

COAL ASH REVISITED

Jennifer McGinnis
Staff Attorney
North Carolina General Assembly

Presentation to
Public Law for the Public's Lawyers
October 13, 2016

Overview

- ▣ A little historical context...
 - The Dan River Spill
 - S.L. 2014-122/S729 (The Coal Ash Management Act of 2014)
 - Implementation issues of note
 - *McCrory v. Berger* (in brief!)
- ▣ 2016 developments...
 - H630/S.L. 2016
 - S71 (and S71's veto)

Coal Ash 101

- ❑ Coal ash is the byproduct left behind when coal is burned to generate electricity.
- ❑ Coal ash contains numerous toxic substances, including arsenic, selenium, chromium, thallium, mercury, and lead
- ❑ Although it does contain toxic contaminants, coal ash itself was historically considered an exempt waste under an amendment to RCRA (the Resource Conservation and Recovery Act) and prior to 2015, there were no federal regulations governing coal ash. In 2015, however, federal regulations became effective that treat coal ash as a solid waste under Subtitle D of RCRA, and essentially require all ponds to cap-in-place.

The Dan River Spill



Photo Credit: SouthWings



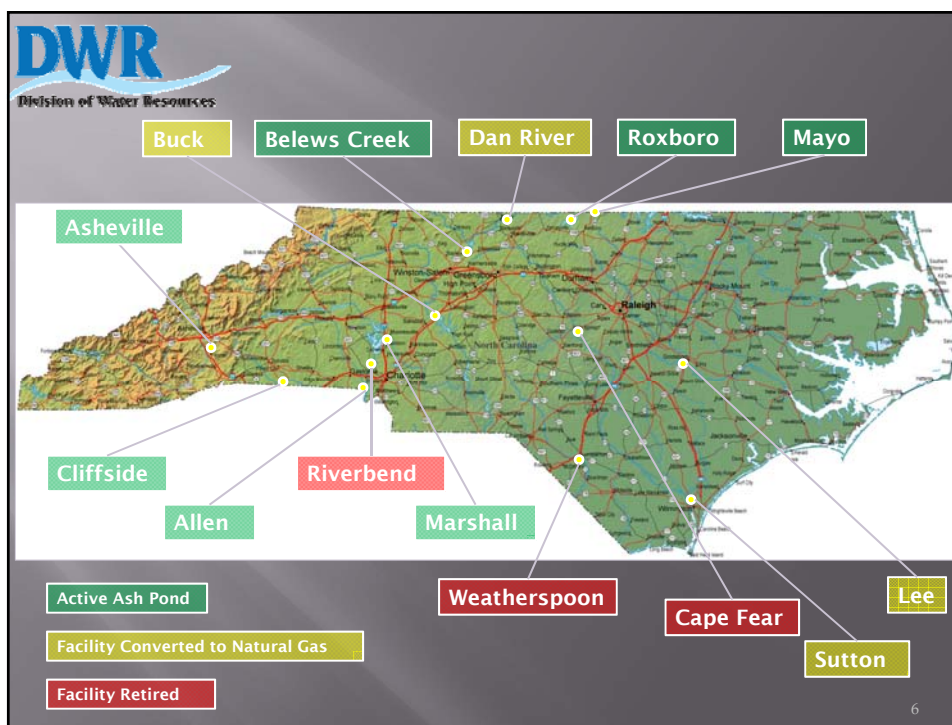
Photo Credit: Appalachian Voices



Photo Credit: Gerry Broome AP


The Bigger Picture

- ▣ 33 ash ponds at 14 power plants (active and retired) in North Carolina
- ▣ All ponds together house a total of more than 107 million tons of coal ash
- ▣ The largest of these ponds, located at the Marshall Steam Plant, houses more than 22 million tons of ash
- ▣ Because power plants are typically located by surface waters, such as lakes and rivers, these coal ash ponds often sit in very close proximity to some of the State's major waterways



OTHER IMPLEMENTATION ISSUES

Drinking Water Supply Well Controversy


North Carolina Department of Environment and Natural Resources

Pat McCrory
Governor

Donald R. van der Vaart
Secretary

DATE

Well Owner ID
Well Owner
Address
City, State Zip

Subject: Results of Water Supply Well Sampling and Health Risk Evaluation
Property Address


NOTE: Parts of this letter that are in green highlight may not be included in email letters

Dear Well Owner:

As part of the groundwater assessment conducted in accordance with N.C. Session Law 2014-122, the North Carolina Department of Environment and Natural Resources (DENR) requested that, at a minimum, all water supply wells within 1,000 feet of each coal ash waste facility's boundary be sampled.

On DATE, Laboratory Name collected groundwater samples from X well(s) on the referenced property. The water samples were collected and analyzed for constituents that may be associated with coal ash. For quality control, staff from DENR's _____ Regional Office also collected samples for laboratory analysis of the same constituents at the state's laboratory in Raleigh.

A complete copy of the laboratory sample results are attached for your review. The table below provides a comparison of the lab results with the groundwater standards North Carolina's groundwater standards are calculated to protect your groundwater as a source of drinking water. The standards which a community should meet are shown in green.


North Carolina
Department of Health and
Human Services

Richard O. Brajer
Secretary

Randall Williams, M.D.
Regional Administrator for Human Services
North Carolina's Department of Health and Human Services

March 11, 2016

Dear Well Owner,

We have withdrawn the "do not drink" usage recommendation because we have determined your water is as safe to drink as water in most cities and towns across the state and country. It is appropriate to return to drinking and using your water for cooking, bathing and other household uses.

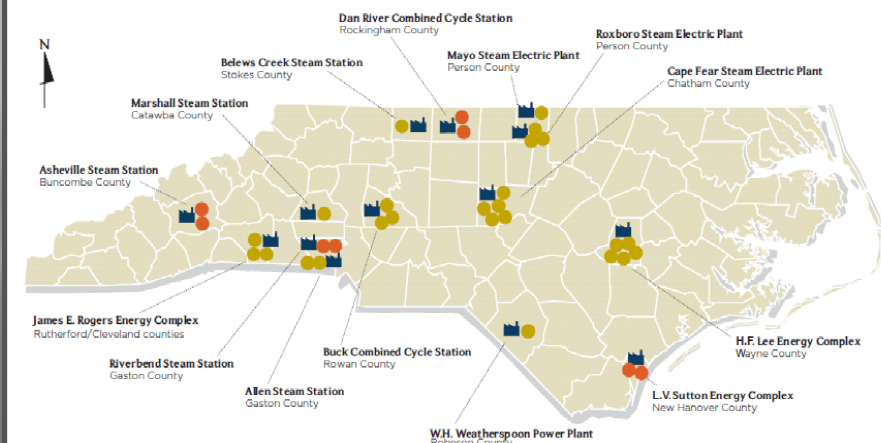
We updated our recommendation after extensive study of how other cities, states and the federal government manage the elements (hexavalent chromium and vanadium) in drinking water. Based on this review, as well as our own independent assessments, we have now concluded the water out of your well is as safe as the majority of public water systems in the country. All public water systems are required to meet or exceed federal standards for safe drinking water.

S729/S.L. 2014-122 (Coal Ash Management Act of 2014)

- 30,000 foot overview:
 - Established a comprehensive regulatory framework for the management of coal ash
 - Required remediation of groundwater at all coal ash ponds owned by public utilities, and implementation of measures to protect nearby surface waters
 - Required closure of 4 named ponds by 2019
 - Required closure of all remaining ponds, and established a staggered schedule for closure based on risk of the individual ponds:
 - High-risk by 2019
 - Intermediate-risk by 2024
 - Low-risk by 2029
- The bill in its entirety was 50+ pages and covered a myriad of issues. I will only address the matters that are relevant to the legislation enacted in 2016, including:
 - The Coal Ash Management Commission
 - Drinking water supply well provisions
 - Pond prioritization provisions
 - Closure requirements and deadlines
 - Variance Authority

DEQ'S PROPOSED CLASSIFICATIONS

Proposed Classifications



McCrorry v. Berger

Clash between the Legislative and Executive branches concerning creation of the Coal Ash Management Commission, the Oil and Gas Commission, and the Mining Commission over whether the legislative appointments to the commissions violated several provisions of the State's Constitution, including the separation of powers clause¹ (N.C. Const. Art. III, sec. 5(8)) and the appointments clause² (N.C. Const. Art. 1, sec. 6). The Court held "while the appointments clause itself places no restrictions on the General Assembly's ability to appoint statutory officers, the challenged provisions violate the separation of powers clause."

WE HAD TO DO SOMETHING...

IN THE SUPREME COURT OF NORTH CAROLINA

No. 113A15

Filed 29 January 2016

STATE OF NORTH CAROLINA, upon the relation of PATRICK L. MCCRORY, individually and in his official capacity as Governor of the State of North Carolina; JAMES B. HUNT, JR.; and JAMES G. MARTIN

v.

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; and, in their official capacities as members of the Coal Ash Management Commission, HARRELL JAMISON AUTEN III, TIM L. BENNETT, D. ALLEN HAYES, SCOTT FLANAGAN, RAJARAM JANARDHANAM, and LISA D. RIEGEL

Senate Bill 71 (2016)

- ▣ Would have:
 1. Required a coal ash pond owner to provide permanent alternative water supplies for residents in areas surrounding coal combustion residuals surface impoundments
 2. Extended the period for public comment and review of proposed risk classifications for coal combustion residuals surface impoundments
 3. Modified appointments to the Coal Ash Management Commission, the Mining Commission, and the Oil and Gas Commission in response to *McCrory v. Berger*
- ▣ Passed by both chambers and sent to the Governor for signature

Senate Bill 71

Pat McCrory
Governor

Approved _____ m, this _____ day of _____, 2016

VETO

Pat McCrory
Pat McCrory, Governor

RECEIVED FROM GOVERNOR

Date June 6, 2016

Time 8:00 p.m.

Signed Sarah Lang

Date 6/6/16

Senate Bill 71-Ratified

Page 15

S.L. 2016-95/House Bill 630

- ▣ *Repeals all provisions related to the Coal Ash Management Commission in the General Statutes*
- ▣ *Requires a coal ash pond owner to provide permanent alternative water supplies for residents in areas surrounding coal combustion residuals surface impoundments*
- ▣ *Allows reconsideration of risk classifications for coal ash ponds based on fulfillment of certain criteria*
- ▣ *Modifies appointments and other provisions governing the Mining Commission and the Oil and Gas Commission*

Questions?

Jennifer McGinnis – jenniferm@ncleg.net
919-733-2578