



September 20, 2017

Via Registered Mail – Return Receipt Requested

Ms. Lynn J. Good, Chairman, President and Chief Executive Officer
Duke Energy Corporation
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Ms. Melody Birmingham-Byrd, President
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Notice of Intent to Sue: Resource Conservation and Recovery Act - 42 U.S.C. § 6972

RE: Duke Energy's Coal Ash Open Dump at its Gallagher Generating Station in Floyd County, Indiana: Violation of the Resource Conservation and Recovery Act and the Coal Combustion Residuals Rule by Duke Energy Corporation.

To Whom It May Concern:

Pursuant to 42 U.S.C. § 6972(a)(1)(a), the Hoosier Environmental Council (“HEC”), through their counsel, Earthjustice, gives Duke Energy Indiana, LLC (“Duke Energy” or “the company”) notice of its intent to file suit for violations of the Resource Conservation and Recovery Act (“the Act”) and the Coal Combustion Residuals Rule (“the Coal Ash Rule” or “the Rule”), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act. After the expiration of sixty (60) days as provided in the Act, HEC plans to file suit in United States District Court against Duke Energy to enforce the provisions of the Rule and the Act.

Duke Energy Is Hiding Critical Safety Information from Indiana Residents

Duke Energy is hiding critical information from Indiana residents in blatant violation of the Coal Ash Rule. Duke Energy owns lagoons full of toxic coal ash along the banks of the Ohio River just outside of New Albany, Indiana, at its coal-burning power plant, the Gallagher Generating Station (“Gallagher”). It admits that several ash lagoons at Gallagher have “significant hazard potential” under the Coal Ash Rule, meaning that, if the earthen and ash

dams separating those lagoons from the Ohio River, local roads and residences were to fail, that failure could disrupt essential transportation or utility infrastructure, damage the economy, and/or harm the environment.¹ Due to the potentially severe impacts of a dam failure at Gallagher, Duke Energy was required to create an Emergency Action Plan (“Plan” or “EAP”) containing, among other things, an inundation map showing downstream areas that would be affected by failure of the ash lagoon dams, and contact information for emergency responders the public can call if the dams fail. In spite of well-founded public concern about its ash lagoons – and in open violation of the Coal Ash Rule – Duke Energy refused to provide either the inundation map or the emergency contact information in the Plans it made publicly available. Duke Energy’s Gallagher coal ash lagoons are, therefore, open dumps in violation of the Rule and the Act.

Duke Energy’s Perilous Open Dumps at the Gallagher Plant

The Gallagher Plant is an old, dirty coal plant that has been in operation since 1958. Until 2012, Gallagher burned coal in four boilers; since then only two of the boilers have remained in operation. Throughout those many decades, Duke Energy dumped coal ash generated at the plant into large, unlined, water-filled pits. Nearly sixty years of burning coal creates vast quantities of ash. According to Duke Energy, two coal ash lagoons at the site, the “Primary pond” and “Ash Pond A,” contain nearly two million (1,861,680) tons of toxic ash and over 400,000 tons² of contaminated wastewater.³ In addition to those millions of tons of ash and wastewater, there are millions of additional tons of toxic coal ash that have been dumped around the plant in unlined pits, contributing to the lagoons’ instability.⁴

Duke Energy’s ash lagoons at Gallagher were carved into the earth on the western banks of the Ohio River, directly across from Louisville, Kentucky. Indiana families live immediately to the west of the ash lagoons, just across a narrow road.⁵ The only things standing between the ash lagoons and the homes to the west are a brief stretch of grass; a low, metal roadway barrier,

¹ See “Initial Hazard Potential Classification Assessment Certification, CCR Surface Impoundment: Gallagher Station, CCR Unit: Primary Pond,” available at https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-gal-haz-class-pp.pdf, at 1, and “Initial Hazard Potential Classification Assessment Certification, CCR Surface Impoundment: Gallagher Station, CCR Unit: Ash Pond A,” available at https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-gal-haz-class-apa.pdf, at 1.

² 404, 569.54 tons, to be precise. 1 acre-foot = 1,211.29 tons (water).

³ Duke Energy Annual Report for 2017 for Gallagher, available at https://www.duke-energy.com/_/media/pdfs/our-company/ash-management/ccr-gal-annl-imp-2017.pdf?la=en, at 6-7.

⁴ See “Proposed Closure and Post-Closure Plans, Ash Pond System, Gallagher Generating Station,” dated Dec. 16, 2016, available at https://ecm.idem.in.gov/cs/idcplg?IdcService=GET_FILE&dID=80398994&dDocName=80398571&Rendition=web&allowInterrupt=1&noSaveAs=1&fileName=80398571.pdf, at 7 (noting millions of cubic feet of coal ash at Gallagher). One cubic yard = approximately 1 ton of coal ash. See U.S. EPA, Appendices for Regulatory Impact Analysis for Coal Combustion Residuals (CCR) Landfills and Surface Impoundments at Electric Utility Plants, App. S, S-102 (Oct. 2014).

⁵ See <https://www.google.com/maps/@38.2604696,-85.841548,745m/data=!3m1!1e3?hl=en>.

full of openings; and the road itself, none of which would impede overflowing ash and contaminated water from flowing right onto the roadway towards those residences.⁶

Immediately to the east of the ash lagoons flows the Ohio River. The Ohio is one of the country's most significant waterways, with waters flowing through, or serving as the border of, the states of Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, and Illinois.⁷ Twenty five million people – more than 10% of the entire U.S. population – live in the Ohio River basin; more than five million people get their drinking water from the river.⁸ Many people boat, fish, and swim in the Ohio, including in the vicinity of the Gallagher plant.⁹ Approximately 160 different fish species have been found in the Ohio,¹⁰ and, near Gallagher, the river serves as nesting grounds for the once-threatened peregrine falcon.¹¹ The Ohio River is also a major commercial artery, transporting over 220 million tons of cargo each year.¹²

The great Ohio, and the people, fish and wildlife who use the river – as well as the Indiana families living adjacent to the Gallagher ash lagoons – stand to be harmed if those ash lagoon dams fail. The threat of such failure is very real. Duke Energy's consultants reported that the dikes of the "primary pond" ash lagoon do not meet the Coal Ash Rule's standards for structural stability. In particular, the primary pond fell well short of stability requirements during earthquakes. Duke Energy's consultants reported that "[t]he compacted ash embankments... analyzed for the Primary Ash Pond are founded on saturated fly ash which has a high potential for liquefaction during seismic events" and which "may undergo large scale deformations" if an earthquake occurs.¹³ In other words, the dams of the primary pond are made of wet coal ash, which will not hold up during an earthquake. Not surprisingly, the primary pond's wet ash dams failed, and failed miserably, two of EPA's "factors of safety" relating to earthquakes. The minimum safety factor for dikes "constructed on soils that have susceptibility to liquefaction" is 1.20, 40 C.F.R. § 257.73(e)(1)(iv), but the dikes of the primary pond only qualifies for a measly 0.26¹⁴. The minimum seismic safety factor is 1.00, 40 C.F.R. § 257.73(e)(1)(iii), but the primary pond qualifies for a seismic safety factor of just 0.71.¹⁵ Seismic activity is not a hypothetical

⁶ See <https://www.google.com/maps/@38.2598511,-85.8453377,3a,60y,99.96h,90t/data=!3m6!1e1!3m4!1sNbkEbNZUyU1qukGvMWCaXw!2e0!7i13312!8i6656?hl=en> (showing view directly across River Road from the Gallagher plant coal ash lagoons).

⁷ See Ohio River Valley Water Sanitation Commission, "The Ohio River at a Glance," available at <http://www.orsanco.org/river-facts/>.

⁸ *Id.*

⁹ See <http://www.orsanco.org/river-facts/marinas-along-the-ohio-river/>; <http://www.falloftheohio.org/fishing.html>; and <http://wfpl.org/kentucky-regulators-lift-ohio-river-recreation-advisory-louisville-area/>.

¹⁰ See "The Ohio River at a Glance," *supra* note 6.

¹¹ See <http://fw.ky.gov/Wildlife/Pages/Peregrine-Falcon.aspx>.

¹² See "The Ohio River at a Glance," *supra* note 6.

¹³ Duke Energy Annual Report for 2016 for Gallagher, available at <https://www.duke-energy.com//media/pdfs/our-company/gal-annl-imp-2016.pdf>, at 5-6.

¹⁴ Duke Energy Initial Factor of Safety Assessment, Gallagher, available at <https://www.duke-energy.com//media/pdfs/our-company/ash-management/ccr-gal-safetyfactor-pp.pdf?la=en>, at 2.

¹⁵ *Id.*

concern at Gallagher: Indiana has been hit by many earthquakes through the years, including several centered or felt near New Albany.¹⁶ As recently as 2015, an earthquake near Shelbyville, Kentucky, was felt in Louisville, immediately across the Ohio River from Gallagher.¹⁷

We need not guess what kind of contamination would spill from the Gallagher coal ash lagoons if their dams were to fail. Groundwater monitoring at the site reveals elevated levels of arsenic, boron, manganese, and sulfate – pollutants long recognized as toxic to people, aquatic life, birds and wildlife.

In short, the only thing separating Duke Energy’s toxic coal ash lagoons from the Ohio River and nearby residences are leaking, unstable earthen and ash dams that even the company’s own consultants admit are in poor shape. The threat that these dams will fail, sending a rush of toxic ash and contaminated water toward the boaters, fishermen and wildlife in the river – or toward the family homes to the west of the lagoons – is very real; indeed, it is exactly what happened at Duke Energy’s Dan River Plant in North Carolina in February 2014, when up to 39,000 tons of coal ash and 27 million gallons of wastewater spilled from a failed ash lagoon, fouling 70 miles of river in North Carolina and Virginia and causing nearly \$300 million in damages over just six months.¹⁸ This threat makes Duke Energy’s failure to provide the required inundation maps and emergency responder contact information all the more serious. Residents and river users near Gallagher deserve, and are legally entitled, to know if they are likely to be impacted by a dam failure and who they should contact if those ash dams fail.

Duke Energy’s Criminal Convictions

The threat posed by Duke Energy’s Gallagher coal ash lagoons cannot be fully appreciated without taking into consideration Duke Energy’s actions at its ash lagoons in other states. In May of 2015, Duke Energy operating companies pleaded guilty 18 times to 9 federal Clean Water Act coal ash crimes across North Carolina. Duke Energy operating companies paid a \$102 million fine, and they are under nationwide criminal probation. Under court orders, the criminal plea agreement, statutes, regulatory requirements, and settlement agreements with conservation groups, Duke Energy is now required to excavate all the coal ash from behind coal ash dams and in unlined coal ash pits at 8 of its 14 coal ash storage sites in North Carolina, and all its sites in South Carolina.

Transparency Is an Essential Component of the Coal Ash Rule

The Coal Ash Rule is a self-implementing federal rule that is built on transparency. Enforcement of the rule is dependent on the public’s access to information via the documents that coal ash lagoon owners are required to post on their public websites. As EPA explains, the requirements to post information about, among other things, the structural stability of ash

¹⁶ See <https://earthquake.usgs.gov/earthquakes/byregion/indiana.php>.

¹⁷ See <https://earthquake.usgs.gov/earthquakes/eventpage/us10003km3#dyfi>

¹⁸ See <https://www.epa.gov/sites/production/files/2014-06/documents/signed-eden-ash-spill-aoc-04-2014-3762.pdf> and Dennis Lemly, *Environmental Pollution*, “Damage Cost of the Dan River Coal Ash Spill,” 2015, available at <https://www.srs.fs.usda.gov/pubs/49260>.

lagoons and the contaminants they are causing to leach into groundwater “serve as a key component by ensuring that the entities primarily responsible for enforcing the requirements have access to the information necessary to determine whether enforcement is warranted.” 80 Fed. Reg. at 21,339. EPA has explained that these transparency requirements are consistent with, even encouraged by, the Act itself, which: “...contains neither provisions that grant facilities the right to withhold regulatory compliance information from the public, nor provisions that establish any reasonable expectation that such information will be kept confidential. To the contrary, section 7004 [of the Act] explicitly provides that ‘[p]ublic participation in the . . . implementation, and enforcement of any regulation under this chapter shall be provided for, encouraged, and assisted by the Administrator.’” 80 Fed. Reg. at 21,338-39.

The reasons underlying Congress’ and EPA’s demand that information be made available to the public are, in this case, crystal clear. It is the people living in communities across our nation near coal-fired power plants who face the most harm when coal ash spills from blown-out dams and fouls rivers, streams, and homes with toxic sludge, poisoning fish and rendering water undrinkable – as happened in North Carolina in 2014 and Tennessee¹⁹ in 2008. People living near coal ash lagoons such as those at the Gallagher Plant have the right to know – and, under the Rule, are entitled to know – if their homes and schools lie in the likely path of a torrent of ash and contaminated water that will flow towards them if ash lagoon dams break. For their health and well-being, they are also entitled to know who to contact, and how to contact them, if those dams fail or show signs of leaking.

Duke Energy Is Violating the Rule by Hiding Required Safety Information from the Public

Under the Coal Ash Rule, owners of coal ash surface impoundments²⁰ must periodically evaluate the “hazard potential” of those ash lagoons and classify them as low, significant, or high hazard potential lagoons. 40 C.F.R. § 257.73(a)(2). Several of Duke Energy’s coal ash lagoons at the Gallagher Plant – including the Primary Pond and Ash Pond A – are sufficiently hazardous to qualify as “significant hazard potential” impoundments. That means a failure of those ash lagoon dams “can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns.” 40 C.F.R. § 257.53.

¹⁹ On December 22, 2008, a coal ash lagoon at the Tennessee Valley Authority’s Kingston Fossil Plant in Harriman, Tennessee, failed, spilling more than 5 million tons of coal ash into and around the Emory River. US EPA reports that the spill “disrupt[ed] power, rupture[d] a gas line, and destroy[ed] or damage[ed] scores of homes,” while contaminating local soils with toxic pollutants including arsenic and rendering the lower portion of the Emory River unsafe for fishing. See U.S. EPA, “Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals From Electric Utilities; Proposed Rule,” 75 Fed. Reg. 35,128 at 35,239 (June 21, 2010), available at <https://www.gpo.gov/fdsys/pkg/FR-2010-06-21/pdf/2010-12286.pdf>.

²⁰ Duke Energy’s coal ash lagoons at Gallagher are “CCR surface impoundments” under the Coal Ash Rule and therefore are subject to the requirements discussed herein. The Rule defines “coal combustion residuals (CCR)” as “fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers.” 40 C.F.R. § 257.53. A “CCR surface impoundment,” in turn, is defined as “a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.” *Id.* Duke Energy does not dispute that the coal ash lagoons at issue in this Notice are CCR surface impoundments subject to the Rule.

The Rule further requires that, by April 17, 2017, owners of coal ash lagoons with significant hazard potential “must prepare and maintain a written [Emergency Action Plan].” 40 C.F.R. § 257.73(a)(3)(i). Those Plans must, at a minimum and along with other information, “provide contact information of emergency responders” and “include a map which delineates the downstream area which would be affected in the event of a CCR unit failure...,” 40 C.F.R. § 257.73(a)(3)(i)(C) and (D).

Thirty days after creating that Plan and placing it in the facility’s “operating record,” the owner of the ash lagoons must post the Plan on its publicly accessible website. 40 C.F.R. §§ 257.105(f)(6), 257.107(d), 257.107(f)(5). The Coal Ash Rule contains no exceptions authorizing owners of ash lagoons to decline to post information required by the Rule on the publicly accessible website.

Any violation of the requirements of the Rule constitutes illegal open dumping. 40 C.F.R. § 257.1(a)(2) (“Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.”) (emphasis added); 40 C.F.R. § 257.1(a)(1) (“Facilities failing to satisfy any of the criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 or §§ 257.50 through 257.107 are considered open dumps, which are prohibited under section 4005 of the Act.”); 40 C.F.R. § 257.2 (“Open dump means a facility for the disposal of solid waste which does not comply with this part.”).

As discussed above, Duke Energy classified coal ash lagoons at Gallagher – specifically, “Ash Pond A” and the “Primary Pond” – as “significant hazard potential” lagoons under the Rule. Duke Energy created an Emergency Action Plan for those ash lagoons, included here as Exhibit A, and posted that Plan on its publicly accessible website in May 2017. However, the company included no “map which delineates the downstream area which would be affected in the event of a CCR unit failure,” and redacted all contact information for emergency responders.

Duke Energy appears to claim that it is withholding this critical information on the basis of Indiana Code 5-14-3-4(b)(19): a header at the top of each page of its Emergency Action Plan says “Confidential” and cites that provision. But the company’s implicit assertion that the provision authorizes it to redact or withhold the emergency contact information and the inundation map from the Plan is simply implausible and without legal basis: the cited provision is part of Indiana’s law requiring public agencies to disclose information to the public, and Duke Energy is not a “public agency.” The provision does not apply to Duke.

Even if that Indiana provision did apply to Duke Energy, it would be preempted – and therefore invalid as applied to the company – by the Coal Ash Rule. Under the Supremacy Clause of the U.S. Constitution and numerous Supreme Court and Seventh Circuit Court of Appeals’ decisions, federal law overrides state law when there is a direct conflict between the two. *See, e.g., Mutual Pharm Co., Inc. v. Bartlett*, 133 S.Ct. 2466 (2013). If the Indiana provision applied to Duke Energy, it would be in direct conflict with the Rule: the Coal Ash Rule requires the emergency contact information and inundation map be developed and provided to the public on the publicly-accessible website; the Indiana law, as Duke Energy appears to interpret it, prohibits it from making that information public. Therefore, even if the Indiana law did apply to Duke Energy (it does not), it would be preempted by the Coal Ash Rule.

In sum, Duke Energy was required to provide and post on its website contact information for emergency responders and a map of downstream areas that would be affected if the Gallagher ash lagoons were to fail. 40 C.F.R. §§ 257.73(a)(3)(i)(C) and (D), 257.107(d), and 257.107(d). Duke Energy failed to do so, and therefore violated, and continues to violate, those requirements. Accordingly, under 40 C.F.R. § 257.1(a)(1) and Section 4005(a) of the Act, the Gallagher coal ash lagoons constitute illegal open dumps.

Duke Is Withholding the Same Critical Dam Safety Information from the Public at Every One of its High and Significant Hazard Coal Ash Lagoons

The communities near Gallagher are not the only ones that Duke Energy is depriving of inundation maps and emergency responder contact information. Our review of Duke Energy's Emergency Action Plans for all of its coal ash lagoons reveals that Duke Energy is withholding this critical dam safety information at every ash lagoon the company has classified as high or significant hazard potential – including coal ash lagoons in Indiana, Kentucky, Florida, North Carolina and South Carolina. In contrast, to our knowledge, no other ash lagoon owner or operator has refused to provide that essential, and required, information.

Citizens May Sue to Enforce the CCR Rule

Section 7002(a)(1) of the Act provides for citizen suits to redress violations of any standard, regulation, and requirement that have become effective pursuant to the Act. 42 U.S.C. § 6972(a)(1). 40 C.F.R. §§ 257.73(a)(3)(i)(C) and (D); 257.107(d), and 257.107(f)(5) are standards, regulations, and requirements that became effective pursuant to the Act on October 19, 2015. Section 7002(a)(1)(A) of the Act provides that citizens may commence civil actions against any person who is alleged to be in violation of any regulation or requirement that has become effective pursuant to the Act and to compel compliance with such requirement or regulation. 42 U.S.C. § 6972(a)(1).

Additionally, under Section 4005(a) of the Act, any solid waste management practice or disposal of solid waste that constitutes the open dumping of solid waste is prohibited, except where the practice occurs under a timetable or schedule for compliance. According to Section 4005(a), this prohibition shall be enforceable under Section 7002 against persons engaged in the act of open dumping. *Id.*

Section 7002(b)(1)(A) of the Act, and its implementing regulations, require prior notice of citizen suits. 42 U.S.C. § 6972(b)(1)(A) and 40 C.F.R. Part 254. This notice of intent to sue is provided pursuant to these requirements.

PERSONS RESPONSIBLE FOR VIOLATIONS

The Gallagher Generating Station is owned and operated by Duke Energy Indiana, LLC, a subsidiary of Duke Energy Corporation. Duke Energy Indiana, LLC, is a corporation with its principal place of business in Plainfield, Indiana. Duke Energy Indiana, LLC, is responsible for all violations at Gallagher.

PERSONS GIVING NOTICE

Hoosier Environmental Council (HEC) is Indiana's largest environmental policy non-profit organization, with more than 1,400 members statewide, including members in Floyd County. HEC's mission is to be the voice of the people for the environment in Indiana - the organization with the passion and the plan to tackle our environmental challenges and help make our state a healthier, better place to live and do business. Since its founding in 1983, the Hoosier Environmental Council has become Indiana's leading educator and advocate on environmental issues and policies, and has been a leading advocate on cleaning up toxic coal ash in the state.

HEC believes that a negotiated settlement of these violations, codified through a court-approved consent decree, would be preferable to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, HEC are prepared to file suit in the United States District Court for the Southern District of Indiana pursuant to 42 U.S.C. § 6972(a)(1)(A), after sixty days from receipt of this letter. This lawsuit will seek injunctive relief, fees and costs of litigation, and such other relief as the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice is incorrect in any respect, please contact the undersigned counsel, Earthjustice, at (215) 717-4525. During the notice period, we are available to discuss this matter with you, but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Please be advised that the failure to remedy any of the violations set forth in this letter can result in a court order enjoining further violations, and upon the successful prosecution of this suit, HEC intends to seek compensation for attorneys' fees and the costs of litigation under the citizen suit provisions of 42 U.S.C. § 6972(e).

Thank you for your prompt attention to this matter.

Sincerely,



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