

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF DUKE ENERGY KENTUCKY,	)	
INC. FOR A DECLARATORY ORDER THAT THE	)	
CONSTRUCTION OF A NEW LANDFILL	)	
CONSTITUTES AN ORDINARY EXTENSION IN	)	CASE NO. 2015-00089
THE USUAL COURSE OF BUSINESS OR, IN THE	)	
ALTERNATIVE, FOR A CERTIFICATE OF PUBLIC	)	
CONVENIENCE AND NECESSITY	)	

NOTICE OF FILING

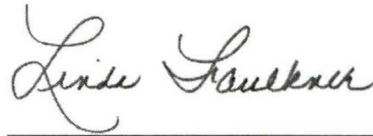
Notice is given to all parties that the following materials have been filed into the record of this proceeding:

- The digital video recording of the evidentiary hearing conducted on June 10, 2015 in this proceeding;
- Certification of the accuracy and correctness of the digital video recording;
- All exhibits introduced at the evidentiary hearing conducted on June 10, 2015 in this proceeding;
- A written log listing, *inter alia*, the date and time of where each witness' testimony begins and ends on the digital video recording of the evidentiary hearing conducted on June 10, 2015.

A copy of this Notice, the certification of the digital video record, hearing log, and exhibits have been electronically served upon all persons listed at the end of this Notice. Parties desiring an electronic copy of the digital video recording of the hearing in Windows Media format may download a copy at: [http://psc.ky.gov/av\\_broadcast/2015-00089/2015-00089\\_10Jun15\\_Inter.aspx](http://psc.ky.gov/av_broadcast/2015-00089/2015-00089_10Jun15_Inter.aspx). Parties wishing an annotated digital video

recording may submit a written request by electronic mail to [pscfilings@ky.gov](mailto:pscfilings@ky.gov). A minimal fee will be assessed for a copy of this recording.

Done at Frankfort, Kentucky, this 16<sup>th</sup> day of June 2015.

A handwritten signature in cursive script, reading "Linda Faulkner".

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Public Service Commission of Kentucky

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PUBLIC CONVENIENCE AND NECESSITY )	

CERTIFICATE

I, Pamela Hughes, hereby certify that:

1. The attached DVD contains a digital recording of the Hearing conducted in the above-styled proceeding on June 10, 2015. Hearing Log, Exhibits, Exhibit List, and Witness List are included with the recording on June 10, 2015.
2. I am responsible for the preparation of the digital recording.
3. The digital recording accurately and correctly depicts the Hearing of June 10, 2015.
4. The "Exhibit List" attached to this Certificate correctly lists all exhibits introduced at the hearing of June 10, 2015.
5. The "Hearing Log" attached to this Certificate accurately and correctly states the events that occurred at the Hearing of June 10, 2015 and the time at which each occurred.

Signed this 12<sup>th</sup> day of June, 2015.

  
\_\_\_\_\_  
Pamela Hughes, Notary Public  
State at Large  
My Commission Expires: April 22, 2015





# Session Report - Detail

2015-00089 10JUN2015

Duke Energy Kentucky, Inc.

Date:	Type:	Location:	Department:
6/10/2015	Other	Public Service Commission	Hearing Room 1 (HR 1)

Judge: David Armstrong; Jim Gardner; Dan Logsdon

Witness: Tammy Jett-Duke; Jr.-Duke Joseph A. Miller; Nicholas R. Sellet-Duke; William Don Wathan-Duke

Clerk: Pam Hughes

Event Time	Log Event
8:59:48 AM	Session Started
8:59:51 AM	Session Paused
10:03:07 AM	Session Resumed
10:03:11 AM	Vice Chairman Gardner Note: Hughes, Pam Preliminary remarks and introcuction of Commissioners
10:04:23 AM	Introductions Note: Hughes, Pam All Atty's introduce themselves: Duke Energy - David Samford, Rocco D'Ascenzo; AG's Office - Greg Dutton, Stephanie Kingsley; and PSC - Quang Nguyen.
10:05:16 AM	Vice Chairman Gardner asks for any Motions Note: Hughes, Pam No motions.
10:05:32 AM	Vice Chairman Gardner Note: Hughes, Pam asks for Public comment- no public comment
10:06:34 AM	Atty. D'Ascenzo calls Joseph Miller, Jr. to the stand Note: Hughes, Pam Mr. Miller is sworn in by Vice Chairman Gardner. Atty D'Ascenzo asks Witness Miller if he has any changes to previously filed testimony. Witness Miller has one change, pg 11 line 2 of testimony. Permit should be replaced with application form. Adopts testimony
10:07:20 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam Atty Kingsley hands out document assigned as AG's exhibit 1
10:08:26 AM	Exhibit AG exhibit 1 Note: Hughes, Pam US District Court document -criminal case against Duke
10:09:02 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam pg 4, par 7 of exhibit 1
10:12:08 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam cell 1 of proposed landfill not meeting requirements of EPA's CCR rule or the coal combustion residual rule regarding the lining.
10:13:21 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam questions regarding cell 6 as to the lining
10:13:54 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam last sentence concerning inspections pg 4 of AG's exhibit 1
10:14:53 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam Regarding paragraph 2 on pg. 4 court appointed monitor about inspections.
10:15:32 AM	Atty Dutton requests post data hearing request Note: Hughes, Pam Atty Dutton asks for a post hearing data request-specifically concerning the 1st and 3rd sentence on page 4 of AG exhibit 1
10:16:51 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam 700 ft from Ohio river project, has duke given consideration to redesign for add'tl buffers?
10:18:02 AM	Atty Dutton direct exam of Witness Miller Note: Hughes, Pam fly ash and bottom ash---is this landfill set up to take both and are there plans to put both fly ash and bottom ash in this landfill?

10:18:54 AM	Atty Nguyen cross exam of Witness Miller Note: Hughes, Pam	Regarding the bottom ash and the Poz- O -Tech material
10:20:35 AM	Atty Nguyen cross exam of Witness Miller Note: Hughes, Pam	Do you oversee planning cost estimates for the landfill or just construction?
10:21:31 AM	Atty Nguyen cross exam of Witness Miller Note: Hughes, Pam	Question regarding Duke's response to data request, Duke stated this should be constructed over a series of cells and phases...is this best practice done across Duke businesses?
10:23:27 AM	Commissioner Logsdon cross exam of Witness Miller Note: Hughes, Pam	Regarding Witness Miller's direct testimony, how does material get transported?
10:25:14 AM	Commissioner Logsdon cross exam of Witness Miller Note: Hughes, Pam	Regarding the approximate cost difference now as opposed to the new CCR rule.
10:25:46 AM	Commissioner Logsdon cross exam of Witness Miller Note: Hughes, Pam	Regarding Mr. Miller's change in wording in his direct testimony.
10:26:17 AM	Commissioner Logsdon cross exam of Witness Miller Note: Hughes, Pam	Have there been any compliance issues concerning the east bend landfill?
10:27:07 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Clarifying whether Duke is looking to see if they are required to take bottom ash.
10:28:01 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding the length of time that west landfill to be used, 30 years. Does that include the bottom ash?
10:28:49 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding the difference in cost of the liner if done before October date as to after that date.
10:29:45 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding additional permit for liner for cell 1.
10:30:27 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding cost estimate for additional items. What will be the total difference if Duke has to comply with new CCR rule. Witness Miller stated it would be a \$900,000.00 total cost.
10:31:29 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding non Duke KY entities.
10:32:11 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding volume and accepting additional fly ash.
10:33:33 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding estimate of % of non east bend material going into this landfill.
10:34:26 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Question regarding Miller's direct testimony,pg 5, line 6 & 7.
10:36:10 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding Miami 6 fort no longer operating.
10:36:29 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding page 7, lines 19 & 20 of direct testimony related to cost of landfill.
10:37:56 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding page 9, of direct testimony that Duke assumes life of west landfill is 30 years. East Bend is 10 years?



10:40:28 AM	Vice Chair Gardner cross exam of Witness Miller Note: Hughes, Pam	Regarding page 11, lines 12 through 20 of Miller's direct testimony. Not a recent development, that the Commission has known well over a decade that this would be needed.
10:41:05 AM	Atty D'Ascenzo clarify to Vice Chairman Gardner Note: Hughes, Pam	Clarifying the number of tons is in the AG second DR # 12 chart costs of transport and total tons of ash brought in from other sights
10:41:45 AM	Atty D'Ascenzo redirect of Witness Miller Note: Hughes, Pam	Regarding paragraph 7, AG exhibit 1
10:43:00 AM	Atty D'Ascenzo redirect of Witness Miller Note: Hughes, Pam	Timing of the construction of the Cells in relation to needing a permit.
10:44:11 AM	Atty D'Ascenzo redirect of Witness Miller Note: Hughes, Pam	Regarding whether the company looked at other third party disposal facilities.
10:45:10 AM	Commissioner Logsdon redirect of Witness Miller Note: Hughes, Pam	Regarding the life of Poz-O-Tech.
10:46:10 AM	Commissioner Logsdon redirect of Witness Miller Note: Hughes, Pam	Regarding how long Poz-O-Tech has been put in the East Bend facility.
10:46:40 AM	Witness Miller excused	
10:46:45 AM	Atty Samford calls Witness Don Wathan Jr. to the stand Note: Hughes, Pam Note: Hughes, Pam	Witness Wathan is sworn in by Vice Chairman Gardner Mr. Wathan is Director of Rates & Regulatory Strategy for Ohio and Kentucky.
10:47:45 AM	Atty David Samford direct exam Note: Hughes, Pam	Witness Wathan adopts his testimony and responses.
10:48:27 AM	Atty Dutton cross exam of Witness Wathan Note: Hughes, Pam	Regarding construction financing of landfill and costs.
10:49:12 AM	Atty Nguyen cross exam of Witness Wathan Note: Hughes, Pam	Regarding when will Duke make the decision of how to recover costs.
10:49:55 AM	Atty Nguyen cross exam of Witness Wathan Note: Hughes, Pam	Regarding surcharge, and other recovery that Duke will seek pertaining to pollution control equipment.
10:50:19 AM	Atty Nguyen cross exam of Witness Wathan Note: Hughes, Pam	Regarding why has duke not previously filed an environmental compliance plan?
10:50:53 AM	Vice Chair Gardner cross exam of Witness Note: Hughes, Pam	Regarding data with respect to the sale and purchase of the land.
10:52:16 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding what was included in the \$2.5 million transaction?
10:52:48 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Asks for clarification of west landfill, page 3 and 4 of Mr. Wathan's direct testimony. Tri-state and Duke KY own 69% of the land. Vice Chairman Gardner would like this information in a post-hearing data request.
10:54:34 AM	Atty D'Ascenzo clarifies questions of Vice Chair Gardner Note: Hughes, Pam	2 transactions net result, Duke Energy, Ky now owns 100% of the station and surrounding land.
10:55:56 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding the purchase of land for west landfill for roughly \$2.5 million.

10:56:20 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding page 4, line 5 of Mr. Wathan's direct testimony. Did Duke do appraisal and where did the market value come from. attachment 3 to application. 3rd party appraisal
10:57:20 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding the DPNL case--- aware of RFP and comparison of prices of 12.4 million cost.
10:58:26 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding the additional acreage, is that part of the \$2.5 million transaction.
11:00:10 AM	Vice Chair Gardner cross exam of Witness Wathan Note: Hughes, Pam	Regarding 31 % estimated cost of landfill.
11:00:49 AM	Witness Wathan excused	
11:01:18 AM	Atty D'Ascenzo calls Witness Tammy Jett to the stand Note: Hughes, Pam	Ms. Jett is the Principal Environmental Specialist with Duke Energy, KY Ms. Jett is sworn in by Vice Chairman Gardner.
11:02:20 AM	Atty D'Ascenzo to Witness Jett Note: Hughes, Pam	Witness Jett adopts her testimony, no changes.
11:02:55 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding her position at Duke Energy, KY.
11:03:34 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding the CCR rule, and the date.
11:04:40 AM	Exhibit AG exhibit 2 Note: Hughes, Pam	Atty Dutton later asks that this exhibit not be made part of the record.
	Note: Hughes, Pam	Federal Regulation concerning the CCR rule.
11:05:17 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding if the construction commence after October 19, 2015, would it the landfill be in compliance with the CCR rule?
11:06:10 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding cost to make Cell 1 compliant with the CCR rule.
11:06:33 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding compacted soil having to be used in place of a geo-synthetic clay liner.
11:07:44 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding modifying the geo synthetic clay liner.
11:08:23 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding estimate of time as to what type liner to be used.
11:08:50 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding what would be modified as to the liner.
11:09:40 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding when the current permit was issued.
11:09:58 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding cap changes and permit modification.
11:10:22 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding Duke's proposal to begin construction before October 19, 2015. When will official design be completed?
11:11:08 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding when the application for CPCN was filed.
11:11:51 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding 90 days for PSC to rule on this CPCN for construction.
11:12:40 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding permit modifications and CCR rule- treating fly ash, bottom ash, etc. Is there anything else that will need permit modification?



11:14:12 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding how much additional time will be needed for re-design if the Commission doesn't rule before the October 19th deadline.
11:15:00 AM	Atty Dutton cross exam of Witness Jett Note: Hughes, Pam	Regarding if DEP has looked at any other modifications.
11:15:31 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding why did Duke didn't apply for this CPCN until March.
11:16:51 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding the ash pond at the East Bend facility, and when will that pond reach capacity?
11:17:22 AM	David Samford to Atty Nguyen Note: Hughes, Pam	Clarification about asking about the ash pond.
11:17:28 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam Note: Hughes, Pam	Regarding exhibit 1 of Duke's application. Referencing pg. 4 of 15, pg. 4, item 3.
11:19:42 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Referencing page 5 and page 6 of exhibit 1 of Duke's application
11:21:00 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding unfixed waste.
11:21:20 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Referencing line 6 & 7 of exhibit 1 of Duke's application.
11:23:24 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Referencing page 4 of exhibit 1 of Duke's application. Dry waste.
11:23:45 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Referencing exhibit 5 to Duke's application. Aerial photo of East Bend facility. Where is current east landfill located?
11:25:11 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding where the ash pond is located.
11:25:24 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding Duke's response to Comm staff's second data request, item 3.
11:27:20 AM	Atty Nguyen cross exam of Witness Jett Note: Hughes, Pam	Regarding the results of liner cap.
11:27:40 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding the change on page 11 of Mr Miller's testimony.
11:28:59 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding Ms. Jett's testimony on pg. 13, line 20, CCR regulations impact on east landfill and west landfill.
11:31:10 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding cost analysis.
11:31:35 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding why it is important to start before the October 19th deadline for the West landfill.
11:32:53 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding Ms. Jett's testimony that Duke has expertise to construct and run this landfill. Do you contract out?
11:33:53 AM	Commissioner Logsdon cross exam of Witness Jett Note: Hughes, Pam	Regarding Ms. Jett's direct testimony page 5, line 10 and 11 and local permit requirements.
11:34:33 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding different types of ash.
11:35:30 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding material going into West landfill.



11:36:16 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Would the bottom ash in the West landfill from the East landfill be a small amount?
11:36:58 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding page 12 of Witness Jett's direct testimony, CO 2 emissions and the price of CO 2.
11:37:32 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	would like to have information about how CO 2 is priced or modeled in a Post Hearing Data Request.
11:38:12 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding the proposed CCR rule put in place in June 2010 and the subsequent rule.
11:39:11 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding Option of hazardous waste concerning the material for the landfill.
11:39:56 AM	Vice Chair Gardner cross exam of Witness Jett Note: Hughes, Pam	Regarding if the EPA had determined this material be treated as hazardous waste, what would it mean about the fly ash and what would have been the options.
11:41:16 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Questions concerning what could have happened if the CCR opted to make the ash material waste hazardous.
11:42:22 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Regarding when Duke acquired the 31% interest from DPL.
11:42:47 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Regarding if the acquisition of the 31% interest weighed in to when the company decided to file the application.
11:43:16 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Clarify for record, when current east landfill is scheduled to reach capacity.
11:44:21 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Regarding how long will take phase 1 to receive waste.
11:44:40 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Regarding the timing of getting re-permitted to have phase 1 in a useable manner if this construction doesn't start before the October 2015 date.
11:45:19 AM	Atty D'Ascenzo redirect to Witness Jett Note: Hughes, Pam	Regarding when CCR rule was actually published.
11:45:51 AM	Vice Chair Gardner redirect to Witness Jett Note: Hughes, Pam	Regarding the permit that is exhibit 1 to Duke's application.
11:47:02 AM	Vice Chair Gardner redirect to Witness Jett Note: Hughes, Pam	Regarding the issuance date and the date the application was made.
11:48:04 AM	Vice Chair Gardner redirect to Witness Jett Note: Hughes, Pam	Regarding when did Duke purchased the real estate and if the owners knew that Duke applied to use it for a particular use.
11:49:02 AM	Atty Samford clarifying Vice Chairman Gardners question Note: Hughes, Pam	Clarifying what the question pertaining to previous owners of property knowing what Duke intended to use the land for.
11:49:45 AM	Atty Dutton strikes his Exhibit 2 Note: Hughes, Pam	Vice Chairman Gardner Orders after no objections.
11:50:52 AM	Break	
11:50:54 AM	Session Paused	
12:03:39 PM	Session Resumed	
12:03:40 PM	Atty Samford calls Tom Wiest to the stand. Note: Hughes, Pam	Engineer with Duke Energy- Is sworn in by Vice Chairman Gardner.

12:04:20 PM	Atty Samford to Witness Wiest	
	Note: Hughes, Pam	adopts prefiled testimony
12:04:38 PM	Atty Dutton-AG	
	Note: Hughes, Pam	no questions, but would like to recall Witness Wiest if needed.
12:05:00 PM	Witness Weist excused	
	Note: Hughes, Pam	No questions from Atty Nguyen or Commissioners.
12:05:21 PM	Atty D'Ascenzo calls Witness Nicholas Sellet to the stand.	
	Note: Hughes, Pam	Technical Superintendent who supervises engineers who operate East bend and capitol project engineers.
12:05:40 PM	Witness Sellet is sworn in and adopts his testimony with changes.	
	Note: Hughes, Pam	Corrections- page 2, line 12 of direct testimony. 5 engineers instead of 6.
12:06:48 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Discussing how long Witness has been involved with the project.
12:07:27 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing the East Ky landfill project that the Commission recently approved.
12:08:03 PM	Atty Dutton enter exhibit 3 into the record.	
12:08:57 PM	Exhibit Ag exhibit 3	
	Note: Hughes, Pam	Order in 2014-00252 East Kentucky Power Cooperative, Inc. granting the CPCN for the construction of the Smith landfill.
12:08:59 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Regarding compliance with the CCR rule, page 8 of AG exhibit 3
12:10:00 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing page 14 of AG exhibit 3 (East KY Power Order) and the 4 million dollar cost.
12:10:27 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing Duke's application exhibit 2, and the accuracy of the cost for this project.
12:12:00 PM	Exhibit AG exhibit 4	
	Note: Hughes, Pam	Comparison chart of total cost, volume, and cost per million cubic yard between the EKPC project and the Duke proposed project.
12:12:26 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing the comparison chart (AG exhibit 4) and the difference.
	Note: Hughes, Pam	Can you agree that this exhibit chart is accurate?
12:14:59 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Regarding the compliance issues of Cell 6 being built on top of Cell 1.
12:16:27 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing Winess response to AG's 1st DR concerning usefull life of east bend generating station.
	Note: Hughes, Pam	AG's 1st request DR
12:17:49 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Questioning what could happen in 10 years that could make this plan not viable.
12:18:51 PM	Atty Dutton cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing paragraph 7 of the settlement and if they apply to KY.
12:19:13 PM	Atty Nguyen cross exam of Witness Sellet	
	Note: Hughes, Pam	Regarding cells 6 and 7 to be on top of one another. Referencing Commission staff's 1st DR item 6.
12:21:03 PM	Atty Nguyen cross exam of Witness Sellet	
	Note: Hughes, Pam	Regarding cell 8, and the additional costs involved.
12:21:34 PM	Atty Nguyen cross exam of Witness Sellet	
	Note: Hughes, Pam	Referencing attachment to Staff's DR item 6...construction for phases estimated costs.



12:22:37 PM	Atty Nguyen cross exam of Witness Sellet Note: Hughes, Pam	Regarding the accuracy of bids on Cell 5, 18.5 million average. Constructed in 2030.
12:24:00 PM	Atty Nguyen cross exam of Witness Sellet Note: Hughes, Pam	Referencing Item 6b...onsight disposal expenses.
	Note: Hughes, Pam	Regarding the meaning of fuel adjustments.
12:25:42 PM	Atty Nguyen cross exam of Witness Sellet Note: Hughes, Pam	Referencing Duke's response to AG 1st DR, item 7
12:27:15 PM	Atty Nguyen cross exam of Witness Sellet Note: Hughes, Pam	Referencing last paragraph of Duke's response to AG 1st DR, item 7
	Note: Hughes, Pam	Regarding volume of ash and needing to start construction sooner.
12:29:01 PM	Atty Nguyen cross exam of Witness Sellet Note: Hughes, Pam	Regarding when Commission makes it decision in respect to 10/19 date, when is last date that an Order can be issued so Duke can construct 1st cell so it will be grandfathered in?
12:31:09 PM	Vice Chair Gardner cross exam of Witness Sellet Note: Hughes, Pam	Referencing Mr. Sellet's direct testimony on page 5, lines 16 and 17.
12:32:02 PM	Vice Chair Gardner cross exam of Witness Sellet Note: Hughes, Pam	Questioning how Duke communicated with others about purchasing land for a landfill.
12:32:35 PM	Vice Chair Gardner cross exam of Witness Sellet Note: Hughes, Pam	Regarding the trucking expenses.
12:33:46 PM	Vice Chair Gardner cross exam of Witness Sellet Note: Hughes, Pam	Referencing Commission Staff's 2nd DR, question 1 on page 3.
12:36:03 PM	Witness Sellet is excused.	
12:36:05 PM	Atty Dutton moves to enter Exhibits 3 and 4 into the record Note: Hughes, Pam	exhibits moved to be added in record 3 & 4, so ordered
12:36:21 PM	Atty Samford clarifies questions	
12:38:20 PM	Time line for upcoming events Note: Hughes, Pam	Post hearing data requests due June 24, 2015.
	Note: Hughes, Pam	CO2 pricing and modeling If landfill costs were included as part of calculations in the analysis in the DPL case.
12:39:07 PM	Vice Chair Gardner Note: Hughes, Pam	No briefs needd.
12:39:45 PM	adjourned	
12:40:14 PM	Session Paused	
12:41:30 PM	Session Ended	



## Exhibit List Report

2015-00089 10JUN2015

Duke Energy Kentucky, Inc.

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Name:	Description:
AG exhibit 1	US district coures concerning a criminal case against Duke
AG exhibit 2	EPA
Ag exhibit 3	PSC order in case no 2014-252
AG exhibit 4	AG's chart to compare two projects

# UNITED STATES DISTRICT COURT

Eastern

District of

North Carolina

UNITED STATES OF AMERICA

V.

DUKE ENERGY BUSINESS SERVICES LLC

## JUDGMENT IN A CRIMINAL CASE

(For Organizational Defendants)

CASE NUMBER: 5:15-CR-62, 67 & 68

James P. Cooney, III

Defendant Organization's Attorney

### THE DEFENDANT ORGANIZATION:

☒ pleaded guilty to count(s) Ct 1 (5:15-CR-62-H-1), Cts 1 - 6 (5:15-CR-67-H-1), and Cts 1 - 2 (5:15-CR-68-H-1)

☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.

☐ was found guilty on count(s) \_\_\_\_\_  
after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
	Docket No. 5:15-CR-62-H-1		
33 USC §§1311, 1319, 1342, and 18 USC § 2	Negligent Discharge of Pollutants from a Point Source and Aiding and Abetting	December 30, 2014	1

The defendant organization is sentenced as provided in pages 2 through 8 of this judgment.

☐ The defendant organization has been found not guilty on count(s) \_\_\_\_\_

☐ Count(s) \_\_\_\_\_ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's  
Federal Employer I.D. No.: 56-2115358

Defendant Organization's Principal Business Address:

550 South Tryon Street  
Charlotte, NC 28202

May 14, 2015

Date of Imposition of Judgment

Signature of Judge

Malcolm J. Howard

Name of Judge

Senior U.S. District Judge

Title of Judge

May 14, 2015

Date

Defendant Organization's Mailing Address:

550 South Tryon Street  
Charlotte, NC 28202

AG  
Exhibit

1



DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

Judgment—Page 2 of 8

**ADDITIONAL COUNTS OF CONVICTION**

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
Docket No. 5:15-CR-67-H-1			
33 USC §§ 1311, 1319, 1342, and 18 USC § 2	Negligent Discharge of Pollutants from a Point Source and Aiding and Abetting	February 8, 2014	1
33 USC §§ 1319, 1342, and 18 USC § 2	Failure to Maintain Treatment System Equipment and Related Appurtenances, and Aiding and Abetting	February 2, 2014	2
33 USC §§ 1311, 1319, 1342, and 18 USC § 2	Negligent Discharge of Pollutants from a Point Source and Aiding and Abetting	February 21, 2014	3
33 USC §§ 1319, 1342, and 18 USC § 2	Failure to Maintain Treatment System Equipment and Related Appurtenances, and Aiding and Abetting	February 6, 2014	4
33 USC §§ 1319, 1342 and 18 USC § 2	Failure to Maintain Treatment System Equipment and Related Appurtenances, and Aiding and Abetting	January 24, 2014	5 & 6
Docket No. 5:15-CR-68-H-1			
33 USC §§ 1311, 1319, 1342, and 18 USC § 2	Negligent Discharge of Pollutants from a Point Source and Aiding and Abetting	December 30, 2014	1 & 2

DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

### PROBATION

The defendant organization is hereby sentenced to probation for a term of :

5 years. This term consists of 5 years on Count 1 of Docket No. 5:15-CR-62-H-1, 5 years on Counts 1 through 6 of Docket No. 5:15-CR-67-H-1, and 5 years on Counts 1 and 2 of Docket No. 5:15-CR-68-H-1, all such terms to run concurrently.

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it is a condition of probation that the defendant organization pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant organization must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page (if indicated below).

### TERMS OF PROBATION

While on probation, the defendant shall not commit another federal, state, or local crime. If the defendant learns of any such violations committed by its agents or employees within the scope of their employment during the term of probation, the defendant shall, within five (5) business days, notify the United States Probation Office of the violations.

The defendant shall comply with all federal, state, and other regulations relating to coal ash during the period of probation. The defendant shall not have any new notices of violation, notices of deficiencies, or other criminal, civil or administrative enforcement actions with respect to coal ash while on probation. It shall be considered to be a violation of probation if the defendant receives any new notices of violation, notices of deficiencies, or other criminal, civil or administrative enforcement actions with respect to coal ash and based on conduct, including the failure to act, occurring after entry of this judgment in which a final assessment, after the conclusion of any appeals, of more than \$5,000 is imposed and is deemed material by the court. Continued on the following page...



DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

Judgment—Page 4 of 8

### ADDITIONAL PROBATION TERMS

Any conduct or conditions resulting in a final assessment of more than \$15,000 shall be presumed to be material and a violation of probation. The Court will not consider there to be a violation of the conditions of probation if the defendant complies with federal environmental laws when there is a direct conflict between the state and federal environmental laws. The Court will also not deem it to be a violation of probation if the enforcement action is based upon information disclosed by the defendant in its 2014 Topographical Map and Discharge Assessment and/or its 2014 National Pollutant Discharge Elimination System permit renewal application. Further, the defendant shall comply with the following additional conditions:

1. The defendant shall cooperate fully with the United States Probation Office during the period of supervision including truthfully answering any inquiries by the probation office. The defendant shall provide the probation office with the following: full access to any of the defendant's operating locations; 10 days prior notice of any intended change in principal business or mailing address; and notice of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay fines or meet other financial obligations as set forth in this Judgment.
2. The defendant and its two codefendants, Duke Energy Carolinas, LLC and Duke Energy Progress, Inc., (collectively "the defendants,") shall pay for a court appointed monitor (CAM) as set forth in Paragraphs 2A through 2I of Exhibit A of this Judgment. Exhibit A has been provided to the parties, and they have agreed to the conditions contained therein.
3. The defendant shall develop, adopt, implement, and fund a comprehensive nationwide environmental compliance plan (NECP) and a comprehensive statewide environmental compliance plan (ECP-NC) as set forth in Paragraphs 3A through 3H of Exhibit A of this Judgment. Exhibit A has been provided to the parties, and they have agreed to the conditions contained therein.
4. The defendants shall adopt, implement, and enforce a comprehensive environmental training program for all domestic employees as set forth in Paragraph 4A of Exhibit A of this Judgment. Exhibit A has been provided to the parties, and they have agreed to the conditions contained therein.
5. The defendant shall cooperate with the bromide remediation claims process as detailed in the Plea Agreement.
6. The defendant shall identify or establish a position as a compliance officer at the Vice President level or higher, who will liaise with the CAM and the United States Probation Office as set forth in Paragraphs 6A and 6B of Exhibit A of this Judgment. Exhibit A has been provided to the parties, and they have agreed to the conditions contained therein.
7. The defendant shall ensure that any new, expanded, or reopened coal ash or coal ash wastewater impoundments at any facilities owned by the defendant are lined. At such impoundments, the defendant shall ensure that there are no unpermitted discharges of coal ash or coal ash wastewater from any engineered, channelized, or naturally occurring seeps. Coal ash and wastewater impoundments will be subject to inspection by the CAM and/or United States Probation Office at any time.
8. The defendants shall, within five (5) business days of entry of this Judgment, place a full-page (132 column inches) public apology in at least two national newspapers and a major newspaper in each of Raleigh, Greensboro, and Charlotte, North Carolina. The language of the public apology has been agreed upon by the parties and is contained in Exhibit C of the Plea Agreement. Proof of each public apology shall be provided to the United States Probation Office within seven (7) days of being placed in each respective newspaper.
9. The defendant shall not seek or take credit for any fine, restitution, community service payment, mitigation payment, or funding of the environmental compliance plan, including the costs associated with the hiring or payment of staff or consultants needed to assist the CAM, in any related civil or administrative proceeding, including, but not limited to, the Natural Resources Damages Assessment process.



DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

Judgment—Page 5 of 8

### **ADDITIONAL PROBATION TERMS**

10. The defendant shall not capitalize into inventory or basis or take as a tax deduction, in the United States or elsewhere, any portion of the monetary payments (fine, restitution, community service, mitigation, or funding of the environmental compliance plans) imposed as part of this Judgment. Provided, however, that nothing in this Judgment shall bar or prevent the defendant from appropriately capitalizing or seeking an appropriate tax deduction for restitution in connection with the remediation of bromide claims, as set forth in the Plea Agreement, or for costs which would have been incurred by the defendant regardless of the environmental compliance plans (costs that would have been incurred irrespective of the environmental compliance plans include, by way of example only, costs for staffing and operating Central Engineering Services, ABSAT, Coal Combustion Products, or other similar organizations.)

11. The defendant shall not reference the burden of, or the cost associated with, compliance with the criminal fines, restitution related to counts of conviction, the community service payments, the mitigation obligation, costs of the clean-up in response to the February 2, 2014, release at Dan River Steam Station, and funding of the environmental compliance plans, in any request or application for a rate increase on customers. Provided, however, that nothing in this Judgment shall bar or prevent the defendant from seeking appropriate recovery for restitution in connection with the remediation of bromide claims, as set forth in the Plea Agreement, or which would have been incurred by the defendant regardless of the environmental compliance plans (costs that would have been incurred irrespective of the environmental compliance plans include, by way of example only, costs for staffing and operating Central Engineering Services, ABSAT, Coal Combustion Products, or other similar organizations.)

12. The defendant shall exercise its best efforts to comply with each and all of the obligations under both the NECP and ECP-NC. Any attempted reliance on the "force majeure" clause to excuse performance or timely performance of any condition of the NECP and ECP-NC should be exercised by the defendant in accordance with the provisions of the Plea Agreement.

The special conditions of probation shall hereafter be subject to review by the Court upon petition or motion by the United States Probation Office, the Court Appointed Monitor, either of the parties, or on its own motion.

DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

Judgment — Page 6 of 8

### CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 1,125.00	\$ 0.00	\$ 0.00

- ☐ The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.
- ☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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<b>TOTALS</b>	\$ 0.00	\$ 0.00
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- ☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_
- ☐ The defendant organization shall pay interest on restitution or a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.



DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

Judgment — Page 7 of 8

### **ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES**

The Court Finds that in light of total criminal penalties of 68 million dollars (\$68,000,000) being paid by its codefendants, Duke Energy Progress, Inc., and Duke Energy Carolinas, LLC, and the overall corporate structure as it relates to this defendant, no further fine is necessary. Therefore, no fine is being imposed.

#### **Special Assessment Breakdown:**

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Docket No. 5:15-CR-62-H-1

Ct. 1: \$125.00

Docket No. 5:15-CR-67-H-1

Ct. 1: \$125.00

Ct. 2: \$125.00

Ct. 3: \$125.00

Ct. 4: \$125.00

Ct. 5: \$125.00

Ct. 6: \$125.00

Docket No. 5:15-CR-68-H-1

Ct. 1: \$125.00

Ct. 2: \$125.00

DEFENDANT ORGANIZATION: DUKE ENERGY BUSINESS SERVICES LLC  
CASE NUMBER: 5:15-CR-62, 67 & 68

### SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 1,125.00 due immediately, balance due  
☒ not later than May 15, 2015, or  
☐ in accordance with ☐ C or ☒ D below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or
- C ☐ Payment in \_\_\_\_\_ (e.g., equal, weekly, monthly, quarterly) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (e.g., months or years), to commence \_\_\_\_\_ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☒ Special instructions regarding the payment of criminal monetary penalties:

The defendant shall make payment to the Clerk of Court for the Eastern District of North Carolina at 310 New Bern Avenue, Raleigh, North Carolina, on or before 1:00 p.m. on Friday, May 15, 2015.

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant organization shall pay the cost of prosecution.
- ☐ The defendant organization shall pay the following court cost(s):
- ☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION**

**UNITED STATES OF AMERICA**

**v.**

**DUKE ENERGY BUSINESS SERVICES LLC**  
**Defendant**

)  
)  
)  
)  
)  
)

**NO. 5:15-CR-62-H-1**

**NO. 5:15-CR-67-H-1**

**NO. 5:15-CR-68-H-1**

**EXHIBIT A TO THE JUDGMENT**

**ADDITIONAL SPECIAL CONDITIONS OF PROBATION**

- 1A. As incorporated by reference in Paragraphs 2, 3, 4, and 6 of the Judgment entered on May 14, 2015, against the above-named defendant, the defendant, Duke Energy Business Services LLC, shall comply with the following additional special conditions of probation:

**Court Appointed Monitor**

- 2A. The defendants<sup>1</sup> shall pay for reasonable costs and expenses approved by the Court for the authorized work of a Court Appointed Monitor (CAM) who will report to the Court and/or, through the United States Probation Office, during the period of probation. The CAM will be responsible for overseeing the implementation of both the national and state comprehensive environmental compliance plans as well as the bromide claims process. Within 30 days of judgment being entered in this case, the defendants shall submit to the Court and the government a list of three qualified candidates for the position of CAM. The Court directs that proposed candidates have a staff, or be able to retain staff, and have experience in regulatory programs under the United States and North Carolina Environmental Law. Further, the CAM must have sufficient expertise and competence to assess whether the defendants have adequate management systems in place to ensure regulatory compliance, document noncompliance, and to prevent future noncompliance. Finally, the CAM must have sufficient expertise to review claims for reimbursement under the process for identifying, verifying, and providing restitution for claims related to bromide discharge.

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<sup>1</sup> Reference to "the defendants" in this document refers collectively to the defendant named in this Judgment along with its codefendants, Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc.



- 2B. The government shall have 15 days from receipt of the nominations to file any reasonable objection to any or all of the proposed candidates. In the event the government lodges an objection to a candidate, the defendant will have an additional 15 days to nominate replacement candidates. The government, in turn, has the right to lodge additional objections to any replacement candidate as detailed above. The deadline for filing a finalized list of candidates for the Court's review shall not exceed 75 days from entry of judgment in this case. Upon receipt of a final list of candidates, the Court shall select a CAM. In the event that the Court does not find any of the candidates satisfactory or if, during any point in the term of probation, the Court does not find the work of the selected CAM satisfactory, the defendants will be directed to nominate additional candidates as outlined above. Compensation for the CAM will be determined and approved by the Court as provided in a separate Order to be issued in due course.
- 2C. Within the first ninety (90) days of appointment, the CAM shall establish a schedule for conducting environmental audits of each of the defendant's coal ash impoundments on an annual basis. Defendants may request that the CAM accept any full environmental audit prepared by ABSAT or a similar organization in that same calendar year for facilities subject to the audits under the Nationwide Environmental Compliance Program (NECP) and Comprehensive Statewide Environmental Compliance Plan (ECP-NC). The CAM may reject any such request by defendants if the CAM concludes that the proposed environmental audit is not sufficiently comprehensive or not prepared by a competent organization. Copies of the environmental audit reports shall be posted on the defendants' company webpage(s) and accessible to the public. Subject to approval of the CAM, the defendant may redact confidential business information or any information it reasonably believes could impair the security of its operations before such audits or reports are posted for public access. The CAM shall inspect such proposed redactions to determine the propriety of the redactions. Notwithstanding the foregoing, unredacted copies shall be provided to the Court and the United States Probation Office. Defendants may seek to have the filings placed under seal to protect any information that the CAM has deemed to warrant redaction.
- 2D. The CAM shall provide copies of the reports, as posted, to the United States Attorneys' Offices for the Eastern, Middle, and Western Districts of North Carolina; the Department of Justice – Environmental Crimes Section; the United States Environmental Protection Agency – Criminal Investigation Division; and the United States Environmental Protection Agency – Legal Counsel Division. If the reports contain redactions, any of these parties may inspect the redactions to determine the propriety of the redactions. The Court shall be the final arbiter of any challenge to the redactions.



- 2E. On an annual basis or as often as the Court directs, the CAM shall provide a report in writing to the Court, through the United States Probation Office, demonstrating whether the defendant is in compliance with the NECP and the ECP-NC. The report shall include, among other things, a detailed description of all excavation, closure, and proper remediation of the coal ash impoundments located in North Carolina and addressed in the ECP-NC, and the status of defendant's compliance with all appropriate environmental laws and regulations in connection with the management of its coal ash impoundments in North Carolina and elsewhere.
- 2F. The defendant shall post copies of any environmental compliance audits, annual reports, and/or any other reports prepared pursuant to the NECP or ECP-NC on a company web page with public access. All posts shall remain on the company website for the entire term of probation. As new documents are posted, previous posts may be moved to an archived location provided that they remain accessible to the public through the company website. Subject to approval by the CAM, defendant may redact confidential business information or any information it reasonably believes could impair the security of its operations before such audits or reports are posted for public access. The CAM shall inspect such proposed redactions to determine the propriety of the redactions. Notwithstanding the foregoing, unredacted copies shall be provided to the Court and the United States Probation Office. The defendant may seek to have the filings placed under seal to protect any information the CAM has deemed to warrant redaction.
- 2G. The CAM shall contemporaneously provide copies, as posted, of any reports to the United States Attorneys' Offices for the Eastern, Middle, and Western Districts of North Carolina; the Department of Justice – Environmental Crimes Section; the United States Environmental Protection Agency – Criminal Investigation Division; and the United States Environmental Protection Agency – Legal Counsel Division. If the reports contain redactions, any of these parties may inspect the redactions and challenge the propriety of the redactions subject to review by this Court.
- 2H. The defendants shall establish and maintain, within thirty (30) days of the appointment of a CAM by the Court, a toll-free hotline that will be answered twenty-four (24) hours per day, seven (7) days per week, through which any person may report suspected violations of applicable environmental laws or regulations, or violations of the NECP or ECP-NC. The defendants may utilize existing toll-free hotlines subject to approval by the CAM. The defendants shall, within 30 days of the appointment of a CAM by the Court, also create an electronic mail inbox accessible from its webpages and accessible through a share link, through which any employee of Duke Energy Corporation, its subsidiaries, or its affiliates, or any other person may report suspected violations of applicable environmental laws or regulations or violations of the NECP or ECP-NC. All suspected violations will be reported to the CAM within five (5) business days of receipt. In the event that the defendants establish the toll-free hotline prior to the appointment of the CAM, the compliance officer shall maintain a record of the investigation and disposition of



each suspected violation and provide such matters, as requested, to the United States Probation Office. Upon appointment of the CAM, the compliance officer shall disclose to the CAM any previous record of the investigation and the disposition of each suspected violation.

- 2I. The defendant shall, within thirty (30) days of the appointment of a CAM in this case, apprise employees and the public of the availability of the toll-free hotline and electronic mail inbox by posting notices on the Internet, Intranet (known within Duke Energy Corporation as the "Portal"), by distributing notice via its electronic mail system, and by publication in appropriate employee work areas and community outlets. Additional notifications will be made periodically as directed by the CAM during the period of probation. All reports of suspected violations of applicable environmental requirements, the NECP, or the ECP-NC shall promptly be provided to the compliance officer for further action. The compliance officer shall maintain a record of the investigation and disposition of each suspected violation and disclose such matters in monthly reports to the CAM.

#### **Environmental Compliance**

- 3A. The defendant shall cause, assist, and otherwise take all steps necessary to develop, adopt, and implement a Comprehensive Nationwide Environmental Compliance Plan (NECP) and a Comprehensive Statewide Environmental Compliance Plan (ECP-NC), which incorporates all requirements of the NCEP, as approved by the court, during the term of probation. Consistent with the provisions of the Plea Agreement, the defendant shall develop and adopt the NECP and ECP-NC within seventy (70) days of the selection of the CAM. A copy of the final NECP and ECP-NC shall be submitted to the Court, the United States Probation Office, the United States Attorneys' Offices for the Eastern, Middle, and Western Districts of North Carolina; the Department of Justice – Environmental Crimes Section; the United States Environmental Protection Agency – Criminal Investigation Division; and the United States Environmental Protection Agency – Legal Counsel Division for review. Final approval of the NECP and ECP-NC will be made by the Court.
- 3B. Upon approval of the compliance plans by the Court, the defendant shall, either in written correspondence or through electronic mail communication, notify its employees of its criminal behavior and the compliance plan. In addition, the defendant shall cause a notice containing the same information to be sent to the shareholders of Duke Energy Corporation in a form and date as prescribed by the CAM.
- 3C. The defendant shall maintain and fund the operation of all of the compliance organizations created as a result of the instant offenses, including: Ash Basin Strategic Action Team (ABSAT), the Coal Combustion Products Organization, and the National Ash Management Advisory Board. To the extent necessary, the defendants may transfer operations and responsibilities



between internal organizations or adjust funding of such organizations as deemed appropriate by the CAM. The defendant and the CAM will notify the United States Probation Office of any substantial changes to these organizations. The defendant shall pay its proportionate share of the continued maintenance and operations of these organizations. Failure to pay by any of the other defendants individually will not relieve the defendant of its obligation to fund these organizations.

- 3D. The defendant shall, with respect to each of the facilities with coal ash impoundments in North Carolina, identify or establish a point of contact for the CAM within each of the following three business services: ABSAT; Environmental, Health & Safety; and Coal Combustion Products.
- 3E. The defendant shall ensure that Duke Energy Carolinas, LLC, and Duke Energy Progress, Inc., comply with all legislative and regulatory mandates concerning closure of the coal ash impoundments which it operates, and shall ensure complete excavation and closure of all of the coal ash impoundments at the Dan River, Riverbend, Sutton, and Asheville facilities in accordance with federal and state laws, including the United States Environmental Protection Agency's ("EPA") 2014 final rule governing the disposal of coal combustion residuals from electric utilities ("CCR Rule") and North Carolina's Coal Ash Management Act of 2014, by the deadlines established by those laws. The defendant shall act diligently and in good faith to help its codefendants to meet projected critical milestones in the closure plans for each site as set forth in the following documents: Duke Energy's Dan River Steam Station Coal Ash Excavation Plan dated November 13, 2014; Duke Energy's Riverbend Steam Station Coal Ash Excavation Plan dated November 13, 2014; Duke Energy's L.V. Sutton Electric Plant Coal Ash Excavation Plan dated November 13, 2014; and Duke Energy's Asheville Steam Electric Generating Plant Coal Ash Excavation Plan dated November 13, 2014, as may be amended with the approval of the North Carolina Department of Environment and Natural Resources.
- 3F. Every six months, or as often as deemed necessary by the CAM, the defendant shall assist and coordinate with its codefendants to ensure that they provide the CAM with a detailed, consolidated description of its efforts to facilitate the excavation of coal ash and the closure of all of the coal ash impoundments at the Dan River, Riverbend, Sutton and Asheville facilities. Further, the defendant shall inform the CAM as to whether it has met the critical milestones set forth in the Excavation Plans in the time period since the last report. The defendant shall also include the status of all permits and permit applications with any regulatory body, including but not limited to North Carolina Department of Environment and Natural Resources. The defendant shall also make such reports publicly available on its website throughout the duration of its term of probation. The CAM shall immediately notify the Court, the United States Probation Office, and the parties if it has any concerns regarding whether the defendant has acted diligently or in good faith to meet its obligations under this provision.



- 3G. The defendants shall coordinate to determine the volume of wastewater and coal ash in each of its wet-storage coal ash impoundments in North Carolina every six months or as directed by the CAM. Additional determinations shall be made following the conclusion of activities that significantly change the volumes of materials in the impoundments, including but not limited to temporary rerouting of waste streams other than sluiced coal ash to the ash impoundment, dredging, and dewatering. Written or electronic records of the volumes shall be maintained by the defendants in a location(s) accessible to facility staff, the defendant's employees responsible for making environmental or emergency reports, and the CAM.
- 3H. The defendant shall, by November 14, 2019, or no later than six months prior to the scheduled termination date of probation, provide the Court, the United States Probation Office, the CAM, and the government with a full report of its efforts to facilitate the excavation of coal ash and closure of all of the coal ash impoundments at Dan River, Riverbend, Sutton, Asheville, and the anticipated completion date.

#### **Comprehensive Training Program**

- 4A. The defendant shall, within the first 12 months of probation, adopt, implement, and enforce a comprehensive training program to educate all domestic employees of Duke Energy Corporation and its wholly-owned or operated affiliates on the environmental impact of coal ash impoundment operations and to be aware of the procedures and policies that form the basis of the NECP and ECP-NC. The training program, shall, to the extent practicable, ensure that every employee of Duke Energy Corporation understands applicable compliance policies and is able to integrate the compliance objectives in the performance of his/her job. The training shall include applicable notice and reporting requirements in the event of a release or discharge. Subject to the approval of the CAM, defendant may develop different training programs that are tailored to the employee's specific job description and responsibilities as long as the overall goal of the training requirement is met. The defendant shall also provide to employees training and written materials describing the safe and proper handling of pollutants, hazardous substances, and wastes. Copies of all written materials and training curricula shall be provided to the CAM and the United States Probation Officer upon request.

#### **Designated Point of Contact**

- 6A. The defendant shall, within 60 days of this Judgment, identify or establish a position as compliance officer at the Vice President level or higher who will liaise with the CAM and the United States Probation Office. The designated compliance officer shall have, among other duties, the primary responsibility for ensuring compliance with applicable environmental requirements and requirements of the NECP and ECP-NC. The compliance officer shall submit detailed reports to the CAM regarding the development, implementation, and enforcement of the

NECP and ECP-NC as directed by the CAM, but no less than two times per year. The first report shall also include an explanation of the current corporate structure responsible for the operation and control of the coal ash impoundments and the names of the individuals filling the relevant positions. With the approval of the CAM, the compliance officers for the defendants may elect to submit a joint report detailing the required information for all three defendants. Any changes to the corporate coal ash oversight structure shall be immediately forwarded to the CAM and included in the next regular report.

- 6B. Subject to the approval of the CAM, defendant may redact confidential business information or any information it reasonably believes could impair the security of its operations before such reports are posted for public access. The defendant may seek to have the unredacted report submitted to the Court placed under seal to protect any information that the CAM or Court has deemed to warrant redaction. The CAM shall contemporaneously provide copies of the reports (as posted) to the United States Attorneys' Offices for the Eastern, Middle, and Western Districts of North Carolina; the Department of Justice – Environmental Crimes Section; the United States Environmental Protection Agency – Criminal Investigation Division; and the United States Environmental Protection Agency – Legal Counsel Division. If the reports contain redactions, any of these parties may inspect the redactions and challenge the propriety of the redactions. The Court shall be the final arbiter of any challenge by either party as to the redactions.



# ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Parts 257 and 261

[EPA-HQ-RCRA-2009-0640; FRL-9919-44-OSWER]

RIN-2050-AE81

## Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is publishing a final rule to regulate the disposal of coal combustion residuals (CCR) as solid waste under subtitle D of the Resource Conservation and Recovery Act (RCRA). The available information demonstrates that the risks posed to human health and the environment by certain CCR management units warrant regulatory controls. EPA is finalizing national minimum criteria for existing and new CCR landfills and existing and new CCR surface impoundments and all lateral expansions consisting of location restrictions, design and operating criteria, groundwater monitoring and corrective action, closure requirements and post closure care, and recordkeeping, notification, and internet posting requirements. The rule requires any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent's groundwater protection standard to stop receiving CCR and either retrofit or close, except in limited circumstances. It also requires the closure of any CCR landfill or CCR surface impoundment that cannot meet the applicable performance criteria for location restrictions or structural integrity. Finally, those CCR surface impoundments that do not receive CCR after the effective date of the rule, but still contain water and CCR will be subject to all applicable regulatory requirements, unless the owner or operator of the facility dewater and installs a final cover system on these inactive units no later than three years from publication of the rule. EPA is deferring its final decision on the Bevill Regulatory Determination because of regulatory and technical uncertainties that cannot be resolved at this time.

**DATES:** This final rule is effective on October 14, 2015.

**ADDRESSES:** EPA has established three dockets for this regulatory action under

Docket ID No. EPA-HQ-RCRA-2009-0640, Docket ID No. EPA-HQ-RCRA-2011-0392, and Docket ID No. EPA-HQ-RCRA-2012-0028. All documents in these dockets are available at <http://www.regulations.gov>. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the OSWER Docket, EPA/DC, WJC West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC 20460. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OSWER Docket is 202-566-0276.

**FOR FURTHER INFORMATION CONTACT:** For questions on technical issues: Alexander Livnat, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5304P; telephone number: (703) 308-7251; fax number: (703) 605-0595; email address: [livnat.alexander@epa.gov](mailto:livnat.alexander@epa.gov), or Steve Souders, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5304P; telephone number: (703) 308-8431; fax number: (703) 605-0595; email address: [souders.steve@epa.gov](mailto:souders.steve@epa.gov). For questions on the regulatory impact analysis: Richard Benware, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5305P; telephone number: (703) 308-0436; fax number: (703) 308-7904; email address: [benware.richard@epa.gov](mailto:benware.richard@epa.gov). For questions on the risk assessment: Jason Mills, Office of Resource Conservation and Recovery, Environmental Protection Agency, 5305P; telephone number: (703) 305-9091; fax number: (703) 308-7904; email address: [mills.jason@epa.gov](mailto:mills.jason@epa.gov).

For more information on this rulemaking please visit <http://www.epa.gov/epawaste/nonhaz/industrial/special/fossil/index.htm>.

### SUPPLEMENTARY INFORMATION:

#### A. Does this action apply to me?

This rule applies to all coal combustion residuals (CCR) generated by electric utilities and independent power producers that fall within the North American Industry Classification

System (NAICS) code 221112 and may affect the following entities: Electric utility facilities and independent power producers that fall under the NAICS code 221112. The industry sector(s) identified above may not be exhaustive; other types of entities not listed could also be affected. The Agency's aim is to provide a guide for readers regarding those entities that potentially could be affected by this action. To determine whether your facility, company, business, organization, etc., is affected by this action, you should refer to the applicability criteria discussed in Unit VI.A. of this document. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

#### B. What actions are not addressed in this rule?

This rule does not address the placement of CCR in coal mines. The U.S. Department of Interior (DOI) and, as necessary, EPA will address the management of CCR in minefills in separate regulatory action(s), consistent with the approach recommended by the National Academy of Sciences, recognizing the expertise of DOI's Office of Surface Mining Reclamation and Enforcement in this area. See Unit VI of this document for further details. This rule does not regulate practices that meet the definition of a beneficial use of CCR. Beneficial uses that occur after the effective date of the rule need to determine if they comply with the criteria contained in the definition of "beneficial use of CCRs." This rule does not affect past beneficial uses (*i.e.*, uses completed before the effective date of the rule.) See Unit VI of this document for further details on proposed clarifications of beneficial use. Furthermore, CCR from non-utility boilers burning coal are also not addressed in this final rule. EPA will decide on an appropriate action for these wastes through a separate rulemaking effort. See Unit IV of this document for further details. Finally, this rule does not apply to municipal solid waste landfills (MSWLFs) that receive CCR for disposal or use as daily cover.

#### C. The Contents of This Preamble Are Listed in the Following Outline

- I. Executive Summary
- II. Statutory Authority
- III. Background
- IV. Bevill Regulatory Determination Relating to CCR From Electric Utilities and Independent Power Producers
- V. Development of the Final Rule—RCRA Subtitle D Regulatory Approach



COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF EAST KENTUCKY POWER	)	
COOPERATIVE, INC. FOR A CERTIFICATE OF	)	
PUBLIC CONVENIENCE AND NECESSITY FOR	)	
CONSTRUCTION OF AN ASH LANDFILL AT J.K.	)	CASE NO.
SMITH STATION, THE REMOVAL OF IMPOUNDED	)	2014-00252
ASH FROM WILLIAM C. DALE STATION FOR	)	
TRANSPORT TO J.K. SMITH AND APPROVAL OF A	)	
COMPLIANCE PLAN AMENDMENT FOR	)	
ENVIRONMENTAL SURCHARGE RECOVERY	)	

ORDER

On September 8, 2014, East Kentucky Power Cooperative, Inc. ("EKPC") filed an application, pursuant to KRS 278.020(1), KRS 278.183, and 807 KAR 5:001, Sections 14 and 15, seeking a Certificate of Public Convenience and Necessity ("CPCN") to construct an ash landfill at its J.K. Smith Generating Station ("Smith Landfill") to receive coal ash removed and transported from EKPC's William C. Dale Generating Station ("Dale Station"). EKPC also seeks approval of an amendment to its Environmental Compliance Plan for purposes of recovering the costs for the proposed project through EKPC's environmental surcharge. The total cost of the project is approximately \$26.9 million.

On September 26, 2014, the Commission issued an Order establishing a procedural schedule for the processing of this matter. The procedural schedule established a deadline for requests to intervene and provided for two rounds of discovery on EKPC's application, the opportunity for the filing of intervenor testimony, discovery upon intervenor testimony, and the opportunity for EKPC to file rebuttal



testimony. The Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention ("AG"), and Grayson Rural Electric Cooperative Corporation ("Grayson") were granted intervention. A formal evidentiary hearing was conducted on February 3, 2015. EKPC filed responses to post-hearing information requests on February 10, 2015. EKPC submitted its post-hearing brief on February 17, 2015. On February 19, 2015, Grayson filed a motion requesting a one-week extension, or until February 24, 2015, in which to file its post-hearing brief. Grayson stated that it was unable to timely file its post-hearing brief due to inclement winter weather. On February 24, 2015, Grayson filed its post-hearing brief. On February 19, 2015, the AG filed a motion requesting an extension of time in which to file a paper copy of his brief. The AG noted that on February 17, 2015 an electronic version of his brief was transmitted by e-mail to all parties and Commission Staff. However, due to inclement weather on February 16, 2015, the AG was unable to file a paper copy of his brief by the February 17, 2015 deadline. On February 19, 2015, the AG filed a paper copy of his brief with the Commission. The matter now stands submitted to the Commission for a decision.

The Commission finds that the Grayson and the AG have established good cause to permit them an extension of time in which to file their post-hearing briefs. The briefs of the AG and Grayson, filed on February 19, 2015, and February 24, 2015, respectively, are accepted for filing and deemed part of the official record of this matter.

## BACKGROUND

EKPC's Dale Station is located on the Kentucky River at Ford, Clark County, Kentucky.<sup>1</sup> Dale Station consists of four base-load coal units.<sup>2</sup> Dale Units 1 and 2 were commissioned in 1954, and each is rated at 25 megawatts ("MW").<sup>3</sup> Dale Units 3 and 4, each rated at 75 MW, were commissioned in 1957 and 1960, respectively.<sup>4</sup> The Dale Station currently has two ash ponds and one dry storage area for coal ash (collectively "Dale Ash Ponds").<sup>5</sup> EKPC currently has two types of permit-by-rule at the Dale Station. The first is a permit-by-rule pursuant to 401 KAR 45:060, Section 1(5), for the Dale Ash Ponds that are used as impoundments for the storage of coal ash and operated in compliance with a Kentucky Pollutant Discharge Elimination System permit.<sup>6</sup> The second is a permit-by-rule pursuant to 401 KAR 45:060, Section 1(7) for structural fills that were built at Dale Station by beneficially reusing coal ash.<sup>7</sup> Currently, the Dale Ash Ponds contain approximately 560,000 cubic yards of coal ash,<sup>8</sup> 80 percent of which is fly ash and 20 percent consists of bottom ash.<sup>9</sup>

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<sup>1</sup> Application at 1.

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> Direct Testimony of Jerry B. Purvis ("Purvis Testimony") at 7.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> Direct Testimony of Matt Clark ("Clark Testimony") at 17.

<sup>9</sup> Purvis Testimony at 5.



Beginning in 1985, EKPC used the Hancock Creek Landfill to permanently dispose of coal ash produced by the Dale Station. The Hancock Creek Landfill reached maximum capacity and was closed in 2010. At that time, EKPC began an evaluation to identify a new disposal site for the coal ash generated at the Dale Station. EKPC and outside consultants<sup>10</sup> identified and examined the following alternatives.

1. Alternative 1 – Construct a new special waste landfill at the Dale Station.

2. Alternative 2 – Construct a new special waste landfill in close proximity to the Dale Station. EKPC was unable to negotiate a deal with the landowners for the purchase of the property identified by EKPC as potentially suitable to develop a special waste landfill.<sup>11</sup>

3. Alternative 3 – Remove Dale Station coal ash and transport by truck to EKPC's Spurlock Generating Station special waste landfill ("Spurlock Landfill"). The cost for this alternative was approximately \$35.6 million.<sup>12</sup>

4. Alternative 4 – Remove Dale Station coal ash and transport by rail to Spurlock Landfill. The cost for this alternative was approximately \$30.7 million.<sup>13</sup>

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<sup>10</sup> EKPC retained Kenvirons, Inc. to provide expertise on landfill issues; Redwing Ecological Services, Inc. to provide expertise on water and wetland impacts; and Burns and McDonnell to evaluate on-site options related to coal ash generated at the Dale Station. See EKPC's Response to Commission Staff's Initial Request for Information, Item 3.

<sup>11</sup> Clark Testimony at 7-8.

<sup>12</sup> Clark Testimony at 8-11; and Application at 11.

<sup>13</sup> *Id.*

5. Alternative 5 – Remove Dale Station coal ash and transport by truck to a private solid waste landfill in Montgomery County, Kentucky, operated by Rumpke of Kentucky. The cost for this alternative was approximately \$32.9 million.<sup>14</sup>

6. Alternative 6 – On-site closure of Dale Ash Ponds by consolidating the coal ash in Ash Pond 2 and installing a cap consisting of a geomembrane, 18 inches of protective soil cover, followed by six inches of topsoil for seeding. Burns & McDonnell estimated the cost for this alternative to be \$34.8 million.<sup>15</sup>

7. Alternative 7 – On-site closure of Dale Ash Ponds by dewatering the wet coal ash in Ash Pond 2, then placing an intermediate soil and geomembrane liner on top of Ash Pond 2, consolidating the remaining dewatered coal ash from Ash Ponds 3 and 4 over the intermediate liner system and installing a final cap over the coal ash. A protective soil cover of 18 inches and six inches of topsoil cover would then be placed over the cap. Burns & McDonnell estimated the cost for this alternative at \$36.6 million.<sup>16</sup>

8. Alternative 8 – Remove Dale Station coal ash and transport by truck to a newly constructed Smith Landfill. This alternative is the subject of the instant application.

As of April 2014, EKPC made the decision to retire Dale Units 1 and 2 and is currently exploring the marketing of the assets of those units.<sup>17</sup> Also at that time, EKPC decided to place Dale Units 3 and 4 into indefinite storage beginning April 2015 as a

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<sup>14</sup> *Id.*

<sup>15</sup> Clark Testimony at 12.

<sup>16</sup> *Id.*

<sup>17</sup> Direct Testimony of Don Mosier at 4.



result of the Mercury and Air Toxics Standards ("MATS") rule.<sup>18</sup> EKPC subsequently sought and obtained, at the behest of its regional transmission operator, PJM Interconnection, LLC, a one-year extension of the deadline to comply with MATS, or through April 2016, with respect to Dale Units 3 and 4.<sup>19</sup>

EKPC asserts that once Dale Units 3 and 4 are placed in indefinite storage and the Dale Generating Station is effectively closed, the Dale Ash Ponds would no longer be used as impoundments and, as a result, would lose their permit by rule status provided by 401 KAR 45:060, Section 1(4).<sup>20</sup> EKPC contends that it is faced with two feasible options for complying with state environmental requirements: either obtain a permit to operate the Dale Ash Ponds as a special waste landfill or remove the coal ash currently stored in the Dale Ash Ponds and permanently dispose of it in the off-site Smith Landfill, which has already been permitted as a special waste landfill.<sup>21</sup>

#### PROPOSED PROJECT

EKPC maintains that the proposed project represents the most prudent and least-cost alternative to ensure compliance with applicable state environmental law. EKPC notes that the design of the Smith Landfill will also comply with the Disposal of Coal Combustion Residuals from Electric Utilities rule ("CCR Rule") that was recently issued by the U.S. Environmental Protection Agency on December 19, 2014. Further, EKPC points out that it has consulted with KDWM regarding the closing of the Dale Ash

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<sup>18</sup> *Id.*

<sup>19</sup> Supplemental Direct Testimony of Don Mosier at 3; and EKPC's Response to Commission Staff's Third Request for Information, Item 1.

<sup>20</sup> Purvis Testimony at 8.

<sup>21</sup> *Id.* at 11. On July 29, 2013, EKPC obtained a permit from the Kentucky Division of Waste Management ("KDWM") to construct a special waste landfill at the Smith Generating Station.

Ponds and KDWM has indicated in writing that it is in agreement with EKPC's proposed plan to close the impoundments.<sup>22</sup>

EKPC contends that the on-site alternative, Alternative 1, was unworkable due to the physical constraints of the property itself. EKPC noted that one possible area within the Dale Station's 80-acre site was adjacent to the Kentucky River and within the 100-year floodplain, which would not have satisfied Special Waste Landfill siting requirements. The other area at the Dale Station was unsuitable for development of a landfill due to its location on a severe slope above a public road, limited size, and proximity to neighboring homes.<sup>23</sup>

EKPC rejected Alternatives 3, 4, 5, 6, and 7 after concluding that the costs associated with these alternatives were greater than the cost of the proposed project. EKPC also stated that Alternatives 6 and 7, like Alternative 1, would have kept the coal ash produced by the Dale Station permanently located adjacent to the Kentucky River, raising siting-requirement concerns that would make it unlikely that EKPC could successfully obtain a special waste landfill permit.<sup>24</sup>

EKPC states that the Smith Generating Station site, which is located on 3,272 acres, would allow for the construction of the Smith Landfill of sufficient size to provide for the required disposal of coal ash from the Dale Station, along with associated

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<sup>22</sup> Purvis Testimony at 15.

<sup>23</sup> Clark Testimony at 6-7.

<sup>24</sup> *Id.* at 13.



infrastructure and necessary buffers to adjoining property owners.<sup>25</sup> The size of the Smith Landfill also provides acres for borrowing soil essential to construction of a landfill and backfilling the Dale Ash Ponds.<sup>26</sup> Although the total permitted capacity under the special waste landfill permit is 3,834,579 cubic yards, EKPC is requesting to construct a 750,000 cubic yard landfill cell.<sup>27</sup> Thus, the Smith Landfill could be used to dispose of coal ash from EKPC's Spurlock or Cooper Generating Stations in the event of an emergency.

The proposed project would consist of construction of the Smith Landfill; dewatering wet ash at Dale Ash Ponds; discharge of treated water from the site; relocation of transmission lines at the Dale Station; removal of coal ash from the Dale Ash Ponds and hauling it to the Smith Landfill; and restoring the Dale Ash Ponds site after the ash is removed.<sup>28</sup> The current project schedule assumes that the Smith Landfill construction will begin in April 2015 and will be able to accept dry coal ash from the Dale Station for use as a protective cover by late summer/early fall of 2015.<sup>29</sup> Remaining coal ash from the Dale Ash Ponds will be hauled starting in April 2016.<sup>30</sup> The duration of the hauling is estimated to take 53 weeks and is estimated to be completed over the course of a small part of the 2015 construction season and over

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<sup>25</sup> *Id.* at 14.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 15-16.

<sup>28</sup> Direct Testimony of Ed Tohill ("Tohill Testimony") at 10.

<sup>29</sup> Clark Testimony at 19.

<sup>30</sup> Tohill Testimony, Exhibit ET-1, at 6-1.

most of the 2016 and 2017 construction seasons, with the project expected to be completed by November 2017.<sup>31</sup>

The proposed hauling plan to transport the coal ash from the Dale Station to the Smith Landfill is 27.3 miles each way and encompasses state highways and interstates, with the exception of plant drives.<sup>32</sup> EKPC estimates that 132 truckloads of coal ash can be hauled from Dale Station to the Smith Landfill each eight-hour work day.<sup>33</sup> EKPC asserts that the haul route has been publicly vetted and was incorporated into the permit for the Smith Landfill.<sup>34</sup>

## DISCUSSION

### CPCN

No utility may construct or acquire any facility to be used in providing utility service to the public until it has obtained a CPCN from this Commission.<sup>35</sup> To obtain a CPCN, the utility must demonstrate a need for such facilities and an absence of wasteful duplication.<sup>36</sup>

"Need" requires:

[A] showing of a substantial inadequacy of existing service, involving a consumer market sufficiently large to make it economically feasible for the new system or facility to be constructed or operated.

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<sup>31</sup> *Id.*, Exhibit ET-1, at 6-1 and 6-2.

<sup>32</sup> Tohill Testimony at 16.

<sup>33</sup> *Id.*

<sup>34</sup> Clark Testimony at 20.

<sup>35</sup> KRS 278.020(1).

<sup>36</sup> *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 252 S.W.2d 885 (Ky. 1952).



[T]he inadequacy must be due either to a substantial deficiency of service facilities, beyond what could be supplied by normal improvements in the ordinary course of business; or to indifference, poor management or disregard of the rights of consumers, persisting over such a period of time as to establish an inability or unwillingness to render adequate service.<sup>37</sup>

"Wasteful duplication" is defined as "an excess of capacity over need" and "an excessive investment in relation to productivity or efficiency, and an unnecessary multiplicity of physical properties."<sup>38</sup> To demonstrate that a proposed facility does not result in wasteful duplication, we have held that the applicant must demonstrate that a thorough review of all reasonable alternatives has been performed.<sup>39</sup> Selection of a proposal that ultimately costs more than an alternative does not necessarily result in wasteful duplication.<sup>40</sup> All relevant factors must be balanced.<sup>41</sup> The statutory touchstone for ratemaking in Kentucky is the requirement that rates set by the Commission must be fair, just and reasonable.<sup>42</sup>

EKPC contends that the proposed project satisfies the criteria for issuing a CPCN under KRS 278.020(1) because the Smith Landfill is needed to allow EKPC to

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<sup>37</sup> *Id.* at 890.

<sup>38</sup> *Id.*

<sup>39</sup> Case No. 2005-00142, *Joint Application of Louisville Gas and Electric Company and Kentucky Utilities Company for a Certificate of Public Convenience and Necessity for the Construction of Transmission Facilities in Jefferson, Bullitt, Meade, and Hardin Counties, Kentucky* (Ky. PSC Sept. 8, 2005).

<sup>40</sup> See *Kentucky Utilities Co. v. Pub. Serv. Comm'n*, 390 S.W.2d 168, 175 (Ky. 1965). See also Case No. 2005-00089, *Application of East Kentucky Power Cooperative, Inc. for a Certificate of Public Convenience and Necessity for the Construction of a 138 kV Electric Transmission Line in Rowan County, Kentucky* (Ky. PSC Aug. 19, 2005), Final Order.

<sup>41</sup> Case No. 2005-00089, *East Kentucky Power Cooperative, Inc.* (Ky. PSC Aug. 19, 2005), Final Order at 6.

<sup>42</sup> KRS 278.190(3).

comply with existing state environmental regulations and the recently issued federal CCR Rule and will not result in wasteful duplication.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds that EKPC has sufficiently demonstrated that there is a need for the project. We note that the Dale Ash Ponds will lose its permit by rule status due to the imminent retirement of the Dale Station, and EKPC would need to obtain a special waste permit to continue the operation of the existing impoundments or find a reasonable alternative method to dispose of the coal ash currently stored at the Dale Ash Ponds. The proposed project is needed to address the disposition of the Dale Ash Ponds; the fact that Dale Units 3 and 4 will not be retired until April 2016 does not change the need for the proposed project, because those two units will ultimately be decommissioned.

The Commission further finds that the proposed alternative reflects the most reasonable least-cost alternative to address the permanent disposal of the Dale Ash Ponds coal ash. The proposed Smith Landfill project was the least expensive option, ranging from approximately \$5 million to \$10 million lower, as compared to the other alternatives evaluated and considered by EKPC. Accordingly, the Commission finds that EKPC should be authorized a CPCN for the construction of the proposed Smith Landfill project.

#### Applicability of KRS 278.183

EKPC contends that the proposed project satisfies the requirements for being included in its Environmental Compliance Plan under KRS 278.183. EKPC asserts that KRS 278.183 guarantees a utility the right to recover costs associated with complying



with state and federal environmental requirements that apply to coal-combustion wastes and by-products from facilities used for production of energy from coal. EKPC argues that the bottom ash and fly ash that are stored at the Dale Ash Ponds are coal combustion wastes. EKPC further argues that the ash would qualify as a by-product of a facility used for the production of energy from coal because it was produced in the course of the Dale Station's production of electricity by burning coal over the course of its operations. EKPC maintains that under existing state and newly issued federal rules regarding the permanent storage of such coal-combustion wastes and by-products, removal of the ash from the Dale Station is necessary.

The AG did not express a specific position on this issue. The AG characterized the instant issue of using KRS 278.183 as a recovery mechanism for costs associated with the retirement of aging coal-fired generating plants as a new use of this recovery mechanism. Because this is a matter of first impression before the Commission, the AG advocates for a cautious expansion of the use of the environmental surcharge statute and that all similar future projects should be evaluated strictly on a case-by-case basis, supported by findings of fact specific to the application presented, and not based on the mere approval or disapproval of similar past projects previously adjudged by the Commission.

Grayson contends that "EKPC is attempting to stretch the bounds of the environmental surcharge statute by requesting that all the costs associated with"<sup>43</sup> the proposed project be recovered pursuant to KRS 278.183. Grayson further contends that the statute's intent was for a utility to be allowed recovery only for the costs of

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<sup>43</sup> Grayson's Post-Hearing Brief at 4.

having scrubbers and that the expenses associated with coal ash removal projects cannot be recovered through the environmental surcharge because the production of coal ash "happened a long time ago"<sup>44</sup> and not as a result of new environmental law.

Having reviewed the record and being otherwise sufficiently advised, the Commission finds, based on the unique circumstances presented herein, that EKPC should be allowed to recover the costs associated with the proposed project via the environmental surcharge mechanism. KRS 278.183(1) provides, in relevant part, as follows:

a utility shall be entitled to the current recovery of its costs of complying with the Federal Clean Air Act as amended and those federal, state, or local environmental requirements which apply to coal combustion wastes and by-products from facilities utilized for production of energy from coal in accordance with the utility's compliance plan . . . .

Here, EKPC proposes a plan that would allow it to be in compliance with federal and state environmental requirements applicable to coal-combustion wastes and by-products from facilities utilized for production of energy from coal. The proposed Smith Landfill project serves as a means by which EKPC will be able to dispose of the coal ash currently stored at the Dale Ash Ponds in a more permanent manner and be in compliance with Kentucky's special landfill waste requirements and the standards recently imposed by the CCR Rule. Accordingly, EKPC should be allowed to recover the costs associated with the proposed project via the environmental surcharge mechanism.

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<sup>44</sup> *Id.*



### Treatment of the Removal and Hauling Costs Associated with the Proposed Project

EKPC proposes to recover the total project cost of \$26,962,000 through the environmental surcharge over a ten-year period. The project consists of three major components.

- Construction of the Smith Landfill \$4,000,000
- Reclamation of the Dale Ash Ponds site \$13,095,807
- Hauling the ash from Dale Station to the Smith Landfill \$9,866,193

In support of its request to capitalize the ash transfer costs, EKPC states that the transfer costs of the ash to the Smith Landfill are costs associated with the retirement of the Dale Ash Ponds. EKPC points out that the accounting treatment would be to accumulate these costs on a retirement work order as prescribed by the Rural Utilities Service ("RUS") Uniform System of Accounts ("USoA") for retirement costs. EKPC proposes that it be permitted to treat these accumulated costs as capital expenditures for environmental surcharge purposes. Upon completion of the transfer of the ash to the Smith Landfill, EKPC proposes to recover the amortization of the ash transfer costs, and a return on the unamortized balance over a ten-year period.

EKPC notes that the instant matter is distinguishable from the transfer of ash to its now closed Hancock Creek Landfill, and cited the treatment afforded Louisville Gas & Electric ("LG&E") in Case No. 2004-00421.<sup>45</sup> EKPC states that the transfer of ash to the Hancock Creek Landfill was from operating the Dale Station, and the appropriate accounting treatment was to expense those costs as incurred over a 25-year period. In the instant matter, EKPC asserts there are no significant ongoing operations at Dale

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<sup>45</sup> Case 2004-000421, The Application of Louisville Gas and Electric Company for Approval of Its 2004 Compliance Plan for Recovery by Environmental Surcharge (Ky. PSC July 6, 2005).

Station, with the transfer costs becoming a one-time expense occurring over three years. In relying on the LG&E case, EKPC noted that the Commission found that the transfer of the ash to an on-site landfill was deemed to extend the useful life of LG&E's existing ash pond at Mill Creek, and the transfer costs should be treated as a capital expenditure. EKPC further noted that LG&E was allowed to defer the ash transfer costs and earn a return on the unamortized deferred balance.

The Commission finds that the ash hauling costs associated with the proposed project should not be treated as a capital cost. The Commission is of the opinion that, for ratemaking purposes, the nature of the hauling costs at issue is more reasonably characterized to be an operating cost, notwithstanding the accounting treatment required by the RUS USoA to the contrary. Unlike the facts as presented in Case No. 2004-00421, the hauling costs proposed herein neither extend the life of any asset, namely the Dale Ash Ponds, nor do they add value to the new Smith Landfill. The Commission recognizes the need for EKPC to incur these costs due to environmental regulatory requirements, but we are also cognizant of our duty to minimize the impact of such costs on EKPC's ratepayers. The Commission notes the analysis provided by EKPC which indicates a savings to the ratepayers of approximately \$3.6 million over the life of the proposed project if the ash transfer costs are expensed rather than capitalized.<sup>46</sup> While the analysis shows that the savings do not occur until over nine years into the project, the Commission believes that it is important that the ratepayers be afforded the benefit of available cost savings. The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that for

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<sup>46</sup> EKPC's response to post-hearing information request.

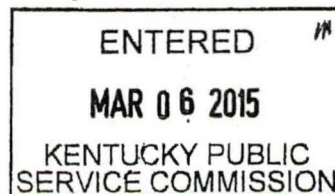


ratemaking purposes, the ash transfer costs of \$9,866,193 should be expensed and recovered as incurred through the environmental surcharge.

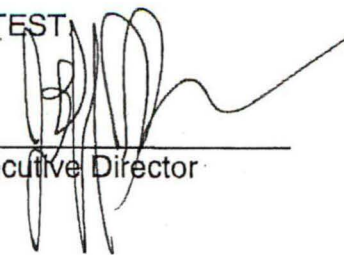
IT IS THEREFORE ORDERED that:

1. EKPC is granted a CPCN to construct the Smith Landfill to receive coal ash removed and transported from the Dale Ash Ponds.
2. EKPC's request to amend its Environmental Compliance Plan for purposes of recovering the costs of the proposed project through its environmental surcharge is granted.
3. EKPC's request to recover the costs of the J.K. Smith Landfill and the reclamation of the Dale Ash Ponds site over a ten-year period is approved.
4. EKPC shall treat the hauling costs associated with the proposed project for ratemaking purposes as an expense and recovered as incurred through its environmental surcharge.
5. Grayson's motion for an extension of time to file its post-hearing brief is granted.
6. The AG's motion for an extension of time to file a paper copy of its post-hearing brief is granted.

By the Commission



ATTEST

  
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	Duke Case No. 2015-00089	EKPC Case No. 2014-00252
Total Construction Cost	\$159m	\$4m
Volume of Landfill	30,121,534	750,000
Cost per Million Cubic. Yards	\$5.28	\$5.33m

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