

October 21, 2010

Certified Mail

Return Receipt Requested

Hon. Dupree Pennington, Mayor
City of Vernon
P.O. Box 357
Vernon, Alabama 35592

Certified Mail

Return Receipt Requested

Hon. Jeff Randolph, Chairman
Vernon Water and Sewer Board
P.O. Box 481
Vernon, Alabama 35592

**Re: Notice of Intent to File Suit under the Clean Water Act
NPDES Permit No. AL0024368**

Dear Messrs. Pennington and Randolph:

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 Vernon Water and Sewer Board for discharges from the Vernon Yellow Creek Lagoon located at County Road No. 9 in Vernon, Alabama into Yellow Creek in violation of the Clean Water Act as described herein.

A. History of Previous Violations and Enforcement Actions

On July 29, 2003, the State of Alabama and Alabama Department of Environmental Management filed a lawsuit against the Vernon Water and Sewer Board alleging violations of NPDES Permit No. AL0024368 occurring between July 1998 and May 2003. *State v. Vernon Water and Sewer Bd.*, No. CV-03-72 (Lamar County Cir. Ct. filed Jan. 29, 2003). On November 22, 2005, Lamar County Circuit Judge James W. Moore approved a Consent Decree drafted by representatives of the Alabama Attorney General and the Vernon Water and Sewer Board that required that the Vernon Water and Sewer Board pay a civil penalty of \$5,100 for all violations asserted in the Complaint. The Decree also required compliance with the discharge limitations in NPDES Permit No. AL0024368 for Fecal Coliform, and percent removal of Total Suspended Solids and Carbonaceous Biochemical Oxygen Demand no later than four years after entry of the Decree (November 28, 2009) and all other discharge limitations immediately. Finally, the Decree required that the Vernon Water and Sewer Board submit a Compliance Plan not later than 150 days after entry of the Decree, and submit progress reports in January and July of each year.

The Alabama Department of Environmental Management issued a Notice of Violation to the Vernon Water and Sewer Board on September 26, 2008, but has since taken no further action to enforce NPDES Permit No. AL0024368 or the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005).

B. Discharges in Excess of Fecal Coliform, Percent Removal of Total Suspended Solids and Carbonaceous Biochemical Oxygen Demand Limitations in NPDES Permit No. AL0024368 after November 27, 2009.

The following are violations of Paragraph VIII. D., sentence one of the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005) which requires compliance with the discharge limitations in NPDES Permit No. AL0024368 for Fecal Coliform, and percent removal of Total Suspended Solids and Carbonaceous Biochemical Oxygen Demand no later than November 28, 2009.

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Fecal Coliform	≤ 200 colonies/100 mL Monthly Average	420 colonies/100 mL	Mar 2010	31
		290 colonies/100 mL	Apr 2010	30
		260 colonies/100 mL	May 2010	31
		220 colonies/100 mL	Jun 2010	30
		220 colonies/100 mL	Jul 2010	31
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Suspended Solids	≥ 65 Percent Removal Monthly Average	31.82 Percent Removal	Dec 2009	31
		17.86 Percent Removal	Jan 2010	31
		21.95 Percent Removal	Feb 2010	28
		2.15 Percent Removal	Mar 2010	31
		1.11 Percent Removal	May 2010	31
		13.79 Percent Removal	Jun 2010	30
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Carbonaceous Biochemical Oxygen Demand	≥ 85 Percent Removal Monthly Average	13.11 Percent Removal	Dec 2009	31
		5.21 Percent Removal	Jan 2010	31
		35.5 Percent Removal	Mar 2010	31
		4.45 Percent Removal	May 2010	31

		15.38 Percent Removal	Jun 2010	30
TOTAL VIOLATIONS				489

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 has committed 489 violations of Paragraph VIII. D., sentence one of the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005). These continuing violations of the Consent Decree and NPDES Permit No. AL0024368 represent a failure of the State and Alabama Department of Environmental Management to diligently prosecute the Vernon Water and Sewer Board.

C. Discharges in Excess of Other Limitations in NPDES Permit No. AL0024368 after November 28, 2005.

The following are violations of Paragraph VIII. D., sentence two of the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005) which requires immediate compliance with all other discharge limitations in NPDES Permit No. AL0024368.

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Carbonaceous Biochemical Oxygen Demand	≤ 25 mg/L Monthly Average	28.95 mg/L	Jul 2009	31
	≤ 187.7 lbs/day Weekly Average	230.8 lbs/day	Aug 2009	7
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Ammonia Nitrogen (as N)	≤ 6.0 mg/L Monthly Average	6.4 mg/L	Feb 2007	28
		12.75 mg/L	Nov 2007	30
		16.4 mg/L	Dec 2007	31
		7.75 mg/L	Jan 2009	31
	≤ 9.0 mg/L Weekly Average	10.3 mg/L	Feb 2007	7
		14.0 mg/L	Nov 2007	7
		23.5 mg/L	Dec 2007	7
		9.3 mg/L	Jan 2009	7
	≤ 30 lbs/day Monthly Average	30.52 lbs/day	Feb 2007	28
		37.81 lbs/day	Nov 2007	30

		40.95 lbs/day	Dec 2007	31
		35.91 lbs/day	Jan 2009	31
	≤ 45 lbs/day Weekly Average	49.12 lbs/day	Feb 2007	7
		66.76 lbs/day	Nov 2007	7
		80.26 lbs/day	Dec 2007	7
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Dissolved Oxygen	≥ 6.0 mg/L Daily Minimum	5.3 mg/L	Aug 2008	1
		4.2 mg/L	Jul 2009	1
		5.5 mg/L	Aug 2009	1
		4.9 mg/L	Sep 2009	1
		4.2 mg/L	Oct 2009	1
		4.9 mg/L	Apr 2010	1
		5.5 mg/L	May 2010	1
		5.6 mg/L	Jun 2010	1
		5.7 mg/L	Jul 2010	1
		4.7 mg/L	Aug 2010	1
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Suspended Solids	≤ 675 lbs/day Weekly Average	988.39 lbs/day	Sep 2009	7
TOTAL VIOLATIONS				344

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 has committed 295 violations of Paragraph VIII. D., sentence two of the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005). These continuing violations of the Consent Decree and NPDES Permit No. AL0024368 represent a failure of the State and Alabama Department of Environmental Management to diligently prosecute the Vernon Water and Sewer Board.

D. Failure to Submit Reports Required by Consent Decree.

The Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005) requires that the Vernon Water and Sewer Board submit a Compliance Plan not later than 150 days after entry of the Decree, and submit progress reports in

January and July of each year. The Alabama Department of Environmental Management's e-File system shows that the Compliance Plan was timely submitted. However, the e-File system fails to show that any of the semi-annual progress reports have been filed. Accordingly, the Vernon Water and Sewer Board violated the Consent Decree by failing to submit progress reports in July 2006, January 2007, July 2007, January 2008, July 2008, January 2009, July 2009, January 2010, and July 2010. Furthermore, there is no indication in the e-File system that the Vernon Water and Sewer Board paid the stipulated penalties prescribed by the Consent Decree for failure to submit progress reports. Once again, the State and Alabama Department of Environmental Management have failed to diligently prosecute the Vernon Water and Sewer Board.

E. Violations of NPDES Permit No. AL0024368 (October 2005 to October 2010)

Because the State and Alabama Department of Environmental Management are not diligently enforcing the Consent Decree in *State v. Vernon Water and Sewer Board*, No. CV-03-72 (Lamar County Cir. Ct. filed Nov. 28, 2005), the Vernon Water and Sewer Board is subject to a citizen suit under the Clean Water Act, 33 U.S.C. § 1365, for all violations occurring during the previous five year period. These violations include:

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Fecal Coliform	≤ 200 colonies/100 mL Monthly Average	280 colonies/100 mL	Jul 2006	31
		353 colonies/100 mL	Sep 2006	30
		851 colonies/100 mL	Oct 2006	31
		232.5 colonies/100 mL	Nov 2006	30
		226.5 colonies/100 mL	Dec 2006	31
		240 colonies/100 mL	Jan 2007	31
		409 colonies/100 mL	Nov 2008	30
		245 colonies/100 mL	Dec 2008	31
		420 colonies/100 mL	Mar 2010	31
		290 colonies/100 mL	Apr 2010	30
		260 colonies/100 mL	May 2010	31
		220 colonies/100 mL	Jun 2010	30
		220 colonies/100 mL	Jul 2010	31

Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Suspended Solids	≤ 675 lbs/day Weekly Average	988.39 lbs/day	Sep 2009	7
	≥ 65 Percent Removal Monthly Average	1.42 Percent Removal	Jul 2006	31
38.51 Percent Removal		Aug 2006	31	
30.43 Percent Removal		Oct 2006	31	
16 Percent Removal		Nov 2006	30	
52.94 Percent Removal		Dec 2006	31	
13.73 Percent Removal		Jan 2007	31	
54.35 Percent Removal		Feb 2007	28	
22.22 Percent Removal		Mar 2007	31	
26.79 Percent Removal		Apr 2007	30	
17.31 Percent Removal		May 2007	31	
26.09 Percent Removal		Jun 2007	30	
52.27 Percent Removal		Jul 2007	31	
35.37 Percent Removal		Aug 2007	31	
29.17 Percent Removal		Dec 2007	31	
12.66 Percent Removal		Jan 2008	31	
12.07 Percent Removal		Mar 2008	31	
31.75 Percent Removal		Apr 2008	30	
51.61 Percent Removal		May 2008	31	
16.18 Percent Removal		Jun 2008	30	
40 Percent Removal		Jul 2008	31	
61.9 Percent Removal		Aug 2008	31	
35.9 Percent Removal		Nov 2008	30	
45.57 Percent Removal		Dec 2008	31	
42.86 Percent Removal	Jan 2009	31		
55.74 Percent Removal	Feb 2009	28		
46.88 Percent Removal	Mar 2009	31		
29.58 Percent Removal	May 2009	31		

		31.82 Percent Removal	Dec 2009	31
		17.86 Percent Removal	Jan 2010	31
		21.95 Percent Removal	Feb 2010	28
		2.15 Percent Removal	Mar 2010	31
		1.11 Percent Removal	May 2010	31
		13.79 Percent Removal	Jun 2010	30
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Carbonaceous Biochemical Oxygen Demand	≥ 85 Percent Removal Monthly Average	13.11 Percent Removal	Dec 2009	31
		5.21 Percent Removal	Jan 2010	31
		35.5 Percent Removal	Mar 2010	31
		4.45 Percent Removal	May 2010	31
		15.38 Percent Removal	Jun 2010	30
	≤ 25 mg/L Monthly Average	28.95 mg/L	Jul 2009	31
	≤ 187.7 lbs/day Weekly Average	230.8 lbs/day	Aug 2009	7
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Total Ammonia Nitrogen (as N)	≤ 6.0 mg/L Monthly Average	6.4 mg/L	Feb 2007	28
		12.75 mg/L	Nov 2007	30
		16.4 mg/L	Dec 2007	31
		7.75 mg/L	Jan 2009	31
	≤ 9.0 mg/L Weekly Average	10.3 mg/L	Feb 2007	7
		14.0 mg/L	Nov 2007	7
		23.5 mg/L	Dec 2007	7
		9.3 mg/L	Jan 2009	7
	≤ 30 lbs/day Monthly Average	30.52 lbs/day	Feb 2007	28
		37.81 lbs/day	Nov 2007	30
		40.95 lbs/day	Dec 2007	31
		35.91 lbs/day	Jan 2009	31

	≤ 45 lbs/day Weekly Average	49.12 lbs/day	Feb 2007	7
		66.76 lbs/day	Nov 2007	7
		80.26 lbs/day	Dec 2007	7
Pollutant Parameter	Discharge Limit	Discharge Violation	Violation Date(s)	Days in Violation
Dissolved Oxygen	≥ 6.0 mg/L Daily Minimum	5.3 mg/L	Aug 2008	1
		4.2 mg/L	Jul 2009	1
		5.5 mg/L	Aug 2009	1
		4.9 mg/L	Sep 2009	1
		4.2 mg/L	Oct 2009	1
		4.9 mg/L	Apr 2010	1
		5.5 mg/L	May 2010	1
		5.6 mg/L	Jun 2010	1
		5.7 mg/L	Jul 2010	1
		4.7 mg/L	Aug 2010	1
TOTAL VIOLATIONS				1903

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 at least 1854 violations of NPDES Permit No. AL0024368 that are subject to a penalty. The maximum penalty authorized by the Clean Water Act is \$37,500 for each violation occurring after January 12, 2009 and \$32,500 for each violation occurring before January 13, 2009. Thus, the maximum penalty for the cited violations is 726 violations × \$37,500 = \$27,225,000 and 1128 violations × \$32,500 = \$36,660,000, for a total of \$63,885,000.

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
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Hon. Gwendolyn Keyes Fleming, Regional Administrator
U.S. Environmental Protection Agency-Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303-3104

Hon. Lance LeFleur, Director
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

Hon. Joyce White Vance, U.S. Attorney
U.S. Attorney's Office
1801 4th Ave North
Birmingham, AL 35203-2101

Conservation Alabama Foundation
P.O. Box 130656
Birmingham, AL 35213-0656
Tel. (205) 533-6178



AlaFile E-Notice

40-CV-2003-000072.00

Judge: JAMES W. MOORE

To: ROBERT D. TAMBLING
rtambling@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF LAMAR COUNTY, ALABAMA

STATE OF ALABAMA EX REL BILL PRYOR ET AL VS VERNON WATER AND SEWER BOA
40-CV-2003-000072.00

The following matter was FILED on 12/22/2010 11:13:55 AM

**C001 STATE OF ALABAMA EX REL BILL PRYOR AND
JOINT MOTION TO MODIFY CONSENT DECREE**

[Attorney: TAMBLING ROBERT DOUGLAS]

Notice Date: 12/22/2010 11:13:55 AM

MARY ANN JONES
CIRCUIT COURT CLERK
LAMAR COUNTY, ALABAMA
P.O. BOX 434
VERNON, AL 35592

205-695-7193
mary.jones@alacourt.gov



ELECTRONICALLY FILED
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 CV-2003-000072.00
 CIRCUIT COURT OF
 LAMAR COUNTY, ALABAMA
 MARY ANN JONES, CLERK

STATE OF ALABAMA
 Unified Judicial System
 40-LAMAR

Revised 3/5/08

Case

District Court Circuit Court

CV20

STATE OF ALABAMA EX REL BILL PRYOR ET AL
 VS VERNON WATER AND SEWER BOA

CIVIL MOTION COVER SHEET

Name of Filing Party: C001 - STATE OF ALABAMA EX REL BILL

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.
 ROBERT D. TAMBLING
 500 DEXTER AVENUE
 MONTGOMERY, AL 36130
 Attorney Bar No.: TAM001

Oral Arguments Requested

TYPE OF MOTION

- Motions Requiring Fee**
- Default Judgment (\$50.00)
 Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
 - Judgment on the Pleadings (\$50.00)
 - Motion to Dismiss, or in the Alternative Summary Judgment(\$50.00)
 Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
 - Summary Judgment pursuant to Rule 56(\$50.00)
 - Motion to Intervene (\$297.00)
 - Other _____
 pursuant to Rule _____ (\$50.00)
- *Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.
- Local Court Costs \$ _____

- Motions Not Requiring Fee**
- Add Party
 - Amend
 - Change of Venue/Transfer
 - Compel
 - Consolidation
 - Continue
 - Deposition
 - Designate a Mediator
 - Judgment as a Matter of Law (during Trial)
 - Disburse Funds
 - Extension of Time
 - In Limine
 - Joinder
 - More Definite Statement
 - Motion to Dismiss pursuant to Rule 12(b)
 - New Trial
 - Objection of Exemptions Claimed
 - Pendente Lite
 - Plaintiff's Motion to Dismiss
 - Preliminary Injunction
 - Protective Order
 - Quash
 - Release from Stay of Execution
 - Sanctions
 - Sever
 - Special Practice in Alabama
 - Stay
 - Strike
 - Supplement to Pending Motion
 - Vacate or Modify
 - Withdraw
 - Other JOINT MOTION TO MODIFY CONSENT DECREE
 pursuant to Rule 60 (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:
 12/22/2010 11:11:22 AM

Signature of Attorney or Party:
 /s ROBERT D. TAMBLING

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.
 **Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



IN THE CIRCUIT COURT OF LAMAR COUNTY, ALABAMA

STATE OF ALABAMA,)	
ex rel. TROY KING,)	Civil Action No.: CV-03-72
ATTORNEY GENERAL, and ALABAMA)	
DEPARTMENT OF ENVIRONMENTAL,)	
)	
Plaintiffs,)	
)	
VERNON WATER AND SEWER BOARD,)	
)	
Defendant.)	

JOINT MOTION TO MODIFY CONSENT DECREE

Plaintiffs, State of Alabama, ex rel. Troy King, Attorney General, and Alabama Department of Environmental Management (the "Department"), as well as Defendant Vernon Water & Sewer Board, hereby move the Court to modify its Consent Decree of November 28, 2005 in this matter, on the following grounds:

1. Pursuant to Article XIII of the Consent Decree, this Court retains jurisdiction of this matter for purposes of implementing and enforcing the terms and conditions of the Consent Decree. Furthermore, this Article provides for the extension of deadlines set forth in the Consent Decree in the event the parties agree to such extension in writing or the Court otherwise allows the extension upon motion.
2. Article XIX of the Consent Decree provides that any modification to this Consent Decree by the parties shall be in writing and approved by the Court before it will be deemed effective.
3. Article XX of the Consent Decree provides for the continuing jurisdiction of the Court over this matter for the modification of the terms of the Consent Decree.

4. Many of the terms of the Consent Decree have been met by the Defendant, such as payment of required fines or penalties, submission of a Compliance Plan to the Department and submission of progress reports to the Department. Moreover, Defendant has made improvements in its wastewater discharges from the treatment plant to reduce violations of certain permit limitations. In so doing, Defendant has indicated that they have expended considerable sums toward changes to its maintenance and operation procedures as well as other improvements to the overall system to correct permit violations.

5. Nevertheless, Defendant has claimed that they have not been able to completely remediate an infiltration problem in its collection system which results in exceedances of some permit limits. Consequently, the Plaintiffs and Defendant have been in discussions and/or meetings to develop remedial measures and a schedule for accomplishing them. This includes exploration of a variance to the NPDES permit's "percent removal" requirements under existing regulations.

6. A modification to the terms of the Consent Decree would enable a final remediation plan and schedule to bring the permit into full compliance and otherwise achieve enforcement of the permit terms.

WHEREFORE, the parties to this action hereby move the Court for a hearing in forty five (45) days or more, at which time written, detailed modifications to the Consent Decree will be presented for the Court's consideration.

For Plaintiff The State of Alabama

Date: 12/22/10

/s/ ROBERT D. TAMBLING
Robert D. Tambling (TAM001)
Assistant Attorney General
State of Alabama

Address of Counsel:
OFFICE OF ATTORNEY GENERAL
500 DEXTER AVENUE
MONTGOMERY, AL 36130

For Plaintiff The Alabama Department of Environmental Management

Date: 12/22/10

/s/ JAMES L. WRIGHT
James L. Wright
General Counsel
Alabama Department of Environmental
Management

Address of Counsel:
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
POST OFFICE BOX 301463
MONTGOMERY, AL 36130

For Defendant Vernon Water and Sewer Board

Date: 12/22/10

/s/ J. LISTER HUBBARD
J. Lister Hubbard (HUB007)
Vernon Water and Sewer Board

OF COUNSEL:
CAPELL & HOWARD, P.C.
Post Office Box 2069
Montgomery, AL 36102