

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

MOBILE BAYKEEPER, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CASE NO.: 1:22-cv-00382-KD-B
ALABAMA POWER COMPANY,	)	
	)	
Defendant.	)	
	)	

**PLAINTIFF’S RESPONSE TO MOTION TO DISMISS**

**OF COUNSEL:**

Barry Brock (ASB-9137-B61B)  
Christina Tidwell (ASB-9696-D10R)  
Southern Environmental Law Center  
2829 Second Avenue S., Suite 282  
Birmingham, AL 35233  
Telephone: (205) 745-3060  
bbrock@selcal.org  
ctidwell@selcal.org

Richard Moore (ASB-5730-M55R)  
450C Government Street  
Mobile, AL 36602  
Telephone: (865) 300-1206  
richardmooreig@hotmail.com

Nicholas Torrey (*admitted pro hac vice*)  
Southern Environmental Law Center  
601 W. Rosemary St, Suite 220  
Chapel Hill, NC 27516  
Telephone: (919) 967-1450  
ntorrey@selcnc.org

Frank Holleman (*admitted pro hac vice*)  
Southern Environmental Law Center  
525 East Bay Street, Suite 200  
Charleston, SC 29403  
Telephone: (843) 720-5270  
fholleman@selcsc.org

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Plaintiff Mobile Baykeeper (“Baykeeper”) submits this response to the motion to dismiss (the “Motion”) of Defendant Alabama Power Company (“Alabama Power”), Doc. 60.

Alabama Power makes three arguments in support of its Motion. First, Alabama Power contends that to comply with the Coal Combustion Residuals Rule (“CCR Rule” or the “Rule”), 40 C.F.R. §§ 257.50 through 257.107, it was required only to publish a plan that discusses how it claims that it has complied with the Rule. In fact, the Rule sets out three mandatory performance standards that Alabama Power must satisfy before it can cap the Plant Barry coal ash impoundment in place, and Alabama Power cannot avoid compliance with those standards just by publishing a plan that asserts possible compliance while ignoring violations of these standards. Second, Alabama Power claims the three performance standards govern only the cap it places on top of the unlined impoundment; in fact, those requirements apply to the entire “CCR unit,” which is defined as the entire unlined impoundment—not just the cap—to prevent ongoing pollution from the unlined sides and bottom of the impoundment. Finally, Alabama Power contends that Baykeeper is barred from enforcing the CCR Rule because Baykeeper submitted comments and spoke at a public permit hearing and ADEM allegedly litigated and determined Baykeeper’s CCR claims by issuing a state permit; in fact, EPA has not granted ADEM authority to issue federal CCR Rule permits, and participation in a separate state public comment process is not an “adjudication” of any federal claim and has no effect on a citizen group’s right to enforce the federal CCR Rule.

## **BACKGROUND**

**Facts.** At the James M. Barry Electric Generating Plant (“Plant Barry”), Alabama Power stores over twenty-one million tons of coal ash in an unlined impoundment on the banks of the Mobile River in the Mobile-Tensaw Delta. Coal ash is waste from burning coal and contains toxic pollutants like arsenic and mercury. Complaint, Doc. 1 at ¶ 42. Coal ash impoundments

“are essentially pits where wastewater sits, solids (sometimes) settle out, and toxins leach into groundwater.” *Sw. Elec. Power Co. v. U.S. EPA*, 920 F.3d 999, 1003 (5th Cir. 2019).

At Plant Barry, earthen dikes contain the unlined impoundment within a meander loop of the Mobile River, bounded by the Mobile River and a cooling canal. The impoundment sits within the 100-year floodplain of the Mobile River in the Mobile-Tensaw Delta, built in wetlands and on top of a tributary of the Mobile River, Sisters Creek. Complaint at ¶¶ 1, 40-41.

The Delta is subject to floods, storms, and hurricanes. River levels of fifteen to sixteen feet in the Mobile River at Plant Barry are considered just under “moderate” flood stage; the water levels at Plant Barry are subject to substantial rises with floods, storms, and hurricanes. The riverside location of the impoundment makes it subject to catastrophic failure and spilling coal ash into the Mobile River and the Delta. Complaint at ¶¶ 12, 41-42. As explained by the D.C. Circuit Court,

[S]urface impoundments . . . pose threats to human health and the environment. The risks generally stem from the fact that “thousands, if not millions, of tons [of coal ash are] placed in a single concentrated location.” These disposal sites are at risk of structural failure, particularly where they are located in unstable areas such as wetlands . . . The sheer volume of Coal Residuals at these sites, moreover, can force contaminants into the underlying soil and groundwater.

*Util. Solid Waste Activities Grp. v. U.S. EPA*, 901 F.3d 414, 421-22 (D.C. Cir. 2018) (hereinafter referred to as “*USWAG*”) (internal citation omitted).

The coal ash in the unlined Plant Barry impoundment is saturated in water several feet deep. Complaint at ¶¶ 1-2, 41. Alabama Power’s own consultant has found that the materials under the unlined impoundment are “leaky,” and the groundwater is in hydraulic connection with the Mobile River and an underlying aquifer. Complaint at ¶¶ 41, 47. The unlined impoundment has been contaminating groundwater for decades. According to a 1991 site assessment:

Arsenic was found in groundwater, surface and subsurface soil, and sediment samples in amounts up to 80 times background. The presence of these inorganic constituents can be traced to coal, the fuel for the power plant, which contains many metallic elements like beryllium, mercury, and arsenic. These metallic elements, which are not readily combustible, remain in higher concentrations in the fly ash waste.<sup>1</sup>

This contamination continues today, as Alabama’s Department of Environmental Management (“ADEM”) set out in a 2018 Administrative Order citing Alabama Power for water contamination.<sup>2</sup> In 2018, Alabama Power reported exceedances of groundwater standards for arsenic and cobalt at Plant Barry. In 2020, Alabama Power found statistically significant increases for arsenic, boron, calcium, chloride, cobalt, fluoride, pH, sulfate, and TDS. Complaint at ¶¶ 42-43. “Surface water bodies—*i.e.*, rivers, lakes and streams . . . are . . . at risk of contamination through harmful constituents that migrate through groundwater . . . which can lead to environmental harms such as ‘wetland vegetative damage, fish kills, amphibian deformities, \*\*\* [and] plant toxicity.’”<sup>3</sup>

When faced with leaking, unlined, waterfront coal ash impoundments, other Southeastern utilities have closed the impoundments by moving coal ash to safe, dry, lined storage away from rivers and lakes. All such utility-owned coal ash impoundments in South and North Carolina have been or are being excavated; Dominion Energy is excavating all its unlined waterfront coal ash impoundments in Virginia; and Georgia Power is excavating over sixty million tons of coal ash from unlined waterfront impoundments in Georgia. Complaint at ¶ 37.

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<sup>1</sup> NUS Corporation, 1991, Screening Site Inspection, Phase II, Alabama Power Company – Barry Steam Plant, Bucks, Mobile County, Alabama, EPA ID#: ALD082148800 at ES-1.

<sup>2</sup> *In the Matter of Alabama Power Company James M. Barry Electric Generating Plant*, Order No. 18-094-GW at 1-3, 8-10 (ADEM Aug. 15, 2018).

<sup>3</sup> *USWAG*, 901 F.3d 414, 422 (D.C. Cir. 2018) (quoting 75 Fed. Reg. 35,128, 35,172 (June 21, 2010)).

Unlike other Southeastern utilities, Alabama Power is leaving coal ash in the unlined impoundment on the Mobile River, building another dike, and putting a cap on top. The ash remains saturated feet deep in contaminated groundwater in hydraulic connection with the underlying aquifer and the Mobile River. The unlined impoundment is at risk of hurricanes, storms, floods, and water level rise. Complaint at ¶¶ 2, 41, 44-49.

**CCR Rule and RCRA.** By leaving coal ash saturated in groundwater in a capped unlined impoundment, Alabama Power violates the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6901 *et. seq.*, and the CCR Rule. EPA adopted the Rule pursuant to RCRA in 2015 following catastrophes when unlined coal ash impoundments failed and dumped large quantities of coal ash into rivers at Tennessee Valley Authority’s Kingston facility in 2008 and Duke Energy’s Dan River facility in 2014. Complaint at ¶ 18.

As EPA has summarized the Rule’s requirements: “The closure in-place standards are designed to ensure that the waste in the closed unit has been dried out and is kept dry so that leachate cannot form in the closed unit and subsequently be released to the environment.”<sup>4</sup> As described below, the Rule prohibits Alabama Power from capping the unlined impoundment unless Alabama Power complies with the Rule’s standards designed to protect groundwater and the surrounding environment. By capping the impoundment in place and leaving ash saturated in groundwater, Alabama Power violates three separate provisions of the Rule.

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<sup>4</sup> Ex. B, U.S. EPA, Denial of Alternative Closure Deadline for General James M. Gavin Plant, Response to Comments on Proposed Denial, Docket ID No. EPA-HQ-OLEM-2021-0590, at 66-67 (Nov. 2022) (hereinafter referred to as “EPA Gavin Responses”). Exhibit A has previously been filed in the record of this case at Doc. 50-1, PageID 11186. Exhibit B has been filed at Doc. 50-1, PageID 11281. Plaintiff is attaching these exhibits to this Response for the convenience of the Court.

In 2022, EPA issued a final decision that applies the Rule’s plain text, consistent with the Complaint here, and that rejects the arguments made by Alabama Power in its motion to dismiss. On November 18, 2022, EPA denied a utility application for an alternative closure deadline for the Gavin Plant in Ohio.<sup>5</sup> As set out below, EPA enforced the text of the Rule, explaining that a utility may not close an unlined impoundment by capping it in place when coal ash remains in contact with groundwater.

Alabama Power makes one attempt to distinguish *Gavin* by contending that EPA in *Gavin* required only that the utility publish a plan that merely “discusses” how it will comply with the CCR Rule and that EPA did not require that the plan in fact comply with the performance standards of the CCR Rule. *See* Doc. 60 at 26-28. That contention is plainly wrong.

As EPA explained, a utility does not comply with the Rule by a mere “discussion.” Rather, the Rule “requires a facility to *ensure the CCR unit will be closed* in a manner that *will*” meet the performance standards. Ex. A at 39 (emphasis added).

The regulations provide two options for closing a CCR unit: closure by removal and closure with waste in place. 40 C.F.R. § 257.102(a). Each option establishes specific performance standards that must be met in their entirety. 40 C.F.R. §§ 257.102(c)-(d). . . . [A] facility must meet all of the performance standards for the closure option it has selected, and *if it cannot meet all of the performance standards for one option, then it must select the other option and meet all of the performance standards for that option.* 40 C.F.R. § 257.102(a).

*Id.* at 26-27 (emphasis added). These standards “must be met at every unit.” *Id.* at 32.

It is not enough that the closure plan document only “discusses” the Rule; rather, the Rule “requires facilities to develop a written closure plan *documenting the steps that will be taken* to complete closure and *to ensure the performance standards are met.*” *Id.* at 42 (emphasis added).

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<sup>5</sup> Ex. A, U.S. EPA, Final Decision, Denial of Alternative Closure Deadline for General James M. Gavin Plant, Docket ID No. EPA-HQ-OLEM-2021-0590 (Nov. 18, 2022) (hereinafter referred to as “*Gavin*”).

EPA specifically rejected Alabama Power’s “discuss” theory, which was presented by Alabama Power’s trade association,<sup>6</sup> pointing out that the “narrative description must actually describe the means by which the general and specific performance standards will be met.” *Id.* at 44-45.

EPA is not alone in recognizing that the plain meaning of the CCR Rule prohibits capping an unlined impoundment in place when ash is in contact with groundwater. Duke Energy, one of the nation’s largest utilities operating in the nearby Carolinas, has set out that the Rule’s “closure performance standards prohibit closure-in-place where groundwater is in actual or likely contact with the CCR unless effective engineering measures can be installed to control, minimize, or eliminate such conditions.” Ex. C at 16.<sup>7</sup> Duke Energy’s testimony makes clear that utilities understand and can comply with the requirements of the Rule.

**Alabama Permit.** Alabama Power spends a considerable portion of its Motion describing the permit it has received from ADEM under Alabama’s state regulations. But Alabama Power never even contends that this state permit is a defense to the federal CCR Rule claims in the Complaint. In fact, while Alabama Power must comply with state regulations and obtain a state permit, it must *additionally* comply with the federal requirements of the CCR Rule.

A utility closing an unlined CCR impoundment must comply with both state and federal requirements. 40 C.F.R. § 257.52. Indeed, EPA adopted the CCR Rule in part because of “significant gaps in state programs,” “particularly with respect to the oversight of surface impoundments.” 80 Fed. Reg. 21,302, 21,322 (Apr. 17, 2015). The Rule establishes national standards that all CCR impoundments must meet, in addition to any state requirements. *Id.* at

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<sup>6</sup> The argument was presented by USWAG, of which the Southern Company and Alabama Power are members. USWAG Membership List, available at <https://www.uswag.org/USWAGMemberList>. See Ex. A at 43 n.18.

<sup>7</sup> Testimony Before The Public Service Commission of South Carolina, Docket No. 2022-254-E (Sept. 1, 2022).

21,335. “[A] facility must still comply with the CCR rule requirements, even if the state has issued a permit that contains less stringent conditions or requirements than those in the CCR rule.”<sup>8</sup> Violations of the Rule are corrected through citizen suits like this one. *USWAG*, 901 F.3d 414, 424 (D.C. Cir. 2018).

In 2016, Congress passed the WIIN Act which provides that states can operate CCR Rule permitting programs. 42 U.S.C. § 6945(d). However, states must apply to EPA for approval. Before a state program is approved, EPA must find that the state program will require each CCR unit in the state to comply with the requirements of the Rule or with state requirements at least as protective as those in the Rule. *Id.* at §6945(d)(1)(B).

Alabama Power notes that over a year ago, ADEM applied to EPA to operate a CCR Rule permitting program. Doc. 60 at 6. But this application has no impact on the Complaint. EPA has not approved ADEM’s application and could not, since ADEM has applied Alabama’s solid waste rules in a way directly contrary to the plain meaning of the federal CCR Rule as written and as applied by EPA in *Gavin*.

The WIIN Act makes clear that ADEM’s state permit is of no consequence for the claims in the Complaint: “The applicable criteria for coal combustion residuals units under [the CCR Rule] shall apply to each coal combustion residuals unit in a State unless . . . a permit under a State permit program or other system of prior approval and conditions *approved by the Administrator under paragraph (1)(B)* is in effect for the coal combustion residuals unit.” 42

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<sup>8</sup> U.S. EPA, *Frequent Questions about Applicability of Other Regulations and Implementing the Final Rule Regulating the Disposal of Coal Combustion Residuals (CCR)*, available at <https://www.epa.gov/coalash/frequent-questions-about-applicability-other-regulations-and-implementing-final-rule#t3>.

U.S.C. § 6945(d)(3) (emphasis added). There is no EPA-approved ADEM CCR permitting program or other EPA-approved CCR system, much less a permit issued under such a program.

**Corrective Action and Post-Closure Obligations.** Alabama Power must take corrective action to address groundwater contamination, and the CCR Rule imposes post-closure obligations. 40 C.F.R. §§ 257.90-104. But those requirements deal with Alabama Power’s pollution legacy; they do not exempt Alabama Power from the standards with which it must comply *before* cap-in-place closure can be implemented. In other words, Alabama Power is not excused from properly closing its leaking impoundment and removing the source of the pollution because of additional requirements to deal with the water pollution flowing from its failing unit.<sup>9</sup> Post-closure obligations exist to protect against the problems of unlined impoundments after closure; nowhere does the Rule allow a utility to avoid the prerequisites to cap in place by undertaking or satisfying post-closure obligations. *Id.* at §§ 257.102(d) and 257.104.

#### STANDARDS FOR A MOTION TO DISMISS

In reviewing a Rule 12(b)(6) motion, the Court must accept “the allegations in the complaint as true” and construe them “in the light most favorable to the plaintiff.” *Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016) (citation omitted). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

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<sup>9</sup> “All . . . CCR impoundments . . . are subject to the groundwater monitoring and corrective action requirements.” *Id.* at §257.90.

## ARGUMENT

The straightforward requirements of the CCR Rule defeat Alabama Power’s arguments that it cannot be held accountable for its violations. Indeed, EPA—the agency that wrote the Rule and is responsible for it—considered and rejected these same arguments in EPA’s responses to comments from Alabama Power’s trade association and other utilities on the proposed *Gavin* decision, and in the final *Gavin* decision itself. EPA’s responses are attached as Exhibit B, *see particularly* pp. 30, 38-47, 51-56, and 65-68; and the final *Gavin* decision is attached as Exhibit A, *see particularly* pp. 26-45.

### **1. Alabama Power Must Comply with the CCR Rule’s Performance Standards, Not Just Discuss Them in a Plan Document.**

Alabama Power argues that it complies with the Rule and cannot be held to account for violating performance standards as long as it files a closure plan that simply discusses its *contention* that it will comply with the Rule. Doc. 60 at 15-16. Alabama Power argues that the Court should dismiss the Complaint without even considering the merits of three counts that set out how Alabama Power is violating three separate requirements by leaving millions of tons of coal ash sitting forever in water in its unlined impoundment. *Id.* at 18.

#### **A. Alabama Power Must Comply with the Rule’s Performance Standards for Cap-in-Place.**

Under the plain language of RCRA and the CCR Rule, Alabama Power must comply with the mandatory requirements of each of the three standards for cap-in-place and cannot avoid those standards by publishing a plan. “Practices failing to satisfy *any of the criteria* in . . . §§ 257.50 through 257.107”—including the closure requirements at 40 C.F.R. § 257.102(d)—are “prohibited under section 4005 of the Act,” and violations are corrected by citizen suit enforcement. 40 C.F.R. § 257.1(a)(2) (emphasis added); 42 U.S.C. § 6972(a)(1)(A).

Further, Alabama Power is well past the phase of just publishing a written plan. Alabama Power concedes that since the issuance of the state permit in July 2021, it has been in the process of capping its unlined impoundment in place. Doc. 60 at 2. The Complaint addresses the federal CCR Rule violations that Alabama Power is committing by its ongoing activities to cap the impoundment in place, not merely what Alabama Power once said in a document it published on its website. There is not one word in the Rule to suggest that a utility can comply with the Rule's requirements by merely filing a plan claiming it complies.

The Complaint sets out three causes of action, each based on Alabama Power's violation of a separate mandatory requirement of the Rule. First, Alabama Power "must" eliminate free liquids "prior to installing the final cover system." 40 C.F.R. § 257.102(d)(2)(i); Complaint, First Count. Second, Alabama Power "must ensure" that its closure of the unlined impoundment "will" "preclude" the probability of future impoundment of water, sediment, and slurry. *Id.* at § 257(d)(1)(ii); Complaint, Second Count. Third, Alabama Power "must ensure" that its closure of the unlined impoundment "will" control, minimize or eliminate, to the maximum extent feasible, the infiltration of liquids into the coal ash and release of pollution from the ash. *Id.* at §257.102(d)(1)(i); Complaint, Third Count. These are unqualified requirements separate from the requirements to submit a written closure plan in § 257.102(b), and these performance standards do not provide that they can be satisfied by a plan that merely discusses Alabama Power's opinion as to compliance. Instead, to legally close its impoundment, a utility must comply with these standards prior to closure, because under the Rule a utility may close an impoundment only in a way that complies with these standards. As EPA has stated, "*if [a]*

*facility is unable to meet the performance standards for closure with waste in place for a particular unit (or portion of a unit), it must clean close the unit (or that portion).*”<sup>10</sup>

Rather than eliminating free liquids from the basin, as required by § 257.102(d)(2)(i), Alabama Power will leave coal ash sitting in groundwater. Complaint at ¶¶ 26-32, 44-47, 53. Rather than precluding the probability of future impoundment of water, sediment, or slurry, as required by § 257.102(d)(1)(ii), Alabama Power will continue to impound wet ash and contaminated water. Complaint at ¶¶ 33-34, 48, 54. And rather than eliminating to the maximum extent feasible infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters, as required by § 257.102(d)(1)(i), Alabama Power will continue to allow groundwater to enter the ash and contamination to leave the impoundment, polluting the surrounding waters. Complaint at ¶¶ 35-49, 55. These are violations of the CCR Rule and RCRA that are not excused if Alabama Power ignores the fundamental problems with its cap-in-place plan and merely publishes a plan asserting that it will comply.

Alabama Power does not dispute that capping of the impoundment will leave water in the ash basin; will impound water, slurry, or sediment; and will continue to release pollutants and contaminated water from the basin into the surrounding environment. Indeed, these allegations of the Complaint must be taken as true at the motion to dismiss stage of the litigation.

EPA in *Gavin* rejected this attempt to erase the CCR Rule’s performance standards. Under the Rule, “a facility must meet all of the performance standards for the closure option it has selected, and if it cannot meet all of the performance standards for one option, then it must

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<sup>10</sup> U.S. EPA, *Closure Requirements: What are the options and the performance standards for closure of units under the CCR rule?*, available at <https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule#Closure> (revised on July 18, 2018) (emphases added).

select the other option and meet all of the performance standards for that option.” Ex. A at 27. Simply writing a plan and claiming a discussion of the standards is not enough.

**B. A Plan to Cap-in-Place Must Comply with the CCR Rule’s Closure Plan Requirements.**

Alabama Power’s reliance on its closure document is beside the point, because the Complaint alleges violations of the Rule’s separate performance standards. But apart from the violations of the § 257.102(d) mandatory performance standards alleged in the Complaint, Alabama Power cannot hide behind its plan because that document does not comply with the separate requirements in § 257.107(b). A cap-in-place closure plan “must include” a “description of how the CCR unit”—not just the final cover system— “will be closed in accordance with” § 257.102 of the Rule, including the Rule’s performance standards set out in § 257.102(d). 40 C.F.R. § 257.102(b)(1)(i). The Rule thus mandates that Alabama Power’s plan to cap-in-place must describe “how the CCR unit”—the entire coal ash impoundment— “will be closed in accordance with” the Rule’s performance standards.

Alabama Power claims its closure document complies because it contains conclusory predictions of compliance with the performance standards, regardless of whether the plan in fact complies with the standards. For example, the closure plan, as quoted by Alabama Power, states that its “closure approach will effectively control the source of CCR constituents to groundwater by removing free water and some interstitial water from the ash, reducing the footprint area of the ash and preventing further infiltration of surface water resulting from rainfall through the ash.” Doc. 60 at 18 (quoting Doc. 27-1 at PageID 4870). But the plan nowhere explains:

- How Alabama Power will eliminate *all* free liquids, including groundwater, that are mixed with the ash—indeed, the plan does not claim to eliminate all the groundwater in the impoundment;

- How Alabama Power will stop the continued infiltration of groundwater through the unlined sides and bottom of the impoundment—not just rainfall from above—into the ash;
- How Alabama Power will preclude the continued impoundment of groundwater and wet coal ash slurry within the CCR unit after it is capped; and
- How Alabama Power will stop the continued release of coal ash, leachate, or contaminated run-off from the CCR unit.

The plain text of the Rule requires Alabama Power to explain how it will satisfy these requirements.

Alabama Power resorts to hair-splitting arguments about whether it has adequately “discussed” or “described” how its cap-in-place plan will achieve the standards. *E.g.*, Doc. 60 at 16. However, under the plain meaning of the Rule, in order for Alabama Power to “describe” and “discuss” how closure of the CCR unit will achieve the performance standards, its plan must provide a detailed account of how the plan will do so.<sup>11</sup> Without addressing its basic violations of the performance standards, Alabama Power has not “discussed” or “described” how it will achieve such standards. Alabama Power cannot shield its violations of the performance standards by pointing to its closure plan, because that plan itself also violates the Rule.

Moreover, Alabama Power contends that it can install a cap-in-place system that violates the performance standards and then try to manage the consequences later “if the selected approach is not performing as intended.” Doc. 60 at 16. That “cap first, ask questions later” approach flies in the face of the plain language of the Rule. The Rule requires that Alabama Power “must meet” the requirements of § 257.102(d)(2) “prior to installing the final cover system,” including the elimination of all “free liquids,” including water, from the coal ash. The

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<sup>11</sup> The definition of “discuss” includes “to present in detail for examination or consideration.” *Discuss*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/discuss> (last visited Feb. 2, 2023). And to “describe” is to “give an account of.” *Describe*, Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/describe> (last visited Feb. 2, 2023).

Rule also states that Alabama Power “must ensure” that its closure “will”—not “may”—satisfy the standards for cap-in-place. 40 C.F.R. § 257.102(d)(1). Since the Rule provides that utilities must select a closure method that will achieve the performance standards, it makes perfect sense that Alabama Power’s closure plan must disclose at the outset how it *will* achieve those performance standards.

It is true, as Alabama Power points out, that, where cap-in-place is permitted, the Rule requires that utilities must also monitor and take corrective action to address existing groundwater contamination. But those are additional precautions designed to address groundwater contamination when a cap-in-place plan can satisfy the required performance standards; they are not substitutes for the performance standards themselves.

Further, EPA firmly rejected Alabama Power’s argument when it was served up by Alabama Power’s trade association in its comments on the *Gavin* decision: The Rule “requires facilities to develop a written closure plan documenting the steps that will be taken to complete closure and to ensure the performance standards are met.” Ex. A at 42. The “narrative description must actually describe the means by which the general and specific performance standards will be met.” *Id.* at 43-44; Ex. B at 30. The Rule’s closure plan requirements prevent a utility from steamrolling ahead with a defective plan, as Alabama Power is attempting to do here.

## **2. Alabama Power Is Violating the Rule’s Standards for Cap-in-Place.**

It is understandable that Alabama Power postpones its discussion of the governing performance standards for cap-in-place until the last half of its Motion, because these clear, straightforward, and governing standards are violated by Alabama Power at Plant Barry.

As EPA has made clear, the Rule’s requirements prohibit the capping of an unlined impoundment in place when coal ash mixed with groundwater will remain in a leaking impoundment. Indeed, the primary purpose of the performance standards is “to protect

groundwater” by “prevent[ing] the migration of leachate and contaminants out of the closed impoundment into the environment.” Ex. B at 52. The underlying rationale is clear: “[A]llowing groundwater to continue flowing through the waste would not protect human health and the environment.” Ex. A at 31.

Alabama Power disregards the Rule’s plain language by claiming it has an unqualified right to choose between removing coal ash from the impoundment or leaving the ash sitting in water and leaking forever by capping in place. It is true that a utility can choose to remove coal ash when it closes an impoundment. “An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected by releases from the CCR unit.” 40 C.F.R. § 257.102(c). This is the course followed by Alabama Power’s sister Southern Company utility, Georgia Power, for at least sixty million tons of ash and all its unlined impoundments in Georgia’s coastal region, and by all utilities in the Carolinas and by Dominion Energy in Virginia. Complaint at ¶ 37.

But if Alabama Power insists on capping the Plant Barry ash, it must satisfy a series of specific requirements that prevent coal ash from being left sitting in groundwater and leaking in perpetuity. EPA made that clear in the preamble to the Rule, which Alabama Power quotes only in part; a utility’s decision to cap in place is “subject to an additional set of performance standards,” specifically the standards on which the Complaint is based. 80 Fed. Reg. 21,302, 21,413-14 (Apr. 27, 2015).

Alabama Power attempts to avoid these requirements through selective and incomplete quotation. As Alabama Power quotes, Doc. 60 at 18, a utility may close an impoundment “either by leaving the CCR in place and installing a final cover system or through removal of the CCR and decontamination of the CCR unit,” but Alabama Power conveniently omits the rest of that

sentence, which mandates those closure options are only available “*as described in paragraphs (b) through (j) of this section.*” 40 C.F.R. § 257.102(a) (emphasis added). It is Alabama Power’s violations of those provisions—specifically of subsection (d)—on which this Complaint is based.

Alabama Power is violating three independent standards at Barry, each of which must be satisfied before a coal ash impoundment can be capped in place. “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.” 40 C.F.R. § 257.1(a)(2) (emphasis added).

**A. Eliminating Free Liquids.** Subsection (d) of Section 257.102 provides:

The owner or operator of a CCR surface impoundment . . . ***must*** meet the requirements of paragraphs (d)(2)(i) and (ii) of this section prior to installing the final cover system required under paragraph (d)(3) of this section.

- (i) Free liquids ***must be eliminated*** by removing liquid wastes or solidifying the remaining wastes and waste residues.

40 C.F.R. § 257.102(d) (emphases added). The Rule defines “free liquids” broadly to include “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure.” *Id.* § 257.53. The Complaint alleges that water, including groundwater, separates from coal ash under ambient temperature and pressure. Complaint at ¶¶ 28-30. The Complaint alleges, and Alabama Power does not dispute, that Alabama Power is leaving coal ash in water at Plant Barry; its unlined impoundment sits below the water table, below sea level, in wetlands, on top of a stream, and on the banks of the Mobile-Tensaw Delta. *E.g., id.* at ¶¶ 1-2, 40-49.

Alabama Power makes several futile attempts to avoid this straightforward requirement. It notes that the word “groundwater” is not specifically mentioned in the definition of “free liquids.” In fact, the Rule is written to encompass all “free liquids,” including water of all descriptions—without any limitation. The important fact is that the Rule does not *exclude* groundwater, which is encompassed by the expressly universal definition of “free liquids.” “[I]f

groundwater saturates the waste in an impoundment, EPA considers that liquid to be a free liquid that must be eliminated.” Ex. B at 46. “Liquid, including any suspended or dissolved constituents in the liquid, . . . that passes through the containment structure (*e.g.*, bottom, dikes, berms) of a surface impoundment,” 80 Fed. Reg. 67,838, 67,847 (Nov. 3, 2015), “can migrate from the site in the ground water at concentrations that could contaminate public or private drinking water wells and surface waters, even years following disposal of combustion residuals.” *Sw. Elec. Power Co. v. U.S. EPA*, 920 F.3d 999, 1029 (5th Cir. 2019) (internal citation omitted).

Alabama Power seizes upon the title of this sub-subsection of the Rule and tries again to evade the Rule’s plain language. The content of the Rule, not a sub-subsection’s title, is determinative,<sup>12</sup> but the applicable titles defeat Alabama Power’s arguments. The title of the entire section is “Criteria for conducting the closure or retrofit of CCR units,” 40 C.F.R. § 257.102, making clear that Alabama Power must satisfy specific criteria when it closes its impoundment. The subsection’s title is “Closure performance standard when leaving CCR in place,” *id.* at § 257.102(d), making clear that Alabama Power must satisfy the performance standard if it is going to cap the impoundment in place. And the sub-subsection’s title is “Drainage and stabilization of CCR surface impoundments,” *id.* at § 257.102(d)(2), making clear that its requirements address drainage *and* stabilization, not just stabilization of the final cap.

Alabama Power again resorts to rewriting and omitting portions of the Rule in trying to avoid its requirements. In attempting to leave millions of tons of coal ash saturated deep in groundwater, Alabama Power contends that the Rule requires only “removing *liquid wastes* or

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<sup>12</sup> *E.g.*, *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947) (“[T]he title of a statute ... cannot limit the plain meaning of the text”).

solidifying the remaining *wastes* and waste residues” “prior to installing the final cover” “sufficient to support the final cover system.” Doc. 60 at 25 (emphases in original).

But Alabama Power omits the key mandate: “Free liquids must be eliminated.” 40 C.F.R. § 257.102(d)(2)(i). They must be eliminated by “removing liquid wastes” because Alabama Power does not propose to solidify the millions of tons of wet coal ash sitting in water. Alabama Power argues that it does not consider groundwater to be “waste.” But its Plant Barry impoundment contains millions of tons of coal ash sitting and saturated in groundwater, and this wet slurry and the polluted groundwater with which it is mixed, are “liquid wastes.” As EPA has made clear: “[T]he regulation deliberately uses the very general term ‘liquids,’ with the clear presumption that water (or any other liquid) in a disposal unit saturating the solids in the unit is a liquid waste.” Ex. B at 54. It is true, as Alabama Power quotes, that it must eliminate free liquids and remove liquid wastes from the leaking impoundment “prior to installing the final cover,” but that is a matter of timing, not a limitation on the removal of free liquids. The Rule provides that Alabama Power cannot rely upon a *prediction* that it may eliminate the movement of groundwater into the unlined, leaking impoundment at some point in the future; instead, the elimination must be accomplished before the capping is complete.

Alabama Power misleadingly rewrites the Rule when it combines this series of quoted fragments with the final phrase: “sufficient to support the final cover system.” Doc. 60 at 25. In fact, 40 C.F.R. § 257.102(d)(2) contains two separate requirements. As the title of the subsection indicates, one deals with “drainage”—free liquids must be eliminated. *Id.* at § 257.102(d)(2)(i). A second, separate provision expressly addresses stabilization and requires: “*Remaining* wastes must be stabilized sufficient to support the final cover system.” *Id.* at §

257.102 (d)(2)(ii) (emphasis added). Contrary to Alabama Power's conflating of the Rule's language, Alabama Power must *both* eliminate free liquids *and* stabilize the remaining wastes.

In *Gavin*, EPA made clear that Alabama Power's rewriting of the Rule is wrong. EPA rejected the idea that a utility has an unqualified choice to cap an impoundment in place:

The regulations provide two options for closing a CCR unit: closure by removal and closure with waste in place. 40 C.F.R. § 257.102(a). Each option establishes specific performance standards that must be met in their entirety. 40 C.F.R. §§ 257.102(c)-(d) . . . [A] facility must meet all of the performance standards for the closure option it has selected, and if it cannot meet all of the performance standards for one option, then it must select the other option and meet all of the performance standards for that option. 40 C.F.R. § 257.102(a).

Ex. A at 26-27. EPA described the requirements for eliminating free liquids:

Section 257.102(d)(2)(i) establishes a clear standard to be met: "free liquids must be eliminated." The regulation further specifies how this standard is to be met: by "removing liquid wastes or solidifying the remaining wastes and waste residues." *Id.* In situations where the waste in the unit is inundated with groundwater, the requirement to eliminate free liquids thus obligates the facility to take engineering measures necessary to ensure that the groundwater, along with the other free liquids, has been permanently removed from the unit prior to installing the final cover system. *See*, 40 C.F.R. § 257.102(d)(2)(i).

*Id.* at 34.

EPA expressly rejected Alabama Power's argument that reads polluted groundwater and coal ash slurry out of the Rule's requirement to eliminate free liquids and remove liquid wastes:

The process-specific technical standard that governs dewatering provides that "free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues." 40 C.F.R. § 257.102(d)(2)(i). Free liquids are defined as all "liquids that readily separate from the solid portion of a waste under ambient temperature and pressure," regardless of whether the source of the liquids is from sluiced water or groundwater. 40 C.F.R. § 257.53. Consequently, the directive applies to both the freestanding liquid in the impoundment and to all separable porewater in the impoundment, whether the porewater was derived from sluiced water, stormwater runoff, or groundwater that migrates into the impoundment.

*Id.* EPA further explained that the Rule’s direct language does not allow a coal ash impoundment to be capped in place when coal ash remains in groundwater:

[G]roundwater intersects at least a portion of the [impoundment] at levels high enough that [coal ash] in the unit would be saturated. Based on the undisputed facts in the record, therefore, EPA concludes that at least a portion of the [coal ash] in the [impoundment] remains in contact with groundwater. These facts alone support the conclusion that Gavin has failed to demonstrate that the closure of the [impoundment] meets the performance standards in 40 C.F.R. § 257.102(d).

[T]he [coal ash] in the [impoundment] remains in contact with groundwater, and . . . groundwater is continuously flowing in and out of the [impoundment]. These facts alone provide a sufficient basis for EPA to conclude not only that Gavin has failed to demonstrate that its closure of the [impoundment] complies with 40 C.F.R. § 257.102(d), but also that the closure of the [impoundment] fails to meet all of the performance standards.

*Id.* at 19 & 22. Each of Alabama Power’s arguments was specifically addressed and rejected by EPA in its responses to *Gavin* comments. Ex. B at 52-58.

Alabama Power objects to Baykeeper pointing out that it cannot cap its coal ash impoundment in place and leave coal ash saturated in groundwater. Doc. 60 at 18.

Alabama Power’s quarrel is with the language of the Rule itself, as explained by EPA.

**B. Impoundment of Water, Sediment, or Slurry.** An additional mandatory requirement shows that the Rule does not allow a utility to cap an unlined impoundment in place with coal ash sitting in groundwater:

The owner or operator of a CCR unit *must ensure* that, at a minimum, the CCR unit is closed in a manner that *will*:

- (ii) Preclude the probability of future impoundment of water, sediment, or slurry.

40 C.F.R. § 257.102(d)(1)(ii) (emphases added).

The definition of impoundment makes clear that the Rule reaches broadly to prohibit facilities that contain coal ash mixed with water—like the Plant Barry impoundment.

Impoundment is defined to mean “a natural topographic depression, man-made excavation,

or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.” *Id.* at § 257.53. The Complaint alleges that the Plant Barry impoundment is made up of natural depressions and man-made excavations, that it is a diked area, and that it is designed to hold and will hold coal ash and liquids—water, sediment, and slurry. Complaint at ¶¶ 33-34, 46-49, 54. Alabama Power does not deny these facts.

Alabama Power’s only argument to avoid this plain language is its brief contention that the Rule requires only that the top cover of the closed impoundment prevent rain from flowing vertically into the impoundment. Doc. 60 at 26. But that is not what the Rule says. It provides that Alabama Power “must ensure” that “the CCR unit”—not just the cap— “is closed in a manner that will [p]reclude the probability of future impoundment of water, sediment, or slurry.” The Rule defines “CCR unit” to mean the entire “surface impoundment.” 40 C.F.R. § 257.53.

Thus, this provision of the Rule contains a requirement for closure of the entire unit, not just a design requirement for the cap itself. It would be absurd for the Rule to ban only the impoundment of rain falling vertically and to ignore the substantial water and coal ash slurry present in the impoundment due to the pre-existing saturated ash and the continued movement of groundwater through the sides and bottom of this leaky impoundment.

Alabama Power’s argument is also contrary to the express structure of the Rule. The Rule does contain different, specific requirements for the “final cover system” in 40 C.F.R. § 257.102(d)(3). But the prohibition against impoundment is contained in the first, not the third, provision of this subsection of the Rule, *id.* at § 257.102(d)(1). The impoundment prohibition expressly governs the “CCR unit,” not just the “final cover system.”<sup>13</sup>

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<sup>13</sup> Alabama Power cites a 2014 response to comments which indicates that the final cover system must preclude the probability of impoundment. Doc. 60 at 26. But that response answered a question specifically about only the requirements for a final cover system, not a question about

Not surprisingly, EPA has rejected Alabama Power’s wholesale rewriting of the Rule. Where the “closed, unlined impoundment sits in groundwater several feet deep,” the utility has not demonstrated that it meets the requirement to “preclude the probability of future impoundment of water, sediment, or slurry.” Ex. A at 29-30. “EPA is unaware of a circumstance where these standards could be, or have been, met when the waste in a closed, unlined impoundment remains in contact with groundwater that freely migrates in and out of the CCR remaining in the closed unit.” *Id.* at 33. The impoundment prohibition is not met when “the waste in the closed unit remains saturated with several feet of water” or by an “unlined CCR impoundment that continues to be inundated with groundwater.” *Id.* at 39, 42. EPA also rejected Alabama Power’s attempt to limit the scope of these requirements to the cap and to eliminate the Rule’s requirements for the entire impoundment, including the cessation of the flow into and out of the unlined sides and bottom. Ex. B at 66-68.

**C. Infiltration and Releases.** Violation of either of the first two standards establishes that Alabama Power’s plan to cap the Plant Barry coal ash in place violates the Rule and RCRA. In addition, there is a third, separate requirement that Alabama Power also violates:

The owner or operator of a CCR unit ***must ensure*** that, at a minimum, the CCR unit is closed in a manner that ***will***:

- (i) 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.

40 C.F.R. § 257.10(d)(1)(i) (emphases added).

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leaving ash in groundwater. Doc. 50-1, Page ID# 1026-27. Further, this response did not say that the impoundment prohibition was limited *only* to the final cover system. The prohibition set forth in the Rule applies to the entire “CCR unit,” and that is how EPA applied the Rule in *Gavin*. EPA rejected this argument in its response to *Gavin* comments. Ex. B at 41-42.

Alabama Power again tries to rewrite the Rule to make this requirement applicable only to “the final cover system” and only to rainwater falling vertically from the sky. But that is not what the Rule says.

The Rule plainly says that the requirement to control, minimize, or eliminate applies to “the CCR unit,” not just “the final cover system.” In fact, the words “the final cover system” do not appear in this standard; this standard is in no way limited to “the final cover system” but applies to the entire “CCR unit.” This fact is made even clearer because the third subpart of this provision dealing with slope stability, § 257.102(1)(iii), expressly addresses “the final cover system.” When the Rule limits its application to the final cover system, it expressly says so.

Nor is this provision limited to rain falling from the sky. To “infiltrate” means “to pass into or through (a substance) by filtering or permeating” or “to cause (something, such as a liquid) to permeate something by penetrating its pores or interstices,” without any limitation on the type or direction of permeation.<sup>14</sup> Likewise, the provision does not contain the word “vertical” or any other limitation on “infiltration,” and the provision is not limited to water coming from above and does not mention rain. Rather, the provision addresses “infiltration of liquids into the waste” without limitation, including groundwater that infiltrates the sides and bottom of an unlined impoundment, like at Plant Barry. If the Rule was meant to be limited to “vertical” infiltration, it would say so; Alabama Power cannot insert a limiting condition that the Rule does not contain.

As the EPA itself has explained, this standard “contains no language that limits the direction of infiltration” so that “the plain language of the general performance standard also

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<sup>14</sup> *Infiltrate*, Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/infiltrate> (last visited Feb. 2, 2023).

applies to the horizontal groundwater infiltration into an impoundment.” Ex. B at 39. This literal meaning is backed up by the purpose of the regulation which is to “protect human health and the environment,” whereas an unspoken limitation to vertical infiltration “would allow a significant number of sites to continue leaking hazardous constituents, such as arsenic and mercury, indefinitely.” *Id.* at 40.

The Rule’s unambiguous language is the end of the matter. *Landau v. RoundPoint Mortg. Servicing Corp.*, 925 F.3d 1365, 1369 (11th Cir. 2019). Alabama Power’s discussion of various other provisions and documents, some of which pre-date the Rule by more than thirty years, is beside the point. Further, as EPA explains, Alabama Power’s version of RCRA history “misstates EPA’s consistent 40-year approach to the closure of surface impoundments under RCRA”—an approach that protects groundwater as the priority, that prevents lateral movement of groundwater through waste and contaminants leaking into surrounding groundwater, and that removes free liquids. Ex. B at 66, 38-40, 67-68.

Moreover, analysis conducted by the industry itself has concluded that cap-in-place cannot succeed when groundwater is in contact with coal ash. The industry’s research arm, the Electric Power Research Institute, studied the issue and determined: “Caps are not effective when [coal ash] is filled below the water table, because groundwater flowing through the [coal ash] will generate leachate even in the absence of vertical infiltration through the [coal ash].”<sup>15</sup>

Beyond the requirement to prevent infiltration of liquids into coal ash, this standard also requires Alabama Power to control, minimize, or eliminate “releases of CCR, leachate, or contaminated run-off” from the CCR unit. Leachate is the contaminated liquid that results from

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<sup>15</sup> Groundwater Remediation of Inorganic Constituents at Coal Combustion Product Management Sites, EPRI Technical Report (2016) at p. 3-6.

coal ash pollutants dissolving into water. Merely focusing on the cap's performance, as Alabama Power does (Doc. 60 at 19, 22), is no answer, because the standard addresses not merely the cap but closure of the entire CCR unit: Alabama Power "must ensure that, at a minimum, *the CCR unit is closed in a manner that will: Control, minimize, or eliminate . . . post-closure releases*" of leachate and other pollution to the maximum extent feasible. 40 C.F.R. § 257.102(d)(1)(i) (emphasis added). Closure in place of this CCR unit will not prevent leachate releases when the ash is saturated with water after the unlined impoundment is capped. When Alabama Power does briefly refer to this part of the standard (Doc. 60 at 22), it does not attempt to argue that its plan controls, minimizes, or eliminates such releases "to the maximum extent feasible," as the standard requires. Indeed, it cannot for purposes of this motion, since Baykeeper has set out in the Complaint that eliminating such releases entirely is feasible by ash removal rather than capping it in place, as every other utility in the region is doing. Complaint at ¶¶ 36-38.

Alabama Power makes only a parenthetical argument to suggest that the requirement to control, minimize, or eliminate releases is limited to discharges to the ground, not to groundwater. Doc. 60 at 22. This argument requires the reader to ignore both the Rule's purpose and its grammatical structure. The Rule requires control of releases of "CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere." 40 C.F.R. § 257.102(d)(1)(i). It would make no sense for the Rule governing unlined impoundments to protect surface waters and the atmosphere but overlook groundwater when the major threat is contaminants flowing from the unlined pit into the surrounding groundwater. For Alabama Power to be correct, the sentence would also have to be restructured to say: "to the ground or to the surface waters or to the atmosphere." Instead, the Rule addresses the "ground or surface" waters in one prepositional phrase with one noun object (waters) and addresses the atmosphere

as the object noun in a second phrase beginning with a separate “to.” There are only two prepositional phrases, one addressing types of “waters” and one addressing the “atmosphere.” There is not a third one directed only at the ground.

Alabama Power contends that the final cover system must function properly and not allow infiltration. Of course, the Rule requires proper design and performance of the final cover system in several ways. But the Rule is not limited to ensuring only that a proper cap is put on top of the ash; if that were all the Rule required, it would fail. Instead, this standard applies to the entire “CCR unit.” Thus, while the Rule requires the utility to describe how the final cover system will prevent infiltration, 40 C.F.R. § 257.102(b)(1)(iii), it also requires “a narrative description of how *the CCR unit* will be closed in accordance with” § 257.102 (emphasis added), including § 257.102(d) and its requirements that the entire CCR unit be closed in a way that controls infiltration and releases. And while § 257.102(d)(3) addresses requirements for the final cover system, the preceding provisions of § 257.102(d) set forth standards for the entire CCR unit or surface impoundment, *id.* at § 257.102(d)(1) and (2). Consequently, while the preamble to the Rule discusses the various requirements for the cap, it also sets out the performance standards that apply to the entire “CCR unit.” 80 Fed. Reg. 21,302, 21,413-14 (Apr. 27, 2015).

Alabama Power tries to find support in what EPA supposedly said about other RCRA programs in the 1980s, more than thirty years before it issued the 2015 Rule. However, EPA itself disagrees with Alabama Power’s rewriting of history:

EPA’s application of the CCR regulations reflects the same approach EPA has taken to the closure of surface impoundments since 1982, when EPA issued RCRA standards for both permitted and interim status hazardous waste facilities. . . . Although the CCR and hazardous waste regulations are not identical, both adopt the same overall approach to closure of surface impoundments: requiring facilities to minimize the formation and migration of leachate in the unit that could be released to the environment by 1) removing free liquids to eliminate any existing leachate that could migrate from the unit, and 2) preventing water/liquid

from entering a closed unit and preventing or controlling releases from the closed unit. This is explained in several places in the preamble to the 1982 interim final hazardous wastes rule. *See, e.g.*, 47 Fed. Reg. 32,278, 32,284, 32,318-32,319.

Ex. A at 30-31. *See also* Ex. B at 43-44. In *Gavin*, EPA rejected the arguments made by Alabama Power:

Several commenters cite to various documents from 40 years of RCRA implementation . . . . None of the statements they identify address the specific circumstances at hand: how the requirements for closing with waste in place apply to an unlined surface impoundment several feet deep in groundwater. And commenters identify no document in which EPA has ever interpreted the closure regulations to allow a facility to put a cover on an unlined impoundment sitting several feet deep in groundwater, without taking any further measures to prevent the continued formation of leachate in the closed unit or the continued releases of that leachate into the surrounding groundwater. Simply put, this is because allowing groundwater to continue flowing through the waste would not protect human health and the environment.

Ex. A at 31.

Illustrative is the old primitive diagram that Alabama Power reproduces in its motion. Doc. 60 at 21. That sketch is not a comprehensive statement of RCRA requirements, nor a binding prediction of what the 2015 CCR Rule would require thirty-three years later. But it indicates that the leachate releases flow out of the sides and bottom of the unlined pit and that groundwater flows through the waste where the pit is below the water table. Moreover, as EPA has underscored, its 1982 guidance expressly cited “*controls [that] function to prevent the subsurface flow of ground water into the impounded waste.*” Ex. A at 29 (emphasis in original);

Ex. B at 43-44.

Alabama Power also spends some time discussing a 2010 proposal. Doc. 60 at 23-24.

But as EPA pointed out in *Gavin*, the governing language is that of the 2015 Rule:

EPA’s conclusions are based on a straightforward reading of the plain language of 40 C.F.R. § 257.102(d). . . . Specifically, . . . a CCR unit must be closed in a manner that will 1) “control, minimize or eliminate, to the maximum extent feasible,” post-closure **infiltration of liquids into** the waste; 2) “control,

minimize or eliminate, to the maximum extent feasible,” **post-closure releases** of CCR or leachate out of the unit to the ground or surface waters[.] . . . EPA is unaware of a circumstance where these standards could be, or have been, met when the waste in a closed, unlined impoundment remains in contact with groundwater that freely migrates in and out of the CCR remaining in the closed unit.

Ex. A at 32-33 (emphases in original). *See also* Ex. B at 38-39.

### **3. Baykeeper Is Not Estopped from Asserting Its Federal CCR Claims Based on ADEM’s State Permit Determination.**

Alabama Power’s final argument is that Baykeeper’s federal CCR Rule claims are “estopped” because Baykeeper participated in a public comment process for an ADEM state permit and “ADEM made a final determination of the issues in this Complaint when it issued the final closure permit.” Doc. 60 at 28. Alabama Power’s argument is fatally flawed because as a matter of federal law, ADEM has no authority to “determine” the adequacy of the closure plan at issue nor to “reject” the Complaint’s federal CCR Rule claims.

In addition, Alabama Power’s novel claim that mere participation in a public comment process constitutes “litigation” of federal claims is unprecedented in Alabama law. Alabama Power has not cited a single case in which collateral estoppel was applied to participation in a public comment process for a permit.<sup>16</sup> Collateral estoppel is an affirmative defense; thus, “the

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<sup>16</sup> The only cases located by Baykeeper considering this issue have rejected such an argument. In *Albuquerque Cab Co. v. Lyft*, the court held that Defendants were not collaterally estopped based on a state agency’s order based on notice and comment. “The Final Order itself makes it clear that the [Public Regulation Commission] made its decision based on a regulatory notice-and-comment procedure, not an adversarial process . . . . There is no indication in the Final Order that the parties engaged in any discovery or were permitted to participate in an evidentiary hearing. These types of ‘procedural differences between the agency and court actions’ constitute sufficient basis to deny the application of collateral estoppel.” *Albuquerque Cab Co., Inc. v. Lyft, Inc.*, Civ. No. 17-1006 SCY/KBM, 2019 WL 1082205 (D.N.M. Mar. 7, 2019) (citing *Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 20, 850 P.2d 996, 1004 (N.M. 1993)); *see also Pacific Lumber Co. v. State Water Res. Control Bd.*, 126 P.3d 1040 (Cal. 2006) (“[The] interagency [Timber Harvest Plan] review and approval process does not possess a judicial character.”).

party raising the defense has the burden of proving each element.” *Lee L. Saad Const. Co., Inc. v. DPF Architects, P.C.*, 851 So.2d 507 (Ala. 2002). For an administrative proceeding to have potential estoppel effects, these elements must be established:

(1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.

*Ex parte Shelby Med. Ctr.*, 564 So.2d 63 (Ala. 1990) (quoting *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241, 1245 (11th Cir. 1985)).<sup>17</sup> None of the required elements for collateral estoppel is present here.

**A. As a Matter of Federal Law, ADEM’s Proceeding Could Not “Actually Litigate” or Determine Any Federal CCR Rule Issues.**

First, Baykeeper’s federal claims were not actually litigated or determined by ADEM in the state permitting process, nor could they have been because ADEM has no legal authority to resolve any federal CCR Rule claims, including the adequacy of a closure plan.

Alabama Power must comply with *both* state and federal requirements in closing the Plant Barry impoundment. 42 U.S.C. § 6945(d)(3). Alabama Power must obtain a state permit, but ADEM is not authorized by EPA to administer a federal CCR Rule permitting program. Therefore, no ADEM state administrative proceeding, including a public comment process, can resolve the Complaint’s federal CCR Rule claims. The WIIN Act clearly states that the federal CCR Rule applies to each CCR unit in a state “unless . . . a permit under a state permit program or other system of prior approval and conditions *approved by the [EPA] Administrator under*

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<sup>17</sup> Alabama Power incorrectly cites *Chappelle v. City of Leeds*, a case applying collateral estoppel to a prior *court* proceeding—not an *administrative* proceeding as the standard. Doc. 60 at 28-29.

*paragraph (1)(B)* is in effect for the [CCR] unit.” *Id.* § 6945(d)(3) (emphasis added).<sup>18</sup> To approve a state program, EPA must determine that the state permit program’s standards are at least as protective as those in the CCR Rule, *id.*, and EPA has not made such a determination for ADEM’s application. Thus, by federal statute, ADEM’s process for its state permit could not have litigated or determined Baykeeper’s federal CCR Rule claims, and this fact alone is dispositive of all of Alabama Power’s collateral estoppel arguments.

Director Lance LeFleur confirmed ADEM’s lack of authority when he addressed the Alabama Environmental Management Commission in February 2022: “Full approval of our CCR program will allow the regulated community, EPA, and the courts . . . to defer to State regulatory oversight rather than relying on citizen lawsuits to enforce CCR regulations.” Ala. Power Br. Ex. O, AEMC Minutes, Feb. 11, 2022, at PageID # 6409. Since EPA has not approved ADEM’s application for a federal CCR Rule program and no federal CCR Rule permit has been issued for Plant Barry, federal citizen suits like this one are the proper means to correct violations of the CCR Rule. Thus, as a matter of federal law, the ADEM permit proceeding was not a determination of the claims set out in the Complaint.

In reality, no claims were “actually litigated” in the public comment process for the state permit. The Alabama Administrative Code sets out the procedures for an adjudicative administrative proceeding. Ala. Admin. Code r. 335-2-1-.04 (“Any person aggrieved by an administrative action of the Department . . . may file with the Commission a request for hearing to

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<sup>18</sup> See also U.S. EPA, Coal Combustion Residuals State Permit Program Guidance Document; Interim Final (Aug. 2017), at 1-9, *available at* <https://www.epa.gov/coalash/guidance-coal-combustion-residuals-state-permit-programs> (“[T]he [WIIN Act] expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until an *approved* state permit is in effect for that facility, or, in the case of a non-participating state, until the EPA permit is in effect.” (citing 42 U.S.C. § 6945(d)(3)) (emphasis added)).

contest such action within thirty days of such action.”). The filing must provide a statement of the alleged errors, and the terms the initiating party seeks to have modified or disapproved. *Id.* When a party files a request for hearing, a Hearing Officer is appointed, discovery may be granted, motions may be filed, and a hearing with sworn testimony and findings of fact and law is required. *Id.* r. 335-2-1-.10.

The administrative procedures described above are totally different than the public hearing and comment process, where no judicial process is allowed. Here, none of the judicial processes provided for in an administrative appeal took place. Baykeeper only submitted a letter to ADEM and spoke for several minutes at a public hearing run by ADEM personnel. There was no judge to hear arguments and make decisions. Public Hr’g Tr. (Ex. G to Doc. 60) (Doc. 51-1, PageID 12117) (“The role of the hearing officer is limited to ensuring an orderly hearing so that an accurate record of the hearing may be developed for the Department’s evaluation. I do not make the decisions regarding these proposed permit actions.”). There was no live expert or other witness testimony, and there was no opportunity for cross examination. Public Hr’g Tr. (Ex. G to Doc. 60) (Doc. 51-1, PageID 12120) (“This proceeding tonight is not an open forum as in a question-and-answer session. This hearing is an opportunity for you to submit comments that you wish the Department to consider in the final review of the permit applications.”). No discovery was conducted, no motions were filed, and there was no hearing with sworn testimony or findings of fact and law. Contrary to Alabama Power’s claim, a public comment was in no way an “oral argument” like one made in court, and nothing resembling a judicial process or litigation took place at the public hearing. Doc. 60 at 33.

**B. The ADEM Process Did Not Satisfy Any of the Other Elements of Collateral Estoppel Under *Ex parte Shelby Medical Center*.**

ADEM’s lack of authority under federal law to determine the federal CCR Rule claims here is fatal to the collateral estoppel defense. But in addition, the ADEM process did not satisfy the other requirements for collateral estoppel.

**Adequate Opportunity to Litigate.** Alabama Power argues that Baykeeper had an opportunity to litigate its CCR claims and “voluntarily gave up its right to re-litigate the issues before this Court” by not challenging the closure plan “through state proceedings.” Doc. 60 at 28. Relying primarily on the Restatement of Judgments (not binding Alabama precedent), Alabama Power attempts to stitch together the argument that the “procedures available” to Baykeeper—the ability to challenge the state permit through state proceedings—provide sufficient safeguards to protect its due process rights.<sup>19</sup>

But as shown above, there was no opportunity to “actually litigate” the federal CCR Rule issues in the ADEM permit process because it did not allow discovery, witnesses, or cross examination. Additionally, the United States Supreme Court has rejected Alabama Power’s argument that an agency permitting process could trigger collateral estoppel. In *United States v. Utah Construction & Mining Co.*, the Court explained that collateral estoppel may apply to administrative proceedings only if the administrative agency is acting in a *judicial capacity*, affording the parties an adequate opportunity to litigate the issue in that proceeding. 384 U.S. 394, 422 (1966). *See also Nasem v. Brown*, 595 F.2d 801 (D.C. Cir. 1979) (noting preclusion applies only to “a full-dress adversary proceeding, with testimony, cross-examination, exhibits,

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<sup>19</sup> Alabama Power discusses four “due process” factors under § 83 of the Restatement and their alleged availability in the permit proceeding. Doc. 60 at 29-31. However, this is not the appropriate test or standard under Alabama law. The appropriate, binding test is laid out in *Ex parte Shelby Medical Center*. 564 So.2d 63 (Ala. 1990).

briefs, and argument”). In *Nasem v. Brown*, the D.C. Circuit held that even an *adversarial* proceeding, which the ADEM state permit process was not, did “not provide the procedural safeguards contemplated by *Utah Construction*.” 595 F.2d at 806-07. The court was “particularly disturbed by the inability of parties to present live witness testimony” and the lack of cross-examination. *Id.*

The cases cited by Alabama Power were all based on actual prior *litigation*, not public hearings.<sup>20</sup> In *Caton v. City of Pelham*, where the plaintiff filed an administrative challenge of an unemployment claim, the Court based its analysis of preclusive effect on plaintiff’s failure to avail himself of procedures *available in the hearing* he initiated, such as issuing subpoenas, calling witnesses, or cross-examining witnesses. 329 So.3d 5, 25-26 (Ala. 2020). The Court held that preclusion applied to the issues in that prior proceeding because the administrative proceeding had “the characteristics of an adjudication.” *Id.* at 25. The ADEM process was in no sense an adjudication in an adversarial proceeding with discovery, motions, sworn testimony, cross examination, and determinations of fact and law made by a judicial official.

Alabama Power also ignores that fact that there was a jurisdictional bar to litigating Baykeeper’s CCR claims in state court. Federal law bars the ADEM state administrative process from having any effect on the Complaint’s federal CCR Rule claims. Baykeeper’s claims are brought as an enforcement suit under RCRA—the statute pursuant to which the CCR Rule was

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<sup>20</sup> In *Sierra Club v. Two Elk Generation Partners, Ltd. Partnership*, plaintiffs filed a petition for review of an administrative action, thereby initiating a judicial proceeding. See 646 F.3d 1258, 1262 (10th Cir. 2011). In *Families Concerned About Nerve Gas Incineration v. Department of the Army*, plaintiffs filed a petition for the Alabama Environmental Management Commission’s review under Alabama Code § 22-22A-7 and subsequently appealed the Commission’s decision to state court. 380 F.Supp.2d 1233, 1241 (N.D. Ala. 2005). *Durfee v. Duke* was based on previous state court litigation, and *Adams v. Morton* was based on previous federal court litigation. *Durfee v. Duke*, 375 U.S. 106 (1963); *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978).

promulgated. The federal courts have exclusive jurisdiction over such RCRA claims. Any claim for violation of a RCRA regulation “shall be brought in the district court for the district in which the alleged violation occurred.” 42 U.S.C. §6972 (a). Applying this exclusive jurisdiction statute, the U.S. Court of Appeals for the Third Circuit refused to give any effect in subsequent federal RCRA litigation even to prior state court litigation on the same matter, because RCRA claims can be resolved only by the federal courts. *Litgo N.J. Inc. v. Comm’r N.J. Dep’t of Env’t Prot.*, 725 F.3d 369, 394 (3d Cir. 2013). *Accord Blue Legs v. U.S. Bur. of Indian Aff.*, 867 F.2d 1094, 1098 (8th Cir. 1989).<sup>21</sup> Thus, state court litigation was not an “available procedure” for purposes of litigating federal CCR Rule claims. An appeal in the state system that addressed the Complaint’s federal CCR claims simply could not have occurred.

**Identity of Issues.** For the same reasons, there is not identity of issues between the issues in the state permitting process and this Complaint. “Only issues actually decided in a former action are subject to collateral estoppel.” *Leverette ex rel. Gilmore v. Leverette*, 479 So.2d 1229, 1237 (Ala. 1985). As ADEM’s permit decision states, it merely issued a permit pursuant to state law. The ADEM permitting process did not and could not decide Alabama Power’s compliance with the federal CCR Rule; that process only dealt with Alabama state rules.<sup>22</sup>

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<sup>21</sup> See also *Interfaith Cmty. Org. Inc. v. PPG Indus., Inc.*, 702 F.Supp.2d 295, 304 (D.N.J. 2010); *Remington v. Mathson*, 2010 WL 1233803, at \*6-9 (N.D. Cal. Mar. 26, 2010); *K-7 Enter., L.P. v. Jester*, 562 F.Supp.2d 819, 827 (E.D. Tex. 2007); *Spillane v. Commonwealth Edison Co.*, 291 F.Supp.2d 728, 732 (N.D. Ill. 2003); *Chem. Weapons Working Grp., Inc. v. U.S. Dep’t of the Army*, 990 F.Supp. 1316, 1319 (D. Utah 1997) *White & Brewer Trucking, Inc. v. Donley*, 952 F.Supp. 1306, 1312 (C.D. Ill. 1997); *Prisco v. New York*, 1992 WL 88165, at \*3 (S.D.N.Y. Apr. 22, 1992); *Middlesex Cnty. Bd. of Chosen Freeholders v. N.J. Dep’t of Env’t Prot.*, 645 F.Supp. 715, 719 (D.N.J. 1986).

<sup>22</sup> ADEM, Coal Combustion Residual Facility Permit at 1, Doc. 22-1, PageID 107 (“Pursuant to the Solid Wastes & Recyclable Materials Management Act, Code of Alabama 1975, §§22-27-1, et seq., as amended, and attendant regulations promulgated thereunder by [ADEM], this permit is issued to Alabama Power Company (hereinafter called the Permittee) for the coal combustion residual units located at the James M. Barry Electric Generating Plant.”).

**Necessary Findings.** Likewise, determining the closure plan’s compliance with the federal CCR Rule was not “necessary” to ADEM’s state permit decision. As shown, ADEM had no authority to determine the federal CCR issues, and those issues were not and could not have been part of the decision to issue a purely state permit, as the permit determination stated.

**Identity of Parties.** Finally, the “same parties” were not involved in the permit determination. Alabama Power focuses exclusively on Baykeeper’s “identity” for the purposes of collateral estoppel. However, Baykeeper submitted public comments for ADEM’s consideration—not Alabama Power’s. Baykeeper did not litigate any claim against Alabama Power by commenting on a draft permit issued by ADEM. Further, thousands of other individuals and organizations submitted public comments. The ADEM comment process had a different set of parties and addressed different issues from those presented in this federal CCR Rule enforcement action.

### CONCLUSION

Alabama Power is attempting to circumvent the straightforward requirements of the federal CCR Rule. EPA has already rejected these arguments in its *Gavin* decision and in its *Gavin Responses to Comments*, and another major Southeastern utility, Duke Energy, has also rejected them in the attached sworn testimony. In addition, the public comment process on a separate state permit cannot be used to block Baykeeper from enforcing the federal CCR Rule under this Court’s exclusive jurisdiction. For all the reasons given above, Baykeeper respectfully asks that the Court deny Alabama Power’s motion to dismiss.

Respectfully submitted this the 6<sup>th</sup> day of February, 2023.

s/ Barry A. Brock  
Barry A. Brock  
*One of the Attorneys for Plaintiff*

**OF COUNSEL:**

Barry Brock (ASB-9137-B61B)  
Christina Tidwell (ASB-9696-D10R)  
Southern Environmental Law Center  
2829 Second Avenue S., Suite 282  
Birmingham, AL 35233  
Telephone: (205) 745-3060  
bbrock@selcal.org  
ctidwell@selcal.org

Richard Moore (ASB-5730-M55R)  
450C Government Street  
Mobile, AL 36602  
Telephone: (865) 300-1206  
richardmooreig@hotmail.com

Nicholas Torrey (*admitted pro hac vice*)  
Southern Environmental Law Center  
601 W. Rosemary St, Suite 220  
Chapel Hill, NC 27516  
Telephone: (919) 967-1450  
ntorrey@selcnc.org

Frank Holleman (*admitted pro hac vice*)  
Southern Environmental Law Center  
525 East Bay Street, Suite 200  
Charleston, SC 29403  
Telephone: (843) 720-5270  
fholleman@selcsc.org

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 6, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

s/ Barry A. Brock  
Barry A. Brock  
*One of the Attorneys for Plaintiff*