

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**BLACK WARRIOR RIVERKEEPER,)
INC.)**

Plaintiff,)

vs.)

**BIRMINGHAM AIRPORT)
AUTHORITY and DUNN)
CONSTRUCTION COMPANY, INC.)**

Defendants.)

**CIVIL ACTION NO. CV-07-J-
0591-S**

CONSENT DECREE

This matter is before the Court on the Parties' Joint Motion for Entry of Consent Decree ("Decree").

WHEREAS, on April 3, 2007, Black Warrior Riverkeeper ("Riverkeeper") filed a citizen suit, pursuant to Section 505 of the Clean Water Act ("CWA"), 33 U.S.C. §1365 against the Birmingham Airport Authority ("the Authority") and its contractors Ellard Construction Co., Inc. ("Ellard"), APAC-Southeast, Inc. ("APAC"), and Dunn Construction Company, Inc. ("Dunn") for alleged violations of the CWA and Alabama Water Pollution Control Act ("AWPCA") and the implementing regulations of the CWA and AWPCA related to stormwater runoff from the Runway Extension Project ("the Project") at the Birmingham International Airport;

WHEREAS, all of Riverkeeper's claims against the Authority and Dunn (collectively referred to hereinafter as "Defendants") for alleged violations of the CWA and AWPCA and their implementing regulations are set forth in its Amended Complaint filed on August 20, 2008;

WHEREAS, the Parties agree that entry of this Decree without further litigation is the most appropriate means of resolving this matter;

WHEREAS, the Parties have agreed, and the Court by entering this Decree finds that: this Decree has been negotiated in good faith and at arms length; this settlement is fair, reasonable, in the best interest of the Parties and in the public interest; and this settlement is consistent with the goals of the CWA and AWPCA.

NOW, THEREFORE, without any admission of fact or law, and without any admission by the Defendants that any of the violations alleged by Riverkeeper occurred, it is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this action, the subject matter herein, and the Parties consenting hereto, under 28 U.S.C. §1331 and Section 505(a) of the CWA, 33 U.S.C. §1365(a). Venue is proper under 28 U.S.C. §1391(b) and (c) and Section 505(c) of the CWA, U.S.C. §1365(c).

2. Riverkeeper met the notification requirements of Section 505(b) of the CWA, 33 U.S.C. §1365(b).

II. LODGING AND APPROVAL OF DECREE

3. Pursuant to Section 505(c)(3) of the CWA, 33 U.S.C. §1365(c)(3), this Consent Decree will be lodged with the Court and simultaneously presented to the U.S. Attorney General and U.S. Environmental Protection Agency (EPA) for review and comment for a period of forty-five (45) days. The Plaintiff shall serve, by certified mail, a copy of this Decree upon the Attorney General, the Administrator of the EPA, and the Regional Administrator of the EPA. Once Plaintiff receives notice of the dates upon which the EPA and the Attorney General have received the proposed Consent Decree, Plaintiff shall inform the Court of the dates of service. As long as neither the EPA nor the Attorney General objects or otherwise seeks to intervene in this matter, this Decree may be entered by the Court 45 days or longer after receipt of a copy of it by the Attorney General and the EPA.

III. SUPPLEMENTAL ENVIRONMENTAL PROJECT

4. In settlement of Riverkeeper's claims against the Defendants, Defendants shall pay the sum of Sixty Thousand Dollars (\$60,000.00) for the establishment of a Supplemental Environmental Project located off of the Authority's property, the substance and scope of which will be in the sole discretion of Riverkeeper. Said sum shall be paid to the Clerk of the Court for remittance to the Freshwater Land Trust within sixty (60) days of the Effective Date of this Decree. The Clerk shall deposit said funds into an appropriate account

and, after sufficient time to allow the deposit to resolve, remit said funds to “Freshwater Land Trust” and tender a check to the Trust at the following address:

Freshwater Land Trust
Box 549071
Birmingham-Southern College
900 Arkadelphia Road
Birmingham, AL 35254

IV. COSTS

5. Defendants shall pay Ninety Thousand Dollars (\$90,000.00), which Riverkeeper accepts as the full amount of all Riverkeeper's attorneys' fees, costs, and other expenses in this litigation. Said sum shall be paid to the Clerk of the Court for remittance to Mark E. Martin, Counsel for Riverkeeper, within sixty (60) days of the Effective Date of this Decree.

V. INJUNCTIVE RELIEF

6. In further settlement of Riverkeeper's claims, the following injunctive relief is agreed upon by Riverkeeper and the Authority and ordered by the Court:

- A. The Authority will immediately designate four (4) employees whose primary responsibility will include implementing and maintaining Best Management Practices (BMPs) as outlined in Ala. Admin. Code r. 335-6-12 (2008) and the Alabama Handbook for Erosion Control, Sediment Control and Stormwater Management on Construction Sites and Urban Areas (June 2003) and pursuant to the requirements of the FWPCA, AWPCA, and

any applicable National Pollutant Discharge Elimination System ("NPDES") permits;

- B. Within ninety (90) days of the Effective Date of this Decree, three (3) supervisory level employees responsible for overseeing the implementation and maintenance of BMPs will have completed the Qualified Credentialed Inspector Program as outlined in Ala. Admin. Code r. 335-6-12-.02(q) (2008) and all other Authority employees responsible for implementing and maintaining BMPs will receive one full day of stormwater compliance training by a Qualified Credentialed Professional, as defined in Ala. Admin. Code r. 335-6-12-.02(r) (2008), and approved by ADEM to train Qualified Credentialed Inspectors;
- C. On or before February 1, 2009, an independent third-party expert, to be selected from the Authority's list of approved contractors and at the Authority's sole discretion, shall conduct an Initial Comprehensive Site Compliance Evaluation (the "Initial CSCE") to evaluate the overall effectiveness of the Authority's BMPs in preventing or minimizing, to the maximum extent practicable, sediment and other pollutants in stormwater leaving the Authority's property;

- D. Following the completion of the Initial CSCE Report, the Authority's independent third-party expert shall conduct quarterly inspections to monitor the Authority's progress in correcting any deficiencies noted in the Initial CSCE;
- E. To the extent any deficiencies are discovered as a result of the Initial CSCE, such deficiencies and recommendations for correcting the deficiencies will be documented in a report to be sent to both Riverkeeper and the Authority on or before February 1, 2009. The Authority shall correct all deficiencies in accordance with the Initial CSCE Report and pursuant to all applicable regulations, including without limitation, regulations issued by the Environmental Protection Agency, the Alabama Department of Environmental Management, the Federal Aviation Administration, and the U.S. Department of Agriculture. Riverkeeper and the Authority acknowledge that due to the complex regulatory environment in which the Authority operates, correcting any deficiencies noted in the Initial CSCE, including without limitation completing site stabilization in accordance with appropriate growing seasons for grassing, may require a reasonable period of time of not less than twelve (12) months.

F. On or before February 1, 2010, the Authority's independent third-party expert shall complete a Final Comprehensive Site Compliance Evaluation ("Final CSCE") to determine whether the Authority has substantially corrected the deficiencies, if any, that were documented in the Initial CSCE Report. The Final CSCE shall be documented in a report to be sent to Riverkeeper and the Authority on or before February 1, 2010. If the Final CSCE Report documents that the Authority has substantially corrected all deficiencies noted in the Initial CSCE Report, then on or before February 15, 2010, Riverkeeper and the Authority shall certify to the Court that all recommendations for correcting all deficiencies have been completed and that the Authority is in substantial compliance with all requirements under the CWA, AWPCA, and any applicable NPDES permits. In the event that the parties do not agree to said certification, then the parties agree to mediate the dispute. In such event the parties request U.S. Magistrate Judge John Ott as the mediator, if he is available and willing to so serve.

7. At all times during the period in which the above injunctive relief is being implemented, Riverkeeper may continue to monitor from off-site stormwater runoff originating from the Authority's property, including without limitation, by taking samples pursuant to Ala. Admin. Code r. 335-6-12-.26 and ADEM

Sampling Guidelines for Turbidity (ADEM Standard Operation Procedure #2044) at Riverkeeper's expense. To the extent Riverkeeper takes any samples that reflect an alleged violation or notes any BMP deficiencies during its inspections, Riverkeeper shall provide the Authority with sampling results or otherwise notify the Authority in writing, as soon as reasonably practicable, but no later than 48 hours after Riverkeeper's inspection is complete or Riverkeeper has received sampling results. The Authority shall respond to Riverkeeper in writing within 30 days acknowledging receipt of Riverkeeper's inspection report or sampling results and describing what steps have been taken or will be taken in response to Riverkeeper's written notification.

8. The Parties agree that in any action or proceedings to enforce this Decree, the Authority may raise the defenses of *Force Majeure*, compliance with Federal, state, or local regulations, and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of the Authority, including the Authority's contractors and consultants, which could not be overcome by due diligence (i.e., causes which 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 Authority) and which delays or prevents performance by a date required by the Decree. Examples of *Force Majeure* include but are not limited to severe weather conditions such as

drought or chronic and catastrophic rainfall, as defined by Ala. Admin. Code r. 335-6-7-.02 (p).

9. The Authority shall continue to comply with the requirements of the CWA, AWPCA, and the requirements of any applicable NPDES permit. However, nothing herein shall be interpreted to impose upon the Authority any requirements more stringent than what is required under Federal, state, or local statutes and regulations.

10. Riverkeeper and the Authority agree that life safety shall be given precedence when determining the appropriate course of action in the implementation of the injunctive relief outlined above. Nothing herein shall be interpreted to prevent the Authority from following the requirements, recommendations, and policies of the U.S. Department of Agriculture, the Federal Aviation Administration, or any other agency setting forth requirements or providing guidance regarding life safety issues, including without limitation, issues associated with wildlife control and turf management. Interpretation and implementation of life safety requirements and guidance shall be solely the responsibility and in the discretion of the Authority.

V. EFFECTIVE DATE

11. The Effective Date of this Decree shall be the date upon which this Decree is entered by the Court.

VI. MOTION TO DISMISS DUNN WITH PREJUDICE

12. Within fifteen (15) days of Defendants' fulfillment of Paragraphs 3, 4, and 5 above, Plaintiffs will file with this Court a Motion to Dismiss with Prejudice all claims against Dunn.

**VII. RETENTION OF JURISDICTION,
TERMINATION OF CONSENT DECREE, AND
MOTION TO DISMISS THE AUTHORITY WITH PREJUDICE**

13. The Court shall retain jurisdiction to enforce compliance with the terms and conditions of this Decree and take any action necessary or appropriate for its interpretation, construction, execution, modification, or adjudication of disputes.

14. Concurrent with the certification to be made by Riverkeeper and the Authority as outlined in Paragraph 6.F. above, Riverkeeper will file with this Court a Motion to Dismiss with Prejudice all claims against the Authority.

15. The Court's jurisdiction over this case and the Decree shall then terminate upon entry of the Court's Order granting Riverkeeper's Motion to Dismiss with Prejudice.

VIII. RELEASE BY PLAINTIFFS

16. Upon approval and entry of this Decree by the Court, this Decree shall constitute a final resolution between Riverkeeper and Defendants of all counts of the Amended Complaint. Except for claims which may arise under the provisions of this Decree, Plaintiffs hereby release, discharge, and covenant not to assert any

and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they may have had, or may now or hereafter have, against Defendants and each of their officers, directors, shareholders, partners, attorneys, predecessors, successors, representatives, insurers, assignees, agents, employees, executors, administrators, heirs, and all persons acting by, through, or in any way on behalf of the Defendants, based upon matters which have been asserted in the Amended Complaint. The Parties further covenant and agree that this Decree may be pleaded or asserted by or on behalf of the Defendants as a defense and complete bar to any action or claim that may be brought against or involving the Defendants by anyone acting or purporting to act on behalf of Riverkeeper with respect to any of the matters within the scope of this Decree excepting only the obligations of the Parties under this Decree.

IX. USE OF CONSENT DECREE

17. The Defendants neither admit nor deny that the violations alleged in Riverkeeper's Amended Complaint occurred and enter into this Decree with the understanding that this Decree shall not be deemed or construed at any time for any purpose by anyone (including but not limited to other parties who may attempt to bring claims in any legal, administrative, or other proceeding) as an admission by the Defendants of liability.

X. OTHER PARTIES

18. Pursuant to the Court's July 13, 2007 and March 3, 2008 Orders, the Court dismissed with prejudice all of Riverkeeper's claims against Ellard Construction Company ("Ellard") and APAC-Southeast, Inc ("APAC"). Riverkeeper agrees that the time for appeal of those Orders has expired and that nothing herein should be interpreted to alter those Final Orders.

XII. NOTICES

19. Unless otherwise provided herein, whenever notifications or communications are required by this Decree, they shall be made in writing and addresses as follows:

For Black Warrior Riverkeeper, Inc.

Mark E. Martin
Mark E. Martin, Attorney at Law, LLC
712 37th Street South
Birmingham, Alabama 35222

For Birmingham Airport Authority

James L. Goyer
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
Suite 2400
Birmingham, Alabama 35203

For Dunn Construction Company, Inc.

E. Glenn Waldrop, Jr.
Lightfoot, Franklin & White LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203

20. All notifications or communications made pursuant to this Paragraph shall be sent either by: (a) overnight mail or delivery service; (b) certified or registered mail, return receipt requested; or (c) electronic transmission, unless the recipient is not able to review the transmission in electronic form. All notifications or communications (a) sent by overnight, certified or registered mail shall be deemed submitted on the date they are postmarked, or (b) sent by overnight delivery service shall be deemed submitted on the date they are delivered to the delivery service. All notifications or communications made by electronic means shall be electronically signed and certified, and shall be deemed submitted on the date that such transmissions are sent, unless the recipient shows it did not receive such transmission.

21. Any Party may change either the notice recipient or the address for providing notices to it by serving to the other Parties a notice setting forth such new notice recipient or address.

XIII. MUTUAL DRAFTING

22. It is hereby expressly understood and agreed that this Decree was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning or interpretation of this Decree.

XIV. ENTIRE AGREEMENT

23. This Decree constitutes the entire agreement and understanding between Defendants and Riverkeeper with respect to the issues addressed herein and cannot be modified or amended except in writing signed by the Parties. Any prior agreements, promises, negotiations or representations, either oral or written, relating to the subject matter of this Decree and not expressly set forth in this Decree or in any instruments or agreements executed in connection herewith are of no force or effect, except as expressly set forth herein.

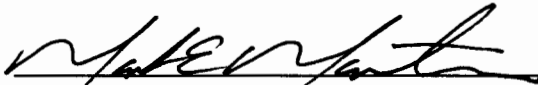
24. The undersigned representatives of the Parties certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

SO ORDERED, THIS 17th DAY OF February, 2008⁹



INGE JOHNSON
UNITED STATES DISTRICT JUDGE

ATTORNEY FOR BLACK WARRIOR RIVERKEEPER, INC.



MARK E. MARTIN
Mark E. Martin, Attorney at Law, LLC
712 37th Street South
Birmingham, Alabama 35222

BLACK WARRIOR RIVERKEEPER, INC.

By: Nelson Brooke

Its: Executive Director

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned authority, a Notary Public in and for said county in said State, hereby certify that Nelson Brooke, as Executive Director of Black Warrior Riverkeeper, Inc., an instrumentality of the State of Alabama formed as a public corporation, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such representative and with full authority, executed the same voluntarily for and as the act of said corporation.

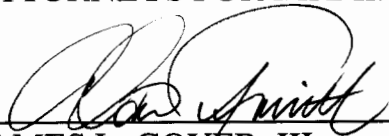
Given under my hand and official seal, this 18th day of December, 2008.


Notary Public

AFFIX SEAL

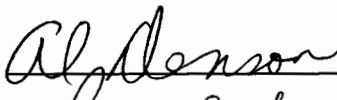
My commission expires: 12/23/2009


ATTORNEYS FOR BIRMINGHAM AIRPORT AUTHORITY



JAMES L. GOYER, III
J. ALAN TRUITT
CHRISTOPHER J. WILLIAMS
Maynard, Cooper & Gale, P.C.
2400 Regions Harbert Plaza
Birmingham, AL 35203

BIRMINGHAM AIRPORT AUTHORITY

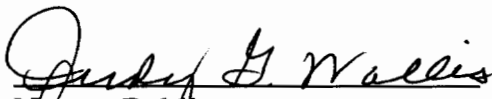
By: 

 Its: President & CEO

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned authority, a Notary Public in and for said county in said State, hereby certify that Al Denson, as President & CEO of Birmingham Airport Authority, an instrumentality of the State of Alabama formed as a public corporation, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such representative and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal, this 3rd day of December, 2008.



Notary Public

AFFIX SEAL

My commission expires: January 6, 2009

ATTORNEY FOR DUNN CONSTRUCTION COMPANY, INC.

E. Glenn Waldrop, Jr.
E. GLENN WALDROP, JR.

Lightfoot, Franklin & White LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203

DUNN CONSTRUCTION COMPANY, INC.

By: J. Al Caskey
Its: Vice President

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, the undersigned authority, a Notary Public in and for said county in said State, hereby certify that J. Al Caskey, as Vice President of Dunn Construction Company, Inc., an instrumentality of the State of Alabama formed as a public corporation, is signed to the foregoing instrument and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, he, as such representative and with full authority, executed the same voluntarily for and as the act of said corporation.

Given under my hand and official seal, this 20th day of November, 2008.

Chad R. Miller
Notary Public

AFFIX SEAL

My commission expires: 1/26/09