



September 20, 2017

Via Registered Mail – Return Receipt Requested

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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 East Bend Station in Union, Kentucky:
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), Kentuckians For The Commonwealth (“KFTC”), through their counsel, Earthjustice, gives Duke Energy Kentucky, Inc. (“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, KFTC 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 Kentucky Residents Concerning its Significant Hazard Potential Coal Ash Impoundment

Duke Energy is hiding critical information from Kentucky residents in blatant violation of the Coal Ash Rule. The company owns and operates lagoons full of toxic coal ash at its East Bend Station (“East Bend”), which is located on the bank of the Ohio River in west-central

Boone County, Kentucky, approximately 2.5 miles south of Rabbit Hash, KY. Duke Energy admits that these lagoons include a lagoon classified as “significant hazard potential” under the Coal Ash Rule, meaning that, if the earthen dam impounding millions of tons of coal ash were to fail, that failure could disrupt essential transportation or utility infrastructure, damage the economy, and/or harm the environment. Due to the potentially severe impacts of a dam failure at East Bend, 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 dam, and contact information for emergency responders the public can call if the dam fails. In spite of well-founded public concern about Duke Energy’s coal 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 Plan it made publicly available. Duke Energy’s East Bend ash lagoon is, therefore, an open dump in violation of the Rule and the Act.

Duke Energy’s Dangerous Open Dump at its East Bend Station

The East Bend Station is a 648 MW coal-fired power plant that began operation in 1981. Coal ash generated at East Bend has been dumped in its unlined East Bend Station Ash Pond, which contains approximately 878,070 cubic yards of coal ash and approximately 516,700 cubic yards of wastewater.¹ Duke Energy estimates that it disposes of approximately 28,000 cubic yards of coal ash (36,000 tons) in the East Bend Station Ash Pond each year.²

The East Bend Station Ash Pond is located right next to 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.³ 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.⁴ Many people boat, fish, and swim in the Ohio River, including in the vicinity of the East Bend plant.⁵ Approximately 160 different fish species have been found in the Ohio,⁶ which is also a major commercial artery, transporting over 220 million tons of cargo each year.⁷

The river and the people, plants and animals who use the river, stand to be harmed if East Bend’s coal ash lagoon dam fails. Among the contaminants that may enter the Ohio River if the ash dam fails are heavy metals including arsenic, cadmium, chromium, lead, mercury, selenium

¹ See Duke Energy’s Annual Inspection Report – 2016 for East Bend, available at <https://www.duke-energy.com//media/pdfs/our-company/eb-annl-imp-2016.pdf>, at page 6.

² See Duke Energy’s Annual Inspection Report – 2016 for East Bend, available at <https://www.duke-energy.com//media/pdfs/our-company/eb-annl-imp-2016.pdf> at page 5.

³ See Ohio River Valley Water Sanitation Commission, “The Ohio River at a Glance,” available at <http://www.orsanco.org/river-facts/>.

⁴ *Id.*

⁵ See <http://www.orsanco.org/river-facts/marinas-along-the-ohio-river/>;

⁶ See “The Ohio River at a Glance,” *supra* note 4.

⁷ See “The Ohio River at a Glance,” *supra* note 4.

and thallium-- pollutants long recognized as toxic to people, aquatic life, birds and wildlife. Elevated levels of manganese and sulfate been detected in groundwater monitoring wells at East Bend between January 20, 2010 and July 12, 2013, and levels of arsenic just barely achieved health-based standards.⁸ In earlier groundwater monitoring, elevated concentrations of mercury, arsenic, and iron were repeatedly detected near the Ash Pond.⁹

The threat that the ash lagoon's dam will fail is real; 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.¹⁰ 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 the East Bend Station deserve, and are legally entitled, to know if they are likely to be impacted by a dam failure and who they should contact if the ash dam fails.

Duke Energy's Criminal Convictions

The threat posed by Duke Energy's East Bend Station 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. These crimes included unpermitted coal ash lagoon discharges very much like those flowing from the East Bend coal ash lagoons. 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 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,

⁸ See Ashtracker, East Bend Station, groundwater monitoring data, available at <http://ashtracker.org/facility/62/east-bend-station>.

⁹ See "Slow Motion Spills: Coal Combustion Waste and Water in Kentucky," available at https://www.kftc.org/sites/default/files/docs/resources/coal_combustion_waste_and_water_in_ky_042110.pdf, at 9, 18-23.

¹⁰ 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>.

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 Tennessee¹¹ in 2008. People living near coal ash lagoons such as those at the East Bend Station 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 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 impoundments¹² 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). Duke Energy's coal ash lagoon at East Bend is sufficiently hazardous to qualify as a "significant hazard potential" lagoon.¹³ That means failure of that ash lagoon "can cause economic loss, environmental damage, disruption of lifeline facilities, or impact other concerns." 40 C.F.R. § 257.53.

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,

¹¹ 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[d] 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>.

¹² Duke Energy's coal ash lagoons at East Bend 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.

¹³ See "Initial Hazard Potential Classification Assessment Certification, CCR Surface Impoundment: East Bend Station, CCR Unit: Ash Pond" (Sept. 28, 2016), available at <https://www.duke-energy.com//media/pdfs/our-company/ash-management/ccr-eb-haz-class-ap.pdf>, at 1.

“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.

Under the Act, 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 a coal ash lagoon at the East Bend Station as a “significant hazard potential” lagoon 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. But 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 Kentucky Code Ky. Rev. Stat. § 61.878(1)(m). A header at the top of each page of its Emergency Action Plan says “Confidential” and cites that provision. The Kentucky provision cited by Duke Energy, however, only applies to the Commonwealth of Kentucky to exempt from inspection certain “public records.” The provision does not affect the duty of Duke Energy to publish information on its publicly-accessible website, as required by the Coal Ash Rule. Even if the provision cited applied to Duke Energy and the records it seeks to withhold, the provision 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 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).

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 East Bend ash lagoon 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 East Bend Station’s ash lagoon constitutes an illegal open dump.

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

The communities near the East Bend Station 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

East Bend Station is owned and operated by Duke Energy Kentucky, Inc. Duke Energy Kentucky is a Kentucky corporation with its principal office and principal place of business at 139 East Fourth Street Cincinnati, Ohio, 45202. The Company's local office in Kentucky is Duke Energy Envision Center, 4580 Olympic Boulevard, Erlanger, Kentucky 41018. Duke Energy Kentucky is a subsidiary of Duke Energy, headquartered in Charlotte, North Carolina. Duke Energy Kentucky, Inc. is responsible for all violations at the East Bend Station.

PERSONS GIVING NOTICE

Kentuckians For The Commonwealth ("KFTC") is a statewide, grassroots, citizens social justice organization organizing for a fair economy, a healthy environment, new safe energy, and an honest democracy. As part of this vision, the organization has worked for 36 years to protect

and preserve a clean environment for Kentuckians by pushing for stronger regulations and better enforcement of existing regulations. KFTC has over 11,000 members in Kentucky and across the nation, including in Boone County.

KFTC 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, KFTC is prepared to file suit in the United States District Court for the Eastern District of Kentucky 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, KFTC 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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