

REL: August 25, 2023

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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2023

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**Black Warrior Riverkeeper, Inc., and Black Belt Citizens
Fighting for Health and Justice**

v.

**State of Alabama ex rel. Steve Marshall, Alabama Department of
Environmental Management, and Waterworks and Sewer Board
of the City of Uniontown**

**Appeal from Perry Circuit Court
(CV-22-900048)**

EDWARDS, Judge.

Black Warrior Riverkeeper, Inc. ("Riverkeeper"), and Black Belt Citizens Fighting for Health and Justice ("Citizens") appeal from an order entered by the Perry Circuit Court ("the circuit court") denying

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their petition to intervene in an action commenced in that court by the State of Alabama, by and through Attorney General Steve Marshall, and the Alabama Department of Environmental Management ("ADEM") against the Waterworks and Sewer Board of the City of Uniontown ("the Board").

On August 26, 2022, Riverkeeper and Citizens sent a notice-of-intent-to-sue letter ("the August 2022 letter") to the Board regarding the Board's permit ("the permit") to operate the Uniontown Wastewater Treatment Facility ("the treatment facility"). See 33 U.S.C. § 1365(b). The permit for the treatment facility had been issued under the National Pollutant Discharge Elimination System. See 33 U.S.C. § 1342(a). The August 2022 letter alleged that the Board had violated the terms of the permit, 33 U.S.C. § 1342(b), and the Alabama Water Pollution Control Act ("the AWPCA"), Ala. Code 1975, § 22-22-1 et seq. The August 2022 letter stated that the Board had self-reported violations that included 3 instances of exceeding maximum pH allowances in April, May, and June 2022 at a particular outfall and that unpermitted discharges had occurred on 49 days over September 2021, January 2022, and April 2022.

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The August 2022 letter further stated that it appeared that unpermitted discharges had continued to occur (1) directly into an unnamed tributary of Cottonwood Creek through the use of an unpermitted pipe that had been installed to an outlet structure from the treatment-facility lagoon in October 2018 "to avoid, reduce, and prevent future catastrophic breaches" at the treatment facility and (2) into an unnamed tributary of Freetown Creek through the use of an unpermitted pipe and elsewhere in an inadequately maintained berm surrounding "sprayfield #1" of the treatment facility. Also, according to Riverkeeper and Citizens, the Board had failed to properly operate and maintain the treatment facility in various ways, including, in part, by failing to maintain and operate an aerator and particle screen and by failing to place limits on the volume of wastewater that certain large-volume dischargers could discharge for handling by the treatment facility.

In response to the August 2022 letter, the State and ADEM filed in the circuit court, on October 24, 2022, a complaint against the Board under the remedial provisions of the Alabama Environmental Management Act ("AEMA"), Ala. Code 1975, § 22-22A-1 et seq. The

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complaint alleged that the Board had violated the AWPCA and the terms of the permit for the treatment facility. The complaint included exhibits listing many of the same violations that had been alleged by Riverkeeper and Citizens in the August 2022 letter. According to the complaint, the permit authorized the treatment facility to discharge wastewater onto a sprayfield after treatment in a lagoon, but, they asserted, the treatment facility

"ha[d] not functioned properly for many decades resulting in routine permit violations and sanitary sewer overflows, and subsequent water quality violations. The collection system [that routes wastewater to the lagoon] is riddled with cracks, openings, and faulty connections resulting in excessive infiltration and inflow which has inundated the treatment system. The treatment systems at the lagoon have not functioned properly and the soils at the sprayfield do not allow adequate infiltration of the wastewater."

According to the complaint, in 2005, ADEM had commenced an action in the circuit court against the City of Uniontown ("Uniontown"), the predecessor in interest to the Board, regarding permit violations at the treatment facility, which resulted in a consent decree entered in 2008. In 2012, ADEM commenced another action in the circuit court against Uniontown for alleged violations of the 2008 consent decree. That action

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resulted in the issuance of an injunction in November 2015 prohibiting unpermitted discharges, but that injunction was stayed to provide Uniontown with time to prepare and institute a plan to comply with the requirements of the AWPCA. An additional order was entered in the 2012 action in June 2018. In the June 2018 order, the circuit court awarded ADEM additional injunctive relief relating to emergency work necessary to avoid breaches at the treatment facility. Also in 2018, the United States Department of Agriculture awarded Uniontown a grant in excess of \$30,000,000, conditioned on the creation of the Board and the transfer of all Uniontown sewer assets and liabilities, including the treatment facility and the permit, to the Board, which occurred effective May 26, 2021.

The complaint further alleged that

"remedial work has begun on the collection system in accordance with the Engineering Report and Compliance Plan [required by the 2015 injunction issued by the circuit court]. The Engineering Report outlines several potential treatment options which will not be ripe to assess until flows are analyzed following completion of collection system rehabilitation. In essence, [the Board] has picked up the baton of running the sewer system and is finally making headway to solve decades-old problems. Any delays to the

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project will likely increase cost and could jeopardize the funding that must be used within a certain period of time."

The complaint also alleged, however, that certain permit provisions had been violated and that unpermitted discharges had occurred. The State and ADEM requested a judgment declaring that the Board, as the successor in interest to Uniontown, had violated certain provisions of the permit and the AWPCA, that the Board had allowed unpermitted discharges to occur from the treatment facility, and that the Board must comply with the previous court orders regarding the maintenance and operation of the treatment facility "to ensure the continued remediation of the long-standing problems with [that facility]." Pursuant to the AEMA, the State and ADEM also requested injunctive relief regarding the alleged violations and the assessment of civil penalties against the Board for each permit violation. See Ala. Code 1975, §§ 22-22A-5(18)b. and 22-22A-5(19). The Board filed an answer denying the material allegations of the complaint filed by the State and ADEM.

On November 7, 2022, Riverkeeper and Citizens filed in the circuit court a motion to intervene, pursuant to Rule 24(a)(1), Ala. R. Civ. P. See § 22-22A-5(18)b. ("Any person having an interest which is or may be

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adversely affected may intervene as a matter of right in any civil action commenced under this paragraph."); § 22-22A-5(19) ("In any [action to enjoin such violation], any person having an interest which is or may be adversely affected may intervene as a matter of right."). The motion to intervene included as an exhibit a complaint in intervention, which requested declaratory and injunctive relief regarding the Board's purported violations of the permit and the AWPCA and alleged that Riverkeeper

"is an Alabama nonprofit membership corporation with over 6,000 members that is dedicated to the preservation, protection and restoration of the Black Warrior River and its tributaries. Riverkeeper actively supports effective implementation and enforcement of environmental laws, including the [Act], on behalf of and for the benefit of its members. Uniontown is in the Black Warrior River watershed."

It also alleged that Citizens

"works toward a Uniontown and Black Belt Region where all people will unite to act in love and for shared liberty and justice for all. [Its] officers, members and allies have worked for clean water and working sanitation in Uniontown for over seven years. To help Uniontown achieve clean water, [Citizens] has partnered with different organizations and institutions to document access to water, wastewater failures, and industrial pollution from multiple sources."

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The complaint in intervention alleged that members of Riverkeeper and Citizens

"live, work, or own property in Uniontown Certain members ... also live, work, or own property on or near creeks downstream of Uniontown Several unnamed tributaries to Cottonwood Creek begin in ... Uniontown, before flowing past the [lagoon at issue] and emptying into Cottonwood Creek. Cottonwood Creek then flows for approximately ten miles before it reaches its confluence with Big Prairie Creek ... near Prairieville Big Prairie Creek is a tributary of the Black Warrior River."

The complaint in intervention continued:

"The condition of the collection system [for the treatment facility], the [lagoon], and [sprayfield #1] pose a threat to the health on [Riverkeeper's and Citizens'] members, livestock, and wildlife, and to water quality and the environment around them.

"... These members are harmed aesthetically and olfactorily by the polluted runoff into area streets and streams, together with the terrible smell of the sewage overflows. Their quality of life and their livelihoods are affected by this ongoing mess."

On November 21, 2022, the State and ADEM filed an objection to the motion to intervene, arguing that the motion was untimely because, according to the State and ADEM, such

"intervention may alter the enforcement of the prior orders of [the circuit court] in the 2012 litigation against the ...

treatment facility. In that previous case, Riverkeeper and [Citizens] were denied intervention [as untimely]. Riverkeeper and [Citizens] should not be permitted a 'second bite' at the apple as to matters already adjudicated. Thus, [the State and ADEM] request that if the court grants intervention, intervention should be limited and Riverkeeper and [Citizens] should not be afforded rights that could interfere with or alter [the Board's] existing obligations to ADEM and this court, including but not limited to the right to a hearing, discovery, or appeal on those controversies which have been previously adjudicated."

The objection continued:

"Riverkeeper and [Citizens] will not be prejudiced or harmed by placing conditions on their intervention. In fact, the remedies sought by Riverkeeper and [Citizens] in their complaint in intervention have already been granted by this court against the [Board's] predecessor, and [the State and ADEM] seek to ensure that these remedies will continue to be enforced as to the [Board] as a successor."

The objection concluded as follows: "WHEREFORE, Riverkeeper and [Citizens' motion] for intervention is due to be limited."

On November 22, 2022, the circuit court entered an order denying the motion to intervene as "untimely filed." On December 16, 2022, Riverkeeper and Citizens filed a postjudgment motion, requesting that the circuit court vacate the November 2022 order pursuant to Rule 59, Ala. R. Civ. P., and grant its motion to intervene. See Penick v. Roberts,

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203 So. 3d 1224, 1233 (Ala. Civ. App. 2015) (stating that the denial of a motion to intervene is a final, appealable order and may be the subject of a postjudgment motion under Rule 59). In part, they argued that their motion was timely based on its being filed approximately two weeks after the complaint was filed and that the State and ADEM had argued only that any intervention should be limited. Riverkeeper and Citizens also alleged that, contrary to the allegations of the State and ADEM, they "[did] not seek to disturb or revisit prior rulings of [the circuit court]. Instead, [they] only seek to be heard in ADEM's current litigation, which is intended to require the newly created [Board] to meet the requirements of [the permit] and the law."¹ The circuit court entered an order scheduling the postjudgment motion for a hearing to be held on January 13, 2023.

On January 3, 2023, Riverkeeper and Citizens filed a notice of appeal to this court. Their notice of appeal was held in abeyance pending

¹Riverkeeper and Citizens also requested that the circuit court set aside the denial of their motion to intervene under Rule 60(b)(6), Ala. R. Civ. P., a request that was unnecessary because they had filed a timely postjudgment motion.

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the disposition of their postjudgment motion. See Rule 4(a)(5), Ala. R. App. P. Based on the record, it is unclear whether a hearing was held on January 13, 2023, regarding the postjudgment motion filed by Riverkeeper and Citizens. However, it does not appear that the circuit court entered any order on that motion. Accordingly, we conclude that it was denied by operation of law. See Rule 59.1, Ala. R. Civ. P.

This court has jurisdiction of this appeal under Ala. Code 1975, § 12-3-10. See Black Warrior Riverkeeper, Inc. v. East Walker Cnty. Sewer Auth., 979 So. 2d 69, 72 (Ala. Civ. App. 2007); see also Ex parte Mt. Zion Water Auth., 599 So. 2d 1113, 1119-20 (Ala. 1992). Riverkeeper and Citizens argue that the circuit court erred by concluding that their motion to intervene was untimely. Rule 24(a), Ala. R. Civ. P., states that, "[u]pon timely application, anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene." The standard of review regarding the denial of a motion to intervene as of right as untimely is whether the trial court has exceeded its discretion. Black Warrior Riverkeeper, Inc., 979 So. 2d at 72.

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The State and ADEM commenced this action on October 24, 2022, regarding, in part, alleged violations of the permit and pertinent environmental laws that occurred in 2022, after the Board had assumed the maintenance and operation of the treatment facility. In part, they requested injunctive relief and civil penalties relating to those violations. Although those alleged violations may also have been violations of previous orders of the circuit court entered in other actions, this action is a new action that is based on violations that had not occurred when those other actions were adjudicated.

Riverkeeper and Citizens filed their motion to intervene approximately two weeks after the State and ADEM commenced this action regarding the remediation of alleged violations of the terms of the permit and pertinent environmental laws that had occurred in 2022. As this court has stated:

"[T]he 'timely application' requirement of Rule 24[, Ala. R. Civ. P.,] is "'not intended to punish an intervenor for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervenor's failure to apply sooner."' Randolph County v. Thompson, 502 So. 2d 357, 365 (Ala. 1987) (emphasis added; quoting McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1074 (5th Cir. 1970), which in turn quotes Note, The Requirement

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of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure, 37 Va. L. Rev. 863, 867 (1951))."

Black Warrior Riverkeeper, Inc., 979 So. 2d at 73.

Based on the record before us, the conclusion that the motion to intervene was untimely filed as to this action, which is the action at issue under § 22-22A-5(18)b. and § 22-22A-5(19), is patently without foundation in reason or law. The record includes no evidence regarding how the State and ADEM were or would be prejudiced by the failure of Riverkeeper or Citizens to file their motion to intervene earlier than the approximately two weeks that had transpired between the commencement of this action and the filing of their motion to intervene. Likewise, the alternative argument on appeal that res judicata barred Riverkeeper and Citizens from intervening in an action regarding alleged violations of the terms of the permit and pertinent environmental laws that did not occur until 2022 -- simply because earlier actions involved similar violations at earlier times or because Riverkeeper and Citizens failed to timely intervene in those earlier actions -- warrants no further discussion.

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Based on the foregoing, the circuit court erred by concluding that the motion to intervene filed by Riverkeeper and Citizens was untimely filed. The November 2022 order denying that motion as untimely is reversed, and the case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Moore, Hanson, and Fridy, JJ., concur.