

STATE OF NORTH CAROLINA
COUNTIES OF CHATHAM & LEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 EHR _____

ENVIRONMENTALEE, CHATHAM CITIZENS)
AGAINST COAL ASH DUMP, AND BLUE)
RIDGE ENVIRONMENTAL DEFENSE)
LEAGUE, INC.)

Petitioners,)

v.)

N.C. DEPARTMENT OF ENVIRONMENT)
AND NATURAL RESOURCES, DIVISION)
OF WASTE MANAGEMENT, AND DIVISION)
OF ENERGY, MINERAL AND LAND)
RESOURCES.)

Respondents.)

PETITION FOR
CONTESTED CASE HEARING,
MOTION TO CONSOLIDATE,
AND MOTION TO JOIN
NECESSARY PARTIES

PURSUANT TO G.S. 150B-23, now come the Petitioners, EnvironmentalLEE, Chatham Citizens Against Coal Ash Dump, and the Blue Ridge Environmental Defense League, Inc. (“BREDL”) (collectively also the “community groups”), by and through the undersigned attorney, with a petition for a contested case hearing on the issuance of the following permits on or about June 5, 2015:

a. Permit No. 1910-STRUCT-2015, Solid Waste Management Facility Structural Fill, Mine Reclamation, Brickhaven No. 2 Mine (Chatham County) by N.C. Department of Environment and Natural Resources (“DENR”), Division of Waste Management to Green Meadow, LLC and Charah, Inc.

b. Permit No. 5306-STRUCT-2015, Solid Waste Management Facility Structural Fill, Mine Reclamation, Colon Mine (Lee County) by DENR, Division of Waste Management to Green Meadow, LLC and Charah, Inc.

c. Permit No. 19-25, Operation of Mining Activity, Brickhaven No. 2 Mine, (Chatham County) by DENR, Division of Energy, Mineral and Land Resources to Green Meadow, LLC.

d. Permit No. 53-05, Operation of Mining Activity, Colon Mine (Lee County) by DENR, Division of Energy, Mineral and Land Resources to Green Meadow, LLC.

This Petition adopts by reference the testimony submitted by the community groups and their members at the hearings by the Respondent state agencies held on April 13, 2015, in Sanford and April 16, 2015, in Pittsboro and in the extensive written comments filed on behalf of the community groups and their members with the Respondent state agencies during the comment period.

MOTION TO CONSOLIDATE

As part of this Petition, the Petitioners move pursuant to 26 NCAC 03.011 that the potentially four contested cases, i.e., a challenge of the two permits issued for each of the two proposed coal ash sites, are consolidated into one case, and have presented it herein as one case. As noted below the technical and legal issues are the same for each of the two sites. The applicants are the same for both sites, with little difference between the applications for each of the two sites. The Respondent state agencies are the same and in fact, held public hearings on April 13, 2015 and April 16, 2015 on both permits for both sites. Testimony and comments submitted by the community groups

and their members addressed similar, if not identical, technical and legal issues. To the extent the sites have different characteristics that require a distinction in the hearing process, the parties are easily able to make those characteristics clear to the Administrative Law Judge. If this motion is denied, Petitioners reserve the right to file separate petitions.

MOTION TO JOIN NECESSARY PARTIES

As part of this Petition, the Petitioners further request that Duke Energy (Duke Energy Carolinas, LLC and Duke Energy Progress, Inc.), Charah, Inc. and Green Meadow LLC (the “permittees”) are made parties to this proceeding as a necessary party pursuant to G.S. 1A-1, Rule 19, or in the alternative, if the if the permittees desire to intervene, the Petitioners would have no objections. The solid waste permits are issued to both Charah and Green Meadow, although the mining permits are issued just to Green Meadow. The coal ash comes from the Duke Energy coal plants across the state, and Duke Energy has contracted with Charah to transport and dispose of the waste. Petitioners believe Duke Energy is one of the principal partners in the limited liability corporation, or at least has a direct interest in the permittees and their activities.

PETITION

1. The proposed coal ash disposal facilities are characterized in the applications and permits as “structural fill for mine reclamation.” The plan is to dispose of toxic coal ash (also referred to as “coal combustion residue” in some of the state rules) from Duke Energy coal ash landfills adjacent to its coal-fired electric plants. Duke Energy and

Charah, Inc., a company managing coal combustion products for utilities, have created a limited liability corporation, Green Meadow LLC, as the North Carolina contractor for removing coal ash from the existing landfills, transporting it to the Brickhaven slate and clay mine in Chatham County and the Colon Road slate and clay mine in Lee County.

2. The Petitioner, BREDL, is a public interest citizen organization, incorporated under North Carolina law, providing support to local community efforts opposing unwanted and harmful development. It has member chapters in more than 35 North Carolina communities and individual members across North Carolina and several surrounding states. Members of the BREDL chapters are also members of BREDL. Its address is Post Office Box 88, Glendale Springs, North Carolina 28629.

3. The Petitioner, EnvironmentalLEE, is an incorporated association registered with Lee County pursuant to G.S. 66-68. It has at least 15 member families and many other supporters. It is a chapter of BREDL and has as its address c/o Deborah Hall, Vice Co-Chair, 957 Cumnock Road, Sanford, North Carolina 27330.

4. The Petitioner, Chatham Citizens Against Coal Ash Dump, is an incorporated association registered with Chatham County pursuant to G.S. 66-68. It has more than 100 members and many other supporters. It is a chapter of BREDL and has as its address c/o Judy Hogan, Chair, Post Office Box 253, Moncure, North Carolina 27559.

5. The Petitioners are community-based membership groups and are bringing this action on behalf of their membership, and their request. Members of the Petitioner EnvironmentalLEE live adjacent to or proximate to the proposed coal ash disposal facility at the Colon Mine site in Lee County; members of the Petitioner Chatham Citizens Against Coal Ash Dump live adjacent to or proximate to the proposed coal ash

disposal facility at the Brickhaven site in Chatham County. Many are along transportation routes for the coal ash from other Duke Energy coal plants across North Carolina. Members of the petitioners have attended numerous hearings and public meetings on issues related to the two proposed coal ash disposal facilities and provided comments on the permits that are the subject of this consolidated contested case hearing.

6. The actions allowed by the permits would have a significant and adverse impact on the health and well-being of the members of the Petitioners, and on their families, the use and enjoyment of their property, the value of their property and other economic interests.

7. The Respondent state agency's issuance of the Permit has substantially prejudiced the rights of the Petitioners and their members. By issuing the permits, the state agencies exceeded their authority or jurisdiction; acted erroneously; failed to use proper procedure; acted arbitrarily or capriciously; and failed to act as required by law or rule.

8. Specifically, the Petitioners allege and would show the following at the contested case hearing:

A. The proposed sites are solid waste landfills, rather than mine reclamation projects, and should be regulated as such.

The Respondent state agencies have conflated the mining permit for reclamation with the solid waste permit for coal ash use as structural fill, creating a hybrid regulatory scheme in order to expedite the permitting process. The proposed coal ash disposal facilities *sub judice* in Lee and Chatham Counties should be regulated as solid waste

landfills rather than mine reclamation sites. Even though the Coal Act Management Act (“CAMA”), NC Session Law 2014-122, changes previous requirements in the Solid Waste Act, G.S. 130A-291 ff., and allows coal ash to be used as fill for mine reclamation, both of the present sites will need extensive amounts of slate and clay removed before the coal ash can be placed on site. Several of the landfill cells will be excavated on land that has never been mined. Contrary to the permit applications for the proposed sites, nothing can be built on top of the finished "reclamation" sites. The need to keep liners intact and projected height above grade would make these areas unsuitable for any future development.

There is a significant difference in the regulation of a coal ash landfills and the use of coal ash as structural fill. A coal ash landfill is regulated under the 15A NCAC 13B .0500 rules with siting, design and operational requirements and requires a permit to construct and permit to operate. A structural fill is regulated under the 15A NCAC 13B .1700 rules and up until the passage of CAMA, did not require a permit, just a notification with minimal siting, design, construction and operational requirements. CAMA now requires permits for larger projects, such as the Brickhaven and Colon Road sites, and requires additional requirements, including liners, leachate collections, and cap systems. The proposed guidelines by the US Environmental Protection Agency (“EPA”) will be more stringent, with coal ash clearly treated as a solid waste.¹

¹ Final Rule: Disposal of Coal Combustion Residuals from Electric Utilities; published in the Federal Register (FR) on April 17, 2015. <http://www2.epa.gov/coalash/coal-ash-rule>

B. The bonding requirement in the permits are insufficient to fund closure and post closure cost, corrective measures and agency costs.

The financial assurances and bonding requirements under the Mining Act, G.S. 74-54, implemented by 15A NCAC 05B .0103, are substantially less complete than those under the CAMA, G.S. 130A-309.221, which as noted above require full funding for closure and post closure, but also corrective measures and all agency costs. This disparity is because the Mining Act envisioned the reclamation of a mine to be accomplished through the use of tailings, soil and fill material from the site, rather than through the use of toxic coal ash, transported across the state, and used as structural fill. The financial assurances for each of the sites is based on the legal charade these are mine reclamation projects rather than solid waste landfills.

C. The liner and leachate collection system is not protective of groundwater and drinking water wells.

The permit allows a single composite liner system for each of the coal ash disposal facilities. The efficacy of using composite liner systems for containment of coal ash has not been demonstrated and as a result, the approved design is not likely to protect groundwater from contamination. In addition to the degradation of the HDPE (high-density polyethylene) liner by the metals and chemicals in the coal ash and its leachate, there are a number of other factors which cause liners to fail, including the use of heavy equipment during construction and operation, and the lack of daily cover, capping the site as part of closure, and other methods to keep additional water from entering into the landfill. The result of failure of the liners is contamination of

groundwater by waste-derived leachable components, and ultimately, drinking water wells for neighboring families.

D. The requirements for compliance with other laws for the protection of the environment should be examined for all of corporate partners of Green Meadow, LLC.

The substantial compliance with environmental laws, or “track record,” provisions in both the Mining Act, G.S 74-51(d)(7), and the Solid Waste Act, G.S. 130A-294(b2)(2), require the applicant, and any partner, subsidiary or other affiliate or partner to be in substantial compliance with Federal and state environmental laws. While the Mining Act examines violations only in North Carolina, the Solid Waste Act examines the track record across the states. As such, Green Meadow, LLC should disclose all of its corporate partners, and the application should present all of their track records of compliance with environmental standards, including Duke Energy and Charah, in addition to Green Meadow. The Respondent state agencies failed to investigate the environmental track records of the permittees and Duke Energy.

As an immediate example of noncompliance ignored by the state agencies, Charah and/or Green Meadow were found in violation by DENR at the Brickhaven site on or about June 2, 2015, for beginning construction activities without a stormwater permit and it issued a notice of deficiency for activities that violated the mining permit conditions at the site, including clearing and grading prior to the installation of required sediment and erosion control devices. Of particular concern is the Duke Energy track record specifically on coal ash; in addition to the coal ash spill into the Dan River in 2014, all of the present Duke Energy coal ash landfills are in violation by leaking into

surface water and groundwater, and the corporation has known about it for decades, and done nothing. On May 15, 2015, Duke Energy pleaded guilty to, and was later convicted of, eight Federal criminal convictions for mishandling coal ash at its Dan River coal ash impoundment. As part of its conviction, Duke Energy was required to pay \$102 million in penalties.

E. The permits for proposed landfills in Lee and Chatham County do not adequately address health and property damage from toxic coal ash dust.

The permits do not require provisions to protect the health and prevent property damage from the toxic dust generated by the transportation of the coal ash to the proposed coal ash disposal facilities, and the construction and operation at those new facilities. The apparent lack of daily cover and use of heavy equipment exacerbates the windblown dust. There has been no showing that keeping moisture levels above 20% (compounding a potential leachate problem) or the use of a poorly described polymer will keep down the dust and the various toxic materials associated with it. To date, the DENR has not required a separate air quality permit for the facility.

F. The proposed coal ash disposal facilities will have an undue impact on families and protected uses.

The permittees did not conduct a survey of the surrounding residences and the families living in those residences as part of their applications, and did not present any analysis of off-site impacts. The Respondent state agencies did not conduct an independent study of the immediate area or analyze the impacts of the surrounding

communities. However, the community groups surveyed residents and in their comments showed uncontroverted proof the proposed coal ash facilities will have a significant and undue impact on the families surrounding the sites. The community group studies are on-going.

The survey of the Colon Mine site included 317 residents within a three to five-mile radius of the center of the proposed site. Of these, 62 are senior citizens, and 83 are children; 103 confirmed suffered from chronic illnesses. The area is rural in nature with 202 livestock, some of which were food source, and 54 households maintain a garden as a source of food for their families. Many of the residences and farms have water wells for human and animal consumption, and watering gardens, while only 87 receive water from the City of Sanford. A large number of the families supplement their diets by hunting and fishing on their own land and adjacent property. There are three child daycares and one adult care facility within a three-mile radius of the proposed coal ash dump site were surveyed, with two additional child daycares located along the rail tracks within city limits.

Similarly, a survey of residences within a three-mile radius from the center of the Brickhaven site included 424 residents. Of these, 93 are senior citizens, and 38 are children; 33 admitted health problems. The Brickhaven area is also rural in nature with considerable amount of livestock and gardens for sources of food. Many of the residences and farms have water wells for human consumption, watering gardens, and feeding animals. A significant number of families supplement diets by hunting and fishing.

Of particular concern, the construction and operation of the coal ash disposal facilities will have a disproportionate impact on African-American populations and low-income families near the Colon Mine and Brickhaven sites. DENR's Environmental Equity Policy requires the Respondent state agencies to analyze the impacts of its permitting actions on communities that are disproportionately impacted by sources of pollution, and the Solid Waste Act, G.S. 130A-294(a)(9) requires the Division of Waste Management to determine if the cumulative impact of the proposed facility would have an adverse and disproportionate impact on a minority or low-income community. The communities adjacent to and in close proximity to the two sites have significant African-American populations, as are communities on transportation routes from the other Duke Energy coal ash sites. Regardless, the Respondent state agencies did not investigate, or require the applicants to investigate, the cumulative impacts on the communities.

G. The permits do not contain a reliable method of characterizing the toxic constituents in the coal ash.

Coal ash contains toxic constituents, including metals such as arsenic, selenium, mercury, vanadium and chromium (often present as hexavalent chromium), and radionuclides. Despite the most current research on appropriate test methods for coal combustion residuals, the applicants have stated in permit documents that they rely on Duke Energy's testing from existing coal ash facilities, and will use the Toxicity Characteristic Leaching Procedure ("TCLP"), to characterize the toxic constituents in the coal ash. EPA does not recommend the TCLP for the characterization of coal ash waste, because it may underestimate the toxicity of the coal ash and does not

recommend it for risk assessments for coal ash facilities. As a result, the toxicity of the coal ash received at the proposed facilities will be unknown, as will the impacts on that toxicity on the families around the sites.

H. Other matters may arise during the course of the contested case hearing.

Petitioners reserve the right to amend their Petition if appropriate after discovery. The Respondent state agencies have not been responsive to requests for documents pursuant to the Public Records Law, G.S. Chapter 132, made by Petitioners so there may be additional matters to be included in the contested case hearing that can only be obtained through the discovery process.

THEREFORE, the Petitioners pray that

1. They are allowed a contested case hearing on these matters;
2. The potentially four contested case hearings are consolidated into one case;
3. The permittees and Duke Energy are made parties to this proceeding as necessary parties OR they are allowed to intervene as parties; and
4. The administrative law judge grant any other relief that is just and reasonable.

This is the 6th day of July 2015.

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CERTIFICATE OF SERVICE

I hereby certify that copies of this PETITION FOR A CONTESTED CASE HEARING, MOTION TO CONSOLIDATE, AND MOTION TO JOIN NECESSARY PARTIES were served by hand delivery or by deposit in the U.S. Mail, certified mail return requested, on the following:

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This is the 6th day of July 2015

Attorney at Law

VERIFICATION

I, Therese Vick, NC Sustainable Economic Development Coordinator and Community Organizer for the Blue Ridge Environmental Defense League, Inc., and its chapters, verify that the contents of the foregoing PETITION FOR A CONTESTED CASE HEARING AND MOTION FOR CONSOLIDATION are true to the best of my knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

Therese Vick

date _____

Sworn to and subscribed before me,
this is the _____ day of July 2015.

Notary Public

my commission expires: