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July 14, 2023

Via Email and U.S. Registered & Certified Mail – Return Receipt Requested

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Re: Notice of Intent to File Citizen Suit under Clean Water Act for Violations by Bluestone Coke

To Whom It May Concern:

Black Warrior Riverkeeper, Inc. (Riverkeeper) and the Greater-Birmingham Alliance to Stop Pollution (GASP) intend to file a lawsuit against Bluestone Coke, LLC (Bluestone or Facility) under § 505 of the Clean Water Act (CWA), 33 U.S.C. §1365, for the discharge of pollutants from Bluestone's foundry coke-producing facility located at 3500 35th Ave North, Birmingham, AL 35207. Bluestone holds NPDES Permit No. AL0003247 issued by the Alabama Department of Environmental Management (ADEM) pursuant to Alabama's NPDES permit program approved by the U.S. Environmental Protection Agency (EPA) under Clean Water Act § 402(b), 33 U.S.C. § 1342(b). Bluestone is in violation of the Clean Water Act and the Alabama Water Pollution Control Act (AWPCA), § 22-22-1 *et seq.*, Code of Alabama 1975, and the regulations thereunder, as more fully set out below. The lawsuit will seek monetary penalties, injunctive relief, attorneys' fees, and expenses of litigation of the Clean Water Act. Bluestone's violations alleged in this Notice Letter have occurred and continue to occur at its site located at 3500 35th Ave N, Birmingham, AL 35207.

SUMMARY OF VIOLATIONS

Bluestone Coke is in violation of the Clean Water Act and the Alabama Water Pollution Control Act based on several circumstances. First, Bluestone Coke is violating the effluent limitations mandated by NPDES Permit No. AL0003247 for various pollutants including but not limited to ammonia, nitrogen, and phenols. Additionally, Bluestone Coke is violating certain permit conditions by failing to operate and maintain the treatment facility on site and by failing to treat certain stormwater discharges. Additionally, Bluestone Coke is discharging unpermitted undisclosed pollutants at its permitted discharge point. Finally, Bluestone has unpermitted stormwater discharging into an Unnamed Tributary of Five Mile Creek, or alternatively, discharges of coal, coke, and slag constitute unpermitted fill material under Section 404 of the Clean Water Act. All of these violations are likely to continue in the future.

I. PERSON RESPONSIBLE FOR VIOLATIONS

Bluestone Coke is the party responsible for the violations alleged in this Notice Letter, as defined by section 502(5) of the Clean Water Act. Bluestone has owned the facility located at 3500 35th Ave North, Birmingham, AL 35207 since 2019 and has been discharging wastewater for the duration of its ownership. Bluestone has operational control over the day-to-day industrial activities at the site, including operation of the on-site wastewater treatment plant, and is responsible for managing the site, including historical pollution at the site, in compliance with the Clean Water Act. Bluestone is thus identified as the person[1] responsible for all violations described in this Notice Letter.

II. PERSON GIVING NOTICE

Pursuant to 40 C.F.R. § 135.3(a), notice is hereby provided that the name, address and telephone number of the persons giving notice of intent to sue is as follows: Black Warrior Riverkeeper, Inc., 712 37th Street South, Birmingham, AL 35222, Tel: (205) 458-0095; Greater-Birmingham Alliance to Stop Pollution (GASP), 2320 Highland Avenue South, Suite 270, Birmingham, AL 35205, Tel: (205) 701-4277.

Riverkeeper is an entity organized under the laws of the State of Alabama that seeks to protect, restore and preserve the Black Warrior River and its tributaries through education, advocacy, and pollution prevention. It is a member organization with over 6,000 members, some of whom live, work and/or recreate in the area of the violations discussed herein, and who are harmed by those violations. Furthermore, these injuries or risks are traceable to Bluestone's violations as alleged in this notice letter, and redressing those ongoing violations will redress the members' injuries or harm.

GASP is a 501(c)(3) nonprofit membership organization whose mission is to enhance the health and wellbeing of Alabamians by reducing air pollution, advancing environmental justice, and promoting climate solutions through education, advocacy, and collaboration. GASP has over 1,750 members, some of whom live, work, and recreate in the area of the violations discussed herein, and who are harmed by those violations. Furthermore, these injuries or risks are traceable to Bluestone's violations as alleged in this notice letter, and redressing these ongoing violations will redress the members' injuries or harm.

III. IDENTIFICATION OF LEGAL COUNSEL

Riverkeeper and GASP are represented by legal counsel in this matter. Pursuant to 40 C.F.R. § 135.3(c), the contact information for those providing legal counsel is as follows:

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[1] "Person" includes corporations under the Clean Water Act. 33 U.S.C. § 1362(5).

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IV. BACKGROUND

The history of this facility dates back to the early 1900s, when it created coke for Birmingham's booming iron and steelmaking industry. Coke, a solid residue that remains after certain types of coal are heated at high temperatures in the absence of oxygen, provided one of the raw materials needed to create the iron and steel that made Birmingham "the Steel City." Two coking facilities were built miles apart from each other and adjacent to the neighborhoods of Collegeville, Harriman Park, and Fairmont. However, booming industry came at an extreme cost to residents of Birmingham and disproportionately impacted predominately Black communities. Between the 1960s and 1970s, emphysema deaths in Birmingham increased by 200 percent.[2] Researchers estimated that breathing the air in Birmingham was equivalent to smoking two packs of cigarettes a day.[3] This legacy of environmental injustice continues into present day.[4]

Coking facilities have also greatly impacted nearby watersheds and the people who enjoy them. Bluestone is permitted to discharge its process and other wastewaters into Five Mile Creek, a tributary of the Locust Fork which meets the Black Warrior River. The headwaters of the Five Mile Creek watershed originate at the eastern basin of Red Mountain and flow westward, winding through communities like Fultondale, Coalburg, and Brookside. According to EPA, for the portion of Five Mile Creek immediately north of Birmingham, each designated use is categorized as impaired, likely caused by industrial discharge.[5]

1. Bluestone's Operations

Bluestone produces coke at the facility through a destructive distillation process in which coal is heated in ovens in an oxygen-deficient atmosphere. After the coking process is completed, coke is pushed out of the oven and the "quench" car carrying the hot coke moves to the quench tower where approximately 1,130 liters (L) of water per Mg of coke (270 gallons of water per ton) are sprayed onto the coke to cool it and prevent it from igniting.[6]

The volatile materials in the heated coal are removed from the ovens as coke oven gas, which is then processed to remove desired byproducts and waste materials; the gas is then combusted in boilers to produce steam for the facility and to provide process heat for the coke ovens.[7] The unpurified gas contains water vapor, tar, light oils, solid particulate of coal dust, heavy hydrocarbons, and complex carbon

[2] Max Blau, *The Tragedy of North Birmingham*, PROPUBLICA (Sep. 1, 2022), https://www.propublica.org/article/bluestone-jim-justice-north-birmingham.
[3] *Id.*
[4] *Id.*
[5] EPA, *Cleanup Process in the North Birmingham Environmental Collaboration Project*, https://archive.epa.gov/epa/north-birmingham-project/cleanup-process-north-birmingham-environmental-collaboration-project.html (last visited July 7, 2023)
[6] EPA, *Coke Production*, https://www3.epa.gov/ttnchie1/old/ap42/ch12/s02/final/c12s02_1995.pdf (last visited July 7, 2023).
[7] *Id.*

compounds.[8] As it leaves the coke chamber, coal oven gas is first cleaned with a weak ammonia spray.[9] The remaining gas is cooled and compressed in various stages, removing byproducts like coke tars, ammonia, and light oils.[10]

2. NPDES Permit No. AL 0003247

On June 25, 2020, ADEM approved transfer of NPDES Permit No. AL0003247 from ERP Compliant to Bluestone.[11] Subject to certain limitations, that permit authorizes discharges from Bluestone's facility and associated areas at 3500 35th Avenue North, Birmingham, Alabama 35207. Under this permit, Bluestone is authorized to discharge certain pollutants through one outfall—Outfall DSN001—into Five Mile Creek.

Coke plant wastewater, process area stormwater, sanitary wastewater, and groundwater from Arichem, LLC (transported to Birmingham) are all supposed to be processed in Bluestone's Biological Treatment Facility (BTF).[12] The BTF was constructed in 1974 and first began receiving wastewater in 1975.[13] The BTF treatment processes include equalization, neutralization, activated sludge, sedimentation (settling), chemical oxidation, and disinfection. The "treated" waters from the BTF discharge through DSN01B, an internal discharge and monitoring point, into the Final Pond, where they eventually are discharged from DSN001 into an Unnamed Tributary of Five Mile Creek. According to the permit and permit application, coke plant non-contact cooling water, stormwater runoff, and groundwater are all permitted to route to the Final Pond for treatment (by equalization and sedimentation), where they are also discharged through DSN001. (See map on page 12 below.)

3. RCRA Section 3008(h) Order on Consent

The Bluestone facility is subject to a longstanding Resource Conservation and Recovery Act (RCRA) Consent Order. In 1989, EPA issued Walter Coke an Administrative Order under Section 3008(h) of RCRA. This required Walter Coke to perform a RCRA Facility Investigation (RFI) to evaluate whether solid waste had escaped any of the solid waste management units.[14] In 2012, EPA and Walter Coke agreed that Walter Coke had completed all approved investigation tasks and entered into a new order. EPA and Walter Coke further agreed that any remedial measures would be conducted and completed pursuant to the 2012 Order.[15] In 2016, that Order was transferred to ERP Compliant. When Bluestone bought the facility in 2019, it assumed responsibility of the 2016 Order.

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[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] In 2014, Walter Coke reapplied for NPDES Permit No. AL0003247 after notice that the permit was set to expire. *See* Walter Coke, Application for Reissuance of NPDES Permit No. AL0003247 (May 29, 2014) [hereinafter referred to as "2014 Permit Application"]. Additionally, ADEM publicly noticed and transmitted a draft permit to Bluestone in late 2020. However, that permit was never issued in its final form and thus Bluestone is operating under the June 25, 2020 permit modification and 2014 permit application. This permit has been administratively continued by ADEM.
[12] 2014 Permit Application at 23.
[13] Land Use Control Plan (Revision 1.0) SMA 4 – Former Chemical Plant (Oct. 29, 2020), at 8 [hereinafter referred to as "2020 LUCP"]. Attached as Ex. A.
[14] RCRA Section 3008(h) Order on Consent, Docket No. RCRA-04-2016-4250 (Aug. 2016), at 5.
[15] *Id.*

This Consent Order is relevant because one of the interim measures employed under it includes a pump-and-treat operation for contaminated groundwater to prevent it from migrating off-site. During the RFI, a groundwater plume was identified at the former chemical plant. Chemicals were identified in this groundwater above maximum contaminant levels (MCLs) including benzene, toluene, chlorobenzene, benzo(a)pyrene and several chlorinated ethenes.[16] In order to contain this groundwater plume, Walter Coke and EPA agreed to certain interim measures to provide hydraulic containment. These include groundwater recovery, where contaminated groundwater is pumped and discharged into the process water treatment system.[17] According to Bluestone, this groundwater is eventually discharged in compliance with NPDES Permit No. AL0003247. However, several pollutants that were not disclosed during the permit application process have been detected in this groundwater and in the effluent tank from which the discharge is eventually released into an Unnamed Tributary of Five Mile Creek.[18] Additionally, the BTF is not operating or is not operating efficiently and is thus not processing groundwater contaminants from this process.

V. CLEAN WATER ACT

Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[19] To that end, section 301(a) of the Clean Water Act[20] prohibits the discharge of pollutants from a point source to waters of the United States except in compliance with, among other conditions, an NPDES permit issued pursuant to section 402 of the Clean Water Act.[21] Notably, each violation of a permit—and each discharge that is not authorized by a permit—is a separate violation of the Act.[22] If an NPDES permit applicant does not adequately disclose its release of a pollutant from a point source, the applicant does not have approval to discharge the pollutant.[23] Disclosure is considered adequate when the applicant provides enough information for a permitting agency to "be[ ] able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment."[24]

Under the Clean Water Act, the phrase "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[25] The term "pollutant" includes "solid waste, . . . sewage, garbage, sewage sludge, . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste."[26] The term "point source" includes any "discernible, confined and discrete conveyance" from which pollutants may be discharged, including pipes, ditches, channels, tunnels,

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[16] Walter Coke, Groundwater Interim Measures Work Plan for the Former Chemical Plant (May 2012), at 5.
[17] *Id.*
[18] Interim Measures (IM) June 2019-May 2020 Report (Aug. 31, 2020), at 34-36. Ex. B.
[19] 33 U.S.C. § 1251(a).
[20] 33 U.S.C. § 1311(a).
[21] 33 U.S.C. § 1342.
[22] *See* 33 U.S.C. § 1319(d) ("penalty . . . per day for each violation"); *Sierra Club, Haw. Chapter v. City & Cnty. of Honolulu*, 486 F.Supp.2d 1185, 1190–91 (D. Haw. 2007) (summarizing holdings).
[23] *See In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EPA 1998); *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 268 (4th Cir. 2001).
[24] *Piney Run*, 268 F.3d at 268 ("Because the permitting scheme is dependent on the permitting authority being able to judge whether the discharge of a particular pollutant constitutes a significant threat to the environment, discharges not within the reasonable contemplation of the permitting authority during the permit application process, whether spills or otherwise, do not come within the protection of the permit shield.").
[25] 33 U.S.C. § 1362(12)(A).
[26] *Id.* at § 1362(6).

conduits, wells, discrete fissures, and containers.[27] The point source need not be the original source of the pollution; all that is required is that it conveys the pollution to a water of the United States (WOTUS).[28]

VI. VIOLATIONS OF THE CLEAN WATER ACT

Bluestone is in violation of §§ 301 and 402 of the Clean Water Act (33 U.S.C. §§ 1311 and 1342). These laws mandate that Bluestone shall not discharge pollutants to waters of the United States except in compliance with a permit issued pursuant to the NPDES program.

1. Discharge Monitoring Report (DMR) Violations

Bluestone is in violation of the provisions referenced above by operating its facility in a manner which discharges pollutants to the waters of the United States and waters of the State in excess of the limitations contained in NPDES Permit No. AL0003247. Bluestone has reported 392 permit violations in its Discharge Monitoring Reports. Specifically, Bluestone has reported exceeding its ammonia, Total Kjeldahl Nitrogen, BOD, Benzo(a)pyrene, and Total Suspended Solids discharge permit limits on numerous occasions, as shown below.

Bluestone Coke NPDES Permit (AL0003247) Violations				
Discharge Monitoring Report (DMR) Violations				
Date	**Parameter**	**Permit Limit**	**Discharge**	**# of Violations**
5/31/23	BOD Concentration, daily maximum	8.11 mg/L	11.10 mg/L	1
5/31/23	Toxicity, Pimephales Chronic	Pass/Fail	Fail	1
2/28/23	Ammonia, Quantity, daily maximum	9.47 PPD	9.65 PPD	1
1/31/23	Ammonia, Concentration, monthly average	6.53 mg/L	6.83 mg/L	31
1/31/23	Ammonia, Concentration, daily maximum	9.47 mg/L	10.59 mg/L	-
11/30/22	CBOD, Concentration, daily maximum	8.11 mg/L	10.0 mg/L	1
3/31/22	Nitrogen, Ammonia, daily maximum	9.47 PPD	10.72 PPD	1
11/30/21	BOD, daily maximum	8.11 mg/L	8.85 mg/L	1
10/31/21	Total Suspended Solids, daily maximum	1215 PPD	1299 PPD	1
10/31/21	BOD Loading, daily maximum	381 PPD	624.8 PPD	31
10/31/21	BOD Concentration, monthly average	5.41 mg/L	6.03 mg/L	31
10/31/21	BOD Concentration, daily maximum	8.11 mg/L	39.90 mg/L	-
09/30/21	Phenols, monthly average	0.08 PPD	0.13 PPD	30
09/30/21	Phenols, daily maximum	0.12 PPD	0.40 PPD	-
08/31/21	Total Suspended Solids, daily maximum	1215 PPD	1390 PPD	1

[27] *Id*. at § 1362(14).
[28] *See id*. at § 1362(7).

08/31/21	Benzo(a)pyrene, monthly average	0.0408 mg/L	0.31 mg/L	31
08/31/21	Benzo(a)pyrene, daily maximum	0.0816 mg/L	0.31 mg/L	-
07/30/21	Total Kjeldahl Nitrogen, daily maximum	3.74 mg/L	3.81 mg/L	1
07/30/21	BOD Loading, daily maximum	381 PPD	784.8 PPD	30
07/30/21	BOD Concentration, monthly average	5.41 mg/L	7.54 mg/L	30
07/30/21	BOD Concentration, daily maximum	8.11 mg/L	41.40 mg/L	-
07/30/21	Phenols, daily maximum	0.12 PPD	0.15 PPD	1
06/30/21	Total Kjeldahl Nitrogen, daily maximum	3.74 mg/L	5.38 mg/L	1
06/30/21	BOD Concentration, daily maximum	8.11 mg/L	9.14 mg/L	1
06/30/21	Phenols, monthly average	0.08 PPD	0.16 PPD	30
06/30/21	Phenols, daily maximum	0.12 PPD	0.50 PPD	-
05/31/21	Ammonia concentration, daily maximum	0.95 mg/L	3.19 mg/L	1
05/31/21	Ammonia loading, daily maximum	9.47 PPD	21.73 PPD	1
05/31/21	Phenols, monthly average	0.08 PPD	0.11 PPD	31
05/31/21	Phenols, daily maximum	0.12 PPD	0.26 PPD	1
04/30/21	Nitrogen, Ammonia, daily maximum	3.2 mg/l	3.67 mg/l	1
04/30/21	Nitrogen, Ammonia, daily maximum	9.47 PPD	96.44 PPD	-
04/30/21	Nitrogen, Ammonia, monthly average	6.53 PPD	41.28 PPD	30
04/30/21	Phenols, daily maximum	0.12 PPD	0.18 PPD	1
03/31/21	Phenols, daily maximum	0.12 PPD	0.15 PPD	1
02/28/21	Phenols, daily maximum	0.12 PPD	0.23 PPD	1
12/31/20	Phenols, daily maximum	0.12 PPD	0.14 PPD	1
11/30/20	Nitrogen, Ammonia, daily maximum	9.47 PPD	11.66 PPD	1
10/31/20	Benzo (A) Pyrene, monthly average	0.048 ug/l	0.575 ug/l	31
10/31/20	Benzo (A) Pyrene, daily maximum	0.0816 ug/l	0.890 ug/l	-
11/30/19	BOD, Carbenaceous 05 Day, 20C, daily maximum	8.11 mg/l	10.3 mg/l	1
09/30/19	Total Suspended Solids, daily maximum	1215 PPD	1250 PPD	1
01/31/19	Phenols, daily maximum	0.12 PPD	0.34 PPD	-
01/31/19	Phenols, monthly average	0.08 PPD	0.09 PPD	31
08/31/18	Phenols, daily maximum	0.12 PPD	0.13 PPD	1
01/31/18	Phenols, daily maximum	0.12 PPD	0.18 PPD	1
Total Violations				**392**

2. *Violation of Permit Conditions - Failure to Maintain and Operate the Biological Treatment Facility and Failure to Treat Stormwater*

Part II.A.1 of Bluestone's NPDES permit requires that it maintain and operate all facilities and systems of treatment and control. Specifically, the permit states:

> The permittee shall at all times properly install and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve

> compliance with the conditions of the permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of backup or auxiliary facilities only when necessary to achieve compliance with the conditions of the permit.[29]

Bluestone is in violation of this condition because the Biological Treatment Facility (BTF) is either not operating or not operating efficiently. There is no evidence of redundant or temporary dissolved organic waste removal equipment in place at the BTF. Riverkeeper and GASP intend to file suit based on this permit violation, which is ongoing.

The BTF is responsible for treating wastewater from the coke plant, by-products plant, steam traps, process area stormwater, sanitary wastewater, and groundwater from Arichem LLC.[30] As Bluestone disclosed in its permit application, these waters contain pollutants like aniline, benzene, cresol, cyanide, naphthalene, and phenols.[31] In addition, sanitary wastewater can contain pathogenic organisms requiring disinfection prior to discharge.

The BTF is also responsible for treating polluted groundwater in compliance with a 2012 RCRA Consent Order. Under the Interim Measures for the Former Chemical Plant, Bluestone is responsible for a pump-and-treat operation to keep groundwater from migrating off the property. As admitted by operators of the site, one of the purposes of the BTF is to treat this polluted groundwater before it is discharged to surface waters.[32] This groundwater contains harmful volatile organic compounds (VOCs) and semi-volatile organic compounds (SVOCs) including bromodichloromethane (carcinogenic); 4-chloroaniline (carcinogenic); carbazole (carcinogenic); cis-1,3-Dichloropropene (carcinogenic); 1,2-dibromo-3-chloropropane (carcinogenic); 1,2-dibromoethane (EDB) (carcinogenic); 1,4-dioxane (carcinogenic); 2-methylnaphthalene (carcinogenic); and styrene (carcinogenic).[33] It is thus imperative that Bluestone operate the BTF or provide redundant treatment in an effective manner.

Additionally, as detailed below in Section 4, Bluestone has failed to route all of its stormwater through the Final Pond, the treatment and control system identified in its permit and permit application. This violates a condition of NPDES Permit No. AL0003247, specifically the condition that the "permittee shall at all times properly operate and maintain all facilities and systems of treatment and control."[34] This is a violation of Bluestone's permit and the Clean Water Act, and Riverkeeper and GASP intend to file suit based on this violation.

3. Unpermitted Discharge of Undisclosed Pollutants

Bluestone is also in violation of §§ 301 and 402 of the Clean Water Act (33 U.S.C. §§ 1311 and 1342). The Clean Water Act generally prohibits discharges of "any pollutant" to waters of the United States.[35] The NPDES permitting program, implemented in Alabama, is a limited exception to that

[29] NPDES Permit No. AL0003247 Part II A.1.
[30] *Id.* at 9.
[31] 2014 Permit Application at 29.
[32] Ex. A, 2020 LUCP at 10.
[33] Ex. B, Interim Measures (IM) June 2019-May 2020 Report (Aug. 31, 2020), at 34-36.
[34] NPDES Permit No. AL0003247 Part II A.1.
[35] 33 U.S.C. § 1311(a).

prohibition,[36] but discharges under the program cannot be approved unless they are adequately disclosed.[37] EPA has stressed the need for disclosure of pollutants that may be discharged:

> [D]ischargers have a duty to be aware of any significant pollutant levels in their discharge. […] Most important, [the disclosure requirements] provide the information which the permit writers need to determine what pollutants are likely to be discharged in significant amounts and to set appropriate permit limits. […] [P]ermit writers need to know what pollutants are present in an effluent to determine appropriate permit limits in the absence of applicable effluent guidelines.[38]

The EPA Environmental Appeals Board's decision in *In re: Ketchikan Pulp Company* further emphasized the importance of disclosure,[39] and this reasoning has been adopted by the Eleventh Circuit. In *Black Warrior Riverkeeper v. Black Warrior Minerals, Inc.*, the Eleventh Circuit stated:

> [A] citizen may sue for violations of section 1316 when the alleged violator, although a permit holder, discharges pollutants *that were not disclosed* to the permit-issuing authority. Those discharges would not be contemplated by the permit and would not come within the absolute defense provided by section 1342(k).[40]

As seen below, on at least eighteen occasions, Bluestone has discharged Barium, Strontium, and *E.coli* that was not permitted, nor part of Bluestone's permit application. Riverkeeper collected the samples of the discharges of pollutants out of DSN001 on the dates identified below. These are violations of the Clean Water Act and NPDES Permit No. AL0003247, as each constitutes an unpermitted discharge and the "discharge of a pollutant from a source not specifically identified in the permit application for this Permit and not specifically included in the description of an outfall in this Permit."[41] Bluestone is liable for every day that it discharges without a permit.[42] The discharges outlined below are not authorized by and constitute noncompliance with the Clean Water Act and NPDES Permit No. AL0003247.

Bluestone Coke NPDES Permit (AL0003247) Violations				
Unpermitted Discharge of Pollutants				
Date	**Parameter**	**Limit**	**Discharge**	**# of Violations**
6/8/23	E. coli	No Discharge	5,440 col./100mL	1
6/8/23	Barium	No Discharge	0.060 mg/L	1
6/8/23	Strontium	No Discharge	0.118 mg/L	1

[36] *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007).
[37] *See In re Ketchikan Pulp Co.*, 7 E.A.D. 605 (EPA 1998).
[38] Consolidated Permit Application Forms for EPA Programs, 45 Fed. Reg. 33,516, 33,526 & 33,531 (May 19, 1980).
[39] *See In re Ketchikan Pulp Co.*, 7 E.A.D. at 605.
[40] 734 F.3d 1297, 1304 (11th Cir. 2013) (emphasis added) (citing *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty.*, 268 F.3d 255, 269 (4th Cir. 2001)).
[41] NPDES Permit No. AL0003247, Part II.D.1.c.
[42] *See Carr v. Alta Verde, Indus., Inc.,* 931 F.2d 1055, 1063 (5th Cir. 1991) (holding that a discharger who violates the Clean Water Act by discharging without a permit remains in continuing state of violation until it obtains a permit).

5/17/23	Barium	No Discharge	0.061 mg/L	1
3/1/23	E. coli	No Discharge	7,000 col./100mL	1
3/1/23	Strontium	No Discharge	0.23 mg/L	1
1/17/23	Barium	No Discharge	0.13 mg/L	1
1/10/23	Barium	No Discharge	0.12 mg/L	1
12/8/22	Barium	No Discharge	0.118 mg/L	1
12/8/22	Strontium	No Discharge	0.231 mg/L	1
11/3/22	Barium	No Discharge	0.116 mg/L	1
10/27/22	BOD5	No Discharge	10 mg/L	1
10/27/22	E. coli	No Discharge	1,200 col./100mL	1
10/27/22	Barium	No Discharge	0.101 mg/L	1
10/27/22	Strontium	No Discharge	20 mg/L	1
10/19/22	E. coli	No Discharge	5,120 col./100mL	1
10/19/22	Barium	No Discharge	0.073 mg/L	1
10/19/22	Strontium	No Discharge	0.177 mg/L	1

Bluestone has even admitted to discharging undisclosed pollutants in its effluent. As detailed in the Interim Measures (IM) June 2019-May 2020 Report, thirty-five different pollutants that were not disclosed in the 2014 permit application have been detected in the facility's effluent.[43] As that report states, "effluent samples were collected *from the effluent tank* and analyzed for VOCs by USEPA Method 8260B and SVOCs by USEPA Method 8270D" (emphasis added).[44] Bluestone is not permitted to discharge these pollutants, nor were they disclosed in the 2014 permit application and thus constitute unpermitted discharges in violation of the Clean Water Act. Because the BTF is not operating or is operating inefficiently, these violations are likely to continue into the future.

4. Unpermitted Stormwater Discharges

Bluestone is also in violation of §§ 301 and 402 of the Clean Water Act (33 U.S.C. §§ 1311 and 1342) for discharging into a water of the United States (WOTUS) without a NPDES permit. The Clean Water Act prohibits discharge of any pollutants from a point source into a WOTUS without authorization via a permit. As illustrated in the map below, illegal discharges from facility runoff are routing through a "Historical Drainage Ditch,"[45] bypassing the Biological Treatment Facility and Final Pond, and ultimately

[43] Ex. B, Interim Measures (IM) June 2019-May 2020 Report (Aug. 31, 2020), at 34-36. Pollutants detected in Bluestone's effluent that were not disclosed in the 2014 Permit Application include Acetone, Acetophenone, 2-Butanone, Benzyl Alcohol, Bromodichloromethane, 4-chloro-3-Methylphenol, 4-Chloroaniline, Carbazole, Carbon disulfide, Cis-1,2-Dichloroethene, Cis-1,3-Dichloropropene, Cyclohexane, 1,2-Dibromo-3-chloropropane, 1,2-dibromoethane (EDB), 1,4-Dioxane, 4,6 Dinitro 2 Methylphenol, Dibenzofuran, 2-Hexanone, Isopropylbenzene, 2- Methylnapthalene, 4-Methyl-2-Pentanone, m,p-Xylenes, Methyl Acetate, Methyl Tert-Butyl Ether (MTBE), Methylcyclohexane, 2-Nitroaniline, 3-Nitroaniline, 4-Nitroaniline, O-Xylene, Styrene, 1,1,2-Trichloro-1,2,2-trifluroethane, 1,2,3-Trichlorobenzene, 2,4,5 Trichlorophenol, Trans-1,2-Dichloroethene, Trans-1,3-Dichloropropene.

[44] *Id.* at 13 (emphasis added).

[45] Riverkeeper and GASP refer to this as a "ditch" because that is how it is labeled in Bluestone's own materials. Upon information and belief, each water feature that Bluestone labels a "ditch" is not a ditch at all but an Unnamed Tributary to Five Mile Creek. Historically, these two "ditches" were likely one stream with a path through the final pond and outfall before being disturbed. Thus, Riverkeeper and GASP do not concede that these features are ditches, because without a

are released into an Unnamed Tributary of Five Mile Creek.[46] This is a violation of the Clean Water Act because the "ditch," which is a point source, discharges pollutants into an Unnamed Tributary of Five Mile Creek, a water of the United States. Alternatively, the "ditch" and the Unnamed Tributary are both point sources that discharge pollutants without a permit into Five Mile Creek, a water of the United States. While it is clear that illegal discharges are ongoing, it is impossible for Riverkeeper and GASP to know where the WOTUS ends and where the point source begins without a thorough site inspection. This letter, therefore, gives general notice of these violations. Below is a map, compiled using Bluestone's own materials, that demonstrates that surface waters flow off Bluestone's site into the southern-most "Historical Drainage Ditch" and end up in the Unnamed Tributary and Five Mile Creek. The Clean Water Act defines a point source to include "any discernable, confined, and discrete conveyance," including any "ditch," "channel," or "conduit" from which "pollutants are or may be discharged."[47] Point sources include surface water runoff which is channeled or collected by man.[48]

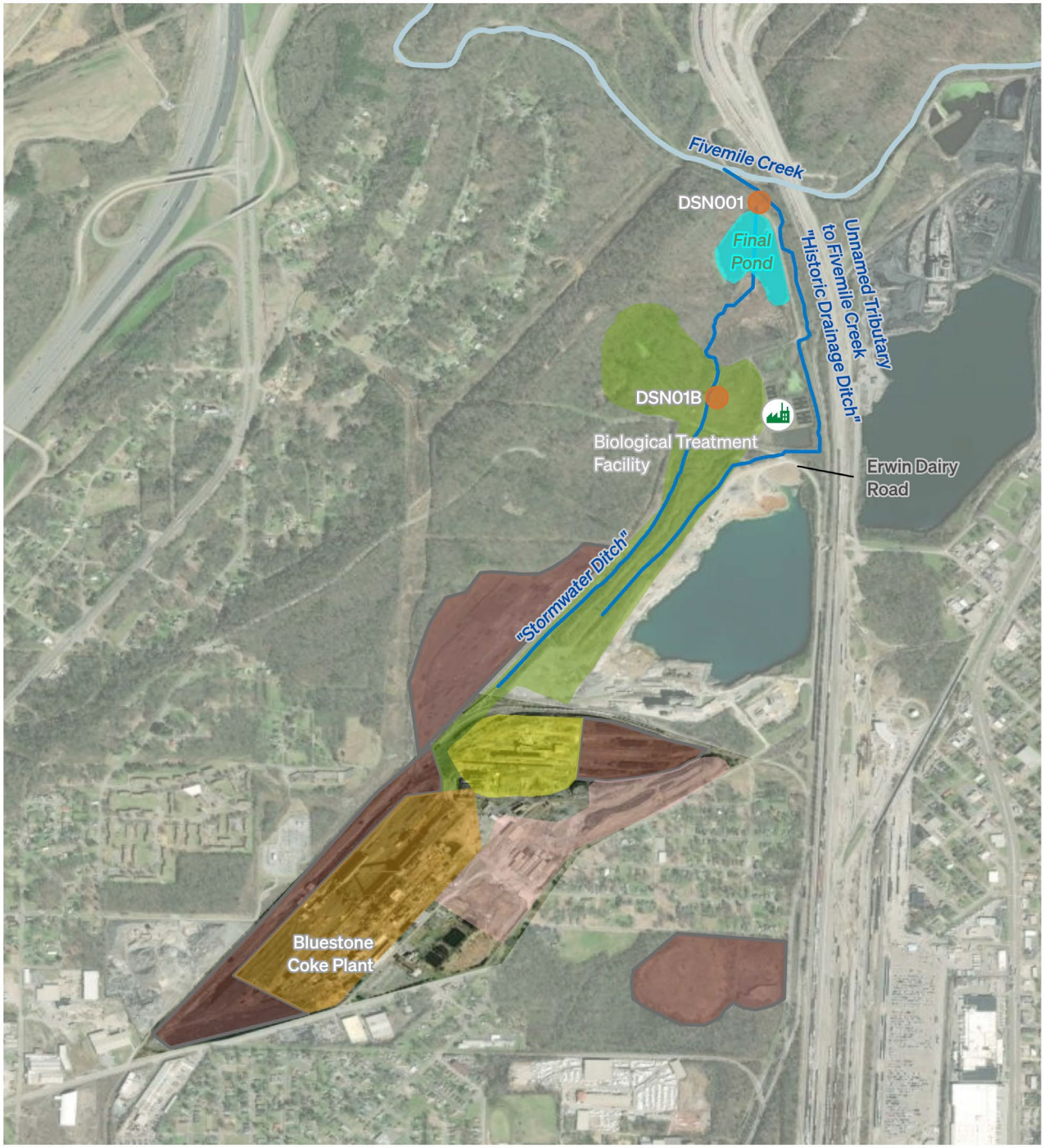
thorough site inspection, it is impossible to know where the point source ends and where the WOTUS begins. In any event, these materials demonstrate Bluestone's admittance that this constitutes a point source under the Clean Water Act.

[46] Bluestone refers to this Unnamed Tributary as a "Historic Drainage Ditch." *See* Ex. A, 2020 LUCP at 17. Riverkeeper and GASP allege that all or parts of this waterbody constitute a WOTUS under the Clean Water Act, and nothing in this notice letter shall be interpreted as an admittance that these features are not jurisdictional waters. However, for clarity, Riverkeeper and GASP use both terms in the illustration below.

[47] 33 U.S.C. § 1362(14).

[48] 40 C.F.R. § 122.2.

Bluestone Coke Clean Water Act Violations



Waste Piles
Coke Manufacturing Plant
Former Chemical Plant
Former Pig Iron Foundry
Land Disposal Area

Words in quotations are Bluestone's terminology from Fig. 1-2, Land Use Control Plan, Ex. A; BWRK/GASP do not concede that these "ditches" are not Waters of the United States
Map created by: Miller Cochran (mcochran@selcnc.org)
Last updated: July 13, 2023
Sources: ESRI, USGS, Maxar, Black Warrior Riverkeeper, 2016 RCRA Consent Decree

0 500 1,000 1,500 2,000 Feet

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Clean Water Act jurisdiction is predicated on discharges to "navigable waters."[49] "Navigable waters" are defined as "the waters of the United States, including territorial seas."[50] The Supreme Court defines "waters of the United States" as "a relatively permanent body of water connected to traditional interstate navigable waters."[51]

As demonstrated by Bluestone's own materials, Bluestone's permit does not allow or contemplate this discharge. In its 2014 permit application, Walter Coke stated that "[c]oal and coke are stored onsite in piles to the south of the coke ovens. Slag and slag waste are stored in piles north of the Mineral Wool building. Stormwater runoff from these areas *is routed to the final pond* for solids settling."[52] It further states that all stormwater discharges discharge through Outfall 001, where they are treated via equalization and sedimentation.[53] Additionally, the permit application expressly states that "[t]here are no stormwater only outfalls."[54] The 2014 permit application demonstrates that Walter Coke represented that all stormwater flows are routed from various areas of the facility to the Final Pond.

However, stormwater is reaching the Unnamed Tributary of Five Mile Creek without routing through the Final Pond. In at least one area of the facility, stormwater flows through a "ditch" and discharges directly into the Unnamed Tributary. That Unnamed Tributary directly discharges into Five Mile Creek without being treated. In fact, a Facility Map from the 10-29-2020 Land Use Control Plan even admits that stormwater is flowing from the facility to the Unnamed Tributary and into Five Mile Creek without flowing through the final pond.[55] Additionally, this map indicates that there is a pipe outfall (AOC A) into the Unnamed Tributary (*i.e.*, "Historical Drainage Ditch"), which is an admittance of an unpermitted discharge.[56]

The final element of Clean Water Act liability is that Bluestone is discharging pollutants into a water of the United States. Riverkeeper's instream sampling, illustrated on the chart below, reveals that Bluestone's stormwater is bypassing treatment and entering the Unnamed Tributary of Five Mile Creek as indicated by the presence of several pollutants including but not limited to Nitrate-Nitrite, Chloride, Barium, Manganese, Aluminum, Iron, Zinc, and Sodium. Additionally, soil samples taken from the "Historic Drainage Ditch" reveal contaminants found in a coke processing facility, such as aluminum, barium, iron, zinc, and copper, among others, are accumulating in the sediment of the Unnamed Tributary. Fragments of coal, coke, and slag are also being deposited into the Unnamed Tributary and are pollutants as defined by the Clean Water Act.[57]

[49] 33 U.S.C. § 1362(12).
[50] *Id.* at § 1362(7).
[51] *Sackett v. EPA*, 598 U.S. ___ (2023).
[52] 2014 Permit Application at 52 (emphasis added).
[53] *Id.*
[54] *Id.*
[55] Ex. A, 2020 LUCP at 17, Figure 1-2.
[56] *Id.* at 17 (labeling AOC A as "Pipe Outfall into Ditch next to BTF Area").
[57] The Clean Water Act defines pollutant "broadly to include not only traditional contaminants but also solids such as dredged spoil, … rock, sand [and] cellar dirt." *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (citing 33 U.S.C. § 1362(6)).

Bluestone Coke UT to FMC Pollutant Concentrations			
Date	**Location**	**Parameter**	**Concentration**
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Total Dissolved Solids (TDS)	358 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Conductivity	598 µmhos/cm
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Sulfate, Total	101 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Nitrate-Nitrite	0.17 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Kjeldahl Nitrogen, Total	0.22 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	BOD-5	4 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Chloride	4.20 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Total Organic Carbon	2.5 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Aluminum	0.026 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Barium	0.058 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Manganese	0.020 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Iron	0.040 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Zinc	5.9 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Magnesium	24 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Strontium	0.272 mg/L
6/8/23	UT to Five Mile Creek @ Erwin Dairy Road	Sodium	22 mg/L
5/17/23	UT to Five Mile Creek	Total Dissolved Solids (TDS)	422 mg/L
5/17/23	UT to Five Mile Creek	Conductivity	637 µmhos/cm
5/17/23	UT to Five Mile Creek	Sulfate, Total	112 mg/L
5/17/23	UT to Five Mile Creek	Nitrate-Nitrite	0.39 mg/L
5/17/23	UT to Five Mile Creek	Kjeldahl Nitrogen, Total	0.92 mg/L
5/17/23	UT to Five Mile Creek	Nitrate	0.21 mg/L
5/17/23	UT to Five Mile Creek	BOD-5	34 mg/L
5/17/23	UT to Five Mile Creek	Chloride	4.31 mg/L

5/17/23	UT to Five Mile Creek	Barium	0.060 mg/L
5/17/23	UT to Five Mile Creek	Manganese	0.071 mg/L
5/17/23	UT to Five Mile Creek	Iron	0.101 mg/L
5/17/23	UT to Five Mile Creek	Zinc	0.019 mg/L
5/17/23	UT to Five Mile Creek	Sodium	32 mg/L

Staggering amounts of these coal, coke, slag, and their fines coat the bottom of the Unnamed Tributary to Five Mile Creek and can be found along and on its banks from at least Erwin Dairy Road all the way into Five Mile Creek at their confluence. Brown and black fines regularly cover the rock, leaf, and woody debris substrate in the Unnamed Tributary to Five Mile Creek after rain events. One of Riverkeeper's patrols documented the tributary flowing turbid brown/black with coal fines, sending an obvious dark and turbid plume into Five Mile Creek. Rock substrate in the Unnamed Tributary is stained black at the confluence of the Unnamed Tributary with Five Mile Creek, indicating a long-term pattern of polluted stormwater being discharged into the Unnamed Tributary to Five Mile Creek. In the alternative, these discharges of coke, coal, and slag are unpermitted discharges of fill material under Section 404 of the Clean Water Act.

VII. CONCLUSION

If Bluestone fails to stop violating its NPDES permit and the Clean Water Act by discharging polluted water as discussed herein and fails to come into full compliance with the Clean Water Act within 60 days of the receipt of this letter, Riverkeeper and GASP intend to file a citizen suit seeking declaratory and injunctive relief as well as civil penalties. Riverkeeper and GASP will request, among other remedies, a judgment declaring the discharges or violations described herein to be unlawful and declaring that Bluestone is in continuing violation of the Clean Water Act. Riverkeeper and GASP intend to pursue these and similar or related violations, including all violations which occur or continue after service of this notice and all violations revealed in the course of the litigation discovery process.

Riverkeeper and GASP will also seek the imposition of civil penalties for Bluestone's permit violations. *See* 40 C.F.R. Part 19. In addition, if successful in the prosecution of this suit, Riverkeeper and GASP intend to seek an award of the costs of litigation (including reasonable attorney and expert witness fees) under 33 U.S.C. § 1365.

If Bluestone has taken any steps to eradicate the violations described above, or if anything in this letter is inaccurate, please let us know. If Bluestone does not advise of any remedial steps taken during the notice period, we will assume that no such steps have been taken, that there are no material errors in this letter, and that violations are likely to continue. Finally, we would be happy to meet with Bluestone or its representatives to attempt to resolve these issues within the notice period. Our preference always is to work with polluters to address and resolve the environmental compliance concerns we have identified. All responses to this letter should be directed to Sarah Stokes, sstokes@selcal.org or 205-745-3060, at the Southern Environmental Law Center.

Thank you for your attention to this matter and we look forward to hearing from you.

Sincerely,

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Southern Environmental Law Center
Attorneys for
Black Warrior Riverkeeper, Inc. and GASP

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