

October 13, 2010

**Certified Mail**

**Return Receipt Requested**

Hon. Ted Ezelle, Jr., Chairman  
Water and Sewer Board of the City of Aliceville  
311 Third Avenue N.W.  
Aliceville, Alabama 35442

Re: **Notice of Intent to File Suit under the Clean Water Act  
NPDES Permit No. AL0020770**

Dear Mr. Ezelle:

Pursuant to the Clean Water Act § 505, 33 U.S.C. § 1365, and 40 C.F.R. Part 135, Subpart A, you are hereby notified that after the expiration of 60 days following service of this notice, Conservation Alabama Foundation may file suit against the Water and Sewer Board of the City of Aliceville for discharges from the East Lagoon located on Wilson Road into Lubbub Creek in violation of the Clean Water Act as described herein.

**A. History of Previous Violations and Enforcement Actions (Sept 2005 to March 2007)**

The Alabama Department of Environmental Management issued a Notice of Violation to the Water Works and Sewer Board of the City of Aliceville on May 10, 2006, and Warning Letters to the Board on May 21, 2007, June 22, 2007, and June 27, 2007. The Alabama Department of Environmental Management and the Water Works and Sewer Board of the City of Aliceville entered into Consent Order 08-026-CWP dated October 19, 2007. The Consent Order assessed a \$5,700.00 penalty for violations occurring between September 2005 and March 2007 as follows:

<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>	<b>Violation Date(s)</b>	<b>Days in Violation</b>
Total Suspended Solids	≤ 112 lbs/day Monthly Average	122 lbs/day	Oct. 2006	31
	≥ 65% Removal Monthly Average	46.3%	Mar 2007	31
		9.68%	Feb 2007	28
		0%	Jan 2007	31
		63.9%	Nov 2006	30
		0%	Oct 2006	31
		0%	Jul 2006	31
		0%	Jun 2006	30
		0%	May 2006	31
		0%	Apr 2006	30
		49%	Mar 2006	31
		0%	Feb 2006	28
		0%	Jan 2006	31
		0%	Dec 2005	31
		0%	Nov 2005	30
		0%	Oct 2005	31
		32.5%	Sep 2005	30
		<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>
Carbonaceous Biochemical Oxygen Demand	≤ 31.2 lbs/day Monthly Average	46.9 lbs/day	Jan 2007	31
	≤ 46.9 lbs/day Weekly Average	60.2 lbs/day	Jan 2007	7
	≥ 65% Removal Monthly Average	63.6%	Feb 2007	28
		51.1%	Jan 2007	31
		61.6%	May 2006	31
		61.6%	Apr 2006	30
		59.9%	Jan 2006	31

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Fecal Coliform	≤ 1000 colonies/100 ml Monthly Geometric Mean	1180 colonies/100 mL	Feb 2007	28
		1370 colonies/100 mL	Nov 2005	30
	≤ 2000 colonies/100 ml Daily Maximum	2300 colonies/100 mL	Feb 2007	1
		2600 colonies/100 mL	Nov 2005	1
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Dissolved Oxygen	≥ 6.0 mg/L Daily Minimum	4.1 mg/L	Jul 2006	1
		3.8 mg/L	Oct 2005	1
		4.2 mg/L	Sep 2005	1
<b>TOTAL VIOLATIONS</b>				768

Applying the violation calculation methodology adopted by *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), and *Interim Clean Water Act Settlement Policy* (U.S. EPA, 1995), the Board committed 759 violations which are each subject to a penalty. The minimum penalty under Ala. Code § 22-22A-5(18) is \$100 per violation. Thus, the minimum penalty should have been  $\$100 \times 759$  violations = \$76,800. The maximum penalty under Ala. Code § 22-22A-5(18) is \$25,000 per violation. Thus, the maximum penalty could have been  $\$25,000 \times 759$  violations = \$18,975,000. The maximum penalty authorized by the Clean Water Act is \$32,500 per violation. Thus, the maximum penalty could have been 759 violations  $\times$  \$32,500 = \$24,667,500. In any case, the \$5,700 penalty assessed in Consent Order 08-026-CWP is not appropriate to the violations and does not represent diligent prosecution.

The Consent Order also required the Board to submit a compliance plan that will achieve compliance with the limitations for Ammonia as Nitrogen (NH<sub>3</sub>-N), Fecal Coliform (FC), Carbonaceous Biochemical Oxygen Demand (CBOD), Carbonaceous Biochemical Oxygen Demand Percent Removal (CBOD percent removal), Total Suspended Solids (TSS) and Total Suspended Solids Percent Removal (TSS percent removal) by a date selected by the Board. The Board submitted such a plan and selected February 2011 as the compliance deadline.

#### **B. Discharges In Excess of Permit Limitations (April 2007 to October 17, 2007)**

Although Consent Order 08-026-CWP was issued on October 17, 2007, it failed to include violations from April 2007 to October 2007. Thus, for the violations which follow, the Alabama Department of Environmental Management assessed no penalty.

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Carbonaceous Biochemical Oxygen Demand	≤ 11 mg/L Monthly Average	16.2 mg/L	Jul 2007	31
		17 mg/L	Aug 2007	31
		14 mg/L	Sep 2007	30
		21.6 mg/L	Oct 2007	31
	≤ 16.5 mg/L Weekly Average	170 mg/L	Aug 2007	7
		140 mg/L	Sep 2007	7
		27.6 mg/L	Oct 2007	7
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Fecal Coliform	≤ 1000 colonies/100 mL Monthly Average	1040 colonies/100 mL	Apr 2007	30
	≤ 200 colonies/100 mL Monthly Average	1760 colonies/100 mL	May 2007	31
	≤ 2000 colonies/100 mL Daily Maximum	2300 colonies/100 mL	May 2007	1
<b>TOTAL VIOLATIONS</b>				206

Once again, applying the violation calculation methodology adopted by *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), and *Interim Clean Water Act Settlement Policy* (U.S. EPA, 1995), the Board committed 184 violations which are each subject to a penalty. The minimum penalty under Ala. Code § 22-22A-5(18) is \$100 per violation. Thus, the minimum penalty should have been  $\$100 \times 184 \text{ violations} = \$18,400$ . The maximum penalty under Ala. Code § 22-22A-5(18) is \$25,000 per violation. Thus, the maximum penalty could have been  $\$25,000 \times 184 \text{ violations} = \$4,600,000$ . The maximum penalty authorized by the Clean Water Act is \$32,500 per violation. Thus, the maximum penalty could have been  $184 \text{ violations} \times \$32,500 = \$5,980,000$ . In any case, the Department's failure to assess any penalty in Consent Order 08-026-CWP for the violations occurring between April 2007 and October 2007 is not appropriate to the violations and does not represent diligent prosecution.

### C. Discharges In Excess of Permit Limitations (October 18, 2007 to August 2010)

After issuance of Order 08-026-CWP on October 19, 2007, the Board discharged pollutants in excess of the limitations contained in NPDES Permit No. AL0020770 as indicated below:

<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>	<b>Violation Date(s)</b>	<b>Days in Violation</b>
Carbonaceous Biochemical Oxygen Demand	≤ 11 mg/L Monthly Average	19.9 mg/L	Nov 2007	30
		12.6 mg/L	Jan 2008	31
		18.7 mg/L	Jul 2008	31
		18.1 mg/L	Nov 2008	30
		12.3 mg/L	Dec 2008	31
		18.1 mg/L	Feb 2009	28
		12.2 mg/L	Apr 2009	30
		21.1 mg/L	Jun 2009	30
		18.1 mg/L	Jul 2009	31
		23 mg/L	Aug 2009	31
		11.2 mg/L	Sep 2009	30
		13.6 mg/L	Oct 2009	31
		14.2 mg/L	Mar 2010	31
		14.6 mg/L	Jul 2010	31
	≤ 16.5 mg/L Weekly Average	23.9 mg/L	Nov 2007	7
		22.7 mg/L	Jul 2008	7
		18.2 mg/L	Nov 2008	7
		29.3 mg/L	Feb 2009	7
		17.8 mg/L	Apr 2009	7
		28.1 mg/L	Jun 2009	7
		19.3 mg/L	Jul 2009	7
		23.3 mg/L	Aug 2009	7
		20.2 mg/L	Oct 2009	7
		21.8 mg/L	Mar 2010	7
	≤ 32.2 lbs/day Monthly Average	32.4 lbs/day	Feb 2008	28
		32.6 lbs/day	Mar 2009	31
		77.3 lbs/day	Apr 2009	30
		61.7 lbs/day	Oct 2009	31

		36.4 lbs/day	Dec 2009	31
		71.3 lbs/day	Mar 2010	31
	≤ 48.3 lbs/day Weekly Average	113 lbs/day	Apr 2009	7
		97.6 lbs/day	Oct 2009	7
		52 lbs/day	Dec 2009	7
		120 lbs/day	Mar 2010	7
<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>	<b>Violation Date(s)</b>	<b>Days in Violation</b>
Fecal Coliform	≤ 200 colonies/100 ml Monthly Geometric Mean	269 colonies/100 mL	Sep 2009	30
<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>	<b>Violation Date(s)</b>	<b>Days in Violation</b>
Ammonia as Nitrogen	≤ 3.0 mg/L Monthly Average	3.99 mg/L	Jan 2009	31
		3.57 mg/L	Feb 2009	28
		3.41 mg/L	Feb 2010	28
	≤ 4.5 mg/L Weekly Average	4.72 mg/L	Jan 2009	7
		288 mg/L	Jan 2010	7
	≤ 8.8 lbs/day Monthly Average	11.4 mg/L	Jan 2009	31
		9.96 mg/L	Jan 2010	31
		15.8 mg/L	Feb 2010	28
	≤ 13.1lbs/day Weekly Average	17.0 mg/L	Feb 2010	7
<b>Pollutant Parameter</b>	<b>Discharge Limit</b>	<b>Discharge Violation</b>	<b>Violation Date(s)</b>	<b>Days in Violation</b>
pH	≤ 9.0 s.u. Daily Maximum	10.1 s.u.	May 2008	1
		9.31 s.u.	Jun 2008	1
		9.66 s.u.	Jul 2008	1
		9.06 s.u.	Dec 2008	1
		9.71 s.u.	Apr 2009	1
		9.21 s.u.	Jun 2009	1
		9.1 s.u.	Jul 2009	1
		9.19 s.u.	Jul 2010	1

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Suspended Solids	≤ 90.0 mg/L Monthly Average	108 mg/L	Jul 2008	31
	≥ 65% Removal Monthly Average	6.06%	Dec 2007	31
		42.2%	Mar 2008	31
		9.46%	Dec 2008	31
		17.4%	Mar 2009	31
		56.1%	Jun 2009	30
		21.1%	Sep 2009	30
		4.92%	Oct 2009	31
		56.6%	Mar 2010	31
		10.4%	Apr 2010	30
		0%	May 2010	31
		12.0%	Jul 2010	31
		0%	Aug 2010	31
		<b>TOTAL VIOLATIONS</b>		

Paragraph F of Consent Order 08-026-CWP provides that future violations of each and every daily maximum, daily minimum, weekly average, and minimum percent removal limitation in NPDES Permit No. AL0020770 shall be subject to a penalty of \$150 per violation. In addition, the Order provides that future violations of each and every monthly average limitation shall be subject to a penalty of \$300 per violation. These penalties are not appropriate to the violations and do not represent diligent prosecution. More importantly, it is clear from Ala. Code § 22-22A-5(18) that penalties may be assessed only for past violations. *See e.g.*, Ala. Code § 22-22A-5(18)c. (“Civil penalties may be assessed under this subdivision for any violation occurring within two years prior to the date of issuance of an order under paragraph a. of this subdivision . . .”). *See also Cahaba River Society v. Gold Kist, Inc.*, No. 2:01-CV-01725, slip op. at 23-25 (N.D. Ala. July 30, 2002) (questioning ADEM’s authority to assess stipulated penalties for future violations). Moreover, public comment on the circumstances of future violations (*e.g.*, seriousness of the violation, economic benefit, standard of care, history of previous violations, efforts to minimize or mitigate effects, and ability to pay) is precluded by a penalty assessment for future violations. Hence, the Department’s effort to penalize future violations is *ultra vires* and of no effect. In addition, the Court in *Friends of Hurricane Creek v. SDW, Inc.*, No. 7:08-cv-01587 (N.D. Ala. Jan. 16, 2009), held that violations occurring after issuance of a state penalty order are properly the subject of a citizen suit.

Once again, applying the violation calculation methodology adopted by *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), and *Interim Clean Water Act Settlement Policy* (U.S. EPA, 1995), the Board committed 1237 violations after issuance of Consent Order 08-026-CWP which are each subject to a penalty.

Civil penalties of *not less than \$100 per violation per day* nor more than \$25,000 per violation per day may be sought by the State or Alabama Department of Environmental Management in State court. Civil penalties of up to \$37,500 per violation per day may be sought by Conservation Alabama Foundation in federal court after the expiration of 60 days. Suit by Conservation Alabama Foundation may be avoided if these violations have been permanently abated before the expiration of 60 days following service of this notice. Please advise the undersigned of any measures that you may undertake or may have undertaken which you contend have permanently abated these violations before suit is filed.

Sincerely,

David A. Ludder  
Attorney for Conservation Alabama Foundation

cc:

Hon. Lisa P. Jackson, Administrator  
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