

Counsel for ADEM:

LUTHER STRANGE
ATTORNEY GENERAL

/s/ James L. Wright
James L. Wright (WRI022)
Assistant Attorney General

/s/ Schuyler K. Espy
Schuyler K. Espy (KEA009)
Assistant Attorney General

Alabama Department of Environmental Management
Office of General Counsel
P.O. Box 301463
Montgomery, AL 36130-1463
(334) 271-7855 (Office)
(334) 394-4332 (Telefax)
jlw@adem.state.al.us
sespy@adem.state.al.us

Counsel for TVA:

/s/ R. Bruce Barze, Jr.

R. Bruce Barze, Jr.
Thomas L. Casey, III
Balch & Bingham LLP
1901 Sixth Avenue North, Ste. 1500
Birmingham, AL 35203
(205) 226-8716 (telephone)
(205) 488-5706 (fax)
bbarze@balch.com
tcasey@balch.com

/s/ Maria V. Gillen
Maria V. Gillen
NY Attorney Reg # 4080875
Tennessee Valley Authority
Office of General Counsel
400 West Summitt Hill Drive
Knoxville, TN 37902-1401
(865) 632-7741 (telephone)
(865) 632-6718 (fax)

IN THE CIRCUIT COURT OF COLBERT COUNTY, ALABAMA

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,)	
Plaintiff,)	
v.)	
TENNESSEE VALLEY AUTHORITY,)	20-CV-2013-900123
Defendant.)	

CONSENT DECREE

I. INTRODUCTION

Plaintiff, Alabama Department of Environmental Management (“ADEM” or the “Department”), and Defendant, Tennessee Valley Authority (“TVA”), hereby represent and acknowledge that they agree to enter into this Consent Decree regarding alleged violations at the Colbert Fossil Plant in Tuscumbia, Colbert County, Alabama (“Colbert”). ADEM filed a Complaint in this action on April 12, 2013, alleging that TVA is in violation of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 to 22-22-14 (2006 Rplc. Vol.) (“AWPCA” or the “Act”). Plaintiff is seeking injunctive relief pursuant to the Alabama Environmental Management Act, Ala. Code § 22-22A-5(18)b. The Complaint alleges that TVA has violated the AWPCA by discharging pollutants at Colbert from one or more unauthorized sources into waters of the State. TVA neither admits nor denies these allegations. The parties have consented to the entry of this Consent Decree without further adjudication of any of the factual or legal issues raised in the Complaint and in full settlement of the above-styled proceedings.

NOW THEREFORE, without admission by TVA of the non-jurisdictional allegations in the Complaint, without further adjudication of any issue of fact or law pertaining to this action,

and upon the consent and agreement of the parties to this Consent Decree, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

II. JURISDICTION

1. This court has jurisdiction over the subject matter herein and the parties to this action pursuant to Ala. Code § 22-22A-5(18)(a),(b) (2006 Rplc. Vol.). The Complaint states claims pursuant to Ala. Code § 22-22-9 (2006 Rplc. Vol.) for injunctive relief and civil penalties. ADEM is authorized to bring this suit under Ala. Code § 22-22A-5 (2006 Rplc. Vol.).

III. VENUE

2. Venue is proper under Ala. Code § 22-22A-5(19) (2006 Rplc. Vol.).

IV. PARTIES

3. Plaintiff ADEM is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.). Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), ADEM is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act”). ADEM is also authorized to administer and enforce the provisions of the AWPCA, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.).

4. Defendant TVA is a corporate agency and instrumentality of the United States pursuant to the Tennessee Valley Authority Act of 1933, *as amended*, 16 U.S.C. §§ 831-831ee (2006 & Supp. III 2009) (“TVA Act”), with its headquarters in Knoxville, Tennessee. Defendant operates Colbert, which TVA acquired as agent of the United States to accomplish the purposes of the TVA Act.

V. BINDING EFFECT

5. The provisions of this Consent Decree shall apply to, and be binding upon TVA and any successor, representative, responsible corporate officer, agent or agency thereof, and upon ADEM and the State of Alabama, including its representatives.

VI. OBJECTIVES

6. It is the express purpose of the parties entering into this Consent Decree to further the objectives set forth in § 22-22-2 of the Act, and to resolve certain issues alleged by ADEM in the Complaint. In light of these objectives, TVA agrees to, *inter alia*, cause the expeditious implementation of the remedial measures as herein set forth and in accordance with the schedules approved by ADEM, and do all lawful acts necessary to effectuate the provisions of this Consent Decree.

VII. DEFINITIONS

7. Unless otherwise defined herein, terms used in this Consent Decree shall have the meaning given to those terms in the AWPCA, §§ 22-22-1 through 22-22-16 (2006 Rplc. Vol.), and the regulations promulgated thereunder.

8. The following terms used in this Consent Decree shall be defined as follows:

- a. "2009 ARBCA" shall mean the Alabama Risk-Based Corrective Action assessment submitted to ADEM on October 13, 2009, to determine the potential environmental and health risks from contamination of groundwater flowing below the Colbert ash ponds and the former location of the metal cleaning pond.
- b. "Complaint" shall mean the Complaint filed by ADEM against TVA in the above-styled proceeding.

- c. "Consent Decree" shall mean this Consent Decree.

VIII. REMEDIAL MEASURES PREVIOUSLY PERFORMED

9. ADEM has been actively addressing possible contamination of the waters of the State associated with Colbert's ash ponds for a number of years, including through an October 2009 enforcement order.

10. TVA has performed the following actions in response to Consent Order No. 10-002-CWP:

- a. Under ADEM supervision, permanently closed the metal cleaning pond in 2011 that was determined in the 2009 ARBCA to be a significant source of groundwater contaminants;
- b. Expended more than eight million, two hundred thousand dollars (\$8.2 million) to address and collect wastewater seepage at Ash Pond No. 5 and closed and capped approximately ten (10) acres of the dry ash management facility associated with the Colbert ash ponds as part of the remediation project to address seepage and drainage;
- c. Expended more than seven million, three hundred thousand dollars (\$7.3 million) to improve stability and address and collect wastewater seepage at Ash Pond No. 4.

11. TVA has conducted under ADEM observation extensive groundwater monitoring across the Colbert site since at least 1987.

12. It has been determined that groundwater flows locally and regionally toward the Tennessee River, which borders portions of the Colbert site.

13. ADEM established the ARBCA assessment process to determine the potential risk to human health and the environment from groundwater contamination. The process is a risk-based, corrective action approach to site cleanup that has been accepted and well-documented by the U.S. Environmental Protection Agency (“EPA”). The ARBCA utilizes a tiered approach to assessing risks, with each tier requiring an increasing level of site-specific investigation and analysis. If risk values are exceeded, risk-based target levels are formulated to be used at a site to guide remediation and achieve risk levels protective of human health and the environment.

14. The 2009 ARBCA assessment at Colbert showed excesses of preliminary screening values. Comprehensive site investigations, on which the 2009 ARBCA was based, identified a potential risk to a well located on private property bordering Ash Pond No. 5. This well is no longer in use. ADEM recommended that TVA work with the owner to close the private well. Recent monitoring data suggests there may be an increasing risk to this private well. In addition, it was concluded that TVA should continue its groundwater monitoring activities.

IX. ADDITIONAL ACTIONS REQUIRED

15. Within ninety (90) days of the date of entry of this Consent Decree, TVA shall submit to the Department a corrective action plan and schedule of implementation necessary to mitigate threatened and documented contamination of the private well identified as P-2 in the 2009 ARBCA. TVA shall make any changes to the proposed plan and schedule considered necessary by the Department within a timeframe required by the Department.

16. TVA shall continue to conduct groundwater monitoring to determine changes in levels of contamination at the Colbert site and shall report results to ADEM on a semi-annual basis. TVA shall continue to monitor groundwater consistent with the current ADEM-accepted

Groundwater Monitoring Plan. The Department may require additional parameters related to coal combustion waste and monitoring locations if determined to be necessary. The semi-annual reports shall include analytical sampling results, the locations of wells, potentiometric surface maps, trend evaluations, and all corresponding laboratory test reports.

17. TVA has applied for a permit to construct a lined industrial solid waste landfill within Ash Pond No. 5 and to use this facility to manage dry ash from Colbert. If and when ADEM approves and TVA constructs the lateral expansion management facility, TVA shall cease the active placement of fly ash or other coal combustion products in the portion of Ash Pond No. 5 that TVA does not replace with the new facility.

18. The parties anticipate that, due to actions already performed by TVA to address the issues at Colbert raised in the Complaint, monitoring data may show a decrease in the levels of contamination of groundwater from ash management activities at Colbert. If the data from the wells directly down gradient of Ash Pond No. 4 does not reflect such an overall downward trend after five years, TVA shall prepare and submit to ADEM a plan for the closure of Ash Pond No. 4 in accordance with then-current closure requirements for industrial solid waste landfills.

19. Notwithstanding the above, TVA may reduce the number of wells monitored with prior ADEM approval. TVA may also reduce the number of parameters monitored at a well if the data shows that in the previous five years, the parameter has not exceeded the applicable water quality goal. In the absence of a water quality goal, the parties will use another appropriate goal as identified by ADEM after consulting with TVA.

20. Within ninety (90) days of entry of this Consent Decree, TVA shall submit to the Department a mercury characterization study plan with a timeframe for implementation. The study plan shall include sampling of Cane Creek for total mercury at locations and frequencies to

be established jointly by TVA and ADEM. In addition, stormwater runoff shall be sampled for total mercury to identify possible mercury contamination within the facility at locations and frequencies described in the plan. Following the end of the sampling plan period, an evaluation of the sampling results shall be used to determine if further action will be required. Modifications to the mercury characterization study plan, if required, shall be submitted to the Department no later than thirty (30) days after receipt of the Department's comments.

21. In conjunction with the remediation project to address seepage and drainage from the ash ponds undertaken as required by Consent Order No. 10-002-CWP, TVA shall perform routine inspections, at a frequency accepted by ADEM, of the ash ponds to determine the presence of any seeps. If seeps are identified, TVA shall notify the Department within five (5) business days. Within sixty (60) days, TVA shall either (1) stop the seep or capture and route the seep such that it is discharged through a National Pollutant Discharge Elimination System permitted outfall, or (2) submit to ADEM for its acceptance a seep corrective action plan, including a schedule for implementation. All seepage points identified and the subsequent corrective actions taken during the reporting period shall be included in the semi-annual reports required by the Groundwater Monitoring Plan.

X. CIVIL PENALTY

22. TVA asserts that it is not subject to civil penalties for violations of the AWPCA. Nevertheless, TVA agrees to pay to the State of Alabama within forty-five (45) days after entry of this Consent Decree a total of \$150,000, as a civil penalty and as reimbursement for ADEM's expenses related to its investigation and oversight of this matter.

23. If TVA fails to pay such penalties or expenses within the time required, TVA agrees to pay the State's expenses and attorney fees necessary for the State to collect said expenses.

XI. FORCE MAJEURE

24. "Force Majeure" for purposes of this Consent Decree is defined as any event arising from causes beyond the control of TVA or any entity or person employed by TVA, including its employees, consultants, and contractors, which delays or prevents the performance of any obligation under this Consent Decree.

25. When circumstances are occurring or have occurred which may delay the completion of any requirement of this Consent Decree, whether or not due to a Force Majeure event, TVA shall so notify ADEM, in writing, within fifteen (15) days after TVA knew, or should have known, of the delay or anticipated delay. The notice shall describe in detail the basis for TVA's contention that it experienced or anticipates that it will experience a Force Majeure delay, the anticipated length of the delay, the precise cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. Failure to so notify ADEM shall constitute a waiver of any claim of Force Majeure as to the event in question.

26. If ADEM finds that a delay in performance is, or was, caused by a Force Majeure event, it shall extend the time for performance, in writing, for a period to compensate for the delay resulting from such event. In proceedings on any dispute regarding a delay in performance, the dispute resolution of Section XII RETENTION OF JURISDICTION / DISPUTE RESOLUTION shall apply, and TVA shall have the burden of proving that the delay

is, or was, caused by a Force Majeure event, and that the amount of additional time requested is necessary to compensate for that event.

27. Compliance with a requirement of this Consent Decree shall not by itself constitute compliance with any other requirement. An extension of one compliance date based on a particular event shall not automatically extend another compliance date or dates. TVA shall make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought. TVA may petition for the extension of more than one compliance date in a single request.

XII. RETENTION OF JURISDICTION / DISPUTE RESOLUTION

28. This Court shall retain jurisdiction of this matter for the purposes of implementing and enforcing the terms and conditions of this Consent Decree and for the purpose of adjudicating all disputes among the parties that may arise under the provisions of this Consent Decree.

29. Submission of any matter to the Court for resolution shall not extend any of the deadlines set forth in this Consent Decree, unless the parties agree to such extension in writing or the Court allows the extension upon motion.

XIII. RIGHT OF ENTRY

30. Without limiting the authority otherwise available to it, ADEM, including its authorized representatives and contractors shall have authority at all reasonable times, upon the presentation of credentials, to enter the premises of TVA at its Colbert site to:

- a. Monitor the program of activities required by this Consent Decree;
- b. Verify any data or information submitted by TVA to ADEM;

- c. Obtain samples from the ash wastewater collection system, or groundwater monitoring system;
- d. Inspect and evaluate any portion of the Colbert ash management system, including the ash ponds and wastewater collection systems; and
- e. Inspect and review any records required to be maintained under the terms and conditions of this Consent Decree, under any ADEM permit, or under the AWPCA. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects ADEM's statutory authority to conduct inspections, to require monitoring, and to obtain information from TVA as authorized by law.

31. ADEM agrees to provide TVA an opportunity to obtain split samples of any water samples taken by ADEM at the Colbert site. ADEM further agrees to provide TVA with the quality assured / quality controlled laboratory analytical results of any samples obtained by ADEM from the Colbert site, and any non-privileged reports prepared by ADEM concerning such results. ADEM shall use its best efforts to coordinate field sampling inspections at the Colbert site with TVA by notifying TVA in advance of its plan to conduct such inspections.

XIV. NOT A PERMIT / COMPLIANCE WITH OTHER STATUTES / REGULATIONS

32. This Consent Decree is not and shall not be construed as a permit, nor a modification of any existing permit, issued by ADEM pursuant to the AWPCA or Clean Water Act, nor shall it in any way relieve TVA of its obligations to obtain a permit for discharges at Colbert. Any new permit, or any modification to an existing permit, shall be complied with in accordance with applicable state and federal laws and regulations, and any new permit limitations or requirements or any modification to existing permit limitations or requirements shall take precedence over this Consent Decree.

33. Nothing herein shall be construed as relieving TVA of the duty to comply with the AWPCA, the regulations promulgated thereunder, and all applicable permits issued thereunder, or as relieving TVA of its duty to comply with any other applicable state or federal law.

XV. NON-WAIVER PROVISIONS

34. Nothing contained in this Consent Decree shall be construed to prevent or limit ADEM's rights to obtain penalties or further or additional injunctive relief under the AWPCA or other State law except as expressly specified herein.

35. This Consent Decree does not limit or affect the rights of TVA or ADEM against any third parties which are not parties to this Consent Decree. The parties recognize that this Consent Decree resolves only matters between ADEM and TVA and that its execution does not preclude TVA from asserting any legal or factual position in any action brought against TVA by any person or entity not a party to this Consent Decree.

36. Subject to the terms in this Consent Decree, the parties reserve any and all legal and equitable remedies available to enforce the provisions of this Consent Decree.

37. This Consent Decree shall not limit any authority of ADEM under any applicable statute, including the authority to seek information from TVA or to seek access to the Colbert site, nor shall anything in this Consent Decree be construed to limit the ADEM's authority to undertake any action against any person, including TVA, in response to conditions that may present an imminent and substantial endangerment to the environment or to the public health or welfare.

38. Delays caused by inadequate facility planning or plans and specifications on the part of TVA shall not be cause for extension of any required compliance date in this Consent

Decree, except as allowed by the express written agreement of the parties and/or by Order of the Court.

39. TVA's obligations under the provisions of this Consent Decree to perform duties scheduled to occur after the date of entry of this decree shall be legally enforceable from that date.

40. It is the intent of the parties hereto that the clauses hereof are severable, and should any clause(s) be declared by a court of competent jurisdiction to be invalid and unenforceable, the remaining clauses shall remain in full force and effect.

41. ADEM reserves the right to elect to file a civil or criminal action for statutory penalties or injunctive relief against TVA for any violations of the AWPCA by TVA not covered by this Consent Decree and discovered after the date of entry of this Consent Decree.

42. This Consent Decree was negotiated, mutually drafted, and executed by the parties in good faith to avoid further litigation and is a settlement of claims which were vigorously contested, denied, and disputed. The execution of this Consent Decree is not an admission of any fact, liability or wrongdoing of any kind regarding any of the matters addressed in the Consent Decree. Accordingly, with the exception of this proceeding, this Consent Decree shall not be admissible in any judicial or administrative proceeding for use against any party over the objection of that party.

XVI. FORM OF NOTICE

43. Unless otherwise specified or agreed to in writing by all parties, all reports, notices, or any other written communications required to be submitted under this Consent Decree shall be sent to the respective parties at the following addresses:

Alabama Department of Environmental Management
Glenda Dean, Chief of Water Division

1400 Coliseum Blvd.
Post Office Box 301463
Montgomery, Alabama 36130-1463

Alabama Department of Environmental Management
James Wright, Office of General Counsel
1400 Coliseum Blvd.
Post Office Box 301463
Montgomery, Alabama 36130-1463

Maria V. Gillen, Senior Attorney
Tennessee Valley Authority
Office of the General Counsel
400 West Summit Hill Drive
Knoxville, TN 37902-1401

Terry L. Gamble, Plant Manager
Tennessee Valley Authority Colbert Fossil Plant
900 Colbert Steam Plant Rd.
Tuscumbia, AL 35674

44. Notifications to or communications with ADEM shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested. Notifications to or communications with TVA shall be deemed received ten (10) days after the date they are postmarked. However, the parties may agree to communicate through electronic mail in lieu of by written documents.

XVII. MODIFICATION

45. This Consent Decree represents the entire agreement of the parties and shall not be modified by any prior oral or written agreement, representation or understanding. Prior drafts of this Consent Decree shall not be used in any action involving the interpretation or enforcement of this Consent Decree. This Consent Decree may not be amended or modified except by written order of this Court. Any modification of this Consent Decree by the parties shall be in writing and approved by the Court before it will be deemed effective. However, minor changes which do not significantly alter the remedial or monitoring action to be conducted

by TVA may be made by the parties without the approval of the Court, provided such changes are agreed upon in writing.

XVIII. CONTINUING JURISDICTION OF THE COURT

46. The Court shall retain jurisdiction to enforce the terms and conditions and achieve objectives of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction, modification, implementation or execution of this Consent Decree.

XIX. TERMINATION

47. The obligations of this Consent Decree shall terminate upon the granting of a motion to the Court after each of the following has occurred:

- a. TVA has achieved compliance with all provisions contained in this Consent Decree;
- b. TVA has paid all penalties and other monetary obligations due hereunder and no penalties or other monetary obligations due hereunder are outstanding or owed to ADEM or the State of Alabama;
- c. TVA has certified compliance with Paragraphs 48 (a) and (b) above to the Court and to ADEM; and
- d. ADEM, within forty-five (45) days of receiving such certification from TVA, has not contested, in writing, that such compliance has been achieved. If ADEM disputes TVA's full compliance with this Consent Decree, the Consent Decree shall remain in effect pending resolution of the dispute by the parties or the Court.

48. TVA may petition ADEM for termination of the obligations of any paragraph of this Consent Decree, provided that TVA has satisfied each and every term and condition of that paragraph, and certified to ADEM that it has satisfied each and every term and condition of that paragraph.

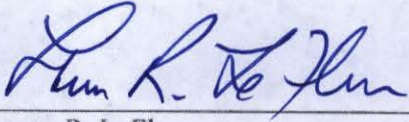
49. Any groundwater or surface water monitoring at Colbert imposed by ADEM or agreed to by TVA in future agreements, permits or enforcement orders shall not affect the termination of this Consent Decree.

XX. SIGNATORIES

The Department and TVA certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such parties to this document. WE HEREBY CONSENT to the entry of this Consent Decree in Alabama Department of Environmental Management v. Tennessee Valley Authority, Case No. 20-CV-2013-900123.

**FOR PLAINTIFF, ALABAMA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT:**

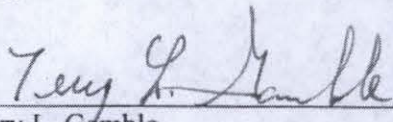
5/13/2013
Date


Lance R. LeFleur
Director
Alabama Department of
Environmental Management

ADDRESS OF COUNSEL:
Alabama Department of
Environmental Management
Post Office Box 301463
Montgomery, Alabama 36130

FOR DEFENDANT, TENNESSEE VALLEY AUTHORITY:

5/13/2013
Date


Terry L. Gamble
Plant Manager
Colbert Fossil Plant

ADDRESS OF COUNSEL:
Steven G. McKinney
Balch & Bingham LLP
1901 Sixth Avenue North, Ste. 1500
Birmingham, AL 35203

Maria V. Gillen
Senior Attorney
Tennessee Valley Authority
Office of the General Counsel
400 West Summit Hill Drive
Knoxville, TN 37902-1401

APPROVED, this _____ day of _____, 2013.

Jaqueline M. Hatcher
Circuit Judge