

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

**APALACHICOLA BAY AND RIVER
KEEPER INC. d/b/a APALACHICOLA
RIVERKEEPER, SOUTHERN ALLIANCE
FOR CLEAN ENERGY, and
WATERKEEPER ALLIANCE,**

Case No.: 4:14-cv-00268-MW-CAS

Plaintiffs,

v.

GULF POWER COMPANY,

Defendant.

_____ /

SETTLEMENT AGREEMENT

1. This document shall constitute a Settlement Agreement between APALACHICOLA BAY AND RIVER KEEPER, INC. d/b/a/ APALACHICOLA RIVERKEEPER, SOUTHERN ALLIANCE FOR CLEAN ENERGY, and WATERKEEPER ALLIANCE, (collectively referred to as “Plaintiffs” for purposes of this Settlement Agreement), and GULF POWER COMPANY (referred to as “Defendant”), and their respective successors, in order to resolve all claims and issues alleged in the Third Amended Complaint in this case related to Defendant’s Herbert Scholz Generating Plant near Sneads, Florida (“Scholz Plant”). All Plaintiffs and Defendant concur in and agree to be bound by the terms, conditions, and mutual understandings set forth in this Settlement Agreement. All parties that have signed below concur that this Settlement Agreement constitutes a mutually acceptable resolution and compromise regarding the claims and issues raised in the Third Amended Complaint.

2. Plaintiffs' Third Amended Complaint and Defendant's Answer are appended hereto as Attachments 1 and 2.
3. Plaintiffs and Defendant recognize the exceptional ecological importance of the Apalachicola River and Bay, and their economic significance to the surrounding communities.
4. Plaintiffs and Defendant participated in a mediation session on June 2, 2015 and mediated discussions continued thereafter.
5. Authorized Representatives of Plaintiffs and Defendant, having met during mediation and having addressed the issues identified in the pleadings, mutually concur in this Settlement Agreement to the following comprehensive resolution of all issues:

I. Ash Pond Closure

Subject to review and approval by the Florida Department of Environmental Protection (DEP), Defendant shall close all coal ash ponds at the Scholz Plant in accordance with the Essential Requirements for Ash Pond Closure Plan, as set forth in greater detail in Attachment 3 (hereinafter, the phrase "this Settlement Agreement" includes Attachment 3):

- a. **Ash Dewatering** – The coal combustion residuals ("coal ash" or "CCR") in the coal ash ponds at Scholz Plant shall be dewatered to prepare it for permanent dry storage in accordance with the Essential Requirements for Ash Pond Closure Plan. Defendant estimates that, once initiated, the dewatering process will take no more than 18 months.

- b. CCR Dry Storage Area** – Defendant shall construct a CCR dry storage area (the “DSA”) at an upland site at the plant, with construction estimated to be completed within three years of DEP approval of a closure plan. The DSA will be located so as to ensure all CCR permanently stored at the facility remains at an elevation of at least 83 feet NGVD. Defendant anticipates that the footprint of the DSA will lie primarily within the current footprint of the Upper Ash Pond. The actual footprint of the DSA may extend beyond the current footprint of the Upper Ash Pond as necessary consistent with good engineering design but may extend into the current footprint of the Middle Ash Pond only as necessary.
- c. Cutoff Wall** – Defendant shall construct a “cutoff wall” that extends into the confining layer of clay below the shallow aquifer, in an area upgradient of the DSA. The cutoff wall will be designed to divert the groundwater flow so that it bypasses the area beneath the entire DSA.
- d. Lower Ash Pond Closure** – The dewatered CCR in the Lower Ash Pond will be removed and transferred to the DSA, no part of which will be located in the Lower Ash Pond area.
- e. Middle Ash Pond** –The dewatered CCR from areas of the middle pond not covered by the DSA, will be removed and transferred to the DSA.
- f. Permits and Approvals** - Defendant shall take all steps necessary to file for the permits and approvals necessary for a closure plan in

accordance with this Settlement Agreement by June 1, 2016, or within one year after dismissal of this case under this Settlement Agreement (whichever is later). Defendant shall propose a plan to close the coal ash ponds at Scholz Plant that is consistent with this Settlement Agreement. Defendant agrees to respond expeditiously to all requests for additional information it receives from DEP or other regulatory authority that relate to obtaining necessary permits and approvals to execute a closure plan consistent with this Settlement Agreement. Defendant shall provide to Plaintiffs copies of all proposals, applications, and supporting documents relating to the closure plan that Defendant submits to DEP or other regulatory authority in the course of obtaining such permits and approvals.

II. DEP Approval of Closure Plan – Subject to DEP’s review and approval under applicable statutes and regulations, including, but not limited to chapter 403, Florida Statutes and the federal Clean Water Act, the Parties’ mutual expectation and intention is that DEP will approve Defendant’s proposal to close the coal ash ponds at Scholz Plant consistent with this Settlement Agreement and issue any environmental permits necessary to complete such closure.

III. Agreement Not to Challenge DEP’s Approval of Closure Plan

a. Plaintiffs – Plaintiffs agree not to challenge, appeal, assist in or incite any challenge or appeal by others, including, but not limited to, under section 120.569, Florida Statutes, any other state administrative or legal procedure, or any other federal court or state court action, or in any other way impede or interfere with the

DEP's issuance of permits and approvals in response to Defendant's proposed ash pond closure plan, provided that DEP's final permits and approvals are consistent with this Settlement Agreement, or contains measures that are equally or more protective of the environment, surface water, and groundwater. If the parties disagree as to whether DEP's approval is consistent with this Settlement Agreement, they shall undertake the dispute resolution process outlined in 5.VII(b). However, Plaintiffs reserve the right to contest, under Chapter 120, Florida Statutes, or other applicable statutes, and submit comments to DEP or other agencies on the CCR dewatering effluent limitations and monitoring for arsenic or any surrogate for arsenic in DEP's approval of the Ash Pond Closure Plan or the related NPDES permit.

- b. Defendant** – Defendant agrees not to challenge, appeal, or in any other way impede or interfere with any aspects of DEP's final approval of Defendant's proposed ash pond closure plan that correspond with this Settlement Agreement.
- c. DEP Action on Proposed Closure Plan:** If DEP approves the ash pond closure plan in a manner that is not consistent with all of the provisions of this Settlement Agreement, the parties will negotiate in good faith as to alternate or amended proposals to DEP for an ash pond closure plan. If the parties cannot agree on an alternate or amended proposal, they will undertake the dispute resolution process outlined in 5.VII(b).

- IV. **Other Agreements** - Plaintiffs agree not to contest cost recovery for expenses associated with this Settlement Agreement or the ash pond closure plan in any proceeding.
- V. **Filing of this Settlement Agreement with the Court** – Within two days of the effective date of this Settlement Agreement, the parties shall, through their counsel of record, file a copy of this Settlement Agreement along with a corresponding joint motion for voluntary dismissal with the Court. This joint motion (Attachment 4) shall request that the case be dismissed with prejudice following the Department of Justice’s 45-day review period so that this Settlement Agreement can be fulfilled.
- VI. **Release** – In consideration of Defendant’s obligations under this Settlement Agreement, Plaintiffs, on behalf of themselves and their successors, assigns, officers, directors, agents, and employees, hereby completely release and forever discharge Defendant from all past, present, and future claims, demands, obligations, actions, and causes of action, whether now known or unknown, including, but not limited to, claims for injunctive relief, personal injury, property damage, economic loss or expense, attorneys’ fees, penalties, sanctions, and consequential damages of any nature whatsoever, whether based on statute, tort, subrogation, contract, quasi-contract, or any other theory of recovery or responsibility, for the claims set out in the Third Amended Complaint. Nothing in this section precludes the ability of Plaintiffs to pursue any claims for any unpermitted discharges or water quality violations caused by the construction or operation of the DSA. Except as noted in this section and in section 5.III, nothing in this Settlement Agreement affects or releases the rights of the Plaintiffs.

This release and discharge by Plaintiffs shall apply to and inure to the benefit of Defendant, its past, present, and future officers, directors, agents, servants, representatives, employees, affiliates, partners, predecessors and successors in interest, and assigns.

Defendant on behalf of itself and its successors, assigns, officers, directors, agents, and employees, hereby and fully releases and discharges Plaintiffs from all causes of action, suits, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, claims and demands whatsoever, in law or in equity, which Defendant ever had, now has, or which Defendant and any successors, administrators or assigns of Defendant hereafter can, shall or may have, against Plaintiffs regarding claims which were asserted or that could have been asserted in United States District Court for the Northern District of Florida Case No. 4:14-cv-00268-MW-CAS, including, but not limited to, all claims asserted in Plaintiffs' Third Amended Complaint, claims related to the investigation or gathering of evidence for this action, and statements made regarding the allegations, facts or status of this litigation.

This release and discharge by Defendant shall apply to and inure to the benefit of Plaintiffs, their past, present, and future officers, directors, agents, servants, representatives, employees, shareholders, subsidiaries, insurers, affiliates, partners, predecessors and successors in interest, and assigns.

Defendant and Plaintiffs expressly acknowledge that other, new, or supplemental information or defenses that either may now exist or that may arise or become known in the future could cause it to evaluate the

underlying facts or its position in this action differently than it has been evaluated as of the date of this Settlement Agreement. Defendant and Plaintiffs expressly agree, and specifically assume the risk, that if facts with respect to the matters covered by this Settlement Agreement are found hereafter to be other than, in addition to, or different from, the facts now believed or assumed to be true by either or all parties, this Settlement Agreement shall nonetheless remain in full force and effect.

VII. General Provisions

- a. Effective Date** – This Settlement Agreement shall become effective upon the date of latest signature below. All Plaintiffs and the Defendant must sign in order for this Settlement Agreement to be effective.
- b. Dispute Resolution** – The parties shall endeavor to settle any disagreements arising under this Settlement Agreement, including any disputes as to whether a final approval issued by DEP meets the requirements of this Settlement Agreement or as to the contents of an alternative or amended closure plan to be submitted to DEP, through good faith negotiation. Any party seeking relief from or enforcement of any provision of this Settlement Agreement or alleging noncompliance with this Settlement Agreement based on such a dispute shall first notify the other party or parties in writing. Representatives of the parties shall meet within fourteen days after the notice. Should the meeting fail to resolve the issue, representatives of the parties shall mediate within fourteen days after the meeting. Defendant and the Plaintiffs will each pay half

of the cost of mediation. If the mediation fails to resolve the matter(s) within ten days or the parties are unable to agree on a mediator within ten days, the party who initiated Dispute Resolution shall be entitled to seek binding arbitration. Within thirty days of notifying the other party that binding arbitration is sought, the parties will start binding arbitration with a mutually acceptable arbitrator. If the parties are unable to agree on an arbitrator within ten days, the Plaintiffs will select one arbitrator and the Defendant will select one arbitrator within three days of the failure to agree on an arbitrator. The two arbitrators will be asked to expeditiously select the arbitrator who will arbitrate the dispute. The result of arbitration is enforceable in any court of competent jurisdiction.

- c. Amendments and Modifications** – No amendments or modifications of this Settlement Agreement shall be valid unless set forth in writing and signed by the duly authorized representatives of all parties. No other representations, covenants, undertakings, or other prior or contemporaneous agreements, oral or written, respecting such matters, which are not specifically incorporated herein, shall be deemed in any way to exist or to bind any of the parties to this Settlement Agreement. The Plaintiffs and Defendant acknowledge that all terms of this Settlement Agreement including its attachments are contractual and not merely a recital.
- d. Joint Preparation** – All parties have jointly participated in the review and preparation of this Settlement Agreement, and this

Settlement Agreement shall not be construed more severely against any one of the parties than against any other party.

- e. **Authority to Sign** – Each person signing this Settlement Agreement warrants and represents that the person or entity on whose behalf he or she is signing has given him or her full, complete and proper authority to execute the instrument.
- f. **Disclaimer of Duress** – The parties hereby all disclaim any duress in entering this Settlement Agreement. All parties hereby certify that they have entered into this Settlement Agreement of their own free will, solely for the benefit of the mutual covenants and promises contained herein, and not under any duress or pressure from anyone to do so.
- g. **Attorneys Fees and Expenses** – Defendant agrees to pay a total of \$130,000.00 towards attorneys’ fees and associated expenses in maintaining this cause of action. Payment shall be made in the form of a check payable to Earthjustice within 30 days subsequent to the filing of the voluntary dismissal referenced in 5.V., above. Plaintiffs agree that payment under the paragraph satisfies all potential claims for fees and expenses in this matter.
- h. **Governing Law** – This Settlement Agreement, including all matters of interpretation and construction shall be governed by the Clean Water Act, 33 U.S.C. § 1251 *et seq.* and the laws of the State of Florida.

- i. No Admission of Liability** – It is understood and agreed that this Settlement Agreement is in full compromise of a disputed claim, and that neither this Settlement Agreement nor any action taken pursuant to this Settlement Agreement shall be construed as an admission of liability.
- j. Admissibility of Settlement** – This is a Settlement Agreement that, pursuant to Rule 408 of the Federal Rules of Evidence, is admissible against Defendant or Plaintiffs in only certain circumstances, and is admissible in a proceeding to enforce this Settlement Agreement.
- k. Warranty of Capacity** – The Plaintiffs and Defendant represent that they have the legal capacity to enter into this Settlement Agreement, and that this Settlement Agreement is not for the benefit of any party other than those who have entered into this Settlement Agreement, and gives no rights or remedies to any third parties.
- l. Binding Upon Successors and Assigns** – The Plaintiffs and Defendant agree that this Settlement Agreement is binding upon the Plaintiffs’ and Defendant’s successors and assigns.
- m. Severability** – The Plaintiffs and Defendant agree that if any provision of this Settlement Agreement should become prohibited by present or future law governing the subject matter of the provision, such provision shall be deemed to be rescinded or modified in accordance with any such law. In all other respects, the Plaintiffs and Defendant agree that the other provisions of this

Settlement Agreement shall continue and remain in full force and effect.

- n. Execution in Counterparts** – This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original Settlement Agreement, and all of which shall constitute one agreement to be effective as of the Effective Date. Photocopies or facsimile copies of executed copies of this Settlement Agreement may be treated as originals. A duly authorized attorney may sign on behalf of a corporate entity.
- o. Notice to Parties** – Notices required or authorized to be given pursuant to this Settlement Agreement shall be sent to the persons at the addresses set out below. Notices are effective upon receipt. All notices may be delivered in person, by United States Mail, overnight delivery service, or by electronic mail. Either party may change the persons and/or addresses for notice by providing notice to the representative(s) of the other party set out below.

For the Plaintiffs:

Bradley Marshall
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, Florida 32301
bmarshall@earthjustice.org

Amelia Shenstone
Southern Alliance for Clean Energy
250 Arizona Ave., NE
Atlanta, GA 30307
amelia@cleanenergy.org

For the Defendant:

James O. Vick
Director of Environmental Affairs
Gulf Power Company
One Energy Place
Pensacola, Florida 32520
jovick@southernco.com

- p. Satisfaction** – Defendant’s obligations under this Settlement Agreement shall be satisfied upon Defendant’s compliance with paragraph 5.VII.g. of this Settlement Agreement and DEP final agency action on all permits and approvals authorizing implementation of a closure plan consistent with this Settlement Agreement, except as to the reporting requirements in Attachment 3.

Dated this 24th day of June, 2015.

AGREED TO BY DEFENDANT

GULF POWER COMPANY

By:  6/19/15
Date
JIM R. FLETCHER
Vice President, External Affairs & Corporate Services

By:  6/19/15
Date
JEFFREY A. STONE
Florida Bar No. 325953
jas@beggslane.com
BEGGS & LANE, R.L.L.P.
501 Commendencia Street (32502)
P.O. Box 12950
Pensacola, FL 32591-2950
Telephone: (850) 432-2451
Facsimile: (850) 469-3331
General Counsel for Gulf Power Company

 6/24/15
Date
JAMES S. ALVES
Florida Bar No. 443750
jalves@hgslaw.com
Hopping Green and Sams, P.A.
Post Office Box 6526 (32314)
119 South Calhoun Street, Suite 300
Tallahassee, FL 32301
Telephone: (850) 222-7500
Facsimile: (850) 224-8551
Counsel for Gulf Power Company

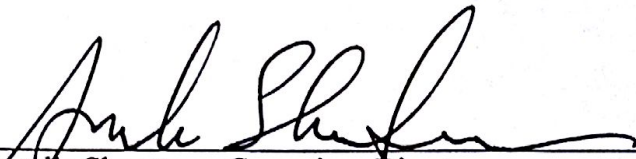
AGREED TO BY PLAINTIFFS

Shannon Lease

Shannon Lease, Executive Director
APALACHICOLA BAY AND RIVER KEEPER, INC

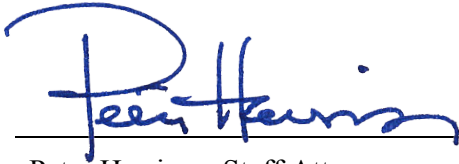
6/19/15

Date



Amelia Shenstone, Campaigns Director
SOUTHERN ALLIANCE FOR CLEAN ENERGY

6/19/2015
Date

A handwritten signature in blue ink, appearing to read "Peter Harrison". The signature is written in a cursive style with a large initial "P".

Peter Harrison, Staff Attorney
WATERKEEPER ALLIANCE

6/23/2015

Date



David Guest

Florida Bar No. 267228

dguest@earthjustice.org

Bradley Marshall

Florida Bar No. 0098008

bmarshall@earthjustice.org

EARTHJUSTICE

111 S. Martin Luther King, Jr. Blvd.

Tallahassee, FL 32301

(850) 681-0031

(850) 681-0020 fax

Counsel for Plaintiffs

6.23.2015

Date

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

NO. 4:14-cv-00268-MW-CAS

APALACHICOLA BAY AND RIVER
KEEPER INC. d/b/a APALACHICOLA
RIVERKEEPER, SOUTHERN ALLIANCE
FOR CLEAN ENERGY, and
WATERKEEPER ALLIANCE,

Plaintiffs,

v.

Gulf Power COMPANY,

Defendant.

COMPLAINT
(JURY TRIAL DEMANDED)

**THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

Plaintiffs Apalachicola Riverkeeper, Southern Alliance for Clean Energy, and Waterkeeper Alliance sue Defendant Gulf Power Company for violating sections 301 and 402 of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311 and 1342, by violating its permit conditions and illegally discharging pollutants into the Apalachicola River without the required CWA permits. This complaint seeks a declaratory judgment, injunctive relief, and civil penalties.

NATURE OF THE CASE

1. This citizen enforcement action challenges ongoing, unlawful discharges of toxic metals and other pollutants by Defendant Gulf Power Company, at its coal-fired Herbert Scholz Generating Plant (“Plant Scholz”), in violation of the Clean Water Act (“CWA,” or the “Act”), 33 U.S.C. §§ 1251-1376.

2. Gulf Power Company (“Defendant” or “Gulf Power”) is engaged in the generation, transmission, distribution, and sale of electricity. Defendant is a Florida corporation with its headquarters in Pensacola, Florida. Plant Scholz is located along the banks of the Apalachicola River near Sneads, Jackson County, Florida. Plant Scholz is owned and operated by Gulf Power.

3. Local residents and visitors alike enjoy fishing, boating, and other recreational activities on the river, while others come simply to enjoy its scenic beauty. Many people who fish in Apalachicola River consume the fish they catch. The river also provides valuable economic services, including sustaining the multi-million-dollar Apalachicola Bay oyster fishery.

4. Plant Scholz includes an on-site waste impoundment into which Defendant flushes coal ash waste, the residue left behind after coal is burned in the plant, using a “wet sluicing” process. The coal ash waste impoundment spans approximately 40 acres and is divided into three settling ponds known as the “Upper,” “Middle,” and “Lower” Ponds. None of the ponds have a synthetic liner to prevent contamination from leaking out of the impoundment.

5. Professional engineers contracted by the United States Environmental Protection Agency (“EPA”) have inspected hundreds of coal ash impoundments within the last five years to assess the potential for structural failure. The impoundment at Plant Scholz is in a small minority of sites inspected by EPA contractors for which impoundment inspection reports and “hazard potential” ratings have not been made

available to the public, due to Gulf Power's claim that such information contains "confidential business information."

6. Toxic pollutants including arsenic and chromium—both known carcinogens—as well as aluminum, barium, beryllium, boron, cadmium, cobalt, copper, lead, iron, manganese, mercury, nickel, vanadium, and zinc, are leaking from Defendant's coal ash impoundment at Plant Scholz.

7. Unless authorized by a permit issued under the CWA National Pollutant Discharge Elimination System (NPDES), a discharge of a pollutant to a water of the United States is a violation of the Act. A violation of any term or condition of a discharge permit issued under the CWA is a violation of the CWA.

8. Gulf Power has violated the Scholz permit and the CWA by allowing harmful pollution to leak out of its coal ash impoundments and into the Apalachicola River through point sources that are not authorized by the Scholz permit, and by failing to prevent, monitor, and report these unauthorized discharges. These unauthorized discharges indicate that there is a significant risk of the catastrophic collapse of the impoundment at Plant Scholz. Such a collapse would destroy the ecosystem of the Apalachicola River in the vicinity of Plant Scholz, and damage the ecosystem downstream of the plant.

JURISDICTION AND VENUE

9. Apalachicola Bay and River Keeper Inc. d/b/a Apalachicola Riverkeeper, Southern Alliance For Clean Energy, and Waterkeeper Alliance, (collectively, the "Conservation Groups") bring this enforcement action under the citizens' suit provision of the CWA, 33 U.S.C. § 1365. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 2201 (declaratory relief).

10. In full compliance with 33 U.S.C. § 1365(b)(1)(A), and 40 C.F.R. § 135.2, on February 5, 2014, the Conservation Groups gave Defendant, the Administrator and

Regional Administrator of the EPA, and the Florida Department of Environmental Protection (DEP) notice of the violations specified in this complaint and of the Conservation Groups' intent to file suit after sixty days should Defendant's violations continue. A copy of the Conservation Groups' February 5, 2014 notice-of-intent-to-sue letter (the "NOI"), with documentation of its receipt, is attached as Exhibit A. More than sixty days have passed since service of the NOI. Neither DEP nor EPA have commenced or are diligently prosecuting a civil or criminal action to redress the violations alleged in the NOI and in this action.

11. The violations alleged in the NOI and in this action are continuing at this time and are reasonably likely to continue in the future.

12. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and 33 U.S.C. § 1365(c)(1). Apalachicola Riverkeeper, the first listed plaintiff, is located in Franklin County in the Tallahassee Division

PARTIES

13. The Conservation Groups file this lawsuit on behalf of themselves and their members who have been injured by Defendant's unlawful acts alleged herein.

14. The members of the Conservation Groups on whose behalf the Conservation Groups file this lawsuit would otherwise have standing to sue Defendant in their own right for the unlawful acts alleged herein.

15. The purpose of this lawsuit is germane to each Conservation Groups' mission and purpose.

16. Neither the claims asserted herein nor the relief requested requires the participation of the Conservation Groups' members who have been injured by Defendant's actions.

17. Apalachicola Riverkeeper is a nonprofit corporation organized under the laws of Florida. Its mission is to provide stewardship and advocacy for the protection of

the Apalachicola River and its tributaries and watersheds, including the Apalachicola Bay, in order to improve and maintain the environmental integrity of these waterways. Apalachicola Riverkeeper's mission also includes preserving the natural, scenic, recreational, and commercial fishing character of the Apalachicola River system. Apalachicola Riverkeeper is based at 232 Water St., Apalachicola, Florida in Franklin County.

18. Southern Alliance for Clean Energy (SACE) is a not-for-profit, non-partisan organization working to promote responsible energy choices that solve global warming problems and ensure clean, safe, and healthy communities throughout the southeast. SACE is a leading voice for energy policy to protect the quality of life and treasured places across the region, including Florida. Since 1985, SACE has worked to minimize the impact of the energy sector on Southeastern communities, natural resources, and economies.

19. Waterkeeper Alliance Inc. is a non-profit New York corporation founded in 1999 which serves as the umbrella organization for approximately 200 local Waterkeeper organizations (including Riverkeepers, Baykeepers, Coastkeepers, etc.). The mission of Waterkeeper Alliance is to connect and support local Waterkeeper programs to provide a voice for waterways and communities worldwide. The Waterkeeper Alliance supports and empowers member Waterkeeper organizations to protect communities, ecosystems, and water quality; promotes the Waterkeeper model for watershed protection worldwide; and advocates for issues common to Waterkeeper programs. Apalachicola Riverkeeper is a member of Waterkeeper Alliance.

20. The Plaintiffs, (collectively, "Conservation Groups" or "Plaintiffs") and their members have been harmed by Defendant's unlawful discharges at Scholz. Members of the Conservation Groups recreate and fish on the Apalachicola River. Members of the Conservation groups worry about, and have their use and enjoyment of the Apalachicola River adversely affected by, contamination of river water, fish, and

wildlife by discharges from Defendant's coal ash ponds containing arsenic, lead, and other harmful pollutants. Many of the pollutants Gulf Power Company is illegally discharging bioaccumulate in the fish that members of the Conservation Groups catch and eat. Defendant's discharges of coal ash contaminants from the Plant Scholz coal ash impoundment are diminishing the ability of the Conservation Groups' members to use and enjoy of the Apalachicola River by the Conservation Groups and their members.

21. Plaintiffs' injuries will not be redressed except by an order from this Court assessing civil penalties against Defendant and requiring Defendant to take immediate and substantial action to stop its unlawful discharges of toxic pollution that is leaking from its coal ash impoundment into the Apalachicola River.

22. Defendant Gulf Power Company is headquartered in Pensacola, FL, in Escambia County.

23. Defendant owns and operates Plant Scholz and its associated coal ash waste impoundment. Defendant holds the NPDES permit for Plant Scholz (NPDES Permit No. FL0002283). The permit was issued in accordance with 33 U.S.C. § 1342.

STATUTORY BACKGROUND

24. The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish that objective, Congress set the national goal that "the discharge of pollutants into the navigable waters be eliminated." *Id.* Accordingly, the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to 33 U.S.C. § 1342.

25. Each violation of an NPDES permit, and each discharge of a pollutant that is not authorized by the permit, is a violation of the CWA. 33 U.S.C. §§ 1311(a); 1342(a); 1365(f).

26. The CWA defines a “point source” as “*any* discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). Under this broad definition, the discharge of pollutants from mining pits, slurry ponds, sediment basins, and mining leachate collection systems have been held to be point sources. The term “point source” has been taken beyond pipes and ditches and now includes less discrete conveyances, such as cesspools and ponds.

27. In addition, a “point source” need not be the original source of the pollutant; it need only convey the pollutant to “navigable waters.” Thus, ditches and channels that convey pollutants but are themselves not the original source constitute point sources. This includes unintentional conveyance of pollutants, for example, through naturally-formed ditches, gullies, or fissures.

28. The term “discharge of a pollutant” means any addition of any pollutant to navigable waters of the United States from any point source. 33 U.S.C. § 1362(12).

29. “Navigable waters” are the waters of the United States, including the territorial seas. 33 U.S.C. § 1362(7).

30. The term “pollutant” specifically includes, among other things, “industrial . . . waste discharged into water.” 33 U.S.C. § 1362(6). This industrial waste sent to the ash ponds at Plant Scholz is harmful and includes, but is not limited to, high levels of arsenic, cadmium, chromium, aluminum, barium, beryllium, copper, lead, nickel, zinc, selenium, and mercury.

31. Under section 505(a)(1) of the Clean Water Act, any citizen may commence a civil action for injunctive or declaratory relief against “any person,” including any corporation, alleged to be in violation of NPDES requirements and/or engaging in the unpermitted discharge of a pollutant. 33 U.S.C. § 1365(a)(1); *see also* 33 U.S.C. § 1365(5) (the term “person” includes “corporation, partnership, association”).

32. Section 309(d) of the Clean Water Act provides that any person who violates section 301 of the Act, 33 U.S.C. § 1311, or violates any permit condition or limitation in a NPDES permit issued under 33 U.S.C. § 1342, shall be subject to a civil penalty payable to the United States of up to \$25,000 per day for each violation. 33 U.S.C. § 1319(d).

33. Pursuant to the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, the Court may assess a civil penalty of \$37,500 per day for each violation that occurred after January 12, 2009. *See* 40 C.F.R. § 19.4.

34. Additionally, under section 505(d) of the Clean Water Act, the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing party or substantially prevailing party, whenever the court determines that such award is appropriate.” 33 U.S.C. § 1365(d).

FACTUAL BACKGROUND

35. The Apalachicola River is a water of the State and a water of the United States, subject to the full protections of the CWA.

36. Pursuant to its delegated authority under the CWA, 33 U.S.C. § 1342(b), the Florida Department of Environmental Protection (“DEP”) issued NPDES Permit No. FL0002283-004, as renewed July 1, 2005 and Sept. 23, 2010 (the “Scholz Permit”).

37. The Scholz Permit authorizes Gulf Power, subject to certain terms and limitations, to discharge coal ash wastewater, along with chlorinated condenser cooling water, to the main body of the Apalachicola River through outfall D-001. Outfall D-001 is located in the middle of a discharge canal about 180 feet from the point where the trench from the ash ponds deposits coal ash wastewater into the canal, and it is the only outfall through which the Scholz Permit authorizes direct water pollution discharges to the Apalachicola River. *See* Attachment A to Exhibit A.

38. The lagoons at Scholz have received various waste streams, including coal ash that is sluiced to the lagoons in a wet form, coal ash transport water, coal pile runoff, and sanitary wastewater. These waste streams are allowed to settle out in the ash impoundment.

39. The pollutants, solids, and sludges from Gulf Power's Plant Scholz coal ash ponds have for years been illegally entering waters of the United States through unpermitted point sources. The impoundment has leached, and will continue to leach, these substances and pollutants from the bottom and sides of the impoundment into the Apalachicola River and additionally into the ground water at Plant Scholz.

40. The leaching from the impoundment indicates that there is some preferential flow and that there is a significant risk of a catastrophic collapse of the impoundment if the leaks from the impoundment remain unaddressed. Erosional events also indicate there is a risk of collapse from erosion or over-topping of the impoundment, should these risks remain unaddressed.

41. Gulf Power's unpermitted discharges include, but are not limited to, direct surface water discharges from boils, seeps, and other leaks from the ash ponds that go through ditches, channels, and other means of conveyance to enter the Apalachicola River without passing through an authorized discharge point. The locations of these ditches are described in Exhibit A, and are point sources under the Clean Water Act.

42. Data from the EPA demonstrates that leachate from the impoundment at Plant Scholz contains toxic heavy metals including arsenic, barium, cadmium, lead, and selenium. See U.S. Env'tl Prot. Agency, *Draft: Human and Ecological Risk Assessment of Coal Combustion Wastes* at App'x A, p. A-2-24 (Apr. 2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0002>.

43. Arsenic is a known carcinogen that causes multiple forms of cancer in humans. It is also a toxic pollutant, 40 C.F.R. § 401.15, and a priority pollutant, 40 C.F.R. Part 423 App'x A. Arsenic is also associated with non-cancer health effects of the

skin and the nervous system. According to the Agency for Toxic Substances and Disease Registry, there is some evidence that in childhood, long-term exposure to arsenic may result in lower IQ scores and exposure to arsenic in the womb and early childhood may increase mortality in young adults.

44. Manganese is known to be toxic to the nervous system. Manganese concentrations greater than 50 µg/L render water unusable by discoloring the water, giving it a metallic taste, and causing black staining. Exposure to high levels can affect the nervous system; very high levels may impair brain development in children.

45. Iron can render water unusable by imparting a rusty color and a metallic taste and causing sedimentation and staining; to prevent these effects the EPA has set a secondary drinking water standard of 300 µg/L.

46. Lead is a very potent neurotoxin that is highly damaging to the nervous system. Health effects associated with exposure to lead include, but are not limited to, neurotoxicity, developmental delays, hypertension, impaired hearing acuity, impaired hemoglobin synthesis, and male reproductive impairment. Importantly, many of lead's health effects may occur without overt signs of toxicity. Lead is also classified by the EPA as a "probable human carcinogen."

47. Concurrent exposure to multiple contaminants may intensify existing effects of individual contaminants, or may give rise to interactions and synergies that create new effects. Where several coal ash contaminants share a common mechanism of toxicity or affect the same body organ or system, exposure to several contaminants concurrently produces a greater chance of increased risk to health.

48. The Apalachicola River flows into the Gulf of Mexico.

49. The Apalachicola River is a distinct, navigable water of the United States and a water of the State of Florida.

50. All violations of the CWA set forth herein are ongoing and are reasonably likely to continue.

CLAIMS FOR DECLARATORY JUDGMENT AND CIVIL PENALTIES

**COUNT I:
UNAUTHORIZED POINT-SOURCE DISCHARGES**

51. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

52. A direct, hydrologic surface water connection exists on a recurring basis between the Apalachicola River and the boils, seeps, or leaks coming from the Plant Scholz coal ash impoundment.

53. Defendant has discharged and continues to discharge pollutants from a point source to a water of the United States.

54. In particular, Gulf Power has caused and continues to cause unpermitted point-source discharges of harmful pollutants leaking out of the coal ash impoundment at Plant Scholz into the Apalachicola River, in violation of section 301 of the Clean Water Act, 33 U.S.C. § 1311.

55. No permit issued under section 402 of the Clean Water Act, 33 U.S.C. §1342, authorizes the discharges described in the preceding paragraph.

56. Based on the foregoing facts, Plaintiffs request a declaration that Gulf Power has violated and is violating sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 & 1342.

57. By committing the acts and omissions alleged above, Gulf Power is also subject to an assessment of civil penalties pursuant to sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. §§ 1319(d) and 1365.

**COUNT II:
PERMIT VIOLATIONS BY FAILURE TO REPORT AND MONITOR SPILLS**

58. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

59. Part VIII(B)(1) of the Scholz Permit requires that Gulf Power notify the Florida Department of Environmental Protection (DEP) as soon as it knows or has reason to believe:

- a. That any activity has occurred . . . which would result in the discharge, on a routine or frequent basis, of any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following levels: (1) One hundred micrograms per liter . . . , or (3) Five times the maximum concentration value reported for that pollutant in the permit application; or
- b. That any activity has occurred . . . which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following levels: (1) Five hundred micrograms per liter . . . , or (3) Ten times the maximum concentration value reported for that pollutant in the permit application.

60. Part VII.1.a.4 of the Scholz Permit defines “toxic pollutant” as including: “any toxic substance listed in Section 307(a)(1) of the CWA, any hazardous substance listed in Section 311 of the CWA, or chemical listed in Section 313(c) of the Superfund Amendments and Reauthorization Act of 1986; and []any substance (that is not also a conventional or non-conventional pollutant except ammonia) for which EPA has published an acute or chronic toxicity criterion.” Pursuant to section 307(a)(1) of the Clean Water Act, arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium, and zinc are all listed as toxic pollutants. 40 C.F.R. § 401.15.

61. Gulf Power has failed to monitor and report its unpermitted point-source discharges of pollutants from the Plant Scholz coal ash impoundment into the Apalachicola River.

62. Defendant’s failure to report and monitor spills as required by Part VIII.B.1 of the Scholz Permit is a violation of CWA “effluent standard or limitation” as defined in section 505(f) of the Act. 33 U.S.C. § 1365(f).

63. Gulf Power has failed to notify DEP of these spills, or take any other action, as required by NPDES Permit FL0002283 at Part VIII.B.1.

64. Defendant Gulf Power has not obtained separate NPDES permits for these discharges.

65. Based on the foregoing facts, Plaintiffs request a declaration that Gulf Power has violated and is violating sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342.

66. By committing the acts and omissions alleged above, Gulf Power is also subject to an assessment of civil penalties pursuant to sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. §§ 1319(d) and 1365.

**COUNT III:
FAILURE TO MAINTAIN COAL ASH IMPOUNDMENT TO PREVENT
UNAUTHORIZED DISCHARGE OF POLLUTANTS**

67. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

68. Part VIII.C.1 of the Scholz Permit requires that “[a]ll ash impoundments used to hold or treat wastewater and other associated wastes shall be operated and maintained to prevent the discharge of pollutants to waters of the State, except as authorized under this permit.”

69. Each unauthorized discharge of pollutants leaking from the Plant Scholz coal ash impoundment to the Apalachicola River violates Part VIII.C.1 of the Scholz Permit.

70. Gulf Power’s failure to maintain the coal ash impoundment at Plant Scholz to prevent the unauthorized discharge of pollutants has led to a significant risk of catastrophic failure of the impoundment.

71. Based on the foregoing facts, Plaintiffs request a declaration that Gulf Power has violated and is violating sections 301 and 402 of the Clean Water Act, 33

U.S.C. §§ 1311 and 1342, by failing to operate and maintain the Plant Scholz coal ash impoundment to prevent unauthorized discharges to the Apalachicola River.

72. By committing the acts and omissions alleged above, Gulf Power is also subject to an assessment of civil penalties pursuant to sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. §§ 1319(d) and 1365.

**COUNT IV:
UNPERMITTED BYPASS OF TREATMENT WORKS**

73. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

74. Part IX.22 of the Scholz Permit prohibits pollution discharges resulting from bypass events, defining “bypass” as “the intentional diversion of waste streams from any portion of a treatment works.”

75. Part I.C.7 of the Scholz Permit states: “Any bypass of the treatment facility which is not included in the monitoring specified in [elsewhere in the Scholz Permit], is to be monitored for flow and all other required parameters.”

76. Defendant has received notice that waste streams from the Plant Scholz coal ash impoundment are being diverted from a portion of a treatment works and discharging into the Apalachicola River, however Defendant has continued to allow such diversions to continue unabated.

77. By allowing unauthorized point-source discharges to occur from the ash impoundment at Scholz to the Apalachicola, Gulf Power has created an ongoing bypass of the permitted treatment works, in violation of Part IX.22 of the Scholz Permit.

78. Defendant’s failure to monitor the ongoing bypass described above for “flow and other required parameters” is a violation of Part I.C.7 of the Scholz Permit.

79. Based on the foregoing facts, Plaintiffs request a declaration that Gulf Power has violated and is continuing to violate sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342.

80. By committing the acts and omissions alleged above, Gulf Power is also subject to an assessment of civil penalties pursuant to sections 309(d) and 505 of the Clean Water Act, 33 U.S.C. §§ 1319(d) and 1365.

CLAIM FOR INJUNCTIVE RELIEF

81. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

82. Plaintiffs have no adequate remedy at law for Gulf Power's ongoing and routine unpermitted discharges of industrial pollutants from the coal ash impoundment at Plant Scholz; ongoing and routine failure to report and monitor spills as required by the Scholz Permit; ongoing failure to operate and maintain the ash pond impoundment to prevent unauthorized discharges in violation of Part VIII.C.1 of the Scholz Permit; and continued failure to report and monitor these bypasses as required by Part IX.22 and Part I.C.7 of the Scholz Permit.

83. Gulf Power's continuous and unlawful discharges of industrial pollutants from the coal ash impoundment at Plant Scholz, bypasses of permitted treatment works, failure to take reasonable steps, failure to maintain and operate the ash pond as required to prevent unauthorized discharges, and failure to report and monitor spills are causing irreparable environmental degradation and adverse harm to Plaintiffs and other users of the Apalachicola River.

84. Gulf Power will continue to violate sections 301 and 402 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1342, in this manner, unless enjoined by the Court.

85. Therefore, Plaintiffs seek an injunction pursuant to section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), requiring Gulf Power to halt the unpermitted discharge of pollutants and comply with the terms of its permit.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment stating that Defendant is violating the CWA with its ongoing unauthorized discharges of arsenic and other pollutants, and by allowing and causing the entering of such pollutants into the Apalachicola River and the ground water at Plant Scholz in violation of Defendant's NPDES permit and the CWA;

B. Issue a declaratory judgment that Defendant's failure to monitor and report spills is a violation of its NPDES permit and the CWA;

C. Issue a declaratory judgment that Defendant's failure to operate and maintain its ash ponds at Plant Scholz so as to prevent unauthorized discharges is a violation of its NPDES permit and the CWA;

D. Issue a declaratory judgment that Defendant's bypass of permitted treatment works is a violation of its NPDES permit;

E. Enter appropriate preliminary and injunctive relief to ensure that Defendant:

- i. Ceases all unlawful discharges of pollutants from the Plant Scholz coal ash impoundment into the Apalachicola River;
- ii. Remediates the contaminated ground water beneath the Plant Scholz site resulting from its unpermitted discharges.

F. Assess civil penalties against Gulf Power of up to \$37,500 per violation per day pursuant to 33 U.S.C. §§ 1319(d), 1365(a), and 74 Fed. Reg. 626, 627 (Jan. 7, 2009);

G. Award Plaintiffs the costs of this action, including reasonable attorney and expert fees, as authorized by 33 U.S.C. § 1365(d); and

H. Grant Plaintiffs such further and additional relief as the Court deems just and proper.

THE PLAINTIFFS HEREBY DEMAND A TRIAL BY JURY

Respectfully submitted on this 29th day of May, 2015.

/s/ Bradley Marshall

Bradley Marshall
Fla. Bar No. 0098008
bmarshall@earthjustice.org
David Guest
Fla. Bar No. 267228
dguest@earthjustice.org
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
(850) 681-0031
(850) 681-0020 fax
*Counsel for Apalachicola Riverkeeper,
Southern Alliance for Clean Energy, &
Waterkeeper Alliance*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served using CM/ECF on this 29th day of May, 2015, and service was accomplished upon counsel of record by the Court's CM/ECF system.

s/ Bradley Marshall
Attorney



EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-CIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

February 5, 2014

**SENT VIA CERTIFIED MAIL, RETURN
RECEIPT REQUESTED, & VIA FACSIMILE**

Stan W. Connally Jr., President and CEO
James O. Vick, Director of Environmental Affairs
Gulf Power Company
One Energy Place
Pensacola, Florida 32520-0001
Fax: (850) 444-6448

**Re: Notice of intent to file citizen suit for Clean Water Act for violations at
the Herbert Scholz Generating Plant**

Dear Sirs:

We are writing on behalf of Apalachicola Riverkeeper, the Southern Alliance for Clean Energy, and Waterkeeper Alliance (collectively, "Conservation Groups"), as well as their thousands of members, to notify the United States Environmental Protection Agency (EPA), the Florida Department of Environmental Protection (DEP), and the Gulf Power Company ("Gulf Power") of ongoing violations of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, at Gulf Power's Herbert Scholz Generating Plant ("Plant Scholz" or "Scholz"). Pursuant to CWA § 505(b)(1)(A), this letter serves as notice that the Conservation Groups intend to file suit against Gulf Power for the violations of the CWA described herein, unless such violations permanently cease within sixty days of service of this letter.

BACKGROUND

Plant Scholz is an 80-megawatt¹ coal-fired power plant located along the banks of the Apalachicola River near Sneads, Jackson County, Florida. The plant's two generating units began operating in 1953, and Gulf Power has announced that it will permanently

¹ Nameplate capacity; 98 MW gross capacity.

discontinue electricity generation at Scholz in 2015.² Gulf Power deposits coal ash residue from the Scholz Plant into an on-site waste impoundment using a wet sluicing process. The coal ash waste impoundment, which is as old as the plant itself, is divided into three settling ponds known as the “upper,” “mid,” and “lower” ponds. Although coal ash is known to contain high concentrations of many harmful pollutants including various heavy metals, the Scholz impoundment contains no impermeable liner to prevent these pollutants from leaking out of the impoundment and into nearby ground and surface waters.

The CWA National Pollutant Discharge Elimination System (NPDES) Permit No. FL0002283-004, as renewed July 1, 2005 and Sept. 23, 2010 (the “Scholz permit”) authorizes Gulf Power to discharge pollutants into the Apalachicola River, a water of the United States, from certain specified wastewater outfalls at the Scholz Plant, subject to various terms and limitations. Gulf Power has violated the CWA and the Scholz permit by allowing harmful pollution to leak out of its coal ash impoundments and into the Apalachicola River through point sources that are not authorized by the Scholz permit, and by failing to monitor and report these unauthorized discharges. Additionally, Gulf Power has violated the Scholz permit by discharging pollutants from authorized outfalls in excess of numerical permit limits.

These violations harm the Apalachicola River and the people who use it. Home to several endangered species, the Apalachicola is a unique and cherished resource of great importance. Local residents and visitors alike enjoy fishing, boating, and other recreational activities on the river, while others come simply to enjoy its scenic beauty. The river also provides valuable economic services, including sustaining the multi-million dollar Apalachicola Bay oyster fishery. Illegal pollution from Plant Scholz is harming the Apalachicola River and the people who depend on it, and the harm will continue until Gulf Power comes into compliance with the Clean Water Act.

Section 505 of the CWA allows citizens to enforce the Act to ensure compliance with its provisions. 33 U.S.C. § 1365. In addition to injunctive relief, attorneys’ fees, and litigation costs, civil penalties up to \$37,500 per day for each violation may be imposed. 33 U.S.C. § 1319(d) and 40 C.F.R. §§ 19,19.4, Table 1 (or as otherwise provided by law).

² See Press Release, Gulf Power Co., Gulf Power announces closure of Plant Scholz (Mar. 22, 2013), available at <http://www.gulfpower.com/about-us/pressroom.cshhtml> (last visited Jan. 6, 2013).

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Unpermitted Point-Source Discharges

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source to waters of the United States, except in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit. The Clean Water Act defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container ... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(4).

Gulf Power owns and operates structures associated with its coal ash waste impoundment/disposal area at Plant Scholz (collectively, the “coal ash impoundment”). The Scholz permit authorizes discharges of wastewater from the coal ash impoundment only through an internal “ash pond overflow” outfall (outfall I-012) located in a concrete weir at the toe of the south-facing berm of the lower ash pond, subject to certain monitoring requirements and effluent limits specific to outfall I-012. The coal ash wastewater is then channeled down a nearly 900-foot trench that runs through a wooded area parallel to the toe of the southern berm of the lower ash pond. Finally, the coal ash wastewater cascades out of the trench into a 60-foot-wide, 750-foot-long “discharge canal” that stems off of the Apalachicola River.

The Scholz permit authorizes Gulf Power, subject to certain terms and limitations, to discharge this wastewater, along with chlorinated condenser cooling water, to the main body of the Apalachicola River through outfall D-001. Outfall D-001 is located in the middle of the discharge canal about 180 feet from the point where the trench deposits coal ash wastewater into the canal, and it is the only outfall through which the Scholz permit authorizes direct water pollution discharges to the Apalachicola River.

Gulf Power has allowed and is continuing to allow harmful pollution to seep out of its coal ash impoundment and into the Apalachicola River from points other than outfall D-001. Gulf Power has also allowed and is continuing to allow pollution from its coal ash impoundment to enter its waste stream in an unauthorized manner. Multiple seeps located along the south berm of the lower ash pond contain high levels of toxic substances including arsenic, cadmium, and chromium, all known carcinogens, as well as aluminum, barium, beryllium, copper, lead, nickel, zinc, selenium, and mercury. The applicable Florida Surface Water Quality Criteria for arsenic in Class III waters, including the Apalachicola River at Plant Scholz, is 50 µg/L. Fla. Admin. Code R. 62-302.530(5)(a). For example, on June 10, 2013, the arsenic concentrations in at least one of these ongoing seeps was greater than 3,000 (three thousand) micrograms per liter (µg/L), *three hundred*

times the maximum level deemed safe for drinking water supplies.³ On Aug. 25, 2013, seepage from the coal ash impoundment that contained arsenic at a concentration of 464 µg/L was observed discharging directly into the Apalachicola River. *See Attachment A*, satellite image of Plant Scholz, illustrating the approximate area where seepage is occurring.

As discussed above, outfall D-001 is the only outfall through which the Scholz permit authorizes direct water pollution discharges to the Apalachicola River. With respect to wastewater from the coal ash impoundment, the Scholz permit requires that all wastewater must pass through outfall I-012 before it may ultimately be discharged into the main body of the river through outfall D-001. As such, Gulf Power has violated and continues to violate the Clean Water Act by discharging pollutants from the coal ash impoundment into the Apalachicola River without a NPDES permit.

These leaks or “seeps” form ongoing, unpermitted point-source discharges to the Apalachicola River. Such discharges occur via surface flows directly into the river; into the trench that conveys wastewater from outfall I-012 to the discharge canal (downstream of outfall I-012); or directly into the discharge canal. Discharges also occur where ground water forms a hydrologic connection with the Apalachicola River through which pollutants from the coal ash impoundment are deposited into the river. These discharges are reasonably likely to occur on an ongoing basis until the source of the contamination is removed or fully contained.

Unpermitted discharges are especially likely to occur during periods of heavy precipitation and/or water releases from the Jim Woodruff Dam, which increases surface runoff and groundwater flow, and causes the water level in the river to rise closer to or above areas where seepage is escaping the coal ash impoundment. On August 25, 2013, when seepage from the coal ash impoundment was observed discharging directly into the Apalachicola River, the gauge height of the river was only about 54 feet. *See Attachment B*, daily stream gauge data for Aug. 25, 2013; *see also Attachment C*, elevation model for Apalachicola River at Plant Scholz (illustrating encroachment of river towards the seepage area and coal ash impoundment relative to water level). At this site, the Apalachicola River has risen to levels between 50 and 55 feet multiple times in each of the last five years, indicating that unpermitted surface discharges occur at least as often. *See Attachment D*, Apalachicola River gauge height at Chattahoochee, FL: 2009–2013.

³ *See* U.S. Env't'l Prot. Agency, Basic Information about Arsenic in Drinking Water, *available at* <http://water.epa.gov/drink/contaminants/basicinformation/arsenic.cfm> (last accessed Jan. 24, 2014). The applicable Florida Surface Water Quality Criteria for arsenic in Class III waters is 50 µg/L. Fla. Admin. Code R. 62-302.530(5)(a).

The severity and likelihood of seepage discharges increase as the water level of the river goes up. As shown in **Attachment D**, the gauge height of the Apalachicola River below the Jim Woodruff Dam has risen above 60 feet in three of the last five years, and it is extremely likely to continue doing so periodically. **Attachment E** contains an aerial image of Apalachicola River at Plant Scholz, taken Feb. 8, 2010 when the gauge height of the river was approximately 63 feet, illustrating the inundation of the general area where seepage is occurring.

B. Violations of Permit Terms & Conditions

Any contravention of the terms and conditions of a NPDES permit is also subject to a citizen enforcement suit under the Clean Water Act. *See* 33 U.S.C. §§ 1365(f)(6), 1342(a); 40 C.F.R. § 122.41(a) (“Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action”). Gulf Power violated and is reasonably likely to continue violating the terms and conditions in the Scholz permit in the following ways:

1. Failure to report & monitor spills

Gulf Power is in violation of the reporting provisions contained in the Scholz permit. Part VIII(B)(1) of the permit requires Gulf Power to notify DEP as soon as they know or have reason to believe:

- a. That any activity has occurred ... which would result in the discharge, on a routine or frequent basis, of any toxic pollutant⁴ which is not limited in the permit, if that discharge will exceed the highest of the following levels: (1) One hundred micrograms per liter ..., or (3) Five times the maximum concentration value reported for that pollutant in the permit application; or
- b. That any activity has occurred ... which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the following levels: (1) Five hundred micrograms per liter ..., or (3) Ten

⁴ Part VII.1.a.4 of the Scholz permit defines “toxic pollutant” as including: “any toxic substance listed in Section 307(a)(1) of the CWA, any hazardous substance listed in Section 311 of the CWA, or chemical listed in Section 313(c) of the Superfund Amendments and Reauthorization Act of 1986; and [] any substance (that is not also a conventional or non-conventional pollutant except ammonia) for which EPA has published an acute or chronic toxicity criterion.”

times the maximum concentration value reported for that pollutant in the permit application.

At least one seep from the coal ash impoundment at Plant Scholz contained arsenic at a concentration greater than 3,000 (three thousand) micrograms per liter on June 10, 2013, while another contained arsenic at a concentration greater than 1,000 (one thousand) micrograms per liter. On August 25, 2013, a seepage discharge from the coal ash impoundment contained arsenic concentrations greater than 400 micrograms per liter.

With respect to Part VIII.B.1 of the Scholz permit, pollutants discharged from unauthorized outfalls are not “limited,” because the permit limits only discharges from prescribed outfalls. Moreover, the permit does not limit arsenic discharges from outfall I-012 at all. As such, each of Gulf Power’s failures to report a seepage discharge that satisfies the criteria set forth above amounts to a violation of Part VIII.B.1 of the Scholz permit. For the reasons discussed in Section A above, such violations are ongoing.

2. Failure to maintain the coal ash impoundment to prevent the unauthorized discharge of pollutants to waters of the State

Gulf Power has also violated part VIII.C.1 of the Scholz permit, which requires that “[a]ll ash impoundments used to hold or treat wastewater and other associated wastes shall be operated and maintained to prevent the discharge of pollutants to waters of the State, except as authorized under this permit.” Each unpermitted discharge of pollutants to the Apalachicola River or any other water of the State of Florida from the ash pond impoundment is a violation of part VIII.C.1 of the Scholz permit. For the reasons discussed in Section A above, such violations are ongoing.

3. Illegal bypasses of permitted discharge points

Part IX.22 of the Scholz permit prohibits bypass events, defining “bypass” as “the intentional diversion of waste streams from any portion of a treatment works.” See Part I.C.7 (“Any bypass of the treatment facility which is not included in the monitoring specified in [elsewhere in the Scholz permit], is to be monitored for flow and all other required parameters.”). By allowing seepage discharges to occur from the ash impoundment at Scholz without authorization, Gulf Power has created an ongoing bypass of the permitted treatment works, in violation of Part IX.22 of the Scholz permit. For the reasons discussed in Section A above, such violations are ongoing.

4. Pollution discharges exceeding numerical limits in permit

Pollution discharges from the Scholz Plant are subject to various numerical effluent limitations contained in the Scholz permit. Gulf Power submitted discharge monitoring

reports to DEP on which it reported the following exceedances of numerical effluent limitations contained in the Scholz permit:

Monitoring Period	Outfall	Parameter	Limit	Reported
2010 annual	D-001	Copper (total recoverable) daily max.	5.1 µg/L	8.60 µg/L
2010 annual	0-001	Lead (total recoverable) daily max.	1.28 µg/L	1.40 µg/L
2011 annual	D-001	Copper (total recoverable) daily max.	4.54 µg/L	7.20 µg/L
2013 annual	0-001	Copper (total recoverable) daily max.	3.62 µg/L	6.50 µg/L

Each self-reported violation of a daily-maximum numerical effluent limitation constitutes a violation of the terms and conditions of the Scholz permit. Given Gulf Power's history of violations of numerical effluent limitations in the Scholz permit, such violations are reasonably likely to recur until the cause of the violations is addressed.

PERSONS RESPONSIBLE FOR VIOLATIONS

Gulf Power owns, operates and/or maintains the discharge structures and impoundments at Plant Scholz, including those structures and discharge areas identified above, and is the NPDES permit holder for Plant Scholz.

PERSONS GIVING NOTICE

Apalachicola Riverkeeper is a nonprofit corporation organized under the laws of Florida. Its mission is to provide stewardship and advocacy for the protection of the Apalachicola River and its tributaries and watersheds, including the Apalachicola Bay, in order to improve and maintain the environmental integrity of these waterways. Apalachicola Riverkeeper's mission also includes preserving the natural, scenic, recreational, and commercial fishing character of the Apalachicola River system.

Southern Alliance for Clean Energy (SACE) is a not-for-profit, non-partisan organization working to promote responsible energy choices that solve global warming problems and ensure clean, safe, healthy communities throughout the Southeast. SACE is a leading voice for energy policy to protect the quality of life and treasured places across the region, including Florida. Since 1985, SACE has worked to minimize the impact of the energy sector on the Southeast's communities, natural resources, and economies.

Waterkeeper Alliance (WKA) is a non-profit corporation founded in 1999, which serves as the umbrella organization for more than 200 local Waterkeeper organizations (e.g., Riverkeepers, Baykeepers, Coastkeepers, etc.). WKA's mission is to connect and support

local Waterkeeper organizations to provide a voice for waterways and communities worldwide. WKA supports and empowers member Waterkeeper organizations to protect communities, ecosystems, and water quality; promotes the Waterkeeper model for watershed protection worldwide; and advocates for issues common to Waterkeeper programs.

The names, addresses, and telephone numbers of the persons giving notice pursuant to this Notice Letter are:

Ms. Shannon Lease
Apalachicola Bay and River Keeper Inc.
d/b/a Apalachicola Riverkeeper
232-B Water Street, Box 8
Apalachicola, Florida 32320
(850) 653-8936

Ms. Ulla Reeves
Southern Alliance for Clean Energy
46 Orchard Street
Asheville, NC 28801
(828) 254-6776, ext. 2

Mr. Marc A. Yaggi
Waterkeeper Alliance Inc.
17 Battery Place, Suite 1329
New York, NY 10004
(212) 747-0622, ext. 132

If you have any questions or wish to discuss this matter, please contact one of us at the numbers below.

Sincerely,



Bradley Marshall
Fla. Bar No. 0098008
Associate Attorney
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301
bmarshall@earthjustice.org
(850) 681-0031
(850) 681-0020 fax
*Counsel for Apalachicola Riverkeeper,
Southern Alliance for Clean Energy, &
Waterkeeper Alliance*

/s/

Peter A. Harrison
Staff Attorney
Waterkeeper Alliance
17 Battery Place, Suite 1329
New York, NY 10004
pharrison@waterkeeper.org
(212) 272-0622, ext. 132
Counsel for Waterkeeper Alliance

cc:

Regina McCarthy, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

Heather McTeer Toney
Regional Administrator, EPA Region 4
61 Forsyth St., S.W.
Mail Code: 9T25
Atlanta, GA 30303-8960

Mark Thomasson
Director
Division of Water Resource Management
Florida Department of Environmental Protection
2600 Blair Stone Road, M.S. 3500
Tallahassee, FL 32399-2400



Herschel T. Vinyard, Jr.
Secretary
Florida Department of Environmental Protection
3900 Commonwealth Blvd. M.S. 49
Tallahassee, FL 32399

Terry A. Davis
Registered Agent - Gulf Power Co.
500 Bayfront Pkwy.
Pensacola, FL 32520-0786

Attachment A

Plant Scholz coal ash impoundment: seepage area (approximate)

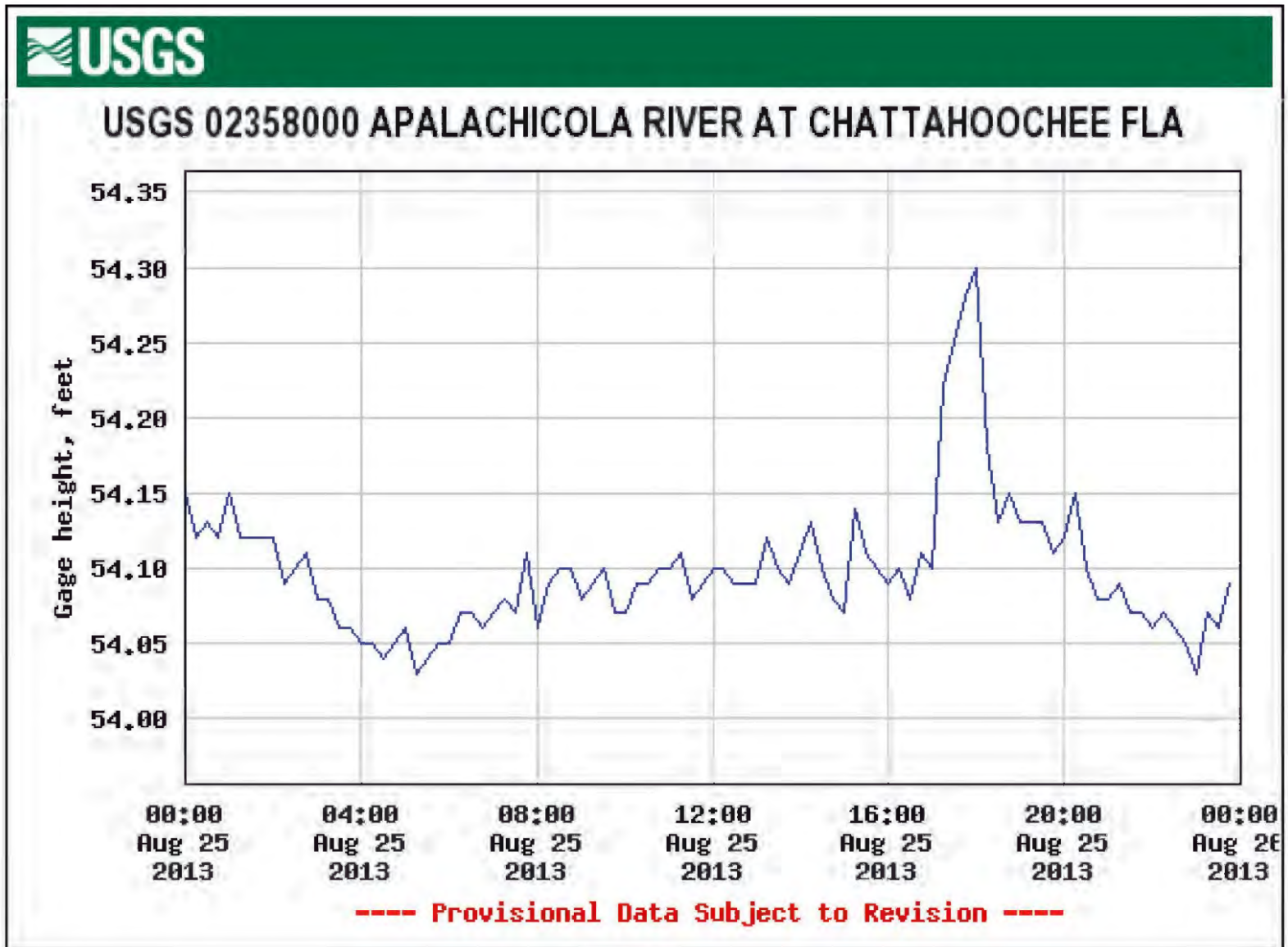


-  Berm where seepage is occurring
-  Approximate seepage flow direction

-  Permitted outfall

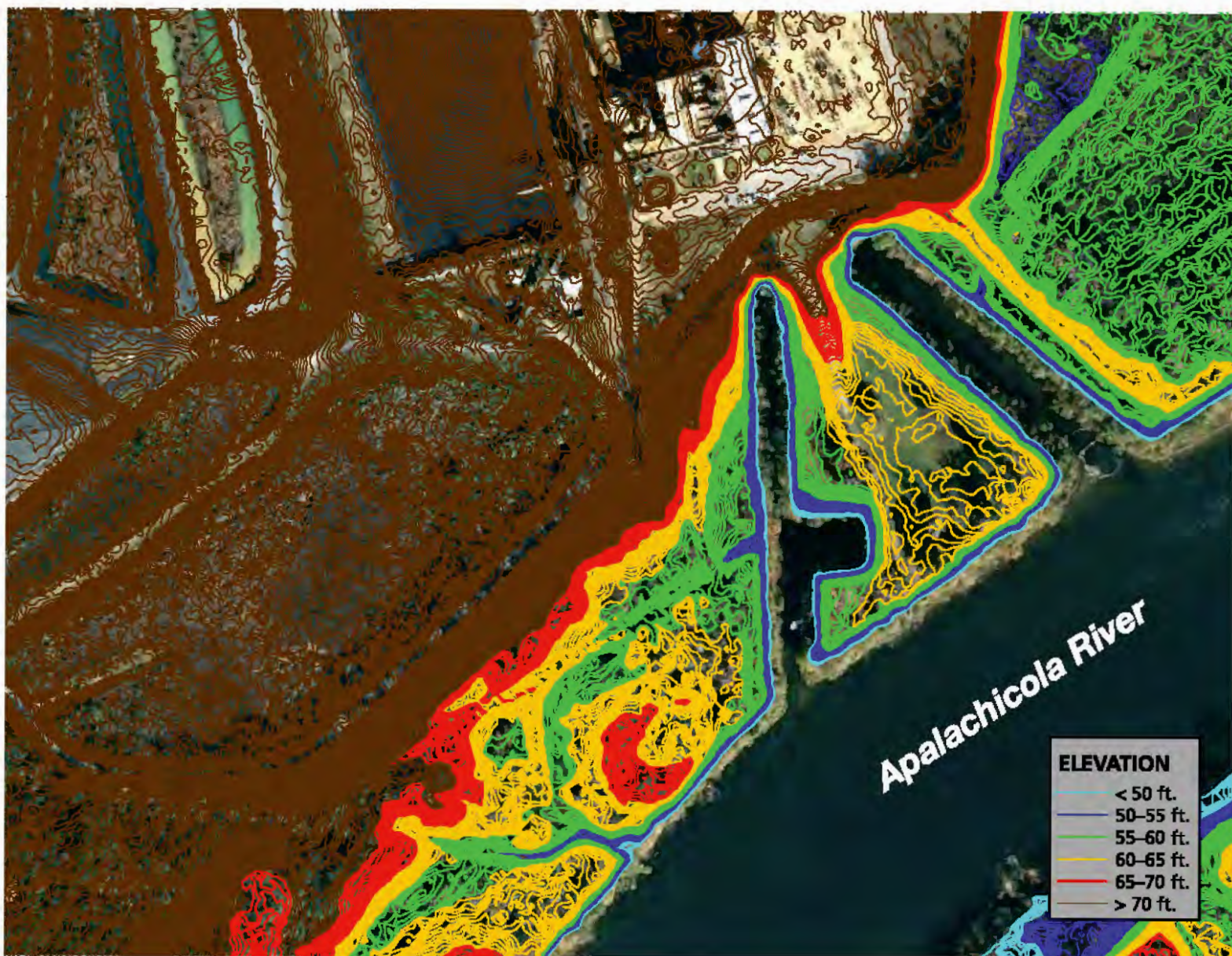
Attachment B

Apalachicola River gauge height at Chattahoochee, FL: Aug. 25, 2013



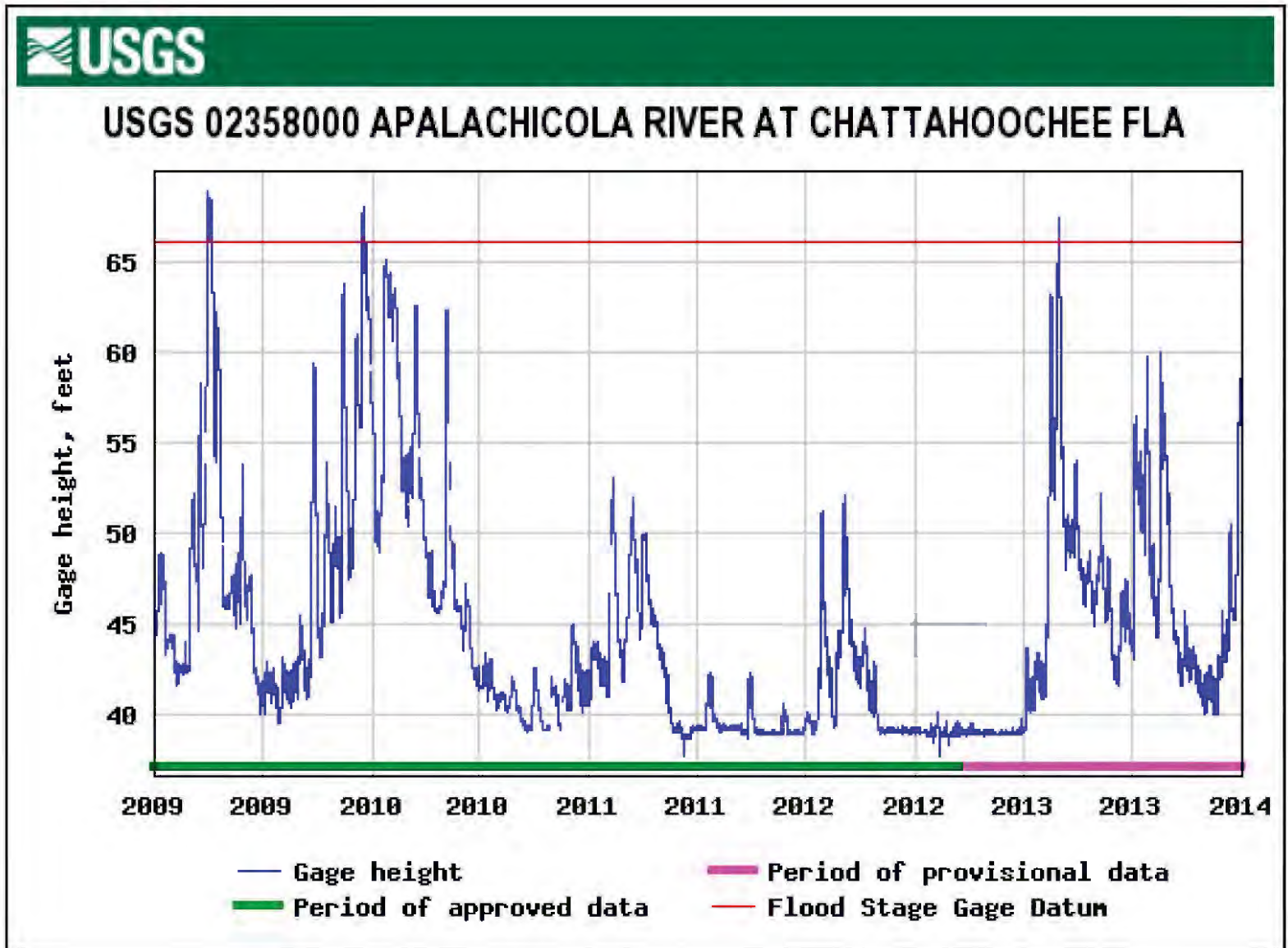
Attachment C

Elevation model: Apalachicola River at Plant Scholz



Source: USGS

Apalachicola River gauge height at Chattahoochee, FL: 2009–2013



Attachment E

Apalachicola River, Feb. 8, 2010 (approximate gauge height = 63 ft.)



Source: USGS

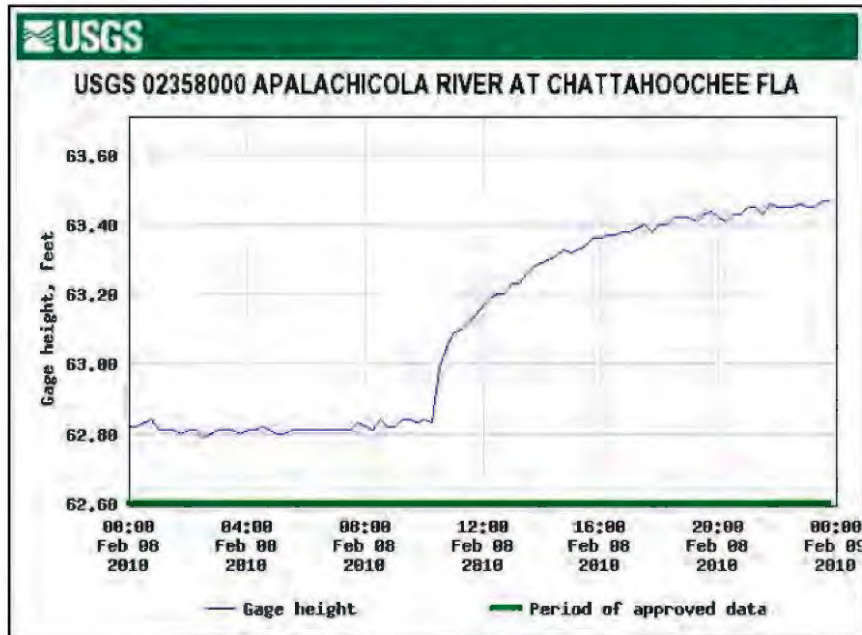


Exhibit A

- SENDER: COMPLETE THIS SECTION**
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
 - Print your name and address on the reverse so that we can return the card to you.
 - Attach this card to the back of the mailpiece, or on the front if space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

1. Article Addressed to:

Regina McCarthy, Administrator
 U.S. Environmental Protection Agency
 Ariel Rios Building
 1200 Pennsylvania Avenue, N.W.
 Mail Code 1101A
 Washington, D.C. 20460

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) **7012 1640 0000 7861 1255**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

- SENDER: COMPLETE THIS SECTION**
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
 - Print your name and address on the reverse so that we can return the card to you.
 - Attach this card to the back of the mailpiece, or on the front if space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

1. Article Addressed to:

Stan W. Connally Jr.
 President and CEO
 James O. Vick
 Director of Environmental Affairs
 Gulf Power Company
 One Energy Place
 Pensacola, Florida 32520-0001

3. Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) **7012 1640 0000 7861 0777**

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-154

- SENDER: COMPLETE THIS SECTION**
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
 - Print your name and address on the reverse so that we can return the card to you.
 - Attach this card to the back of the mailpiece, or on the front if space permits.

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

1. Article Addressed to:

Heather McTeer Toney
 Regional Administrator, EPA Region 4
 61 Forsyth St., S.W.
 Mail Code: 9T25
 Atlanta, GA 30303-8960

3. Service Type
 Certified Mail® Priority Mail Express™
 Registered Return Receipt for Merchandise
 Insured Mail Collect on Delivery

4. Restricted Delivery? (Extra Fee) Yes

2. Article Number (Transfer from service label) **7012 1640 0000 7861 0760**

PS Form 3811, July 2013 Domestic Return Receipt

Exhibit A

<p>SENDER: COMPLETE THIS SECTION</p> <ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>COMPLETE THIS SECTION ON DELIVERY</p> <p>A. Signature <input checked="" type="checkbox"/> <i>Wendy Brooks</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) WENDY BROOKS</p> <p>C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>1. Article Addressed to:</p> <p>Terry A. Davis Registered Agent - Gulf Power Co. 500 Bayfront Pkwy. Pensacola, FL 32520-0786</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from service label)</p> <p>7012 1640 0000 7861 1231</p>		<p>PS Form 3811, July 2013 Domestic Return Receipt</p>	

<p>SENDER: COMPLETE THIS SECTION</p> <ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>COMPLETE THIS SECTION ON DELIVERY</p> <p>A. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) LEROY JONES</p> <p>C. Date of Delivery 2/13/14</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>1. Article Addressed to:</p> <p>Mark Thomasson Director Division of Water Resource Management Florida Department of Environmental Protection 2600 Blair Stone Road M.S. 3500 Tallahassee, FL 32399-2400</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from service label)</p> <p>7012 1640 0000 7861 1248</p>		<p>PS Form 3811, February 2004 Domestic Return Receipt 102585-02-M-154</p>	

<p>SENDER: COMPLETE THIS SECTION</p> <ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		<p>COMPLETE THIS SECTION ON DELIVERY</p> <p>A. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) LEROY JONES</p> <p>C. Date of Delivery 2/13/14</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
<p>1. Article Addressed to:</p> <p>Herschel T. Vinyard, Jr. Secretary Florida Department of Environmental Protection 3900 Commonwealth Blvd. M.S. 49 Tallahassee, FL 32399</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™ <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>2. Article Number (Transfer from service label)</p> <p>7012 1640 0000 7861 1224</p>		<p>PS Form 3811, July 2013 Domestic Return Receipt</p>	

Attachment 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

**APALACHICOLA BAY AND RIVER
KEEPER INC. d/b/a APALACHICOLA
RIVERKEEPER, SOUTHERN ALLIANCE
FOR CLEAN ENERGY, and
WATERKEEPER ALLIANCE,**

Case No.: 4:14-cv-00268-MW-CAS

Plaintiffs,

v.

GULF POWER COMPANY,

Defendant.

_____ /

**ANSWER TO THIRD AMENDED COMPLAINT
AND AFFIRMATIVE DEFENSES**

Defendant, **GULF POWER COMPANY (Gulf)** answers Plaintiffs’ Third Amended Complaint for Declaratory and Injunctive Relief (ECF 62) and responds to each numbered paragraph therein as follows:

1. Denied that there are “ongoing, unlawful discharges of toxic metals and other pollutants by Defendant Gulf Power Company, at its coal-fired Herbert Scholz Generating Plant (‘Plant Scholz’), in violation of the Clean Water Act...”

2. Admitted.

3. Admitted.

4. Denied to extent that Plaintiffs’ allegations suggest or imply that a synthetic liner is a legal requirement or that the lack thereof is inappropriate or illicit practice; the remaining allegations are admitted.

5. Without knowledge as to the number of coal ash impoundments EPA has inspected in the last five years. Denied that, to date, no EPA inspection report has been made public. Denied to the extent Plaintiffs imply by placing quotation marks around the terms “hazard potential” and “confidential business information” that EPA has identified hazardous conditions at Plant Scholz and that Gulf’s identification of certain information as CBI is intended as a subterfuge to improperly keep any such information from the public. Admit that Gulf Power Company previously asserted that certain information provided to EPA qualified as confidential business information (CBI).

6. Denied.

7. Paragraph 7 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

8. Denied.

9. Admitted that Plaintiffs purport to bring this action under the citizens’ suit provision of the Clean Water Act; denied that Plaintiffs have properly invoked the jurisdiction of this Court.

10. Denied that Plaintiffs’ presuit notice was in compliance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.2; admitted that Plaintiffs provided the presuit letter to Gulf; admitted that at the time of filing the complaint, 60 days had passed; admitted that neither EPA nor DEP have commenced or are prosecuting an enforcement action; without knowledge as to the remaining allegations in paragraph 10.

11. Denied.

12. Without knowledge as to the location of the Apalachicola Riverkeeper for legal purposes; venue is appropriate in this Court only if Plaintiffs properly invoke this Court's jurisdiction; denied to the extent paragraph 12 implies Plaintiffs have properly invoked this Court's jurisdiction.

13. Denied that Plaintiffs or any of their members have been injured by any unlawful acts as alleged; without knowledge as to the remaining allegations.

14. Without knowledge and therefore denied.

15. Without knowledge and therefore denied.

16. Without knowledge and therefore denied.

17. Without knowledge and therefore denied.

18. Without knowledge and therefore denied.

19. Without knowledge and therefore denied.

20. Denied.

21. Denied.

22. Admitted.

23. Admitted.

24. Paragraph 24 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

25. Paragraph 25 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

26. Paragraph 26 states no facts to be admitted or denied and is a characterization of the applicable law by Plaintiffs.

27. Paragraph 27 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

28. Paragraph 28 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

29. Paragraph 29 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

30. The first sentence in paragraph 30 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs; the remaining allegations of paragraph 30 are denied as characterized by Plaintiffs.

31. Paragraph 31 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

32. Paragraph 32 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

33. Paragraph 33 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

34. Paragraph 34 states no facts to be admitted or denied and is an interpretation of the applicable law by Plaintiffs.

35. Admitted.

36. Denied to the extent Plaintiffs allege that DEP's NPDES permitting program is a delegated program; admitted that DEP issued Permit No.: FL0002283-004 under its EPA-approved NPDES program.

37. Denied to the extent Plaintiffs' allegation that Outfall D-001 "is the only outfall through which the Scholz Permit authorizes direct water pollution discharges to the Apalachicola River" may be intended by Plaintiffs to exclude permitted groundwater discharges. The remaining allegations in paragraph 37 recite permit language and are admitted.

38. Admitted.

39. Denied.

40. Denied.

41. Denied.

42. Denied to the extent Plaintiffs imply that the presence of arsenic, barium, cadmium, lead and selenium is unlawful or that that the substances were reported by EPA as present in toxic amounts or at concentrations that exceeded applicable standards. Admitted that EPA reported the listed constituents as present in the one measurement that EPA relates to Plant Scholz in its Draft, Human and Ecological Risk Assessment of Coal Combustion Wastes at Appendix A, Attachment A-2, page 24.

43. Without knowledge as to the statement regarding arsenic Plaintiffs assert without citation to authority; admitted that 40 C.F.R. § 401.15 and 40 C.F.R. Part 423 appendix A, identify arsenic as alleged; denied to the extent Plaintiffs assert or imply that arsenic from Plant Scholz is causing any of the health effects asserted by Plaintiffs.

44. Without knowledge as to the statements regarding manganese Plaintiffs assert without citation to authority; denied to the extent Plaintiffs assert or imply that manganese from Plant Scholz is causing any of the health effects asserted by Plaintiffs.

45. Without knowledge as to the statements regarding iron Plaintiffs assert without citation to authority; denied to the extent Plaintiffs assert or imply that iron from Plant Scholz is causing water to be unusable or exceeding EPA's secondary drinking water standard.

46. Without knowledge as to the statements regarding lead Plaintiffs assert without citation to authority; denied to the extent Plaintiffs assert or imply that lead from Plant Scholz is causing any of the health effects asserted by Plaintiffs.

47. Without knowledge as to the statements regarding coal ash constituents Plaintiffs assert without citation to authority; denied to the extent Plaintiffs assert or imply that coal ash constituents from Plant Scholz is causing any of the health effects asserted by Plaintiffs.

48. Admitted.

49. Admitted that the Apalachicola River is navigable, a water of the United States and a water of the State; without knowledge as to Plaintiffs' characterization of the river as distinct.

50. Denied.

51. Gulf answers each paragraph incorporated by reference in the same manner as first answered hereinabove.

52. Denied.

53. Admitted that Gulf lawfully discharges pollutants from a point source to a water of the United States under FDEP's EPA approved NPDES permit program; denied

to the extent Plaintiffs imply by using the term “pollutant” that the alleged discharges are unlawful.

54. Denied.

55. Denied.

56. Denied that Gulf is in violation of section 301 or 402 or the Clean Water Act.

57. Denied.

58. Gulf answers each paragraph incorporated by reference in the same manner as first answered hereinabove.

59. Admitted

60. Admitted.

61. Denied.

62. Denied.

63. Denied.

64. Denied that any such discharges are occurring that require separate permit coverage.

65. Denied that Gulf is in violation of section 301 or 402 or the Clean Water Act.

66. Denied.

67. Gulf answers each paragraph incorporated by reference in the same manner as first answered hereinabove.

68. Admitted.

69. Denied that unauthorized discharges of pollutants are leaking from the Plant Scholz coal ash impoundment to the Apalachicola River.

70. Denied.

71. Denied that Gulf is in violation of section 301 or 402 or the Clean Water Act.

72. Denied.

73. Gulf answers each paragraph incorporated by reference in the same manner as first answered hereinabove.

74. Denied as characterized by Plaintiffs.

75. Denied as characterized by Plaintiffs.

76. Denied.

77. Denied.

78. Denied.

79. Denied that Gulf is in violation of section 301 or 402 or the Clean Water Act.

80. Denied.

81. Gulf answers each paragraph incorporated by reference in the same manner as first answered hereinabove.

82. Denied.

83. Denied.

84. Denied.

85. Denied that Gulf is not complying with its permit or that unpermitted discharges of pollutants are ongoing and must be enjoined by this Court.

AFFIRMATIVE DEFENSES

First Affirmative Defense, Lack of Subject Matter Jurisdiction, Inadequate Notice Letter

86. Plaintiffs failed to comply with the conditions precedent for the filing of this citizens' suit under the federal Clean Water Act by failing to provide sufficient information in its notice to afford Gulf Power an opportunity to identify and correct any alleged violations of its permit or the federal Clean Water Act and therefore failed to properly invoke subject matter jurisdiction.

Second Affirmative Defense, Violation of Fourth Amendment – Bad Faith Notice Letter

87. Plaintiffs entered onto a secured gated and posted electrical power generating facility without express or implied consent and entered portions of the plant itself including the ash pond berm and areas immediately adjacent and associated with the permitted discharge point, intake structure and areas of the plant out of plain view that are essential infrastructure at the gated secured facility. Having illicitly entered the gated secured facility from the Apalachicola River, Plaintiffs collected samples of water and or sediment from various locations within the facility and the facility wastewater and disposal system.

88. Under federal and state law, neither state nor federal environmental regulatory personnel could lawfully enter the privately owned secured site without consent or a warrant. No portion of the secured facility is open to the public and Gulf Power Company has an expectation of privacy, precluding unauthorized entry onto the

facility, guaranteed by the Fourth Amendment to the U. S. Constitution and further protected by state and federal law. Plaintiffs brought the instant action under the citizen suit provisions of the Clean Water Act yet acted beyond the scope and authority of the agencies on whose behalf Plaintiffs purport to be acting.

89. Any information obtained through their illicit entry and collection of samples was in violation of the Fourth Amendment to the U. S. Constitution and in contravention of the citizen suit provisions of the Clean Water Act which anticipate that, in acting as private attorneys general, citizens provide notice to alleged violators in good faith to afford an opportunity for the putative defendant to correct any legitimate violations.

Third Affirmative Defense – Permit Shield

90. All discharges from the Gulf Power facility to the Apalachicola River are permitted by an Industrial Facility Wastewater Permit issued to Gulf Power by FDEP, and reviewed by the U. S. Environmental Protection Agency (EPA). The same permit expressly authorizes discharges from the Gulf Power facility to groundwater from the facility ash pond. Both surface water and groundwater discharges at the Gulf Power facility are authorized by permit.

Fourth Affirmative Defense – Standing

91. Permitted discharges from the Gulf Power facility do not cause or contribute to violations of any applicable water quality criteria or other water quality measures in the Apalachicola River. To the extent Plaintiffs claim that their use and enjoyment of the Apalachicola River have been impacted, there is no basis for any claim

that any such impact is associated with Gulf Power Company or Plant Scholz. No member of any of the Plaintiff environmental organizations has suffered any injury real, perceived or potential as the result of any action of Gulf Power Company.

92. Plaintiffs, each a corporate entity organized under the laws of separate states (Florida, Tennessee and New York), lack standing to bring this citizen suit.

Submitted this 12th day of June, 2015, by:

/s/ J. Nixon Daniel, III
J. NIXON DANIEL, III
Florida Bar No. 228761
jnd@beggslane.com
MARY JANE BASS
Florida Bar No. 64858
mjb@beggslane.com
CHARLES WIGGINS
Florida Bar No. 48021
ctw@beggslane.com

Beggs & Lane, RLLP
P. O. Box 12950 (32591-2950)
501 Commendancia Street
Pensacola, Florida 32502
Telephone: (850) 432-2451
Facsimile: (850) 469-3331

/s/ James S. Alves
James S. Alves
Florida Bar No. 443750
jalves@hgslaw.com
Winston K. Borkowski
Florida Bar No. 0698891
winstonb@hgslaw.com
GARY V. PERKO
Florida Bar No. 855898
garyp@hgslaw.com

Hopping Green and Sams, P.A.
Post Office Box 6526 (32314)
119 South Calhoun Street, Suite 300
Tallahassee, FL 32301
Telephone: (850) 222-7500
Facsimile: (850) 224-8551

Trial Counsel for Gulf Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 12, 2015, I electronically filed the foregoing with the Clerk of the U.S. District Court for the Northern District of Florida using the CM/ECF system. All registered counsel will receive electronic notification of this filing through the CM/ECF system.

/s/ James Alves

Attachment 3 –Essential Requirements for Ash Pond Closure Plan

Described are the essential elements of the ash pond closure plan that have been agreed-to by the parties:

1. Gulf Power shall dewater all coal combustion residuals (“coal ash” or “CCR”), including any CCR mixed with soil, currently stored at the Herbert Scholz Generating Plant (“Scholz”). The wastewater produced through the dewatering process shall be treated before being discharged to waters of the State of Florida, if treatment is necessary to meet 40 CFR Part 423 or a final determination of Best Professional Judgment by DEP. Plaintiffs reserve the right to contest, under Chapter 120, Florida Statutes, or other applicable statutes, and submit comments to DEP or other agencies on the CCR dewatering effluent limitations, treatment method, and monitoring for arsenic or any surrogate for arsenic in DEP’s approval of the Ash Pond Closure Plan, the related NPDES permit, or other permits.
2. Gulf Power shall remove all CCR, including any CCR mixed with soil, from the Lower Ash Pond at Scholz and transfer it to an upland site at the plant. Gulf Power shall regrade and manage the land in and around the Lower Ash Pond to ensure the stability of any remaining slopes and contours. Defendant shall remove all CCR, including CCR mixed with soil, from any portion of the Middle Ash Pond that is not included in the capped dry storage area (the “DSA”) described below.
3. Gulf Power shall construct a CCR DSA at a location that ensures all CCR at the facility remains at an elevation of at least 83 feet NGVD. The footprint of the DSA will lie primarily within the current footprint of the Upper Ash Pond, and may extend into the current footprint of the Middle Ash Pond only as necessary. The CCR shall be properly distributed and compacted within this area consistent with good engineering practice.

4. All dewatered and consolidated CCR in the DSA shall be covered with a cap or liner having a coefficient of permeability of no greater than 10^{-7} cm/sec. The engineer of record shall oversee the installation of the cap or synthetic liner. If premix or admix clays are used, Gulf Power, during installation, shall test the compacted, installed clay cap by taking core samples at least every 10,000 square feet. If core tests indicate the permeability of any part of the cap is greater than 10^{-7} cm/sec, Gulf Power shall implement remedial measures to ensure a permeability of no greater than 10^{-7} cm/sec. A copy of the testing results shall be delivered to DEP and Plaintiffs within 30 days of results delivery to Gulf Power.
5. Gulf Power shall maintain a layer of soil at least six inches thick over the cap on the DSA. The soil layer shall be free of materials that may penetrate the cap, and shall not contain any oils, hazardous, toxic, or flammable materials. As approved by the engineer of record and consistent with good engineering practice, the soil layer above the cap shall be sufficiently compacted to permit establishment of a cover that minimizes erosional forces. Gulf Power shall monitor and maintain the cap and overlying layer to minimize erosion of the DSA.
6. Prior to construction of the DSA, Gulf Power shall demonstrate the continuity and thickness of the clay confining layer beneath the entire footprint of the DSA through non-intrusive geophysical technology. A sufficient number of shallow site borings will be taken (or existing data utilized) to determine representative permeability levels. In accordance with standard engineering practices, the 10^{-7} cm/sec permeability benchmark, in the context of clay liners, assumes a thickness of 2 feet. The data concerning the continuity and thickness of the natural clay liner will be utilized in conjunction with the permeability data to demonstrate, with 90 percent confidence, performance equivalent to 10^{-7} cm/sec with a 2 feet thick clay liner. This is equivalent to a vertical specific hydraulic conductance rate of 2.8E-04 feet/day per foot. A copy of the results of the

geophysical testing, borings, and equivalency calculations shall be delivered to DEP and the Plaintiffs within 30 days of results delivery to Gulf Power. In any areas in which the equivalency demonstration is not made, Gulf Power shall implement remedial measures to ensure equivalent permeability consistent with this paragraph.

7. Gulf Power shall construct a “cutoff wall” that extends at least 12 inches into the confining layer of clay below the shallow aquifer and that is designed to divert the groundwater flow so that it bypasses the area beneath the entire DSA. The permeability of the cutoff wall shall be no greater than 10^{-7} cm/sec and shall be constructed upgradient of the ash disposal area to prevent surficial aquifer water from interacting with the ash disposal area. Gulf Power shall conduct borings to determine the interface point with the natural clay layer and the cutoff wall. Gulf Power shall make at least one boring every 500 feet along the length of the cut-off wall. A copy of the results of testing for the cut-off wall shall be delivered to DEP and the Plaintiffs within 30 days of results delivery to Gulf Power.
8. The depression known to the parties as WS-1 (shown on Exhibit A) shall be eliminated and filled with clean fill, after any needed permits are obtained from DEP and the U.S. Army Corps of Engineers.
9. A new, lined industrial stormwater pond shall be constructed near or within the current lower ash pond area in order to accommodate industrial stormwater from the plant site. This stormwater pond shall meet the requirements of DEP’s Multi-Sector Generic Permit for industrial facilities.
10. Operations and Maintenance (O&M) of the DSA shall include at a minimum slope maintenance, vegetation maintenance (as applicable), erosion repair, and monitoring for subsidence and animal burrows.

11. Gulf Power shall continue monitoring well clusters MW-210, MW-205, and MW-203 pursuant to the terms of the current NPDES permit for Scholz (Permit No. FL0002283-004), except that Gulf Power shall collect samples quarterly, and boron, and cobalt shall be added to the list of parameters to be analyzed. Gulf Power shall construct and monitor under the same terms at least one new well cluster in the vicinity of and downgradient of the DSA to monitor for coal ash constituents emerging from the dewatered CCR in the capped closure area. The new well cluster shall withdraw groundwater from both the deep and surficial aquifers. The new well cluster shall be located along a line that is marked by starting at the midpoint between MW 203 and MW 204 and extending to the boundary of the DSA, with the new well cluster located as close to the DSA as can be reasonably accommodated. If within one year following the completion of construction of the DSA, the surficial well at MW-210 does not produce sufficient water to sample the applicable parameters, Gulf Power will construct a new surficial well to be located along a line that is marked by starting at the midpoint between MW 203 and MW 210 and extending to the boundary of the DSA, with the new well located as close to the DSA as can be reasonably accommodated. This well shall be sampled at the same frequency and for the same parameters as the other wells in this paragraph. Monitoring will commence at this new well once construction is completed. It is recognized, however, that subsequent to construction of the DSA initial monitoring results may detect remnant discharges from the unlined ash pond system. At least one piezometer shall be located immediately adjacent to the DSA to monitor for groundwater interacting with the CCR, and shall be monitored quarterly. If water is found in the piezometer, it shall be tested for the same parameters as the other groundwater monitoring wells. Groundwater monitoring shall continue for at least five years following the end of construction of the DSA. Gulf Power shall provide a copy of all groundwater monitoring results to DEP and the Plaintiffs within 30 days of Gulf Power's receipt of the results.

12. Gulf Power shall provide its complete ash pond closure proposal to Plaintiffs for review and comment 20 days prior to filing the proposal with DEP. Plaintiffs' comments shall be limited to a technical review of Gulf Power's closure proposal. Gulf Power shall consider Plaintiffs' comments on the proposal. Upon request of Plaintiffs or Gulf Power, the Parties shall meet to discuss Plaintiffs' comments prior to Gulf Power's submission of the proposal to DEP. Gulf Power shall not be required to modify the ash pond closure proposal based on Plaintiffs' input.

13. The closure plan will be subject to the common law force majeure exception to performance obligations and, in addition, Gulf Power is excused from the performance schedule to the extent that if, at no fault of Gulf Power, it is unable to obtain contractors or materials.

Exhibit A

WS-1



**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

**APALACHICOLA BAY AND RIVER
KEEPER INC. d/b/a APALACHICOLA
RIVERKEEPER, SOUTHERN ALLIANCE
FOR CLEAN ENERGY, and
WATERKEEPER ALLIANCE,**

Plaintiffs,

Case No.: 4:14cv268/MW/CAS

v.

GULF POWER COMPANY,

Defendant.

**JOINT MOTION TO FILE SETTLEMENT AGREEMENT
AND FOR VOLUNTARY DISMISSAL**

Plaintiffs APALACHICOLA BAY AND RIVER KEEPER INC. d/b/a APALACHICOLA RIVERKEEPER, SOUTHERN ALLIANCE FOR CLEAN ENERGY, and WATERKEEPER ALLIANCE, and Defendant, GULF POWER COMPANY hereby file the attached Settlement Agreement with the Court. The Settlement Agreement represents a complete settlement of all claims in this matter, as explained and pursuant to the terms therein. The parties represent that the settlement terms are appropriate, reasonable, and consistent with the public interest.

Under Section 503(c)(3) of the Clean Water Act and 40 C.F.R. 135.5(b), the United States has 45 days from receipt of a consent judgment¹ by the Department of Justice (“DOJ”) Citizen Suit Coordinator (on behalf of the Attorney General) and USEPA to complete federal review and provide any comments to the Court. The parties have forwarded the Settlement

¹ As indicated in the attached correspondence from DOJ (Attachment 1), DOJ construes these requirements as applying to settlement agreements that result in voluntary dismissal of a citizen suit.

Agreement to the DOJ, and will notify this Court when the 45 day review period has expired. The parties jointly request that the Court enter a voluntary dismissal with prejudice at the conclusion of the 45 day review period, if DOJ has not timely filed objections.

EXECUTED on behalf of Plaintiffs this 22nd day of June, 2015 by:

/s/ Bradley Marshall
Bradley Marshall
Florida Bar No. 0098008
Earthjustice
111 S. Martin Luther King, Jr. Blvd.
Tallahassee, FL 32301
(850) 681-0031
(850) 681-0020 fax
bmarshall@earthjustice.org

Counsel for Apalachicola Riverkeeper, Southern Alliance for Clean Energy & Waterkeeper Alliance

EXECUTED on behalf of Defendant this 22nd day of June, 2015 by:

s/J. Nixon Daniel, III
J. NIXON DANIEL, III
Florida Bar No. 228761
jnd@beggslane.com
MARY JANE BASS
Florida Bar No. 64858
mjb@beggslane.com
CHARLES WIGGINS
Florida Bar No. 48021
ctw@beggslane.com

Beggs & Lane, RLLP
P. O. Box 12950 (32591-2950)
501 Commendencia Street
Pensacola, Florida 32502
Telephone: (850) 432-2451
Facsimile: (850) 469-3331

s/James S. Alves
JAMES S. ALVES
Florida Bar No. 443750
jalves@hgslaw.com
WINSTON K. BORKOWSKI
Florida Bar No. 698891
winstonb@hgslaw.com
GARY V. PERKO
Florida Bar No. 855898
garyp@hgslaw.com

Hopping Green and Sams, P.A.
Post Office Box 6526 (32314)
119 South Calhoun Street, Suite 300
Tallahassee, FL 32301
Telephone: (850) 222-7500
Facsimile: (850) 224-8551

Trial Counsel for Gulf Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June ____, 2015, I electronically filed the foregoing with the Clerk of the U.S. District Court for the Northern District of Florida using the CM/ECF system. All registered counsel will receive electronic notification of this filing through the CM/ECF system.

s/James S. Alves



U.S. Department of Justice

Environment and Natural Resources Division

FHT:rcd
90-1-24-177

Attachment 1

Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

Telephone (202) 305-0641

Facsimile (202) 514-4231

SEP 19 2014

✓ Bradley I. B. Marshall, Esq.
Earthjustice
111 S. Martin Luther King Jr. Blvd.
Tallahassee, FL 32301

James S. Alves, Esq.
Winston K. Borkowski, Esq.
Hopping Green & Sams, PA
119 S. Monroe Street., Suite 300
Tallahassee, FL 32301

James N. Daniel, Esq.
Mary J. Bass, Esq.
Beggs & Lane, RLLP
501 Commendencia St.
Pensacola, FL 32502

Re: *Apalachicola Bay and River Keeper, Inc. et al. v. Gulf Power Co.*, United States
District Court for the Middle District of Florida, No. 4:14-cv-268 MEW

Dear Counsel of Record:

As required by the Clean Water Act, 33 U.S.C. § 1365(c)(3), plaintiffs' counsel sent the Attorney General a copy of the Complaint in the above captioned citizen suit. Please review the attached document entitled "Notification on Receipt of a Clean Air Act or Clean Water Act Citizen Suit Complaint," which contains information that we routinely transmit upon receipt of such a complaint.

Note that the P.O. Box and accompanying zip code for all citizen suit-related correspondence has recently changed to:

Citizen Suit Coordinator
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

Please update your records accordingly. Note that the P.O. Box address to which payments of civil penalty monies should be made has also changed. (Both new addresses are noted in the attached document.)

The Department of Justice has assigned me to answer questions or otherwise assist the parties in achieving a fair and expeditious resolution of this litigation. Please feel free to contact me at (202) 305-0641 at any time. I am also available to answer questions about citizen enforcement generally and to discuss the role of the United States in such cases.

Sincerely,

A handwritten signature in blue ink, appearing to read "Fred Turner".

Frederick H. Turner, Attorney
Law and Policy Section

Attachment



U.S. Department of Justice

Environment and Natural Resources Division

*Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415*

*Telephone (202) 514-1442
Facsimile (202) 514-4231*

Revised February 2014

**NOTIFICATION ON RECEIPT OF A CLEAN AIR ACT OR CLEAN WATER ACT
CITIZEN SUIT COMPLAINT**

The Clean Air Act and Clean Water Act provide for service of a copy of a citizen suit complaint on the Administrator of the Environmental Protection Agency (EPA) and on the Attorney General. 42 U.S.C. § 7604(c)(3); 33 U.S.C. § 1365(c)(3); 40 C.F.R. § 135.4. In cases in which the United States is not a party, the United States Department of Justice, Environment and Natural Resources Division, Law and Policy Section, receives such materials on behalf of the Attorney General. Upon receipt of a complaint, the Section's longstanding practice is to respond with a standard letter to the parties with basic information on the role of the United States Department of Justice and EPA under the statute in question. To simplify that process, the Section now formats that letter as a shorter cover letter, accompanied by this attachment.

A. Resources Available for Citizen Suits

Citizen enforcement actions are an integral component of the Acts' overall enforcement schemes. The United States values the contribution that responsibly-pursued citizen suits make to protecting our nation's air and waters. As discussed below, the United States Department of Justice and EPA play an important role in the citizen suit process by reviewing and commenting on proposed consent judgments. The Department also has some expertise in the resolution of certain common legal and practical issues that may arise in drafting consent judgments in citizen suit actions, and we are pleased to consult with counsel or review early drafts of such documents.

The Office of Enforcement and Compliance Assurance of EPA is also available to assist you. EPA has information available to the public that may be of assistance to the parties in this action, such as the BEN computer model for calculating the economic benefits a defendant may have enjoyed as a result of its non-compliance. EPA also has developed a Supplemental Environmental Project (SEP) Policy, which provides guidance in designing environmentally beneficial projects that may be included in a settlement. Many of these resources are available on EPA's Civil Enforcement webpage: <http://www2.epa.gov/enforcement>. For more information regarding EPA resources, please contact Charlie Garlow at (202) 564-1088 regarding the Clean Air Act or David Drelich at (202) 564-2949 regarding the Clean Water Act.

Additionally, the United States participates as amicus curiae in some citizen enforcement actions. Please contact the assigned attorney in the Department's Law and Policy Section if a legal issue arises in this case that you believe may be of interest to the United States.

B. Review of Consent Judgments

1. *45 Day Review Period.* If the parties choose to resolve a citizen suit rather than continue with litigation, the statutory citizen suit provisions require that any settlement be entered as a consent judgment and that the United States be given at least 45 days to review any proposed consent judgment before its entry by the Court. The United States typically uses the entirety of its 45-day comment period. At the end of that period, the United States files a letter or pleading with the Court stating whether the United States objects to the proposed consent judgment and providing any comments on the document.
2. *Instruments Subject to Review.* For purposes of the United States' right of review, the term "consent judgment" has a broad meaning, and encompasses all instruments entered with the consent of the parties that have the effect of resolving any portion of the case. For example, a document related to dismissal of a case or any part thereof, including voluntarily, would fall within the scope of this language. Such documents and any associated instruments (even if not submitted to the Court) must be submitted to the United States for review, notwithstanding any provisions purporting to maintain the confidentiality of such materials. Amendments to previously-entered consent judgments must also be submitted to the United States for review before entry by the Court. The Department monitors citizen suit litigation to review compliance with this requirement. Settlements that do not undergo the statutorily-required review process are at risk of being void.
3. *Compliance and Remedies.* In its review, the United States seeks to ensure that the proposed consent judgment complies with the requirements of the relevant statute and is consistent with its purposes. See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986) (a consent decree should conform with and further the objectives of the law upon which the complaint was based). For example, if the defendant has been out of compliance with statutory or permit requirements, the proposed consent judgment should require the defendant to come into prompt compliance and should include a civil penalty, enforceable remedies, injunctive relief, and/or a SEP payment sufficient to deter future violations, or combinations of the above. Please note that payments denominated as civil penalties must be paid to the United States Treasury and should be sent to Sandra Doyle at the following address:

Sandra Doyle
Debt Collection Specialist
Environment & Natural Resources Division
Executive Office
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611
(202) 616-3135

4. *Federal/State Law Claims.* In some instances, a plaintiff will incorporate claims under federal environmental law and state tort law into a single complaint. Note that any resolution of such a complaint should distinguish between the relief attributable to the federal and the state claims. Any recovery of money damages should be attributable only to the state-law claims. Recovery of money damages by plaintiffs is not permitted under the Clean Air Act or Clean Water Act

(although attorney's fees, litigation costs, and compliance monitoring recoveries are permissible in some circumstances). As a rule, a settlement of this type must specifically provide and identify appropriate relief attributable to the federal-law claims consistent with the objectives of the Clean Air Act or Clean Water Act, and may not exclusively allocate relief to the state-law claims. Appropriate types of relief for federal citizen suit claims are discussed in the preceding paragraph (B.3).

5. *SEP Provisions.* A consent judgment may include payments to third parties to carry out a SEP (or analogous beneficial environmental project) so long as there is a sufficient substantive and geographical nexus between the SEP and the violations contained in the complaint. The United States monitors SEP monies to ensure appropriate transparency and accountability measures are in place. In particular, payments for SEPs should not be made directly to a plaintiff in a citizen suit and should not benefit the plaintiff in any fashion, directly or indirectly. This approach avoids any appearance that a citizen suit seeks to benefit the plaintiff or plaintiff organization itself, as opposed to providing redress for environmental harm. In addition, if a consent judgment submitted for United States review includes a SEP, the United States will require a detailed description of the SEP and the allocation of SEP monies for the particular project. This will allow the United States to evaluate whether there is a sufficient nexus between the SEP and the alleged violations. For guidance, you may consult EPA's SEP Policy, available at <http://www2.epa.gov/enforcement/supplemental-environmental-projects-seps>.

When sending the Department a proposed consent judgment that includes a SEP, parties should also include a letter from the third-party recipient(s) of SEP funding to the Department of Justice, stating that the SEP recipient: (1) has read the proposed consent judgment; (2) will spend any monies it receives under the consent judgment for the purposes specified in the consent judgment; (3) is a 501(c)(3) tax-exempt organization; (4) will not use any money it receives under the consent judgment for lobbying purposes (*see, e.g.*, Internal Revenue Service definition of lobbying, 26 C.F.R. § 56.4911-2); and (5) will submit to the Court, the United States, and the parties a letter describing how the SEP funds were spent. We additionally request that this letter include a project description detailing how the funds will be utilized. These practices help to ensure that the SEP advances the purpose of the Clean Water Act or Clean Air Act and serves the public interest.

6. *Procedures for Lodging Proposed Consent Judgments.* EPA's Clean Water Act regulations set forth procedures for service of proposed citizen suit consent judgments on the Department of Justice and EPA. 40 C.F.R. § 135.5. The regulations also provide a process for lodging such proposed consent judgments with the Court. We draw your attention to these requirements. The regulations state that when a proposed consent judgment is filed or lodged with the Court, "the plaintiff shall notify the court of the statutory requirement that the consent judgment shall not be entered prior to 45 days following receipt by both the Administrator and the Attorney General of a copy of the consent judgment." *Id.* at § 135.5(b)(1). They also require the plaintiff to notify the Court of the date on which the Administrator and the Attorney General received copies of the proposed consent judgment, either at the time of lodging or after the proposed consent judgment is lodged. *Id.*

The Department requests that the parties follow a similar approach in Clean Air Act cases. This will ensure that the Court is notified of the applicable statutory review period and can defer entry of the proposed consent judgment until the government's review is complete.

7. *Mailing Address for Service on the Department of Justice.* EPA's Clean Water Act regulations provide for service of a copy of a proposed citizen suit consent judgment on the Attorney General at a specified street address. 40 C.F.R. § 135.5. As a result of new security procedures, mail sent to that address is automatically subjected to special mail handling procedures that may delay its arrival for a month or longer. **We therefore request until further notice that any proposed consent judgments served on the Department of Justice be sent to the following address:**

Citizen Suit Coordinator
Environment and Natural Resources Division
Law and Policy Section
P.O. Box 7415
Ben Franklin Station
Washington, DC 20044-7415

The Department will treat this as satisfying the statutory requirement to serve the Attorney General. (The separate procedures appearing in the regulation for service on EPA remain applicable and should also be followed.) If a copy of the consent judgment is sent only to the address listed in the regulations, the Department will not regard the 45-day review period as commencing until the special handling process has been completed. You may also arrange for service of consent judgments by fax or email. Please call the Law and Policy Section's main number at (202) 514-1442 to discuss with the Citizen Suit Coordinator or an attorney the process for doing so.

C. Conclusion

We are pleased at any time to discuss these and other principles related to citizen suit actions. It is our hope that through discussions early in the process of resolving a citizen suit we can provide useful information and help to facilitate the prompt, fair and appropriate disposition of these cases. The United States notes for the record that, notwithstanding such discussions or any other involvement, it is not bound by the resolutions of citizen suit matters. See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he was not a party); 28 U.S.C. §§ 516, 519.