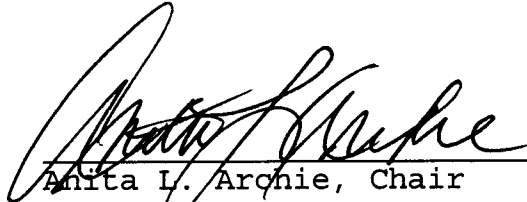


**10/16/09**

**Minutes  
Environmental Management Commission Meeting  
Alabama Department of Environmental Management Building  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2059  
August 21, 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 August 21, 2009.



---

Anita L. Archie, Chair  
Environmental Management Commission

Certified this 16th day of October 2009.



**Minutes**  
**Environmental Management Commission Meeting**  
**Alabama Department of Environmental Management Building**  
**1400 Coliseum Boulevard**  
**Montgomery, Alabama 36110-2059**  
**August 21, 2009**

**Convened: 11:00 a.m.**  
**Adjourned: 1:50 p.m.**

**Part A**

**Transcript**

**Part B**

**Attachment Index**

**Attachments 1 – 9**



**Part A**





ALABAMA ENVIRONMENTAL MANAGEMENT  
COMMISSION MEETING

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

August 21, 2009      11:00 a.m.

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 8/21/2009

Page 2	Page 4
<p>1 COMMISSION MEMBERS PRESENT:                  2 DR. LAUREL G. GARDNER, CHAIR (not present)                  3 SAM H. WAINWRIGHT, P.E., VICE-CHAIR                  4 ANITA L. ARCHIE                  5 W. SCOTT PHILLIPS                  6 DR. J. CONRAD PIERCE                  7 H. LANIER BROWN, II, ESQ.                  8 DR. JOHN H. LESTER                  9 ALSO PRESENT                  10 ROBERT TAMBLING, EMC LEGAL COUNSEL                  11 DEBI THOMAS, EMC EXECUTIVE ASSISTANT                  12                  13                  14                  15                  16                  17                  18                  19                  20                  21                  22                  23</p>	<p>1 Motion carries.                  2 The next item of business is                  3 the election of two of our members to the                  4 personnel committee, Mr. Lanier Brown and                  5 Dr. Conrad Pierce have been nominated for                  6 those slots with the -- in the personnel                  7 committee. You don't have to worry about                  8 this. It's just for a month or two, so                  9 we'll do it again in October. So -- but                  10 do I have a motion to approve these                  11 nominations?                  12 MR. PHILLIPS: So move.                  13 DR. LESTER: Second.                  14 MR. WAINWRIGHT: Made and                  15 seconded to approve these nominations.                  16 All in favor, say aye.                  17 ALL: Aye.                  18 MR. WAINWRIGHT: All                  19 opposed, like sign? (No response.) The                  20 motion carries. The next item is --                  21 MS. THOMAS: Chairman --                  22 Vice-Chair Wainwright, do you want to                  23 pause to sign this order on the</p>
Page 3	Page 5
<p>1 MR. WAINWRIGHT: Ladies and                  2 gentlemen, I'd like to get the meeting of                  3 the Alabama Environment Management                  4 Commission started. It's 11 o'clock.                  5 And first order of business -- we do have                  6 a quorum. First order of business is                  7 consideration of the minutes held -- for                  8 the meeting held on June 19th, 2009. Are                  9 there any corrections or additions to the                  10 minutes? (No response.)                  11 DR. LESTER: Move to adopt                  12 the minutes as written.                  13 MR. WAINWRIGHT: Motion made                  14 to adopt the minutes as written. Do I                  15 have a second?                  16 MS. ARCHIE: Second.                  17 MR. WAINWRIGHT: Motion's                  18 made and seconded. All in favor of                  19 adopting the minutes as presented, say                  20 aye.                  21 ALL: Aye.                  22 MR. WAINWRIGHT: Any                  23 opposed, like sign? (No response.)</p>	<p>1 elections? Thank you, sir.                  2 MR. WAINWRIGHT: Thank you.                  3 The next item will be the report from the                  4 Director.                  5 MR. GLENN: Thank you,                  6 Vice-Chair Wainwright and Commissioners.                  7 It's a pleasure to be standing before you                  8 today to address you on what all's going                  9 on at the Department. Let me first start                  10 with the administrative issues. You                  11 should have received a memo from me                  12 recently regarding recently-executed                  13 contracts as well as our rules that we                  14 have in the hopper and the like.                  15 But let me spend just a                  16 second on the budget. That's always a                  17 good, interesting topic; not just in our                  18 state or our household or our country,                  19 but at here at ADEM as well. We will begin                  20 the FY 2010 budget basically at the level                  21 that we left off in FY 2009 after the                  22 governor induced budget cuts and spending                  23 cuts. We're going to go in pretty much</p>

2 (Pages 2 to 5)

Page 6	Page 8
<p>1 level with that.                  2 There's, of course, no                  3 information on revenue for the upcoming                  4 fiscal year. This is regarding the                  5 general fund. But the revenue proponents                  6 of the general fund will likely remain                  7 stagnant at best. Through conversations                  8 with the legislative fiscal office, my                  9 staff understands that the budgetary                  10 problems that you may be hearing about or                  11 seeing about with other state agencies                  12 that they're experiencing will not affect                  13 ADEM as severely as it might other                  14 agencies.                  15 This is due in large part in                  16 fact -- to the fact that most of the                  17 revenues or a large part of the revenues                  18 that we as ADEM generate come directly                  19 from our customers through the form of                  20 fees and the like. Next fiscal year 2011                  21 is going to be real tricky. That's, I                  22 think, what we're all seeing now and                  23 being announced at the general fund</p>	<p>1 You've got, I know, a                  2 discussion about the compliance rate                  3 project up at the next agenda item, so                  4 I'll hold any remarks until that. But                  5 that's just an example of how we continue                  6 to give the information that we outlined                  7 in the operating plan.                  8 Per your direction, the '09                  9 plan focused more heavily on commitments                  10 made during the FY '09 year. Several of                  11 the projects developed plans,                  12 methodologies, frameworks, benchmarks;                  13 they kind of set the stage for a lot of                  14 future activities, and that will be used                  15 to achieve goals laid out in the                  16 Strategic Plan.                  17 And so in 2010, I would                  18 anticipate presenting you with a lot of                  19 this type information continuing in that                  20 same direction that we were -- that we                  21 have been going, to include some new                  22 things like revising our programmatic                  23 quality plans, developing smarter search</p>
Page 7	Page 9
<p>1 level.                  2 And I think, to put it in                  3 perspective, the general fund budget this                  4 year came in at about \$2.5 billion                  5 dollars, and stimulus funds, the one-time                  6 stimulus funds for 2010, made up about a                  7 billion of that. Just to say there's                  8 going to be some challenges as we                  9 continue to move forward here. But I                  10 think we can all see and agree that the                  11 efficiencies, the measures that we put in                  12 place and continue to implement will                  13 serve us here at ADEM sooner rather than                  14 later.                  15 Now I'd like to jump to the                  16 operating plan. You should have received                  17 an update recently from me regarding our                  18 progress on implementing the 2009                  19 operating plan. At this point, I think                  20 you saw that all projects are on track,                  21 some were even completed, and we're just                  22 continuing to move forward with the                  23 fulfillment of that plan as written.</p>	<p>1 features for the FileNet documents that                  2 are on the internet now through Project E                  3 File, transitioning to more electronic                  4 inspections for our field inspectors                  5 through -- as noted in Project E data as                  6 well as working to meet the speed goals.                  7 And we've talked, I know, in detail about                  8 that, one on one, through Project Speed.                  9 But making sure that we have an eye                  10 toward why we as a department were                  11 created and are working toward fulfilling                  12 that mission.                  13 I do expect to put before                  14 you at the October Commission meeting the                  15 2010 suggestion as far as an operating                  16 plan goes, but it will mainly contain                  17 that type of information and, again,                  18 always welcome input, feedback on that.                  19 I do want to stop for just a                  20 second here and just recognize what's                  21 been going on, because this has all been                  22 very quiet in the external world on how                  23 we've been implementing this plan and</p>

3 (Pages 6 to 9)

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 8/21/2009

Page 10	Page 12
<p>1 what we've been doing, but it's not been                  2 that same way here internally. We've                  3 been working -- I say we. My 600 staff                  4 members have been doing an outstanding                  5 job.                  6 You know, we can all think                  7 back five plus years ago, there was                  8 turmoil with regard to the management of                  9 the Commission and everything else, and I                  10 can think back to early '05 where I was                  11 given a very clear talk. I can vividly                  12 remember the conversations where I was                  13 told in general by everyone, take a good                  14 agency and make it better. That was in                  15 general.                  16 There were different                  17 examples: More transparency; try to                  18 demystify; this part's confusing; run it                  19 more like a business, more responsive,                  20 and the list goes on. But the message                  21 was well received, and it's been                  22 discussed from that minute here at ADEM.                  23 It started a very lengthy process. It</p>	<p>1 implement a management system, everything                  2 from the cost accounting we've talked                  3 about to just management techniques to                  4 align staff and to influence performance                  5 and measure results in these areas.                  6 I didn't tell these two                  7 folks I was going to do this until this                  8 morning just because I didn't want them                  9 to call in sick or something, but I do                  10 have to recognize -- y'all don't get to                  11 meet a lot of our staff members. But                  12 Glenda Dean and Eric Sanderson, they're                  13 in our NPDES permitting program; and I                  14 just have to acknowledge them and what                  15 they've done, and I do want to do that in                  16 front of y'all.                  17 They are just an example of                  18 the great staff that we have here and                  19 what we're doing. I could go into detail                  20 about everything they've done and what                  21 they've done, and we've talked about                  22 that. But I'll just sum it up this way:                  23 If they were hired to run a</p>
Page 11	Page 13
<p>1 started to devise a strategy to implement                  2 proper steps to make sure our business                  3 processes, how we did business, was                  4 altered in a way to improve our                  5 efficiency.                  6 I think you clearly know                  7 what I've been doing, what people like                  8 Chuck have been doing, and all of our                  9 staff, to try and lead us in that                  10 direction. What we found is that we're                  11 trying to get a focus on management being                  12 simple here. Let's get it real simple.                  13 Let's define what you do, why you do it,                  14 who you do it for type thing. Let's                  15 start at that basis.                  16 Let's set goals and define                  17 what's needed to control the quality                  18 that's important to the customers that we                  19 have, the people who are paying our                  20 salaries. Let's control our operations                  21 and the steps taken to ensure that our                  22 goals are being met and those quality                  23 objectives are being met, and then let's</p>	<p>1 publicly-traded company and they run it                  2 like they're doing their department, I'd                  3 invest in it tomorrow without a second                  4 thought. Let's just put it that way.                  5 And so, you, they're those kind of                  6 leaders.                  7 Management, leadership,                  8 continuous process improvement and the                  9 like, they're never complete. It's an                  10 ongoing process; but we're going in the                  11 right direction, and I hope that all the                  12 documents that I've given you can reflect                  13 that to the extent it can and, of course,                  14 always welcome the opportunity to talk                  15 with you more about what we have going on                  16 here and trying to be respectful of your                  17 time in that.                  18 Good morning, Commissioner                  19 Brown.                  20 Now I'd like to move on to                  21 stimulus funds. I know we've been                  22 hearing a lot about that for some time                  23 now, and we do have a role there. The</p>

4 (Pages 10 to 13)

ENVIRONMENTAL MANAGEMENT COMMISSION MEETING - 8/21/2009

Page 14	<p>1 Department's in the process of executing                  2 its responsibilities under the American                  3 Recovery and Reinvestment Act by                  4 appropriately loaning and distributing                  5 funds that we have received. It's around                  6 \$70 million of funds that have come in,                  7 coming through the Department as per this                  8 act. You know, everything from diesel                  9 retrofits in the Birmingham area to                  10 water-quality planning to drinking water                  11 and clean water, revolving loan programs,                  12 underground storage tanks, and Brownfield                  13 redevelopment.                  14 The main thing is revolving                  15 loan funds, and those dollars are being                  16 distributed utilizing -- not a new                  17 process. Luckily, this is not something                  18 we had to develop this year, but we've                  19 been able to utilize processes and                  20 procedures that have been used for years                  21 and years and years here by the                  22 Department to provide loans to these                  23 facilities.</p>	Page 16	<p>1 appropriately.                  2 Let me just go through here,                  3 how this works in the SRF program, paint                  4 a picture of that. The applications are                  5 evaluated against the regulatory                  6 requirements that we have. An                  7 environmental review, an actual                  8 environmental review, is conducted of the                  9 project and is ranked against other                  10 projects that we have.                  11 Initial work for each of                  12 these steps is conducted by staff                  13 engineers; program managers above them                  14 review and audit the quality of each one                  15 of these steps, so you're starting to see                  16 our layered-in quality management system                  17 that we have here. To layer on even                  18 more, competency issues, those managers                  19 are licensed professional engineers from                  20 the SRF program or other appropriate                  21 regulatory programs as called for in                  22 the -- in the management of the funds.                  23 Standard tools and</p>
Page 15	<p>1 And I know we had a                  2 discussion at the last Commission meeting                  3 about the controls on this. With an                  4 extra flux in money comes an extra                  5 responsibility, too, to make sure we're                  6 taking the proper steps to control those                  7 processes to make sure that it's done                  8 right. As anyone involved in this knows,                  9 there's a lot of expectations out there                  10 placed on us by the Governor, by the                  11 President, Congress, and everything else                  12 about how we spend these funds and what                  13 we do.                  14 This was just a perfect                  15 opportunity to talk -- to point out                  16 quality management and what we're doing                  17 here. This just is a great opportunity                  18 to highlight that. Our SRF program                  19 manages hundreds of millions of                  20 taxpayers' dollars. Every single year,                  21 we do that, and it's incumbent upon the                  22 program to have proper procedures in                  23 place to make sure that's all being done</p>	Page 17	<p>1 procedures have been developed to conduct                  2 each one of these -- each part of the                  3 application processing. Staff conducting                  4 the work has gone through extensive                  5 training including a mentoring period by                  6 those professional engineers that have                  7 many years of experience and education in                  8 environmental management and this type of                  9 decision making, specifically.                  10 Timeliness and process flows                  11 are managed through a proprietary data                  12 management system, and then funds are                  13 ultimately disbursed incrementally                  14 accompanied with field inspections and                  15 concurrence by a project -- concurrence                  16 of project progress by the program                  17 management, the ADEM accountants, and                  18 anyone else that's involved in that.                  19 So that type of quality                  20 control is what we've been talking about                  21 for some time with you, and this is just                  22 a perfect opportunity to give you some                  23 examples about an overview of how that</p>

5 (Pages 14 to 17)

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<p>1 might work.                  2 Lastly, I want to mention                  3 air toxics. We continue to talk about                  4 air toxics. At the April meeting, we                  5 talked in detail about this, and we                  6 talked about the Department's focus on                  7 MACT, Maximum Available Control                  8 Technologies, and those requirements that                  9 are placed on many of the point sources                  10 of the stationary sources that we                  11 regulate here.                  12 Our staff continues to talk                  13 with those special interest groups about                  14 the ideas and efforts to address these                  15 issues and the air toxics in Alabama.                  16 You've recently even seen recommendations                  17 to form study commissions and do studies                  18 and take all kinds of steps along those                  19 lines. I think you're aware those have                  20 happened in Alabama, particularly in                  21 Mobile and Birmingham. We've got some                  22 detailed studies on one of our sister                  23 states that even completed a very lengthy</p>	<p>1 the fact that an idling automobile,                  2 particularly diesel, near a school or                  3 playground increases the risk of a child                  4 getting cancer. That's just a fairly                  5 common thing. We don't talk about it a                  6 lot, but it's out there and it's an                  7 issue. And so in an effort to reduce air                  8 toxics in the state of Alabama, we're                  9 working with the health department, we're                  10 working with the lung association to                  11 initiate a program to encourage idle-free                  12 zones, anti-idling or no-idle zones                  13 around schools and the like.                  14 One of our local school                  15 districts has already jumped on board.                  16 They have no-idling zones established                  17 where busses load and unload                  18 particularly. That's obviously a major                  19 concern there. No-idling signs have been                  20 developed. I think I even sent y'all a                  21 mock-up of some of those signs and are                  22 ready for deployment. We're working on                  23 doing that now every day.</p>
Page 19	Page 21
<p>1 stakeholder big committee-type process.                  2 All these things point to an                  3 elephant in the room that is something                  4 that it can't go unnoticed, and that's                  5 mobile emissions. We have an entire                  6 division working for Ron -- y'all've met                  7 Ron and many of his staff members as                  8 we've talked about rules and regulations.                  9 All those rules and regulations are                  10 geared around stationary sources and                  11 implementing the next thing that EPA                  12 brings down or next issue that you or us                  13 have brought up.                  14 We have a whole group that                  15 are implementing the current science and                  16 technologies and standards out there                  17 every day, but there has not been a whole                  18 lot of focus placed on what I consider --                  19 and spoken as a father of four young                  20 children -- to be the greatest airborne                  21 risk that my kids face every single day                  22 and all the children in Alabama face.                  23 I think we all agree with</p>	<p>1 We're excited about the                  2 impact that this will have. We're                  3 excited about what this will mean, given                  4 the fact that air pollutants that come                  5 from tailpipe emissions do present a                  6 significant risk out there for the whole                  7 population, particularly children. We                  8 expect student exposure to toxic                  9 emissions to be reduced by this program.                  10 We're looking for the                  11 results that we can get and spending some                  12 resources where we can see those and                  13 thereby reducing the cancer risk for some                  14 of the kids in Alabama.                  15 With that said, I don't want                  16 to close my remarks without forgetting to                  17 mention something that Commissioner                  18 Wainwright and I talked about a little                  19 bit ago, and that was the Anniston Army                  20 Depot activities. They're not a focus of                  21 your conversations every 10 seconds like                  22 they were maybe several, several years                  23 ago, but it needs to go -- and Gerald can</p>

6 (Pages 18 to 21)

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1 jump in and correct me if I'm wrong, but  
 2 the VX and Sarin campaigns have been  
 3 completed. Now there are just only a few  
 4 of those words -- the mustard gas, which  
 5 is a major milestone in these programs.  
 6 And with that said, this  
 7 concludes my prepared remarks. I'll be  
 8 happy to answer any questions that you  
 9 may have or address other issues.  
 10 MR. WAINWRIGHT: Are there  
 11 any questions from the Commission?  
 12 MS. ARCHIE: I have one.  
 13 I'm very interested in air toxics with  
 14 the school busses and the idle program.  
 15 Do you have some information on that,  
 16 when that program potentially gets  
 17 started, the pilot program? And you  
 18 don't have to discuss it here; just, you  
 19 know, asking to send that information as  
 20 well as how will you end up measuring the  
 21 results, you know.  
 22 So that's what I'm really  
 23 curious in. How do you measure something

Page 23

1 like that to see if it's working or not?  
 2 So when your group that's working  
 3 together, I would like to get some  
 4 information on exactly, you know, how  
 5 this is actually going to work.  
 6 MR. GLENN: And let me  
 7 answer your first question, dodge the  
 8 second question, but then take advantage  
 9 to jump on a tangent there. First  
 10 question asked was do we have some  
 11 material. We'll make sure each one of  
 12 y'all get that. You even have an  
 13 anti-idling sign for your driveway just  
 14 in case you have visitors or something.  
 15 Those are very hard things  
 16 to capture, as we know. These items  
 17 about risk and what causes that are very  
 18 difficult things to capture. The  
 19 indicators are not quite so difficult to  
 20 capture. In particular, I don't know  
 21 if -- I know Commissioner Brown and  
 22 Phillips travel between Birmingham and  
 23 Montgomery a whole lot, as do I, and I

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1 sometimes stop a whole lot on the  
 2 interstate in doing that.  
 3 And traffic flow and how  
 4 it's moving is an indicator. If you have  
 5 congestion, at that spot, you have an  
 6 increased amount of emissions that are  
 7 being put into the environment compared  
 8 to what they were designed to be at that  
 9 stage. Traffic, in theory, was designed  
 10 to move properly. We might all disagree  
 11 with that some around our favorite  
 12 intersections; right.  
 13 But -- so we can measure  
 14 some of the indicators, and I think -- I  
 15 know that there are many scientists who  
 16 feel comfortable making that statement  
 17 that if those indicators move in a  
 18 certain direction, then the risk moves in  
 19 a certain direction. Quantifying the  
 20 exact number, I've not seen that science  
 21 out there yet. I think there's a lot of  
 22 work that's been done on this, but I have  
 23 not seen that.

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1 And it's something that  
 2 we'll continue to work on, but there are  
 3 very clear indicators that, you know, do  
 4 you have idling school busses near a  
 5 playground, or do you not? I think we're  
 6 -- the kids are in a whole lot better  
 7 shape if we don't. Do you have a bunch  
 8 of cars sitting there dead still on I-65,  
 9 or do you not? I think we're all in a  
 10 lot better shape if we don't have cars  
 11 sitting there dead still.  
 12 And so it's those kinds of  
 13 indicators I think we can point to and  
 14 focus on. I think -- I'm excited to work  
 15 with everybody else in the country and  
 16 with y'all on quantifying those and  
 17 judging how effective these efforts are  
 18 because I think that's a very challenging  
 19 job.  
 20 MR. WAINWRIGHT: Mr.  
 21 Phillips?  
 22 MR. PHILLIPS: Mr. Director,  
 23 you mentioned the stimulus package, and

7 (Pages 22 to 25)

Page 26	Page 28
<p>1 we heard, or at least I heard, quite a                  2 bit about Congress wanting to measure                  3 this from a transparency perspective.                  4 What has our experience been so far in                  5 working with Congress to do that?                  6 MR. GLENN: I think after                  7 we've gone through a whole lot of Tylenol                  8 and Advil and pulled more hair out, we're                  9 filling out all the reports. We have                  10 more reports than you can shake a stick                  11 at with regard to what this means, what                  12 jobs are created. Transparency's no                  13 problem. We can tell very clearly where                  14 the money's going, who's spending it.                  15 That's no problem. We're reporting that;                  16 it's out there. Everything's public                  17 record. It's going on state sites and                  18 federal sites and everything else.                  19 So the transparency of where                  20 the funds are going, that I think -- I                  21 know Ms. Archie's in the system as well,                  22 and it's what we all have to do now. And                  23 we have some staff members who grumble</p>	<p>1 federalreporting.gov, that you can start                  2 keying information in. I think you -- I                  3 think, Marilyn, what, 10 days to key in                  4 information.                  5 At the December meeting, can                  6 you possibly tell us whatever you keyed                  7 into -- I think in that database, you're                  8 going to be able to download what you                  9 have reported to the feds. I'd love to                  10 have that as part of your director's                  11 report for the December meeting.                  12 MR. GLENN: Absolutely. Be                  13 happy to do that.                  14 MR. WAINWRIGHT: Any other                  15 questions from the Commission? (No                  16 response.) Thank you, Mr. Director. I'd                  17 like to put -- get some special attention                  18 on the completion of the incineration.                  19 The getting rid of the VX and Sarin                  20 weapons in Alabama has been a great step.                  21 I had many sleepless nights, thanks to                  22 Mr. Ludder's comments, on the problems we                  23 might have up there, but that's a major</p>
Page 27	Page 29
<p>1 about it, as we all do, when you look at                  2 how onerous it is, but it's also great                  3 opportunity that this country has and so                  4 we need to, you know, take advantage of                  5 that.                  6 But there's also been a lot                  7 of reporting about impact on jobs and                  8 green infrastructure and everything else.                  9 So all that is being presented to the                  10 public. We have links on our website                  11 now, I believe. Governor Riley has taken                  12 a very proactive stance in that area.                  13 Obviously, you know, in Washington, a lot                  14 has been done there. So that information                  15 is flowing out there, and we're taking                  16 actions daily to make sure that                  17 information's being put out there.                  18 MR. PHILLIPS: Good.                  19 Thanks.                  20 MS. ARCHIE: Can I follow up                  21 on that question? Are you required to do                  22 Section 1512 reporting? October 10th is                  23 the first day that you reported to</p>	<p>1 step that should be noted.                  2 The next item of business is                  3 a report from the Commission Chair. The                  4 Commission Chair handed me this, so we'll                  5 attempt to have a discussion here.                  6 There's no action items in this                  7 discussion. But the first item we have                  8 is the discussion on greenhouse gas                  9 emissions.                  10 The Director has assembled a                  11 large volume of information which he gave                  12 us at the last meeting, and we're                  13 continually getting new information in.                  14 And I think the major focus now is                  15 assembling information that the                  16 Commissioners can use when these issues                  17 come before us. And is there any comment                  18 from any of the Commissioners regarding                  19 this item?                  20 MR. PHILLIPS: I have a                  21 comment. Seems to me we have a                  22 legislative bill that kind of ties our                  23 hands around this very issue. How do we</p>



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1 resolve that issue? I mean, we can talk  
 2 about our position on greenhouse gas  
 3 emissions, but so what?  
 4 MR. WAINWRIGHT: That --  
 5 that's an item that will be sent to each  
 6 Commissioner, but it is Section 22-28A-3.  
 7 It's -- I guess it's about a 10-year-old  
 8 legislative act that would give us a  
 9 problem if certain types of requests were  
 10 made for EPA -- from EPA to the agency.  
 11 I'll give each of the Commissioners a  
 12 copy of this.  
 13 I've also gotten information  
 14 from Farm Bureau and other organizations,  
 15 and that information will be distributed.  
 16 I would like to ask the Director if they  
 17 could come up with some system that we  
 18 can assemble this information and get to  
 19 it without having to thumb through acres  
 20 of e-mails, maybe a binder that we can  
 21 add these in as we go, an index of some  
 22 sort so we can refer to it. We'd very  
 23 much like the assistance of the Director

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1 there to help us assemble this  
 2 information as we get it.  
 3 MR. GLENN: Be happy to do  
 4 that.  
 5 MR. WAINWRIGHT: I'll give  
 6 these to Debi to distribute to the  
 7 Commissioners. Anything else on the  
 8 greenhouse gas emissions? (No response.)  
 9 Item -- the next item is the  
 10 discussion for the ADEM Operating Plan  
 11 for the methodology of quantifying the  
 12 compliance rates for the major ADEM  
 13 programs. We were given a handout at the  
 14 last meeting of formulas that are used to  
 15 determine these compliance rates. Has  
 16 everyone had a chance to look at those  
 17 formulas?  
 18 I think there's a correction  
 19 made on the very last one. Any -- any  
 20 comments on them, on the system?  
 21 MR. PHILLIPS: I'll make a  
 22 comment. I think it's good that we're  
 23 starting to quantify how we look at

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1 compliance. Anything we can do to  
 2 quantify and look at something at least  
 3 gives us the opportunity to determine  
 4 trends and make recommendations relative  
 5 to doing things different. So I commend  
 6 the Department for coming up with a  
 7 quantifiable way of looking at  
 8 compliance.  
 9 MR. WAINWRIGHT: Looking at  
 10 the broader picture of the ADEM operating  
 11 plan, this is -- this plan is the  
 12 property of the Director, and he's using  
 13 it within the agency. As I understand,  
 14 he would like to get information  
 15 regarding activities on this plan to us;  
 16 and it's not items that we have to  
 17 consider and approve, but we do need a  
 18 system here again that this  
 19 information -- the information on the  
 20 operating plan that you'd like to get to  
 21 us, give it to us in a form that we can  
 22 update and that we can -- can reference  
 23 rather easily.

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1 We're getting inundated with  
 2 information, and it's -- it gets rather  
 3 difficult to keep up with it. Back when  
 4 we used to get assembled hard copy, we  
 5 could pile one pile over here and another  
 6 pile over there, but in the computer,  
 7 it's a major search effort to go through  
 8 all of the stuff we get. It's scattered,  
 9 and it's a major search effort. If you  
 10 can help us in that area, we'd certainly  
 11 appreciate it.  
 12 MR. GLENN: We'll try to do  
 13 that.  
 14 MR. WAINWRIGHT: Are there  
 15 any other comments or discussion on the  
 16 operating plan? (No response.) Hearing  
 17 none, we'll go on to the next item of  
 18 business which is Agenda Item No. 5,  
 19 Canaan Systems, Incorporated, vs. ADEM,  
 20 EMC Docket No. 09-06.  
 21 You all have been given a  
 22 tremendous amount of information on this.  
 23 It's very complicated to me as an

9 (Pages 30 to 33)

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<p style="text-align: right;">Page 34</p> <p>1 engineer. It's a lot of legal 2 complications. And I'm going to ask 3 Robert to sort of guide us through this. 4 Robert, if you would, go over the 5 different options that we are being 6 presented with and give us some clarity 7 on the different options. 8 MR. TAMBLING: Commissioner 9 Wainwright, you have before you a motion 10 to sever and stay that has been submitted 11 by the Department, and the petitioner has 12 obviously objected to that and has 13 requested oral arguments before you. So 14 I guess the first item of business that 15 you should take up is whether or not you 16 want to grant oral argument in this case 17 and how much time you would want to 18 allocate to each side. 19 MR. WAINWRIGHT: All right. 20 Do you think 10 minutes is a reasonable 21 amount for an oral argument? 22 MR. TAMBLING: I think a 23 total of 10 minutes for each side is a</p>	<p style="text-align: right;">Page 36</p> <p>1 minutes, or what's the structure will 2 this be? 3 MR. TAMBLING: However you 4 want to do it. It's just a suggestion. 5 You could give them -- they could choose 6 to allocate the time as they wish. The 7 petitioner, for instance, could take 8 seven minutes on the argument, the 9 principal argument, and three minutes in 10 rebuttal. Just however you want to do 11 it. I would recommend 10 minutes. You 12 can enlarge the time if you want to. 13 MS. ARCHIE: Who's the time 14 keeper on this? 15 MR. TAMBLING: I would say 16 Debi. 17 MS. ARCHIE: I would propose 18 10 minutes from rebuttal to actually 19 presenting their arguments. 20 MR. TAMBLING: The logic 21 here is that the briefs have pretty much 22 teed everything up for you. If you've 23 read the briefs, you probably already</p>
<p style="text-align: right;">Page 35</p> <p>1 reasonable amount of time, which would 2 also include rebuttal time and would also 3 include any questions you would have, 4 given the size of our docket today. 5 MR. WAINWRIGHT: All right. 6 The chair would entertain a motion then 7 to allow or not allow oral argument. 8 MR. PHILLIPS: So move. 9 MR. WAINWRIGHT: Which one? 10 MR. PHILLIPS: To allow. So 11 I'm saying yes. 12 DR. LESTER: Second. 13 MR. WAINWRIGHT: We have a 14 motion that's been seconded -- a motion 15 made and seconded to allow oral argument. 16 Any discussion on that? 17 MS. ARCHIE: Mr. Chair, I 18 have a question so far as as procedure, 19 how we're going to handle this. So are 20 you saying a total of 10 minutes, Robert, 21 you're proposing for -- even for rebuttal 22 for each side, or we're saying for them 23 to actually -- the first, like, five</p>	<p style="text-align: right;">Page 37</p> <p>1 understand the arguments. Anyways, it's 2 the petitioner's request for oral 3 argument that you're ruling on, so if you 4 grant oral argument, I would assume the 5 petitioner would step up and commence the 6 argument. 7 MS. ARCHIE: Thank you. 8 MR. WAINWRIGHT: All right. 9 Any other comments? Ready to vote on 10 whether to allow oral arguments. The 11 motion is made that we do allow oral 12 arguments. All in favor, say aye. 13 ALL: Aye. 14 MR. WAINWRIGHT: All 15 opposed, like sign? (No response.) 16 Motion carries. I guess we would start 17 with the petitioner? 18 MR. TAMBLING: That's 19 correct. 20 MR. TURNER: Good morning, 21 Commissioners. My name's Bart Turner. 22 I'm with the law firm Maynard, Cooper &amp; 23 Gale, here representing the petitioners</p>

10 (Pages 34 to 37)

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<p>1 Canaan Systems. I will keep this brief, 2 very likely under 10 minutes. 3 I think as the Commissioners 4 have noted, this matter's been well 5 briefed by both parties. I think you 6 have a strong feel for positions each 7 party have taken. With that said, I 8 would like to just kind of jump into what 9 the petitioners view as a threshold 10 question here to be addressed before the 11 Commission that's here by way of ADEM's 12 motion to stay and motion to sever. 13 Essentially, the question is 14 this: Whether ADEM is required to 15 provide notice of deficiency to 16 petitioners in instances where a request 17 for a hearing is filed by a non-lawyer. 18 Now, this matter was initially raised and 19 motion dismissed and motion to strike 20 filed by the Department. Our client, 21 Canaan Systems, filed their initial 22 request for a hearing by and through its 23 president of the company, Roger Rader.</p>	<p>1 to file within five days of receipt of 2 that petition. 3 Reading those two 4 requirements side by side, the hearing 5 officer ruled that ADEM's motion to 6 dismiss and motion to strike which 7 assumes that very question was due to be 8 denied. Petitioners contend that the 9 framework presented in Judge Cotter's 10 order is well reasoned and presents the 11 appropriate framework and structure which 12 is very instructive as to the same issue 13 that's now presented before the 14 Commission through ADEM's motion to sever 15 and motion to stay. That's the 16 jurisdictional issue you'll find in their 17 pleadings. We believe Judge Cotter's 18 recommendation and his order aptly 19 answers that question. 20 In moving forward with that 21 same issue, it's instructive to go 22 straight to the regulations which set 23 this out. Now, the Department in their</p>
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<p>1 Roger's a non-lawyer. By 2 virtue of this, the Department filed a 3 motion to dismiss and motion to strike. 4 That motion was further briefed, then 5 heard by the hearing officer, Judge 6 Cotter. 7 Judge Cotter, after 8 reviewing the motions, reviewing the 9 legal issues presented in the briefings, 10 issued an order July 1st, 2009, coming to 11 the conclusion that while it is correct, 12 according to the Commission rules, that 13 an individual in practice before the 14 Commission does have to be a licensed 15 lawyer recognized by the Alabama State 16 Bar. 17 That requirement also must 18 be read in conjunction with the 19 Commission's rule that provides to the 20 extent a petition filed requesting a 21 hearing is deficient, there is a notice 22 of deficiency requirement by which the 23 Department and Commission are obligated</p>	<p>1 briefings have identified, I believe, 2 almost six individual orders and opinions 3 that have either been adopted by the 4 Commission or written by hearing officers 5 that have addressed the question of what 6 to do in instances when a request for a 7 hearing has been filed by a petitioner 8 who is either a non-lawyer or not 9 recognized by the Alabama State Bar. 10 Correctly noted, the 11 Department observes that in all six of 12 those instances, those cases and 13 petitions were dismissed, and the 14 Commission affirmed those decisions. 15 What is missing from those six decisions 16 that have been cited as support in this 17 matter is the fact that none of those 18 cases and none of those orders addressed 19 the narrow question of what to do in 20 instances when a notice of deficiency was 21 not filed or in instances when that issue 22 has been raised as a reason why the 23 motion should not carry.</p>

11 (Pages 38 to 41)

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<p>1 It's our contention as                  2 Canaan Systems that we believe the                  3 regulations read very clearly to this                  4 issue. And while I will not read them                  5 all the way through, I do think it's                  6 instructive to go to the section that                  7 addresses this question. Alabama                  8 Administrative Code Section 335-2-1-.04,                  9 Subparagraph 7, addresses this question,                  10 and I will read that provision to you.                  11 (As Read:) Within five                  12 days' receipt of the Department of a                  13 timely request for a hearing, the                  14 Department shall file with the                  15 Commission, if appropriate, a notice                  16 alleging any pleading defects in the                  17 request for a hearing in identifying the                  18 omissions of information required by                  19 Paragraph Subpart 5.                  20 And I'll get to Paragraph                  21 Subpart 5, because that's very important.                  22 It sets out what is determined to be the                  23 appropriate elements that must satisfy</p>	<p>1 for a hearing which was signed and                  2 admitted through the undersigned counsel.                  3 We satisfied and carried that forward,                  4 and that's exactly how the hearing                  5 officer viewed this duty and obligation.                  6 But going back to what is                  7 set out as the required elements for                  8 perfecting a request for a hearing, what                  9 has to be included in it? And if it's                  10 not included, what does the Department                  11 have a duty and obligation to inform the                  12 petitioner that's missing? Well, let me                  13 read that for you --                  14 MS. THOMAS: Five minutes.                  15 MR. TURNER: Thank you.                  16 Section 335-2-1-.04, Subparagraph 5,                  17 there are seven elements that are                  18 provided that must be satisfied to                  19 perfect a request for a hearing. I'm                  20 just going to read Subpart F and Subpart                  21 G, and it's bolded in the most recent                  22 brief that petitioners filed.                  23 (As Read:) The name,</p>
Page 43	Page 45
<p>1 that request for a hearing. Before                  2 moving on though, I do think it's                  3 important to note this is                  4 nondiscretionary duty. The word "shall"                  5 is included in this provision. Once that                  6 request for hearing is received within                  7 five days and it's a timely requested                  8 hearing, the Department shall file with                  9 the Commission a notice of pleading                  10 defect.                  11 In turn, that notice of                  12 pleading defect is provided to the                  13 petitioners wherein they have                  14 approximately 10 days upon receipt of                  15 notice to correct and cure any pleading                  16 defect. Judge Cotter, when he took this                  17 issue under submission, acknowledged the                  18 importance of this requirement. Indeed,                  19 his order also provided petitioners an                  20 opportunity to correct its pleading                  21 deficiency.                  22 By order, he allowed                  23 petitioners to file an amended request</p>	<p>1 mailing address, and telephone number of                  2 the attorney for the person making the                  3 request, if represented by the attorney.                  4 Subpart D: An original signature of the                  5 person making the request or such                  6 person's attorney.                  7 Therein those two provisions                  8 expressly provide the requirement for                  9 having an effectively pled request for a                  10 hearing, indication, signature, and name                  11 of effective attorney. That's the exact                  12 same basis for which the Department                  13 contends the petitioner's motion's due to                  14 be denied, because it wasn't effectively                  15 filed by undersigned counsel. These are                  16 the exact elements that are required to                  17 be included, and if they're not, the                  18 Department's obligated to file notice of                  19 defective pleading such that petitioner,                  20 like Canaan, can have an opportunity to                  21 cure.                  22 With respect to this issue,                  23 we believe it's been asked, answered, and</p>

12 (Pages 42 to 45)

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<p>1 duly informed by the result of the 2 hearing officer's opinion. We 3 respectfully request as to Jurisdictional 4 Issue No. 1 that the Commission, when 5 considering the context of the motion to 6 stay and motion to sever, deny that 7 request. 8 As to Jurisdictional Issue 9 No. 2 -- and I will quickly move on to 10 that one -- Jurisdictional Issue No. 2 11 deals with one of the three permits that 12 was denied by the Department of which 13 forms the basis of the petitioner's 14 appeal. That's the Lawrence Landing 15 permit. 16 The Lawrence Landing permit 17 is a permit for a subsurface water system 18 that has capacity of less than 15,000 19 gallons per day. The reason that's 20 important, that as of May 22nd, 2009, the 21 governor signed into law Act 2009-773, 22 which effectively describes that for 23 purposes of regulating those types of</p>	<p>1 act that was enacted May 22nd, 2009, is 2 an attempt to retroactively apply a law 3 that was not intended for 4 retroapplication. 5 The Supreme Court's clearly 6 spoken on the lay of the law in the state 7 of Alabama as to retroactive applications 8 as to laws newly enacted. There are two 9 prongs that have been set out in ex parte 10 Calhoun, Alabama Supreme Court case 11 decided in 1999, wherein the Court said 12 Alabama generally disfavors retroactive 13 application of new laws or facts. 14 There are two exceptions to 15 that. One is to the extent the -- there 16 is clearly express legislative intent for 17 there to be retroactive application of 18 that law. The other prong is to the 19 extent the statute is deemed to be a 20 quote, unquote, remedial act. 21 Again, the Court has spoken 22 on what those involve when there's clear 23 legislative expression of an intent to</p>
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<p>1 wastewater systems of which Lawrence 2 Landing is one of those, in instances 3 when the capacity is under 15,000 gallons 4 per day, the authority has now been 5 granted and shifted to Department of 6 Health to administer and regulate that 7 program. 8 The petitioner's contention 9 herein with respect to that issue is 10 that, as framed by the Department, the 11 Department's contending that it no longer 12 has jurisdiction to hear that permit 13 appeal because Lawrence Landing is under 14 15,000 gallons, and in their view, by 15 virtue of this new act signed into law, 16 they no longer have jurisdiction to 17 handle it; the Department of Public 18 Health does. 19 The petitioners contend that 20 by virtue of its application that went in 21 in October 2008 and by virtue of its 22 denial, the denial it received from ADEM 23 in May 15th, 2009, the application of an</p>	<p>1 retroactively apply and when there is 2 statutes considered to be remedial. The 3 Department's contention as to why the act 4 should be retroactively applied is they 5 claim that there is clear express intent 6 for it to be that way by virtue of the 7 act. 8 MS. THOMAS: One minute. 9 MR. TURNER: They identify 10 the term "immediate" as a reason why that 11 act should be retroactively applied. 12 Immediate has no connotation of 13 retroactivity. It simply describes and 14 discusses the point in time in which that 15 act was enacted, May 22nd, 10:15, 2009. 16 As to the remedial statute, 17 remedial statutes primarily deal with 18 procedures as defined by the Alabama 19 Supreme Court. The change in the act has 20 much more to do with procedural timing; 21 it has to do with a wholesale change in 22 the way that the state of Alabama, 23 through ADEM or the Department of Public</p>

13 (Pages 46 to 49)

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1 Health, are to enact permits, adopt them,  
 2 and carry forward that program.  
 3 As such, we don't believe  
 4 that the statute's intended -- or the  
 5 act, rather, is intended to be any sort  
 6 of remedial statute, and it's our  
 7 position that Jurisdictional Issue No. 2  
 8 as framed in the motion to stay motion  
 9 and motion to sever is due to be denied.  
 10 Thank you.  
 11 MS. BROWN: Mr. Chairman,  
 12 members of the Commission, my name is  
 13 Mary Frank Brown, and I'm here to  
 14 represent the Department. Today you sit  
 15 in a judicial role, not in a  
 16 policy-making role, and before you is  
 17 twofold issue: Was the request filed on  
 18 behalf of Canaan Systems, Incorporated,  
 19 and when is a pleading defect applicable.  
 20 The first hurdle that the  
 21 petitioner must clear is a timely-filed  
 22 request for hearing. The Code of Alabama  
 23 in Section 34-3-6 says that a person

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1 representing another before a commission  
 2 must be licensed by the state of Alabama.  
 3 When Canaan Systems was formed, it had a  
 4 decision to make. Does it want to be a  
 5 partnership, a sole proprietorship, a  
 6 limited liability company, or a  
 7 corporation, and it chose a corporation.  
 8 It gets many benefits by  
 9 being a corporation, but it also must  
 10 have representation when it comes before  
 11 a commission, a committee, a board, or a  
 12 court. Alabama courts have consistently  
 13 held that a corporation, even a  
 14 corporation with a sole shareholder and  
 15 one director, may not be represented in  
 16 court by a director, officer which is not  
 17 licensed to practice law, and that any  
 18 filing by a non-attorney on behalf of a  
 19 corporation is a legal nullity, which  
 20 means that the request for hearing on  
 21 behalf of Canaan Systems, Incorporated,  
 22 was not only untimely filed; it doesn't  
 23 even exist. It was not filed.

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1 And since an administrative  
 2 agency is purely a creature of the  
 3 legislature, it has only those powers  
 4 conferred on it by its creator; in other  
 5 words, it cannot pass rules that  
 6 contradict what the law has enacted.  
 7 When we go down to the  
 8 second issue brought, which is the notice  
 9 of pleading defects, notice of pleading  
 10 defect is a notice requirement for those  
 11 requests that are recognized under law as  
 12 existing. In other words, they're not a  
 13 legal nullity. ADEM 335-2-1-.04(7) gives  
 14 us those requirements.  
 15 Within five days of receipt  
 16 by the Department of a timely request for  
 17 hearing, the Department shall file with  
 18 the Commission, if appropriate, a notice  
 19 alleging any pleading defects in the  
 20 request for a hearing and identify the  
 21 omissions of information required in  
 22 Paragraph 5 above.  
 23 Paragraph 5 above has five

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1 subsections, but we're only going to  
 2 concentrate on two today. Subsection  
 3 335-2-1-.04(5)(f), all that simply states  
 4 is that you have the name, mailing  
 5 address, telephone number of the attorney  
 6 for the person making the request, if  
 7 they have an attorney. Canaan Systems,  
 8 Incorporated, did not have an attorney.  
 9 Moving down to that same  
 10 335-2-1-.04(5)(g), it states that you must  
 11 have an original signature of the person  
 12 making the request or such person's  
 13 attorney. In this case, the  
 14 original -- original signature was there.  
 15 It was Roger Rader. He made the request,  
 16 and the signature was there.  
 17 This section and no other  
 18 section does it say that the Department  
 19 has to tell anybody that they must hire  
 20 an attorney. Nowhere in the rules does  
 21 it say that. A notice of pleading defect  
 22 is intended to be used to clarify the  
 23 issues of what is being requested to be

14 (Pages 50 to 53)

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<p>1 heard. It is not to be used to override 2 what the legislature and the Supreme 3 Court and the state laws of Alabama say 4 in regards to jurisdiction. 5 Therefore, since the request 6 for the hearing was not signed by a 7 licensed attorney, it is illegal -- it is 8 a legal nullity, and it does not exist, 9 meaning there is nothing to amend because 10 Canaan Systems never filed a request for 11 hearing. 12 As to the second 13 jurisdictional issue, we know that 14 Governor Riley signed an act, 2009-77, on 15 May 22nd which establishes the 16 jurisdictional areas of the state agency 17 with regard to permitting and regulating 18 the subsurface distribution wastewater 19 systems, also known as lateral 20 distribution or the drip disposal 21 systems, for disposal of treated sanitary 22 wastewater effluent. 23 The Department's position is</p>	<p>1 which do not create in large, diminish, 2 or destroy vested rights and are favored 3 by the Court and are retroactively 4 applied. The Department contends that 5 the act is a remedial statute and should 6 be applied retroactively because the 7 petitioner has no vested interest. 8 The fact that the 9 application is submitted does not give 10 the permittee a vested right. As a 11 matter of fact, the Department sent 12 Lawrence Landing a letter on October 27th 13 of '08 stating that the UIC regulations 14 prohibits construction of injection 15 facilities prior to the issuance of a 16 permit. Thus, this is evidence that no 17 property rights or privileges were 18 conveyed to the applicant by the 19 Department's receipt of that application 20 for a permit. 21 The Department, even in its 22 draft permits and issued permits, 23 contained the following standard language</p>
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<p>1 that this act is retroactive. It is 2 clear from the act that it appears to be 3 both -- that it applies to both existing 4 permits and to all future permits, 5 retrospectively and respectively. The 6 Class V subsurface fluid distribution 7 system permit application for Lawrence 8 Landing subdivision is a system with a 9 design flow of 15,000 gallons per day or 10 less, and as a result, the new law -- of 11 the new law, the Department no longer has 12 jurisdiction over this permit request. 13 The petitioner contends that 14 the act should not be applied 15 retroactively consistent with the general 16 law recognized in Alabama that disfavors 17 retroactive application of the new law. 18 The general rule, however, is subject to 19 an equally well-established exception 20 called remedial statutes, which do 21 operate retroactively. 22 What is the remedial 23 statute? Remedial statute are those</p>	<p>1 which says the permit does not convey any 2 property rights of any sort or any 3 exclusive privilege, further evidence 4 that even a permit doesn't convey that. 5 There simply is no vested rights here. 6 In addition, when the act 7 became effective, it also removed the 8 Department's regulatory authority for all 9 subsurface distribution wastewater 10 systems for the disposal of treated 11 sanitary wastewater effluent with a 12 design flow of 15,000 gallons per day or 13 less. That in and of itself shows the 14 intent of the legislature that the new 15 act is retroactive. We can't even 16 regulate the permits. 17 In closing, I would like to 18 reiterate that the five decisions of the 19 Commission cited to you in the 20 Department's brief reflects the issues 21 that are here today. In four of the five 22 decisions, a notice of pleading defect 23 was not filed advising the parties that</p>

15 (Pages 54 to 57)

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<p style="text-align: right;">Page 58</p> <p>1 they needed an attorney licensed in the 2 state of Alabama, and the only case where 3 a notice of pleading defect was filed 4 concerning the issue of a licensed -- the 5 issue of a licensed attorney was not even 6 mentioned in that notice of pleading 7 defect. 8 Why? It is not a defect 9 issue. It's a jurisdictional problem. 10 Despite the unfortunate loss of a 11 petitioner's ability to pursue its 12 appeal, striking the request for hearing 13 and dismissing petitioner's case is 14 consistent with the laws of the state of 15 Alabama, the Court, and the Commission's 16 longstanding rule regarding practice 17 before them. 18 Thank you. I'll answer any 19 questions, if you have any. 20 MR. WAINWRIGHT: Okay. Any 21 questions for the attorneys from the 22 Commission? (No response.) I'd like to 23 thank the attorneys for -- I wish I could</p>	<p style="text-align: right;">Page 60</p> <p>1 looked at these four alternatives 2 as -- if there are no further -- if 3 there's no further discussion, questions 4 for the attorneys, does anyone want to 5 make a motion on any of the four 6 alternatives that we have? 7 MS. ARCHIE: Before -- if I 8 may.... 9 MR. WAINWRIGHT: Yes. 10 MS. ARCHIE: -- the motion's 11 made, I'm trying to get my arms around 12 this whole issue of this section that's 13 dealing with -- I got the part with the 14 original signature, but in that rule 15 that's out there, it talks about -- I 16 think (e), that talks about the -- and I 17 don't have the rule in front of me, but 18 what I'm hearing from Canaan Systems' 19 attorney, in dealing with the whole issue 20 of that little line in that -- what 21 qualify as a pleading defect, it says 22 about getting the signature of an 23 attorney on there, original signature to</p>
<p style="text-align: right;">Page 59</p> <p>1 say you were clarifying things, but this 2 old engineer's a little confused by it. 3 Are there any questions from the 4 Commission? (No response.) 5 Robert, would you give us an 6 idea of the alternatives that we are 7 faced with? 8 MR. TAMBLING: I will do the 9 best I can. There are four proposed 10 orders before you. One is A, the 11 proposed order from the Department. B 12 would be the petitioner's proposed order. 13 And recognizing that there could be a 14 split on the issues, I have prepared two 15 alternative orders for your 16 consideration. And if you have any 17 questions from me about those, I'll be 18 more than happy to answer them. And I 19 think at this point, you should probably 20 engage in a discussion. 21 MR. WAINWRIGHT: Yes. Are 22 there any questions from the 23 Commissioners? (No response.) Having</p>	<p style="text-align: right;">Page 61</p> <p>1 make that -- perfect the pleading, that 2 you've got to have the actual -- you 3 know, the attorney, and the -- and other 4 one's original signature. 5 I'm kind of little bit kind 6 of struggling with that because if you're 7 a person and you're filing on 8 behalf -- if you're filing on behalf -- I 9 mean, in this particular case, Rader was 10 filing on behalf of himself and for his 11 company, and he filed this for a hearing 12 before the Commission, you know, he 13 assumed he had jurisdiction before the 14 Commission because -- it just -- to me, 15 how could -- distinguish between 16 jurisdictional issue, which the 17 Department is arguing that he didn't have 18 jurisdiction in the first place to come 19 to the Commission because he was not an 20 attorney. 21 And on the other hand where 22 you've got this issue of a pleading 23 defect and was it perfected and given</p>

16 (Pages 58 to 61)



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1 notice. But you've got a little  
 2 statement there saying they have to be an  
 3 attorney. I am struggling with that  
 4 area, and I don't know if other  
 5 Commissioners are struggling with that as  
 6 well. But that's what I'm struggling  
 7 with, because you're saying, oops, they  
 8 don't have are jurisdiction.  
 9 Well, then you have that  
 10 little section there saying, well, you  
 11 perfect the pleading, so when were you  
 12 supposed to give notice? So I'm just  
 13 throwing this out here. I'm just kind of  
 14 struggling with that, trying to see if  
 15 any other Commissioner is struggling with  
 16 this as well.  
 17 MR. WAINWRIGHT: Ms. Archie,  
 18 are you directing that question to any of  
 19 the attorneys or just --  
 20 MS. ARCHIE: Well, I think  
 21 it's pretty clear where the attorneys are  
 22 on this. I'm just directing it to the  
 23 Commissioners to see if are you

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1 struggling with that issue as well?  
 2 MR. WAINWRIGHT:  
 3 Commissioner Phillips?  
 4 MR. PHILLIPS: Ms. Archie, I  
 5 am, and actually I would like to see that  
 6 portion of our act, the 335-2-1-.04(5)(f)  
 7 and (g).  
 8 MR. WAINWRIGHT: If you  
 9 would, let's bring the discussion to the  
 10 table, please, so we can --  
 11 MR. PHILLIPS: We're reading  
 12 a --  
 13 MS. ARCHIE: We're reading;  
 14 we're not discussing.  
 15 DR. PIERCE: It does say if  
 16 represented by an attorney. In (g), it  
 17 says the original signature of the person  
 18 making the request or such person's  
 19 attorney.  
 20 MR. WAINWRIGHT: Are you  
 21 about through?  
 22 MR. PHILLIPS: Through as  
 23 I'm going to get.

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1 MR. WAINWRIGHT: Pass that  
 2 down to our attorney. Are there any  
 3 other questions that we need to look at?  
 4 (No response.) Hearing none, I'll ask  
 5 for a motion of one of the four items  
 6 that we have. Or if you want  
 7 clarification on an item, we'll ask  
 8 Robert to do that.  
 9 MS. ARCHIE: I'm ready to  
 10 make a motion if no one else is, just to  
 11 get this up for consideration. I move  
 12 that the Commission grant the Department  
 13 motion to sever and stay and grant the  
 14 Department motion to strike and  
 15 dismiss.  
 16 MR. BROWN: Second.  
 17 MR. WAINWRIGHT: Which of  
 18 the options is this, Robert?  
 19 MR. TAMBLING: That would be  
 20 -- I believe it's Proposal A, ADEM's  
 21 proposed ordered.  
 22 MR. WAINWRIGHT: Any  
 23 discussion on this -- is the

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1 motion -- motion was seconded.  
 2 MR. BROWN: I seconded.  
 3 MR. WAINWRIGHT: Any  
 4 discussion on this item?  
 5 MR. PHILLIPS: How did you  
 6 resolve that question so quickly?  
 7 MS. ARCHIE: After I  
 8 actually looked at the actual regulation,  
 9 it was clear from -- clear to me what was  
 10 said in there, because if -- I really  
 11 don't want to get into a discussion of  
 12 merits of the case, but my decision was  
 13 made after looking at the regulation.  
 14 MR. PHILLIPS: Thank you.  
 15 MR. WAINWRIGHT: Any further  
 16 discussion?  
 17 MS. THOMAS: Excuse me, Mr.  
 18 Wainwright. Who was the second on that?  
 19 DR. LESTER: Brown.  
 20 MR. WAINWRIGHT: Any further  
 21 discussion? All in favor of the motion,  
 22 signify by saying aye.  
 23 MS. THOMAS: Raise your

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1 hand.  
 2 ALL BUT MR. PHILLIPS: Aye.  
 3 MR. WAINWRIGHT: All  
 4 opposed?  
 5 MR. PHILLIPS: Nay.  
 6 MS. THOMAS: Mr. Wainwright,  
 7 can we do that again? Vote and raise  
 8 your hand so I can get --  
 9 MR. WAINWRIGHT: All in  
 10 favor? (Indicating.) All opposed?  
 11 (Indicating.) That's four to two?  
 12 MR. TAMBLING: Dr. Pierce  
 13 voted in favor of the motion.  
 14 MS. THOMAS: Okay.  
 15 MR. WAINWRIGHT: The motion  
 16 carries.  
 17 MS. THOMAS: Yes, sir.  
 18 Thank you.  
 19 MR. WAINWRIGHT: Next item  
 20 of business --  
 21 MS. THOMAS: Mr. Wainwright,  
 22 we need to pause to sign the order,  
 23 please.

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1 MS. ARCHIE: Mr. Chair, can  
 2 I have point of personal privilege, if  
 3 possible?  
 4 MR. WAINWRIGHT: Yes,  
 5 ma'am.  
 6 MS. ARCHIE: I really,  
 7 although I struggled with the decision,  
 8 the motion that I made, I would like to  
 9 throw out for topic of discussion that we  
 10 really need to look at changing that  
 11 particular regulation and make it more  
 12 clear so that we will not have issues  
 13 like this come before the Commission  
 14 again.  
 15 MR. WAINWRIGHT: All right.  
 16 The Director's heard that request.  
 17 MS. ARCHIE: That's what I'm  
 18 asking.  
 19 MR. WAINWRIGHT: We'll  
 20 just -- I need a motion to refer that to  
 21 the Rulemaking Committee.  
 22 MR. PHILLIPS: So moved.  
 23 DR. PIERCE: Second.

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1 MR. WAINWRIGHT: Motion made  
 2 and seconded to refer the request to look  
 3 at that regulation to the Rulemaking  
 4 Committee. All in favor, say aye.  
 5 ALL: Aye.  
 6 MR. WAINWRIGHT: All  
 7 opposed? (No response.) That motion  
 8 carries. We can get an order on that  
 9 later, Debi.  
 10 Next item of business is  
 11 Item 6, Russell D. Lippert, Lippert Bank  
 12 Services, L.L.C. vs. ADEM, and Santek  
 13 Environmental of Alabama, L.L.C., EMC  
 14 Docket No. 09-05.  
 15 Robert, here again, would  
 16 you guide us with this, give us the  
 17 alternatives that we have?  
 18 MR. TAMBLING: Well, your  
 19 options are, frankly, a lot more simple  
 20 now.  
 21 MR. PHILLIPS: For some of  
 22 us.  
 23 MR. TAMBLING: You have an

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1 order or proposed order before you to  
 2 adopt the recommendations of the hearing  
 3 officer in the hearing officer's order on  
 4 motion for summary judgment and the order  
 5 on motions to dismiss, or you can reject  
 6 the same. The issue is still presented  
 7 to you on the request for hearing  
 8 concerning Lippert Bank Services, but if  
 9 you're going to be consistent, you will  
 10 not consider that option.  
 11 MR. WAINWRIGHT: Do we have  
 12 any attorneys present to -- there's no  
 13 request for --  
 14 MS. THOMAS: There's no  
 15 request.  
 16 MR. WAINWRIGHT: No request  
 17 for oral argument. I'll open this item  
 18 up for discussion with the Commission.  
 19 MS. ARCHIE: Mr. Chair --  
 20 MR. WAINWRIGHT: We need a  
 21 motion -- I guess you better make a  
 22 motion. Thanks. Do a hear a motion?  
 23 MS. ARCHIE: Mr. Chair, I'm

18 (Pages 66 to 69)

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1 willing to make a motion, but I need  
 2 Robert to clarify something for me.  
 3 MR. WAINWRIGHT: Please.  
 4 MS. ARCHIE: Refresh my  
 5 memory again on the facts surrounding  
 6 this case.  
 7 MR. TAMBLING: Well, I will  
 8 attempt to do so, if the Department will  
 9 offer to correct me if I mistake --  
 10 MR. THRASH: I'll be happy  
 11 to, or I'll be happy --  
 12 MR. TAMBLING: Maybe it's  
 13 more appropriate, I think, for the  
 14 Department to go ahead and answer your  
 15 questions on the facts surrounding this  
 16 case.  
 17 MS. ARCHIE: No. I think  
 18 that you need to do it.  
 19 MR. TAMBLING: Okay. All  
 20 right. Well, it's -- Commissioner  
 21 Archie, it's my understanding -- I don't  
 22 remember the name of the company that  
 23 applied for the permit. Santek applied

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1 for a permit, I guess for a landfill, and  
 2 the Department granted the permit; and it  
 3 was opposed by Russell Lippert, his wife,  
 4 Jennifer Lippert, and Lippert Banking  
 5 System.  
 6 And what happened there is  
 7 that Russell Lippert filed an appeal on  
 8 behalf of Lippert Banking System; the  
 9 same issue that existed in the Canaan  
 10 case is present again here in this  
 11 particular case. The hearing officer  
 12 ruled consistently with the Commission's  
 13 decision today that because Russell  
 14 Lippert is not an attorney, he could not  
 15 represent Lippert Banking and that the  
 16 appeal was not properly perfected.  
 17 I believe a notice of  
 18 pleading defects was filed in that case  
 19 with regard to Jennifer Lippert and  
 20 Russell Lippert, and I believe that what  
 21 happened after that is that Russell  
 22 Lippert and Jennifer Lippert did not  
 23 respond to the notice of pleading

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1 defects. And if I'm not mistaken, I  
 2 believe that the hearing officer  
 3 then -- is now recommending that the  
 4 Commission grant summary judgment in  
 5 favor of the Department.  
 6 MS. ARCHIE: I'm ready to  
 7 make a motion.  
 8 MR. WAINWRIGHT: Please.  
 9 MS. ARCHIE: I move to adopt  
 10 the recommendation of the hearing officer  
 11 in the hearing officer's order on motion  
 12 for summary judgment and an order on  
 13 motion to dismiss.  
 14 MR. WAINWRIGHT: We have a  
 15 motion. Do we have a second?  
 16 DR. LESTER: Second.  
 17 MR. WAINWRIGHT: Motion's  
 18 made and seconded. Any further  
 19 discussion on the motion? (No response.)  
 20 Seeing none, we'll call (inaudible.) All  
 21 in favor of the motion, say aye.  
 22 ALL EXCEPT COMMISSIONER  
 23 PHILLIPS: Aye.

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1 MR. WAINWRIGHT: All  
 2 opposed?  
 3 MR. PHILLIPS: Aye.  
 4 MR. WAINWRIGHT: Next item  
 5 of business is Agenda Item 7, Friends of  
 6 Hurricane Creek and John Wathen vs. ADEM  
 7 and SDW, Inc., EMC Docket No. 09-02.  
 8 Here again, Robert, would ask you to give  
 9 us a brief on this.  
 10 MR. TAMBLING: It's my  
 11 understanding, Commission Members, that  
 12 the hearing officer has -- has entered or  
 13 has provided us with a proposed order  
 14 that grants standing to the petitioners  
 15 and in which modifies the proposed  
 16 penalty imposed by ADEM.  
 17 The petitioners, I believe,  
 18 are Friends of Hurricane Creek and John  
 19 Wathen. My understanding is they have  
 20 proposed an alternative penalty, and they  
 21 are seeking oral argument in this  
 22 particular case. So I think the business  
 23 now before the Commission will be to

19 (Pages 70 to 73)

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<p>1 decide whether to grant or deny oral 2 argument of the petitioners. 3 And I believe there are 4 three parties now: Friends of Hurricane 5 Creek and John Wathen, the Department, 6 and SDW, which is the intervenor in this 7 case. 8 MR. WAINWRIGHT: Do I have a 9 motion -- we need a motion to allow oral 10 argument. 11 MR. PHILLIPS: I move we 12 hear oral argument. 13 MR. BROWN: Second. 14 MR. WAINWRIGHT: Motion made 15 and seconded. And I assume the rules 16 will be the same for 10 minutes. All in 17 favor, say aye. 18 ALL: Aye. 19 MR. WAINWRIGHT: All 20 opposed, like sign? (No response.) 21 Motion carries. Who will be the 22 first -- I guess Mr. Ludder. 23 MR. LUDDER: Mr. Vice</p>	<p>1 end of that brief is a chart which we've 2 tried to lay out what's happened in this 3 case. And in the first column of that 4 chart is basically the -- the first two 5 columns -- should say second and third 6 columns -- are the violations that were 7 alleged by ADEM in the administrative 8 order, and those total 707 days in 9 violation. 10 If you'll notice in the 11 hearing officer's recommendation, he has 12 cut that down to 120 days of violation, 13 so this is not just an issue about the 14 appropriate penalty, as Mr. Tambling 15 said; it's also an issue about how many 16 violations are there. 17 In the middle of the chart, 18 we have indicated what we think that the 19 evidence proves in this case about 20 additional violations, violations in 21 addition to those that are alleged in the 22 administrative order, and we don't think 23 that there's any dispute about that. In</p>
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<p>1 Chairman, Commissioners, my name is David 2 Ludder. I represent the Petitioners John 3 Wathen and Friends of Hurricane Creek. 4 This case presents one of 5 those rare occasions where no party to 6 the case agrees with the hearing officer, 7 so it's going to turn and fall on you to 8 sort it all out. I appreciate the fact 9 that attorneys' legal arguments 10 can -- are difficult to follow for 11 non-lawyers, but unfortunately, that's 12 the task that you signed up for. 13 As the Commission's attorney 14 has said, the hearing officer did find 15 that the petitioners have standing, and 16 therefore, the Commission has 17 jurisdiction to decide this case. Given 18 that, let me first turn to the merits of 19 the case and then come back to standing. 20 Attached to petitioner's 21 first brief -- we filed two briefs: The 22 first one goes to the merits; the second 23 goes to standing. Attached at the very</p>	<p>1 fact, let me go back to the point about 2 the violations in the -- alleged in the 3 order. 4 I have quoted in this 5 document the counsel for the intervenor, 6 the violator. He said that the hearing 7 officer in his opening statement, (As 8 Read:) SDW, Incorporated, concedes the 9 violations that are listed in the order 10 that we're here about. 11 That's 707 days of 12 violations, but the hearing officer only 13 agreed with 120. Now, we think in the 14 course of the hearing, we've proven 1322 15 additional days of violation because the 16 order didn't look past a certain date. 17 We looked past that certain date up to 18 the date the order was issued. And when 19 you count those days, you increase the 20 number. 21 So in total, we think the 22 evidence, both agreed to by SDW, agreed 23 to in the order, proven at the hearing,</p>

20 (Pages 74 to 77)

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<p>1 totaled 2,029 days of violation. Now,                  2 the hearing officer, I think when he                  3 reached his determination of 120 days of                  4 violation, he took the approach that we                  5 don't have to cite them for every                  6 violation, and we don't have to impose a                  7 penalty for every violation; therefore,                  8 I'm going to choose 120 and impose a                  9 penalty for 120.                  10 We don't think the law                  11 permits that. The law says each day of                  12 violation -- well, for each day of                  13 violation and each day of continued                  14 violation, the Department shall -- not                  15 may -- shall assess a penalty of \$100 per                  16 day. So I think what the judge did was                  17 he wanted to keep the penalty down to an                  18 amount which was close to what the                  19 Department assessed in the administrative                  20 order. The Department assessed 20,000;                  21 he assessed 21 thousand and some dollars.                  22 I think he was trying to                  23 keep the penalty close to what the</p>	<p>1 injury? Your regulations adopted a                  2 definition of aggrieved, and it says that                  3 it is an actual or threatened injury in                  4 fact. That regulation was based on                  5 federal case law. The history to that                  6 regulation demonstrates that. Federal                  7 case law says an injury in fact is a very                  8 low threshold.                  9 It's not like proving a tort                  10 injury. It's not like you have to prove                  11 damages to property or personal injury.                  12 It's a very low threshold just to                  13 distinguish you from everybody in                  14 the -- in the state that may have a                  15 concern about the problem. It                  16 distinguishes you and gives you the right                  17 to pursue a hearing.                  18 The United States Supreme                  19 Court has held that a person who                  20 suffers -- that a person who                  21 suffers -- excuse me. A person suffers                  22 an injury in fact if their aesthetic and                  23 recreational use and enjoyment of a water</p>
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<p>1 Department assessed. But in doing so, he                  2 threw out a bunch of violations, and he                  3 didn't follow the mandate of the law of a                  4 \$100-a-day minimum penalty.                  5 Let me turn now to standing,                  6 because that is an issue that's argued by                  7 ADEM and SDW. Indeed, standing is a                  8 threshold issue. Only persons who are                  9 aggrieved by an ADEM action have a right                  10 to come to you for a hearing. The                  11 hearing officer found that my clients                  12 were aggrieved.                  13 What does aggrieved mean?                  14 According to the Alabama Court of Civil                  15 Appeals, it means that the person has                  16 suffered a threatened or actual injury or                  17 is -- or is somehow adversely affected.                  18 That is the most definitive statement of                  19 aggrieved in this state, and that's                  20 interpreting the statute that we're                  21 applying here.                  22 Well, what is -- what is an                  23 actual injury, a threatened or actual</p>	<p>1 body is lessened by the challenged                  2 action.                  3 The evidence in this case is                  4 absolutely clear that John Wathen and                  5 Friends of Hurricane Creek do -- have                  6 lessened their use and enjoyment of                  7 Cottondale Creek and Hurricane Creek                  8 because of turbidity and sediment in                  9 those creeks. They contend that -- and                  10 the evidence shows from their                  11 testimony -- that they have lessened                  12 their use of the creeks because the ADEM                  13 order does not effectively control the                  14 violations of SDW.                  15 We have cited in our brief                  16 numerous cases where an agency can be                  17 held responsible for poor water quality                  18 because they failed to control it. Even                  19 if it's caused by some third party, if                  20 the agency fails to control the                  21 pollution, the agency can be held                  22 responsible.                  23 MS. THOMAS: One minute.</p>

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1 MR. LUDDER: Are  
 2 petitioner's concerns reasonable? The  
 3 U.S. Supreme Court asked that question  
 4 because the standard for standing was  
 5 have the petitioners lessened their use  
 6 of the water because of concern about  
 7 continuing violations? And in that same  
 8 supreme court case, the Court said  
 9 it's -- this is not a difficult question  
 10 to answer.  
 11 The proposition that the  
 12 failure -- the Court said that it's  
 13 not -- there's nothing improbable about  
 14 the proposition that petitioners would  
 15 curtail their use of the creeks because  
 16 of the violations. In this case, we have  
 17 proven that petitioners have --  
 18 MS. THOMAS: Time.  
 19 MR. LUDDER: -- have seen  
 20 discharges of turbidity and sediment from  
 21 the discharge pipe (inaudible); they've  
 22 seen turbidity in the receiving water.  
 23 That turbidity has continued downstream

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1 to the places where they use the water,  
 2 and they have curtailed their use of the  
 3 water because the order does not  
 4 effectively control that pollution.  
 5 We would submit that you  
 6 should affirm the hearing officer's  
 7 decision that petitioners have standing  
 8 but that you should modify the hearing  
 9 officer's decision on his finding of  
 10 violations and the minimum penalty  
 11 assessment. Thank you.  
 12 MR. WAINWRIGHT: Thank you,  
 13 Mr. Ludder.  
 14 MS. ROWELL: Good afternoon.  
 15 Members of the Commission, my name is  
 16 Olivia Rowell, and I'm one of the  
 17 attorneys representing the Department in  
 18 this action.  
 19 We've all heard the saying  
 20 there are only two things in life that  
 21 are certain: Death and taxes. Well, I  
 22 suggest to you that there's at least one  
 23 other thing that is certain, and that is

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1 at some time each one of us will disagree  
 2 with something that the government has  
 3 done or how it has done it.  
 4 We may have a disagreement  
 5 with health care reform or with Cash for  
 6 Clunkers or with the war in Afghanistan.  
 7 We may have certain disagreements with  
 8 certain local or state issues. But those  
 9 are political disagreements, and the  
 10 interest that we seek to protect is a  
 11 political interest, not a legal interest.  
 12 We have ways to address our  
 13 concerns about political interest, but we  
 14 don't have the right to challenge every  
 15 government action that we disagree with  
 16 if the only interest that we are seeking  
 17 to protect is a political interest. In  
 18 order to have standing to challenge a  
 19 government action in a judicial or  
 20 administrative forum such as this, we  
 21 have to have a legal, not political  
 22 interest, and we have to show that that  
 23 legal interest has been injured by the

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1 government's action.  
 2 Now, the action that is  
 3 being challenged today is a order that  
 4 the Department issued to SDW to correct  
 5 violations of the Alabama Water Pollution  
 6 Control Act; and it required remedial  
 7 actions and required SDW to come into  
 8 compliance, and it assessed a civil  
 9 penalty. The petitioner's disagreement  
 10 is with that civil penalty and how the  
 11 department arrived at that civil penalty.  
 12 That is a political disagreement.  
 13 The petitioners have  
 14 demonstrated no legal injury that has  
 15 been caused by the Department's issue of  
 16 that order. In fact, any legal interest  
 17 that they might have such as the  
 18 recreational and the aesthetic interest  
 19 have been protected by that order  
 20 requiring SDW to come into compliance.  
 21 The Commission has  
 22 considered this issue before, and we've  
 23 cited to you in our briefs a number of

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<p>1 cases where the Commission has dismissed                  2 appeals because the Commission has held                  3 that the petitioner did not have                  4 standing. The Commission has said that a                  5 petitioner must demonstrate an actual or                  6 imminent concrete and particularized                  7 injury in fact to a legally cognizable                  8 evidence and must demonstrate that that                  9 injury resulted from the Department's                  10 action.</p> <p>11 And the Alabama Court of                  12 Civil Appeals has confirmed the                  13 Commission's dismissal of an appeal                  14 because the petitioner environmental                  15 group did not demonstrate injury caused                  16 by the assessment of a civil penalty. In                  17 its decision affirming the Commission's                  18 dismissal, the Court of Civil Appeals                  19 found that the Environmental Management                  20 Act does not entitle persons who were                  21 neither injured nor threatened with                  22 injury by an ADEM action to a hearing                  23 before the Commission.</p>	<p>1 allegations of standing that they made                  2 were that they -- that they felt they                  3 were afraid that they could not go in the                  4 water because it was polluted, but they                  5 never tied -- there's no evidence on the                  6 record that directly ties SDW's                  7 discharges to any injury suffered by the                  8 petitioners.</p> <p>9 And these are merely                  10 speculation. In fact, the petitioner                  11 submitted that there are there were other                  12 dischargers on the creek that could have                  13 caused the concerns that they had. Those                  14 are purely speculative; they did not                  15 prove it, and those are related to SDW's                  16 discharges, not the Department's order                  17 which addressed those discharges and                  18 addressed the violations and required SDW                  19 to come into compliance.</p> <p>20 Now, we have asked that the                  21 Commission dismiss for lack of standing,                  22 and we have a proposed order for you.                  23 But should you decide not to dismiss the</p>
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<p>1 Because it was neither                  2 injured nor threatened with injury by                  3 ADEM's order assessing civil penalties,                  4 the Court of Civil Appeals found that the                  5 petitioner was not entitled to a hearing.                  6 Now, in the case before you, the hearing                  7 officer said that he had serious doubts                  8 about the petitioners standing. But                  9 despite those doubts and despite the lack                  10 of evidence on record that any injury                  11 that can be related to the Department's                  12 action was caused, the hearing officer                  13 allowed the hearing to go forward.</p> <p>14 ADEM submits that there is                  15 no injury on record that the petitioner                  16 suffered an injury or threatened injury                  17 to a legal interest as a result of ADEM's                  18 issuance of that order or of assessment                  19 of a civil penalty. Speculative injuries                  20 are not enough to confer standing.</p> <p>21 Other than the petitioner's                  22 political disagreement with ADEM's                  23 assessment of the penalty, the only other</p>	<p>1 appeal, we would respectfully request                  2 that you affirm the Department's order as                  3 it was originally issued.</p> <p>4 In his analysis of the civil                  5 penalty, the hearing officer appeared to                  6 agree with the Department's assessment of                  7 the civil penalty factors. He did not                  8 find the Department erred in its                  9 assessment of those factors, yet he                  10 recommended the modified penalty with no                  11 explanation. The hearing officer is                  12 required to determine every matter of                  13 controversy upon a preponderance of the                  14 evidence, and the burden rests with the                  15 petitioners to show that the Department's                  16 action should be modified or disapproved.</p> <p>17 Unless the hearing officer                  18 found that the petitioners met that                  19 burden of proving that the Department's                  20 civil penalty should be modified and was                  21 incorrect -- and the hearing officer                  22 clearly did not find that -- ADEM'S order                  23 must be approved as issued.</p>

23 (Pages 86 to 89)

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<p style="text-align: right;">Page 90</p> <p>1 We would respectfully 2 request that our motion to dismiss be 3 granted, but if not, you have also before 4 you an order which would affirm the 5 Department's assessment of civil penalty 6 that was assessed by ADEM, and we would 7 respectfully request that that order be 8 affirmed. Thank you. 9 MR. WAINWRIGHT: Is there 10 another attorney? 11 MR. DONALD: Mr. Chairman -- 12 MR. PHILLIPS: Would you ask 13 the guy taking the camera -- he's got 14 plenty of photos. It's kind of hard to 15 pay attention when you've got lights 16 flashing. 17 MR. DONALD: Mr. Chairman, 18 Counsel Members, I'm Bill Donald, III, 19 and I'm here on behalf of SDW. 20 These are the options I see 21 before you. You can dismiss this 22 proceeding because of lack of standing, 23 or you can, as counsel who just addressed</p>	<p style="text-align: right;">Page 92</p> <p>1 So if you adopt the analysis 2 of the hearing officer, it'd be \$500 for 3 the VMP violations, and \$175 per day 4 times 10 days, that would be a total 5 penalty of \$2,250. In other words, you 6 could accept fully the recommendation of 7 the hearing officer and make the 8 correction as to the mistake he made in 9 calculating the number of days that SDW 10 was out of registration. 11 The third option you have is 12 what the petitioners want you to do is to 13 basically disregard altogether what the 14 hearing officer did and substitute an 15 entirely different order which would 16 impose on SDW a penalty of over \$200,000, 17 which to me would be an insult to this 18 hearing officer who went through four 19 days of testimony and reams of evidence 20 and came up with the findings that he 21 came up. 22 We would agree with the 23 Department that this case fails on the</p>
<p style="text-align: right;">Page 91</p> <p>1 you said, basically adopt the order of 2 the recommendation of the hearing officer 3 but affirm the \$20,000 penalty. It'd be 4 the same difference. That's one 5 possibility. 6 Another option before you is 7 to accept the recommendation of the 8 hearing officer, and if you did that, I 9 would just point out to you that what he 10 said was the BMP violations, I find \$500 11 is the appropriate penalty. I find that 12 nothing should be assessed as of January 13 18th, 2008, and I assess SDW \$175 per day 14 for being out of registration from that 15 date until May 16 of 2008. 16 That's where you get the 17 penalty of \$20,325. The problem with 18 that is the hearing officer made a 19 mistake as to the amount of time that SDW 20 was out of registration. Actually, it 21 was only out of registration from January 22 18, 2008, to January 28, 2008, which 23 would be 10 days.</p>	<p style="text-align: right;">Page 93</p> <p>1 issue of standing. And the reason why it 2 fails on the issue of standing, all you 3 have to do is go to the hearing officer's 4 decision itself. He basically said 5 there's virtually no evidence of any 6 injury to this Hurricane Creek. 7 There's -- I'm quoting him. 8 (As Read:) There's much speculation, 9 assumption, and conjecture as to the 10 petitioner's contentions. He says, I 11 have serious doubts as to standing. None 12 of -- none of these findings were 13 objected to by the petitioners. And then 14 he said this: He said SDW's post-hearing 15 brief is generally correct on the issue 16 of standing. 17 And what we pointed out was 18 several things which were detailed in our 19 post-hearing brief as to there being no 20 evidence of any significant amount of 21 turbidity or sediment flowing from this 22 site into the watershed. 23 I would ask when you're</p>

24 (Pages 90 to 93)

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<p>1 making the decision about what to rule on                  2 the issue of standing, whether to enhance                  3 this penalty or not, or as to the                  4 petitioner's objectivity in submitting to                  5 you an order that would impose a penalty                  6 of \$200,000, I would ask you to consider                  7 a few things. One is the date of                  8 November of 2007. That is the date that                  9 Mr. Wathen -- he's the watchkeeper of                  10 Hurricane Creek. He vigilantly watches                  11 whatever happens on this creek.                  12 His own testimony was, I                  13 didn't see a reason to investigate                  14 Williamsburg until November of 2008, yet                  15 the evidence shows that Williamsburg had                  16 construction activity actively in 2005,                  17 2006, and all of 2007. And by 2007, you                  18 had several other operators operating in                  19 the same area.                  20 Another important date is                  21 December 2006, which is when SDW conveyed                  22 the majority of the lots at Williamsburg                  23 to a set of home builders, and that's the</p>	<p>1 other words, the evidence showed in this                  2 case that the violations by these                  3 operators were either the same or more                  4 serious than those at Williamsburg. In                  5 fact, in this case ADEM initially said                  6 only a \$10,000 penalty was appropriate,                  7 and the only reason why it was raised to                  8 \$20,000 is because SDW, if it acted                  9 sooner, could have taken advantage of                  10 that.                  11 Another figure to keep in                  12 mind, particularly in looking at the                  13 objectivity of the petitioners, are the                  14 figures of 7 million to 16,000 -- 16                  15 million dollars. Mr. Ludder made                  16 reference to a chart that he had that                  17 comes up with this penalty of \$200,000.                  18 Yet when the petitioners originally had                  19 their public comments to the proposed                  20 order, they were submitting a chart to                  21 the Department that said basically we                  22 think Williamsburg ought to be fined 7                  23 million to 16 million dollars but for the</p>
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<p>1 reason why SDW was not able to get the                  2 QCPs in. There was a paperwork -- some                  3 of these violations they're talking about                  4 are simply matters of paperwork.                  5 The QCP certifications were                  6 not turned in because SDW could not get                  7 the cooperation of the home builders and                  8 had to hire me, an attorney, to write a                  9 letter to get them to do that. And                  10 that's not an excuse, but that's a reason                  11 for some of these technical violations                  12 that the petitioners are talking about.                  13 Another important figure is                  14 the figure of \$15,000, which is what ADEM                  15 imposed penalties upon the owner and the                  16 operators of Abby Trace, which adjoins                  17 Williamsburg, the operators of Camden                  18 Lake, which adjoins Williamsburg, and                  19 another nearby development by Mr.                  20 Washington; \$15,000 was the fine imposed                  21 on them.                  22 In this particular case                  23 here, ADEM only imposed a 10,000 -- in</p>	<p>1 \$250,000 cap.                  2 And finally the figure of                  3 \$500. We've talked about all these                  4 violations, yet the hearing officer said                  5 for the actual activity that could have                  6 any effect on the environment, I find                  7 that the penalty of \$500 is appropriate.                  8 So what else are we talking about? We're                  9 talking about registrations SDW                  10 registered every year, but their                  11 registration became out of registration                  12 at some point because SDW's engineer did                  13 not submit the annual inspection reports.                  14 Yet activity is being                  15 monitored; the engineer's doing his                  16 activity, but for a period of days, we                  17 were out of registration because the                  18 engineer did not turn in the inspection                  19 reports yet. And that had to do with the                  20 2007 NOR, yet the Department did not even                  21 require those reports for the 2005 NOR or                  22 the 2007 NOR.                  23 And so what they're talking</p>

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1 about is let's fine SDW \$100 per day for  
 2 every technical paperwork violation we  
 3 can find. Let's just add them all up,  
 4 and let's just fine them until we put  
 5 them out of business. That's basically  
 6 what the petitioners are asking you to do  
 7 when the law is clear.  
 8 When he said that the law  
 9 mandates a penalty, I respectfully  
 10 disagree, because the statute says that  
 11 civil penalties may be assessed. And the  
 12 operative word is may be assessed under  
 13 this (inaudible) for any violation  
 14 occurring within two years prior to the  
 15 date of the issuance of the order.  
 16 There's no mandate to charge  
 17 anybody anything for any technical  
 18 violation. The statute leaves it up to  
 19 the Department to determine what  
 20 penalties are appropriate; and that's  
 21 exactly what the Department did, and SDW  
 22 agreed to the \$20,000 penalty.  
 23 And SDW certainly concurred

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1 with the analysis of the hearing officer  
 2 that there's got to be some discretion  
 3 here. And all the petitioner's trying to  
 4 say is let's just gather up every little  
 5 violation and charge these operators so  
 6 much per day when the law does not allow  
 7 for that.  
 8 We would respectfully submit  
 9 to you that the option here is to either  
 10 dismiss this proceeding for lack of  
 11 standing because the evidence clearly  
 12 shows -- as the Department said in their  
 13 own brief, there was no connection  
 14 between the activity of this operator and  
 15 any harm or threat of harm to Hurricane  
 16 Creek. Either do that, or adopt the  
 17 hearing officer's recommendations and  
 18 correct it to make the proper fine  
 19 \$2,250, or as SDW said before, we're  
 20 willing to pay the \$20,000 penalty which  
 21 we agreed to in the first place.  
 22 MR. WAINWRIGHT: Any  
 23 questions Commissioners may have of the

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1 attorneys? (No response.) Hearing none,  
 2 we have -- you have heard the options  
 3 that we have. Robert, would you get up  
 4 there again and please give us those  
 5 options?  
 6 MR. TAMBLING: Commissioner  
 7 Wainwright, I believe we have six options  
 8 here.  
 9 MR. WAINWRIGHT: Six,  
 10 okay.  
 11 MR. TAMBLING: As I  
 12 understand it, I think you have six.  
 13 First is you can adopt the recommendation  
 14 of the hearing officer that everybody  
 15 seems to object to. And then, keeping it  
 16 simple, you have Mr. Ludder's proposed  
 17 order on behalf of the Friends of  
 18 Hurricane Creek and John Wathen which  
 19 imposes a penalty of \$200,200.  
 20 Or you can adopt one of two  
 21 ADEM proposed orders. I believe you can  
 22 adopt ADEM's proposed order, Exhibit A,  
 23 which if you were to adopt that order,

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1 you would find that the Friends of  
 2 Hurricane Creek and John Wathen do not  
 3 have standing. Or you could adopt ADEM's  
 4 proposed order, Exhibit B, which if you  
 5 find that the Friends of Hurricane Creek  
 6 and John Wathen do have standing, as I  
 7 understand it, that the Department's  
 8 penalty would stand.  
 9 Then finally, you have two  
 10 proposals by the intervenor, which I  
 11 believe one would reduce the penalty to  
 12 \$2,250, finding fault with the way the  
 13 hearing officer calculated the penalty.  
 14 And the other proposed order by SDW would  
 15 be to accept the hearing officer's  
 16 recommendation except as to the penalty,  
 17 and the penalty that you would adopt  
 18 under that proposed order would be the  
 19 Department's proposed penalty of \$20,000.  
 20 That's it.  
 21 MR. PHILLIPS: Isn't there  
 22 an F?  
 23 MR. TAMBLING: Is there an

26 (Pages 98 to 101)

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Page 102	Page 104
<p>1 F? Yeah. The petitioner's proposed 2 order is the one I discussed first. It's 3 just the -- if you adopt Friends of 4 Hurricane Creek and John Wathen's 5 proposed order, you would be imposing a 6 penalty of \$200,200 on SDW. 7 MR. WAINWRIGHT: Any other 8 questions for Mr. Tambling? (No 9 response.) Entertain a motion to adopt 10 one of these alternatives. 11 DR. LESTER: Mr. Chairman, 12 what is the difference in B and D? 13 MR. WAINWRIGHT: Are you 14 asking Mr. Tambling? 15 DR. LESTER: I'll ask Mr. 16 Tambling. 17 MR. WAINWRIGHT: Thank you 18 very much. 19 MR. TAMBLING: Okay. The 20 difference between what -- 21 DR. LESTER: B and D. 22 MR. TAMBLING: B and D. 23 DR. LESTER: Uh-huh.</p>	<p>1 under B? 2 MS. ARCHIE: Am I looking at 3 something wrong, because in my packet of 4 information, it says adopt the 5 recommendation of the hearing officer. 6 So we're just on B and D, Robert. I 7 think you mentioned that option -- that A 8 was ADEM's, and that's not correct. 9 MR. TAMBLING: No. A is the 10 hearing officer's. 11 MS. ARCHIE: Right. Okay. 12 MR. TAMBLING: And everybody 13 objects to it. 14 MS. ARCHIE: Okay. All 15 right. 16 MR. TAMBLING: I was 17 answering Commissioner Lester's question 18 difference as to the difference between B 19 and D. And B, I believe, as it appears 20 on agenda outline Page 8, which is adopt 21 ADEM's proposed order, Exhibit A, to 22 ADEM's objection to hearing officer's 23 recommendation proposed alternative</p>
Page 103	Page 105
<p>1 MR. WAINWRIGHT: Page 8. 2 MR. TAMBLING: Page 8 on the 3 agenda outline. If you adopt ADEM's 4 proposed order which is Exhibit A, which 5 is Item B on Page 8, I believe ADEM's 6 proposed order, Exhibit A, would be a 7 finding by the Commission that the 8 Friends of Hurricane Creek and John 9 Wathen lack standing. 10 DR. LESTER: Would it have 11 the penalty in it? 12 MR. TAMBLING: Pardon me? 13 DR. LESTER: Would it have 14 the penalty -- 15 MR. TAMBLING: No, no. 16 Because if it didn't have standing, there 17 -- 18 MS. ARCHIE: That's not 19 right. 20 MR. TAMBLING: The penalty 21 would remain the same at \$20,000, I 22 believe. 23 MR. WAINWRIGHT: How about</p>	<p>1 finding of facts and conclusions of law, 2 I believe that is -- that would be an 3 order from the Commission finding that 4 the Friends of Hurricane Creek and John 5 Wathen do not have standing. 6 DR. PIERCE: Does that 7 include a \$20,000 fine? 8 MR. TAMBLING: Let me go 9 back and take a look. 10 MR. PHILLIPS: I think it 11 upholds the order -- 12 MR. TAMBLING: I think the 13 order would stay the way it is. It would 14 basically leave everything the same 15 except the petitioners' request for a 16 hearing would be dismissed for lack of 17 jurisdictional standing. And if that 18 were the case, then ADEM's order would 19 stand as is. 20 MR. PHILLIPS: And then D? 21 MR. TAMBLING: D, I believe 22 is -- I believe is the intervenor's, if 23 I'm not mistaken. It would basically</p>

27 (Pages 102 to 105)

Page 106	<p>1 adopt the hearing officer's order with                  2 the exception of the penalty. And I                  3 really, to be honest with you, don't know                  4 what would be -- I guess the hearing                  5 officer would have found that there was                  6 standing; so I guess standing would have                  7 been conferred by the hearing officer in                  8 that case, so that order would allow the                  9 Friends of Hurricane Creek to remain in.                  10 But honestly don't know what would be                  11 left in the (inaudible).                  12 MR. PHILLIPS: It was                  13 reduced to 21,000 (inaudible.)                  14 MR. TAMBLING: To \$20,000,                  15 that's right.                  16 MR. WAINWRIGHT: Any further                  17 questions?                  18 DR. PIERCE: I'm still                  19 confused a little bit --                  20 MR. TAMBLING: Okay.                  21 DR. PIERCE: -- regarding if                  22 you take the Option B, adopt ADEM's                  23 proposed order in Exhibit A, that says</p>	Page 108	<p>1 that says reject it all; is that right?                  2 So who has Page 17 of the hearing                  3 officer's document, because I'd like to                  4 see Page 17, Mr. Chairman. Anybody?                  5 MR. WAINWRIGHT: Are there                  6 any further questions? We'll entertain a                  7 motion.                  8 DR. LESTER: Make a motion                  9 we adopt B.                  10 MR. WAINWRIGHT: To adopt                  11 proposal?                  12 DR. LESTER: B.                  13 MR. WAINWRIGHT: Motion's                  14 made to --                  15 DR. LESTER: And the 20,000                  16 would be in it, I'm sure.                  17 MR. WAINWRIGHT: Motion's                  18 been made to adopt choice B.                  19 DR. PIERCE: Second.                  20 MR. WAINWRIGHT: Been                  21 seconded. Any more discussion?                  22 MR. TAMBLING: That's ADEM's                  23 proposed order Exhibit A?</p>
Page 107	<p>1 that Hurricane Creek -- they don't have                  2 standing. It does not include the                  3 penalty. Is that what I'm hearing you                  4 say?                  5 MR. TAMBLING: If they don't                  6 have standing to contest the penalty,                  7 then the penalty itself would remain                  8 \$20,000.                  9 DR. PIERCE: Okay. We still                  10 had a penalty is what I'm trying to --                  11 MR. PHILLIPS: Who has Page                  12 17, because it seems to me that that says                  13 ADEM -- that all portions of the hearing                  14 officer's recommendation except for Page                  15 17 are hereby accepted. Am I misreading                  16 that?                  17 MR. TAMBLING: What item are                  18 you looking at?                  19 MR. PHILLIPS: I'm reading                  20 from the order. That's C.                  21 MR. TAMBLING: Which order                  22 is this?                  23 MR. PHILLIPS: B is the one</p>	Page 109	<p>1 MS. THOMAS: Yes.                  2 DR. LESTER: Yes.                  3 MR. WAINWRIGHT: Any further                  4 discussion? (No response.) All in                  5 favor, say aye.                  6 ALL EXCEPT COMMISSIONER                  7 PHILLIPS: Aye.                  8 MR. WAINWRIGHT: All                  9 opposed?                  10 MR. PHILLIPS: Aye.                  11 MR. WAINWRIGHT: The motion                  12 carries.                  13 MR. LUDDER: Mr. Chairman,                  14 was there a vote by Commissioner Archie                  15 and Commissioner --                  16 MR. BROWN: Aye.                  17 MR. LUDDER: -- Brown?                  18 MS. ARCHIE: No.                  19 MR. BROWN: Yes.                  20 MS. ARCHIE: No.                  21 MR. WAINWRIGHT: The vote                  22 was four for and two against. The motion                  23 carries.</p>

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1 Next item of business is  
 2 other business. That's item -- I'm  
 3 sorry. Go back to Item 8, Black Warrior  
 4 Riverkeeper, Incorporated. This is Black  
 5 Warrior River, Incorporated, vs. ADEM and  
 6 Shepherd Bend, L.L.C., EMC Docket No.  
 7 09-04. Robert, has there been a request  
 8 to postpone this or....  
 9 MR. TAMBLING: Commissioner,  
 10 it's my understanding that there's been a  
 11 -- all parties have agreed that this item  
 12 be tabled, and they've waived the time  
 13 period until the next Commission  
 14 meeting.  
 15 MR. WAINWRIGHT: The chair  
 16 will entertain a motion to that effect.  
 17 DR. PIERCE: Move we table  
 18 Item 8.  
 19 MR. WAINWRIGHT: Motion's  
 20 been made to table Item 8.  
 21 MR. PHILLIPS: Second.  
 22 MR. WAINWRIGHT: Motion made  
 23 and seconded. All in favor -- excuse me.

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1 Any discussion?  
 2 MR. PHILLIPS: Robert, I  
 3 just want to clarify. All parties have  
 4 agreed to it?  
 5 MR. TAMBLING: That's my  
 6 understanding. If any of the parties are  
 7 here and object to it, they need to be  
 8 heard.  
 9 MR. PHILLIPS: Wanted to  
 10 clarify.  
 11 MR. WAINWRIGHT: Any further  
 12 discussion? (No response.) All in  
 13 favor, say aye.  
 14 ALL: Aye.  
 15 MR. WAINWRIGHT: All  
 16 opposed, like sign. (No response.)  
 17 Motion carries.  
 18 All right. We're down to  
 19 other business. Is there any other  
 20 business to come before the Commission?  
 21 (No response.)  
 22 Hearing none, we go to Item  
 23 10. The next session of the Commission

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1 will be October 16th, 2009. Is that a  
 2 date that everyone can agree with? Need  
 3 a motion on the date for October 16th,  
 4 2009.  
 5 MR. PHILLIPS: So move.  
 6 DR. LESTER: Second.  
 7 MR. WAINWRIGHT: Motion made  
 8 and seconded. Any discussion? (No  
 9 response.) All in favor, signify by  
 10 saying aye.  
 11 ALL: Aye.  
 12 MR. WAINWRIGHT: All  
 13 opposed, like sign? (No response.) That  
 14 motion carries. We're down to the point  
 15 of public presentations, and I'd like to,  
 16 if I could, take about a 10-minute recess  
 17 here. Please come back in 10 minutes.  
 18 (Break.)  
 19 MR. WAINWRIGHT: Like to  
 20 call the meeting back to order. We've  
 21 finished our business for today, and  
 22 we'll now take up the public comments,  
 23 the public hearing. We have two

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1 requests. Both have been approved by the  
 2 Chair and recommended to the Commission.  
 3 They do need to be voted on, and we will  
 4 take the -- the first request is from Mr.  
 5 William Mullen, Michael Mullen. Do we  
 6 have a motion?  
 7 MR. PHILLIPS: I move that  
 8 we approve.  
 9 MR. BROWN: Second.  
 10 MR. WAINWRIGHT: Motion's  
 11 been made and seconded to approve Mr.  
 12 Mullen's presentation. Is there any  
 13 discussion?  
 14 MR. PHILLIPS: I just want  
 15 to make sure with Robert that there were  
 16 some items you were going to have  
 17 removed; they were removed.  
 18 MR. TAMBLING: I have asked  
 19 Mr. Mullen to remove any information from  
 20 his presentation that would identify the  
 21 sites that will be depicted on the slide  
 22 show. So he's agreed to do that, and I  
 23 believe did do that. If he will

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1 represent that to you, then I think --  
 2 MR. PHILLIPS: Because they  
 3 may come before us in the future.  
 4 MR. TAMBLING: It may wind  
 5 up becoming an enforcement action that  
 6 could come before the Commission.  
 7 MR. WAINWRIGHT: Let's -- we  
 8 need to vote on this. Any other comments  
 9 or requests? (No response.) Hearing  
 10 none, we'll hear the question. All in  
 11 favor, say aye.  
 12 ALL: Aye.  
 13 MR. WAINWRIGHT: All  
 14 opposed, like sign? (No response.) That  
 15 motion carries.  
 16 DR. LESTER: 10-minute  
 17 thing?  
 18 (Off-the-record.)  
 19 MR. WAINWRIGHT: Chairman  
 20 has approved and recommended to us that  
 21 we allow Mr. Ludder to make this  
 22 presentation. I'd like to ask one thing,  
 23 Mr. Ludder: Yesterday we received a

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1 tremendous volume of exhibits from you.  
 2 I think there were 14 PDFs with many  
 3 pages in each PDF.  
 4 We have not had an  
 5 opportunity to go through that. I  
 6 wondered if you would be willing to  
 7 postpone this for one -- to the next  
 8 meeting so we would have an opportunity  
 9 to go through --  
 10 MR. LUDDER: I'll tell you,  
 11 the exhibits -- those additional  
 12 documents were just the underlying data  
 13 that I relied on to develop this slide  
 14 show. Most of it was EPA data. It  
 15 doesn't -- it was just provided so that  
 16 if you wanted to go back and look at  
 17 where this data came from, it was there  
 18 for you to look at.  
 19 I didn't -- I didn't intend  
 20 to submit it at all, but I just thought  
 21 if you had questions about this data,  
 22 here's the documents that came.  
 23 MR. WAINWRIGHT: If you just

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1 hadn't hit send.  
 2 MR. LUDDER: Sorry.  
 3 MR. WAINWRIGHT: We do have  
 4 a problem if at the last minute we get  
 5 inundated with information. We ask with  
 6 these -- we provided for public comment  
 7 that we be given plenty of time to look  
 8 at that.  
 9 MR. LUDDER: I was not  
 10 intending to discuss that data at all.  
 11 It was just provided in case you wanted  
 12 to look at the underlying data for this  
 13 presentation, period. You should have  
 14 received --  
 15 MR. WAINWRIGHT: We have a  
 16 motion to --  
 17 MR. LUDDER: I'm sorry.  
 18 MR. WAINWRIGHT: -- before  
 19 us. We need a motion.  
 20 DR. PIERCE: Motion to hear  
 21 Mr. Ludder's presentation.  
 22 MR. WAINWRIGHT: Motion made  
 23 to hear Mr. Ludder's presentation.

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1 MS. ARCHIE: Second.  
 2 MR. WAINWRIGHT: Motion made  
 3 and seconded. Any further comment? (No  
 4 response.) All in favor, say aye.  
 5 ALL: Aye.  
 6 (Off the record.)  
 7 MR. WAINWRIGHT: Any  
 8 comments from the Commission? We're at  
 9 the end of the day, unless you want to  
 10 stay around a while. Need a motion to  
 11 adjourn.  
 12 DR. LESTER: So move.  
 13 DR. PIERCE: Second.  
 14 MR. WAINWRIGHT: We're  
 15 adjourned.  
 16 (End of proceedings.)  
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REPORTER'S CERTIFICATE  
\* \* \* \* \*

STATE OF ALABAMA  
COUNTY OF MONTGOMERY

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

This 30th day of August, 2009.

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

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REPORTER'S CERTIFICATE  
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STATE OF ALABAMA  
COUNTY OF MONTGOMERY

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

This 30th day of August, 2009.

----- Jenny Cone /ca -----

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



<p style="text-align: center;"><b>A</b></p> <p><b>Abby</b> 95:16  <b>ability</b> 58:11  <b>able</b> 14:19 28:8              95:1  <b>absolutely</b> 28:12              81:4  <b>accept</b> 91:7 92:6              101:15  <b>accepted</b> 107:15  <b>accompanied</b> 17:14  <b>accountants</b> 17:17  <b>accounting</b> 12:2  <b>accurate</b> 118:12  <b>achieve</b> 8:15  <b>acknowledge</b> 12:14  <b>acknowledged</b>              43:17  <b>acres</b> 30:19  <b>act</b> 14:3,8 30:8              46:21 47:15 48:1              48:20 49:3,7,11              49:15,19 50:5              54:14 55:1,2,14              56:5 57:6,15 63:6              85:6 86:20  <b>acted</b> 96:8  <b>action</b> 29:6 79:9              81:2 83:18 84:15              84:19 85:1,2              86:10,22 87:12              89:16 114:5  <b>actions</b> 27:16 85:7  <b>actively</b> 94:16  <b>activities</b> 8:14              21:20 32:15  <b>activity</b> 94:16 97:5              97:14,16 99:14  <b>actual</b> 16:7 61:2              65:8 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**Part B**



## Attachment Index

- Attachment 1**      **Agenda**
- Attachment 2**      **Order adopting motion to approve the nominations of Commissioners Brown and Pierce as members of the 2009 Personnel Committee**  
**(Agenda Item 2 – Election)**
- Attachment 3**      **Order granting Petitioner’s Request for Oral Argument**  
**(Agenda Item 5 – Canaan Systems, Inc. v. ADEM, EMC Docket No. 09-06)**
- Attachment 4**      **Order granting ADEM’s Motion to Sever and Stay and Motion to Strike and Dismiss based on the request for hearing being a legal nullity and ruling that the Commission will not address ADEM’s second jurisdictional issue in regards to the Class V subsurface fluid distribution system (drip disposal well) permit application for Lawrence Landing Subdivision because it is moot**  
**(Agenda Item 5 – Canaan Systems, Inc. v. ADEM, EMC Docket No. 09-06)**
- Attachment 5**      **Order adopting motion to refer request from Commissioner Archie to look at R. 335-2-1-.04(g) to Rulemaking Committee**  
**(Agenda Item 5 – Canaan Systems, Inc. v. ADEM, EMC Docket No. 09-06)**
- Attachment 6**      **Order adopting recommendations of the Hearing Officer in the Hearing Officer’s Order on Motion for Summary Judgment and recommendations of the Hearing Officer in the Hearing Officer’s Order on Motions to Dismiss**  
**(Agenda Item 6 – Russell D. Lippert, Lippert Bank Services, L.L.C. v. ADEM, and Santek Environmental of Alabama, L.L.C., EMC Docket No. 09-05)**

## Attachment Index

- Attachment 7**            **Order granting Petitioners' Request for Oral Argument**
- (Agenda Item 7 – Friends of Hurricane Creek and John Wathen v. ADEM, and SDW, Inc., EMC Docket No. 09-02 [NPDES-Related Matter])**
- Attachment 8**            **Order rejecting all portions of the Hearing Officer's Recommendation except for the Summary of Relevant Testimony/Facts; dismissing the Petitioners' request for hearing for lack of jurisdictional standing; and declining to make a decision on the merits of said request for hearing**
- (Agenda Item 7 – Friends of Hurricane Creek and John Wathen v. ADEM, and SDW, Inc., EMC Docket No. 09-02 [NPDES-Related Matter])**
- Attachment 9**            **Order granting the Intervenor's Motion to Table Until the Next Commission Meeting**
- (Agenda Item 8 – Black Warrior Riverkeeper, Inc. v. ADEM, and Shepherd Bend, L.L.C., EMC Docket No. 09-04 [NPDES-Related Matter])**

**Attachment 1**



Amended 8/14/09

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, August 21, 2009  
11:00 a.m.

<u>ITEM</u>	<u>PAGE</u>
1. Consideration of minutes of meeting held on June 19, 2009**	2
2. Election	2
3. Report from the Director	2
4. Report from the Commission Chair	2
5. <u>Canaan Systems, Inc. v. ADEM</u> EMC Docket No. 09-06	2
6. <u>Russell D. Lippert, Lippert Bank Services, L.L.C. v. ADEM,</u> <u>and Santek Environmental of Alabama, L.L.C.</u> EMC Docket No. 09-05	3
7. <u>Friends of Hurricane Creek and John Wathen v. ADEM,</u> <u>and SDW, Inc.</u> EMC Docket No. 09-02 (NPDES-Related Matter)	3
8. <u>Black Warrior Riverkeeper, Inc. v. ADEM,</u> <u>and Shepherd Bend, L.L.C.</u> EMC Docket No. 09-04 (NPDES-Related Matter)	3
9. Other business	4
10. Future business session	4
PUBLIC COMMENT PERIOD	4

\* The Agenda for this meeting will be available on the ADEM website,  
[www.adem.alabama.gov](http://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 JUNE 19, 2009

2. ELECTION

The Commission will hold an election of Personnel Committee members.

3. REPORT FROM THE DIRECTOR

4. REPORT FROM THE COMMISSION CHAIR

Included in the report from the Commission Chair will be the following:

- A. Discussion of Greenhouse Gas Emissions – The Commission will discuss greenhouse gas emissions and various stances taken on the impact that reductions of said emissions will make and consider taking a formal stance on the issue.
- B. Discussion of proposal for the ADEM Operating Plan for a methodology to quantify compliance rates for major ADEM programs - The Commission will discuss and consider the Director’s proposal for the ADEM Operating Plan for a methodology to quantify compliance rates for major ADEM programs.

5. CANAAN SYSTEMS, INC. V. ADEM, EMC DOCKET NO. 09-06

The Commission will consider Respondent ADEM’s “Amended Motion to Sever and Stay” (dated July 23, 2009); the “Petitioner’s Response in Opposition to Respondent’s Motion to Sever and Stay” (dated July 28, 2009); the “Petitioner’s Supplemental Response in Opposition to Respondent’s Motion to Sever and Stay” (dated August 6, 2009); the “Petitioner’s Request for Oral Argument” (dated August 10, 2009); and the “Amendment to ADEM’s Reply Brief to Petitioner’s Opposition to ADEM’s Motion to Sever and Stay” (dated August 12, 2009).

The ADEM administrative actions appealed under Docket No. 09-06 are ADEM’s denial of Class V injection well permits to Canaan Systems, Inc. for The Cottages of Bethune Lake Subdivision, The Water’s Edge Subdivision, and Lawrence Landing Subdivision.



6. RUSSELL D. LIPPERT, LIPPERT BANK SERVICES, L.L.C. V. ADEM, AND SANTEK ENVIRONMENTAL OF ALABAMA, L.L.C., EMC DOCKET NO. 09-05

The Commission will consider the Hearing Officer's "Order on Motion for Summary Judgment" (dated July 6, 2009), which is construed as the Hearing Officer's recommendations to the Commission to grant the Intervenor's Motion for Summary Judgment and dismiss with prejudice the Request for Hearing filed by Russell D. Lippert. The Commission will also consider the "Order on Motions to Dismiss" (dated May 19, 2009) for incorporation in a final order on the Hearing Officer's recommendations. The May 19th "Order on Motions to Dismiss" was a preliminary order by the Hearing Officer dismissing the Requests for Hearing by Lippert Bank Services, L.L.C. and Jennifer J. Lippert.

The administrative action appealed under Docket No. 09-05 is ADEM's approval of the modification of the permit for Mt. Olive Landfill located on Mary Buckelew Drive in Jefferson County, Alabama.

7. FRIENDS OF HURRICANE CREEK AND JOHN WATHEN V. ADEM, AND SDW, INC., EMC DOCKET NO. 09-02 (NPDES-RELATED MATTER)

The Commission will consider the "Recommendation of Hearing Officer" (dated July 27, 2009); the "Intervenor's Response (Objections and/or Comments to Hearing Officer's Recommendation)" (dated August 4, 2009); "ADEM's Objection to the Hearing Officer's Recommendation and Proposed Alternate Findings of Fact and Conclusions of Law" and Proposed Orders (dated August 6, 2009); the Petitioners' Request for Oral Argument, "Objections to Hearing Officer's Recommendation and Supporting Brief," "Alternative Findings of Fact and Conclusions of Law and Discretion," and Proposed Order (dated August 7, 2009); and the "Intervenor's Replies to Objections" (dated August 11, 2009).

The administrative action appealed under Docket No. 09-02 is ADEM Administrative Order 08-203-MNPS issued on September 5, 2008, to SDW, Inc., Williamsburg Subdivision, Cottondale, Tuscaloosa County, NPDES ALR165846.

8. BLACK WARRIOR RIVERKEEPER, INC. V. ADEM, AND SHEPHERD BEND, L.L.C., EMC DOCKET NO. 09-04 (NPDES-RELATED MATTER)

The Commission will consider the Intervenor's motion to table consideration of the Hearing Officer's Recommended Findings of Fact and Conclusions of Law until the next scheduled meeting of the Commission.

The ADEM administrative action appealed under Docket No. 09-04 is ADEM's issuance of NPDES Permit AL0079163 on July 21, 2008, to Shepherd Bend, L.L.C., Shepherd Bend Mine, Walker County.

9. OTHER BUSINESS
10. FUTURE BUSINESS SESSION

**PUBLIC COMMENT PERIOD**

(The requests from the public to address the Commission are attached to the agenda.)

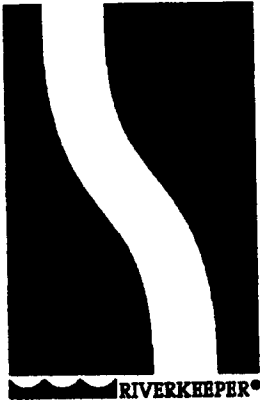
Request 1

Michael William Mullen, Choctawhatchee Riverkeeper  
SUBJECT: ADEM's general lack of effectiveness  
on construction stormwater compliance enforcement

Request 2

David A. Ludder, on behalf of the ADEM Reform Coalition  
SUBJECT: Compliance and enforcement in the  
Alabama NPDES (Water Pollution Control) Program

**CHOCTAWHATCHEE**



Laurel G. Gardner, D.V.M., Chair  
Alabama Environmental Management Commission  
c/o Debbie Thomas  
P.O. Box 301463  
Montgomery, AL 36130-1463

July 23, 2009



Dear Commissioner Gardner:

By this letter I request an audience before the AEMC at its August 21, 2009 meeting for the purpose of presenting examples of failure to enforce that illustrate a general failure by the Alabama Department of Environmental Management (ADEM) to take adequate measures to obtain compliance and prevent unnecessary runoff of sediment and turbid water from construction sites that hold ADEM permits.

My presentation (a set of handout pages is enclosed) includes slides that show how permit violations continued for months after ADEM received citizen complaints at two Troy construction sites. Citizen complaints were filed repeatedly for these sites after just about every significant precipitation event. Despite the offsite pollution that was occurring ADEM either did not take action or did not take action sufficient to cause permit holders to bring sites into compliance. Despite this no orders apparently were ever issued for these out-of-compliance sites or those orders were not executed.

This situation is not limited to these two examples. Most construction sites that I have observed in SE Alabama and elsewhere in Alabama over the last dozen or so years have been in not compliance with construction stormwater regulations. Most of those have had avoidable offsite transport of pollutants.

The Department's compliance enforcement program for the construction stormwater permit program is broken. If anything, response to citizen complaints is worse now than before the numerous re-organizations that have taken place over the last few years. It appears that there are even fewer enforcement actions than before and it appears that fewer penalties are being levied.

The last part of my presentation includes a handful of recommendations for making compliance enforcement more effective for the construction stormwater permit program.

Sincerely,

Michael William Mullen, CPESC  
Choctawhatchee Riverkeeper/Executive Director

CHOCTAWHATCHEE RIVERKEEPER®, INC.  
P.O. BOX 6734  
BANKS, AL 36005  
334-807-1365  
EMAIL: RIVERKEEPER@TROYCABLE.NET  
WEB: HTTP://CHOCRIVERKEEPER.GOOGLEPAGES.COM



CHOCTAWHATCHEE RIVERKEEPER®, INC. IS A MEMBER OF THE WATERKEEPER® ALLIANCE



August 7, 2009

**Delivered via Facsimile**

(334) 279-3052

Ms. Laurel Gardner, Chair  
Alabama Environmental Management Commission  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

**Re: Request to address Commission at August 21, 2009 meeting**

Dear Ms. Gardner:

On behalf of the ADEM Reform Coalition, I request the opportunity to address the Environmental Management Commission during the public comment period following the August 21, 2009 meeting of the Commission.

The topic of my remarks will be Compliance and Enforcement in the Alabama NPDES Program. By electronic mail sent to Debi Thomas, I am submitting a draft copy of material I intend to present. If changes are made before August 21, I will submit those.

Sincerely,

A handwritten signature in cursive script that reads "David A. Ludder".

DAVID A. LUDDER



**Attachment 2**



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

MOTION

Approve the nominations of Commissioners Brown and Pierce  
as Members of the 2009 Personnel Committee

ORDER

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

1. That the above motion is hereby adopted; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below.

Environmental Management Commission Order  
Page 2

ISSUED this 21st day of August 2009.

APPROVED:

Commissioner

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DISAPPROVED:

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ABSTAINED:

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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 21st day of August 2009.

Vice Chair

Environmental Management Commission  
Certified this 21st day of August 2009.



**Alabama Environmental Management Commission**  
**Proposed 2009 Personnel Committee Members**  
Chair Gardner, Vice Chair Wainwright  
August 2009

**Personnel**

We are proposing the following Committee Members for the 2009 Personnel Committee to serve until the October 2009 Commission meeting:

Members: Mr. Lanier Brown  
Dr. Conrad Pierce



**Attachment 3**



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

Canaan Systems, Inc.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	EMC Docket No. 09-06
	)	[Administrative Action: ADEM's denial of
Alabama Department of	)	Class V injection well permits to Canaan
Environmental Management,	)	Systems, Inc. for The Cottages at Bethune Lake
	)	Subdivision, The Water's Edge Subdivision, and
Respondent.	)	Lawrence Landing Subdivision]

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ORDER

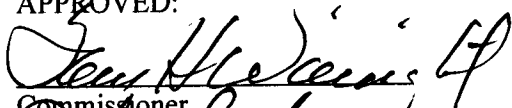
This cause having come before the Environmental Management Commission pursuant to the Petitioner's Request for Oral Argument, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

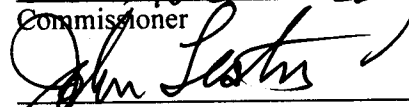
1. That the Petitioner's Request for Oral Argument is hereby granted; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
3. That a copy of this Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.


Environmental Management Commission Order  
Page 2 of 2

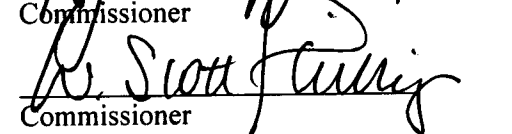
ISSUED this 21<sup>st</sup> day of August 2009.


APPROVED:

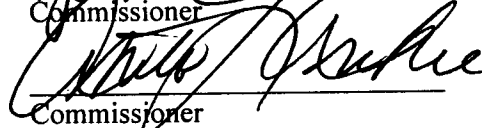
  
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DISAPPROVED:

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ABSTAINED:

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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 21<sup>st</sup> day of August 2009.

  
\_\_\_\_\_  
Vice Chair  
Environmental Management Commission  
Certified this 21<sup>st</sup> day of August 2009.

**Attachment 4**





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

CANAAN SYSTEMS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	EMC DOCKET NO.: 09-06
	)	
ALABAMA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT,	)	
	)	
Respondent.	)	
	)	

ORDER OF THE ENVIRONMENTAL MANAGEMENT COMMISSION

This matter having come before the Commission by way of Motion by the Alabama Department of Environmental Management (hereinafter the Department) to Sever and Stay the Petition, and the Commission having considered the various submissions, and arguments of the parties and of the Hearing Officer, the Commission finds that the Motion to Sever and Stay should be granted and that the Motion to Strike and Dismiss should be granted. As grounds for its action, the Commission FINDS:

1. The Commission may consider a Motion to Sever pursuant to ADEM Admin. Code r. 335-2-1-.09(3), by any party whenever it appears that severance would promote judicial economy and serve to make presentation of the issues more orderly.
2. Jurisdiction is a fundamental issue; it may be considered by the Commission and decided in a timely and expedited manner, prior to consideration of the issues raised by the Petitioner in its Request for Hearing.

3. In order for an administrative agency to act with authority, its jurisdiction over a matter must first be affirmatively established.

4. Based on the filings it appears that, the Petitioner, Canaan Systems, Inc., filed its Request for Hearing by letter on June 9, 2009. The letter was signed by Roger D. Rader, the President of Canaan Systems, Inc.

5. The Department's Motion to Strike and Dismiss raised the issue that the Request for Hearing was filed in the name of Canaan Systems, Inc., by its President, Roger D. Rader. Mr. Rader is not a duly licensed attorney as required by State law and the Commission's rules. Moreover, Mr. Rader filed this Request on behalf of a corporation, not for himself as an individual.

6. The legal authority to appear before this Commission is a matter of state law. The Code of Alabama §34-3-6 states as follows:

- (a) Only such persons as are regularly licensed have authority to practice law.
- (b) For the purposes of this chapter, the practice of law is defined as follows:  
Whoever,
  - (1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; ...

7. Commission rule 335-2-1-.30 provides that “[n]o person shall represent a party before the Commission unless that person is licensed to practice law in the State of Alabama or has been admitted *pro hac vice* in accordance with Rule VII, Rules Governing Admission to the Alabama State Bar.” The “party” here is the corporation, and Mr. Rader clearly served as the representative of Canaan Systems, Inc. when filing the Request for Hearing.

8. A corporation can appear in court or other tribunal only through an attorney, it may not appear *pro se*. Stage Door Development, Inc. v. Broadcast Music, Inc., 698

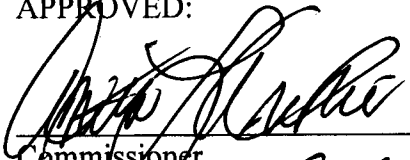
So.2d 787 (Ala. Civ. App. 1997); Waste Care v. ADEM, Docket No. 95-16, January 23, 1996, citing A-OK Construction Company, Inc. v. Castel Construction Company, Inc., 594 So.2d 53,(Ala. 1992) and Ex parte Lamberth, 242 Ala. 165, 5 So.2d 622(1942). Thus, any submissions by Mr. Rader, a non-lawyer attempting to represent the Corporation, are invalid, meaning that those submissions do not exist as a matter of law.

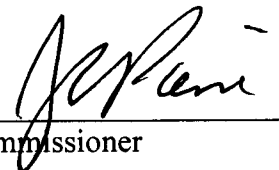
9. Finally, since the Petitioner's Request for Hearing is a legal nullity, the issue regarding the Class V subsurface fluid distribution system (drip disposal well) permit application for Lawrence Landing Subdivision is moot.

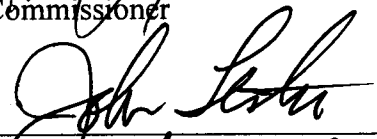
WHEREFORE, the foregoing considered, the Department's Motion to Sever and Stay is GRANTED and the Department's Motion to Strike and Dismiss is GRANTED based on the Request for Hearing being a legal nullity. We do not address the Department's second jurisdictional issue in regards to the Class V subsurface fluid distribution system (drip disposal well) permit application for Lawrence Landing Subdivision because it is now moot.

Entered this 21<sup>st</sup> day of August, 2009.

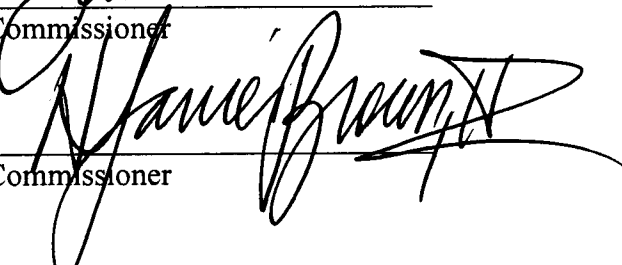
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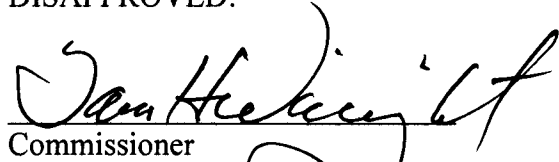
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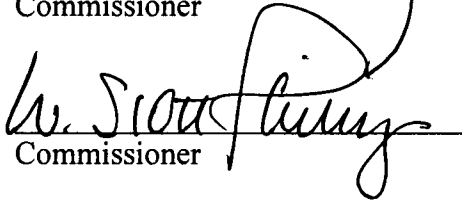
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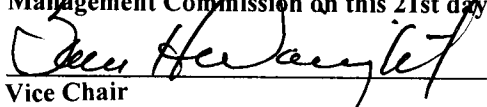
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ABSTAINED:

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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 21st day of August 2009.**

  
\_\_\_\_\_  
Vice Chair  
Environmental Management Commission  
Certified this 21st day of August 2009.

**Attachment 5**



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

MOTION

Refer request from Commissioner Archie to look at R. 335-2-1-.04(g) to Rulemaking Committee

ORDER

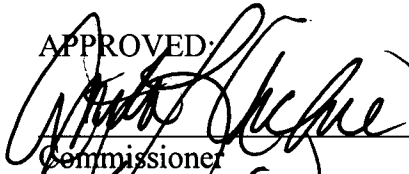
This cause having come before the Environmental Management Commission pursuant to the above motion, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the above motion is hereby adopted; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below.

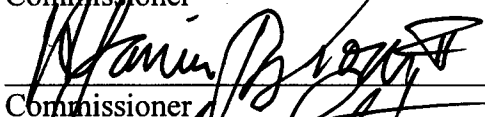
Environmental Management Commission Order  
Page 2

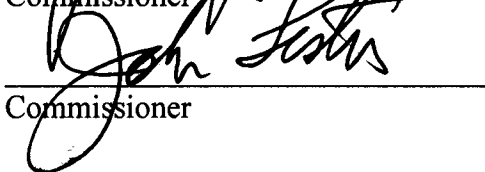
ISSUED this 21st day of August 2009.

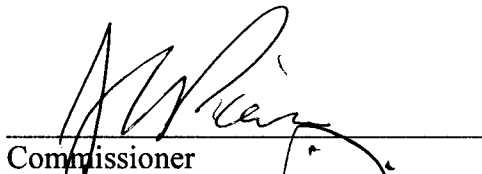
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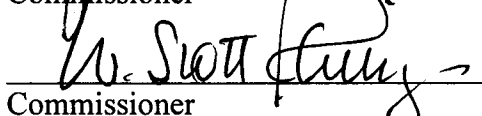
  
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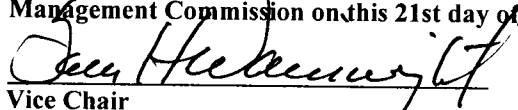
ABSTAINED:

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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 21st day of August 2009.

  
Vice Chair

Environmental Management Commission  
Certified this 21st day of August 2009.



**Attachment 6**



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

Russell D. Lippert,	)	
Lippert Bank Services, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	EMC Docket No. 09-05
	)	[Administrative Action: ADEM's approval
Alabama Department of	)	of the modification of the permit for Mt.
Environmental Management,	)	Olive Landfill located on Mary Buckelew
	)	Drive in Jefferson County, Alabama]
Respondent,	)	
	)	
and	)	
	)	
Santek Environmental of Alabama, L.L.C.,	)	
	)	
Intervenor.	)	

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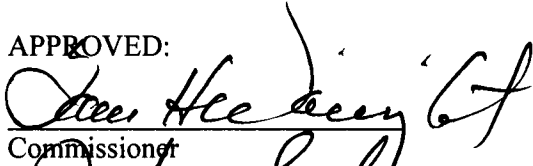
ORDER

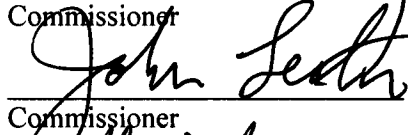
This cause having come before the Environmental Management Commission pursuant to the recommendations of the Hearing Officer in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

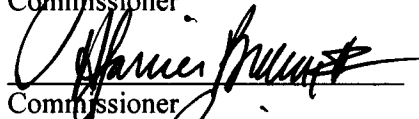
1. That the recommendations of the Hearing Officer in the Hearing Officer's "Order on Motion for Summary Judgment" dated July 6, 2009, are hereby adopted and incorporated into this Order; and
2. That the recommendations of the Hearing Officer in the Hearing Officer's "Order on Motions to Dismiss" dated May 19, 2009, are hereby adopted and incorporated into this Order; 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 shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

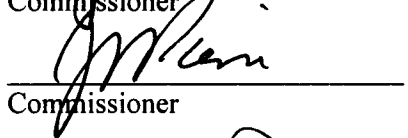
ISSUED this 21<sup>st</sup> day of August 2009.

APPROVED:

  
Commissioner

  
Commissioner

  
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DISAPPROVED:

  
Commissioner

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Commissioner

ABSTAINED:

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Commissioner

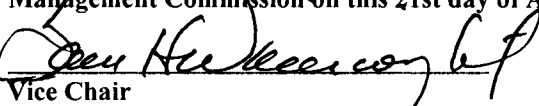
  
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This is to certify that this Order is a true and accurate  
account of the actions taken by the Environmental  
Management Commission on this 21st day of August 2009.

  
Vice Chair

Environmental Management Commission  
Certified this 21st day of August 2009.

# **EXHIBIT A**



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

**RUSSELL D. LIPPERT,** )  
**LIPPERT BANK SERVICES, L.L.C.,** )

**Petitioners,** )

v. )

**EMC DOCKET NO.: 09-05**

**ALABAMA DEPARTMENT OF** )  
**ENVIRONMENTAL MANAGEMENT,** )

**Respondent,** )

and )

**SANTEK ENVIRONMENTAL OF** )  
**ALABAMA, L.L.C.,** )

**Intervener.** )



**ORDER ON MOTION FOR SUMMARY JUDGMENT**

This matter is before the undersigned Hearing Officer on the Motion to Dismiss by Santek Environmental of Alabama, LLC (“Santek”), construed herein as a Motion for Summary Judgment by Order of May 19, 2009. For the reasons below, the Motion is due to be granted.

1. By orders entered on May 19, 2009, the Motions to Dismiss of the Department and Santek were granted, excepting one issue which, due to evidentiary considerations, was construed as a Motion for Summary Judgment. As set forth in the order, paragraph 1 of the Motion to Dismiss of Santek would be addressed as one for summary judgment:

“In Paragraph 1 of the Motion to Dismiss of Santek filed herein on April 22, 2009, Santek contends that Petitioner, Russell D. Lippert, cannot prove any facts which would constitute either an “actual injury” or “threatened injury” as a result of the modifications to the landfill permit, and therefore, is not a “person aggrieved” within the laws and regulations of the Alabama Department of Environmental Management. Because this issue depends upon evidentiary

considerations, the Motion to Dismiss of Santek, particularly Paragraph 1 of said Motion, shall be construed pursuant to the summary judgment provisions of Ala. Admin. Code No. 335-2-1-.22.”

(Order to construe Motion to Dismiss as Motion for Summary Judgment, May 19, 2009)

2. Petitioner, Russell Lippert was ordered to respond to the Motion for Summary Judgment by June 10, 2009, showing why summary judgment should not be granted. On Petitioner’s request, the time to respond was extended to June 19, 2009.

3. On June 24, 2009, the Intervenor, Santek, filed a request that summary judgment be entered because Petitioner has made no response whatsoever to the motion for summary judgment. The time in which Petitioner was ordered to respond expired more than two weeks ago and he has made no response, nor has he explained why a response has not been filed.

4. Accordingly, this Hearing Officer is of the opinion that there remains no genuine issue of material fact and that the Motion for Summary Judgment of Santek is due to be granted.

### **Ruling**

It is hereby ordered as follows:

1. The Motion for Summary Judgment by Santek is due to be, and is hereby, granted.

2. The Request for Hearing filed by Russell Lippert is due to be, and is hereby, dismissed with prejudice.

3. The Requests for Hearing by Lippert Bank Services, LLC and Jennifer J. Lippert previously having been dismissed, this ruling today is a final disposition of all claims and issues in this matter.



DONE this the 6 day of July, 2009.

  
JAMES H. MCLEMORE  
HEARING OFFICER

cc: Debi Thomas (via hand delivery)  
James R. Thrash, Esq.  
Mary-Frank Brown, Esq.  
Russell D. Lippert  
Jennifer J. Lippert  
Thomas R. DeBray, Esq.  
Scott Morro, Esq.



## **EXHIBIT B**



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

**RUSSELL D. LIPPERT,** )  
**LIPPERT BANK SERVICES, L.L.C.,** )

**Petitioners,** )

**v.** )

**EMC DOCKET NO.: 09-05**

**ALABAMA DEPARTMENT OF** )  
**ENVIRONMENTAL MANAGEMENT,** )

**Respondent,** )

**and** )

**SANTEK ENVIRONMENTAL OF** )  
**ALABAMA, L.L.C.,** )

**Intervener.** )



**ORDER ON MOTIONS TO DISMISS**

This matter is before the undersigned Hearing Officer on the Notice of Hearing Defects and Motion To Dismiss filed by the Alabama Department of Environmental Management (“Department”), and the Motion to Dismiss filed by the Intervenor, Santek Environmental of Alabama, L.L.C. (“Santek”). In consideration of the pleadings and the presentation of the parties the Hearing Officer finds as follows:

**Procedural History**

1. On March 13, 2009, Russell D. Lippert filed a request for hearing purportedly for himself and Lippert Bank Services, L.L.C., challenging the issuance on February 11, 2009, of Solid Waste Disposal Permit No. 37-43.
2. On March 18, 2009, the Department filed a Notice of Pleading Defects.

3. On March 31, 2009, Russell D. Lippert, for himself and for Lippert Bank, and joined for the first time by Jennifer J. Lippert, filed an amended request for hearing.

4. Following a pre-hearing conference among the parties and a scheduling order which followed that conference, the Department moved to strike and dismiss the request for hearing as amended.

5. Santek moved to intervene, which motion was granted, and also moved to dismiss the requests for hearing, as amended.

#### **Alleged Grounds for Dismissal**

Taken together, the pleadings of the Department and Santek seek a dismissal on the following grounds:

- (a) Jennifer J. Lippert failed to make a timely request for hearing.
- (b) The appearance of Lippert Bank Services, L.L.C. is not by and through legal counsel of record and, therefore, is without authority and should be dismissed.
- (c) The request for hearing does not bear an original signature.
- (d) In filing the request for hearing, Petitioners failed to serve a copy on the recipient of the permit, Jefferson County, Alabama.
- (e) The Petitioners do not constitute an “aggrieved party” and, therefore, lack standing to make a request for hearing.
- (f) The Alabama Environmental Management Commission lacks jurisdiction to consider the injuries alleged by the Petitioners.

#### **Findings of the Hearing Officer**

The procedure to request an administrative hearing is set forth in Alabama Code, Section 22-22A-7(c)(1). That section requires that an aggrieved person must request a hearing within

thirty (30) days of the contested administrative action. In this case, Russell D. Lippert, purporting to file for himself and Lippert Bank Services, L.L.C., filed a request for hearing within the prescribed thirty (30) days. However, in joining the amended request for hearing which was filed on March 31, 2009, the appearance of Jennifer J. Lippert is untimely and she is due to be dismissed.

The request on behalf of Lippert Bank Services, L.L.C. also is due to be dismissed. A corporate entity can appear in a court or other adjudicatory tribunal only by and through legal counsel. A corporate entity is without authority to appear *pro se*. See, Waste Care v. ADEM, Docket No. 95-16, January 23, 1996, citing A-OK Construction Co., Inc. v. Castel Construction Co., Inc., 594 So.2d 53 (Ala. 1992), and Ex parte Lamberth, 242 Ala. 165, 5 So. 2d 622 (1942). Here Lippert Bank Services, L.L.C. appears in this cause by and through Russell D. Lippert. Mr. Lippert has not shown that he is an attorney, and a review of the website for the Alabama State Bar does not reflect that he is licensed to practice law in the State of Alabama. Accordingly, the request for hearing on behalf of Lippert Bank Services, L.L.C. is due to be dismissed.

Santek argues that Russell D. Lippert's individual request for hearing should be dismissed because it does not bear an original signature and a copy was not served on Santek. See Alabama Administrative Code No. 335-2-1-.04. However, the use of the word "shall" in legislation does not necessarily carry a jurisdictional or mandatory connotation:

The word "shall" is normally considered to be mandatory, but in some cases has been held to be merely directory. It has been held that where a provision relates only to form or manner, it is directory.

Key v. Alabama State Tenure Commission, 406 So.2d 133, 135 (Ala.Civ.App. 1981), citing Mobile County Republican Executive Committee v. Mandaville, 363 So.2d 754 (Ala. 1978), etc. See also, Alabama Public Service Commission v. Red Wing Carriers, 281 Ala. 11, 115, 119

So.2d 653 (Ala. 1967) (“[G]enerally speaking, provisions not relating to the essence of the thing to be done, and as to which compliance is a matter of convenience rather than substance, are directory.”) The Hearing Officer finds that the requirements for an original signature and for the service of a copy upon the permittee do not relate to the essence of the thing requested to be done, that is, the filing with the Commission of a request for hearing, and therefore, are directory. The failure of the Petitioner to comply with these provisions are not grounds for the dismissal of his request for hearing.

Santek argues that Russell D. Lippert does not have standing to file a request for hearing. The governing regulations, Ala. Admin. Code No. 355-2-1-.03 provides for a request for hearing to be made by “any person aggrieved by an administrative action of the Department.” The term “aggrieved” is defined as having suffered a threatened or actual injury in fact. Ala. Admin. Code No. 335-2-1-.02(b). In his request for hearing as amended, Russell D. Lippert alleges as his injury that he owns property within a mile of the subject landfill and that the challenged modification of the landfill permit will subject his property to loss of value, increased traffic resulting in hazardous driving conditions, excessive roadway deterioration, and undue concentration of solid waste in the vicinity of a residential area.

In examining the definition of “aggrieved” in the Department’s regulations, the Alabama Court of Civil Appeals has sought guidance from Black’s Law Dictionary which defines “aggrieved party” as follows:

“One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree of judgment . . . . the word ‘aggrieved’ refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation.”



Black's Law Dictionary, 65(6th Ed, 1990); cited by Alabama Department of Environmental Management v. Legal Environmental Assistance Foundation, 973 So.2d 369, 378 (Ala.Civ.App. 2007).

Russell D. Lippert alleges injury to the very thing encompassed within the above definition. Russell D. Lippert alleges that his pecuniary interest associated with his property will be adversely affected by the modification to the permit. Therefore, on the face of the pleadings, Russell D. Lippert has made a sufficient allegation of a threatened injury which, if proved, would make him a person aggrieved within the meaning of the Department's regulation. Santek also argues that the nature of the modified permit is such that there cannot conceivably be any injury, actual or threatened. That is a consideration that involves evidentiary considerations which are not presently before the Hearing Officer on the motions to dismiss. However, the Hearing Officer finds that the motion to dismiss should be construed as a one for summary judgment and addressed separately under Ala. Admin. Code 335-2-1-.22.

Santek also argues that the alleged or threatened injuries are matters beyond the jurisdiction of the Alabama Environmental Management Commission and therefore should be dismissed. Santek argues that Alabama Code Section 22-27-48(a) sets forth various factors required to be considered by the local governing body (here, the Jefferson County Commission) in the determination of the approval for a solid waste management site. However, although the Jefferson County Commission is required to address the factors, the statutory authority does not jurisdictionally preclude the permitting authority which is conferred upon the Department and whether the Department's actions in this instance were appropriate, or as Russell D. Lippert alleges, inappropriate.

### **Ruling**

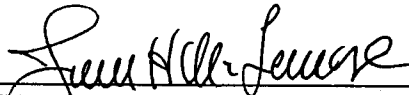
For the aforesated reasons, the undersigned Hearing Officer holds as follows:

(a) The motions to dismiss the requests for hearing filed by Lippert Bank Services, L.L.C. and by Jennifer J. Lippert are due to be, and are hereby, granted. The requests for hearings filed by Lippert Bank Services, L.L.C. and Jennifer J. Lippert are dismissed with prejudice.

(b) The Department's and Santek's motions to dismiss the request for hearing of Russell D. Lippert are due to be, are hereby, denied, with the exception below.

(c) Santek's motion to dismiss to the extent it relies upon evidentiary considerations concerning the inability of Petitioner to prove any harm as a result of the modifications to the permit shall be converted into a motion for summary judgment under Ala. Admin. Code No. 335-2-1-.22 by separate order.

DONE this the 19 day of May, 2009.

  
\_\_\_\_\_  
JAMES H. MCLEMORE  
HEARING OFFICER

cc: Debi Thomas  
James R. Thrash, Esq.  
Mary-Frank Brown, Esq.  
Russell D. Lippert  
Jennifer J. Lippert  
Thomas R. DeBray

**Attachment 7**



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

Friends of Hurricane Creek and	)	
John Wathen,	)	
	)	
Petitioners,	)	
	)	
vs.	)	EMC Docket No. 09-02
	)	[Administrative Action: ADEM Admin.
Alabama Department of	)	Order 08-203-MNPS issued on 9/5/08 to
Environmental Management,	)	SDW, Inc., Williamsburg Subdivision,
	)	Cottondale, Tuscaloosa County,
Respondent,	)	NPDES ALR165846]
	)	
and	)	
	)	
SDW, Inc.,	)	
	)	
Intervenor.	)	

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ORDER

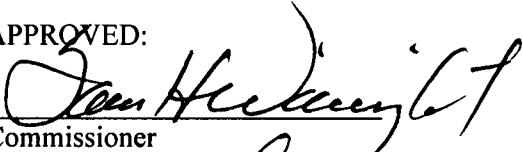
This cause having come before the Environmental Management Commission pursuant to the Petitioners' Request for Oral Argument, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

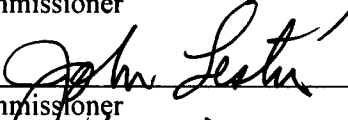
1. That the Petitioners' Request for Oral Argument is hereby granted; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
3. That a copy of this Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.


Environmental Management Commission Order  
Page 2 of 2


ISSUED this 21<sup>st</sup> day of August 2009.

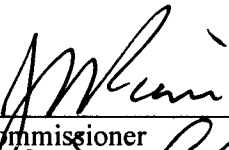
APPROVED:

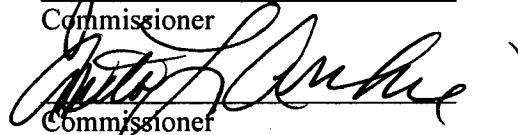
  
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DISAPPROVED:

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Commissioner


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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 21st day of August 2009.

  
Vice Chair  
Environmental Management Commission  
Certified this 21st day of August 2009.

**Attachment 8**







The administrative action at issue in this appeal is an administrative Order assessing a civil penalty issued to SDW, Inc. Neither John Wathen nor Friends of Hurricane Creek is subject to the Order. The only issue before the Commission with regard to the issuance of this Order is the amount of the civil penalty. The Commission has a long history of following state and federal law with regard to standing, and the Commission continues to adhere to the tenet that “the requirement for standing must be shown for each claim for which relief is sought, and it cannot simply be plead. The actual cause of the injury must be the action which is challenged.” City of Alabaster v. Alabama Department of Environmental Management, AEMC Docket No. 06-04, 2007 WL 5476632. Here, Petitioners have provided no evidence that they have suffered a real or threatened injury as a result of the penalty assessed in the administrative Order issued by the Department.

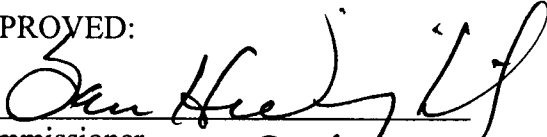
Lack of standing is a jurisdictional defect. Alabama Department of Environmental Management v. Legal Environmental Assistance Foundation, *supra*, quoting E.V.W. v. Jefferson County Dep’t of Human Res., 893 So.2d 1212, 1213 (Ala. Civ. App. 2004). If a party lacks standing, the Commission does not have jurisdiction to hear that party’s appeal. This is a threshold issue. Where a plaintiff lacks standing, “a court is not free to opine in an advisory capacity about the merits of plaintiff’s claims,” and “the court is powerless to continue.” CAMP Legal Defense Fund, Inc. v. City of Atlanta, 451 F.3d. 1257, 1269 (11<sup>th</sup> Cir. 2006). The Hearing Officer committed clear error when he essentially determined that the Petitioners lacked standing and yet proceeded to examine Petitioners’ arguments as to the merits of the case.

For the reasons stated above, the Commission hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. That all portions of the Hearing Officer's Recommendation except for the Summary of Relevant Testimony/Facts are hereby REJECTED; and
2. That the Petitioners' request for hearing should be DISMISSED for lack of jurisdictional standing; and
3. That, because the Commission lacks jurisdiction over the Request for Hearing, it declines to make a decision on the merits of said Request for Hearing.
4. That this action has been taken and this Order shall be deemed effective as of the date shown below.

ISSUED this the 21<sup>st</sup> day of August, 2009.


APPROVED:

  
 Commissioner

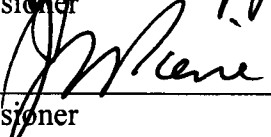
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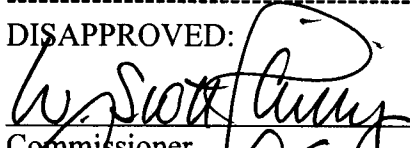
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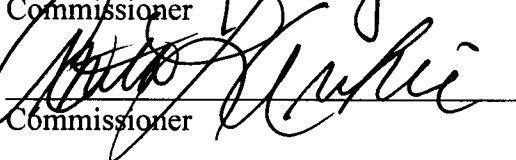
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DISAPPROVED:

  
 Commissioner

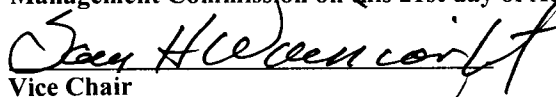
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 Commissioner

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 21st day of August 2009.

  
 Vice Chair  
 Environmental Management Commission  
 Certified this 21st day of August 2009.



**Attachment 9**



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

Black Warrior Riverkeeper, Inc.,	)	
Petitioner,	)	
	)	
vs.	)	EMC Docket No. 09-04
	)	
Alabama Department of	)	[ADEM Administrative Action:
Environmental Management,	)	ADEM's issuance of NPDES Permit
Respondent,	)	AL0079162 on July 21, 2008, to
	)	Shepherd Bend, L.L.C., Shepherd Bend
and	)	Mine, Walker County]
	)	
Shepherd Bend, L.L.C.,	)	
Intervenor.	)	

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ORDER

This cause having come before the Environmental Management Commission pursuant to the Intervenor's Motion to Table Until Next Commission Meeting and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Intervenor's Motion to Table Until Next Commission Meeting is hereby granted and incorporated into this Order; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
3. That a copy of this Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.



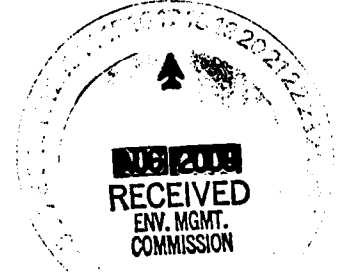


# **EXHIBIT A**



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

BLACK WARRIOR )  
RIVERKEEPER, INC. )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ALABAMA DEPARTMENT OF )  
ENVIRONMENTAL )  
MANAGEMENT, )  
 )  
Respondent, and )  
 )  
SHEPHERD BEND LLC, )  
 )  
Intervenor. )  
 )



EMC DOCKET NO. 09-04  
OAH 08-484

**MOTION TO TABLE UNTIL NEXT COMMISSION MEETING**

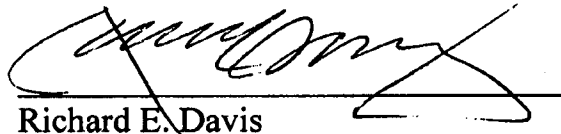
Intervenor Shepherd Bend, LLC moves the Commission to table consideration of the Hearing Officer's recommendation in this matter, which is currently on the Commission's agenda for the August 21, 2009 meeting, until the Commission's next meeting, which Shepherd Bend understands will be set for a date certain in October, 2009 (if not sooner). While no party has requested oral argument in accordance with ADEM Admin. R. 335-2-1-.29, Shepherd Bend is mindful that the Commission, pursuant to ADEM Admin. R. 335-2-1-.28(3), may

take up oral argument on objections to the Hearing Officer's recommendation on its own motion. Rescheduling is, therefore, sought here because Black Warrior Riverkeeper, Inc. has filed an objection, to which Shepherd Bend will be timely replying, and counsel for Shepherd Bend has an irreconcilable scheduling conflict with another case on August 21, 2009.

Counsel for the Alabama Department of Environmental Management and for Black Warrior Riverkeeper, Inc. have stated to the undersigned that they do not oppose this motion.

WHEREFORE, Shepherd Bend requests that consideration of the Hearing Officer's Recommended Findings of Fact and Conclusions of Law be tabled until the next scheduled meeting of the Commission.

Respectfully submitted this 14th day of August, 2009.

  
Richard E. Davis

Attorney for Intervenor  
Shepherd Bend LLC

Of Counsel

STARNES & ATCHISON, LLP  
100 Brookwood Place, 7<sup>th</sup> Floor  
Birmingham, Alabama 35209  
Telephone: (205) 868-6000  
Facsimile: (205) 868-6099

CERTIFICATE OF SERVICES

I hereby certify that the foregoing Motion to Table Until Next Commission

Meeting was served by e-mail and U.S. Mail as follows:

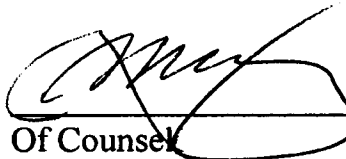
To Petitioner's Counsel

Catherine Wannamaker, Esq.  
Gilbert Rogers, Esq.  
Southern Environmental Law Center  
The Candler Building  
127 Peachtree Street, Suite 605  
Atlanta, Georgia 30303-1800  
[cwannamaker@selcga.org](mailto:cwannamaker@selcga.org)  
[grogers@selcga.org](mailto:grogers@selcga.org)  
[akron@selcga.org](mailto:akron@selcga.org)

To Respondent's Counsel

James L. Wright, Esq.  
Schuyler K. Espy, Esq.  
Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463  
[jlw@adem.state.al.us](mailto:jlw@adem.state.al.us)  
[sespy@adem.state.al.us](mailto:sespy@adem.state.al.us)

This 14th day of August, 2009.

  
\_\_\_\_\_  
Of Counsel

cc: Hon. Julia Jordan Weller (by e-mail and U.S. Mail)