

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

BLACK WARRIOR RIVERKEEPER, INC.,)	
Plaintiff,)	
)	
)	
v.)	CIVIL ACTION NO.
)	
ALABAMA DEPARTMENT OF)	
ENVIRONMENTAL MANAGEMENT,)	
TREY GLENN, Director, Alabama Department)	
of Environmental Management, in his official)	
Capacity, and SHEPHERD BEND LLC,)	
Defendants.)	
)	

**COMPLAINT FOR REVIEW OF AGENCY ACTION, DECLARATORY JUDGMENT,
AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

Plaintiff Black Warrior Riverkeeper, Inc. ("Riverkeeper") brings this action seeking review of a decision of the Alabama Department of Environmental Management ("ADEM") and its director, Trey Glenn, sued in his official capacity, in issuing a permit to Shepherd Bend Mine, LLC ("Shepherd Bend") in violation of procedural and substantive requirements of Alabama and federal law. Plaintiff Riverkeeper also seeks declaratory and injunctive relief declaring the actions of Director Glenn in issuing the permit in violation of ADEM regulations to be illegal and therefore void, and enjoining Director Glenn and Shepherd Bend from, respectively, allowing the commencement of or commencing any actions purportedly authorized by the permit.

STATEMENT OF THE PARTIES

1. Plaintiff Riverkeeper is a non-profit membership corporation that is dedicated to the

preservation, protection, and defense of the environment, specifically the Black Warrior and its tributaries and watershed. Riverkeeper was formed in 2002, and has approximately 1,600 members. Riverkeeper actively monitors and supports effective enforcement and implementation of environmental laws, including the Federal Water Pollution Control Act (“Clean Water Act”) and the Alabama Water Pollution Control Act, on behalf of, and for the benefit of, its members. Members of Riverkeeper have recreated in, on, or near and have otherwise used and enjoyed the Mulberry Fork of the Black Warrior River. Riverkeeper and its members have an interest in seeing the requirements and procedures of state and federal law upheld and followed so that the organization and its members can enjoy and exercise their informational and procedural rights, including the right to educate themselves and the public about environmental concerns and policy issues affecting the Black Warrior River, as well as their right to have environmental decisions carried out in accordance with the evaluative and notice requirements of applicable law and regulation.

2. Defendant ADEM is an agency of the State of Alabama whose responsibility is to adopt and enforce rules and regulations to protect and improve the quality of Alabama’s environment and the health of all its citizens.

3. Defendant Trey Glenn is the Director of ADEM and is sued in his official capacity.

4. Defendant Shepherd Bend is an Alabama corporation formed in October of 2007 for the purpose of owning and operating mines in the State of Alabama. Defendant Shepherd Bend has proposed the construction of a 1,773-acre coal mine along the banks of the Mulberry Fork of the Black Warrior River in Walker County, Alabama (“the site”). As more fully set forth below, Defendant Shepherd Bend has received an unlawfully granted permit to cover discharges from

its mining operations from Defendant ADEM. In connection with its efforts to obtain the permit, Defendant Shepherd Bend submitted false and incomplete information to ADEM.

STATEMENT OF THE FACTS

A. Facts Related to ADEM's Failure to Provide Adequate Public Notice and Access to Public Documents

5. On October 10, 2007, Shepherd Bend applied for a National Pollutant Discharge Elimination System ("NPDES") permit from ADEM to authorize the discharge of water from its mining operations into the Mulberry Fork of the Black Warrior River and certain tributaries. Shepherd Bend plans to release discharges from its mining operations within 800 feet of the Mulberry Raw Water Pump Station, a drinking water intake valve maintained by the Birmingham Water Works Board. The Mulberry Raw Water Pump Station is one of the largest sources of drinking water for the Birmingham water system.

6. Alabama and federal law require that the process for issuance of a permit be an open and public process with rights for citizen participation. *See, e.g.,* Ala. Code § 41-22-4 (2008); Ala. Admin Code r. 335-6-6-.21 (2008); 33 U.S.C. § 1342 (2008), 40 C.F.R. § 123.25 (2006).

7. In November of 2007, ADEM released a draft permit (NPDES Permit No. AL0079162) which proposed the authorization of Shepherd Bend's discharges at the site. Pursuant to the requirements of Alabama and federal law, ADEM provided a thirty day period in which the public could comment on the draft permit. *See* Ala. Admin. Code r. 335-6-6-.21(2) (2008).

8. In December of 2007, ADEM published its "Guide for Citizen Participation: How to Make Your Voice Heard on Community Environmental Issues." *See* Alabama Department of Environmental Management, Guide for Citizen Participation 27, 32 (2007), available at <http://www.adem.state.al.us/Publications/CitizensGuideFirstPrinting12-07.pdf> (last visited Dec. 18, 2008), attached hereto as Exhibit 1. In this guidance, ADEM explained the public

participation process that the agency follows. According to ADEM, the issuance of environmental permits for new facilities is a process that “require[s] public input.” *Id.* at 21. ADEM further explained that “[t]he decision to issue or deny a permit will be sent to the applicant, **and any persons who submitted public comments** or otherwise requested that they be notified of the decision.” *Id.* at 27 (emphasis added). Similarly, ADEM explained that “any person who submitted public comments [will be] notified when the permitting decision is issued” “through the issuance of a formal “Notice of Decision” to commenters that “describes whether and why the permit or other approval was issued or denied.” *Id.* at 32.

9. Riverkeeper relied on the procedures outlined in the Guide for Citizen Participation, and on past practices of ADEM that were consistent with those outlined in the Guide for Citizen Participation, during its participation in the permitting process for Shepherd Bend mine.

10. On December 13, 2007, Riverkeeper submitted comments on the draft permit and formally requested a public hearing and a response to comments. Riverkeeper’s comments raised concerns regarding the proximity of the mining operation to the drinking water intake valve and additional deficiencies in the draft permit regarding expected water quality impacts.

11. On December 14, 2007, the Birmingham Water Works Board submitted comments on the draft permit and formally requested a public hearing. *See* Letter of December 14, 2007 from Mac Underwood, Birmingham Water Works Board, to Steve Jenkins, Alabama Department of Environmental Management, attached hereto as Exhibit 2. The Birmingham Water Works Board also raised concerns regarding the proximity of the mining operation to its drinking water intake valve and additional deficiencies in the draft permit regarding expected water quality impacts. Furthermore, the letter notes that the permit’s limits on iron and manganese are not protective of drinking water uses and could result in additional operational and maintenance costs at its water

treatment facility. In its tenth comment on the permit, the Birmingham Water Works Board complained that the permit application was incomplete because the permit was missing important documents, including a Pollution Abatement/Prevention Plan ("PAP plan"), an integral and essential part of the permit. *See* Ala. Admin. Code rr. 335-6-9.03, 335-6-9-.05 (2008).

12. In February of 2008, ADEM representative Scott Hughes told a reporter with *The Birmingham News* that ADEM was evaluating Riverkeeper's request for a public hearing. *See* Kent Faulk, *ADEM Mine water decision awaited; City system opposes proposed discharge into Mulberry Fork*, THE BIRMINGHAM NEWS (Feb. 24, 2008), attached hereto as Exhibit 3.

13. On June 3, 2008, in response to a direct inquiry by Riverkeeper staff, Brian Marshall of ADEM told Riverkeeper that Shepherd Bend had withdrawn its permit application, and would be working with ADEM to apply for a new permit.

14. On June 4, 2008, Riverkeeper staff met with Brian Marshall of ADEM. Marshall told Riverkeeper that ADEM was reorganizing many divisions, including the mining and permit division affecting the Shepherd Bend permit. Marshall also informed Riverkeeper that, contrary to ADEM's representations just one day previously on June 3, 2008, ADEM was still considering the original permit application submitted by Shepherd Bend. Marshall further explained that due to the sensitive nature of the case, its complexity, its political sensitivity, and the reorganization process, ADEM had not made a decision whether to grant, deny, or request modifications in the proposed permit. Finally, Marshall explained that ADEM had not made a decision regarding Riverkeeper's and the Birmingham Water Works Board's requests for a hearing, but that he felt a hearing would be granted in this case.

15. On July 21, 2008, ADEM issued a final permit to Shepherd Bend. The final permit became effective on August 1, 2008. In connection with its issuance of the final permit, ADEM

circumvented and avoided the requirements of Alabama and federal law and ADEM's published policies so as to deprive the public, including Riverkeeper, of its legal rights.

16. In direct contravention of the requirements of Alabama and federal law and ADEM policies explained in its Guide for Citizen Participation, ADEM did not send a Notice of Decision to Riverkeeper or the Birmingham Water Works Board, parties who had commented on the permit. ADEM did not otherwise notify Riverkeeper or the Birmingham Water Works Board of its final decision to issue the permit.

17. Likewise, because of ADEM's failure to send Riverkeeper a Notice of Decision as required by Alabama and federal law and in accordance with the policies outlined in its Guide for Citizen Participation, Riverkeeper did not receive any response to its comments.

18. ADEM similarly did not provide Riverkeeper with any response to its request for a hearing on the draft permit.

19. On November 24, 2008, Riverkeeper and the Birmingham Water Works Board learned of ADEM's issuance of the final permit for Shepherd Bend. Riverkeeper learned this when a reporter from *The Birmingham News* informed them that he had heard from a reliable source at ADEM that the permit had been issued several months earlier.

20. Riverkeeper staff contacted Brian Marshall at ADEM to confirm that the permit had been issued. Marshall informed Riverkeeper that it had, and Riverkeeper requested a copy of the permit. Marshall provided Riverkeeper staff with a copy of the final permit via email on November 25, 2008.

21. On December 3, 2008, having learned of issuance of the final permit, Riverkeeper staff contacted ADEM and asked to review ADEM's file for the Shepherd Bend site pursuant to Alabama's open records laws. Riverkeeper asked to see "the actual paper file for this facility,

including all records of correspondence related to this permit.” *See* Email of December 3, 2008 from John Kinney, Riverkeeper to Azure Jones, ADEM, attached hereto as Exhibit 4.

22. On December 5, 2008, Riverkeeper staff conducted the file review. At this file review, ADEM provided Riverkeeper with a CD that ADEM claimed contained all of its files for the site. The CD contained only sixteen electronic documents. The last document included on the CD was dated March 21, 2008, four months before the final permit was issued by ADEM.

23. During the file review, Brian Marshall from ADEM explained to Riverkeeper staff that ADEM is now attempting to keep all “public” files only electronically, and that ADEM managers choose selected documents from their paper files for any given site to be placed in the electronic file. Brian Marshall explained to Riverkeeper staff that he had additional paper files for the Shepherd Bend site in his office, but that he was waiting for direction from superiors as to what should go in the electronic “public” file. In other words, the “public” file placed on the CD contained only specifically selected documents.

24. On December 9, 2008, undersigned counsel for Riverkeeper emailed Brian Marshall to confirm that Riverkeeper had been provided “all materials that ADEM had in its files for the Shepherd Bend mine project.” *See* Email from Gil Rogers, Southern Environmental Law Center, to Brian Marshall, ADEM, Dec. 9, 2008, attached hereto as Exhibit 5.

25. On December 11, 2008, Brian Marshall at ADEM responded that he had “provide[d] all documentation that I am aware of regarding the above-referenced permit.” *See* Email from Brian Marhsall, ADEM to Gil Rogers, Southern Environmental Law Center, Dec. 11, 2008, attached hereto as Exhibit 6.

26. Marshall also explained that there had been no change in policy at ADEM regarding providing notice to those who had submitted comments on a draft permit. With respect to

issuance of the final permit to Shepherd Bend, however, ADEM had acted in contravention of the requirements of Alabama and federal law and ADEM's policy explained in the Guide for Citizen Participation.

27. In an article published in *The Birmingham News* on Sunday, December 14, 2008, ADEM representative Jerome Hand explained that, in direct contravention of ADEM policy announced in the Guide for Citizen Participation, ADEM had not sent out Notices of Decision or the agency's response to comments on the draft permit to Alabama citizens, like Riverkeeper, who had submitted comments on the draft permit. Hand also explained that ADEM had decided against holding a public hearing on the draft permit because the agency selected a course of action that was "best for the state." See Kent Faulk, *Birmingham Water Works, environmental group surprised permit issued to mine*, THE BIRMINGHAM NEWS, December 14, 2008, available at <http://www.al.com/news/birminghamnews/statebriefs.ssf?/base/news/1229246213102190.xml&coll=2> (last visited December 17, 2008), attached hereto as Exhibit 7.

B. Facts Related to Substantive Flaws in the Permit

1. PAP Plan

28. According to ADEM regulations, surface mine operators "shall provide the Department with a pollution abatement and/or prevention plan" Ala. Admin. Code § 335-6-9-.03 (2008). Moreover, permits "shall be based on a determination by the Department that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality." Ala. Admin. Code § 335-6-9-.05 (2008). The PAP plan is therefore the document that allows ADEM to make a judgment as to how pollution will specifically be controlled off of a site, and how water quality in the receiving waterways will be maintained.

29. In its permit application, Shepherd Bend disclosed that it was not submitting a PAP plan with its application. Shepherd Bend further disclosed that no detailed mining and engineering design plans had been submitted to the Alabama Surface Mining Commission, an agency which regulates mining activities in Alabama, but that a permit application, “with detailed plans for each proposed outfall will be submitted to A[labama] S[urface] M[in]ing C[ommission] for their approval December 2007.” *See* Shepherd Bend Permit application of October 10, 2007, attached hereto as Exhibit 8.

30. In its permit application, Shepherd Bend provided a Professional Engineer’s Certification regarding the status of its PAP plan. In this certification, professional engineer David Muncher certified that “a comprehensive PAP plan . . . has been prepared under my supervision for this facility utilizing effective, good engineering and pollution control practices and in accordance with the provisions of ADEM Admin. Code Division 335-6.” *Id.* at 11.

31. Alabama regulations provide that one grounds for termination of a permit is “the permittee’s failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee’s misrepresentation of any relevant facts” Ala. Admin. Code § 335-6-6-.17(c)(1)(ii) (2008).

32. The draft permit issued by ADEM did not include a PAP plan.

33. The final permit issued by ADEM does not include a PAP plan.

34. There is no PAP plan in the file produced by ADEM. In fact, ADEM has represented that it never received or reviewed a PAP plan for the Shepherd Bend site.

35. The Alabama Surface Mining Commission has not received a permit application or a PAP plan from Shepherd Bend, despite Shepherd Bend’s representations to ADEM that it would be submitting a permit application with a PAP plan to the Alabama Surface Mining Commission

in December of 2007. The Alabama Surface Mining Commission has represented that it has not received, reviewed, or approved any PAP plan for the Shepherd Bend site. *See* Letter of December 16, 2008 from Randall Johnson, Alabama Surface Mining Commission to Catherine Wannamaker, Southern Environmental Law Center, attached hereto as Exhibit 9.

36. In its response to comments appended to the final permit, ADEM did not respond to the Birmingham Water Works Board's tenth comment -- that the permit was incomplete because there was no PAP plan.

37. In response to a different comment, however, ADEM explained that the PAP plan for this facility had "been prepared by a professional engineer (PE) registered in the State of Alabama and is designed to ensure reduction of pollutants in the waste stream to a level that, if operated properly, the treated discharge will not contribute to or cause a violation of applicable State water quality standards. . ." *See* ADEM Response to Comments at 10, attached hereto as Exhibit 10.

38. Based on ADEM's representations and its public files, ADEM had never seen a copy of the PAP plan and, to date, has no copy of the PAP plan in its files.

2. Violation of Water Quality Standards

39. Pursuant to federal NPDES regulations, "[n]o permit may be issued...[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i) (2008). As a further matter, federal regulations require that every NPDES permit include conditions in order to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d) (2008).

40. While the permit otherwise established daily average and daily maximum discharge limitations on iron, manganese, and total suspended solids (“TSS”), ADEM included in the final permit exemptions from these limitations during all precipitation events. Permit at 5-8.

41. For iron, the Permit completely exempts compliance with the daily average discharge limitation during any precipitation event equal to or less than a “2-year, 24-hour precipitation event.” Id. at 6. Furthermore, the Permit increases the daily maximum discharge limitation for iron to 7.0 mg/L, from 6.0 mg/L, during any precipitation event equal to or less than a “2-year, 24-hour precipitation event.” Id. For any precipitation event greater than a “2-year, 24-hour precipitation event,” the Permit completely exempts all discharges of iron from any discharge limitation. Id. at 6-8.

42. For manganese and TSS, the Permit exempts compliance with all discharge limitations during all precipitation events. Id. at 5-8.

43. The Permit does not include any limits on several other pollutants associated with mining activity, such as Total Dissolved Solids (“TDS”), sulfates, chlorides, or aluminum.

44. As explained below, these exemptions cause or contribute to violations of Alabama water quality standards on the Mulberry Fork of the Black Warrior River, which is designated for public water supply and fish and wildlife uses.

CLAIMS FOR RELIEF

Count One (As to Defendants ADEM and Glenn – Violations of Alabama’s Open Records Act, Ala. Code §§ 36-12-2, 36-12-40, 36-12-41)

45. Riverkeeper incorporates by reference the allegations of paragraphs 1-44 as if restated here in full.

46. The purpose of Alabama's open records act is to allow private citizens to monitor the manner in which public officers discharge their public duties. *See Stone v. Consolidated Publ'g Co.*, 404 So. 2d 678, 681 (Ala. 1981); *Munger v. State Bd. for Registration of Architects*, 607 So. 2d 280, 284 (Ala. Civ. App. 1992); *Water Works & Sewer Bd. of Talladega v. Consolidated Publ'g, Inc.*, 892 So. 2d 859, 862 (Ala. 2004). "That right is the same whether the requestor is a single individual or a group of private citizens. Additionally, the public's right to access public documents does not depend upon whether the requestor intends to support or challenge the manner in which a public duty has been discharged." *Graham v. Ala. State Emples. Ass'n*, 991 So. 2d 710, 717 (Ala. Civ. App. 2007).

47. Pursuant to Ala. Code § 36-12-2 (2008), ADEM officials are required to "correctly make and accurately keep in and for their respective offices or places of business all such . . . documents, files, papers, letters and copies of letters as at all times shall afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant and from which the actual status and condition of such activities and business can be ascertained without extraneous information"

48. ADEM officials are required to keep all of these "documents, files, papers, letters and copies of letters" in a manner such that the records are "carefully protected and safely preserved and guarded from mutilation, loss or destruction." *Id.*

49. ADEM maintains that a CD provided to Riverkeeper on December 5, 2008 containing sixteen documents constitutes its entire file on the Shepherd Bend matter. *See Exhibit 6.*

50. Upon information and belief, this CD provided by ADEM does not contain all documents, files, papers, letters and copies of letters regarding the site as required by Alabama

law. The CD represented by ADEM to be the agency's entire file also contains no documents created after March 21, 2008, four months before the final permit was issued to Shepherd Bend.

51. On December 5, 2008, Brian Marshall of ADEM explained to Riverkeeper that supervisors at ADEM selectively choose documents from the paper files to be placed in an electronic file available to the public. Upon information and belief, other documents from the paper file are routinely shredded, destroyed, or otherwise excluded from public review by ADEM.

52. ADEM and Director Glenn have violated Ala. Code § 36-12-2 by not keeping all documents, files, papers, letters, and copies of letters related to the Agency's permitting activities for the Shepherd Bend matter.

53. ADEM and Director Glenn have violated Ala. Code § 36-12-2 by not ensuring that records are carefully protected, safely preserved, and guarded from mutilation, loss, or destruction.

54. Pursuant to Ala. Code § 36-12-40 (2008), "[e]very citizen has a right to inspect and take a copy of any public writing of this state" Ala. Code § 36-12-41 (2008) further provides that "[e]very public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it."

55. Pursuant to ADEM regulations, "any records, reports, rules, forms, or information obtained under the [Alabama Environmental Management Act] and the official records of the Department shall be available to the public for inspection." Ala. Admin. Code r. 335-1-1-.06(1).

56. ADEM and Director Glenn have violated Ala. Code §§ 36-12-40, 41 and Ala. Admin. Code r. 335-1-1-.06(1) by precluding Riverkeeper from inspecting and making copies of all records related to the Shepherd Bend permit, including all paper files that remain in existence.

57. The practice of excluding certain documents from a “public file” directly violates the strict terms of Alabama’s open records laws. Furthermore, such a practice deprives the public – and, specifically in this case, Riverkeeper – of a full opportunity for public participation and to make adequate, informed comments on, and to challenge, if necessary, a NPDES permit.

**Count Two (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k))**

58. Riverkeeper incorporates by reference the allegations of paragraphs 1-57 as if restated here in full.

59. By failing to provide its Notice of Decision to Riverkeeper in accordance with Alabama and federal law and ADEM’s customary practice and procedure as described in and required by the Guide for Citizen Participation, ADEM and Director Glenn have intentionally deprived Riverkeeper of its ability to appeal the final permit to the EMC as provided for by Ala. Admin. Code rr. 335-2-1-.03 and 335-2-1-.04. *See* Exhibit 7 (ADEM official noting that the agency decided not to provide notice of decision to commenters in an attempt to do what was “best for the state.”) Accordingly, Riverkeeper has been deprived of any administrative remedies to exhaust pursuant to Ala. Code § 41-22-20 (a).¹

60. Riverkeeper is aggrieved by a final decision in a contested case within the meaning of Ala. Code § 41-22-2 (a) and thus is entitled to judicial review in this Court.

¹ Concurrently with this filing, and in an attempt to make every effort to comply with applicable Alabama procedures, Riverkeeper has filed a request for a hearing on ADEM’s granting of the final permit with the Environmental Management Commission of ADEM. Riverkeeper has filed its Request for a Hearing within thirty days of actual notice of ADEM’s decision on the final permit, which Riverkeeper and others received on November 24, 2008.

61. Riverkeeper files this action within 30 days after it received notice that ADEM and Director Glenn had granted the final permit on November 24, 2008 as required by Ala. Code § 41-22-20(d). In a matter of this nature, where ADEM has conscientiously failed to comply with requirements of Alabama and federal law and its customary practice and procedure as described in and required by the Guide for Citizen Participation, the time for filing this action must be tolled until the aggrieved citizen receives actual notice of the agency's final decision.

62. By not maintaining and providing Riverkeeper access to all of its files related to the Shepherd Bend permit, ADEM and Director Glenn have violated the terms of its National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV. *See United States Env'tl. Prot. Agency, National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (1994) (hereinafter "MOA"), attached hereto as Exhibit 11.

63. Pursuant to this MOA, ADEM is required to "[m]aintain an adequate public file at the appropriate district or central office . . . for each permittee," which "must include at a minimum, copies of . . . [the] Permit Application . . . [and] [o]ther pertinent information and correspondence." *See* MOA at 2. As alleged above, upon information and belief, ADEM's public file provided to Riverkeeper does not provide all pertinent information and correspondence, or the permit application submitted by Shepherd Bend.

64. ADEM and Director Glenn's actions in failing to comply with the terms of the MOA, which by its own terms "defines the manner in which the National Pollutant Discharge Elimination System will be administered by the State of Alabama Department of Environmental

Management”, *see* MOA at 1, are per se unreasonable, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3), (7).

**Count Three (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code §41-22-20(k) and Ala. Admin. Code r. 335-6-6-.21)**

65. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-64 as if restated here in full.

66. Pursuant to Ala. Code §41-22-4(a) (2008), ADEM is required to adopt “methods whereby the public may obtain information or make submissions or requests” and “rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all . . . instructions used by the agency.”

67. ADEM and Director Glenn have adopted such methods and rules of practice in Ala. Admin. Code r. 335-1-1-.06 and in the agency’s Guide for Citizen Participation. As described in this document, ADEM’s formal procedures for public involvement in community environmental matters require the agency to provide a Notice of Decision to all persons who have submitted comments on a draft permit.

68. ADEM and Director Glenn failed to provide a Notice of Decision to Riverkeeper, a commenter on the draft permit, when it issued its final decision to grant the permit on July 21, 2008. On December 14, 2008, an ADEM representative affirmed that ADEM intentionally decided not to provide this notice. *See* Exhibit 7.

69. ADEM and Director Glenn’s actions in granting the final permit to Shepherd Bend without providing Riverkeeper a Notice of Decision as required by ADEM’s Guide for Citizen Participation are in violation of ADEM’s own rules, unreasonable, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3), (7).

70. ADEM and Director Glenn's actions in granting the final NPDES permit for the Shepherd Bend mine without providing Riverkeeper a Notice of Decision as required by ADEM's Guide for Citizen Participation are also made upon unlawful procedure in violation of Ala. Code § 41-22-20(k)(4).

71. ADEM and Director Glenn failed to make ADEM's response to comments available to the public when the agency refused to issue a Notice of Decision or otherwise notify commenters that a response to comments had been prepared by the agency, in violation of Ala. Admin. Code r. 335-6-6-.21.

72. ADEM's combined errors in failing to provide public notice and in failing to provide all records with respect to Shepherd Bend (as described in Count 1) are substantial and serve to delegitimize the public participation procedures under which ADEM was required to conduct the consideration and issuance of the Permit.

**Count Four (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k) and Alabama Admin. Code rr. 335-6-9.03, 335-6-9-.05)**

73. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-72 as if restated here in full.

74. Alabama Admin. Code r. 335-6-9.03 (2008) provides that "all surface mine operators shall provide the Department with a pollution abatement and/or prevention plan." (emphasis added). This is a mandatory requirement for issuance of a permit.

75. Additionally, and most importantly, "the permit to conduct any surface mining operation shall be based on a Determination by the Department that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality" Alabama Admin. Code r. 335-6-9.05 (2008) (emphasis added).

76. Shepherd Bend did not provide ADEM or Director Glenn with a PAP plan with its Permit Application.

77. To date, Shepherd Bend has not submitted the PAP Plan to either ADEM or the Alabama Surface Mining Commission.

78. Given that ADEM did not review any PAP plan for the Shepherd Bend site, ADEM and Director Glenn have unlawfully failed to make a “determination...that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality in and adjacent to the area of operations....” Ala. Admin. Code r. 335-6-9-.05(2).

79. ADEM’s failure to review Shepherd Bend’s PAP Plan means that ADEM had no way of gauging whether Shepherd Bend’s proposed mining operation would be adequately protective of the water quality of the receiving waters when it issued the permit. The PAP Plan is the document that sets out the specific means and practices by which the permittee will achieve compliance with effluent limitations and water quality standards. Thus, without reviewing – or, for that matter, even possessing or seeing – the PAP Plan, ADEM cannot possibly ensure that Shepherd Bend will operate in compliance with such effluent limitations and water quality standards.

80. ADEM and Director Glenn’s actions in granting the final permit without requiring Shepherd Bend to submit a PAP plan are in violation of pertinent agency rules, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k) (3), (7).

81. ADEM and Director Glenn’s actions in granting the final permit for Shepherd Bend without reviewing the PAP plan and in rendering an agency determination that the PAP plan is

adequate to provide for the protection of water quality are in violation of pertinent agency rules, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3),(7).

82. ADEM and Director Glenn's actions in granting the final permit for Shepherd Bend without requiring Shepherd Bend to submit a PAP plan and without rendering an agency determination that the PAP plan is adequate to provide for the protection of water quality are also made upon unlawful procedure in violation of Ala. Code § 41-22-20(k)(4).

**Count Five (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k))**

83. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-82 as if restated here in full.

84. ADEM and Director Glenn improperly included exemptions to discharge limitations in the final permit for iron, TSS, and manganese. Specifically, while the permit otherwise established daily average and daily maximum discharge limitations on iron, manganese, and TSS, the final permit issued by ADEM and Director Glenn exempts Shepherd Bend from complying with these limitations during all precipitation events in the final permit.

85. ADEM and Director Glenn improperly excluded discharge limitations in the permit for other mining-related pollutants such as Total Dissolved Solids (TDS), sulfates, chlorides, or aluminum.

86. Pursuant to federal NPDES regulations, “[n]o permit may be issued...[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i) (2008). As a further matter, federal regulations require that every NPDES permit include conditions in order to “[a]chieve

water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d) (2008).

87. Pursuant to Alabama’s water quality criteria, as found in Alabama regulations, one of the “Minimum Conditions Applicable To All State Waters” is that “[s]tate waters shall be free from substances attributable to sewage, industrial wastes or other wastes in concentrations or combinations which are toxic or harmful to human, animal or aquatic life to the extent commensurate with the designated usage of such waters.” Ala. Admin. Code r. 335-6-10-.06(c) (2008). Alabama regulations define “industrial waste” to mean “liquid or other wastes resulting from any process of industry, manufacture, trade or business or from the development of natural resources.” Ala. Admin. Code r. 335-6-10-.02(4) (2008).

88. Pursuant to Alabama regulations, the “Specific Water Quality Criteria” with respect to “Public Water Supply” include the following: For “[s]ewage, industrial wastes, or other wastes,” the criterion is “[n]one which are not effectively treated or controlled in accordance with Rule 335-6-10-.08.” Ala. Admin. Code r. 335-6-10-.09(2)(e) (2008). For “[t]oxic substances; color producing; ... or other deleterious substances attributable to sewage, industrial wastes, or other wastes,” the criterion is “[o]nly such amounts, whether alone or in combination with other substances...as will not render the water unsafe or unsuitable as a source of water supply for drinking...or adversely affect the aesthetic value of waters for any use under this classification.” Ala. Admin. Code r. 335-6-10-.09(2)(e)5.

89. A portion of the waters receiving discharges under Shepherd Bend’s permit are designated Public Water Supply. Ala. Admin. Code r. 335-6-11-.02(14); Field Operations Division, Alabama Department of Environmental Management, NPDES Individual Permit Rationale at 3 (Oct. 31, 2007) [hereinafter Permit Rationale], attached hereto as Exhibit 12.

90. Pursuant to Alabama's water quality criteria, as found in Alabama regulations, the "Specific Water Quality Criteria" with respect to waters classified for "Fish and Wildlife" use include the following: For "[s]ewage, industrial waste, or other wastes," the criterion is "[n]one which are not effectively treated in accordance with Rule 335-6-10-.08." Ala. Admin. Code r. 335-6-10-.09(5)(e)1.

91. A portion of the waters receiving discharges under Shepherd Bend's permit are designated as Fish and Wildlife. Ala. Admin. Code r. 335-6-11-.02(14); Permit Rationale at 3.

92. With respect to the exempted discharges' impacts in light of the Alabama regulations on the public water supply usage, the exempted discharges clearly are "not effectively treated or controlled," as the permit requires no discharge limitations during the vast majority of precipitation events. Ala. Admin. Code r. 335-6-10-.09(2)(e). The exempted discharges will "render the water unsafe or unsuitable as a source of water supply for drinking...or adversely affect the aesthetic value of waters for any use under [the public water supply] classification." Ala. Admin. Code r. 335-6-10-.09(2)(e)5. *See* Comments from Birmingham Water Works Board, December 14, 2007, Exhibit 2.

93. With respect to the exempted discharges' impacts in light of Alabama regulations on fish and wildlife usage, the exempted discharges clearly are "not effectively treated in accordance with Rule 335-6-10-.08," as the Permit waives the majority of discharge limitations during precipitation events. Ala. Admin. Code r. 335-6-10-.09(5)(e)1. Accordingly, the permit's terms directly violate this water quality criterion specific to the fish and wildlife usage.

94. With respect to the exempted discharges' impacts in light of the "Minimum Conditions Applicable To All State Waters," the exemptions are in violation of the requirement that "[s]tate waters shall be free from substances attributable to sewage, industrial wastes or other wastes in

concentrations or combinations which are toxic or harmful to human, animal or aquatic life to the extent commensurate with the designated usage of such waters.” Ala. Admin. Code r. 335-6-10-.06(c).

95. In addition to the impacts from the exempted discharges during precipitation events, the fact that the permit contains no limits on other mining-related pollutants such as TDS, sulfates, chlorides, and aluminum, also results in violations of the water quality criteria cited above.

96. ADEM’s actions in issuing the permit with exemptions to discharge limitations for iron, manganese, and TSS during precipitation events without further controls, and with no limits on mining pollutants such as TDS, sulfates, chlorides, and aluminum, are arbitrary, capricious, and in violation of the Alabama water quality criteria and federal NPDES regulations.

Count Six (As to Defendant Glenn - Declaratory Judgment Act)

97. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-96 as if restated here in full.

98. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated Alabama Code §§ 36-12-2, 36-12-40, 36-12-41, and the terms of ADEM’s “National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV,” in failing to preserve all documents, files, papers, letters and copies of letters regarding the Shepherd Bend permit, and in failing to allow Riverkeeper to inspect and obtain copies of all such documents.

99. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated the provisions of Ala. Admin. Code rr. 335-2-1-.03 and 335-2-1-.04 by failing to provide Riverkeeper with a Notice of Decision explaining that the final Shepherd Bend NPDES

permit had been granted in accordance with the formal procedures outlined in ADEM's Guide for Citizen Participation.

100. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated Ala. Administrative Code rr. 335-6-9.03, 335-6-9.05 by failing to require Shepherd Bend to submit a PAP plan, and by failing to make a Determination that the PAP plan is adequate to provide for the protection of water quality before granting a final permit.

101. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper requests a declaration that Director Glenn violated Alabama regulations, water quality criteria, and federal NPDES regulations in issuing the permit with exemptions to certain discharge limitations during precipitation events.

102. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper further requests a declaration that, given these substantive violations of Alabama law and regulations regarding the terms of the Shepherd Bend permit, the permit has been illegally granted and is thus void.

Count Seven (As to Defendant Glenn – Claim for Injunctive Relief)

103. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-102 as if restated here in full.

104. Director Glenn's issuance of the final permit to Shepherd Bend was beyond his authority given the aforementioned procedural and substantive errors in the permitting process.

105. Director Glenn's issuance of the final permit to Shepherd Bend was also based on a mistaken interpretation of law given the aforementioned substantive errors.

106. Pursuant to Ala. Code § 6-6-500, Riverkeeper seeks an injunction prohibiting Director Glenn from allowing the commencement of any activities purportedly authorized by the permit, and from taking any other actions relating to ADEM's authorization of the permit. *See*

Drummond Co. v. Alabama Dep't of Transp., 937 So.2d 56, 58 (Ala. 2006) (holding that actions for injunction lie against State officials when they have acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law).

Count Eight (As to Defendant Shepherd Bend – Claim for Injunctive Relief)

107. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-106 as if restated here in full.

108. Pursuant to Ala. Code § 6-6-500, Riverkeeper seeks an injunction prohibiting Shepherd Bend from commencing any activities purportedly authorized by the permit because Shepherd Bend failed to disclose fully all relevant facts and/or misrepresented facts in its permit application in violation of Ala. Admin. Code r. 335-6-6-.17(c)(1)(ii), because Director Glenn acted beyond his authority in issuing the permit to Shepherd Bend given the aforementioned procedural and substantive errors in the permitting process, and because Director Glenn's issuance of the permit was based on mistaken interpretations of law.

DEMAND FOR RELIEF

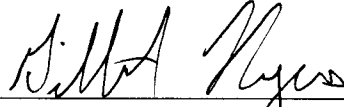
Wherefore, based upon these facts and matters of law, Riverkeeper respectfully requests that the Court grant the following relief:

1. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated the statutory procedures established in Alabama Code §§ 36-12-2, 36-12-40, and 36-12-41 by failing to properly maintain and allow public access to all public records on the Shepherd Bend mine permit, and requiring Defendant Glenn to keep and make available all ADEM public records as required by law;

2. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama Code §41-22-20(k) and the agency's own *Guide to Citizen Participation* by failing to provide Riverkeeper with a Notice of Decision, or other notice, informing Riverkeeper that the final Shepherd Bend mine permit had been granted;
3. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama Code §41-22-20(k) in issuing the final Shepherd Bend mine permit without a PAP plan, and without rendering a determination that the PAP plan was adequate to protect water quality;
4. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama regulations, water quality criteria, and federal NPDES regulations in issuing the permit with exemptions to certain discharge limitations during precipitation events, and with no limits on certain mining-related pollutants;
5. Issue a declaratory judgment finding that the permit is illegal, and thus void, given the procedural and substantive errors described herein;
6. Issue an injunction prohibiting Director Glenn from allowing the commencement of any activities purportedly authorized by the permit and from taking any other actions relating to ADEM's authorization of the permit.;
7. Issue an injunction prohibiting Defendant Shepherd Bend from commencing any activities purportedly authorized by the permit;

8. Award plaintiff its costs, expenses, expert witness fees, and reasonable attorneys' fees as provided by law; and
9. Award such additional relief as the Court deems proper.

This 22nd day of December, 2008.



Gilbert Rogers, Al. Bar No. ASB-2085-T66R.
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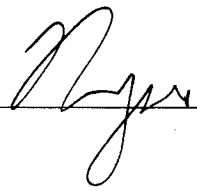
Service Is To Be Conducted By Certified Mail Pursuant To Rule 4(i)(2) Of The Alabama Rules of Civil Procedure:

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