

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

BLACK WARRIOR RIVER-)	
KEEPER, INC. and GASP,)	
)	Case No. _____
Plaintiffs,)	
)	
v.)	
)	
BLUESTONE COKE, LLC)	
)	
Defendant.)	
_____)	

COMPLAINT

1. Bluestone Coke has continually discharged unpermitted pollutants into Five Mile Creek and its tributary, violating its National Pollutant Discharge Elimination System (“NPDES”) Permit. The Clean Water Act prohibits the discharge of pollutants by any person except in compliance with the terms of an NPDES permit issued by the Environmental Protection Agency or an authorized state pursuant to Section 402 of the Act. 33 U.S.C. § 1311(a); *Id.* § 1342.

2. Bluestone Coke is a coking facility and has a legacy of pollution and environmental injustice. Currently, black and brown coal sediments discharged by Bluestone suffocate both an Unnamed Tributary of Five Mile Creek and Five Mile Creek itself. People can no longer use Five Mile Creek without fearing for their health and their children’s health, and there is a noticeable dearth of wildlife in

these waterways. This lawsuit seeks to remedy years of Bluestone's indifference and apathy for these streams and the communities and businesses that rely on them.

3. Bluestone is in violation of the Clean Water Act for violating conditions outlined in NPDES Permit No. AL0003247. According to Bluestone's own reports, it has discharged pollutant levels that exceed what its permit allows 392 times. Additionally, it has violated its permit by failing to operate and maintain the treatment facility on site.

4. Also, Bluestone is in violation of the Clean Water Act for discharging certain pollutants at its discharge point that are not allowed by its permit, including Barium, Strontium, *E.coli*, semi-volatile organic compounds ("SVOCs"), and volatile organic compounds ("VOCs").

5. Further, Bluestone is in violation of the Clean Water Act for discharging pollutants at locations that are not authorized by its permit. Specifically, Bluestone is discharging pollutants during and after rain events. Stormwater flows from the facility into an Unnamed Tributary of Five Mile Creek, transporting various unpermitted pollutants to Five Mile Creek including but not limited to Nitrate-Nitrite, Chloride, Barium, Manganese, Aluminum, Iron, Zinc, and Sodium.

6. Finally, Bluestone has discharged staggering amounts of coal, coke, slag, and their associated sediment into the Unnamed Tributary of Five Mile Creek, and this sediment reaches Five Mile Creek. These discharges constitute

unpermitted fill into waters of the United States, a violation of Section 404 of the Clean Water Act. *Id.* § 1344.

7. This action seeks declaratory relief, injunctive relief, civil penalties, and costs of litigation (including reasonable attorney and expert witness fees).

PARTIES

8. Black Warrior Riverkeeper, Inc., and GASP (“Plaintiffs”) bring this suit against Bluestone under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, which allows citizens to commence an action against any person in violation of any effluent standard or limitation.

9. Plaintiff Black Warrior Riverkeeper (“Riverkeeper”) is an Alabama nonprofit membership corporation with over 6,000 members that is dedicated to the protection and restoration of the Black Warrior River and its tributaries, including Five Mile Creek. Riverkeeper actively supports effective implementation and enforcement of environmental laws, including the Clean Water Act, on behalf of and for the benefit of its members. Riverkeeper is a “citizen” within the meaning of the Clean Water Act. 33 U.S.C. § 1365(g).

10. Members of Riverkeeper use and value Five Mile Creek and the Black Warrior River for recreation, including but not limited to paddling, boating, fishing, swimming, wildlife observation, nature and landscape observation and photography, and for aesthetic enjoyment. These members have been harmed by

Bluestone's actions. They are concerned about the significant concentrations of pollutants that Bluestone is putting into Five Mile Creek, and whether those pollutants make it unsafe to recreate in Five Mile Creek.

11. These violations have lessened members' recreational and aesthetic enjoyment of Five Mile Creek. They would use and enjoy these waters more if the violations were abated. Enforcement by this Court of the Clean Water Act as to Plaintiffs' claims, including injunctive relief and the imposition of fines, would remedy the injuries suffered by Riverkeeper's members. The interests Riverkeeper seeks to protect are germane to its purposes and objectives, but neither the claims asserted herein, nor any of the relief requested, require the participation of individual members in this lawsuit. Accordingly, Riverkeeper has standing to bring this action. *See* Ex. 1 (Decls. of Black Warrior Riverkeeper and Members).

12. For example, Jonathan McNair has been a member of Black Warrior Riverkeeper since 2021 and serves on the Advisory Council. Jonathan frequently uses the Black Warrior River to paddleboard, boat, and take pictures and videos. He has paddle boarded down Five Mile Creek and frequently uses other tributaries of the Black Warrior River, including the Locust Fork downstream. Jonathan does not take his family on Five Mile Creek because he fears how the pollution would impact his children. Jonathan joined Riverkeeper on a patrol of the Unnamed

Tributary to Five Mile Creek and was astonished with the amount of pollution, describing it as a “wasteland.” *See* Ex. 1 at P000006-09.

13. Plaintiff GASP is a 501(c)(3) nonprofit membership organization whose mission is to enhance the wellbeing of Alabamians by reducing air pollution, advancing environmental justice, and promoting climate solutions through education, advocacy, and collaboration. GASP has over 1,700 members, some of whom live, work, and recreate in the impacted area. GASP is a citizen within the meaning of the Clean Water Act. 33 U.S.C. § 1365(g). The interests GASP seeks to protect are germane to its purposes, but neither the claims asserted herein, nor any of the relief requested, require the participation of individual members in this lawsuit. Accordingly, GASP has standing to bring this action. *See* Ex. 2 (Decls. of Executive Director of GASP and Charlie Powell).

14. For example, Charlie Powell has been a member of GASP since 2012. He lived in Fairmont, a neighborhood adjacent to Bluestone, for 43 years. He still owns six properties in Fairmont. Several of his family members, including his wife, who grew up in Fairmont have cancer. He is concerned that Bluestone has lowered his property values and caused health problems in his family and community. Mr. Powell also has concerns about how water can transport pollutants into the community through surface runoff and flooding. He used to swim in Five Mile Creek but will not do so now. He is concerned about the amount of pollution that

is in the Creek. Mr. Powell refers to the Creek as “Tar Creek” because of its putrid smell and black water. *See* Ex. 2 at P000019-23.

15. Defendant Bluestone is a limited liability company registered in the State of Alabama, which engages in the production of coke and coking byproducts. Bluestone owns the facility located at 3500 35th Ave. N, Birmingham, AL 35207, in Jefferson County, Alabama, where the violations are occurring. Bluestone acquired the site from ERP Compliant Coke in 2019. Bluestone is a “person” within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. § 1362(5).

JURISDICTION, VENUE, AND NOTICE

16. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and has jurisdiction over the parties.

17. Before bringing a suit under 33 U.S.C. § 1365(a), citizens must give violators sixty days’ notice of their intent to sue.

18. Riverkeeper and GASP served a notice of the violations and their intent to sue on Bluestone by certified mail, in accordance with 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.2, on July 14, 2023. A copy of the notice letter is attached as Exhibit 3 and incorporated herein by reference. Copies of such notice were also served on the Administrator of the U.S. Environmental Protection Agency (“EPA”), the Regional Administrator of the EPA, and the Director of the Alabama Department of Environmental Management (“ADEM”).

19. More than 60 days have passed since notice was given and the violations identified in the notice letter are reasonably likely to continue in the future.

20. Neither the United States nor the State of Alabama has commenced or is diligently prosecuting a civil or criminal action to redress the violations asserted in this citizen enforcement action. 33 U.S.C. § 1365(b)(1)(B).

21. Venue is proper in the Northern District of Alabama because the source of the violations is located within the Northern District of Alabama. *Id.* § 1365(c)(1); and 28 U.S.C. § 1391(b) and (c).

LEGAL BACKGROUND

22. Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

23. The Clean Water Act prohibits discharges of “any pollutant” to waters of the United States except in compliance with an NPDES permit. *Id.* § 1311(a).

24. Notably, each violation of a permit—and each discharge that is not authorized by a permit—is a separate violation of the Act. *See id.* § 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 finding a monthly average violation as separate violations for each day of that month).

25. Under the Clean Water Act, the phrase “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A).

26. The term “pollutant” includes “solid waste, . . . sewage, garbage, sewage sludge, . . . chemical wastes, biological materials, . . . rock, . . . and industrial, municipal, and agricultural waste.” *Id.* § 1362(6).

27. The term “point source” includes any “discernible, confined and discrete conveyance” from which pollutants may be discharged, including pipes, ditches, channels, and tunnels. *Id.* § 1362(14).

28. The term “navigable waters” means “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). The Supreme Court has defined “waters of the United States” as a relatively permanent body of water connected to traditional navigable waters. *Sackett v. EPA*, 598 U.S. 651, 678 (2023).

29. Absent an NPDES permit, discharges of pollutants from a point source into waters of the United States are a violation of the Clean Water Act. 33 U.S.C. § 1311(a).

30. Additionally, the Clean Water Act prohibits the discharge of any dredge or fill material into waters of the United States without a permit. *Id.* § 1344.

31. The Secretary of the Army, responsible for issuing permits pursuant to Section 404 of the Clean Water Act, defines fill material as any material that has the effect of “[c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1).

32. Section 505 of the Clean Water Act authorizes any “citizen” to “commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a).

33. The Clean Water Act defines an “effluent standard or limitation,” for the purposes of the citizen suit provision, to include an unlawful act under Section 301(a) (*i.e.*, unpermitted discharges) and “a permit or condition of a permit issued” under Section 402. *Id.* § 1365(a); *id.* § 1365(f); *id.* § 1311(a); *id.* § 1342.

34. Under this chapter, *i.e.*, the citizen suit provision, effluent standard or limitation includes “an unlawful act under subsection (a) of section 1311 of this title,” which prohibits the discharge of dredge or fill material without a permit issued under Section 404. *See* 33 U.S.C. § 1365(a); *id.* § 1365(f); *id.* § 1311(a). *See also Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (citizen enforcement of unpermitted discharge under Section 404); *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267 (10th Cir. 2018) (same).

35. In an action brought under Section 505(a) of the Clean Water Act, the District Court has jurisdiction to order compliance with the Act and to assess civil penalties under Section 309(d) of the Act. 33 U.S.C. § 1365(a); *id.* § 1319(d).

36. Under Section 505(d) of the Clean Water Act, the Court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” *Id.* § 1365(d).

FACTUAL BACKGROUND

Bluestone’s Operations

37. The history of this facility dates to the early 1900s, when it was constructed to produce coke for Birmingham’s iron and steelmaking industry. Coke is created by heating coal at high temperatures in the absence of oxygen, and it provided one of the raw materials needed to create iron and steel.

38. Two coking facilities were built a couple of miles apart from each other and are adjacent to the majority-Black neighborhoods of Collegeville, Harriman Park, and Fairmont. The pollution from these facilities disproportionately impacts these communities, who were historically constrained to living in these areas due to racist redlining practices.

39. One of these coking facilities, located at 3500 35th Ave. N, Birmingham, AL 35207, was acquired by Bluestone Resources, LLC, in 2019.

40. Bluestone is owned and operated by James “Jay” Justice III and James “Jim” Justice II, governor of the State of West Virginia. Donald Wiggins is the Vice President of Engineering for Bluestone Coke.

41. On June 25, 2020, ADEM approved transfer of NPDES Permit No. AL0003247 from ERP Compliant Coke (previous owner) to Bluestone. Subject to certain limitations, that permit authorizes discharges from Bluestone’s facility. Under this permit, Bluestone is currently authorized to discharge certain pollutants through one outfall—DSN 001—into Five Mile Creek.

42. In 2021, Bluestone suspended its coke production processes.

43. However, much of the historical pollution on the site, including untreated, polluted water, remains, and Bluestone is still discharging water under the authority of its active NPDES permit.

44. Five Mile Creek is a “relatively permanent” and navigable tributary of the Locust Fork of the Black Warrior River.

45. Five Mile Creek’s designated uses include swimming and protection of fish and wildlife. Ala. Admin. Code r. 335-6-11-.02.

46. According to EPA, for this portion of Five Mile Creek, each designated use is categorized as impaired, likely caused by industrial discharge.

47. Although NPDES Permit No. AL0003247 identifies Five Mile Creek as the receiving water, discharges are occurring on an ongoing basis to the

Unnamed Tributary of Five Mile Creek near the confluence of the Unnamed Tributary and Five Mile Creek.

48. The Unnamed Tributary is a relatively permanent body of water connected to traditional navigable waters. It flows throughout the year, and at places it is waist deep. It runs into Five Mile Creek, which connects to the Black Warrior River, which opens into the Gulf of Mexico via the Tombigbee River.

49. NPDES Permit No. AL0003247 prohibits 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.” NPDES Permit No. AL0003247, Part II.D.1.c, Page 19 of 33.

50. NPDES Permit No. AL0003247 requires that Bluestone:

[A]t all times properly operate 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.

NPDES Permit No. AL0003247, Part II.A.1, Page 18 of 33.

51. Bluestone relies on two treatment systems to clean its wastewater: the Biological Treatment Facility and the Final Pond.

Biological Treatment Facility

52. According to the permit, coke plant wastewater, process area stormwater, sanitary wastewater, and groundwater from Arichem, LLC are all

supposed to be processed in Bluestone’s Biological Treatment Facility (“BTF”), which was constructed in 1974. NPDES Permit No. AL0003247, Part I, Page 5 of 33. The “treated” waters from the BTF flow through DSN01B, an internal discharge and monitoring point, into the Final Pond, where they are eventually discharged from DSN001 into the Unnamed Tributary of Five Mile Creek.

53. The BTF is currently not operating or is operating inadequately for its intended purpose.

54. Bluestone stated in a recent engineering report to ADEM that the BTF is operating only on an “as needed schedule.” Notice of Violation Engineering Report, Bluestone Coke, LLC at P000252 (July 14, 2023) (attached as Ex. 4).

55. There is no evidence of any other treatment system in place at the plant.

56. As Bluestone disclosed in its permit application, the wastewaters the BTF is responsible for treating contain Aniline, Benzene, Cresol, Cyanide, Naphthalene, and Phenols. In addition, sanitary wastewater can contain pathogenic organisms requiring disinfection prior to discharge.

Discharge Monitoring Reports

57. Under the terms of NPDES Permit No. AL0003247, Bluestone is required to submit a monthly and quarterly Discharge Monitoring Report (“DMR”) to ADEM listing the results of water quality monitoring at outfall DSN001. NPDES Permit No. AL0003247, Part I.C, Page 13 of 33.

58. According to Bluestone's DMRs, Bluestone has admitted it has violated effluent limitations mandated by its permit. In the past five years, Bluestone has reported 392 permit violations for pollutants including Ammonia, Total Kjeldahl Nitrogen, BOD, Benzo(a)pyrene, Phenols, and Total Suspended Solids.

Riverkeeper's Sampling

59. Riverkeeper's own sampling has revealed that on at least eighteen occasions Bluestone is discharging undisclosed pollutants from DSN001. These pollutants include Barium, Strontium, and *E.coli*.

60. Barium, Strontium, and *E.coli* were not disclosed in Bluestone's permit application and are not permitted pollutants according to its NPDES permit.

RCRA Consent Order and Groundwater Pollution

61. Bluestone is subject to a longstanding Resource Conservation and Recovery Act ("RCRA") Consent Order. Under certain Interim Measures for a Former Chemical Plant on the site, which produced chemical byproducts from the coking process, Bluestone is responsible for a pump-and-treat operation to keep polluted groundwater from migrating off the property.

62. One of the purposes of the BTF is to treat this polluted groundwater before it is discharged to surface waters. *See* Ex. 3 at P000053.

63. On August 31, 2020, Bluestone Coke submitted a report under the RCRA Consent Order detailing certain interim measures taking place at the facility.

This report included results of groundwater monitoring and effluent monitoring. See Ex. B to Ex. 3 at P000114-121.

64. Chemicals were identified in this groundwater above maximum contaminant levels (MCLs) including Benzene, Toluene, and Chlorobenzene. Ex. 3 at P000114-118.

65. According to Bluestone, this groundwater is pumped and eventually discharged in compliance with NPDES Permit No. AL0003247. Ex. 3 at P000053.

66. The report states that “effluent samples were collected from the effluent tank and analyzed for VOCs by USEPA Method 8260B and SVOCs by Method 8270D.” Ex. 3 at P000098.

67. According to the report, VOCs and SVOCs detected in 2019 and 2020 in Bluestone’s effluent 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- Methylnaphthalene, 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-trifluoroethane, 1,2,3-Trichlorobenzene, 2,4,5 Trichlorophenol, Trans-1,2-Dichloroethene, and Trans-1,3-Dichloropropene. Ex. 3 at P000119-121.

68. None of the above-mentioned pollutants were disclosed in Bluestone's permit application nor are they authorized by NPDES Permit No. AL0003247.

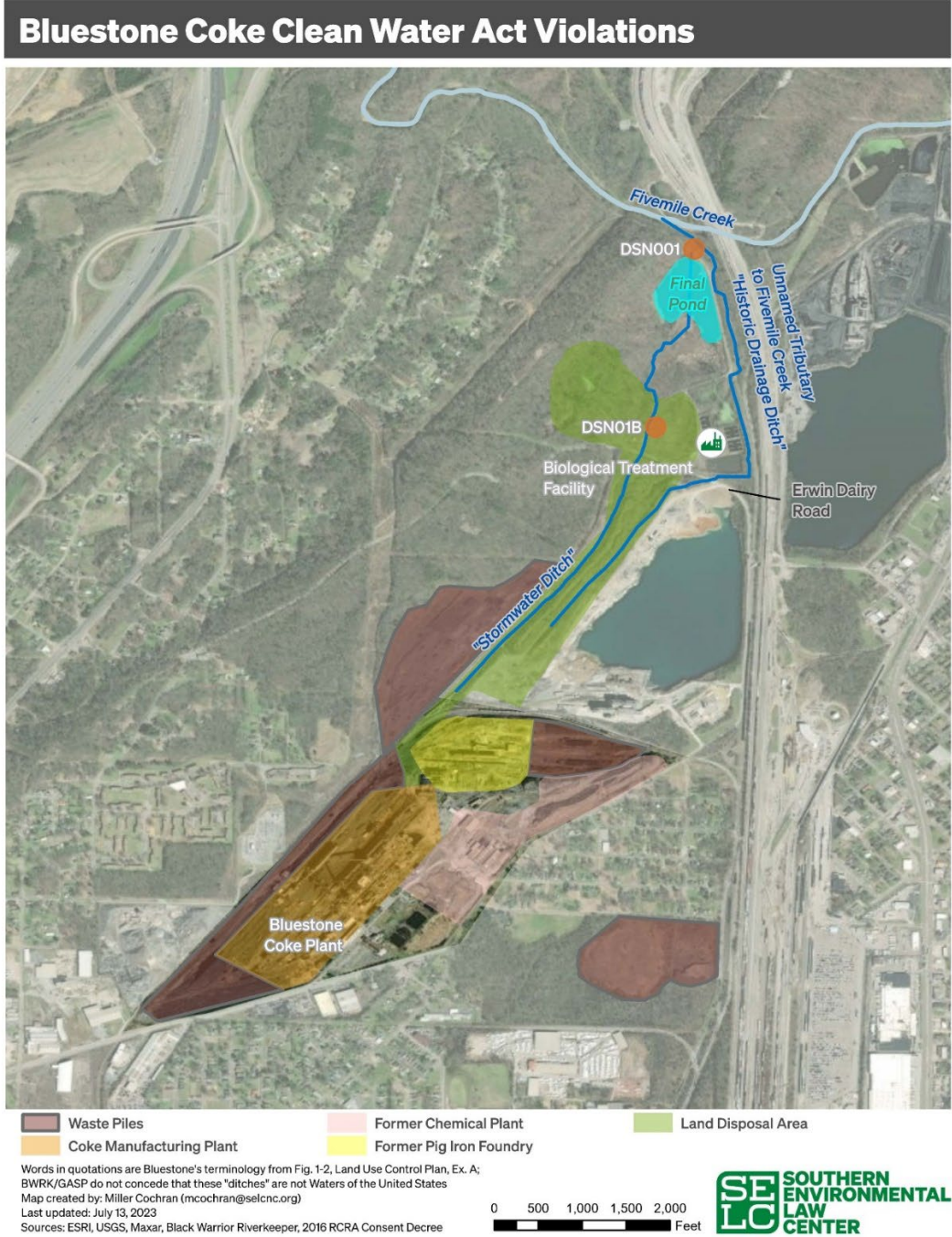
69. Discharge of these undisclosed pollutants is continuing because the BTF is not operating or is operating inadequately, and thus is not treating these pollutants.

Unpermitted Stormwater Discharges

70. According to the permit and permit application, stormwater runoff is only permitted to route through the Final Pond for treatment, where it is discharged through DSN001. NPDES Permit No. AL0003247, Part I at Page 1 of 33.

71. 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. Specifically, discharges from facility runoff are routing to the Unnamed Tributary of Five Mile Creek. Bluestone calls this Unnamed Tributary a "Historic Drainage Ditch" in its Land Use Control Plan required by the RCRA Consent Decree. Ex. 3 at P000060 (showing SWMU#40 labeled as "Historic Drainage Ditch"). Channels and other intended conveyances from the facility constitute point sources. These stormwater discharges bypass the Biological

Treatment Facility and Final Pond, and flow into the Unnamed Tributary of Five Mile Creek and Five Mile Creek. See map below.



72. According to Riverkeeper's instream sampling, several pollutants are being discharged into the Unnamed Tributary including but not limited to Nitrate-Nitrite, Chloride, Barium, Manganese, Aluminum, Iron, Zinc, and Sodium. Additionally, soil samples from the Unnamed Tributary 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.

73. Staggering amounts of coal, coke, slag, and their fines coat the bottom of the Unnamed Tributary of 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. Brown and black fines regularly cover the rock, leaf, and woody debris substrate in the Unnamed Tributary of Five Mile Creek after rain events.

74. Riverkeeper's patrols documented the Unnamed Tributary flowing turbid black with coal fines, sending an obvious dark plume into Five Mile Creek.

75. 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 both waterways.

76. Discharges of coal, coke, and slag have changed the bottom elevation of the Unnamed Tributary of Five Mile Creek.

COUNT I

Violation of NPDES Permit No. AL0003247 (33 U.S.C. § 1311)

Effluent Limitation Violations

78. The preceding paragraphs are incorporated herein by reference.

79. The Clean Water Act prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311.

80. Since 2018, Bluestone has reported 392 permit violations in its Discharge Monitoring Reports.

81. Specifically, Bluestone has reported exceeding its Ammonia, Total Kjeldahl Nitrogen, BOD, Benzo(a)pyrene, and Total Suspended Solids discharge permit limits on numerous occasions. The below chart details each violation of discharge limits.

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
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

82. The activity described above, and in Plaintiffs' notice letter, constitutes noncompliance with NPDES Permit No. AL0003247 and the Clean Water Act.

83. Bluestone is in violation of the Clean Water Act, on an ongoing and continuous basis, by exceeding permit limitations. These violations are likely to

continue in the future because Bluestone is inadequately treating water pollution at the facility. The ongoing violations will continue unless this Court orders and enjoins Bluestone to cease any and all illegal discharges. These violations have caused and will continue to cause Plaintiffs irreparable injury.

COUNT II

Violation of NPDES Permit No. AL0003247 (33 U.S.C. § 1311)

Failure to Operate and Maintain BTF

84. The preceding paragraphs are incorporated herein by reference.

85. The Clean Water Act prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311.

86. Bluestone’s NPDES permit requires that it “operate 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.” NPDES Permit No. AL0003247, Part II.A.1, Page 18 of 33.

87. Bluestone is not operating or is not adequately operating the Biological Treatment Facility (“BTF”), one of the two treatment systems identified in its NPDES permit and application.

88. The BTF is responsible for treating wastewater from the coke plant, by-products plant, steam traps, process area stormwater, sanitary wastewater, and contaminated groundwater.

89. The BTF is responsible for treating polluted groundwater in compliance with a RCRA Consent Order.

90. The activity described above, and in Plaintiffs' notice letter, constitutes noncompliance with NPDES Permit No. AL0003247 and the Clean Water Act.

91. Bluestone is in violation of the Clean Water Act, on an ongoing and continuous basis, by failing to operate and maintain the BTF. These violations started from at least from 2022 and will continue unless this Court orders and enjoins Bluestone to cease its illegal activity. These violations have caused and will continue to cause Plaintiffs irreparable injury.

COUNT III

Unauthorized Discharges to Waters of the United States in Violation of the Clean Water Act (33 U.S.C. § 1311)

Unpermitted Discharge of Barium, Strontium, and E.coli

92. The preceding paragraphs are incorporated herein by reference.

93. The Clean Water Act prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311.

94. For discharges to be approved, they must be adequately disclosed. *In re: Ketchikan Pulp Co.*, 7 E.A.D. 605 (EPA 1998).

95. NPDES Permit No. AL0003247 prohibits 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.” NPDES Permit No. AL0003247, Part II.D.1.c, Page 19 of 33.

96. On at least eighteen occasions, Bluestone has discharged Barium, Strontium, and *E.coli* from DSN001 into the Unnamed Tributary of Five Mile Creek which flows into Five Mile Creek. The chart below details each instance of unpermitted discharge.

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
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

97. Bluestone did not disclose that it discharges Barium, Strontium, or *E.coli* in its permit application, and it is not permitted to discharge such pollutants in NPDES Permit No. AL0003247.

98. The activity described above, and in Plaintiffs’ notice letter, constitutes an unauthorized discharge of pollutants into waters of the United States. This activity also constitutes noncompliance with NPDES Permit No. AL0003247.

99. Bluestone is in violation of the Clean Water Act, on an ongoing and continuous basis, by illegally discharging undisclosed pollutants from a point source, DSN001, into the Unnamed Tributary of Five Mile Creek which flows into Five Mile Creek without a permit from at least 2022 to the present.

100. The ongoing violations will continue unless this Court orders and enjoins Bluestone to cease any and all illegal and unpermitted discharges. These violations have caused and will continue to cause Plaintiffs irreparable injury.

COUNT IV

**Unauthorized Discharges to Waters of the United States
in Violation of the Clean Water Act (33 U.S.C. § 1311)**

*Unauthorized Discharge of
Pollutants Pumped from the Ground*

101. The preceding paragraphs are incorporated herein by reference.

102. The Clean Water Act prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311.

103. For discharges to be approved, they must be adequately disclosed. *In re: Ketchikan Pulp Co.*, 7 E.A.D. (EPA 1998).

104. NPDES Permit No. AL0003247 prohibits 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.” NPDES Permit No. AL0003247, Part II.D.1.c, Page 19 of 33.

105. On August 31, 2020, Bluestone Coke submitted a report under the RCRA Consent Order which included monitoring results. Ex. 3 at P000119-121.

106. The report states that in 2019 and 2020, “effluent samples were collected from the effluent tank and analyzed for VOCs by USEPA Method 8260B and SVOCs by Method 8270D.” Ex. 3 at P000098. The effluent tank referenced is at the permitted discharge point, *i.e.*, DSN001.

107. According to the report, pollutants detected in this effluent 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-Methylnaphthalene, 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-trifluoroethane, 1,2,3-Trichlorobenzene, 2,4,5-Trichlorophenol, Trans-1,2-Dichloroethene, and Trans-1,3-Dichloropropene. Ex. 3 at P000119-121.

108. Bluestone did not disclose any of the above-mentioned pollutants in its permit application.

109. Because the treatment system on site is not operating or is not operating adequately, and Bluestone continues to discharge this groundwater through DSN001, these violations are ongoing and likely to continue in the future.

110. The activity described above, and in Plaintiffs' notice letter, constitutes an unauthorized discharge of pollutants into waters of the United States. This activity also constitutes noncompliance with NPDES Permit No. AL0003247.

111. Bluestone is in violation of the Clean Water Act, on an ongoing and continuous basis, by illegally discharging undisclosed pollutants from a point source, DSN001, into the Unnamed Tributary of Five Mile Creek which flows into Five Mile Creek without a permit from at least 2019 to the present and continuing in the future.

112. The ongoing violations will continue unless this Court orders and enjoins Bluestone to cease any and all illegal and unpermitted discharges. These violations have caused and will continue to cause Plaintiffs irreparable injury.

COUNT V

Unauthorized Discharges to Waters of the United States in Violation of the Clean Water Act (33 U.S.C. § 1311)

Unpermitted Stormwater Discharges

113. The preceding paragraphs are incorporated herein by reference.

114. The Clean Water Act prohibits the “discharge of any pollutant by any person” into waters of the United States except in compliance with the terms of an NPDES permit. 33 U.S.C. § 1311.

115. NPDES Permit No. AL0003247 prohibits 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.” NPDES Permit No. AL0003247, Part II.D.1.c, Page 19 of 33.

116. Bluestone does not have an NPDES permit for the stormwater which routes under Erwin Dairy Road, discharges into the Unnamed Tributary, and eventually discharges into Five Mile Creek. *See* map above at 17. According to its permit, all stormwater from the facility must flow through the Final Pond and through DSN001. NPDES Permit No. AL0003247, Part I at Page 1 of 33.

117. The activity described above constitutes a discharge of pollutants into waters of the United States without a permit. This activity also constitutes noncompliance with NPDES Permit No. AL0003247.

118. This “discharge” contains pollutants within the meaning of the Clean Water Act. These pollutants include Nitrate-Nitrite, Chloride, Barium, Manganese, Aluminum, Iron, Zinc, and Sodium. Pollutants were discharged on the dates identified in the chart below.

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

119. The ditches and channels which route stormwater at Bluestone's facility to the Unnamed Tributary of Five Mile Creek are discernable conveyances that constitute point sources.

120. These pollutants are discharged into waters of the United States, *i.e.*, the Unnamed Tributary of Five Mile Creek. This waterbody constitutes a water of

the United States. Alternatively, the ditch/Unnamed Tributary are both point sources which discharge into Five Mile Creek, a water of the United States.

121. Bluestone is violating Section 301(a) of the Clean Water Act, on an ongoing and continuous basis, by illegally discharging pollutants from point sources into the Unnamed Tributary of Five Mile Creek and Five Mile Creek without a permit from at least the past five years to the present. The ongoing violations will continue into the future unless this Court orders and enjoins Bluestone to cease any and all illegal and unpermitted discharges. These violations have caused and will continue to cause Plaintiffs irreparable injury.

COUNT VI

Unauthorized Fill Activity to Waters of the United States in Violation of the Clean Water Act (33 U.S.C. § 1344)

Unpermitted Discharge of Fill of Coal, Coke, and Slag

122. The preceding paragraphs are incorporated herein by reference.

123. Citizens are authorized to sue under 33 U.S.C. § 1365 for any violation of an effluent standard or limitation. Under this chapter, effluent standard or limitation includes “an unlawful act under subsection (a) of section 1311 of this title,” which prohibits the discharge of dredge or fill material without a permit issued under section 1344. *See* 33 U.S.C. § 1365(a); *id.* § 1365(f); *id.* § 1311(a).

124. Fill material is any material that has the effect of “[c]hanging the bottom elevation of any portion of a water of the United States.” 33 C.F.R. § 323.2(e)(1).

125. Bluestone has discharged fragments of coal, coke, and slag into the Unnamed Tributary of Five Mile Creek and Five Mile Creek for decades. *See id.* § 323.2(f) (stating the discharge of fill material includes “placement of overburden, slurry, or tailings or similar mining-related materials”).

126. This discharge has had the effect of changing the bottom elevation of the Unnamed Tributary of Five Mile Creek, a water of the United States.

127. Bluestone does not have a Section 404 permit for this fill.

128. The activity described above, and in Plaintiffs’ notice letter, constitutes an unauthorized fill to waters of the United States.

129. The ongoing violations have occurred for at least five years and will continue unless this Court orders Bluestone to cease discharging illegal fill. These violations have caused and will continue to cause Plaintiffs irreparable injury.

DEMAND FOR RELIEF

Plaintiffs respectfully request that this Court grant the following relief:

A. Render a judgment finding that Bluestone has violated and is violating the Clean Water Act through noncompliance with NPDES Permit No. AL0003247 for violating effluent limits and failing to operate the Biological Treatment Facility.

B. Render a judgment declaring that Bluestone has violated and is violating the Clean Water Act through the illegal and unpermitted discharges of pollutants at its outfall and from other point sources into the Unnamed Tributary of Five Mile Creek and Five Mile Creek; and through the unpermitted filling of the Unnamed Tributary with coke, coal, and slag discharged by Bluestone from the site.

C. Enjoin Bluestone from violating the Clean Water Act.

D. Order Bluestone to remove any fill material illegally discharged into the Unnamed Tributary of Five Mile Creek and to cease filling this waterway.

E. Assess a civil penalty of \$64,618 for each actionable violation of the Clean Water Act in accordance with 33 U.S.C. § 1365(a). *See* 40 C.F.R. Part 19.

F. Award costs of litigation (including reasonable attorney and expert witness fees) to Plaintiffs in accordance with 33 U.S.C. § 1365(d); and

G. Award Plaintiffs such other relief to which it may be entitled.

Respectfully submitted this 13th day of September, 2023,

s/Sarah Stokes

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