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Environmental attorneys call state's suit against Oxford water board a protective measure

By Zach Tyler, Star Staff Writer, ztyler@annistonstar.com 8 hrs ago

As Oxford Water Works & Sewer Board considers this week the Alabama Department of Environmental Management suit that alleges to lay out in detail the board's failure, environmental lawyers said the state's suit may be more a shield than any punishment.

Oxford's water board in a statement sent Tuesday wrote that it's evaluating the allegations made in the suit, in which the conservation group that initially announced it would sue over similar allegations has joined. The release says Coosa Riverkeeper's allegations relate to issues "that have already been corrected or are otherwise not justified."

Meanwhile, the lawyer representing the Riverkeeper organization and others not involved in the suit say that the Department of Environmental Management's action follows a familiar pattern: preempt citizen-filed lawsuits allowed under federal law by filing first, then slap the offending entity on the wrist.

The board is "not yet currently prepared to comment in detail" on the allegations, the statement reads, before noting that the "vast majority ... have been resolved." Any remaining issues "are being diligently addressed," and the board is confident that none "pose a threat to human health or the environment."

General manager Wayne Livingston said Tuesday the board had retained Birmingham law firm Balch & Bingham to represent it in the case.

"Everything is not like it appears — we're not bad," Livingston said by phone Tuesday of the state's allegations. "A lot of this stuff, it'll come out to wash."

Oxford's water board is not a stranger to state scrutiny over too many pollutants in the treated water it discharges, or missed reports.

The state's Department of Environmental Management in 2012 ordered the board pay a \$20,450 penalty, as well as hire an engineer to draft a plan to avoid dumping treated water that contained too many pollutants or changed the color of Choccolocco Creek. The water from the board's treatment plant is piped into the creek.

The plan was also to address the presence of chemicals from industrial dischargers. Water from the wood products manufacturer Kronospan, for example, contained high levels of formaldehyde.

In 2013, the department issued another order, this one because of, among other issues, the acceptance of unpermitted wastewater and waste proven to have an adverse effect on the treatment process from industrial dischargers in the city — specifically, Kronospan.

Those actions, Southern Environmental Law Center attorney Sarah Stokes said Tuesday, amount to a “slap on the wrist.” The law center is representing the Riverkeeper in the suit.

Stokes said the department has historically demonstrated a routine response to the announcement of suits from groups such as the Riverkeeper — wait until the 60 days' notice required by the federal Clean Water Act before any suit can be filed is nearly over, and then swoop in.

“The riverkeepers file suit, and then ADEM takes it over,” Stokes said. “They want to be steering the ship.”

A 2010 article from The Daily Home on sewer overflow woes in Pell City seems to indicate why.

The Attorney General's Office filed suit against the city in 2007 for the overflows, a preemptive measure to protect the city from future civil lawsuits, then chief of staff Chris Bence said.

State agencies taking a public entity to state court can spare the entity from severe federal penalties and attorney's fees, according to David Ludder, a Florida-based environmental lawyer licensed to practice in Alabama.

State settlements over environmental violations can also “assure that requirements for compliance are agreeable” to those offending public bodies, Ludder said.

That practice seems to be public policy in Alabama, Ludder said. Once general counsel at the Department of Environmental Management and later a lawyer at the Legal Environmental Assistance Foundation, he's filed dozens of suit notices on behalf of environmental groups — and was each time blocked from proceeding to court by a state suit.

Ludder believes that was Congress's intent in including the notice requirement — citizens aren't supposed to take enforcement action; states together with the Environmental Protection Agency are, he said.

“When the state does take the lead, it's fulfilling the intent of Congress — however, the settlements that the state makes, I think, do not fulfill the intent,” Ludder said.

Those settlements often give public entities a lengthy amount of time to bring themselves into compliance, if they set those limits at all; they “certainly don't impose sufficient penalties to prevent future noncompliance,” said Ludder.

That leaves organizations such as the Riverkeeper with one avenue: filing motions to intervene in state suits, providing “a voice at the table,” according to Stokes.

The center will seek “enforcement that will send a message to these water boards,” Stokes said, “because it becomes the cost of doing business.

It's cheaper to violate a treatment permit than it is to clean up any issues, she said. “If it were more expensive to violate, they would stop.”

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