No. 08-10810-BB

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BLACK WARRIOR RIVERKEEPER, INC,

Respondent-Appellee,

v.

CHEROKEE MINING, LLC,

Petitioner-Appellant.

On Permissive Appeal under 28 U.S.C. § 1292(b) from the United States District Court for the Northern District of Alabama

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Brief of Amicus Curiae Alabama Coal Association in Support of Cherokee Mining, LLC and Reversal

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May 5, 2008

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Alabama Coal Association ("ACA") is an association of coal mining and related companies that produce over ninety percent (90%) of the coal in Alabama. Cherokee Mining, LLC ("Cherokee Mining") is a member of ACA.

ACA represents its members by serving as a liaison to government agencies and local, regional and state officials and acting as information resources for the media and general public. When appropriate, as in this case, ACA also advocates its members' positions in court. ACA does not have a parent company, and no publicly-held company has a 10% or greater ownership interest in ACA.

Pursuant to 11th Circuit Rule 26.1-1, the following is a list of all persons and entities known to have an interest in the outcome of this case in addition to those listed in the Certificate of Interested Persons contained in the brief filed by Cherokee Mining:

Alabama Coal Association

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STATEMENT REGARDING CONSENT OF OTHER PARTIES

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of Alabama Coal Association's amicus brief.

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Pursuant to 11th Circuit Rule 28-1(f), Alabama Coal Association ("ACA") adopts by reference the statement of the issue described in the Petition for Permission to Appeal filed by Cherokee Mining and granted by this Court, namely: whether the District Court's order refusing to dismiss this case under the jurisdictional bar against citizen suits in 33 U.S.C. § 1319(g)(6)(A)(ii) is contrary to the plain statutory language and Congress' intent.

However, this is not a "me too" amicus brief. While ACA's brief addresses the same question raised in Cherokee Mining's petition and ultimately reaches the same result, the brief reaches that result in a different way.[1] Thus, this brief respects the general rule that an amicus may not raise issues the parties do not, but it also is not duplicative of the arguments made by the parties. In any case, the brief raises an issue that goes to a question of the District Court's jurisdiction to entertain this citizen suit, and so it is properly considered by this Court. *See Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

[1] ACA wholeheartedly agrees with Cherokee Mining that the "exception" found in 33 U.S.C. § 1319(g)(6)(B)(ii) does not even apply here because this case involves an administrative action by the State of Alabama under state law, not one by the U.S. Environmental Protection Agency ("EPA") under 33 U.S.C. § 1319(g). This brief does not re-argue that threshold point, but offers another reason that the "exception" does not apply here.

INTEREST OF AMICUS CURIAE

The ACA files this brief in support of reversal of the District Court's order refusing to dismiss the citizen suit against Cherokee Mining. The perspective of ACA's members in the State of Alabama is particularly relevant on this point.

ACA's members presently operate approximately thirty two (32) mining sites in Alabama, all of which are subject to the requirements of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*., and the Alabama Water Pollution Control Act ("AWPCA"), Alabama Code §§ 22-22-1 – 22-22-14, and therefore hold discharge permits issued by the Alabama Department of Environmental Management ("ADEM"). ACA's members have been on many occasions, and likely will be in the future, involved in administrative proceedings concerning discharge permit compliance matters and potentially subject to duplicative citizen suits like this one. Because the District Court's erroneous application of the jurisdictional bar to citizen suits will, if not reversed, greatly complicate the ability of discharge permit holders to achieve timely and efficient resolution of alleged violations, this appeal is of significant concern to ACA's members.

SUMMARY OF THE ARGUMENT

The District Court erred in finding that ADEM's enforcement action did not "commence" until after plaintiff sent its notice letter to Cherokee Mining. The District Court made this mistake because it failed to consider the totality of Alabama's statutory process for administrative enforcement of discharge permit requirements, as clearly required by this Court's precedent. Under that process, ADEM's enforcement action in this case commenced well before the plaintiff provided notice of its intent to file this action, so the exception in 33 U.S.C. § 1319(g)(6)(B)(ii) does not apply and plaintiff's claims are barred by 33 U.S.C. § 1319(g)(6)(A)(ii). The District Court's decision to the contrary undermines the State of Alabama's established process for administratively enforcing alleged discharge permit violations and significantly expands the reach of the CWA's citizen suit provision. Its decision should be reversed.

ARGUMENT

I. Alabama Law Creates a Graduated and Integrated Enforcement Scheme to Address Water Pollution Violations

ACA's members strive for one hundred percent compliance with limitations in discharge permits issued to them by ADEM. But unanticipated or uncontrollable conditions sometimes result in violations. And when they do, the experience of ACA's members is that the graduated enforcement scheme established by Alabama law and followed by ADEM is the most efficient and effective way to address and resolve these violations. Alabama's graduated enforcement scheme is critical to resolving the present case because courts look to the specific state law procedures governing the enforcement process to determine when a state administrative action "commences" for purposes of the CWA's citizen suit bar in 33 U.S.C. § 1319(g)(6)(A)(ii). *See, e.g., Sierra Club v. Colo. Refining Co.*, 852 F. Supp. 1476, 1485 (D. Colo. 1994) (looking to specific provisions of Colorado law to hold that a Notice of Significant Noncompliance commenced a state enforcement action); *Public Interest Group of New Jersey, Inc. v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1172 (D.N.J. 1993) (looking to specific provisions of New Jersey law to hold that a Compliance Evaluation Inspection Report did not commence a state enforcement action).

Here, the relevant state laws are the AWPCA, Alabama Code §§ 22-22-1 – 22-22-14, and the Alabama Environmental Management Act, Alabama Code §§

22-22A-1 – 22-22A-16 ("AEMA").[2] This Court has held that both the AEMA and the AWCPA form the core of ADEM's enforcement authority for discharge permit violations and both statutes must be considered when determining whether Alabama has "commenced and is diligently prosecuting an action under a [comparable] State law" for purposes of the citizen suit bar in 33 U.S.C. § 1319(g)(6)(A)(ii). *See McAbee v. City of Fort Payne*, 318 F.3d 1248, 1249, 1254 n.8 (11th Cir. 2003).[3] Alabama courts have recognized this Court's approach in their own decisions on these issues. *See Ala. Dept. of Envtl. Mgmt. v. Legal Envtl. Assistance Found., Inc.* ("*LEAF*"), 973 So. 2d 369, 372 (Ala. Civ. App. 2007) ("In [*McAbee*], a panel of the Eleventh Circuit Court of Appeals held that the [AEMA]

[2] The AWPCA is the state statute that, among other things, authorizes ADEM to issue discharge permits under the National Pollution Discharge Elimination System ("NPDES") program established by the CWA. The AEMA is the more general statute that establishes the powers and duties of ADEM and its oversight commission, the Alabama Environmental Management Commission. The two statutes work in tandem in the case of enforcement of NPDES permit requirements.

[3] *Accord North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992) (looking beyond "the precise statutory section under which the State issued its Administrative Order" to other State statutory provisions that were "cogs in the same statutory scheme implemented by the State for the protection of its waterways"). In fact, this Court said that other Alabama laws in addition to the AEMA and the AWPCA might also inform the analysis, but it did not reach that issue in *McAbee*. *See* 318 F.3d at 1254 n.8. That issue need not be addressed in this case either because the AEMA and AWPCA answer the question here.

and the [AWPCA] were not 'comparable' to the federal Clean Water Act [] for purposes of the 'limitations-on-actions' provision of the Clean Water Act.").

Under these Alabama laws, the first step in an enforcement proceeding for alleged violations of the AWPCA (or permits issued thereunder, as is the case here) is the issuance of a Notice of Violation ("NOV") by ADEM. *See* Ala. Code § 22-22-9(e). Specifically, the AWPCA provides:

> Whenever [ADEM] determines that any person is violating, or is about to violate, any of the provisions of this chapter, or any rule or regulation or order or permit of [ADEM] promulgated thereunder, [ADEM] may notify such person of such determination of [ADEM]. The notice may be served by registered or certified mail or by an officer empowered to serve process under existing laws or by an officer or agent of [ADEM]. Within such time as may be specified in such notice, such person shall file with [ADEM] a full report showing steps that have been taken and are being taken to control such discharge or pollution. Thereupon, [ADEM] may make such orders as in its opinion are deemed reasonable.

Id. (emphasis added). Thus, as provided in section 22-22-9(e), ADEM's procedure for enforcing alleged violations of NPDES discharge permits begins with a NOV, which requires written documentation of steps taken to control the alleged illegal discharges. It is only *after* issuance of the NOV and the permit holder's response that ADEM is authorized to take further action. In other words, if the recipient of the NOV has fixed the problem to ADEM's satisfaction, the enforcement may conclude, but if not, ADEM may continue its enforcement by taking other steps.

One such other step that may be pursued by ADEM is to file a civil action for compensatory damages (in the case of negligent violations) and punitive damages (in the case of willful or wanton violations). *See* Ala. Code § 22-22-9(m). Criminal penalties are further available in the case of willful or grossly negligent violations of the AWPCA (or a permit issued thereunder). *See id.* at § 22-22-14(a).[4]

Another, arguably less severe, enforcement route that ADEM may take (and the further step that ADEM took in the present case) is to assess a civil penalty through an administrative order. Such civil penalty orders are authorized by the AEMA, which applies generally to all of the environmental programs administered by ADEM, not just its water pollution control program. *See* Ala. Code § 22-22A-5(1). Under the AEMA, ADEM may "[i]ssue an order assessing a civil penalty to any person who violates [the AWPCA] . . . or any condition of any permit . . . issued by the department." *Id.* at § 22-22A-5(18)(a). The AEMA sets out the procedures ADEM must follow in issuing such a civil penalty order (including

[4] ADEM's graduated enforcement response approach is similar to the enforcement approach of EPA. EPA's enforcement responses for CWA violations range from phone calls, warning letters, notices of violation, administrative compliance orders, and administrative penalty orders, to judicial civil and criminal referrals. *See* EPA Enforcement Response Guide (Attachment B to The Enforcement Management System, National Pollutant Discharge Elimination System (Clean Water Act), U.S. Environmental Protection Agency Office of Water (1989)), *available at* www.epa.gov/compliance/resources/policies/civil/cwa/emscwa-jensen-rpt.pdf.

public participation[5]) and prescribes minimum and maximum penalty amounts. *Id*. at § 22-22A-5(18)(a), (c).

II. The District Court Misinterpreted Alabama Law on the "Commencement" of ADEM's Enforcement

The District Court made a fundamental error when it concluded that "under Alabama's mechanism for administrative enforcement actions, ADEM commenced the action in this case via letter on July 20, 2007." R. 13 at 5. The District Court's error stemmed from its failure to consider the totality of Alabama's statutory enforcement scheme under the AEMA and the AWPCA, as required by this Court's decision in *McAbee*.

Specifically, the District Court relied exclusively on section 22-22A-5(18)(a) of the AEMA to the complete exclusion of the enforcement prerequisites of the AWPCA. This was a critical mistake because, with respect to enforcement

[5] It was in response to the *McAbee* decision that the Alabama Legislature amended state law to provide the "comparable" public participation provisions this Court said were lacking at the time. Ala. Act No. 2003-397. *See also LEAF*, 973 So. 2d at 372. Unfortunately, the District Court's decision here essentially nullifies those amendments by allowing a plaintiff to end run the administrative process and file a piggy-back federal suit. The situation here is particularly egregious, where the plaintiff did not participate at all in the pre-order proceedings at ADEM that were adopted for its benefit in response to *McAbee*. Apparently, this Court gave plaintiffs too much credit when it assumed in *McAbee* that "provid[ing] interested citizens a meaningful opportunity to participate at significant stages of the decision-making process" is something they actually want. 318 F.3d at 1257 (internal quotation omitted). If plaintiff's actions here are any indication, they are not at all interested in participating in the administrative process—what they really want are duplicative fines and attorney fees.

of the AWPCA and discharge permits in particular, section 22-22A-5(18)(a) comes into play only after ADEM commences the enforcement action pursuant to section 22-22-9(e) through issuance of an NOV.[6]

This mistake made all the difference in the outcome of the present case. Here, ADEM commenced its enforcement action against Cherokee Mining on September 29, 2006, by serving a NOV by certified mail on the company, notifying it of alleged violations, requiring it to file a written report within fourteen days "show[ing] the steps that have been taken and are being taken to correct all violations," and advising it that ADEM was considering further enforcement options, including imposition of monetary penalties "for the noted violations." *See* Addendum, Tab A.[7] After determining the alleged violations warranted a penalty

[6] The fact that an NOV under the AWPCA does not itself assess a civil penalty does not mean that the state has not "commenced and is diligently prosecuting an action under a State law comparable to [33 U.S.C. § 1319(g)]." 33 U.S.C. § 1319(g)(6)(A)(ii). *See Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 682 F. Supp. 1186, 1188 (N.D. Ala. 1988) (concluding a compliance order that did not assess civil penalties was diligent prosecution). The crucial point is that the issuance of a NOV is a statutory prerequisite to a later penalty order, and thus is the *commencement* of "an enforcement procedure against the polluter" under Alabama law. *McAbee*, 318 F.3d at 1251. Further, while this Court observed that the issuance of an administrative consent order "would satisfy the 'commencement' requirement" as applied by most courts, that observation does not preclude a holding here that the earlier NOV established the initial commencement date. *Id.* at 1251 n.6.

[7] The NOV and subsequent enforcement correspondence were testified to in the record below (*see* R. 5, Ex. A) and the plaintiffs did not dispute either the existence of the NOV or the date it was issued. For the Court's convenience, ACA has attached certified copies of these documents obtained from ADEM. *See*

based on the information submitted and further investigation, ADEM issued a proposed penalty order on July 16, 2007, in accordance with the process set forth in section 22-22A-5(18)(a).[8] Thereafter, on August 16, 2007, ADEM published notice of the proposed consent order and, after the requisite opportunity for public comment, issued the final order assessing civil penalties on September 24, 2007.

Thus, looking at the full scope of ADEM's enforcement action, the state action commenced against Cherokee Mining on September 29, 2006, with the issuance of the NOV—not on July 20, 2007 when the proposed civil penalty order was issued to Cherokee Mining, as the District Court presumed.[9] This means that

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Addendum Tabs A - D. This Court may take judicial notice of them. *See* Fed. R. Evid. 201(f). *See also B. H. Papsan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (taking judicial notice of items in the public record); *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper.").

[8] *See* Addendum, Tab B. During the intervening months from September 2006 to July 2007, ADEM was not sitting on its hands. ADEM followed up the September NOV with an inspection on or about March 7, 2007, which was followed by a warning letter issued on March 12, 2007, requiring a written report within seven days "showing the steps that have been taken and are being taken to correct the deficiency(s)," and again advising Cherokee Mining that ADEM was considering its enforcement options. *See* Addendum, Tab C. ADEM issued a second NOV on April 13, 2007, identifying additional discharge violations similar to those noted in the September NOV, and notifying Cherokee Mining that ADEM was considering imposition of civil penalties. *See* Addendum, Tab D.

[9] The District Court's mistake was apparently based on language in section 22-22A-5(18)(a) that specifies how ADEM is to "commence enforcement action *under this paragraph*." (emphasis added). That language, however, only instructs ADEM how it must commence enforcement action "under this paragraph"—*i.e.*,

the state action was commenced before the plaintiffs here sent their sixty-day notice letter on May 16, 2007, so that the "exception" to the citizen suit bar in 33 U.S.C. § 1319(g)(6)(B)(ii) simply does not come into play.

Under the CWA, "[s]tates are afforded some latitude in selecting the specific mechanisms of their enforcement program." *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). In the present case, Alabama law requires that an enforcement action directed at a violation of the AWPCA (or a permit issued thereunder) must commence with the issuance of an NOV. EPA has approved of that enforcement scheme and given ADEM the primary role of enforcing water quality requirements in the state.[10] That enforcement scheme, and

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for a civil penalty order under the AEMA. It does not control the larger issue of when an enforcement action to address a violation of the AWPCA or a permit issued thereunder has been commenced. On that point, Alabama law is clear that the issuance of an NOV is the first step to commencing enforcement, including enforcement that ultimately leads to a civil penalty. *See* Ala. Code § 22-22-9(e) ("Thereupon [issuance of an NOV], [ADEM] may make such orders as in its opinion are deemed reasonable.") (emphasis added). Even if NOV issuance were not *required* in every case, it was done in this case for these violations and thus marks the commencement of ADEM's enforcement action here.

[10] Under the CWA, each State has the right to administer its own permit program if the state's program satisfies the criteria in 33 U.S.C. § 1342(b). This Court has expressly recognized Congress' policy that the states are primarily responsible for dealing with water pollution under the CWA. *See McAbee*, 318 at 1252 (citing 33 U.S.C. § 1251(b) for Congressional recognition of the "*primary responsibilities and rights of States* to prevent, reduce and eliminate pollution.") (emphasis in original). This extends to the state's enforcement scheme. The criteria in 33 U.S.C. § 1342(b) relate specifically to administering and enforcing the NPDES program. For example, in order to be approved, a state's program must contain adequate authority for the state to, among other things, "abate

the actions taken by ADEM pursuant to it in this case, should be applied to bar a subsequent citizen suit for the same violations.[11]

III. The District Court's Decision Undermines Efficient and Effective Enforcement

The District Court's mistaken interpretation of Alabama law has far-reaching impacts beyond simply Cherokee Mining and their case. Regardless of the reason why the District Court's decision is wrong—whether it is because the District Court misinterpreted the word "commenced" (as ACA's brief argues) or because it misinterpreted the phrase "under this subsection" (as Cherokee Mining's brief argues)—the result will impact every NPDES permit holder in Alabama and will unquestionably impair the efficient and effective enforcement of water pollution control laws in the state.

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violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement." 33 U.S.C. § 1342(b)(7). EPA approved Alabama's NPDES program in 1979. *See* 44 Fed. Reg. 61452 (Oct. 25, 1979). Since that time, ADEM (or ADEM's predecessor) has been responsible for issuing and enforcing NPDES permits pursuant to the AWPCA. *See* Ala. Code § 22-22-9(e), (g).

[11] Even if the Court determines that ADEM's NOV to Cherokee Mining did not, for whatever reason, commence ADEM's enforcement in this case, ACA requests that this Court limit its decision to the facts of this case and refrain from holding that a NOV under the AWPCA can never commence an enforcement action that would bar a CWA citizen suit or that ADEM can never commence an enforcement action that would bar a citizen suit until it issues a proposed penalty order under Alabama Code § 22-22A-5(18)(a).

Individuals and businesses that hold NPDES permits in Alabama (like ACA's members) are motivated to resolve alleged violations through consent orders with ADEM (and to pay a civil penalty without protest) in large part because of the protection such a resolution provides against duplicative citizen suits. Prior to the District Court's decision in this case, it was the conventional wisdom among permit holders that the bar in 33 U.S.C. § 1319(g)(6)(A)(ii) would prevent a duplicative citizen suit, so long as an adequate consent order was executed and adhered to. This understanding meant that ADEM has been able to resolve a substantial number of alleged violations through negotiated consent orders.[12] The loophole created by the District Court's decision will remove this incentive for cooperative administrative settlement because a citizen suit can later challenge the same violations that have been resolved by ADEM *just because the plaintiff was lucky enough to mail its sixty-day notice letter before the proposed penalty order is sent to the permit holder*. This result makes no sense and will be an impediment to environmental compliance efforts.

Specifically, with the bar in 33 U.S.C. § 1319(g)(6)(A)(ii) essentially obliterated by the District Court's decision here, permit holders in Alabama will have only one option for achieving full resolution of alleged violations. Instead of

[12] For example, across all its programs during the 2007 fiscal year, ADEM issued 179 administrative orders and assessed civil penalties totaling more than $1.75 million. *See* ADEM Annual Report, 2006-2007, *available at* www.adem.state.al.us/Publications/EnvSummary/EnvSum.htm.

consenting to administrative penalty orders, they will be forced to contest the violations so that ADEM will sue them in state court, such that the other citizen suit bar in the CWA (33 U.S.C. § 1365(b)(1)(B)) will become operative.[13] Such litigation will likely result in the same level of compliance and penalty assessment as an administrative order would have—but it will be more costly and time-consuming for all involved. This is a bad outcome, which can be avoided by a correct application of Alabama's enforcement scheme under the AWPCA and the AEMA.

CONCLUSION

For these reasons, this Court should reverse the District Court's decision, and remand for dismissal pursuant to 33 U.S.C. § 1319(g)(6)(A)(ii).

[13] As evidence of this fact, ADEM noted a "curtailment" of administrative consent orders issued in 2003, when the citizen suit bar in 33 U.S.C. § 1319(g)(6)(A)(ii) was the subject of uncertainty in Alabama because of this Court's decision in *McAbee v. City of Fort Payne*, 318 F.3d 1248 (11th Cir. 2003). *See* ADEM, Environmental Prospective 2003, *available at* www.adem.state.al.us/Publications/EnvSummary/EnvSum.htm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the length limitation in Rule 29(d). According to the word count feature in the word-processing program used to prepare this brief, it contains 3,239 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and six (6) copies of the foregoing brief were filed on May 5, 2008, by dispatching them to Federal Express for overnight delivery to:

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ADDENDUM

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