

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463
Montgomery, Alabama 36130-1463
(334) 271-7700 ■ FAX (334) 271-7950

DEC 20 2011

CERTIFIED MAIL #91 7108 2133 3935 0329 7576
RETURN RECEIPT REQUESTED

Jeffery H. Stricklin
Jim Walter Resources, Inc.
16243 Alabama Highway 216
Brookwood, Alabama 35444

RE: Final Consent Order No. 12-050-CWP
NPDES Permit No. AL0030546
North River Underground Mine No. 1
Fayette County (057)
Tuscaloosa County (125)

Dear Mr. Stricklin:

Please find enclosed ADEM Consent Order No. 12-050-CWP which requires you to take certain actions at the coal mine listed above in regard to alleged violations of the Alabama Water Pollution Control Act. This Consent Order has been issued with the consent of Jim Walter Resources, Inc. and the Department.

Please note that the civil penalty in the amount of \$60,000.00 must be paid no later than 45 days after the issuance of this Order. Failure to pay the civil penalty within 45 days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

If you have questions regarding this matter, please contact Chase Gamble at (334) 270-5622.

Sincerely,

Glenna L. Dean
Glenda L. Dean, Chief
Water Division

GLD/mcg

Enclosure

cc: Dan O'Lone, US EPA Region IV
Glenda Dean, ADEM - Water Division
Thomas L. Johnston, ADEM
Laura Eubanks, ADEM
Johnathan E. Hall, ADEM
Chase Gamble, ADEM
ADEM - Public Affairs Office



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Decatur Branch
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(251) 479-2593 (FAX)

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(251) 432-6533
(251) 432-6598 (FAX)

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

IN THE MATTER OF:

Jim Walter Resources, Inc.

North River Underground Mine No. 1

NPDES Permit No. AL0030546

UIC Permit No. ALSI9929374

Fayette County, Alabama

Tuscaloosa County, Alabama

CONSENT ORDER NO. 12-050-CWP

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter "the Department") and Jim Walter Resources, Inc., (hereinafter "the Permittee") pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.), the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.), and the regulations promulgated pursuant thereto, and § 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342.

STIPULATIONS

1. The Permittee operates the following coal mine in the State of Alabama: North River Underground Mine No. 1 (hereinafter "the Mine") located in Fayette County and Tuscaloosa County, Alabama.

2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 through 22-22A-16 (2006 Rplc. Vol.).

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387. In addition,

3. Pursuant to Ala. Code § 22-22A-4(n) (2006 Rplc. Vol.), the Department is the state agency responsible for the promulgation and enforcement of water pollution control regulations in accordance with the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 to 1387. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.).

4. On June 30, 2008, the Department issued the Permittee National Pollutant Discharge Elimination System (hereinafter "NPDES") Permit Number AL0030546 (hereinafter "the Permit"), which established limits on the discharge of pollutants from the Mine from twenty-two point sources, designated therein as outfall numbers 001, 002, 003, 007, 025 into Cedar Creek; 004, 005, 010, 012, 024 into unnamed tributaries (hereinafter "UTs") to Cedar Creek; 014, 015, 016, 018, 019, 023 into UTs to North River; 020, 021, 022, 028 into UTs to Boone Creek; and 026 and 027 into Gin Branch; all of which are Waters of the State.

5. The Permit requires that the Permittee monitor its discharges and submit periodic Discharge Monitoring Reports (hereinafter "DMRs") to the Department describing the results of the monitoring. The Permit also requires that the Permittee maintain in good working order all systems used by the Permittee to achieve compliance with the terms and conditions of the Permit.

6. The Department issued Underground Injection Control (hereinafter "UIC") Permit Number ALSI9929374 to Chevron Mining, Inc., January 11, 2010, for the discharge of wastewater resulting from the operation of a coal washing facility, by a Class V injection well, to a closed underground mine area. This permit was transferred to Jim Walter Resources, Inc., effective June 10, 2011.

7. On July 15, 2011, the Permittee reported a violation of Part II.A.2.d. of the Permit by having an unpermitted discharge of pollutants into waters of the State. It is unknown at what time the unpermitted discharges initially began on July 15, 2011. The addition of pollutants to the Waters of the State was stopped at approximately 11:30 a.m. on July 15, 2011, when the coal slurry pumps were shut down at the preparation plant.

8. On July 15 and July 19, 2011, inspections of the Mine by the Department confirmed the unpermitted release of pollutants to waters of the State in the form of coal

preparation plant slurry. During the inspections, the coal preparation plant slurry was observed in a UT to Freeman Creek, Freeman Creek, and North River, all waters of the State.

9. Part II.A.1. of the Permit requires that the Permittee properly operate and maintain all facilities and systems of treatment and controls to achieve compliance with the conditions of the Permit.

10. ADEM Admin. Code r. 335-6-8-.12(c)8. states "The injection well shall function properly and, when required by the Department, fluids and/or pollutants shall not surface or saturate the uppermost soil layer."

11. On July 19, 2011, the Department received written notification of the coal preparation plant slurry spill, which indicated that the coal preparation plant slurry was overflowing from the containment tank at injection well #R17 on July 15, 2011. This event was confirmed during the Department's inspections at the Mine on July 15 and July 19, 2011. Further investigation by the Permittee determined that the float switch in the injection well overflow tub did not function properly because the ground wire inside the float-switch was routed in a manner that obstructed movement of the switch.

12. The injection well facility failed to function properly and resulted in an unpermitted discharge to waters of the State, constituting a violation of Part II.A.1. of the Permit and ADEM Admin. Code r. 335-6-8-.12(c)8.

13. ADEM Admin. Code r. 335-6-10-.06 establishes the minimum conditions that are applicable to all State Waters, at all places and at all times, regardless of their uses. ADEM Admin. Code r. 335-6-10-.06(a) states: "State waters shall be free from substances attributable to sewage, industrial wastes or other wastes that will settle to form bottom deposits which are unsightly, putrescent or interfere directly or indirectly with any classified water use."

14. ADEM Admin. Code r. 335-6-8-.12(c)7. states "The permittee shall not exceed the limits that the Department has determined may cause, have reasonable potential to cause, or contribute to an exceedance of a narrative or numerical water quality standard for an individual fluid and/or pollutant."

15. The unpermitted discharge to a UT to Freeman Creek and Freeman Creek from the

injection well facility contributed to an exceedance of the water quality standard for the receiving stream and constitutes violations of ADEM Admin. Code r. 335-6-10-.06(a) and 335-6-8-.12(c)7.

16. The Permittee consents to abide by the terms of the following Consent Order and to pay the civil penalty assessed herein.

17. The Department has agreed to the terms of this Consent Order in an effort to resolve the violations cited herein without the unwarranted expenditure of State resources in further prosecuting the alleged violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

CONTENTIONS

Pursuant to Ala. Code § 22-22A-5(18)c., as amended, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by the Permittee; the economic benefit that delayed compliance may have conferred upon the Permittee; the nature, extent and degree of success of the Permittee's efforts to minimize or mitigate the effects of such violation upon the environment; the Permittee's history of previous violations; and the ability of the Permittee to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day that such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATIONS AND BASE PENALTY: The Department noted three discrete violations of the Permit and the ADEM Admin. Code. The Department considered the general nature of each violation, the magnitude and duration of each non-compliant discharge, the characteristics of each pollutant discharged, and any available evidence of irreparable harm to the environment or threat to public.

B. THE STANDARD OF CARE: In consideration of this factor, the Department noted that the violations were the result of the Operator's failure to construct and maintain its slurry disposal system appropriately.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: The Department does not believe that the violations noted herein conferred an economic benefit upon the Permittee.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATIONS UPON THE ENVIRONMENT: The Permittee shut down the coal slurry pumps and diverted the slurry system flow to the slurry pond upon notification of the coal slurry spill. The Permittee also immediately initiated clean-up and stream mitigation activities to minimize the extent of the spill and its effects on State waters.

E. HISTORY OF PREVIOUS VIOLATIONS: The Permittee does not have a history of previous violations at this Mine.

F. THE ABILITY TO PAY: The Permittee has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: This Special Order by Consent is a negotiated settlement and, therefore, the Department has compromised the amount of the penalty the Department believes is warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unwarranted expense of litigation.

H. The civil penalty is summarized in Attachment 1.

ORDER

THEREFORE, the Permittee, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., as amended, including previous penalty amounts assessed for similar violations, as well as the need for timely and effective enforcement, and the Department believes that the penalty assessed below and the following conditions are appropriate to the violations alleged herein. Therefore, the

Department and the Permittee agree to enter into this ORDER with the following terms and conditions:

A. The Permittee agrees to pay to the Department a civil penalty in the amount of \$60,000.00 for the violations stated herein, not later than forty-five days after issuance of this Order. Failure to pay the civil penalty within forty-five days from the effective date may result in the Department's filing a civil action in the Circuit Court of Montgomery County to recover the civil penalty.

B. The Permittee agrees that all penalties due pursuant to this Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

C. Not later than ninety days after the effective date of this Order, the Permittee agrees to prepare and submit to the Department an Engineering Report that includes a schedule for implementation (i.e., Compliance Plan) that identifies the potential causes of noncompliance and summarizes an investigation of the changes necessary for the Permittee to implement to achieve compliance with NPDES Permit Number AL0030546 and UIC Permit Number ALSI9929374. At a minimum, the Permittee's Engineering Report must address the need for changes in maintenance and operating procedures, the need for modification of existing treatment works, and the need for new or additional treatment works. The Engineering Report must be prepared by a professional engineer licensed to practice in the State of Alabama. If the Department determines through its review of the submitted Engineering Report that the submittal is not sufficient to accomplish compliance with the NPDES Permit, then the Permittee agrees to modify the Engineering Report so that it does accomplish compliance. The Permittee agrees to submit modifications to the Engineering Report, if required, to the Department no later than thirty days after receipt of the Department's comments.

D. Not later than thirty days after the effective date of this Order, the Permittee agrees to prepare and submit to the Department a Remediation Plan that identifies the steps that will be taken to remove the coal slurry from the UT to Freeman Creek, Freeman Creek, and North River. At a minimum, the Permittee's Remediation Plan must address the removal of coal slurry from upland slopes and waters of the State, stabilization of any disturbed areas, and mitigation of any potential long-term impacts to waters of the State. If the Department determines through its review of the submitted Remediation Plan that the submittal is not sufficient to accomplish compliance with the NPDES Permit and State water quality criteria, then the Permittee agrees to modify the Remediation Plan so that it does accomplish compliance. The Permittee agrees to submit modifications to the Engineering Report, if required, to the Department no later than thirty days after receipt of the Department's comments.

E. The Permittee agrees to implement all modifications outlined in the Engineering Report and Remediation Plan, including any modification identified by the Department, not later than 180 days after the effective date of this Order.

F. The Permittee agrees to prepare and submit detailed Progress Reports to the Department describing the Permittee's progress towards achieving compliance with the items presented in the Compliance Plan upon the Department's request.

G. The Permittee agrees to comply with all other terms and conditions of NPDES Permit Number AL0030546 and UIC Permit Number ALSI9929374 immediately upon the effective date of this Consent Order.

H. The Permittee agrees to submit a certification to the Department, signed by a professional engineer licensed to practice in the State of Alabama, indicating whether or not the Permittee is in compliance with all requirements of this Order. The Permittee agrees to submit said certification to the Department not later than 180 days after the effective date of this Order.

I. The Department and the Permittee (hereinafter "Parties") agree that this Consent Order shall not affect the Permittee's obligation to comply with any Federal, State, or local laws or regulations.

J. The Parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

K. The Parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the violations, which are cited in this Consent Order.

L. The Permittee agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

M. For purposes of this Consent Order only, the Permittee agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. The Permittee also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, the Permittee shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and that are beyond the reasonable control of the Permittee, including its contractors and consultants, that could not be overcome by due diligence (i.e., causes that could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of the Permittee) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increased costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of the Permittee, the Department may extend the time as justified

by the circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

N. The Parties agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances referenced herein. Should additional facts and circumstances be discovered in the future concerning the facility that would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed by other Orders as may be issued by the Director, by litigation initiated by the Department, or by such other enforcement action as may be appropriate, and the Permittee shall not object to such future orders, litigation or enforcement action based on the issuance of this Consent Order if future orders, litigation or other enforcement action address new matters not raised in this Consent Order.

O. The Parties agree that this Consent Order shall be considered final and effective immediately upon signature of all parties. This Consent Order shall not be appealable, and the Permittee does hereby waive any hearing on the terms and conditions of same.

P. The Parties agree that final approval and issuance of this Consent Order are subject to the requirement that the Department provide notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the proposed Consent Order.

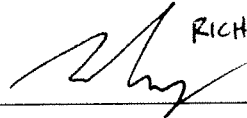
Q. The Parties agree that, should any provision of this Consent Order be declared by a court of competent jurisdiction or the Environmental Management Commission to be inconsistent with Federal or State law and, therefore, unenforceable, the remaining provisions hereof shall remain in full force and effect.

R. The Parties agree that any modifications of this Consent Order must be agreed to in writing and signed by both parties.

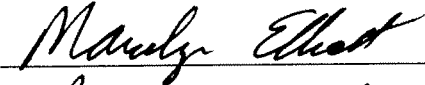
S. The Parties agree that, except as otherwise set forth herein, this Consent Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State or local law, and shall not be construed to waive or relieve the Permittee of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

Jim Walter Resources, Inc.

By:  RICH DONNELLY
Its: V.P. ENGINEERING
Date: 9-9-11

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT**

By: 
Its: Deputy Director
Date: 12-20-2011

Attachment 1
Penalty Calculation Worksheet
Jim Walter Resources, Inc.

Violation	Number of Violations	Seriousness of Violation & Base Penalty*	Standard of Care*	History of Previous Violations*
Unpermitted discharge of coal preparation plant slurry to waters of the State	1	\$10,000	\$10,000	
Violation of State water quality standards	1	\$15,000	\$10,000	
Failure to operate and maintain all facilities and systems of treatment and controls	1	\$10,000	\$10,000	
Totals:	3	\$35,000	\$30,000	\$0
Economic Benefit*:				\$0
Mitigating Factors:				\$0
Ability to Pay*:				\$0
Other Factors*:				(\$5,000)
Final Penalty:				\$60,000.00

* Refer to the "Findings" of the Order for a description of each penalty factor

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ROBERT J. BENTLEY
GOVERNOR

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DEC 20 2011

CERTIFIED MAIL #91 7108 2133 3935 0329 7590
RETURN RECEIPT REQUESTED

Mr. Nelson Brooke, Riverkeeper
Mr. John Kinney, Enforcement Coordinator
Ms. Eva Dillard, Staff Attorney
Black Warrior Riverkeeper
712 37th Street South
Birmingham, Alabama 35222

RE: Response to Comments
Draft Consent Order
NPDES Permit Number AL0030546
Jim Walter Resources, Inc. – North River Underground Mine No. 1
Fayette and Tuscaloosa Counties

Dear Ms Dillard and Messrs. Brooke and Kinney:

The abovementioned draft Consent Order was made available for public review for a period of thirty days beginning on September 28, 2011. Comments on the proposed permit were received from CREDO Action and Black Warrior Riverkeeper.

The Department reviewed all comments and has prepared a summary of the comments, as well as the Department's responses, for Black Warrior Riverkeeper. The summary of the comments and the Department's responses is enclosed.

The Department appreciates your careful review of the draft permit and your participation in the public review process.

Sincerely,

A handwritten signature in black ink, appearing to read "Vernon H. Crockett", is written over a horizontal line.

Vernon H. Crockett, Chief
Stormwater Management Branch
Water Division

VHC/mcg

Enclosure: Comments Summary and Responses

File: FPER / 9692

cc: Chase Gamble, ADEM

Birmingham Branch
110 Vulcan Road
Birmingham, AL 35209-4702
(205) 942-6168
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DEC 20 2011

CERTIFIED MAIL #91 7108 2133 3935 0329 7583
RETURN RECEIPT REQUESTED

Mr. Josh Nelson, Campaign Manager
CREDO Action
2637 16th Street NW
Apartment 704
Washington, DC 20009

RE: Response to Comments
Draft Consent Order
NPDES Permit Number AL0030546
Jim Walter Resources, Inc. – North River Underground Mine No. 1
Fayette and Tuscaloosa Counties

Dear Mr. Nelson:

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The Department reviewed all comments and has prepared a summary of the comments, as well as the Department's responses, for CREDO Action. The summary of the comments and the Department's responses is enclosed.

The Department appreciates your careful review of the draft permit and your participation in the public review process.

Sincerely,

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Vernon H. Crockett, Chief
Stormwater Management Branch
Water Division

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Enclosure: Comments Summary and Responses

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cc: Chase Gamble, ADEM

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RESPONSE TO COMMENTS

November 2011

Jim Walter Resources, Inc. – North River Underground Mine No. 1
Proposed Issuance of Consent Order
NPDES Permit AL0030546
Fayette and Tuscaloosa Counties

The proposed draft issuance of a Consent Order regarding National Pollutant Discharge Elimination System (NPDES) permit AL0030546, Jim Walter Resources, Inc. – North River Underground Mine No. 1 (Jim Walter Resources or the Permittee) was placed on Public Notice for a period of 30 days beginning on September 28, 2011. This document addresses comments regarding the July 15, 2011 coal slurry spill. The Department reviewed all comments received during the comment period. Listed below are the comments and the Department's response to those comments. To view the comments in their entirety the reader should refer to the official record which is located at ADEM, 1400 Coliseum Boulevard, Montgomery, AL 36110. All new public records are also available through the Department's electronic filing system, eFile, which is located at <http://edocs.adem.alabama.gov/eFile/>.

COMMENTS REGARDING THE CIVIL PENALTY:

Alabama law provides the Department the authority assess civil penalties in amounts not exceeding \$25,000.00 for each violation and each day such violation continues. In determining the amount of any penalty, the Department must consider the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty (Ala. Code §22-22A-5). The Department's consideration of these factors and the facts relied upon are clearly explained in the proposed Order. The Department further compromised the amount of the civil penalty is believed was warranted in this matter in the spirit of cooperation and the desire to resolve this matter amicably, without incurring the unnecessary expense of litigation.

COMMENTS CONCERNING THE REQUIRED TIMEFRAME IN WHICH TO SUBMIT A RESPONSE TO THE DEPARTMENT STATING THE CAUSE OF THE COAL SLURRY SPILL, AND THE ENGINEERING REPORT IMPLEMENTING MODIFICATIONS TO REDUCE THE CHANCE OF ANOTHER SPILL IN THE FUTURE:

Upon learning of the spill, the Mine immediately shut down operations and began cleanup of the affected areas. The Department has been receiving weekly progress reports regarding cleanup on behalf of Jim Walter Resources, Inc. since the spill occurred. Jim Walter Resources, Inc. has coordinated with the Department as well as other State and federal agencies to ensure cleanup efforts are conducted appropriately. As a result, the root cause analysis, plans for future improvements to the slurry injection process, and cleanup activities are complete or nearing completion. Therefore, the Department believes that the requirements of the order are appropriate for these circumstances.

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Birmingham, AL 35222
Tel: (205) 458-0095
Fax: (205) 458-0094
edillard@blackwarriorriver.org
www.BlackWarriorRiver.org



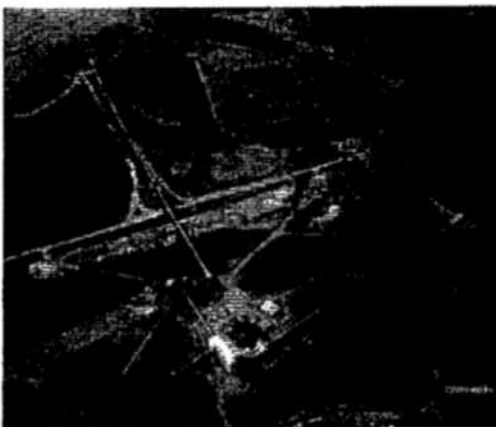
October 28, 2011

Glenda L. Dean
Chief, NPDES Permit Branch, Water Division
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110

**Re: ADEM's Proposed Order to Jim Walter Resources, Inc.
July 15, 2011 Coal Slurry Spill at North River Underground Mine No. 1**

Dear Glenda:

Thank you for the opportunity to provide comments on the Alabama Department of Environmental Management's (ADEM) proposed administrative consent order to Jim Walter Resources, Inc. for the July 15, 2011 coal slurry spill at North River Underground Mine No. 1 located in Fayette and Tuscaloosa Counties, Alabama. The North River Mine coal slurry spilled into unnamed tributaries of Freeman Creek; Freeman Creek; and the North River, which are in the Black Warrior River watershed. We write on behalf of Black Warrior Riverkeeper, a nonprofit organization dedicated to protecting and restoring the Black Warrior River and its tributaries.



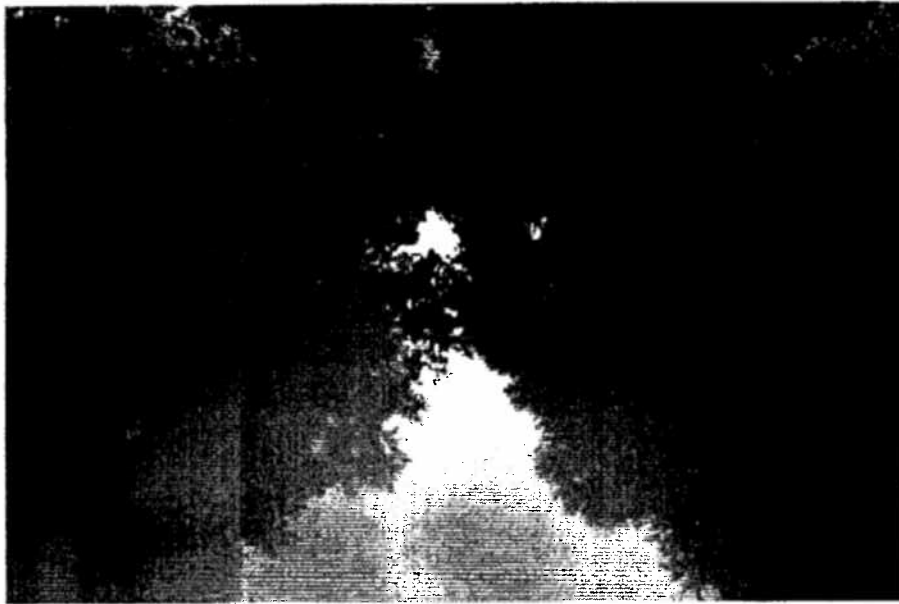
North River Underground Mine No. 1

The proposed consent order provides for a civil penalty of \$60,000 (Consent Order ¶ A, p.6) and contains injunctive relief provisions (Consent Order ¶¶ C through H, pp. 6-7) that require Jim Walter to develop and implement compliance and remediation plans to address the spill.

Adequacy of Penalty

The injunctive relief portion of the consent order is entirely appropriate. Having Jim Walter examine in detail what operational failures caused the spill ideally can help the facility avoid catastrophic events like the slurry spill in the future and may be instructive for other, similar permittees, as well as ADEM and other regulatory agencies. Given the magnitude of the spill and the documented damage to natural resources, it is just as fitting that Jim Walter be required to remediate the site.

What is not appropriate is the amount of the proposed fine. Under the consent order, ADEM and Jim Walter have agreed to a fine of \$60,000 for a catastrophic yet preventable coal slurry spill that took some three months to clean up.¹ Excess levels of suspended solids, arsenic, lead, and other heavy metals were found in Freeman Creek and the North River as a direct result of the spill. The embedded pictures testify eloquently as to the tremendous effects of the spill on the environment. ~~Because of the size of the spill and its demonstrable harm to water quality, the amount of the penalty is clearly inadequate.~~



7/18/11 [photo © Nelson Brooke]

Coal slurry from the spill painted the North River a turbid milky gray color at Wittson Bridge.

¹ The Alabama Surface Mining Commission will also impose a fine for the operational and engineering failures that led to the spill. The tentative amount of that fine is \$220,000, although that could change when the final assessment goes out.



7/18/11 [photo © Nelson Brooke]

Gray coal slurry in the North River contrasts with the rocky bottom and creek bank at Wittson Bridge.



7/20/11 [photo © Bernard R. Kuhajda, Ph.D.]

Lower Freeman Creek (Site 6) showing coal slurry deposits along pools and riffles.



7/20/11 [photo © Bernard R. Kuhajda, Ph.D.]

Extremely turbid water of Freeman Creek mixing with clear water of North River.



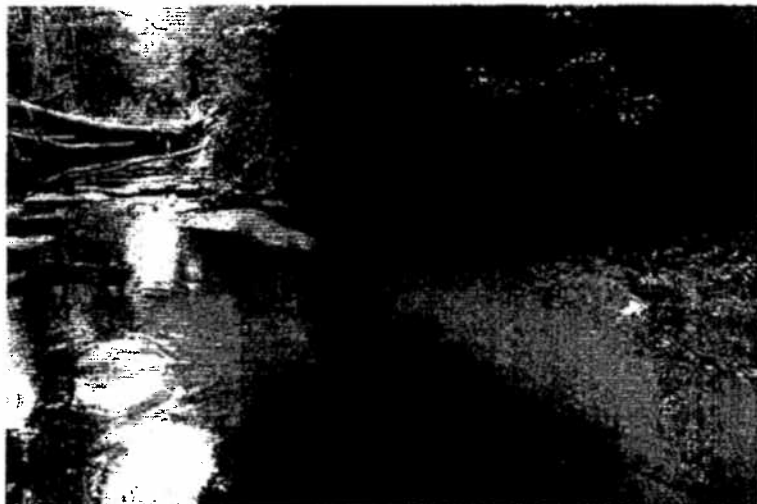
7/25/11 [photo © Bernard R. Kuhajda, Ph.D.]

Freeman Creek downstream of AL Hwy 43 (Site 5) showing coal slurry deposits.



7/25/11 [photo © Bernard R. Kuhajda, Ph.D.]

Unnamed tributary to Freeman Creek downstream of coal slurry spill (Site 2) showing slurry deposited onto sandbars and banks. Note lack of stream depth due to slurry deposition.



7/25/11 [photo © Bernard R. Kuhajda, Ph.D.]

Unnamed tributary to Freeman Creek (Site 3) at its mouth.



7/26/11 [photo © Nelson Brooke]

Slurry cleanup in Freeman Creek prior to its confluence with the North River. Note worker on right edge of rip-rap pond tossing powdered polymer into the creek as another worker sprays it from the left.



7/26/11 [photo © Nelson Brooke]

The North River Mine coal slurry spill flows into the top end of Lake Tuscaloosa, the water supply for 200,000 people in the greater Tuscaloosa area.



7/26/11 [photo © Nelson Brooke]

Close-up of the coal slurry staining Lake Tuscaloosa gray/brown as it flows in from the North River.



8/26/11 [photo © Bernard R. Kuhajda, Ph.D.]

Freeman Creek downstream of coal slurry spill input and US Hwy 43 with coal slurry deposits deep in backwater areas of pools.



9/19/11 [photo © Bernard R. Kuhajda, Ph.D.]

Freeman Creek upstream of original filter dams showing isolated clumps of coal slurry deposits along the shore.

The fact that Jim Walter, to the extent possible, immediately began to mitigate the effects of the spill (§ D) is not nearly as relevant to the calculation of the penalty as the threat to public health: the spill was directly upstream of Lake Tuscaloosa, the drinking water source for 200,000 people in the greater Tuscaloosa area. Moreover, the North River and Lake Tuscaloosa are used regularly for swimming, fishing, and recreation. Irreparable harm was caused to the environment not just by the spill, but also by the kind of invasive clean up that occurred to remove the slurry. Yet, neither the threat to public health nor the irreparable harm to natural resources and the environment is even discussed, much less considered, in calculating the penalty.² The failure to address these two factors results in a much lower penalty than what is deserved and appropriate.

² Ala. Code § 22-22A-5-(18) authorizes ADEM to issue of an order assessing a civil penalty "to any person who violates" environmental requirements. "In determining the amount of any penalty, consideration shall be given to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person;

What about the significant harm caused to aquatic species and their habitat? Bernard R. Kuhajda, Ph.D.'s *Survey for Fishes in Freeman Creek System and North River, Fayette and Tuscaloosa Counties, Alabama* definitively showed the harm caused to aquatic resources by the spill. This unfortunate effect of the spill should play a significant role in the calculation of an adequate penalty.

ADEM has also completely ignored its responsibility to consider the "economic benefit which delayed compliance may confer upon such person" in the order. In its discussion of this penalty factor, the consent order states "The Department does not believe that the violations noted herein conferred an economic benefit upon the Permittee." It appears that ADEM has misinterpreted the penalty factor, which applies to the economic benefit conferred by "delayed compliance," not by the actual violations. In order to find evidence that the Permittee has, in fact, received an economic benefit of delayed compliance, the Department must look no further than the discussion of "The Standard of Care" included in the consent order. In that section, ADEM writes "The Department noted that the violations were the result of the Operator's failure to construct and maintain its slurry disposal system appropriately." The potential costs to the Permittee of properly constructing and maintaining its slurry disposal system, which were avoided in this case, represent the economic benefit conferred by delayed compliance. ADEM is required to calculate the costs of properly constructing and maintaining the disposal system including any necessary parts, labor, payroll for maintenance, etc. that the permittee avoided paying and add that value into the total penalty amount.

Similarly, the fact that ADEM has characterized the spill, conservatively estimated between 250,000 to 600,000 gallons of toxic slurry, as three "discrete" violations, thus limiting the total number of violations, is extremely disturbing given the magnitude of this spill. There exist a number of ways to count these violations that would more accurately represent the extent and effect of the spill. Artificially limiting the violations to three may also limit ADEM's future enforcement options in situations like this.

What is just as concerning is the arbitrary way the fine is apparently calculated. ADEM's calculation of penalties and the continued failure of the Department to implement a structured penalty calculation methodology have led to two serious challenges to the Department's penalty calculations: *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.* No. 09-02 (Ala. Env'tl. Mgmt. Comm'n Aug. 21, 2009) (affirming ADEM penalty order), rev'd by No. CV-2009-1320 (Montgomery County Cir. Ct. Mar. 10, 2010), appeals pending Nos. 2090633/2090646 (Ala. Ct. Civ. App.) and *Southeastern Cheese, LLC v. Alabama Dep't of Env'tl. Mgmt.*, No. 10-06 (Ala. Env'tl. Mgmt. Comm'n Nov. 17, 2010) (Report of Hearing Officer) (Findings adopted by the EMC December 10, 2010).

While we recognize that the proposed order in this matter is a negotiated consent order, it is still important that ADEM develop and apply a consistent, transparent methodology to calculate penalties. Such a methodology serves several important functions: it provides the public and the regulated community with a clear understanding of how the penalty was assessed and assigned. It promotes fairness and equality of treatment. Moreover, in a contested matter or order, a consistent methodology for calculating penalties makes it much less likely that the penalty will be challenged or reduced, as has happened in the past.

the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty."

In recent history, ADEM has made some slight advances in calculating penalties. The Department now appears to be making more of an attempt to consider the six penalty factors of Code § 22-22A-5-(18)(c) and uses a penalty work sheet. However, there is still no meaningful attempt to develop complete facts responsive to all six penalty factors and there continues to be insufficient information of exactly *how* ADEM arrives at the penalty amount. That is the case here: there is no analysis that adequately addresses the threat to public health, the irreparable harm to the environment, that the slurry spill created. Nor is there an adequate calculation of the economic benefit conferred by delayed compliance. As a result of ADEM's failure to properly consider the penalty factors the amount of the fine is too low.

In applying the six penalty factors enumerated in Ala. Code § 22-22A-5-(18)(c) to calculate a penalty amount, ADEM is not allowed to recoup its own costs in responding to the slurry spill or monitoring its cleanup. Given the magnitude of this event as well as the Deepwater Horizon oil spill last year, ADEM should consider petitioning the Alabama State Legislature for such a provision. Although we understand that, as has been the case with the oil spill, ADEM may recoup some of its administrative costs, that is not typical.

Applying all the penalty factors, and especially in light of the irreparable damage to the environment, ADEM's fine should be close to or at the statutory maximum of \$250,000, *see* Ala. Code § 22-22A-5-(18)(c).

Jim Walter Resources and ADEM were not prepared to handle this sort of catastrophic event. Front-end fail safe measures were not in place, and an adequate spill response and cleanup plan was clearly not in place. It took a week for cleanup operations to meaningfully get underway, and initial efforts such as hay bales, turbidity curtains, and polymers being put instream were totally inappropriate. In the weeks and months that followed the spill, every time it rained, more coal slurry made its way downstream into water resources. As a result of poor operations and unpreparedness, an unnamed tributary to Freeman Creek, Freeman Creek, the North River, and Lake Tuscaloosa were all burdened with coal ash pollution that should never have made its way into our water resources.

Thank you for your consideration of our comments. Please do not hesitate to contact us if you have any questions or if you require any additional information. We look forward to the Department's response.

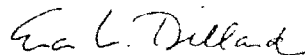
For the river,



Nelson Brooke
Riverkeeper



John Kinney
Enforcement Coordinator



Eva Dillard
Staff Attorney

Glenda L. Dean
Chief of the Water Division
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

Jim Walter Resources Consent Order

Glenda L. Dean:

The civil penalty of \$60,000 is far too small of a fine for Walter Energy's July 15th spill of coal slurry into a tributary of Alabama's North River. In order to adequately deter Walter Energy and other mining companies from reckless practices that result in similar environmental disasters, a far greater fine should be levied. ADEM's consent order also gives Walter Energy far too long – up to six months – to submit an engineering report on the cause of the spill and implement modifications to lessen the likelihood of another spill. The company should be required to take such steps in a matter of weeks, not months.

Sincerely,

Mona Mitchell
606 Marion Dr.
Madison, AL 35758

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