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15CV013760

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS ________

In Re FINAL DECISION OF ADMINISTRATIVE LAW JUDGE, CONTESTED CASE, 15 EHR 02581, DUKE ENERGY PROGRESS, INC. V. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER RESOURCES

PETITION FOR JUDICIAL REVIEW

Petitioners respectfully seek review, pursuant to N.C. Gen. Stat. §§ 150B-43, 150B-45, and 150B-46, of the Order of Dismissal issued by an Administrative Law Judge ("ALJ") in the Office of Administrative Hearings ("OAH"), concluding an appeal of a civil penalty assessed by the North Carolina Department of Environmental Quality ("DEQ")[1] for groundwater contamination at Duke Energy Progress's Sutton Plant (contested case, 15 EHR 02581). In support of this petition for judicial review, Petitioners show the Court as follows:

NATURE OF THE CASE

1. Petitioners Cape Fear River Watch, MountainTrue, Roanoke River Basin Association, Sound Rivers, Waterkeeper Alliance, and Winyah Rivers Foundation (collectively, "Petitioners") are nonprofit conservation organizations dedicated to protecting streams, rivers, and groundwater from contamination. Petitioners have brought and intervened in multiple lawsuits in pursuit of requiring Duke Energy Progress and Duke Energy Carolinas (collectively

[1] The penalty was initially assessed by the North Carolina Department of Environment and Natural Resources which was renamed the North Carolina Department of Environmental Quality by Session Bill 2015-241.

"Duke Energy") to fully remedy contamination from coal ash stored in primitive unlined lagoons that leak and seep into rivers, streams, and groundwater across North Carolina. Those lawsuits are ongoing.

2. The Sutton facility along the Cape Fear River near Wilmington, North Carolina, is one of fourteen powerplants where Duke Energy stores coal ash in unlined pits. At Sutton, Duke Energy's coal ash pits leak into groundwater, threaten drinking water supplies, and pollute Sutton Lake both directly and through flows of contaminated groundwater.

3. Duke Energy's contamination of groundwater around its coal ash lagoons at all fourteen powerplants is a matter of ongoing controversy in the General Court of Justice, Superior Court Division, before the Honorable Paul Ridgeway, Civil Actions: Wake County, 13 CVS 9352 and 13 CVS 11032; Mecklenburg County 13 CVS 4061, and 13 CVS 14661 (the "Superior Court injunction cases").

4. These Superior Court injunction cases were filed in response to legal actions by Petitioners. Petitioners brought suit stemming from groundwater contamination, including the Sutton site, in 2012.[2] In 2013, Petitioners sent a series of notices of intent to file suit under the Clean Water Act for the Asheville, Riverbend, and Sutton sites. DEQ responded by filing the Superior Court injunction cases, seeking injunctive relief to abate Duke Energy's groundwater contamination and certain illegal discharges of polluted wastewater. The four Superior Court injunction cases have been designated as exceptional and assigned to the Honorable Paul Ridgeway under Rule 2.1 of the General Rules of Practice for the Superior and District Courts.

5. Based on Petitioners' demonstration that their members were impacted by Duke Energy's coal ash pollution and had a significant interest in abating such pollution, and that DEQ

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[2] *See Cape Fear River Watch, et al.,* Request for Declaratory Ruling before the Environmental Management Commission (Oct. 10, 2012).

did not adequately represent their interests, Petitioners were granted full participation as parties in the Superior Court injunction cases, over Duke Energy's objections and notwithstanding DEQ's request to curtail their participation. DEQ, Duke Energy Progress, and Duke Energy Carolinas are parties to the Superior Court cases with Petitioners, where the injunctive relief for groundwater contamination at all fourteen of Duke Energy's plants is in controversy.

6. In April 2015, completely separate from the Superior Court injunction cases (but while they were pending), Duke Energy Progress challenged in OAH a $25 million civil penalty DEQ had issued for the Sutton groundwater contamination. The contested case involved one claim, at one power plant, brought by one party. The civil penalty would be paid into the state treasury, and nothing in DEQ's notice of penalty addressed the need for action to stop the illegal groundwater contamination or to remedy contaminated groundwater – claims DEQ has pursued instead through a complaint for injunctive relief already pending in Superior Court.

7. Only Duke Energy Progress and DEQ are party to the penalty action. Duke Energy Carolinas, which operates seven of fourteen powerplants, and Petitioners, are not party to the Sutton penalty action.

8. On September 29, 2015, an ALJ entered an Order of Dismissal concluding the Sutton penalty action ("ALJ Order," attached as Exhibit 1). Despite the limited scope of the Sutton penalty being adjudicated before the ALJ, the ALJ Order purports to approve and accept a settlement as "full and fair resolution" of claims not before it: "other *potential* groundwater controversies" at "other coal-powered plants" operated by Duke Energy Progress and Duke Energy Carolinas. Ex. 1, at pp. 1-2 (emphasis added). The settlement (attached as Exhibit 2) also purports to resolve all pending groundwater claims in the Superior Court injunction cases. Ex. 2, at p. 5; *id.* ¶ III.B.

9. Groundwater controversies at coal-powered plants owned by the Respondent Duke Energy Progress, other than the Sutton plant, and Duke Energy Carolinas, who was not a party to this case, were not before the ALJ. For that matter, no claims for *injunctive* relief related to groundwater contamination at any of Duke Energy's fourteen plants were before the ALJ. These claims are pending in Superior Court.

10. The broad language in the ALJ Order strays well beyond the singular issue of the Sutton penalty. By purporting to resolve claims beyond the jurisdiction of the Sutton penalty action and parties before it, the ALJ exceeded its statutory authority, exceeded its jurisdiction, and committed clear errors of law.

11. Petitioners only learned of the settlement and ALJ Order following DEQ's announcement via a press release on the day the Order was issued.[3] At no point have Petitioners been served with the ALJ Order.

12. Petitioners are persons aggrieved by entry of the ALJ Order purporting to resolve injunctive claims for relief to which Petitioners are parties in Superior Court and which Petitioners have been litigating for two years. Petitioners have a substantial and direct interest in ensuring the unlawful pollution from Duke Energy's coal ash lagoons is fully stopped and remediated. These interests are substantially injured by entry of the ALJ Order, which reached beyond the pleadings and parties before it in order to approve – without any record – a resolution of injunctive claims for groundwater at fourteen powerplants.

13. Petitioners ask the Court to vacate the parts of the ALJ Order that exceed OAH's authority and jurisdiction and enter a modified order limited to the issue and parties before the ALJ: the Sutton penalty imposed by DEQ against Duke Energy Progress.

[3] http://portal.ncdenr.org/c/journal/view_article_content?groupId=4711509&articleId=26320388

PARTIES

14. Petitioners are nonprofit conservation organizations whose missions include protecting surface and ground waters from contamination, including protection of drinking waters and ensuring groundwater does not degrade surface water. These organizations and their members use, enjoy, and depend upon the areas near and downstream of Duke Energy's coal ash lagoons for recreation, fishing, aesthetic enjoyment, and other uses. Duke Energy's unlawful pollution of the rivers, tributaries, and adjacent groundwater from its coal ash sites across North Carolina adversely affects the recreational, environmental, economic, aesthetic, and quality-of-life interests of Petitioners in the watersheds they work to protect. Petitioners have been granted full party status as plaintiff-intervenors at their respective plants in the Superior Court injunction cases on the basis of these interests, which are not adequately represented by the other parties. Copies of the orders granting intervention are attached as Exhibit 3.

15. Petitioner Cape Fear River Watch ("River Watch") is a not-for-profit membership organization focused on restoring and maintaining the ecological integrity of the lower Cape Fear River basin. It serves this mission by advocating for strong environmental regulations, promoting ecosystem restoration, and educating the public on the value of the natural resources in the basin. River Watch's Cape Fear Riverkeeper is the sole Riverkeeper for the entire Cape Fear River. River Watch has more than 600 members, many of whom live in the Cape Fear River basin and visit, fish, hunt, boat, and otherwise use and enjoy the river. Members of River Watch also recreate, fish, and operate charter businesses on Sutton Lake, which is being polluted by ongoing discharges of contaminated groundwater as well as surface discharges from the Sutton coal ash lagoons, and they patronize area businesses that use water from nearby ground water supply wells and are concerned about the health effects of coal ash pollution on the

drinking water around the Sutton site. Members of River Watch also recreate and fish on the Cape Fear River in the vicinity of and downstream from the Cape Fear facility. Duke Energy's discharges of contaminants from the Cape Fear and Sutton coal ash sites are reducing the use and enjoyment by River Watch and its members of the Cape Fear River and Sutton Lake.

16. Petitioner MountainTrue is a § 501(c)(3) nonprofit public interest organization. Founded in 2015 when Western North Carolina Alliance merged with several other conservation groups, MountainTrue's mission includes protecting water quality throughout Western North Carolina. MountainTrue is the home of the French Broad Riverkeeper, the primary protector and defender of the French Broad River watershed. MountainTrue is involved in the Broad River Alliance which advocates for protection of the Broad River. Members of MountainTrue fear contamination of drinking water, wildlife, and river water by contaminated discharges, including contaminated groundwater, from the Cliffside and Asheville coal ash facilities. Duke Energy's discharges of contaminants from the Asheville and Cliffside coal ash sites are reducing the use and enjoyment by MountainTrue and its members of the French Broad River and the Broad River.

17. Petitioner Roanoke River Basin Association ("RRBA") is a § 501(c)(3) nonprofit organization with its principal place of business in Danville, VA, 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, RRBA 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 Lake, Crutchfield Branch, Mayo Creek, and Hyco Lake. RRBA and its members have been harmed by Duke Energy's unpermitted discharges at the Mayo and Roxboro facilities. Members of RRBA live, recreate, and fish in and around 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 to groundwater and surface waters from Duke Energy's Mayo and Roxboro coal ash ponds. Many are also concerned by the impact these discharges will have on the property value of their homes. Duke Energy's discharges of contaminants from the Mayo and Roxboro coal ash sites are reducing the use and enjoyment by RRBA and its members of Mayo Lake, Crutchfield Branch, Mayo Creek, and Hyco Lake.

18. Petitioner Sound Rivers was formed in 2015 when the Neuse Riverkeeper Foundation merged with the Pamlico-Tar River Foundation. Sound Rivers continues the Neuse Riverkeeper Foundation's mission and purpose to monitor, protect, and enhance the Neuse River watershed. Sound Rivers includes the Upper Neuse Riverkeeper, who serves as investigator, advocate, and educator for the watershed around the H.F. Lee coal ash facility. Sound Rivers represents the interests of thousands of members, many of whose use and enjoyment of the Neuse River has been harmed by the discharges of contaminated wastewater and groundwater from the H.F. Lee coal ash site.

19. Petitioner Waterkeeper Alliance is a § 501(c)(3) nonprofit public interest organization with its principal place of business in New York, NY, that connects and supports local Waterkeeper programs to provide a united voice and to champion clean water issues around

the world. The Waterkeeper Alliance seeks to protect fishable, swimmable, and drinkable waterways worldwide. Waterkeeper Alliance has members who live and recreate in the vicinity of and downstream of the Dan River, Asheville, Allen, Marshall, Buck, Cape Fear, Lee, and Sutton facilities and the organization has worked actively to identify, monitor, and test the numerous illegal discharges at these sites. Duke Energy's discharges of contaminants from these sites are reducing the use and enjoyment by Waterkeeper Alliance and its members of the waterways and nearby drinking water supplies around these sites. The French Broad Riverkeeper, Cape Fear Riverkeeper, Upper Neuse Riverkeeper, Catawba Riverkeeper, and Yadkin Riverkeeper are members of Watershed Alliance.

20. Petitioner Winyah Rivers Foundation (WRF) is a § 501(c)(3) nonprofit public interest organization with its principal place of business in Conway, South Carolina. Winyah Rivers 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 the Weatherspoon coal ash site who are concerned about coal ash pollution of the river and connected groundwaters. WRF'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 sub-basin. Duke Energy's discharges of contaminants, including contaminated groundwater, from the Weatherspoon coal ash site are reducing the use and enjoyment of the Lumber River and nearby drinking water supplies by Winyah Rivers Foundation and its members.

21. The orders granting Petitioners' interventions into the Superior Court enforcement actions and affidavits supporting these interventions are attached hereto as Exhibits 3 and 4, respectively.

22. The North Carolina Department of Environmental Quality (formerly known as the North Carolina Department of Environment and Natural Resources), Division of Water Resources, is an agency of the state vested with the statutory authority to enforce environmental laws pursuant to N.C. Gen. Stat. § 143-211 *et seq.*

23. Duke Energy Progress, LLC (formerly known as Duke Energy Progress, Inc.), is a North Carolina limited liability company with its principal place of business in Wake County, North Carolina. Duke Energy Progress owns, operates, and maintains the facilities at Sutton, as well as Asheville, Cape Fear, Lee, Mayo, Roxboro, and Weatherspoon.

JURISDICTION AND VENUE

24. The Superior Court has jurisdiction over this action pursuant to N.C. Gen. Stat. § 150B-43, -45.

25. Venue is proper in Wake County pursuant to N.C. Gen. Stat. § 150B-45(a)(2).

BACKGROUND

26. The sweeping ALJ Order in the Sutton penalty case is the latest in a series of extraordinary efforts by DEQ and Duke Energy to marginalize the interests of Petitioner conservation groups. Petitioners have fought for years to protect communities from Duke Energy's coal ash, which is stored perilously beside rivers and lakes in unlined, leaking pits.

27. In October 2012, a year and half before the Dan River catastrophe, conservation groups[4] requested a declaratory ruling to confirm Duke Energy's cleanup obligations at its

[4] The petitioning conservation groups were Cape Fear River Watch, MountainTrue (then Western North Carolina Alliance), Sierra Club, and Waterkeeper Alliance.

leaking coal ash lagoons. DEQ's resistance to enforce the groundwater protection rule against Duke Energy prompted the conservation groups' first suit.[5]

28. In January 2013, conservation groups began sending notices of intent to sue Duke Energy for violating the federal Clean Water Act including conditions of pollution discharge permits at several of its facilities.

Superior Court Injunction Cases

29. DEQ responded to Petitioners' notices by filing a series of enforcement actions in Superior Court, culminating in preemptive suits at all of Duke Energy's coal ash sites in North Carolina by August 2013 for violations of water quality laws, including the state groundwater rules.

30. DEQ's complaints in the Superior Court injunction cases request preliminary and permanent injunctive relief under N.C. Gen. Stat. § 143-215.6C, and seek to require Duke Energy to "abate" certain violations of state groundwater rules and North Carolina's federally delegated Clean Water Act program. Such suits for injunctive relief, according to N.C. Gen. Stat. § 143-215.6C, may only be filed in Superior Court.

31. Under oath, DEQ alleged that failure to correct the violations identified in its complaints "*poses a serious danger to the health, safety and welfare of the people of the State of North Carolina and serious harm to the water resources of the State*." Complaints ¶¶ 67 (13 CVS 9352), 77 (13 CVS 4061), 204 (13 CVS 11032), 197 (13 CVS 14661) (emphasis added).

32. Since filing, DEQ repeatedly impeded the progress of its own Superior Court injunction cases pending in Superior Court. From the earliest inception, it resisted the

[5] When conservation groups prevailed, the legislature intervened to change the law in 2014, with passage of the Coal Ash Management Act ("CAMA"). As a result, the Supreme Court found the conservation groups' claims to be moot on appeal. *See Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 772 S.E.2d 445 (N.C. 2015).

participation of community groups that identified legal violations of water quality laws in the Superior Court injunction cases. After Petitioners moved to intervene in those cases, DEQ argued to limit their participation, even though it was barred by law from opposing their intervention.

33. With intervention motions pending, DEQ agreed to a hasty settlement with Duke Energy at Asheville and Riverbend. The settlement included only a nominal fine and did not mandate a cleanup. As a result, it ignited a wave of public opposition, with almost 5,000 public comments, only one of which (from a Duke employee) supported the settlement. Despite this, DEQ formally asked the Superior Court to approve the settlement.

34. Intervenors were granted the full rights of parties regarding their respective sites in the various Superior Court injunction cases in 2013 and 2014. DEQ and Duke Energy then turned their energies to blocking Intervenors' discovery.

35. In the aftermath of the Dan River spill in February 2014 and following announcement of a federal grand jury investigation, DEQ abandoned the discredited settlement at Asheville and Riverbend. The Superior Court entered a schedule for the progress of discovery, but DEQ still took no meaningful action to prosecute its own Superior Court injunction cases against Duke Energy.

36. To date, neither DEQ nor Duke Energy have taken a single deposition in the state Superior Court injunction cases or pursued document discovery of each other, instead electing an informal stay of discovery as between them.

37. DEQ followed inaction with promise of a motion to stay the Superior Court injunction cases in January 2015. DEQ tried to impede entry of a case scheduling order for its Superior Court injunction cases in April 2015, asserting instead that discovery was unnecessary

because of the passage of the Coal Ash Management Act ("CAMA").[6] CAMA is explicit that it does not preempt the state and federal water protection laws at issue in the Superior Court injunction cases. The Superior Court rejected DEQ's position and entered an order for discovery in the Superior Court injunction cases in May 2015.[7]

38. After the conservation groups deposed two DEQ employees in July 2015, Duke Energy moved for a protective order, and DEQ moved to stay the Superior Court injunction cases altogether. The Superior Court denied the motions to stay and for protective order at a hearing before the Honorable Paul Ridgeway on September 14, 2015.

39. Neither Duke Energy nor DEQ apprised the Superior Court, much less the Petitioners who are parties to those cases, of their efforts to settle injunctive claims pending in Superior Court through the administrative penalty action.

<u>The Sutton Penalty Action 15 EHR 02581</u>

40. While letting the state Superior Court cases for injunctive relief to arrest contamination languish, DEQ sent to Duke Energy Progress an "Assessment of Penalties" on March 10, 2015, for the Sutton facility. A copy is attached as Exhibit 5.

41. DEQ cites N.C. Gen. Stat. § 143-215.6A as the basis for the penalty, which authorizes DEQ to directly issue the penalty without court action. Section (d) of the same section authorizes a contested case petition to challenge imposition of a civil penalty. A contested case is commenced by filing a petition with OAH pursuant to N.C. Gen. Stat. § 150B-23(a) of the Administrative Procedure Act.

[6] *See* Joint Case Management Report at 4-6 (April 17, 2015).

[7] *See* May 29, 2015, Final Case Management Order (Mecklenburg, 13-CVS-14661; Wake, 13-CVS-11032).

42. In comparison, the statute DEQ cites for its injunctive authority in the Superior Court injunction cases to abate the pollution, N.C. Gen. Stat. § 143-215.6C, places jurisdiction in Superior court – where the Superior Court injunction cases are pending.

43. On April 9, 2015, Duke Energy Progress appealed the Sutton penalty to OAH. *See* Petition for a Contested Case Hearing (checking the box related to "a fine or civil penalty"), attached as Exhibit 6.[8]

44. Subsequent filings, including the prehearing statement filed by Duke Energy Progress, indicate the sole issue on appeal to OAH was the $25.1 million Civil Penalty Assessment for the Sutton facility.

45. Duke Energy Carolinas, the owner of several other leaking coal ash lagoons in North Carolina (Allen, Belews Creek, Buck, Cliffside, Dan River, Marshall, and Riverbend) was not party to the Sutton penalty case.

46. Petitioners here, who are advocating for a full cleanup of coal ash contamination and whose interests are in the injunctive relief at issue in the Superior Court injunction cases, also were not parties to Duke Energy Progress's penalty appeal.

47. While DEQ and Duke Energy agreed to stay discovery of each other in the Superior Court injunction cases, they had elected to pursue discovery in the administrative penalty case, outside view of Petitioners. *See, e.g.*, Duke Amended Notice of Filing (Sept. 9, 2015) (filing depositions and other materials in the administrative record); Case Management and Scheduling Order (June 2, 2015). Duke Energy meanwhile opposed *any* fact depositions by Petitioners until 2016 in the Superior Court injunction cases.

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[8] Duke Energy Progress's full 166-page contested case filing is available in the administrative record.

48. Duke Energy Progress moved for summary judgment in the penalty case on September 4, 2015. DEQ responded on September 21, 2015, defending its $25.1 million Sutton penalty.

49. On September 29, 2015, Duke Energy Progress and DEQ settled the Sutton penalty case, but in fact, they purport to resolve much more:

a. DEQ abandons its groundwater claims in the Superior Court injunction cases: "DEQ further acknowledges that this Agreement fully addresses and resolves all issues related to groundwater contamination associated with coal ash facilities at the Duke Energy Sites, including all ***groundwater violations alleged in the state enforcement actions currently pending in Superior Court in Wake and Mecklenburg Counties***." Ex. 2, at p. 5.

b. DEQ relinquishes future enforcement for groundwater violations, agreeing to "forgo current, prior, ***and future claims*** related to exceedances of groundwater standards associated with coal ash facilities at Duke Energy's North Carolina facilities." *Id.*, p. 1.

c. DEQ agrees not to issue "Notices of Violation, Notices of Regulatory Requirements," or to take "***any judicial action***" at all against Duke Energy for groundwater contamination, so long as Duke Energy complies with CAMA, a statute that does not prohibit water pollution.[9] *Id.* ¶ III.B.

d. DEQ agrees not to issue any "Notices of Violation, Notices of Regulatory Requirements," or to take "any administrative, regulatory, or other enforcement actions" that are "based on or in any way related to the classification of Sutton Lake as waters of the State." *Id.*

e. DEQ surrenders its ability to impose additional groundwater monitoring terms through "***future NPDES Permits for the Duke Energy Sites.***" *Id.* ¶ III.C.

f. DEQ significantly reduces the penalty from $25 million just for Sutton, to $7 million for all 14 powerplants – or exactly $500,000 per site, as compared with the $25 million that DEQ sought for Sutton alone. *Id.* ¶ II.C.

50. The same day DEQ and Duke Energy entered the settlement, the ALJ entered an Order approving the settlement and dismissing the penalty action.

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[9] CAMA itself sets forth a long-term process for closing ash basin, but explicitly and repeatedly states that it does not supplant federal and state water protection laws.

51. The ALJ Order is a final decision in a contested case, pursuant to N.C. Gen. Stat. § 150B-34(e).

52. Far from entering a mere dismissal of the issue before it, the ALJ veered far outside the summary briefing on the narrow issue of the Sutton penalty before OAH.

53. Instead, without any record before it on injunctive relief necessary to abate the groundwater contamination at 14 powerplants, the ALJ finds without explanation that the settlement is a "full and comprehensive resolution of ***other potential groundwater controversies at the Plants,***" which refers to the powerplants that were not part of the OAH proceeding.[10]

54. The ALJ Order, by purporting to adjudicate the resolution of issues beyond the Sutton penalty, including the currently pending enforcement actions seeking injunctive relief under the jurisdiction of the Superior Court, significantly overstepped its authority.

55. The ALJ lacked statutory authority to adjudicate the claims for injunctive relief, which were not before it anyway, but are properly before Superior Court pursuant to N.C. Gen. Stat. § 143B-215.6C.

56. The ALJ likewise lacked any record to evaluate the injunctive relief before it.

57. The ALJ did not even attempt to determine whether the settlement would comply with existing law.

58. Despite its complete lack of evidentiary or legal basis, the ALJ purports to resolve claims for injunctive relief not before it, on behalf of parties not before it, including Duke Energy Carolinas.

[10] Duke Energy forecast its intention to use the decision to undermine the ongoing enforcement actions which Petitioners are party to by letter to Honorable Paul Ridgeway dated September 30, 2015. *See* Letter from Nash Long, Hunton & Williams, to Hon. Paul Ridgeway (Sept. 30, 2015), attached as Exhibit 7.

59. Petitioners had no notice that the administrative challenge to the Sutton penalty would suddenly turn into a forum for dissolving injunctive claims to which Petitioners are party.

60. Petitioners also had no opportunity to administratively exhaust these issues, as these are issues which were outside the scope of the penalty action and pleadings before OAH.

61. As to the sole issue before the ALJ, Duke Energy's penalty appeal, Petitioners would have encountered significant hurdles in attempting to intervene on that issue in light of the precedent from *Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res.*, 361 N.C. 531, 648 S.E.2d 830 (2007), which casts doubt on the interest of environmental groups in mere penalty actions, such as this.

62. The ALJ Order impairs the very interests Petitioners intervened to protect in the Superior Court injunction cases currently pending in Superior Court. As a result, Petitioners are persons aggrieved by the entry of the ALJ Order, which attempts to decide issues far outside of the limited record before it and overreaches its jurisdictional authority.

63. Petitioners are conservation groups that are persons aggrieved, within the meaning of N.C. Gen. Stat. § 150B-2, by the final decision entered in a contested case, under N.C. Gen. Stat. § 150B-34, who can properly seek judicial review pursuant to N.C. Gen. Stat. § 150B-43; *see Appeal of Brunswick Cnty*, 81 N.C. App. 391, 396, 344 S.E.2d 584, 587-88 (1986).

PETITIONERS' EXCEPTIONS TO THE FINAL DECISION

Pursuant to N.C. Gen. Stat. §§ 150B-43, 150B-45, 150B-46, and 150B-51(b), Petitioners submit the following exceptions to the ALJ Order:

The Order Exceeds the Statutory Authority and Jurisdiction of the Office of Administrative Hearings

64. OAH exceeded its authority by entering an Order that went outside the scope of the claims before it on review of agency action, and by purporting to approve remedial relief for claims pending in Superior Court. The ALJ intruded into proceedings currently pending in Superior Court by purporting to "find" the settlement "to be a fair and comprehensive resolution of other potential groundwater controversies at the Plants," which are defined to include all "coal-powered plants . . . operated in North Carolina by Duke Energy Progress and Duke Energy Carolinas LLC." The settlement agreement, which OAH's order "incorporate[s] by reference" and "accept[s] and approve[s]," purports to "fully address[] and resolve[] all issues related to groundwater contamination with coal ash facilities . . . including all groundwater violations alleged in the state enforcement actions currently pending in Superior Court in Wake and Mecklenburg County." Ex. 2, at p. 5.

65. Claims concerning the appropriate remedy for groundwater contamination at all fourteen powerplants are currently pending in Superior Court against multiple defendants. By converting this extremely broad contractual settlement agreement into a finding and order of an ALJ, OAH exceeded its jurisdiction over the Sutton groundwater penalty contested case, and purported to supersede, without notice or opportunity to be heard, the injunctive claims and interests of parties (like Petitioners) in the state Superior Court injunction cases.

66. OAH also exceeded its jurisdiction by purporting to resolve groundwater claims at coal ash sites owned and operated by Duke Energy Carolinas, an entity not party to the contested case.

67. OAH's jurisdiction was limited to the resolution of Duke Energy Progress's challenge to a civil penalty at Sutton. The General Assembly "may vest in administrative

agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. The purposes for which OAH was created are "to ensure that ***administrative decisions*** are made in a fair and impartial manner, to protect the due process rights of citizens who challenge ***administrative action*** and to provide a source of independent administrative law judges to conduct administrative hearings in ***contested cases***." N.C. Gen. Stat. § 7A-750 (emphasis added). The purposes of OAH also include preventing the "commingling of legislative, executive, and judicial functions in the administrative process." *Id.*

68. In service of these purposes, OAH is vested only with the power to resolve the contested cases challenging administrative decisions that are before it.

69. This contested case presented a narrow issue under specific statutory authority for the imposition of a civil fine against polluters – authority which is expressly independent of procedures for an agency to seek injunctive relief to compel remediation of the pollution itself. The North Carolina General Statutes provide three different enforcement procedures to resolve violations of water quality laws. *See* N.C. Gen Stat. § 143-215.6A (civil penalties); N.C. Gen Stat. § 143-215.6B (criminal penalties); N.C. Gen Stat. § 143-215.6C (injunctive relief).

70. Civil penalties "may be assessed by the Secretary" pursuant to limits proscribed by the statute. N.C. Gen Stat. § 143-215.6A(a). The civil penalty statute explicitly authorizes "contested case petitions" challenging the Secretary's decision on a civil penalty. N.C. Gen Stat. § 143-215.6A(d).

71. To compel a polluter to abate pollution, however, an agency must seek relief subject to the oversight of the judiciary. N.C. Gen. Stat. § 7A-245(a)(2) ("The superior court division is the proper division … where the principal relief prayed is injunctive relief to compel

enforcement of any statute, ordinance, or regulation"). The water pollution control statute provides that injunctive relief can *only* be obtained by "request[ing] the Attorney General to institute a civil action in the name of the State upon the relation of the Department for injunctive relief to restrain the violation or threatened violation." N.C. Gen. Stat. § 143-215.6C. The statute specifies that jurisdiction over such an action lies in the "superior court." *Id.* If such a case is filed in superior court, the statute directs that upon determining that "the alleged violation . . . has occurred or is threatened," the superior court "shall grant the relief necessary to prevent or abate the violation or threatened violation." *Id.*

72. OAH here lacked authority to issue an Order barring injunctive relief which was outside the jurisdiction of issues before it, and which, moreover, is the subject of active enforcement actions in Superior Court. Those claims are beyond the statutory authority and jurisdiction of the Office of Administrative Hearings. In so doing, the ALJ's order also violated OAH's statutory authority by improperly commingling executive and judicial functions by purporting to resolve in OAH – an executive agency – claims that may be brought only in Superior Court and in fact are currently pending before that court.

The ALJ's Order Is Unsupported by Substantial Evidence in View of the Entire Record

73. The ALJ's conclusion that the settlement is a "fair and comprehensive resolution of other potential groundwater controversies," at plants other than the Sutton plant, including plants owned by nonparty Duke Energy Carolinas, LLC, is unsupported by substantial evidence in view of the entire record.

74. The ALJ Order states that the "Court" reviewed only the Settlement itself in purporting to approve the resolution of claims for injunctive relief for plants beyond Sutton. Even if the issue of injunctive relief could have been properly pled before the ALJ, which it was

not, the record is devoid of any evidentiary basis to evaluate those claims or any settlement attempting to resolve them.

75. From its inception, this contested case has been limited to challenging "the assessment of a civil penalty [] on March 20, 2015, for violations of groundwater quality standards at the L.V. Sutton complex located in Wilmington, North Carolina and owned by [Duke Energy Progress, Inc.]." Respondent North Carolina Department of Environment and Natural Resources Prehearing Statement, 2; *see* Prehearing Statement of Petitioner Duke Energy Progress, Inc., at 2-3 (each of the fifteen issues identified by Duke Energy Progress to be resolved as part of this proceeding are specific to the civil penalty at the Sutton plant). The Order of Dismissal resolving these claims came before the ALJ "on motion for summary judgment filed on behalf of Petitioner Duke Energy Progress," which was similarly limited to the Sutton penalty. *See* ALJ Order at 1; Petitioner Duke Energy Progress, LLC's Motion for Summary Judgment at 1.

76. Without evidence before it relating to the nature and extent of contamination, risks to human health and the environment, or remedial options available to address groundwater contamination, and without any briefing on the requirements under the law for responding to such contamination, the ALJ issued an order that "finds" the settlement was a "fair and comprehensive resolution of other potential groundwater controversies."

77. There is no administrative record to support this finding in the final decision, let alone substantial evidence to support it. Entry of the overly broad ALJ Order unsupported by substantial evidence prejudiced the substantial rights of the Petitioners at stake in the state Superior Court injunction cases.

The ALJ's Order Is Arbitrary and Capricious

78. Without any evidence or legal briefing before the ALJ related to thirteen of the fourteen sites, the ALJ Order was also arbitrary and capricious, lacking a fair and careful consideration of the facts and law and failing to offer any course of reasoning of the exercise of judgment.

79. For example, the settlement agreement, which the ALJ Order "approve[s] and accept[s]" as "fair and comprehensive resolution of other potential groundwater controversies" at all fourteen coal plants in North Carolina, provides for accelerated action to arrest the spread of groundwater contamination at only four of those sites. Entering an Order that purports to allow groundwater contamination to languish at ten of Duke Energy's sites would be arbitrary and capricious under any scenario. Doing so without an evidentiary basis (which arises out of OAH's lack of jurisdiction over these issues in the first place), is egregious error.

80. Similarly, the settlement agreement purports to immunize Duke Energy Carolinas (a non-party) and Duke Energy Progress from liability or remedial obligation for past, present, or future groundwater violations at all "coal ash facilities" they operate, without limitation, in deference to remedial measures under CAMA; but Duke Energy has taken the position in the Superior Court injunction cases that CAMA itself applies to only a subset of ash storage facilities at each site. Of course, as injunctive relief was not before the ALJ, the ALJ did not consider or weigh the impacts of which storage facilities CAMA may or may not apply to. Flying blind on these issues, the ALJ nonetheless purported to dispose of them.

The ALJ's Order Is Made Upon Unlawful Procedure

81. "An administrative law judge's final decision shall be based exclusively on: (1) competent evidence and arguments presented during the hearing and made a part of the official record; (2) stipulations of fact; (3) matters officially noticed; (4) any proposed findings of fact

and written arguments submitted by the parties under Paragraph (g) of Rule .0119 of this Section; and (5) other items in the official record that are not excluded by G.S. 150B-29(b)." 26 N.C. Admin. Code 3.0127(b).

82. The ALJ was presented with no evidence, stipulations of fact, findings of fact, or written arguments related to "other potential groundwater controversies" at any plant other than Sutton. The only matters officially noticed in this action are specific to the civil penalty at the Sutton plant. *See* Duke Energy Progress, LLC, Petition for a Contested Case.

83. The ALJ's finding that the settlement is a "fair and comprehensive resolution of other potential groundwater controversies at the Plants" is based on information not properly before OAH, in violation of procedures governing final decision in a contested case.

84. "In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law." N.C. Gen. Stat. § 150B-34(a). But "a decision granting a motion for judgment on the pleadings or summary judgment need not include findings of fact or conclusions of law." *Id.* at § 150B-34(e).

85. Here, the "cause came before the undersigned on motion for summary judgment." Order of Dismissal, 1. But there was no decision "*granting* a motion for judgment on the pleadings or summary judgment," instead the case was dismissed. *Id.* at § 150B-34(e)(emphasis added). Because the ALJ did not grant summary judgment, he was required to "make a final decision or order that contains findings of fact and conclusions of law." The failure to do so makes the Order based on unlawful procedure.

86. In addition, the Order purports to make findings with respect to coal ash sites owned and operated by Duke Energy Carolinas, an entity that was not before the ALJ and had

never been part of the contested case. For this reason as well, the Order was based on unlawful procedure.

The ALJ's Order Is Affected by Other Errors of Law

87. These significant errors are not without harm. Without the benefit of a factual record or legal briefing, the ALJ Order accepted and approved a settlement agreement that itself violates the law in several respects:

a. Accepting groundwater remediation that falls short of the minimum requirements compelled by North Carolina's groundwater protection rule;

b. Accepting groundwater remediation that falls short of the statutory mandate for injunctive relief to remedy past violations;

c. Granting a de facto variance from North Carolina groundwater standards without following statutory procedure;

d. Granting immunity from civil or criminal liability;

e. Abdicating enforcement of state or federal law for any future pollution of Sutton Lake, a water of the state and a water of the United States;

f. Granting a de facto variance from water quality standards for Sutton Lake without following statutory procedure;

g. Binding future administrations not to enforce against future violations of the law which are currently unknown and undefined; and

h. Restricting the terms of future National Pollution Discharge Elimination Permits in contravention of state and federal law.

88. Because the ALJ Order converted the deficient contractual agreement between DEQ and Duke Energy into an order of OAH embracing these legal deficiencies, the ALJ Order is affected by other errors of law and must be vacated and modified to resolve the narrow groundwater penalty issue before it.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray this Court enter the following relief:

1. Declare that Petitioners are persons aggrieved under the N.C. Administrative Procedure Act;

2. Vacate the ALJ's Order;

3. Enter a Modified Order of Dismissal properly confined to the penalty claim before the ALJ;

4. Such other and further relief as the Court deems proper.

This the 13 of October, 2015.

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