

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

Clyde Marcus Jones, II; Dennis Phillips, and
Deborah Phillips, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

Duke Energy Corporation and Duke Energy
Carolinas, LLC,

Defendants.

Civil Action No.: 3:24-cv-1281-MGL

FIRST AMENDED CLASS ACTION COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiffs Clyde Marcus Jones, Dennis Phillips, and Deborah Phillips, on behalf of themselves and all others similarly situated (collectively “Plaintiffs”), bring this Class Action Complaint and Demand for Jury Trial (the “Complaint”) against Duke Energy Corporation, individually and as successor in interest to Catawba Power Company, Southern Power Company, Wateree Power Company, Great Falls Power Company, Western Carolina Power Company, Cincinnati Gas and Electric, and the Vanguard Group, Inc., and against Duke Energy Carolinas, LLC (collectively “Defendants” or “Duke Energy Defendants”). Plaintiffs hereby allege as follows:

NATURE OF THE ACTION

1. This is a civil action for compensatory and punitive damages owed to Plaintiffs and the Class as a result of the Duke Energy Defendants’ repeated and continuous infringement of Plaintiffs’ property rights by Defendants’ dissemination of a group of toxic chemicals known as Polychlorinated Biphenyls (“PCBs”).

2. PCBs are man-made, non-flammable chemicals with a high boiling point. Throughout the late nineteenth and early twentieth century, and due to their chemical properties, PCBs were used in many applications.

3. By the late 1960s, however, evidence had emerged linking PCB exposure to serious negative health effects in humans.

4. By the 1970s, the United States Environmental Protection Agency (“EPA”) deemed PCBs a probable known human carcinogen and banned the manufacture of PCBs in the United States.

5. Even prior to that time, industrial users of PCBs knew or should have known of their dangers.

6. In addition to cancer, PCBs have been shown to pose substantial health risks, including adverse effects on the immune system, the reproductive system, neurological development, decreased thyroid hormone levels, and elevated blood pressure and cholesterol levels. <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls#release>, last accessed November 19, 2024.

7. Once released, PCBs remain in the environment for long periods of time. They can accumulate in the environment and contaminate the bodies of fish and other small animals, causing people who eat such fish or other animals to be exposed to the toxic chemicals. <https://www.epa.gov/pcbs/learn-about-polychlorinated-biphenyls#release>, last accessed November 19, 2024.

8. From 1923 until 2016, the Duke Energy Defendants operated the “oldest

continuous environmental program of any utility in the US, and one of the first in North America”¹ to eradicate mosquito populations on lakes, rivers, and waterways in South Carolina under Duke Energy’s control (“the Duke Energy Mosquito Control Program”).

9. The Duke Energy Defendants created Lake Wateree in 1919 and thereafter were directly responsible for its management and maintenance, including on behalf of waterfront property owners.

10. Plaintiffs and the Class are property owners with waterfront property located on Lake Wateree. As such, Plaintiffs and the Class hold littoral and/or riparian rights relating to Lake Wateree.

11. During the course of the Duke Energy Mosquito Control Program—including for decades after PCBs were proven to cause cancer and a number of other adverse health effects—the Duke Energy Defendants intentionally disseminated millions of gallons of PCB-laden motor oil and transformer oil into South Carolina waterways, including Lake Wateree.

12. After PCBs were banned in the United States, the Duke Energy Defendants hid their use of these substances from the public and thereafter engaged in studies that artificially manipulated the scientific data to lead the public and, specifically, waterfront homeowners to believe contamination was not an issue.

13. As a direct result of Defendants’ actions in spraying harmful PCBs, Lake Wateree’s waters and waterbeds were inundated with harmful PCBs, which thereafter accumulated, invading the area’s biological, aquatic, and ecological environment and encroaching upon Plaintiffs’ property rights.

¹ Duke Energy Mosquito Control Program in its 90th year, Duke Energy | News Center. Available at: <https://news.duke-energy.com/releases/duke-energy-mosquito-control-program-in-its-90th-year> (last accessed: November 20, 2024).

14. Because the Duke Energy Defendants hid their use of PCBs or misstated the impact of these harmful substances through self-serving studies, homeowners were not aware of the dangers to their properties or to their rights as homeowners, including the rights to use and enjoy the water touching their properties.

15. Plaintiffs now seek redress for this invasion and infringement upon their properties and property rights by dangerous toxic chemicals.

16. Plaintiffs file this class action on behalf of all waterfront residents of Lake Wateree, each of whom hold littoral and/or riparian rights in their properties and who experienced and will continue to experience interference and infringement with their right to peaceful enjoyment of their properties, permanent diminution in value, as well as other injuries caused by Defendants' conduct.

JURISDICTION AND VENUE

17. At all times relevant to this complaint, Plaintiff Clyde Marc Jones has been a citizen of Kershaw County, in the State of South Carolina, with a primary address in Camden, South Carolina on Lake Wateree.

18. At all times relevant to this complaint, Plaintiffs Dennis and Deborah Phillips have been citizens of Kershaw County, in the State of South Carolina, with a primary address in Camden, South Carolina on Lake Wateree.

19. At all times relevant to this Complaint, Defendant Duke Energy Corporation ("Duke Energy") has been a for-profit corporation organized and headquartered in the state of North Carolina at 526 S. Church St., Charlotte, NC 28202, having a principal place of business located at 550 S. Tryon St., Charlotte, NC 28202, and has been the parent and owner of Defendant Duke Energy Carolinas, LLC, and responsible for providing electricity and related services to 8.4

million customers across the southeast through its wholly owned subsidiaries, including Defendant Duke Energy Carolinas, LLC.

20. At all times relevant to this Complaint, Defendant Duke Energy Carolinas, LLC (“Defendant DEC”) has been a for-profit corporation organized and headquartered in the state of North Carolina at 526 S. Church St., Charlotte, NC 28202, having a principal place of business located at 550 S. Tryon St., Charlotte, NC 28202.

21. Defendant DEC is Defendant Duke Energy’s wholly owned subsidiary operating in North and South Carolina and is directly responsible for providing electric power and related services to millions of customers across South Carolina, including surrounding Lake Wateree.

22. Defendant DEC is directly responsible for managing, maintaining, and ensuring the safety and satisfactory operation of several of Defendant Duke Energy’s assets, including Lake Wateree, a reservoir owned by Defendant Duke Energy and operated by Defendant DEC.

23. Since the early 1900s, the Duke Energy Defendants (and their predecessors) have owned and operated power facilities throughout South Carolina and have been charged with the responsibility of maintaining and treating significant portions of land and water within the state of South Carolina, including those areas that form the basis of this dispute. The Duke Energy Defendants’ contacts with South Carolina have been systemic and continuous.

24. Defendant DEC has continuously done business in South Carolina for the entire tenure of the acts giving rise to these claims, including the intentional disposal and introduction of dangerous PCBs into South Carolina waters and the failure to remediate this contamination.

25. In addition, throughout the relevant timeframe of this complaint, the Duke Energy Defendants have, collectively and individually, been responsible for putting forth representations about Defendants’ programs for treating and maintaining bodies of water used by Defendants for

daily operations, as well as the Duke Energy Defendants' commitment to environmental stewardship.

26. As set forth below, the Duke Energy Defendants, during the relevant timeframe, have put forth and disseminated studies and statements about Lake Wateree and their program to eradicate mosquitos from Lake Wateree, using purposefully misleading statements and information that downplayed or otherwise denied that the program created any risk of harm to Lake Wateree.

27. The acts complained of in this action are uniquely related to South Carolina, involve application of South Carolina law, and courts of South Carolina are best situated to discern appropriate remedies.

28. This civil dispute is brought under the laws of South Carolina, and the injuries Defendants committed against the entire plaintiff class involve violations of Plaintiffs' rights as South Carolina landowners within the borders of South Carolina.

29. This Court has subject matter jurisdiction because Defendant Duke Energy is a citizen of a different state from at least two-thirds of the Plaintiff class, with headquarters in Charlotte, North Carolina, and this controversy seeks over \$5,000,000 in damages, including damages for diminution in property value for over 2,600 water-front homeowners surrounding Lake Wateree. *See* 28 U.S.C. § 1332(d).

30. Personal jurisdiction over Defendants is proper because the Duke Energy Defendants transact substantial and pervasive business in the State of South Carolina, and own and are directly responsible for the daily operation and management of Lake Wateree.

31. Venue is proper in this Court because a substantial part of the events or omissions giving rise to the alleged claims occurred in Kershaw County, South Carolina where Defendants

do substantial business, including managing, operating, and maintaining Lake Wateree.

STATEMENT OF FACTS

A. The Rise of PCBs

32. PCBs were invented in the late 1800s and were used for decades as lubricants, coolants, and in other manufacturing and industrial applications because of their ability to withstand heat, and their chemical stability.

33. Once created, PCBs are essentially indestructible and remain permanently in the environment wherever they are used.

34. Because of their vast potential for industrial application, beginning in the 1930s companies in the United States started manufacturing PCBs.

35. Monsanto became the predominant manufacturer of PCBs, selling them under the trade name Aroclor.

36. In 1944, Public Health Reports published one of the first studies linking acute toxicity in lab animals to PCBs. According to the report, conducted by the Industrial Hygiene Research Laboratory of the National Institutes of Health, “[t]wo conspicuous pathologic findings were observed – liver damage in all series of experiments and skin changes in the animals receiving subcutaneous injections or applications of the material to the skin.”²

37. During hearings in the 1950s about the use of certain chemicals in food products, Dr. James O. Clarke, the director of the Division of Program Research at the United States Food and Drug Administration discussed the potential dangers of using chlorinated hydrocarbons. While the hearings specifically focused on Dichlorodiphenyltrichloroethan (“DDT”), Dr. Clarke was

² Public Health Rep. 2018 Nov.; 133(6): 721-725 (“From Industrial Toxins to Worldwide Pollutants; a Brief History of Polychlorinated Biphenyls”), quoting the United States Surgeon General.

unequivocal, finding: “Without exception, every one of the chlorinated cyclic hydrocarbon insecticides³ is a liver poison...”

38. Dr. Clarke continued:

The extremely stable nature of the [chlorinated hydrocarbon] group of insecticides poses another problem. **In amounts normally used for growing crops, severe poisoning of the soil has persisted for the entire duration of reported observations** (7 years) and as no means are available to destroy these compounds, millions of acres of farmland may ultimately have to be withdrawn from cultivation since these substances not only inhibit the growth of many plants but also may be absorbed into the food portions in dangerous concentrations.⁴ (emphasis added)

39. From these same studies in the 1950s, the American Public Health Association’s Committee on Chemicals Introduced in Foods issued a warning against widespread use of chlorinated hydrocarbons, finding: “These compounds possess a high order of toxicity, and their uncontrolled or unwise use is not desirable.”⁵

40. Evidence against the use of PCBs continued to mount, including an incident in 1968 when more than 1,000 people in Japan were poisoned by PCB contaminated rice.

41. In 1971, the United States created a task force on PCBs. In a report issued in 1972, the task force determined that the use of PCBs should be restricted to “essential” or “non-replaceable” uses involving minimal direct human exposure.⁶

42. This 1972 report set forth a list of various PCB sources in the environment, among them, municipal and some industrial sewers, accidental spills, improper waste disposal practices,

³ PCBs are considered chlorinated hydrocarbons. See M. Friend and J.C. Franson, Polychlorinated Biphenyls, Information and Technology Report 1999-0001, https://pubs.usgs.gov/itr/1999/field_manual_of_wildlife_diseases.pdf#page=315.

⁴ *Id.*

⁵ *Id.* quoting Bing FC, Clarke JC, Darby WJ, et al. Report of the Committee on Chemicals Introduced in the Production of Foods, Am. J. Public Health, 1950; 40: 121-126.

⁶ See Interdepartmental Task Force on PCBs. Washington, DC, Departments of Agriculture, Commerce, Health, Education, and Welfare, and Interior, and US Environmental Protection Agency; 1972.

and direct application as pesticides. The report suggested, however, that by 1972 no entities were directly applying PCBs as pesticides.

43. By 1977, the evidence connecting PCB exposure to severe negative health effects was irrefutable, and the Duke Energy Defendants knew or should have known about these severe health effects.

44. The EPA banned further production of PCBs in the United States in 1979.

B. PCB Use in South Carolina

45. The first report of PCBs in the ecological environment of South Carolina arose out of an industrial spill near Lake Hartwell in 1976.

46. Around this timeframe, researchers began studying PCB contamination in several of South Carolina's reservoirs.

47. Developed by the Duke Energy Defendants in 1919 through damming the Wateree River, Lake Wateree is one of South Carolina's oldest man-made reservoirs extending over twenty-one square miles, and including more than one hundred and eighty-one miles of shoreline.⁷

48. During the relevant timeframe, the Duke Energy Defendants have owned, operated, and controlled Lake Wateree and been responsible for its management and maintenance along with several other lakes and bodies of water on or near the Catawba and Wateree Rivers.⁸

49. By creating and undertaking to control Lake Wateree, the Duke Energy Defendants assumed responsibility for maintaining this body of water, including the application of any substances on the water and the implementation of mitigation programs and remediation programs

⁷ See *Loving Lake Wateree*, <https://lakewaterree.com> (“WHOA is a community organization dedicated to maintaining the high standard of living on Lake Wateree”). (last accessed Nov. 19, 2024).

⁸ See *Catawba-Wateree Shoreline Management Plan*, <https://www.duke-energy.com/community/lakes/services/cw-shoreline-management-plan> (last accessed Nov. 19, 2024).

using due and reasonable care in accord with best practices.

50. According to the Duke Energy Defendants, the Catawba-Wateree project, of which Lake Wateree is a part, “is the backbone of Duke Energy’s generation fleet, providing 819 megawatts of renewable hydropower and cooling water to more than 8,000 megawatts of fossil and nuclear generation.”⁹

51. According to their re-licensing agreement, the Duke Energy Defendants specifically promised Lake Wateree homeowners that Defendants were responsible for the fish and wildlife habitat, water quality, and conservation of the land surrounding the lake, including shoreline management.¹⁰

52. The Duke Energy Defendants further acknowledged “the reservoirs [of the Catawba-Wateree project] provide the region with public water supplies, opportunities for public recreation, and wildlife habitat.”¹¹

53. Class members enjoy special riparian and littoral rights including rights to make use of the water abutting their property and have the right to title up to the high-water mark.

54. Based upon Defendants’ s responsibility to manage and maintain Lake Wateree, the Duke Energy Defendants have a direct responsibility to Lake Wateree water-front homeowners.

55. These homeowners rely upon the Duke Energy Defendants to properly manage Lake Wateree, including the condition of the water, surrounding ecosystems, and environmental stewardship of the reservoir and its perimeter.

⁹ See Catawba-Wateree Relicensing, available at: <https://www.duke-energy.com/community/lakes/hydroelectric-relicensing/catawba>.

¹⁰ See Lake Wateree Perspective of the Catawba-Wateree Relicensing Agreement, available at: <https://www.duke-energy.com/-/media/pdfs/community/wateree-agreement.pdf?rev=d3ee54ead58f4919960633f9b2c0a3f2> (last accessed Nov. 19, 2024).

¹¹ *Id.*

56. By the early 1990s, information came to light indicating that bodies of water in South Carolina, including Lake Wateree, had been contaminated by PCBs.

57. This information included dangerous levels of PCBs found in fish tissue samples, often used as a proxy for the impacts on human tissue.

58. In 1993, to address concerns over the levels of contamination in the reservoir, the Duke Energy Defendants conducted their own study (“the Duke study”) of fish in the Catawba River, including Lake Wateree.

59. The Duke study failed to identify contamination at excessive levels. Unlike comparable studies, however, the Duke study set contamination levels at .35 parts per million (ppm) for Aroclor 1260 – levels far exceeding the .05 ppm detection limits employed in other studies.

60. The Duke study thus concealed the impacts of the Duke Energy Defendants’ Mosquito Control Program on the water and ecological and aquatic health of Lake Wateree and led property owners to believe that the Duke Energy Defendants were appropriately responding to PCB levels in both Lake Wateree and its flora, fauna, and aquatic life.

61. In 2009, the EPA performed a national study evaluating levels of PCBs in aquatic life and detected potentially harmful levels of PCBs in South Carolina waterways.

62. As a result of this study, South Carolina’s Department of Health and Environmental Control (“SCDHEC”) and North Carolina’s Department of Environmental Quality (“NCDEQ”) implemented heightened monitoring of these waterways.

63. Since at least 2009, Lake Wateree has also been continuously subject to SCDHEC’s restrictive consumption guidance based upon unsafe levels of PCBs detected in multiple species of fish within the water.

64. As of the date of this filing, SCDHEC has issued fish consumption restrictions for six (6) species of Lake Wateree fish.

65. While this list of species is routinely updated, and changes regularly, SCDHEC has consistently advised against regular consumption of fish from Lake Wateree.

66. These perpetual consumption advisories confirm the continued presence of PCBs in Lake Wateree through the positive presence of PCBs in the tissues of these fish.

67. At no point, however, did the Defendants acknowledge the possible connection between their actions and the advisories and at no point did the advisories prompt the Defendants to warn the class members and the public of the dangers they knew to be associated with their intentional contamination of Lake Wateree.

68. In addition, at no point, despite knowledge of the Duke Energy Defendants' role in the contamination, did Defendants appropriately mitigate or remediate the harm.

69. Despite these advisories and studies, the Duke study, coupled with statements from the Duke Energy Defendants in press releases and filings with the Federal Regulatory Energy Commission ("FERC") and Defendants' commitments to Lake Wateree homeowners obfuscated the nature of the injury and concealed the cause, leading to misinformation about the impact of PCBs in Lake Wateree and whether the water has been appropriately managed by the Duke Energy Defendants.

70. At the same time, fishing, boating, and general use of waterfront property is a specific right for waterfront property owners.

71. Once introduced, PCBs will remain in the environment, poisoning the soil and waterways, and absorbing into the tissue of aquatic and biological life, which the Duke Energy Defendants knew or should have known.

72. Yet the contamination at issue in this case is not the result of some long-abandoned industrial application, or an unintended spill from decades past. Rather, it is the result of a concerted campaign by the Duke Energy Defendants that was done with knowing disregard for the long-term effects of PCBs.

C. Duke Energy Mosquito Control Program

73. In 2013 Defendant Duke Energy reported that its Mosquito Control Program, which began in 1923, was the “oldest continuous environmental program of any utility in the US, and one of the first in North America.”¹²

74. Their program continued for 93 years before being terminated in 2016.

75. In the early 1900s, as power companies created impoundments, malaria became epidemic around the new reservoirs.

76. Creating reservoirs to support hydroelectric stations necessarily required the creation of large bodies of stagnant water where mosquito populations thrived.

77. Controlling malaria was therefore a major planning consideration for utility providers constructing hydroelectric plants and required those providers, including the Duke Energy Defendants, to create solutions to the threat of malaria presented by reservoirs.

78. The Duke Energy Defendants therefore undertook the Mosquito Control Program on bodies of water they created or under their control. During the 1970s, the Duke Energy Defendants chose to implement this program by applying a mixture of No. 2 fuel oil and transformer oil directly to the water sources.

79. These substances contained PCBs.

80. One of the reservoirs treated with PCBs in this manner was Lake Wateree.

¹² See Footnote 1.

81. In a 1970 workshop on mosquito control in North Carolina, a representative of the Duke Energy Defendants estimated that 2,500 miles of shoreline, including Lake Wateree, were being treated annually in North Carolina and South Carolina beginning in April and ending in October, with treatments occurring every 8 days.

82. According to the Duke representative, George Swearingen, the reason that burned cylinder oil and transformer oil were used was because of its residual film on the water, which allowed workers to discern treated areas from non-treated areas.

83. Mr. Swearingen also indicated that part of the Duke Energy Defendants' plan in maintaining the shorelines and keeping them clean was providing property to homeowners adjoining the lakes. By establishing relationships with property owners, the Duke Energy Defendants' realized substantial financial benefits in uncompensated maintenance and upkeep of the shoreline.

84. At that same workshop, a representative of the North Carolina State Board of Health confirmed that two electric companies were using a mixture of No. 2 fuel oil and used transformer oil to control mosquito populations at a rate of ten to fifteen gallons per acre.

85. The goal of this workshop was clear. In his opening statements, Dr. J. Lawrence Apple, the Director of the Institute of Biological Sciences at North Carolina State University's School of Agriculture and Life Sciences stated:

I doubt if man has ever gone through a period of more critical self-examination of human values than the 1970's promises us. I think whether agree or disagree with the trend of events at the present time, it is unmistakably clear that man's inherent rights are being idealized as never before. Does each individual have the right to a clean, undisturbed, natural – yet healthful – environment...All of us, I think would hope that utopia is possible.

The subject of this workshop is involved in that paradox. We do not like the discomforts and diseases that mosquitoes might bring, but in effecting mosquito

control other conditions may be created which are also undesirable.

Proceedings Workshop on Mosquito Control in North Carolina, May 4, 1970, at p. 1.

86. Later in that same workshop, representatives of the United States military confirmed the trend in phasing out persistent compounds when implementing mosquito prevention.

87. Yet, following this workshop, the Duke Energy Defendants continued to utilize PCBs in their Mosquito Control Program.

88. Two brothers, Buster Beckham and Henry Beckham, who helped administer the program on behalf of the Duke Energy Defendants, specifically recall placing 55-gallon barrels of motor oil and transformer oil into an aluminum boat and administering these substances around the shoreline of Lake Wateree between 1968 and 1973. (*See Exhibits A and B, Beckham Affidavits*).

89. This resulted in the dumping of more than 500 gallons of these substances into Lake Wateree on a weekly basis during the timeframe of the program. (*Id.*).

90. At all times relevant to this complaint, the Duke Energy Defendants consciously chose to use transformer and fuel oil to implement the Mosquito Control Program.

91. In addition, at no point was the application of these fuels appropriate, considering best disposal practices for transformer and fuel oil.

92. The representatives, agents, and authorized individuals of the Duke Energy Defendants were charged with knowledge of the chemical composition of the oils and fuels used in the program.

93. Further, the Duke Energy Defendants were charged with knowledge of the appropriate disposal method for fuels, transformer oils, and other materials containing PCBs and

harmful chemicals and additives.

94. At all times relevant to this complaint, the Duke Energy Defendants knew or should have known the oils used in the Mosquito Control Program contained high levels of PCBs, which, once disseminated directly into water, would result in significant and permanent pollution to the waterways, sediment, and adjoining land where the Duke Energy Defendants executed the program.

95. Moreover, the Duke Energy Defendants knew or should have known that disposing of used transformer oil and fuel oil directly into a reservoir contradicted best management practices for the disposal of PCBs and was likely to result in contamination.

96. At all times relevant, alternative methods to these substances existed to eradicate mosquito populations.

97. Beginning as early as the 1950s, many entities charged with controlling mosquito populations abandoned their traditional use of kerosene, used oil, and fuel products, and replaced these products with government approved insecticides.

98. Yet, at least through the late 1970s, the Duke Energy Defendants knowingly chose to use spent transformer oil and fuels as one of their methods to eradicate mosquitos in South Carolina.

99. This use of spent fuel oil allowed the Duke Energy Defendants to perpetuate the Duke Energy Mosquito Control Program cheaply and further allowed them to dispose of a nasty byproduct with no additional oversight or regulation.

100. After conducting the self-serving 1993 Duke study, the Duke Energy Defendants continued to issue public statements via their website assuring members of the class and the public that their Mosquito Control Program used only safe and government-approved larvicide that

attacks only mosquito larvae¹³.

101. In addition, in regulatory filings, and filings with FERC, the Duke Energy Defendants represented that they were responsible for the ecological and aquatic life surrounding their reservoirs, including Lake Wateree.

102. These same filings have listed the very homeowners comprising the Plaintiff Class as “stakeholders”.

103. At no point in time have the Duke Energy Defendants mitigated, remediated or otherwise attempted to address the continued presence of PCBs in Lake Wateree.

104. In addition, given the Duke Energy Defendants misstatements and misrepresentations, the homeowners surrounding Lake Wateree had no reason to know that the Duke Energy Defendants had dumped harmful levels of PCBs into the reservoir or that the Duke Energy Defendants’ earlier representations about managing the reservoir did not encompass appropriate mitigation or remediation of PCBs.

105. A 2021 peer-reviewed article by James B. Glover and Deke T. Gunderson combined spatial analysis with historic evidence to identify the source of the PCB contamination in the Catawba-Wateree River Basin as the Duke Energy Defendants’ direct application of used transformer oil on reservoirs located along the River Basin.¹⁴

106. Even after its publication, property owners and members of the Class would not necessarily have been privy to this study or its implications.

107. Moreover, to date the Duke Energy Defendants have never publicly advised those

¹³ *Id.*

¹⁴ Glover, James B. and Gunderson, Deke T. (2021) “Widespread Contamination of Polychlorinated Biphenyls in South Carolina and North Carolina (USA): A Legacy of Malarial Eradication and Mosquito Control.” *Journal of South Carolina Water Resources*: Vol 8: Iss 1, Article 10, available at: <https://open.clemson.edu/jscwr/vol8/iss1/10>. (Last accessed Nov. 19, 2024). (Attached as **Exhibit C**).

owning or inhabiting waterfront property at Lake Wateree that the Mosquito Control Program utilized unsafe spent motor and transformer fuels or that the Duke Energy Defendants had failed to implement mitigation or remediation measures after direct application of PCBs to the reservoir.

108. Moreover, the article highlighted the Duke Energy Defendants' 1993 study, which downplayed the contamination in the reservoir and was silent as to the Duke Energy Defendants' role in the contamination.

109. Upon information and belief, the Duke Energy Defendants' decision to use PCB laden fuels and transformer oils over safe alternative larvicides was based in part on cost savings.

110. The PCB contamination in the Catawba and Great Pee Dee River Basins, which includes Lake Wateree, has a specific, traceable chemical signature—an Aroclor number—consistent with the chemical signature of transformer oils utilized in the Duke Energy Mosquito Control Program.

111. Based on the Duke Energy Defendants' deceptive public representations, PCB contamination in the Catawba and Great Pee Dee River Basins and in Lake Wateree has not been linked to a specific pollution event or source.

112. The Duke Energy Defendants have purposefully issued guidance on reducing the presence of mosquitos while touting the narrative that their program utilized only government-approved substances.

113. Despite knowing their role in creating the contamination, the Duke Energy Defendants have further failed to undertake any remediation efforts for Lake Wateree.

114. Based upon the physical properties of PCBs, once disseminated, they essentially anchor into the environment and are impossible to destroy or move.

115. As set forth herein, for years during the Mosquito Control Program and every year

since it has ceased, SCDHEC has issued fish consumption advisories for the waterways affecting Plaintiffs' and the Class Members' properties, finding excessively dangerous levels of PCBs in the fatty tissue of fish in Lake Wateree and confirming that PCBs continue to contaminate the sediment, soil, and waterways.

116. During this same timeframe, the Duke Energy Defendants have had actual or constructive knowledge of the continued contamination of waterways previously subject to the Mosquito Control Program not only because of the fish consumption advisories but by virtue of Defendants' own testing programs to purportedly address PCB contamination in these same waterways.

117. By intentionally dumping PCBs into waters adjoining or including Plaintiffs' properties, Defendants exposed Plaintiffs' and the Class Members' properties to repeated inundation from PCBs used in the Mosquito Control Program and have never addressed or otherwise mitigated or remediated the effects of this program.

118. The Duke Energy Defendants' watered down study, coupled with their statements and representations about appropriate management practices upon Lake Wateree, could not have alerted Plaintiffs or the Class Members about the dangerous PCB contamination impacting the Lake, the need for remediation, or the impact of this contamination on homeowner's rights and properties.

119. Plaintiffs are all property and homeowners with waterfront property on Lake Wateree.

120. As property owners, Plaintiffs were vested with certain fundamental rights, including littoral and riparian rights, and were entitled to enjoy those rights without undue interference or trespass from intruders, including through the invidious release of harmful

chemicals.

CLASS ALLEGATIONS

121. As noted above, Plaintiffs bring this action on behalf of themselves and all others similarly situated as a class under Rule 23 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), defined as follows:

All persons or entities who currently have ownership of any real waterfront property on Lake Wateree.

Excluded from the Class are:

Current and former officers and directors of the Defendants; members of the immediate families of the officers and directors of the Defendants; the Defendants' legal representatives, heirs, successors, assigns, any entity in which either of them has or had a controlling interest; any federal, state, or local governmental agencies; Class Counsel or any person retained or working on behalf of Class Counsel in furtherance of the litigation, any judges who have decided or are assigned to decide some or all issues in this case any persons related to a judge in a manner that would disqualify the judge from hearing the case; and any chambers staff working for the assigned judge or other courthouse staff who perform tasks relating to this matter.

122. Plaintiffs reserve the right to expand, limit, modify, or amend this class definition, including the addition of one or more subclasses, in connection with Plaintiff's motion for class certification, or at any other time, based upon, *inter alia*, changing circumstances and/or new facts obtained during discovery.

123. This action is proper for class treatment under Fed. R. Civ. P. Rule 23(a) and (b).

124. *Numerosity*: While the exact number and identities of other Class Members are unknown to Plaintiffs at this time, Lake Wateree spans approximately 12,360 acres over territory encompassing Fairfield, Kershaw, and Lancaster counties in South Carolina, and is bordered by roughly 2,600 properties consisting of hundreds if not thousands of property owners, whose joinder

in this action would be impracticable. The disposition of their claims through this class action will benefit all Class Members, the parties, and the courts.

125. *Commonality and Predominance*: There exists commonality in questions of law and a common nucleus of operative fact affecting the Class, in that Defendants' reckless, negligent, and improper conduct as well as the Defendants' physical interference with Plaintiffs' property rights has infringed and caused damage to Plaintiffs' and the Class members' rights in the same or similar fashion as the Class members. Moreover, answers to the questions of law and operative facts will drive resolution of the litigation and are capable of class wide resolution. Such questions are common to all Class members and predominate over any questions affecting individual Class members and include:

- a. Whether Defendants negligently, recklessly, and/or knowingly used PCBs in waterways adjoining the Class members' properties;
- b. Whether Defendants negligently, recklessly, and wantonly failed to remediate Lake Wateree after knowingly disseminating PCBs into this reservoir;
- c. Whether Defendants' use and/or continued use in its Mosquito Control Program of transformer oil, a substance known to contain PCBs, was reasonable;
- d. Whether the activity was of such a nature that the Defendants are strictly liable for any attendant damages;
- e. Whether PCBs from the Defendants' intentional spraying of transformer oil interfered with Class members' inalienable property rights including littoral and riparian rights;
- f. Whether the continued presence of PCBs from Defendants' Mosquito Control Program has impacted the value and use of the Class members' properties

including the use and access to unadulterated natural resources such as fish and other aquatic life;

g. Whether the Plaintiffs have suffered natural resource damages as a result of Defendants' conduct;

h. Whether PCBs from the Defendants' intentional spraying of transformer oil infringed upon the bundle of property rights inherent to the Class members;

i. Whether Defendants' practices in disposing of transformer oil through the Mosquito Control Program violated best management practices for disposal of PCBs;

j. Whether PCBs from the Defendants' intentional spraying of transformer oil resulted in a diminution in value of property owned by the Class members;

k. Whether Defendants' actions constitute a continuing trespass upon the Class members' properties;

l. Whether Defendants should be responsible for remediation, sampling, and monitoring of Lake Wateree;

m. Whether Defendants have misled or misrepresented the presence of PCBs in Lake Wateree such that the Class members would have no opportunity to know that their rights had been infringed upon by Defendants' conduct;

n. Whether Defendants' actions constitute a private nuisance unreasonably interfering with the use and enjoyment of the Class members' properties;

o. Whether the Class members have sustained damages, including natural resource damages, as a result of the Defendants' wrongful conduct;

- p. Whether the Class members are easily identifiable based upon property owners with property affixed to impacted waterways;
- q. Whether Defendants actively concealed their role in contaminating Lake Wateree;
- r. Whether Defendants failed to exercise due and reasonable care in managing the Mosquito Control Program upon Lake Wateree;
- s. Whether Defendants were exclusively responsible for the control, management, and maintenance of Lake Wateree;
- t. Whether Defendants' undertaking surveys and studies to test Lake Wateree and other impacted waterways for PCB contamination using falsely elevated detection levels was done in an effort to conceal Defendants' role in contaminating Lake Wateree;
- u. Whether Defendants knew or should have known that their errant PCB disposal practices would result in permanent contamination to impacted waterways; and
- v. The appropriate measure of damages and other relief.

The prosecution of separate actions by Class members would create a risk of establishing inconsistent rulings or incompatible standards of conduct for Defendants, especially when dealing with production, use, and improper disposal of toxic chemicals. Additionally, individual actions may be dispositive of the interest of all members of the Class, although certain Class members are not parties to such actions.

126. *Typicality*: Plaintiffs' claims and defenses are typical of, and are not antagonistic to, the claims of all Class members, in that Plaintiffs and Class members sustained damages arising

out of Defendants' uniform wrongful conduct.

127. *Superiority*: This case is also appropriate for class certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy given that joinder of all parties is impracticable. The damages suffered by the individual members of the Class may be small in comparison to the burden and expense of individual prosecution of the complex litigation necessitated by Defendants' actions. Thus, it would be difficult and not economical for the individual members of the Class to obtain effective relief from Defendants' misconduct. Even if members of the Class could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this complaint. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court. Economies of time, effort, and expense will be fostered, and uniformity of decisions ensured.

128. *Adequacy*: Plaintiffs will fairly and adequately represent and protect the interests of the Class and have retained counsel with substantial experience in litigating complex cases, including class actions. Plaintiffs' claims are representative of the claims of the other members of the Class. That is, Plaintiffs and members of the Class sustained damages as a result of Defendants' uniform conduct. Plaintiffs also have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs. Plaintiffs and their Counsel will vigorously prosecute this action on behalf of the Class and have the financial ability to do so. Neither Plaintiffs nor counsel have any interest adverse to other Class Members. Rather, Plaintiffs share the same interest as all Class Members in remedying Defendants' unlawful conduct.

129. *Ascertainability*: While the exact number and identities of other Class members are unknown to Plaintiffs at this time, Plaintiffs are informed and believe that there are hundreds of Class Members that can be easily ascertained.

130. *Amount in controversy per class member*: Given that this case involves a dispute over diminution in value to water-front property (among other damages) damages to each property in the Class, including for diminution, far exceed one hundred dollars.

131. The prerequisites to maintaining a class action for equitable relief pursuant to Rule 23 Fed. R. Civ. P. are met, as Defendants have acted on grounds generally applicable to the Class, thereby necessitating relief with respect to the Class as a whole.

132. Moreover, class treatment is appropriate because common questions of law or fact, including those questions set forth above, predominate over any individual questions.

COUNT I
NEGLIGENCE/GROSS NEGLIGENCE

133. Plaintiffs reassert and reemphasize all allegations herein stated.

134. The Duke Energy Defendants own and are exclusively responsible for the management and maintenance of Lake Wateree and have held themselves out as providing water management as well as management of the aquatic and ecological life surrounding Lake Wateree.

135. At all times relevant, the Duke Energy Defendants have deemed Lake Wateree homeowners “stakeholders” in the Duke Energy Defendants’ managerial responsibility over Lake Wateree and have represented to these owners that the Duke Energy Defendants would manage Lake Wateree in a due and reasonable manner in accordance with applicable standards of care.

136. From 1923 until 2016, the Duke Energy Defendants implemented their Mosquito Control Program upon Lake Wateree.

137. This program involved purposeful dissemination, distribution, and use of toxic

substances containing PCBs directly into waterways touching Plaintiffs' and Class members' properties.

138. During the relevant timeframe, the Duke Energy Defendants understood PCBs would remain permanently in the environment, were probable human carcinogens, and toxic to humans, plants, and animals.

139. During the relevant timeframe, the Duke Energy Defendants knew or should have known that use of harmful motor oils and transformer oils in their Mosquito Control Program contradicted best practices for disposal of PCBs.

140. At all times relevant to this, the Duke Energy Defendants knew or through the exercise of reasonable care should have known that PCBs used in Defendants' Mosquito Control Program had accumulated in soil, groundwater, and wildlife including aquatic life.

141. Rather than address these issues, the Duke Energy Defendants engaged in self-serving studies to purposefully obfuscate the impact of PCB contamination in Lake Wateree.

142. Meanwhile, the Duke Energy Defendants knew that, without mitigation, PCBs would remain in Lake Wateree, causing permanent degradation to important aquatic and ecological resources for which Defendants were specifically responsible.

143. At all times relevant, the Duke Mosquito Control Program was conducted on bodies of water, including Lake Wateree, bordered by water-front properties and it was therefore foreseeable that these properties and their respective owners would be impacted by the Duke Mosquito Control Program and its resultant contamination.

144. The owners included Plaintiffs and the Class members.

145. At all times relevant to this complaint, the Duke Energy Defendants owned, were responsible for, and charged with monitoring and managing Lake Wateree and should have done

so using due and reasonable care.

146. As property owners with waterfront homes on Lake Wateree, Plaintiffs and the Class members were readily identifiable, and Defendants knew or should have known Plaintiffs and the Class members would be directly harmed by the Duke Energy Defendants' administration of PCBs and failure to mitigate or remediate these contaminants.

147. Defendants owed and continue to owe Plaintiffs and Class Members a duty of care. This duty includes the duty not to interfere with Plaintiff and Class members' inalienable property rights.

148. Defendants knew or should have known their use of PCBs permanently contaminated Lake Wateree, forever devaluing Plaintiffs and Class members' properties.

149. As set forth herein, Defendants conduct was unreasonable, negligent, grossly negligent, careless, and reckless in one or more of the following particulars:

- a. Improperly using, dumping, and spreading known toxic chemicals into Lake Wateree;
- b. Improperly executing a Mosquito Control Program that included toxic PCBs instead of other, less dangerous methods of mosquito prevention;
- c. Engaging in improper practices and procedures for disposal of PCBs, which knowingly contaminated Lake Wateree, impeding the rights of private property owners, including littoral and riparian rights;
- d. Systematically failing to accurately report to Plaintiffs and Class members, either directly or indirectly, that PCB chemicals found in excessive levels based upon fish tissue samples in Lake Wateree were the result of Defendants' Mosquito Control Program;

- e. Systematically failing to warn, either directly or indirectly, of the negative impact on property values and the value of natural resources from PCB contamination, caused by Defendants' intentional acts;
- f. Failing to properly maintain records and properly investigate the levels of contamination caused by Defendants' intentional dumping of PCBs into the environment and Lake Wateree;
- g. Failing to remediate reservoirs contaminated by PCBs;
- h. Failing to timely replace outmoded or faulty techniques for disposal and dumping of dangerous PCBs;
- i. Failing to comply with the South Carolina Pollution Control Act, S.C. Code Ann. §48-1-10 (1976) *et seq.*;
- j. Failing to comply with the South Carolina Constitution Article I, Section 13, which forbids the taking of property without just compensation;
- k. Knowingly concealing the source of PCB contamination;
- l. Failing to remediate the damage caused and perpetuated through Defendants' mismanagement of the waterways;
- m. Committing the foregoing acts systematically and individually against Plaintiffs and the Class members; and
- n. Committing the foregoing acts recklessly and with disregard to the sanctity of Plaintiffs' and Class members' property rights.

150. In view of the widespread information available about the harmful effects of PCBs and the propensity of PCBs to bioaccumulate, Defendants' continued mismanagement of waterways under their control, and Defendants' efforts to distance themselves from prior bad

practices, amounts to the complete absence of care.

151. As a result of the Duke Energy Defendants' systematic negligence in designing, maintaining, managing, and executing their Mosquito Control Program and spreading, disposing, failing to warn, and failing to mitigate, Defendants have caused permanent harm to Plaintiffs and the Class members, including diminution of property values, and degradation of natural resources.

152. Plaintiffs and the Class members will continue to suffer damages including great financial loss; the loss of the use and enjoyment of their property; natural resource damages; infringement upon their inalienable property rights; and the diminution in value of their property.

153. Plaintiffs and the Class are therefore entitled to judgment against Defendants and for a finding of actual, consequential, compensatory, and punitive damages, as well as all other damages in law or equity as this court deems proper.

COUNT II
STRICT LIABILITY FOR ULTRAHAZARDOUS ACTIVITY

154. Plaintiffs reassert and reemphasize all allegations herein stated.

155. As alleged, the Duke Energy Defendants handled, distributed, and disposed of PCBs into Lake Wateree, a man-made reservoir adjoining Plaintiffs' and Class members' properties and, at all times relevant, the Duke Energy Defendants knew or should have known that these PCBs were interfering with and infringing upon Plaintiffs' and Class members' property rights and natural resource rights.

156. Throughout the Mosquito Control Program, the Duke Energy Defendants rid themselves of toxic transformer oil and other used oils— knowing these oils were hazardous and laden with PCBs — by spreading that waste directly into Lake Wateree, which adjoined Plaintiffs' and Class members' properties.

157. PCBs are hazardous substances. South Carolina law recognizes the ultrahazardous

nature of PCBs and the deleterious effect these chemicals have on property.¹⁵

158. The Duke Energy Defendants or their agents were responsible for the toxic and dangerous products disposed of, used, and purposefully dumped during the Mosquito Control Program, and received substantial financial benefits from that dumping and disposal.

159. Upon information and belief, while promoting that Defendants were administering the oldest continuous Mosquito Control Program in the United States, the Duke Energy Defendants were simultaneously ridding themselves of massive amounts of toxic waste in contravention of known disposal methods and best practices.

160. Moreover, and upon information and belief, Defendants received important permissions, licensure, and regulatory approvals as a result of the Mosquito Control Program, which was undertaken at a time when the Duke Energy Defendants were expanding their hydroelectric resources through the creation of reservoirs including Lake Wateree.

161. As a result of Defendants' ultrahazardous activities, Plaintiffs and the Class have suffered and will continue to suffer damages including great financial loss; the loss of the use and enjoyment of their property; natural resource damages; infringement upon their inalienable property rights; and the diminution in value of their property.

162. Plaintiffs and the Class are therefore entitled to judgment against the Duke Energy Defendants and for a finding of actual, consequential, compensatory, and punitive damages, as well as all other damages in law or equity as this court deems proper.

COUNT III
TRESPASS

163. Plaintiffs reassert and reemphasize all allegations herein stated.

¹⁵ See e.g. S.C. Code Regs. § 61-79.261.A.8

164. At all times relevant, the Duke Energy Defendants have known or should have known that PCBs are carcinogenic and bioaccumulate in organic matter.

165. Further, for decades the Duke Energy Defendants knew that PCBs were in the byproduct they sprayed into Lake Wateree, which directly adjoined Plaintiffs' and the Class Members' waterfront properties.

166. As set forth herein, Defendants are the source of and are responsible for repeatedly exposing and contaminating Lake Wateree and its aquatic and ecological life with harmful PCBs.

167. At all times relevant, Plaintiffs and Class members have been property owners with waterfront properties on Lake Wateree. Plaintiffs and Class members therefore hold littoral and riparian rights over Lake Wateree.

168. Once introduced, these invidious chemicals bioaccumulate and thus permanently infringe on Plaintiffs' and Class members' property rights, including their riparian rights, and their rights of access to natural resources.

169. At no time did the Duke Energy Defendants receive voluntary and informed permission from Plaintiffs or Class members to interfere with their respective rights, including rights associated with natural resources, through the administration of toxic chemicals.

170. Defendants' conduct and unauthorized dissemination has invaded and interfered with Plaintiffs' and Class members' possessory interests in their properties including the right of access to unimpaired natural resources and will continue to do so.

171. These dangerous chemicals were intentionally dumped into waterways where Plaintiffs and the Class enjoyed property rights, which have been interrupted and infringed upon, and thus the Defendants' actions constitute an unreasonable invasion.

172. Upon information and belief, without intervention, these chemicals will never

dissolve or biodegrade and will continuously interfere with Plaintiffs' and the Class members' possessory interests in their properties.

173. Defendants' conduct amounts to an unauthorized interference upon Plaintiffs' and Class members' property rights without legal authority, and without the informed permission of Plaintiffs or Class members.

174. As a proximate result of Defendants' continuing trespass, the property rights of Plaintiffs and the Class members have been injured and continue to be injured, causing injury to property, diminution in value, loss of use, financial and economic loss, natural resource damages, and an increased risk of exposure to PCBs.

175. Plaintiffs and the Class are therefore entitled to judgment against Defendants and for a finding of actual, consequential, compensatory, and punitive damages, as well as all other damages in law or equity as this court deems proper.

COUNT IV:
NUISANCE

176. The Plaintiffs reassert and reemphasize all allegations herein stated.

177. As set forth herein, Lake Wateree has been contaminated by PCBs from the Duke Energy Defendants' disposal of fuels, transformer oils, and other substances during the course of Defendants' Mosquito Control Program.

178. This contamination poses a significant risk of harm and has resulted in a continuous and ongoing interference with Plaintiffs' and the Class members' property rights including rights to natural resources.

179. Defendants' illicit disposal of PCBs into the environment connected to Plaintiffs' and Class members' properties was done with knowledge or with reckless disregard for the potential harm caused by PCBs.

180. South Carolina law prohibits Defendants from interfering with Plaintiffs' and the Class members' property rights, including riparian and littoral rights traceable to the title.

181. The Defendants' actions, which substantially and unreasonably interfered with Plaintiffs' and Class members' possession of their own real properties, were unreasonable, unwarrantable, and/or unlawful.

182. As a result of Defendants' illicit use of PCBs to effectuate the Mosquito Control Program, Defendants have created a private nuisance as to Plaintiffs' and the Class members' property rights.

183. Furthermore, Defendants' conduct has caused and will continue to cause into the foreseeable future, damages including loss of use and enjoyment, diminution in value, economic and financial loss, loss of natural resources, and other personal and emotional injuries.

184. Plaintiffs and the Class are therefore entitled to recover compensatory damages, consequential damages, punitive damages, attorneys' fees and costs, and any other relief the Court deems appropriate.

COUNT V:
UNJUST ENRICHMENT

185. The Plaintiffs reassert and reemphasize all allegations herein stated.

186. The Duke Energy Defendants were aware or should have been aware that by treating Lake Wateree with PCBs, it was using a hazardous industrial byproduct.

187. Upon information and belief, in order to dam and/or receive and continue to receive necessary licensure or permitting for the Catawba-Wateree, the Duke Energy Defendants agreed to implement a Mosquito Control Program upon certain man-made bodies of water under its control, including Lake Wateree.

188. By spraying this hazardous byproduct onto the water, the Duke Energy Defendants

not only attached themselves to a program that they falsely represented as having great public benefit, bolstering their reputation, but Defendants were able to dispose of a hazardous byproduct for free.

189. During this interim, Plaintiffs and the Class Members provided financial benefits to Defendants including by maintaining their own homes and the shoreline of Lake Wateree at no added cost to Duke Energy.

190. As such, any benefits conferred by Plaintiffs and the Class, and any benefits realized by Defendants, including any access, payment or indirect benefit for the program, and any savings by improper disposal of hazardous byproduct, are unjust benefits and the retention of the same unjustly enriches the Duke Energy Defendants.

191. The Duke Energy Defendants should be disgorged of any monetary benefits obtained through implementation of this program on Lake Wateree and of any financial benefit conferred upon them by Plaintiffs and the Class.

JURY TRIAL DEMANDED

192. Plaintiffs respectfully demand a trial by jury on each count raised in this complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, respectfully request the following relief:

A. An Order that this action be maintained as a class action and appointing Plaintiffs as representatives of the Class and appointing the undersigned as Class Counsel in this action;

B. An Order that Plaintiffs and the Class are entitled to recover from Defendants the general and special damages, in amounts to be determined by the jury, to have been sustained by each of them respectively, including, but not limited to, financial losses, natural resource

damages, loss of use and enjoyment, diminution in value, as well as reimbursement of the costs of inspection, analysis, containment, and remediation, attorney's fees and costs, and all such damages and other relief provided by statute;

C. An Order that Plaintiffs and the Class are entitled to recover punitive damages in an amount to be determined by the jury from Defendants for Defendants' intentional, reckless, or willful conduct;

D. An Order directing Defendants to provide funds to effectively monitor, analyze, and remediate continuing contamination throughout the impacted area;

E. An Order that Plaintiffs are entitled to recover the costs of this suit from Defendants, including but not limited to any expert witness fees, together with reasonable attorney's fees; and

F. That the Court grant such other, further or different relief as may be deemed just and proper.

Respectfully submitted,

WYCHE, P.A.

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