OEA
CC: Don & Jimmy

LAW OFFICE OF
DAVID A. LUDDER
A Professional Limited Liability Company

August 7, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

2007 AUG -9 A 11:03

Re: **Notice of Intent to File Suit for Failure to Perform Non-discretionary Duty under the Clean Water Act**

Dear Mr. Johnson:

Pursuant to the Clean Water Act § 505, 33 U.S.C. § 1365, and 40 C.F.R. Part 135, Subpart A, you are hereby notified that after the expiration of 60 days, the Alabama Rivers Alliance, Inc. and Conservation Alabama, Inc. intend to file suit against you for your failure to perform a non-discretionary duty under the Act.

Among Alabama's published water quality standards is Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii). It provides:

> The values used for the reference dose (RfD) shall be values available through the U.S. Environmental Protection Agency's Integrated Risk Information System (IRIS), and values used for the bioconcentration factor (BCF) shall be values contained in ambient water quality criteria documents published by the U.S. Environmental Protection Agency, except where other values are established pursuant to subparagraph (1)(g). The RfD and BCF values for specific pollutants are provided in Appendix A.

Ala. Admin. Code R. 335-6-10-.07 was approved on July 18, 1991 by Greer C. Tidwell, Regional Administrator, U.S. Environmental Protection Agency, Region 4, and on August 2, 1995 by Robert F. McGhee, Acting Director, Water Management Division, U.S. Environmental Protection Agency, Region 4, pursuant to 33 U.S.C. § 1313.

On June 29, 2007, contrary to the plain language of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii), the Environmental Management Commission of the Alabama Department of Environmental Management *interpreted* Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii) as if it read as follows:

9150 McDougal Court • Tallahassee • Florida 32312-4208 • Telephone 850-386-5671
Facsimile 206-888-5671 • Email DavidALudder@enviro-lawyer.com • Web www.enviro-lawyer.com

The values used for the reference dose (RfD) shall be values ~~available through the U.S. Environmental Protection Agency's Integrated Risk Information System (IRIS)~~ used by the U.S. Environmental Protection Agency in the development of National Recommended Water Quality Criteria, and values used for the bioconcentration factor (BCF) shall be values contained in ambient water quality criteria documents published by the U.S. Environmental Protection Agency, except where other values are established pursuant to subparagraph (1)(g). The RfD and BCF values for specific pollutants are provided in Appendix A.

"Under the CWA, 33 U.S.C. § 1313, the Administrator has a mandatory duty to review any new or revised state water quality standards." *Miccosukee Tribe of Indians of Florida v. U.S. Envtl. Protection Agency*, 105 F.3d 599, 602 (11th Cir. 1997). "[A state's] failure to submit any new or revised standards cannot circumvent the purposes of the CWA. . . . Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards." *Id.* (citations omitted). *Accord, Florida Public Interest Group Citizen Lobby, Inc. v. Envtl. Protection Agency*, 386 F.3d 1070 (11th Cir. 2004).

Among the review criteria in 40 C.F.R. § 131.5 is "[w]hether the State has followed its legal procedures for revising or adopting standards; . . .." In *Hartford Healthcare, Inc. v. Williams*, 751 So.2d 16 (Ala. Civ. App. 1999), the Alabama Court of Civil Appeals held that "[w]hen an administrative agency substantially changes its interpretation of its regulation and the new interpretation 'substantially affects the legal rights of, or procedures available to, the public or any segment thereof,' the administrative agency is bound to comply with formal AAPA rulemaking procedures. See § 41-22-3(9)(c)." The Alabama Department of Environmental Management is required "to comply with the rulemaking provisions embodied by §§ 41-22-1 to -27, specifically §§ 41-22-4, -5, and -23, and §§ 22-22A-8(a) and (b), Ala. Code 1975." *Ex parte Legal Envtl. Assistance Found., Inc.* 832 So.2d 61 (Ala. 2002). The Alabama Department of Environmental Management did not comply with these procedures when it adopted its interpretation of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii). Accordingly, you are required to disapprove the revision to Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii).

You were provided notice of the revised water quality standards (*i.e.*, revised interpretation of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii)) in a letter dated July 11, 2007 (attached). Your failure to review and approve or disapprove the revised water quality standard within 60-days will subject you to a citizen suit under 33 U.S.C. §1365 to compel you to perform your mandatory duty.

Sincerely,

David A. Ludder

cc: J.I. Palmer, Jr., Regional Administrator
U.S. Environmental Protection Agency-Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303-3104

LAW OFFICE OF
DAVID A. LUDDER
A Professional Limited Liability Company

July 11, 2007

Hon. Stephen L. Johnson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: **NOTICE OF REVISION OF ALABAMA WATER QUALITY STANDARDS**

Dear Mr. Johnson:

This letter is written on behalf of the Alabama Rivers Alliance, Inc. and Conservation Alabama, Inc. The purpose of this letter is to notify you that the Alabama Department of Environmental Management has revised its water quality standards but failed to submit those revisions to the U.S. Environmental Protection Agency for review and approval or disapproval. This notice invokes your mandatory duty under 33 U.S.C. § 1313 to review the revised water quality standards and to approve or disapprove those revised standards under the criteria prescribed in 40 C.F.R. § 131.5.

Among Alabama's published water quality standards is Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii). It provides:

> The values used for the reference dose (RfD) shall be values available through the U.S. Environmental Protection Agency's Integrated Risk Information System (IRIS), and values used for the bioconcentration factor (BCF) shall be values contained in ambient water quality criteria documents published by the U.S. Environmental Protection Agency, except where other values are established pursuant to subparagraph (1)(g). The RfD and BCF values for specific pollutants are provided in Appendix A.

Ala. Admin. Code R. 335-6-10-.07 was approved on July 18, 1991 by Greer C. Tidwell, Regional Administrator, U.S. Environmental Protection Agency, Region 4, and on August 2, 1995 by Robert F. McGhee, Acting Director, Water Management Division, U.S. Environmental Protection Agency, Region 4, pursuant to 33 U.S.C. § 1313.

On April 20, 2007, eighteen organizations petitioned the Environmental Management Commission of the Alabama Department of Environmental Management to amend Ala. Admin. Code Chap 335-6-10, Appendix A to revise the reference dose values for Acrolein and Phenol to be consistent with the reference dose values published in the Integrated Risk Information System as required by Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii).

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On June 29, 2007, the Environmental Management Commission of the Alabama Department of Environmental Management denied the petition to revise the reference dose (RfD) values for Phenol and Acrolein in Ala. Admin. Code Chap 335-6-10, Appendix A to be consistent with the reference dose values published in the Integrated Risk Information System. The basis offered for retaining the existing, less protective, reference dose values for Phenol and Acrolein in Ala. Admin. Code Chap 335-6-10, Appendix A, was that those values are consistent with the values used by the U.S. Environmental Protection Agency in the derivation of the recommended criteria for Phenol and Acrolein in National Recommended Water Quality Criteria (2002/2006). Exhibit A (Chap. 1 Water Quality Standards, Integrated Water Quality Assessment and Monitoring Report, 2006); Exhibit B (Memorandum from Onis "Trey" Glenn, III to Sam H. Wainwright, April 2, 2007); Exhibit C (E-mail from Kathleen Felker to Robert Tambling, May 22, 2007); Exhibit D (Transcript of Rulemaking Committee Meeting, June, 1, 2007); Exhibit E (Transcript of Environmental Management Commission Meeting, June 29, 2007). *See* Exhibit F (Letter from David A. Ludder to Dr. Kathleen Felker, June 5, 2007).[1] Thus, contrary to the plain language of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii), the Environmental Management Commission of the Alabama Department of Environmental Management has *interpreted* Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii) as if it read as follows:

> The values used for the reference dose (RfD) shall be values ~~available through the U.S. Environmental Protection Agency's Integrated Risk Information System (IRIS)~~ used by the U.S. Environmental Protection Agency in the development of National Recommended Water Quality Criteria, and values used for the bioconcentration factor (BCF) shall be values contained in ambient water quality criteria documents published by the U.S. Environmental Protection Agency, except where other values are established pursuant to subparagraph (1)(g). The RfD and BCF values for specific pollutants are provided in Appendix A.

"Under the CWA, 33 U.S.C. § 1313, the Administrator has a mandatory duty to review any new or revised state water quality standards." *Miccosukee Tribe of Indians of Florida v. U.S. Envtl. Protection Agency*, 105 F.3d 599, 602 (11th Cir. 1997). "[A state's] failure to submit any new or revised standards cannot circumvent the purposes of the CWA. . . . Even if a state fails to submit new or revised standards, a change in state water quality standards could invoke the mandatory duty imposed on the Administrator to review new or revised standards." *Id.* (citations omitted). *Accord, Florida Public Interest Group Citizen Lobby, Inc. v. Envtl. Protection Agency*, 386 F.3d 1070 (11th Cir. 2004).

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[1] Ala. Admin. Code R. 335-6-10-.07(1)(g) authorizes the Alabama Department of Environmental Management to determine reference dose values from sources other than the U.S. Environmental Protection Agency's Integrated Risk Information System (IRIS) in consultation with the Alabama Department of Public Health. The Department did not consult with the Alabama Department of Public Health when it adopted and refused to revise the reference dose values for Acrolein and Phenol. Instead, the Department relied exclusively on the reference dose values incorporated in National Recommended Water Quality Criteria (2002/2006).

Among the review criteria in 40 C.F.R. § 131.5 is "[w]hether the State has followed its legal procedures for revising or adopting standards; . . .." In *Hartford Healthcare, Inc. v. Williams*, 751 So.2d 16 (Ala. Civ. App. 1999), the Court held that "[w]hen an administrative agency substantially changes its interpretation of its regulation and the new interpretation 'substantially affects the legal rights of, or procedures available to, the public or any segment thereof,' the administrative agency is bound to comply with formal AAPA rulemaking procedures. See § 41-22-3(9)(c)." The Alabama Department of Environmental Management is required "to comply with the rulemaking provisions embodied by §§ 41-22-1 to -27, specifically §§ 41-22-4, -5, and -23, and §§ 22-22A-8(a) and (b), Ala. Code 1975." *Ex parte Legal Envtl. Assistance Found., Inc.* 832 So.2d 61 (Ala. 2002). The Alabama Department of Environmental Management did not comply with these procedures when it adopted its interpretation of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii). Accordingly, you are required to disapprove the revision to Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii).

Your failure to review and approve or disapprove the revised water quality standard (*i.e.*, revised interpretation of Ala. Admin. Code R. 335-6-10-.07(1)(d)1.(iii)) subsequent to receiving this notice will subject you to a citizen suit under 33 U.S.C. §1365 to compel you to perform your mandatory duty.

Sincerely,

s/David A. Ludder

David A. Ludder

cc: Jimmy I. Palmer, Regional Administrator
U.S. Environmental Protection Agency - Region 4