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May 23, 2016

Ms. Ashley R. Farless, PE, AICP  
NEPA Compliance  
Tennessee Valley Authority  
1101 Market Street  
Chattanooga, TN 37402

Re: TVA's Obligation to Prepare a Supplemental Environmental Impact Statement for Draft Ash Impoundment Closure Environmental Impact Statement, Part I - Programmatic NEPA Review, and Part II, Site-Specific NEPA Review ("DEIS") (Originally published December 2015); TVA's Continuing Refusal to Disclose and Properly Analyze Key Environmental Impacts in the DEIS

Dear Ms. Farless:

The undersigned groups are writing to notify the Tennessee Valley Authority of its obligation to prepare a supplemental environmental impact statement ("SEIS") to address (1) significant new information and changed circumstances regarding the regulatory requirements of the federal Coal Ash Rule; (2) significant changes in the proposed action at Bull Run Fossil Plant ("Bull Run"); and (3) significant omitted information regarding the existing environment at Bull Run. We also write to highlight TVA's continuing refusal to provide the public access to the key environmental analyses upon which the flawed—and now outdated—DEIS relied.

First, the availability of the early closure loophole in the federal Coal Ash Rule—upon which TVA relies in the DEIS to justify closing eleven of its coal ash ponds in place—has been called into serious question by the United States Environmental Protection Agency ("EPA"). As we noted in our previous comments, the federal Coal Ash Rule is the subject of litigation in the United States Court of Appeals for the District of Columbia. Pursuant to an agreement with environmental and industry petitioners, on April 18, 2016, EPA filed an unopposed motion to vacate and remand the early closure loophole. In the unopposed motion, EPA admits procedural deficiencies in the promulgation of the early closure loophole and does not seek to preserve that portion of the rule.

Vacatur would require TVA to comply with all of the closure and post-closure requirements of the Coal Ash Rule at inactive ponds regardless of whether it closes them by

April 2018. This regulatory change of circumstances eliminates the primary justification for TVA's proposal in the DEIS to expedite closure of ponds at six of its coal-fired power plants in Tennessee and Alabama, and significantly affects the analysis of alternatives and impacts throughout the programmatic DEIS and the site-specific analyses for impoundments at the Allen, Bull Run, Colbert, John Sevier, Kingston and Widows Creek Fossil Plants.

Second, with respect to the site-specific analysis for Bull Run, TVA must prepare a supplemental EIS based on significant changes in the proposed action. In mid-March, shortly after the close of the comment period on the DEIS, TVA submitted a final coal ash closure plan ("Final Plan") to the Tennessee Department of Environment and Conservation ("TDEC") that describes significant changes from the proposed action analyzed in the DEIS, including plans to decant and excavate the Stilling Pond and excavate the Bottom Ash Disposal Area, neither of which were identified as impoundments to be closed or otherwise addressed in the DEIS. The map below shows these additional areas that were not included in the project description or analysis of impacts in the DEIS.

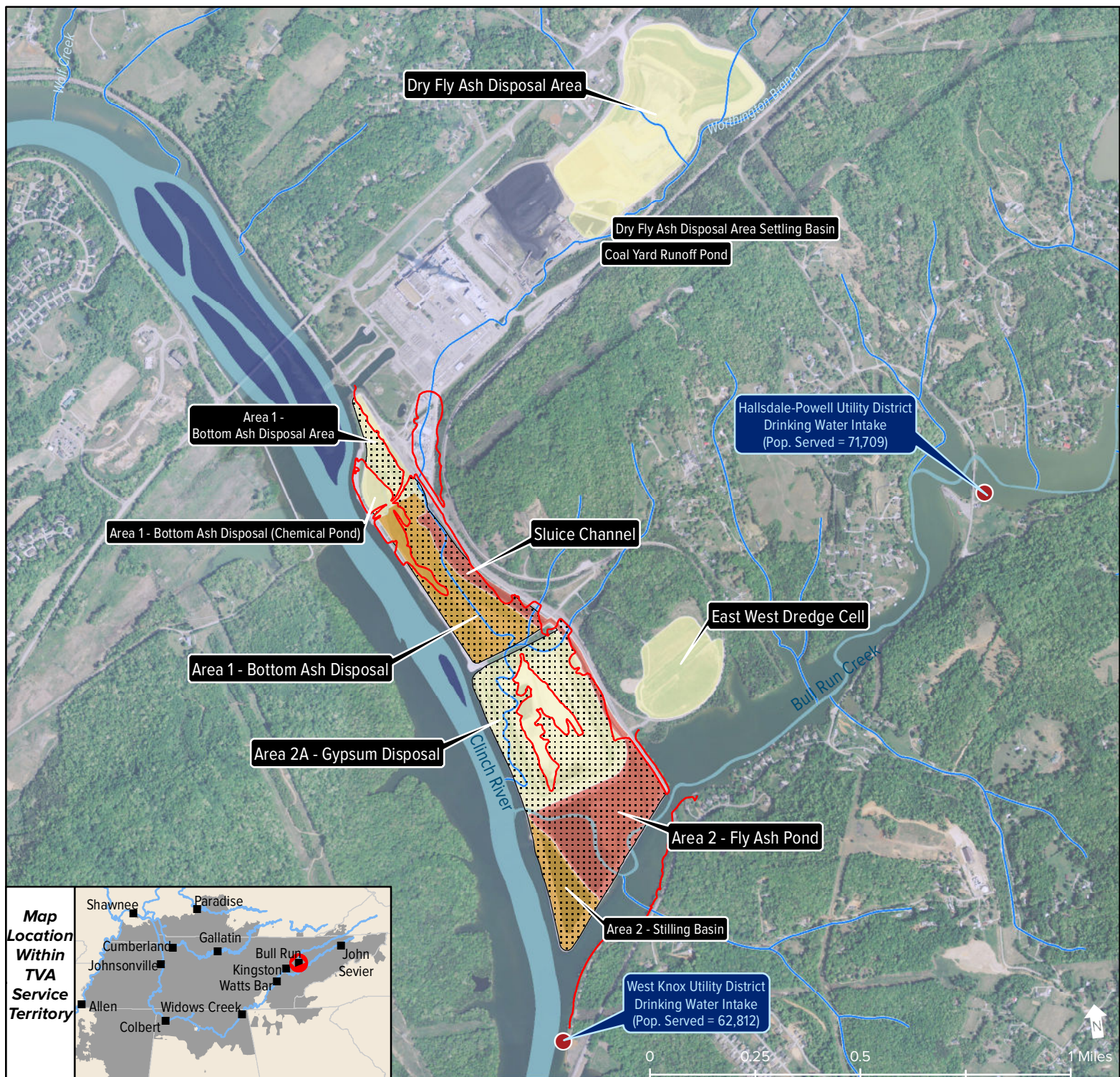
The map below also shows that the Fly Ash Pond is perched precariously at the confluence of Bull Run Creek and the Clinch River, atop the original streambed of Bull Run Creek and within the impounded reservoir normal pool elevation. Notwithstanding the Fly Ash Pond's location in surface and ground waters, the Final Plan proposes to dump ash from the Stilling Pond into the Fly Ash Pond, and excavate and dump ash from the Bottom Ash Disposal Area into the Fly Ash Pond, threatening violation of federal and state solid waste and water pollution control laws as detailed in the attached comments. Because these actions were not identified in the DEIS, the impacts associated with dumping additional coal ash into the Fly Ash Pond were not analyzed.



Figure 1

# Water Related Concerns for Coal Ash

Bull Run Power Station (Tennessee Valley Authority - Clinton, TN)



**About the map:** This map combines elevation and hydrography data from the early 1950s with recent aerial imagery (USDA-NAIP, 2014) in order to illustrate stream banks and elevations before construction of the Melton Hill Reservoir (1963) and the Bull Run Power Station ash ponds (1966), and current locations and extents of coals ash units and river banks.

1 = Illustrates an elevation contour line of 794 feet MSL (as shown on a 1962 TVA map of engineers plans for the ash pond plans). Normal pool of Melton Hill Reservoir fluctuates between 793 and 795 feet MSL. In some areas of the source map, the contour interval changes from 2 feet to 10 feet, where contours are tighter. In these areas the contour line drawn for this map follows the space between the 790 and 800 ft. MSL contour lines.

2 = "Original" refers to topographic and hydrographic conditions on the 7.5 min. series USGS topographic maps: Clinton, TN (1952) and Lovell, TN (1953).

3 = Illustrates the areas of the coal ash ponds that are built on elevation below the normal pool level of the reservoir. These areas also serve to further illustrate the significance of the 794 foot contour line(1) as delineating the inundation zone, or area flooded when the reservoir was created.

**DISCLAIMER:** Map intended for illustrative purposes only. Ash pond and landfill boundaries are best estimates based on documents from EPA and the utilities themselves. Locations of existing and retired ash ponds and landfills were created by heads-up digitizing of aerial imagery and USGS 7.5 min. topographic maps.



Third, in addition to significantly changing the proposed action, the Final Plan contains reference to significant information and analysis regarding the existing environment at Bull Run that TVA omitted in the original DEIS, including information regarding the Fly Ash Pond's placement within the groundwater table and its long and ongoing history of structural instability. Given its location and construction history, a more detailed analysis of site stability, geology, hydrogeology, floodplain risk (especially the risk of waste washout), groundwater and surface water quality and related impacts associated with closing the Fly Ash Pond in place is required.

Pursuant to applicable law, any supplemental EIS prepared by TVA to address these issues must be provided to the public for comment prior to issuance of the final EIS.

Sincerely,



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## Table of Contents

I.	TVA Must Prepare a Supplemental EIS and Release it for Public Comment Prior to Issuing a Final EIS. ....	6
A.	NEPA Requires a Supplemental EIS if an Agency Makes Substantial Changes in a Proposed Action, or There are Significant New Circumstances or Information Relevant to Environmental Concerns. ....	6
B.	EPA’s Unopposed Motion to Vacate the Early Closure Loophole Constitutes a Significant New Circumstance and New Information Relevant to Environmental Concerns. ....	7
C.	TVA Has Made Substantial Changes in its Proposed Action Relevant to Environmental Concerns at Bull Run Fossil Plant. ....	10
1.	The Final Plan threatens violation of the federal Coal Ash Rule and the Tennessee Solid Waste Disposal Act by proposing to dump additional coal ash into the Fly Ash Pond. ....	12
2.	The Final Plan threatens violation of the federal Clean Water Act and the Tennessee Water Pollution Control Act by proposing to dump coal ash into waters of the United States, discharge pollutants without a permit, and violate existing permit obligations. ....	16
D.	TVA Omitted Significant Information and Analysis Relevant to Environmental Concerns at Bull Run Fossil Plant. ....	18
1.	Omitted Information Shows that Ash in the Fly Ash Pond and Other Impoundments is in Contact With and Is Contaminating Groundwater. ....	18
2.	TVA’s analyses of impacts to surface water, aquatic habitat and endangered species, which rely on the assumption that contaminated groundwater will not leave the site, are inadequate. ....	19
3.	Omitted Information Shows that the Fly Ash Pond and Other Impoundments at Bull Run Have Been and Continue to Be Unstable. ....	20
4.	The Bottom Ash Disposal Area and the Gypsum Disposal Area are surface impoundments within the meaning of the federal Coal Ash Rule. ....	21
II.	TVA continues to refuse to provide the public access to the analysis of environmental impacts in the EPRI reports, upon which it relies in the EIS. ....	21

## COMMENTS

### **I. TVA Must Prepare a Supplemental EIS and Release it for Public Comment Prior to Issuing a Final EIS.**

#### **A. NEPA Requires a Supplemental EIS if an Agency Makes Substantial Changes in a Proposed Action, or There are Significant New Circumstances or Information Relevant to Environmental Concerns.**

NEPA requires an agency to prepare a supplemental EIS if: “(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”<sup>1</sup> An agency is required to “prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement. . . .”<sup>2</sup> TVA’s NEPA regulations require it to make “significant new information concerning action modifications, alternatives or probable environmental effects” available to the public.<sup>3</sup>

If changed circumstances or new information will affect the environment “in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.”<sup>4</sup> An agency must evaluate the significance of the new information using several metrics,<sup>5</sup> including, but not limited to:

- Potential impacts on public health and safety;
- The controversial nature of the effects on the environment;
- The degree of uncertainty about the effects;
- The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration; and
- Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.<sup>6</sup>

A supplemental EIS is also appropriate to correct significant omissions in the original draft.<sup>7</sup>

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<sup>1</sup> 40 C.F.R § 1502.9(c)(1).

<sup>2</sup> 40 C.F.R § 1502.9(c)(1).

<sup>3</sup> TVA Procedures for Compliance with the National Environmental Policy Act § 5.4.10.

<sup>4</sup> *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989).

<sup>5</sup> *Id.*

<sup>6</sup> See 40 C.F.R § 1508.27 (defining “significantly”).

<sup>7</sup> *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000).

**B. EPA's Unopposed Motion to Vacate the Early Closure Loophole Constitutes a Significant New Circumstance and New Information Relevant to Environmental Concerns.**

As discussed in our previous comments, litigation regarding the federal Coal Ash Rule is currently pending in the United States Court of Appeals for the District of Columbia.<sup>8</sup> The litigation includes a challenge to 40 C.F.R. § 257.100 (the “early closure loophole”), which TVA relies on as a basis for expediting closure at the eleven ponds discussed in Part II of the DEIS. On April 18, 2016, EPA filed an unopposed motion to, among other things, vacate the early closure loophole and remand that portion of the rule to the agency.<sup>9</sup> In the unopposed motion, EPA admits procedural deficiencies in the promulgation of the early closure loophole and does not seek to preserve that regulatory provision.<sup>10</sup> None of the parties to the litigation oppose EPA's motion.<sup>11</sup>

The effect of vacatur would be to require inactive surface impoundments to comply with the closure and post-closure provisions of the Coal Ash Rule regardless of whether they close prior to April 2018.<sup>12</sup> EPA asked the Court to stay the effect of the vacatur until EPA completes an expedited rulemaking to give affected inactive surface impoundments additional time to comply with the requirements applicable to existing surface impoundments.<sup>13</sup> Thus, vacatur of the early closure loophole would require the inactive surface impoundments analyzed in Part II of the DEIS (impoundments at the Kingston, Bull Run, Colbert, John Sevier and Allen Fossil Plants) to comply with the closure and post-closure requirements applicable to existing impoundments, with some extension of time to accommodate the regulatory change.

In the DEIS, a primary component of TVA's stated purpose and need for the proposed project at the programmatic level is to “assist TVA in complying with” the federal Coal Ash Rule.<sup>14</sup> TVA relies primarily on the early closure loophole to support its view that it should fast-track closure by capping in place several ponds throughout its system without even determining

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<sup>8</sup> Comments of SELC, et al., on DEIS for Ash Impoundment Closure Plan, submitted March 9, 2016 [hereinafter SELC Comments on DEIS], at 14; *see also* Proof Opening Brief of Environmental Petitioners at 37–41, *Util. Solid Waste Activities Group v. U.S. EPA*, No. 15-1219 (D.C. Cir. 2015).

<sup>9</sup> Att. S1, Respondent EPA's Unopposed Motion for Voluntary Remand of Specific Regulatory Provisions, *Util. Solid Waste Activities Group v. U.S. EPA*, No. 15-1219 (D.C. Cir. 2015) (“EPA Unopposed Motion”).

<sup>10</sup> *Id.*, 5.

<sup>11</sup> *Id.*, 10.

<sup>12</sup> *See id.* at 5-6 (asking the Court to vacate all of 40 C.F.R. § 257.100 except for the provision making inactive surface impoundments subject to all of the requirements applicable to existing surface impoundments); *see also* 40 C.F.R. § 257.100.

<sup>13</sup> EPA Unopposed Motion 5-6.

<sup>14</sup> TVA, Draft Ash Impoundment Closure Environmental Impact Statement (December 2015) [hereinafter DEIS] Part I, 7.

whether the ash is in contact with groundwater.<sup>15</sup> As we discussed in our previous comments, TVA defines the purpose and need too narrowly, without taking into account its obligation to comply with *all* laws and regulations that apply to its closure of coal ash ponds.<sup>16</sup> In addition, TVA erroneously interprets the Coal Ash Rule and the early closure loophole as encouraging early closure of inactive coal ash ponds regardless of potential risks to health and the environment.<sup>17</sup>

EPA's unopposed motion for vacatur of the early closure loophole constitutes a significant change in circumstances triggering the need for an SEIS for several reasons. First, it significantly affects the analysis of alternatives in the programmatic DEIS and each of its site-specific analyses, which are premised on TVA's purported need to close the ponds by April 2018. The analysis of several variations of clean closure by removal alternatives is affected at both the programmatic and site-specific level, including variations that would (1) store waste in properly permitted and constructed on-site landfills; (2) transport waste to properly permitted landfills using rail or barge; or (3) make use of intermodal transport.<sup>18</sup>

Second, vacatur of the early closure loophole would also significantly affect TVA's analysis of the impacts associated with variations of the closure by removal alternative at the programmatic level. The analysis of several of the impacts analyzed in the DEIS assumes that ponds would have to close by April 2018, which increases TVA's assessment of short-term impacts substantially. Affected impacts associated with clean closure by removal include but are not limited to: (1) Air quality impacts; (2) climate change; (3) transportation; (4) public safety; and (5) environmental justice.<sup>19</sup> Because the DEIS relies on the two-year timeframe of the early closure loophole for its assessment of many of the impacts associated with clean closure by removal, TVA must also revisit the comparison of relative impacts of the various alternatives at the programmatic level.<sup>20</sup>

Third, the analysis of alternatives and impacts in each site-specific EIS is affected by potential vacatur of the early closure loophole because it would eliminate TVA's primary

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<sup>15</sup> See, e.g., DEIS Part I, 7 ("EPA purposefully structured its CCR Rule to encourage regulated utilities to accelerate the closure of CCR impoundments...TVA identified impoundments to close prior to the April 17, 2018 deadline"); Part I, 25 (discussing "screening factors" for selecting alternatives, identifying "Schedule" as one such factor, and stating that "The CCR Rule is structured to encourage utilities to cease disposing of CCRs in impoundments by October 19, 2015, and complete closure activities by April 17, 2018").

<sup>16</sup> See, e.g., SELC Comments on DEIS, 3-7; 13-17.

<sup>17</sup> See, e.g., *id.*, 10-17.

<sup>18</sup> See, e.g., DEIS Part I, 19-33; see also SELC Comments on DEIS, 18-24.

<sup>19</sup> See DEIS Part I, 40 (air quality analysis assumes removal by truck over short period); 44 (climate change analysis assumes same); 100 (socioeconomics and environmental justice assumes same); 106-109 (transportation analysis assumes trucking most likely because of short timeframe for closure); 127-128 (public safety analysis assumes same).

<sup>20</sup> See DEIS Part I, 29-32.



justification for deciding to close its ponds in place. TVA uses the programmatic analysis to “screen” alternatives at the site-specific level, leading it to eliminate clean closure from further consideration in four of the six site-specific analyses in Part II.<sup>21</sup> Based on its rejection of clean closure as “unreasonable,” the DEIS does not provide a full analysis of the clean closure alternative (and many possible iterations of clean closure) or its potential impacts in the DEIS for Bull Run, Kingston, Colbert or Widows Creek. TVA’s “reasonability” determination at each site is based on assumptions made at the programmatic level regarding cost, duration, and environmental impacts, which, as explained above, are premised on the need to close sites by April 2018 under the early closure loophole. Moreover, even when TVA carried the clean closure alternative forward (in the John Sevier and Allen Part II site-specific analyses), it applied the short timeframe associated with the early closure loophole to reject clean closure in favor of cap in place.<sup>22</sup>

The site-specific EIS TVA prepared for the Sluice Channel and Fly Ash Pond at Bull Run provides a useful illustration of the significance of vacatur of the early closure loophole. Based on the assumption that it must close the Sluice Channel and Fly Ash Pond at Bull Run by April 2018, TVA rejected clean closure as unreasonable.<sup>23</sup> In doing so, TVA applied the screening factors it evaluated at the programmatic level.<sup>24</sup> “Key factors” leading to the rejection of clean closure as a reasonable alternative for analysis at Bull Run in the DEIS included air quality, transportation, cost and safety impacts based on the two-year constraint associated with the early closure loophole.<sup>25</sup> Importantly, TVA did not even evaluate the possibility of utilizing space in its proposed on-site landfill expansion for clean closure of the Sluice Channel and the Fly Ash Pond, despite having begun the permit application process for a new on-site landfill.<sup>26</sup>

In sum, the availability of the early closure loophole significantly influences TVA’s analysis of alternatives and impacts throughout Parts I and II of the DEIS. As we explained in our previous comments, the federal Coal Ash Rule does not require TVA to use the early closure loophole and TVA’s environmental analysis should not rely on an artificial two-year time constraint.<sup>27</sup> Vacatur of the early closure loophole would completely eliminate any basis for that

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<sup>21</sup> DEIS Part II (Bull Run), 6-9; DEIS Part II (Colbert), 6-9; DEIS Part II (Kingston), 6-9; DEIS Part II (Widows Creek), 6-9.

<sup>22</sup> DEIS Part II (Allen), 5-14; DEIS Part II (John Sevier), 5-14.

<sup>23</sup> *See* DEIS Part II (Bull Run), 6, 8-9.

<sup>24</sup> *See id.*

<sup>25</sup> *Id.* 8-9.

<sup>26</sup> Att. S2, TVA, Bull Run Fossil Plant Landfill Draft Environmental Impact Statement (May 2016); Att. S3, Letter from Revendra Awasthi (TDEC) to Sam Hixson (TVA), re: Notice of Incompleteness—Proposed Bull Run Fossil Plant Landfill #3 (January 12, 2016); Att. S4, TDEC email correspondence re: TVA BRF New CCR Landfill-stream realignment (August 25, 2015) (including map showing location of proposed new landfill). Of course, the proposed landfill will have to demonstrate compliance with the requirements for new landfills under the federal Coal Ash Rule and state Solid Waste Disposal Act.

<sup>27</sup> *See, e.g.,* SELC Comments on DEIS, 13-17.

constraint. Based on this significant change in circumstances, TVA must prepare a supplemental EIS to accurately reflect the relative impacts of clean closure and cap-in-place closure.

**C. TVA Has Made Substantial Changes in its Proposed Action Relevant to Environmental Concerns at Bull Run Fossil Plant.**

In the DEIS for Bull Run, TVA proposed to close the Sluice Channel and the Fly Ash Pond by decanting surface water from the impoundment,<sup>28</sup> grading and reconfiguring coal ash to reduce the footprint of the disposal site, using borrow material “as needed” to grade and cover the site, and installing a cover over the disposal site.<sup>29</sup> TVA mentioned in the DEIS that it planned to “analyze bottom ash to determine if it meets the beneficial use criteria, and if it could be used to help grade and cover the Fly Ash Impoundment.”<sup>30</sup>

Two days after the public comment period on the DEIS closed, TVA sent a “final” ash pond closure plan (“Final Plan”) to the Tennessee Department of Environment and Conservation (“TDEC”) Division of Water Resources, purportedly to comply with a provision in its NPDES permit.<sup>31</sup> In its Final Plan, TVA describes plans to close “portions of the wet CCP disposal area that manage and convey plant storm water and wastewater to Outfall 001.”<sup>32</sup> These areas include “the Sluice Channel, Bottom Ash Disposal Area, Gypsum Disposal Area 2A, Fly Ash Pond 2B and the Stilling Pond 2C.”<sup>33</sup> The Final Plan outlines three stages of closure.<sup>34</sup>

The Final Plan diverges from the proposed action described in the DEIS in several important ways. First, in the Final Plan, TVA proposes to either dredge or drain and excavate the Stilling Pond.<sup>35</sup> Second, TVA will dump the ash-laden sediment of the Stilling Pond into the Fly Ash Pond prior to capping the Fly Ash Pond.<sup>36</sup> In addition to ash from the Stilling Pond, TVA proposes to dump ash from the Bottom Ash Disposal Area into the Fly Ash Pond prior to

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<sup>28</sup> In our previous comments, we explained that simply decanting the free water does not meet the standard of dewatering under the federal Coal Ash Rule, which also requires removing the pore water. Moreover, decanting does nothing to address lateral inflow of groundwater in ponds located within the groundwater table. SELC Comments on DEIS, 30-32.

<sup>29</sup> DEIS Part II (Bull Run), 10.

<sup>30</sup> *Id.*

<sup>31</sup> Att. S5, TVA, TVA Bull Run Fossil Plant Ash Pond Closure Plan Final (Revision 2-March 2, 2016) [hereinafter Final Plan].

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Id.* Although TVA characterizes the Bottom Ash Disposal Area and the Gypsum Disposal Area as “wet disposal,” the Final Plan does not discuss closure of these areas in detail. TVA explains that in its view, these areas are governed solely by state solid waste laws. *Id.* at 3. As discussed in more detail below, we disagree.

<sup>34</sup> *Id.* at 7-8.

<sup>35</sup> *Id.* at 7.

<sup>36</sup> *Id.*

closure.<sup>37</sup> Third, once the Stilling Pond has been drained and excavated, it will then be used for treatment and discharge of process water and storm water.<sup>38</sup>

In the DEIS, TVA did not describe or analyze significant environmental impacts associated with dumping ash from the Bottom Ash Disposal Area into the Fly Ash Pond and the Sluice Channel. TVA did not mention any plans to close the Stilling Pond, which is located adjacent to the Fly Ash Pond at the convergence of Bull Run Creek and the Clinch River, or the Bottom Ash Disposal Area, which is located along the bank of the Clinch River. Nor did TVA mention plans to dump coal ash from the Stilling Pond into the Fly Ash Pond.

These departures from the proposed action in the DEIS are relevant to environmental concerns and will affect the environment in significant ways not already considered in the DEIS, triggering the need for an SEIS.<sup>39</sup> First, several of these changes threaten to violate relevant federal and state solid waste disposal and water quality laws and regulations in different ways than the proposed action, and in turn significantly impact public health and the environment. Second, the proposed changes—including the proposal to dump additional ash into the Fly Ash Pond—are controversial and involve unique or unknown risks. Indeed, TVA is under an existing obligation to quantify the full extent of soil, groundwater and surface water contamination at Bull Run *before* the State of Tennessee will consider whether closure in place sufficiently protects public health and the environment.<sup>40</sup> As the Tennessee Department of Environment and Conservation points out in its comments on the DEIS, TVA has not yet performed that analysis and TDEC has not authorized TVA to close the ponds at Bull Run in place.<sup>41</sup> Third, these proposed changes could set a precedent for future action at other ash impoundments in Tennessee, making them significant for Valley-wide implementation of the federal Coal Ash Rule and state law. TVA cannot implement the Final Plan without analyzing these significant impacts in a supplemental EIS.<sup>42</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Marsh*, 490 U.S. at 374; 40 C.F.R. § 1508.27.

<sup>40</sup> Commissioner's Order, *In re Tenn. Valley Auth.*, No. OGC015-0177 (Tenn. Dep't of Env't & Conservation Aug. 8, 2015) [hereinafter Commissioner's Order], [https://tn.gov/assets/entities/environment/attachments/TVA\\_Order\\_8-6-15.pdf](https://tn.gov/assets/entities/environment/attachments/TVA_Order_8-6-15.pdf).

<sup>41</sup> Att. S6, Letter from Kendra Abkowitz, TDEC Department of Policy and Planning, to Ashley Farless, TVA, 4-5 (March 8, 2016).

<sup>42</sup> In the cover letter to the Final Plan, TVA states that construction of the project described in the Final Plan is “scheduled for June 2016.” TVA has not issued a final EIS or a record of decision for the proposed action analyzed in the DEIS, let alone analyzed the additional significant impacts associated with the Final Plan. NEPA prohibits TVA from beginning construction in these circumstances. *See* 40 C.F.R. §§ 1506.1; 1506.10(b)(2).

**1. The Final Plan threatens violation of the federal Coal Ash Rule and the Tennessee Solid Waste Disposal Act by proposing to dump additional coal ash into the Fly Ash Pond.**

In the Final Plan, TVA describes new plans to dump ash from the Bottom Ash Disposal Area and the Stilling Pond into the Fly Ash Pond prior to closing the Fly Ash Pond.<sup>43</sup> TVA asserts that “[t]he reuse of bottom ash material from the bottom ash disposal area is permitted under the current CCR rules as beneficial reuse, for structural fill.”<sup>44</sup> This assertion is incorrect.

In fact, the federal Coal Ash Rule prohibits disposal of additional ash in surface impoundments that have not been properly closed pursuant to the Rule.<sup>45</sup> In the Preamble, EPA discusses and rejects the practice of placing dry ash over wet ash in a surface impoundment, “without stabilizing the CCR in the unit or capping the unit.”<sup>46</sup> EPA explains the significant risk associated with this practice:

A foundation composed of unconsolidated materials, such as CCR that is susceptible to slip-plane failure, is an unstable area (man-made), and, under provision of this rule, is therefore a prohibited location for new CCR units. The TVA Kingston ash fill failure was at least partly attributable to slip-plane failure of saturated CCR that made up the subgrade and foundation beneath the unit.<sup>47</sup>

For this reason, the Coal Ash Rule expressly defines an “overfill” as “a new CCR landfill constructed over a closed CCR surface impoundment,” and requires overfills to comply with the requirements applicable to new landfills, including location restrictions.<sup>48</sup>

In the Final Plan, TVA describes its plan to dump additional coal ash into the Fly Ash Pond prior to closing and capping it. In other words, TVA is proposing to build a new landfill over a surface impoundment. Because the additional ash is being excavated from other on-site surface impoundments, it is not even clear whether it will be dry or saturated. Moreover, as detailed in Section D below, the foundation of the Fly Ash Pond is sluiced coal ash, and much of it is saturated with groundwater and will remain saturated with groundwater even after

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<sup>43</sup> Final Plan, 6-8.

<sup>44</sup> *Id.* at 6.

<sup>45</sup> See 40 C.F.R. § 257.53 (defining “overfill” and “closed”); U.S. EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule, 80 Fed. Reg. 21,302, 21,312 (Apr. 17, 2015); as amended by Technical Amendments to the Hazardous and Solid Waste Management System; Att. S3, Disposal of Coal Combustion Residuals from Electric Utilities—Correction of the Effective Date, 80 Fed. Reg. 37,988, 21373-74 (July 2, 2015) [hereinafter Coal Ash Rule].

<sup>46</sup> Coal Ash Rule, 80 Fed. Reg. 21373.

<sup>47</sup> *Id.*

<sup>48</sup> 40 C.F.R. § 257.53 (defining “overfill” and “new CCR landfill”); see also *id.* §§ 257.60-70; Coal Ash Rule, 80 Fed. Reg. 21373.

decanting.<sup>49</sup> This is precisely the type of unstable area that the overfill requirements in the Coal Ash Rule are intended to address.

To the extent that TVA intends to dispose of ash from the Bottom Ash Disposal Area and the Stilling Pond in the Fly Ash Pond, it must comply with all of the requirements applicable to overfills, including “both the requirements applicable to the closure of surface impoundments or landfills, and with all of the technical requirements applicable to new landfills.”<sup>50</sup> Among other things, TVA is prohibited from creating a new landfill without a buffer of at least five feet between coal ash and the water table.<sup>51</sup> TVA’s ash disposal would plainly violate this provision by placing ash below the water table.<sup>52</sup>

Even if TVA were somehow able to dewater the Fly Ash Pond sufficiently so that it no longer impounded water, the disposal of ash in the dewatered pond would meet the definition of a “landfill” under the Coal Ash Rule and similarly trigger the requirements applicable to new landfills.<sup>53</sup>

Moreover, contrary to TVA’s view, dumping ash from other on-site impoundments into an unlined, leaking pit for disposal does not constitute “beneficial use” within the meaning of the Coal Ash Rule. In order to constitute “beneficial use,” a proposed use must satisfy several conditions, including (1) meeting relevant regulatory and design standards; and (2) for land applications greater than 12,400 tons, documenting “that environmental releases to groundwater, surface water, soil and air are comparable to or lower than those from analogous products made without CCR, or that environmental releases to groundwater, surface water, soil and air will be at or below relevant regulatory and health-based benchmarks for human and ecological receptors during use.”<sup>54</sup> TVA has not demonstrated that its proposal to permanently dispose of up to 250,000 cubic yards<sup>55</sup> of additional ash in an unlined pit satisfies any of these conditions.

Indeed, TVA cannot meet these conditions, because the Coal Ash Rule makes clear that use that is “akin to disposal” is not beneficial use:

EPA recognizes that several proven damage cases involving the large-scale placement, akin to disposal, of CCR have occurred under the guise of “beneficial reuse”—the “beneficial” use being the filling up of old quarries or gravel pits, *or*

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<sup>49</sup> See Section I.D below.

<sup>50</sup> Coal Ash Rule, 80 Fed. Reg. 21373.

<sup>51</sup> 40 C.F.R. § 257.60.

<sup>52</sup> Final Plan, Attachment C, Figures B and C.

<sup>53</sup> See 40 C.F.R. § 257.50 (defining “landfill” and “new CCR landfill”); 40 C.F.R. §§ 257.60-70 (requirements for new landfills).

<sup>54</sup> 40 C.F.R. § 257.53.

<sup>55</sup> DEIS Part II (Bull Run), 4 (TVA will need 250,000 cubic yards of borrow material to close the Fly Ash Pond and Sluice Channel).



*the re-grading of landscape with large quantities of CCR.* EPA did not consider this type of use as a “beneficial” use in its May 2000 Regulatory Determination and still does not consider this type of use to be covered by the exclusion... EPA has adopted criteria in the final rule to ensure that inappropriate uses that effectively are disposal will be regulated as disposal.<sup>56</sup>

Consistent with the definition and regulation of overfills as new landfills, the Coal Ash Rule defines as a landfill “any practice that does not meet the definition of a beneficial use of CCR.”<sup>57</sup> Nothing can be more “akin to disposal”—and further from beneficial use—than TVA’s proposal to dump up to 250,000 cubic yards of additional coal ash into the Fly Ash Pond.

Even if TVA’s proposal could possibly satisfy the minimum requirements of the federal Coal Ash Rule (which it cannot), nothing in Tennessee state law authorizes TVA to use coal ash as fill in an unlined, leaking pit. In fact, under Tennessee law, “It is unlawful to: [] Place or deposit any solid waste into the waters of the state except in a manner approved by the department or the Tennessee board of water quality, oil and gas.”<sup>58</sup> And while a provision of the state solid waste disposal law authorizes TDEC to issue permits for the use of “treated ash aggregate” in site preparations, it expressly defines “treated ash aggregate” as ash derived from the incineration of “municipal solid waste.”<sup>59</sup> The definition of municipal solid waste expressly excludes industrial waste.<sup>60</sup> Tennessee law therefore does not authorize TDEC to issue permits for the use of industrial waste, such as the coal ash in the Bottom Ash Disposal Area and the Stilling Pond, as fill in an unlined landfill saturated with groundwater.

In addition to TVA’s obligation to comply with the federal Coal Ash Rule, our previous comments identified the need for TVA to obtain a solid waste disposal permit under state law for permanent disposal of ash in the decanted Fly Ash Pond.<sup>61</sup> The Final Plan’s description of its plan to dispose of additional coal ash in the Fly Ash Pond make the applicability of this requirement all the more clear. Under state law, a “disposal facility” is “a facility or part of a facility at which solid waste disposal occurs.”<sup>62</sup> “Solid waste disposal” means “the process of permanently or indefinitely placing, confining, compacting or covering solid waste.”<sup>63</sup> “Solid waste” includes “ash” and other discarded material resulting from industrial operations.<sup>64</sup>

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<sup>56</sup> Coal Ash Rule, 80 Fed. Reg. 21330 (emphasis added).

<sup>57</sup> 40 C.F.R. § 257.53 (defining “CCR landfill”).

<sup>58</sup> Tenn. Code § 68-211-104(1).

<sup>59</sup> Tenn. Code § 68-211-124.

<sup>60</sup> Tenn. Code § 68-211-802(10).

<sup>61</sup> SELC Comments on DEIS, 55.

<sup>62</sup> Tenn. Rule 0400-11-01-.01.

<sup>63</sup> Tenn. Rule 0400-11-01-.01.

<sup>64</sup> *Id.*

Under the Tennessee Solid Waste Disposal Act, disposal facilities must satisfy siting requirements.<sup>65</sup> These requirements include but are not limited to the following:

- (1) Floodplain restrictions, including being designed and maintained to prevent washout of any solid waste;<sup>66</sup>
- (2) Prohibition against locating in wetlands unless “the presumption that practicable alternative to the proposed landfill is available which does not involve wetlands is clearly rebutted”;<sup>67</sup>
- (3) Restrictions on siting in karst terrain;<sup>68</sup>
- (4) Restrictions on locating in seismic zones or fault areas;<sup>69</sup> and
- (5) Engineering demonstrations related to locating in an unstable area.<sup>70</sup>

Disposal facilities must also include a buffer zone of 200 feet from “the normal boundaries of springs, streams, lakes.”<sup>71</sup> Leachate migration control standards, including a composite liner, are also required.<sup>72</sup> TVA must comply with these requirements to permanently dispose of ash in the Fly Ash Pond.

Moreover, once TVA has disposed of coal ash in the Fly Ash Pond, TVA proposes to close the site. In the Final Plan, TVA claims that Tennessee does not have state law governing closure of ash impoundments.<sup>73</sup> On the contrary, as explained above, Tennessee has solid waste disposal laws, and these govern disposal facilities, including dewatered ash impoundments “at which solid waste disposal occurs.”<sup>74</sup> Indeed, the active administrative order issued by TDEC is designed to ensure TVA’s compliance with state solid waste disposal laws as it closes its ash ponds throughout Tennessee.<sup>75</sup>

The decanted Fly Ash Pond is a disposal facility subject to the siting and closure requirements of state law. State law governing closure of a disposal area requires a facility to meet the following performance standard, in addition to other requirements: “Controls, minimizes, or eliminates, to the extent necessary to prevent threats to public health and the environment, post-closure escape of solid waste, solid waste constituents, leachate, contaminated

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<sup>65</sup> Tenn. Rule 0400-11-01.04.

<sup>66</sup> Tenn. Rule 0400-11-01.04(2)(n).

<sup>67</sup> Tenn. Rule 0400-11-01.04(2)(p).

<sup>68</sup> Tenn. Rule 0400-11-01.04(2)(q).

<sup>69</sup> Tenn. Rule 0400-11-01.04(2)(u).

<sup>70</sup> Tenn. Rule 0400-11-01.04(2)(w).

<sup>71</sup> Tenn. Rule 0400-11-01.04(3)(b).

<sup>72</sup> Tenn. Rule 0400-11-01.04(4).

<sup>73</sup> Final Plan, 3.

<sup>74</sup> Tenn. Rule 0400-11-01-.01.

<sup>75</sup> Commissioner’s Order, 2-4.

rainfall, or waste decomposition products to the ground or surface waters or to the atmosphere.”<sup>76</sup>

In the SEIS, TVA must disclose and analyze how the Final Plan will comply with applicable federal and state solid waste laws.

**2. The Final Plan threatens violation of the federal Clean Water Act and the Tennessee Water Pollution Control Act by proposing to dump coal ash into waters of the United States, discharge pollutants without a permit, and violate existing permit obligations.**

The DEIS baldly states that “TVA holds the permits necessary for the operation of BRF,” and only identifies the need to obtain storm water permits in connection with the proposed action.<sup>77</sup> As we noted in previous comments, the proposed action requires TVA to obtain permits under the federal Clean Water Act and the Tennessee Water Pollution Control Act.<sup>78</sup> The changes described in the Final Plan, together with information omitted in the DEIS, show that TVA will need to obtain additional permits and permit modifications in order to comply with federal and state water quality laws.

We previously commented on TVA’s obligation to obtain section 404 permit for the permanent disposal of coal ash in waters of the United States (Bull Run Creek and the Clinch River).<sup>79</sup> In the Final Plan, TVA makes clear that it not only plans to leave existing coal ash in place in the Fly Ash Pond, but also proposes to dump additional coal ash into the decanted Fly Ash Pond, which is located in waters of the United States.<sup>80</sup> An SEIS must identify the need to obtain a section 404 permit and accompanying section 401 water quality certification, as well as analyze surface water, wetlands and related impacts (including aquatic habitat and threatened and endangered species) associated with the Final Plan.

TVA has no permit to discharge pollutants into Bull Run Creek.<sup>81</sup> As set forth in more detail below, TVA omitted information in the DEIS that demonstrates that groundwater beneath

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<sup>76</sup> Tenn. Rule 0400-11-01.04(8)(a).

<sup>77</sup> DEIS, Part II (Bull Run), 13.

<sup>78</sup> SELC Comments on DEIS, Part I, 33-35; Part II (Bull Run), 55.

<sup>79</sup> SELC Comments on DEIS, 35, 55.

<sup>80</sup> See Figure 1, above, and Att. S7, Global Environmental LLC, Supplemental Technical Comments (May 13, 2016) [hereinafter Quarles Report II], Paragraphs 11-18. The Quarles Report II is incorporated into these comments by reference.

Quarles Report II, Paragraphs 11-18 and Ref. 1, 3, 4, 6, 8, 10, 11.

<sup>81</sup> See Att. S8, State of Tennessee NPDES Permit No. TN0005410 (Effective Date November 1, 2010, modified May 16, 2011), I [hereinafter Bull Run NPDES permit] (describing receiving waters as Clinch River for all permitted outfalls).

the Fly Ash Pond is contaminated and flows into Bull Run Creek.<sup>82</sup> Because TVA proposes to close the Fly Ash Pond in place, leaving the ash in contact with groundwater, the ash will continue to discharge into Bull Run Creek.<sup>83</sup> An SEIS must identify the need to cease these discharges, or, to the extent available, obtain a NPDES permit for discharges into Bull Run Creek. The SEIS must further analyze surface water, wetlands and related impacts (including aquatic habitat and threatened and endangered species) associated with discharges to Bull Run Creek that will occur under the Final Plan.

Our previous comments explained TVA's obligation to obtain a NPDES permit or permit modification for decanting wastewater and discharging it through existing outfalls.<sup>84</sup> This obligation also attaches to the decanting of the Fly Ash Pond and the Sluice Channel described in the proposed action in the DEIS. In 2011, TVA obtained a modification of its NPDES permit to address discharge of wastewater decanted during the closure of the Chemical Pond.<sup>85</sup> A modification similarly is required for decanting the Fly Ash Pond. As discussed in our previous comments, any such modification must establish technology-based effluent limitations for legacy wastewater.<sup>86</sup> TVA will also have to quantitatively demonstrate that the discharges – which will inevitably change in volume and water quality as the pond volume is lowered – will not violate water quality criteria. And TVA will have to conduct much more aggressive discharge monitoring. TVA will have to monitor more pollutants, and much more often, to ensure that water quality is protected.

The Final Plan also describes the possibility of “draining” the Stilling Pond.<sup>87</sup> An SEIS must describe how TVA plans to “drain” the Stilling Pond and, if the plan is to discharge into surface waters, identify the need to obtain a NPDES permit or permit modification for this activity. Assuming that TVA plans to discharge decanted water from the Stilling Pond through Outfall 001, decanting an additional pond will increase total pollutant load. An SEIS must analyze surface water, wetlands and related impacts (including aquatic habitat and threatened and endangered species) associated with the Final Plan.

Under the Final Plan, the drained and excavated Stilling Pond “will then be returned to service as a non-CCR wastewater treatment facility in accordance with the existing NPDES permit.”<sup>88</sup> The existing permit authorizes discharge of “ash pond effluent,” comprising a combination of sluiced ash, process water and storm water, from Outfall 001.<sup>89</sup> Modifying the

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<sup>82</sup> See Section I.D, below, and Quarles Report II, Paragraphs 11-27.

<sup>83</sup> *Id.*

<sup>84</sup> SELC Comments on EIS, 32-34.

<sup>85</sup> Bull Run NPDES permit, 4.

<sup>86</sup> SELC Comments on EIS, 32-34.

<sup>87</sup> Final Plan, 7.

<sup>88</sup> *Id.*

<sup>89</sup> Bull Run NPDES Permit, 1.

Stilling Pond to treat solely process water and storm water will significantly alter the characteristics of the waste stream discharging from Outfall 001. TVA's current NPDES permit requires it to notify TDEC of this planned change.<sup>90</sup> Under the Tennessee Water Pollution Control Act, it is unlawful to, among other things, modify treatment works without a valid permit.<sup>91</sup>

In the SEIS, TVA must disclose and analyze how the Final Plan will comply with applicable federal and state water quality laws.

**D. TVA Omitted Significant Information and Analysis Relevant to Environmental Concerns at Bull Run Fossil Plant.**

In addition to describing a closure process that differs significantly from the proposed action described in the DEIS, the Final Plan contains information and references regarding the existing environment at Bull Run that were omitted from disclosure and analysis in the DEIS.<sup>92</sup> This information is significant because it demonstrates that the Fly Ash Pond is in contact with groundwater and has a history of instability that neither the proposed action in the DEIS nor the Final Plan have fully addressed. Both of these facts influence the extent of impacts to ground and surface water quality and related impacts as well as the analysis of floodplain impacts in the DEIS. In addition, information in the Final Plan and other documents demonstrates that the Bottom Ash Disposal Area and the Gypsum Disposal Area impound water and should be regulated as surface impoundments under the federal Coal Ash Rule.

**1. Omitted Information Shows that Ash in the Fly Ash Pond and Other Impoundments is in Contact With and Is Contaminating Groundwater.**

The DEIS does not state forthrightly that ash in the Fly Ash Pond and other impoundments at Bull Run is in contact with groundwater.<sup>93</sup> However, a comparison of the surface elevations in an original construction drawing included in the Final Plan with groundwater monitoring reports that describe current groundwater elevations reveals that

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<sup>90</sup> *Id.*, 10.

<sup>91</sup> Tenn. Code § 69-3-108(b).

<sup>92</sup> See Quarles Report II, Paragraphs 8-10 and Ref. 1 (Stantec Consulting Services, Report of Geotechnical Exploration, Bottom Ash Disposal Area 1, Gypsum Disposal Area 1A and Fly Ash Pond Area 2, for the Bull Run Fossil Plant (April 12, 2010)) [hereinafter Stantec Geotechnical Report].

<sup>93</sup> See DEIS Part II (Bull Run), 15-19.



approximately 10 to 25 feet of ash in the disposal areas is in contact with groundwater that flows into the Clinch River and Bull Run Creek.<sup>94</sup>

Moreover, as we described in our previous comments, the DEIS downplays the extent to which the Fly Ash Pond is contaminating groundwater.<sup>95</sup> In particular, arsenic concentrations in the downgradient well from the Fly Ash Pond regularly exceed groundwater protection standards.<sup>96</sup> Groundwater mounding in the Fly Ash Pond has caused the groundwater to flow toward both Bull Run Creek and the Clinch River.<sup>97</sup> Groundwater is similarly contaminated at the Bottom Ash Disposal Area and the Gypsum Disposal Area, as well as the Dry Fly Ash Stack.<sup>98</sup> Given that a significant amount of ash is saturated with groundwater, capping the Fly Ash Pond in place will not prevent future contamination of groundwater. The DEIS must adequately disclose and analyze site-specific groundwater impacts associated with closing the Fly Ash Pond in place.

**2. TVA's analyses of impacts to surface water, aquatic habitat and endangered species, which rely on the assumption that contaminated groundwater will not leave the site, are inadequate.**

The DEIS assumes that capping the Fly Ash Pond in place “would eliminate the potential for any future lateral movement of water from berms and subsurface flow of groundwater and their subsequent release to surface waters.”<sup>99</sup> Accordingly, TVA also concludes that “aquatic habitat outside the CCR impoundments is not being impacted by this closure project.”<sup>100</sup> Contrary to these conclusions, capping the Fly Ash Pond in place will not prevent groundwater from flowing through coal ash and into surface waters, as explained above and in the attached Quarles Report II.<sup>101</sup> Given the consistent, ongoing contamination of groundwater and its demonstrated mounding and flow toward Bull Run Creek and the Clinch River, TVA must fully evaluate potential impacts to surface water, aquatic habitat, and endangered species.

In order to perform this evaluation, TVA must also adequately assess the existing environment, including the full extent of contamination of groundwater, sediment and surface water. TVA's assessment of the existing environment should also include updated species surveys. For example, in its analysis of impacts to endangered aquatic species, the DEIS relies on

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<sup>94</sup> Quarles Report II, Paragraphs 11-18 and Ref. 1, 3, 4, 6, 8, 10, 11; *see also* Att. S8A, URS, TVA Ash Pond Closure Plan Bull Run Fossil Plant Revision 1, 8 (May 31, 2011) (“The bottom of the [Fly Ash] pond is below the Clinch River water level, so the area cannot be completely dewatered prior to closure construction.”)

<sup>95</sup> SELC Comments on DEIS, 52-54.

<sup>96</sup> Quarles Report II, Paragraphs 26-27 and Ref. 6.

<sup>97</sup> *Id.*

<sup>98</sup> Quarles Report II, Paragraphs 32, 34 and Ref. 1, 4, 5, 7, 8.

<sup>99</sup> DEIS Part II (Bull Run), 25.

<sup>100</sup> *Id.* 34.

<sup>101</sup> Quarles Report II, Paragraphs 37-39.

an outdated mussel survey from 2010.<sup>102</sup> Because perpetual surface water and sediment contamination is a likely impact of the proposed action and the Final Plan, NEPA requires a more extensive and updated analysis of potential impacts to aquatic habitat, including endangered species.

### **3. Omitted Information Shows that the Fly Ash Pond and Other Impoundments at Bull Run Have Been and Continue to Be Unstable.**

In the DEIS, TVA describes stability under static conditions at Bull Run as “adequate.”<sup>103</sup> The Final Plan, however, describes a lengthy history of dam instability and a handful of partially-implemented improvements at Bull Run.<sup>104</sup> The Final Plan also refers to the Stantec Geotechnical Report for Bull Run.<sup>105</sup> That report details stability issues at all of the ash impoundments at Bull Run, and explains that the Fly Ash Impoundment has historically been unstable because of (1) the relatively high water levels in the pond; (2) lack of an underdrain system to control seepage across the dikes; and (3) weak shear strength of the dike material.<sup>106</sup>

The Fly Ash Pond currently is rated a Significant Hazard for dam safety.<sup>107</sup> A Significant Hazard designation means that the Fly Ash Pond risks include economic loss, environmental damage and disruption of lifeline facilities.<sup>108</sup> These risks are real. The public drinking water intake for the West Knoxville Utility District is a mere 0.25-mile downstream from the Plant and the Hallsdale-Powell Utility District is 2 miles upstream on Bull Run Creek.<sup>109</sup>

Neither the proposed action nor the Final Plan to close the Fly Ash Pond in place remedy the instability because they only address one source of instability: lowering the water level.<sup>110</sup> Neither the proposed action nor the Final Plan address the low shear strength of the sluiced ash on the bottom of the impoundment, seepage through the dike or weak shear strength of the dike materials.<sup>111</sup>

Moreover, as we explained in our previous comments, TVA did not analyze the potential for waste washout in flood events, which is significant based on the location of the Fly Ash Pond within the floodplain of Bull Run Creek and the Clinch River.<sup>112</sup> Given the ongoing structural

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<sup>102</sup> DEIS Part II (Bull Run) 34.

<sup>103</sup> *Id.* 7.

<sup>104</sup> Final Plan 4-5.

<sup>105</sup> *Id.*

<sup>106</sup> Quarles Report II, Paragraph 21 and Ref. 1.

<sup>107</sup> Final Plan 4.

<sup>108</sup> Att. S9, Stantec, Coal Combustion Facility Assessment Report, Slide 9 (October 20, 2010).

<sup>109</sup> Quarles Report II, Paragraph 20; *see also* Figure 1 of this letter.

<sup>110</sup> *Id.* Paragraphs 22-24.

<sup>111</sup> *Id.*

<sup>112</sup> SELC Comments on DEIS 34-35.

stability issues at the site that were not disclosed or analyzed in the DEIS, TVA must revisit its analysis of stability-related impacts associated with its proposal to cap the Fly Ash Pond in place.<sup>113</sup>

**4. The Bottom Ash Disposal Area and the Gypsum Disposal Area are surface impoundments within the meaning of the federal Coal Ash Rule.**

The federal Coal Ash Rule defines a “CCR surface impoundment” as “a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR.”<sup>114</sup> A CCR landfill, in contrast, is “an area of land or an excavation that receives CCR and which is not a surface impoundment...” The critical difference between the two categories is whether a unit is designed to—and continues to—hold CCR *and* liquid. Accordingly, the definition of an “inactive surface impoundment,” is “a CCR surface impoundment that no longer receives CCR on or after October 19, 2015 and *still contains both CCR and liquids on or after October 19, 2015.*”<sup>115</sup>

Neither the Bottom Ash Disposal Area nor the Gypsum Disposal Area are identified as surface impoundments under the federal Coal Ash Rule in the DEIS or the Final Plan.<sup>116</sup> The history of these two areas, however, reveals that they were designed as surface impoundments—that is, to hold CCR and liquid—and that they continue to hold both CCR and liquid due to the presence of groundwater and saturated sluiced ash.<sup>117</sup> Accordingly, they are surface impoundments within the plain language of the Rule, and must comply with the requirements applicable to inactive surface impoundments, including closure provisions. In an SEIS, these impoundments, along with the East/West Dredge Cell,<sup>118</sup> must be disclosed and existing contamination described as part of the existing environment at Bull Run.

To the extent the Final Plan proposes to close the Bottom Ash Disposal Area, it must be analyzed in the DEIS as closure of a surface impoundment as well.<sup>119</sup>

**II. TVA continues to refuse to provide the public access to the analysis of environmental impacts in the EPRI reports, upon which it relies in the EIS.**

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<sup>113</sup> Quarles Report II, Paragraph 36.

<sup>114</sup> 40 C.F.R. § 257.53.

<sup>115</sup> *Id.* (Emphasis added.)

<sup>116</sup> Indeed, TVA does not even identify these disposal areas as subject to the federal Coal Ash Rule on its compliance website. See <https://www.tva.com/Environment/Environmental-Stewardship/Coal-Combustion-Residuals/Bull-Run>.

<sup>117</sup> Quarles Report II, Paragraphs 28-31 and Ref. 1, 10.

<sup>118</sup> Quarles Report II, Paragraph 3.

<sup>119</sup> See Final Plan at 6-7.

As we discussed in our previous comments, the DEIS relies extensively on two reports prepared by the Electric Power Research Institute (“EPRI”) for key environmental analyses in the DEIS.<sup>120</sup> SELC requested the EPRI reports from TVA pursuant to the Freedom of Information Act (“FOIA”) and TVA refused to disclose them.<sup>121</sup>

Shortly after we submitted comments on the DEIS, SELC appealed the FOIA officer’s determination that the EPRI reports were exempt from disclosure.<sup>122</sup> In the appeal, SELC argued that the EPRI reports were not exempt, and, that even if they were, TVA should be responsible for paying to make them available to the public because TVA knew at the time of commissioning the EPRI reports it would use them for analysis of environmental impacts under NEPA.<sup>123</sup> In addition, we argued that TVA had failed to provide underlying documents we requested, which were, in any case, not exempt.<sup>124</sup>

The TVA FOIA Appeal Officer rendered a decision on April 14, 2016.<sup>125</sup> Pursuant to the decision, TVA continues to refuse to provide the EPRI reports the public, claiming “if TVA released this information, EPRI and other organizations to which TVA belongs or might belong may be unwilling to extend membership to TVA and other federal agencies out of fear that FOIA may be used to undercut their ability to obtain paying customers.”<sup>126</sup> Having apparently contracted with EPRI to prevent the public from viewing the EPRI reports, the onus remains on TVA to satisfy the public participation requirements of NEPA.

The FOIA Appeal Officer has ordered TVA to provide underlying documents related to the reports to SELC.<sup>127</sup> The FOIA officer has acknowledged its obligation and agreed to provide this information, including data and inputs TVA provided to EPRI for purposes of generating the reports.<sup>128</sup> We continue to wait for TVA to provide the responsive documents.

In a separate FOIA request, SELC also requested other documents cited and relied on in the DEIS.<sup>129</sup> That request was granted expedited status.<sup>130</sup> SELC received a final response on Friday, May 20, 2016 and is in the process of evaluating it.

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<sup>120</sup> SELC Comments on DEIS, 8-10.

<sup>121</sup> *Id.* 9.

<sup>122</sup> Att. S10, Letter from Amanda Garcia, SELC, to Janet J. Brewer, TVA, re: Southern Environmental Law Center FOIA Request dated February 9, 2016 re: EPRI studies relied on in TVA’s draft environmental impact statement for ash impoundment closure (March 17, 2016) [hereinafter FOIA Appeal].

<sup>123</sup> *Id.* 6.

<sup>124</sup> *Id.* 9-10.

<sup>125</sup> Att. S11, Letter from Janet J. Brewer, TVA, to Amanda Garcia, SELC (April 14, 2016).

<sup>126</sup> *Id.* 2.

<sup>127</sup> *Id.*

<sup>128</sup> Att. S12, Email correspondence between Denise Smith, TVA, and Amanda Garcia, SELC (April 19 to 25, 2016).

<sup>129</sup> Att. S13, Letter from Beth Alexander, SELC, to Denise Smith, TVA, re: Expedited Freedom of Information Act Request: Tennessee Valley Draft Ash Impoundment Environmental Impact Statement December 2015 (Feb. 10, 2016).

In summary, TVA must prepare an SEIS to address significant changes in regulatory circumstances that affect both its programmatic and site-specific analyses, as well as significant changes in the proposed action and omitted information regarding the existing environment at Bull Run. In preparing the SEIS, TVA is obligated to comply with the public participation requirements of NEPA, including the obligation to disclose information and analysis to the public and circulate the SEIS for public comment.

### ATTACHMENTS

- S1. Respondent EPA's Unopposed Motion for Voluntary Remand of Specific Regulatory Provisions, *Util. Solid Waste Activities Group v. U.S. EPA*, No. 15-1219 (D.C. Cir. 2015)
- S2. TVA, Bull Run Fossil Plant Landfill Draft Environmental Impact Statement (May 2016)
- S3. Letter from Revendra Awasthi (TDEC) to Sam Hixson (TVA), re: Notice of Incompleteness—Proposed Bull Run Fossil Plant Landfill #3 (January 12, 2016)
- S4. TDEC email correspondence re: TVA BRF New CCR Landfill-stream realignment (August 25, 2015)
- S5. TVA, TVA Bull Run Fossil Plant Ash Pond Closure Plan Final (Revision 2-March 2, 2016)
- S6. Letter from Kendra Abkowitz, TDEC Department of Policy and Planning, to Ashley Farless, TVA, 4-5 (March 8, 2016)
- S7. Global Environmental LLC, Supplemental Technical Comments (May 13, 2016), including references
- S8. State of Tennessee NPDES Permit No. TN0005410 (Effective Date November 1, 2010, as modified May 16, 2011)
- S8A. URS, TVA Ash Pond Closure Plan Bull Run Fossil Plant Revision 1 (May 31, 2011)
- S9. Stantec, Coal Combustion Facility Assessment Report, Slide 9 (October 20, 2010)
- S10. Letter from Amanda Garcia, SELC, to Janet J. Brewer, TVA, re: Southern Environmental Law Center FOIA Request dated February 9, 2016 re: EPRI studies

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<sup>130</sup> Att. S14, Letter from Denise Smith, TVA, to Beth Alexander, SELC, re: Expedited Freedom of Information Act Request: Tennessee Valley Draft Ash Impoundment Environmental Impact Statement December 2015 (February 19, 2015).



relied on in TVA's draft environmental impact statement for ash impoundment closure (March 17, 2016)

- S11. Letter from Janet J. Brewer, TVA, to Amanda Garcia, SELC (April 14, 2016)
- S12. Email correspondence between Denise Smith, TVA, and Amanda Garcia, SELC (April 19 to 25, 2016)
- S13. Letter from Beth Alexander, SELC, to Denise Smith, TVA, re: Expedited Freedom of Information Act Request: Tennessee Valley Draft Ash Impoundment Environmental Impact Statement December 2015 (Feb. 10, 2016)
- S14. Letter from Denise Smith, TVA, to Beth Alexander, SELC, re: Expedited Freedom of Information Act Request: Tennessee Valley Draft Ash Impoundment Environmental Impact Statement December 2015 (February 19, 2015)