

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BLACK WARRIOR)
RIVERKEEPER, INC.,)
)
Plaintiff,)
)
v.)
)
KIM T. THOMAS, in his Official) Case No. _____
Capacity as COMMISSIONER,)
ALABAMA DEPARTMENT OF)
CORRECTIONS, and ALABAMA)
UTILITY SERVICES, LLC)
)
Defendants.)
_____)

COMPLAINT

COMES NOW Plaintiff Black Warrior Riverkeeper, Inc., (“Riverkeeper”) and files this Complaint against Defendants Kim T. Thomas, in his official capacity as Commissioner of the Alabama Department of Corrections (“Thomas”), and Alabama Utility Services LLC (“AUS”) as follows.

Nature of the Case

1. This is an action under Federal Water Pollution Control Act (“FWPCA”) § 505, 33 U.S. § 1365, for declaratory relief, injunctive relief, penalties and costs of litigation (including reasonable attorney and expert witness fees) arising out of the discharge of pollutants from the Donaldson Correctional

Facility (“Donaldson”) Wastewater Treatment Plant. Defendants Thomas and AUS are in violation of sections 301 and 402 of the CWA (33 U.S.C. §§ 1311 and 1342) and section 122.1 of Title 40 of the Code of Federal Regulations at Donaldson. These laws require that no facility shall discharge pollutants to waters of the United States except as authorized by a permit issued pursuant to the National Pollutant Discharge Elimination System (“NPDES”).

Jurisdiction and Venue

2. This action arises under FWPCA § 505(a), 33 U.S.C. § 1365(a), and 28 U.S.C. §§ 2201 and 2202 (declaratory judgments). This Court has subject matter jurisdiction over the claim set forth in this Complaint under FWPCA § 505(a), 33 U.S.C. § 1365(a), and 28 U.S.C. §1331 (actions arising under the Constitution or laws of the United States).

3. On December 21, 2012, Riverkeeper served notice of the violations alleged herein and their intent to sue on Thomas and AUS by certified mail in accordance with FWPCA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), and 40 C.F.R. § 135.3. Copies of such notice were also served on the Administrator of the U.S. Environmental Protection Agency, the Regional Administrator of the U.S. Environmental Protection Agency - Region 4, and the Director of the Alabama Department of Environmental Management.

4. Neither the Administrator of the U.S. Environmental Protection Agency nor the State of Alabama has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or in a court of the State of Alabama, to require that Thomas and AUS comply with NPDES Permit No. AL0045560 or redress the violations alleged herein.

5. Neither the Administrator of the U.S. Environmental Protection Agency nor the State of Alabama has issued a final order not subject to further judicial review under FWPCA § 309(g), 33 U.S.C. § 1319(g), or comparable law of the State of Alabama assessing a penalty for the violations alleged herein. The Defendants have not paid any penalty assessed under FWPCA § 309(g), 33 U.S.C. § 1319(g), or comparable law of the State of Alabama for the violations alleged herein.

6. Since Riverkeeper gave notice, the violations complained of have not ceased.

7. Venue is appropriate in the Northern District of Alabama because the source of the violations alleged herein is the Donaldson Wastewater Treatment Plant, 100 Warrior Lane, Bessemer, AL 35023-7299, which is within the Northern District of Alabama. *See* FWPCA § 505(c)(1), 33 U.S.C. §1365(c)(1).

Parties - Plaintiff

8. Plaintiff Riverkeeper is an Alabama nonprofit membership

corporation with over 2,000 members that is dedicated to the preservation, protection and defense of the Black Warrior River and its tributaries. Riverkeeper actively supports effective implementation and enforcement of environmental laws, including the FWPCA on behalf and for the benefit of its members.

9. Donaldson Wastewater Treatment Plant discharges to Big Branch, a tributary of Valley Creek. Both Big Branch and Valley Creek are tributaries of the Black Warrior River and all are waters of the United States.

10. Members of Riverkeeper use and value Big Branch and Valley Creek as well as the Black Warrior River for recreation, including but not limited to canoeing, kayaking, fishing, swimming, wading, wildlife observation, nature and landscape observation, photography and for aesthetic enjoyment. This area is known as the Bankhead Lake section of the Black Warrior River and it is among the most heavily used sections of the River for recreation. Riverkeeper's members intend to continue to use these waters in the future.

11. These members have a direct and beneficial interest in the protection, preservation and enhancement of the environmental, aesthetic and recreational values of Big Branch, Valley Creek and the Black Warrior River. The quality of these waters directly affects the recreational, aesthetic and environmental interests of Riverkeeper's members.

12. Members of Riverkeeper now use and enjoy Big Branch, Valley

Creek and the Black Warrior River less because of the violations at Donaldson's Wastewater Treatment Plant alleged herein. These violations have a direct and substantial impact on the interests of Riverkeeper's members, because the violations make the waters of Big Branch, Valley Creek and the Black Warrior River less suitable for canoeing, kayaking, fishing, swimming, wading, wildlife observation, nature and landscape observation, photography and for aesthetic enjoyment. These members would use and enjoy Big Branch, Valley Creek and the Black Warrior River more if the violations complained of ceased.

Parties - Defendants

13. Defendant Thomas is the Commissioner of the Alabama Department of Corrections ("DOC"), which is a "person" as defined under CWA § 502(5), 33 U.S.C. § 1362(5). Under applicable law, the DOC is "headed by and under the independent direction, supervision and control" of the Commissioner, who is appointed by and serves at the pleasure of the Governor. *See* Ala. Code § 14-1-1.3. "Any administrator shall have the authority and the duties which the Governor may designate and all of the power and authority incident to carrying out the functions and duties assigned." Ala. Code § 14-1-17.

14. Donaldson is a maximum security prison for men owned and operated by the DOC in Jefferson County, Alabama. By law, defendant Thomas independently directs, supervises and controls the DOC, including the DOC's

operations at Donaldson, and possesses all the power and authority incident to carrying out the functions and duties assigned to him as Commissioner, including the power and responsibility to ensure that operations at the DOC's prisons, including Donaldson, meet all applicable requirements of law.

15. Defendant AUS is an Alabama corporation formed in 2003 for wastewater collection as well as treatment plant construction, management and operation. In June 2005, the DOC retained AUS to operate and manage the Donaldson Wastewater Treatment Plant. On June 8, 2005, the DOC and AUS executed a ninety-nine (99) year ground lease for the plant. Upon information and belief, AUS currently operates Donaldson's Wastewater Treatment Plant, although the DOC, under the direction, supervision and control of Thomas, remains the owner of the real property where both the prison and the plant are located, as well as the prison and the plant themselves.

Facts

16. Riverkeeper incorporate paragraphs 1 through 15 by reference.

17. On October 19, 1979, the Administrator of the U.S. Environmental Protection Agency approved the State of Alabama's NPDES permit program pursuant to CWA § 402(b), 33 U.S.C. § 1342(b). *See* 44 Fed. Reg. 61452 (1979).

18. The DOC owns and AUS operates the Donaldson Wastewater Treatment Plant under NPDES Permit No. AL0045560. Upon information and

belief, AUS may hire subcontractors to help manage operations at the plant, but AUS is the current NPDES permittee.

19. Donaldson Wastewater Treatment Plant has had a long history of permit violations.

20. Originally built for 700 inmates, today Donaldson houses approximately 1492 inmates. It is not known to Riverkeeper what, if any, changes were made to the Donaldson Wastewater Treatment Plant to adjust treatment capacity to reflect the increased load which results from doubling the prison's population.

21. On October 26, 1999 the DOC entered into Consent Order 00-015-CWP ("the Consent Order") to resolve numerous violations of NPDES Permit No. AL0045560 from August 1996 through August 1999. A November 10, 2004 CWA Notice of Intent to Sue sent to the DOC by Riverkeeper chronicles 1060 additional violations of NPDES Permit No. AL0045560 and observes that Donaldson failed to comply with almost all terms of the Consent Order (other than the submittal of a Compliance Plan January 25, 2000).

22. On January 7, 2005, the State of Alabama filed suit against the DOC in Jefferson County Circuit Court (Case No. CV-05-40) for the violations that were the subject of Riverkeeper's Notice. Riverkeeper intervened on February 11, 2005. The State later filed a Motion to Dismiss the action against Donaldson, citing the

retention of Alabama Utility Services and Donaldson’s “substantial compliance with the terms and conditions” of NPDES Permit No. AL0045560.

23. On December 20, 2005 ADEM reissued NPDES permit number AL0045560 (“the 2005 NPDES permit”) to the DOC. The permit was issued under CWA § 402(b), 33 U.S.C. § 1342(b), and State law. That 2005 NPDES permit authorized the discharge of pollutants to waters of the state subject to the following limitations:

NPDES Permit No. AL0045560 (2005)

Parameter	Monthly Average	Weekly Average	Monthly Average	Weekly Average	Daily Minimum	Daily Maximum
Oxygen, Dissolved					6.0 mg/L	
pH					6.0 s.u.	8.5 s.u.
Solids, Total Suspended	87.5 lbs/day	131 lbs/day	30.0 mg/L	45.0 mg/L		
Ammonia Total (As N)	8.99 lbs/day	13.4 lbs/day	3.1 mg/L	4.6 mg/L		
Chlorine, Total Residual				.011mg/L	0.5 mg/L	.01 mg/L
Coliform, Fecal General			2000 col/100 ml			2000 col/100 ml
BOD, Carbonaceous 5-Day	37.9 lbs/day	56.9 lbs/day	13.0 mg/L	19.5 mg/L		

24. The 2005 NPDES permit also requires at least an 85% removal rate for both 5-day Carbonaceous Biochemical oxygen demand (“BOD”) and Total Suspended Solids (“TSS”).

25. On April 12, 2006 ADEM modified the 2005 NPDES permit to change the name of the permittee from the DOC to AUS. On November 29, 2010 ADEM reissued NPDES permit number AL0045560 (“the 2010 NPDES permit”) to AUS, which authorizes the discharge of pollutants to waters of the State subject to the following limitations:

NPDES Permit No. AL0045560 (2010)

Parameter	Monthly Average	Weekly Average	Monthly Average	Weekly Average	Daily Minimum	Daily Maximum
Oxygen, Dissolved					6.0 mg/L	
pH					6.0 s.u.	8.5 s.u.
Solids, Total Suspended	87.5 lbs/day	131 lbs/day	30.0 mg/L	45.0 mg/L		
Ammonia Total, (as N) (Summer)	6.4 lbs/day	9.6 lbs/day	2.2 mg/L	3.3 mg/L		
Ammonia Total, (As N) (Winter)	9.0 lbs/day	13.5 lbs/day	3.1 mg/L	4.6 mg/L		
Chlorine, Total Residual				.011 mg/L		.019 mg/L
E Coli (June-September)				126 col/100 ml		487 col/100 ml
E Coli(Oct. - May)				548 col/100 ml		2507 col/100 ml
BOD, Carbonaceous 5-Day (Summer)	37.9 lbs/day	56.9 lbs/day	13.0 mg/L	19.5 mg/L		
BOD, Carbonaceous 5-Day (Winter)	43.7 lbs/day	65.6 lbs/day	15.0 mg/L	22.5 mg/L		

26. The 2010 permit also requires at least an 85% removal rate for both 5-day BOD and TSS.

Count I
Clean Water Act:
NPDES Permit Violations

27. Riverkeeper incorporate paragraphs 1 through 26 by reference.

28. CWA § 301(a), 33 U.S.C. § 1311(a), provides that “[e]xcept in compliance with this section and section[] . . . 1342 . . . of this title, the discharge of any pollutant by any person shall be unlawful.”

29. Thomas and AUS have operated and continue to operate the Donaldson Wastewater Treatment Plant in violation of NPDES Permit No. AL0045560 by discharging pollutants from point sources into Big Branch and Valley Creek, tributaries of the Black Warrior River, and into the Black Warrior River, on the dates shown in the attached *Table of NPDES Permit No. AL0045560 Violations* (Exhibit I). The *Table of Violations* is compiled from Discharge Monitoring Reports that Donaldson is required to file with ADEM as a condition of NPDES Permit No. AL0045560.

30. In addition to Donaldson’s self-reported violations set out in Exhibit I, Riverkeeper staff Nelson Brooke and John Kinney performed additional sampling at Donaldson Wastewater Treatment Plant on February 21, 2013. That sampling found an additional violation of NPDES Permit No. AL0045560. The Donaldson

NPDES permit limits *e. coli* bacteria to a daily maximum of 2507 col./100 ml. The Riverkeeper sample measured the Donaldson Wastewater Treatment Plant discharge at nearly twice that: 4,800 col./100ml.

31. In addition to being violations of NPDES Permit No. AL0045560, the violations identified in paragraphs 29 and 30 indicate operational failures at the Donaldson Wastewater Treatment Plant and/or failures to properly treat sewage prior to discharge.

32. Big Branch, Valley Creek and the Black Warrior River are navigable-in-fact waters. The quality of the waters in Big Branch and Valley Creek affect the chemical, physical, and biological integrity of the Black Warrior River. All such waters are “navigable waters” within the meaning of CWA § 502(7), 33 U.S.C. § 1362(7).

33. The violations alleged herein will continue unless this Court enjoins Thomas and AUS from future violations. These violations have caused and will continue to cause Riverkeeper irreparable injury. Riverkeeper has no adequate remedy at law for the injuries caused by Thomas and AUS’s continuing violations at Donaldson.

Count II
Clean Water Act:
NPDES Permit Violation

34. Riverkeeper incorporate paragraphs 1 through 33 by reference.

35. NPDES Permit No. AL0045560 specifically incorporates by reference ADEM Administrative Code Chapter 335-6-6 and makes these regulations a part of the 2010 permit. *See* 2010 NPDES Permit Part II.D(4). State waters like Big Branch, Valley Creek and the Black Warrior River must “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).

36. On February 6, 2013 Riverkeeper staff Nelson Brooke and Charles Scribner performed sampling at Donaldson Wastewater Treatment Plant. That sampling measured heavy concentrations of fecal coliform bacteria in the Donaldson wastewater discharge: 43,200 cols./100ml. Though not a violation of Donaldson’s current permit limitations (bacteria is expressed in the 2010 permit using *e coli* rather than fecal coliform to better conform to EPA requirements), this high concentration of bacteria associated with Donaldson’s February 6 sewage discharge is a violation of Ala. Admin. Code r. 335-6-10-.06 (c), which is incorporated by reference into the 2010 NPDES permit.

37. By way of comparison, the 2005 NPDES permit which expressed bacteria limitations in fecal coliform colonies per 100 milliliters of effluent contained a permit limit of 2000 col./100ml. Donaldson’s discharge of wastewater

with high concentrations of sewage bacteria –nearly 22 times the amount of the earlier permit limit-- constitutes a violation of the 2010 NPDES permit and also indicates operational failures at the Donaldson Wastewater Treatment Plant and/or a failure to properly treat sewage prior to discharge.

38. Big Branch, Valley Creek and the Black Warrior River are navigable-in-fact waters. The quality of the waters in Big Branch and Valley Creek affect the chemical, physical, and biological integrity of the Black Warrior River. All such waters are “navigable waters” within the meaning of CWA § 502(7), 33 U.S.C. § 1362(7).

39. Violations like the one alleged herein will continue unless this Court enjoins Thomas and AUS from future violations. These violations have caused and will continue to cause Riverkeeper irreparable injury. Riverkeeper has no adequate remedy at law for the injuries caused by Thomas and AUS’s continuing violations at Donaldson.

Demand for Relief

Riverkeeper respectfully requests that this Court grant the following relief:

A. That the Court render a judgment finding and declaring that Thomas and AUS have violated and continue to violate the CWA by operating the Donaldson Wastewater Treatment Plant in violation of the discharge limitations in NPDES Permit No. AL0045560;

B. That the Court enjoin Thomas and AUS from continuing to operate the Donaldson Wastewater Treatment Plant in violation of the discharge limitations in NPDES Permit No. AL0045560;

C. That the Court order Thomas and AUS to take all necessary steps to comply with NPDES Permit No. AL0045560 and the CWA at the Donaldson Wastewater Treatment Plant;

D. That the Court assess a civil penalty against AUS of \$32,500.00 for each violation of the discharge limitations in NPDES Permit No. AL0045560 alleged herein which occurred before January 13, 2009 and \$37,500.00 for each violation of the discharge limitations in NPDES Permit No. AL0045560 alleged herein which occurred after January 12, 2009 in accordance with CWA § 505(a), 33 U.S.C. § 1365(a) (*see* 40 C.F.R. Part 19);

D. That the Court award costs of litigation from AUS to Riverkeeper (including reasonable attorney and expert witness fees) in accordance with CWA § 505(d), 33 U.S.C. § 1365(d);

E. That the Court retain jurisdiction over this action to ensure compliance with this Court's decree; and

F. That the Court award Riverkeeper such other relief to which they may be entitled.

Respectfully submitted,

s/ Eva L. Dillard

Eva L. Dillard

ASB-4118-A59E

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Table I
Donaldson Correctional Facility WWTP NPDES Violations

Date	Parameter	Permit Limit	Discharge	# of Violations
Sep-08	Ammonia Max Concentration (Weekly Average)	4.6 mg/l	4.84 mg/l	7
Jan-09	Ammonia Max Concentration (Weekly Average)	4.6 mg/l	5.05 mg/l	7
Feb-09	Ammonia Max Concentration (Weekly Average)	4.6 mg/l	8.24 mg/l	7
Feb-09	Ammonia Max Quantity(Weekly Average)	13.4 mg/l	16.6 mg/l	7
Feb-09	Chlorine, Total Residual Daily Maximum	0.01mg/l	0.50 mg/l	1
Mar-09	Chlorine, Total Residual Daily Maximum	0.01 mg/l	0.50 mg/l	1
Jul-10	All Parameters – DMR missing ¹	-	-	-
Sep-10	All Parameters – DMR missing	-	-	-
May-11	TSS Max Concentration (Weekly Average)	45.0 mg/L	45.8 mg/L	7
Nov-11	TSS Average Quantity (Monthly Average)	87.5 ppd	146 ppd	30
Nov-11	TSS Max Quantity (Weekly Average)	131 ppd	558 ppd	-
Nov-11	TSS Average Concentration (Monthly Average)	30.0 mg/L	104 mg/L	30
Nov-11	TSS Max Concentration (Weekly Average)	45.0 mg/L	399 mg/L	-
Nov-11	TSS % Removal (Monthly Average)	85%	54.40%	30
Jan-12	TSS Average Concentration (Monthly Average)	30.0 mg/L	32.7 mg/L	31

¹ For July and September 2010, the failure to submit DMRs could conceivably be counted as a violation of every parameter for the applicable period, which would substantially increase the number of violations.

Jan-12	TSS Max Concentration (Weekly Average)	45.0 mg/L	48.8 mg/L	-
May-12	Ammonia Average Concentration (Monthly Average)	2.2 mg/L	2.45 mg/L	31
Jun-12	TSS Average Quantity (Monthly Average)	87.5 ppd	105 ppd	30
Jun-12	TSS Max Quantity (Weekly Average)	131 ppd	257 ppd	-
Jun-12	TSS Average Concentration (Monthly Average)	30.0 mg/L	68.6 mg/L	30
Jun-12	TSS Max Concentration (Weekly Average)	45.0 mg/L	157 mg/L	-
Jun-12	Ammonia Max Quantity (Weekly Average)	9.6 ppd	13.7 ppd	7
Jun-12	Ammonia Max Concentration (Weekly Average)	3.3 mg/L	8.7 mg/L	7
Jul-12	TSS Average Quantity (Monthly Average)	87.5 ppd	149 ppd	31
Jul-12	TSS Max Quantity (Weekly Average)	131 ppd	271 ppd	-
Jul-12	TSS Average Concentration (Monthly Average)	30.0 mg/L	90.4 mg/L	31
Jul-12	TSS Max Concentration (Weekly Average)	45.0 mg/L	165 mg/L	-
Jul-12	BOD Average Quantity (Monthly Average)	37.9 ppd	49.6 ppd	31
Jul-12	BOD Max Quantity (Weekly Average)	56.9 ppd	103 ppd	-
Jul-12	BOD Average Concentration (Monthly Average)	13.0 mg/L	30.3 mg/L	31
Jul-12	BOD Max Concentration (Weekly Average)	19.5 mg/L	61.8 mg/L	-
Aug-12	Ammonia Average Quantity (Monthly Average)	6.4 ppd	10.45 ppd	31
Aug-12	Ammonia Max Quantity (Weekly Average)	9.6 ppd	13.4 ppd	-
Aug-12	Ammonia Average Concentration (Monthly Average)	2.2 mg/L	6.29 mg/L	31
Aug-12	Ammonia Max Quantity (Weekly Average)	3.3 mg/L	8.04 mg/L	-

Aug-12	E. Coli Average Concentration (Monthly Average)	126 col./100m L	3545 col./100m L	31
Aug-12	E. Coli Max Concentration (Daily Max)	487 col./100m L	12,001 col./100m L	-
Aug-12	BOD Average Concentration (Monthly Average)	13.0 mg/L	14.64 mg/L	31
Aug-12	BOD Max Concentration (Weekly Average)	19.5 mg/L	19.65 mg/L	-
Sep-12	Ammonia Max Concentration (Weekly Average)	3.3 mg/L	3.89 mg/L	7
Sep-12	E. Coli Max Concentration (Daily Max)	487 col./100m L	770 col./100m L	1
			Total Violations	519²

² In *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), the United States Court of Appeals for the Eleventh Circuit held that under the Clean Water Act, 33 U.S.C. § 1319, violations of monthly average permit limitations are counted as 30 or 31 days of violation, rather than one day of violation. To avoid multiple penalties for the same violation, a daily maximum violation is not counted if it is included in a monthly average violation. It follows that seven-day averages are counted as seven days of violation, thirty-day averages are counted as thirty days of violation and seven-day violations are not counted if they are also included in a thirty-day violation.