

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF)
MCOAL CORPORATION)
ROSA MINE) **NPDES Permit No. AL0080080**
BLOUNT COUNTY)
T11S, R2E, S 31)
T11S, R1E, S 34-36)
T12S, R1E, S 2-11, 14-17, & 20, 21)

REQUEST FOR HEARING
TO CONTEST ADMINISTRATIVE ACTION

Come now Black Warrior Riverkeeper, Inc., 712 37th Street South, Birmingham, Alabama 35222, (205) 458-0095, and Friends of the Locust Fork River, Inc., P.O. Box 245, Hayden, Alabama, (205) 466-3858, and file this request for a hearing by the Alabama Environmental Management Commission (“Commission”), pursuant to Ala. Code §§ 22-22A-6(a)(4), 22-22A-7(c) and Ala. Admin. Code rr. 335-2-1-.01 to -.05, to contest the issuance of the above-referenced National Pollutant Discharge Elimination System (“NPDES”) permit by the Alabama Department of Environmental Management (“ADEM”), and says as follows:

I. Statement of the Administrative Action Being Contested and the Injury Suffered by Black Warrior Riverkeeper and Friends of the Locust Fork River.

1. On October 23, 2009, ADEM issued NPDES Permit No. AL0080080 (“Permit”) to MCoal Corporation (“MCoal”) for the discharge of water associated with MCoal’s proposed coal mining operation into the Locust Fork of the Black Warrior River and certain tributaries. See NPDES Permit No. AL0080080 (October 23, 2009), attached hereto as Exhibit 1.

2. Black Warrior Riverkeeper, Inc. (“Riverkeeper”) is a non-profit membership corporation that is dedicated to the preservation, protection, and defense of the environment, and actively supports effective implementation of environmental laws, including the federal Clean Water Act (“CWA”) and the Alabama Water Pollution Control Act (“AWPCA”), on behalf and for the benefit of its members. Members of Riverkeeper have recreated in, on, or near; have otherwise used and enjoyed; or have attempted to use and enjoy the Locust Fork of the Black Warrior River and its tributaries in the past; and they intend to do so in the future.

3. Friends of the Locust Fork River, Inc. (“FLFR”) is a non-profit membership corporation that is dedicated to preserving the natural integrity of the Locust Fork of the Black Warrior River. Members of FLFR have recreated in, on, or near; have otherwise used and enjoyed; or have attempted to use and enjoy the Locust Fork of the Black Warrior River and its tributaries in the past; and they intend to do so in the future.

4. Members of Riverkeeper and FLFR have a direct and beneficial interest in the continued protection, preservation, and enhancement of the environmental, aesthetic, and recreational values in the Locust Fork of the Black Warrior River and its tributaries. The quality of these waters directly affects the recreational, aesthetic, and environmental interests of certain members of Riverkeeper and FLFR. The recreational, aesthetic, and environmental interests of certain Riverkeeper and FLFR members have been, are being, and will be adversely affected by ADEM’s issuance of the Permit in violation of the CWA, federal regulations pursuant to the CWA, the AWPCA, and Alabama NPDES regulations, as well as by MCoal’s unlawful mining-related discharges thereunder.

5. ADEM’s issuance of the Permit and MCoal’s unlawful mining-related discharges thereunder will have a detrimental impact on those members’ interests because the expected

discharges will make the Locust Fork of the Black Warrior River and its tributaries less suitable for fishing, boating, wading, walking, observing nature, or relaxing. Certain members of Riverkeeper and FLFR will recreate less in and around Locust Fork and its tributaries once MCoal commences its unlawful mining-related discharges. If the Permit is cured so as to prevent unlawful mining-related discharges by MCoal, certain members of Riverkeeper and FLFR will continue to recreate in and around the Locust Fork of the Black Warrior River and its tributaries.

6. Riverkeeper and FLFR's interests in the proper enforcement and implementation of environmental laws and in protecting the environmental interests of its members are or will be injured by ADEM's issuance of the Permit in error and in violation of the above-cited laws and regulations.

II. Short and Plain Statement of the Errors Made by ADEM in Issuing the Permit

7. Petitioners contend that ADEM made at least four distinct errors in issuing the Permit. Each of these errors provides a separate and distinct basis requiring the Commission to invalidate the Permit.

A. ADEM Improperly Failed to Require Review and Submittal of MCoal's PAP Plan

8. As a first error, ADEM failed to review – or, for that matter, affirmatively require the submittal of – MCoal's pollution abatement and/or prevention plan ("PAP Plan") in advance of issuing the Permit.

9. Pursuant to ADEM's regulations, ADEM must in all instances receive and review a permit applicant's PAP Plan. Specifically, "[a]ll surface mining operations shall be conducted in such a manner as to minimize their impact on water quality to avoid contravention of applicable water quality standards. To this end, all surface mine operators shall provide the

Department with a pollution abatement and/or prevention plan.” Ala. Admin. Code r. 335-6-9-.03(1) (2008) (emphasis added). Furthermore, “[u]pon review of the plan required in Rule 335-6-9-.03, the Department shall notify the operator, in writing, of the acceptance or rejection of his plan.” Ala. Admin. Code r. 335-6-9-.04 (2008).

10. Additionally, and most importantly, “[t]he 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 in and adjacent to the area of operations....” Ala. Admin. Code r. 335-6-9-.05(2) (2008) (emphasis added).

11. MCoal never submitted to ADEM, nor did ADEM review, a PAP Plan prior to issuing the Permit on October 23, 2009. Accordingly, ADEM did not and cannot 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).

12. ADEM’s failure to have required the submittal of and undertake review of the PAP Plan is in direct violation of the above-cited Alabama law and regulations.

13. ADEM’s failure to review MCoal’s PAP Plan simply means that ADEM had no way of gauging whether MCoal’s proposed mining operation will be adequately protective of the water quality of the receiving waters. The PAP Plan is the document that sets out the specific means and practices by which a 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 MCoal will operate in compliance with such effluent limitations and water quality standards.

B. ADEM Improperly Authorized Discharges to Waters Listed On Alabama's 303(d) List of Impaired Waterways.

14. Second, ADEM improperly authorized discharges to a stream that is, by its own admission, already impaired and not meeting its water quality criteria.

15. Both Federal and State regulations prohibit the issuance of a permit for the “discharge from the operation of a new source of the operation of a new discharger, if the discharge from its operation will cause or contribute to a violation of water quality standards.” Ala. Admin. Code r. 335-6-6-.04(i); 40 C.F.R. § 122.4(i) (2008).

16. MCoal's proposed mining operation is a “new source” within the meaning of Ala. Admin. Code r. 335-6-6-.04(i).

17. Section 303(d) of the Clean Water Act requires ADEM to identify and rank waters within Alabama where technology-based controls are inadequate to attain water quality standards. 33 U.S.C. § 1313(d). These waters are not supporting their designated uses, and are placed on what is known as a 303(d) list, which is published by ADEM every 2 years.

18. The Permit authorizes discharges to waterbodies that are not currently meeting their designated use of “Fish & Wildlife” and thus are currently listed on Alabama's 303(d) list for an impairment of siltation. Field Operations Division, Alabama Department of Environmental Management, NPDES Individual Permit Rationale at 3 (May 5, 2009) [hereinafter Permit Rationale], attached hereto as Exhibit 2.

19. The Permit authorizes new discharges of Total Suspended Solids at an amount of 35mg/L per day average, 70mg/L per day maximum. See Permit at 5. Further, the Permit allows unlimited discharge of TSS during any 24-hour rain event. Id. at 6-9.

20. Discharges of TSS into a waterbody already impaired for siltation, especially in the unlimited amounts allowed during rain events, will contribute to the already impaired condition of the waterbody, in violation of Ala. Admin Code 335-6-6-.04(i) and Federal NPDES regulations.

C. ADEM Improperly Exempted Discharge Limitations for Iron, Manganese, Silver, Lead, and Total Suspended Solids during Precipitation Events, Thereby Violating Alabama Water Quality Criteria

21. Third, ADEM improperly included terms in the Permit that allow for exemptions to the discharge limitations for iron, silver, lead, Total Suspended Solids (“TSS”), and manganese, in violation of Alabama water quality criteria.

22. 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).

23. 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).

24. The Locust Fork of the Black Warrior River is classified for “Fish & Wildlife” use. Ala. Admin. Code r. 335-6-11-.02(14) (2008); Permit Rationale at 3.

25. 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” 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).

26. Specifically, while the Permit otherwise established daily average and daily maximum discharge limitations on iron, manganese, silver, lead, and TSS, ADEM included in the final Permit exemptions from these limitations during all precipitation events. See Permit at 5-9.

27. 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 6-7. Furthermore, the Permit increases the daily maximum discharge limitation for iron from 6.0 mg/L to 7.0 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 6-9

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

29. This exemption during precipitation is particularly significant because the concentrations of TSS, iron, silver, lead, and manganese discharged by MCoal would all be at their highest during such precipitation events. If anything, the Permit should establish strict

controls on such pollutants during precipitation in order to guard against the possibility of serious violations of water quality criteria and/or impairments of important uses of the receiving water, such as drinking water.

30. With respect to the exempted discharges' impacts in light of the water quality criteria specific to the 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, as a simple matter, the Permit's terms directly violate this water quality criterion specific to the fish and wildlife usage.

31. With respect to the exempted discharges' impacts in light of the "Minimum Conditions Applicable To All State Waters," the exemptions are in clear 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). The increased and uncontrolled discharges of iron, manganese, silver, lead, and TSS during precipitation are likely to be harmful to the aquatic life of the Locust Fork and to cause the Locust Fork to be unsuitable to such aquatic life. Accordingly, the Permit's precipitation exemptions are in direct violation of the Alabama water quality criteria's "Minimum Conditions Applicable To All State Waters."

32. Because ADEM issued the Permit with exemptions to discharge limitations during precipitation events without further controls, ADEM violated the Alabama water quality criteria, the federal prohibition on issuing a NPDES permit if the discharge from construction or operation will cause or contribute to the violation of water quality criteria, and the federal

requirement that NPDES permit include conditions in order to achieve water quality criteria.

Accordingly, ADEM issued the Permit in error, and the Permit should be invalidated.

D. ADEM Violated Alabama Water Quality Criteria in its Failure to Take into Account Total Dissolved Solids, Sulfate, Chloride, and Aluminum in its Issuance of the Permit

33. Fourth, in its issuance of the Permit to MCoal, ADEM failed to address or to establish limits for total dissolved solids (“TDS”), sulfate, chloride, or aluminum, all of which are known to be present at unacceptable levels in typical discharges from coal-mining operations. These uncontrolled discharges will violate Alabama water quality criteria, and ADEM therefore violated federal regulations in failing to establish discharge limitations in the Permit for TDS, sulfates, chloride, and aluminum.

34. 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). 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).

35. Pursuant to Alabama’s water quality criteria, 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). As noted supra, the 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).

36. The Locust Fork of the Black Warrior River is classified for “Fish and Wildlife” use. Ala. Admin. Code r. 335-6-11-.02(14) (2008); see also Permit Rationale at 3.

37. 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” 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.

38. With respect to ADEM’s failure to establish discharge limitations in the Permit for TDS, sulfates, chloride, and aluminum in light of the water quality criteria for waters classified for fish and wildlife use, the uncontrolled and unlimited discharges of TDS, sulfates, chloride, and aluminum clearly are “not effectively treated in accordance with Rule 335-6-10-.08,” as the Permit sets no discharge limitations for TDS, sulfate, chloride, or aluminum. 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.

39. With respect to the “Minimum Conditions Applicable To All State Waters,” ADEM’s failure to set discharge limitations for TDS, sulfate, chloride, or aluminum is 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).

40. Because ADEM issued the Permit with exemptions to discharge limitations during precipitation events without further controls, ADEM violated the Alabama water quality criteria, the federal prohibition on issuing a NPDES permit if the discharge from construction or operation will cause or contribute to the violation of water quality criteria, and the federal requirement that NPDES permit include conditions in order to achieve water quality criteria. Accordingly, ADEM issued the Permit in error, and the Permit should be invalidated.

III. Statement of the Terms and Conditions that the Commission Should Include in an Order on the Permit:

41. Riverkeeper and FLFR propose that the Commission implement the following terms and conditions in an order on the Permit:

- a. The Commission should invalidate the Permit.

Respectfully submitted this 20th day of November, 2009.



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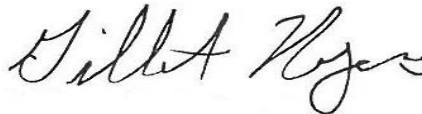
CERTIFICATE OF SERVICE

I hereby certify that I have on this the 20th day of November, 2009, served a copy of the Request for Hearing on the following parties by certified U.S. Mail.

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