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Via Registered Mail – Return Receipt Requested

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RE: Notice of Intent to Sue under Resource Conservation and Recovery Act, Plant Gadsden
Coal Ash Pond

To Whom It May Concern:

Pursuant to the Resource Conservation and Recovery Act (RCRA or the Act), 42 U.S.C. § 6972(a)(1)(A) and 40 C.F.R. § 254.2(a), Coosa Riverkeeper (Riverkeeper) gives Alabama Power Company (Alabama Power) notice of its intent to file suit for violations of RCRA and the Coal Combustion Residuals (CCR) Rule (the Rule), 40 C.F.R. § 257.50 *et seq.*, at the Gadsden Steam Plant Ash Impoundment. After the expiration of sixty days, Riverkeeper intends to file suit against Alabama Power in United States District Court to enforce the provisions of the Rule and the Act.

Alabama Power owns and operates the Gadsden Steam Plant Ash Impoundment (“Plant Gadsden impoundment”), located at Alabama Power’s former coal-fired power plant in the City of Gadsden, Alabama. As part of the process of generating electricity from coal, Alabama Power created and stored coal ash—one of the by-products of burning coal—in an unlined impoundment, in a floodplain, on the banks of Neely Henry Lake and the Coosa River. In 2015, Plant Gadsden

ceased using coal and stopped sending ash to the ash pond. Years later, the impoundment was capped and closed. However, nearly 40% of coal ash in the Plant Gadsden impoundment remains in contact with groundwater, allowing coal ash contamination to leach into groundwater and nearby surface waters in perpetuity. Alabama Power also relies on a faulty groundwater monitoring network that does not accurately characterize impacts of the leaching coal ash impoundment. As detailed below, these are clear violations of the CCR Rule and the open dumping prohibition in RCRA.

I. BACKGROUND

Utilities across the Southeast are cleaning up unlined coal ash impoundments. These utilities have removed more than one quarter of a billion tons of coal ash from unlined impoundments and other storage to safe, dry, lined landfills, or they are recycling ash into cement and concrete. Every unlined impoundment in South Carolina¹ and North Carolina² has been excavated or is being excavated. Duke Energy alone is excavating more than 145 million tons of coal ash from unlined impoundments in the Carolinas. In Virginia, Dominion Energy is excavating all of its unlined coal ash impoundments,³ and Appalachian Power is excavating its sole open impoundment.⁴ The Tennessee Valley Authority is excavating 12 million tons of coal ash at its Gallatin facility near Nashville⁵ and the ash at its Allen facility in Memphis.⁶ Alabama Power's sister company, Georgia Power, is likewise excavating half of the coal ash it has stored in unlined lagoons,⁷ and in May 2024 submitted a revised Closure Plan to excavate another 16 million tons from its unlined impoundment at Plant Wansley.⁸

¹ David Wren, *South Carolina utilities lead the region in efforts to clean up coal ash pollution*, Charleston Post & Courier (July 15, 2017), <https://perma.cc/J3YT-6TGY>.

² Lynn Bonner, *Duke Energy to dig up coal ash at 6 North Carolina sites*, Raleigh News & Observer (Jan. 2, 2020), <https://www.newsobserver.com/news/politics-government/article238898708.html>.

³ Adrian Teran-Tapia, *Governor signs coal ash cleanup bill*, Va. Mercury (Mar. 22, 2019), <https://www.virginiamercury.com/blog-va/governor-signs-coal-ash-cleanup-bill/>.

⁴ See Va. Code § 10.1-1402.04.

⁵ Jamie Satterfield, *TVA agrees to remove 12 million tons of coal ash from Gallatin plant, clean contamination*, Knoxville News (June 13, 2019), <https://www.knoxnews.com/story/news/crime/2019/06/13/tva-agrees-dig-up-12-million-tons-coal-ash-gallatin-plant/1443294001/>.

⁶ Dave Flessner, *TVA to begin coal ash removal at abandoned Allen Fossil plant in Memphis*, Chattanooga Times Free Press (June 24, 2021), <https://www.timesfreepress.com/news/business/story/2021/jun/24/tva-begin-coal-ashremoval-abandoned-allen-fossil-plant-memphis/549267/>.

⁷ Georgia Power, *Ash Pond Closures Update* (June 2023), <https://www.georgiapower.com/content/dam/georgia-power/pdfs/company-pdfs/ash-pond-closure-update.pdf>.

⁸ Georgia Power, *Closure Plan, Plant Wansley Ash Pond 1 (AP-1) Closure Revision 0* (May 2024), <https://epd.georgia.gov/document/document/wansley-ap-1-closure-plan-05-24-2024-fnl-approvedpdf/download>.

When utilities remove coal ash from dangerous, unlined, leaking, waterfront pits, it can be moved to safe, lined storage and can also be recycled into cement and concrete. In Georgia, Georgia Power has announced major coal ash recycling projects at Plant Branch, Plant Bowen, and Plant Mitchell.⁹ Throughout the Carolinas, coal ash from unlined impoundments has been and is being reprocessed for use in concrete and is being moved to cement manufacturing facilities.¹⁰ Alabama Power is aware of the benefits of recycling as evidenced by the fact that it has contracted with a third party to build a recycling facility at its Plant Barry site.¹¹ These efforts create local jobs and promote local economic development, reduce the pollution from the manufacture of concrete, and help local cement, concrete, and construction industries. These efforts also reduce the dependence on coal ash imported from abroad, from countries like Turkey and China.

In contrast to utilities' plans across the Southeast, at Plant Gadsden, Alabama Power has left 1.2 million cubic yards of coal ash in an unlined impoundment, in the middle of the City of Gadsden—in the floodplain of the Coosa River, where it will sit in groundwater forever. Strikingly, the Gadsden Water Works and Sewer Board, a utility that provides drinking water to over 14,000 customers, has a drinking water intake less than a mile downstream from the impoundment. Alabama Power's closure-in-place of the Plant Gadsden impoundment is not in compliance with the requirements of the Rule and poses a risk to water resources, Gadsden citizens, and those who recreate on Neely Henry Lake and downstream waters of the Coosa River. It also flouts federal laws written to ensure that utilities like Alabama Power take responsibility for decades of shoddy waste management practices which have polluted valuable water resources.

a. RCRA and the CCR Rule

RCRA is a bedrock environmental statute that regulates the disposal of solid and hazardous waste. Congress enacted RCRA in 1976 with the avowed intention of closing “the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials.”¹² In 2015, the Environmental Protection Agency (EPA) published a final rule to regulate the disposal and storage of coal ash (called Coal Combustion Residuals or “CCR” in the Rule) as a solid waste

⁹ Georgia Power, Georgia Power continues industry leadership in coal ash beneficial reuse with new project at Plant Branch (Oct. 18, 2023), <https://www.georgiapower.com/company/news-hub/company-news/georgia-power-announces-new-coal-ash-beneficial-reuse-project.html>.

¹⁰ *E.g.*, Press Release, Santee Cooper, Santee Cooper Records Most Successful Year to Date for Recycling and Beneficial Use (Feb. 4, 2020), <https://www.santeecooper.com/news/2020/020420-Santee-Cooper-Records-Most-Successful-Year-to-Date-for-Recycling-and-Beneficial-Use.aspx>.

¹¹ Press Release, Alabama Power, Alabama Power, Eco Material plan expected to recycle millions of tons of coal ash for beneficial use (Jan. 23, 2024), <https://www.alabamapower.com/press-releases/2024/alabama-power--eco-material-plan-to-recycle-tons-of-coal-ash.html>.

¹² *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 287 (1st Cir. 2006) (citing H.R. Rep. No. 94-1491, pt. 1, at 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241).

under subtitle D of RCRA.¹³ Under RCRA, any violation of the Rule constitutes illegal open dumping: “Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act.”¹⁴ The prohibition on open dumping, and the requirements that certain criteria are met at CCR facilities, are meant to ensure that there will be “no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility.”¹⁵

The Rule allows two options for closure: either removal of the ash (clean closure), or, under certain prescribed conditions, dewatering an impoundment and leaving the ash in place (cap in place).¹⁶ Coal ash impoundments can be capped in place only if they satisfy several clearly defined criteria designed to keep the coal ash out of contact with groundwater and other water resources. In particular, the closure must achieve each of the following performance standards:

- “Free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues;”¹⁷
- It must “[p]reclude the probability of future impoundment of water, sediment, or slurry;”¹⁸ and
- It must “[c]ontrol, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters.”¹⁹

Each of these three performance standards requires that a coal ash impoundment cannot be capped in place with coal ash in contact with groundwater. The D.C. Circuit has ruled that “[t]he 2015 Rule, standing on its own, makes clear that operators cannot close their surface impoundments with groundwater leaching in and out of the unit and mixing with coal residuals.”²⁰

And in enforcing the plain language of the Rule, EPA has underscored that “free liquids” includes groundwater: “Free liquids are defined as all ‘liquids that separate from the solid portion

¹³ EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); as amended by Technical Amendments to the Hazardous and Solid Waste Management System, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988 (July 2, 2015); 40 C.F.R. § 257.50 *et seq.*

¹⁴ 40 C.F.R. § 257.1(a)(2) (emphasis added); *Id.* § 257.2 (“Open dump means a facility for the disposal of solid waste which does not comply with this part.”).

¹⁵ 42 U.S.C. § 6944(a); 40 C.F.R. § 257.50(a).

¹⁶ 40 C.F.R. § 257.102(a).

¹⁷ *Id.* § 257.102(d)(2)(i).

¹⁸ *Id.* § 257.102(d)(1)(ii)

¹⁹ *Id.* § 257.102(d)(1)(i).

²⁰ *Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 41 (D.C. Cir. 2024).

of a waste under ambient temperature and pressure, regardless of whether the source of the liquids is from sluiced water or groundwater.”²¹ EPA’s denial of Alabama’s state CCR permitting program, discussed below, emphasizes the Rule’s requirement to eliminate free liquids, including groundwater, from closed impoundments.²² And in a Notice of Potential Violations issued to Alabama Power based on its Plant Barry Closure Plan, EPA warned Alabama Power that it was potentially in violation of the Rule because “[t]he Amended Closure Plan does not address this ongoing flow of groundwater into the Ash Pond and does not describe how free liquids (groundwater or any other liquids within the Ash Pond) will be eliminated.”²³

The CCR Rule also prescribes certain performance standards for groundwater monitoring. The Rule requires utilities to install a robust series of groundwater monitoring wells and sample these wells for various constituents.²⁴ This is critical to protecting water resources, including rivers and streams, and is meant to paint an accurate picture of groundwater contamination emanating from CCR units for the benefit of regulators and the public. As such, the CCR Rule prescribes two integral performance standards for a utility’s groundwater monitoring network. First, utilities must install a monitoring system that accurately represents “the quality of background groundwater that has not been affected by leakage from a CCR unit.”²⁵ This requirement ensures the utility’s analysis of groundwater trends in waters impacted by the CCR unit is accurate. Additionally, the utility must accurately represent “the quality of the groundwater passing the waste boundary of the CCR unit.”²⁶ This requirement informs regulators and the public of the CCR unit’s impacts on ground and surface water resources.

b. Plant Gadsden

Plant Gadsden, located at 1000 Goodyear Avenue, Gadsden, AL 35903, operated as a coal-fired power plant for more than 100 years. During much of that time, coal ash was disposed of via

²¹ Final Decision, Denial of Alternative Closure Deadline for General James M. Gavin Plant, Chesire, Ohio at 34 (Nov. 18, 2022), <https://www.regulations.gov/document/EPA-HQ-OLEM-2021-0590-0100>.

²² EPA, Alabama: Denial of State Coal Combustion Residuals Permit Program, 88 Fed. Reg. 55220, 55230 (Aug. 14, 2023) (“EPA is proposing to determine that ADEM issued multiple permits allowing CCR in closed units to remain saturated by groundwater, without requiring engineering measures that will control the groundwater flowing into and out of the closed unit...Based on EPA’s review, the Agency is proposing to deny Alabama’s Application because the State’s CCR permit program does not require each CCR unit in the State to achieve compliance with... the minimum requirements in the Federal CCR regulations.”) [hereinafter referred to as “Proposed Denial”].

²³ Letter from Kimberly Bingham (EPA) to Susan Comensky (Alabama Power), Notice of Potential Violations and Opportunity to Confer at 11 (Jan. 31, 2023), <https://southern-science.com/wp-content/uploads/2023/06/january-31-2023-plant-barry-nopv.pdf>.

²⁴ 40 C.F.R. § 257.94-95.

²⁵ *Id.* § 257.91(a)(1).

²⁶ *Id.* § 257.91(a)(2).

sluicing, a process by which Alabama Power mixed the coal ash with water and piped it, underneath the Coosa River, to an unlined impoundment built in 1949.²⁷ The ash impoundment is located at 101 Delilah Street, Gadsden, Alabama 35903.²⁸ The impoundment was constructed next to a high risk flood zone on the banks of the Coosa River.²⁹ In 1976, Alabama Power modified the impoundment by constructing a new western impoundment and emergency discharge structure.³⁰ In 1978, Alabama Power expanded the western impoundment to the northwest towards the Twin Bridges Golf Course.³¹ The impoundment stopped receiving coal ash in 2015 when Alabama Power converted Units 1 and 2 to run on natural gas; however, it continued to receive process water from the Plant.³²

The coal ash impoundment has been contaminating nearby surface waters for decades. In 2002, the Alabama Department of Environmental Management (ADEM) performed a site assessment under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Sampling revealed arsenic “in the sediment and surface water below the site,” but no presence of arsenic upgradient from the site.³³ Arsenic was detected in surface water at levels as high as 0.097 mg/L—more than nine times the groundwater protection standard and the drinking water standard (0.01 mg/L).³⁴ Sampling also revealed arsenic in river sediment at the Gadsden Water Works and Sewer Board intake downstream from the impoundment.³⁵

In 2016, Alabama Power notified ADEM that they were closing the pond.³⁶ In doing so, Alabama Power attempted to qualify for the early closure provision of the Rule, which exempted

²⁷ Alabama Power, Revised Permit Application for CCR Surface Impoundment, Plant Gadsden Ash Pond, Gadsden, Alabama at 15 (Apr. 30, 2020), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104374727&dbid=0> [hereinafter referred to as “Revised Permit Application”] (page numbers refer to PDF page number).

²⁸ *Id.* at 472.

²⁹ FEMA, National Flood Hazard Layer FIRMette, https://msc.fema.gov/arcgis/rest/directories/arcgisjobs/nfhl_print/mscprintb_gpserver/j4e87843be6bd492e9edfc2615acc4160/scratch/FIRMETTE_ce8c4421-0cad-4847-b196-0ebb5c937267.pdf (last accessed Apr. 14, 2025).

³⁰ *Id.* at 15.

³¹ *Id.*

³² *Id.*

³³ ADEM, Site Investigation for Alabama Power Gadsden Electric Generating Plant (Gadsden Steam Plant) at 6 (Sept. 25, 2002), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105136470&dbid=0&cr=1>.

³⁴ *Id.* at 39.

³⁵ *Id.* at 6.

³⁶ Letter from Mike Godfrey (Alabama Power) to Scott Story (ADEM), Closure Plan/ Alternative Cover, Gadsden Steam Plant Ash Pond (Apr. 6, 2016), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=21122906&dbid=0&cr=1>.

units closed in a certain timeframe from some of the Rule's requirements.³⁷ This exemption was later vacated by the D.C. Circuit, requiring Alabama Power to comply with all requirements of the CCR Rule.³⁸

By September 2018, Alabama Power completed closure of the Plant Gadsden coal ash impoundment. The process included treating and removing some water from the ash pond, excavating and consolidating material at the site, installing a barrier over the consolidated material, installing stormwater systems, and installing groundwater monitoring wells.³⁹ In October 2018, after the closure process was complete, Alabama Power submitted its first permit application to ADEM under state CCR regulations.⁴⁰ ADEM approved this application in December 2020 over the opposition of hundreds of public commenters.⁴¹ ADEM also approved variances for certain state CCR regulations, including a variance for the requirement that a buffer of 100 feet surround the facility boundary.⁴² As depicted in Alabama Power's drawings, the waste disposal boundary is less than 100 feet away from the Coosa River in certain areas.⁴³

The closure process is complete, but the impoundment continues to leak and to contaminate groundwater. In August 2019, nearly a year after closure, ADEM issued an Administrative Order to Alabama Power, finding that Alabama Power violated state law by contaminating groundwater. Specifically, Alabama Power's groundwater samples exceeded primary maximum contaminant levels for arsenic and combined radium.⁴⁴ Since closure, Alabama Power has reported Statistically Significant Increases for Appendix IV parameters in their semi-annual and annual groundwater

³⁷ Letter from Susan Comensky (Alabama Power) to Stephen Cobb (ADEM), Proposed Administrative Order for the Plant Gadsden Ash Pond at 2 (June 13, 2019), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=21194657&dbid=0>.

³⁸ *Id.*

³⁹ *Id.* at 3.

⁴⁰ Alabama Power Company, Permit Application for CCR Surface Impoundment, Plant Gadsden Ash Pond, Gadsden, Alabama (Oct. 1, 2018), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=31561459&dbid=0>.

⁴¹ Letter from Scott Story (ADEM) to Mike Godfrey (Alabama Power), Initial Permit and Variance, Gadsden Steam Plant, Permit No. 28-09 (Dec. 18, 2020), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104438098&dbid=0>; Plant Gadsden Public Comments (Dec. 18, 2020), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104438094&dbid=0&cr=1>.

⁴² Letter from Mike Godfrey (Alabama Power) to Scott Story (ADEM), Request for Variances for Alabama Power Company Coal Combustion Residual Units (Aug. 4, 2020), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104374729&dbid=0&cr=1>.

⁴³ Revised Permit Application, *supra* note 27, at 12.

⁴⁴ Letter from Stephen Cobb (ADEM) to Susan Comensky (Alabama Power), Administrative Order No. 19-104-GW (Aug. 27, 2019), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=31565962&dbid=0>.

monitoring reports.⁴⁵ These include detections of excess levels of arsenic and lithium.⁴⁶ Arsenic levels at more than forty times the 0.01 mg/L groundwater protection standard were detected as recently as October of 2024.⁴⁷ The post-closure data since 2018 shows a trend of increasing levels of a number of pollutants in groundwater.

This is no surprise, because Alabama Power's own documents demonstrate that the bottom elevation of the coal ash is below the water table and is in contact with groundwater. The base of the CCR waste is located at an elevation of approximately 505.9 feet above sea level (asl);⁴⁸ hence, the base of the CCR waste is below the top of the groundwater surface, which is an average of 511 ft asl, and it will remain so because it is also below the surface elevation of the Coosa River.⁴⁹ Thus, approximately 483,230 cubic yards of coal ash remain permanently saturated in groundwater in the impoundment. This represents over 40% of the total amount of coal ash in the impoundment. Although groundwater flow prior to closure was interpreted to be radial, since closure, groundwater has resumed its natural north to south flow pattern toward the Coosa River.⁵⁰ Due to the close proximity of the River, a hydraulic connection is presumed to exist between the uppermost aquifer and the Coosa River.⁵¹

c. Alabama's Coal Ash Program

In 2016, Congress passed the Water Infrastructure Improvements for the Nation (WIIN) Act which amended section 4005 of RCRA and established a federal permitting regime for the CCR Rule. The WIIN Act allows states to seek approval from EPA to operate their own state permitting program in lieu of the federal program, if—and only if—that program is “at least as protective” as the federal standards.⁵² In December of 2021, the State of Alabama applied for approval of the state's CCR permit program. In June of 2024, EPA issued a final denial of Alabama's permit program finding that it is not as protective as the federal CCR regulations.⁵³ Thus, Alabama Power's state permit for the Plant Gadsden impoundment does not relieve it from complying with federal requirements and performance standards and has no impact on an action to enforce the federal CCR Rule.

⁴⁵ Anchor QEA, Groundwater Remedy Selection Report, Plant Gadsden at 12-15 (Oct. 2021), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=104728137&dbid=0&cr=1>.

⁴⁶ *Id.* Although the groundwater wells with these detections are now interpreted to be upgradient, Alabama Power still utilizes them as compliance monitoring wells. *See id.*

⁴⁷ Alabama Power, 2024 Semi-Annual Groundwater Monitoring and Corrective Action Report, Plant Gadsden Ash Pond at 61 (Jan. 31, 2025), <https://lf.adem.alabama.gov/WebLink/DocView.aspx?id=105601181&dbid=0>.

⁴⁸ Revised Permit Application, *supra* note 27 at 494-497, at Appendix 8, Appendix A Drawings.

⁴⁹ *Id.*

⁵⁰ *Id.* at 111-112.

⁵¹ *See* Proposal Denial, 88 Fed. Reg. at 55247.

⁵² 42 U.S.C. § 6945(d)(1)(B).

⁵³ EPA, Alabama: Denial of State Coal Combustion Residuals Program, 89 Fed. Reg. 48774 (June 7, 2024).

In EPA's denial of Alabama's coal ash program, it relied on several permits issued by ADEM that allowed "facilities to close unlined surface impoundments without complying with all the necessary requirements in the Federal regulations."⁵⁴ Specifically, EPA reviewed permits "that have closed or are closing with waste that will remain in place below the water table, because these units have the greatest potential to cause significant environmental and human health effects if mismanaged."⁵⁵ Among these permits was the one issued at Plant Gadsden.

In its review of the Plant Gadsden state CCR permit, EPA noted numerous deficiencies. First and foremost was that coal ash in the impoundment remains in contact with groundwater; "[b]ased on EPA estimates, the closure of the Plant Gadsden Ash Pond, authorized and approved by ADEM, does not meet the requirements of § 257.102(d)."⁵⁶ EPA also noted numerous issues with the Plant Gadsden impoundment's groundwater monitoring network, finding that the permit failed to effectively monitor groundwater impacts. EPA found that the groundwater monitoring network does not sufficiently monitor preferential pathways, including the southwestern unit boundary that borders the Coosa River.⁵⁷ EPA also determined that there are currently no reliable background monitoring wells in the monitoring network,⁵⁸ calling into question the accuracy of Alabama Power's groundwater monitoring data.

II. VIOLATIONS OF RCRA AND THE CCR RULE

a. *Violation of Closure Performance Standards*

Riverkeeper intends to bring suit against Alabama Power based on its violation of three separate closure performance standards: 1) the requirement to eliminate free liquids;⁵⁹ 2) the requirement to preclude the probability of future impoundment of water, sediment, or slurry;⁶⁰ and 3) the requirement to control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters.⁶¹ Under each of these three requirements, Alabama Power is violating the CCR Rule by leaving coal ash saturated in water in the Plant Gadsden impoundment. Alabama Power has not eliminated free liquids; the unit continues to impound solid and liquid materials; liquids are infiltrating the impoundment, and the impoundment is releasing contamination and leachate to the groundwater and surface waters. Because Alabama Power is in violation of these requirements, the Plant Gadsden impoundment is an open dump in violation of RCRA.

⁵⁴ Proposed Denial, 88 Fed. Reg. at 55229.

⁵⁵ *Id.* at 55230.

⁵⁶ *Id.*

⁵⁷ *Id.* at 55253.

⁵⁸ *Id.* at 55251.

⁵⁹ 40 C.F.R. § 257.102(d)(2)(i).

⁶⁰ *Id.* § 257.102(d)(1)(ii).

⁶¹ *Id.* § 257.102(d)(1)(i).

The CCR Rule defines “free liquids” as “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure.”⁶² Free liquids are not limited to the so-called “free water” that exists above the surface of the coal ash but includes all water throughout the saturated ash. Simply dewatering the coal ash pond does not eliminate the free liquids—water, including groundwater—that saturates the ash below the top surface of the coal ash.

The requirement to eliminate free liquids prior to installing the final cover system prohibits a coal ash impoundment from being capped and closed in place if coal ash is in groundwater or mixed with water of any kind. Liquid wastes have not been removed from the impoundment if groundwater—or any other category of water—is in the impoundment, or if coal ash disposed of in the impoundment is in contact with water. Groundwater and any other category of water are “free liquids” because water readily separates from coal ash under ambient temperature and pressure.

Alabama Power’s closure of the Plant Gadsden impoundment violates the requirement to eliminate free liquids. Groundwater will continue to flow into, saturate, and flow out of the coal ash within the storage area. As explained above, Alabama Power’s Permit Application shows that the CCR waste is below the groundwater table.⁶³ Alabama Power admits that it only eliminated the “free water” pooled in the impoundment and that it dewatered coal ash only “to the extent necessary.”⁶⁴ Because hundreds of thousands of cubic yards of coal ash remain saturated in water, Alabama Power has not eliminated free liquids prior to installing the final cover system and is in violation of the plain language of 40 C.F.R. § 257.102(d)(2)(i).

Alabama Power’s closure of the Plant Gadsden impoundment also violates the requirement to preclude the probability of future impoundment of water, sediment, or slurry. The CCR Rule defines an impoundment to be “a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.”⁶⁵ The Plant Gadsden coal ash impoundment does and will continue to impound water, sediment, and slurry. The unlined impoundment will continue to impound water with CCR because it contains saturated ash, and groundwater will continue to flow into and out of the CCR unit and come in contact with CCR waste. According to Alabama Power’s Permit Application and public CCR documents, there are no engineering controls in place that would preclude future impoundment. Consequently, Alabama Power is in violation of 40 C.F.R. § 257.102(d)(1)(ii).

⁶² *Id.* § 257.53.

⁶³ EPA estimates that 8% to 36% of the CCR waste in the unit is saturated. Proposed Denial, 88 Fed. Reg. at 55248.

⁶⁴ See Revised Permit Application, *supra* note 27 at 473 (“Free water in the clear pool will be removed through pumping, maintaining compliance with NPDES discharge limits. The saturated ash will be dewatered *to the extent necessary* to allow a stable working surface for earthwork equipment.”) (emphasis added).

⁶⁵ 40 C.F.R. § 257.53.

Finally, Alabama Power's closure of the Plant Gadsden impoundment does not control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere. Because the natural hydrology will cause groundwater to continue flowing into the CCR unit, groundwater will continue to infiltrate into the CCR waste. According to Alabama Power's Permit Application and public CCR documents, there are no engineering controls in place that would control or minimize post-closure infiltration. Considering the proven effectiveness and feasibility of excavation, Alabama Power has not demonstrated that it has controlled, minimized, or eliminated, to the maximum extent feasible, post-closure infiltration of liquids and is thus in violation of 40 C.F.R. § 257.102(d)(1)(i).

b. Violation of Groundwater Monitoring Performance Standards

Riverkeeper intends to bring suit against Alabama Power based on its violation of two separate groundwater monitoring performance standards: 1) the requirement to install a groundwater monitoring system that accurately represents the quality of background groundwater that has not been affected by leaking from the CCR unit; and 2) the requirement to install a groundwater monitoring system that accurately represents the quality of groundwater passing the waste boundary of the CCR unit.⁶⁶

Alabama Power's groundwater monitoring plan violates the requirement to install a network that accurately represents background groundwater quality. All of Alabama Power's background monitoring wells are located on the southern side of the Coosa River and are hydraulically disconnected from the impoundment, rather than being "upgradient," as regulations require. Additionally, Alabama Power's plan does not document that the wells meet the performance standards in 40 C.F.R. § 257.91(a)(1)(i) or (ii). These background wells are also likely influenced by industrial operations, including the former Gadsden Steam Plant and Goodyear Plant.

Alabama Power's groundwater monitoring plan violates the requirement to install a groundwater monitoring system that accurately represents the quality of groundwater passing the waste boundary of the CCR unit. First, the groundwater monitoring network has insufficient lateral spacing to monitor all potential contaminant pathways, particularly where groundwater discharges to the Coosa River. Thus, the groundwater monitoring network does not adequately monitor preferential pathways—specifically, it does not adequately monitor preferential pathways along the southwestern waste boundary adjacent to the Coosa River. Although Alabama Power has not satisfied these requirements, increasing downgradient trends make it clear that coal ash pollutants are migrating beyond the waste boundary and further emphasize the need for a robust monitoring network to monitor the impoundment's influence on adjacent waterways.

⁶⁶ *Id.* § 257.91(a).

III. PERSON RESPONSIBLE FOR VIOLATION

Plant Gadsden is owned and operated by Alabama Power. Alabama Power is a corporation with its principal place of business in Alabama. Alabama Power is responsible for the violations alleged in this Notice.

IV. PERSON GIVING NOTICE

Riverkeeper is a § 501(c)(3) non-profit public interest organization with members in Alabama and the Gadsden area. Riverkeeper's mission is to protect, promote, and restore the Coosa River. It is a member organization with more than 2,874 members, some of whom live, work, and/or recreate in the vicinity of and downstream from Plant Gadsden and the coal ash impoundment. They fear contamination of drinking water, wildlife, and river water, by ground and surface water contamination discharging from the coal ash impoundment. Additionally, the lack of accurate groundwater monitoring data and lack of public accessibility of such data impacts Riverkeeper's members' ability to keep themselves informed of the risks associated with activities like fishing and swimming. Alabama Power's storage of coal ash in groundwater and its pollution from this illegal storage method are reducing the use and enjoyment by Riverkeeper and its members of Neely Henry Lake, the Coosa River, and their watersheds. The name, address, and phone number of the person giving notice is listed below.

Justinn Overton, Executive Director and Riverkeeper
Coosa Riverkeeper
102-B Croft St.
Mt. Laurel, AL 35242
(205) 981-6565
justinn@coosariver.org

V. IDENTIFICATION OF LEGAL COUNSEL

Riverkeeper is represented by legal counsel in this matter. Pursuant to 40 C.F.R. § 254.3(c), the contact information for those providing legal counsel is provided below.

Barry Brock
Christina Tidwell
Ryan Anderson
Southern Environmental Law Center
2829 2nd Ave. S, Suite 282
Birmingham, AL 35233
(205) 745-3060
bbrock@selc.org
ctidwell@selc.org
randerson@selc.org

Nicholas Torrey
Southern Environmental Law Center
601 West Rosemary St., Suite 220
Chapel Hill, NC 27516
(919) 929-9421
ntorrey@selc.org

VI. CONCLUSION

Riverkeeper is willing to discuss a negotiated settlement of these violations, codified through a court-approved consent decree as an alternative to protracted litigation. However, if we are unable to reach an enforceable settlement agreement, Riverkeeper is prepared to file suit in the United States District Court for the Northern District of Alabama, or other appropriate court, pursuant to 42 U.S.C. § 6972(a)(1)(A). This lawsuit will seek declaratory and injunctive relief, attorneys' fees and costs of litigation, and other such relief the Court deems appropriate.

If you have any questions concerning this letter or the described violations, or if you believe this notice letter is incorrect in any respect, please contact the undersigned counsel, the Southern Environmental Law Center, at (205) 745-3060. During the notice period, we are available to discuss this matter with you but suggest if you desire to institute negotiations in lieu of a civil action that you do so immediately as we do not intend to delay prosecution of this suit once the notice period has expired. Thank you for your prompt attention to this matter.

Sincerely,



Barry Brock
Office Director and Senior Attorney
Southern Environmental Law Center

cc:

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Kevin J. McOmber, Regional EPA Administrator
U.S. Environmental Protection Agency, Region 4

Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303-8960

Lance LeFleur, Director
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130

Stephen Cobb, Director of ADEM Land Division
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130

Teresa Minor
Registered Agent for Alabama Power Company
600 North 18th Street
Birmingham, AL 35203