intervene

6. Citizens can intervene in the state enforcement action. RRBA now seeks to intervene in the State’s civil enforcement action to ensure the unlawful pollution from Defendant’s Roxboro coal ash lagoon is fully stopped and remediated.

7. Rule 24 of the North Carolina Rules of Civil Procedure sets forth the criteria and procedure for intervention in a civil action. The rule authorizes intervention as of right upon

“timely application” when the applicant “claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

8. RRBA’s Motion to Intervene is timely. RRBA understands that, well over a year after the State filed this action, no material activities have occurred in the court with respect to the Mayo and Roxboro sites. The proposed intervention will not unduly delay this litigation.

9. In addition, RRBA has an interest in the subject of the action, namely, enforcement against Defendant’s ongoing contamination of the Mayo Reservoir, Hyco Lake, and tributaries of the Roanoke River from its Mayo and Roxboro coal ash lagoons, including contamination via unpermitted seeps from the coal ash ponds and coal ash storage facilities and contamination of groundwater flowing into these waters.

10. The presence of unpermitted seeps at the Mayo and Roxboro facilities discharging into Mayo and Hyco Lakes has been publicly documented for years. Prior to this enforcement action, DENR did not take enforcement action despite being aware of the situation at these facilities.

11. RRBA also has an interest in ensuring that Plaintiff complies with its obligations under the law to address groundwater contamination.

12. Moreover, RRBA has a direct and substantial interest because Defendant’s coal ash has polluted and is continuing to pollute these rivers, tributary streams, and lakes within the Roanoke River basin, where many of RRBA’s members live, own property, and recreate. This pollution is reducing their use and enjoyment of the lake and their property. Defendant’s decision to store coal ash indefinitely on the banks of lakes and rivers within the Roanoke River

basin in inadequate, unlined lagoons creates an ongoing risk of catastrophic failure that significantly affects the daily lives and long-term interests of RRBA's members. The risk of spills, as well as the ongoing illegal pollution, will continue as long as the coal ash remains in the Mayo and Roxboro lagoons.

13. The berms at the Mayo and Roxboro Ash Lagoons have been given a "High" hazard rating by the state of North Carolina, due to the contents of the ponds and the potential environmental damage in the event of a failure. The EPA has rated the Mayo and Roxboro Coal Ash Lagoons as posing a "Significant" hazard, meaning "failure is likely to cause significant economic loss, environmental damage, or damage to infrastructure."

14. The Roanoke River Basin Association ("RRBA") is a § 501(c)(3) nonprofit organization whose mission is to establish and carry out a strategy for the development, use, preservation, and enhancement of the resources of the Roanoke River basin in the best interest of present and future generations. The Mayo Reservoir and Hyco Lake are both located within the Roanoke River basin. RRBA believes that basin resource conservation can co-exist with managed economic growth. RRBA's membership includes local governments, non-profit, civic and community organizations, regional government entities, businesses and individuals. As part of its mission, the Roanoke River Basin Association monitors activities that might negatively impact the quality of the water resources within the basin, including illegal pollution from the Mayo and Roxboro coal ash ponds into the Mayo Reservoir and Hyco Lake.

15. RRBA and its members have been harmed by Defendant's unpermitted discharges at the Mayo and Roxboro facilities. Members of RRBA live, recreate, and fish in the Mayo Reservoir and Hyco Lake in the vicinity of and downstream from the Mayo and Roxboro plants. They fear damage to the natural environment they use and enjoy, as well as contamination of

drinking water from ongoing discharges from Defendant's coal ash ponds containing arsenic and other pollutants. Many are also concerned by the impact these discharges will have on the property value of their homes. Copies of affidavits demonstrating the interest of RRBA and its members are attached as Exhibit 1.

16. RRBA has an interest in ensuring public participation in the State enforcement action to protect the Mayo Reservoir and Hyco Lake, as required by federal regulations governing the State's federally delegated CWA program, by intervening in this enforcement action.

17. Furthermore, RRBA's interests are not adequately represented by the Plaintiff.

18. The divergence between the interests of the State and RRBA is demonstrated by prior inaction of the North Carolina Department of Environment and Natural Resource ("DENR") to require adequate monitoring and maintenance of the Mayo and Roxboro facilities. Public records demonstrate that DENR has been aware of seepage from these coal ash ponds for years, yet has continued to allow Defendant to discharge polluted water seeping from the coal ash ponds into the Mayo Reservoir and Hyco Lake at locations other than its permitted outfalls. DENR has failed to take enforcement action in response to Defendant's unpermitted discharges, including illegal channels constructed by Defendant, despite conducting regular site visits.

19. In addition, the limited injunctive relief requested by the State appears to stop short of seeking to enjoin ongoing illegal discharges of pollutants. Plaintiff does not expressly seek remediation of the unpermitted contamination or removal of the source of the contamination. Complaint, Prayer for Relief. In addition, DENR opposed the plain language reading of the 2L rules' "immediate action" requirement that was clarified by this Court's March 6, 2014 ruling.

20. RRBA understands that the Plaintiff has conducted no discovery in this case, and the Plaintiff conducted no discovery in its previously-filed enforcement actions against Defendant and its sister entity for its coal ash pollution in North Carolina.

21. More fundamentally, the Plaintiff represents a different and much broader set of interests than RRBA. DENR represents all the citizens of the state, including Defendant (a state-regulated utility), and has wide-ranging responsibilities, including its role as a service organization that issues permits, like the environmental permits for Defendant's facility. RRBA, however, represents its members, who live and recreate in and around the basin, including the Mayo Reservoir and Hyco Lake. RRBA is focused on protecting the health of a specific river system that its members live near and recreate in, including its tributaries and groundwater, from pollution, including the coal ash pollution that is attributable to Defendant's actions and, up until this point, Plaintiff's inaction.

22. In sum, in order to advance RRBA's interest in protecting the water quality of the Mayo Reservoir, Hyco Lake, and adjoining groundwater within the basin, and ensuring compliance with NPDES permits issued under the CWA, RRBA must be afforded the opportunity to intervene as a full party in this action.

23. In addition, the Court has ruled that RRBA, along with other conservation organizations working to protect North Carolina's waters, may intervene in these enforcement cases. Orders Granting Motions to Intervene (Aug. 9, 2013, Nov. 18, 2013, and May 3, 2014), *State of North Carolina ex rel. N.C. DENR v. Duke Energy Carolinas, LLC*, 13 CVS 9352 & 13 CVS 14661 (Mecklenburg Co.); *State of North Carolina ex rel. N.C. DENR v. Duke Energy Progress, Inc.*, 13 CVS 4061 & 13 CVS 11032 (Wake Co.).

24. Furthermore, intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties, and judicial economy is served by addressing RRBA's interests relating to the subject matter of this litigation as intervenor in this case.

25. Pursuant to Rule 24(c), this motion is accompanied by a proposed Complaint in Intervention (Exhibit 2).

WHEREFORE, for the reasons stated, RRBA respectfully requests that this Court grant its Motion to Intervene pursuant to N.C. R. Civ. P. 24.

This the 2nd day of October, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Intervene was served on all parties by depositing a true and correct copy in the U.S. Mail, first-class postage prepaid, addressed as follows:

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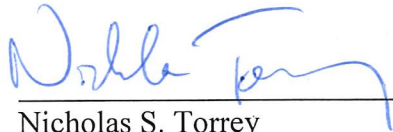
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A courtesy copy was provided to all parties by electronic mail as well.

This the 24 day of October, 2014.



Nicholas S. Torrey

