



IN THE CIRCUIT COURT OF WALKER COUNTY, ALABAMA

THE STATE OF ALABAMA, *ex rel.*)
STEVE MARSHALL,)
ATTORNEY GENERAL; THE)
ALABAMA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT;)
and THE ALABAMA DEPARTMENT)
OF CONSERVATION AND NATURAL)
RESOURCES)
Plaintiffs,)
v.) CV-2020-_____)
TYSON FARMS, INC.) JURY TRIAL DEMANDED
Defendant.)

)

COMPLAINT

The State of Alabama (“State”), the Alabama Department of Environmental Management (“ADEM”), and the Alabama Department of Conservation and Natural Resources (“DCNR”) (hereinafter, “Plaintiffs”) file this Complaint against Tyson Farms, Inc. (“Tyson” or “Defendant”) and allege as follows:

NATURE OF THE ACTION

1. This is a civil action against Tyson for violations of the Alabama Water Pollution Control Act (“AWPCA”) and the Alabama Environmental Management Act (“AEMA”) and certain regulations promulgated under each statute, as a result of violations of its National Pollutant Discharge Elimination System Permit, and unpermitted discharges of wastewater and/or partially treated wastewater from Tyson’s processing facility into waters of the State. In addition, the Plaintiffs allege herein that Tyson engaged in negligent and wanton conduct by causing a public

nuisance, committing a trespass to State land, and by committing a trespass to chattel, resulting in the death of various species of fish and other wildlife. Plaintiffs seek declaratory and injunctive relief as well as the recovery of civil penalties and compensatory and punitive damages from Tyson for alleged violations of the law of the State of Alabama.

THE PARTIES

2. Plaintiff, the State of Alabama, by and through the authority of Attorney General Steve Marshall, is authorized by Ala. Code §§ 22-22-9(m), 22-22A-5(12), and 22-22A-5(18) to enforce the provisions of the AWPCA. Specifically, Ala. Code § 22-22A-5(18)b. authorizes the Attorney General to bring a civil action on behalf of the State for unpermitted discharges of pollutants in violation of said Acts. In addition, Ala. Code § 22-22A-5(18)c. authorizes ADEM and the State to recover civil penalties for such violations. The Attorney General is authorized by Ala. Code § 36-15-12 “to institute and prosecute, in the name of the State, all civil actions and other proceedings necessary to protect the rights and interests of the State.”

3. Plaintiff, ADEM, is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1, *et seq.* Pursuant to Ala. Code § 22-22A-4(n), ADEM 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, *et seq.* (“Clean Water Act”). ADEM is also authorized to administer and enforce the provisions of the AWPCA, Ala. Code §§ 22-22-1, *et seq.*

4. Plaintiff, DCNR, is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 9-2-1, *et seq.* Pursuant to Ala. Code § 9-2-2, one of the primary duties of DCNR is to “protect, conserve, and increase wildlife of the state and to administer all laws relating to wildlife and the protection, conservation and increase thereof.” In accordance with these statutes,

DCNR may recover damages for the loss of its species, natural resources, and the public's use of these resources.

5. Defendant, Tyson, is a corporation formed under the laws of the State of North Carolina, with its principal place of business located in Springdale, Arkansas. Tyson is a "person" within the meaning of Ala. Code §§ 22-22-1(b)(7) and 22-22A-3(7). Tyson owns and operates a poultry byproduct rendering plant, known as the "Tyson Farms, Inc. – River Valley Ingredients Hanceville Alabama Facility" ("Facility") located at 1170 County Road 508, in the city of Hanceville, Cullman County, Alabama. Tyson is registered to do business in Alabama, does business in Alabama, and has a registered agent in Alabama. Tyson holds National Pollutant Discharge Elimination System Permit No. AL0040843 that was previously issued by ADEM to American Proteins, Inc. on April 19, 2018, and transferred to Tyson on October 1, 2018.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter herein and the Parties to this action pursuant to Ala. Code §§ 22-22-9(m) and 22-22A-5(18)b. The Complaint states claims pursuant to Ala. Code §§ 22-22-1, *et seq.*, and 22-22A-1, *et seq.* for declaratory and injunctive relief and for the assessment of civil penalties as well as compensatory and punitive damages pursuant to Ala. Code § 22-22-9(m) and applicable Alabama law.

7. Venue in Walker County is proper under Ala. Code § 22-22-9(m) and Ala. Code § 22-22A-5(17)-(19) because it is one of the counties adversely affected by pollution from Defendant's unlawful discharges.

GENERAL ALLEGATIONS

8. Defendant owns and operates the Facility located in Cullman County, Alabama.

9. As alleged with more particularity below, unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into waters of the State caused depressed levels of dissolved oxygen and elevated levels of pathogens. These discharges resulted in the killing of various species of fish and other wildlife downstream of the Facility. Defendant's aforesaid discharges further interfered with and damaged the general public's ability to use and enjoy waters of the State.

TYSON'S NPDES PERMIT

10. ADEM issued National Pollutant Discharge Elimination System Permit No. AL0040843 ("NPDES Permit" or "Permit"), in accordance with ADEM Admin. Code chap. 335-6-6 and the AWPCA, to Tyson effective October 1, 2018. American Proteins, Inc. was originally issued the Permit on April 19, 2018, which became effective May 1, 2018. Tyson completed a transfer agreement, and the Permit was transferred from American Proteins, Inc. to Tyson on October 1, 2018. The NPDES Permit establishes limitations on the discharges of pollutants from point sources, designated therein as outfalls DSN001 and DSN003 into Mulberry Fork, outfall DSN002 to an Unnamed Tributary ("UT") to Mulberry Fork, and outfalls DSN004 and DSN005 to a UT to Mulberry Fork, both waters of the State. The NPDES Permit requires that Tyson monitor its discharges and submit periodic Discharge Monitoring Reports ("DMRs") to ADEM describing the results of the monitoring. In addition, the NPDES Permit requires that Tyson properly operate and maintain all facilities and systems of treatment and control which are installed or used to achieve compliance with the terms and conditions of the NPDES Permit.

11. Tyson's NPDES Permit Condition Part II.A.1. states that the Permittee shall, at all times, properly operate and maintain all facilities and systems of treatment and control (and related

appurtenances) which are installed or used by the Permittee to achieve compliance with the conditions of the permit.

12. Tyson's NPDES Permit Condition Part II.A.3. requires the Permittee to "provide spill prevention, control, and/or management sufficient to prevent any spills of pollutants from entering a water of the state or a publicly or privately-owned treatment works."

13. Tyson's NPDES Permit Condition Part IV.A.1. requires the Permittee to "develop and implement a Best Management Practices ("BMP") Plan which prevents, or minimizes the potential for, the release of pollutants from ancillary activities, including material storage areas; plant site runoff; in-plant transfer, process and material handling areas; loading and unloading operations, and sludge and waste disposal areas, to waters of the State through plant site runoff; spillage or leaks; sludge or waste disposal; or drainage from raw material storage."

14. DMRs submitted to ADEM by Tyson indicate that it failed to properly monitor and discharged and continues to discharge pollutants in violation of the limits imposed by Part I.A. of the NPDES Permit.

ADEM'S WATER QUALITY REGULATIONS

15. ADEM Admin. Code r. 335-6-6-.03(1) states that "[n]o person shall discharge pollutants into waters of the state without first having obtained a valid NPDES permit or coverage under a valid General NPDES Permit[.]"

16. ADEM Admin. Code r. 335-6-10-.05(1) states that "[t]he quality of any waters receiving sewage, industrial wastes or other wastes, regardless of their use, shall be such as will not cause the best usage of any other waters to be adversely affected by such sewage, industrial wastes or other wastes."

17. Regulations promulgated under the AWPCA establish minimum standards applicable “to all State waters, at all places and at all times, regardless of their uses.” ADEM Admin. Code r. 335-6-10-.06.

18. According to ADEM Admin. Code r. 335-6-10-.06(a), “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.”

19. According to ADEM Admin. Code r. 335-6-10-.06(b), “State waters shall be free from floating debris, oil, scum, and other floating materials attributable to sewage, industrial wastes or other wastes in amounts sufficient to be unsightly or interfere directly or indirectly with any classified water use.”

20. According to ADEM Admin. Code r. 335-6-10-.06(c), “State waters shall be free from substances attributable to sewage, industrial wastes or other wastes in concentrations or combinations which are toxic or harmful to human, animal or aquatic life to the extent commensurate with the designated usage of such waters.”

21. ADEM Admin. Code r. 335-6-10-.09(2)(e)5., regarding specific criteria for toxic substances or other deleterious substances attributable to sewage, industrial wastes, or other wastes, provides for “[o]nly such amounts, whether alone or in combination with other substances, and only such temperatures as will not render the waters unsafe or unsuitable as a source of water supply for drinking or food-processing purposes, or exhibit acute toxicity or chronic toxicity, as demonstrated by effluent toxicity testing or by application of numeric criteria given in Rule 335-6-10-.07, to fish, wildlife and aquatic life, or adversely affect the aesthetic value of waters for any use under this classification.”

22. Pursuant to ADEM Admin. Code r. 335-6-10-.09(5)(e)2., “[s]ewage, industrial wastes or other wastes shall not cause the pH to deviate more than one unit from the normal or natural pH, nor be less than 6.0, nor greater than 8.5.”

23. ADEM Admin. Code r. 335-6-10-.09(5)(e)4.(i.) states that “[f]or a diversified warm water biota, including game fish, daily dissolved oxygen concentrations shall not be less than 5 mg/l at all times[.]”

24. ADEM Admin. Code r. 335-6-10-.09(5)(e)7.(ii) states that “[f]or incidental water contact and whole body water-contact recreation during the months of May through October, the bacterial quality of water is acceptable when a sanitary survey by the controlling health authorities reveals no source of dangerous pollution and when the geometric mean *E. coli* organism density does not exceed 126 colonies/100 ml nor exceed a maximum of 298 colonies/100 ml in any sample in non-coastal waters.”

TYSON’S UNPERMITTED DISCHARGES

25. On Sunday, May 26, 2019, a clean-out pipe transferring wastewater to the activated sludge system failed at Tyson’s Facility, resulting in the unpermitted discharge of approximately 2800 gallons of wastewater, which flowed into a UT to Mulberry Fork, locally known as Dave Young Branch, and into Mulberry Fork, waters of the State.

26. On Thursday, June 6, 2019, a section of pipe transferring partially treated wastewater between Tyson lagoons failed, resulting in the unpermitted discharge of approximately 220,000 gallons of partially treated wastewater to a UT to Mulberry Fork (Dave Young Branch), and eventually to Mulberry Fork, both of which are waters of the State.

27. ADEM conducted an emergency response investigation based on Tyson’s reported spill from June 6, 2019, to June 13, 2019. During the investigation, ADEM’s monitoring results

indicated that instream Dissolved Oxygen (“DO”) and *E. coli* levels did not comply with water quality criteria. ADEM also observed dead fish that were attributed to low instream DO. In addition, DCNR observed dead fish that were attributed to the low instream DO.

28. The Jasper Waterworks & Sewer Board (“JWWSB”) drinking water plant is approximately thirty miles downstream of the Facility. JWWSB contacted ADEM on June 11, 2019 and indicated that its drinking water plant had been impacted by Tyson’s spill.

29. On September 16, 2019, Tyson reported instream sample results it collected between June 6, 2019, and June 24, 2019, to ADEM, which indicated that Tyson’s discharges caused or contributed to a violation of instream water quality standards for pH.

TYSON IS LIABLE FOR DAMAGES, ACTUAL COSTS INCURRED BY ADEM, AND FOR CIVIL PENALTIES

30. Section 22-22A-5(17) of the AEMA makes Defendant liable for, and authorizes ADEM to commence a civil action to recover, “the actual costs reasonably incurred by the department to prevent, minimize or abate any adverse effect on air, land, or water resources which results or may result from such violation.”

31. Section 22-22A-5(17) of the AEMA authorizes ADEM to commence a civil action to recover a civil penalty against any person who violates the AWPCA, including any rule, regulation, or any condition of any permit promulgated or issued by ADEM under the AWPCA.

32. Section 22-22-9(m) of the AWPCA makes Defendant liable for, and authorizes ADEM and the State to commence a civil action to recover, “damages for pollution of waters of the state, including, but not limited to, any reasonable costs to prevent, minimize or clean up any damage resulting from pollution resulting from the wrongful act, omission or negligence of a person.”

33. Section 22-22-9(n) of the AWPCA provides that any person who violates any provision of the AWPCA or any permit or regulation issued under thereunder and in doing so, causes the death of fish or other wildlife is, in addition to civil penalties, liable to the State for the sum of money required to restock such waters and replenish such wildlife.

34. The Defendant caused unauthorized discharges of pollutants to waters of the State.

35. Defendant's violations caused the death of various species of fish and other wildlife.

36. Pursuant to the AWPCA, Defendant is liable to the State, ADEM, and DCNR for reasonable costs to prevent, minimize, or clean up any damage resulting from Defendant's actions.

37. Pursuant to the AEMA, Section 22-22A-5(18)(c), each day that such violation continues constitutes a separate violation. For each such violation and for each day that such violation continues, Defendant is liable to the State and ADEM for a civil penalty.

CAUSES OF ACTION

COUNT ONE

Violations of the Alabama Water Pollution Control Act

38. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

39. Section 22-22-9(i)(3) of the AWPCA provides that “[e]very person, prior to discharging any new or increased pollution into any waters of this state, shall apply to the commission in writing for a permit and must obtain such permit before discharging such pollution.”

40. On May 26, 2019, and again on June 6, 2019, Defendant unlawfully discharged wastewater and/or partially treated wastewater from its Facility causing new or increased pollution

to waters of the State in violation of Section 22-22-9(i)(3) of the AWPCA and applicable water quality regulations.

41. Defendant's failure to properly operate and maintain all facilities to achieve compliance with the conditions of the Permit, to develop and implement BMPs which minimized the potential for the release of pollutants, failure to provide adequate spill prevention, control, and/or management, are violations of NPDES Permit Condition Part II.A.1, NPDES Permit Condition Part II.A.3, NPDES Permit Condition Part IV.A.1. and ADEM Admin Code r. 335-6-6.03(1).

42. Defendant's unpermitted discharge on June 6, 2019, resulted in instream water quality criteria violations and killed fish in violation of ADEM Admin. Code r. 335-6-10-.09(5)(e)4.(i), ADEM Admin. Code r. 335-6-10-.09(5)(e)7.(ii), and ADEM Admin. Code r. 335-6-10-.06(c).

43. Defendant's unlawful discharge on June 6, 2019, interfered with a designated water use classification, including the public water supply use classification, in violation of ADEM Admin. Code r. 335-6-10-.09(2)(e)5 and ADEM Admin. Code r. 335-6-10-.05(1).

44. Defendant's unlawful discharge on June 6, 2019, that resulted in new or increased pollution into waters of the State, as set out above, and which caused or contributed to exceedances of the minimum standards, constitute violations of ADEM Admin. Code r. 335-10-.06(a)-(c).

45. On numerous occasions, Defendant discharged treated wastewater into Mulberry Fork, a water of the State, in violation of the numeric effluent limitations of Part I.A. of its Permit, ADEM regulations and the AWPCA.

46. Defendant's discharges also caused or contributed to violations of instream water quality for pH in violation of ADEM Admin. Code r. 335-6-10-.09(5)(e)2.

47. Pursuant to Section 22-22-9(i)(4) of the AWPCA, “[a]ny and all pollution is hereby declared to be a public nuisance and, if it creates, or is about to create, a health hazard, shall be subject to immediate control of [ADEM] by order or injunction.”

48. Defendant’s unlawful discharges of pollutants into waters of the State on May 26, 2019, and June 6, 2019, created a public nuisance in violation of Section 22-22-9(i)(4) of the AWPCA.

49. Pursuant to the AEMA, each day that such violation continued constitutes a separate violation. For each such violation, and for each day that each such violation continued, Defendant is liable to the State and ADEM for a civil penalty.

50. The above violations are due to be abated by injunction.

COUNT TWO

Public Nuisance

51. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

52. Defendant caused a public nuisance by allowing or causing unpermitted discharges of wastewater and/or partially treated wastewater from Defendant’s Facility to enter into the UT to Mulberry Fork and Mulberry Fork, waters of the State.

53. Discharges of wastewater and/or partially treated wastewater from Defendant’s Facility into waters of the State interfered with and damaged the general public’s ability to use and enjoy waters of the State.

54. Defendant had a duty to act reasonably and use care while handling wastewater and/or partially treated wastewater.

55. Defendant breached its duty to act reasonably and use care by failing to properly handle wastewater and/or partially treated wastewater, thereby allowing or causing unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility to enter waters of the State.

56. As a direct and proximate cause of the public nuisance allowed or caused by Defendant, Plaintiffs have suffered injuries and damages stated herein.

COUNT THREE

Trespass to Land

57. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

58. Pursuant to precedent set by the Supreme Court of the United States in *Pollard v. Hagan*, 44 U.S. 212, 213 (1845), and Ala. Code § 9-12-22, the State of Alabama is the owner of the bottoms of navigable streams and rivers.

59. Defendant interfered with Plaintiff's ownership and exclusive possession of the Mulberry Fork river bottom and beds by allowing or causing the unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into a water of the State.

COUNT FOUR

Trespass to Chattel

60. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

61. Fish and other wildlife in Alabama waterways are the property and resources of the State of Alabama held in trust for citizens of the State. Pursuant to Ala. Code § 9-11-81, the State of Alabama is the owner of all fish inhabiting the waters of the State.

62. Defendant interfered and caused damage to the ownership and exclusive possession of the State's property by allowing or causing unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into waters of the State, causing the death of fish and other wildlife owned by the State.

COUNT FIVE

Negligence

63. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

64. Defendant negligently allowed or caused unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into a UT to Mulberry Fork and Mulberry Fork, waters of the State.

65. Defendant had a duty to act reasonably and use care while handling wastewater and/or partially treated wastewater.

66. Defendant breached its duty to act reasonably and use care by failing to properly handle wastewater and/or partially treated wastewater, thereby allowing or causing the unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into waters of the State.

67. As a direct and proximate cause of the negligence of Defendant, the Plaintiffs have suffered injuries and damages stated herein.

68. Plaintiffs demand judgment against Defendant, for compensatory damages pursuant to Ala. Code § 22-22-9(m), in an amount to be determined by this Court.

COUNT SIX
Wantonness

69. Plaintiffs repeat, reallege, and incorporate by reference each and every allegation set forth in all preceding paragraphs as if fully restated here.

70. Defendant wantonly allowed or caused unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into a UT to Mulberry Fork and Mulberry Fork, waters of the State.

71. Defendant had a duty to act reasonably and use care while handling wastewater and/or partially treated wastewater.

72. Defendant breached its duty to act reasonably and use care by failing to properly handle wastewater and/or partially treated wastewater, thereby allowing or causing unpermitted discharges of wastewater and/or partially treated wastewater from Defendant's Facility into waters of the State.

73. As a direct and proximate cause of Defendant's wantonness, the Plaintiffs have suffered injuries and damages stated herein.

74. Plaintiffs demand judgment against Defendant, for both compensatory and punitive damages pursuant to Ala. Code § 22-22-9(m), in an amount to be determined by this Court.

PRAYER FOR RELIEF

WHEREFORE, the State, ADEM, and DCNR request that this Court:

- A. Take jurisdiction over this matter.
- B. Adjudge and declare that Defendant violated the limitations, terms, and conditions of its NPDES Permit and the AWPCA.
- C. Adjudge and declare that Defendant caused or allowed unpermitted discharges of pollutants from its Facility into waters of the State.

D. Order and enjoin the Defendant to take actions to ensure that similar violations of the AWPCA, the Permit, and all applicable ADEM regulations will not recur in the future.

E. Assess a civil penalty against Defendant and in favor of Plaintiffs pursuant to Ala. Code §§ 22-22A-5(17) and (18) for each and every violation of the Permit, the AWPCA and applicable regulations alleged in this Complaint.

F. Adjudge and declare that Defendant caused a public nuisance by unlawfully discharging untreated or partially treated wastewater into a UT to Mulberry Fork and to Mulberry Fork, waters of the State.

G. Order Defendant to compensate the State for the general public's loss of use and enjoyment, including loss of recreational use, of Mulberry Fork and/or other State waters, incurred as a result of Defendant's unlawful discharges.

H. Adjudge and declare that, as a result of its unlawful discharges, Defendant interfered with the State's exclusive possession and ownership of its river bottoms and beds and trespassed on State land.

I. Adjudge and declare that, as a result of its unlawful discharges, Defendant interfered with the State's exclusive possession and ownership of the fish and other wildlife inhabiting Mulberry Fork and/or other State waters.

J. Adjudge and declare that Defendant negligently allowed or caused the unpermitted discharge or release of untreated or partially treated wastewater into a UT to Mulberry Fork and Mulberry Fork causing the death of fish and other wildlife belonging to the State.

K. Order Defendant to pay to Plaintiffs restitution and/or compensatory damages for negligently allowing or causing the unpermitted discharge or release of untreated or partially

treated wastewater into Mulberry Fork and other state waters and causing the death of fish and other wildlife.

L. Adjudge and declare that Defendant wantonly allowed or caused the unpermitted discharge or release of untreated or partially treated wastewater into a UT to Mulberry Fork and Mulberry Fork, causing the death of fish and other wildlife, causing a public nuisance, and for trespassing on State land and causing injury to Plaintiffs.

M. Order Defendant to pay to Plaintiffs punitive damages for wantonly allowing or causing the discharge or release of untreated or partially treated wastewater into a UT to Mulberry Fork and Mulberry Fork, causing the death of fish and wildlife, causing a public nuisance, for trespassing on State land, for causing injury to Plaintiffs and for interfering with and damaging the general public's ability to use and enjoy waters of the State.

N. Enter a judgment against Defendant for the costs of this action.

O. Award Plaintiffs reasonable attorneys' fees and costs.

P. Order such other relief that the Court deems proper.

DONE this 29th day of April, 2020.

Respectfully submitted,

STEVE MARSHALL
ATTORNEY GENERAL

/s/ Robert D. Tambling
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