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Ms. Audra Dickson
Environmental Protection Division
Georgia Department of Natural Resources
Wastewater Regulatory Program
2 MLK Jr. Drive
Suite 1152E
Atlanta, GA 30334

May 5, 2017

Re: **NPDES Draft Permit Issuance – Georgia Power Company – Plant Mitchell**
NPDES Permit No. GA0001465

Dear Ms. Dickson:

Please accept the following comments on the Permit No. GA0001465, the draft National Pollutant Discharge Elimination System permit (“Draft Permit”) for Georgia Power Company’s (“Georgia Power”) Plant Mitchell facility located on the Flint River at 5200 Radium Springs Road, Albany, Georgia 31705. These comments are submitted to the Georgia Environmental Protection Division (“EPD”) on behalf of Flint Riverkeeper, who has members who rely on the quality of the Flint River for their livelihoods, including irrigated farming and livestock, and who regularly fish, swim, boat and recreate in the river. We appreciate the opportunity to provide these comments.

The mission of the Flint Riverkeeper is to restore and preserve the habitat, water quality and flow of the Flint River for the benefit of current and future generations and dependent wildlife. Flint Riverkeeper membership is comprised of over 650 families, farms, and businesses, representing approximately 3,000 citizens, and is governed by a 17-person (current) Board. The membership, Board and staff cover the watershed from its headwaters in East Point, Georgia to where the Flint joins the Chattahoochee under the impounded waters of Lake Seminole.

Plant Mitchell is a former coal-fired power plant owned by Georgia Power in southwest Georgia. The plant ceased burning coal to generate electricity as of April 2015, and has since received regulatory approval to retire the coal unit. Nevertheless, the facility’s three coal ash ponds will continue to be a source of wastewater discharges to the Flint River for the foreseeable future. The Draft Permit is intended to impose appropriate effluent limits and other conditions on those discharges under the Clean Water Act and state law. The Draft Permit would replace Plant Mitchell’s current wastewater discharge (“NPDES”) permit, which expired on February 28,

2015, over two years ago. As set forth in the Public Notice, the Draft Permit is intended to authorize the discharge of approximately 48.96 million gallons per day (mgd) of “steam electric power generating wastewater (coal ash pond wastewater and ash pond emergency wastewater)” to the Flint River via external outfall nos. 01B, 01E, and 04.

As discussed further herein, in addition to these ordinary discharges, the plant’s coal ash pond wastewater discharges may also include those resulting from the complete draining and dewatering of the ash ponds prior to their final closure. Unfortunately, the Draft Permit fails to adequately protect the Flint River from the dewatering of Plant Mitchell’s coal ash ponds. Specifically, the Draft Permit purports to allow Georgia Power to drain the facility’s ash ponds without any further modification of the permit, and the opportunities for public notice, comment, and permit strengthening that such modification would entail. To address this deficiency, Part III.C.2 of the Draft Permit must be revised to require permit modification subject to public notice and comment prior to authorizing the complete drawdown and draining of Plant Mitchell’s coal ash ponds.

As a result of these and other deficiencies discussed at greater length herein, the Draft Permit must be withdrawn, substantially revised, and reissued for public comment.

I. GENERAL COMMENTS

A. Facility Description.

Plant Mitchell is a former 163-megawatt coal-burning electric generation facility located on the Flint River approximately 8 miles south of Albany, Georgia. The Plant is approximately 20 miles north and upriver of Newton, Georgia, and 50 miles north and upriver of Bainbridge, Georgia. The plant was first commissioned in 1964, and operated as a coal-fired power plant for the ensuing fifty-one years. The facility’s sole remaining coal-fired generating unit (Unit 3) ceased operation in April 2015.

As set forth above, the Draft Permit would authorize wastewater discharges via three external outfalls on the Flint River (Nos. 01B, 01E, and 04). The only wastestreams generated and discharged from the retired power plant site are “low volume wastewater, legacy coal ash pond [wastewater] and stormwater.” Fact Sheet, p. 2. Outfall No. 01B conveys ash transport water from AP-1, AP-2 and AP-A to the Flint River. Fact Sheet p. 34, Appendix C – Process Flow Line Diagram. Similarly, Outfall Nos. 01E and 04 convey emergency overflow wastewater from AP-1 and/or AP-2. *See id.*; *see also* Fact Sheet at 2.

Coal ash is a term used to refer generally to the waste byproduct left behind by the combustion of coal for the generation of electricity, including fly ash, bottom ash, and other coal combustion residual (“CCR”) wastes. Plant Mitchell features three coal ash waste ponds (AP-1, AP-2, and AP-A) that received, hold and treat CCR wastes and impacted wastewaters. Georgia Power has announced that it will remove coal ash waste from all three of the waste disposal

ponds at Plant Mitchell, although the utility has not specified when such excavation will occur.¹ However, it is expected that prior to such excavation work, the ponds will be drained of their impounded wastewater, a process known as “dewatering.” Based on other Georgia Power sites where such dewatering is or has taken place, it is expected that the entire liquid contents of the ponds, including coal ash contaminants, will be pumped and discharged into the Flint River.²

Available EPA records report that Plant Mitchell’s AP-A has a storage capacity of 99,080 cubic yards (CY), or approximately 100,000 tons of CCR.³ AP-1 and AP-2 have a total storage capacity of 1,063,295 CY and 1,039,129 CY respectively, or approximately 2 million tons of combined CCR storage capacity.⁴ AP-A and AP-1 were filled with CCR, while AP-2 contained approximately 673,144 CY of CCR as of 2010.⁵ Accordingly, the three ash ponds at Plant Mitchell contained at least 1.8 million tons of CCR as of 2010, five years prior to the date when the plant ceased generating CCR waste.

Unlike several of its other coal-fired plants throughout Georgia, Georgia Power has not disclosed the volume of impounded wastewaters within AP-1 and AP-2 at Plant Mitchell, a portion of which is thereby in direct contact with, and is therefore saturated by, the impounded wastewater. Nevertheless, for purposes of comparison, Georgia Power’s Plant Hammond, an 865 MW coal-fired power plant with ash ponds of similar vintage to that of Plant Mitchell, impounds approximately 120,901,651 gallons of wastewater in just two of its four coal ash ponds.⁶ Notably absent from Georgia Power’s NPDES permit application for Plant Mitchell are any coal ash pond closure records, plans or similar disclosures specifically identifying operations contributing to

¹ See, e.g., Ash Pond Closure Update – October 2016 (*available at* https://www.georgiapower.com/environment/docs/ccr/1601738_ASHPOND_CLOSURES.pdf) (*accessed* April 20, 2017).

² The Draft Permit recognizes that even Mitchell’s Ash Pond A, which is inactive and receives no wastes or wastewater at present will undergo “dewatering activities” attendant to final closure of Pond A. Draft Permit Part III.E.1.a.iii.

³ December 2010 AMEC Report of Dam Safety Assessment Coal Combustion Surface Impoundments, Georgia Power Plant Mitchell, Albany GA, p. 3 (*available at* <https://archive.epa.gov/epawaste/nonhaz/industrial/special/fossil/web/html/index-4.html>, https://archive.epa.gov/epawaste/nonhaz/industrial/special/fossil/web/pdf/gp_mitchell_final.pdf (hereinafter “2010 AMEC Report”)) (*accessed* April 28, 2017).

⁴ See *id.*, 2010 AMEC Report at pp. 4-6.

⁵ See *id.* at pp. 3-4, 6, 23.

⁶ Report of Annual Inspection of CCR Surface Impoundment, Plant Hammond AP-1 (Jan. 15, 2017), *available at* https://www.georgiapower.com/environment/docs/ccr/20170115_AnInsp_HAM_AP-1_FINAL.pdf; Report of Annual Inspection of CCR Surface Impoundment, Plant Hammond AP-2 (Jan. 15, 2017), *available at* https://www.georgiapower.com/environment/docs/ccr/20170115_AnInsp_HAM_AP-2_FINAL.pdf.

closure-related effluent or wastewater treatment methods for ash pond dewatering effluent discharges.

B. The Flint River and Impacts from Plant Mitchell.

Plant Mitchell is situated in Dougherty County, within the Apalachicola River Basin, over two thirds of the distance from the Flint River's origin south of Atlanta, and Lake Seminole at the border of Georgia and Florida. The Flint River is approximately 334-miles long, and one of only 40 rivers in the nation to flow more than 200 miles unimpeded by dams or other manmade systems. Draining 8,460 square miles of western Georgia, the river flows generally southward from the upper Piedmont region below Atlanta to the wetlands and Ocala Limestone formation housing a major recharge and use area of the Floridan aquifer in the Dougherty Plain portion of the Gulf Coastal Plain in the southwestern corner of the state. Along with the Apalachicola and Chattahoochee rivers, the Flint River forms part of the Apalachicola-Chattahoochee-Flint (ACF) river system. The lower Flint in the area of Plant Mitchell is a major agricultural production area, the most important row-crop production area in Georgia.

The ACF has been long admired as one of the Southeast's most ecologically diverse river basins. Unique to the ACF river system are the shoal bass and Halloween Darter, the latter of which was discovered only recently, in the early 1990s. The Halloween Darter, or *Percina crypta*, is a small, striped and brilliantly colored fish that requires a habitat of swiftly flowing water over rocky shoals – an environment that is becoming less and less common due to damming of rivers and increased sedimentation due to human activity. The Flint is also home to more than twenty species of freshwater mussels, including the federally protected purple bankclimber, or *Elliptioideus sloatatinanus*.⁷ Mussels, known as “filter feeders,” strain suspended matter and food particles, and thereby act to clean up the waters in which they inhabit as they absorb nutrients, sediments, and chemicals. The lower Flint boasts springs and caves, which are in turn home to the Georgia blind cave salamander and the Dougherty Plain cave crayfish.

Below Lake Seminole, the Flint merges with and forms the Apalachicola River, which flows 110 miles south through the Florida panhandle including the Apalachicola National Forest, and onward to the Gulf of Mexico at Apalachicola Bay.

⁷ See October 28, 2003 letter to Michael Creason, P.E., EPD, from Sandra S. Tucker, U.S. Fish and Wildlife Service re comments to draft NPDES Permit for Plant Mitchell p. 1 (Attachment 1) (documenting the purple bankclimber mussel within the Flint River in proximity to and downstream of Plant Mitchell, requesting notification of any discharge limitation exceedances from the plant, including copper, a toxic priority pollutant per 40 C.F.R. § 423, Appendix A); see also U.S. Fish & Wildlife Service Fact Sheet: Endangered and Threatened Mussels in the Apalachicola-Chattahoochee-Flint Basin, at p. 1 (identifying the Purple bankclimber and numerous other freshwater mussel species within the ACF River Basin in proximity of Plant Mitchell, and explaining that siltation is among the problems facing these imperiled aquatic species) (available at <https://www.fws.gov/panamacity/resources/ACFmusselsFactSheet.pdf>) (accessed April 25, 2017).

1. *Coal ash waste ponds.*

Toxic pollutants common in coal ash wastes include arsenic, mercury, selenium and copper.⁸ Arsenic causes cancer, including lung cancer, skin tumors, and internal organ tumors, and is connected to heart problems, nervous system disorders, and stomach pain. EPA estimates that nearly 140,000 people per year experience increased cancer risk due to arsenic in fish from coal-fired power plants.⁹ Mercury is a highly toxic compound and dangerous even in small concentrations as it bioaccumulates and impairs brain development in children and causes nervous system and kidney damage in adults. EPA estimates that almost 2,000 children per year are born with lower IQs because of mercury in fish that their mothers have eaten.¹⁰ Short-term exposure to selenium can cause hair and fingernail changes, damage to the peripheral nervous system, and fatigue and irritability, whereas long-term exposure can damage the kidneys, liver, and nervous and circulatory systems. Selenium is acutely poisonous to fish and aquatic life in even small doses; concentrations below 3-8 micrograms per liter (ug/L) can kill fish, and lower concentrations can leave fish deformed or sterile. Selenium, too, bioaccumulates and can impair ecosystems by interfering with fish reproduction. Copper contamination can lead to reproductive failure, gill damage, and reduced sense of smell in fish. Human exposure to high concentrations of copper can cause nausea, vomiting, diarrhea, and liver and kidney damage. Plant Mitchell's ash ponds contain all of these pollutants and others, including cadmium, lead, and boron.

Even though Plant Mitchell's coal unit has been retired, the site still houses waste from fifty years of operation within its coal ash ponds. In its detailed 2015 environmental assessment report addressing the new 2015 Effluent Limit Guidelines ("ELGs") for the steam electric power generating point source category, EPA concluded that "current scientific literature indicates that

⁸ See, e.g., EPA, Environmental Assessment for the Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Docket No. EPA-821-R-15-006 (Sept. 2015) (hereinafter, "2015 ELG EA"), at pp. 2-2 (Table 2-1), 3-3 (Table 3-1), 3-14 (Table 3-2), available at https://www.epa.gov/sites/production/files/2015-10/documents/steam-electric-envir_10-20-15.pdf (accessed April 25, 2017).

⁹ EPA, Benefit and Cost Analysis for the Proposed Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category, Docket No. EPA-HQ-OW-2009-0819-2238 (Apr. 2013) at 3-6, available at <https://nepis.epa.gov/Exe/ZyNET.exe/P100MZC1.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2011+Thru+2015&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C11thru15%5CTxt%5C00000016%5CP100MZC1.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=hpfr&DefSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL> (accessed May 1, 2017).

¹⁰ See *id.* at 3-13.

steam electric power plant wastewater is *not* a benign waste.”¹¹ The 2015 ELG environmental assessment explained that coal ash ponds at steam electric power plants “accumulate high concentrations of toxic pollutants,” and that “[l]eachate or seepage may occur from [these] surface impoundments or landfills containing combustion residuals.”¹² EPA concluded that there is “substantial” evidence that pollutants from coal combustion wastewater discharges to nearby recreational waters can present a threat to human health.¹³ Once these pollutants are released from coal ash pits to nearby waters, their harmful effects are persistent and widespread—precisely the sort of harm the Clean Water Act is designed to prevent. *See* 33 U.S.C. § 1251(a). As EPA recognized, “[a]fter being released into the environment, pollutants can reside for a long time in the receiving waters, bioaccumulating and binding with the sediment. There is documented evidence of slow ecological recovery as a result of these pollutant discharges Some impacts might not be realized for years due to the persistent and bioaccumulative nature of the pollutants released.”¹⁴ “In addition, EPA’s [2015 ELG EA case study] modeling demonstrates that pollutant loadings from discharges of [these wastestreams] are impacting areas beyond the immediate receiving waters and *pose a threat to wildlife and human populations in thousands of river-miles downstream from steam electric power plants . . .*”¹⁵ Importantly, EPA concluded that discharges from steam electric power plants *alone* contribute over one third of the toxic pollutants discharged annually from industrial sources throughout the nation, an amount equal to approximately three million toxic-weighted pound equivalents released to the environment annually, releases which “can cause considerable harm to surface waters, aquatic life, wildlife, and human health.”¹⁶

2. Coal ash pond dewatering.

Harm associated with discharges from the Mitchell coal ash ponds could increase drastically with Georgia Power’s plans to dewater the ponds prior to their closure. While pond discharges during ordinary plant operations certainly pose a threat to the river, aquatic life, and the communities downstream of Plant Mitchell, these ordinary discharges are limited to the upper portion of the water column, a portion that has undergone “treatment” through the settling of ash waste in the lower portions of the pond. Further, the discharges occurred only sporadically. With wholesale dewatering the threat from toxic coal ash pollutants increases exponentially. This is because dewatering requires both the pumping of wastewater from within lower portions of the water column and the mechanical extraction of interstitial pore water from within the coal ash itself. Such processes will re-suspend removed and settled wastes, and the pollutants contained within them. Unless handled appropriately, these dewatering activities will produce a higher volume and concentration of polluted wastewater compared to ordinary plant operations.

¹¹ *See supra* Note 8, 2015 ELG EA at 3-1 (emphasis added).

¹² *See id.* at 2-3.

¹³ *Id.* at 1-1.

¹⁴ *Id.* at 3-1.

¹⁵ *Id.* at 9-1 (emphasis added).

¹⁶ *Id.* at 3-12.

II. SPECIFIC COMMENTS

A. The Draft Permit violates the CWA because it fails to protect the Flint River from the dewatering of Plant Mitchell's coal ash ponds.

Part III.C.2 of the Draft Permit improperly proposes to give Georgia Power *advance* authorization to discharge *all* of its impounded, coal ash-polluted wastewater—the accumulation of decades of on-site coal ash disposal—into the Flint River at some unspecified future date. The provisions contemplate that the wholesale emptying of the ponds' accumulated wastewater could occur without reopening the permit. The provisions would confer this advance blanket authorization even though Georgia Power did not in its application identify the complete release of impounded wastewater as an *operation* giving rise to discharges, nor did the Company identify any treatment method to address such wastestreams. The Draft Permit imposes just one condition on this fundamental change to how the ponds have historically been operated: Georgia Power must first submit a “Coal Ash Pond Dewatering Plan,” which EPD will evaluate and may approve without undergoing public notice and comment as required by state and federal law.

These provisions are improper. First, material changes to waste disposal practices, such as the complete draining of Plant Mitchell's coal ash waste ponds, require major permit modifications so that appropriate effluent limitations and other conditions can be imposed. Second, the Draft Permit's effluent limitations are not sufficient to cover future dewatering discharges, which result from a fundamentally different activity than the passive, gravity-based settling treatment method contemplated by the Draft Permit and underlying application. Finally, the Draft Permit sets *no* technology-based effluent limits on the discharge of pollutant-laden wastewater from the lower portions of the ash ponds, which will require pumping or other mechanized draining in order for the discharges to occur.

Accordingly, for the reasons set forth above and those presented in further detail below, Part III.C.2 of the draft Permit must be amended by striking the entire sentence appearing after subsection g., page 20 of 24 which currently reads:

EPD will evaluate the submitted data and determine if there is a reasonable potential for the discharge to cause or contribute to a violation of the instream water quality standards and if necessary, may open the permit to include applicable effluent limits to protect the receiving water body.

In place of this language, Part III.C.2 of the Draft Permit should be amended by inserting the following sentence to read as follows (hereinafter, the “Dewatering Condition”):

EPD will evaluate the submitted data and act in accordance with the requirements of EPA's regulations for permit modification under 40 C.F.R. § 122.62(a), to develop appropriate effluent limitations and other conditions applicable to discharges comprising coal ash pond dewatering. EPD will develop appropriate water-quality based effluent limitations or technology-based effluent limitations in accordance with 33 U.S.C. § 1311(b)(1)(C), 40 C.F.R. § 125.3(g); Ga. Comp. R. & Regs. 391-3-6-.06(4)(a)(1),

(a)(10), (d). No discharge of effluent associated with the large-scale decanting or dewatering of the ash ponds for closure purposes shall be authorized under this Permit prior to modification of this Permit in accordance with this Paragraph 2.

Furthermore, Part II.A.1.c of the draft Permit must be amended by inserting the following language underlined below to read:

Following notice in paragraph a. or b. of this condition, the permit may be modified in accordance with 40 C.F.R. § 122.62 and any other applicable requirements imposed by law. The permittee shall not make any changes, or conduct any activities, requiring notification in paragraph a. or b. of this condition without approval from EPD.

Finally, Part III.C.2.e of the Draft Permit should be amended to correct a typographical error, striking internal reference to Part III.C.7.d and replacing the stricken reference with reference to Part III.C.2.d.

1. *The Draft Permit cannot authorize coal ash pond dewatering discharges without opening the permit to make a major modification.*

Effluent discharges associated with complete draining of the ash ponds are not something that can be authorized *in advance*, as proposed by Part III.C.2 of the Draft Permit. Instead, material changes like those contemplated by the Draft Permit's dewatering provision require a major modification. 33 U.S.C. § 1311(b)(1)(C); Ga. Comp. R. & Regs. 391-3-6-.06(4), (12)(b); 40 C.F.R. §§ 122.62(a)(1), 125.3.

The relevant Federal regulation, which is adopted and incorporated into Georgia's water quality control regulations, provides that "substantial *alterations* or *additions* to the permitted facility or activity (*including a change or changes* in the permittee's sludge use or *disposal practice*)" are cause for a permit modification. 40 C.F.R. § 122.62(a)(1) (emphasis added).¹⁷ Georgia law provides that EPD must determine whether a permit modification is necessary "*in accordance with the provisions of Federal Regulations*" ... "*including, but not limited to, the enumerated causes listed in Federal Regulations, 40 C.F.R. [§] 122.62...*" Ga. Comp. R. & Regs. 391-3-6-.06(12)(b) (emphasis added).

Here, there is no question that draining the ponds will entail material and substantial alterations to the existing coal ash wastewater treatment system and a change in the waste disposal practices at Plant Mitchell. Final closure will entail the pumping and discharge of millions of gallons of impounded wastewaters containing coal ash pollutants to facilitate final closure of the ponds. EPD anticipates that the changes necessary to accomplish this feat, while protecting water quality, will be no small undertaking. Indeed, that is why EPD is requiring

¹⁷ See also 2010 NPDES Permit Writers' Manual, at 11-18, 11-19 (Exhibit 11-10, providing that alterations or changes in the permitted facility and receipt of new information after permit issuance are causes for major permit modification). Absent the specifically delineated causes for "minor modification" that are not at issue here, any modification of a NPDES permit must undergo full draft permit, public notice and comment in accordance with 40 C.F.R. § 122.62.

submission of a Coal Ash Pond Dewatering Plan, which must – according to the Draft Permit – include descriptions of the “wastewater treatment system components,” the “process controls being installed,” and accompanying monitoring and reporting practices to be deployed and implemented at the plant. Draft Permit at Part III.C.2.a-g. But, for the same reason, the Draft Permit cannot treat permit modification in this instance as optional, or as merely a “minor modification” that would otherwise enable EPD to authorize these changes within the permit without subjecting them to full public notice and comment.

EPA Region IV has made clear that ash pond dewatering activities must be treated as a major modifications. For example, last year, Gulf Power sought a minor modification of its NPDES permit from the Florida Department of Environmental Protection (Florida “DEP”) to authorize changes to the Scholz Electric Generating Plant’s coal ash disposal and wastewater treatment practices in order to facilitate closure of its coal ash ponds at its Pensacola Florida power plant. Upon notice of the proposed “minor revision” of Gulf Power’s NPDES permit to authorize such changes, EPA Region IV instructed the Florida DEP that EPA would consider Gulf Power’s request as a “major modification” of the permit, because the utility’s proposed alterations to its coal ash disposal and wastewater treatment practices did not fit the specifically enumerated situations qualifying for a “minor modification” of the plant’s NPDES permit under 40 C.F.R. § 122.63.¹⁸ In doing so, EPA Region IV *rejected* Florida DEP’s August 2016 determination that Gulf Power’s proposed alterations to its coal ash disposal and wastewater treatment practices, intended to facilitate ash pond closure, could be accomplished by a “minor modification” of the Scholz Plant’s NPDES permit.¹⁹ Rather, because the changes entailed alterations, additions and changes to waste disposal and wastewater treatment practices at Plant Scholz, the NPDES permit must undergo major permit modification subject to full public notice and comment prior to authorizing pollutant discharges under that permit.²⁰

Because similar plant alterations, additions and changes to disposal practices will be necessary to fully dewater the ponds at Plant Mitchell, and because these changes are specifically enumerated as cause for major permit modification, EPD may not unilaterally decline to “open the permit to include applicable effluent limits to protect the receiving water body.” By purporting to give EPD such authority, Part III.C.2 of the Draft Permit violates 40 C.F.R. § 122.62(a)(1) and must be stricken for that reason. *See* Ga. Comp. R. & Regs. 391-3-6-.06(12)(b) (requiring that permit provisions must be “in accordance with the provisions of the Federal Regulations”).

¹⁸ October 4, 2016 letter from Denisse D. Diaz, EPA Region IV to Elsa Potts, Florida Department of Environmental Protection re “Review of Draft Permit Modification Gulf Power Scholz [NPDES] No. FL0002283, Attachment 2.”

¹⁹ *See id.*, referencing August 25, 2016 Notice of Draft Permit Minor Revision re Scholz Electric Generating Plant NPDES Permit No. FL0002283, Attachment 3; August 10, 2016 Gulf Power application for Minor Modification for NPDES Permit No. FL0002283, Gulf Power Company – Scholz Electric Generating Plant, Attachment 4.

²⁰ *See supra* Note 18, Attachments 2 - 4.

Accordingly, Part III.C.2 of the draft Permit must be amended by striking the final sentence of that Part, and inserting in its place the Dewatering Condition.

2. *Georgia Power's permit application fails to identify coal ash pond dewatering as an operation contributing to discharges, requiring effluent characterization.*

In applying for the issuance or renewal of a NPDES permit, an applicant must identify the operation contributing to the effluent for which discharge authorization is sought. Ga. Comp. R. & Regs. 391-3-6-.06(5)(a), (c); 40 C.F.R. §§ 122.21(e)(3), (f)(1), (g)(3), (g)(4), (g)(7). The applicant must additionally identify the proposed methods for treating those discharges. Ga. Comp. R. & Regs. 391-3-6-.06(5)(a), (c); 40 C.F.R. § 122.21(g)(3). Georgia Power's application does not describe the type of operation that a future "dewatering plan" would contemplate: the mechanized pumping and draining of those ponds. Instead, the application merely identifies the same sort of operation that has been in place for decades – the passive treatment, by settling, of coal ash waste.

Specifically, Georgia Power's August 28, 2014 application, including EPA Form 2C²¹, calls for disclosure of detailed and specific information for each discharge outfall leading from the coal ash ponds including among other things (1) "All operations contributing wastewater to the effluent"; (2) "The average flow contributed by each operation" and maximum effluent discharge; (3) "The treatment received by the wastewater"; and (4) anticipated waste effluent characteristics for individual pollutants via EPA Form 3510-2C. Permit Application, at 1a of 4 and V-1 (for Outfall No. 01B).²² The coal ash wastewaters and comingled stormwaters are treated through a physical/chemical system largely entailing gravity-based settling and recycling of wastewater to assist in settling of waste solids. For instance, prior to discharge to the Flint River via Outfall 01B, ash transport wastewaters lead from the plant's low volume waste sump via internal outfall 03A to AP-2, and from there to AP-1, which wastewaters are in turn "treated" via sedimentation (gravity-based settling, EPA Treatment Code 1U) within AP-2 and AP-1, prior to eventual discharge from the upper portion of the water column to surface waters (EPA Treatment Code 4A). Application, at p. 1a of 4; Fact Sheet at p. 34 Appendix C – Process Flow Diagram. Similarly, discharges to the Flint from emergency Outfall No. 01E and Emergency Outfall No. 04 are treated via sedimentation (gravity-based settling, EPA Treatment Code 1U) prior to discharge to surface waters (EPA Treatment Code 4A). *See id.*

²¹ As Georgia EPD has previously explained, in order for an industrial wastewater discharge to enjoy coverage under a NPDES permit, the applicant must identify the specific production, manufacturing processes, waste treatment and other operations contributing to the effluent within the consolidated permit application forms published by US EPA, and that "the application should reflect *any change*" in these operations or treatment methods using the EPA forms. September 17, 2001 letter from Michael S. Creason, P.E., GA EPD Industrial Wastewater Unit to Mr. M.E. Wilder, Georgia Power Company re Plant Mitchell NPDES Permit No. GA0001465 (Attachment 5) (emphasis added).

²² The August 28, 2014 NPDES Permit Application includes a Certification under penalty of perjury that "the information submitted is, to the best of [designated representative's] knowledge and belief, true, accurate, and *complete*." Application, at p. 4 of 4 (emphasis added).

In addition to EPA Treatment Codes 1U (sedimentation) and 4A (passive discharge), the August 28, 2014 NPDES permit application identifies chlorine disinfection (EPA Treatment Code 2F) as a means of wastewater treatment for Plant Mitchell's final discharge outfall Nos. 01 and 01A. Application p. 1a of 4. Nevertheless, the Draft Permit does not authorize effluent discharge from Outfall No. 01 or Outfall No. 01A. *See* Draft Permit at p. 1 (Identifying authorized discharges via Outfall Nos. 01B, 01E and 04 only); Fact Sheet at p. 2 (Section 1.8 ("01 Deleted – outfall decommissioned ... Discharge not authorized"; "01A Deleted – outfall decommissioned ... Discharge not authorized")). Consequently, passive, gravity based settling (EPA Code 1U) and discharge from the upper portion of the water column from these coal ash ponds (EPA Code 4A) are the *only* wastewater treatment methods identified in the application for wastewater discharge from the permitted outfalls at Plant Mitchell – Outfall Nos. 01B, 01E, and 04. Application, pp. 1a-1b of 4; Draft Permit at p. 1; Fact Sheet at p. 2. In the ordinary course of operation, riser structures allow water from the *upper portion* of Ash Pond AP-1 and AP-2 to flow into the designated discharge pipe, leaving the denser, settled wastes to *remain* within lower levels of the ponds. *None* of these wastewater treatment methods address the wholesale pumping out of the impounded wastewaters contained within AP-1, AP-2, or AP-A. Nor do these treatment methods address wastewater generated as a result of coal ash pond *closure* operations.

While no information in the NPDES permit application discusses ash pond closure plans, Georgia Power has already disclosed its intent to close all of its ash ponds within the state, including those at Plant Mitchell.²³ Based on the utility's public disclosures concerning coal ash pond closures at other plants, impounded wastewaters within the coal ash ponds will be completely pumped out as part of pond dewatering and closure operations.²⁴ The closure process would entail not only large scale drawdown and decanting of impounded wastewater, but also mechanical extraction of interstitial pore water out from between the ash particles, and/or other mechanical movement of the ash as part of pond closure.

Thus, neither the dewatering wastestream, nor the treatment to be applied to that wastestream is identified on the utility's EPA Form 2C NPDES application for Plant Mitchell. (*Compare* Permit Application, at pp. 1a of 4 through 4 of 4 *with* 40 C.F.R. § 122.21(g)(3) (requiring identification of a "narrative description of each type of process, operation, or

²³ *See, e.g.,* <https://www.georgiapower.com/environment/ash.cshtml> ("Georgia Power is working to permanently close all of its 29 ash ponds located around 11 coal-fired generation facilities across the state.") (accessed April 24, 2017).

²⁴ *See Georgia Power Company, Initial Written Closure Plan Plant Hammond AP-1* p.1 (Oct. 17, 2016) (Hammond's "AP-1 will be dewatered as required to facilitate excavation or dredging of ash for removal."), available at https://www.georgiapower.com/environment/docs/ccr/20161017_ClosPln_HAM_API_FINAL.pdf (accessed April 24, 2017); *Georgia Power Company, Initial Written Closure Plan Plant Hammond AP-2* p.1 (Oct. 17, 2016) (same), available at https://www.georgiapower.com/environment/docs/ccr/20161017_ClosPln_HAM_AP2_FINAL.pdf (accessed April 24, 2017).

production area which contributes wastewater to the effluent for each outfall, . . . and a description of the treatment the wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge” in the application). Hence, as set forth above, the activities associated with dewatering would be fundamentally different than those reflected in Georgia Power’s NPDES Application. Therefore, to be authorized by the permit, dewatering activities must be disclosed in the permit application. Because such activities are not disclosed in the current application, they must be disclosed in a future one, and EPD must then treat that application as a major modification that requires reopening the permit.

EPA Region IV has addressed the material distinction between discharge of coal ash pond effluent stemming from ordinary passive, gravity-based settling wastewater treatment methods versus the large scale decanting of coal ash ponds in connection with Duke Energy’s request to decant 14 ponds. EPA informed North Carolina’s Department of Natural Resources (“DENR”) that Duke’s request was unacceptable under the Clean Water Act, absent adherence with the applicable regulatory controls.²⁵ EPA concluded that large scale decanting represents a major change in discharge activity as compared with discharges from the upper levels of these coal ash ponds during ordinary plant operations. As exemplified by the concerns raised by EPA Region IV with respect to the Duke coal ash ponds, the mechanical draining of ash ponds circumvents the treatment system envisioned by the Mitchell Draft Permit, including the methods of wastewater treatment identified in the NPDES Application at 1a – 4.

Based on information obtained to date, it appears that the concentrations of toxic pollutants in the ash pond dewatering effluent at other Georgia Power plants undergoing dewatering are materially higher than those disclosed on Georgia Power’s NPDES permit applications for those facilities. For instance, monitoring records from plant McDonough since December 2016 reveal concentrations of Chromium in the dewatering effluent that are nearly three times higher than the values disclosed in the McDonough NPDES Form 3510-2C permit application.²⁶ Likewise, concentrations of Selenium were detected in the pond dewatering effluent at 13 ug/l and 16 ug/l, *thirteen* and *sixteen* times the concentration identified in Georgia Power’s effluent characterization for Plant McDonough as identified in the NPDES permit

²⁵ See Sept. 16, 2014 Letter from Mark J. Nuhfer to Jeff Poupart,, Attachment 6 (“EPA Letter”) (referencing September 19, 2014 Letter from Jeff Poupart to Mark McIntire, Duke Energy, and explaining that “higher concentrations of pollutants may be present at deeper levels in the pond which will be discharged in the decanted wastewater. Further, the drawdown of wastewater may involve a much higher discharge rate than contemplated at the time the permits were issued” compared with the passive settling contemplated by the NPDES permits, which contemplated ordinary, passive-settling as the form of treatment).

²⁶ (Compare Attachment 7 at p. V-3 with December 2016 pond dewatering effluent sample results, Attachment 8). The EPA Form 3510-2C toxic pollutant concentrations are expressed as a Maximum Daily Value in milligrams per liter (mg/l), and are converted to equivalent concentrations in micrograms per liter (ug/l) for purposes of comparison against the December 2016 through February 2017 effluent monitoring results at Plant McDonough’s Outfall 03.

application for that facility.²⁷ Importantly, these reported effluent concentrations were recorded at the outfall leading to the adjacent waterways *after* undergoing so-called “enhanced” wastewater treatment as described in a November 2016 coal ash pond “Dewatering Plan” subsequently approved by EPD (without notice or public comment). The concentration of pollutants within the effluent may only rise in the future, as water is drawn and pumped from lower levels of the ponds, and eventually from the interstitial pore water from within the saturated coal ash particles.

The instream impact of dewatering discharges at another Georgia Power plant in coastal Georgia raises similar concerns. In the summer of 2016, a concerned citizen complained to EPD’s Coastal Division about dewatering discharges at Georgia Power’s Plant McManus in Brunswick, Georgia. Photos submitted by the resident documented the discharge and release of visible sediments, and/or floating solids from the ash pond dewatering discharges at Plant McManus.²⁸ The photographs submitted to EPD depicted highly discolored effluent from the coal ash pond outfall at Plant McManus.²⁹ These conditions were documented over the course of months, from the summer through winter of 2016.

EPD personnel later confirmed the release of pollutants from the McManus dewatering site. A subsequent site inspection in June 2016 confirmed “water leaving the [pond] outfall which was clear but foamy” adjacent to the ash pond outfall, where pond closure-related discharges were taking place.³⁰ However, as demonstrated by the highly discolored, turbid plume depicted in photographs of the dewatering site, the effluent released from the ash ponds at Plant McManus is anything but “clear.”³¹

The above examples illustrate how dewatering wastestreams are fundamentally different than those attendant to ordinary plant operations and treatment methods. Given Georgia Power’s public records concerning future, but not-yet noticed pond closure operations, the *dewatering wastewaters*, as well as the *means of treatment*, would substantially change in a dewatering operation attendant to ash pond closures at Plant Mitchell, in comparison with the wastes and treatment methods identified on Georgia Power’s NPDES permit application for Plant Mitchell. Under these circumstances, the law requires that the Permit must first be modified so that appropriate effluent limitations and other conditions can be imposed on these distinctly different wastestreams, subject to public notice and comment. 33 U.S.C. § 1311(b)(1)(C); Ga. Comp. R. & Regs. 391-3-6-.06(5)(a), (c), (12)(b); 40 C.F.R. §§ 122.62(a)(1), (a)(2), (a)(11). Thus, Part III.C.2 of the Draft Permit is improper as it purports to pre-authorize ash pond dewatering discharges. Because both the *operations* contributing to the effluent and the means of *treating* these wastestreams will change from those set forth in Georgia Power’s NPDES permit application for

²⁷ *See id.*

²⁸ Citizen complaints re Plant McManus dewatering and EPD tracking log, Attachment 9, at 7-15, 23-25, 30.

²⁹ *Id.*

³⁰ *See id.*, Complaint Tracking Log, at 17-18.

³¹ *See, e.g., id.* at 10 (photo #13), 13 (photo #8).

Plant Mitchell, the permit must be reopened and modified to address dewatering activities before they occur.

Accordingly, the final sentence of Part III.C.2 of the Draft Permit should be stricken and replaced with the Dewatering Condition, as set forth above.

3. *The Draft Permit fails to establish technology-based effluent limits for coal ash pond dewatering discharges.*

In an apparent attempt to address the future, substantially different wastestreams that would be released by the complete pumping out of the Plant Mitchell coal ash ponds, Part III.C.2 of the Draft Permit calls for the permittee to submit a Coal Ash Pond Dewatering Plan outlining the “wastewater treatment system components” and “process controls being installed” that would be used to treat those future wastestreams. Part III.C.2.a– b. The approach sanctioned by this provision is contrary to both the letter and intent of the Clean Water Act and its regulations, which require imposing specific TBELs *within a permit*, and *prior* to authorizing such discharges.

The CWA requires NPDES permits to include effluent limits based on the performance achievable through the use of statutorily-prescribed levels of technology that “will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” 33 U.S.C. § 1311(b)(2)(A)(i), *see also id.* § 1311(b)(1)(A). Technology-based effluent limitations (“TBELs”) constitute the minimum level of control that must be included in a permit “regardless of a discharge’s effect on water quality.” *Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 344 (5th Cir. 1981).

For sources constructed prior to the passage of the Federal Water Pollution Control Act of 1972, such as Plant Mitchell, discharges of pollutants must be eliminated or controlled through application of Best Available Technology (“BAT”). *See* 33 U.S.C. § 1311(b)(2)(A). In accordance with the Act’s goal to eliminate all discharges of pollutants, BAT limits “shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him . . . that such elimination is technologically and economically achievable” 33 U.S.C. § 1311(b)(2)(A).

The requirement to meet the BAT standard is ongoing; it compels polluting industries to meet ever more stringent limitations on the path towards complete elimination of water pollution. *See NRDC v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987). With each renewal of a NPDES permit, permitting agencies must reconsider whether further pollution reductions and technologies are attainable. The objective of the law is continuous, rapid improvement:

The BAT standard reflects the intention of Congress to use the latest scientific research and technology in setting effluent limits, pushing industries toward the goal of zero discharge as quickly as possible. In setting BAT, EPA uses not the average plant, but the optimally operating plant, the pilot plant which acts as a beacon to show what is possible.

Kennecott v. EPA, 780 F.2d 445, 448 (4th Cir. 1985) (citing 1 *Legislative History of the Federal Water Pollution Control Act of 1972*, 798 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93-1 (1973)).

EPA periodically codifies national ELGs for NPDES permits that reflect BAT standards for particular discharges, pollutants, and activities found in a category of point sources. See 40 C.F.R. Pt. 423. Where those guidelines have been set, they establish the floor or minimum level of control that must be imposed in a NPDES permit. In the absence of promulgated ELGs, or where such guidelines are inadequate, a state permitting agency must promulgate permit effluent limitations, in accordance with BAT, on a case-by-case basis using the permit writer's best professional judgment ("BPJ"). 40 C.F.R. §§ 125.3(c)(2) and (3); see also *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998). In doing so, the state agency is bound by the same factors that EPA is required to apply in determining and applying BAT limits in a permit. 33 U.S.C. §§ 1311(b), 1342(b); see also 33 U.S.C. § 1314(b)(2)(B); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1988).

EPA recently updated ELGs for steam electric power plants. 80 Fed. Reg. 67,838 (Nov. 3, 2015) (codified at 40 C.F.R. Pt. 423). EPA's final rule, published in November 2015, noted: "Steam electric power plants contribute the greatest amount of all toxic pollutants discharged to surface waters by industrial categories regulated under the [Clean Water Act]." *Id.* Among other things, the new rule prohibits the discharge of pollutants from bottom ash and fly ash transport water and limits the amount of arsenic, mercury, selenium, and nitrate that may be discharged in FGD wastewater. 40 C.F.R. §§ 423.13 (g)(1)(i), (h)(1)(i), and (k)(1)(i). Dischargers must meet these limitations "as soon as possible beginning November 1, 2018." *Id.*³²

During the decades of operation prior to retiring the plant's final coal-fired Unit 3 in 2015, Plant Mitchell generated and discharged significant quantities of toxic water pollutants from its coal ash ponds including arsenic, mercury, selenium, boron, cadmium, and lead. These toxic pollutants, which remain within the coal ash stored at AP-1, AP-2 and AP-A, are hazardous to humans and to aquatic life. Once released to the environment, these toxic water pollutants are absorbed by fish and other aquatic life, and by humans through fish and water consumption, swimming, boating, and other activities.³³ These pollutants are hazardous even in very small

³² EPA has subsequently announced its decision to reconsider the final rule's effective date of November 1, 2018 and administratively stay compliance dates that have not yet passed. See EPA April 12, 2017 Notice, delay of compliance deadlines. Docket ID No. EPA-HQ-OW-2009-0819, RIN 2040-AF14.

³³ See EPA's ELG 2015 EA, *supra*, Note 8 at pp. 2-3, 3-1.

doses, as they do not degrade over time and bioaccumulate, meaning they increase in concentration as they are passed up the food chain.³⁴

As noted above, EPA codified a national ELG for NPDES permits that impose BAT standards for certain discharges, pollutants and activities within the steam electric power generating point source category at 40 C.F.R. § 423, but the Draft Permit's effluent limitations remain subject to the far less stringent 1982-era ELGs for Outfall Nos. 01B, 1E and 04 for the now-retired Plant Mitchell. As set forth in detail herein, such effluent limitations are manifestly inappropriate for pond closure-related dewatering discharges.

a. The 1982 ELGs do not apply to coal ash pond dewatering discharges.

The wastewater treatment systems currently in place at Plant Mitchell have remained essentially unchanged for decades. As set forth in the Mitchell NPDES Application, the wastewater treatment system entails sluicing wet ash to a series of ash settling ponds. In the ash ponds, coal ash particles are removed from the ash transport water through a combination of ash transport/process water recycling and passive, gravity-based settling as the predominant form of wastewater treatment, prior to discharge from the *upper portion* of the ponds via designated outfalls. Permit Application, at 1a – 1b of 4 (identifying EPA treatment codes 4A, 1U). This type of discharge meets the EPA's definition of "low-volume wastes" under the 1982 ELGs, and it is therefore appropriate that the 1982 ELGs would apply to such routine discharges. As EPA Region 1 recently explained in amending TBELs in a NPDES permit governing coal ash pond discharges, the 1982 ELGs "established effluent limitations based on the best practicable control technology currently available (BPT) standard for the 'catch-all' category of 'low-volume wastes.'"³⁵ Because discharges associated with draining the ponds are different in both volume and kind, they require EPD to formulate TBELs specific to that distinctly different operation contributing to the pond closure-related dewatering effluent.

With respect to the treatment of "low volume wastes," EPA's technical report underlying the 1982 ELGs detailed two waste treatment technologies: vapor-compression evaporation; and evaporation ponding, *i.e.* waste settling ponds.³⁶ The latter form of treatment—passive settling

³⁴ See *supra*, Note 14 and accompanying discussion ("After being released into the environment, pollutants can reside for a long time in the receiving waters, bioaccumulating and binding with the sediment. There is documented evidence of slow ecological recovery as a result of these pollutant discharges . . . Some impacts might not be realized for years due to the persistent and bioaccumulative nature of the pollutants released.").

³⁵ Merrimack Station Revised Draft Permit 2014 Fact Sheet, NPDES No. NH001465 at 14 (Attachment 10, hereinafter "Merrimack Fact Sheet"), available at <https://www.puc.nh.gov/Regulatory/CASEFILE/2011/11-250/TRANSCRIPTS-OFFICIAL%20EXHIBITS-CLERKS%20REPORT/11-250%202014-10-14%20EXH%2061.PDF> (accessed April 24, 2017).

³⁶ See EPA Development Document for Final Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Steam Electric Point Source Category, (EPA 440/1-82-029) November 1982 (hereinafter "1982 EPA Development

of waste solids through evaporation ponding—has been the treatment and discharge practice at Plant Mitchell for years, and remains the identified form of treatment in the Mitchell NPDES Application, even though the plant is no longer burning coal for electricity generation. Permit Application at 1a – 1b of 4 (identifying EPA treatment Codes 4A, 1U). As the 1982 EPA Development Document underlying the 1982 ELGs explains, the “ponds use solar energy to evaporate wastewater” as the form of treatment, “and thereby concentrate dissolved solids in the wastewater” at the lower portions of the ponds, as a means of capturing and containing the waste via settling and evaporation.³⁷

It is that vastly more concentrated *wastestream* – the settled, removed waste occupying the lower portions of Mitchell ash ponds – that would be released to the environment via pond closure dewatering operations at some future, unspecified date. Here, EPD erroneously proposes to authorize release of these wastestreams *in advance* via Part III.C.2 of the Draft Permit, subject only to certain disclosure requirements via a Coal Ash Pond Dewatering Plan and EPD’s evaluation of that information. But because the 1982 ELGs *do not* envision the discharge of these settled and removed wastes, and therefore *do not* impose national effluent standards for such wastestreams, it is incumbent upon EPD to develop applicable TBELs either now or as part of a future permit modification.³⁸

b. EPD must use its Best Professional Judgment to establish TBELs for ash pond dewatering discharges.

The law is clear that separate TBELs must be developed and imposed on proposed dewatering discharges *prior* to authorizing their release. The Clean Water Act requires that TBELs “shall be established . . . for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.” 40 C.F.R. § 125.3(g) (emphasis added); Ga. Comp. R. & Regs. 391-3-6-.06(4)(a)(1), (a)(10), (d). The release of removed, settled waste and accompanying wastewater occupying the lower portion of the ash ponds and within the saturated coal ash plainly meets this definition. Additionally, the 1982 ELGs do not apply to stored FGD wastes.³⁹ Thus, the provisions of the Draft Permit that would authorize release of these dewatering wastestreams (including FGD wastewater), subject only to certain information disclosure requirements within an yet-to-be-disclosed Coal Ash Pond Dewatering Plan is manifestly improper under 40 C.F.R. § 125.3(g);

Document”) at 438-441 (available at https://www.epa.gov/sites/production/files/2015-07/documents/steam-electric_dd_1982.pdf).

³⁷ 1982 EPA Development Document at 441. The 1982 EPA Development Document, giving rise to the national 1982 ELG standards, identifies coal ash ponding as a form of wastewater treatment for several waste classifications, none of which address the wholesale pumping and release of ash pond dewatering wastestreams. *See id.* at pp. 365, 369 (Figure VII-32), 374-75 (Figure VII-35), 398 – 405 (Figure VII-41). 438 – 441.

³⁸ *Id.* at 438-441.

³⁹ *See, e.g.*, Merrimack Fact Sheet at 14 (citing 1982 EPA Development Document at 248); 47 Fed. Reg. 52,291 (Nov. 19, 1982) (preamble to final Rule for 1982 ELGs); 1982 EPA Development Document at 3, 7.

Ga. Comp. R. & Regs. 391-3-6-.06(4)(a)(1), (a)(10), (d). The law requires EPD to develop and impose appropriate TBELs in a permit prior to authorizing the discharges.

The Clean Water Act requires that NPDES permits impose TBELs reflecting the “minimum level of control that must be imposed in a permit” for each pollutant and *each wastestream* being discharged from the ash ponds. 40 C.F.R. § 125.3. For the toxic pollutants at issue here, TBELs must reflect the pollution reduction achievable by BAT for the covered discharge. 40 C.F.R. § 125.3(a)(2)(iii)-(v); Ga. Comp. R. & Regs. 391-3-6-.06(4); 33 U.S.C. §§ 1311(b)(2)(A), (C), (D), (F). The BAT requirement sets a stringent treatment standard that requires “elimination of discharges of all pollutants if . . . such elimination is technologically and economically achievable.” 33 U.S.C. 1311(b)(2)(A). As shown above, the 1982 ELGs upon which the TBELs are derived in the Draft Permit do not define the treatment that is “technologically and economically achievable” for the dewatering discharges.⁴⁰

As such, upon receipt of proper notification from Georgia Power of an anticipated change in waste disposal operations or wastewater treatment methods (as envisioned by Part II.A.1.a.2 – 3, Part II.A.1.d.2, and/or Part II.A.1.e – f of the Draft Permit), EPD must use its BPJ to make a case-by-case determination of the proper BAT limitations that should apply to the dewatering discharges. To do so, EPD must assess what technologies are “available”, and, of the available technologies, which are “economically achievable.” 33 U.S.C. § 1311(b)(2)(A). “In other words, the BAT standard requires [the issuing authority] to set effluent discharge limits corresponding to the use of the best pollution control technologies that are technologically and economically achievable and result in reasonable progress toward eliminating discharges of the pollutant(s) in question, which will include eliminating such discharges if doing so would be achievable.”⁴¹

EPD must make this determination once (and *not before*) information concerning anticipated changes to disposal practices or waste generating operations is provided by the applicant.⁴² This allows EPD to develop appropriate TBELs in a validly issued NPDES permit

⁴⁰ See, e.g., 1982 EPA Development Document at 438-441.

⁴¹ Merrimack Fact Sheet, at 15.

⁴² As noted above, the Draft Permit requires that the permittee submit advance notice of any physical alterations or additions to the facility that includes an “alteration or addition that could significantly change the nature or increase the quantity of pollutants discharged”, an “alteration or addition [that] results in a significant change in the permittee’s sludge use or disposal practices,” and “any planned installation of new equipment or modification of existing processes that could increase the quantity of pollutants discharged” (Draft Permit, Part II.A.1.a.2 – 3; Part II.A.1.d.2). In compliance with similar provisions contained within NPDES permits issued to Georgia Power for Plant McManus, Georgia Power tendered an April 18, 2016 Notice of Change in Operations to EPD, identifying “a process modification at Plant McManus that involves the addition of treatment systems being installed for Outfall 02 (ash pond final discharge)” to “facilitate final closure of the ash pond.” (Attachment 11). Georgia Power submitted a similar Notice of Change in Operations to EPD on May 16, 2016, with planned discharge via Outfall 03 (ash pond final discharge) to facilitate final closure of the ash ponds at Plant McDonough.

prior to dewatering discharges occurring based on available information, so that the appropriate technology-based standard is imposed. 40 C.F.R. §§ 122.62, 124.6, 124.10, 124.57, 125.3(a)(iii)-(v), (c)(2)-(3), (d)(3), (g); Ga. Comp. R. & Regs. 391-3-6-.06(4), (7)(b), (c), (d); 33 U.S.C. §§ 1311(b)(2)(A), (C), (D), (F); *Chemical Manufacturers Ass'n v. U.S.E.P.A.*, 870 F.2d 177, 239 (5th Cir. 1989) (“The legislative history of the CWA indicates that the [BAT] refers to the single best performing plant in an industrial field.”), *decision clarified on reh'g*, 885 F.2d 253 (5th Cir. 1989); *see also Am. Paper Inst. v. Train*, 543 F.2d 328, 346 (D.C. Cir. 1976) (BAT should “at a minimum, be established with reference to the best performer in any industrial category.”); *Kennecott v. U.S.E.P.A.*, 780 F.2d 445, 448 (4th Cir. 1985) (“In setting BAT, [the issuing authority] uses not the average plant, but the optimally operating plant which acts as a beacon to show what is possible.”).

Furthermore, EPD’s development of appropriate TBELs must occur in full compliance with the Clean Water Act’s notice and public comment provisions, enabling not only interested members of the public, but EPA, the U.S. Fish and Wildlife Service⁴³ and citizens of neighboring states to participate in this important agency determination. 33 U.S.C. §§ 1251(e) (“Public participation in the development, *revision*, and *enforcement* of any...standard, [or] *effluent limitation* ... established by...any State under this chapter *shall be provided for*, encouraged, and assisted by the Administrator and the States.”) (emphasis added), 1342(d) (“No permit shall issue . . . if the Administrator . . . objects in writing to the issuance of such permit...”); Ga. Comp. R. & Regs. 391-3-6-.06(8)(b)(3) (“No NPDES Permit shall be issued authorizing . . . 3. Any discharge to which the Regional Administrator has objected in writing”); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (examining impact of NPDES permit conditions issued to Arkansas sewage treatment plant on effluent discharges that ultimately reached Oklahoma, on challenge raised by the downstream state); *Hughey v. Gwinnett County*, 278 Ga. 740, 743 (Ga. Sup. Ct. 2004) (explaining that “Agency actions . . . undergo a public notice and comment period to provide the public with the opportunity for meaningful participation in important agency decisions.”); *Ohio Valley Env’l Coalition Inc. v. Apogee Coal Co., LLC*, 555 F. Supp. 2d 640, 645-46 (S.D.W.Va. 2008) (“Public notice is not merely a

(Attachment 12). No such Notice has been tendered to date for Plant Mitchell, and, as set forth above, the Mitchell NPDES application does not identify coal ash pond dewatering as an “Operation Contributing Flow” to any effluent being discharged at *any* NPDES permitted Outfall at Plant Mitchell. Permit Application, at 1a – 1b of 4. Part III.C.2 of the Draft Permit for Plant Mitchell cannot, therefore, authorize dewatering wastewaters absent major modification of the Permit, because EPD has not undertaken the requisite determinations to develop appropriate effluent limitations on such discharges in a validly-issued, modified NPDES permit.

⁴³ *See supra*, note 7 and accompanying discussion (identifying October 28, 2003 letter to Michael Creason, P.E., EPD, from Sandra S. Tucker, U.S. Fish and Wildlife Service re comments to draft NPDES Permit for Plant Mitchell, Attachment 1, requesting notification of discharge limitation exceedances for pollutants including copper, a toxic priority pollutant, in light of potential adverse impacts to Federally protected purple bankclimber freshwater mussel identified in the Flint River near Plant Mitchell).

formality; it ensures that the public has a meaningful opportunity to participate in the issuance of a permit.”).

Georgia’s NPDES permit regulations provide that “[p]ublic notice of every complete permit application will be prepared and circulated in a manner designated to inform interested and potentially interested persons of the proposed discharge and the proposed determination to issue or deny a permit for the proposed discharge.” Ga. Comp. R. & Regs. 391-3-6-.06(7)(b). The proposed discharges at issue here are only those identified in Georgia Power’s NPDES permit application. The application does not identify or contemplate the complete pumping out of the coal ash ponds at Plant Mitchell. Upon receipt of Notice from Georgia Power of the proposed dewatering activities (which entail a material change in the waste generation and disposal practices), EPD must “inform interested and potentially interested persons of the *proposed* [dewatering] *discharge* and the proposed determination to issue or deny a permit for the *proposed* [dewatering] *discharge*.” *See id.* (emphasis added). Hence, the approach envisioned by Part III.C.2 of the Draft Permit is manifestly improper, because it contemplates allowing dewatering to go forward without public notice and comment, and without a BPJ determination by EPD. Ga. Comp. R. & Regs. 391-3-6-.06(7)(b), (12)(b); 40 C.F.R. § 122.62(a).

As the foregoing demonstrates, the current effluent limitations imposed by the Draft Permit on Plant Mitchell Outfalls 01B, 01E, and 04 are derived from the 1982 ELGs, and therefore do not cover releases of ash pond dewatering discharges that “might” occur at some unspecified future date, and for which Georgia Power has not yet even applied or otherwise provided notice.⁴⁴ Accordingly, while the addition of “wastewater treatment system components,” “process controls”, and enhanced effluent monitoring and reporting as envisioned by the disclosure requirements set forth in Part III.C.2.a–g of the Draft Permit may indeed, once approved and deployed at Plant Mitchell at some future date, offer technical advances beyond the passive, gravity-based wastewater treatment methods addressed in the 1980’s-era ELGs, it does not follow that these treatment methods are BAT for the *dewatering wastestreams*. Indeed, even assuming, *arguendo*, that the treatment technology described in a future Coal Ash Pond Dewatering Plan submitted as required by Part III.C.2 of the Draft Permit *would be*, at that time, the most appropriate and economically achievable means of achieving BAT, the Clean Water Act still requires that EPD develop appropriate TBELs for those discharges through a permit modification that includes public notice and comment. 40 C.F.R. § 122.62(a); Ga. Comp. R. & Regs. 391-3-6-.06(12)(b).

The Draft Permit’s purported preauthorization of dewatering wastestreams circumvents statutory and regulatory safeguards designed to *prevent* the discharge of materially different wastestreams arising from substantial alterations of an industrial utility’s waste handling and treatment practices. Ga. Comp. R. & Regs. 391-3-6-.06(4)(a)(1), (a)(10), (d), (12)(b); 40 C.F.R. §§ 122.62(a)(1), (a)(2); 125.3(g).

⁴⁴ *See* 1982 EPA Development Document at pp. 248 438-441 (treatment of low volume waste via pond settling, no national TBELs for FGD wastewaters); Merrimack Fact Sheet, p. 14; Permit Application, at 1a-1b of 4) (identifying EPA treatment Codes 4A, 1U).

Accordingly, the final sentence of Part III.C.2 of the Draft Permit should be stricken and replaced with the Dewatering Condition set forth above.

4. *The Draft Permit erroneously omits the mandatory TBEL analysis from Part III.C.2 by only addressing water quality impacts stemming from dewatering discharges.*

Under the Clean Water Act, effluent limits imposed in a NPDES permit must reflect evaluation of *both* the applicable TBELs as well as water quality based effluent limitations (“WQBELs”), applying the more stringent of the two in the final permit. 33 U.S.C. § 1311(b)(1)(C); *N. Cheyenne Tribe v. Mont. Dep’t of Env’tl. Quality*, 234 P.3d 51, 57 (Mont. 2010) (“State water quality standards provide an additional layer of protection when pre-discharge treatment standards alone would not protect water quality.”) (*citing PUD No. 1 of Jefferson Cnty. V. Wash Dep’t of Ecology*, 511 U.S. 700, 704 (1994) (emphasis added)); 2010 EPA NPDES Permit Writers’ Manual, p. 5-7) (“TBELs are developed independently of the potential impact of a discharge on the receiving water, which is addressed through water quality standards and [WQBELs].”). Hence, while EPD must consider the anticipated impact of the dewatering discharges on the receiving waters in any future effluent limits determination governing dewatering discharges, EPD must *also* use its BPJ to determine appropriate TBELs for the covered pollutants and wastestreams, and apply the more stringent of the two in a subsequently modified NPDES permit.⁴⁵

Here, the final sentence within Part III.C.2 of the Draft Permit erroneously omits EPD’s mandatory determination of appropriate TBELs under the BAT standard using its BPJ, focusing solely upon water quality based impacts stemming from future dewatering discharges. (*See* Draft Permit, p. 20 of 24) (“EPD will evaluate the submitted data and determine if there is a reasonable potential for the discharge to cause or contribute to a violation of the instream water quality standards and if necessary, may open the permit to include applicable effluent limits to protect the receiving water body.”). The WQBEL-only inquiry envisioned by Part III.C.2 is improper, and therefore cannot authorize the discharge of pollutants stemming from the large-scale drawdown, release and dewatering of coal ash ponds at Plant Mitchell at some unknown future date.

In light of the foregoing, the final sentence of Part III.C.2 of the draft Permit should be stricken and replaced with the Dewatering Condition, as set forth above.

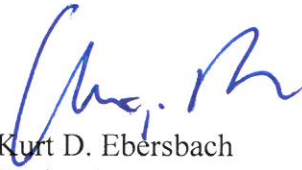
⁴⁵ Furthermore, as set forth above, where a permittee’s waste disposal operations have subsequently changed, resulting in the discharge of materially different wastestreams, the development of appropriate effluent limitations must be made via major modification, as set forth above; such determination cannot be simply put off for a later determination, as envisioned by Part III.C.2 of the draft Permit. Ga. Comp. R. & Regs. 391-3-6-.06(12)(b); 40 C.F.R. §§ 122.62(a)(1), (a)(2).

III. CONCLUSION

For the foregoing reasons, the draft Plant Mitchell NPDES permit must be revised to address the deficiencies identified above before finalization.

Commenters appreciate the opportunity to provide feedback on the Draft Permit. If you have any questions or would like to discuss any comments raised in this letter, please contact Kurt Ebersbach at kebersbach@selcga.org or Chris Bowers at cbowers@selcga.org.

Sincerely,



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