

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

MOBILE BAYKEEPER, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	CASE NO.:
ALABAMA POWER COMPANY,)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff, Mobile Baykeeper, Inc. (“Baykeeper”), by and through its counsel, hereby files this Complaint and alleges as follows:

NATURE OF THE CASE

1. This citizen enforcement action challenges the unlawful closure plan of Defendant Alabama Power Company (“Alabama Power”), to permanently store millions of tons of coal ash and toxic pollutants in an unlined, leaking impoundment at its James M. Barry Electric Generating Plant (“Plant Barry”) in Mobile County, Bucks, Alabama. This plan will continue to impound groundwater and other liquids within the impoundment and will leave coal ash sitting below the water table, where the coal ash will continue to leach pollutants into public waters of the United States and of Alabama indefinitely, all in violation of the Resource Conservation and Recovery Act (“the Act”) and the Coal Combustion Residuals Rule (“the CCR Rule” or “the Rule”), 40 C.F.R. § 257.50 *et seq.*, adopted pursuant to the Act.

2. The CCR Rule requires Alabama Power to post its closure plan for the unlined coal ash impoundment at Plant Barry on a publicly available website.¹ Based on the publicly posted plan, Alabama Power plans to leave over 21 million tons of coal ash capped in place within the footprint of its existing unlined impoundment, which is built on top of a tributary of the Mobile River, Sisters Creek, and is in wetlands adjacent to the Mobile River. This plan leaves large quantities of coal ash in contact with water, including groundwater, and in an impoundment, in violation of the CCR Rule and RCRA. In fact, the plan even leaves coal ash stored below sea level. The capped impoundment will be almost surrounded by the Mobile River and within the river's floodplain. Because the surrounding waters affect the elevation of the groundwater within the ash, the water level in the impoundment will rise and further saturate the ash when there are floods, storms, and with the rise in water level in the Mobile River and the floodplain.
3. This plan violates the CCR Rule and therefore is open dumping in violation of the requirements of the Rule and the Act. 40 C.F.R. § 257.1(a)(2) ("Practices failing to satisfy any of the criteria in . . . §§ 257.50 through 257.107 constitute open dumping, which is prohibited under section 4005 of the Act."). Alabama Power cannot be allowed to violate the CCR Rule and leave an illegal open dump at its Plant Barry coal ash disposal site in perpetuity.

¹ Alabama Power Company, Amended Closure Plan for Ash Pond – Plant Barry (Apr. 1, 2020), <https://www.alabamapower.com/content/dam/alabama-power/pdfs-docs/company/how-we-operate/ccr/plant-barry/ash-pond/closure-and-post-closure/Barry%20Ash%20Pond%20Amended%20Closure%20Plan%20Rev%201%20April%202020.pdf>.

JURISDICTION, VENUE, AND NOTICE

4. Mobile Baykeeper, Inc. (“Baykeeper”) brings this enforcement action under the citizens’ suit provision of the Act. 42 U.S.C. § 6972(a)(1)(A). This Court has jurisdiction over this action pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. § 1331 and has jurisdiction over the parties.
5. Venue is proper in this court pursuant to 42 U.S.C. § 6972(a). The Plant Barry coal ash impoundment that is the subject of Alabama Power’s unlawful closure plan is located in Mobile County, in the Southern District of Alabama.
6. In compliance with 42 U.S.C. § 6972(b) and 40 C.F.R. § 254.2, on July 20, 2022, Baykeeper sent a letter giving Alabama Power, the United States Environmental Protection Agency (“EPA”), and the Alabama Department of Environmental Management (“ADEM”) notice of the violations specified in this complaint and of Mobile Baykeeper’s intent to file suit after sixty days should those violations continue. A copy of the notice letter with documentation of its receipt is attached as Exhibit 1.
7. More than sixty days have passed since the notice was served pursuant to law and regulation, and the violations identified in the notice letter are continuing at this time and reasonably likely to continue in the future.
8. EPA has not commenced and is not diligently prosecuting a civil or criminal action to redress the violations of the Act and the Rule asserted in this citizen enforcement action.
9. Alabama Power has obtained a state permit from ADEM to cap the Plant Barry coal ash in place. Accordingly, its closure plan is not preliminary, speculative, or contingent on some additional approval. The plan has been finalized and approved by the state, and this action to enforce the separate, additional federal requirements of the CCR Rule is ripe.

10. ADEM's approval does not shield Alabama Power from compliance with the requirements of the federal CCR Rule. ADEM's solid waste permitting program, which authorized Alabama Power's plan for Plant Barry, has not been approved as a federal CCR Rule state permitting program by the EPA. Alabama Power must comply with federal rules as promulgated under 40 C.F.R. §§ 257.102(b) and (d) and RCRA.

PARTIES AND STANDING

The Association and Its Members

11. Baykeeper is a § 501(c)(3) non-profit public interest organization with members in Alabama and the Mobile area and operating in the watersheds of the Mobile River and the Mobile-Tensaw Delta.
12. Baykeeper and its members have been harmed by Alabama Power's violations of RCRA and the CCR Rule. They recreate, fish, and own property in these watersheds, including in the vicinity of and downstream from Plant Barry. They fear contamination of drinking water, wildlife, and river water, by ground and surface water contamination and by discharges and pollution from coal ash in groundwater, wetlands, and a creek in Alabama Power's Plant Barry coal ash impoundment. They also fear and are concerned by Alabama Power's plans to store millions of tons of coal ash on the banks of the Mobile River and the Mobile-Tensaw Delta, where the storage will be subject to the risks of flooding, storms, water level rise, and hurricanes, thus exposing Baykeeper and its members and these water resources to the risk of catastrophic failure and a spill of coal ash into the Mobile River and the Delta. Alabama Power's storage of coal ash in groundwater, wetlands, and a creek; its storage on the banks of the Mobile River and the Mobile-Tensaw Delta; its contamination, discharges, and pollution from coal ash in

groundwater, wetlands, and a creek; and the risks and dangers created by the location of this storage site, and Alabama Power's plan to continue doing so in perpetuity, are reducing the use and enjoyment by Baykeeper and its members of the Mobile River, the Mobile-Tensaw Delta, and their watersheds. Declarations showing standing are attached as Exhibit 2.

13. Alabama Power has received a permit from ADEM to cap in place its coal ash at Plant Barry, leaving the coal ash impounded and saturated in groundwater and on the banks of the Mobile River and the Mobile-Tensaw Delta, where it will continue to leach out pollutants into the surrounding waters, as well as remaining subject to increased saturation and catastrophic failure and spills from regular flooding, storms, water level rise, and hurricanes. Because Alabama Power has received state approval for its cap-in-place plan, there is no question that this dangerous and defective plan will be implemented—causing continued pollution and perpetuating the risks to Baykeeper and its members, as well as the water resources of the Mobile-Tensaw Delta that they depend on—unless the closure requirements of the federal CCR Rule are enforced at Plant Barry. Upon information and belief, Alabama Power is moving forward at Plant Barry with preliminary work to implement this plan.

14. Alabama Power is proceeding with its plan to cap its Plant Barry coal ash within the existing impoundment, continuing the ongoing pollution of the water resources of the Mobile-Tensaw Delta and creating a continuing danger and threat of catastrophic failure for Baykeeper and its members who own property and/or use and enjoy the waterways downstream. The CCR Rule, however, forbids this result, by the plain terms of its closure standards. Accordingly, the injuries to Baykeeper and its members are directly

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