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December 16, 2019

***Via Electronic Mail Only***

U.S. Army Corps of Engineers Mobile District  
Birmingham Field Office  
Attention: Ms. Courtney Shea  
218 Summit Parkway, Suite 222  
Homewood, Alabama 35209

**Re: JPN No. SAM-2018-00257**

Dear Ms. Shea:

Black Warrior Riverkeeper, Inc. (“Riverkeeper”) and the Southern Environmental Law Center (“SELC”) submit the following comments on Alabama Power Co.’s request for a U.S. Army Corps of Engineers (“Corps”) permit pursuant to § 404 of the Clean Water Act (“CWA”) (33 U.S.C. § 1344) to authorize the discharge of dredged and/or fill material into waters of the United States associated with the closure of a 420-acre coal ash pond at Plant Gorgas in Parrish, Alabama. According to the Joint Public Notice (“JPN”), the requested permit would “result in the unavoidable loss of 5,080 linear feet of ephemeral streams and 3,731 linear feet of intermittent streams” in tributaries to the Mulberry Fork of the Black Warrior River. JPN at 1-2.

Riverkeeper works to protect and restore the Black Warrior River and its tributaries. Part of this work is directed to ensure that regulatory permits comply with the mandates of the CWA, the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 through 4347, and the Endangered Species Act, 16 U.S.C. §§ 1531 through 1544.

The Southern Environmental Law Center is a non-profit, regional environmental organization dedicated to protecting natural resources, preserving special places and promoting vibrant communities throughout the Southeast.

This permit is part of Alabama Power’s proposed Plant Gorgas closure plan that would create a new containment berm, convert the ash pond into a permanent landfill and leave toxic ash in the groundwater. In addition, the new, proposed landfill is situated on top of Rattlesnake Creek, filling a majority of the entire original drainage of the creek. We have significant concerns, as described below,

regarding the impact the closure plan and this permit would have on human health and the environment, the cumulative impacts of this proposed project on the watershed, the impairment of onsite and downstream water quality, the degradation of aquatic and riparian habitats, and the failure to adequately avoid and minimize impacts.

As discussed below, Alabama Power should be required to obtain a § 404 permit for the entire project boundary proposed under the closure plan, not merely the feeder streams into Rattlesnake Creek that it proposes to fill now. The permit should assess the effects of the entire project, including the conversion of Rattlesnake Lake into permanent landfill. Moreover, we do not believe the perfunctory mitigation plan mentioned in the JPN, which is tied to mitigation only for stream impacts on numerous small feeder streams, is correct in scope or will adequately offset the persistent and permanent impacts the project will have on stream function and the aquatic ecosystem in the Rattlesnake Creek and Mulberry Fork watersheds.

Accordingly, we ask the Corps to deny the permit outright because (1) practicable alternatives exist that are less damaging to the aquatic environment; (2) the nation's waters would be significantly degraded by the Corps' grant of the permit, *see* 40 C.F.R. § 230.10 (a), (c); and (3) the request for a 404 permit should be much broader in scope, including all fill activity contemplated by the Plant Gorgas closure plan. If the Corps chooses not to deny the permit, we ask that the Corps prepare an environmental impact statement under NEPA that analyzes the wide range of issues presented by the closure project as a whole and explores all possible alternatives in detail. As proposed, the project considered as a whole is a major federal action that will significantly affect the quality of the human environment. 42 U.S.C. § 4332(C).

### ***Background***

The stated purpose of the permit is “to permanently close the waste treatment pond at Plant Gorgas as required by the CCR [Coal Combustion Residuals] Rule.” JPN at 1-2. The “pond” is actually a massive 420-acre lake impoundment formed by the damming of a perennial stream, Rattlesnake Creek. JPN at 2. The “waste” in the pond is toxic coal ash that has accumulated over the past 65 years. *Id.* Scientific studies have concluded that at least 91% of U.S. coal-fired power plants with monitoring data are contaminating groundwater with unsafe levels of toxic pollutants.<sup>1</sup> Plant Gorgas is among them: available monitoring required by the CCR Rule proves that the Plant Gorgas ash pond is contaminating groundwater beyond the impoundment with statistically significant levels of arsenic, lithium and molybdenum. *Assessment of Corrective Measures Plant Gorgas* (June 2019) (Assessment) at 1.<sup>2</sup>

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<sup>1</sup><https://earthjustice.org/sites/default/files/files/National%20Coal%20Ash%20Report%203.4.19.pdf>.

<sup>2</sup><https://www.alabamapower.com/content/dam/alabamapower/Our%20Company/How%20We%20Operate/ccr/plant-gorgas/ash-pond/groundwater-monitoring-and-corrective-action/Assessment%20of%20Corrective%20Measures%20Plant%20Gorgas%20Ash%20Pond.pdf>.

Until its closure in April of 2019, Plant Gorgas was the oldest operating coal-fired steam plant in Alabama (since 1917).<sup>3</sup> It is located on the north bank of the Mulberry Fork of the Black Warrior River. *Id.* For over sixty years, byproducts of coal combustion, including fly ash, bottom ash, boiler slag, flue gas emission control residuals, and other wastewater products were “sluiced into a storage basin south of the plant impounded by Rattlesnake Dam, a rockfill embankment structure.” *Id.*

Alabama Power built this unlined wet storage coal ash impoundment at Plant Gorgas in a water of the U.S.—Rattlesnake Creek, a perennial tributary to the Mulberry Fork—by construction of a cross-valley dam on the creek at an initial crest elevation of 320 feet above mean sea level. Alabama Power chose to handle the toxic byproduct of its plant in this manner for its own convenience and cost considerations, with no apparent regard for the negative impacts on human health and the environment.

For decades, Alabama Power has been authorized to use the impoundment as a wastewater treatment facility under a National Pollution Discharge Elimination System (“NPDES”) permit issued by ADEM, Permit AL002909. The NPDES permit allows the discharge of treated wastewater at a designated outfall—here, a pipe discharging into the Mulberry Fork. Under the NPDES permit, the massive instream impoundment has discharged tens of millions of gallons of coal ash-contaminated wastewater into the Mulberry Fork of the Black Warrior River every day. The ash pond has a capacity of 29 million cubic yards of coal combustion waste and as of 2009, the ash pond held approximately 25 million cubic yards of coal combustion waste.<sup>4</sup> During the last years of its operation, the ash pond discharged over 19 MGD of wastewater per day into the Mulberry Fork of the Black Warrior River. According to Alabama Power’s own sampling data from 2017-2018, incorporated into findings of fact by the Alabama Department of Environmental Management in Administrative Order No. 18-096-GW, the placement of coal ash pond in the Gorgas ash pond (Rattlesnake Lake) has caused unpermitted discharges of contaminants into waters of the state at and around the site. *See, e.g.,* Final Administrative Order, *In re: Alabama Power Company William C. Gorgas Electric Generating Plant*; apps. A-E (Ala. Dep’t of Env’tl. Mgmt. August 15, 2018) (proposed and eventual final consent orders from ADEM showing MCL exceedances in the groundwater at Gorgas of arsenic, beryllium and cadmium).<sup>5</sup>

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<sup>3</sup> Paul C. Rizzo Associates, *CCW Impoundments Inspection Report, Gorgas Steam Plant, Walker County, Alabama (2009)*, available at [http://www3.epa.gov/epawaste/nonhaz/industrial/special/fossil/surveys2/apc\\_gorgas\\_final.pdf](http://www3.epa.gov/epawaste/nonhaz/industrial/special/fossil/surveys2/apc_gorgas_final.pdf). All the historical facts about Plant Gorgas are taken directly from this report.

<sup>4</sup><https://www.alabamapower.com/content/dam/alabamapower/Our%20Company/How%20We%20Operate/ccr/plant-gorgas/ash-pond/operating-criteria/Report%20of%20Annual%20Inspection%202018%20-%20Ash%20Pond.pdf>

<sup>5</sup><https://www.alabamapower.com/content/dam/alabamapower/Our%20Company/How%20We%20Operate/ccr/plant-gorgas/ash-pond/groundwater-monitoring-and-corrective-action/2018%20Annual%20Groundwater%20Monitoring%20and%20Corrective%20Action%20Report%20-%20Plant%20Gorgas%20Ash%20Pond.pdf>

The NPDES permit does not allow Alabama Power to fill Rattlesnake Creek with coal ash, and there is no record of Alabama Power ever obtaining a 404 permit that would allow it to fill the creek.

The 2015 CCR Rule requires Alabama Power to close the ash pond because of the documented contamination of groundwater at the site, caused by decades of unchecked toxic pollution. The project is not a voluntary undertaking. The applicant needs the § 404 authorization to implement its inadequate plan to cap in place sixty-five years of coal ash pollution. Cap-in-place as a remedial measure for leaking coal ash ponds that will likely not stop water contamination. The only remedial measure that truly contains the coal ash is to dig it up and remove it to a modern, dry, lined landfill. This is called “clean closure.” In other states, utilities are either being forced to excavate and remove the coal ash, or voluntarily removing it to dry, lined landfills for “clean closure.” For example, all power plants in South Carolina are excavating ash from unlined basins like the one at Plant Gorgas. Legislation recently passed in Virginia requires its utilities to excavate their ash ponds and either recycle the ash or move it to new, modern lined landfills. In North Carolina, Duke Energy has been required by court orders and a settlement agreement to excavate all the coal ash at 8 of its 14 facilities, and in April the North Carolina Department of Environmental Quality ordered it to excavate all the ash at its remaining 6 sites. Even Alabama Power’s sister corporation Georgia Power Company is excavating and moving coal ash at some of their facilities.

All told, utilities in the Southeast region that includes Alabama are required and committed to excavate over 250 million tons of ash and, to date, approximately 70% of all the coal ash impoundments covered by the federal CCR Rule. Those numbers are increasing: for example, in recent months, TVA agreed to a state court order requiring it to excavate its active coal ash lagoon at its Gallatin facility near Nashville. Excavation of coal ash lagoons is now the standard method of closure in the Southeast, and cap-in-place like Alabama Power’s plan at Gorgas is the outlier

However, instead of following the more protective measures of excavation and removal for recycling and placement in a lined landfill, Alabama Power is asking the Corps to provide a permit for the utility to largely leave the waste in situ in Rattlesnake Creek, a water of the U.S. The cap-in-place plan outlined by the JPN and the Assessment rearranges the waste currently in the lake and moves some of the coal ash further away from the Mulberry Fork into the upper reaches of Rattlesnake Lake. It is not enough that Alabama Power has buried Rattlesnake Creek in coal ash for over half a century; the utility now wants to make the vast destruction of the creek permanent and bury additional feeder streams at the site to facilitate cap-in-place. However, this permit and the plan it enables still leaves decades of toxic waste in the middle of a live, perennial stream and on top of an extensive groundwater system where it will continue to contact and pollute ground and surface water in perpetuity.

Given the widespread contamination of groundwater indicated by Alabama Power’s own monitoring results, it is critical that any permit issued by the Corps ensure the protection of public health

and the environment. The plan to cap-in-place and create a permanent landfill will not provide that assurance that the groundwater in this area will ever be free from contamination. This will be especially important to those people living on neighboring properties who use wells for their drinking water.

## **A. The Clean Water Act**

### *1. Standard of Review*

Section 404 of the CWA authorizes the Secretary of the Army, acting through the Corps, to issue permits, after notice and opportunity for public hearing, for the discharge of dredged or fill material into waters of the United States at specified disposal sites. *See* 33 C.F.R. Part 323. The Corps' evaluation of a § 404 permit application involves multiple issues, including (1) evaluating the proposal's impacts in accordance with NEPA, (2) determining whether the proposal complies with the Section 404(b) Guidelines (40 C.F.R. Part 230), and (3) determining whether the proposal is contrary to the public interest (33 C.F.R. § 320.4). The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. *Id.* The Corps must determine that a proposal is not contrary to the public interest in order to issue a permit.

### *2. Cumulative Impacts*

The Corps "shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment." 40 C.F.R. § 230.11. Cumulative impacts are "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems." 40 C.F.R. § 230.11(g)(1) (emphasis added). *See also* 40 C.F.R. § 1508.7 (Under NEPA, "[c]umulative impact' is 'the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.'")

In evaluating the Plant Gorgas permit application, the Corps must "document and consider" information about the cumulative effects attributable to the discharge of dredged or fill material from similar activities into the aquatic ecosystem of the Black Warrior River watershed. 40 C.F.R. § 230.11(g)(2). As an important initial point, we reject Alabama Power's implicit suggestion that the only § 404 permit needed in connection with the Gorgas closure plan is for fill of tributaries to Rattlesnake Creek. Alabama Power has never had a § 404 permit allowing it to fill Rattlesnake Creek and the

Company should be required to apply for one in connection with ceasing operations under the NPDES permit and attempting to convert the creek valley into a permanent landfill. The closure plan also calls for partially removing the existing dam, and consideration should be given as to whether significant alteration of the dam should also require a § 404 permit.

When the true scope of the project is considered, the project's proposed impacts are significant: the entire drainage valley of Rattlesnake Creek would be buried in toxic coal ash (dredged, moved and consolidated on site), and converted to a permanent landfill; the dam creating the impoundment would be altered; the new footprint of the permanent dump would expand to destroy 5,080 linear feet of ephemeral streams and 3,731 linear feet of intermittent streams. Even though the initial fill was prior to the Clean Water Act, the utility continued to place coal ash waste in Rattlesnake Creek until Plant Gorgas was closed in April 2019. Upon information and belief, Alabama Power was placing coal ash or some other black material in Rattlesnake Lake as recently as December 12, 2019.

The photographs below, taken by Black Warrior Riverkeeper Nelson Brooke during a SouthWings flight on December 12, show what appears to be black fill material placed within the footprint of Rattlesnake Lake over the main channel of Rattlesnake Creek. It also appears that two roads are being built across the creek/lake. It appears that filling may be taking place prior to the issuance of the permit. Given this activity and all the other construction activity that is taking place around Rattlesnake Lake, we want to make sure the Corps is aware of and monitoring current activities at the site.



Black material placed in Rattlesnake Lake and ongoing road construction.



Black material in upper Rattlesnake Lake, looking North toward dam & Plant Gorgas.



Rattlesnake Lake coal ash impoundment. Headwaters of Rattlesnake Creek in foreground.

The vast majority of the coal ash in the lagoon was dumped after the passage of the Clean Water Act. Even the limited and vastly under-inclusive proposed § 404 permit will have a major cumulative impact on water quality in the Mulberry Fork watershed when aggregated with the massive fill that created the Rattlesnake Lake impoundment as well as the continuing fill that occurred as Alabama Power placed even more waste in the ash pond.

The planned fill of over 8000 feet of linear streams is part of a much larger project. The Corps must assess the lost functions associated with the *all* of the filled water resources contemplated by the Plant Gorgas closure plan and study these impacts on a cumulative basis. The Corps must undertake a detailed look at these impacts before making the necessary factual determination whether to issue this or any other necessary § 404 permit. *See* 40 C.F.R. § 230.11. The Corps must analyze the potential contribution of pollutants from all similar activities, e.g. currently active or known future impacts, together with the impacts of similar activities in the context of reclaimed, and abandoned coal mines or quarries and their associated operations (like coal preparation) in the vicinity of Plant Gorgas or upstream, as well as the lost stream function from each and every headwater, intermittent, ephemeral, or perennial stream that has been impounded at each of those projects and related operations, or any other sources that may contribute similar pollutants that have an impact on the Mulberry Fork.

### 3. *Water Quality*

A full accounting of the cumulative impacts is absolutely essential to ensure that the Mulberry Fork and the Black Warrior River downstream can continue to meet or exceed their designated use classifications. At some point, the loss of stream function and aggregated contributions of pollutants will cause downstream waters to exceed their carrying capacities for these contaminants and become impaired. This is especially true given the amount of heavy metals and other toxic pollutants that the Plant Gorgas ash pond has contributed and will continue to contribute to area surface and groundwater.

When activities associated with proposed impacts to special aquatic sites are not water dependent, e.g., they do not need to be located in or near water, practicable alternatives that do not involve special aquatic sites are presumed to be available. *See* 40 C.F.R. § 230.10(a)(3). While it may be cheaper or more convenient for Alabama Power to rearrange their coal ash onsite and fill streams to accommodate their closure plan, there is no suggestion in the JPN that the project is water dependent. To the contrary: the JPN outlines a process where ash will be dewatered, solidified and stacked. JPN at 2. Rather than permanently burying Rattlesnake Creek and filling even more streams and wetlands at the Plant Gorgas site, the dewatered ash could be recycled into encapsulated concrete or transported to a lined landfill, away from water resources. We ask the Corps to require the applicant to revisit their alternatives analysis and select an option that does not require stream alterations or fills.

Moreover, no discharge may be authorized if it will cause or contribute to a violation of any applicable State water quality standard, *see* 40 C.F.R. § 230.10(b), or cause or contribute to a significant degradation of waters of the U.S., *see* 40 C.F.R. § 230.10(c). Rattlesnake Lake is an impoundment of Rattlesnake Creek. Since coal ash slurry has been pumped into it for 65 years, Rattlesnake Creek is therefore polluted by fill and the myriad pollutants in coal ash. Since Rattlesnake Creek is already significantly impacted by coal ash, any additional fill within Rattlesnake Creek, its tributaries, or Rattlesnake Lake will cause or contribute to violations of Alabama water quality standards and further contribute to degradation of a water of the U.S. Given that the ash pond has degraded and is degrading



adjacent ground and surface water, we are extremely concerned about the potential that the project will introduce toxic pollutants in drinking water sources and where people regularly boat, fish and swim.

#### *4. Avoidance and Minimization*

The Section 404(b)(1) Guidelines provide that “no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.” *See* 40 C.F.R. § 230.10(a). Here, there *are* practicable alternatives to the proposed discharge which have less adverse environmental impact: the excavation and removal of the ash to a lined landfill with adequate leachate collection, handling, and disposal systems in place (clean closure) or and its removal for recycling into encapsulated concrete . Alabama Power certainly is aware of both alternatives, as Alabama Power has been recycling its coal ash for decades, and has already built an upland, lined landfill for dry coal ash disposal across the river adjacent to Plant Gorgas.

What Alabama Power proposes in the JPN is not true avoidance and minimization. The applicant states that the project “would avoid 9,404 linear feet of streams within the project boundary.” JPN at 2. However, there is no supporting documentation of this assertion in the JPN. The JPN offers no offsite options for disposal of the ash that do not require the fill of streams. If the Corps does not deny this permit outright, we ask that a detailed alternatives analysis be part of any future environmental impact statement.

Alabama Power should be required to conduct a thorough alternatives analysis and incorporate true avoidance and minimization measures. At a minimum, that analysis should include surface area disturbance, disposal location, drainage area, impacts, monitoring data, watershed conditions both at the site and downstream of any discharge points and geological information. In this analysis, the applicant should also address the linear feet of stream impacted and whether alternatives exist to reduce that impact; and whether it is practicable to dispose of coal ash so that it does not impact waters of the U.S. The JPN (at p.3) states that “the applicant considered nine alternatives, including the preferred (proposed) alternative,” before acknowledging that the Corps has yet to verify the adequacy of that analysis. The JPN should never have been published without such verification from the Corps, especially given that the alternatives analysis was not provided to the public for appropriate review and comment.

Moreover, the Alabama Department of Environmental Management (“ADEM”) states that the consolidation and capping of the toxic ash “will not be achieved for an average of 10 years and that no other mechanism is proposed to reduce the potential for further releases to ‘the maximum extent feasible.’” *See November 14, 2019 Letter from ADEM’s Heather M. Jones to Alabama Power’s Dustin Brooks* (attached) at 6. The Corps should not issue a permit for a project (like this one) with enormous

environmental impacts that lacks a sure and certain plan to stop the ongoing pollution of groundwater that prompted closure.

### 5. Mitigation

The JPN states that the applicant “proposes to purchase 20,793 stream credits from an approved mitigation bank.” Upon information and belief, there is currently no approved mitigation bank with available credits in the Mulberry Fork subwatershed. As a result, there is simply no way to determine whether the proposed mitigation is adequate or if it complies with the Section 404(b)(1) Guidelines or the 2008 Mitigation Rule. In addition, in considering the adequacy of mitigation credits, the analysis should not be limited to the newly impacted tributaries, but should be measured in proportion to the reality that the closure plan contemplates permanently filling a 272-acre swath of the Rattlesnake Creek basin. Specifically, adequate mitigation should be considered as compensation for any stream impacts within the entire “Project Boundary” shown on Figure 5 attached to the JPN, and for the entire “Final Cap Footprint” depicted in that Figure. If that entire area is to be used as a dump site (and we urge that it should not be) then Alabama Power’s mitigation obligation must account for all impacts.

The original idea of stream mitigation was to restore some of the filtering, flow, flood protection and habitat lost when streams and wetlands are filled in a watershed. The Corps relies heavily on mitigation to compensate for the impacts of § 404 permits. *See, e.g.*, NWP 21 Decision Document at 25 (“The required compensatory mitigation will attenuate cumulative impacts on the Nation’s aquatic resources by providing aquatic resource functions and services, so that the net effects on the aquatic environment resulting from the activities authorized . . . will be minimal.”)

The JPN for any activity that requires a § 404 permit:

must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address . . . the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts.

*See* 33 C.F.R. § 332.4 (b)(1) (emphasis added). The JPN contains none of this required detail --- and given the scope and scale of the impacts to the Rattlesnake Creek and the Mulberry Fork watersheds, applicable regulation requires that the Corps and the applicant provide specifics about the planned mitigation and how it will remedy the impacts of filling Rattlesnake Creek and its tributaries. The Plant Gorgas JPN contains little to no project-specific information on the nature of the expected environmental impacts and no information on the mitigation measures proposed to counter such impacts, other than a plan to seek credits from an unknown bank.

“Public notice is the primary method of advising all interested parties of the proposed activity for which a permit is sought and of soliciting comments and information necessary to evaluate the probable impacts on the public interest.” 33 C.F.R. § 325.3(a). Accordingly “[t]he notice must include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment.” *Id.* Here, a bare statement that an unidentified mitigation bank may be used in the future to offset impacts of this magnitude fails to meet the requirements of the Clean Water Act. See *Ohio Valley Envt’l Coal. v. U.S. Army Corps of Engineers*, 674 F. Supp. 783 (S.D.W.Va. 2009) (“*OVEC*”).

In *OVEC*, the Corps provided similarly abbreviated JPNs (approximately three and four pages each) for two proposed mines with little detail about the proposed impacts or the mitigation required to offset those impacts. *Id.* at 793, 794. Even though the Corps ultimately relied upon compensatory mitigation to determine that the proposed § 404 permits would not cause or contribute to significant environmental degradation and thus were not contrary to the public interest, the JPNs (like the one here) contained no details about mitigation. *Id.* at 803. The compensatory mitigation measures included in the permits were ultimately central to the Corps’ determinations of no significant degradation. *Id.* Because the public notices contained no substantive information on mitigation, they failed to provide an accurate picture of the Corps’ reasoning and prevented useful criticism on the part of the plaintiffs and on the part of the public in general. *Id.* As a result, the court found that the lack of information on mitigation in the notices deprived the plaintiffs of an existing procedural right—the right to comment intelligently on the permits. *Id.* The Court granted the Plaintiffs’ motions for summary judgment on the grounds that the Corps’ notices were deficient and remanded the permits for correction of the deficiencies. *Id.* at 815.

For Plant Gorgas, the JPN’s failure to include any information on mitigation (or the avoidance and minimization analysis or possible alternatives to the impacts) and its failure to base mitigation on the true scope of impacts constrains the public’s ability to comment intelligently on a project in a watershed that has already been severely degraded by Plant Gorgas, coal mining, industrial discharges, and other impacts. This failure is a violation of the Clean Water Act’s notice requirements: “[s]uch disclosure is necessary because it is this detail and data that allow the public to generate meaningful criticism, which serves as the basis for meaningful comment.” *Id.*

Knowing more about the compensatory mitigation proposed and properly characterizing the full scope of negative impacts is critical to determine whether the Plant Gorgas permit is in the public interest. The Corps must use a watershed approach to establish compensatory mitigation requirements:

required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the

availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses.

33 C. F. R. § 332.3(b)(1) (emphasis added). Where and how the mitigation occurs is very relevant to whether the project will contribute to the environmental degradation ongoing of the Mulberry Fork and thus is contrary to the public interest. If the mitigation does not occur in the Mulberry Fork watershed, it cannot remedy the decline in water quality caused by the conversion of Rattlesnake Lake to a landfill and the fill of additional streams and wetlands at Plant Gorgas.

The applicant does not address in the JPN what stream functions would be lost from the Plant Gorgas fills and whether mitigation can replace those functions, as required by regulation. 40 C.F.R. § 230.11(e). The Corps is not supposed to “rely exclusively on an evaluation of structure in place of function when making a determination under this provision of the Guidelines.” *See, e.g., EPA/Corps Memorandum on Assessment of Stream Ecosystem Structure and Function under Clean Water Act Section 404 Associated with Review of Permits for Appalachian Surface Coal Mining (July 30, 2010)*. In accepting a bare promise to purchase mitigation credits at an unidentified bank at an unidentified time in the future, the JPN represents only a purely structural evaluation of acres lost and acres to be mitigated.<sup>6</sup> As a result, the Corps cannot issue the permit until the specifics of mitigation are provided and the public has an opportunity to review and comment upon them. Requiring the public to comment on the JPN absent this information greatly undermines and invalidates the public comment process.

## **B. The National Environmental Policy Act**

The National Environmental Policy Act (“NEPA”) requires that federal agencies prepare an Environmental Impact Statement (“EIS”) for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). Where it is not readily discernible how significant the environmental effects of a proposed action will be, federal agencies may prepare an Environmental Assessment (“EA”) to establish the project’s level of impact. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1); 33 C.F.R. §§ 230.10 - 230.11. Under applicable Council of Environmental Quality (“CEQ”) regulations, “[m]ajor Federal action” is defined to “includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. “Actions include new and continuing activities, including projects and programs entirely or partly . . . regulated[] or approved by federal agencies.” *Id.*

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<sup>6</sup> One purpose of requiring § 404 individual permits in these circumstances is to force the Corps and the applicant to develop specific conditions to mitigate the adverse effects of the specific projects, *see* 33 C.F.R. § 325.4(a), *and to permit the public to comment on the specific projects and the proposed mitigation*. Moreover, the Corps is required to consider conditions “for mitigation of significant losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.” 33 C.F.R. § 325.4(a)(3). Given that there is no identification of all of these significant losses and no actual mitigation bank or plan proposed to address them, the purpose of the regulation has clearly been thwarted in the public comment process for this permit.

An EIS or EA must identify the direct, indirect, and cumulative impacts of the proposed action, consider alternative actions and their impacts, and identify all irreversible and irretrievable commitments of resources associated with the proposed action. *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1502.14, 1508.7, 1508.8. Cumulative impact refers to “the impact on the environment which results from the incremental impact of the [proposed] action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. The Corps has conceded in other litigation that these regulations require the consideration of the impacts of past actions as a part of any cumulative impacts analysis. *See Kentucky Riverkeeper v. Rowlette*, 714 F.3d 402, 408 (6<sup>th</sup> Cir. 2013). Moreover, the Corps cannot omit consideration of past actions in a cumulative impacts analysis where, as here, the Corps is evaluating past activities and operations which have the same type of environmental impacts as the application under consideration. *Id.* at 410. The Corps must consider the “present effects of past actions,” *id.* (citation omitted), and may not “eschew” its NEPA obligation to “adequately consider [] and disclose [] the environmental impact of its actions.” *Id.* at 411 (citation omitted).

NEPA regulations also require an analysis of measures to mitigate the impacts of proposed actions. *See* 40 C.F.R. §§ 1502.14(f), 1502.16(h). However, the Corps cannot rely on mere conclusory assurances that mitigation “will offset environmental impacts” as stated in the present JPN. *See Rowlette*, 714 F.3d at 411. The Corps must document and explain any such reliance. *Id.* at 413. Based upon the forgoing, the Corps’ issuance of the requested permit and other federal § 404 permits necessary for carrying out the closure plan, which include the destruction of Rattlesnake Creek and other streams at Plant Gorgas is a “major Federal action” requiring NEPA review. Approval of this permit is subject to federal control and responsibility, and results in impacts that may be major. *See* 40 C.F.R. § 1508.18. Thus, the Corps must comply with NEPA and take a “hard look” at the impacts of this project, including its cumulative impacts, in an EIS (or at a minimum, must prepare an EA and support a finding that the project has no potential for significant environmental impacts). In sum, the Corps may not issue this permit without conducting a thorough NEPA review.

In conducting that review, the Corps must address the ongoing environmental impacts that the project will cause. Granting the § 404 authorization allows Alabama Power to cap-in-place its coal ash in Rattlesnake Lake at Plant Gorgas, which will significantly harm the natural ecosystems of Rattlesnake Creek and the Mulberry Fork. Alabama Power knows from experience that cap-in-place won’t work as represented and will actually result in significant and long-term negative environmental impacts. The utility completed closure of the coal ash pond at Plant Gadsden using cap-in-place in 2018. Alabama Power’s own data shows that groundwater still registers 100 times the legal limit of arsenic and 50 times the legal limit of radium at groundwater well monitoring sites surrounding this coal ash pond.<sup>7</sup>

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<sup>7</sup><https://www.alabamapower.com/our-company/how-we-operate/ccr-rule-compliance-data-and-information/plant-gadsden.html>

The “monitored natural attenuation” Alabama Power proposes through cap-in-place at Plant Gorgas does not work for coal ash that sits in water and continually discharges into state waters. This is especially true for dangerous inorganics like arsenic and lithium. *November 14, 2019 Letter from ADEM’s Heather M. Jones to Alabama Power’s Dustin Brooks* at 7. Moreover, monitored natural attenuation requires that an aquifer have sufficient capacity for that attenuation to take place. *Id.* Evidently, Alabama Power has not demonstrated how monitored natural attenuation will work on the inorganics present, evaluated whether it is a feasible remedy based upon site specific conditions or even analyzed whether the aquifer has sufficient capacity for attenuation to take place. *Id.* In other words, Alabama Power is asking the Corps for a blank check to facilitate a project with enormous environmental impacts that the applicant has not fully explored or vetted.

### **C. Incomplete and Inadequate Project Information**

We note (as we have in past comments) that the JPN contains incomplete information about the project. There is no recognition of the true scope of environmental harm which would result from the cap-in-place plan supported by the requested permit and no information about a possible alternatives analysis, no substantive discussion of avoidance and minimization possibilities and no mitigation plan to consider.

We ask why a complete application package or even the regulatory file for this project is not publicly available. If the purpose of the public comment process is to help the Corps “determine whether to issue, modify, condition or deny a permit for this proposal,” how can the public discharge this important duty with no meaningful information to review or inform comments?<sup>8</sup>

We request that the Corps provide complete project information, to include the entire project boundary and cap footprint, with the JPN, including an alternatives analysis, avoidance and minimization discussion and a specific mitigation plan to consider. This additional information is necessary for meaningful public review and comment. Therefore, the public comment period should be extended, and reopened once all applicable information is made available to the public.

### **D. Conclusion**

The CWA Section 404(b)(1) Guidelines instruct that the “fundamental precept of the Guidelines is that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystem of concern.” 40 C.F.R. § 230.1(c). The project proposed by Alabama Power will have an unacceptable

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<sup>8</sup> We sent a request under the Freedom of Information Act for the Corps’ regulatory file immediately upon receiving the JPN. It was not produced before the December 16, 2019 deadline for these comments and our request for a brief extension to incorporate information from that file has been denied.

adverse impact on the ecosystems of Rattlesnake Creek and the Mulberry Fork. If granted, the permit, allows Alabama Power to permanently fill streams with toxic coal ash at a site where it has already conducted a massive fill and caused groundwater contamination. If granted, the permit will sanction the “unacceptable adverse impact,” resulting in the “degradation,” “destruction,” and the “severe environmental impacts” that the Guidelines are supposed to prevent. 40 C.F.R. § 230.1(d).

EPA said it best in its preamble to the 2015 CCR Rule.

EPA’s damage cases and risk assessments indicate that there is significant potential for CCR landfills and CCR surface impoundments to leach hazardous constituents into groundwater, impair drinking water supplies and cause adverse impacts on human health and the environment. Indeed, groundwater contamination is one of the key environmental and human health risks EPA has identified with CCR landfills and CCR surface impoundments.

EPA, Hazardous and Solid Waste Management System; Disposal of CCR from Electric Utilities Final Rule, 80 Fed. Reg. 21,30221,396 (April 17, 2015).

The groundwater testing required by the 2015 CCR rule has identified contaminated aquifers near coal ash impoundments and disposal sites throughout the country and at every coal ash impoundment operated by Alabama Power. These test results dramatically highlight the need for pollution abatement and aggressive cleanup measures. For years, coal-burning power plants like Plant Gorgas have polluted the Black Warrior basin with toxic waste from their operations at the expense of public health and the environment. No other industry comes even close to polluting our nation’s waters like the coal power plant industry. It is by far the largest toxic water polluter in the country: coal-fired power plants alone account for 72 percent of all toxic water pollution in the country.<sup>9</sup> Wastewater from coal plants contains a toxic stew of heavy metals, arsenic, nutrients and other chemicals that are known to be harmful to humans and aquatic life. Exposure to these toxic chemicals through swimming in or drinking contaminated water or through eating contaminated fish can cause skin lesions, birth defects, cancer and other health problems. Rather than enable Alabama Power to allow this pollution to continue in perpetuity, we ask the Corps to deny the permit and direct Alabama Power to select an alternative that does not require the burial and permanent destruction of streams.

Given the public interest in this permit and the impact to human health and the environment this project will have, we ask the Corps to hold a public hearing before making a decision about whether to issue the permit. We ask that, prior to that hearing, the Corps make available all relevant documents from the regulatory file, including, but not limited to, any alternatives analysis the Corps will conduct or consider; any sampling, testing or other environmental analysis the Corps will use, and a complete mitigation plan disclosing the type and location of any proposed mitigation.

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<sup>9</sup> <https://www.nrdc.org/sites/default/files/power-plant-cooling-FS.pdf>.

We appreciate your consideration of our letter and we look forward to a response, including a notification of the public hearing date.

For the River,

Black Warrior Riverkeeper, Inc.




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Riverkeeper

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