

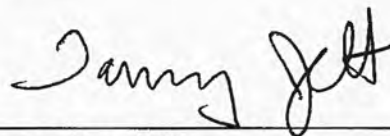
**KyPSC Case No. 2018-00156**  
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**VERIFICATION**

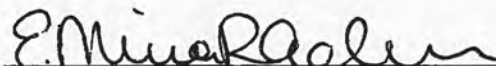
STATE OF OHIO                    )  
  )     SS:  
COUNTY OF HAMILTON        )

The undersigned, Tammy Jett, Principal Environmental Specialist, being duly sworn, deposes and says that she has personal knowledge of the matters set forth in the foregoing data requests and that the answers contained therein are true and correct to the best of her knowledge, information and belief.



\_\_\_\_\_  
Tammy Jett, Affiant

Subscribed and sworn to before me by Tammy Jett on this 17<sup>th</sup> day of Sept., 2018.



\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: July 8, 2022



**E. MINNA ROLFES-ADKINS**  
Notary Public, State of Ohio  
My Commission Expires  
July 8, 2022

**VERIFICATION**


STATE OF OHIO                    )  
  )     SS:  
COUNTY OF HAMILTON        )

The undersigned, Adam Deller, Engineer III, being duly sworn, deposes and says that he has personal knowledge of the matters set forth in the foregoing data requests and that the answers contained therein are true and correct to the best of his knowledge, information and belief.

  
\_\_\_\_\_  
Adam Deller, Affiant

Subscribed and sworn to before me by Adam Deller on this 14<sup>th</sup> day of September, 2018.

**ADELE M. FRISCH**  
Notary Public, State of Ohio  
My Commission Expires 01-05-2019

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires: 11/5/2019

**REQUEST:**

Reference the decision of the U.S. Court of Appeals from the District of Columbia Circuit dated August 21, 2018, in case no. 15-1219 (Utility Solid Waste Activities Group, et al. v. Environmental Protection Agency, et al.),<sup>1</sup> in which that court, *inter alia*, vacated certain sections of the CCR Rule, and remanded them to the U.S. EPA for further consideration. However, it appears the Court is withholding issuing a mandate to give the parties enough time to consider whether to file a petition for rehearing.

- a. Does DEK believe the ruling will have any impact on its plans for construction of the West Landfill Cell 2? Provide a detailed discussion.

**RESPONSE:**

- a. Duke Energy Kentucky does not believe the ruling mentioned in the question above will have any impact on its plans for construction of the West Landfill Cell 2. It must first be understood that the West Landfill is needed for disposal of CCR materials generated at East Bend and will continue to be needed as long as East Bend continues to operate. Unless the CCR rule is revised to such an extent that it no longer governs the disposal of any ash material, and further, CCR materials have no other regulations at either the federal or state level that in any way govern

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<sup>1</sup> The Opinion is accessible at the following link: <https://earthjustice.org/sites/default/files/files/2018-08-21%20CCR%20petition%20for%20review%20Opinion.pdf>

their disposal, the CCR materials generated at East Bend will continue to need a landfill in which to be disposed.

With respect to the decision referenced above, the U.S. Court of Appeals from the District of Columbia Circuit issued an Opinion and Judgement dated August 21, 2018, for case no. 15-1219 (further referred to as Opinion or Decision). It is useful to review the main Components of the Court's Decision in order to explain why the ruling will not have any impact on the plans for the West Landfill Cell 2.

#### Components of the D.C. Court Decision and Impacts on West Landfill Project

The Court's Decision involves several components. Those are outlined below, along with the reason why each one has no impact on Duke Energy Kentucky's plans for construction of West Landfill Cell 2.

##### **Component 1**

The regulation of on-site CCR piles destined for beneficial reuse and the 12,400-ton threshold listed in the fourth beneficial use criterion in the rule were remanded back to EPA for reconsideration.

##### **Impact of Component 1**

There is no impact of this Decision because East Bend does not conduct any reuse activities. The type of materials generated at this site, and the manner in which they are generated, do not lend themselves to meeting the demand in the current beneficial use market. In addition, this particular challenge would not have altered any construction plans for Cell 2 regardless of whether East Bend beneficially reused material because East Bend already took the steps necessary to make on-site CCR piles compliant with the

CCR rule. There is no direct connection between Cell 2 and this component of the Court's Decision.

### **Component 2**

The Court rejected the argument that EPA did not have the authority to regulate inactive CCR surface impoundments within the CCR rule.

### **Impact of Component 2**

There is no impact to the West Landfill Cell 2 construction from this ruling because it does not directly apply to landfills. In addition, it does not affect East Bend in general because this site does not have any inactive surface impoundments as defined by the CCR rule. The only CCR impoundment at this site governed by the CCR rule is an active impoundment. Thus, any ruling on inactive impoundments has no bearing on the East Bend ash impoundment. The impoundment is in the process of closing.

### **Component 3**

The Court disagreed that aquifer location restrictions should not be applied to existing CCR surface impoundments.

### **Impact of Component 3**

There is no impact to East Bend as a whole related to this component. No action was being undertaken at this site solely due to the aquifer location restriction section of the rule. All activities are being undertaken for reasons other than, or in addition to, the aquifer location restriction. For example, the surface impoundment is already being closed due to groundwater impacts detected under the state monitoring program, among other reasons. Regardless of whether the surface impoundment at this site meets the aquifer location restriction, the closure actions are being implemented for the

groundwater impacts that stand apart from that location restriction requirement. Absent these other reasons, Duke Kentucky was already proceeding down a course of action that assumed the aquifer location restriction would apply to existing impoundments.

#### **Component 4**

The challenge that the operating life of existing impoundments is shortened by having to consider the 2,500-year seismic event in meeting the location restriction requirements in the CCR rule was rejected by the Court.

#### **Impact of Component 4**

There is no impact to East Bend as a whole related to this component. No action was being undertaken at this site solely due to the having to consider the 2,500-year seismic event in meeting the location restriction requirement in the CCR rule. All activities are being undertaken for reasons other than or in addition to the seismic event location restriction. For example, the surface impoundment is already being closed due to groundwater impacts detected under the state monitoring program, among other reasons. Regardless of whether the surface impoundment at this site meets the seismic event location restriction, the closure actions are being implemented for the groundwater impacts that stand apart from that location restriction requirement. Absent these other reasons, Duke Kentucky was already proceeding down a course of action that assumed the 2,500-year seismic event would apply to all CCR units at this site.

#### **Component 5**

The Court held that RCRA does not allow EPA to consider costs when establishing minimum criteria under Subtitle D. This ruling was made in reference to the

challenge on the prohibition on considering costs and convenience when qualifying for the CCR rule's alternative closure provision.

#### **Impact of Component 5**

This ruling does not affect Duke Kentucky's East Bend site. No costs, plans, or projects at this site were related to seeking the use of the CCR rule alternative closure provision.

#### **Component 6**

The Court agreed with the argument that unlined impoundments should not be able to continue operating until groundwater contamination is detected. Accordingly, the Court ordered that 40 C.F.R. Section 257.101(a) be vacated and remanded back to EPA.

#### **Impact of Component 6**

The Court seems to have made a mistake in identifying that 40 C.F.R. Section 257.101(a) be vacated in their Judgment since that section actually requires impoundments to close. The EPA will most likely need the Court to clarify this ruling. This ruling, whether it stands or not, is expected to have no impact on the West Landfill Cell 2 construction plans. Regardless of this ruling, the ash impoundment at East Bend is already in the process of closing. A ruling requiring the impoundment to close thus is moot. The West Landfill Cell 2 project construction has taken that closure into consideration prior to this ruling.

#### **Component 7**

Section 257.71(a)(1)(i) of the CCR rule was ordered vacated by the Court. This will remove the section of the rule that allows for a demonstration that an ash



impoundment lined with a minimum of two feet of compacted soil with a hydraulic conductivity of no more than  $1 \times 10^{-7}$  cm/sec is a "lined" impoundment.

#### **Impact of Component 7**

There is no impact from component 7 on East Bend or the West Landfill Cell 2 construction project because Duke Kentucky never conducted the demonstration allowed under Section 257.71(a)(1)(i) of the CCR rule. Duke Kentucky never represented the ash impoundment as a lined impoundment and does not intend to continue to operate the unlined ash impoundment as a CCR unit. The ash impoundment is already in closure.

#### **Component 8**

The Court ordered vacatur of Section 257.50(e) of the CCR rule, which excluded inactive impoundments at closed facilities from the rule.

#### **Impact of Component 8**

Component 8 has no impact on the West Landfill Cell 2 construction project because East Bend is an active facility and not a closed facility. Component 8 changes nothing for East Bend from a CCR rule perspective.

#### **Component 9**

The Court rejected the challenge of various aspects of the CCR rule's public notification requirements. This means the public notification requirements will remain as they currently appear in the rule.

#### **Impact of Component 9**

Duke Kentucky is already complying with the public notification requirements for East Bend. The public notification requirements only involve electronic communication

with the public and the State and have no direct impact to the West Landfill Cell 2 construction.

**PERSON RESPONSIBLE:** Tammy Jett

**Duke Energy Kentucky  
Case No. 2018-00156  
Attorney General's Second Set Data Requests  
Date Received: September 5, 2018**

**AG-DR-02-002**

**REQUEST:**

Will the liners DEK plans to install in the West Landfill Cell 2 include geomembrane materials?

**RESPONSE:**

The approved West Landfill permit design of the geocomposite liner system is comprised of a textured HDPE (high density polyethylene) geomembrane; along with a geosynthetic clay liner and geotextiles.

**PERSON RESPONSIBLE:** Adam Deller