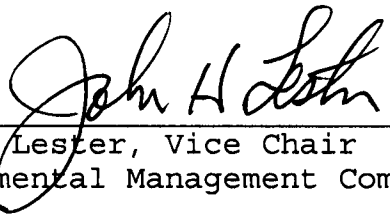
6/28/10

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
April 16, 2010

This is to certify that the Minutes contained herein are a true and accurate account of actions taken by the Alabama Environmental Management Commission on April 16, 2010.



John H. Lester, Vice Chair
Environmental Management Commission

Certified this 25th day of June 2010.

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
April 16, 2010

Convened: 11:00 a.m.
Adjourned: 11:45 a.m.

Part A

Transcript

Part B

Attachment Index

Attachments 1 – 5

Part A

ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING

Alabama Department of Environmental
Management Building
Alabama Room (Main Hearing Room)
1400 Coliseum Boulevard
Montgomery, Alabama

April 16, 2010 11:00 a.m.

COMMISSION MEMBERS PRESENT:
ANITA ARCHIE, CHAIR (not present)
DR. JOHN H. LESTER, VICE-CHAIR
SAM H. WAINWRIGHT, P.E.
W. SCOTT PHILLIPS
DR. J. CONRAD PIERCE
H. LANIER BROWN, II, ESQ.

ALSO PRESENT
ROBERT TAMBLING, EMC LEGAL COUNSEL
DEBI THOMAS, EMC EXECUTIVE ASSISTANT

PROCEEDINGS

DR. LESTER: Call this meeting of ADEM to order. Acknowledge there's a quorum present. Enter a motion to adopt the minutes circulating too.

MR. PHILLIPS: So move.

DR. PIERCE: Second.

DR. LESTER: Motion seconded. All in favor, say "aye."

ALL: Aye.

DR. LESTER: All opposed? (No response.) Debi wants us to raise our hands on these votes, so --

MS. THOMAS: She can't quite hear you. There you go.

DR. LESTER: Said on the rest of the votes, wants us to raise our hands so you can identify who's voting which way, okay? At this time, we'll have our report from our Director.

MR. HAGOOD: Thank you, Mr. Chairman, members of the Commission. You've received a memo from me concerning

rulemaking contracts. We're on track with our FY '10 budget. About halfway through last fiscal year, the FY '11 budget was introduced; proposed a 30-percent cut. And as you noted from a memo I sent you earlier this week, that number was significantly reduced, and we've gained significant money in operating funds.

Something that was in discussion when the memo was being written was that an extra $300,000 has been put in the budget specifically for NPDES. I didn't put that in the memo at this time because I didn't want to jinx it before the rabbit was all the way out of the hat. But I'd like to thank Chairman Bedford for helping us there.

On the NPDES, going further than NPDES, we filed a response to the withdrawal petition last week. There's no set timeline on processing this, but we understand from EPA that they will

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process this as quickly as possible.
In addition to the one withdrawal petition, we were asked to file a response to two other smaller petitions, one on our anti-degradation rules and our Capital Rule, Capital Program. We've answered those as well, so the three responses are in. And at this time, I would recognize Olivia Rowell for her work in coordinating these responses. If Olivia were in a private firm, I don't think she'd have to post any billable hours for the rest of the year.
Further, the folks that implement this program made this a real easy story to tell, and the response, all the people that work in NPDES, and especially, I'd like to recognize Chip Crockett, Glenda Dean, Richard Hulcher, and Lynn Sisk for what they've done.
In the construction storm water arena, as you are aware, we have

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been working for several months on a general permit. This is where this program is headed, both at the federal and the state levels. We now have a draft of that permit to a point where we can discuss the general nature of it with stakeholders, and we have begun those meetings with our permitted stakeholders in storm water.
The changes necessary in the general permit rules will be in the upcoming May cycle, and the hearing will be in June. Your action will come in the fall of this year as far as voting on those rules, and we will, of course, be in contact with you if you have any questions along this way. This is going to be a significant rule-change time with general permits and storm water and also a pesticide rule that's now coming down.
Also, in NPDES, I wanted to mention that as we have talked about the last couple of meetings, we're

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continually working with that program to tweak it, to make it better as we go along, and we've recently gone through what everybody's calling the "re-reorg" so that we have the program working more programmatically, the thought being -- and we think rightfully so -- that you can't effectively permit if you don't enforce and vice versa.
So enforcement in permitting is put under a programmatic section chief, branch chief, in that program, and that's working well for us thus far, and we -- just we've entered this with our stakeholders in that area on the advocacy side and the industry side.
Moving on to land recycling, scrap tire and illegal dumps are keeping folks pretty busy. As you can see from the handouts that you have, we have cleaned up the Prichard site, which was our second big site behind Attala. The map you have also points out the other

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sites around the state that we're cleaning. This program, of course, is several years old and is working very well to clean up scrap-tire sites.
Additionally, you will note in the handout that we've ordered $1.7 million in recycling grants from the bill that was passed in '08. If you'll remember, the tip-and-fee bill that was part of the Strategic Plan in place at that time included a recycling component and an illegal dump component.
$1.7 million in recycling grants has been awarded throughout the state, and that's based on $7 million in requests. So you can see from the requests that came in, in two short years, the word has gotten out about this program, and we consider that a nice success.
As with the unauthorized dump remediation program that you can see in the subsequent map, that program is

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working in a number of different ways, some at a county-wide level so that we can partner with our local governments better. And within two years, this has become a success envied by other states and other programs. And the credit here goes to Phil Davis at Solid Waste Branch. They've taken this ball and run very well with it. And I would like to recognize Brent Watson, Holly Funk, Gavin Adams, all from Phil's shop and all the people that work in the Solid Waste Branch.

In the air arena, we have asked for -- we're requesting a redesignation of Jefferson County for the attainment of the 24-hour standard for fine particulate. We completed the annual attainment demonstration. We issued a public notice -- that was last March -- explaining our plan, offering opportunity for public hearing. We received one request, but we had no commenters show up. So Dale Hurst and

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Chris Howard are continuing that effort for that redesignation, which would be significant for Jefferson County and Birmingham.

Later on your agenda, you have a discussion, the formation of an Air Toxic Study Committee that was initiated through conversations with Adam Snyder and David Ludder from Conservation Alabama, and you have received from me a proposed list of participants, which span industry and the advocacy community. It's a good composite of our stakeholders in that area.

And when we get to that point, I'm not sure how you want to discuss it, but I did want to mention that we have that before you. Most of these folks on this list we've already invited. There are a couple of them that know that they're going to be invited because of the nature of the discussion.

Moving on to our website, at

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the last meeting, we told you that it was going to be up. It's now up, and I would like to recognize the IT folks for their work in this area. And also, in the E-permitting and the NMS area, David Hutchison's group recently received a $200,000 exchange grant to help with our data information transfer electronically.

Of course, as you know from discussions we've had, we lead the nation here. Everything that goes on here that's not proprietary or privileged is on our website and can be accessed. It's a public agency; it's public document. That's the way that we've considered it, and that's the way that we've developed our website.

Under this umbrella, Mike Sherman has been leading an effort to update our complaint system. We've noted some areas for improvement in the complaint system. What he's working on is a route that will permeate this

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department programmatically so that we can get to the bottom of a citizen's complaint a lot quicker.

Further, he's working on a component that will -- it will be a web-based application of the complaint system such that a citizen can go on our website and follow their complaint. Where we're trying to get is the UPS tracking system type thing where you have a number; you can follow where it is through the inspection process, the enforcement, if there is, and you'll know exactly how your voice affected what we do.

To give you an example of where we are, which is not where we're going -- we are proud of where we are right now -- but to give you an example of where we are right now, at this point, I'd like for Ed McBride to come up and demonstrate a sample complaint.

MR. MCBRIDE: Commissioners,

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good morning. Can everybody everyone see the screen all right? Great. This is our new website, and it's very easy to get to E-File if you just click on the large tab button that says E-File right here. Has all the media areas: Air, land, and water. You can look by facility name or master ID. If you don't know what the master ID is, you can click on the hyperlink there, and it will take you to an area where you can search for the facility name and look in different counties for that facility.

If you know the permit number, you can check, and I'll give you an example on how to do that shortly. Look by your counties. If you happen to know a file name or partial file name, you search on that. You can go by document dates. You can also put a range of dates in there.

You can go -- if you know the category that you're looking in,

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which we'll be going through complaints, but we also have other enforcement/general correspondence sections that you can look in there also. You can also do a custom query type on here. If you happen to know what type of document type you're looking for -- and there are an awful lot of them on there.

So if people need to have a little bit of direction on where to go, they can click on the "Show Document Descriptions," and they can look through all the different medias and see what all's out there if they want to search in those areas.

The -- if we go -- for example, if we go -- we can check "Water," we can check all of them if we want to. And go to my home county, Autauga, and you look for complaints and do a search on there. It will return back 42 documents that it found.

One of these is from a

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gentleman there that was having some problems, and he sent in his complaint by e-mail to us. We can simply click on that and open it up, and he has sent pictures of an area that's been washing close to some property that he had. And so he initiated this complaint by the e-mail.

And if you simply highlight this number that's associated with this, you can go up and -- I believe this was a water issue since it was washing -- and you can put it into the permit number and do a search on that, and it will return back everything associated with that particular issue.

And a lot of -- one of the things that happened was one of our folks went out there and took a look at the area. And they came back, put everything into a PowerPoint slide show. And this is what -- and so now we have our investigator going out there and taking a

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look at everything. And so that's available for folks to go and see on the website. They can also go to the....

And they can go to the very last thing on here which is a memo from us saying that after our investigation, it was found that the folks that were doing everything did not have to have any type of permit for what they were doing, so they can find a resolution to it all online here. They can probably find it out before they actually would receive a letter from us. Actually, we can post it out here quicker than U.S. Mail would get it to them.

Anybody have any questions?

MR. WAINWRIGHT: Have you got an app for my iPhone yet?

MR. MCBRIDE: Working on that.

MR. PHILLIPS: When you post it, do you send a link to the person by e-mail if they've given you an e-mail

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address?
MR. MCBRIDE: I don't know that, but I can sure find that out for you and let you know.
MR. PHILLIPS: Because it will get to them faster, but if they don't know it's uploaded, they won't necessarily know to find it.
MR. HAGOOD: Like we said, this is where we are now, and where we're headed is going to include a lot of other notifications to the actual complainant.
DR. PIERCE: Very good.
MR. HAGOOD: Ed has an aversion to razors, and I'm always giving him the needle about it; so I called him up here to do this so I could say, it's so easy a cave man could do it.
Under compliance enforcement, we've discussed in the last meeting our inspections have increased in NPDES. This is a continuing trend. Having a better understanding of our

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facilities through inspection is only going to make what we do more efficient and better, and it's going to help us achieve the goals that we have envisioned in the three-year Strategic Plan.
How -- another example of how tweaking NPDES has worked is through our construction permitting numbers over that last couple of months. As you know, the bulk of that regulation is done on the back end. In other words, we get our notice, and then we -- we have to keep up with the construction site. In February, ADEM issued 191 construction permits. In March, we issued 467. So you can see that this has better than doubled just with a little tweaking of the program, which continues here every day.
Move on to drinking water, drinking water is a jewel of this department, and we're awfully proud of Dennis Harrison and his bunch, what they do. Pleased to welcome representatives

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from Fayette and Monroeville. These two drinking-water systems have recently been recognized for their Consumer Confidence Reports. Seven states competed, five awards were given, and Alabama got two, which is fairly significant.
At this time, I call on Dennis to go ahead and give these awards to the representatives from Fayette and Monroeville.
MR. HARRISON: Good morning. With us today from Fayette, we've got Scotty Moore, who's the general manager of the Fayette Water Works Board, and from Monroeville, we have William Snider, the general manager of Monroeville Water Work and two of their board members, Bob Burns and Butch Feaster. If they'll come up, we'll present their awards.
(Applause.)
MR. HAGOOD: Who's running the shop?
(Applause.)

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MR. PHILLIPS: Do we get to see the winning awards, the CCRs that they have? Can we get a copy of that?
MR. HARRISON: We can get you a copy.
MR. PHILLIPS: Great.
MR. HAGOOD: Monroe County and Fayette are both tigers, by the way, for all the Auburn fans in here.
DR. LESTER: I heard Dennis say that.
MR. HAGOOD: In closing, we've gone over a lot of things that the Department's done, and I would like to say that all of the accomplishments I've addressed here today are due to the employees here. That's your best resource at ADEM. And I would like to take a moment to point out Marilyn Elliott, our Deputy. She's -- if you want something done, just mention it around Marilyn. Kind of like coaching Bill Russell: All you had to do was tell

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Bill Russell where, when, and who he was playing, and it happened.

And a group that goes largely unnoticed here are our section chiefs. We know the division chiefs; we know the branch chiefs. But if I can get the section chiefs to stand up that are in here. The saying goes -- (applause.) The saying goes, the generals get the glory, and the captains win the war. Well, those are your captains. And I've appreciated this opportunity. A very rewarding time, and I thank you. (Applause.)

DR. LESTER: John has his picture made and it shows up in the post office. And now with this website, it will be all over everywhere. Appreciate the job y'all are doing.

Next was the report from the Commission Chair, and Debi [sic] didn't leave me anything except she wasn't going to be here. So that's where it sits. I

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would, myself, like to thank Anita for letting me do this job, yep. I'd like to thank Debi and John for putting all this together for us. My work today on all this, sometimes folks think, well, it just happens. But you've got all these folks here putting all this together.

Next item for consideration is the Stakeholders Committee to study air toxics. Director Hagood says we've got a list of 18 members, which are very -- or be appointed, which are very diverse over the state. At the moment, I'll entertain a motion from the Committee regarding the Air Toxics Study Committee, but first I want to ask, were there any comments or questions from any of the Commissioners on this.

If not, then I would ask for a motion to support designating matters related to the Air Toxics Study Committee to the Commission Chair and the ADEM Director and approve the list of the

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proposed invitees to serve on the committee. Need to move to designate matters related to an Air Toxics Study Committee to the Commission Chair and the ADEM Director.

DR. PIERCE: So move.

MR. WAINWRIGHT: Second.

DR. LESTER: Motion and second. Any questions? All in favor, raise your hand.

MR. WAINWRIGHT: Hold on, Mr. Chairman. I think this should be amended to Special Committee.

DR. LESTER: Special Committee?

MR. WAINWRIGHT: Should be Special Committee with the charge to study air toxins.

DR. LESTER: All members agree?

MR. PHILLIPS: Do you want to read the list or....

DR. LESTER: Do you want to

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read the list? Want me to read them, or you read them?

MR. PHILLIPS: Either way.

DR. LESTER: Go ahead. You read them, since you've got them up.

MR. HAGOOD: Most of your monitors are in Mobile or Birmingham. There's going to be a representation from both of those communities. At the top of the list, I have a representative from ThyssenKrupp who's building in Mobile; David Roberson with the Alabama Coal Association; Danny Smith with Energen; Dr. Don Williamson with the Department of Public Health. I think that his representative will be Neil Sass.

Wayne Studyvin from Jefferson County; Casi Callaway from Mobile Baykeeper; Steve Perry from The Forum in Mobile; Tony Owens from Manufacture Alabama; Roy McAuly with Alabama Pulp and Paper. Roy's our resident bad penny. He's on every one of

these committees.
John Howley with IPSCO Steel; Ernie Glenn with Iron and Steel Institute; and Attorney David Roth of Bradley, Arant, Boult & Cummings; Adam Snyder from Conservation Alabama; David Ludder, an attorney for Conservation Alabama; Dr. Roy Martino, a private citizen.
I'm going to butcher the pronunciation of this name, but I believe it's Daagye Hendricks, a private citizen; Bert Eichold from Mobile County Health Department; and Brandon Colvin from BCA.
I think this is a good cross space of involvement based upon the chemicals that we're considering, those 10 chemicals, most of which come from foundries or chemical plants or some agri business. These seem to cover all the bases there. And, of course, if there's a suggestion for any other member, we will take that into consideration as

well.
DR. LESTER: Thank you, Mr. Director. Did a good job on getting that many folks to say that they would serve. Now we'll have our motion. All in favor, raise your hands, please.
(All Committee Members indicated by raised hands.)
DR. LESTER: All opposed? (No response.) Motion passed, and I think we've got an order to sign.
Talking about our attorney, he had a big input in the list to make sure what we were doing was going to be legal. So Robert, thank you.
Next item, Gulf Equipment Corporation v. ADEM, EMC Docket No. 10-01, NPDES-related matter. Commission will acknowledge that Petitioner Gulf Equipment Corporation's withdrawal of the appeal and request for a hearing and Respondent ADEM's withdrawal of its motion to dismiss.

The administrative action appealed in this matter is the Notice of Violation of ADEM Administrative Code Rule 335-6-12, Hope-VI Housing Development Project, Phases 4 and 5, Construction and Land Disturbance Registry, ALR16EDTT - Gulf Equipment Corporation of Mobile.
Next item of business is the Friends of Hurricane Creek and the Alabama Rivers Alliance, Incorporated, v. ADEM and Tuscaloosa Resources, EMC Docket No. 08-07, Formerly Consolidated Docket Nos. 08-07 and 08-08, NPDES-related matter.
I'll note that the item before the Commission involves consideration on the recommendation of the Hearing Officer and the Hearing Officer's order on Motions for Summary Judgment, which is attached in part of the recommendations of the Hearing Officer.

I will note that the Petitioners filed an objection to the Hearing Officer's recommendation and Proposed Order. I'll note that the Intervenor, Tuscaloosa Resources, TRI, filed an objection to the Hearing Officer's recommendation on standing and the briefs in support, along with proposed order with the proposal substitute finding on standing.
Note that ADEM and TRI filed replies to the Petitioner's objection to the Hearing Officer's recommendation. I will entertain a motion from the Commission regarding the recommendation of the Hearing Officer. Any questions, or do I have a motion?
MR. PHILLIPS: So move.
DR. LESTER: Do I have a second?
DR. PIERCE: Second.
DR. LESTER: Motion and second. Any questions or discussion?

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MS. THOMAS: Dr. Lester, could you clarify what the motion is?
DR. LESTER: Move to adopt the recommendation of the Hearing Officer and the Hearing Officer's order on motion of summary judgment.
MS. THOMAS: Thank you.
DR. LESTER: Sorry.
MS. THOMAS: Thank you.
DR. LESTER: Any discussion or questions? All in order, say aye, raise your hand.
(All Committee Members indicated by raised hands.)
DR. LESTER: All opposed? (No response.) We'll have to sign this one.
DR. LESTER: While we've got a lawyer on our Commission, let me tell you, he keeps us straight on all this technical terminology.
Next item is De Nora Tech, Incorporated, formerly known as Eltech

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Systems, Corporated v. ADEM, Docket No. 10-05. The Commission will consider a joint motion to continue and the placement on administrative docket. The administration action -- administrative action appealed in this matter is ADEM's denial by letter dated February the 22nd, 2010, of De Nora Tech Corporation's request to utilize the financial test to replace DNT's existing letter of credit as a financial assurance mechanism for the former Eltech Colbert County Facility.
MR. PHILLIPS: I move we support the action of granting the joint motion to continue and placement on the administrative docket.
DR. LESTER: I have a motion. Do I have a second?
MR. BROWN: Second.
DR. LESTER: Motion and second. Any question? (No response.) All in favor, say "aye."

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ALL: Aye.
DR. LESTER: All opposed? (No response.)
The next item is appoint and set salary for the new ADEM Director. I will note that the item before the Commission is to appoint and set salary of the new ADEM Director.
It's the Commission's pleasure to make appointments of the new ADEM Director prior to the Vice-chair -- this is some of the work that you wrote for me.
Consideration of the Commission's compensation package summary. This -- talking about appointing and setting the salary. In a little bit, we'll get to the appointment phase, but I would like to say that on this package that I will read out, I just want to make it clear, John Hagood has been working as our director, but he did not get this package. And he's been

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working since we had the resignation of Trey. Just wanted everybody to know that just because he is our director now, he did not get this package.
Along with the appointment of a new director, the compensation package summary, this is what Trey Glenn had when he left. The salary level is $144,195.84 annually. The ADEM director position provides Blue Cross and Blue Shield of Alabama health insurance, which is low cost to employees of the Department; dependent coverage for the cost of $205 a month; 13 paid holidays for a year; travel allowance for in-state and out-of-state travel per state rules and regulations; a state vehicle that was reserved for the Office of the Director in the Department's motor pool for official state business.
Also, in this motion, we would have where when we pass or appoint the new director, this will have to go to

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the State Personnel Committee for their approval -- or Board -- for their approval. Their next meeting is on May the 19th, so I would like to include in this motion that the start date for the new director would be June 1st, which would follow the approval of the Personnel Board, if they approve it.

Debi or Robert, if they don't approve it, I don't know where we go from there. I guess to the next meeting.

MR. TAMBLING: That's right.

DR. LESTER: So does anyone have any questions on what we are fixing to do with it? We're going to nominate and appoint a director. We're going to set the salary level, compensation package, and also the date of his hire. Show when we'll have him hired subject to Personnel. Any questions?

MR. WAINWRIGHT: Mr.

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Chairman, we're getting ready to appoint someone to a position that's currently filled. I don't want to get in any trouble with the Personnel Department like we did in December. Do we have any clarification on what's going -- what's the process it's going to lead to? We need to....

MR. TAMBLING: Commissioner Wainwright, I think by virtue of the fact that you're going to be appointing a director that you can include in your motion, I guess, if it's not Mr. Hagood, who's already the director, I guess you can go ahead make a note of the fact that he is being replaced by one of the candidates.

MR. WAINWRIGHT: Well, Mr. Hagood has done an excellent job for us. The agency seems to have -- the morale seems better. He's done a great job representing us before the EPA. I don't want to do anything that would appear

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that he's being fired, so I would like to get a clearer picture of this.

MR. TAMBLING: Mr. Hagood advises me that he still has a deputy appointment that he has not resigned, so he would remain in his position. His classification hasn't changed. He's still -- I guess he's wearing two hats; is that right?

MR. HAGOOD: Deputy Attorney General, if the Attorney General still likes me.

DR. LESTER: That's why, you know, when we appointed John to start with, we had him as acting; and then Personnel folks said we couldn't do one acting. But that's why in the process, and why I wanted to make the statement earlier, that John hasn't been receiving the package that Trey had or we're talking about now. It's not -- nothing is -- same salary, same office really. He hasn't even moved out of his office.

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It's still back there.

MR. TAMBLING: I don't think your action today would in any way affect John.

DR. LESTER: Any questions from Commissioners?

DR. PIERCE: Thanks for the clarification.

MR. TAMBLING: Y'all have any more questions?

MR. PHILLIPS: I would just ask that if after this Commission meeting, if something does come up that might change that view, ask that you notify the Chair.

MR. TAMBLING: I'll be glad to do that.

MR. WAINWRIGHT: I just don't want to do anything that would --

MR. HAGOOD: Me, too, Robert.

MR. TAMBLING: I think John's going to be in good shape.

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DR. LESTER: We all know John's done a good job and his staff and all the rest of them. That's why I wanted to state that, say, well, don't get a drop in pay. Still the same as he was when he's in the job that he has been in.

At this point, I'll receive a motion to support the actions of appointing the new ADEM Director, setting the effective date for the appointment, and affirming the compensation package. Do I have a motion? (No response.) Once again, do I have a motion?

MR. PHILLIPS: I move that we appoint Lance LeFleur as Director of ADEM and affirm the salary level and compensation package summarized by the Vice-Chair to be offered to the appointee.

DR. LESTER: I have a motion. Do I have a second?

DR. PIERCE: I second.

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DR. LESTER: I have a motion and a second. Any discussion for the motion? (No response.) Do you have a motion?

MS. THOMAS: I have a motion and a second.

DR. LESTER: Are we right on it?

MS. THOMAS: Yes, I've got it.

DR. LESTER: Okay. No further question. All in favor, say "aye." Or raise your hand.

(All Committee Members with the exception of Commissioner Wainwright indicated by raised hands.)

DR. LESTER: All opposed?

MR. WAINWRIGHT: I'll abstain, Mr. Chairman.

DR. LESTER: One abstention. Abstention to be noted by the secretary.

Any other business from the Commission? Next session was originally

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going to be for June 18th, but due to the fact that we have two members that can't be here that day but can be here on June the 25th, problem with any of the other Commissioners on the June 25th date? Any problem? Do I have to have a motion on that?

MS. THOMAS: You can, or just to clear it up that we're setting it on the 25th.

DR. LESTER: Do I have a motion then that we'll meet June the 25th, 11 a.m. at this location?

MR. PHILLIPS: So move.

MR. WAINWRIGHT: Second.

DR. LESTER: Motion and second. All in favor, say "aye."

ALL: Aye.

DR. LESTER: All opposed? (No response.)

We have a person who wants to give -- during the public comment period after we adjourn this meeting.

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I'll entertain a motion regarding the approval or disapproval of the request to address the Commission. Chairman Archie had indicated that she would have recommended the approval of the request. This will be limited to 10 minutes. Would be a Clara Curtis from Sylacauga, Concerned Citizens for a Better Environment. Do I have a motion for Ms. --

DR. PIERCE: I move for approval to hear.

DR. LESTER: Motion. Do I have a second?

MR. BROWN: Second.

DR. LESTER: All in favor?

(All Committee Members with the exception of Commissioner Wainwright indicated by raised hands.)

DR. LESTER: All opposed? (No response.)

At this time, we will adjourn the Commission Meeting and move

to the public comment period.
(End of proceedings.)

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REPORTER'S CERTIFICATE
* * * * * * * *

STATE OF ALABAMA
COUNTY OF MONTGOMERY

I, Jenny Cone, Certified Court Reporter and Notary Public in and for the State of Alabama at Large, do hereby certify that the foregoing is a true and accurate excerpt of the proceedings as taken by me at the time and place aforementioned.
This 29th day of April, 2010.

Jenny Cone
Certified Court Reporter (Lic. #108) and Notary Public
State of Alabama at Large

* * * * * * * *

REPORTER'S CERTIFICATE

* * * * * * * *

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Jenny Cone, Certified Court Reporter and Notary Public in and for the State of Alabama at Large, do hereby certify that the foregoing is a true and accurate excerpt of the proceedings as taken by me at the time and place aforementioned.

This 29th day of April, 2010.

Jenny Cone/ca

Jenny Cone

Certified Court Reporter (Lic. #108) and Notary Public

State of Alabama at Large

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Part B

Attachment Index

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Attachment 2	**Order adopting motion to designate matters related to a special committee to study air toxics to the Commission Chair and the ADEM Director and approving the list of proposed invitees to serve on the committee** **(Agenda Item 4 – Consideration of formation of a stakeholder committee to study air toxics)**
Attachment 3	**Order adopting the Recommendation of the Hearing Officer and the Hearing Officer's Order on Motions for Summary Judgment** **(Agenda Item 6 – Friends of Hurricane Creek and Alabama Rivers Alliance, Inc. v. ADEM, and Tuscaloosa Resources, Inc., EMC Docket No. 08-07 [formerly Consolidated Docket Nos. 08-07 and 08-08] [NPDES-Related Matter])**
Attachment 4	**Order granting the Joint Motion to Continue and for Placement on Administrative Docket** **(Agenda Item 7 – De Nora Tech, Inc. [formerly known as Eltech Systems Corp.] v. ADEM, EMC Docket No. 10-05)**
Attachment 5	**Resolution appointing Lance R. LeFleur to the position of Director of ADEM at the salary of $144,195.84 annually, to be effective June 1, 2010** **(Agenda Item 8 – Appoint and set the salary for the new ADEM Director)**

Attachment 1

Amended 4/1/10

AGENDA*
MEETING OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
DATE: April 16, 2010
TIME: 11:00 a.m.
LOCATION: Alabama Department of Environmental Management (ADEM) Building
Alabama Room (Main Hearing Room)
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400

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* The Agenda for this meeting will be available on the ADEM website, www.adem.alabama.gov, under Environmental Management Commission.

** The Minutes for this meeting will be available on the ADEM website under Environmental Management Commission.

1. CONSIDERATION OF MINUTES OF MEETING HELD ON FEBRUARY 19, 2010

2. REPORT FROM THE DIRECTOR

3. REPORT FROM THE COMMISSION CHAIR

4. CONSIDERATION OF FORMATION OF A STAKEHOLDER COMMITTEE TO STUDY AIR TOXICS

   The Commission will consider the formation of a stakeholder committee to study air toxics.

5. GULF EQUIPMENT CORPORATION V. ADEM, EMC DOCKET NO. 10-01 (NPDES-RELATED MATTER)

   The Commission will acknowledge Petitioner Gulf Equipment Corporation's withdrawal of the appeal and request for hearing and Respondent ADEM's withdrawal of its motion to dismiss. The administrative action appealed in this matter is the Notice of Violation of ADEM Administrative Code Rule 335-6-12, Hope VI Housing Development Project, Phases 4 and 5, Construction and Land Disturbance Registration ALR16EDTT – Gulf Equipment Corporation, Mobile County, Alabama.

6. FRIENDS OF HURRICANE CREEK AND ALABAMA RIVERS ALLIANCE, INC. V. ADEM, AND TUSCALOOSA RESOURCES, INC., EMC DOCKET NO. 08-07 (FORMERLY CONSOLIDATED DOCKET NOS. 08-07 AND 08-08) (NPDES-RELATED MATTER)

   The Commission will consider the Recommendation of the Hearing Officer and the Hearing Officer's Order on Motions for Summary Judgment (Attachment "A" to the Recommendation). The administrative action appealed in this matter is ADEM's reissuance of NPDES Permit No. AL0074012 to Tuscaloosa Resources, Inc., Panther 3 Mine, Tuscaloosa County. Docket No. 08-07 was formerly consolidated with Tuscaloosa Resources, Inc. v. ADEM, Docket No. 08-08. The request for hearing in Docket No. 08-08 was withdrawn.

7. DE NORA TECH, INC. (FORMERLY KNOWN AS ELTECH SYSTEMS CORP.) V. ADEM, EMC DOCKET NO. 10-05

   The Commission will consider a Joint Motion to Continue and for Placement on Administrative Docket. The administrative action appealed in this matter is ADEM's denial by letter dated February 22, 2010, of De Nora Tech, Inc.'s request to utilize the financial test to replace DNT's existing Letter of Credit as a financial assurance mechanism for the former Eltech Colbert County Facility.

8. APPOINT AND SET THE SALARY FOR THE NEW ADEM DIRECTOR

9. OTHER BUSINESS

10. FUTURE BUSINESS SESSION

PUBLIC COMMENT PERIOD

(Request from the public to address the Commission is attached to the agenda.)

Request

Clara Curtis, Sylacauga Concerned Citizens for a Better Environment
SUBJECT: REEF, LLC's waste treatment facility located in Sylacauga, Alabama
(Chair Archie will recommend approval of the request.)

ATTACHMENT
PUBLIC COMMENT PERIOD REQUEST

Date: March 8, 2010

TO: Debi Thomas
Alabama Department of Environmental Management
(334)279-3052

FROM: Clara Curtis - Clara Curtis
Sylacauga Concern Citizens for Better Environment
(256) 249-9002

Attendance: Clara Curtis - Vicki Crowe

I would like to request a private hearing with the Environmental Management at your April, 2010 meeting.

For three years the citizens of Sylacauga have experienced health-related illness due to the air permeating into our homes from REEF LLC. located at Twin Street, Sylacauga. This waste treatment facility is located in Talladega County but only 500 feet from the city limits of Sylacauga. The fumes and odors have destroy the Quality of Life for all citizens in the area.

For three years we have constantly requested assistance from Alabama Department of Environmental Management with little or no success. In July 2010 they indicated a Consent Order against REEF and published it in our local newspaper for anyone that wished to speak. I have over 2000 signatures and a personal letter requesting the hearing be located in Sylacauga at a convenient time for senior citizens, students and working citizens to attend. We were told that those citizens did not word their request properly and the Consent Order would stand. Or we could request for an appeal. 351 citizens requested an appeal with letters and ADEM still denied our appeal.

I have requested from the Freedom of Information Act the content of matter that REEF was bring into our area. NO WORD to date from ADEM. The Talladega County Commissioners also requested this information. NO WORD from ADEM.

Therefore, upon the recommendation of Rep. Ron Johnson I request a hearing with your Commission to discuss how the citizens of Sylacauga can stop this terrorist crime against them. Citizens suffer from nosebleeds, headaches, nausea, G.I. distress, fatigue, eye irritation, throat irritation, shortness of breath, runny nose, sleep disturbance, chemical taste. Our Quality of Life has been destroyed and it is now affecting the economy of our area.

This operation is located less than a mile from 3 schools and a senior citizen living complex. Over 50% of the seniors are now living with oxygen due to breathing problems.

Thanking you in advance for your consideration for a hearing at your April 16, 2010 meeting.

Those attending this meeting will be myself, Vicki Crowe, Nelson Bates, Retired Talladega Co. EMA Director, and if not in session Rep. Ron Johnson of District 33. I shall be the only one speaking.

Attachment 2

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

MOTION

Designate matters related to a special committee to study air toxics to the Commission Chair and the ADEM Director and approve the list of proposed invitees to serve on the committee

ORDER

This cause having come before the Environmental Management Commission pursuant to the above motion, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the above motion is hereby adopted; and

2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below.

ISSUED this 16th day of April 2010.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 16th day of April 2010.

John H. Lester, Vice Chair
Environmental Management Commission
Certified this 16th day of April 2010

Attachment 3

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the Matter of:	)	
	)	
Friends of Hurricane Creek and	)	
Alabama Rivers Alliance, Inc.,	)	
	)	
Petitioners,	)	
	)	
vs.	)	EMC Docket No. 08-07
	)	
Alabama Department of	)	
Environmental Management,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
Tuscaloosa Resources, Inc.,	)	
	)	
Intervenor.	)	

ORDER

This cause having come before the Environmental Management Commission pursuant to the Recommendation of the Hearing Officer and the Hearing Officer's Order on Motions for Summary Judgment (Attachment "A" to the Recommendation) in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Recommendation of the Hearing Officer and the Hearing Officer's Order on Motions for Summary Judgment are hereby adopted; and

2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and

3. That a copy of this Order, along with copies of the Recommendation of the Hearing Officer and the Hearing Officer's Order on Motions for Summary Judgment, attached hereto and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 16th day of April 2010.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 16th day of April 2010.

John H. Lester, Vice Chair
Environmental Management Commission
Certified this 16th day of April 2010

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Alabama Rivers Alliance and The Friends of Hurricane Creek,	)	
Petitioners (08-07) and Intervenors (08-08),	)	
v.	)	**Docket No.: 08-07**
The Alabama Department of Environmental Management,	)	
Respondent,	)	
		Consolidated With
Tuscaloosa Resources, Inc.,	)	
Petitioner (08-08) and Respondent (08-07),	)	
v.	)	**Docket No.: 08-08**
The Alabama Department of Environmental Management,	)	
Respondent.	)	

RECOMMENDATION OF HEARING OFFICER

Procedural Background

In 2001, the Alabama Department of Environmental Management ("Department") issued to Tuscaloosa Resources, Inc. ("TRI") NPDES Permit No. AL0074012 in connection with a surface mine called "Panther 3" mine (the "First Permit"). The Panther 3 mine site is adjacent to

the North Fork of Hurricane Creek. The permit allowed effluent from the area to be discharged into the North Fork of Hurricane Creek and its tributaries.

Alabama Rivers Alliance and the Friends of Hurricane Creek (together called here "ARA") challenged the permit successfully before the Circuit Court of Montgomery County, by its order of April 20, 2006, which ruling was affirmed on appeal to the Alabama Court of Civil Appeals. See ADEM v. Alabama Rivers Alliance, 14 So.3d 853 (Ala. Civ. App. 2007) cert. den. ____ So.3d ____ (Ala. Feb. 20, 2009).

While the court action was pending, TRI applied for a reissuance of the permit which was scheduled to soon expire by its own terms. Under ADEM's rules, a permittee's authority to discharge waters may be effectively continued by reapplication and reissuance of a permit, which results in a new permit, rather than an extension of the previous permit. ADEM issued to TRI a new permit in October 2007 (the "Second Permit"). See, ADEM Admin. Code r.335-6-6-.17.

ARA challenged the issuance of TRI's Second Permit to the AEMC (Docket No. 08-07). TRI intervened. In 2008, and independent of the challenge, the Department elected to revoke the Second Permit, and issue a new and Third Permit (Pet. Ex. 1). The Department acted pursuant to its regulations to address at least two changed circumstances. One, being to accommodate the issuance by the EPA on November 1, 2004, of a Total Maximum Daily Load ("TMDL") for pollutants for Hurricane Creek under Section 303(d) of the Clear Water Act. Two, being to accommodate a correction to an admitted error of TRI in the previous permit application. ARA amended its challenge in Docket No. 08-07, to challenge the issuance of the Third Permit. The issued permit was later slightly modified and corrected (Pet. Ex. 3).

TRI objected as well to the revocation of the Second Permit and challenged the decision to AEMC (Docket 08-08). TRI's objection was designed to restore the Second Permit. ARA

intervened. Subsequently, the two dockets were consolidated. At the hearing , TRI voluntarily dismissed its petition to challenge the revocation of the Second Permit. Accordingly, the only matter before the Commission is ARA's Petition for Hearing in Docket No. 08-07, to challenge TRI's present permit.

A joint prehearing order was issued on March 13, 2009 containing the parties' stipulations and respective positions, and prescribing a schedule and deadlines targeting a hearing date for July 28, 2009. By agreement of the parties the schedule was amended to include a hearing date for October 27, 2010.

In its petition for hearing, ARA set forth in Paragraph 4 five alleged errors, to challenge the NPDES Permit to TRI. They are paraphrased as follows:

A. ADEM was without authority to "reissue" the first NPDES Permit because the First Permit was invalidated by court order. See, ADEM v. Alabama Rivers Alliance, 14 So.3d 852 (Ala.Civ.App. 2007). ARA contends that ADEM cannot reissue a permit that does not exist, and that the reissuance would be void in any event because of collateral estoppel, or res judicata, based on upon the prior judgment.

B. Ala. Admin. Code, 335-6-6-.04(j) prohibits the reissuance of a permit in this case because the discharge from TRI's operation constitutes a "new discharger" or "new source" and will cause or contribute to a violation of water quality standards, those standards being set out in ADEM's Administrative Regulations.

C. The reissuance of the permit is prohibited by Ala. Admin. Code, 335-6-6-.04(h) because the discharge will not comply with 40 C.F.R. § 122.44(d)(1)(vii)(B) and 40 C.F.R. § 122.4(i).

D. The discharge limitations and monitoring requirements included in the NPDES Permit fail to include the requirements of Ala. Admin. Code, 335-6-.14(3)(e)(f) as necessary to insure compliance with the several water quality standards set out in the Administrative Regulations.

E. The discharge limitations and monitoring requirements included in the NPDES Permit are not consistent with the assumptions and the requirements of Total Maximum Daily Load (TMDL) for metals, pathogens and turbidity in the Hurricane Creek watershed, established by the EPA and is required by 40 C.F.R. § 122.44(d)(1)(vii)(B) and ADEM's continuing planning process adopted pursuant to 40 C.F.R. § 130.5.

The Department and ARA filed cross-motions for summary judgment supported by briefs. By order and opinion of October 8, 2009, the hearing officer recommended granting in part, and denying in part, the respective motions as follows, which recommendation is adopted and incorporated herein by reference (a copy of which is attached hereto as Attachment "A").

In sum, the hearing officer concluded that the previous litigation, ADEM v. Alabama Rivers Alliance, did not preclude by res judicata or other estoppel the issuance to TRI of the permit in issue. In his opening statement at the hearing on October 27th, counsel for ARA confirmed that the ruling on summary judgment reduced the issues to be tried to subparagraphs C and E of ARA's Petition, which appear above (Tr. 15, 30-31).

SUMMARY OF THE TESTIMONY

Testimony of Mitchell Lawrence Reid (TR 58-70)

Mitchell Reid is a resident of Tuscaloosa, Alabama, and is Program Director for the Alabama Rivers Alliance. He has frequently canoed and recreated on Hurricane Creek and the

North Fork of Hurricane Creek, most recently at the end of the previous September. He complains that the storm water runoff from the coal mine sites into the water courses have discolored the creek, left it very muddy, and has caused him general unease. He is frightened enough that he refuses to swim in it.

On cross-examination, he acknowledged that he had no data on the specific materials contained in storm water discharge to the creek. He acknowledges that he was aware of other notices of permits for the North Fork of Hurricane Creek, but that ARA did not challenge those, for reasons he does not know. He generally acknowledges not having inspected TRI's sediment ponds or other storm water protection work.

John Wathen (TR 71-124)

John Wathen is a resident of Tuscaloosa County, and is a past officer and current employee of the Friends of Hurricane Creek. As Hurricane Creek Keeper, his job is to perform investigative and enforcement services. He lives and owns property along Hurricane Creek and recreates upon it on occasion. It has been four or five years since he has kayaked on the North Fork of Hurricane Creek, the last time being when his paddle jacket faded and the threads began to rot even though it was fairly new. He does, however, continue to paddle upon Hurricane Creek.

His recreational use has been adversely impacted by the coal mines along the creek and the storm water discharge because he is afraid to immerse himself completely in the water or swim in it. He is afraid of the water because of the incident of his paddle jacket suddenly deteriorating. He used to fish on Hurricane Creek, using catch and release, but no longer does so because he claims fish are no longer there, he believes as a result of the pollution.

On cross-examination, he admitted that he does not know exactly what caused the paddle jacket to deteriorate. As to why the Friends of Hurricane Creek did not challenge other permits along the creek, he said they did not have enough money to sue everybody and so they picked one.

He acknowledges that he had no specific evidence to justify his concerns about not kayaking or swimming as a consequence of the TRI permit. He also acknowledges that although he chooses not to swim, during the summer cars are lined up and down the highway from people who are swimming in the creek.

On redirect, Mr. Wathen said that he thinks a "schedule of compliance" would improve the watershed because it would set benchmarks, goals and things to shoot for. Without such a schedule, he complains that it could be eons before there is any improvement. He also believes that a turbidity requirement consistent with the TMDL should be put in place and that it would improve the water quality.

On cross-examination, he acknowledges that the TMDL is the means by which the EPA determines water quality standards for a watershed. Specifically, he agrees that the TMDL sets a series of standards that, if met, would improve the water quality. But he complains that there is no schedule of compliance, specifically a time element, with respect to this permit.

Glenda Dean (TR 124-159)

Glenda Dean is the Chief of the NPDES Permit Branch for ADEM. She has worked with ADEM for over twenty-three years and is personally familiar with TRI's Panther 3 Mine NPDES permit. She identified and explained the memorandum agreement between ADEM and EPA (ADEM Exhibit 1) which she says describes the process by which EPA reviews draft and proposed permits, modifications, revocations, and reissuance of permits. The memorandum

addresses the requirements for a "fact sheet" and/or a "rationale" to be accompanied with a draft permit. The "rationale" is a statement for the basis of the permit. It is an explanation of how the permit limits were derived and why such conditions are necessary. On the other hand, the "fact sheet" includes not only a statement of the basis of the rationale, but also information as to how the public may comment on the permit and information about legal proceedings.

With regard to the permit in this case, Ms. Dean confirmed that the draft permit was submitted to EPA and that ADEM received no adverse comments from EPA. Based upon the absence of EPA's comments to the draft, she assumed that EPA was satisfied with the permit. Therefore, she concluded that TRI's Panther 3 Permit establishes what EPA approves as sufficient to satisfy the TMDL. Also, the TMDL in the permit requires TRI to meet the turbidity standard.

Ms. Dean explained the difference between "continuous discharging" and "intermittent discharging." A continuous discharge is one that occurs without interruption over the operating hours of the facility, whereas an intermittent discharge is a non-continuous discharge, usually the result of a rain event. TRI is a point source, rather than a non-point source, intermittent discharger.

On cross-examination, Ms. Dean acknowledges that the draft permit (Petitioner Exhibit 1) does not contain a "fact sheet." In response to her testimony, counsel for ADEM acknowledged that a fact sheet did not accompany the permit, and further argued that a "rationale" is all that was required for this permit. Ms. Dean explained that the rationale is contained within the draft permit. Again, she confirmed that a rationale does exactly what a fact sheet would do, that is to provide an explanation for how the permit conditions were derived and

why they are necessary. A fact sheet, on the other hand, provides additional information to the public about the procedural process related to the permit.

She acknowledges that the permit does not expressly contain a numerical limitation for turbidity. She explains that although there is no specific discussion in the permit about pollutant-load allocations for this watershed or this discharge, she understands that the TMDL addresses those matters, specifically turbidity.

In response to questioning why there was no "compliance schedule" included within the permit, she explained that a compliance schedule is not required. Although there is no waiver of a compliance schedule, she insists that such a schedule is not required here.

On cross-examination, Ms. Dean clarified that although the pollution load allocations are not expressed in the rationale sheet accompanying the permit, that is because those concerns are addressed by the TMDL which governs the permit. So, in reference to the TMDL, the rationale sheet does in substance address the pollution load allocation. She clarified, too, that although she personally had no discussions with EPA about TRI's permit, she understands that others in the Department, specifically Steve Jenkins and Lynn Sisk, discussed the permit with EPA.

On further cross-examination, Ms. Dean explained that in approving a permit for its compliance with TMDL, the Department did not also determine whether other non-point discharge sources which affected the creek where already exceeding pollution load discharge limits. The permit does not specifically address non-point sources, although she understands that the TMDL itself takes that under consideration.

Stephen Jenkins (TR 159-176)

Stephen Jenkins has served as Chief of the Field Operations for ADEM for eleven years.

He is familiar with a previous NPDES permit for TRI for the East Brookwood Mine. The mine is in the Hurricane Creek watershed. With respect to the East Brookwood Mine Permit (ADEM Exhibit 2), ADEM had discussions with EPA about implementation of the TMDL. As a result of meetings with EPA, ADEM derived permit limits which EPA indicated would comply with the TMDL.

In support, Mr. Jenkins authenticated a letter dated December 3, 2007, from EPA indicating that EPA believes the permit was consistent with the TMDL (ADEM Ex. 3). In developing the Panther 3 Mine Permit, ADEM relied upon its previous discussions with EPA that the limits in the East Brookwood Mine permit would be applicable to all coal mine operations in the Hurricane Creek watershed. Accordingly, because the Panther 3 Mine is on Hurricane Creek, he concluded that the East Brookwood Permit was an effective model for the Panther 3 Permit. So, they included in the Panther 3 draft permit the same limitations of the East Brookwood Mine Permit and sent the draft to EPA. Following no comment from EPA, adverse of otherwise, he concluded that EPA was satisfied with the permit. His understanding was consistent with his discussion with EPA that the limits which they discussed specifically with the East Brookwood Mine was equally applicable to all permits in the Hurricane Creek watershed.

Subsequently, ADEM published notice of the Panther 3 Permit for purposes of soliciting public comment. Neither Alabama Rivers Alliance nor Friends of Hurricane Creek made any comment concerning the specific numeric limitations on turbidity for surface coal mines. During that time, there was no comment from anyone to the effect that the TMDL requires a specific numeric limitation upon turbidity for surface coal mines.

Mr. Jenkins testified that the Panther 3 Permit in issue here was issued for public notice in February of 2008 (TRI Exhibit 6). The purpose for the issuance was to revoke the previous permit and reissue a new permit in order to incorporate the new information ADEM had received from EPA concerning the recently developed TMDL for Hurricane Creek. At the same time, three additional permits were issued for public notice in order to make them consistent with the TMDL. Although all four permits contain the same permit limits, ARA and Friends of Hurricane Creek challenged only the Panther 3 TRI permit.

Lynn Sisk (TR 176-217)

Lynn Sisk is Chief of the Water Quality Branch within the Water Division of ADEM. He has been employed with ADEM over twenty-fives years, and in his current position since February of 2001. The Water Quality Branch is responsible for surface water quality standards, the development of total maximum daily loads, MDL's, waste load allocations for NPDES permitted facilities, and other technical support within the Water Division.

He explained the difference between TMDL's and MDL's. TMDL's are a requirement of the Clean Water Act for stream segments that do not fully support designated uses for that segment. For other stream segments that are supporting their uses, his branch develops permit limits consistent with the permitting regulations of ADEM to insure water quality standards are met. Waste load allocations concern specific permits, whereas TMDL's concern the whole stream.

The TMDL for Hurricane Creek was developed at EPA, not at ADEM. The development of the TMDL for Hurricane Creek was a consequence of a settlement agreement from a lawsuit in 1998 against EPA involving a claim that it had failed its statutory duty to develop TMDL. The Hurricane Creek TMDL applies to the Hurricane Creek watershed, which includes both the

North Fork of Hurricane Creek and Hurricane Creek. The Hurricane Creek TMDL measures pollutants by concentration, as opposed to mass. A measurement for concentration is an expression of the mass of the substance contained within a specific volume. On the other hand, mass is simply the amount of a substance that is present.

He explained EPA's national ambient water quality criteria. Under the Clean Water Act, EPA is directed to develop water quality criteria and publish recommended guidelines. These guidelines are not promulgated as rules, but serve as guidelines. They are available to states to adopt as criteria, and must be justified by appropriate scientific data. EPA's national ambient water quality criteria are expressed as biologically tolerable concentrations, not masses, of pollutants. He is not aware of anyone who measures quality toxicity by mass rather than concentration.

He is generally familiar with TRI's Hurricane Creek Panther 3 NPDES permit. In discussing turbidity, he explained it is an optical property that describes the scattering of light by particles in suspension. It is measured in nephelometric turbidity units, and is done with an instrument that measures light through a water sample. With respect to Hurricane Creek, the TMDL accounts for two sub-categories for point source discharges, continuous point sources, and intermittent or storm water driven point sources. There are no turbidity limitations in terms of specific numeric standards for storm water point discharges like that of TRI's permit.

Nevertheless, the TMDL addresses turbidity specifically. The TMDL provides that the State may rely upon a narrative implementation of the turbidity requirement rather than a numeric standard, provided that two things are done. One, is that there must be a discussion in the "rationale" about how the TMDL is to be implemented regarding the particular storm water

discharge. Two, the State must provide ambient monitoring to show that the aggregate allocation is being achieved.

With respect to Hurricane Creek, the aggregate allocation would be the allocation for both continuous and non-continuous point sources plus the load allocation from non point sources. The target for the TMDL for Hurricane Creek is 60.8 NTU's, a numeric standard for turbidity. To assess compliance with the target, ADEM conducts ambient monitoring upon Hurricane Creek where regular samples are collected and turbidity is measured, and the data is submitted to EPA. He has received no objection or other expressions of dissatisfaction from EPA in regard to monitoring.

In regard to TRI's Panther 3 Permit, he is of the opinion that the permit meets EPA's requirements on turbidity. Specifically, the allocations for storm water driven point sources are to be implemented using best management practices. The TMDL does not require specific numeric limitations for the permit itself.

On further examination, he confirms that part of his job is to ensure that an NPDES permit satisfies all of the regulatory criteria for water quality. In this instance, he is satisfied that the conditions of TRI's permit meet the requirements for water quality and are consistent with the TMDL. On cross-examination, he acknowledges that the TMDL allocation for turbidity, as set out in the TMDL, is based on a target turbidity of 60.8 NTU's, for both point and non-point sources. He further clarifies that the standard applies not to the discharge, but to the stream. In other words, the standard is measured in the stream body, not at the end of a discharge pipe.

Mr. Sisk went on to explain that the TMDL allows for a narrative criteria rather than a 60.8 NTU numeric criteria in regard to turbidity. In other words, ADEM may explain in

narrative fashion the reason it expects the chosen best management practices to achieve aggregate waste load allocation for the permitted storm water discharges.

On redirect examination by the Department, Mr. Sisk confirmed that the TMDL allocation for turbidity required a numeric standard of 60.8 NTU's for continuous discharges (Pet. Ex. 2). The numeric standard does not apply to intermittent discharges dependant upon rain. Also, he repeated earlier testimony that the 60.8 numeric standard is an in stream target. It is not a measure to the discharges into Hurricane Creek.

In questioning by counsel for TRI, Mr. Sisk reviewed the TMDL further and noted that it provides that it would be unfeasible to calculate the numeric water quality base of polluted limitations for turbidity from individual storm water discharges. That is one of the reasons why the TMDL and the Panther 3 Permit do not assign a specific numeric turbidity standard for the end of pipe discharge. Instead, other provisions in the permit address TRI's discharges to satisfy the in-stream quality standard.

On further cross-examination, Ms. Sisk acknowledges that its possible to measure the turbidity of the discharge at the pipe. However, that measurement would not tell you anything in regard to compliance because the in-stream measurement is the controlling target. But, certainly if during a rain storm all point and non-point sources measured a level of NTU 100, and all at the same time, the stream would likely exceed the 60.8 in-stream target.

But, he said that you really cannot determine in the abstract how particular turbidity at discharge is going to impact in-stream turbidity. There are number of variables that would play into determining the in-stream effect. That is why EPA says that it is not feasible to calculate a numeric limitation for turbidity at the discharge point.

Jan Kizziah (TRI-218-240)

Jan Kizziah is a resident of Tuscaloosa and is Vice President of Operations for TRI. He is familiar with all operations, including environmental matters.

TRI began mining on Panther 3 in 2002. Mining occurs in increments, and seven increments were set up for Panther 3. Mining ceased on increment 1 in mid-2004. TRI has not continued and mined the other increments because of economic reasons. They still have a permit from the Surface Mining Commission to recommence mining as to the other increments.

Typically, and as for Increment 1 on Panther 3, TRI conducts reclamation, which includes planting grasses, trees, grading and other matters. The Surface Mining Commission monitors the reclamation before releasing the bond posted to insure the clean up. Typically, and as true for the Panther 3 operation, TRI builds sediment control basins. There is no water used in the mining process at Panther 3 so only rain water is captured by the sedimentation ponds. There are four sediment ponds for Panther 3 and two outfalls into the creek. The sediment ponds are set up in series as to each pair, and there is an outfall for each pair. He notes that the sediment ponds also catch water runoff from the previous, pre-law mining areas along Hurricane Creek. Mr. Kizziah notes that the industry practice is to have one sediment pond so TRI's installation of two is above the norm.

On cross-examination Mr. Kizziah noted that the amount of acreage covered by the NPDES Permit is about 1,200. The first increment for mining Panther 3 covers about 100 acres. So, if economics change, TRI could recommence mining pursuant to this permit. If that would occur, it would involve planned increments two through seven of Panther 3 Mine which would involve stripping the site of trees and otherwise disturbing the soils. The runoff from those disturbances, which have not occurred, would have to be handled by the existing sedimentation ponds.

Carlton Wayne McGhee (TR 241-290)

Carlton McGhee is a consulting engineer for McGhee Engineering Corporation. He worked for Drummond Coal, and afterward at Perk Engineering and started his own company around 1990, where he has been ever since. He commenced work for TRI around 1998 and has worked with them ever since, including on TRI's Panther 3 Mine site. He has handled all of the several permits required for the site in addition to the NPDES Permit from ADEM.

The purpose for the NPDES Permit is to monitor the effluents going into the receiving streams. The only effluent at Panther 3 is rainfall. In order to address surface water runoff at Panther 3, TRI followed best management practices, including constructing sediment ponds, and constructing silt fences in constructed areas, and other methods. In connection with this site they also put in ground water monitoring wells and monitored the creek. Prior to mining, they typically inquire with U.S. Fish and Wildlife in regard to threatened species and perform a pre-mine land use study. This helps them determine the effect on the sediment load. They generally follow best management practices for drainage control. The work that they do in connection with requiring the various permits, including the permit and bond from the Alabama Surface Mining Commission, applies as well to the development of an NPDES Permit. They prepare maps to reflect the mining area and the drainage areas that will be disturbed, the identification of outfalls, potential outfalls, estimations of surface water runoff, the potential for estimated pH, iron and different parameters concerning the NPDES Permit. Many of the items required by the Alabama Surface Mining work and of the ADEM permit go hand in hand.

He designed the sediment ponds for Panther 3. He designed the sedimentation ponds to accommodate drainage from additional areas other than the mining areas because, like it or not, that water drains to the outfall, so he had to accommodate for all of it. In this instance, he

designed a total of four sediment ponds, each two of which are in series with one another to address one outfall, for a total of two outfalls. Each pair of ponds addresses two distinct drainage areas, 30% of each area which are pre-law mined areas. The reclamation for increment 1 at Panther 3 has been fully accomplished and the bond has been released by the Mining Commission. In addition, ADEM has released TRI of further monitoring for the outfalls. (TRI Ex. 10, 11, 12). Nonetheless, the Surface Mining Commission requires that the four ponds at Panther 3 be left as permanent water impoundments. Had TRI not mined a portion of that area, the pre-law mined areas would have discharged into the creek without any treatment or sediment ponds.

Mr. McGhee explained on cross-examination that he was responsible for completing the applications for the NPDES Permits to ADEM for the Panther 3 Mine, both the first permit application and the second one that was submitted in February of 2008. He acknowledges that the activities addressed by both applications are the same. One difference is that the first permit addressed only one outfall, and the second permit addresses two outfalls. He also acknowledges that in connection with the second issued permit, ADEM did not require any changes in the proposed operation in coal mine activities.

He acknowledges that if a rain event is sufficient to fill up both ponds set up for an outfall, and the ponds are filled, the water will discharge continuously until the pond level drops below the discharge.

He acknowledged during his previous testimony in the earlier legal proceeding for this mine that his projections to the Surface Mining Commission showed that there would be an increase in iron discharges during and after mining the Panther 3 site. He agrees that is still true, although he cannot confirm whether or not his previous testimony on the projected milligrams

per ton of iron would be accurate. He believes that now that the State has actual data, that his previous projections could be wrong. He also recalls testifying in the previous proceeding that discharge from the mining at a high point would have a pH of 5.87 before mining, during and after. However, he qualified his earlier projections, which he said were made around 1999 and 2000, by explaining that over the six or seven years since that time, actual discharge monitoring data was complied which evaluates the actual materials in the discharges. His projections, in other words, are moot. In that regard, he notes that the monitoring reports confirmed that TRI complied with the conditions and limits of the NPDES permit.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is a challenge to the issuance by ADEM to TRI of a permit for the discharge of rainwater from TRI's reclaimed coal mining site known as Panther Mine No. 3. The permit, National Pollutant Discharge Elimination System ("NPDES") Permit No. AL0074012 (or, "the Permit") allows for rainwater discharge into the North Fork of Hurricane Creek and its tributaries.

Following the disposition of some of the issues on summary judgment in these administrative proceedings, ARA presented two claims challenging the Permit: First, ARA contends the Permit does not comply with the Federal Clean Water Act because it does not meet the requirements of 40 CFR 122.4(i) because (1) it fails to contain an analysis of pollutant load allocations in the Hurricane Creek Watershed and (2) it fails to demonstrate that existing discharges into the watershed are subject to compliance schedules for bringing the water up to water quality standards. Second, ARA contends that the Permit fails to comply with the TMDL for the watershed because it lacks a numerical prescription by which the standard for turbidity will be met.

A review of the background for the Federal Clean Water Act and the Alabama Clean Water Act is important to an analysis of the Permit. In 1972, Congress passed the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act") to create a comprehensive program for the restoration and maintenance of the nation's water resources. *LEAF v. Peques*, 904 F.2d 640, 641 (11th Cir. 1990). Under the Act, Congress sought to regulate the discharge of pollutants into the navigable waters. 33 U.S.C. § 1251. The Act provides that the EPA or the states must develop a permit system that regulates the discharge of pollutants from discrete "point sources" to the level of discharge authorized under a permit. *Sierra Club v. Hankinson*, 351 F.3d 1358, 1360 (11th Cir. 2003). The purpose of the permit system is to ensure that pollution is not so excessive that it causes a violation of the water quality standards, i.e. causes a waterbody to fail to support its designated use. See *Sierra Club v. Meiburg*, 296 F.3d 1021, 1024-24 (11th Cir. 2002). In this case, the appropriate designated use is "Fish and Wildlife," as that is what ADEM classifies Hurricane Creek and the North Fork of Hurricane Creek. Thus, the streams must support "[f]ishing, propagation of fish, aquatic life, and wildlife." Ala. Admin. Code R. 335-6-10-.09(5). They must also be fit for swimming under certain conditions. *Id.*

Pursuant to § 303(d)(1) of the Act (33 U.S.C. § 1313(d)(1)), each state is required to identify those waters that do not meet the water quality standard which is frequently called the "§ 303(d)(1) list." For impaired waters identified in the § 303(d)(1) list, the states must establish a TMDL (Total Maximum Daily Load) for pollutants identified by the EPA. A TMDL specifies the maximum amount of pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.

Each state is required to submit its § 303(d)(1) list and its TMDL to the EPA for its approval or disapproval. The state then incorporates its § 303(d)(1) list and its TMDL or the

EPA's approved document into its continuing planning process as required by § 303(e), 33 U.S.C. § 1313(e). In this case, Hurricane Creek was on the § 303(d)(1) list, but the State had not prepared a TMDL. So, the EPA prepared the TMDL and ADEM used it in awarding the permit to TRI.

ARA does not challenge the TMDL for Hurricane Creek adopted in the Permit. Rather, as noted above, ARA contends that ADEM failed to appropriately implement the TMDL in the Permit, and failed to comply with additional requirements under the Clean Water Act.

Application of 40 C.F.R. § 122.4(i).

EPA issued regulations under the Clean Water Act prescribing certain conditions for the issuance of NPDES permits. Under 40 C.F.R § 122.4(i), no permit may be issued to a "new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards . . . ." *Id.* The regulation goes on to provide that a new discharger who proposes to discharge into a watershed where a TMDL is established must demonstrate "before the close of the public comment period, that: (1) there are sufficient remaining pollutant load allocations to allow for that discharge; and (2) the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards." *Id.* See also *Friends of Pinto Creek v. United States Environmental Protection Agency*, 504 F. 3d 1007 (9th Cir. 2007)(holding that 40 C.F.R. § 122.4(i) requires that where a TMDL is in existence for a watershed, a permit can be issued only if the owner or operator demonstrates before the close of the comment period that the two conditions referenced above are met).

ADEM contends that 40 C.F.R. § 122.4(i) is not applicable to Alabama's NPDES program, and also that the TMDL is enforceable only by the EPA. This Hearing Officer rejects

both arguments. A state's NPDES-permit program must meet the standards set forth in the Clean Water Act. See, *Black Warrior River Keeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 989 (11th Cir. 2008). See also, 40 C.F.R. 123.25 ("[a]ll state programs under this part must have legal authority to implement . . . (1) § 122.4"). Likewise, ADEM's regulations provide that a permit may not issue if the discharge will not "comply with AWPCA or the FWPCA." Ala. Admin. Code R. 335-6-6-.04(h).

TRI, too, argues that § 122.4(i) is inapplicable because it applies only to a "new discharger" or a "new source." TRI contends it is neither because its discharge was previously permitted and is now, therefore, an existing, not a new, discharge or source. However, the terms are specifically defined in 40 C.F.R. § 122.2, and show that TRI is definitionally either a "new discharger" or a "new source." Its reliance upon *Sierra Club v. Hankinson*, 939 F.Supp 872 (N.D. Ga. 1996), where the court interchanged the phrases "new permittees" and "new dischargers" without issue or analysis, neither interprets nor changes the plain language of the regulation.

TRI argues also that § 122.4(i) is not applicable because ARA failed to show that TRI's discharge would cause or contribute to a violation of water quality standards. A careful reading of the regulation shows that TRI's argument is misplaced. The regulation applies to a new discharger for a watercourse for which a TMDL is in place, notwithstanding the extent or whether the discharge is demonstrated to in fact violate water quality standards.

The provision in 40 C.F.R. § 122.4(i) reads as follows:

No permit may be issued:

> . . . (i) To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is

> not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of public comment period, that:
>
> (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
>
> (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

40 C.F.R. § 122.4(i)

The first sentence appears to literally ban all discharges which contribute to a violation of water quality standards. Despite these plain words, neither the Clean Water Act nor § 122.4(i) may be interpreted to impose an absolute ban on discharges shown to contain detectable pollutants. See, *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007 (9th Cir. 2007), addressing *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). Instead, "[t]he statute does . . . contain provisions designed to remedy existing water quality violations and to allocate the burden of reducing undesirable discharges between existing sources and new sources." *Friends* at 1013, quoting *Arkansas* at 108.

Similarly, nor can the first sentence be literally interpreted to exempt a new discharger from the requirements of § 122.4(i) if there is no present evidence of actual pollution from the discharge. By definition, the discharge must come from a facility from which there "may be," not necessarily "is," a pollutant. 40 CFR § 122.2 ("new discharger"). In addition, the second sentence of § 122.4(i) states without exception that every new discharger into a water segment for which there is a pollutant load allocation must comply with the two conditions of the regulation. Moreover, this permit concerns storm water discharges from a reclaimed coal mine. It was previously and recently adjudged that discharges from this mine will include pollutants

and contribute to the impairment of the creek. See, *ADEM v. Alabama Rivers Alliance*, 14 So.3d 853, 866 (Ala. Civ. App. 2007) cert. den. ____ So.3d ____ (Ala. Feb. 20, 2009). While that ruling does not prove that pollutants in fact exist today in the discharge, in the absence of proof to the contrary it at least shows that pollutants "may be" in the discharge.

As to the first condition of § 122.4(i), that the new discharger demonstrate that there are sufficient load allocations to allow the discharge, ARA contends that the Permit made no such showing whatsoever. Simply incorporating the TMDL, argues ARA, is not sufficient, citing *Friends of Pinto Creek*, supra. However, in the hearing, Glenda Dean, Chief of the NPDES permit branch at ADEM, testified that the TMDL in this instance establishes the pollution load allocation for Hurricane Creek. Further, she explained that the TMDL, considered with the Rationale sheet of the Permit itself, explains how the Permit complies with the TMDL. (Tr. 148-149, Pet. Ex. 2, TMDL, p. 18, Section 6.0-6.1, Table 8, and Pet. Ex.1, ("NPDES Individual Permit Rational")). ARA, in turn, fails to show how TRI's permit does not comply with the first condition of § 122.4(i), resting instead on conclusory allegations. In any event, as explained later below, this request is subject to waiver by the Department if it is otherwise adequately informed to evaluate the permit.

The second condition of § 122.4(i) is that the permittee demonstrate that existing discharges into the water segment are subject to "compliance schedules" designed to bring the segment into compliance with water quality standards. ARA cites *Friends of Pinto Creek* to argue that TRI must show that all sources of pollution, point and non-point, regulated or not, are subject to such compliance schedules. On the contrary, the court, noting that the term "discharge" is in turn defined as "discharge of pollutant" which in turn is defined as a discharge

from a "point source," held that compliance schedules are confined to "point sources" only. *Friends of Pinto Creek*, 504 F.3d 1012-1013.

To be clear, a compliance schedule is a schedule of remedial measures for a permit designed to lead the water segment to compliance:

> Schedule of compliance means a schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to complaint with the CWA regulations.

40 C.F.R. § 122. Likewise, ADEM Admin. Code R. 335-6-6-.02, defines a compliance schedule as:

> (rr) "Scheduling of Compliances" means a schedule of remedial measures, included in a permit, including an enforceable sequence of actions or operations leading to compliance with any permit requirement or water quality standard.

Here, TRI's Permit provides that the schedule of compliance for purposes of these regulations is immediate: "Compliance must be achieved by the effective date of this permit." (ADEM Ex. 4, Panther Mine No. 3 Permit, Part I, p. 13). Similarly, TRI's East Brookwood permit for Hurricane Creek which the EPA approved also requires immediate compliance (ADEM Ex. 3, p. 14). These permits, and the TMDL, demonstrate that ADEM is sufficiently accounting for existing discharges and scheduling compliance as immediate. ARA does not show, much less prove, otherwise as to any point source.

ARA's allegation that there is a lack of compliance schedules for existing non-point discharges is neither relevant or accurate. Compliance schedules as used in §122.4(i) are definitionally restricted to point sources. Also, according to EPA's TMDL, non-point source loading in this case results primarily from various land uses, such as farming, construction, forestry, dirt roads and other land uses that contribute pollutants to the Creek -- particularly fine-grained sediment -- through all its tributaries via rainfall. EPA's TMDL does not identify any

particular land use that requires a compliance schedule to meet EPA's target loads. Nor did ARA introduce any evidence that a compliance schedule is necessary for any land use in order to meet EPA's target loads.

Accordingly, the record establishes that the Permit complies with § 122.4(i) as to compliance schedules.

The Permit Contains Adequate Information From ADEM To Evaluate TRI's Discharges Regardless Of The Technical Operation Of 122.4(i)

Regardless whether the Permit meets the technical conditions in § 122.4(i), TRI raises an important exception to having to meet those requirements. After setting forth the two requirements for a new permittee or new discharger, Part 122.4 provides:

> The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under Sec. 124.56(b)(1) of this chapter.

40 C.F.R. § 122.4(i). Accordingly, ADEM may waive TRI's submission of information under 122.4(i) if it otherwise has adequate information to evaluate TRI's discharges. The record demonstrates that ADEM had sufficient information to ensure that TRI's discharges would not cause or contribute to a violation of water quality standards under the TMDL's limits. A waiver, therefore, is appropriate.

The Rationale for the 2008 Permit that was included in the Draft Permit submitted for public comment stated:

> The applicant is proposing continuation of existing discharges of pollutants(s) to a water with an approved Total Maximum Daily Load (TMDL). If the requirements of the proposed permit are fully implemented, there is reasonable assurance that pollutant(s) addressed by the approved TMDL will not be present in the discharge at significant levels, or the facility will not discharge pollutant(s)

> at levels that will cause or contribute to a violation of applicable State water quality standards.

(*See* Pet. Ex. 1, Permit Rationale, p. 2).[1] The Rationale also explained that TRI submitted representative sampling and that a professional engineer prepared its Pollution Abatement/Prevention Plan. *Id.* at 1-2.

The Rationale listed specific measures required by the proposed permit and by the Pollution Abatement/Prevention Plan to support TMDL implementation. *Id.* at 3. It also stated:

> If there is a reasonable potential that a pollutant present in treated discharges from a facility could cause or contribute to a contravention of applicable State water quality standards above numeric or narrative criteria, 40 CFR § 122 requires the Department to establish effluent limits using a calculated water quality criterion; establish effluent limits on a case-by-case basis using criteria established by EPA; or establish effluent limits based on an indicator parameter. Based on available information, potential pollutants discharged from this facility, if discharged with the concentrations allowed by this permit, would not have reasonable potential to cause or contribute to a contravention of applicable State water quality standards .

Id. at 2. The Rationale makes it clear that ADEM had sufficient information from which to determine, and reasonably did determine, that TRI's damages could be supported by the watershed and would not violate water quality standards. ARA offered no evidence to the contrary.

ADEM representatives confirmed in the hearing that ADEM had adequate information to conclude that compliance with the Permit would not violate water quality standards. Steve Jenkins, Chief of ADEM's Field Operations, testified about discussions ADEM had with EPA during the development of the limits for TRI's East Brookwood Mine's Permit limits, which limits are exactly those of the Permit at issue in this matter. Jenkins testified that, during those

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[1] The Rationale is a subset of a typical fact sheet that explains how ADEM derived the limitations in the permit (TR. 127-28). Glenda Dean explained that a fact sheet was not prepared for this Permit; only a Rationale was prepared and stands in the place of a fact sheet (Tr. 139-41). Additionally, as ADEM Counsel James Wright stated at the hearing, ADEM only prepares fact sheets for major dischargers (400,000 gallons per day or more) and prepares only rationale for minor dischargers, like TRI. Tr.136.

discussions, EPA was aware of the Panther 3 Mine's Permit limits and indicated to ADEM that those limits complied with the TMDL. (TR.161-72. *See also* Testimony of Glenda Dean, Chief of ADEM's NPDES Permit Department, Tr. 133 (testifying that she had information to conclude that the Permit's limitations satisfied the TMDL)). Also, ADEM explained in the Permit Rationale that it used information regarding TRI's discharges, samplings and Pollutant Abatement/Prevention Plan to derive the Permit's limits, which would not discharge pollutants at a level to cause or contribute to a violation of water quality standards.

Therefore, ADEM had adequate information to evaluate whether the watershed could support TRI's discharges under the Permit's terms in order to waive the 122.4(i) submission of information as to sufficient waste load allocation and compliance schedules ADEM's explanation serves to waive the operation of 122.4(i).

The Permit Complies With The TMDL As To Turbidity

ARA contends that the Permit fails to comply with the TMDL because it does not appropriately implement standards for turbidity. ARA argues that the numerical standards set forth in the TMDL apply to TRI's permit, and that because the Permit includes no numerical standard, it is non-compliant. But, as explained below, because the Permit is for a non-continuous, point source discharge, numeric standards do not apply. Instead, narrative explanations for turbidity are appropriate.

TRI's permit appropriately does not contain a numerical limit for turbidity because numerical turbidity limits are not feasible for individual storm water dischargers like TRI. Instead, ADEM properly used narrative limits (TRI's BMPs) to ensure that TRI's discharges will comply with the TMDL's turbidity limits. Additionally, ADEM stated in the Permit and in the

Rationale, as required by the TMDL, that the limits in TRI's permit will assure achievement of water quality standards.

Section 6.2 of the TMDL discusses turbidity and provides a target for turbidity expressed in Nephelometric Turbidity Units (NTU). (Pet. Ex. 2, TMDL, 21-22.) "The appropriate target was selected as the numeric criterion described in Alabama Water Quality Criteria, which states that turbidity should be no more than 50 NTU above backgrounds levels. Both point and non-point sources should meet this standard." *Id.* at 21. ["T"]o ensure compliance with the turbidity water quality standard under the dry weather turbidity conditions observed in Hurricane Creek, which are as low as 1.0 NTU, any continuous NPDES facility should be permitted to discharge no more than 51 NTUs at the end-of-pipe." *Id.*

Section 6.2.1, regarding Waste Load Allocation ("WLA"), states: "NPDES permits for total suspended solids and other substances that may cause turbidity should require measurements to ensure that continuous discharge does not increase turbidity to greater than 51 NTUs. Any future permitted dischargers should not exceed this water quality criterion." *Id.* at 22. But, TRI is not a continuous discharger (Tr. 134). Nevertheless, TRI's permit contains a Total Suspended Solids limit (Daily Avera: 35.0 mg/l; and Daily Max: 70.0 mg/l). (*See* Pet. Ex. 3, 2009 Modified Permit, p. 4).

The third paragraph of the TMDL's WLA Turbidity Section states:

> Although the aggregate waste load allocation for storm water discharges is expressed in numeric form as a percent reduction, based on the information available today, it is infeasible to calculate numeric WLAs for individual storm water outfalls because discharges from these sources can be highly intermittent, are usually characterized by very high flows occurring over relatively short time intervals, and carry a variety of pollutants whose nature and extent varies according to geography and local land use. This TMDL assumes, for the reasons stated above, that it will also be infeasible to calculate numeric water quality-based effluent limitations for turbidity for individual storm water discharges. Therefore, in the absence of information presented to the permitting authority

> showing otherwise, this TMDL assumes that water quality-based effluent limitations for storm water sources of turbidity derived from this TMDL can be expressed in narrative form (e.g., as best management practices), provided that (1) the permitting authority explains in the permit fact sheet the reasons it expects the chosen BMPs to achieve the aggregate waste load allocation for these storm water discharges; and (2) the state will perform ambient water quality monitoring for turbidity for the purpose of determining whether the BMPs in fact are achieving such aggregate waste load allocation."

Pet Ex. 2, TMDL 6.2.1, at 22. (emphasis added)

TRI's Panther 3 Mine is an individual storm water discharger with intermittent flows. Therefore, according to the TMDL, it is infeasible to calculate numeric water quality-based effluent limitations for turbidity to include TRI's Permit (Tr. 134). For this reason, ADEM explained in the permit fact sheet (the Rationale in this case) and in the Permit itself that discharges compliant with the Permit's limits will achieve compliance with the TMDL, *i.e.* the aggregate waste load allocation for storm water dischargers. The Rationale explained:

> The applicant is proposing continuation of existing discharges of pollutant(s) to a water with an approved Total Maximum Daily Load (TMDL). If the requirements of the proposed permit are fully implemented, there is reasonable assurance that pollutant(s) addressed by the approved TMDL will not be present in the discharge at significant levels, or the facility will not discharge pollutant(s) at levels that will cause or contribute to a violation of applicable State water quality standards.

(*See* Pet. Ex. 1, Permit Rationale, p. 2).

Additionally, the Permit itself outlined TRI's Best Management Practices (BMP) and stated that based on the information available to ADEM about TRI's plans, the Permit's limitations and conditions will assure compliance with the applicable water quality standards. (*See* Pet. Ex. 3, Modified Permit, p.15 (outlining TRI's BMPs) and p.19) ("On the basis of [TRI's] application, plans, or other available information, [ADEM] has determined that compliance with the terms and conditions of this permit will assure compliance with applicable water quality standards.").

Moreover, ADEM explained at the hearing that it had determined that TRI's BMPs should ensure achievement of the aggregate WLAs as a storm water discharger, and thus would comply with the TMDL (Testimony of Lynn Sisk, Tr. 190-91). Also, it is not disputed that ADEM monitors ambient water quality monitoring for turbidity. The monitoring is to ensure that BMPs are in fact achieving such aggregate waste load allocations.

Therefore, the record establishes that ADEM complied with the TMDL regarding turbidity because the Permit properly incorporated the TMDL's turbidity limits in the form of narrative limits (BMPs), ADEM explained in the Rationale and in the Permit that based on TRI's plans (including its BMPs) it expected compliance with applicable water quality standards (including the TMDL), and ADEM monitors ambient water quality for turbidity. As such, TRI's Permit complies with the TMDL.

Petitioners Have Standing

TRI challenges Petitioners' standing, claiming that they show no actual injury in fact. This Hearing Officer concludes differently.

Petitioners' standing in this proceeding arises from Alabama Code § 22-22 A-7(c):

> Upon proper request made in accordance with subdivisions 1 or 2 of this subsection and any hearing procedure prescribed by the Environmental Management Commission, any person aggrieved by an administrative action of the Department shall be entitled to a hearing before the Environmental Management Commission or its designated Hearing Officer.

Id. In *ADEM v. Legal Environmental Assistant Foundation, Inc.*, 973 So.2d 369, 378 (Ala.Civ. App. 2007) the Court held, "by its plain language, therefore, a 'person aggrieved' under §22-22A-7 is one who has suffered a threatened or actual injury, i.e., one who has somehow adversely effected. . . The Alabama Supreme Court has said that "a citizen's statutory right to

appeal an ADEM decision should be interpreted broadly." *Ex parte Fowl River Protection Association, Inc.*, 572 So. 2d 446, 456 fn. 2 (Ala. 1990).

The term "aggrieved" is defined in Ala. (ADEM) Admin. Code R. 335-2-1-.02(b) as "having suffered a threatened or actual injury in fact." ARA argues that this definition is derived from judicial decisions interpreting the same term in the Federal Administrative Procedure Act, 5 U.S.C. § 702, and provide guidance here. In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), the Court said that "'[i]njury in fact' reflects the statutory [5 U.S.C. § 702] requirement that a person be 'adversely affected' or 'aggrieved' and it serves to distinguish a person with a direct stake in the outcome of a litigation - even though small - from a person with a mere interest in the problem." *Id.* at 689 n.14. The Court explained that it saw "no reason to adopt a more restrictive interpretation of 'adversely affected' or 'aggrieved'" in 5 U.S.C. § 702 that the "injury in fact" requirement for standing imposed by the "case or controversy" provision of Art. III of the U.S. Constitution. *Id.*

An "injury in fact" must be concrete and particularized. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). An injury is "concrete" if it is direct, real, palpable or perceptible, rather than abstract. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury is "particularized" if it is personal, individual, and distinct. *See Lujan*, 504 U.S. at 560 n.1. ("By particularized, we mean that the injury must affect the plaintiff in a person and individual way"). *See also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("The Supreme Court has rejected the argument that an injury must be 'significant;' a small injury, 'an identifiable trifle,' is sufficient to confer standing").

In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) the Court rejected an argument that standing depends upon injury to the environment,

noting instead that it requires injury to the plaintiff. *Accord, Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d at 159-161 (proof of environmental degradation is not necessary to establish injury in fact). The Court in *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* went on to say that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are person 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) and citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.")). *Accord, Sierra Club v. Tennessee Valley Auth.*, 430 F.3d 1337, 1344 (11th Cir. 2005)(cognizable injury is suffered by plaintiffs that use, or would use more frequently, an area affected by the challenged activity and that their aesthetic or recreational interests in the area have been harmed).

Mitch Reid is a member and program director of the Alabama Rivers Alliance (Tr.58). Mr. Reid is a resident of Tuscaloosa County who uses, enjoys and recreates on Hurricane Creek and the North Fork of Hurricane Creek (Tr.58). The last time he was out on the North Fork of Hurricane Creek was just a few weeks before the hearing (Tr. 59). He has plans to use both Hurricane Creek and the North Fork of Hurricane Creek in the future. *Id.* Mr. Reid believes that his use and enjoyment of Hurricane Creek and the North Fork of Hurricane Creek has been lessened as a result of the coal mining permits like the TRI Permit. He said that he cannot use the creek as much because of surface water runoff in the watershed. He is concerned and has a fear about what is in the water from these mines, and as a kayaker, his use is adversely affected when the water is muddy and discolored from surface water runoff (Tr. 59-61).

John Wathen lives in Tuscaloosa County on property that adjoins Hurricane Creek. He is a member of the Friends of Hurricane Creek, and he is a past officer and a current employee of Friends (Tr. 71-72). Mr. Wathen uses, enjoys and recreates on Hurricane Creek and the North Fork of Hurricane Creek. The last time he used the North Fork of Hurricane Creek was about five years ago. The reason he has not been out there since then is that his paddle jacket suddenly rotted after being in the water (Tr. 72-73). He had last recreated on Hurricane Creek just a couple of weeks before the hearing. *Id.* at 73.

The Hearing Officer concludes that Reid and Wathen established under the above authority standing for themselves and their associations.

CONCLUSION

For the above stated reasons, the Hearing Officer finds and recommends that Petitioners have failed to prove that the Department failed to follow applicable law in the issuance to TRI of the NPDES Permit for Panther Mine No. 3. Therefore, the Hearing Officer recommends that the Petitioners' challenge be denied.

DONE this the 22nd day of March, 2010.

JAMES H. MCLEMORE
HEARING OFFICER

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ATTACHMENT "A"

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Alabama Rivers Alliance and The Friends of Hurricane Creek,	
Petitioners (08-07) and Intervenors (08-08),	
v.	**Docket No.: 08-07**
The Alabama Department of Environmental Management,	
Respondent,	
	Consolidated With
Tuscaloosa Resources, Inc.,	
Petitioner (08-08) and Respondent (08-07),	
v.	**Docket No.: 08-08**
The Alabama Department of Environmental Management,	
Respondent.	

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter came before the undersigned Hearing Officer on the following motions:

(1) Motion for Partial Summary Judgment of the Alabama Department of Environmental Management;

(2) ADEM's Motion and Memorandum in Support of Motion for Summary Judgment on Tuscaloosa Resources, Inc.'s Hearing Request; and

(3) Petitioner's [Friends of Hurricane Creek and Alabama Rivers Alliance, Inc.] Motion for Summary Judgment and Response to ADEM's Motion for Summary Judgment.

The motions have been briefed and addressed by the parties in accordance with the scheduling order issued herein.

Background

The procedural and factual background of these cases are set forth generally in the stipulation among the parties in the Joint Prehearing Order of March 13, 2009, and by the materials submitted in this motion proceeding. In 2001, the Alabama Department of Environmental Management ("Department") issued to Tuscaloosa Resources, Inc. ("TRI") NPDES Permit No. AL0074012 in connection with a surface mine called "Panther 3" mine (the "First Permit") Alabama Rivers Alliance and the Friends of Hurricane Creek (together called here "ARA") challenged the permit successfully before the Circuit Court of Montgomery County, by its order of April 20, 2006, which ruling was affirmed on appeal to the Alabama Court of Civil Appeals. See ADEM v. Alabama Rivers Alliance, 14 So.3d 853 (Ala. Civ. App. 2007) cert. den. ____ So.3d ____ (Ala. Feb. 20, 2009).

During the court proceedings, TRI applied for a reissuance of the permit which was scheduled to soon expire by its own terms. Under ADEM's rules, a permittee's authority to discharge waters may be effectively continued by reapplication and reissuance of a permit, which results in a new permit, rather than an extension of the previous permit. ADEM issued to TRI a new permit in October 2007 (the "Second Permit"). See, ADEM Admin. Code r.335-6-6-.17.

ARA challenged the issuance of TRI's Second Permit to the AEMC (Docket No. 08-07). In August 2008, and independent of the challenge, the Department elected to revoke the Second Permit, and issue a new and Third Permit. The Department acted, pursuant to its regulations, to address at least two changed circumstances, one being to accommodate the issuance by the EPA on November 1, 2004, of a Total Maximum Daily Load ("TMDL") for the North Fork of Hurricane Creek, and two being to accommodate a correction to an admitted error of TRI in the previous permit application.

TRI objected to the revocation of the Second Permit and challenged the decision to AEMC (Docket 08-08). ARA intervened. At the same time, ARA filed in the pending Docket No.08-07, a challenge to the AEMC of the reissuance of the permit after revocation, i.e. the Third Permit. Subsequently, these dockets were consolidated.

I. ARA's Contention No. 4A of ARA's Hearing Request

The Department's and ARA's respective motions for summary judgment on ARA's Hearing Request focus on three separate contentions, each which will be addressed in turn. Paragraph 4A of ARA's Hearing Request charges as follows:

> "NPDES Permit No. AL0074012 cannot be "reissued" because the previous issuance of NPDES Permit No. AL0074012 was reversed in *Alabama Rivers Alliance, Inc. v. Alabama Dep't of Envtl. Mgmt.*, No. Cv-2004-1052 (Montgomery County Cir. Ct.)(Order, Apr. 20, 2006), *appeal pending sub nom. Alabama Dep't of Envtl. Mgmt. v. Alabama Rivers Alliance, Inc.*, Docket Nos. 2050974 and 2050995. The Department cannot reissue a permit that does not exist. The reissuance is also void because of the doctrine of collateral estoppel, based on the prior judgment."

(ARA Hearing Request, Docket 08-07, Sept. 18, 2008). ARA moves from summary judgment on some, or all, contentions in its hearing request based on *res judicata,* collateral estoppel, and judicial estoppel. The Department, in turn, supported by TRI, moves for summary judgment on contention 4.A., arguing that as a mater of law *res judicata* or other estoppel theories do not apply.

ARA cites Ex Parte Flexible Products Company, 915 So.2d 35 (Ala. 2005), for the correct proposition that collateral estoppel, or for that matter *res judicata*, bars the relitigation of claims or issues previously decided where (1) the issues are identifiable (2) the issue was litigated in the previous case, (3) the issue was necessary to the previous judgment, and (4) the parties in both cases are the same. *Id*, at 45. ARA insists that the Third Permit (and for the matter the Second Permit) is the same "claim" and is wrought with the same issues as the First Permit which was invalided by the decision of the Circuit Court, as affirmed by the Alabama Court of Civil Appeals.

The Department disagrees and explains that the Second and Third Permits were not simply extensions of the First Permit, but were in fact and law, "new permits," issued after renewed application processes. In addition, the Department contends that the Third Permit was issued on the basis of different considerations and terms and conditions. The Department shows that the Third Permit was issued to accommodate what the First Permit did not, EPA's TMDL for the North Fork of Hurricane Creek. (Affidavit of Lynn Sisk, Exh. F, Motion for Partial Summary Judgment of the Department). Similarly, the Department shows that the applicable state regulations upon which the Third Permit was processed have changed since the issuance of the First Permit. Accordingly, argues the Department, the issues as to the different permits are not the same. In addition, the Department argues that because the Third Permit is the result of an independent and different application process than the First Permit, the judgment of the Circuit Court, as affirmed, involved a different "claim" and cannot be *res judicata.*

The Department is correct. The Third Permit is a result of a separate and successive application process than the First Permit. The challenge to the Third Permit, therefore, is not the "same claim" as the challenge addressed in the previous court proceedings. *Res judicata* and issue preclusion on the basis of a prior judicial decision do not operate to void the Third Permit. In addition, claims or issue preclusion in regard to successive and similar applications for governmental administrative authority (or "administrative finality") also is not applicable. The doctrine of administrative finality involves an interpretation of the underlying statutory scheme. See, Astoria Federal Savings & Loan v. Solimino, 501 U.S. 104 (1991), and generally, Johnston Ambulatory Surgical v. Nolan, 755 A.2d 799 (R.I., 2000). In Alabama, the doctrine has been recognized exclusively in the context of successive applications for land zoning permits. See Mobile v. Cunningham, 243 So.2d 723 (Ala.Civ.App. 1971). Even then, the appellate court held that a change in conditions or circumstances between the first and successive applications precluded the application of *res judicata* or estoppel in the administrative law context.

Here, the courts in Alabama have not adopted *res judicata* or collateral estoppel in the context of successive applications for an NPDES permit. In addition, the Third Permit is a different proceeding than that addressed in the previous court orders, and involves materially different conditions and circumstances and law. Therefore, there is no basis under Alabama law for the application of *res judicata*, collateral estoppel, issue preclusion, or "administrative finality" as to any matters between the First Permit and the successive permits. Accordingly, the Hearing Officer recommends that the Department's motion for summary judgment as to ARA's contention in Paragraph 4.A. of the Hearing Request should be GRANTED. Similarly, ARA's motion for summary judgment on the basis of judicial estoppel theories should be DENIED.

II. ARA's Contention No. 4.C. of ARA's Hearing Request

Paragraph 4.C. of ARA's Hearing Request charges as follows:

> "The reissuance of NPDES Permit No. AL0074012 is prohibited under ADEM Admin. Code R. 335-6-6-.04(h) because the discharge will not comply with 40 C.F.R. § 122.44(d)(1)(vii)(B) and 40 C.F.R. 122.4(i)."

(ARA Hearing Request, Docket No. 08-07, September 18, 2008). The Department moves for summary judgment and argues that (1) the above-referenced federal regulatory provisions do not apply to this permit and (2) that the EPA, which adopted TMDL for the subject water course, implicitly approved the Third Permit because it had expressly approved a different permit (TRI's East Brookwood Mine permit) which incorporated the same TMDL, and upon which the subject Third Permit was modeled. The Department, therefore, argues that EPA's purported approval of the Third Permit precludes further assessment under the aforesaid federal regulations.

ARA argues that the Department has failed to demonstrate the inapplicability of the aforesaid regulations. It also argues that there is no evidentiary showing that EPA has approved this permit as compliant with TMDL or otherwise.

Having reviewed the submission, this Hearing Officer is not satisfied that summary judgment on this contention is justified. Accordingly, the Hearing Officer declines to

recommend approval of the Department's motion for summary judgment on ARA's contention in Paragraph 4.C. of its Hearing Request.

III. ARA's Contention No. 4.E. of ARA's Hearing Request

Paragraph 4.E. of ARA's Hearing Request charges as follows:

> "The discharge limitations and monitoring requirements included in NPDES Permit No. AL0074012 are not consistent with the assumptions and requirements of *Total Maximum Daily Load (TMDL) for Metals, Pathogens and Turbidity in the Hurricane Creek Watershed* (Nov. 1, 2004) established by EPA pursuant to 40 C.F.R. § 130.7 as required by 40 C.F.R. § 122.44(d)(1)(vii)(B) and ADEM's Continuing Planning Process (Sept. 25, 2002) adopted pursuant to 40 C.F.R. § 130.5."

(ARA Hearing Request, Docket No. 08-07, September 18, 2008). The Department moves for summary judgment and argues that the Third Permit meets the requirements of the TMDL adopted by the EPA, and that this proceeding cannot be used to challenge EPA's interpretation of its own TMDL. In response, ARA states that its challenge is not to TMDL, or even EPA's interpretation of the TMDL. Rather, ARA contests that ADEM properly applied the TMDL to the Third Permit. The Department's submission does not establish that there is no genuine issue of material fact on this issue. Accordingly, this Hearing Officer declines to recommend the approval of the Department's motion for summary judgment on ARA's Contention No. 4.E.

IV. Department's Motion for Summary Judgment on TRI's Hearing Request

As set forth above in the procedural and factual Background section of this recommendation, TRI filed a Hearing Request challenging the Department's revocation of the Second Permit and consequent issuance of the Third Permit. (TRI Hearing Request, Docket No. 08-08, September 26, 2008.) TRI alleged, in general, that the Department was not justified revoking the Second Permit and in turn, issuing the Third Permit. TRI contended that EPA's adoption of TMDL, in reliance upon which the Department purported to revoke the Second Permit, had been in effect long before the application process and, therefore, was not "new

information" which could justify revocation. TRI also challenged the more stringent obligations imposed upon TRI by the Third Permit.

As set forth in the motion, ADEM Admin. Code r.335-6-6-.17 authorizes the Department to modify an existing permit, or revoke it and issue a new permit, for such cause as the receipt of new information. While reviewing the permit file for the purpose of making modifications to accommodate EPA's TMDL, the Department discovered an error in the application for the Second Permit, which error the Department says was confirmed by TRI (Affidavit of Steven Jenkins, Exh. B, Motion for Summary Judgment as to TRI). Accordingly, the Department contends its revocation of the Second Permit, and issuance of a new permit, the Third Permit, was justified as a matter of law. This Hearing Officer agrees and notes that TRI has not opposed or otherwise responded to the motion.

The Department also contends that it is entitled to summary judgment on TRI's challenge to the issuance of the Third Permit. In support of the motion, the Department submits the Affidavit of Glenda Dean, Chief of the NPDES Permit Branch at ADEM (Exh. "A" to the motion at to TRI). Ms. Dean testifies that the Third Permit implements EPA's TMDL. In addition, Steven Jenkins testifies that the Third Permit was modeled after TRI's East Brookwood Mine Permit which the EPA approved. (Exh. "B" to the motion as to TRI.) Notwithstanding TRI's election not to respond to the Department's motion as to TRI, the issue whether the Third Permit properly applies TMDL remains a question of fact and law under APA's Hearing Request in Docket No. 08-07, as addressed above. Accordingly, summary judgment is not appropriate in regard to this aspect of the Department's motion.

Therefore, this Hearing Officer recommends that the Department's motion for summary judgment is due to be GRANTED in part, that there is no issue of fact or law that the Department's revocation of the Second Permit was justified. This Hearing Officer declines to

recommend summary judgment on the Department's contention that the issuance of the Third Permit complies with TMDL or otherwise is compliant with all applicable law.

Conclusion

For the reasons stated herein, this Hearing Officer recommends as follows:

(1) That as to ARA's contention in Paragraph 4.A. of its Hearing Request that the issuance of the Second and Third Permits is barred by *res judicata* or collateral estoppel, the Department's motion for partial summary judgment should be GRANTED. In turn, ARA's motion for summary judgment should be DENIED. *Res judicata* or collateral estoppel do not apply to the issuance of the Second or Third Permit.

(2) That as to ARA's contention in Paragraph 4.C. of its Hearing Request, the Department's motion for partial summary judgment should be DENIED.

(3) That as to ARA's contention in Paragraph 4.E. of its Hearing Request, the Department's motion for partial summary judgment should be DENIED.

(4) That as to TRI's Request for Hearing challenging the revocation of the Second Permit, and challenging the Third Permit, the Department's motion for summary judgment should be GRANTED in part and the Department's action to revoke the Second Permit should be upheld. As to the issue whether the Third Permit complies with applicable laws, there remains a question of material fact and the motion in that regard should be DENIED.

DONE this the 8th day of October, 2009.

JAMES H. MCLEMORE
HEARING OFFICER

cc: Via Electronic Mail
Debra S. Thomas

1150665.doc

Via Electronic and U.S. Mail
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Jarred O. Taylor II

Attachment 4

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the Matter of:	)	
	)	
De Nora Tech, Inc.,	)	
(formerly known as Eltech Systems Corp.)	)	
	)	
Petitioner,	)	
	)	
vs.	)	EMC Docket No. 10-05
	)	
Alabama Department of	)	
Environmental Management,	)	
	)	
Respondent.	)	

ORDER

This cause having come before the Environmental Management Commission pursuant to the Joint Motion to Continue and for Placement on Administrative Docket in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Joint Motion to Continue and for Placement on Administrative Docket is hereby granted; and

2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and

3. That a copy of this Order, along with a copy of the Joint Motion to Continue and for Placement on Administrative Docket, attached hereto and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 16th day of April 2010.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 16th day of April 2010.

John H. Lester, Vice Chair
Environmental Management Commission
Certified this 16th day of April 2010

BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

DE NORA TECH, INC., (formerly known as ELTECH SYSTEMS CORP.)	)	
v.	)	
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	)	
(In the matter of ADEM's denial by letter dated February 22, 2010, of De Nora Tech, Inc.'s request to utilize the financial test to replace DNT's existing Letter of Credit as a financial assurance mechanism for the former Eltech Colbert County Facility)	)	**EMC Docket No. 10-05**

JOINT MOTION TO CONTINUE AND FOR PLACEMENT ON ADMINISTRATIVE DOCKET

COME NOW, De Nora Tech, Inc. (f/k/a ELTECH SYSTEMS CORP) ("De Nora"), by and through its attorney, T. Michael Brown, and the Alabama Department of Environmental Management ("ADEM"), by and through its attorney, Paul Christian Sasser, Jr., and hereby move to continue these proceedings and request that this matter be placed on the administrative docket. In support of this motion, the parties state as follows:

1. This matter concerns De Nora's financial assurance for certain real property located in Colbert County, Alabama, EPA ID NO: ALD 067 110 676.

2. On March 23, 2010, De Nora filed a formal request for an administrative hearing, pursuant to ADEM Administrative Code Rule 335-2-1-.04.

3. The parties now seek to continue this matter and place it on the administrative docket to allow time for the parties to explore possibilities of settlementof the issues raised in De Nora's administrative hearing request.

4. The parties agree to waive the forty-five (45) day hearing requirement, as well as the pre-conference hearing.

5. The parties further agree that neither party's time to file requests or objections is waived.

6. Neither party will be prejudiced by continuing this matter and placing it on the administrative docket and doing so will give the parties ample time to explore all settlement possibilities.

WHEREFORE, De Nora Tech, Inc. and the Alabama Department of Environmental Management respectfully request that this matter be continued and placed on the administrative docket.

Respectfully submitted,

T. Michael Brown
Attorney for De Nora Tech, Inc.

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Attachment 5

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

WHEREAS, pursuant to Ala. Code § 22-22A-6(a)(1) (2006 Rplc. Vol.), the Alabama Environmental Management Commission (Commission) met on April 16, 2010, and considered the selection of the Director of the Alabama Department of Environmental Management (ADEM); and

WHEREAS, the Commission by a majority of votes selected Lance R. LeFleur as Director of ADEM;

NOW THEREFORE, the Commission does hereby appoint Lance R. LeFleur to the position of Director of ADEM at the salary of $144,195.84 annually, to be effective June 1, 2010.

IN WITNESS WHEREOF, we have affixed our signatures below on this 16th day of April 2010.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 16th day of April 2010.

John H. Lester, Vice Chair
Environmental Management Commission
Certified this 16th day of April 2010