

CIVIL COVER SHEET

COPY

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Larry Mays

(b) County of Residence of First Listed Plaintiff Roane (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number) Gordon Ball, Ball & Scott Law Offices, Suite 601, Bank of America Center, 550 Main Street, Knoxville, TN 37902 865.525.7028

DEFENDANTS

Tennessee Valley Authority

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known) Maureen Dunn, General Counsel, 400 W. Summit Hill Drive, Knoxville, TN 37902-1499

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, TORTS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause: Action for private nuisance

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 5,000,000.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

01/07/2009 /s/ Gordon Ball [Signature]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

# INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

## Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

**I. (a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

**II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

**III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

**IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

**V. Origin.** Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

**VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**  
 Example: U.S. Civil Statute: 47 USC 553  
 Brief Description: Unauthorized reception of cable service

**VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

**VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

**Date and Attorney Signature.** Date and sign the civil cover sheet.

# UNITED STATES DISTRICT COURT

for the

Eastern District of Tennessee

LARRY MAYS

Plaintiff

v.

TENNESSEE VALLEY AUTHORITY

Defendant

)  
)  
)  
)  
)

Civil Action No.

## Summons in a Civil Action

To: *(Defendant's name and address)*

Maureen Dunn, General Counsel  
Tennessee Valley Authority  
400 W. Summit Hill Drive  
Knoxville, Tennessee 37902-1499

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, whose name and address are:

Gordon Ball, Ball & Scott Law Offices  
Suite 601, Bank of America Center  
550 Main Street  
Knoxville, Tennessee 37902

If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

\_\_\_\_\_  
Name of clerk of court

Date: \_\_\_\_\_

\_\_\_\_\_  
Deputy clerk's signature

*(Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States allowed 60 days by Rule 12(a)(3).)*

**Proof of Service**

I declare under penalty of perjury that I served the summons and complaint in this case on \_\_\_\_\_,  
by:

- (1) personally delivering a copy of each to the individual at this place, \_\_\_\_\_;  
\_\_\_\_\_ ; or
- (2) leaving a copy of each at the individual's dwelling or usual place of abode with \_\_\_\_\_  
who resides there and is of suitable age and discretion; or
- (3) delivering a copy of each to an agent authorized by appointment or by law to receive it whose name is  
\_\_\_\_\_ ; or
- (4) returning the summons unexecuted to the court clerk on \_\_\_\_\_ ; or
- (5) other (*specify*) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ 0.00.

Date: \_\_\_\_\_

\_\_\_\_\_  
Server's signature

\_\_\_\_\_  
Printed name and title

\_\_\_\_\_  
Server's address

COPY

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

AT KNOXVILLE

2009 JAN -7 P 2:09

LARRY MAYS, on behalf of himself and all  
others similarly situated,

U.S. DISTRICT COURT  
EASTERN DIST. TENN.

No. 3:09-CV-6

BY \_\_\_\_\_ ) DEPT. CLERK

Jordan Guyton

PLAINTIFFS,

v.

CLASS ACTION

TENNESSEE VALLEY AUTHORITY,

JURY DEMAND

DEFENDANT.

CLASS ACTION COMPLAINT

NOW INTO COURT comes the Plaintiff, Larry Mays ("Plaintiff"), pursuant to Rule 23 of the Federal Rules of Civil Procedure, and files this Class Action Complaint ("Complaint"), individually and on behalf of all others similarly situated.

This Complaint is alleged upon information and belief, except as to those allegations which pertain to the named Plaintiff, which are alleged on his personal knowledge.

I. NATURE OF ACTION

1. Plaintiff brings this proposed class action against the Tennessee Valley Authority ("TVA") for damages for TVA's creation of a private nuisance in Roane County, Tennessee on behalf of himself and all other similarly situated riparian owners of land on the Emory and Clinch Rivers downstream from the TVA Kingston Fossil Plant (known locally as the "Kingston Steam Plant"). Specifically, on December 22, 2008, a coal fly ash slurry spill occurred near the TVA Kingston Steam Plant, a power plant located in the city of Kingston, in Roane County, Tennessee. The coal-fired plant uses three ponds to store fly ash, a byproduct of coal combustion, in wet form.

The spill resulted when an earthen dike broke at a 40-acre waste retention pond<sup>1</sup> constructed, operated, and supervised by TVA. As a result of the breach, approximately 1.1 *billion* gallons of coal fly ash slurry (a mixture of fly ash and water) was released into the surrounding community, covering the surrounding land with up to six feet of sludge. It was the largest fly ash slurry spill in United States history.

2. The Environmental Protection Agency (“EPA”) initially estimated that the fly ash spill would take four to six weeks to clean up; however, it is now estimated that the cleanup could take months and possibly years. The slurry traveled downhill, covering up to 600 acres of the surrounding land, damaging homes and flowing into nearby waterways such as the Emory and Clinch Rivers (tributaries of the Tennessee River).

3. The sludge discharged by TVA into the adjacent waterways and groundwater as a result of the spill contains effluents, compounds, and other pollutants and contaminants, including aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, chromium, cobalt, copper, iron, lead, magnesium, manganese, mercury, molybdenum, nickel, selenium, silver, thallium, tin, titanium, and zinc. The EPA has found “very high” levels of arsenic in water samples taken near the site of the spill, and has released data showing levels of arsenic exceeding 100 times safe levels in the water. The EPA has said that sediment and water samples from near the spill were above federal maximum levels for contaminants.

---

<sup>1</sup>The 40-acre unlined aboveground pond contained a watery slurry of fly ash generated by the burning of finely ground coal at the steam power plant.

4. TVA's actions at the Kingston Steam Plant have substantially and unreasonably interfered with the Plaintiff and other proposed Class members' property rights, privileges, and have substantially and unreasonably interfered with their use and enjoyment of their property so as to constitute a private nuisance under Tennessee common law.

5. Plaintiff – a riparian owner of land on the Clinch River downstream from the Kingston Steam Plant in Roane County, Tennessee – alleges that the TVA's December 22, 2008 discharge of the coal ash slurry has substantially and unreasonably interfered with Plaintiff's right to use and enjoy his property. Specifically, Plaintiff alleges that TVA's coal ash slurry spill has: (a) unreasonably altered and diminished the quality of water for Plaintiff and proposed Class members; (b) substantially diminished the quality of the surrounding environment; (c) substantially impaired the quality of life of the Plaintiff and proposed Class members and disrupted their well-being; (d) caused Plaintiff and proposed Class members to suffer a substantial disturbance in comfort and conveniences, including their peace of mind, as well as fear, stress, annoyance, and anxiety, *e.g.*, Plaintiff and other proposed Class members have heretofore been warned about allowing their children to play outside, not to go outdoors if they suffer from asthma, not to do heavy exercise outside, all due to the possibility of breathing the fly ash; and (e) caused Plaintiff and other proposed Class members to suffer out-of-pocket losses.

6. As a result of the massive discharge of coal ash slurry on Dec. 22, 2008, TVA has created a private nuisance by altering the properties of the surrounding waters, by discharging wastes into those waters, and by otherwise discharging such wastes, pollutants, and contaminants into the surrounding Roane County environs. TVA has therefore engaged, and continues to engage, in conduct – whether otherwise lawful or not – that substantially and unreasonably interferes with or

obstructs rights common to the Plaintiff and other proposed Class members. Based upon TVA's conduct, as described herein, TVA is liable to Plaintiff and other proposed Class members for the creation of the private nuisance under Tennessee common law.

7. By this action, Plaintiff seeks certification of a class of all persons similarly situated, trial by jury of twelve, a determination that TVA has perpetrated this private nuisance upon Plaintiff and such Class members and that the rights of the Plaintiff and such Class members were unreasonably and substantially interfered with as a result of TVA's discharge of coal ash slurry, an award of all compensatory damages available under Tennessee nuisance law, as set forth in *Freeman v. Blue Ridge Paper Prod., Inc.*, 229 S.W.3d 694 (Tenn. Ct. App. 2007), and all other, further, and equitable relief to which they might be rightly entitled.

## II. JURISDICTION AND VENUE

8. This Court has jurisdiction of this matter under 28 U.S.C. §1331, which grants federal subject matter jurisdiction over all suits against TVA. Subject matter jurisdiction is also based on 28 U.S.C. §1337 in that TVA is a federal corporation created by a federal statute regulating commerce.

9. Venue is proper in this District pursuant to 28 U.S.C. §1391(b). TVA has significant contacts in the Eastern District of Tennessee, as its principal executive offices are located in Knoxville. Venue is also proper in this District because the claim alleged herein arose here, and because TVA's acts, as alleged in this Complaint, occurred in this District. The Kingston Fossil Plant is located in the city of Kingston in Roane County, Tennessee, and is thus located within the



geographic boundary of the Eastern District of Tennessee. Further, all or a substantial part of the damages sustained by Plaintiff and proposed Class members as a result of TVA's coal ash spill in Kingston, Tennessee, as described herein, occurred, or is occurring, in this District.

### III. PARTIES

10. ***Plaintiff.*** Plaintiff, Larry Mays, is a citizen and resident of Roane County, Tennessee, and at all material times alleged herein, was a riparian owner of land located on the Clinch River downstream from the Kingston Steam Plant. Plaintiff suffered damages as described herein as a result of TVA's actions, and is a member of the proposed Class.

11. ***Defendant.*** TVA is a federal corporation and the nation's largest public power company. At all times material to this Complaint, TVA owned and operated the coal-fired Kingston Fossil Plant in Roane County, Tennessee.

12. TVA was established by the United States Congress in 1933 by virtue of the Tennessee Valley Authority Act of 1933, as amended, 16 U.S.C. §§ 831-831ee (as amended, the "TVA Act"), primarily to reduce flood damage, improve navigation on the Tennessee River, provide electric power, and promote "agricultural and industrial development" in the region. As a regional development agency, TVA operates fossil-fuel, nuclear, and hydropower plants, and also produces energy from renewable sources. TVA's power system operations constitute the majority of its activities and provide virtually all of its revenues.<sup>2</sup>

---

<sup>2</sup>Although TVA is similar to other power companies in many ways, there are many features other than those referenced above that make it different, including:

- Each member of TVA's board of directors (the "TVA Board") is appointed by the President of the United States with the advice and consent of the U.S. Senate.

13. TVA is also responsible for managing the nation's fifth-largest river system – the Tennessee River and its tributaries – for multiple river-system purposes, to reduce flood damage, produce power, maintain navigation, provide recreational opportunities, and protect water quality in the 41,000-square-mile watershed.

14. TVA is governed by the TVA Board. The Consolidated Appropriations Act, 2005, amended the TVA Act by restructuring the TVA Board from three full-time members to nine

- 
- TVA does not own real property; it holds real property as an agent for the United States.
  - TVA is required to make payments to the U.S. Treasury as a repayment of and a return on the appropriation investment that the United States provided TVA for its power facilities (the “Power Facilities Appropriation Investment”).
  - TVA is not authorized to issue equity securities such as common or preferred stock. Accordingly, TVA finances its operations primarily with cash flows from operations and proceeds from issuing debt securities.
  - The TVA Board sets the rates TVA charges for power. In setting rates, the TVA Board must have due regard for the objective that power be sold at rates as low as are feasible. These rates are not subject to judicial review or review by any regulatory body.
  - TVA is exempt from paying federal income taxes and state and local taxes, but it must pay certain states and counties an amount in lieu of taxes equal to five percent of TVA's gross revenues from the sale of power during the preceding year, excluding sales or deliveries to other federal agencies and off-system sales with other utilities, with a provision for minimum payments under certain circumstances.
  - TVA performs stewardship activities in connection with the Tennessee River and its tributaries and is required by federal law to fund these activities primarily with revenues from the power system and to a lesser extent with revenues from other sources.

part-time members, at least seven of whom must be legal residents of the TVA service area. TVA Board members are appointed by the President of the United States with the advice and consent of the United States Senate. The TVA Board, among other things, establishes broad goals, objectives, and policies for TVA; establishes long-range plans to carry out these goals, objectives, and policies; approves annual budgets; and establishes a compensation plan for employees.

15. TVA's current headquarters are located in Knoxville, Tennessee, within the Eastern District of Tennessee, where it has its principal executive offices. TVA may be served with process through its Executive Vice President and General Counsel, Maureen Dunn, at its principal place of business: 400 W. Summit Hill Dr., Knoxville, TN 37902-1499.

#### **IV. FACTUAL BACKGROUND**

##### **A. TVA's Kingston Steam Plant**

16. TVA's Kingston Fossil Plant ("Kingston Steam Plant") is located on Watts Bar Reservoir on the Tennessee River near Kingston, Tennessee. The plant has nine coal-fired generating units. At the time it was completed in 1955, the Kingston Steam Plant was the largest coal-burning power plant in the world. The plant consumes some 14,000 tons of coal a day and supplies enough electricity for 670,000 households.

##### **B. Fly Ash**

17. The coal-fired plant uses three ponds to store fly ash, a byproduct of coal combustion, in wet form. The retention pond is a multi-cell, above-ground pool, where TVA placed a mixture of fly ash and water. The fly ash settles to the bottom of a cell, then is placed into dredge cells. The water drains off into the steam plant's water intake. The pool's walls, called dikes by the agency, are made of bottom ash that is sculpted and landscaped to prevent erosion. Fly ash, which is the

consistency of face powder, is the fine toxic waste particulate pollutants produced by the combustion of coal, which are collected rather than allowing them to escape into the atmosphere, then mixed with water so they can be pumped into the retaining pond. Once the particulate matter settles out, it is moved to other, drier ponds.<sup>3</sup>

**C. The December 22, 2008 Spill**

18. The breached retaining pond was surrounded by 60-foot tall earthen walls, which had twice developed leaks since 2002. On December 22, 2008, after a period of heavy rain, the earthen dike that contained the fly ash breached and 5.4 million cubic yards of the sludge slid away. The fly ash rose 55 feet above the banks of the Emory River, which flows into the Clinch River and then the Tennessee, covering hundred's of acres in muck, causing a "tidal wave" of water and ash that also covered at least 12 homes, pushing one entirely off its foundation, rendering at least three uninhabitable, and causing damage to 42 residential properties. At least 22 residences were evacuated. It also washed out a road, ruptured a major gas line, and destroyed power lines. The spill killed a huge number of fish that are washing up on the shores of several rivers, whose waters are opaque with oily gray ash, and compromised the water supply for millions of people living downstream in Tennessee, Alabama, and Kentucky.

**D. Water Tests Showed High Levels of Arsenic and Elevated Levels of Other Compounds or Contaminants.**

19. Arsenic, lead, barium, thallium and other substances are compounds found in fly ash. These compounds can cause health problems, including cancer, liver damage and neurological

---

<sup>3</sup>Thomas J. Fitzgerald, the director of the environmental group, Kentucky Resources Council, and an expert on coal waste, told The New York Times that the ash should have been buried in lined landfills to prevent toxins leaching into the soil and groundwater, a process that had been recommended in a 2006 EPA report,

disorders. Although the EPA does not consider fly ash to be hazardous waste, the pond is regulated as a Class II landfill by the Tennessee Department of Environment and Conservation's Division of Solid Waste Management. TDEC inspection records going back to 2002 show that inspectors occasionally found signs of erosion and seepage.

20. Tests of river water near the spill showed elevated levels of lead and thallium, and “high levels” of arsenic. Specifically, the released data showed total arsenic levels in one water sample was 149 times the maximum level.

21. High levels of toxic heavy metals are also present in samples taken. Specifically, concentrations of eight toxic chemicals range from twice to 300 times higher than drinking water limits, according to scientists with Appalachian State University who conducted the tests. All water samples were found to contain elevated levels of arsenic, barium, cadmium, chromium, lead, mercury, nickel and thallium. The samples were taken from the immediate area of the coal waste spill, in front of the Kingston Fossil plant intake canal just downstream from the spill site, and at a power line crossing two miles downstream from the spill. “I have never seen levels of arsenic, lead and copper this high in natural waters,” said Dr. Carol Babyak, Assistant Professor of Chemistry at Appalachian State University.

22. TVA released an inventory of the Kingston Steam Plant's byproducts on December 29, 2008; it included arsenic, lead, barium, chromium, and manganese. Because the pond contained decades worth of ash from coal of several different types, it is believed that the area of the spill may contain "hot spots" of higher toxicity.

**E. Harmful Effects on Aquatic Life and Ecosystem**

23. Recreation on Watts Bar Lake and nearby regions downstream from the site could be affected for some time to come, according to Dr. Shea Tuberty, an environmental toxicologist at Appalachian State University. Some heavy metals can accumulate in fish, making them unsafe for eating. Although simply touching the water will not necessarily be dangerous for people, failure to wash after contact or swallowing water while swimming could also pose risks.

24. According to Dr. Tuberty, while the toxicity levels of heavy metals in the water are cause for concern to humans, there is even more cause for concern regarding aquatic life's ability to survive and reproduce in waters with these levels. "The ecosystems around Kingston and Harriman are going to be in trouble, the aquatic ones for some time, until nature is able to bury these compounds in the environment," said Tuberty. "I don't know how long that will take, maybe generations." Of particular concern are metals such as selenium and mercury, which bio-accumulate, or increase in concentrations in tissues of animals higher on the food chain. Birds and mammals that ingest fish and invertebrates contaminated with these metals are at risk of health issues.

25. According to Tuberty, with a sediment spill, down-river contamination can take place over time rather than immediately following a spill. "There is a huge quantity of this ash still laying there and being picked up from the water," Tuberty said. "Every time you get a significant rainfall, you're going to be getting another pulse of this coming through . . . until [the ash] is removed from the water, and sequestered one way or another, it is going to be a continued input." Tuberty said "what you could do now is take what was lost to the river, multiply them back by the concentrations

of those known compounds in the fly ash, and calculate a likelihood of what number of tons of these different heavy metals have been released in the water.” He concluded, “I think it's going to be a frightening number.”

**F. Largest Coal Slurry Spill in United States History**

26. It was the largest coal slurry spill in United States history, more than three times the size of the Martin County, Kentucky sludge spill of 2000, which spilled 306 million gallons of liquid coal waste. It has been called the worst environmental catastrophe in southeastern United States history. The sludge was enough to fill 1,660 Olympic-size swimming pools, and the amount released was about 50 times larger than the 1989 Exxon Valdez oil spill off the Alaskan coast.

27. On December 23, 2008, a TVA spokesman, Gil Francis Jr., stated that, at the time of the spill, the area contained about 2.6 million cubic yards of ash, and that two-thirds of that had been released. The New York Times noted that the amount spilled is larger than the amount stated to have been in the pond before the spill, a discrepancy the TVA was unable to explain.

**G. Factors Contributing to Spill**

28. Rain totaling six inches in ten days and 12° F (-11° C) temperatures were identified by TVA as factors that contributed to the failure of the earthen embankment. An October 2008 inspection report had identified a “minor leak” in the faulty wall, but the report was not finalized. Local residents reported that the spill was not a unique occurrence; the 1960s-era pond had been observed leaking, and being repaired, nearly every year since 2001, and a TVA news release confirmed that there had been two prior cases of seepage, in 2003 and 2006.

## H. History of Leaks and Failures

29. Leaks, seepage and water-logged walls plagued the fly ash retention pond at the TVA Kingston Steam Plant for years before the structure's December 22, 2008 catastrophic failure, according to TVA's February 2008 inspection report.

30. While TVA hasn't ended its official probe into the cause of the failure, the report indicates the agency knew about leaks at the site for more than two decades and opted not to pay for long-term solutions to the problem. The report details a Dec. 4, 2007, site inspection of the structural stability of the pond that crumbled on December 22, 2008.

31. According to the February 2008 report, seeps along the bottom of the dike where it blew open have been known for perhaps as long as a quarter-century, though inspectors in 2007 didn't find any wet spots. Over the past five years, the dikes have been prone to leaking except when repairs were being made, according to the report.

32. In November 2003, a leak along the bottom of the dike forced TVA to cease depositing fly ash into the pond's dredge cells. TVA considered at least eight options to address the leak, according to a Dec. 22, 2003, agency update. Three of the options would have provided a "global fix" to the problem, but high costs were cited as liabilities to pursuing them. The most expensive option – converting to a dry fly ash collection system – would have cost an estimated \$25 million. That's far less than the \$37 million spent to clean up a 2005 Pennsylvania fly ash spill which was one-tenth the size of the Kingston spill.



33. Two other proposed “global fixes” were to construct a synthetic liner for the pond for \$5 million and building a cutoff wall around the perimeter of the dredge pond for \$2.6 million. In addition to high cost, TVA noted that using a synthetic liner would set a precedent for all other dredge cells.

34. Consequently, TVA opted to repair the dike and install “underdrains,” which in a summary of the inspection report TVA likens to residential french drains, “to relieve water pressure.” Repairs were completed in 2005, but the dike sprang another leak the next year.

35. The report blames both the 2003 and 2006 leaks on inadequate internal drainage, which supposedly was addressed by the underdrains, and water getting into the dikes themselves. TVA installed “dewatering wells” in 2006, along with 30 piezometers, which are devices to monitor water levels inside the walls.

36. The report also noted that in November 2007 the agency stopped placing fly ash in the dredge cells, based on recommendations from consultants. “This preventive measure was taken (in November 2007) to reduce water levels in the dredge cell through the winter months in an attempt to avoid another blowout,” the report states.

37. Another leak was discovered in January 2008, shortly after the site inspection but before the report was finalized. An inspection determined that the water came from an “old underdrain system” and that evidence of iron-laden water proved the water leached out of the ash. The most recent inspection was conducted in October. TVA has said a preliminary report shows inspectors found a wet spot indicating “a minor leaking issue.” Two months later, and three days before Christmas, the dike burst.

38. Many chemicals and pollutants are contained in the sludge, of which no warning was provided to Plaintiff or other persons living in close proximity, and with no concern for possible damage to the surrounding ecosystem. As to the dangers posed by these chemicals and pollutants, Plaintiff and other proposed Class members have a reasonable concern and are rightly compelled to take safeguards. Moreover, reputable scientific institutions agree that these chemicals and pollutants have potentially adverse health effects, indicating that the existence of such effects is generally accepted.

39. Plaintiff and the proposed Class allege they are entitled to the agricultural, recreational and scenic use and enjoyment of their lands. As a result of TVA's private nuisance, Plaintiff and the proposed Class have suffered injuries.

40. As a direct and proximate result of TVA's unlawful conduct, Plaintiff and the proposed Class have suffered injuries, including, but not limited to: (a) the loss of enjoyment of their real property, (b) an impaired quality of life, (c) impaired quality of water, (d) personal discomfort, fear, stress, annoyance, and inconvenience, (e) loss of recreational use of their land, and (f) all other elements of a private nuisance.

## V. CLASS ALLEGATIONS

41. Plaintiff brings this action on behalf of himself and all others similarly situated, pursuant to Rule 23 of the Federal Rules of Civil Procedure, as the representative of the following Class:

**All individuals who own or owned real property located on the Emory or Clinch Rivers downstream from the TVA Kingston Fossil Plant in Roane County, Tennessee, during the period beginning on December 22, 2008 and ending on the date of trial who suffered available damages under Tennessee nuisance law.**

42. As shown below, the requirements of Rule 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure have been met.

43. This action meets all of the requirements of Rule 23 in that:

- (a) **Numerosity.** Plaintiff does not know the exact size of the proposed Class, but believes that there are approximately hundreds and perhaps thousands of members of the proposed Class and that the members of the proposed Class are sufficiently dispersed throughout Roane County. Therefore, joinder of all members of the proposed Class would be impracticable.
- (b) **Typicality.** Plaintiff's claims are typical of all members of the proposed Class. Plaintiff and all members of the proposed Class have been and continue to be damaged by TVA's conduct. Accordingly, by proving his own claim, Plaintiff will presumptively prove respective class members' claims.
- (c) **Commonality.** Questions of law and fact arising out of TVA's conduct are common to all members of the proposed Class, and such common issues of law and fact predominate over any questions affecting only individual members of the proposed Class. Class certification is appropriate under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The common issues of law and fact include, but are not limited to, the following:
  - (i) Does TVA's actions constitute a private temporary nuisance, which substantially and unreasonably interferes with Plaintiff's and the proposed Class' rights, within the Class Period described herein?
  - (ii) What compensatory damages are owed to Plaintiff and the proposed Class?
- (d) **Adequacy of Representation.** Plaintiff can and will fairly and adequately represent the interests of the proposed Class and has no interest that conflicts with or is antagonistic to the interests of such Class members. Plaintiff has retained attorneys competent and experienced in class actions to ensure the adequate representation of absent Class members. No conflict exists between Plaintiff and proposed Class members. Plaintiff understands and appreciates his duties to the proposed Class under Rule 23 of the Federal Rules of

Civil Procedure and is committed to vigorously protecting the rights of absent proposed Class members.

- (e) **Superiority.** Class certification is appropriate under Rule 23(b)(3) of the Federal Rules of Civil Procedure because a class action is the superior procedural vehicle for fairly and efficiently adjudicating the claims asserted given that:
- (i) Common questions of law and fact overwhelmingly predominate over any individual questions that may arise, such that there would be enormous economics to the courts and the parties in litigating the common issues on a class-wide instead of a repetitive individual basis;
  - (ii) Plaintiff's claims and proposed class members' claims arise from the same course of conduct, *i.e.*, TVA's December 22, 2008 discharge of coal fly ash into waters and environs near its Kingston Steam Plant in Roane County, Tennessee. Plaintiff and the proposed Class members also share the same legal rights, *i.e.*, the right to be free from unreasonable and substantial interference with their lands.
  - (iii) The type of use which TVA has invaded is the same for all Class members. Accordingly, individualized hearings are not necessary to determine whether TVA's interference was unreasonable or substantial.
  - (iv) Because the circumstances of this case do not require individualized hearings to prove the elements of nuisance, common issues of law and fact predominate over individual issues. The unique factual setting of this case also makes a class action the superior method of adjudicating this controversy.
  - (v) The size of each proposed Class member's individual damage claim is too small to make individual litigation an economically viable alternative, such that few proposed Class members have any interest in individually controlling the prosecution of separate actions;
  - (vi) Class treatment is required for optimal deterrence and compensation and for limiting the Court-awarded reasonable legal expenses incurred by Proposed Class members;

- (vii) Despite the relatively small size of individual proposed Class members' claims, their aggregate volume, coupled with the economics of scale inherent in litigating similar claims on a common basis will enable this case to be litigated as a class action on a cost-effective basis, especially when compared to repetitive individual litigation; and
- (f) **Manageability.** No unusual difficulties are likely to be encountered in the management of this class action, in that all questions of law or fact to be litigated at the liability stage are common to the proposed Class.

## VI. CLAIM FOR RELIEF

### PRIVATE TEMPORARY NUISANCE

44. Plaintiff re-alleges and incorporates by reference all of the foregoing paragraphs.

45. TVA is liable to Plaintiff and the proposed Class for creating a private nuisance in Roane County, Tennessee, in violation of Plaintiff's and the proposed Class members' right to be free from substantial and unreasonable interference with the agricultural, recreational, and scenic use and comfortable enjoyment of their land.

46. TVA has unreasonably and substantially interfered with the rights of Plaintiff and members of the proposed Class. The substantial interference with the rights of Plaintiff and the proposed Class, including interfering with their use and enjoyment of their land, greatly exceeds the annoyance, inconvenience or interference with which each individual or community must normally tolerate.

47. As a direct and proximate consequence of the aforesaid acts of TVA which constitute a private nuisance, Plaintiff and the proposed Class have suffered the following injuries:

- (a) A substantial diminution in the quality of the waters, environment, and recreational resources;

- (b) An impaired quality of life and disruption of their lives and well being;
- (c) Personal discomfort, fear, stress, annoyance and anxiety;
- (d) Loss of rental value of their property; and
- (e) Out-of-pocket losses.

48. TVA is liable to the Plaintiff and proposed Class for all of the foregoing harm.

## **VII. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays:

A. That the Court declare this action to be a proper class action maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure and declaring named the Plaintiff to be the Class Representative.

B. With respect to Plaintiff's private temporary nuisance claim, that this Court rule that TVA violated the common laws of the State of Tennessee and award Plaintiff and Class members aggregate compensatory damages in excess of \$5,000,000.

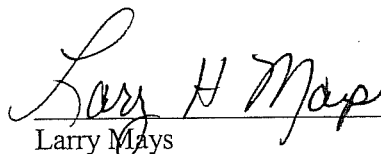
C. That this Court award Plaintiff post-judgment interest, costs, and reasonable attorneys' fees, as applicable.

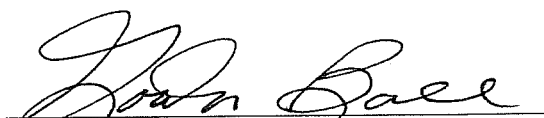
D. That the Court award such other, further, and general relief as the Court deems just and proper.

E. Pursuant to Fed. R. Civ. P. 38(b), Plaintiff demands a trial by jury of all claims asserted in this Complaint so triable.

Respectfully submitted, this \_\_\_\_ day of January, 2009.

**PLAINTIFF LARRY MAYS**

  
Larry Mays

BY: 

W. Gordon Ball, Esq., BPR # 001135  
Thomas S. Scott, Jr., Esq.  
**BALL & SCOTT LAW OFFICES**  
550 West Main Street, Suite 601  
Knoxville, Tennessee 37902  
Telephone: 865.525.7028  
Fax: 865.525.4679

Bruce D. Fox  
**FOX & FARLEY**  
310 North Main Street  
Clinton, Tennessee 37716  
Telephone: 865.457.6440

Michael D. Hausfeld  
**HAUSFELD LLP**  
1700 K Street NW, Suite 650  
Washington, DC 20006  
Telephone: 202.579.1089  
Fax: 202.747.5713