

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

<b>BLACK WARRIOR RIVERKEEPER,</b>	)	
<b>INC.,</b>	)	
<b>Plaintiff,</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO.: CV-07-0591-IPJ</b>
	)	
<b>BIRMINGHAM AIRPORT</b>	)	
<b>AUTHORITY;</b>	)	
<b>and</b>	)	
<b>DUNN CONSTRUCTION</b>	)	
<b>COMPANY, INC.</b>	)	
	)	
<b>Defendants.</b>	)	

**AMENDED COMPLAINT**

COMES NOW the Plaintiff to make and file this Complaint as follows:

**Jurisdiction and Venue**

1. This Court has subject matter jurisdiction over the claims set forth in this Complaint by virtue of Section 505 of the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1365 (a), and by virtue of 28 U.S.C. § 1331 (actions arising under the Constitution or laws of the United States). The relief requested is authorized pursuant to 28 U.S.C. § 2201-02 (power to issue declaratory relief in case of actual controversy and further necessary relief based on such a declaration); 33 U.S.C. § 1319(b), 1365(a) (injunctive relief); and 33 U.S.C. § 1319(d), 1365(a) (civil penalties).

2. Venue is appropriate in the Northern District of Alabama pursuant to 33 U.S.C. § 1365 (c)(1) because the acts, omissions, and/or violations complained of herein occurred within the Northern District of Alabama.

**Notice**

3. Pursuant to 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3, on January 30, 2007, Plaintiff gave Defendants, Birmingham Airport Authority, Ellard Construction Co., Inc., APAC-Southeast, Inc., Alabama Division, and Dunn Construction Company, Inc. notice of the violations alleged herein and their intent to sue more than Sixty (60) days prior to the filing of this Complaint. At the same time a copy of the notice was mailed to the Administrator of the Environmental Protection Agency (EPA), the Regional Administrator of Region IV of the EPA, and the Director of the Alabama Department of Environmental Management (ADEM). Service of notice on Defendants was by certified mail. Additionally, notice was mailed to the registered agent for each corporate defendant.
4. Since the Plaintiff gave notice, the violations complained of herein have not ceased. The EPA or the State of Alabama has not commenced and diligently prosecuted a civil or criminal enforcement action in a court of the United States or a State for the violations set out herein. The EPA or the State has not commenced and diligently prosecuted an action under 33 U.S.C.

§1319(g) or under a state law comparable to 33 U.S.C. §1319(g) for the violations set out herein. The EPA or the State has not issued a final order not subject to further judicial review and the Defendant(s) has/have not paid a penalty assessed under 33 U.S.C. §1319(g) or under a state law comparable to 33 U.S.C. §1319(g) for the violations set out herein.

Furthermore, the EPA or the State did not commence an action under 33 U.S.C. §1319(g) prior to Plaintiff giving notice under 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3 and this action is being filed before the 120<sup>th</sup> day after such notice was given.

### **PARTIES**

5. Plaintiff, Black Warrior Riverkeeper, Inc. is a non-profit membership corporation, with over one thousand members, that is dedicated to the preservation, protection, and defense of the environment and that actively supports effective enforcement and implementation of environmental laws, including the FWPCA and the Alabama Water Pollution Control Act (AWPCA), on behalf and for the benefit of its members.
6. Defendant, Birmingham Airport Authority is a public corporation believed to be organized under Code of Alabama § 4-3-1, *et seq.*, and is engaged in the operation of the Birmingham International Airport (“Airport”) located within the Northern District of Alabama.

7. Defendant, Dunn Construction Company, Inc. is a corporation which does business within the Northern District of Alabama.

### **NATURE OF THE CASE**

8. This is an action for declaratory judgment, injunctive relief, penalties, and attorney fees to enforce provisions of the AWPCA and the FWPCA, regulations adopted pursuant to said Acts, and/or permits adopted and/or issued pursuant to said Acts.
9. Birmingham Airport Authority owns and operates the Birmingham International Airport NPDES construction site which discharges pollutants to Village Creek, a tributary of the Locust Fork of the Black Warrior River, a water of the State and the United States, in the City of Birmingham, Jefferson County, Alabama. These discharges are in violation of the State of Alabama's general permit for construction activities, found at Alabama Administrative Code § 335-6-12-.01, *et seq.*, and other provisions of Alabama NPDES rules, the AWPCA and the FWPCA. Birmingham Airport Authority is an "operator" as defined by Alabama Administrative Code § 335-6-12-.02(n) and, as such, retains full responsibility for the design, construction, operation and maintenance of Best Management Practices (BMPs) to protect water quality. Any noncompliance with the general

permit is a violation of the general permit, Alabama NPDES rules, the AWPCA and the FWPCA, and is grounds for enforcement by civil action.

10. Defendant, Dunn Construction Company, Inc. is also an “operator” as defined by Alabama Administrative Code § 335-6-12-.02(n) and, as such, retains full responsibility for the design, construction, operation and maintenance of Best Management Practices (BMPs) to protect water quality.
11. Members of Black Warrior Riverkeeper have recreated in, on or near, or otherwise used and enjoyed, or attempted to use and enjoy, Village Creek downstream from the Airport in the past, and they intend to do so in the future. They have a direct and beneficial interest in the continued protection, preservation, and enhancement of the environmental, aesthetic, and recreational values in Village Creek downstream from the Airport. The quality of these waters directly affects the recreational, aesthetic and environmental interests of certain members of Black Warrior Riverkeeper. The recreational, aesthetic, and environmental interests of certain of Black Warrior Riverkeeper’s members have been, are being, and will be adversely affected by the Defendants’ continued violation of the general permit, Alabama NPDES rules, the AWPCA and the FWPCA as alleged in this complaint.

12. Members of Black Warrior Riverkeeper now recreate less on Village Creek because of the Airport's illegal discharges. The violations alleged herein have had a detrimental impact on those members' interests because the violations have adversely affected and/or diminished aquatic life in Village Creek and have made the Creek less suitable for fishing, boating, wading, walking, observing nature, or relaxing. Said members would recreate more in and around Village Creek but for Defendants' illegal discharges of pollution. Said members will recreate more often in or near Village Creek once the Defendants' illegal discharges cease.

**COUNT ONE**

13. The Plaintiffs hereby repeat, reallege, adopt, and incorporate by reference paragraphs 1 through 12 herein above as if fully set out in this Count.
14. The State of Alabama, acting through ADEM, has implemented a federally authorized system for regulating the discharge of pollutants to waters of the State that operates in lieu of, or in conjunction with, the federal water pollution control program (see U.S.C. § 1342 (b)).
15. The State of Alabama has implemented a General Permit applicable to all construction activity within the State. The provisions of this general permit are set out at Alabama Administrative Code §335-6-12, *et seq.*

16. The Defendants, or any one of them, are in violation of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by operating the Airport NPDES Construction Site in a manner which discharges pollutants to the waters of the United States and waters of the State. These activities include, but are not limited to, the specific incidents and problems described below. These violations occurred during the land disturbance activities at the Airport Runway Extension NPDES Construction Site beginning on or around December 15, 2002 and continuing up to and beyond the date of this action.
17. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by failure to file with ADEM and implement a Construction Best Management Practices Plan (CBMPP).
18. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by failure to post a sign on-site with the information required by ADEM Administrative Code 335-6-12-.05 (5).
19. The violations set out in this Count are continuing and ongoing and there is a reasonable likelihood that Defendants will continue these or similar violations in the future.
20. These violations have an adverse impact on Village Creek and on the recreational, aesthetic, and environmental interests of the Plaintiff's

members in those waterways as set out in paragraphs 11 and 12 herein above.

**COUNT TWO**

21. The Plaintiffs hereby repeat, reallege, adopt, and incorporate by reference paragraphs 1 through 20 herein above as if fully set out in this Count.
22. The Defendants have failed to ensure that their construction activities are regularly evaluated and/or inspected to ensure compliance with the General Permit, in violation of Alabama Administrative Code 335-6-12-.28 and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.
23. The Defendants have failed to monitor the receiving stream, Village Creek, to ensure protection of water quality, in violation of Alabama Administrative Code 335-6-12-.26, 335-6-12-.28 and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.
24. The Defendants have failed to report to ADEM all non-compliant discharges that cause or contribute to a violation of applicable water quality standards, in violation of Alabama Administrative Code 335-6-12-.33 and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.



25. The Defendants have failed to keep and retain adequate records of each inspection, measurement, sample taken, laboratory or field measurement, parameter, or analysis performed, observed, or recorded in violation of Alabama Administrative Code 335-6-15 and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.
26. The Defendants have failed to file with ADEM summary annual reports for each previous year in violation of Alabama Administrative Code 335-6-15 and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.
27. The violations set out in this Count are continuing and ongoing and there is a reasonable likelihood that Defendants will continue these or similar violations in the future.
28. These violations have an adverse impact on Village Creek and on the recreational, aesthetic, and environmental interests of the Plaintiff's members in those waterways, as set out in paragraphs 11 and 12 herein above.

### **COUNT THREE**

29. The Plaintiffs hereby repeat, reallege, adopt, and incorporate by reference paragraphs 1 through 28 herein above as if fully set out in this Count.

30. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by allowing discharges of pollutants which cause or contribute to a violation of a State water quality standard, turbidity, on, or about, the following dates: September 17, 2004, November 14, 2004, April 1, 2005, November 6, 2005, November 29, 2005, December 15, 2005, January 13, 2006, January 23, 2006, April 21, 2006, August 21, 2006, September 12, 2006, October 17, 2006, October 27, 2006, November 15, 2006, November 17, 2006, December 22, 2006, January 5, 2007, January 7, 2007, January 21, 2007, February 1, 2007, March 15, 2007, April 26, 2007, November 14, 2007, January 9, 2008, January 10, 2008, January 31, 2008, February 12, 2008, February 17, 2008, February 21, 2008, February 22, 2008, March 4, 2008, April 1, 2008, April 11, 2008, May 8, 2008, July 9, 2008, and at other times not currently known by Plaintiff.
31. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by their failure to fully implement and regularly maintain effective BMPs for the protection of water quality to the maximum extent practicable, and in accordance with the operator's Construction Best Management Practices Plan (CBMPP). These violations have been documented on, or about, the following dates: September 14, 2004, September 17, 2004, November 10, 2004, April 1, 2005, June 24,

2005, October 6, 2005, November 30, 2005, December 15, 2005, December 28, 2005, January 13, 2006, January 23, 2006, March 21, 2006, April 18, 2006, April 21, 2006, May 11, 2006, September 12, 2006, October 17, 2006, October 27, 2006, November 15, 2006, December 22, 2006, January 5, 2007, January 7, 2007, January 21, 2007, March 15, 2007, and July 29, 2008. These violations are of a continuous nature and constitute a violation for each day they remain uncorrected.

32. The Defendants have allowed disposition of off-site sedimentation, on, or about, the following dates: November 10, 2004, June 24, 2005, October 6, 2005, December 15, 2005, December 28, 2005, May 11, 2006, April 21, 2006, and at other times not currently known by Plaintiff, in violation of Alabama Administrative Code 335-6-12-.21(5)(b) and other provisions of the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA.
33. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by placing sediment control structures in streams and wetlands.
34. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by failure to place and maintain adequate ground cover to protect against rain and erosion.

35. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by allowing deep gullies and rills to form and remain without controls in the eroding channels to stop the problems from continuing or worsening and without adequate downstream protection before the first receiving stream.
36. The Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and the FWPCA by allowing accumulations of sediment in streams and wetlands and by not removing and remediating the accumulation of sediment in such streams and wetlands.
37. The violations set out in this Count are continuing and ongoing and there is a reasonable likelihood that Defendants will continue such violations in the future.
38. These violations have an adverse impact on Village Creek and on the recreational, aesthetic, and environmental interests of the Plaintiff's members in those waterways, as set out in paragraphs 11 and 12 herein above.

#### **COUNT FOUR**

39. The Plaintiff hereby repeats, realleges, adopts, and incorporates by reference paragraphs 1 through 38 herein above as if fully set out in this Count.

40. The violations set out herein will continue unless this Court enjoins Defendants.
41. These violations have caused certain of Plaintiff's members irreparable injury. Plaintiff has no adequate remedy at law for the injuries caused to its members by Defendants' ongoing violations in that Plaintiff would be forced to bring repeated and burdensome actions for each new injury to its interests if Defendants' ongoing violations are not enjoined.
42. An injunction will be in the public's interest in this case. Because Defendants are in continuing violation of the law, the equities for an injunction weigh in Plaintiff's favor.
43. Therefore, Plaintiff brings this cause of action to enjoin Defendants from engaging in any other affirmative act or conduct which would contribute to further permit violations.

**PRAYER FOR RELIEF**

- A. Plaintiff requests the Court render a judgment finding and declaring that Defendants have violated the General Permit, Alabama NPDES rules, the AWPCA and/or the FWPCA in the manner and on the dates alleged in Counts One through Three herein and that such violations are illegal and that Defendants are liable for all such violations.

- B. Plaintiff requests and petitions this Court to enjoin the violations and any and all illegal conduct by Defendants set out and alleged in Counts One through Three herein.
- C. Plaintiff requests and petitions this Court to assess a \$32,500.00 (thirty-two thousand, five hundred dollars) civil penalty against each Defendant for each violation and each day of continuing violation (*see*, 40 CFR 19) for which such Defendant is found liable.
- D. Plaintiff further requests a judgment for all costs and for attorney fees as are reasonable under the circumstances.
- E. Plaintiff prays for such other, further or more general relief as this Court may deem appropriate.

Respectfully submitted,

**s/ Mark E. Martin**

Mark E. Martin

Bar Number: ASB-9361-A41M

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

J. Alan Truitt  
James L. Goyer, III  
Christopher J. Willialms  
Maynard Cooper & Gale PC  
Attorneys for Birmingham Airport Authority

E. Glenn Waldrop, Jr.  
William S. Cox, III  
Rachel McCulley Lary  
Lightfoot Franklin & White LLC  
Attorneys for Dunn Construction Company, Inc.

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

None.

Respectfully submitted,

s/ Mark E. Martin