

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BLACK WARRIOR RIVER-)
KEEPER, INC.,)
)
)
Plaintiff,)
)
v.)
)
SHANNON, LLC)
)
)
Defendant.)
_____)

Case No. 2:13-CV-00763-RDP
NOT OPPOSED

**JOINT MOTION TO LODGE AND ENTER
SETTLEMENT AGREEMENT AND CONSENT DECREE**

Plaintiff Black Warrior Riverkeeper (“Riverkeeper”) and Defendant Shannon, LLC (“Shannon”) lodge the attached Settlement Agreement and Consent Decree (“the Consent Decree”) with the Court. The Consent Decree represents settlement of all claims presented by Riverkeeper against Shannon. The parties represent that the settlement terms are appropriate, reasonable and in the public's best interest.

Under Section 505(c)(3) of the Clean Water Act and 40 C.F.R. 135.5(b), the United States has 45 days from receipt of a consent judgment by the Department of Justice (“DOJ”) Citizen Suit Coordinator (on behalf of the Attorney General) and USEPA to complete the federal review and provide any comments to the Court. At the conclusion of that review period, the parties jointly request that the Court enter the Consent Decree.

Respectfully submitted this 7th day of July, 2015.

/s/ Eva L. Dillard

Eva L. Dillard
ASB-4118-A59E
Counsel for Plaintiff
Black Warrior Riverkeeper, Inc.
712 37th Street South
Birmingham, AL 35222-3206
Tel. (205) 458-0095
Fax (205) 458-0094
edillard@blackwarriorriver.org

/s/ Richard E. Davis

Richard E. Davis
W. Anthony Davis III
Amber M. Whillock
Attorneys for Shannon, LLC
Starnes Davis Florie LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35209
Telephone: (205) 868-6000
Facsimile: (205) 868-6099
red@starneslaw.com
wad@starneslaw.com
amw@starneslaw.com

NOW, THEREFORE, with the consent of the Parties, **IT IS HEREBY ADJUDGED, ORDERED,** and **DECREED** as follows:

I. INTRODUCTION

Riverkeeper filed this action under the federal Clean Water Act (“CWA”) § 505, 33 U.S.C. § 1365, under the federal Surface Mining Control and Reclamation Act (“SMCRA”) § 520, 30 U.S.C. § 1270, and under the Alabama Surface Mining Control and Reclamation Act (“ASMCRA”), Ala. Code § 9-16-95. Riverkeeper seeks declaratory relief, injunctive relief, penalties, and costs of litigation (including reasonable attorney and expert witness fees) arising out of, inter alia, Shannon’s alleged unpermitted discharges and/or discharges in excess of effluent limitations from its surface mine (the “Mine”), which is subject to National Pollution Discharge Elimination System (“NPDES”) Permit No. AL0076597 issued by the Alabama Department of Environmental Management (“ADEM”) (hereinafter, the ADEM NPDES Permit for the Mine is referred to simply as the “Permit”). Riverkeeper alleged that Shannon, as the operator of the Mine, was in violation of sections 301 and 402 of the CWA (33 U.S.C. §§ 1311 and 1342), and of administrative rules and/or regulations of the Alabama Surface Mining Commission (“ASMC”) promulgated pursuant to § 503 of SMCRA (30 U.S.C. § 1253), and Ala. Code § 9-16-90 of ASMCRA—specifically, ASMC Admin. Code r. 880-X-10C-.13(5), which provides that “[d]ischarges of water from areas

disturbed by mining activities shall be made in compliance with all applicable State and Federal water quality effluent limitation guidelines for coal mining,” and r. 880-X-10C-.28, which provides that “[n]o land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities.” These laws require that no facility shall discharge pollutants to waters of the United States except as authorized by a NPDES permit, and the alleged violations are set out in the Complaint [Doc. 1], the First Amended Complaint [Doc. 31], and the Supplemental Complaint [Doc. 49-1]. Shannon has filed an answer denying Riverkeeper’s allegations as set forth in the First Amended Complaint [Doc. 45] and would further deny any additional allegations in the Supplemental Complaint.

II. JURISDICTION AND VENUE

The Court has jurisdiction over this matter and of Riverkeeper’s claims pursuant to 28 U.S.C. § 1311, 33 U.S.C. § 1365(a), 30 U.S.C. § 1270(a), and 28 U.S.C. § 1367(a). Venue is appropriate in the Northern District of Alabama because the Mine, the source of the alleged violations, is located within the Northern District of Alabama. See CWA § 505(c)(1), 33 U.S.C. § 1365(c)(1), and SMCRA § 520(c)(1), 30 U.S.C. § 1270(c)(1).

III. EFFECT OF SETTLEMENT

In exchange for Shannon’s agreement to and compliance with the terms of this settlement of a contested matter, to which Shannon agrees without admission

of any wrongdoing or liability, Riverkeeper hereby releases and forever discharges Shannon and its members; any parents, subsidiaries, and affiliates, including officers, directors, and shareholders; and any partners, attorneys, predecessors, successors, representatives, insurers, assignees, agents, employees, executors, administrators, heirs, and all persons acting by, through, or in any way on behalf of Shannon of and from any and all claims alleged by Riverkeeper in the Complaint [Doc. 1], the First Amended Complaint [Doc. 31], and the proposed Supplemental Complaint [Doc. 49-1] as well as any violations that may have occurred prior to the effective date (as defined herein) of this Decree. The Parties further covenant and agree that this Settlement Agreement and Consent Decree may be pled and asserted by or on behalf of Shannon as a defense and complete bar to any action or claim that may be brought against or involving Shannon by anyone with respect to any of the matters within the scope of this Settlement Agreement and Consent Decree (hereinafter, the "Consent Decree") excepting only the obligations of the Parties under this Consent Decree. Riverkeeper specifically reserves its rights to, and does not release, any claim not specifically released herein that may occur after the effective date (as defined herein) arising out of the operation of Shannon Mine.

This Consent Decree shall become effective upon its entry following any required time period for notification and consideration by the United States (the "Effective Date").

IV. SUPPLEMENTAL ENVIRONMENTAL PROJECT

In consideration of the settlement of Riverkeeper's claims and the releases contained in this Consent Decree, Shannon shall pay the sum of Seventy Thousand and No/100 Dollars (\$70,000.00) for the establishment of a Supplemental Environmental Project ("SEP") in the Valley Creek subwatershed of the Black Warrior River. Said sum shall be paid in one lump sum payment. Shannon shall remit this payment to the Freshwater Land Trust at the following address:

Freshwater Land Trust
2308 1st Avenue North
Birmingham, Alabama 35203

within thirty (30) days of the Effective Date of this Consent Decree. Shannon shall notify Riverkeeper of the payment by sending a copy of the documents evidencing the payment to Riverkeeper at the time the payment is made, and Shannon will also file a notice of such payment with the Court.

V. INJUNCTIVE RELIEF

1. a. With regard to the seep of undetermined source located immediately below Pond 045, Shannon agrees to sample the seep *as if* it were an outfall of Pond 045 in accordance with the frequency, terms, and parameters of the Permit for

Pond 045 up to the date of bond release for the Mine under ASMC Permit No. P-3925-01-14-S as renewed by Permit Renewal No. P-3925-01-19-S and until termination of post-mining point source outfall monitoring and/or reporting has been authorized by ADEM in accordance with the terms of the Permit as qualified by subsection b. of this section V.1. below. In agreeing to do so, Shannon does not intend to suggest, concede, or admit that the seep is or may be construed to be anything other than a natural seep discharging ground water. Furthermore, under no circumstance does Shannon intend that the seep is or may properly be construed to be a “point source”—as that term is defined in the federal Clean Water Act, 33 U.S.C. § 1362(14), in ADEM Admin. Code r. 335-6-9-.02(g) promulgated under the Alabama Water Pollution Control Act (the “AWPCA”), Ala. Code § 22-22-1 *et seq.*, and in Part III.D.43. of the Permit—or a “nonpoint source”—as that term is defined in ADEM Admin. Code r. 335-6-9-.02(c)—from which any “pollutant”—as defined in the Clean Water Act, 33 U.S.C. § 1362(6) and in Part III.D.44. of the Permit—or “pollution”—as defined in the Clean Water Act, 33 U.S.C. § 1362(19), in the AWPCA, Ala. Code § 22-22-1(b)(3), and in ADEM Admin. Code r. 335-6-1-.01(a)—is “discharged”—as the terms “discharge” and “discharge of a pollutant” are defined in the Clean Water Act, 33 U.S.C. § 1362(19) and (12), the AWPCA, Ala. Code § 22-22-1(b)(8), Part III.D.23. of the Permit, and ADEM Admin. Code r. 335-6-1-.01(a)—to “navigable waters”—as defined in the Clean Water Act, 33

U.S.C. § 1362(7)—or “waters”—as defined in the AWPCA, Ala. Code § 22-22-1(b)(2), ADEM Admin. Code r. 335-6-1-.01(a), and Part III.D.63. of the Permit. It is also not the intention of Shannon to suggest that there is any discharge to ground water from Pond 045, including any ground water that may emanate from the seep, nor to suggest that there is any suspected, threatened, or actual ground water contamination occurring. It is agreed by and between the parties that the sampling of the seep provided for herein is undertaken out of an abundance of caution with the mutual intent of environmental protection. (The seep in question is located, according to Count II of the First Amended Complaint [Doc. 31], at approximately N 33° 22’ 14.09”; W 87° 03’ 05.69”, and, according to a GPS location taken during the parties’ site inspection on January 14, 2015, as shown on the attached Appendix A.) The relevant parameters, discharge limitations, and sampling frequencies are, specifically, the following:

Parameter	Discharge Limitations			Monitoring Requirements	
	Daily Minimum	Monthly Average	Daily Maximum	Sample Type	Measurement Frequency
Specific Conductance	****	Report $\mu\text{S/cm}$	Report $\mu\text{S/cm}$	Grab	2/Month
Sulfate (As S)	****	Report mg/L	Report mg/L	Grab	2/Month
pH	6.0 s.u.	****	9.0 s.u.	Grab	2/Month
Solids, Total Suspended	****	35.0 mg/L	70.0 mg/L	Grab	2/Month
Selenium , Total Recoverable	****	5.0 $\mu\text{g/L}$	20.0 $\mu\text{g/L}$	Grab	1/Month
Iron, Total (As Fe)	****	3.0 mg/L	6.0 mg/L	Grab	2/Month
Manganese, Total (As Mn)	****	2.0 mg/L	4.0 mg/L	Grab	2/Month

Solids, Total Dissolved (TDS)	****	Report mg/L	Report mg/L	Grab	1/Quarter
-------------------------------	------	----------------	----------------	------	-----------

(Permit, Part I, Page 6 of 62.) Based on prior sampling, including a joint sampling event involving both parties and including independent laboratory testing of the samples taken by Riverkeeper, and given that the source of the seep water has not been established, Shannon believes that exceedance of the monitored parameters is unlikely. However, in the event that any contemporaneous exceedance of the relevant parameters occurs *in both Pond 045 and in the seep*, Shannon will, within 48 hours of its receipt of the laboratory analysis indicating the exceedance of one or more of the stated parameters, undertake such of the following treatments/remedies in Pond 045 as may be consistent with best environmental management and engineering practices:

<u>Parameter Exceeded</u>	<u>In-Pond Treatment/Remedy</u>
pH	Buffer the pH
Solids, Total Suspended	Increase retention or flocculate
Selenium, Total	Treat chemically, physically, and biologically
Iron, Total	Aid in precipitation
Manganese	Aid in precipitation.

The efficacy of the treatment/remedy shall be verified by Shannon with the next sampling event undertaken in accordance with the Permit's requirements. If an exceedance is evidenced by the subsequent sampling event, then Pond 045 will be retreated until compliant or the exceedance may be remedied in some other manner

as may then be deemed appropriate and in keeping with best environmental management and engineering practices.

b. Shannon shall perform toxicity testing on the seep's discharge on a quarterly basis for two (2) consecutive quarters. If the samples pass these two toxicity tests, Shannon may discontinue toxicity testing. If the samples fail one or both of these toxicity tests, Shannon shall continue toxicity testing at the seep until two consecutive passing tests are achieved. Shannon will provide informational copies of all of the toxicity testing results to Riverkeeper within ten (10) days of Shannon's receipt of said results from the laboratory.

c. In the event that sampling indicates an exceedance¹ of one or more of the stated parameters *in the seep only* twice in a twelve-month period—which, again, based on prior sampling is believed to be unlikely—Shannon shall undertake such necessary actions as may be required under the Permit or its ASMC permit or regulations then in effect to address the exceedance(s), including, but not limited to, Part II.A.1. of the Permit (“Facilities Operation and Management”); Part II.A.2. of the Permit (“Best Management Practices”); Part II.A.7. of the Permit (“Duty to Mitigate”); Part II.C.1. of the Permit (Prohibition against Discharge from Facilities Not Certified); Part II.C.2. of the Permit (“Permit Modification, Suspension,

¹ “Exceedance,” as used herein, means a test or sample result that has been replicated by subsequent testing and data verification and validation procedures that would be used if the test results for the seep were required to be reported to ADEM on a Discharge Monitoring Report under Part I.C. of the Permit.

Termination and Revocation”); Part II.D.5. of the Permit (“Compliance with Statutes and Rules”); ;Part II.C.6. of the Permit (“Groundwater”); Part II.D. of the Permit (“Duty to Comply”); ASMC Permit P-3925, Condition 2; Ala. Admin. Code r. 880-X-10C-.12 (“Hydrologic Balance Protection”); Ala. Admin. Code r. 880-X-10C-.13 (“Hydrologic Balance: Water Quality Standard And Effluent Limitations”); Ala. Admin. Code r. 880-X-10C-.16 (“Hydrologic Balance: Sediment Control Measures”); Ala. Admin. Code r. 880-X-10C-.18 (“Hydrologic Balance: Discharge Structures”); Ala. Admin. Code r. 880-X-10C-.21 (“Hydrologic Balance: Ground Water Protection”); Ala. Admin. Code r. 880-X-10C-.23 (“Hydrologic Balance: Surface And Ground Water Monitoring”); and Ala. Admin. Code r. 880-X-10C-.49 (“Protection Of Fish, Wildlife, And Related Environmental Values”).

d. Shannon agrees to provide copies of the laboratory analysis reports for the samples from the seep for the parameters set forth in the table on pages 7 and 8 of this agreement to Riverkeeper on a quarterly basis. Shannon also agrees to provide to Riverkeeper basic information regarding the nature and/or type of any treatments or remediation undertaken by Shannon in accordance with subsection a. of this section V.1, above.

2. With regard to the allegation that Shannon is or was in violation of the law prohibiting surface mining activities within 100 feet of a perennial or

intermittent stream as is alleged in Count VII of the First Amended Complaint [Doc. 31], Shannon and Riverkeeper agree to split evenly the cost of hiring a qualified, experienced, and properly licensed third-party surveyor agreeable to both parties (the “third-party surveyor”) who will make an independent survey of the area around Pond 028 in relation to the required 100-foot Stream Buffer Zone from Blue Creek. Both parties may be present at the survey. The third-party surveyor and Riverkeeper will be provided with an informational copy of a survey plot of Shannon 3 Pond 028 in reference to the 100-foot offset of Blue Creek, which plot includes (a) the original survey of the Pond 028 dam at the time of its completion in January 2012, (b) a survey of Blue Creek on January 20, 2015, (c) a 100-foot offset of the creek, (d) and a 100-foot radius from the original survey of the corner of the Pond 028 dam. The third-party surveyor and Shannon will be provided a copy of Riverkeeper’s annotated map(s) of the area of concern, also for informational purposes. If the third-party survey indicates that no “surface mining activities,” as that term is defined in ASMC Admin. Code r. 880-X-2A-.06(170), intrude into the required 100-foot buffer zone for the stream, Riverkeeper agrees that no further action need be taken with regard to the 100-foot offset. If the third-party survey indicates that “surface mining activities” do intrude into the 100-foot buffer zone, Shannon agrees to restore the stream buffer as part of the reclamation plan for the Mine. The parties agree, for purposes of this subsection V.2. of this

agreement, that neither the preexisting road along Blue Creek, nor the pre-existing highwall, nor the excavation and placement of the water line for the Warrior River Authority shall constitute “surface mining activities” or “surface coal mining operations,” as defined in ASMC Admin. Code r. 880-X-2A-.06(167). The parties further agree the use of the pre-existing road by Shannon shall not be deemed “surface mining activities” or “surface coal mining operations” prohibited by Ala. Admin. Code r. 880-X-10C-.28. Except as provided for in this section V no further injunctive relief shall be required.

VI. COSTS

Shannon will pay Thirty thousand and No/100 Dollars (\$30,000.00) to Black Warrior Riverkeeper as costs of this litigation and reasonable attorneys’ fees. Shannon shall pay this amount within thirty (30) days of the Effective Date of this Consent Decree.

VII. RIVERKEEPER AGREEMENT TO HONOR MINE BOUNDARIES

Riverkeeper acknowledges that the Mine is located on property leased by Shannon from U.S. Steel and that neither Riverkeeper nor its members have any right to cross the boundaries of the Mine property for any reason without the express and specific permission of Shannon, as lessee of the Mine property. Riverkeeper, for itself and for its employees, agrees that it will not enter the Mine property—with entry defined as crossing a boundary of the Mine property—for

any reason without express written permission of a duly authorized person extending such permission on behalf of Shannon. Shannon specifically reserves any and all rights to seek civil remedies and relief from and criminal prosecution of any violations.

VIII. RETENTION OF JURISDICTION: TERMINATION OF CONSENT DECREE

The Court shall retain jurisdiction for the purposes of enforcing this Consent Decree and of adjudicating all disputes between the Parties that may arise under this Consent Decree.

IX. CONFIDENTIALITY

The Parties recognize that the fact and terms of this Consent Decree are a matter of public record by virtue of the appearance of this Consent Decree in the Court's records as required by law.

X. SEVERABILITY

The provisions of this Consent Decree shall be severable. If any provisions are declared by a court of competent jurisdiction to be unenforceable, the remaining provisions shall nevertheless remain in full force and effect.

XI. LODGING AND APPROVAL OF DECREE

Pursuant to § 505(b)(3) of the CWA, 33 U.S.C. § 1365(b)(3), this Consent Decree will be lodged with the Court and simultaneously presented to the United States for its review for a period of forty-five (45) days. After the statutory period

expires, this Consent Decree will be entered by the Court as a final judgment of the Court. If this Consent Decree is not entered by the Court, the Parties shall retain all rights they had in this litigation before lodging of this Consent Decree. In the event the United States proposes modifications to this Consent Decree, the Parties agree to confer and undertake good faith efforts to resolve any disputes that may arise out of the proposed modifications by the United States of the Consent Decree.

XII. COMMUNICATIONS

1. Except as otherwise specified, when Shannon or Riverkeeper transmits any written notification or communication required by or in conjunction with the terms of this Consent Decree, the notification shall be addressed as follows both to the stated physical address and the email address of counsel as follows:

As to Riverkeeper:

Eva Dillard, Staff Attorney
Black Warrior Riverkeeper, Inc.
712 37th Street South
Birmingham, Alabama 35222-3206
edillard@blackwarriorriver.org

As to Shannon:

Richard E. Davis
Starnes Davis Florie LLP
100 Brookwood Place, 7th Floor
Birmingham, Alabama 35209
rdavis@starneslaw.com

2. Shannon and Riverkeeper agree to accept service by U.S. Mail and email with respect to all matters arising under or relating to this Consent Decree and to waive any formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court.

3. The Parties shall immediately notify one another of any change of address, whether of physical or email address.

XIII. SIGNATORIES

The undersigned representatives of the Parties certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

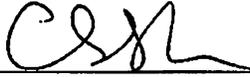
This Consent Decree may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

ENTERED and DONE this __ day of _____, 2015.

R. David Proctor
UNITED STATES DISTRICT JUDGE

[Parties' signatures follow at pages 17 and 18]

FOR PLAINTIFF BLACK WARRIOR RIVERKEEPER, INC.



Charles Scribner, Executive Director
Black Warrior Riverkeeper, Inc.
712 37th Street South
Birmingham, Alabama 35222-3206
(205) 458-0095

Approved as to form:



Eva L. Dillard, Staff Attorney
ASB-4118-A59E
Black Warrior Riverkeeper, Inc.
712 37th Street South
Birmingham, Alabama 35222-3206
(205) 458-0095

Attorney for Black Warrior Riverkeeper, Inc.

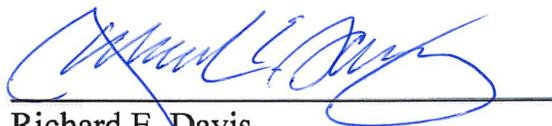
FOR DEFENDANT SHANNON, LLC

Shannon, LLC

By: David Muncher

Its: Manager

Approved as to form:



Richard E. Davis
Starnes Davis Florie LLP
100 Brookwood Place, 7th Floor
Birmingham, Alabama 35209
(205) 868-6000

Attorney for Shannon, LLC