

# **THE IMPORTANCE OF CITIZEN ENFORCEMENT TO PROTECT COMMUNITIES AND CLEAN WATER FROM COAL ASH**

**Testimony of Frank Holleman, Senior Attorney at the Southern Environmental Law  
Center**

**U.S. House Subcommittee on the Environment and the Economy**

**January 22, 2015**

## ***Summary***

EPA's new coal ash rule does not by itself solve the problem of primitive coal ash storage by our public utilities. It sets some minimum national criteria. These criteria supplement a number of other federal, state, and local laws that apply to coal ash storage. But even these minimum criteria – like the other laws that apply to coal ash storage – will not work unless citizens have the right to enforce them. We have seen, over and over again, that state agencies will not effectively enforce laws designed to protect communities from the risks and pollution stemming from coal ash storage sites owned by public utilities.

In the Southeast, public utilities have long been violating state and federal laws in how they store coal ash. Yet state agencies, though they have known of the legal violations, have not taken effective action to require clean ups of these dangerous and polluting sites. The results have been continued pollution, dangers to communities, and, at Duke Energy's Dan River facility, a catastrophic failure. Citizen law enforcement has obtained clean ups of coal ash pollution where state agencies had not taken action and has forced state agencies to confirm, under oath, that public utilities have been violating the law in how they store coal ash. For the new EPA rule to serve the public purposes for which it was intended, the public – and not just state government bureaucracies -- must have the authority to protect themselves through citizen enforcement suits.

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Here is the proposal: We have millions of tons of industrial waste containing toxic substances, including arsenic, lead, chromium, selenium, and mercury. We propose to dig unlined pits next to major rivers and drinking water reservoirs. We will dump the industrial waste into these pits and fill them full of water. These millions of wet tons will be held back from the rivers and the drinking water reservoirs only by earthen dikes that leak into the rivers and reservoirs. The toxic substances in this industrial waste will leach into the groundwater, which flows into the rivers and reservoirs, and in other directions.

Sounds like a good idea? That is exactly what the major public utilities are doing on almost every major river system across the Southeast, and in other areas of the country. In fact, what the utilities are doing is worse, because their unlined leaking coal ash storage lagoons are in most instances decades old, and their infrastructure, which was primitive to begin with, is aging. What is even more striking is that we are tolerating this method of storage by publicly-established monopolies with tremendous resources and great engineering capacity to employ safer and less polluting alternatives.

It should come as no surprise that these lagoons have failures and that there have been catastrophic failures – in the Southeast at TVA’s facility in Kingston, Tennessee, and at Duke Energy’s facility on the Dan River near the North Carolina-Virginia border. It does not take a prophet to predict that other catastrophic failures will happen, it does not take a rocket scientist

to determine that a storage system like this will pollute, and it does not take a legal scholar to figure out that something about this is illegal. And any concerned citizen can see that this is no way for industrial waste to be stored in his or her community in the 21<sup>st</sup> century.

Yet, what we have seen across the Southeast is that even though the utilities are breaking existing law in how they store coal ash and even though the coal ash is polluting groundwater and rivers with coal ash contamination and even though there is the risk of catastrophic failure, the utilities and the state agencies that regulate them have not taken effective action to clean up antiquated coal ash storage and to protect local communities and clean water. We have obtained substantial clean ups and convinced utilities they must change their coal ash storage practices – but only when citizens have had the right to take the future of their communities into their own hands, to bring their own enforcement actions, and to thereby force the state agencies and the utilities to face up to the harm that unlined riverside coal ash storage is doing to local neighborhoods, natural resources, and the utilities themselves.

It is important to emphasize that in the cases we have brought, neither we nor the local community groups we represent have been suing in order to recover money. Over the more than three years we have been working on citizen enforcement actions, we and the groups we represent have settled cases and have not sought or received money in any of those settlements. The goal of this citizen law enforcement is to protect rivers and communities and to clean up coal ash pollution. While provision for recovery of attorney's fees and litigation expenses is an important part of an effective citizens suit provision, we have not petitioned for attorney's fees and we have not received any.

Here are examples of what citizen enforcement actions have accomplished in the Southeast when the state agencies and utilities did not act.

## **A. South Carolina**

For years the utilities in South Carolina have been contaminating groundwater at their coal ash lagoons with substances like arsenic. There is groundwater testing information going back decades showing groundwater contamination at these sites. And these sites leak into nearby waterways. The South Carolina Department of Health and Environmental Control (DHEC) has in the past notified the utilities in writing that they were violating the law through their coal ash pollution. But DHEC did not take direct action to force a cleanup of the lagoons or the groundwater pollution.

Using the citizen's right to enforce clean water and anti-pollution laws, we represented local conservation organizations and brought suit against both SCE&G and Santee Cooper (two of the three South Carolina utilities) to force cleanup of unlined coal ash lagoons on the Catawba-Wateree River near Columbia and the Waccamaw River at Conway near the coast. In both instances, the courts rejected motions to dismiss filed by the utilities. *Catawba Riverkeeper Foundation, Inc. v. SCE&G*, 2012 WL 1963606 (May 31, 2012; *Winyah Rivers Foundation, Inc. v. S.C. Public Service Authority (Santee Cooper)*, C.A. No. 2012-CP-26-4462 (Horry County Court of Common Pleas) (Dec. 17, 2012).

After prevailing on the motions to dismiss, we entered into settlements with both utilities requiring them to excavate the ash from these unlined river-front pits to safe, dry, lined storage away from the rivers or to appropriately recycle it. In the case of SCE&G, we reached the settlement 8 months after filing suit; we settled with Santee Cooper 17 months after filing suit. Both utilities have committed themselves to clean up all the other unlined coal ash lagoons in their systems.

The Santee Cooper experience is instructive. For a year, Santee Cooper fought our litigation and proposed to leave its coal ash in a swamp in the middle of Conway, South Carolina. On behalf of local citizen groups, we brought actions under state and federal anti-pollution laws. At a public hearing, local

citizens from all walks of life spoke out in favor of cleaning up the ash. The Conway Mayor and City Council adopted a resolution urging Santee Cooper to move the ash. After more than a year of litigation, we entered into a settlement agreement with Santee Cooper for removal of the ash from Conway to safe lined storage or recycling. At the same time, Santee Cooper announced it would clean up every lagoon in its system.

“Santee Cooper describes this change of course as a win-win for the utility and the community:

Kierspe [a Santee Cooper official] says in addition to the obvious benefit of getting rid of what is currently a toxic byproduct, ‘It’s a win for the economy, we have several businesses investing as much as \$40 million creating jobs for the economy, and it’s a win for customers because it’s financially the right thing to do and it eliminates a long-term potential problem with the ponds.’

Channel 2 News (Charleston, SC) March 10, 2014.

The removal of the ash from these old lagoons is eliminating a continuing source of pollution and also creating jobs and investment in the community, while protecting the reputations of areas of the Low County that depend upon tourism for significant parts of their economies.

Duke Energy (the third South Carolina utility) owns the remaining set of water-filled lagoons on a South Carolina river, the Saluda River near Anderson and Greenville, South Carolina. After several months of negotiations, in December of 2014 Duke Energy agreed to remove the ash from its lagoons and other storage sites on the Saluda River to dry lined storage away from the River. Earlier in September, we negotiated a settlement with Duke Energy for removal of ash from old storage sites at the facility by agreeing to refrain from bringing suit while Duke Energy considered its options for the full site, and thereafter reached agreement with Duke Energy to clean up all the ash. The ability of citizens groups to bring suit – as they had in S.C. against other utilities and as they had against Duke Energy in N.C. (see

below) – gave local citizens the ability to come to the table to negotiate a solution that works for all concerned.

Thus, through straightforward citizen enforcement of existing anti-pollution laws, we were able to obtain commitments from all three South Carolina utilities to clean up all their riverfront water-filled coal ash lagoons in the state – something the state law enforcement authorities for years had not been willing to do.

## **B. North Carolina**

Duke Energy stores coal ash in unlined riverfront pits across North Carolina. Through groundwater testing over several years, it had been established that there was groundwater contamination at many Duke Energy coal ash sites, and inspections showed Duke Energy sites were illegally leaking into rivers and drinking water sources.

Yet, North Carolina’s Department of Environment and Natural Resources (DENR) had never taken action against Duke Energy for the cleanup of groundwater contamination and other pollution from these lagoons. Duke Energy insisted upon the status quo – operating unlined coal ash lagoons on the banks of rivers, including the storage of 2.5 million tons of coal ash in earthen lagoons overlooking the drinking water reservoir for 800,000 people in and around Charlotte. Conservationists urged DENR to take action, but no direct enforcement occurred.

In 2013 on behalf of local riverkeepers and other citizen organizations, we issued Notices of Intent to Sue Duke Energy under the federal Clean Water Act for violations of its permits by coal ash pollution at three of its coal-fired plants in North Carolina. In response to our notices (and to block our enforcement actions, see below), DENR for the first time brought enforcement actions against Duke Energy for pollution of rivers and groundwater from its leaking coal ash lagoons. DENR confirmed in pleadings filed under oath that Duke Energy was violating state groundwater laws or the federal Clean Water Act or both at every site where Duke Energy stores

coal ash in North Carolina. Further, it stated, again under oath, that Duke Energy's illegal coal ash pollution "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." *E.g., State of N.C. ex rel. N.C. DENR v. Duke Energy Carolinas, LLC*, 13 cvs 11032 (filed August 6, 2013) at ¶ 204.

In the ensuing months, our Clean Water Act litigation continued; Duke Energy's Dan River coal ash storage lagoons failed, spewing 39,000 tons of coal ash and 24 million gallons of coal ash polluted water into the Dan River; the Associated Press published an expose of the joint efforts of Duke Energy and DENR to frustrate our law enforcement efforts; and a federal criminal grand jury issued subpoenas to Duke Energy and DENR concerning their coal ash practices across the state. In response, in the spring of 2014 Duke Energy announced it would clean up four of its fourteen coal ash storage sites in the state (the three for which we issued Clean Water Act Notices and the Dan River spill site) and would evaluate the remaining ones for cleanup. Later in 2014, the North Carolina legislature passed a statute that requires the cleanup of the same four sites – the four that Duke Energy has committed to clean up – and evaluation of the rest.

Again, as in South Carolina, private citizen enforcement has led to clean ups that government law enforcement had never sought. The four sites slated for cleanup are three locations where direct citizen law enforcement action was taken, and the site of the Dan River spill. Through intervention in the pending DENR enforcement suits and filing of federal Clean Water Act suits, we are representing local citizen groups seeking cleanup of the remaining 10 sites – thereby assuring that local communities have a seat at the table when decisions are made.

### **C. Tennessee**

TVA was responsible for the disastrous coal ash spill at Kingston, Tennessee, which dumped over 1 billion gallons of coal ash materials across the Tennessee landscape and has cost TVA over \$1 billion. Yet, TVA continues to store coal ash in unlined pits and resists calls to clean up its unlined riverfront coal ash storage.

At its Gallatin Plant on the Cumberland River near Nashville, TVA stores coal ash in unlined pits near the River and has a history of groundwater contamination at the site. Yet, the Tennessee environmental agency (TDEC) had not taken enforcement action against TVA for a cleanup. TVA insisted it has complied with all laws and has refused to move the ash to safe, dry, lined storage.

Representing local citizen groups, we recently send a Notice of Intent under the federal Clean Water Act, setting out TVA's violations of its National Pollution Discharge Elimination System permit at Gallatin. For the first time, in response to our citizen notice, TDEC has filed an enforcement action against TVA for its violations of law in how it stores coal ash at Gallatin.

In this action, which is filed under oath, Tennessee confirms and sets out that TVA indeed is violating and has for years violated Tennessee anti-pollution and clean water laws. According to the verified complaint, TVA is discharging and has been discharging solid waste into Tennessee's groundwater and around the Gallatin Plant, has illegally discharged coal ash pollution into waters, and has violated its NPDES permit. The state agency also sets out, under oath, that the public interest required that action be taken.

These violations did not occur just recently. They had been ongoing for an extended period of time. Yet, the state agency never brought an enforcement action until local citizens exercised their right of citizen law enforcement.

#### **D. Virginia**

Virginia has had a similar experience, and local groups have had to take law enforcement into their own hands in that state as well. Recently, we have represented local citizens groups in Virginia who are seeking a cleanup of Dominion Power's coal ash storage sites at the Chesapeake Energy Center and at Possum Point. Both notices point out serious issues with coal ash storage at those sites. In both instances, the state agency had not taken action to require a cleanup at those sites, and the Virginia agency has received budget cuts that reduce its ability to take on projects like these.



## **CONCLUSION**

The record is absolutely clear. Without the citizen right to enforce the law, local communities cannot count on state agencies to effectively protect them from illegal, polluting, and dangerous coal ash storage. One significant aspect of EPA's new coal ash rule is that citizens have the power to enforce it. Local citizens must have the ability to enforce this rule if it is going to be effective. State agencies have been reluctant to take action for violations of pre-existing laws, and, in one instance, a federal grand jury is investigating the actions of a state agency with respect to coal ash. If this new rule is going to help local communities to be safe, to protect their economies, and to reduce coal ash pollution of water supplies, citizens must have the right and ability to protect themselves and enforce this rule.