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Alabama Rivers Alliance
Water is Life

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OFFICE OF THE
EXECUTIVE SECRETARIAT

AK-13-020-2829

Monday, February 25, 2013

Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Federal Building
1200 Pennsylvania Avenue, N.W.
Room 300
Washington, D.C. 20460

Regarding: Notice of Intent to File Suit under for Failure to Respond to Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System

Dear Administrator Perciasepe:

On January 14, 2010, the twelve undersigned organizations (Petitioners) submitted a formal petition under 40 C.F.R § 123.64(b) for the issuance of an order commencing proceedings to determine whether to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the State of Alabama because the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123.

Alabama's people and environment deserve the fundamental protections accorded by the Clean Water Act (CWA). In accordance with the requirements of Section 402 of the CWA, 33 U.S.C. § 1342, Alabama's water pollution permitting program must meet minimal federal standards. Under the CWA, a state may administer such a permitting program only if the program meets minimum federal standards. Alabama's water pollution permitting program, as currently administered by the Alabama Department of Environmental Management (ADEM), is fundamentally broken and does not meet these minimum federal standards.

Specifically, Petitioners documented the following failures of Alabama's Program:

- A. Failure of State to ensure that monitoring data are entered into the Permit Compliance System [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24, 123.63(a)(4)]
- B. Failure of State to exercise control over activities required to be regulated, including failure to issue permits. [40 C.F.R. § 123.63(a)(2)(i)]
- C. Failure of State to process in a timely manner and propose to issue, reissue, modify, or deny NPDES permits [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24 and 123.63(a)(4)]

- D. Repeated issuance of permits by State which do not conform to the requirements of 40 C.F.R. Part 123 [40 C.F.R. §§ 123.25(a)(15), 122.44(d)(1)(vii)(B) and 123.63(a)(2)(ii)]
- E. Failure to provide required public notice of outfall locations [40 C.F.R. §§ 123.25(a)(28), 124.10(d), 123.63(a)(2)(iii)]
- F. Failure of State to inspect and monitor activities subject to regulation: Major dischargers [40 C.F.R. §§ 123.26(e)(5), 123.63(a)(3)(iii)]
- G. Failure of State to inspect and monitor activities subject to regulation: Non-major dischargers [40 C.F.R. §§ 123.26(b)(2), 123.63(a)(3)(iii)]
- H. Failure of State to maintain procedures for receipt and consideration of alleged violations by public [40 C.F.R. §§ 123.26(b)(4), 123.27(d)(2)(i), 123.63(a)(2)(iii)]
- I. Failure of State to monitor activities subject to regulation [40 C.F.R. §§ 123.26, 123.63(a)(3)(iii), 123.63(a)(4); Memorandum of Agreement]
- J. Failure of State to maintain a vigorous program of taking timely and appropriate enforcement action [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.63(a)(4)]
- K. Failure of State to seek adequate enforcement penalties: Computation of violations of average limits [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- L. Failure of State to seek adequate enforcement penalties: Identification of all violations [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- M. Failure of State to seek adequate enforcement penalties: Two year limitation period [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- N. Failure of State to seek adequate enforcement penalties: Recovery of economic benefit [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- O. Failure of State to seek adequate enforcement penalties: Degree of culpability [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- P. Failure of State to seek adequate enforcement penalties: Consistency with past penalties [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- Q. Failure of State to seek adequate enforcement penalties: Stipulated penalties for future violations [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]
- R. Failure of State to timely prosecute cases [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24, 123.63(a)(4)]

- S. Failure of State to take prompt action where dischargers violate consent decrees [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4)]
- T. Failure of State to provide adequate personnel qualifications [33 U.S.C. § 1314(i)(2)(D); 40 C.F.R. §§ 123.25(c), 123.63(a)]
- U. The State's legal authority no longer meets the requirements of 40 C.F.R. Part 123: Penalties against state entities [40 C.F.R. §§ 123.27(a)(3) and 123.63(a)(1)]
- V. The State's legal authority does not meet the requirements of 40 C.F.R. Part 123: Large and medium municipal separate storm sewer enforcement authority [40 C.F.R. §§ 123.25(a)(9) and 123.63(a)]
- W. The State's legal authority does not meet the requirements of 40 C.F.R. Part 123: TMDL implementation [40 C.F.R. §§ 123.25(a)(1) and 123.63(a)]
- X. Failure of State to provide adequate manpower [40 C.F.R. § 123.63(a); 33 U.S.C. § 1314(i)(2)(D)]
- Y. Failure of State to provide adequate funding [40 C.F.R. § 123.63(a); 33 U.S.C. § 1314(i)(2)(D)]
- Z. Failure of State to maintain to the maximum extent possible resources required to carry out all aspects of the NPDES program [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4)]

These failures reveal a systemic, statewide problem. From funding to implementation, the failures of the current system are leaving the citizens and environment of Alabama vulnerable to harmful pollution. For more than a decade prior to submitting the Petition, Petitioners attempted to work with agency representatives to find solutions to correct these deficiencies in the state program. Petitioners sought relief through the Alabama Environmental Management Commission and, when necessary, the courts. Petitioners submitted the Petition only after these efforts proved futile.

After three years, EPA has not formally responded to the Petition. During this time, Petitioners have repeatedly submitted updates to the Petition in order to keep the EPA abreast of the ongoing problems in Alabama and to ensure that the Administrator had the most current information to inform her response. Petitioners submitted a supplement to the Petition on February 18, 2010, to alert the Administrator to a development in Alabama's failure to provide adequate personnel qualifications under 33 U.S.C. § 1314(i)(2)(D); 40 C.F.R. §§ 123.25(c) and 40 C.F.R. 123.63(a). ADEM replied to the Petition and supplement on April 8, 2010, and Petitioners responded on November 5, 2010. In their response, Petitioners provided further evidence of the failures of the State's program. On April 23, 2012, after more than two years of delay from EPA, Petitioners submitted a supplement to the Petition that showed that Alabama's program remained deficient. Throughout this process, Petitioners have made every effort to meet and establish a dialogue with ADEM in order address the ongoing problems in the state program. ADEM has steadfastly refused to communicate with the Petitioners about the Petition.

EPA's three year delay in responding to the Petition is unreasonable and violates both the APA and the agencies own regulations. Under 40 C.F.R 123.64(b)(1) EPA must "respond in writing to any petition to

commence withdrawal proceedings". In addition, the Administrative Procedures Act (APA), 5 U.S.C. 555(b), provides that the agency "shall proceed to conclude a matter presented to it" "within a reasonable time". When the EPA fails to do so, the APA empowers the courts to review EPA's inaction and "compel agency action...unreasonably delayed."¹ While the CWA regulations and the APA do not set out a clear deadline for EPA's response to a de-delegation petition, the D.C. Circuit has established that "a reasonable time for agency action is typically counted in weeks or months, not years."²

The Petitioners have made repeated requests that EPA act on the Petition and take action to bring Alabama's NPDES program into compliance with the CWA. In addition to the submissions discussed above, Petitioners have met with officials at EPA Region 4 in May of 2010 and again on October 31, 2011. Additionally, Petitioners have repeatedly asked for status updates and prompt action during other meetings, telephone calls, and through email conversations. Throughout these conversations, various agents have suggested that a formal response was impending.

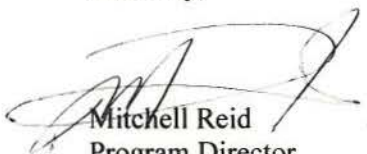
Despite repeated assurances, EPA has yet to issue a response or a definite timeline for when a response would be forthcoming. While Petitioners appreciate the Agency's openness to communication on the Petition, none of these communications with EPA or actions by EPA have resolved the issues raised in the Petition or rendered commencement of proceedings to withdraw approval of Alabama's NPDES program unnecessary. With the exception of compliance with the DMR reporting requirements for non-major facilities in FY2011, Alabama's NPDES program continues to fail to meet the minimum requirements identified in the Petition.

The result of delay is that Alabama's waters continue to degrade without consequence. It is for this reason that EPA has an unambiguous obligation to timely respond to the Petition, and, after three years, its delay in doing so is unreasonable.

In consideration of this obligation, Petitioners respectfully request a formal response granting or denying the Petition. A sufficient response will include an investigation report and will either establish a plan to bring Alabama's NPDES program into compliance with the CWA or initiate formal withdrawal proceedings. If such a response is not received within 90 days of this letter, Petitioners may file suit against the EPA for unreasonable delay.

We look forward to EPA's response, and sincerely hope that it will allow us to avoid legal action.

Sincerely,



Mitchell Reid
Program Director
Alabama Rivers Alliance
2027 2nd Ave N., Suite A
Birmingham, AL 35203

On Behalf of:

¹ 5 U.S.C. 706(1). See also *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

² *In re. American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir 2004)

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Cc: Honorable Gwendolyn Keyes Fleming, Administrator, EPA Region 4, 61 Forsyth Street, SW,
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