STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13CV004061

STATE OF NORTH CAROLINA *ex rel.* NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY,

Plaintiff,

v.

DUKE ENERGY PROGRESS, INC., formerly known as CAROLINA POWER & LIGHT COMPANY d/b/a PROGRESS ENERGY CAROLINAS, INC.

Defendant.

DUKE ENERGY PROGRESS, INC.'S RESPONSE TO MOTION TO INTERVENE

Duke Energy Progress urges the Court to deny the relief sought by movants. The party rights sought by the Sierra Club, the Waterkeeper Alliance, and the Western North Carolina Alliance (the "proposed-intervenors") are not required, necessary or advisable in this case. The public participation contemplated by the Consent Order that is being negotiated between the parties is sufficient to protect the interests of the proposed-intervenors. If the Court allows the proposed-intervenors' motion, such intervention should be permissive, and limited in the discretion of the Court.

BACKGROUND AND PROCEDURAL HISTORY

1. This is a state enforcement action brought by North Carolina's Department of Environment and Natural Resources, Division of Water Quality ("DWQ") against Duke Energy Progress related to alleged unauthorized discharges from two coal ash storage facilities at the

company's Asheville power plant in Skyland, North Carolina. The Asheville plant is the largest electric generating facility in western North Carolina. It began commercial operation in 1964.

2. Among other things, DWQ alleges groundwater and surface water contamination from the coal ash storage facilities at the Asheville plant, and seeks substantial legal and injunctive relief to remedy the alleged violations. *See, e.g.*, DWQ's Am. Compl. ¶¶ 64-103. Such relief includes but is not limited to: (i) the abatement of the alleged violations of groundwater standards; (ii) the preparation of a report regarding the nature and extent of alleged violations; and (iii) certain groundwater assessment activities including water sampling. *Id.* at Prayer for Relief.[1]

3. The proposed-intervenors' motion includes a proposed complaint in intervention. That complaint, if allowed, improperly expands DWQ's enforcement action and, by so doing, undermines DWQ's role as North Carolina's enforcer of the Clean Water Act and groundwater rules. Despite the fact that DWQ's enforcement action is in its very earliest stage, the proposed-intervenors already allege that DWQ's enforcement action is incapable of achieving compliance with those rules and is insufficient to protect their rights.

4. Given the complexity of this matter, Duke Energy Progress filed an unopposed motion to designate this case as "exceptional" under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. On June 10, 2013, the motion was granted and the case assigned to the Honorable Paul Ridgeway.

5. There are two other actions currently proceeding in North Carolina state courts that share similar issues of law and fact with this action: (1) a state enforcement action in

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[1] The Amended Complaint includes allegations related to Duke Energy Carolinas, LLC's Riverbend Steam Station in Gaston County, North Carolina. Because the Riverbend Steam Station is owned by a different entity, and not Duke Energy Progress, DWQ has expressed its intention to withdraw those allegations from its Amended Complaint.

Mecklenburg County Superior Court, and (2) a Petition for Judicial Review of the Environmental Management Commission's ("EMC") declaratory ruling regarding interpretation of North Carolina groundwater protection rules, pending in Wake County Superior Court. There is also a related federal case pending in the United States District Court for the Western District of North Carolina.

DWQ is currently prosecuting a similar state enforcement action in Mecklenburg County Superior Court.

6. DWQ filed a similar action against Duke Energy Carolinas, LLC ("Duke Energy Carolinas") (together with Duke Energy Progress, "Duke Energy"), an affiliate of Duke Energy Progress, in Mecklenburg County Superior Court on May 24, 2013 (the "Mecklenburg Case"). The Mecklenburg Case alleged violations of the same statutory provisions at Duke Energy Carolinas' Riverbend Steam Station in Gaston County, North Carolina. The Mecklenburg Case has also been designated exceptional and assigned to Judge Ridgeway, and the Catawba Riverkeeper Foundation ("Catawba Riverkeeper") has moved to intervene.

7. In both state court actions, the proposed-intervenors assert that DWQ is not adequately representing their interests in the early stages of litigation, and that the relief requested by DWQ is not sufficient. In fact, the proposed-intervernors assert that DWQ's requested relief is contrary to North Carolina's groundwater protection rules, which are now codified as Subchapter 2L of Title 15A of the North Carolina Administrative Code, 15A N.C.A.C. 2L (the "2L Rules").[2]

[2] Citations to the 2L Rules are made with the shortened form of the reference to the Subchapter 2L, plus the 4-digit section citation – e.g., "§ 2L.0106," which would refer to 15A N.C.A.C. 2L.0106.

8. Intervention in the state court actions appears to be part of an on-going effort by various organizations, including proposed-intervenors, to effect a significant change in the application of the 2L Rules to older coal ash storage facilities in North Carolina. The proposed-intervenors disagree with the way in which DWQ, the EMC, the Department of Environment and Natural Resources ("DENR"), and the Attorney General's ("AG") Office have interpreted the 2L Rules. In short, the long-standing interpretation and application of the 2L Rules by DWQ is that coal ash ponds have compliance boundaries, and that an exceedance of the standards in the 2L Rules within a compliance boundary does not require immediate removal of the source of contamination. The proposed-intervenors' preferred interpretation is that corrective action is required for these facilities when groundwater standards are exceeded anywhere at the facility, including within the compliance boundaries.

The proposed-intervenors are challenging DWQ's interpretation of the 2L Rules in Wake County Superior Court through a Petition for Judicial Review.

9. Rather than follow the procedures to attempt to amend the implicated rules, the proposed-intervenors filed a request for a declaratory ruling (the "Request") with the EMC pursuant to N.C. Gen. Stat. § 150B-4 of the Administrative Procedure Act as codified in Chapter 150B of the General Statutes ("APA"). In response, the EMC issued a declaratory ruling, dated December 18, 2012 (the "Declaratory Ruling"). The Declaratory Ruling rejected the position advanced by the proposed-intervenors and affirmed DWQ's position. Specifically, the EMC declared that coal ash ponds permitted pursuant to N.C. Gen. Stat. § 143-215.1 before December 30, 1983 have compliance boundaries. Further, the EMC declared that "[o]perators of coal ponds permitted on or before December 30, 1983, are not required to take corrective action pursuant to [the 2L Rules] until their activity results in [a groundwater standard violation] at or beyond the facility's compliance boundary." (emphasis added).

10. The proposed-intervenors filed a Petition for Judicial Review (the "Petition") of the Declaratory Ruling, which has also been assigned to Judge Ridgeway.

<u>The Catawba Riverkeeper filed a federal citizen suit despite the state enforcement action pending in Mecklenburg County Superior Court.</u>

11. Even while the other cases are pending, the Catawba Riverkeeper, also represented by the Southern Environmental Law Center, commenced a federal citizen suit in the United States District Court for the Western District of North Carolina, Case No. 3:13-cv-00355-MOC-DSC (the "Federal Case"), alleging violations of groundwater and surface water contamination at the Riverbend Steam Station. The Federal Case also implicates issues raised by the proposed-intervenors in the Petition and state court cases regarding the appropriate interpretation of the 2L Rules. The Catawba Riverkeeper filed the Federal Case despite the fact that DWQ is diligently prosecuting a state enforcement action—the Mecklenburg Case—and despite the fact that the Catawba Riverkeeper had already moved to intervene in the state enforcement action. *See* 33 U.S.C. § 1365(b)(1)(B) (prohibiting citizen suits when a state "has commenced and is diligently prosecuting a civil or criminal action…to require compliance with the standard, limitation, or order….").

12. Here, in the motion to intervene, the proposed-intervenors rely on their unilateral interpretation of the 2L Rules set forth in their Petition—already rejected by the EMC—to support their contention that the remedies in the Mecklenburg Case are inadequate to address the alleged violations of North Carolina groundwater standards. But it is DWQ that is uniquely positioned to implement and enforce the regulatory program outlined by the 2L Rules.

13. Importantly, DWQ and Duke Energy Progress are negotiating now a Consent Order to resolve the state enforcement actions related to the Asheville plant and the Riverbend

Steam Station. A key and guaranteed feature of a mutually agreeable Consent Order is public participation through review and comments, including by the proposed-intervenors.

ARGUMENT

14. The proposed-intervenors suggest that full intervention as of right is the only acceptable disposition of their motion under 40 CFR § 123.27(d). In fact, intervention as of right is neither required by 40 CFR § 123.27(d), nor necessary in this case. If the Court allows the proposed-intervenors' motion, such intervention should be permissive, and limited in the discretion of the Court.

15. Because the proposed-intervenors do not allege an unconditional statutory right to intervene in this case pursuant to N.C. Gen. Stat. § 1A-1, Rule 24(a), the request for intervention as of right may only be allowed if there they can show that "(1) [they have] a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (citations omitted); *see* N.C.G.S. § 1A–1, Rule 24(a)(2). Denial of intervention as of right would not result in an impairment of the protection of the proposed-intervenors' interest in the subject of this action. Indeed, they have failed to allege sufficiently that their interests are not adequately represented by DWQ. *See e.g., Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994) ("There is a presumption that the state will adequately represent the position of its citizens."); *United States v. E. Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 n.6 (5th Cir. 1979) (holding that private litigation may be precluded by public action, because "governments are by their nature representative of the cumulative rights of private citizens"); *State ex rel. Montgomery v. City of*

Columbus, 2003-Ohio-2658, at *4 (Ohio Ct. App. May 22, 2003) (holding that denial of motion to intervene is proper because "[a]ppellants' asserted interest was to eliminate the city's violations of environmental laws. Although that may be a sufficient interest for purposes of intervention, appellants still must show that their interest was not being adequately represented by the existing parties").

16. As described above, the parties contemplate a comprehensive Consent Order which explicitly allows for public participation. The proposed-intervenors will have the opportunity to review and submit comments on that Consent Order before it is entered. This role has been explicitly ruled consistent with the aims of public participation. *See, e.g., United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992) ("Once the intervenors had an opportunity to file objections to the proposed consent decree, there is little else they could have done.") (internal quotations omitted); *Local No. 93, Int's Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) (an intervenor "does not have power to block [a] decree merely by withholding its consent"); *Edwards v. City of Houston*, 37 F.3d 1097, 1119 (5th Cir. 1994) ("Neither intervenors nor objectors are entitled to hold consent decrees hostage and require a full-blown trial in lieu of a fairness hearing."). Moreover, the proposed Consent Order contemplates a separate permitting process that also allows for public participation. To the extent the proposed-intervenors have concerns with any draft permit, they can raise those during the public notice and comment period, and may appeal the permit to the North Carolina Office of Administrative Hearings. *See* N.C. Gen. Stat. § 143-215.1.

17. DWQ is the appropriate party to enforce the Clean Water Act in North Carolina, and the only party with the authority to enforce groundwater standards. *See, e.g., Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007) ("The CWA gives primary enforcement authority to the

EPA and state enforcement agencies."). The proposed-intervenors suggest that because DWQ did not file its enforcement action until it received the Notice of Intent to Sue from the proposed-intervenors, DWQ cannot adequately represent the proposed-intervenors' interests. But, "the purpose of the notice requirement [is] to give administrative agencies an opportunity to enforce environmental regulations." *Hallstrom v. Tillamook Cnty.*, 493 U.S. 20, 24 (1989). Accepting the proposed-intervenors' argument would render the notice provision of the Clean Water Act meaningless.

18. If the Court determines that intervention is appropriate in this case, the intervention should be limited by the Court. *See e.g. Harco Nat'l Ins. Co. v. Grant Thorton LLP*, No. 05-CVS-2500 (Wake County Feb. 16, 2009) (Tennille, J.) (allowing "limited intervention" to "make sure the intervention does not 'unduly delay or prejudice the adjudication of the rights of the original parties.'") (quoting N.C. Gen. Stat. § 1A-1, Rule 24(b)); *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992) ("Permissive intervention under Rule 24(b)(2) rests within the discretion of the trial court...."). Thus, if the Court allows the proposed-intervenors to intervene, it should be for limited purposes such as filing amicus briefs, while prohibiting the proposed-intervenors from participating in discovery. *Harco*, No. 05-CVS-2500.

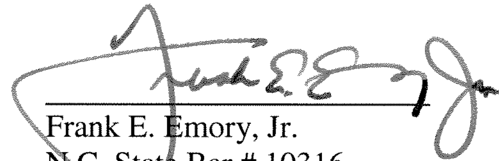
19. Limited intervention may allow for public participation while preserving the strong policy in favor of settlements, as it would allow the parties to focus on negotiating a consent decree as opposed to protracted and expensive litigation. *DuBois v. Thomas*, 820 F.2d 943, 949 (8th Cir. 1987) (the CWA "was not intended to enable citizens to commandeer the ... enforcement machinery"); *Ehrenhaus v. Baker*, -- N.C. App. --, 717 S.E.2d 9, 19 (2012) ("Our judicial system has a strong preference for settlement over litigation.").

20. In any event, the proposed-intervenors may not pursue independent claims for relief against Duke Energy Progress in a state enforcement action, such as those set forth in the proposed Complaint for Intervention. *See, e.g., Vinson v. Wash. Gas Light Co.*, 321 U.S. 489, 498 (1944) ("An intervenor is admitted to the proceedings as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel alteration of the nature of the proceeding."). This is consistent with DWQ's "diligent prosecution" and its right to enforce North Carolina's environmental laws. As the North Carolina Court of Appeals has recognized, "the General Assembly was aware of the provisions of the [Federal Water Pollution Control Act] and clearly chose not to include a citizen suit provision in the state regulatory scheme." *Biddix v. Henredon Furniture Indus., Inc.*, 76 N.C. App. 30, 39, 331 S.E.2d 717, 723 (1985).

WHEREFORE, should the Court allow the proposed-intervenors to intervene in this matter, it should be permissive, and limited in the discretion of the Court.

This 1st day of July, 2013.

HUNTON & WILLIAMS LLP



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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **DUKE ENERGY PROGRESS, INC.'S RESPONSE TO MOTION TO INTERVENE** upon the parties in this lawsuit by electronic mail, addressed as follows:

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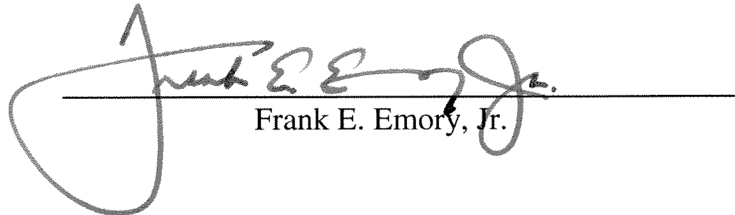
This 1st day of July, 2013.



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