



# The Canary Coalition

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February 10, 2009

Attention: United States Attorney General Eric Holder

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Petition to Investigate

Dear Attorney General Holder,

As you may know, the Canary Coalition represents thousands of voices throughout the Appalachian region who are deeply concerned about poor air quality and the climate crisis. Our paying membership of more than 2300 includes hundreds within the business community, the medical community, individual local government officials, community leaders and concerned, active and influential citizens.

Regrettably, members of the Canary Coalition have experienced a set of circumstances that leads to the conclusion there is impropriety in the relationship between the Division of Air Quality (DAQ) of the North Carolina Department of Environment and Natural Resources (DENR) and Duke Energy, one of the public utilities in that state of which DAQ is responsible for regulating.

We are petitioning you to conduct a federal investigation into this inappropriate relationship, to determine if legal boundaries have been crossed, for the following reasons:

1. In defiance of a federal court order, DAQ, on behalf of Duke Energy, is conducting a Title 5 permit modification process for the construction of Cliffside Unit 6, a new coal-burning power plant in North Carolina.

On December 2, 2008, Federal Circuit Court Judge Lacy Thornburg ruled that Duke Energy's Title 5 Air Quality construction permit was in violation of the Clean Air Act (CAA) for failing to adequately regulate toxic air pollution from its proposed Cliffside Unit 6. The judge ruled that under the CAA, Duke is required to perform a Maximum Achievable Control Technology (MACT) analysis to determine how to best limit mercury and other hazardous air pollutant (HAP) emissions from the proposed unit.

For two years, within its permit application process Duke Energy has maintained that Unit 6 will be a major source of Hazardous Air Pollutants (HAPs) that will emit 217 tons annually. But immediately after the court order, Duke Energy asked DAQ to revise its projected emissions of HAPS within the permit to less than 25 tons, an 85% reduction, without any change of equipment, in order to re-classify Cliffside as a "minor source" and evade the federal court decision. Remarkably, DAQ agreed to collude with Duke Energy in their effort to evade and violate the federal law, by agreeing to begin the permit modification process.

2. In violation of federal law, DAQ has issued a Title 5 construction permit for Cliffside without requiring Duke Energy to perform a Best Available Control Technology (BACT) analysis for carbon dioxide emissions.

In 2007, Massachusetts vs. EPA, the United States Supreme Court ruled that carbon dioxide emissions are to be regulated under the CAA. Under the political influence of Duke Energy, DAQ has ignored this federal ruling in issuing the permit with no provisions to regulate carbon dioxide emissions.

3. In violation of fair access principles, DAQ, on behalf of Duke Energy, has deliberately avoided fair access to a representative portion of the state's population by refusing to hold Cliffside Title 5 HAPs permit modification public hearings in major urban areas and/or during dates and times that are reasonable for including the vast majority of working women and men who will be most affected by plant emissions.

DAQ determined there was more than adequate public interest to warrant public hearings on the issue of Cliffside's HAPs permit modification. But, despite petitioning from organizations representing tens of thousands of people, for hearings in the major urban areas of Charlotte, Asheville, Raleigh and Wilmington, the DAQ refused. The state agency instead provided only two hearings, in Forest City and in Statesville, areas remote and inaccessible during the work week for most of the people in the state who will be impacted by the power plant's emissions. Both of these locations heavily favored a turnout of Duke Energy employees and public officials who are heavily influenced by Duke Energy. As a result, paid Duke Energy staff dominated the time at the hearings, drowning out legitimate independent voices that represent the public interest. These choices of location warrant investigation for illegal collusion between DAQ and Duke Energy because there was no logical reason for their choice other than to eliminate major news media coverage and fair access to those opposed to the permit modification.

4. In violation of the civil rights of participating citizens in North Carolina, DAQ has ignored due process during public hearings by enforcing rules in an arbitrary manner to blatantly favor Duke Energy spokespeople.

In holding the hearing in Forest City, the home of Cliffside and deep Duke Energy influence, on Thursday, January 15, 2009, those people from out of town who wished to participate had to drive many hours to deliver prepared 3-minute statements. After only three speakers finished presenting, DAQ arbitrarily reduced the time limit from 3 minutes to 2 minutes to accommodate dozens of paid Duke staff members who all repeated the same message of unconditional support for the Cliffside permit modification, portraying the energy corporation as environmentally responsible, even as it was in the process of attempting to avoid a federal court order to perform a full MACT analysis on Hazardous Air Pollutants. This arbitrary rule change at the hearing placed an unfair burden on the few non-Duke employees in attendance and opponents of the permit modification who could not complete their carefully prepared and documented 3-minute statements.

DAQ allowed Duke Energy speakers in both Forest City and Statesville to address the audience and take a hand poll of those who favored Cliffside getting the permit modification. This was in direct violation of the ground rules read aloud by DAQ officials at the beginning of the hearing.

5. DAQ has violated the civil rights of North Carolina residents by failing to maintain order during the hearing process while allowing an atmosphere of intimidation to prevail against opponents of Duke Energy's position.

Standing in the room was prohibited, according to the rules read at the opening of the hearing in Forest City, but Duke personnel and supporters were blatantly standing in the rear of the hall and on the sides throughout the hearing, although there were more than enough seats to accommodate all. This contributed to an atmosphere of intimidation within the hall. There was no attempt by the DAQ to enforce this rule.

Duke Energy brought hundreds of its employees and retirees to the auditorium in Forest City. Some, acting like an angry mob proceeded to shout down a speaker from the Canary Coalition and the speaker from the Southern Environmental Law Center for continuing to read a few sentences after the expiration of the re-defined 2-minute time limit. DAQ officials and security did nothing to intervene when people shouted at these speakers and hurled insults or ridicule at opposing speakers who were seated.

In terms of process, if a speaker goes over the limit, it's the responsibility of the agency's facilitator to enforce the rule; not members of the audience who didn't say or do anything when Duke's speakers went over the limit. DAQ officials should have told the mob to calm down and be quiet. They did not.

In Conclusion, the history is long and sordid of the NCDAQ's improper relationship with the industries it is charged with regulating. But, its current activities on behalf of Duke Energy's Cliffside expansion have crossed a line that may well bring it into the realm of illegal activity by a government agency. We are petitioning the Attorney General of the United States to investigate this inappropriate relationship and prosecute any corruption of the system that may be revealed by your investigation.

In addition, we are contacting the North Carolina Department of Justice to investigate whether or not any state laws have been violated by the unseemly relationship between the NCDAQ and Duke Energy Corporation. However, Duke Energy influence throughout the North Carolina state government is pernicious. A recent independent study of political campaign contributions revealed \$744,000 paid toward the campaigns of key state-wide office holders since 2005 from the Duke Energy Political Action Committee and Duke Energy Executives. Therefore, we have little faith the state will carry out a fair and impartial investigation. It is our hope that under the new administration in Washington we can do better on the federal level.

Thank you.

Sincerely,

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