

STATE OF NORTH CAROLINA
OFFICE OF THE GOVERNOR

PAT McCrory
GOVERNOR

May 24, 2016

The Honorable Phil Berger
President Pro Tempore of the Senate
16 West Jones Street, Room 2008
Raleigh, North Carolina 27601

The Honorable Tim Moore
Speaker of the House
16 West Jones Street, Room 2304
Raleigh, North Carolina 27601

Dear Gentlemen:

In 2014, the General Assembly passed comprehensive legislation to address coal ash -- the first state in the nation to do so.

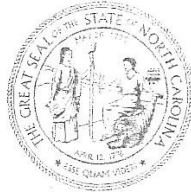
Since then, the Department of Environmental Quality has worked to address the coal ash problem leading to the classification of the remaining coal ash ponds in the state. Those classifications were released on May 18, 2016.

I now understand legislation will be introduced today that will substantially undermine much of the work that has been done to comply with the Coal Ash Management Act. It will substantially weaken environmental protections which are a part of the Act. Further, the proposed legislation recreates the Coal Ash Commission which was found to be unconstitutional by the North Carolina Supreme Court.

Attached are letters from my General Counsel Bob Stephens and the Secretary of the Department of Environmental Quality Don van der Vaart detailing our strong opposition to this misguided and unnecessary legislation which I will veto if passed in its current form.

Sincerely,


Pat McCrory
Governor



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ROBERT C. STEPHENS
GENERAL COUNSEL

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Re: Proposed Bill to Reinst~~ate~~ the Coal Ash, Mining, and Oil & Gas Commissions

Gentlemen,

We have received and reviewed draft legislation which would reinstate the Coal Ash Commission, the Mining Commission, and the Oil & Gas Commission. Please consider my comments below in opposition to that legislation. I make them not only on my behalf, but also on behalf of Governor McCrory.

The Coal Ash Commission does not perform, and is not designed to perform, necessary regulatory tasks. Rather, its job is to "review and approve" the decisions of a cabinet agency. It is an unnecessary bureaucracy that will cost our state nearly half a million dollars a year. Furthermore, the North Carolina Supreme Court decision in *McCrory v. Berger* foreclosed the legal and practical viability of these independent review and approve commissions attached to our cabinet agencies. Significant constitutional problems remain with the Mining Commission, the Oil & Gas Commission, and the Coal Ash Commission.

The three commissions in this bill are the same commissions that were at issue in *McCrory v. Berger*. In that case, our Supreme Court ruled that the structure of all three prevented the Governor from performing his constitutional duty to faithfully execute the laws. This was a violation of the cornerstone principle of our state's constitution—the separation of powers. The Court stated, "[i]n light of the final executive authority that these three commissions possess, the Governor must have enough control over them to perform his

constitutional duty.” In reaching this conclusion, the Supreme Court reaffirmed the vitality of its unanimous decision in *Wallace v. Bone*, which held that the General Assembly may not “retain some control” over commissions endowed with executive powers.

The *McCrorry* Court identified three factors relevant to whether the Governor had enough control over the commissions at issue: the Governor’s “ability to appoint commissioners, to supervise their day-to-day activities, and to remove them from office.” It further held that “the legislation plaintiffs challenge here limits each of these methods of control,” and therefore violated the Separation-of-Powers Clause. The same is true of this newly proposed legislation. It limits each method of control for all three commissions.

In the legislation at issue, the Governor is given no supervisory powers over commission members and staff. Furthermore, he is also given no meaningful removal powers for any of the three commissions. The ability to supervise and remove the Governor’s appointees is critical to his ability to carry out the law and to carry out the will of the voters who elected him to lead the executive branch. By failing to provide the Governor with supervisory and removal authority, the proposed legislation misconstrues the power to appoint as the sole determinative factor for control. That approach conflicts with the Supreme Court’s opinion, and especially so for the entities at issue here—all of which exercise core executive powers and have final executive authority.

Moreover, the proposed legislation contains an additional limitation that the Court did not have a chance to consider—a confirmation requirement. Subjecting the Governor’s appointees to confirmation, in this context, interferes with the Governor’s ability to appoint members of his choosing. When combined with the quorum rules for the Mining Commission and the Oil & Gas Commission, other concerns arise. For example, with the Oil & Gas Commission, the quorum is five of the nine members. The General Assembly appoints four members. What is to prevent the General Assembly from confirming only one of the Governor’s appointees and thereby taking control of the commission?

For all of these entities to comply with the *McCrorry* decision, the Governor must have the majority of the appointments, the ability to remove his appointees at will, and the ability to supervise the day-to-day activities of these commissions. Anything less will run, yet again, afoul of our Constitution. Furthermore, properly structuring these commissions is the only way to safeguard their decisions from third party challenges, such as the one currently filed against the former Mining and Energy Commission.

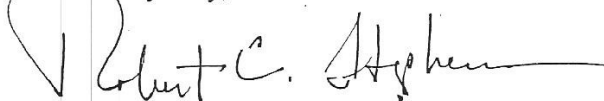
In addition, the proposed legislation relocates the power and duty to “review and approve” proposed classifications to the Environmental Management Commission if the Coal Ash Commission is not appointed by the statutory deadline, or if a court enjoins the authority of the Coal Ash Commission. This does not cure the constitutional problems. The Environmental Management Commission suffers from the same constitutional defects as the proposed Coal Ash Commission. Again, the Governor must have the majority of appointments, the ability to remove his appointees at will, and the ability to supervise the day-to-day activities of the commission. The mere fact that this commission has been in place for many years does insulate it from the reach of *McCrorry v. Berger*.

As mentioned above, the “review and approve” authority of the Coal Ash Commission, and potentially the Environmental Management Commission, presents its own unique set of circumstances. It serves one central purpose—to review and approve or reject decisions made by the Department of Environmental Quality. As detailed in *McCrorry v. Berger*, these “review and approve” commissions, designed to be superior to our cabinet agencies, pose an exceptional threat to the Governor’s duty to execute the laws. They take away executive decision making from where the voters and our Constitution have lodged it, and instead place it in the hands of appointees who are neither answerable to the Governor nor accountable to the voters. Some in the General Assembly believe that independent commissions superior to our agencies are a good idea—that they serve as a check on the executive branch. But *McCrorry v. Berger* rejects this argument. The Governor’s control over these commissions, as affirmed by the Supreme Court, negates the concept of independent commissions checking the executive branch. And rightly so, as it is the Governor—not an independent commission—who, under our Constitution takes care that the laws are faithfully executed.

The Governor, joined by two former governors, took a principled stand on behalf of the executive branch against legislative encroachment in filing *McCrorry v. Berger*. The Governor views preserving the constitutional role of the executive branch as a critical component of his job, as it goes right to the heart of our Constitution that he swore to uphold and defend. He will not retreat.

I urge you to withdraw this bill and to revise the Mining and Oil & Gas Commissions to bring them in line with our Constitution. As for the Coal Ash Commission, I urge you to reconsider entirely. There is no sound basis or need for an independent commission that the Court has said the Governor must control. It has already generated so much controversy. It’s time to retire it for good.

Yours very truly,



Robert C. Stephens
General Counsel to Governor Pat McCrory

cc: All members of the North Carolina House of Representatives
All members of the North Carolina Senate



PAT McCRORY
Governor

DONALD R. VAN DER VAART
Secretary

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Re: Proposed Changes to Coal Ash Management Act

Gentlemen,

We have reviewed the draft legislation that would revise the Coal Ash Management Act and have concluded that the department cannot support this proposal because it substantially weakens environmental protections contained in the current law:

On May 18th, in accordance with current law, DEQ issued classifications based on all credible scientific data available on that date. As we stated at that time the only change we would recommend to the Act would be to allow the Department an opportunity to re-evaluate the classifications in 18 months with the expectation that Duke Energy would complete repairs on their dam structures and provide permanent alternative water to nearby residents. Under our recommended approach Duke Energy would have 18 months to correct many of the conditions that resulted in the ponds being classified as intermediate. Allowing reconsideration might provide for less expensive closure options that provide equal or better environmental protection. However, if Duke Energy does not correct these items the classifications would remain unchanged.

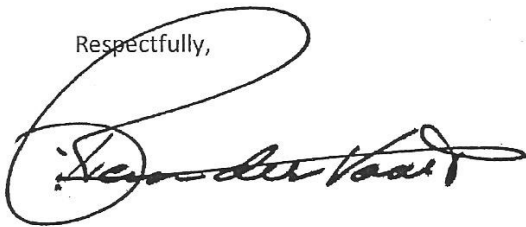
Unfortunately, the draft legislation undermines all of the efforts of this Department to implement the Act. For example, our proposal would eliminate future uncertainty by requiring Duke Energy to actually hook nearby residents up to permanent water supply within 18 months. In contrast the draft gives Duke Energy over one year to come up with an enforceable plan and no deadline to complete the work. Our staff has worked for over two years to identify the extent of groundwater contamination, while the proposed legislation used arbitrary criteria to determine who is provided a permanent alternate water supply. Also, under the proposed legislation permanent water is not provided if it costs Duke Energy too much money. Instead, filters would be provided, which may not be effective at removing some potential contaminants.

The proposed legislation also ignores the required dam safety repairs which, as we stated at the time of our classification, Duke Energy must complete by a date certain in order to be considered for possible reclassification.

The proposed legislation states that our classifications do not become final and arbitrarily extends the comment period and will inevitably lead to a delay in coal ash pond closure. After completing a robust public comment process including over 8,000 public comments and two years of scientific analysis, we believe that our request to amend the statute to allow review in 18 months would support the credibility of the coal ash law.

We urge you to withdraw this legislation and instead allow reconsideration of these classifications 18 months from now as our department originally recommended.

Respectfully,

A handwritten signature in black ink, appearing to read "Donald R. van der Vaart", is written over a circular stamp or seal.

Donald R. van der Vaart

Secretary, N. C. Department of Environmental Quality