

Keeping Construction Runoff Out of Alabama Waters

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Introduction

Alabama is, in the words of one ecologist, “the Fort Knox of the nation’s biodiversity” on account of its vast and heterogeneous river systems.¹ The state has over 132,000 miles of river and stream channels. They run from the Appalachian Mountains to the Gulf of Mexico and are native waters to some 38 percent of all North American fish species.² Of course, these waters and their inhabitants are vulnerable to high-profile disasters, such as oil or chemical spills. But even less conspicuous pollutants like sand and sediment mixtures – byproducts from construction sites – threaten the health of Alabama rivers and streams. This article summarizes Alabama’s mechanisms for monitoring, regulating, and enforcing the activities that produce these pollutants.

The Permit Program

The Clean Water Act (the Act) is the backbone of American water law. Although it is a federal law, most states are authorized by the U.S. Environmental Protection Agency to administer the National Pollutant Discharge Elimination System (NPDES) created under Section 402 of the Act (33 U.S.C. § 1342). NPDES requires current and prospective polluters to obtain permits for discharges from their projects, and compliance with the permit amounts to compliance with the Act.

Alabama, through the Alabama Department of Environmental Management (ADEM), is among the 46 states authorized to administer NPDES permits at the state level.³ ADEM approves or denies NPDES permit applications, monitors the compliance efforts of active permittees, and enforces any violations.

Construction and Stormwater Runoff

“Pollutant” is defined broadly in the Act and its regulations. It includes rock, sand, and dredged spoil – inevitable byproducts of construction activities. After a rain event,

these materials may wash away with stormwater runoff and discharge into public waters. But how do these naturally occurring materials “pollute” water? While it is difficult to measure – in part *because* they exist naturally – experts agree that excess sediment erosion can substantially interfere with aquatic ecosystems. A few of the adverse consequences from suspended and bedded sediment (SABS) include: filling up storm drains, causing flood risks; impeding aquatic animals’ ability to see and eat; stunting the growth of aquatic plants; and clogging fish gills.⁴

Construction sites can emit stormwater runoff highly concentrated with SABS. Hence, in Alabama, as with other states, construction and development activities that disturb one or more acres must receive a state-issued NPDES permit.⁵

A Project Gone Awry

The Wynlake subdivision in Alabaster, Alabama, first received a NPDES permit in 2005.⁶ Wynlake was subdivided into 96 lots across roughly 90 acres, and construction there entailed discharges of sediment that were likely to run into a tributary of Spring Creek, an impaired “water of the state.” Over the next few years, 28 of the 96 lots were developed with homes. But when the housing market collapsed in 2008, all construction activities were permanently halted. That did not relieve Wynlake of its NPDES permit obligations, however, as the regulations require a permittee to maintain a permit “until disturbance activity is complete and all disturbed areas have been reclaimed.”⁷ Indeed, as ADEM soon discovered, runoff from the subdivision was polluting nearby waters even though the work had stopped.

The Permit

Prospective builders have an affirmative obligation to determine whether they need a permit. If so, they start by

submitting a Notice of Intent to ADEM.⁸ The Notice of Intent includes at least the following:

- The name and contact information of the permittee
- A description of the proposed activity
- A topographical map of the affected area
- Signed certification by a Qualified Credentialed Professional (such as a licensed engineer) indicating they have prepared a “comprehensive” Construction Best Management Practices Plan (CBMPP) to mitigate stormwater runoff pollution.

CBMPP refers to those practices specific to that construction permit. The key part, known by contractors and developers, lies in the middle of the extended acronym: Best Management Practices (BMPs). Once the permit is approved, those practices become binding legal obligations on the permittee and must be “continually maintained.”⁹ But what is a BMP? Some BMPs are easily spotted at construction sites. For instance, that ribbon of black plastic surrounding a job site perimeter – known as a “silt fence” – is a common BMP. Silt fences help to collect SABS before they can enter a storm drain or a nearby stream.

ADEM monitors its permittees through mandatory reporting and inspection requirements. By law, NPDES permittees must keep detailed and up-to-date records that track their compliance with the CBMPP.¹⁰ Moreover, at any “reasonable time,” ADEM can go to a construction site and inspect the property for compliance.¹¹

Inspection and Notice of Violation

In early 2011, ADEM paid a visit to Wynlake. Its inspection revealed that the developers had not met the requirements set forth in their NPDES permit. ADEM found Wynlake had failed to implement the BMPs specified in its CBMPP, and ADEM noted that sediment discharges had occurred or were likely to occur into the nearby Spring Creek.

This was not the first time that ADEM discovered issues at Wynlake; it had already issued a Notice of Violation (NOV) for that property. NOVs are the first step in an enforcement action. Here, as is a common ADEM practice, the first NOV was only a warning shot. Following the 2011 ADEM visit, however, Wynlake was ordered to cease its construction activities except for implementing the BMPs. As noted above, however, Wynlake was not going to build more homes anyway. It turns out they also were not going to implement any BMPs.

Credit: K. Alexander



Silt fence used at a construction site in Oxford, MS.

Civil Penalty Assessment and Internal Agency Review

ADEM allowed the Wynlake developers more than six years to correct course. When ADEM returned in 2017, it found four additional violations at the Wynlake property. To make matters worse, the property’s NPDES permit had expired. ADEM issued another NOV in September 2017. Wynlake ignored that one, too.

Therefore, in May 2018, ADEM demanded that Wynlake Development, LLC pay a \$50,300 civil penalty for the NPDES violations, setting forth facts showing that violations had occurred and ADEM’s analysis for reaching that penalty amount.¹²

But permittees have due process rights giving them the opportunity to appeal their fines. The process begins internally with ADEM. Once the assessment order is issued, permittees have 30 days to request a hearing with an ADEM officer, which Wynlake did. The ADEM hearing officer agreed with the Department’s factual findings but disagreed with the penalty amount. The hearing officer found that the penalty was “excessive,” and suggested that it be lowered to \$30,000. ADEM appealed the hearing officer’s decision to the Alabama Environmental Management Commission (the Commission).

The Commission

Like ADEM, the Commission was established in 1982 by the Alabama Environmental Management Act to have oversight of ADEM. Per Ala. Code § 22-22A-6, Commission is chaired by seven members, each appointed by the governor. One of its major functions is to review permitting decisions and administrative orders issued by ADEM. The Commission's conclusion in the Wynlake case proved to be less favorable to the Wynlake developer than that of the ADEM hearing officer. The Commission reinstated the \$50,300 penalty.

Circuit Court

After going through the ADEM officer hearing and then the Commission's review, Wynlake had "exhausted" its administrative appeals. Thus, under the Alabama Administrative Procedure Act, Wynlake could take this matter to court. Wynlake appealed ADEM's and the Commission's decisions to the Jefferson County Circuit Court. Wynlake's essential complaint was that the \$50,300 figure was arbitrary. The penalty assessment, Wynlake argued, was not grounded by any precise standard or algorithm.

Under Sec. 41-22-20 in the Alabama Administrative Procedure Act, courts may overturn an agency decision that is "unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." For NPDES permit decisions, state law allows ADEM discretion in assessing the penalty amounts based on factors such as: the seriousness of the violation, the "irreparable harm" done to environment, the violator's efforts (or lack thereof) to comply, the violator's history, and the violator's ability to pay.¹³

The Circuit Court reversed the entire penalty assessment, writing that "ADEM fail[ed] to state any specific reason for the fines imposed." ADEM appealed that decision to the *next* reviewing authority: the Alabama Court of Civil Appeals.

Court of Civil Appeals

The essential question in *Alabama Department of Environmental Management v. Wynlake Development, LLC* was whether in setting penalties for permit violations does ADEM have to "show its math"? To paraphrase the Alabama Court of Civil Appeals, the answer was not really. No requirement that ADEM document its decisions with

"mathematical calculations" exists. The relevant law only forces ADEM to consider factors like the "seriousness" of a violation in reaching penalty amounts.

The court acknowledged the difficulty of placing a figure on environmental law violations – especially for a judge. That, the court reasoned, is why the Alabama legislature wrote ADEM's penalty assessment standards so broadly: it deferred to the experts who have expertise in this field. It reversed the circuit court, reinstating ADEM's original \$50,300 assessment on Wynlake. 🐦

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Endnotes

- Whit Gibbons, *Alabama's Biodiversity Is Remarkable*, Univ. of Georgia Savannah River Ecology Laboratory (June 29, 2014).
- Alabama Rivers Alliance, *About Alabama's Watersheds*.
- U.S. Environmental Protection Agency, *NPDES State Program Authority*.
- U.S. Environmental Protection Agency, *Framework for Developing Suspended and Bedded Sediment (SABS) Water Quality Criteria* (EPA/822-R-06-001), pp. 4-6 (May 2006).
- Ala. Admin. Code r. § 335-6-12-.02.
- See Alabama Department of Environmental Management v. Wynlake Development, LLC*, No. CV-19-901762, 2021 WL 1324013 (Ala. Civ. App. Apr. 9, 2021).
- Ala. Admin. Code r. 335-6-12-.05(1).
- See* Alabama Department of Environmental Management, *Construction General Permit*, adem.alabama.gov; *see also* Ala. Admin. Code r. 335-6-12-.11 (identifying the initial step as a "Notice of Registration").
- Ala. Admin. Code r. 335-6-12-.21.
- Ala. Admin. Code r. 335-6-12-.15.
- Ala. Admin. Code r. 335-6-12-.18.
- The penalty assessment was based on A. Seriousness of the violation(s) (\$28,500); B. Difficulty in complying and quality of water body(s) that were polluted (\$9,500); C. Economic benefit by not complying (\$2,800); D. History of previous violations (\$9,500); E. Any reduction due to the inability to pay (\$0). *ADEM v. Wynlake LLC*, fn.4. *See, gen.*, Ala. Code § 22-22A-5(18)c (setting forth ADEM's penalty assessment authority with a maximum daily penalty of \$250,000).
- Ala. Code § 22-22A-5(18)a.