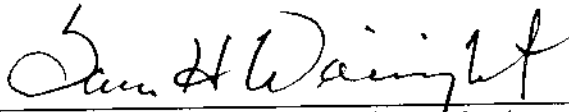


8/26/09

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
June 19, 2009

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 June 19, 2009.



Sam H. Wainwright, Vice Chair
Environmental Management Commission

Certified this 21st day of August 2009.

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
June 19, 2009

Convened: 11:00 a.m.
Adjourned: 11:56 a.m.

Part A

Transcript

Part B

Attachment Index

Attachments 1 – 7

Part A

ENVIRONMENTAL MANAGEMENT COMMISSION

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

June 19, 2009 11:00 a.m.

COMMISSION MEMBERS PRESENT:

LAUREL G. GARDNER, D.V.M., CHAIR
SAM H. WAINWRIGHT, P.E., VICE CHAIR
ANITA L. ARCHIE
H. LANIER BROWN, II
JOHN H. LESTER, D.V.M.
J. CONRAD PIERCE, M.D.

COMMISSION MEMBER NOT PRESENT:

W. SCOTT PHILLIPS

ALSO PRESENT:

ONIS "TREY" GLENN, III,
ADEM DIRECTOR
ROBERT TAMBLING, EMC LEGAL COUNSEL
DEBI THOMAS, EMC EXECUTIVE ASSISTANT

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 6/19/2009

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1 DR. GARDNER: All right.

2 I'm going to call this meeting of the

3 Alabama Environmental Management

4 Commission to order, and our first

5 agenda item is consideration of the

6 minutes of the meeting held on April

7 17th, 2009. Could I have a motion

8 from the Commission to adopt these

9 minutes?

10 DR. LESTER: I make a motion

11 to adopt the minutes as presented to

12 us.

13 MR. WAINWRIGHT: Second.

14 DR. GARDNER: We have a

15 motion and a second. Any discussion

16 regarding those minutes?

17 (No response.)

18 DR. GARDNER: Okay. All in

19 favor, signify by the sign aye.

20 (Those in favor of the

21 motion so indicated.)

22 DR. GARDNER: All opposed

23 same sign.

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1	Inc., versus ADEM and the Utilities Board of the City of Bayou La Batre, Intervenor, EMC Docket Number 09-01, an NPDES-related matter	
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1 (No response.)

2 DR. GARDNER: Okay. That

3 motion carries.

4 Agenda Item Number 2 is

5 report from the Director.

6 MR. GLENN: Thank you, Chair

7 Gardner and Commissioners. And

8 welcome Commissioner Brown and Dr.

9 Pierce as well. I appreciate the

10 opportunity to stand before you and

11 give this report about some of the

12 happenings at the Department.

13 First, jumping right in

14 to that, contracts, you should have

15 recently received a memo from me

16 outlining recently-executed contracts

17 that the Department has entered into.

18 Also, regarding our

19 budget, we're currently in fiscal year

20 2009, and we continue to live within

21 that budget as we have been discussing

22 for some time for the benefit of

23 Commissioners Brown and Pierce; that

2 (Pages 2 to 5)

<p style="text-align: right;">Page 6</p> <p>1 during this year as you may have seen 2 in the media, the Governor has put in 3 place proration, and the budgets were 4 adjusted from when the year began 5 until now. And so we've dealt with 6 those adjustments. And actually we're 7 looking at an increase in our budget 8 from fiscal year 2009 to 2010. Our 9 total budget this year is around \$61 10 and a half million. It will be \$63 11 and a half million in 2010. That 12 increase is mainly due to the 13 continued implementation of the solid 14 waste program from the passage of that 15 bill as that money gets loaded into 16 our budget. But specifically looking 17 at the general fund dollars that we 18 receive, our 2009 general fund 19 appropriation as of today is around 20 \$5.2 million. The one passed by the 21 legislature for 2010 is about 22 \$5.8 million. So we were real pleased 23 with a \$600,000 increase when most</p>	<p style="text-align: right;">Page 8</p> <p>1 grave," a hazardous waste term, "EPA 2 blunder." What the person meant by 3 that was that EPA originally approved 4 a program to regulate and allow the 5 disposal of biosolids as fertilizer to 6 farmers. Now they have come back here 7 very recently and discovered an 8 emerging contaminant within those 9 biosolids as a byproduct to some 10 industrial processes in the area, not 11 just the area in Alabama, but across 12 the country, that may be dangerous to 13 livestock, crops, and in turn human 14 beings. They are now preemptively 15 warning individuals about this issue, 16 and this, of course, has raised many 17 more questions in the area than it has 18 answered at this point in time. ADEM 19 is focused on what ADEM regulates: 20 Primarily drinking water. The most 21 immediate contact with citizens' 22 health and safety is their drinking 23 water, and we have been very actively</p>
<p style="text-align: right;">Page 7</p> <p>1 other agencies around were seeing -- 2 seeing cuts. This figure though is 3 significantly lower than our 2008 4 budget, which was around \$6.6 million 5 from the general fund, so it still is 6 reduced on that. Now, one thing 7 though to note is that the legislature 8 does continue to use the Pollution 9 Control Grant Fund as a mechanism to 10 help fund projects that are authorized 11 under the Environmental Management 12 Act. 13 Let me jump to a few 14 current issues. There are a few 15 issues that you may have either heard 16 about or will be hearing about, and I 17 just want to touch briefly on these 18 things. The first is the Decatur area 19 biosolids. I spoke to Chair Gardner a 20 moment ago and said, I heard the best 21 quote on this to help put it in 22 perspective from ADEM's standpoint. I 23 heard this referred to as a "cradle to</p>	<p style="text-align: right;">Page 9</p> <p>1 engaged in this issue in testing the 2 drinking water and ensuring that it is 3 safe and working through any issues 4 that may come up. 5 During the last 6 legislative session, some law makers 7 did pass some local legislation 8 associated with biosolids and their 9 ability to prohibit it being used as 10 fertilizer in their counties. 11 Another issue is REEF 12 Environmental. There is a 13 privately-owned wastewater treatment 14 plant in the area of Sylacauga that's 15 been producing some fairly foul odors 16 that you may have read about in the 17 newspaper a lot. The health 18 department, of course, was engaged in 19 this very early on. We called and 20 coordinated with them. It's important 21 to know that we don't have regulations 22 that specifically address odor 23 requirements, if you will, in any of</p>

3 (Pages 6 to 9)

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 6/19/2009

<p style="text-align: right;">Page 10</p> <p>1 these plants; but we have used the 2 remaining portions of our regulations 3 to persuade REEF to cover the holding 4 pond and install some scrubbers to try 5 to address the odor issue. We also 6 now have REEF under an air permit that 7 applies fairly stringent standards for 8 compliance with some of those 9 compliance points coming up soon. So 10 this is an ongoing issue that we 11 continue to address here at the 12 Department. 13 The last kind of current 14 issue that I want to touch on is TVA 15 waste. This is the non-hazardous 16 remediation waste that is the 17 byproduct of the Kingston spill which 18 I'm sure you heard about several, 19 several months ago. That is 20 potentially going to a landfill in 21 Perry County, Alabama. The Perry 22 County Commission, of course, many 23 years ago chose to have this type of</p>	<p style="text-align: right;">Page 12</p> <p>1 the outgrowth of the Strategic Plan. 2 I'm very pleased with the results that 3 we've achieved to date on this. And I 4 can confidently say all of your 5 direction and leadership at the 6 Commission level working with the 7 Department, we have taken more steps 8 even now to improve the performance of 9 the Department. 10 Let me touch on a couple 11 of things listed here on the screen. 12 The ADEM Regulatory Conference, and I 13 know Commissioner Wainwright and 14 Commissioner Archie were able to come 15 by and observe a little bit of that, 16 and we appreciate the Commission 17 involvement in that conference. It 18 was held on May 21st, and 250-plus 19 attendees rated the overall conference 20 as excellent. And it was an 21 outstanding turnout, an outstanding 22 conference, and we shared some great 23 information and are looking forward to</p>
<p style="text-align: right;">Page 11</p> <p>1 business operating in their county and 2 allow this type of activity to occur. 3 We are very aware though of the high 4 interest among numerous groups as well 5 as some of the elected officials and 6 citizens in Perry County that may be 7 benefiting from the types of jobs or 8 fees that may be coming in from that. 9 But we do from a regulatory standpoint 10 continue to closely monitor the 11 activity, work with EPA, who is a 12 decision maker in the remediation of 13 the spill in Tennessee, to make sure 14 that all of our regulations are 15 implemented properly so that the 16 Subtitle D landfill continues to 17 operate and function in compliance 18 with our regulations. 19 Now on to what's been the 20 focus, I know, of our conversations 21 for some time and a lot of activity 22 here at the Department, we continue to 23 implement the Operating Plan that was</p>	<p style="text-align: right;">Page 13</p> <p>1 building on that even more next year 2 and taking that to the next level. 3 Project field operations 4 is in the implementation phase 5 starting with the underground storage 6 tank and service station inspections. 7 We're going to begin moving those, 8 transferring those, to the Field 9 Operations Division as they are very 10 ripe for some efficiency and 11 effectiveness benefits through a 12 decentralized compliance determination 13 activity. 14 Project speed, this is 15 the one that y'all received a memo on 16 fairly recently and we're pretty proud 17 of. It was a fairly short memo, and, 18 you know, we really wanted to put some 19 flashing lights on it because of how 20 big of a deal it was. But we now have 21 goals set for each of our major 22 programs and the major areas of our 23 functions. And that obviously now</p>

4 (Pages 10 to 13)

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<p style="text-align: right;">Page 14</p> <p>1 allows us to focus the conversation 2 here and focus the performance and 3 activities at the Department around 4 some commonly-recognized goals that 5 will allow the line of site to occur 6 that we've talked about between the 7 Commission's desires for the 8 Department and everyone here at the 9 department working toward that area. 10 Project eFile is another 11 one that we're real pleased with. 12 I'll have to be honest with you; I 13 have to really hand it to my staff. I 14 envisioned something much smaller 15 scale when I was talking with you in 16 the Strategic Plan and Operating Plan 17 phase, but they've kind of really just 18 blew past that in their initial 19 thinking. And it was -- eFile was 20 initiated, and there is now a link on 21 the ADEM website that allows anyone 22 with web access to search all 23 documents that we have here</p>	<p style="text-align: right;">Page 16</p> <p>1 The next issue involves 2 our construction stormwater program, 3 always a hot topic of discussion with 4 us as well as in the state. But as 5 I'm sure you're aware, our regulations 6 call for pre- and post-construction 7 runoff volume and velocity to be 8 comparable. As we continue to 9 implement these regulations, we have 10 developed a construction best 11 management practice plan template, 12 which can be used by an applicant as a 13 guide to assure consistency with our 14 construction stormwater rules that we 15 have. As part of the template, pre- 16 and post-construction stormwater 17 volume and velocity are addressed in 18 how people can deal with that issue. 19 It's now on our website, and we think 20 it's going to be and already is now an 21 invaluable tool for people to 22 implement as we continue on the effort 23 to implement our compliance rate and</p>
<p style="text-align: right;">Page 15</p> <p>1 electronically in our FileNet system. 2 All documents may not be available 3 today because there are some old 4 historic documents that have not yet 5 been scanned, and they're in paper 6 form still, but we're working on that 7 backlog. And we -- as has been 8 communicated to you, we're looking 9 forward to some of the future 10 enhancements to that program to make 11 searching of those documents possible. 12 They're there. Finding them, as with 13 anything on the internet, sometimes is 14 more of a challenge. 15 Lastly -- and this didn't 16 even make it up here -- but compliance 17 rate, you should have received a memo 18 from me today regarding our proposal 19 to you on how we can begin the 20 discussion about looking at compliance 21 rates for our at least 10 major 22 programs, and then we'll build on it 23 from there.</p>	<p style="text-align: right;">Page 17</p> <p>1 our speed goals that we have. 2 Lastly, on technical 3 issues -- and I would like to touch on 4 one more thing at the end -- but 5 endangerment and greenhouse gas. This 6 is not an ADEM rulemaking or ADEM 7 policy issue right now, but it is a 8 very hot issue going on in -- across 9 the country today. And there's really 10 two things going on: One of them more 11 timely right now from a regulatory 12 standpoint is the April 24th EPA 13 proposed "endangerment and cause or 14 contribute findings" for greenhouse 15 gases under Section 202(a) of the 16 Clean Air Act. Put simply, the 17 finding found that greenhouse gases 18 contribute to air pollution that may 19 endanger public health and welfare and 20 that emissions from new motor vehicles 21 are a significant contributor to that. 22 Six gases were identified, including 23 the main three that we all hear about</p>

5 (Pages 14 to 17)

<p style="text-align: right;">Page 18</p> <p>1 and talk about: Carbon dioxide, 2 methane and nitrous oxide. Comments 3 on this proposal are due by June 23rd. 4 The Department has already issued some 5 preliminary comments and a request for 6 an extension of that time period. We 7 have indicated our preference that's 8 been discussed at this level before, 9 our preference that Congress address 10 this type of national and even global 11 issue comprehensively through 12 legislation, not through, you know, 13 trying to find cracks and holes in the 14 regulations to do that. As a request 15 though, we also prepared a package of 16 a lot of this information that covers 17 everything from the Waxman Bill, which 18 is the bill in Congress, the renewable 19 portfolio standard issue as well as 20 the carbon cap and trade bill with 21 some of the greenhouse gas 22 endangerment finding documents as well 23 and is available to you for your</p>	<p style="text-align: right;">Page 20</p> <p>1 want to recognize our staff for that, 2 you for the passing of the rules to 3 allow us to do that, and, of course, 4 the legislature. 5 Along those lines, I hope 6 you noticed coming in a lot of the 7 recyclable -- or our recycling program 8 material out there. That program is 9 underway. We're looking at the grants 10 going out and continuing to develop 11 those regulations as well as the 12 cleanup portion of the solid waste 13 program as well. So that is 14 continuing to be implemented every 15 day. The staff is developing that 16 program as we speak. And as we 17 mentioned earlier in the budget talk, 18 that you see that that program is 19 still being implemented, and that law 20 is still coming into play. And so the 21 monies are starting to come in for 22 that program to make that just as 23 successful, if not more, than the</p>
<p style="text-align: right;">Page 19</p> <p>1 consideration. 2 In closing before 3 questions, I would like to recognize 4 -- I don't know if Gavin is in here 5 and Phil Davis and Gerald. There they 6 are; that's our good Baptists back 7 there. But Gavin recently went up to 8 Gadsden and received an award at the 9 Keep Etowah Beautiful Awards Banquet 10 for the work on the Attalla site. For 11 the new Commissioners, this is the 12 first success story of our scrap tire 13 program that we have, kind of the 14 first formal recycling effort too, if 15 you will, but taking and implementing 16 a program to clean up some areas in 17 Alabama that have previously been an 18 issue. And so we've gone through all 19 kinds of phases with folks on this, 20 but culminating with taking a site 21 that was a hazard and making it now 22 not a hazard and even receiving an 23 reward for our efforts. So I just</p>	<p style="text-align: right;">Page 21</p> <p>1 scrap tire program. We've completed 2 the first major site on that. We've 3 done a lot of small sites as well on 4 the scrap tire program. 5 With that said, that 6 concludes my remarks that I've 7 prepared for you. I would be happy to 8 answer any questions about these 9 remarks or anything else that you've 10 got on your mind. 11 DR. GARDNER: Do any of the 12 Commissioners have any questions for 13 Mr. Glenn? 14 MR. WAINWRIGHT: I do. 15 DR. GARDNER: Mr. 16 Wainwright? 17 MR. WAINWRIGHT: Mr. Glenn, 18 I want to thank you for putting this 19 material together regarding the 20 endangerment finding for the EPA. It 21 kind of caught me by surprise to find 22 out about it, and it ends on the 23rd, 23 or it closes. Have you -- has the</p>

6 (Pages 18 to 21)

Page 22	Page 24
<p>1 Agency filed any comments regarding 2 this finding? 3 MR. GLENN: Yes, sir, we 4 did. I believe it was last week I 5 signed a letter of comments as to 6 basically doing two things: Saying 7 that there's a significant discussion 8 about this, and so therefore we still 9 know of a lot of people who are 10 developing their thoughts and want to 11 comment on that and would request time 12 to do that; as well as delivering our 13 message, which is that, as we 14 discussed a moment ago, about a 15 legislative solution as opposed to 16 trying to find cracks and holes in 17 regulations. 18 DR. GARDNER: Would it be 19 possible, Mr. Glenn, for us to get 20 copies of those comments? 21 MR. GLENN: Absolutely. 22 I'll make sure y'all receive those. 23 DR. GARDNER: Thank you.</p>	<p>1 understanding, some of these have been 2 previously supplemental appropriations 3 that have been in our budget, or 4 earmarked rather in our budget. And 5 so I want you to tell us a little bit 6 where your internal processes so far 7 as making sure that that money is 8 spent appropriately and we have full 9 accountability. And then a little bit 10 touch on the fact that there was an 11 act that goes in effect October 1st 12 that requires for the posting of 13 expenditures on the website of those 14 expenditures and how that will relate 15 to particularly, you know, earmarks 16 that we may have in ADEM's budget. 17 MR. GLENN: Absolutely. And 18 any time we do administer funds for 19 the state legislature or for funds 20 coming from Congress or anywhere else, 21 we make sure we do that in full 22 coordination with, of course, the 23 comptroller and the examiner's office</p>
Page 23	Page 25
<p>1 Any further questions? 2 MS. ARCHIE: I do, Madam 3 Chair. 4 DR. GARDNER: Ms. Archie -- 5 I'm sorry. Mr. Wainwright? 6 MR. WAINWRIGHT: I'll 7 continue in a moment. 8 MS. ARCHIE: Okay. I want 9 to go back -- first of all, I wanted 10 to just comment and say that I really 11 did enjoy the regulatory conference. 12 I think it was absolutely great. I 13 hope that every Commissioner gets the 14 opportunity to attend one. It is 15 getting better each year, and so I 16 really did enjoy attending that. 17 I want to go back and 18 talk a little bit about the budget. 19 You know, my eyes were kind of opened 20 that I saw some supplemental 21 appropriations that were put into 22 ADEM's budget. And so I, number one, 23 wanted to talk about -- or from my</p>	<p>1 as the body that goes in and ensures 2 the expenditures -- or audits the 3 expenditures of the funds. Of course, 4 before we allocate any funds, 5 distribute any funds, we coordinate 6 with them, as we did in this case. 7 And before we -- any monies are 8 distributed, we make sure that there 9 is, of course, a receipt of a proposal 10 from an authorized entity that 11 outlines a project that makes sure 12 that it is in compliance, that it's a 13 pollution control project. Then per 14 the language in the law, in the 15 budget, we then make the budget 16 chairman of the House and the Senate 17 aware of that to have them in the loop 18 as we understood from the legislature 19 and from that budget is the intention 20 here. And so we make them aware of 21 that, and then barring any issues, we 22 would then execute an agreement 23 between ADEM and the applicant</p>

7 (Pages 22 to 25)

<p style="text-align: right;">Page 26</p> <p>1 ensuring the applicant certifies 2 compliance with the laws and 3 regulations that are applicable 4 specifically to the expenditures of 5 the funds, as the examiners of public 6 accounts will be knocking on their 7 door, I'm sure, as they do ours every 8 year. And as you know in your job, 9 they make sure they come around and 10 check everything to make sure it's 11 done right. Then finally we notify 12 the budget chairman and anyone else 13 that may be in that area that has been 14 involved in that project that the 15 award has taken place and basically 16 turned it over to that entity and the 17 examiners of public accounts. And at 18 that time, the grant funds would then 19 be distributed. Again, that's not 20 really necessarily a new procedure, a 21 few nuances being state level. But 22 we've administered funds for Congress 23 as well when we they may send some</p>	<p style="text-align: right;">Page 28</p> <p>1 put all of the funds out there that 2 are being distributed so everybody 3 knows where they're going, what came 4 in, what goes out, what's sitting 5 there. You know, with funds, whether 6 they're given to us from the state 7 level or the federal level, they're 8 given through here for people to use; 9 and if that doesn't happen, they're 10 going to take them away and give them 11 to some other state or some other 12 program. And so we will be prepared 13 to implement the provisions of the new 14 changes that are occurring in the 15 notification and disclosure area 16 through our practices that we've 17 learned through the stimulus program. 18 MS. ARCHIE: Thank you. I 19 have no other questions. 20 DR. GARDNER: Mr. 21 Wainwright? 22 MR. WAINWRIGHT: I had one 23 more statement about this endangerment</p>
<p style="text-align: right;">Page 27</p> <p>1 money down through ADEM for pollution 2 control projects in Alabama. 3 Now, the thing I didn't 4 touch on, because I felt like I talked 5 about it too much over the past 6 several months, is stimulus funds. 7 And so we continue to implement that 8 and distribute the stimulus funds and 9 run through that program, which 10 requires a lot of new things for ADEM, 11 for the State of Alabama, for this 12 country, regarding notification of how 13 monies are spent. So we at ADEM, as 14 well as, I think, all of our sister 15 agencies in Alabama and across the 16 country, are having to put in place 17 procedures to notify everyone of where 18 this money is going and what it's 19 going to. And so these procedures 20 will be what will allow us to comply 21 with the changes that will occur in 22 October. This will just be our 23 standard course of business now, to</p>	<p style="text-align: right;">Page 29</p> <p>1 finding. I urge you, Commissioners, 2 if you would to please read this 3 material that's been given to us, 4 particularly the statement in here 5 regarding the impact, economic impact, 6 that the -- that this will have on the 7 State of Alabama. There's also a 8 statement from Dr. Christy, who is the 9 state meteorologist, and also a paper 10 by Dr. Fred Singer regarding this 11 issue. So please take the time and 12 read this material. Thank you. 13 DR. GARDNER: Are there any 14 further questions for Mr. Glenn? 15 (No response.) 16 DR. GARDNER: Okay. Thank 17 you, Mr. Glenn. 18 MR. GLENN: Thank you. 19 DR. GARDNER: Agenda Item 20 Number 3 is the report from the 21 Commission Chair. And, first, I would 22 like to welcome our two new 23 Commissioners, Dr. Pierce and Mr.</p>

8 (Pages 26 to 29)

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 6/19/2009

<p style="text-align: right;">Page 30</p> <p>1 Brown. We appreciate your willingness 2 to serve and look forward to working 3 with you and getting your input on 4 various things. 5 We also need to adopt a 6 resolution for former Commissioner 7 Hairston. We're going to miss him. 8 And I would just like to read the 9 resolution. It says (as read:) 10 Whereas, Kenneth A. Hairston, Esquire, 11 has served as a member of the Alabama 12 Environmental Management Commission 13 from March 20th, 2002, until April 14 23rd, 2009; and his legal expertise 15 has contributed significantly to the 16 impartial and orderly conduct of the 17 Commission's deliberations on a 18 variety of issues; and his dedicated 19 service resulted in the continuation 20 of an effective program of 21 environmental management for the State 22 of Alabama; and his efforts have 23 improved the ability of the State to</p>	<p style="text-align: right;">Page 32</p> <p>1 MS. ARCHIE: Second. 2 DR. GARDNER: All in favor? 3 (Those in favor of the 4 motion so indicated.) 5 DR. GARDNER: All opposed 6 same sign. 7 (No response.) 8 DR. GARDNER: Thank you. 9 (Signing of resolution.) 10 DR. GARDNER: Okay. We will 11 move on to Agenda Item Number 4. This 12 is a discussion and consideration of a 13 proposal for the development of a form 14 for the evaluation of the Director. 15 Dr. Lester, would you please introduce 16 this? 17 DR. LESTER: Thank you, 18 Madam Chairman. One of our rules on 19 the evaluation of the Director states 20 that the Director shall be reviewed by 21 the Environmental Management 22 Commission annually. Our last one, we 23 used the State form that they had for</p>
<p style="text-align: right;">Page 31</p> <p>1 respond in an efficient, 2 comprehensive, and coordinated manner 3 to environmental problems assuring for 4 all citizens of the State a safe, 5 healthful, and productive environment; 6 and his contributions have resulted in 7 more effective protection of our air, 8 land, water, and coastal resources, a 9 major challenge in light of the growth 10 and development in Alabama; and his 11 dedication to effectively resolving 12 environmental issues has often been 13 accomplished at great personal effort 14 and sacrifice. Now, therefore, be it 15 resolved that the Alabama 16 Environmental Management Commission 17 expresses gratitude to Kenneth A. 18 Hairston, Esquire, for his significant 19 contribution to a better environment 20 and an improved quality of life for 21 the citizens of Alabama. Done this 22 19th day of June, 2009. 23 DR. LESTER: So move.</p>	<p style="text-align: right;">Page 33</p> <p>1 Directors in all these departments. 2 When we got through with it -- and in 3 each one of your packets you have a 4 copy of what we did last time -- 5 several of the Commissioners thought 6 that this thing was real cumbersome, 7 and a lot of the questions that was in 8 it doesn't apply to us, ADEM or our 9 Director. So they asked that our 10 Committee -- which now I'm the only 11 member on it, Madam Chairman. You'll 12 have to get me some help. 13 DR. GARDNER: I will do 14 that. 15 DR. LESTER: -- come up with 16 a new type of evaluation form. This 17 started, well, last fall. At that 18 particular time through the fall and 19 winter, we were involved with our 20 Strategic Plan for the Commission, and 21 it had parts of this evaluation and 22 all in it, so the Commission decided 23 that we would wait until we got our</p>

9 (Pages 30 to 33)

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<p style="text-align: right;">Page 34</p> <p>1 Strategic Plan through and then come 2 at that point to do the evaluation, 3 which will be due in the fall if 4 everything goes smooth with it. So we 5 -- the Strategic Plan, it was a real 6 complicated proposal, so we used the 7 Auburn Montgomery Center of 8 Government. Robert T. Ashworth who's 9 in charge of it developed our 10 Strategic Plan for us, and I would say 11 he did an outstanding job. And when 12 he brought it back to us, it was 13 approved, and that is what we are 14 working under now. The thoughts were 15 that since they did such a good job in 16 that and that since this other is such 17 a piecemeal thing, that it would be 18 well to ask them to develop an 19 evaluation form and all for us for our 20 Director, which we asked them to get 21 us a proposal, and we presented it to 22 each Commissioner at the last meeting 23 which our two new Commissioners will</p>	<p style="text-align: right;">Page 36</p> <p>1 like to present to the Commission this 2 proposal for the development of the 3 form for ADEM's evaluation of our 4 Director, which would make a real 5 clean thing that we can then go into 6 and we could have all of this back by 7 our -- well, maybe either our August 8 or our October meeting -- August, 9 September -- our October meeting for 10 evaluation that we go through for our 11 Director. So, Madam Chairman, I would 12 like to present this agreement for 13 passage by our Commission. 14 MR. WAINWRIGHT: I second 15 it. 16 DR. GARDNER: Okay. Thank 17 you. We have a motion and a second to 18 accept the proposal for the 19 development of a form for the 20 evaluation of the Director. The floor 21 is now open for discussion. 22 MS. ARCHIE: Madam Chair? 23 DR. GARDNER: Ms. Archie?</p>
<p style="text-align: right;">Page 35</p> <p>1 have a copy of that in there too when 2 it came back. So they will -- it 3 takes about six months for them to go 4 through all this, and the total on the 5 -- the total of doing this would be 6 \$12,000. It's in three different 7 things, and it will be designed for 8 our evaluation of our ADEM Director. 9 It makes a real clean -- once you do 10 this, it makes a real clean thing out 11 of it and nobody can say, well, this 12 one was trying to do this or that, 13 back and forth or whatever. Plus, at 14 the end, the Director always has to 15 send us a self-evaluation. He takes 16 our form, which he took this form and 17 he went through and evaluated himself 18 in writing back to us on that, and 19 then we have each of our remarks and 20 all in that, which was graded, and we 21 came up with an evaluation of it, and 22 he made the grade and came on for 23 another year. I would at this time</p>	<p style="text-align: right;">Page 37</p> <p>1 MS. ARCHIE: A couple 2 comments: I would like to commend 3 Dr. Lester in taking this lead and in 4 trying to get us a new evaluation 5 tool; because at the end of the day, I 6 do agree that the evaluation tool that 7 we currently have needs to be revised. 8 And, secondly, I commend AUM for 9 actually developing the Strategic Plan 10 as a blueprint for us to go through in 11 how we're proceeding and hopefully 12 give charge to the Director with how 13 to proceed with this Strategic Plan. 14 You know, I would like to note that he 15 did -- with our previous Strategic 16 Plan, he accomplished those tasks and 17 completed those tasks that were part 18 of that Strategic Plan. Having said 19 that, I believe that we do have a tool 20 right now with the Strategic Plan that 21 the Personnel Committee with the Chair 22 actually giving some help to 23 Dr. Lester to actually take the</p>

10 (Pages 34 to 37)

<p style="text-align: right;">Page 38</p> <p>1 Strategic Plan that we currently have 2 and draft an evaluation procedure 3 based on the Strategic Plan. I 4 believe that that will -- that we can 5 do that and that we will not have to 6 -- no offense to AUM -- actually have 7 to pay \$12,000 for a tool for them to 8 come up with since we already have a 9 Strategic Plan that basically kind of 10 outlines exactly the direction that we 11 need to go and basically whether the 12 Director actually carries out those 13 objectives and goals that are under 14 that Strategic Plan. So I just want 15 to kind of just throw it out there for 16 consideration. We've taken -- the 17 motion has already been made, but I 18 just believe that we would have a much 19 cheaper route by taking that Strategic 20 Plan and basing criteria on that for 21 the evaluation. 22 DR. LESTER: Madam Chairman? 23 DR. GARDNER: Dr. Lester?</p>	<p style="text-align: right;">Page 40</p> <p>1 when they make it -- just like our 2 Strategic Plan, when they make it, 3 they've already checked all the legal 4 implications and everything else. And 5 you've got to be wary that if the 6 Director carried us to court, we would 7 have it down by a legal manner. And 8 Robert could defend us. But by having 9 something like that, then the Director 10 knows what's going to happen. We all 11 know what's going to happen, and we 12 know it's all legal, and it's not 13 something that, you know, came off the 14 top of our head or by the seat of our 15 britches. So that's why I wanted to 16 make sure that if we could, if we 17 could, to have this developed by a 18 group that knows what they're doing 19 and has already done work for us and 20 that we haven't had any problem 21 whatsoever with. And you get into -- 22 nowadays, you know, when you get into 23 all this legal stuff, you have to</p>
<p style="text-align: right;">Page 39</p> <p>1 DR. LESTER: Thank you, 2 Ms. Archie, for that. The only 3 problem with us doing it, we keep 4 forgetting sometimes in these type 5 things that we get into sort of severe 6 legal problems when we try to develop 7 something like that. You're talking 8 about a Director's job. You're 9 talking about the Department. And 10 sometimes -- that's one of the reasons 11 we have Robert here and our other 12 lawyers, to sort of follow up and make 13 sure that we as individual 14 Commissioners don't make a mistake 15 that would turn around and in turn 16 cost the Agency and sometimes us or 17 something more money than what a plan 18 like this would develop for us with 19 all the legal ramifications. That's 20 one of the reasons that we -- folks 21 will say, well, I could sit down and 22 write one out, you know, in two hours 23 cheaper than that. But the thing is,</p>	<p style="text-align: right;">Page 41</p> <p>1 watch what you do when you are 2 developing something that's going to 3 -- a person is going to depend on for 4 his job or the Department or something 5 like that, that it's completely legal, 6 and that's the reason I would like for 7 us to go this route. Thank you, Madam 8 Chairman. 9 MS. ARCHIE: One last 10 follow-up, if I may. 11 DR. GARDNER: Ms. Archie? 12 MS. ARCHIE: Number one, I 13 respect you on that. Robert is legal 14 counsel for us. He can go through 15 this process for us or we could get 16 State Personnel to go through it for 17 us, because our employees go through 18 that system as well. Right now we 19 could do evaluations through either 20 one of those. And at the same time, 21 as part of the proposal that AUM's 22 presented to us is that it is required 23 for each of us to give input into this</p>

Page 42	<p>1 process. That's part of that \$12,000 2 cost, so we're still going to have 3 some type of input into drafting of 4 that document. So just to me -- you 5 know, it just seems to me that we can 6 go a cheaper route. So we can just 7 vote on it. 8 DR. LESTER: Well, this is 9 the beauty part of having them do it, 10 is that we do have our input into it. 11 It'll be a record. I mean, you can 12 see your imprint on it. But by the 13 time it's all melded together with our 14 group -- there's seven of us -- then 15 it's, you know, a legal document, 16 something that we can do. We will 17 still have our imprint on it. But 18 that's the reason for it. It just 19 makes a good, clean cut, and that way 20 we can continue on with our job. 21 Thank you, Madam Chair. 22 DR. GARDNER: Mr. 23 Wainwright?</p>	Page 44
Page 43	<p>1 MR. WAINWRIGHT: Madam 2 Chair, one of the comments that hit me 3 last time we did this was that we were 4 asking the wrong questions. And I 5 felt like a third party handling this 6 would eliminate that kind of 7 criticism, so I would be in favor of 8 having Auburn do this. 9 DR. GARDNER: Any further 10 questions on Agenda Item Number 4? 11 (No response.) 12 DR. GARDNER: All in favor 13 of accepting this proposal say aye. 14 (Those in favor of the 15 motion so indicated.) 16 DR. GARDNER: All opposed 17 same sign. 18 (Ms. Archie and Dr. Pierce 19 so indicated.) 20 DR. GARDNER: Motion 21 carries. 22 DR. LESTER: Thank you. 23 DR. GARDNER: Moving on to</p>	Page 45
	<p>1 Agenda Item Number 5, consideration of 2 adoption of proposed amendments to 3 ADEM Administrative Code 335-6-8, 4 Groundwater and Underground Injection 5 Control regulations. And the 6 Department has comments. 7 SONJA MASSEY: Good morning. 8 My name is Sonja Massey. I am the 9 Chief of the Groundwater Branch in the 10 Land Division of ADEM. You have 11 before you for consideration, proposed 12 revisions to the Underground Injection 13 Control regulations. The proposed 14 regulations would accomplish several 15 important objectives. They would 16 implement the division of permitting 17 responsibilities between ADEM and the 18 Alabama Department of Public Health 19 established by Act 2009-773 of the 20 Alabama Legislature for sanitary 21 wastewater treatment systems which 22 discharge to the subsurface. It would 23 revise public notice procedures for a</p>	
	<p>1 Class V injection well general permit 2 to be consistent with other ADEM 3 general permit notice procedures. It 4 would require a Class V permit 5 application for disposal of sanitary 6 wastewater to include a demonstration 7 of compliance with any applicable 8 requirement for financial viability 9 certification. And it would clarify 10 siting requirements for Class V wells. 11 And finally, it would prohibit the 12 construction or operation of a Class V 13 vertical well for the direct injection 14 of treated sanitary wastewater into an 15 underground source of drinking water. 16 The Department has 17 permitted nearly 100 Class V wells for 18 indirect injection of treated sanitary 19 wastewater by introduction to the -- 20 of the wastewater just below the 21 surface, and we continue to do this on 22 a regular basis. National research 23 and recent pilot projects have shown</p>	

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<p>1 that direct injection into the 2 underground source of drinking water 3 can frequently result in the violation 4 of drinking water standards for metals 5 and other pollutants. And we also 6 have a concern that allowing direct 7 injection into an underground source 8 of drinking water could result in a 9 threat to the public as a result of 10 undetected or unavoidable lapses in 11 disinfection which could occur. And 12 due to these concerns, should the 13 Department receive applications for 14 this type of direct injection into an 15 underground source of drinking water, 16 we would not be able to legally issue 17 that permit. 18 So you have been provided 19 with a copy of the reconciliation of 20 all comments received during the 21 public comment period. This 22 reconciliation includes technical 23 references from the National Research</p>	<p>1 is often a significant difference in 2 the oxidation reduction potential of 3 the two wastewaters. The dissolved 4 organic carbon in the injected 5 wastewater -- even with well-treated 6 wastewater, there's always a dissolved 7 organic carbon level there, which can 8 lead to the mobilization of these 9 metals. And there are also microbial 10 processes that can result in the 11 mobilization of these metals. So this 12 is really something that's only come 13 to be understood in the last several 14 years, but the National Research 15 Council commissioned -- well, they 16 implemented a study committee for it. 17 They have published a book with all 18 these findings in it, as well as many 19 other findings. A lot of this has 20 come to light as a result of projects 21 for aquifer storage and recovery. So 22 this is not -- these are not 23 consequences that are well-known among</p>
Page 47	Page 49
<p>1 Council and the U.S. Geological Survey 2 publication which we have relied upon 3 in making these technical 4 recommendations for this rulemaking. 5 I'll be glad to answer any questions 6 that you may have. 7 DR. GARDNER: Are there any 8 questions from the Commission? Mr. 9 Wainwright? 10 MR. WAINWRIGHT: Ms. Massey, 11 are there any other -- or is there any 12 degree of treatment that you would 13 allow injection? 14 SONJA MASSEY: Okay. This 15 is one of the things that recent 16 research is showing; that it isn't 17 necessarily a function of the degree 18 of treatment, but there are processes 19 relating to the differences between 20 the injected -- the directly-injected 21 wastewater into the aquifer. Directly 22 injected wastewater contains a much 23 higher concentration of oxygen. There</p>	<p>1 a lot of folks, because it's just in 2 the last several years that this body 3 of information has been developed. 4 MR. WAINWRIGHT: And then I 5 understood you checked to see if there 6 were any permits that would be 7 grandfathered in? 8 SONJA MASSEY: No, sir, 9 there are none that are operating in 10 Alabama. We have not permitted any 11 for direct injection. We permit 12 routinely indirect injection, which 13 also there's a growing national body 14 of evidence that shows that that is a 15 much more protective method of 16 introduction of treated sanitary 17 wastewater to the groundwater. It 18 accomplishes many objectives. 19 MR. WAINWRIGHT: Thank you. 20 DR. GARDNER: Are there any 21 further questions for Ms. Massey? 22 (No response.) 23 DR. GARDNER: And do I have</p>

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<p>1 a motion to adopt the proposed 2 amendment? 3 DR. LESTER: I so move. 4 DR. GARDNER: Okay. Is 5 there a second? 6 DR. PIERCE: Second. 7 DR. GARDNER: All right. 8 All in favor, signify by saying aye. 9 (Those in favor of the 10 motion so indicated.) 11 DR. GARDNER: All opposed 12 same sign. 13 (No response.) 14 DR. GARDNER: The motion 15 carries. Thank you very much. 16 SONJA MASSEY: Thank you. 17 DR. GARDNER: Agenda Item 18 Number 6 is Chalkville, LLC, versus 19 ADEM, EMC Docket No. 00-19. This is 20 an NPDES-related matter. We need to 21 consider the joint motion to dismiss 22 of Chalkville, LLC, and the Alabama 23 Department of Environmental</p>	<p>1 Alabama Recycling versus ADEM, EMC 2 Docket Number 08-02. The Commission 3 needs to consider the recommendation 4 of the Hearing Officer. The Hearing 5 Officer recommends that the 6 administrative order appealed in this 7 matter be approved as issued by the 8 Department. However, I need to note 9 to you that the petitioner has filed 10 an objection to the proposed order, 11 which is an objection to the 12 recommendation of the Hearing Officer. 13 On top of that, the Department has 14 filed a motion to strike the 15 petitioner's objection, along with a 16 proposed order for the Commission for 17 consideration of the motion to strike 18 and adoption of the recommendation of 19 the Hearing Officer. Is everyone 20 clear? 21 (No response.) 22 DR. GARDNER: Okay. I need 23 a motion from the Commission either</p>
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<p>1 Management. Is there a motion either 2 granting or denying this joint motion 3 to dismiss? 4 MS. ARCHIE: So move to 5 grant the motion to dismiss. 6 DR. GARDNER: We have a 7 motion to grant the motion to dismiss. 8 MR. WAINWRIGHT: Second. 9 DR. GARDNER: There's a 10 second. Is there any discussion? 11 (No response.) 12 DR. GARDNER: All in favor, 13 say aye. 14 (Those in favor of the 15 motion so indicated.) 16 DR. GARDNER: All opposed 17 same sign. 18 (No response.) 19 DR. GARDNER: Motion 20 carries. 21 DR. GARDNER: Okay. Moving 22 on to Agenda Item Number 7, this is 23 John Jordan, Sr., doing business as</p>	<p>1 granting or denying the motion to 2 strike and adopting, adopting with 3 modifications, or rejecting the 4 recommendation of the Hearing Officer. 5 MS. ARCHIE: I'll make an 6 attempt at this. 7 DR. GARDNER: You go girl. 8 MS. ARCHIE: Okay. I move 9 that we approve the motion to strike 10 and adopt the recommendation of the 11 Hearing Officer with modification. 12 DR. GARDNER: With 13 modification? 14 ANITA ARCHIE: With 15 modification. 16 DR. GARDNER: Okay. The 17 motion is that we grant the motion to 18 strike and adopt the recommendation of 19 the Hearing Officer with 20 modifications. 21 MS. ARCHIE: Robert, did I 22 do that right? 23 MR. TAMBLING: Commissioner</p>

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1 Archie, that was certainly one of your
 2 options, but you might want to hear
 3 from the Department to clarify this.
 4 I think there may be some confusion
 5 here. I'm not sure that the
 6 Department -- I don't know what
 7 modifications it would be.
 8 MS. ARCHIE: Okay. Can I
 9 amended my motion then?
 10 MR. TAMBLING: You can
 11 amended your motion.
 12 MS. ARCHIE: Let me amend my
 13 motion. I move that we adopt -- we
 14 approve the motion to strike and adopt
 15 the recommendation of the Hearing
 16 Officer.
 17 DR. GARDNER: The motion is
 18 to grant the motion to strike, approve
 19 the motion to strike, and adopt as it
 20 is the recommendation of the Hearing
 21 Officer. Is there a second?
 22 MR. BROWN: Second.
 23 DR. GARDNER: Is there any

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1 further discussion?
 2 (No response.)
 3 DR. GARDNER: All in favor
 4 of this motion say aye.
 5 (Those in favor of the
 6 motion so indicated.)
 7 DR. GARDNER: All opposed
 8 same sign.
 9 (No response.)
 10 DR. GARDNER: The motion
 11 carries.
 12 Agenda Item Number 8,
 13 Portersville Revival Group, Inc.,
 14 versus ADEM and the Utilities Board of
 15 the City of Bayou La Batre,
 16 Intervenor, EMC Docket Number 09-01.
 17 This is an NPDES-related matter. The
 18 Commission needs to consider the
 19 recommendation of the Hearing Officer.
 20 The Hearing Officer recommends that
 21 this appeal be denied and that the
 22 Commission adopt his order of March
 23 12th granting summary judgment. I

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1 would like to entertain a motion from
 2 the Commission either adopting,
 3 adopting with modifications, or
 4 rejecting the recommendation of the
 5 Hearing Officer and the Hearing
 6 Officer's order granting summary
 7 judgment. I need a motion.
 8 MS. ARCHIE: Okay. I love
 9 punishment. Okay. I move that we --
 10 that we deny this appeal and that we
 11 adopt the Hearing Officer's order of
 12 March 12th granting summary judgment.
 13 DR. GARDNER: The motion is
 14 that we adopt the Hearing Officer's
 15 order granting summary judgment. Is
 16 there a second?
 17 DR. LESTER: Second.
 18 DR. GARDNER: All in favor
 19 -- is there any discussion?
 20 (No response.)
 21 MR. WAINWRIGHT: What about
 22 denying the appeal? Do we need to do
 23 that first?

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1 DR. GARDNER: We're supposed
 2 to be entertaining a motion adopting
 3 the recommendation of the Hearing
 4 Officer per the Hearing Officer's
 5 order.
 6 MR. WAINWRIGHT: Okay.
 7 DR. GARDNER: Are you good
 8 with it?
 9 MR. WAINWRIGHT: (Nods
 10 head.)
 11 DR. GARDNER: Any further
 12 question discussion?
 13 (No response.)
 14 DR. GARDNER: Okay. All in
 15 favor, say aye.
 16 (Those in favor of the
 17 motion so indicated.)
 18 DR. GARDNER: All opposed,
 19 same sign.
 20 (No response.)
 21 DR. GARDNER: Motion
 22 carries.
 23 MS. THOMAS: Dr. Gardner,

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1 who seconded that motion?
 2 DR. LESTER: Me.
 3 MS. THOMAS: Thank you.
 4 DR. GARDNER: Okay. Agenda
 5 Item Number 9 is other business. Do
 6 any Commissioners have any other
 7 business we need to discuss?
 8 (No response.)
 9 DR. GARDNER: All right.
 10 Seeing that there is none, we'll move
 11 on to Agenda Item Number 10, the
 12 future business session. The proposed
 13 date for our next Commission meeting
 14 is August 21st, 2009. That is a
 15 Friday. The proposed location is the
 16 ADEM building here in Montgomery. The
 17 proposed start time is 11 a.m. Any
 18 discussion? Does everyone think they
 19 can make that date? If you're not
 20 sure of what your calendars look like,
 21 please contact Debi. We will set that
 22 meeting on the 21st of August.
 23 Could I have a motion to

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1 *****
 2 REPORTER'S CERTIFICATE
 3 *****
 4
 5 I, Karen Reagan Drinkard,
 6 Certified Court Reporter and Notary
 7 Public in and for the State of Alabama
 8 at Large, do hereby certify that I
 9 reported stenographically and then
 10 reduced to typewritten form by means
 11 of computer-aided transcription my
 12 stenographic notes of the foregoing
 13 Alabama Environmental Management
 14 Commission Meeting.
 15
 16 I further certify that the
 17 foregoing transcript is a true and
 18 correct transcript of the proceedings
 19 contained herein.
 20
 21 I further certify that I am
 22 neither of kin nor of counsel to the
 23 parties to said meeting, nor in any

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1 adjourn?
 2 DR. LESTER: So move.
 3 MR. WAINWRIGHT: So move.
 4 DR. GARDNER: Is there a
 5 second?
 6 MR. WAINWRIGHT: Second.
 7 DR. GARDNER: Meeting
 8 adjourned.
 9 (EMC Meeting adjourned.)
 10
 11
 12 (The foregoing AEMC Commission Meeting
 13 concluded and was adjourned at
 14 approximately 11:56 a.m., on June
 15 19th, 2009.)
 16
 17
 18
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 23

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1 manner interested in the results
 2 thereof.
 3
 4 Done this the 30th day of June,
 5 2009.
 6
 7
 8
 9 Karen Reagan Drinkard, ACCR #005
 10 Reporter and Notary Public
 11 State of Alabama at Large
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16 (Pages 58 to 61)

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

I, Karen Reagan Drinkard,
Certified Court Reporter and Notary
Public in and for the State of Alabama
at Large, do hereby certify that I
reported stenographically and then
reduced to typewritten form by means
of computer-aided transcription my
stenographic notes of the foregoing
Alabama Environmental Management
Commission Meeting.

I further certify that the
foregoing transcript is a true and
correct transcript of the proceedings
contained herein.

I further certify that I am
neither of kin nor of counsel to the
parties to said meeting, nor in any

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manner interested in the results
thereof.

Done this the 30th day of June,
2009.

Karen Reagan Drinkard /ca
Karen Reagan Drinkard, ACCR #005
Reporter and Notary Public
State of Alabama at Large

<p style="text-align: center;">A</p> <p>ability 9:9 30:23 able 12:14 46:16 absolutely 22:21 23:12 24:17 accept 36:18 accepting 43:13 access 14:22 accomplish 44:14 accomplished 31:13 37:16 accomplishes 49:18 accountability 24:9 accounts 26:6,17 ACCR 61:9 achieved 12:3 act 7:12 17:16 24:11 44:19 actively 8:23 activities 14:3 activity 11:2,11,21 13:13 address 9:22 10:5 10:11 18:9 addressed 16:17 ADEM 1:21 2:13 2:18,21 3:1 8:18 8:19 12:12 14:21 17:6,6 25:23 27:1 27:10,13 33:8 35:8 44:3,10,17 45:2 50:19 52:1 55:14 58:16 ADEM's 7:22 23:22 24:16 36:3 adjourn 59:1 adjourned 3:7 59:8 59:9,13 adjusted 6:4 adjustments 6:6 administer 24:18 administered 26:22 administrative 2:14 44:3 52:6</p>	<p>adopt 4:8,11 30:5 50:1 53:10,18 54:13,14,19 55:22 56:11,14 adopting 53:2,2 56:2,3 57:2 adoption 2:13 44:2 52:18 AEMC 59:12 agencies 7:1 27:15 Agency 22:1 39:16 agenda 4:5 5:4 29:19 32:11 43:10 44:1 50:17 51:22 55:12 58:4,11 ago 7:20 10:19,23 22:14 agree 37:6 agreement 25:22 36:12 air 10:6 17:16,18 31:7 Alabama 1:2,4 2:21 4:3 8:11 10:21 19:17 27:2 27:11,15 29:7 30:11,22 31:10,15 31:21 44:18,20 49:10 50:22 52:1 60:7,13 61:10 allocate 25:4 allow 8:4 11:2 14:5 20:3 27:20 47:13 allowing 46:6 allows 14:1,21 amend 54:12 amended 54:9,11 amendment 50:2 amendments 2:13 44:2 ANITA 1:11 53:14 annually 32:22 answer 21:8 47:5 answered 8:18 appeal 55:21 56:10</p>	<p>56:22 appealed 52:6 applicable 26:3 45:7 applicant 16:12 25:23 26:1 application 45:5 applications 46:13 applies 10:7 apply 33:8 appreciate 5:9 12:16 30:1 appropriately 24:8 appropriation 6:19 appropriations 23:21 24:2 approve 53:9 54:14 54:18 approved 8:3 34:13 52:7 approximately 59:14 April 2:5 4:6 17:12 30:13 aquifer 47:21 48:21 Archie 1:11 12:14 23:2,4,8 28:18 32:1 36:22,23 37:1 39:2 41:9,11 41:12 43:18 51:4 53:5,8,14,21 54:1 54:8,12 56:8 area 7:18 8:10,11 8:17 9:14 14:9 26:13 28:15 areas 13:22 19:16 Ashworth 34:8 asked 33:9 34:20 asking 43:4 ASSISTANT 1:23 associated 9:8 assure 16:13 assuring 31:3 Attalla 19:10</p>	<p>attempt 53:6 attend 23:14 attendees 12:19 attending 23:16 Auburn 34:7 43:8 audits 25:2 August 36:7,8 58:14,22 AUM 37:8 38:6 AUM's 41:21 authorized 7:10 25:10 available 15:2 18:23 award 19:8 26:15 Awards 19:9 aware 11:3 16:5 25:17,20 aye 4:19 43:13 50:8 51:13 55:4 57:15 a.m 1:6 58:17 59:14</p>	<p>benefiting 11:7 benefits 13:11 best 7:20 16:10 better 23:15 31:19 big 13:20 bill 6:15 18:17,18 18:20 biosolids 7:19 8:5,9 9:8 bit 12:15 23:18 24:5,9 blew 14:18 blueprint 37:10 blunder 8:2 Board 3:1 55:14 body 25:1 49:2,13 book 48:17 Boulevard 1:3 Branch 44:9 briefly 7:17 britches 40:15 brought 34:12 Brown 1:12 5:8,23 30:1 54:22 budget 5:19,21 6:7 6:9,16 7:4 20:17 23:18,22 24:3,4 24:16 25:15,15,19 26:12 budgets 6:3 build 15:22 building 1:2 13:1 58:16 business 2:20 3:4,6 11:1 27:23 51:23 58:5,7,12 byproduct 8:9 10:17</p>
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Part B

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- Attachment 1** **Agenda**
- Attachment 2** **Resolution for former Commissioner
Kenneth A. Hairston, Esq.**
- (Agenda Item 3 – Report from the Commission Chair)**
- Attachment 3** **Order adopting motion to accept the *Proposal for Development
of a Form for the Evaluation of the Director – March 15, 2009*,
from Auburn Montgomery, Center for Government,
Robert T. Ashurst**
- (Agenda Item 4 – Discussion and consideration of a proposal
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- Attachment 4** **Resolution adopting amendments to ADEM Admin. Code
335-6-8, Ground Water and Underground Injection Control
Regulations**
- (Agenda Item 5 – Consideration of adoption of proposed
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and Underground Injection Control Regulations)**
- Attachment 5** **Order granting Joint Motion to Dismiss and dismissing appeal**
- (Agenda Item 6 – Chalkville, L.L.C. v. ADEM, EMC Docket
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- Attachment 6** **Order granting Department’s Motion to Strike and adopting
the Recommendation of the Hearing Officer**
- (Agenda Item 7 – John Jordan, Sr. d/b/a Alabama Recycling v.
ADEM, EMC Docket No. 08-02)**
- Attachment 7** **Order adopting the Recommendation of the Hearing Officer
and the Hearing Officer’s Order granting summary judgments**
- (Agenda Item 8 – Portersville Revival Group, Inc. v. ADEM,
and Utilities Board of the City of Bayou La Batre, Intervenor,
EMC Docket No. 09-01 [NPDES-Related Matter])**

Attachment 1

Amended 6/8/09

AGENDA*
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING
Alabama Department of Environmental Management (ADEM) Building
Alabama Room (Main Hearing Room)
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
Friday, June 19, 2009
11:00 a.m.

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* The Agenda for this meeting will be available on the ADEM website, www.adem.alabama.gov, under EMC Information and Calendar of Events.

** The Minutes for this meeting will be available on the ADEM website under EMC Information.

1. CONSIDERATION OF MINUTES OF MEETING HELD ON APRIL 17, 2009
2. REPORT FROM THE DIRECTOR
3. REPORT FROM THE COMMISSION CHAIR
4. DISCUSSION AND CONSIDERATION OF A PROPOSAL FOR DEVELOPMENT OF A FORM FOR THE EVALUATION OF THE DIRECTOR

The Commission will discuss and consider a *Proposal for Development of a Form for the Evaluation of the Director – March 15, 2009*, from Auburn Montgomery, Center for Government, Robert T. Ashurst.

5. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO ADEM ADMIN. CODE 335-6-8 GROUND WATER AND UNDERGROUND INJECTION CONTROL REGULATIONS

The Commission will consider proposed amendments to ADEM Admin. Code 335-6-8, Ground Water and Underground Injection Control Regulations to provide clarification of permitting requirements for Class V wells; to prohibit discharges from a particular type of well; and, to revise public notice procedures for a Class V injection well general permit to be consistent with other ADEM Admin. Code division 335-6 public notice procedures for a general permit. The Department held a public hearing on the proposed amendments on March 6, 2009, and extended the public comment period to May 18, 2009.

6. CHALKVILLE, L.L.C. V. ADEM, EMC DOCKET NO. 00-19 (NPDES-RELATED MATTER)

The Commission will consider the “Joint Motion to Dismiss of Chalkville, L.L.C. and the Alabama Department of Environmental Management” in this appeal concerning ADEM Administrative Order 00-179-MNPS issued to Chalkville, L.L.C., Chalkville Commercial Development, Jefferson County, ALR103335.

7. JOHN JORDAN, SR. D/B/A ALABAMA RECYCLING V. ADEM, EMC DOCKET NO. 08-02

The Commission will consider the “Recommendation of Hearing Officer” in this appeal concerning ADEM Administrative Order 08-047-AP issued on November 19, 2007, to John Jordan, Sr. and John Jordan, Jr. d/b/a Alabama Recycling, Montgomery, Montgomery County, Air Facility ID No. 209-0094.

8. PORTERSVILLE REVIVAL GROUP, INC. V. ADEM, AND UTILITIES BOARD OF THE CITY OF BAYOU LA BATRE, INTERVENOR, EMC DOCKET NO. 09-01 (NPDES-RELATED MATTER)

The Commission will consider the "Recommendation of Hearing Officer" in this appeal concerning ADEM's issuance of NPDES Permit AL0078921 to Bayou La Batre Utilities Board proposed wastewater treatment plant.

9. OTHER BUSINESS
10. FUTURE BUSINESS SESSION

Attachment 2

State of Alabama



RESOLUTION

WHEREAS, Kenneth A. Hairston, Esquire, has served as a member of the Alabama Environmental Management Commission from March 20, 2002, until April 23, 2009; and

WHEREAS, his legal expertise has contributed significantly to the impartial and orderly conduct of the Commission's deliberations on a variety of issues; and

WHEREAS, his dedicated service resulted in the continuation of an effective program of environmental management for the State of Alabama; and

WHEREAS, his efforts have improved the ability of the State to respond in an efficient, comprehensive, and coordinated manner to environmental problems, assuring for all citizens of the State a safe, healthful, and productive environment; and

WHEREAS, his contributions have resulted in more effective protection of our air, land, water, and coastal resources, a major challenge in light of the growth and development in Alabama; and

WHEREAS, his dedication to effectively resolving environmental issues has often been accomplished at great personal effort and sacrifice; now

THEREFORE, be it resolved that the Alabama Environmental Management Commission expresses gratitude to Kenneth A. Hairston, Esquire, for his significant contribution to a better environment and an improved quality of life for the citizens of Alabama.

DONE this 19th day of June 2009.




Laurel G. Gardner, D.V.M.

Chair



Sam H. Wainwright, P.E.

Vice Chair



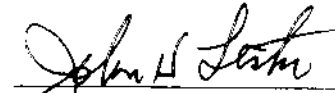
Anita L. Archie

Member



H. Lunier Brown, III

Member



John H. Lester, D.V.M.

Member

W. Scott Phillips

Member



J. Conrad Pierce, M.D.

Member

Attachment 3

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

MOTION

Accept the *Proposal for Development of a Form for the Evaluation of the Director*

ORDER

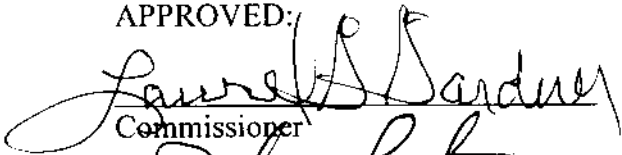
This cause having come before the Environmental Management Commission pursuant to the above motion, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the above motion is hereby adopted; and
2. That a copy of the *Proposal to the Alabama Environmental Management Commission for the Development of a Form for the Evaluation of the Director – March 15, 2009*, Auburn Montgomery, Center for Government, is attached hereto and made a part hereof; and
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below.

Environmental Management Commission Order
Page 2

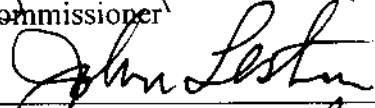
ISSUED this 19th day of June 2009.

APPROVED:


Commissioner

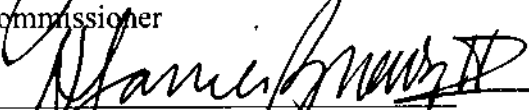
Commissioner

Commissioner



Commissioner

Commissioner

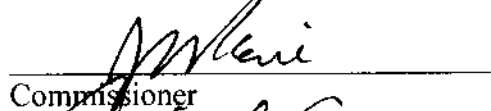


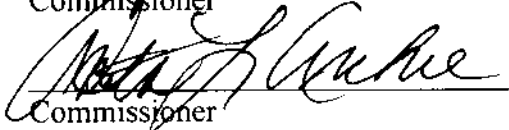
Commissioner

Commissioner



DISAPPROVED:


Commissioner


Commissioner

Commissioner

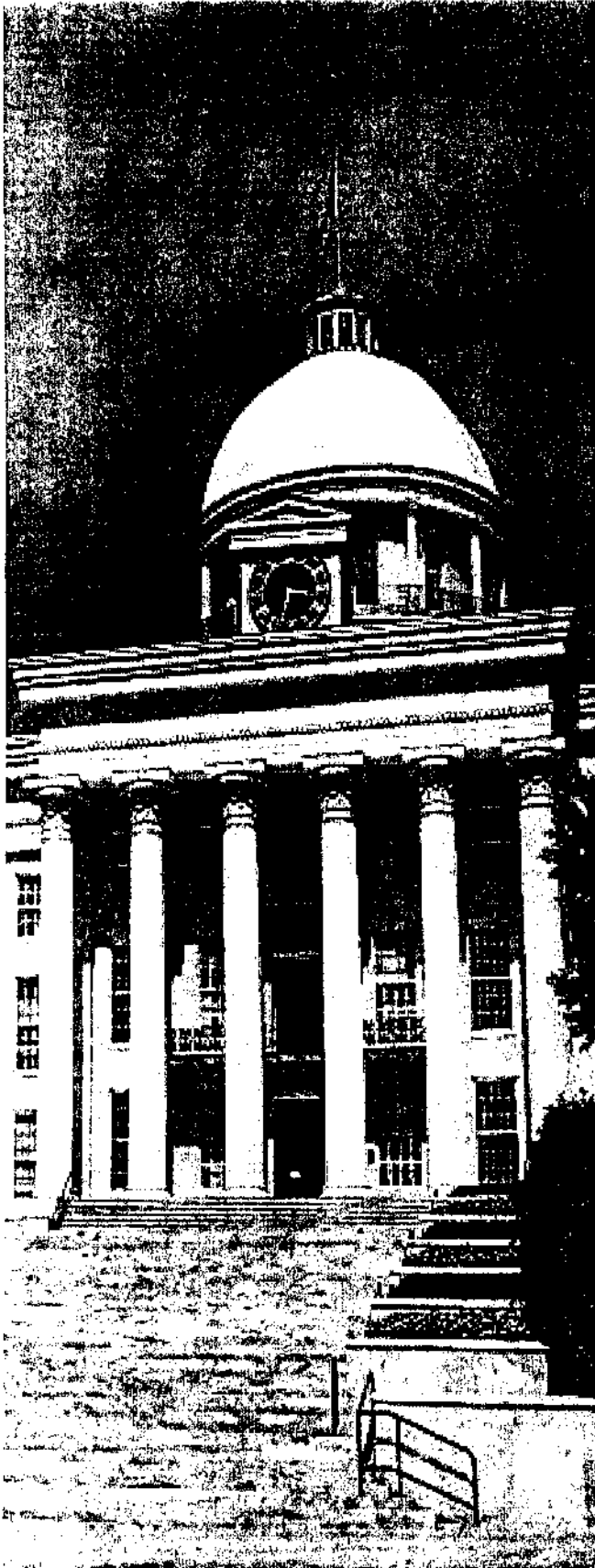
ABSTAINED:

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 19th day of June 2009.


Chair

Environmental Management Commission
Certified this 19th day of June 2009.



AUBURN

MONTGOMERY

CENTER FOR GOVERNMENT

*Proposal
to the
Alabama
Environmental Management
Commission
for the
Development of a Form
for the
Evaluation of the Director*

March 15, 2009

*Contact:
Robert T. Ashurst
Auburn Montgomery,
Center for Government
400 South Union Street, Suite 100
Montgomery, AL 36104
(334) 244-3050*

**Proposal to the Alabama
Environmental Management Commission
for the Development of a Form for the Evaluation of the Director**

Background

The Alabama Environmental Management Commission (AEMC) is responsible for the evaluation of the Director of the Alabama Department of Environmental Management (ADEM).

Past evaluations have involved the use of a form with evaluation criteria which the AEMC could not use. The criteria do not appropriately represent performance criteria of the Director and when Commissioners attempted to use the form they realized that they had no basis for evaluating the Director using the criteria listed.

The Commission would like to use an evaluation form that reflects the Director's current role and includes criteria which Commissioners can, in fact, use for evaluation. The approach should consider both self evaluation and Commissioner evaluation.

Proposed Approach

Auburn Montgomery proposes the following approach to the development of a form for the evaluation of the Director.

Phase 1 – Project Initiation – to initiate the project with key Commissioners and the Director.

- Conduct project initiation meeting and agree on project purpose, scope, schedule and expectations.
- Review the current form and approach to evaluation.

Phase 2 – Definition of Expectations – define the Director's performance expectations to be used for evaluation.

- Performance Expectations Data Collection - Meetings with the Director to collect detailed information about the Director's performance expectations.
- Expectation Identification - prepare draft of job performance expectations.
- Commission Review – Meet with the members of the Commission to review the defined performance expectations.
- Deliverable – A Description of the Director's performance expectations for the purpose of evaluation.

Phase 3 – Develop Evaluation Process and Form

- Develop a suggested process for reviewing identified job performance expectations.
- Present the process, including form, to the Commission for their review.
- Be available to assist the Commission in executing the process they choose.

Schedule and Pricing

Project Schedule	Weeks:							
	1	2	3	4	5	6	7	8
Phase 1: Project Initiation								
Phase 2: Definition								
Phase 3: Process								

Pricing

AUM proposes to develop the evaluation approach and forms as described above for a fixed fee of \$12,000 payable upon completion of the project.

Phase 1: Project Initiation	\$1,800
Phase 2: Definition	\$5,200
Phase 3: Process	<u>\$5,000</u>
Total	\$12,000

Agreement

We propose that we engage in an Interdepartmental Agreement which will contain the terms of this proposal and that we begin work as soon as the Interdepartmental Agreement is signed by both parties.

Attachment 4

**ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION**

WHEREAS, the Alabama Department of Environmental Management gave notice of a public hearing on the proposed revisions to ADEM Admin. Code 335-6 of the Department's Water Division's Water Quality Program regulations in accordance with Ala. Code § 22-22A-8 (2006 Rplc. Vol.) and Ala. Code § 41-22-4 (2000 Rplc. Vol.); and

WHEREAS, a public hearing was held before a representative of the Alabama Department of Environmental Management designated by the Environmental Management Commission for the purpose of receiving data, views and arguments on the amendment of such proposed rules; and

WHEREAS, the Alabama Department of Environmental Management has reviewed the oral and written submissions introduced into the hearing record, and has prepared a concise statement of the principal reasons for and against the adoption of the proposed rules incorporating therein its reasons for the adoption of certain revisions to the proposed rules in response to oral and written submissions, such revisions, where appropriate, having been incorporated into the proposed rules attached hereto; and

WHEREAS, the Environmental Management Commission has considered fully all oral and written submissions respecting the proposed amendments and the Reconciliation Statement prepared by the Alabama Department of Environmental Management.

NOW THEREFORE, pursuant to Ala. Code §§ 22-22A-5, 22-22A-6, 22-22A-8 (2006 Rplc. Vol.), and Ala. Code § 41-22-5 (2000 Rplc. Vol.), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to division 335-6 [rules 335-6-8-.02/Definitions (Amend); 335-6-8-.04/Exempted Operations (Amend); 335-6-8-.05/Prohibited Actions (Amend); 335-6-8-.07/Permit Issuance Procedures (Amend); 335-6-8-.08/Public Notice Requirements (Amend); 335-6-8-.10/Class V Well Permit Application Requirements (Amend); 335-6-8-.12/Class V Well Permit Requirements (Amend); and, 335-6-8-.15/Confidentiality (Amend)] administrative code attached hereto, to become effective thirty-five days after filing with the Alabama Legislative Reference Service.

**ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION**

ADEM Admin. Code chapter 335-6-8
Water Division – Water Quality Program Regulations
Ground Water and Underground Injection Control

IN WITNESS WHEREOF, we have affixed our signatures below on this 19th day of June
2009.

APPROVED:

Laurel Gardner
John Lester
Francis Brown, II
Ken Herington

Marie
Christa Kiefer

DISAPPROVED:

ABSTAINED:

This is to certify that this Order is a true and accurate
account of the actions taken by the Environmental
Management Commission on this 19th day of June 2009.

Laurel Gardner
Chair

Environmental Management Commission
Certified this 19th day of June 2009.

Attachment 5

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

Chalkville, L.L.C.,)	
)	
Petitioner,	)	EMC Docket No. 00-19
	)	[ADEM Administrative Action: ADEM
vs.	)	Administrative Order 00-179-MNPS issued
	)	to Chalkville, L.L.C., Chalkville
Alabama Department of	)	Commercial Development, Jefferson
Environmental Management,	)	County, Alabama, ALR103335]
)	
Respondent.)	

ORDER

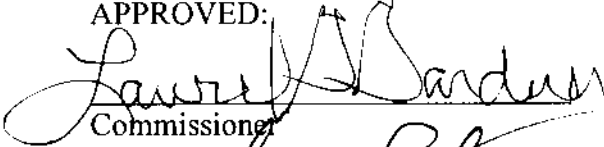
This cause having come before the Environmental Management Commission pursuant to the Joint Motion to Dismiss of Chalkville, L.L.C. and the Alabama Department of Environmental Management in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

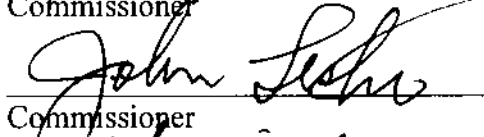
1. That the Joint Motion to Dismiss of April 28, 2009, is hereby granted; and
2. That pursuant to the granting of the Joint Motion to Dismiss, the above-styled appeal is hereby dismissed; and
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
4. That a copy of this Order, along with a copy of the Joint Motion to Dismiss, attached hereto as Exhibit A, and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

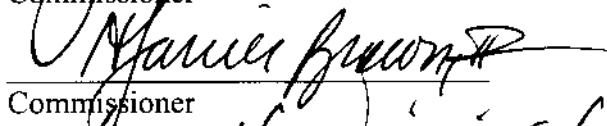
Environmental Management Commission Order
Page 2

ISSUED this 19th day of June 2009.

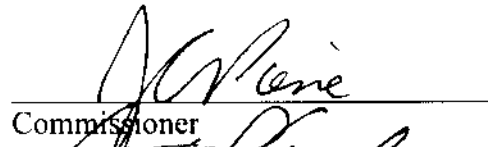
APPROVED:

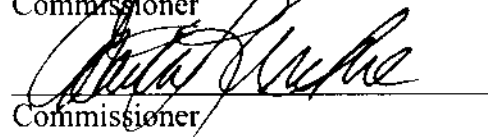

Commissioner


Commissioner


Commissioner


Commissioner


Commissioner


Commissioner

Commissioner

DISAPPROVED:

Commissioner

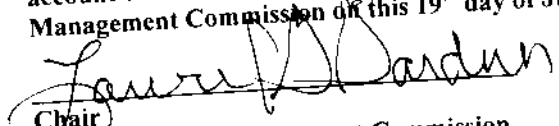
Commissioner

Commissioner

ABSTAINED:

Commissioner

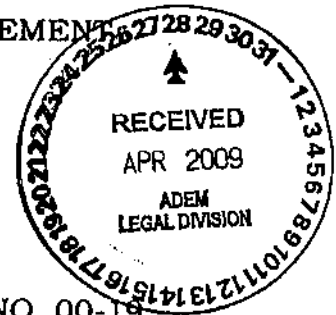
This is to certify that this Order is a true and accurate
account of the actions taken by the Environmental
Management Commission on this 19th day of June 2009.


Chair
Environmental Management Commission
Certified this 19th day of June 2009.

SCANNED

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

CHALKVILLE, L.L.C.,
Petitioner,
v.
ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,
Respondent.



EMC DOCKET NO. 00-19

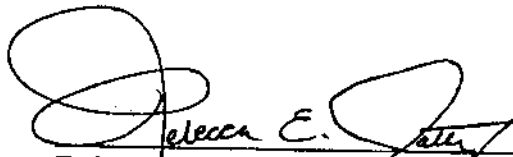



JOINT MOTION TO DISMISS OF CHALKVILLE, LLC AND THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Comes now your Petitioner, Chalkville, LLC ("Chalkville"), and comes now your Respondent, the Alabama Department of Environmental Management ("ADEM"), and jointly move the Commission to dismiss the above matter. For cause Chalkville and ADEM state as follows:

All matters relative to this matter have been resolved by Chalkville and ADEM.

Respectfully submitted this 28th day of April, 2009.


Rebecca E. Patty
Counsel for Respondent
Alabama Department of
Environmental Management


Luther S. Pate
Chalkville, LLC

Attachment 6

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

_____)
)
 JOHN JORDAN, SR. d/b/a)
 ALABAMA RECYCLING,)
)
 Petitioners,)
)
)
)
)
)
 v.)
)
 THE ALABAMA DEPARTMENT OF)
 ENVIRONMENTAL MANAGEMENT,)
)
 Respondent.)
)
)
)
 _____)

EMC DOCKET NO. 08-02
 [Administrative Action: ADEM Administrative Order 08-047-AP issued to John Jordan, Sr. and John Jordan, Jr., d/b/a Alabama Recycling, Montgomery, Montgomery County, Air Facility ID No. 209-0094]

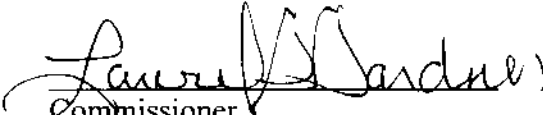
ORDER

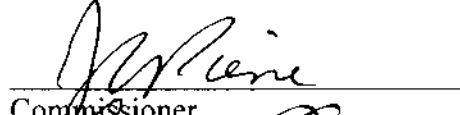
This cause having come before the Environmental Management Commission pursuant to the Recommendation of the Administrative Law Judge in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

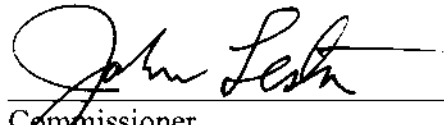
1. That consideration has been given to Petitioner's Objection to the Hearing Officer's Recommendation to affirm the Department's issuance of Administrative Order No. 08-047-AP to Petitioner and the Department's Motion to Strike said Objection; and
2. That the Department's Motion to Strike is hereby granted.
3. That the Recommendation of the Hearing Officer to affirm the Department's issuance of Administrative Order No. 08-047-AP to Petitioner is hereby adopted and incorporated into this Order; and
4. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
5. That a copy of this Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

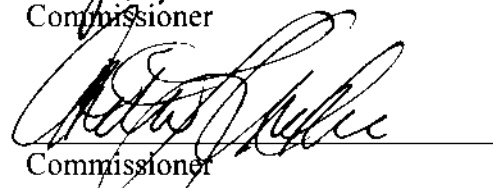
ISSUED this 19th day of June 2009.

APPROVED:


Commissioner

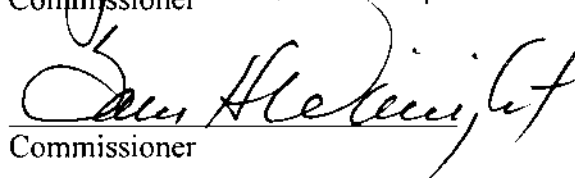

Commissioner


Commissioner


Commissioner


Commissioner

Commissioner


Commissioner

DISAPPROVED:

Commissioner


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 19th day of June 2009.


Chair
Environmental Management Commission
Certified this 19th day of June 2009.

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

JOHN JORDAN, SR. d/b/a)
ALABAMA RECYCLING,)
))
Petitioner,)
))
v.)
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))
THE ALABAMA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
))
Respondent.)

EMC DOCKET NO. 08-02
[Administrative Action: ADEM
Administrative Order 08-047-AP
issued to John Jordan, Sr. and
John Jordan, Jr.
d/b/a Alabama Recycling,
Montgomery, Montgomery
County, Air Facility ID No. 209-
0094]



RECOMMENDATION OF HEARING OFFICER

INTRODUCTION

This proceeding is a challenge to the administrative action of the Alabama Department of Environmental Management (hereinafter “ADEM” or “Department”) in issuing Administrative Order No. 08-047-AP (hereinafter the “AO”) to John Jordan, Sr., d/b/a Alabama Recycling, on November 19, 2007 for failing to obtain a permit before operating, installing or modifying a sweat furnace, in violation of Ala. Code § 22-28-16(d) (2006 Rplc. Vol.) and ADEM Admin. Code r. 335-3-14-.01(1)(a).

The Petitioner, John Jordan, Sr., filed a request for a hearing contesting the issuance of the AO. The Petitioner bears the burden of proof and persuasion on the

factual and legal issues he seeks to present. The Petitioner's burden is to prove, by a preponderance of the evidence, that the Department's action in issuing the AO should be modified or disapproved. (ADEM Admin. Code r. 335-2-1-.27(5); see also the *Statement of Issues and Parties' Response* section of the Pre-Hearing Order (hereinafter, the "PHO"). The Petitioner's burden applies to each of the factual and legal issues described in the PHO. As hereinafter explained, the Petitioner failed to carry his burden to demonstrate that the AO should be modified or disapproved. As specified in the PHO, and as noted above, there are two general allegations of error made by the Petitioner. Each will be discussed below in the following order:

STATEMENT OF ISSUES

The claims or allegations of error raised by the Petitioner in his Petition, PHO and the hearing are summarized as follows:

I. ADEM erred in issuing the AO to John Jordan, Sr. d/b/a Alabama Recycling because:

- (a) Petitioner has no ownership or management interests in Alabama Recycling.
- (b) Alabama Recycling is owned by Petitioner's son, John Jordan, Jr., and Petitioner receives no income from the company, although he occasionally performs clerical duties for Alabama Recycling to accommodate his son.
- (c) Alabama Recycling has no connection with the other businesses operating at 4040 Northern Boulevard, Montgomery.

II. ADEM must prove that a partnership existed between John Jordan, Sr. and John Jordan, Jr. in order to issue the AO to John Jordan, Sr. d/b/a Alabama Recycling.

SUMMARY OF EVIDENCE¹

1. Testimonial Evidence

A. John Jordan

The Petitioner stated that his son, John Jordan, Jr. started Alabama Recycling around 1982. The property where Alabama Recycling is located, 4040 Northern Boulevard, Montgomery, was owned by Petitioner and deeded to his wife in 2002. (T.34). Petitioner left Alabama for California around 1984, and returned to Alabama around 1992. At that time he formed three businesses located at the same address as Alabama Recycling, which are Hotel Liquidators, Circle J Roll-Offs, Inc. and KT Disposal. (T.35). He testified that he has no interest in Alabama Recycling, but admits to “coaching from the rail” to help his son. (T.36). The Petitioner remembered talking with ADEM in 1998 regarding a sweat furnace because “...I’m usually the only guy that somebody can find” at the site. (T.37).

The Petitioner testified that he met with ADEM about the 2007 violation but did not apply for any permits. (T.41). He did, however, later admit that he prepared a “water renewal” permit application for Alabama Recycling. (T.42,44) (Ex. RR-5). He acknowledged lending money, although “not directly,” to his son to purchase the sweat furnace/smelter. (T.51). He testified that the amount of the loan (\$18,000.00) is reflected in a Small Business Administration (SBA) Loan Application, which he prepared and submitted to ADEM to show his “...guestimate of a financial condition of the company [Alabama Recycling].” (T.52) (Ex. R-8). He was not certain as to who actually signed the SBA Loan application. (T.53).

¹ The Parties jointly stipulated to Petitioner’s listed exhibits (P-1 through P-3) and Respondent’s listed exhibits (R-1 through R-19) being admitted into the record without objection. The ALJ granted the joint stipulation and admitted the Parties’ listed exhibits into the record. (T.17)

On cross examination, the Petitioner verified that he is affiliated with Circle J Roll-Offs, Inc., Circle J Roll-Offs South, Inc., and JDC Recovery, located at 4040 Northern Boulevard, Montgomery, as reflected by the Alabama Secretary of State Corporate Record Database. (T.57-58) (Exs. RR-1 through RR-3). He verified Exs. R-16 and R-17 as being accurate copies of deeds reflecting his and his wife's (Virginia Jordan) ownership of the 4040 Northern Boulevard, Montgomery site. (T.59). Petitioner testified that he owns Twin Oaks Recycling in Mobile County and that he signed a National Pollutant Discharge Elimination (NPDES) "water" permit application for that facility. He acknowledged that the application for Twin Oaks lists the telephone number for Alabama Recycling in Montgomery. (T.64) (Ex. RR-4). He admitted to signing Discharge Monitoring Reports (DMRs) for Alabama Recycling and Twin Oaks Recycling. (T.63-64) (Exs. RR-6 and RR-7). The Petitioner testified that he signed the "storm water report" on his son's behalf and for Alabama Recycling, emphasizing that "he'll take the rap" for improper certification, but not for being the owner of Alabama Recycling. (T.65-67) (Ex. RR-5).

The Petitioner acknowledged his signature on traffic court documents. (T.68-69) (Exs. RR-12 through RR-13). The Petitioner verified the accuracy of a Reverse Phone Directory printout reflecting phone numbers of businesses located at 4040 Northern Boulevard, Montgomery. (T.67-69) (Exs. RR-9 through RR-10). The Petitioner's attorney objected to Exs. RR-16 through RR-18 being admitted into the record. (T.73-86). However, Exs. RR-16 through RR-18 were later admitted into the record by the ALJ, pursuant to the Post-Hearing Scheduling Order rendered on March 18, 2009.

The witness admitted and authenticated a deed and tax map for the Twin Oaks Recycling site in Mobile County, which shows the Petitioner's mailing address and phone number as being the same as Alabama Recycling in Montgomery. (T.86-88) (Exs. RR-19 and RR-20). The Petitioner was asked to identify a signature on a traffic court document. He ruled out that it was his signature and could not be certain whether it could be his son's signature. (T.91-92) (Ex.RR-22). The Petitioner denied signing any of the documents contained in Ex. RR-23. (T.89-90). The Petitioner identified the signature in Ex. RR-21, a traffic court document, as being his. (T.92). The witness testified that Ex. RR-25 does not bear his signature. (T.94).

Petitioner authenticated Ex. R-15-E and admitted that the Alabama Recycling, Inc. sign depicted in the photograph is the only signage for the site that can be seen from the roadway of the Northern Boulevard in Montgomery. (T.98) (Ex.R-15-D). The witness identified his vehicle (Yellow Hummer) parked behind the sweat furnace/smelter as depicted in the photograph. (T.103) (Ex.R-3-D). The Petitioner testified about his knowledge and familiarity with the sweat furnace/smelter and the size of the "feed stock" that can be fed into it. (T.104-106) He testified that his son is currently in federal custody awaiting sentencing. (T.113)

B. Christopher Osborne

Mr. Christopher Osborne testified that he is an Environmental Engineer employed with the ADEM Air Division (T.118-119). Alabama Recycling was first assigned to him in April 2007 after the death of John Wright, who was the previous Environmental Engineer assigned to the facility. (T.121-122). Mr. Osborne identified Ex. R-4 as being the NOV which is part of the facility file assigned to him. He also authenticated Ex. R-5

as being a letter in response to the Notice of Violation (NOV), which is part of his facility file. (T.123). He identified and corroborated the accuracy of the aerial photographs in Ex. R-15 as to the position of the sweat furnace on the site. (T.125). He testified that the only signage identifying the site was the sign "Alabama Recycling, Inc." as depicted in Ex. R-15-E. (T.126).

The witness identified the proposed AO and cover letter (Ex.R-11) as being part of his facility file. (T.128). He authenticated a copy of ADEM Admin. Code. Chap. 335-3-11 and a copy of Federal Regulation - National Emission Standards for Hazardous Air Pollutants for Secondary Aluminum Products (Exs.R-12 and R-19), as regulations that apply to the sweat furnace/smelter at Alabama Recycling. (T.138-139). He also identified the Alabama Recycling permit application for the sweat furnace. (T.140) (Ex.R-13). From the aerial photographs in Ex. R-15, he identified the building at the Alabama Recycling site where he was told by workers he could find "John Jordan". (T.146).

C. Douglass Carr

Mr. Douglass Carr testified that he is an Environmental Engineer supervisor and has been employed with the ADEM Air Division for 16 years and he was John Wright's counterpart in 1998. (T.149-150). He identified a Warning Letter that was issued to Alabama Recycling in 1998. (T.151) (Ex.R-1). Mr. Carr testified that he and Ron Brownell, an ADEM Air Division Engineer, were dispatched to Alabama Recycling, 4040 Northern Boulevard, Montgomery, to investigate a complaint regarding an unpermitted sweat furnace at that site. He explained that workers on site told him that Alabama Recycling owned the sweat furnace. The Petitioner appeared at the site of the

sweat furnace and demanded that Mr. Carr and Mr. Brownell leave because they did not have a search warrant. Mr. Carr also testified that the Petitioner indicated that ADEM could never prove that the sweat furnace was his. (T.152).

Mr. Carr testified that the Petitioner was the only "John Jordan" of which he knew for Alabama Recycling. (T.152). The witness identified the Petitioner at the hearing as being the same "John Jordan" he and Mr. Brownell spoke with in 1997. (T.153). Mr. Carr identified Ex. R-2, the response letter from Alabama Recycling to ADEM's Warning Letter. (T.153). He also testified that Ex. R-2 was consistent with what the Petitioner had said during the inspection. (T.153).

Under cross examination, Mr. Carr was asked why Ex. R-2 was unsigned and he replied that is how ADEM received it. (T.155). Mr. Carr also testified that, although Ex. R-2 was unsigned, it did list "John Jordan" in the signature line without designating Jr. or Sr. (T.155).

D. Charles Killebrew

Mr. Charles Killebrew testified that he is an Environmental Engineer and has been employed with the ADEM Air Division for 4 years. (T.158). He testified that he accompanied John Wright to the Alabama Recycling site at 4040 Northern Boulevard in Montgomery for an inspection regarding a sweat furnace. (T.158-159). Mr. Killebrew identified and authenticated the photographs contained in Ex. R-3 and further described what appeared to be feed stock and finished product (ingots) next to the sweat furnace. He also identified Ex. R-15-E, an aerial photograph of the Alabama Recycling sign fronting the Northern Boulevard in Montgomery. (T.161-162).

The witness testified that he was not aware that there was more than one "John Jordan" until some time after the 2007 inspection of the site with John Wright. He testified that he had never seen either "John Jordan" until seeing the Petitioner at the hearing. (T.163).

E. Jeffrey Kitchens

Mr. Jeffrey Kitchens testified that he is an Environmental Engineer Supervisor currently employed with the ADEM Land Division but was assigned to the ADEM Air Division in 2007. (T.167). He testified that during 2007 he was John Wright's and Charles Killebrew's supervisor. Mr. Kitchens dispatched them to the Alabama Recycling site to investigate because he noticed a stack of the sweat furnace/smelter while driving to work on the Northern Boulevard. (T.169-170). He testified that there was no record of an Air Permit being issued to Alabama Recycling at that time.

Mr. Kitchens identified the photograph in Ex. R-3 and pointed out what appeared to be feed stock and ingots next to the sweat furnace. (T.171-172). He also identified the aerial photograph (Ex.R-15-E) depicting the Alabama Recycling signage facing the Northern Boulevard and testified how that was consistent with what he observed when he first noticed the stack of the sweat furnace. (T.174).

F. Ronald Gore

Mr. Ronald Gore testified that he has been employed as an Engineer with ADEM for 34 years and 14 years as the chief of the Air Division. (T.181). He testified as to how a Warning Letter, Notice of Violation and an Administrative Order are parts of a graduated enforcement hierarchy. (T.183). He explained how a Notice of Violation is considered to be an inquiry tool to gather more information about a violation or other

potential violations, but it also serves as a notice to the violator that more enforcement action could follow. (T.185). He testified that issuance of a Notice of Violation is not prerequisite to initiating an enforcement action or issuing an Administrative Order. (T.185).

STANDARD OF REVIEW

The standard by which a hearing officer reviews an aggrieved person's contest of an administrative action of the Department is as follows:

In preparing the recommendation to the Commission, the Hearing Officer shall determine each matter of controversy upon a preponderance of the evidence. The burden shall rest with the petitioner to show by a preponderance of the evidence that the Department's action should be modified or disapproved.

ADEM Admin. Code r. 335-2-1-.27(5). *See also, Bates Motel v. Env'tl Mgmt. Com'n*, 596 So.2d 924, 927 (Ala.Civ.App 1991), cert. denied (Ala. 1992) (Petitioner has burden to establish its contention to the reasonable satisfaction of the trier of fact.)

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

John Jordan, Sr., along with his son, John Jordan, Jr., were found to have owned and/or operated a sweat furnace without an air permit, in connection with a metal recycling facility at the site known as "Alabama Recycling." (Administrative Order No. 08-047-AP). The owners were found in violation of the laws of the Alabama Environmental Management Act and were fined \$17,000.00.

The Alabama Air Pollution Control Act prohibits any "person" from effecting air emissions which are regulated by law without a permit:

No person shall construct, install, modify or use any equipment, device, or other article designated by regulations capable of causing, or contributing to, air pollution or designated to prevent air pollution without a permit from the director or in violation of any conditions imposed by such permits.

Ala. Code, § 22-28-16(d). The Alabama Air Pollution Control Act defines a “person” as:

Any and all persons, natural or artificial, including, but not limited to, any individual, partnership, association, society, joint stock company, firm company, corporation, institution, trust, estate, or other legal or other business organization or any governmental entity, and any successor, representative, agent or agency of the foregoing.

Ala. Code, § 22-28-2(4). Similarly, the Alabama Environmental Management Act, Ala. Code, § 22-22A-3-(7) defines a “person” in the same manner by adopting the definition set forth in the Alabama Air Pollution Control Act. Also, another governing provision, ADEM Admin. Code r. 335-3-1-.02(1)(yy) defines “Owner or Operator” as “...any person who owns, leases, operates, controls or supervises an affected facility, article, machine, equipment, other contrivance, or source.”

Therefore, the issue presented here is whether John Jordan, Sr., is a person who “owned or operated” (as defined) a facility or equipment which caused unlawful air emissions without a permit. More exact, the issue in this contest is whether John Jordan, Sr., has by a preponderance of the evidence reasonably satisfied the Hearing Officer that the Department erred in finding him to be an owner or operator with respect to the unpermitted sweat furnace. For the reasons below, Petitioner fails to prove that the Department’s AO should be overturned or modified.

The parties do not dispute that the sweat furnace was owned or operated through the auspices of Alabama Recycling. Alabama Recycling is a business operation or trade name that for several years has been associated with the geographical site in question,

4040 Northern Boulevard, Montgomery, Alabama. It is not incorporated or otherwise legally formed under the Alabama Business Corporation Act. The Department found that Alabama Recycling is owned and/or operated by both John Jordan, Sr. and his son John Jordan, Jr.

In his contest here, John Jordan, Sr. disavows any connection or involvement with Alabama Recycling and with the sweat furnace in question, and attributes all such activity to his son, John Jordan, Jr. He argues that unless the Department can prove a partnership between himself and his son, he cannot be liable for the activity of Alabama Recycling. It is unnecessary to engage an analysis of partnership because, as noted above, a "person" is liable for unlawfully causing air emissions regardless of the nature of the business arrangement of the affected facility. Also, Petitioner was found liable not vicariously by the activity of his son, but rather in his own stead as an operator or owner.

Significantly, the only indication from Petitioner's son on this matter is that Alabama Recycling was formed as the joint enterprise of father and son. In a criminal proceeding in 1993, an attorney for John Jordan, Jr. filed in the Circuit Court of Montgomery County (cc-93-841,842) a "Defendant's Pre-Sentence Report and Schedule" seeking a favorable sentence in part because of his having started a recent business with his father, John Jordan, Sr., Alabama Recycling:

The Defendant started a new business with his father approximately one year ago. The business is named Alabama Recycling, Inc., and is located on the Northern Bypass in Montgomery, Alabama. Alabama Recycling, Inc. collects wood waste products from various sources (contractors, construction sites, manufacturing plants, etc.), recycles them, and furnishes finished products in the form of firewood, compost, and biofuel. The business is also engaged in aluminum recycling. The Defendant's father is the owner of the business, and the Defendant serves as the president.

(RR-17; RR 16,18).

Petitioner makes no effort to explain how the judicial averment made on behalf of his son was false, other than to say simply that it was false. (T.84). Petitioner also argues that the statement is ineffective to prove a partnership, citing Ala. Code, § 10-8A-308, which provides simply that a mere assertion by one person cannot effect liability of another person as a partner. But, as noted above, Petitioner's liability arises in his own stead as an owner or operator, not vicariously. In addition, the judicial assertion made on behalf of his son is consistent with the substantial evidence in this matter that John Jordan, Sr. consistently exercised authority over Alabama Recycling.

Contrary to Petitioner's insistence that there is no connection between Alabama Recycling and Petitioner's other businesses operating at 4040 Northern Boulevard, the evidence shows differently. Consistent with the son's assertion, several identifying matters of Alabama Recycling link it with the interest of Petitioner. Notably, the site and address for Alabama Recycling (4040 Northern Boulevard) is property that was owned by John Jordan, Sr. when the business was formed, which property he conveyed to this wife in 2002. (RR-17). Alone, or with his wife, John Jordan, Sr., owns or operates several other businesses on the site, or that use the same address as Alabama Recycling, including J.D.C. Recovery, LLC (RR-1), Circle J Roll-Offs, Inc. (RR-2), Circle J Roll-Offs South, Inc., and Twin Oaks Recycling. (RR-2).

The following Exhibits confirm John Jordan, Sr.'s inextricable connection with the site and identifying information for Alabama Recycling:

1. Ex. RR-1 shows Petitioner, identified as "John Jordan" and his wife (Virginia Jordan) as owning another business, J.D.C. Recovery, LLC, at 4040 Northern Boulevard, Montgomery, the same address as Alabama Recycling.

2. Ex. RR-2 shows Petitioner "John Jordan" as being the registered agent for Circle J Roll-Offs, Inc. located, again, at 4040 Northern Boulevard, Montgomery.

3. Ex. RR-3 shows Petitioner "John Jordan" as being the registered agent for Circle J Roll-Offs South, Inc., located, again, at 4040 Northern Boulevard, Montgomery.

4. Ex. RR-4, a NPDES Permit and Application for Twin Oaks Recycling, a business of Petitioner, using the identical phone number as that of Alabama Recycling, 277-0032. The phone number appears on Page 7 of the Exhibit, and Petitioner's signature and the phone number for Alabama Recycling appear on Pages 13 and 16 of the Exhibit. Page 19 of the Exhibit shows Petitioner's signature and his cell phone number (as reflected on his request for appeal in this matter).

5. Ex. RR-5, NPDES Permit and Permit Application for Alabama Recycling, lists Petitioner "John Jordan" as owner on Page 6 of the Exhibit. Page 12 of the Exhibit bears the Petitioner's signature and the phone number for Circle J Roll-Offs. Pages 15, 16 and 17 of the Exhibit bear Petitioner's signature and phone number for Alabama Recycling.

6. Ex. RR-6 and RR-7, Discharge Monitoring Reports for Petitioner's business Twin Oaks Recycling and Alabama Recycling, bear the signature of the Petitioner and the phone number for Circle J Roll-Offs.

7. Ex. RR-8, an ADEM Water Division Non-Compliance Notification Form for Alabama Recycling, bears Petitioner's signature.

8. Ex. RR-9, a phone directory listing for Alabama Recycling, shows the phone number as being 334-277-0032 and that it is located at 4040 Northern Boulevard, Montgomery.

9. Ex. RR-10, a reverse phone directory listing for phone number 334-277-6900, lists Circle J Roll-Offs, Hotel Supplies-Online and Jordan Demolition as being located at 4040 Northern Boulevard, Montgomery.

10. Ex. RR-12 and RR-13, traffic ticket documents from Butler County, bear Petitioner's signature and list his address as 4040 Northern Boulevard, Montgomery.

11. Ex. RR-19, a copy of the Deed for Petitioner's Twin Oaks Recycling property in Mobile County, lists the mailing address which is the same as that for Alabama Recycling in Montgomery.

12. Ex. RR-20, a copy of a tax assessment listing for Twin Oaks Recycling in Mobile County, lists the owner as "John Jordan," with his address being the same as that for Alabama Recycling.

13. Ex. RR-21, a traffic ticket issued to Petitioner, bears his signature and lists his address as 4040 Northern Boulevard, Montgomery.

14. Ex. RR-22, a traffic ticket issued to John Jordan, Jr. appears to bear his signature and lists his address as 3106 Pelzer Avenue, Montgomery.

15. Ex. RR-23, ADEM Notice of Intent (to renew NPDES Permit) documents, appears to bear Petitioner's signature for Alabama Recycling.

16. Ex. RR-24, ADEM Notice of Intent (to renew NPDES Permit) documents, appears to bear Petitioner's signature for Alabama Recycling.

17. Ex. RR-25, ADEM NPDES Permit documents, appears to bear John Jordan, Jr.'s signature as manager for Alabama Recycling.

Despite the numerous instances where Petitioner's known businesses are shown to share the same location, address and telephone number as that of Alabama Recycling, Petitioner insists that his involvement with Alabama Recycling constitutes merely "coaching from the rail." (T.36). His conduct demonstrates differently.

Douglass Carr, an Environmental Engineer with ADEM, testified that on an earlier occasion in 1998, he visited the site to investigate an unpermitted sweat furnace. (T.149-153). The workers told him and fellow ADEM inspector Ron Brownell, that the furnace belonged to Alabama Recycling. A man who they confirmed at the hearing to be John Jordan, Sr. ordered them off the property unless they had a search warrant, and warned that ADEM could never prove that the sweat furnace was his. (T.152). Mr. Carr testified that the Petitioner was the only "John Jordan" who approached them for Alabama Recycling. (T.152). Mr. Carr identified Ex. R-2, the response letter from Alabama Recycling to ADEM's Warning Letter. (T.153). He also testified that Ex.R-2 was consistent with what the Petitioner alleged in person in during the inspection. (T.153).

Petitioner discounts the confrontation explaining that he got involved only because "I'm usually the only guy that somebody can find. . . basically told them what I knew about it, which was absolutely nothing." (T.37). Even if his explanation understates the encounter, he professed no attempt to refer the ADEM officials to his son, or anyone else for Alabama Recycling. Instead, as Mr. Carr's testimony credibly

establishes, John Jordan, Sr. spoke authoritatively for Alabama Recycling in regard to the regulatory enforcement for ADEM.

The Department points to several instances since the issuance of the Notice of Violation in 2007 in this case, where John Jordan, Sr., signed or prepared a number of business or regulatory records for Alabama Recycling. Petitioner argues that his involvement for Alabama Recycling at that point was only to assist his son who he says was incapacitated due to an accident on May 23, 2007. (T.39-43) (RR-6). Even if true, the evidence demonstrates that Petitioner's previous involvement with Alabama Recycling establishes his role as an owner or operator. As well, his involvement subsequent to his son's accident demonstrates, consistent with the evidence, an ongoing authoritative position with the business.

CONCLUSION

The record establishes that the Petitioner, John Jordan, Sr., is a "person" as defined by statute and regulation, who "owned or operated" Alabama Recycling and the sweat furnace in question. The preponderance of the evidence demonstrates to the reasonable satisfaction of the Hearing Officer that the Petitioner's involvement with Alabama Recycling was and is substantially more than mere "clerical duties", "answering the telephone", or "coaching from the rail", and in fact, shows that he acted as the owner or operator since inception of the business through the events of this case.

Accordingly, the Petitioner has not carried his burden to prove that the Administrative Order is in violation of statutes or regulations of the Department. Administrative Order No.: 08-047-AP is due to be approved as issued.

DONE this 2nd day June, 2009.


JAMES H. MCLEMORE
HEARING OFFICER

cc: Debi Thomas
S. Shawn Sibley
Mary-Frank Brown
Knox McLaney
John Jordan, Sr.

Attachment 7

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

Portersville Revival Group, Inc.,)	
Petitioner,)	
)	
vs.)	
	)	EMC Docket No. 09-01
Alabama Department of)	
Environmental Management,	)	[ADEM Administrative Action:
Respondent,	)	ADEM's issuance of NPDES Permit
	)	AL0078921 to Bayou La Batre Utilities
and	)	Board proposed wastewater treatment
	)	plant]
Utilities Board of the City of)	
Bayou La Batre,)	
Intervenor.)	

ORDER


This cause having come before the Environmental Management Commission pursuant to the Recommendation of the Hearing Officer 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 of May 29, 2009, is hereby adopted; and
2. That the Hearing Officer's Order of March 12, 2009, granting summary judgments is hereby adopted; and
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
4. That a copy of this Order, along with a copy of the Recommendation of the Hearing Officer, attached hereto as Exhibit A, and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

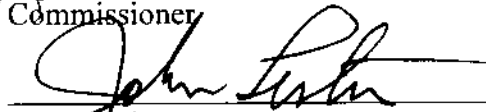
Environmental Management Commission Order
Page 2

ISSUED this 19th day of June 2009.

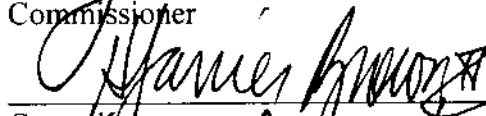
APPROVED:



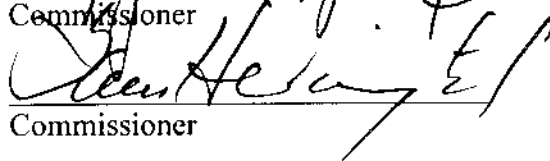
Commissioner




Commissioner



Commissioner



Commissioner



Commissioner



Commissioner

Commissioner

DISAPPROVED:

Commissioner


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 19th day of June 2009.


Chair
Environmental Management Commission
Certified this 19th day of June 2009.

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

In the Matter of:)
)
 Portersville Revival Group, Inc.)
)
 Petitioner,)
)
 vs.)
)
 Alabama Department of Environmental)
 Management)
 Respondent,)
)
 Utilities Board of the City of Bayou)
 La Batre,)
)
 Intervenor.)

EMC Docket No. 09-01



RECOMMENDATION OF HEARING OFFICER

This matter is before the undersigned for a Recommendation to the Alabama Environmental Management Commission. After considering the testimony at the evidentiary hearing, reviewing the post-hearing submissions by the parties and reviewing the record, the undersigned RECOMMENDS as follows:

I.

Introduction

A. The Controversy

This case involves a proposed wastewater treatment plant in Bayou La Batre, Alabama. As part of a 2004 consent order entered with the Department, the Utilities Board of the City of Bayou La Batre (hereinafter referred to as the "Board") agreed to construct a new wastewater treatment facility. Petitioner Portersville Revival Group, Inc. (hereinafter referred to as "PRG") was formed by a group of

citizens for the protection and preservation of coastal areas south of Highway 90 in Mobile County, Alabama. (Transcript “Tr.” at 36). In fact, Portersville Bay is located in the area between the Mississippi state line and Dauphin Island and the City of Bayou La Batre joins the Bay’s waters. (Tr. 37; Petitioner’s Exhibit 1). PRG contends that the Alabama Department of Environmental Management (“ADEM” or “the Department”) erred when it issued the Board a permit to allow discharge from the newly proposed wastewater treatment plant into the Bay.

B. Petitioner’s Specific Claims

Specifically, PRG contends the Commission should reverse the Department’s decision and disallow the subject permit based on the following grounds:

- (a) Alleged insufficiencies in the Department’s Public Hearing Notice related to the subject Permit;
- (b) alleged incompleteness of the subject Permit application;
- (c) the Board’s alleged history of substantial non-compliance;
- (d) that the Permit will cause or contribute to a violation of water quality standards.
- (e) that the Permit limits for bacteria should be modified to protect existing uses of receiving waters;
- (f) that a diffuser should be part of the Permit requirements
- (g) that the Permit limits related to zinc discharge are inadequate; and,
- (h) that the Permit limits should be modified to require more stringent limits so as to protect dissolved oxygen standards of receiving waters.

C. Summary Judgment Phase

The undersigned previously found that there existed no genuine issue of material fact as to the Petitioner's challenges related to: (a) alleged insufficiencies in the Department's Public Notice related to the subject Permit; and (b) alleged incompleteness of the subject Permit, and that the Department was entitled to judgment as a matter of law as to those issues. The original order granting summary judgment as to said issues is part of the Commission's record and a copy of the same is attached hereto. See Exhibit "A." That order is incorporated herein by reference. The undersigned RECOMMENDS that the Commission adopt the order granting summary judgment as a part of its final order.¹ Also, Petitioner stipulated that the issue regarding a diffuser being a part of Permit requirements was, in fact, moot.

The remaining issues proceeded to the evidentiary hearing. The undersigned makes the following Findings of Fact and Conclusions of Law as to those issues.

II.

Findings of Fact and Conclusion of Law

A. Summary of Relevant Testimony

PRG's claims related to the Board's history of non-compliance received perhaps the most attention at the hearing. It is fair to say that these claims melted into all of Petitioner's other claims. The evidence

¹The testimony at the evidentiary hearing only bolstered the propriety of summary judgment on the issues referenced. For instance, Barbara Holley Reid, an attorney and member of PRG, admitted that she and other members of PRG who attended the public hearing were given the opportunity to say whatever they wanted to say. (Tr. 159-160) Thus, contentions concerning undue restrictions in the public notice as to what could be discussed at the public hearing were without merit and properly the subject of summary judgment. As to the issue concerning incompleteness of the permit application for failure to list all non-compliance history, the evidence at the hearing clearly established that PRG was very familiar with the Board's history prior to the issuance of the permit.

established that the Board has a history of non-compliance as to applicable Department standards. In fact, PRG argued that Board's past history of non-compliance already established damage to the waters of Portersville Bay and the related waters. Barbara Holley Reid, a licensed attorney and member of PRG testified that she was not allowed to engage in shellfish harvesting in the Bay waters that adjoin her property. (Tr. 44-46, 56-57; 112). Ms. Reid testified that there have been occasions when Hurricanes and unnamed storms caused what she believed to be untreated sewage to wash up on her property. (Tr. 64; Petitioner's Exhibit 6) She further testified that on some occasions when there are heavy rains the sewers overflow. (Tr. 71).

Similarly, local Bay residents David Anderson Purvis and Edwina Bates echoed Ms. Reid's concerns regarding past conditions and problems allegedly associated with the Board's current wastewater facility. (Tr. 174-177; 529-531).

Also, Casi Callaway, the executive director of Mobile Baykeeper (a local environmental group), testified as to the history of non-compliance by the Board. (Tr. 201; 207-210). Ms. Callaway discussed past violations by the Board related to line breaks, sewer/manhole overflows and the operation of the current wastewater facility. (Tr. 231).

PRG vigorously argued that coupled with the history of the Board's non-compliance, the location of the new, proposed plant would not stop the problems referenced above. (See e.g. Tr. 72). The evidence did indicate that the proposed facility would be located in a flood zone. PRG called George Melton, the environmental services director for Mobile County. (Tr. 290) Mr. Melton testified that initially he believed the Board's new, proposed facility would be located in a high velocity zone as designated by

the federal flood insurance rate map.² (Tr. 305). He originally thought it best for a coastal analysis to be performed in order to analyze the ramifications of the new facility's location. However, Mr. Melton testified that based on new data, he is uncertain as to his initial conclusions and that it will be years before having a new set of flood maps. (Tr. 310)

The evidence, in fact, indicated that initially the Board desired to construct a natural elevated wall to assist in alleviating any problems that might exist should there be heavy rains and wind. (Tr. 75). However, FEMA denied funding for such. (Id.; Tr. 247). Still, the Board contends that the new facility, as engineered, will be a vast improvement over the current facility operated by the Board and will alleviate past issues. PRG argues essentially that the Department should have forced the Board to pursue other alternatives rather than to permit discharges from a new facility because it will not properly operate the new facility based on past history. (Tr. 144). PRG was reluctant to state with any specificity what realistic alternatives could be pursued. (See e.g. Tr. 136-137).

The Department's major contention regarding the Board's history of non-compliance is this: The new, proposed facility will assist in remedying the problems of the past. (Tr. 129). In effect, the Department's argument is that the Board is attempting to rectify its past wrongs by constructing the new facility and come into compliance.

Conversely, most of the testimony of PRG's witnesses centered on the premise that there is little reason to assume there will be compliance with the new facility since there is a pattern of non-compliance with the Board's current facility. For instance, PRG called Jack Gaines to testify at the evidentiary hearing. Among other career posts which relate to ocean and marine life studies, Jack Gaines previously served as

²Mr. Melton made it clear that he only provided his personal comments and that they were not authorized or sanctioned by Mobile County. (Tr. 317).

a senior marine biologist with the United States Department Public Health Service (Tr. 326). His main responsibility for the United States Public Health Service was to perform environmental studies in shellfish growing areas and the effects of wastewater treatment plants on those areas. (Tr. 327). Mr. Gaines testified that the new, proposed facility could cause bigger problems than those currently existing. For instance, Mr. Gaines testified that because the new facility will treat human waste and seafood waste, this could overload the Bay waters causing non-compliance. (Tr. 341). Mr. Gaines stated, in fact, that he believed this will cause the permanent closure of direct shellfish harvesting . (Tr. 341).

In summary, Mr. Gaines testified that the new facility would be a significant detriment to the environment. (Tr. 357). He stated that he expected higher levels of fecal coliform and problems with dissolved oxygen levels as result of the new facility. (Tr. 378-379). However, Mr. Gaines admitted that he premised his testimony on the assumption that the new, proposed facility would not be operated properly. He admitted that if the plant operates as it is designed to operate, the effluent water quality would be acceptable and that water quality standards would be met. (Tr. 420).

Similarly, April Hall, a professional engineer with environmental engineering experience, testified for PRG. (Tr. 429). Ms. Hall testified as to whether the permit issued to the Board would cause or contribute to a violation of water quality standards. (Tr. 441). Although Ms. Hall admitted she was not a water quality expert (Tr. 506), her basic testimony mirrored the testimony of Jack Gaines. That is, if all goes well, the new facility would not have a detrimental effect on water quality standards. If the new facility fails to operate properly, then water quality standards will be threatened. (Tr. 448; 507). In fact, Ms. Hall stated "it just comes down to trust." (Tr. 448).

Glenda Dean is the chief of the NPDES permit branch for the Department. (Tr. 579). She testified that if the new, proposed facility operated in accordance with the permit limits, then water quality

standards would be met. (Tr. 596;648). She oversaw the activities related to the Board's permit which is the subject of this appeal. Ms. Dean testified that the new, proposed facility's outfall/discharge point will be a little over 5,000 feet off shore as opposed to its current location approximately 500 feet off shore. (Tr. 598). She testified that this will assist in maintaining, or at least not further impairing, water quality standards. While she readily admitted that the Department was aware of the Board's long history of non-compliance, Ms. Dean summed up the Department's position when she stated that she believed the new facility will be the solution for prior non-compliance. (Tr. 626). In fact, the Department believes that when the new facility is constructed and operational the fix will be in place to remedy past issues with non-compliance. (Tr. 640-642)

Ms. Dean also testified as to one of PRC's major concerns related to the proposed location of the facility. Ms. Dean testified that the Department would not consider the location of a facility unless the discharge from that location would affect "high quality" waters. (Tr. 642-644). She stated the applicable waters in this case were not classified as high quality. (*Id.*). She testified that if an applicant can meet the applicable discharge limits, the Department would not have grounds to veto an application based on location. (Tr. 645). As for applicants who have a history of non-compliance, Glenda Dean stated the Department did have the discretion not to issue new permits to parties who have a history of non-compliance. (Tr. 656).

Lynn Sisk, the Department's chief of the water quality branch, testified that in the vicinity of the proposed outfall, the water classification is fish and wildlife. (Tr. 667). He stated that the Portersville Bay is on the 303(d) impaired waters list because when the river floods, the shellfish beds are closed. (Tr. 670-671). When shellfish harvesting status is closed for a portion of time, the applicable waters are placed on the 303(d) list. (Tr. 670-671). As to water quality issues related to the new, proposed facility, Mr. Sisk

testified that if the applicable permit levels are adhered to, the permit levels for bacteria are acceptable and that the permitted discharge will retain water quality standards in the Bay. (Tr. 673; 684).

Gregory Ryland, who was a design engineer who worked on the Board's new, proposed wastewater facility, testified that when he designed the new facility he took into account the past non-compliance issues in preparation of the design. (Tr. 716). Mr. Ryland described the new facility as having a sophisticated, technologically-advanced design which includes, among other systems, a series of screens, a sand filtration unit and a disinfection system. (Tr. 721-722; 729; 746). The new facility will be a tertiary treatment system, as compared to the Board's existing secondary treatment system which involves activated sludge and chlorination/dechlorination. (Tr. 723) The new facility will be able to handle nine million gallons a day versus the historic maximum flows at the current facility of three million gallons per day. (Tr. 745). Mr. Ryland stated the new system will cause better reduction of solids, phosphorus, ammonia and organic matter. (Tr. 723).

Mr. Ryland stated that the new design is intended to address past compliance issues. (Tr. 748). For instance, Mr. Ryland stated that the primary issues in the past for the Board's facility have involved suspended solids and pathogens and the new facility will directly address those issues to further reduce past problems. (Tr. 731). While the new facility will treat both human and seafood waste, Mr. Ryland testified the design of the new facility takes this into account and will be able to handle high volume and high concentration of biochemical oxygen demands. (Tr. 743; 780).

B. Applicable Law

Before proceeding to a discussion as to the application of the testimony discussed above in relation to applicable law, it is important to review basic legal principles applicable to this matter. As stated in

Alabama law provides that deference should be accorded the Department when it interprets its own regulations. Brunson Constr. & Environmental Services, Inc. v. City of Prichard, 664 So.2d 885, 890 (Ala. 1995). Of course, this deference must be balanced against the applicable law which makes appeals before the Commission *de novo* hearings. Bates Motel v. Alabama Department of Environmental Management, 596 So.2d 924, 926 (Ala.Civ.App. 1991). The interpretation of an agency regulation by the promulgating agency carries “controlling weight unless it is plainly erroneous or inconsistent with the regulation.” Brunson Construction & Environmental Services v. City of Prichard, 664 So.2d 885, 890 (Ala. 1995) (quoting United States v. Larionoff, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977)). Also, Alabama law provides that “an agency’s interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation.” Ferlisi v. Alabama Medicaid Agency, 481 So.2d 400, 403 (Ala.Civ.App. 1985); see also Dawson v. Alabama Department of Environmental Management, 529 So.2d 1012 (Ala. 1988); State Personnel Bd. v. Wallace, 682 So.2d 1357 (Ala.Civ.App. 1996).

C. Application of Law to Facts/Testimony.

1. Standing.

PRG has standing to assert the claims that proceeded to the evidentiary hearing. The Department and Board do not in any real sense dispute this conclusion. Even if they did dispute, the undersigned finds that PRG has standing.³ The law provides that a group such as PRG has proper standing and aggrieved status in order to challenge a permit in a case such as this. See Valley Forge v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Ex Parte Fowl River Protective Ass’n, Inc., 572 So.2d 446 (Ala. 1990).

³This, of course, excludes standing as to the issue concerning the insufficiency of the public hearing notice which was the subject of the order recommending that summary judgment be granted.

2. Non-Compliance History.

The sum and substance of virtually every claim brought by PRG is that because the Board has a pattern of non-compliance, it is not deserving of a permit to build a new facility. Basically, PRG has no confidence in the Board's ability to start anew and believes the risks to the environment are too great to allow the Board to proceed. Conversely, while the Board and the Department acknowledge the Board's history of non-compliance, both say that the new, proposed facility will make a real difference in improving not only the past problems of the Board but eliminating the problems.

One must consider PRG's position that perhaps it would be too great of a risk to take a chance on the Board. The past compliance issues are indeed substantial and PRG's position related to this issue is certainly not frivolous. PRG correctly points out, and the Board acknowledges, that Department regulations allow the Department to deny a permit based on a history of non-compliance. ADEM Admin. Code R 335-6-6-.19; Tr. 123). However, to make a blanket assumption that because the Board failed to comply with some of the applicable rules and regulations concerning wastewater treatment in the past that warrants a denial of the permit for a new facility, goes too far. The undersigned believes that PRG's argument would be better reasoned if the Board were attempting to renew a permit for its existing facility and system. See e.g. Marshall County Commission v. Department, EMC Docket No. 02-03. Instead, the permit anticipates the completion of a new facility with the latest technology; new piping for the system, and, a new outfall that will be located 10 times further away from shore than the existing outfall. (Tr. 598). While PRG's "educated speculation" asserts that the Board has little hope of staying in compliance with the new facility, it is nevertheless speculation. Virtually all of PRG's own testimony concerning this matter was qualified by the acknowledgment by its witnesses that if the facility operates as designed, will it be sufficient. (Tr. 420; 448; 507).

3. Will the Permit cause or contribute to violation of water quality standards.

As noted above, PRG's witnesses and evidence failed to establish by a preponderance of evidence that the Permit limitations will cause or contribute to a violation of water quality standards related to the subject waters. Jack Gaines speculated that if the new facility was not operated properly, it could contribute to further impairment of water quality standards. (See e.g. Tr. 341; 398) However, he admitted that if the plant operates as it is designed to operate, the effluent water quality would be acceptable and that water quality standards would be met. (Tr. 420). April Hall, although she admitted she was not a water quality expert, testified that if the new, proposed facility operates as designed, then there would be no adverse affect on water quality standards. (Tr. 448;507). Also, Lynn Sisk, the Department's chief of water quality branch, testified that if the applicable permit levels are adhered to, the permit levels for bacteria are acceptable and that the permitted discharge will retain water quality standards in the Bay. (Tr. 673; 684). PRG simply failed to come forward with sufficient evidence that the subject Permit will cause or contribute to a violation of water quality standards.

4. Should the Permit limits for bacteria be modified to protect existing uses of the receiving waters.

The evidence established that once the proposed, new facility begins operation, the new discharge point will be in the existing ship channel, approximately 5,000 feet off shore. (Tr. 598; 722). Now, the existing discharge point is approximately 500 feet off shore. The applicable classification of the relevant waters in the area of the newly proposed discharge point is fish and wildlife. (Tr. 701). Lynn Sisk testified that the proposed discharge will meet this classification. (Tr. 673). Mr. Sisk noted that the reason that the subject waters remain on the 303(d) impaired water list is because when the river floods, the Health

Department closes the oyster beds. (Tr. 671). When the Department used relevant models to determine if the subject permit limitations would protect water quality, Mr. Sisk testified that the permit limit for bacteria is equal to the water quality standard. (Tr. 672-673). He stated that the permit limits would not cause a violation of water quality standards related to bacteria. (Tr. 673; 675). Even April Hall, PRG's witness, testified that assuming compliance with the new Permit limits, the water quality standards for bacteria will be met. (Tr. 499).

5. Should the Permit require a diffuser.

The undersigned previously noted in its order recommending the grant of summary judgment that all parties, including PRG, agree that this claim is now moot and should not be considered by the Commission.

6. Are the Permit limits related to zinc discharge inadequate?

While there was little evidence put forward concerning the subject Permit limits related to zinc discharge, PRG contends that there should be specific limitations in the Permit for such. The subject Permit requires that the Board report and monitor zinc discharges. (Tr. 473). The Department, through Glenda Dean, put forth evidence that it considered and conducted an analysis on the Board's proposed discharge related to zinc content. Ms. Dean testified that the permit is based on the enhanced treatment methods that the new, proposed facility will employ as to any zinc concentrations. (Tr. 650). The Department concluded there would be no issues with harmful zinc discharges in relation to the actual discharge from the facility. (Tr. 650-651). Ms. Dean concluded her summary by stating the newly designed facility will act to better protect against such discharges containing harmful levels of zinc. (Tr. 651).

PRG's witness, April Hall, testified that the Board's past discharge related to zinc concentrations exceeded the applicable criteria for such. (Tr. 487). Therefore, she surmised that the new Permit should more effectively address this issue. It is undisputed that the analysis surrounding the issuance of the new permit did take into account the zinc issue and based on the new, proposed plant, the Department concluded that any zinc discharge would not exceed the applicable criteria. (Tr. 651). The undersigned believes PRG failed to carry its burden of proof on this issue.

7. Should the Permit limits be modified to require limits so as to protect dissolved oxygen standards of receiving waters?

PRG also challenges the subject Permit limits for BODs (biochemical oxygen demand), ammonia, nitrogen and kychldahl nitrogen. Specifically, PRG contends that such limits should be modified to more fully protect dissolved oxygen standards of the Bay. Greg Ryland, the designer of the systems associated with the new facility, testified that there will be a reduction in biochemical oxygen demand. (Tr. 731). He stated that the new system will substantially reduce substances which affect dissolved oxygen standards in the Bay. (Tr. 741). Moreover, the testimony of Lynn Sisk, the Department's chief of the water quality branch, related to the relevant limits in the Permit is consistent with the conclusion that the Permit adequately protects the dissolved oxygen standards. (Tr. 497; 679-681). The Department put forth evidence that the United States Environmental Protection Agency also agreed with this conclusion. (Tr. 497-498). Again, even PRG's technical experts say that if the new, proposed facility operates as designed, the Permit limits are adequate to protect the standards. (Tr. 420; 448).

III.

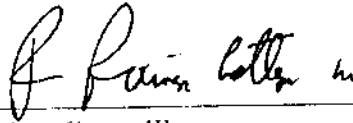
Conclusion

While counsel for PRG presented a well-prepared case, PRG simply failed to meet its burden of proof to warrant a denial of the subject Permit. The undersigned shares PRG's concerns on several issues, particularly as to the proposed location of the new facility. Moreover, PRG and several of its witnesses who live in the affected area and enjoy the use of the Bay, rightfully expressed skepticism as to whether the new facility will bring solutions to past problems. However, the undersigned cannot say the Department failed to properly consider this matter in light of the law summarized above.

First, the undersigned believes that non-compliance history of an applicant should be a relevant factor in the Department's determination as to whether or not to issue a new permit or renew an existing permit. As noted above, the Department's own regulations provide for such as part of its decision-making process. However, the special circumstances of this case militate in favor of the Department's interpretation of its own rules in deciding to issue the Board the new permit. Second, PRG did not bear its burden to come forward with a preponderance of evidence related to the permit contributing to or causing a violation of water quality. Similarly, PRG's contentions regarding the permit requiring modification as to bacteria levels, zinc discharge limitations and dissolved oxygen standards were insufficient to warrant reversal of the Department decision to issue the permit.

Therefore, the undersigned RECOMMENDS that the PRG's appeal be DENIED. In accordance with the undersigned's order dated March 24, 2009, objections to this Recommendation are due on or before June 9, 2009, with replies to objections due on or before June 12, 2009.

Done this 29th day of May, 2009.



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

In the Matter of:)
)
Portersville Revival Group, Inc.)
)
 Petitioner,)
)
vs.)
)
Alabama Department of Environmental)
Management) EMC Docket No. 09-01
)
 Respondent,)
)
Utilities Board of the City of Bayou)
La Batre,)
)
 Intervenor.)

ORDER and RECOMMENDATION AS TO PENDING MOTIONS

This matter is before the undersigned on the Utilities Board of the City of Bayou La Batre's ("Board") and the Alabama Department of Environmental Management's ("Department") Motions for Partial Summary Judgment. This matter is also before the undersigned on the Board's Motion in Limine. After considering the submissions of the parties related to said Motions for Summary Judgment, the Undersigned finds that the same should be GRANTED in part and DENIED in part and RECOMMENDS accordingly. The Undersigned finds the Board's Motion in Limine is due to DENIED.

1. The Board and Department seek summary judgment as to several issues in Petitioner Portersville Revival Group's ("PRG") Request for Hearing. Those issues include (a) alleged insufficiencies in the Department's Public Notice related to the subject Permit (commonly referred to as Issue #1); (b) alleged incompleteness of the subject Permit (commonly referred to as Issue #2); (c) that the Department erred by granting the subject Permit due to the Board's alleged history of



substantial non-compliance (commonly referred to as Issue #3); and, (d) the contention that a diffuser should be part of the Permit requirements (commonly referred to as Issue #6).

2. PRG contends that the Public Notice issued by the Department confused the public because in one line the Notice states: "In order to affect final decisions, comments must offer technically substantial information that is applicable to the proposed permit." Also, PRG argues that the Notice was inadequate to notify non-English speaking individuals of their right to comment.

The Board makes a convincing argument that allegations relating to insufficiency of notice in this case do not relate to "administrative action" as defined in Ala. Code §22-22A-3 which could be the subject of PRG's claims. Even if they could, it is wholly unclear how PRG could have standing to assert the rights of others. It is undisputed that PRG and its members had a full opportunity to assert their rights and did, in fact, fully participate at the public hearing. Moreover, even if it was within the jurisdiction of the Commission to consider such an issue, PRG is entitled to the instant *de novo* proceeding, thus mooted any alleged procedural deficiency. Therefore, PRG's contention related to the sufficiency of notice is without merit and the Undersigned finds that no genuine issue of material fact exists as to Issue 1, and that the Board and Department are entitled to judgment as a matter of law and RECOMMENDS accordingly.¹ See West Bay Watch, Inc., 98-21 (1999); Becky Root, 98-20 (1999).

3. The next issue which is the subject of summary judgment is the alleged incompleteness of the Permit application. PRG argues that the application did not include a complete listing of the Board's history of noncompliance. PRG admits it was aware of the Board's history of non-compliance and there is no allegation that PRG did not have a full opportunity to inspect the

¹It seems clear that the issue related to insufficiency of notice involves pure questions of law.

Department's files in order to comment on the proposed Permit application. To the contrary, from the documents submitted as part of the Board's Motions for Summary Judgment, PRG actively participated in the proceedings leading up to the Department's grant of the subject Permit. PRG seems to argue that while it had the full opportunity to participate in the process, and did so, and was aware of the Board's history of non-compliance, it still should prevail on the issue. There is no contention that PRG sought to obtain relevant information and was denied access to the same.² Based on the foregoing, the Undersigned finds that no genuine issue of material fact exists as to Issue 2 and that the Board and Department are entitled to judgment as a matter of law and RECOMMENDS accordingly.

4. Next, the Board and Department seek summary judgment as to Issue 3: Whether the Department erred in granting the Board's Permit because the Board had a less than favorable history of compliance. The Board specifically argues that a history of noncompliance is irrelevant to whether the Department acted properly in granting the Board's Permit. However, in a recent case before the Commission, In re: Shaun Thistlethwait, 06-08 (2008), a Department employee testified that the Department does review an applicant's history of compliance in determining whether a Permit should be renewed. In Marshall County Commission, 02-03 (2002), the Commission specifically held that the Department should consider compliance history in determining whether to issue a renewal permit. On the other hand, in Wild Alabama, 02-13 (2006), the Commission specifically held that failing to list past history in an application for a Permit goes to whether an application is complete and such a determination is outside the jurisdiction of the Commission.

²PRG members admit in the submissions in Response to the Motions for Summary Judgment that they were aware of the Board's history. At a minimum, in light of this knowledge, it is not unreasonable to assume that if they were concerned with formal documentation related to said history, they could have taken the opportunity to review the Department's files.

Also, the Commission found that such a claim is rendered moot by the *de novo* nature of proceedings before the Commission. Id.

The Undersigned is not satisfied that summary judgment should issue without an evidentiary hearing. Therefore, at this time, the Undersigned finds that summary judgment as to Issue 3 should be denied and RECOMMENDS accordingly. See Jerry James, 92-18 (1992).


5. Finally, the Board and Department contend summary judgment is due to be granted as to Issue 6: Whether a diffuser should be required. Assuming solely for the sake of argument that the Commission determines the Permit was proper, it appears without dispute that a diffuser will be part of the Board's facility which is subject to the Permit. The Department does not seem to disagree. Perhaps the Undersigned mistakenly concludes that this Issue is moot, but at this time it appears that it is. Therefore, at this time, the Undersigned finds and RECOMMENDS that the Motions for Summary Judgment as to Issue 6 should be denied as moot.

6. The Board's Motion in Limine related to the testimony of Bill Melton is DENIED. The Undersigned will rule on said testimony at the evidentiary hearing if objection is made.

7. PRG's previous Motion to Extend the Time to disclose expert witness is GRANTED.

8. The parties' submissions related to the Jointly-Proposed Pre-Hearing Order are hereby incorporated by reference and those submissions shall apply to this matter as it proceeds to evidentiary hearing. The Undersigned finds, and recommends accordingly, that all other requests for relief in the parties' filings related to the Motions for Summary Judgment should be denied at this time.

Done this 12th day of March, 2009.



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