



Alabama Environmental Management Commission

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June 28, 2010

Via Certified Mail

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Via Certified Mail

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P. Stephen Gidiere, III, Esq.
Thomas L. Casey, Esq.
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P.O. Box 306
Birmingham, AL 35201

Re: Black Warrior Riverkeeper, Inc. and Friends of Locust Fork River, Inc. v. ADEM,
and MCoal Corporation, EMC Docket No. 10-04

Dear Messrs. Rogers, Hanson, Wright, Boyd, Gidiere, and Casey and Meses. Wannamaker and Espy:

Enclosed is a copy of the Commission's order in the above-styled appeal.

Yours truly,

Debra S. Thomas
Executive Assistant

DST
Enclosure
cc/enc: James F. Hampton, Hearing Officer

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the Matter of:)	
)	
Black Warrior Riverkeeper, Inc. and)	
Friends of the Locust Fork River, Inc.,)	
Petitioners,)	
)	
vs.)	EMC Docket No. 10-04
)	
Alabama Department of)	
Environmental Management,)	
Respondent,)	
)	
and)	
)	
MCoal Corporation,)	
Intervenor.)	


ORDER

This cause having come before the Environmental Management Commission pursuant to the Report of the Hearing Officer, the objections to the Report of the Hearing Officer, and the responses to the objections in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Report of the Hearing Officer is adopted; and
2. That pursuant to the adoption of the Report of the Hearing Officer, the Findings of Fact and Conclusions of Law and Recommendation contained in said Report are adopted, and the Commission finds in favor of ADEM on all issues in this matter and affirms the proper issuance of ADEM's final permit in this cause; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
3. That a copy of this Order, along with a copy of the Report of the Hearing Officer, attached hereto and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail.

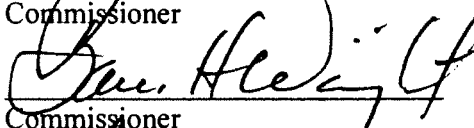
ISSUED this 25th day of June 2010.

APPROVED:



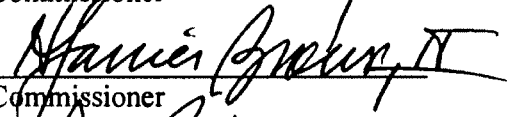
Commissioner

Commissioner



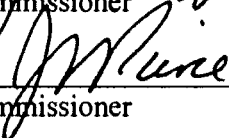
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DISAPPROVED:

Commissioner

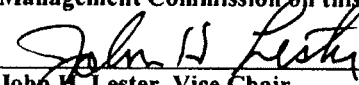
Commissioner

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ABSTAINED:

Commissioner

**This is to certify that this Order is a true and accurate
account of the actions taken by the Environmental
Management Commission on this 25th day of June 2010.**



John H. Lester, Vice Chair
Environmental Management Commission
Certified this 25th day of June 2010

**BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

BLACK WARRIOR RIVERKEEPER, INC.,
and FRIENDS OF THE LOCUST FORK
RIVER, INC.;

Petitioners,

v.

THE ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,

Respondent,

and

MCOAL CORPORATION,

Intervenor.

DOCKET No. 10-04



REPORT OF HEARING OFFICER

The undersigned Hearing Officer, duly employed by the Environmental Management Commission to conduct the hearing and all related proceedings pertinent to this matter, offers this report which includes Findings of Fact, Conclusions of Law and Recommendations. This report is submitted pursuant to Rule 335-2-1-.27 of ADEM Admin Code and is submitted along with the entire record of these proceedings including a complete transcript of the hearing, all documents allowed into evidence, and other relevant briefs and submissions of the parties.

I. INTRODUCTION AND PROCEDURAL HISTORY OF THIS PROCEEDING

The Alabama Department of Environmental Management (ADEM) issued NPDES Permit No. AL0080080 to MCoal Corporation, Inc. (MCoal) on October 23, 2009. Subsequent to that date, Black Warrior Riverkeeper, Inc. (BWR) and Friends of the Locust Fork River, Inc. (FLFR), collectively referred to as Petitioners, requested a hearing in this matter to contest the issuance of this permit more accurately described as a National Pollutant Discharge Eliminations Systems permit. This permit was issued to MCoal for discharges associated with MCoal's proposed "Rosa Mine" operation located in Blount County, Alabama. MCoal filed a motion to intervene in this matter, and that motion was granted on December 9, 2009.

Subsequently, the Petitioners, ADEM and MCoal filed motions for summary judgment on the issues before the Commission. All of those motions were denied in an order issued by this Hearing Officer.

During that process, the Alabama Coal Association filed a motion for leave to file an Amicus brief and brief in support of ADEM and MCoal's motion for summary judgment. That motion to allow the Amicus brief was granted, and such brief is included in the record of this proceeding.

Separate motions and applications of attorneys David Pope, Catherine Wannamaker and David Hanson to be admitted pro hac vice for the purpose of this hearing before the Environmental Management Commission were approved and granted.

Petitioners' motion to strike the affidavits of C. W. McGehee and Lynn Sisk and to bar the testimony of McGehee and Sisk were denied.

This matter proceeded from that point through to the discovery deadlines as established by the Joint Proposed Prehearing Order submitted to this Hearing Officer for signature and dated 19 February 2010. Testimony was taken over four days at the ADEM offices from February 22 through 25, 2010. Thereafter the parties were allowed time, per the above-referenced prehearing order, to submit briefs, argument and proposed findings of fact and conclusions of law to the undersigned Hearing Office for consideration. All of those documents were reviewed by the Hearing Officer and carefully considered in issuing this report.

Additionally, there was a post-hearing motion filed by the Petitioners labeled as Petitioners' Motion for Appropriate Relief. That matter has remained pending before this Hearing Officer until this date, and both ADEM and MCoal filed responses to that motion for appropriate relief. After consideration of all submissions on that motion, it is ORDERED that the Petitioners' Motion for Appropriate Relief is due to be denied and is denied as of this date. Ruling on said motion closes the record and concludes this hearing effective this date. ((See ADEM Admin. Code R. 335-2-1-.27 and 335-2-1-.14(17))

II. STANDARD OF REVIEW

This proceeding is clearly a de novo process, and the Environmental Management Commission essentially stands in the place of ADEM and should exercise its judgment for that of ADEM on questions of law and fact which are related to this proceeding. ((See ADEM Admin. Code R. 335-2-1-.14(6)) and the Environmental Management Commission's order dated October 16, 2009 in *Black Warrior Riverkeeper, Inc. v. ADEM and Shepherd*

Bend, LLC, EMC DN 09-04) The Petitioners in this case bear the burden to prove, by a preponderance of the evidence, that ADEM's decision to issue this permit was improper. There is a presumption that ADEM's administrative action below is correct and the Petitioners have the burden of overcoming that position. That burden requires the proof of applicable standards and cannot be based on theoretical or hypothetical allegations. The ultimate decisions by the Environmental Management Commission should be consistent, and departures from established interpretations by the Commission should not be entered into lightly absent compelling reasons for such.

III. FINDINGS OF FACT

1. ADEM confirmed its receipt of a complete NPDES application by MCoal by letter dated May 5, 2009. MCoal sought, by way of that application, permission for discharges to waters at MCoal's proposed Rosa Mine in Blount County, Alabama.
2. That application, originally submitted on January 6, 2009 (in a form acceptable to ADEM), included a completed Pollution Abatement Plan (PAP) - Appendix A & B Information Checklist and a PAP Review Checklist.
3. MCoal's NPDES permit application included all information required by ADEM's Administrative Code rule 335-6-9-.03(2). This information was submitted to ADEM on ADEM's own forms approved by the Alabama Environmental Management Commission.
4. MCoal's NPDES permit application was certified by a registered professional engineer licensed to practice in Alabama. Sufficient public notice was given concerning the application in the Birmingham News.
5. On July 27, 2009, Black Warrior Riverkeeper, Inc. (BWR) submitted a comment letter to ADEM concerning ADEM's draft permit No. AL0080080. On July 27, 2009, Friends of the Locust Fork River, Inc. (FLFR) also submitted a comment letter to ADEM concerning ADEM's draft permit No. AL0080080.
6. On October 13, 2009, MCoal submitted to ADEM a sediment evaluation study concerning this proposed mine.
7. On October 21, 2009, ADEM released its Response to Comments received.
8. ADEM issues its final NPDES Permit No. AL0080080 to MCoal for the Rosa Mine on October 23, 2009 with an effective date of November 1, 2009.

9. On November 20, 2009, the Petitioners filed their request for a hearing to contest ADEM's issuance of NPDES permit AL0080080 (hereinafter "the Permit") for discharges from 62 outfalls at MCoal's Rosa Mine in Blount County, Alabama.

10. BWR is a nonprofit membership corporation with approximately 1900 members whose mission is to protect and restore the Black Warrior River and its tributaries. (See Hearing Transcript of February 22, 2010 at 32:8-11)

11. FLFR is a nonprofit membership corporation dedicated to preserving the Locust Fork in all of its natural beauty and keeping the river clean from pollutants. (See Petitioners' Hearing Exhibit 20, Affidavit of Sam Howell). Members of BWR and FLFR use and enjoy the Locust Fork and its tributaries in the immediate vicinity of, and downstream from, the Rosa Mine. These members' use and enjoyment is directly threatened by discharges associated with the Rosa Mine.

12. Numerous individuals testified that they are members of BWR and/or FLFR and that they regularly use, enjoy, recreate upon and conduct education seminars on the Locust Fork on a frequent, if not constant, basis. Those individuals testified that such use and enjoyment is threatened by the discharges authorized by NPDES permit AL0080080. Some of those witnesses were/are property owners on the River and have a separate financial stake in the health of the water.

13. Some of the individual members of BWR and FLFR are persons who have an interest in this permit and they have been, or may be, adversely affected by MCoal's actions in exercising its right to engage in mining operations at the Rosa Mine pursuant to NPDES Permit AL0080080. Those members have such interests in their own right, and such interests are germane to these organizations' basic purpose.

14. NPDES Permit No. AL0080080 authorizes discharges of pollutants from sixty-two separate outfalls into named and unnamed tributaries of the Locust Fork but does not authorize any direct discharges to the Locust Fork. The waters receiving the discharges from MCoal's mining operations are classified as "Fish and Wildlife."

15. MCoal's planned operation is scheduled to be conducted in three phases. Phase I of that plan, pursuant to the Alabama Surface Mining Commission (ASMC) permit, includes twenty outfalls and allows for auger mining. It is expected that Phase I will be conducted over a 4½-year period.

16. The NPDES permit in question, AL0080080, contains precipitation event discharge limitations for total suspended solids, iron, lead, manganese and for silver. For these precipitation event discharge limitations to apply, the permittee must submit a written

claim for exemption to ADEM's director. MCoal's discharges for Total Dissolved Solids (TDS) sulfate, chloride and aluminum (if any) will not be at levels that would violate water quality criteria.

17. The Rosa Mine site where MCoal will conduct its mining operations under the ASMC permit is an abandoned "pre-law" surface coal mine that includes over thirty miles of highwall. Under current conditions the site experiences erosion and sediment loss which flows into the waters in question. MCoal's sediment control plan establishes that sediment runoff to the receiving streams during MCoal's mining operations and following completion of MCoal's mining operations will be lower than the current sediment runoff which exists today.

18. NPDES Permit No. AL0080080 contains generally applicable discharge limitations for lead, silver, iron, manganese, total suspended solids (TSS) and pH. The limitations for iron, manganese, TSS and pH are consistent with the EPA's effluent guidelines for surface coal mines.

19. A reasonable potential analysis determines the potential for a pollutant for which ADEM has a numeric water quality criteria to be found in drainage in concentrations at or in excess of twenty percent of the concentration prescribed by ADEM's numeric water quality criterion. Projected concentrations of less than twenty percent of a water quality criteria do not warrant a water quality limitation.

20. ADEM conducted a reasonable potential analysis for the Rosa Mine site based on data submitted by MCoal with its request for this permit, together with data submitted to the ASMC. Based on these submissions, the permit includes effluent limits for lead and silver.

21. ADEM determined that there was not a reasonable potential for total dissolved solids, sulfates, chlorides or aluminum to be found in MCoal's storm water drainage at limits that would exceed applicable water quality standards and, therefore, the permit does not include effluent limitations for those parameters.

22. MCoal's ASMC application contained additional information concerning the specific design of MCoal's pollution abatement and prevention plan which, according to ADEM officials, provided them with sufficient information to evaluate MCoal's pollution abatement plans for this particular site.

23. This NPDES permit authorizes discharges to a segment of Dry Creek. That segment of Dry Creek is listed on ADEM's 2008 Clean Water Act, §303(d) list as not meeting its use classification due to nutrients, ammonia, organic enrichment and pathogens

from pasture grazing. There is no Total Maximum Daily Load (TMDL) for any pollutant for Dry Creek.

24. A segment of the Locust Fork of the Black Warrior River is identified on ADEM's 2008 Clean Water Act, §303(d) list as not meeting its use classification due to siltation. This siltation problem is due, in part, to erosion from abandoned surface mining operations. There is no approved TMDL for any pollutant for the Locust Fork.

25. MCoal submitted a surface mining permit application to the ASMC on March 26, 2009 for a permit for the construction and operation of MCoal's Rosa Mine in Blount County, Alabama.

26. Public notice concerning the filing of MCoal's surface mining permit application with ASMC was published in *The Blount Countian* for four consecutive weeks from June 10, 2009 to July 1, 2009.

27. The Petitioners had notice of MCoal's surface mining application to the ASMC, participated in the public hearing and commented on that application.

28. The ASMC issued Permit No. 3931-08-14-S to MCoal for mining activities associated with the Rosa Mine on December 11, 2009. MCoal's ASMC permit became effective on December 11, 2009.

IV. CONCLUSIONS OF LAW

I. Petitioners Are Aggrieved Parties

A. ADEM Admin. Code R. 335-2-1-.03 provides that "any person aggrieved by an administrative action of the Department shall be entitled to a hearing before the Commission or its designated Hearing Officer."

B. Pursuant to ADEM Admin. Code R. 335-2-1-.02, "[a]ggrieved" is defined as "having suffered a threatened or actual injury in fact."

C. The Petitioners have established more than a generalized set of grievances or complaints about the permit in questions and have established that they stand to suffer an actual injury of fact.

D. The various identified members of BWR and FLFR are aggrieved parties pursuant to ADEM Admin. Code R. 335-2-1 et seq., including but not limited to §§335-2-1-.02(b), 335-2-1-.03, and 335-2-1-.04, and pursuant to *Code of Alabama, 1975, §22-2A-7*.

As a result, both BWR and FLFR are found to be aggrieved parties and thus have the authority to bring and litigate this petition. ((See related discussion in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000))

II. ADEM had Before It A Pollution Abatement and Prevention Plan Sufficient to Issue NPDES Permit No. AL0080080

A. The Commission, pursuant to its order in *Black Warrior Riverkeeper, Inc., EMC DN 09-04*, supra, has established that an application such as this “does not require a PAP Plan.”

[Although the undersigned Hearing Officer may not agree with the finding of the Commission stated in “A” above, it is clear that such is a holding that should be followed herein. Additionally, even if there were no such established precedent on this particular issue, it appears from the evidence that ADEM had before it all relevant PAP Plan information which it needed in order to determine whether this particular permit should be issued. Such information was presented to ADEM in a “format acceptable to the Department staff” and, for this reason, MCoal met its burden in providing a sufficient PAP Plan.]

B. MCoal’s NPDES permit application included two pre-approved forms confirming MCoal’s preparation of a PAP Plan which addressed the elements required by ADEM’s regulations and detailed information concerning the contents of that plan for its proposed operations.

C. The issuance of this final permit was, at least in part, based upon a pollution abatement and prevention plan and accompanying data submitted by the applicant and, thus, ADEM’s PAP Plan regulations were satisfied.

III. Authorized Discharges By This Permit Will Not Cause or Contribute to a Violation of State Water Quality Standards

A. Dry Creek and the Locust Fork are two bodies of water that will ultimately receive discharges from MCoal’s Rosa Mine operations. Both Dry Creek and Locust Fork have been classified as “Fish and Wildlife” use by ADEM.

B. Dry Creek is listed on Alabama’s 2008 §303(d) list as not meeting its “Fish and Wildlife” use classification because of nutrients, ammonia, organic enrichment and pathogens caused by pasture grazing.

C. Locust Fork (between Little Warrior River and Blount County Road 30) is listed on the same §303(d) list as not meeting its "Fish and Wildlife" use classification due to siltation caused by agriculture and an abandoned surface mining operation.

D. Dry Creek's listing on Alabama's 2008 §303(d) list as not meeting its use classification is based only on nutrients, ammonia, organic enrichment and pathogens and is not listed as impaired for any other pollutants.

E. There has been no evidence presented that would establish that the Petitioners met their burden of proof in regard to this issue related to Dry Creek. No evidence supports a conclusion that MCoal's mining operation will result in any discharges of nutrients, ammonia, organic enrichments or pathogens.

F. Without such evidence, Petitioners have failed to meet their burden of proof that MCoal's Rosa Mine operations will result in discharges that will cause or contribute to a violation of water quality standards for Dry Creek.

G. Whether or not the Locust Fork is actually impaired for siltation, the Petitioners have not met their burden of establishing that the issue of this permit will cause or contribute to a violation of Alabama's water quality standards.

H. MCoal's mining operation, so long as it is conducted consistent with the ASMC permit and this NPDES permit, will not cause or contribute to any violation of the Locust Fork water quality standards.

IV. The Final Permits Discharge Limitations for Precipitation Events Will Not Cause or Contribute to a Violation of State Water Quality Standards

A. The limitations contained in this permit related to precipitation event discharges are sufficient to protect the water quality of the receiving streams in question and no evidence was presented that satisfies the Petitioners' burden to support a decision to the contrary.

B. The construction of the sediment ponds that are proposed under the restrictions of this permit are such that, according to the evidence, are likely to significantly reduce the total pollutants discharged to the tributaries of the Locust Fork. Any evidence submitted to the contrary was not sufficient to meet the Petitioners' burden of proof that would allow a conclusion otherwise.

C. ADEM has made a determination in this particular case that, based on the data submitted to it by MCoal, the limitations contained in the permit, including the precipitation discharge limits, "accurately reflect the requirements and intent of state regulations" and if the permit is adhered to by MCoal, then water quality standards will be met and water quality protected. No evidence was presented in this hearing that would lead the undersigned Hearing Officer to a different conclusion.

V. ADEM is Not Required To Include Discharge Limitations in Its Final Permit for Total Dissolved Solids, Sulfates, Chlorides or Aluminum.

No federal or state regulation was submitted that would require ADEM to include discharge limitations for total dissolved solids, sulfates, chlorides or aluminum in its final permit parameters. The Petitioners have failed to meet their burden and have failed to show that MCoal's operation at the local mine site will result in total discharges of dissolved solids, sulfates, chlorides or aluminum in amounts that would cause or contribute to a violation of the state water quality standards.

V. RECOMMENDATION

Accordingly, the undersigned Hearing Officer recommends to the Commission that it enter an order and finding consistent with the documentary evidence and testimony presented, that it adopt these Findings of Fact and Conclusions of Law, and that it enter a decision in favor of ADEM on all issues and affirming the proper issuance of ADEM's final permit in this cause.

Done this the 27th day of May, 2010.



JAMES F. HAMPTON
Hearing Officer

Robert D. Tambling, Esq.
James L. Wright, Esq.
Schuyler K. Espy, Esq.
Gilbert Rogers, Esq.
P. Stephen Gidiere III, Esq.
Thomas L. Casey III, Esq.
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