

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
08 EHR 0771, 0835 & 0836  
09 EHR 3102, 3174, & 3176  
(consolidated)

NORTH CAROLINA WASTE AWARENESS AND  
REDUCTION NETWORK, INC., ENVIRONMENTAL  
DEFENSE FUND, NATIONAL PARKS CONSERVATION  
ASSOCIATION, SIERRA CLUB, and SOUTHERN  
ALLIANCE FOR CLEAN ENERGY,

Petitioners,

v.

N.C. DEPARTMENT OF ENVIRONMENT AND  
NATURAL RESOURCES, DIVISION OF AIR  
QUALITY,

Respondent,

and

DUKE ENERGY CAROLINAS, LLC,

Intervenor-Respondent.

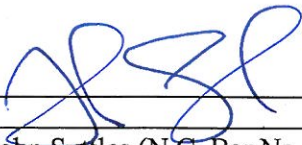
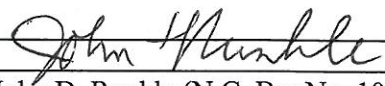
**PETITIONERS' MOTION TO  
VOLUNTARILY DISMISS  
CLAIMS WITH PREJUDICE**

NOW COME Petitioners, Environmental Defense Fund, National Parks Conservation Association, the Sierra Club, Southern Alliance for Clean Energy, and the North Carolina Waste Awareness and Reduction Network, Inc. (collectively, "Petitioners"), by and through their undersigned counsel, and respectfully move the Court to dismiss with prejudice their Petitions for Contested Case Hearing in the above-identified consolidated cases (the "Consolidated Appeals"). In the Consolidated Appeals, Petitioners challenged permits issued by Respondent the North Carolina Department of Environment and Natural Resources, Division of Air Quality to Intervenor-Respondent Duke Energy Carolinas, LLC, for construction and operation of Cliffside Steam Station Unit 6. Petitioners and Intervenor-Respondent Duke Energy Carolinas, LLC, have

mutually agreed to resolve the issues in the Consolidated Appeals, pursuant to the terms and conditions set forth in the "Cliffside Settlement Agreement," a copy of which is attached to and incorporated herein as Exhibit "A."

Accordingly, Petitioners respectfully move the Court to dismiss with prejudice Petitioners' Consolidated Appeals in the above-identified cases.

This the 17<sup>th</sup> day of January, 2012.

 John Suttles (N.C. Bar No. 34393) Gudrun Thompson (N.C. Bar No. 28829) Jill Tauber ( <i>pro hac vice</i> ) SOUTHERN ENVIRONMENTAL LAW CENTER 200 West Franklin Street, Suite 330 Chapel Hill, NC 27516 Telephone (919) 967-1450 Facsimile (919) 929-9421 Email <a href="mailto:jsuttles@selcnc.org">jsuttles@selcnc.org</a> <a href="mailto:gthompson@selcnc.org">gthompson@selcnc.org</a> <a href="mailto:jtauber@selcdc.org">jtauber@selcdc.org</a>  <i>Attorneys for Petitioners Environmental Defense Fund, National Parks Conservation Association, Sierra Club and Southern Alliance for Clean Energy</i>	 John D. Runkle (N.C. Bar No. 10503) P.O. Box 3793 Chapel Hill, NC 27515 Telephone (919) 942-0600 Facsimile (919) 942-0600 Email <a href="mailto:jrunkle@pricecreek.com">jrunkle@pricecreek.com</a>  <i>Counsel for the North Carolina Waste Awareness and Reduction Network, Inc.</i>
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## CLIFFSIDE SETTLEMENT AGREEMENT

This is an AGREEMENT TO SETTLE AND RELEASE OF CLAIMS (the “Agreement”) made and entered by and among Petitioners, Environmental Defense Fund, National Parks Conservation Association, the Sierra Club, Southern Alliance for Clean Energy (“EDF Petitioners”); Petitioner the North Carolina Waste Awareness and Reduction Network, Inc. (“NC WARN”) (collectively, “Petitioners”), and Duke Energy Carolinas LLC (“Duke Energy”). Petitioners and Duke Energy agree to the following terms as a basis of resolving the issues between them in Petitioners’ contested cases challenging the construction and operation permits for Cliffside Unit 6 (the “Consolidated Appeal”). By this Agreement, the undersigned settling Petitioners and Duke Energy (collectively the “Parties”) mutually agree to compromise, settle, and dismiss with prejudice the Consolidated Appeal subject to the terms and conditions set forth below.

### WITNESSETH:

WHEREAS, Duke Energy owns and operates the Cliffside Steam Station located in Cleveland and Rutherford Counties in North Carolina;

WHEREAS, on January 29, 2008, the North Carolina Department of Environment and Natural Resources, Division of Air Quality (“DAQ”), issued Air Quality Permit No. 04044T28 (“T28 Permit”) to Duke Energy for construction of a new coal-fired unit at the Cliffside Steam Station (“Cliffside Unit 6” or “Unit 6”). Construction of Cliffside Unit 6 commenced on January 30, 2008;

WHEREAS, the T28 Permit contains requirements for Duke Energy to retire certain number of megawatts (“MW”) of existing coal-fired generating capacity by specific dates (“Greenhouse Gas Reduction Plan”);

WHEREAS, EDF Petitioners (08 EHR 0835) (“EDF T28 Appeal”) and NC WARN (08 EHR 0771) (“NC WARN T28 Appeal”) timely filed petitions challenging the issuance of the T28 Permit with the Office of Administrative Hearings (“OAH”); similar appeals were also filed by other entities not parties to this Agreement, namely Appalachian Voices (08 EHR 0779) (“AV T28 Appeal”) and the Cape Fear Riverkeeper, Catawba Riverkeeper, French Broad Riverkeeper, Lower Neuse Riverkeeper, New Riverkeeper, Pamlico-Tar Riverkeeper, Upper Neuse Riverkeeper, Watauga Riverkeeper, Waccamaw Riverkeeper and Yadkin Riverkeeper (collectively “Riverkeepers”) (08 EHR 0836) (“Riverkeeper T28 Appeal”);

WHEREAS, the EDF T28 Appeal, NC WARN T28 Appeal, AV T28 Appeal, and the Riverkeeper T28 Appeal were consolidated by Administrative Law Judge May (the “ALJ”) (the “Consolidated T28 Appeal”);

WHEREAS, on March 13, 2009, DAQ issued an amended Air Quality Permit No. 04044T29 (“T29 Permit”) to Duke Energy containing provisions related to hazardous air pollutants;

WHEREAS, EDF Petitioners (08 EHR 3176) (“EDF T29 Appeal”) and NC WARN (08 EHR 3102) (“NC WARN T29 Appeal”) timely filed their petitions at OAH challenging the issuance of the T29 Permit; similar appeals were also filed at OAH by Appalachian Voices (09 EHR 3175) (“AV T29 Appeal”) and the Riverkeepers (09 EHR 3174) (“Riverkeeper T29 Appeal”);

WHEREAS, the EDF T29 Appeal, NC WARN T29 Appeal, and the Riverkeeper T29 Appeal were consolidated with one another (the “Consolidated T29 Appeal”) and with the Consolidated T28 Appeal by the ALJ (the “Consolidation Order”);

WHEREAS, the Consolidation Order did not consolidate the AV T29 Appeal, and also granted the AV motion to split its AV T28 Appeal off from the Consolidated T28 Appeal; those AV T28 and AV T29 Appeals were resolved separately, and are, thus, not a part of this Agreement;

WHEREAS, the Riverkeeper T28 Appeal was dismissed and Riverkeepers voluntarily dismissed Riverkeeper T29 Appeal by filing a Stipulated Withdrawal of Claims with OAH in May, 2010, thereby resolving all of Riverkeepers' claims in the matter; thus, Riverkeepers are not parties to this Agreement;

WHEREAS, various technical amendments have been made to the Cliffside Unit 6 permit and the current version is numbered 0404432 ("Permit T32");

WHEREAS, according to Permit T32, Duke Energy must: (1) retire Cliffside Units 1-4 (totaling 198 MW) prior to commencing operation of Unit 6; (2) retire an additional 800 MW of capacity in three stages (350 MW in 2015, 200 MW in 2016, and 250 MW in 2018); and (3) take additional steps that will assure that the operation of Unit 6 will be carbon neutral by 2018;

WHEREAS, Petitioners believe that, in order to assure that the operation of Unit 6 will be carbon neutral by 2018, Duke Energy must retire an additional 669 MW of coal-fired capacity beyond the 998 MW of capacity explicitly identified in items (1) and (2) of the foregoing paragraph;

WHEREAS, Duke Energy believes that the commitments and requirements in the Greenhouse Gas Reduction Plan are sufficient to render Cliffside Unit 6 carbon neutral by 2018, it is willing to agree to shutting down the amount of additional electric generating capacity requested by Petitioners, subject to the terms of this Agreement and with the further understanding that this Agreement does not alter or modify the terms of the T32 Permit; and

WHEREAS, the Petitioners and Duke Energy now desire to compromise and settle the issues between them in the T28 and T29 Consolidated Appeals (previously referred to as the “Consolidated Appeal”), without admitting the factual or legal contentions or positions taken by any party therein;

NOW, THEREFORE, in consideration of the promises and covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Petitioners and Duke Energy agree to compromise, settle, and dismiss with prejudice all claims and causes of action arising in the Consolidated Appeal upon fulfillment of all terms and conditions set for below:

I. Duke Energy’s Obligations

Duke Energy hereby agrees to retire coal-fired electrical generating units (“EGUs”) representing a total of 1667 MW of capacity, implemented as follows:

A. As required pursuant to the order by the North Carolina Utilities Commission (“NCUC”) entitled “Order Granting Certificate of Public Convenience and Necessity with Conditions,” dated March 21, 2007 (Docket E-7 Sub 790) (the “CPCN Order”) and the Unit 6 Greenhouse Gas Reduction Plan, Duke Energy will retire Cliffside Units 1-4 (totaling 198 MW) prior to commencing operation of Unit 6.

B. Duke Energy will retire coal-fired EGUs representing an additional 800 MW of capacity, as required by the Greenhouse Gas Reduction Plan and the T32 Permit, these retirements would occur in three stages (350 MW by December 31, 2015, 200 MW by December 31, 2016, and 250 MW by December 31, 2018).

C. Finally, to satisfy Petitioners' concerns that the operation of Unit 6 will be carbon neutral, Duke Energy will retire additional coal-fired EGUs representing 669 MW of capacity by no later than December 31, 2020.

D. The retirements described in items B. and C. above are calculated using retirements that are made on or after April 1, 2011.

E. The parties agree and stipulate that this Settlement Agreement does not address or affect Duke Energy's ability to seek approval from the NCUC or DAQ to repower or convert any coal-fired EGU retired pursuant to this Settlement Agreement or to seek approval from DAQ to offset emission increases by netting or otherwise utilizing the retirements required under this Agreement, nor does this Settlement Agreement address or affect Petitioner's ability to challenge any such request.

F. Duke Energy will request that DAQ review the start-up, shutdown, and malfunction provisions of Permit T32 and revise the conditions as necessary to conform to the requirements of 15A NCAC 2D .0535. Petitioners and Duke Energy believe and agree that this can be done through a minor permit amendment.

## II. EDF Petitioners' and NC WARN's Obligations

A. Within ten days of the execution of this Agreement by all Parties, EDF Petitioners and NC WARN will dismiss their contested case petitions challenging the Cliffside Unit 6 air permit. Recognizing that any individual member may take such action as an individual as that member deems fit, EDF Petitioners and NC WARN further agree that they will not, as individual organizations, raise in any other administrative or judicial proceeding pertaining to Cliffside any of the same claims raised in the Consolidated Appeal, nor will the organizations formally approve actions directly assisting third parties in raising those issues in administrative or judicial

proceedings, provided that such agreement does not in any way limit or constrain actions by Petitioners to perform their normal educational and informational activities, including information posted on their internet sites or included in Petitioners' newsletters or similar publications.

B. EDF Petitioners and NC WARN agree that they will not oppose (through formal comments, administrative challenges, lawsuits, or similar formal proceedings) Duke Energy's filings with the NCUC or DAQ regarding Duke Energy's methods of complying with the requirements of the CPCN Order or the Air Permit to demonstrate carbon neutrality; however, EDF Petitioners and NC WARN reserve the right to participate in any formal proceeding that would alter Duke Energy's compliance with the terms set out in this agreement.

### III. Legal Provisions

A. Binding Nature of Agreement. The Parties represent and agree that the persons executing this Agreement have full and sufficient authority to sign and agree to be bound by the agreement, and that this Agreement shall be binding upon the Petitioners and Duke Energy, and their successors and assigns, upon its execution by all parties.

B. Attorney's Fees, Costs, and Expenses. The Parties agree to bear their own attorney's fees, costs, and other expenses that have been incurred in connection with any stage of the Consolidated Appeal.

C. Governing Law and Interpretation. This Agreement shall be governed and conformed in accordance with the laws of the State of North Carolina without regard to the conflict of laws provisions of North Carolina or any other state, and any provision herein that violates a statute or rule shall be void and unenforceable.



D. Contemporaneous Information. In order to facilitate Petitioners' ability to follow and communicate with Duke Energy about its compliance with this agreement, Duke Energy will provide to the Petitioners on a contemporaneous basis notice of the shut-down of any generating unit under this agreement. Duke Energy shall make its best effort to provide the information as set forth in this paragraph, though its failure to do so will not be considered a breach of this Agreement. Duke Energy's obligations as set forth in this paragraph will cease upon satisfaction of this Agreement.

E. Enforceability and Remedies for Breach. The Parties stipulate and agree that this Agreement may be enforced in any court of competent jurisdiction in North Carolina, and that venue is appropriate in either Wake or Mecklenburg County. The Parties' sole and exclusive remedy for breach of this Agreement shall be an action for specific performance or injunction. In no event shall any Party be entitled to monetary damages for breach of this Agreement. In addition, no legal action for specific performance or injunction shall be brought or maintained until: (a) the non-breaching Party provides written notice to the breaching Party which explains with particularity the nature of the claimed breach, and (b) within thirty (30) days after receipt of said notice, the breaching Party fails to cure the claimed breach or, in the case of a claimed breach which cannot be reasonably remedied within a thirty (30) day period, the breaching Party fails to commence to cure the claimed breach within such thirty (30) day period, and thereafter diligently complete the activities reasonably necessary to remedy the claimed breach.

F. Severability. The invalidity or unenforceability of any provision of this Agreement shall in no way affect the validity or enforceability of any other provision; the invalid or unenforceable provision shall be stricken, without assessing damages or imposing penalties to either Party arising out of said provisions by any court of competent jurisdiction.

G. Headings. The headings used in this Agreement are for convenience of reference only and shall in no way define, limit, expand or otherwise affect the meaning of any provision of this Agreement.

H. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

I. Amendment. This Agreement may not be modified, altered or changed except in a written document that is signed by all Parties and that makes specific reference to this Agreement.

J. Entire Agreement. This Agreement sets forth the entire agreement between the Parties, and fully supersedes any prior agreements or understandings between the Parties. In addition, this Agreement does not alter or modify the terms of the T32 Permit.

K. Review and Signing. Each Party and counsel for each Party has reviewed this Agreement. Accordingly, this Agreement shall be construed without regard to any presumption or other rule of construction requiring resolution of ambiguities against the drafting party.

IN WITNESS WHEREOF, the EDF Petitioners, NC WARN and Duke Energy have  
executed this Agreement as of <sup>January</sup> ~~December~~ 3, 201<sup>2</sup>~~1~~.

NORTH CAROLINA WASTE AWARENESS  
AND REDUCTION NETWORK, INC.

By: [Signature]  
Its: EXECUTIVE DIRECTOR  
Date: 1-3-12

ENVIRONMENTAL DEFENSE FUND

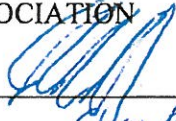
By:

Its:


Date:

*Michael J. Keenan*  
*Director, SE Energy & Air Policy*  
*December 15, 2011*

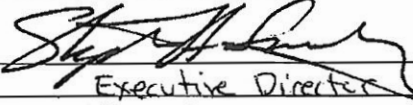
NATIONAL PARKS CONSERVATION  
ASSOCIATION

By:   
Its: Elder Br. Council  
Date: 10/9/11

SIERRA CLUB

By:   
Its: staff attorney  
Date: 12/15/11

SOUTHERN ALLIANCE FOR CLEAN ENERGY

By:   
Its: Executive Director  
Date: Dec. 16, 2011

DUKE ENERGY CAROLINAS, LLC

By: 

Its: Group Executive, Chief Generation Officer, Chief Nuclear

Date: 12-15-11 Officer



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Intervenor-Respondent.

**PROPOSED ORDER**  
**DISMISSING PETITIONERS'**  
**CLAIMS WITH PREJUDICE**

THIS MATTER IS BEFORE THE COURT on the motion of Petitioners Environmental Defense Fund, National Parks Conservation Association, the Sierra Club, Southern Alliance for Clean Energy, and the North Carolina Waste Awareness and Reduction Network, Inc. (collectively, "Petitioners") to Voluntarily Dismiss Claims with Prejudice in the above-identified Contested Cases.

Based on the representations contained in Petitioners' motion and the attached exhibit, IT IS HEREBY ORDERED, that Petitioners' Consolidated Contested Cases, above numbered and entitled, are DISMISSED WITH PREJUDICE, with each party to bear their own costs.

ORDERED this \_\_\_\_\_ day of January, 2012.

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J. Randall May  
Administrative Law Judge

## CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Petitioners' Motion to Voluntarily Dismiss Claims with Prejudice has been served on all parties by United States mail, first-class postage prepaid, with a courtesy copy by electronic mail, addressed as follows:

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Amy L. Bircher, Assistant Attorney General  
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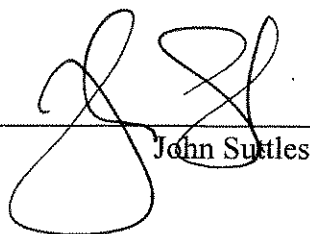
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This the 17th day of January, 2012.



John Suttles