

**BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN RE: PETITION TO COMMENCE)
PROCEEDINGS TO WITHDRAW)
ALABAMA’S AUTHORIZATION TO)
ADMINISTER THE NATIONAL)
POLLUTANT DISCHARGE)
ELIMINATION SYSTEM)
)
ALABAMA RIVERS ALLIANCE, INC.,)
ADEM REFORM COALITION,)
FRIENDS OF HURRICANE CREEK,)
MOBILE BAYKEEPER, INC.,)
BLACK WARRIOR RIVERKEEPER, INC.,)
CHOCTAWHATCHEE RIVERKEEPER, INC.,)
FRIENDS OF THE LOCUST FORK RIVER,)
COOSA RIVER BASIN INITIATIVE, INC.,)
ALABAMA ENVIRONMENTAL COUNCIL,)
THE SIERRA CLUB -- ALABAMA CHAPTER,)
SAND MOUNTAIN CONCERNED CITIZENS, INC.,)
CONSERVATION ALABAMA FOUNDATION, INC.,)
CAHABA RIVERKEEPER, and)
THE FRIENDS OF BIG CANOE CREEK,)
)
PETITIONERS.)

**RESPONSE OF THE ALABAMA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

I. INTRODUCTION

By letter dated February 2, 2010, James D. Giattina, Director of the U.S. Environmental Protection Agency’s (“EPA”) Region 4 Water Division, notified John P. Hagood, Director of the Alabama Department of Environmental Management (“the Department” or “ADEM”), of a Petition to Commence Proceedings to Withdraw Alabama’s Authorization to Administer the National

Pollutant Discharge Elimination System (“Petition”) filed with EPA by the various Petitioners referenced above. Mr. Giattina’s letter requested that ADEM file a Response to the Petition to Commence Proceedings to Withdraw Alabama’s Authorization to Administer the National Pollutant Discharge Elimination System (“Response”) with EPA within sixty days of receipt of his February 2, 2010 letter, which was received on February 8, 2010. Accordingly, the response is due to be filed no later than April 9, 2010.

A. Regulatory Background

The Clean Water Act (“CWA”) establishes the federal National Pollutant Discharge Elimination System (“NPDES”), a system to control the discharge of pollutants into navigable waters through the issuance of permits which authorize such discharges, subject to certain terms, limitations and conditions. 33 U.S.C. § 1342. On the federal level, the NPDES program is administered by EPA. However, the CWA allows each State that wishes to administer its own permitting program to submit an application for approval to establish a similar permitting program under State law which shall be the primary water pollution control program in the approved State, subject to oversight by EPA. 33 U.S.C. § 1342(b). Congress was unambiguous that it intended the CWA to “recognize, preserve, and protect the primary responsibilities of states to prevent, reduce, and eliminate pollution through the NPDES program.” 33 U.S.C. § 1251(b).

40 C.F.R. Part 123 establishes the requirements State programs must meet in order to receive and retain EPA approval to operate a State NPDES program in lieu of the federal program. 40 C.F.R. § 123.21 sets out the elements of an

application for EPA approval of a State-administered NPDES program, which include the execution of a Memorandum of Agreement (“MOA”) between the State and EPA. 40 C.F.R. § 123.21(a)(4). Specific requirements for the MOA are found at 40 C.F.R. § 123.24. It is important to note that although § 123.24 requires the MOA to address specific program provisions, such as reporting, compliance monitoring, etc., it does not dictate how they are to be addressed but merely requires that those issues be addressed. The State’s specific commitments with regard to its NPDES program are to be negotiated by EPA and the State on a case-by-case basis, considering the circumstances. Those commitments are likely to change as the regulated universe changes and new requirements are promulgated. Accordingly, the State’s MOA with EPA is revised periodically to reflect those changes.

B. Alabama’s NPDES Program

In accordance with 33 U.S.C. § 1342(b), Alabama applied to EPA for approval to administer a State NPDES program in lieu of the federal program and, on October 19, 1979, received EPA approval of its NPDES program. As part of its program submission, in accordance with 40 C.F.R. § 123.21(a)(4) and 40 C.F.R. § 123.24, Alabama entered into a MOA with the Region 4 Administrator, an agreement which has periodically been revised and updated. The current MOA, executed on April 11, 2008, is attached as Alabama Exhibit A-1.¹

¹ Although Alabama’s current MOA with EPA, and the only MOA by which Alabama’s compliance may now be judged, has been in effect for almost two years, the Petition compares Alabama’s performance with the terms contained in the undated Petitioners’ Exhibit A-1, a document which, judging by the Regional Administrator whose name appears on the document, is a decade or more old. Petitioners’ Exhibit A-1 is no longer in effect and does not accurately reflect the terms of Alabama’s and EPA’s commitments to each other. Petitioners’ failure to use the correct MOA

The CWA requires State programs to, at all times, comply with the requirements of § 1342. 33 U.S.C. § 1342(c)(2). In addition, § 1342(c)(2) requires state programs to comply with guidelines established pursuant to 33 U.S.C. § 1314(i)(2), including requirements for monitoring, reporting, enforcement, funding, personnel qualifications, and manpower. EPA periodically reviews Alabama's programs for compliance with these requirements and regularly reviews any substantive changes to the program or to Alabama's legal authority to administer a State NPDES program.

Alabama is proud of its NPDES program, which can boast of numerous accomplishments:

- The trend in issuing priority permits for the past four years has been 100% or greater, exceeding the national goal of 95%, and the NPDES Permit program has been recognized by EPA for maintaining a low permit backlog (i.e., 90% current) in FY05, 06 and 07.
- In FY07, 16 General Permits covering approximately 2,500 facilities were re-issued.
- In FY08, revisions to the Department's NPDES regulations to allow the establishment of schedules of compliance in NPDES permits to achieve total maximum daily loads ("TMDLs") were adopted by the Environmental Management Commission and approved by EPA.

invalidates or, at the very least, dilutes all of their arguments regarding Alabama's compliance with MOA with EPA, and the Petition should be denied on this basis alone.

- In fiscal year 2008, revisions to the state's water quality human health criteria were adopted resulting in more stringent criteria. Specifically, these revisions resulted in the addition of the Relative Source Contribution factor for 14 non-carcinogenic pollutants, the reduction in the cancer risk level for 57 carcinogenic pollutants, and the reduction in human health criteria for acrolein and phenol. These revisions to quality standards have resulted in more stringent permit limitations for the affected NPDES permitted facilities.
- In 2007, ADEM was added the Outstanding Alabama Water (“OAW”) classification to Wolf Bay in Baldwin County and to upgrade the classification of Black Creek in Etowah County from Agricultural and Industrial Water Supply (“A&I”) to Fish and Wildlife. Also, in 2009, ADEM was able to add the OAW classification to Magnolia River in Baldwin County. As of January, 2010, Alabama has only 17 stream segments classified as Limited Warm Water or A&I, and 15 stream segments are classified as OAW.

ADEM has initiated many improvements in its NPDES program. These include:

- During 2008 and 2009, the NPDES permit process was mapped and streamlined to gain efficiencies in permitting. In conjunction with streamlining the permit process, the program has established goals to facilitate application review and permit processing and has revised procedures to improve permit quality.

- During 2007 and 2008, a new state NPDES Management System (“NMS”) database, which combines all NPDES permit functions into one common database, was acquired and brought online. All NPDES applications and permits are processed, and permits are generated via the NMS database which is compatible with ICIS. In this regard, Alabama is one of the pilot states for development and testing of facility data flow into ICIS.
- In 2008, the Department began providing a web-enabled electronic environmental (“E2”) reporting system for wastewater facilities to streamline the management of discharge monitoring reports (“DMRs”) required under the Alabama NPDES program. The E2 DMR system provides wastewater facilities with an alternative way to submit DMR data and allows ADEM to validate electronically the data, acknowledge receipt, and upload data to the State's central wastewater database. DMR data flow from NMS to ICIS has also begun. Continued implementation of this new system will improve the management of data associated with the Department's wastewater monitoring program. Like the E2 DMR system, the Department has marketed this program through avenues such as press releases, the ADEM Annual Report, regulatory conferences, the cover letter of NPDES permits, and articles published in periodicals affecting the regulated community. In conjunction with this effort, ADEM has contracted for the presentation of thirty seminars to encourage the use

of e-DMRs. Additionally, ADEM is requiring the use of e-DMRs in many enforcement and permitting actions.

- In 2008, the Department also began providing an E2 reporting system for construction stormwater facilities to streamline the management of notices of registration (“NORs”). The e-NOR system provides construction stormwater registrants with an alternative way to submit NOR data and allows ADEM to validate the data electronically, acknowledge receipt, and upload data to state's central wastewater database. The Department has also provided education and outreach to the general public about this program through avenues such as press releases, the ADEM Annual Report, regulatory conferences, and articles published in periodicals affecting the regulated community. In addition, Alabama has plans to increase the opportunities for electronic application submission by use of E2 for the general permit program (i.e., e-NOI).
- In 2008, the Department established the Office of Environmental Quality (“OEQ”) to centralize all quality activities. Led by a Quality Assurance Manager, the OEQ coordinates development and implementation of the Department-wide program and certain program quality systems. ADEM promotes the continued development of an integrated system of management activities involving planning, implementation, assessment, reporting, and quality improvement to ensure that all processes and services are of the type and quality

necessary to make sound environmental decisions. The Department develops and issues NPDES permits, conducts compliance monitoring, and issues enforcement actions related to these permits and compliance evaluations. Specific information related to this program is submitted to EPA through the federal NPDES-ICIS (“ICIS”) database in accordance with the State/EPA MOA and as a part of the annual EPA Workplan commitment. Currently, the OEQ is working with a team of staff representatives to develop an NPDES/SID program process for quality information reporting. The procedures, outlined in a Standard Operating Procedure (“SOP”) document, will describe the coordination between the various aspects of the NPDES program and the Environmental Data Section (“EDS”) of Permits and Services Division to assure that the data provided in the ICIS database meet the ICIS target quality objectives.

Alabama continuously strives to improve its NPDES program, with the goal of being the premier state NPDES program in the country. In an effort to improve efficiencies and results, in 2008 ADEM initiated a major reorganization of its NPDES program, consolidating all NPDES permitting functions (with the exception of AFO/CAFO) into the NPDES Permit Branch, and all NPDES enforcement functions (again, excepting AFO/CAFO) into the NPDES Enforcement Branch. This reorganization did not achieve the desired results and goals, and the data indicated the revisions had resulted in unanticipated impediments to swift and efficient permitting and enforcement. Consequently,

beginning in the fall of 2009, ADEM began the planning necessary to remove the unintended impediments and reverse this trend. On March 15, 2010, the NPDES program was restructured in order to return to the holistic regulatory approach which had previously been successful.

C. Program Withdrawal

The CWA authorizes EPA to withdraw its approval of a State NPDES program administered in lieu of the federal program if the EPA Administrator determines that the State is not administering the program in accordance with the requirements of the Clean Water Act and, after notification to the State, the State fails to take appropriate corrective action within a reasonable time. 33 U.S.C. § 1342(c). More specifically, EPA's regulations provide that the EPA Administrator may withdraw program approval when a State program no longer complies with the requirements of 40 C.F.R. Part 123, including the terms and conditions of the Memorandum of Agreement executed between EPA and the State. 40 C.F.R. § 123.63(a)(4).

On January 14, 2010, Petitioners filed their Petition to Commence Proceedings to Withdraw Alabama's Authorization to Administer the National Pollutant Discharge Elimination System, alleging twenty-six grounds for withdrawal of EPA's approval of Alabama's NPDES program.

II. RESPONSE TO PETITIONERS' ALLEGATIONS

The Petition asserts that Alabama's NPDES program fails to comply with the requirements of 40 C.F.R. Part 123, including the terms and conditions of the Memorandum of Agreement executed between EPA and Alabama. Each of the Petition's twenty-six allegations of deficiency is addressed below in detail, in the order in which each is raised in the Petition.

A. Alabama's data entry system exceeds the national average for accuracy and continues to improve.

The Petition alleges that Alabama violates its MOA with EPA by failing to comply with the monitoring data entry accuracy rate contained in the MOA. Alabama's MOA with EPA requires Alabama to operate a timely and effective monitoring system via the Permit Compliance System ("PCS") to track compliance of permittees with permit conditions. (Alabama Exhibit A-1, p. 7). As the Petition notes, the MOA requires the State to ensure that monitoring data are entered into PCS with the necessary quality assurance to achieve a 95% accuracy rate. Petitioners' allegations on this point are inaccurate and should be rejected..

The MOA also makes clear that compliance monitoring should focus primarily on major dischargers. Accordingly, ADEM has concentrated its efforts on major dischargers, exceeding both its accuracy goal, as well as the national average accuracy rate for major dischargers. Petitioners' Exhibit A-2 indicates that Alabama has exceeded its goal for major dischargers with a 97.9% accuracy rate, a rate which exceeds the national average of 90.98%. It should also be noted that Alabama's DMR entry rate of 97.90% for major dischargers exceeds

the national average of 89.5%. Alabama's accuracy rate and DMR entry rate also in many cases achieve greater results than EPA in those states in which EPA administers the NPDES program.

Although it is not a reason to withdraw Alabama's NPDES authorization, the Petition is correct that Alabama has not yet achieved the 95% accuracy rate for non-major dischargers. As noted above, Alabama is consistent with its MOA's focus on major dischargers. ADEM's 79.60% accuracy rate for non-major dischargers significantly exceeds the national average of 57.83%, and its 44.40% DMR entry rate for non-major dischargers also exceeds the national average. Moreover, ADEM has recently put in place a number of improvements to its system, such as its establishment of the NMS system and its participation as one of the pilot states for development and testing of facility data flow into ICIS. The E2 reporting system for wastewater facilities and construction stormwater facilities is expected to improve ADEM's accuracy rate, as well. Finally, the recently established Office of Environmental Quality's development of a SOP document is expected to assure that the data provided in the ICIS database meet the ICIS target quality objectives. With these changes, the Department's performance is expected to continue to improve. Based upon Alabama's data entry rates, as well as its proven commitment to constantly improve data entry, withdrawal of approval of Alabama's NPDES program is inappropriate and unnecessary.

B. Alabama has successfully implemented a strategy for the timely issuance of permits.

The Petition alleges that Alabama has failed to issue NPDES permits for dischargers with expired permits that are not administratively continued and further alleges that Alabama has failed to ensure that construction stormwater dischargers who are engaged in construction disturbance activities, or have not completed reclamation of disturbed areas, renew their expired registrations. A complete examination of the facts, however, demonstrates that Alabama has successfully implemented a strategy for timely issuance of permits.

The U.S. EPA tracks the issuance status (i.e., the number and percent current) and sets goals for states and EPA Regions to achieve a 90 percent current permit rate. The percent goal is measured as the number of facilities (major and minor) covered by individual and non-stormwater general permits. EPA Region 4 recognized Alabama (Alabama Exhibit B-1) for maintaining a low permit backlog (90% of all permits current) in Fiscal Years (“FY”) 05, 06 and 07. However, during FY08 and FY09 Alabama experienced an increase in the individual permit backlog (Alabama Exhibit B-2).

This increase in the individual permit backlog is partially attributable to the 2007/2008 acquisition and implementation of the NMS comprehensive state database, as well as the recently corrected reorganization of the NPDES Program. Several other circumstances affected the permit backlog: resolution of unforeseeable permitting issues (e.g., new EPA permit requirements for coal mine discharges and municipal separate storm sewer system (“MS4”) Phase I and II systems); untimely and/or incomplete applications; implementation of TMDLs and wasteload allocations (“WLAs”) in NPDES permits; reissuance of

sixteen General Permits to 2,500 facilities in FY07; issues related to permitting on impaired waters; and permit appeals by advocacy groups.

The ICIS quarterly backlog report (Alabama Exhibit B-3a) provides a snapshot, based on EPA's database, of the status of individual permits (major and minor) in Region 4 as of December 31, 2009. Note that this is one snapshot and that the status of facilities and the universe of facilities change almost daily due to facilities closing and new ones being built. As such, national data systems cannot provide precise current status. Data reflected in this report lags permit issuance by at least thirty days and also includes permits which are not administratively extended.² As noted in Alabama Exhibit B-3b, when the ICIS backlog is adjusted to account for the thirty day lag time for permits issued or closed, the overall permit backlog is 18.9%. If non-receipt of applications is considered in the adjustment, the overall backlog declines to 16.3%. However, the ICIS reports are reasonably accurate for the purposes of determining how well a state like Alabama is performing with regard to backlog. Based on the ICIS December data, Alabama's backlog percent is comparable to the Region 4 States' average. Also, the data indicates Alabama's backlog is lower than EPA Region 4 and two other states within Region 4 and is only slightly higher than the Region 4 States' average (Alabama Exhibit B-4). Utilizing the same data source, Alabama's 8.2% rate for permits expired greater than one year is comparable to

² Not Administratively Extended are those expired permits with incomplete and/or untimely application submittal (i.e., less than 180 days prior to permit expiration). According to EPA Region 4, "Administratively Continued in ICIS", as indicated in the Backlog Report (Alabama Exhibit B-3a), are permits which are expired for greater than 90 days, but an application has been entered into ICIS prior to the permit expiration date.

the Region 4 States' average of 8.3% and is lower than three other states within Region 4 (Alabama Exhibit B-5).

In an effort to assist states in improving their backlog, EPA's Priority Permit Initiative under the Permitting for Environmental Results strategy aims at reducing the backlog of priority permits with the potential for environmental and programmatic impacts. Annually, regions and states develop a list of environmentally significant priority permits. Selection criteria include impacts to TMDL-listed waters, drinking water sources, endangered species, and integration of new water quality standards into permits. Combined with the long-standing goal to achieve and maintain a 90% overall permit issuance rate, the priority permit national goal is to achieve a 95% permit issuance rate for priority permits. Based on EPA's Priority Permit Database, Alabama's status of priority permit issuance for Fiscal Year 2010, as of April 7, 2010 (Alabama Exhibit. B-6) is 100% issued.

EPA Region 4 recognized Alabama for exceeding its priority permit commitments for FY05, FY06 and FY07 (Ala. Exh. B-1). In fact, Alabama has exceeded the priority permit goal for fiscal years FY05-10 with 100% or greater percent of priority permits. A summary is provided as follows:

Fiscal Year	Percent Issued
FY2010	100%
FY2009	188%
FY2008	200%
FY2007	100%
FY2006	100%
FY2005	100%

The State's permit issuance trend (Alabama Exhibit B-7) for FY03-09 indicates, with the exception of FY08, no significant decline in individual permit issuances. In summary, the State's performance illustrates that ADEM has successfully implemented a strategy for timely issuance of permits. Alabama has met the NPDES Permit Program commitments outlined in the FY09 Workplan (Alabama Exhibit B-8) and those commitments required to date in the FY10 Workplan (Alabama Exhibit B-9). The Alabama NPDES Permit Program also continues to operate in accordance with the current Memorandum of Agreement with EPA Region 4, dated April 11, 2008 (Alabama Exhibit A-1).

ADEM recognizes its obligations as a public agency and the ongoing opportunities for improvement, and for this reason ADEM constantly strives to improve its NPDES program. This recognition does not, however, provide a basis for program withdrawal. In the universe of facilities with expired permits there are a number of facilities which failed to submit timely applications (i.e.,

application received less than 180 days from permit expiration) and are, therefore, not administratively continued. In an attempt to prevent late application submittals, Alabama routinely provides permit expiration reminder letters to individual permit holders (i.e., approximately 12-18 months prior to permit expiration) (Alabama Exhibit B-10).

With respect to construction stormwater registrations and the allegation that Alabama has failed to ensure renewal of construction stormwater registrations for active sites, ADEM Admin. Code r. 335-6-12-.11(3) states that the operator is authorized to commence and/or continue construction disturbance if the operator has submitted a complete and correct NOR (unless notified by the Department that the NOR is incomplete or incorrect, additional review time is needed, or the NOR is denied) and provided the construction site remains in full compliance with the state construction stormwater regulations. Additionally, the E2 reporting system for construction stormwater facilitates the registration by streamlining the process.

With respect to those facilities the Petition has specifically cited in the Petition itself, it should be noted that the allegations regarding those facilities are replete with errors and omit information which does not support those allegations. Here are just a few examples of the inaccuracies:

- With regard to SDW, Inc. (ALR165846), the Petition misstates the Order's findings. The Order does not state that August 31, 2008 is the only day of violation for which the Operator is cited. In fact, the Order specifically states in Paragraph B that the Operator failed to keep registration

coverage current. The Department received the Operator's NOR requesting re-registration on January 30, 2009. Additional information was required in order to process the registration. In an effort to obtain the needed information, the Department contacted the Operator's qualified credentialed professional ("QCP") and followed up with a letter to the Operator. The requested information was received June 10, 2009, and the registration was issued June 10, 2009, with an expiration date of August 31, 2009. The Department received a Notice of Termination ("NOT") August 11, 2009, requesting to terminate registration. The Petitioners' Exhibit B-13 is a copy of the NOT; this simply indicates a request was submitted, not that the Department in fact terminated the Operator's registration. The Operator's registration expired on August 31, 2009; the Department did not terminate the registration as the Petition alleges.

- With respect to Builders Group Development LLC (ALR16B471), the Petition states that ADEM did not take enforcement action against the Operator for operation without a valid registration between October 4, and November 27, 2007. That allegation is not true. On July 28, 2008, the Department issued Consent Order 08-183-CMNPS to the Operator for failure to maintain registration coverage as well as for other violations noted on site. Paragraphs 6 and 7 of the Order state that the registration expired on October 3, 2007, and that the Operator submitted a NOR to the Department on November 27, 2007. The Order clearly states in

Paragraph B that the Operator failed to keep the registration current from October 4, 2007 through November 27, 2007. The subsequent registration was issued on November 27, 2007, and expired October 3, 2008. The Birmingham Field Office continues to monitor the site. The Department received the Operator's NOR requesting re-registration on October 8, 2008. Additional information was required in order to process the registration. In an effort to obtain the needed information, the Department contacted the Operator's QCP and followed up with a letter to the Operator.

- Regarding Woodland Place LLC (ALR169357), the Petition claims that ADEM cited the Operator for failure to maintain a valid registration on only two days; again, the allegation is incorrect. In paragraph 5 of the Order, the Department simply cites the registration expiration dates as January 12, 2007, and January 12, 2008; paragraph B clearly states that the Operator failed to maintain current permit coverage. The Facility was inspected February 13, 2009, and again January 13, 2010. Interestingly, the Petition fails to mention that at the time the Petition was filed, ADEM was suing Woodland Place, LLC for failure to comply with Consent Order 08-202-CMNPS. On February 25, 2010, a consent decree was entered by the Court enjoining Woodland Place, LLC from further violations of the Alabama Water Pollution Control Act and its implementing regulations and requiring Woodland Place, LLC to take specified remedial action. In

addition, the consent Decree assessed a \$50,000 penalty against Woodland Place, LLC.

- The Petition's rendition of ADEM's enforcement efforts with regard to JD Development LLC (ALR168018) is also inaccurate and misleading. The Petition ignores the fact that the site was inspected January 17, 2007, resulting in the January 31, 2007, NOV. An inspection conducted May 23, 2007, resulted in a June 5, 2007, warning letter, and an inspection performed January 7, 2008, resulted in the January 18, 2008, NOV. The Petition also fails to mention ADEM's issuance of Order 08-133-MNPS to the Operator on April 18, 2008, requiring the Operator to cease operations due to failure to implement and maintain effective Best Management Practices (BMPs). The Consent Order 08-204-CMNPS was issued September 5, 2008, in an effort to resolve noncompliance issues at the facility. The Department received the Operator's NOR requesting re-registration on January 28, 2009. Additional information was required in order to process the registration. The Department inspected the facility February 3, 2009, and, in an effort to obtain the needed information, the Department sent letters to the Operator requesting the information be provided to the Department. The Department inspected the Facility again December 4, 2009, and further enforcement is pending.
- With respect to RBC Development, Inc. (ALR162991), ADEM has conducted three inspections, issued three NOVs and an Administrative Order since the August 4, 2005, expiration of this registration. The

Department received the Operator's NOR requesting re-registration December 11, 2009. Additional information is required in order to process the registration. In an effort to obtain the needed information, the Department followed up with the Operator requesting the necessary information.

With regard to the status of those facilities listed in Petitioners' Exhibit B-1, a detailed response may be found in Alabama Exhibit B-11. It should be noted that, of those permits listed in Petitioners' Exhibit B-1, five of the permits are EPA's (offshore federal waters) and twenty-two are either terminated or issued. Of the remaining eighty-seven permits, thirty-nine (44.8%) are administratively extended. Below is an accurate summary of those permits.

Summary of Permits Listed:

Administratively Extended	39
Expired	48
Terminated	20
Issued/In Effect	2
EPA Permits	5
TOTAL	114

A review of the complete and accurate information regarding these facilities demonstrates that ADEM has inspected these facilities and has pursued appropriate permitting and enforcement actions where necessary. Every regulated universe has participants who neglect their responsibilities. That is why an enforcement program is a necessary complement to any permitting program. The facts, accurately and completely stated, demonstrate that ADEM

has continuously exercised control over its NPDES permitting program and that withdrawal of approval of Alabama's NPDES program on this ground is both inappropriate and unnecessary.

C. Alabama processes permits in a timely manner.

According to the Petition, Alabama has violated its MOA with EPA by failing “to process in a timely manner and propose to issue, reissue, modify or deny NPDES permits for discharges with permits that have been administratively continued for more than one year” (*Petition to commence proceedings to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System*, p. 13, ¶ 20). As support for this allegation, the Petition presents a list of permits contained in Petitioner's Exhibit C-1.

Alabama's detailed response to Petitioner's Exhibit C-1 is provided in the Alabama's Exhibit C-1. These responses demonstrate that this allegation is unsupported and inaccurate.

As noted in Alabama Exhibit C-1, two permits are no longer extant due to facility closure or other discharge methods now being utilized. Of the remaining twenty non-MS4 expired permits listed in Petitioner's Exhibit C-1, eight permits are either drafted or have been issued. Also, nine permits were delayed in reissuance due to total maximum daily load (TMDL) and/or wasteload allocation (WLA)-related issues.

With respect to the MS4 Phase I and II permits, the renewal of these permits has been delayed partially due to the change in EPA's permitting approach for

MS4s and the subsequent extensive state/EPA discussions on this topic with which EPA is well aware. At any rate, ADEM is taking action to remedy this issue relating to MS4s. During the draft comment period, the State conducted two MS4 Workshops in an effort to educate permittees of the extensive changes in the draft Phase II General Permit. Although at this time the Phase I draft template is still under development, the Phase II General Permit public notice began on January 14, 2010, and recently ended on February 16, 2010. Extensive public comments were received and must be addressed as required by EPA's public participation regulations. 40 C.F.R. § 124.17.

ADEM has not failed to process NPDES permits in a timely manner, and this allegation provides no basis for withdrawal of approval of Alabama's NPDES authorization.

D. Alabama's NPDES program complies with 40 C.F.R. Part 123 with respect to turbidity.

The Petition contends that ADEM has repeatedly issued permits which do not conform to the requirements of 40 C.F.R. §§ 123.25(a)(15) and 122.44(d)(1)(vii)(B) because, the Petition alleges, the permits listed in Table 1 (*Petition to commence proceedings to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System*, pp. 15-16) were issued without any change in the Best Management Practices ("BMPs") that would ensure an aggregate 32% reduction in turbidity and without explaining in a fact sheet why the current BMPs are expected to achieve the required turbidity reduction.

The Department's primary regulatory authority with regard to state waters is found in the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.) ("AWPCA"), which charges ADEM with the duty to control pollution in the waters of the state. Ala. Code § 22-22-9(a). "Pollution" is defined as "the discharge of a pollutant or combination of pollutants." § 22-22-1 (b)(3). The mechanism for control of pollution in waters of the state is two-pronged: (1) the classification of state waters with regard to uses and water quality criteria; and (2) the permitting of discharges of pollutants to waters of the state in a manner that maintains the water quality standards for the receiving waters.

The AWPCA mandates that ADEM establish "such standards of quality for any waters in relation to their reasonable and necessary uses. . . ." Ala. Code § 22-22-9(g). The Act also mandates that ADEM establish a permitting system: "It shall be the duty of the [Department] to issue, continue in effect, revoke, modify or deny under such conditions as it may prescribe, to prevent, control or abate pollution, permits for the discharge of pollutants or other wastes into waters of the state." § 22-22-9(i)(2). The AWPCA requires that "[e]very person, prior to discharging any new or increased pollution into waters of this state, shall apply to the [Department] in writing for a permit and must obtain such permit before discharging such pollution." § 22-22-9(i)(3).

As noted above, an EPA-approved state NPDES permitting system must ensure compliance with various requirements of the federal Clean Water Act, including 33 U.S.C. § 1312. § 1312 requires that, whenever effluent discharge

limitations based upon EPA's effluent guidelines are not sufficient to attain or maintain applicable water quality standards, effluent limitations shall be established which are expected to contribute to or maintain those standards. These limitations are referred to as "water quality-based limitations." ADEM has incorporated federal water quality requirements in its NPDES regulations. ADEM Admin. Code r. 335-6-6-.14 authorizes ADEM to include in its NPDES permits discharge limitations that are more stringent than federal effluent guidelines if such conditions are necessary to achieve water quality standards.

As of the end of FY09, approximately 62% of the NPDES Permits, excluding MS4 permits covered by a TMDL approved during FY08 and prior, have been modified/issued/reissued to reflect the TMDL requirements (56% overall, inclusive of MS4 Permits). Alabama Exhibit D-1.

ADEM Admin. Code r. 335-6-12-.21(7) provides that additional Best Management Practices ("BMPs") are required for construction stormwater discharges to impaired waters. In accordance with this regulation, the Department's construction site registration process includes the submittal of a description of the BMPs to be utilized by the registrant for construction activities with a reasonable potential to impact impaired waters. Prior to authorization of the construction site activity by the Department, the BMPs proposed by the registrant are reviewed by the Department utilizing best professional judgment to ensure the BMPs address the pollutant(s) of concern. This process is consistently applied to all impaired waters including the Hurricane Creek watershed.

In 2008, certain program process improvements were made which include file documentation by the Alabama Construction Stormwater program of BMP review during processing of NORs to impaired waters with an applicable TMDL (Alabama Exhibits D-2a and D-2b). Because the construction stormwater permit process is "permit-by-rule" and not an individual or general permit, a permit fact sheet is not created. In the administration of the Construction Stormwater program, ADEM will continue to evaluate construction site activities on a case-by-case basis to determine whether an individual NPDES permit is appropriate in accordance with the applicable regulations. For those cases where an individual permit is required, a fact sheet and/or rationale will be developed.

Specifically relating to the Hurricane Creek TMDL and the construction site registrations/re-registrations in the Unnamed Tributary of Cottondale Creek, the Department does not at this time have sufficient information correlating the actual effectiveness of BMPs utilized at individual construction sites in the upper part of the watershed to the aggregate (all regulated non-point sources) wasteload allocation ("WLA") for turbidity downstream in Hurricane Creek, and the Petition does not provide any such information. The Department is interested in any information the Petitioners may have in this regard.

Based upon the above, it is clear that the Department has conformed to the requirements of 40 C.F.R. §§ 123.25(a)(15) and 122.44(d)(1)(vii)(B) and that the withdrawal of approval of Alabama's NPDES program on the ground it did not conform to these requirements is neither appropriate nor necessary.

E. Alabama provides appropriate

notice of proposed discharge locations.

EPA regulations require the State to publish notice of proposed discharges, including “a general description of the location of each existing or proposed discharge point.” 40 C.F.R. § 124.10(d)(vii). The Petition alleges that ADEM’s public notices violate this rule, although it does not explain how ADEM’s practice violates the rule. EPA’s regulations do not state what a “general description” is, nor do they give an example of what might be included in a “general description.” There is no requirement to describe discharge points in a particular way. “General” is commonly understood to mean “relating to, determined by, or concerned with main elements rather than limited details” and “not confined by specialization or careful limitation.” Webster’s New Collegiate Dictionary (1981), “general” *adj* def. 4 and def. 5.

ADEM’s public notices which are published in newspapers generally provide the following information:

Copies of the draft permits, conditions, limitations and a fact sheet as applicable describing the methodology for setting the limitations and conditions and other applicable NPDES forms and related documents are available for public inspection electronically via <http://www.adem.state.al.us/PublicNotice/PublicNotice.htm>

This referenced web page, which is available at any time to anyone who wishes to view it, contains every public notice given by ADEM. With a couple of mouse clicks, any interested person can view a draft NPDES permit, the permit rationale, and the permit application, including a very detailed description of the location of each existing and proposed discharge point. The public notice itself

gives a general description of the location of discharge points and provides any interested person with all the information necessary to obtain a very detailed description of the location of discharge points. This same allegation by some of the Petitioners was previously raised and rejected in state circuit court. In that case, the trial judge found that ADEM 's description of its discharge points in its public notices is "adequate and not arbitrary." Phillip Ware, et al., v. Onis "Trey" Glenn, III, Montgomery County Circuit Court, CV-2008-901425.00. (Alabama Exhibit E-1). Contrary to Petitioners' allegation, ADEM's public notice procedures comply fully with the requirements of 40 C.F.R. § 124.10(d), and the allegation provides no basis for withdrawal of approval of Alabama's NPDES authorization.

F. Alabama meets EPA's expectations with regard to the inspection and monitoring of major dischargers.

According to the Petition, Alabama has failed to monitor and inspect major dischargers as required, claiming that the State has implemented a policy whereby only 50% of all major dischargers will be inspected each year. Petitioners' support for this allegation is an e-mail communication from Chip Crockett, at the time Chief of the Department's NPDES Enforcement Branch, to David Ludder. A review of Petitioners' Exhibit F-1 demonstrates that the claim that Mr. Crockett's e-mail is evidence of an ADEM policy of inspecting no more than 50% of all major dischargers annually can only be made by extrapolation. That extrapolation, however, results in a false conclusion. Mr. Crockett said nothing about a "policy," nor did he say that Alabama will inspect no more than

50% of all major dischargers annually. What he *did* say is that Alabama's Workplan requires Alabama to inspect a *minimum* of 50% of all major discharges annually. Any extrapolation of Mr. Crockett's statement regarding the Workplan minimum commitment to equate to a policy to do no more than the Workplan minimum commitment is completely unfounded.

EPA revised its inspection goal for major dischargers in 2007. "OECA's revised goal for state and regional inspection of major permittees is a minimum frequency of at least one comprehensive inspection every two fiscal years. This modifies the existing measure of inspections of major permittees which expresses the goal of inspecting 100% of major permittees annually" (*Compliance Monitoring Strategy for the Core Program and Wet Weather Sources*, USEPA, October 17, 2007). Of significance here is the recognition that this is a goal established by EPA, not ADEM. This translates to an annual inspection coverage goal of 50%. The Department significantly exceeded this goal in both the 2008 and 2009 fiscal years, a further indication that the alleged policy does not exist. Alabama's inspections meet EPA's expectations, and there is no basis for withdrawing approval of Alabama's NPDES program on the ground that its inspection program for major dischargers is insufficient.

G. Alabama meets all requirements with respect to the inspection and monitoring of non-major dischargers.

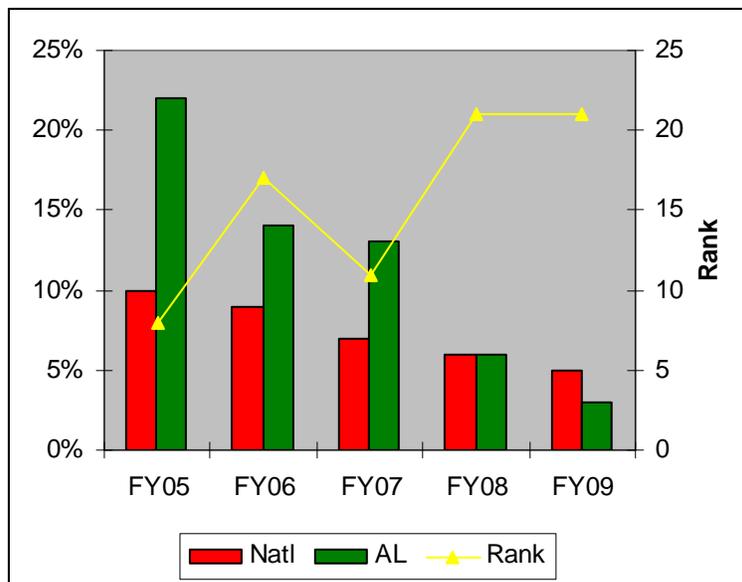
The Petition alleges that Alabama has violated 40 C.F.R. § 123.26(b)(2) by implementing a "policy" whereby only 20% of all non-major dischargers will be inspected each year. EPA's regulations require that a State program must

maintain a “program for periodic inspections of the facilities and activities subject to regulation.” 40 C.F.R. § 123.26(b)(2). That section does not require any specific annual inspection rate; it merely requires “periodic” inspections.

Although neither the Clean Water Act nor its implementing regulations specify an inspection frequency for non-major dischargers, ADEM’s EPA grant Workplan commitments do specify that “minor” dischargers shall be inspected at least once every five years, for an annual inspection rate of at least 20%. The claim that Alabama has “adopted and is implementing a policy whereby only 20% of all non-major dischargers with individual permits will be inspected each year” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 20, ¶ 45) is based upon an e-mail communication from Chip Crockett to David Ludder. Once again, the Petition extrapolates a “policy” that Alabama will inspect no more than 20% of non-major dischargers with individual permits annually from a simple statement that the Workplan requires a minimum of 20% of non major dischargers with individual permits to be inspected annually. (Please see Alabama Exhibit F-1, FY10 Section 106 Workplan, p. 5). Petitioners’ Exhibit F-1 proves nothing more than Mr. Crockett knows the requirements of the Workplan; it does not prove that Alabama has instituted a policy of doing no more than the Workplan requires. However, it should be noted that if such a policy did exist, it would be compliant with state and federal law, as well as EPA’s expectations and ADEM’s commitments.

Moreover, ADEM’s inspection numbers for non-major discharges with individual permits are consistent with other states. The table below illustrates Alabama's inspection coverage for non-major individual permits compared against the national coverage and its overall rank as compared to the other states.

Inspection Coverage: Non-major NPDES Individual NPDES Permits



Source: OTIS Management Reports

End-of-Year CWA Data for FY05, FY06, FY07, FY08, FY09 by State

Clearly, Alabama's performance in this area is wholly consistent with that of the rest of the country. The same decline in inspection coverage referenced by the Petition for Alabama can also be seen in the national coverage.

As support for the claim that Alabama has failed to meet inspection requirements, the Petition includes a table (Petition, pp. 22-23) which purports to

show that Alabama has failed to inspect the listed facilities as required. It is unclear what efforts were made to find the relevant data, but it is abundantly clear that those efforts were severely lacking, as the information presented by the Petition is grossly inaccurate. Below is the correct information:

Permittee	Permit Issuance	Inspections	Notes
AL0073661	1-28-2001 12-30-2005	12-21-2005 12-11-2009	EPA requirements met
AL0070246	8-01-2002 9-28-2007	4-10-2002 7-25-2005 12-11-2009	EPA requirements met
AI0059447	10-31-2000 1-31-2006	12-11-2009	EPA requirements met for current permit term
AL0074331	9-11-2002 10-31-2007		Inspection Needed
AL0074152	7-31-2001 6-22-2007		Inspection Needed
AL0026964	8-29-2003 11-4-2008	5-26-2009	EPA requirements met for current permit term
AL0077402	7-29-2005		Due for inspection in 2010
AL0030546	12-19-1997 2-28-2003 6-30-2008	4-4-2001 2-27-2002	Inspection Needed
AL0026875	10-30-2004 2-28-2006	4-26-2004 5-11-2004 3-28-2005	EPA requirements met
AL0047198	8-31-2001	10-7-2003	Inspection Needed
AL0061034	8-30-2002 11/30/2007		Inspection Needed
AL0070742	10-31-2005	11-9-2005 1-21-2009 12-11-2009	EPA requirements met
AL0077542	10-31-2005	11-9-2005 12-11-2009	EPA requirements met
AL0063525	6-30-2004	10-30-2009	Permit expired; but site is in active reclamation
AL0072613	7-23-2004	8-20-2003	Permit administratively extended; Inspection needed
AL0072605	12-30-2003	8-20-2003	EPA requirements met for previous permit term
AL0066966	1-31-2003 10-31-2008	12-18-2009	EPA requirements met for current permit term

As this table illustrates, only six out of the seventeen mining facilities identified in the Petition are due for inspection, and those will be prioritized for inspection in FY10.

The Petition also alleges that the State has implemented a policy whereby only 10% of all construction stormwater dischargers will be inspected each year. Like the previous allegations regarding a “policy” for inspection major dischargers and non-major dischargers with individual permits, the Petition cites, as evidence of this charge, an e-mail from Mr. Crockett to Mr. Ludder which mentions neither a “policy” nor an intention to inspect no more than the minimum number of facilities required. Petitioners’ Exhibit G-4 clearly indicates that Mr. Crockett merely stated that the minimum requirement for inspection of construction stormwater dischargers is 10% of the known universe annually. Mr. Crockett did not present this number as a “policy” under which no more construction stormwater dischargers would be inspected; rather, he clearly referred to it as “an annual minimum number.” The Petition’s characterization of the minimum requirement as a “policy” is totally unfounded and a misrepresentation of Mr. Crockett’s response. In any case, as noted before, even if Alabama did have such a “policy,” it would, nevertheless, be in compliance with state and federal law, EPA expectations, and ADEM commitments.

In support of the claim that Alabama’s inspection program is inadequate, the Petition lists the number of inspections reported and then asserts that “the number of active construction stormwater (“CSW”) dischargers in the State of Alabama during [the relevant year] is unknown to the Alabama Department of

Environmental Management" (*Petition to commence proceedings to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System*, p. 23, ¶ 52). The Petition references a reply to Mr. Ludder's e-mail which requested "documents" that indicate the "universe" of valid registrations for each of the fiscal years 2004 through 2009. The Department considers the word "universe" as the number of active sites on any given day. The universe is considered dynamic, meaning that active sites change on a daily basis, taking into account newly issued permits, terminated permits, expired permits and reissued permits. The request asked for a universe that would be considered a historical number; however, the Department doesn't maintain documents on a daily basis that would capture the universe in the manner that the request was made. ADEM does not maintain nor archive this type of data; thus, it is impossible go back in time and recreate the data. The Department does retain documented records of permitting actions on a fiscal year basis, which was provided to Mr. Ludder.

Upon request by the public or another agency, or as needed by the Department, the Department can query the NPDES Management System for the current number of active facilities that would constitute the "universe of NPDES facilities" at that specific time on a specific day. The request that was received by the Department from Mr. Ludder on October 22, 2009 did not ask for the current active universe of CSW permittees on that day. It should be noted that Mr. Ludder apparently made no attempt to clarify his request. As noted above, on any given day the Department can query its data to determine the number of active

registrations. Thus, the referenced ADEM presentation cited by the Petitioners gave the active number of registrations in one point of time; i.e., May 15, 2007.

Additionally, the Petition alleges that Alabama “has adopted and is implementing a policy whereby only 60 concentrated animal feeding operation (“CAFO”) dischargers will be inspected each year” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 24, ¶ 57). Once again, the Petition mischaracterizes the information that was provided to Mr. Ludder. Petitioners’ Exhibit G-7 clearly demonstrates that Richard Hulcher, ADEM’s Chief of the Office of Field Services, made no reference to a “policy”; rather, he told Mr. Ludder that “the FY09 and FY10 ADEM/EPA Workplans provided for a **minimum** of 60 CAFO inspections to be performed each fiscal year.” (Emphasis added). Thus, Mr. Hulcher merely stated the requirement; he did not state that ADEM has instituted a policy limiting its inspections to the minimum required by EPA.

The ADEM CAFO program found at ADEM Admin. Code ch. 335-6-7, regulates the construction and operation of animal feeding operations (“AFO”) and CAFOs (dairy, poultry, swine, beef feedlots, etc.). The Petition describes CAFO facilities as “dischargers”. The ADEM rules require operators of AFOs and CAFOs to implement and maintain effective management practices to prevent/minimize the potential for discharges to the maximum extent practicable. The rules prohibit discharges of waste/wastewater pollutants from AFOs and CAFOs to waters of the State at any time except as a direct result of uncontrollable chronic or catastrophic weather conditions.

The Petition alleges that ADEM is implementing a policy whereby only 60 CAFOS will be inspected each year which will result in ADEM-permitted CAFO facilities being inspected on average only every 7.7 years. However, the Petition in another Section lists actual ADEM inspections each year from FY05 to FY09 ranging from 109-176 inspections. Assuming that ADEM continues to conduct only a minimum of 109 inspections every year into the future, ADEM-permitted CAFO facilities would be inspected at least every 4.25 years on average. Consistent with the current MOA (Alabama Exhibit A-1), EPA has determined that ADEM would need to conduct a minimum of 60 CAFO inspections as part of the annual EPA-ADEM NPDES Workplan. The Petition itself provides data that confirms that ADEM has doubled that agreed-to minimum inspection commitment on average each year since FY05.

ADEM also requires each CAFO operator to have his or her farm inspected annually by an independent QCP with a report provided to ADEM. CAFOs with liquid waste impoundments are required to have an Alabama registered professional engineer conduct an evaluation at least once every five years.

It is important to note that ADEM rules currently meet or exceed and are broader in scope than EPA's corresponding federal CAFO rules. *Compare, Waterkeeper Alliance, et al. v. EPA, 399 F.3d 486 (2nd Cir. 2005), 40 C.F.R. §§ 123.23 and 123.25, and 40 C.F.R. Part 412 with ADEM Admin. Code ch. 335-6-7.* It is estimated that less than 50 CAFOs in Alabama would be required to obtain NPDES permit coverage based on the current federal CAFO rules in the

absence of the ADEM CAFO rules. In addition, the ADEM rule regulates all AFOs in Alabama while the federal rules do not regulate AFOs at all. *Id.*

ADEM conducts inspections of AFOs and CAFOs to determine compliance and initiates enforcement as needed, responds to citizen complaints and contacts the complainants with the results of ADEM's investigation, and provides compliance assistance and education outreach to operators. The ADEM rules, which are multi-media, require implementation of effective management practices, including buffers, to protect water quality and minimize offsite odors. ADEM Admin. Code rs. 335-6-7-.01(4) and 335-6-7-.20. The rules also contain requirements for prevention of discharges (ADEM Admin. Code rs. 335.6.7-.04(1) and 335-6-7-.06(4)), continuing education (ADEM Admin. Code r. 335-6-7-.18), records retention (ADEM Admin. Code rs. 335-6-7-.04(1) and 335-6-7-.14), CAFO NPDES registration (ADEM Admin. Code r. 335-6-7-.04(2)), applicable technical standards and guidelines (ADEM Admin. Code r. 335-6-7-.20), land application (ADEM Admin. Code r. 335-6-7-.26), nutrient management (ADEM Admin. Code r. 335-6-7-.20(3) and 335-6-7-.26(2)(j)), and animal mortality management. ADEM Admin. Code r. 335-6-7-.32(10).

ADEM issues NPDES permit coverage to CAFOs through a registration-by-rule process. ADEM requires CAFOs to register annually. During the re-registration process CAFOs are required to submit current information regarding the operation of their facilities. The ADEM Animal Feeding Operation Information System ("AFOIS") database contains registration, inspection, and compliance information. The program benefits from a unique ADEM-Alabama Soil and Water

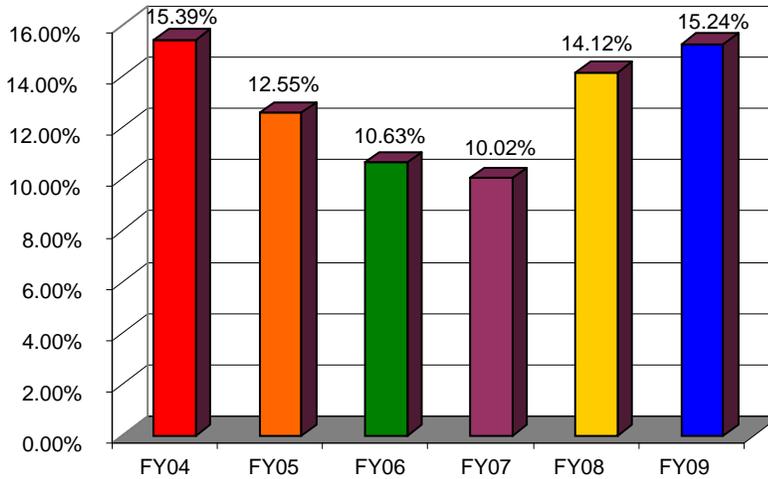
Conservation Committee partnership that provides operators with extensive technical outreach resources to electronically submit or renew ADEM NPDES permit coverage at their local Soil and Water Conservation District office via AFOIS. The opportunity for public review of the registration and facility comprehensive waste management system plan (“WMSP”) and the opportunity to comment and appeal are also available for each annual registration via the ADEM CAFO webpage and e-file system. ADEM responds to public comments and can conduct public hearings/meetings as needed.

Alabama’s CAFO NPDES rule provides for a statewide public notice, opportunity for public review and comment on the rule and program implementation, and a public hearing at least every 5 years. ADEM Admin. Code r. 335-6-7-.03(5). The CAFO rule last went through the statewide public notice and participation process in 2005.

Finally, the Petition alleges that the State of Alabama failed to inspect 99.4% of all non-major dischargers with general NPDES permits in FY 2008 and that there are currently 6,049 non-major dischargers with general NPDES permits. The Petition further contends that, at this FY 2008 rate of inspections, each of the non-major dischargers covered by a general NPDES permit will be inspected once every 167 years on average. The Petitioners’ inspection percentages are incorrect. In FY 2008 there were only 2,835 non-major dischargers with general NPDES permits. The 106 Workplan requires that 10% of the universe of General Permits be inspected each year. The required inspection numbers have been met or exceeded each of the above referenced years (FY 2004 – FY 2008). The

2006 and 2007 inspections numbers met the requirement, but were lower than the other years due to the reissuance of the General Permits those years. The percentage of inspections performed in FY2009 is almost equal to the percentage conducted in FY2004.

Inspection Coverage: Non-major NPDES General NPDES Permits



The allegation that “Alabama has not maintained a program for periodic inspection of the facilities and activities subject to regulation (including non-major dischargers with individual permits, construction stormwater (CSW) dischargers, concentrated animal feeding operations (CAFOs), and non-major general permits) as required by 40 C.F.R. § 123.26(b)(2)” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 26, ¶ 64) is based upon unfounded assumption, incomplete and inaccurate information, and is patently wrong.

Based upon the information above, it is clear that Alabama has not failed to sufficiently monitor and inspect non-major dischargers, and there is no basis for withdrawal of Alabama’s NPDES program approval on this ground.

H. Alabama complies with the public participation requirements of 40 C.F.R. §§ 123.26(b)(4) and 123.27(d)(i).

The Petition asserts that Alabama has failed to comply with the public participation requirements of 40 C.F.R. §§ 123.26(b)(4) and 123.27(d)(i), alleging that Alabama does not provide information on violation reporting procedures on the ADEM website or elsewhere and allegedly does not acknowledge receipt of complaints or provide complainants with copies of inspection reports, enforcement actions, or decisions to not initiate enforcement. These allegations misstate both the law and the facts.

EPA's regulations require that "State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements," including the maintenance of "[p]rocedures for receiving and ensuring proper consideration of information submitted by the Public about violations." 40 C.F.R. § 123.26(b)(4). Reporting of violations by the public is encouraged, and States are required to make information on reporting procedures available to the public. *Id.*

Neither 40 C.F.R. § 123.26(b) nor 40 C.F.R. § 123.27(d) requires that a State's website include information regarding violation reporting procedures; indeed, there is no requirement that a State's website contain information regarding the State's violation reporting procedures. However, ADEM's website in fact does provide clear instructions on how to file a complaint electronically

and includes a complaint submission form for electronic filing. See <http://www.adem.state.al.us/inside/complaints/default.aspx>. ADEM has procedures in place for receiving and ensuring proper consideration of all information submitted by the public concerning alleged violations, in accordance with the current MOA for the NPDES Permit and Enforcement Program between EPA and ADEM. Procedures are also included in ADEM's Enforcement Strategy.

Every complaint received by the Department either by phone, letter, email, fax, in person, or otherwise is investigated if sufficient enough information to investigate has been presented to the Department. If enough information is not reported originally, the complainant will be contacted by ADEM staff. If the complainant is anonymous and the Department is unable to obtain the necessary information, the complaint may not be investigated due to the inability to obtain the correct information. The results of investigations are available for viewing by the public at the ADEM website or through requests for file reviews as set forth in ADEM Admin. Code r. 335-1-1-.06. In addition, on December 11th, 2009, prior to the filing of the Petition, the ADEM Director tasked a Department Senior Environmental Manager to develop a more robust complaint and inquiry system. See Alabama Exhibit. H-1, pp. 8-9. As a result, ADEM is currently assessing the existing complaint process' successes and challenges, and will concentrate on the successes and implement an enhanced, effective, accountable complaint process across all media that will involve staff throughout the Department.

All public information on alleged violations is welcome, and the public has always been encouraged and never discouraged from providing ADEM with

alleged violation information. The new ADEM website contains an electronic complaint form for the public to submit complaint or alleged violation information. The form will be modified as needed to enhance public involvement.

Another enhancement in the complaint system will incorporate checks and balances to assure that all complaint information is available at the ADEM website and that all but anonymous complainants receive notice via email, letter or phone call of the outcome of the complaint investigation. Anonymous complainants will be able to track the status of a complaint when the complaint is received through the ADEM website by entering into the system a specific complaint number assigned to the investigation or by searching name recognition.

The website also publishes ADEM's regulations regarding the availability of public information. ADEM Admin. Code r. 335-1-1-.06 provides that all "records, reports, rules, forms, or information obtained under the Act and the official records of the Department shall be available to the public for inspection."³ Records related to complaints are freely available to the public, and this regulation gives complete instructions as to how such records may be obtained. In addition, the Department's website contains a link to ADEM's "e-file" system, a system which allows the public to review many of ADEM's records electronically from their home computers. See <http://edocs.adem.alabama.gov/eFile/>. Although not all ADEM's records are currently contained in the e-file system, ADEM is steadily working toward this goal so that all its records may ultimately

³ ADEM Admin. Code r. 335-1-1-.06 (2) establishes a limited exception to the availability of all public records, excepting those records which would divulge a "trade secret."

be reviewed electronically without ever having to travel to ADEM's offices. The assertion that 40 C.F.R. § 123.27(d)(2)(i) requires that the State provide assurance that it will investigate and provide written responses to all citizen complaints misstates the law. The requirement is as follows:

(d) Any State administering a program shall provide for public participation in the State enforcement process by providing **either**:

(1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; **or**

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in §123.26(b)(4);

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

(Emphasis added).

Thus, Alabama is required by 40 C.F.R. §123.27 to **either** provide written responses to all citizen complaints, **or** allow intervention as of right in any civil or administrative action to obtain remedies specified in 40 C.F.R. §123.27(a) by any citizen who has an interest which is or may be adversely affected. Alabama provides intervention in civil and administrative actions as required by § 123.27(d)(1) and, thus, is not required to also provide written responses to citizen complaints.

ADEM Admin. Code r. 335-1-1-.04 further provides that “[a]ny person aggrieved by an administrative action of the Department, other than the issuance of any rule or regulation or emergency order, may file with the [Alabama Environmental Management] Commission a request for a hearing to contest such action within thirty days of such action.” In addition, Ala. Code § 22-22A-5(18) and (19) provide that any person having an interest which is or may be adversely affected may intervene as a matter of right in any civil action commenced by the Department or the Attorney General to enjoin violations of the Alabama Water Pollution Control Act or any rule, order or permit issued by the Department or to recover civil penalties for violations of the Act or any rule, order or permit issued by the Department. Petitioners are aware of these avenues for recourse and have availed themselves of the same frequently.

Finally, it should also be noted that ADEM’s website currently allows a complainant to query ADEM’s filenet system to ascertain the results of inspections of facilities. Thus, the complainant can easily determine if ADEM has responded to the complaint.

Alabama has complied with the public participation requirements of 40 C.F.R. §§ 123.26(b)(4) and 123.27(d)(i), and withdrawal of approval of Alabama’s NPDES program on the grounds it has not complied with these requirements is unsupported.

I. Alabama has complied with the terms of its MOA with respect to compliance determination requirements.

According to the Petition, Alabama has violated the terms of its MOA with EPA, claiming deficiencies in Alabama's compliance determination procedures. Specifically, the Petition alleges that Alabama has not comprehensively evaluated dischargers' compliance with applicable requirements; has not conducted timely and substantive review of DMRS; and has not evaluated instances of noncompliance as required by Alabama's MOA with EPA.

These allegations are incorrect for several reasons: 1) the compliance determination requirements as set forth in the Petition are not accurate, as they are based on a decade-old MOA which is no longer in effect and does not accurately reflect the current requirements; 2) Mr. Crockett did not indicate ADEM has a "policy" of reviewing DMRs only once every two years; and 3) the data upon which this argument relies is incomplete and an inappropriate basis for analysis.

The Petition asserts that Alabama is required to "screen all [DMRs] from permittees," or "evaluate instances [of] noncompliance...within 30 days of the identification of the violation" (*Petition to commence proceedings to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System*, p.29, ¶ 76). That is not true. This claim is based upon the superseded MOA designated as Petitioners Exhibit A-1. A review of the correct MOA demonstrates that requirement is no longer in effect. The current MOA (Alabama Exhibit A-1) states as follows:

The State will conduct a timely and substantive review of all [self-monitoring reports] received and all independently gathered information to

evaluate the discharger's compliance status. This evaluation will be uniform and consistent with the Enforcement Management System (EMS) as referenced in Section V.E.

Alabama Exhibit A-1, p. 17, ¶ 3. EPA Region 4 personnel have reviewed the Department's EMS in conjunction with the State Review Framework (SRF), and EPA has not notified Alabama of any deficiencies or deviations.

The Petition also contends that the State has implemented a policy whereby Discharge Monitoring Reports submitted by major dischargers will be reviewed only once every two years and those submitted by non-major dischargers will be reviewed only once every five years as part of a "compliance evaluation." The Petition cites as documentation for this allegation is an e-mail communication from Chip Crockett to David Ludder (Petitioners' Exhibit F-1). The allegation that Mr. Crockett's October 5, 2009 e-mail indicates DMRs will be reviewed only once every two years for major dischargers and only once every five years for non-major dischargers is not supported by the e-mail itself. The e-mail makes no reference to ADEM's "policy" and makes no reference to DMRs. Mr. Crockett's response merely states the Workplan commitments. There is nothing in *any* of the exhibits provided by Petitioners that refers to, or even suggests, the policy to which Petitioners make reference. Yet the Petition repeatedly refers to a "compliance evaluation policy," a policy which does not exist as described by the Petition. Further, Mr. Crockett's e-mail does not, as alleged, state that DMRs

will be reviewed only once every two years for major dischargers but, rather, states that major dischargers are evaluated “*at least* every two years.”

(Emphasis added).⁴

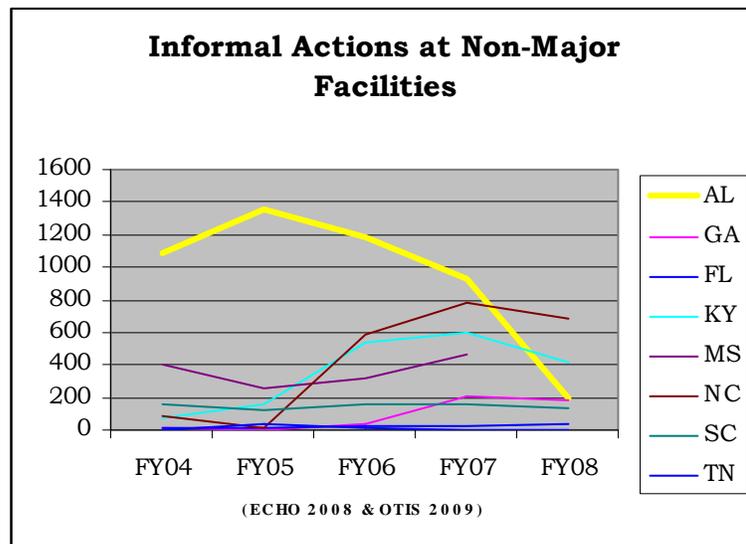
In fact, the Department reviews DMRs for all major dischargers as timely as available resources will allow as evidenced by the frequent communication between ADEM and EPA staff regarding the NPDES watch list and QNCR. It is true that DMRs for non-majors are reviewed less frequently. Emphasis in compliance monitoring activities on majors over non-majors is clearly documented in the State/EPA MOA and EPA's Compliance Monitoring Strategy. Also, EPA's inspection coverage requirements do not target 100% of any NPDES universe at once. Given the massive reporting requirements of the NPDES program, these expectations must extend to the review of self-generated reports as well.

While ADEM believes that its compliance determinations meet EPA's expectations, ADEM is constantly seeking ways to improve its efforts in this area. The Department believes significant improvement will be realized with the use and improvement of electronic reporting. Alabama is a pilot member of the Integrated Project Team (“IPT”) for the ICIS-NPDES Batch Implementation Project of the PCS Modernization Program. The goal of this IPT is to design and implement an Exchange Network data flow of all non-DMR NPDES data from the state's database. Phase 1 of the project, which includes all Permit-related data,

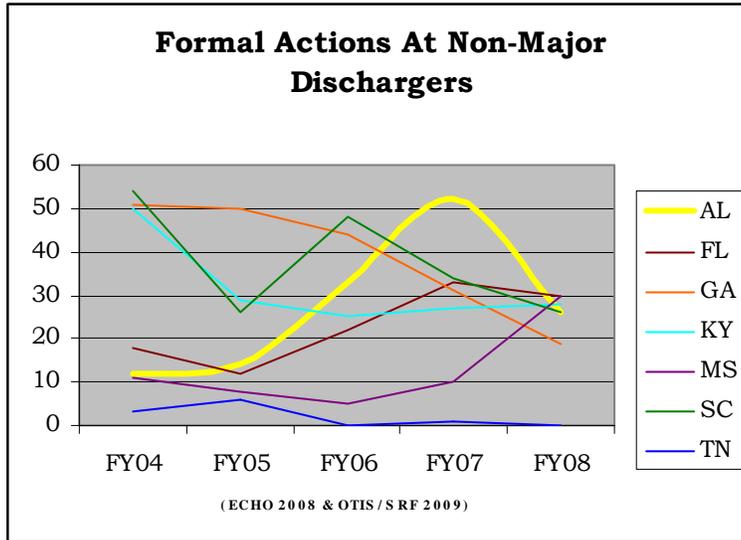
⁴ Petitioners' practice of sending e-mails to ADEM staff only to misrepresent the staff's good faith response is counterproductive, deceptive, and not conducive to the open communications policy Petitioners desire and ADEM strives to maintain. Further, such practice in no way supports in any way the withdrawal of Alabama's NPDES program.

is scheduled to go into production April 18, 2011. Phase 2 of the project, which includes Inspection, Violation, and Enforcement-related data, is scheduled to begin shortly after that. Alabama has been participating in the DMR data flow since June 29, 2009. The Department also eagerly awaits EPA rulemaking requiring electronic DMR reporting. With increasing reporting requirements, these activities are the Department's only option for improving its capability to manage self-reporting data.

The Petition also contends that the fictitious “policy” described in the Petition has contributed to a decrease in informal actions against non-major dischargers. The following graphs illustrate the Department's performance in this area as compared to other Region 4 states.



The Department's issuance of informal actions, while significantly outpacing those of other states in FY04 and FY05, has evolved to levels wholly consistent with the rest of the region.



While a downward trend in informal actions is clearly evident, it is contrasted by a significant upward trend in the number of formal actions (The graph above omits data for North Carolina which is clearly anomalous). The "tail-off" observed in FY08 is due to the impact to operations caused by the significant restructuring of the NPDES program during this time period. When viewed holistically, the Department's NPDES enforcement is not failing but simply evolving to place more emphasis on more stringent forms of enforcement.

According to the Petition, the Department conducted 704, 676, and 591 compliance reviews respectively for the years 2007, 2006, and 2005. Cited as documentation for these figures is the Annual Noncompliance Report ("ANCR") for Non-Majors, which is published by EPA. From conversations with EPA Region 4 personnel, the Department has learned that the ANCR actually only

measures number of facilities that have at least one DMR entered into the federal database (at that time, PCS) for a given year. This measurement has little or no correlation to the number of compliance reviews performed, and any arguments based on this measurement should be disregarded.

The Petition also contends that the State has adopted and implemented a “policy” whereby only 10% of all construction stormwater dischargers will be evaluated and assessed each year. Yet again, the Petition advances a conclusion that could only be reached by pure extrapolation. In Petitioners’ Exhibit G-4, Mr. Crockett responds to Mr. Ludder’s questions by stating that “CSW is 10% of the known universe each year. Its [sic] not an inspection frequency like majors and minors -- its [sic] strictly an annual minimum number of inspections.” Contrary to the Petition’s assertions, Mr. Crockett is not referring to compliance evaluations but, rather, inspections; he does not refer to ADEM “policy”; and he makes clear 10% is a *minimum* expected number of inspections.

Finally, the Petition asserts that Alabama has adopted and implemented a policy whereby only 60 CAFO dischargers are evaluated and assessed each year, citing the e-mail from Richard Hulcher to David Ludder dated October 13, 2009 (Petitioners’ Exhibit G-7) as support. Yet again a conclusion is reached by means of a faulty extrapolation: Mr. Hulcher does not refer to or in anyway imply that there is a “policy” of performing no more than sixty compliance evaluations annually, but he states that such is the Workplan commitment; and he clearly refers to sixty as the *minimum* number of expected inspections. Such a “policy” does not exist.

Clearly, Alabama has adequate procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and others. There is no support for the allegation that Alabama has failed to comply with the terms of its MOA with EPA and with 40 C.F.R. § 123.26(a), and the petition to withdraw approval of Alabama's NPDES program should be denied on this ground.

J. Alabama has maintained a vigorous program of taking timely and appropriate enforcement action.

The Petition declares that Alabama has violated its MOA with EPA by failing to maintain a vigorous program of taking timely and appropriate enforcement actions. This argument fails because the requirements by which the Petition judges Alabama performance are not, in fact, the current requirements by which EPA evaluates Alabama's performance and because the data referenced to support this allegation is inaccurate and incomplete.

The Petition misstates the MOA requirements Alabama must meet as follows:

1. The Petition claims that the MOA provides that "timely enforcement action begins with a written notice of violation to a violator within thirty (30) days after the State becomes aware that the discharger failed to submit a date-related report; failed to submit a self-monitoring report; or failed to meet an effluent limitation." (*Petition to commence proceedings to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System*, p. 37, ¶ 94). However, notices of violation are not mentioned in the current MOA, and there is no requirement that a notice of violation be issued within thirty days.

2. The Petition claims that the State is expected to have initiated enforcement actions to achieve compliance by the time the major discharger appears on the Quarterly Noncompliance Report. This requirement is not contained in the current MOA.

3. The Petition claims that “[p]rior to a permittee appearing on the subsequent QNCR for the same instance of noncompliance, the permittee should be in compliance or the State should have taken formal enforcement action, i.e., issued a unilateral administrative order or consent administrative order” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 37, ¶ 94). There is no such requirement in the current MOA.

What the MOA does say is as follows:

In the case of a violation by a major discharger, or other dischargers or types of dischargers identified in the State 106 Workplan, or for a violation that would cause a facility to be in SNC, the State will determine within thirty (30) days the appropriate initial response to the violation. Where the State has determined an enforcement action is appropriate, it shall commence such appropriate enforcement action within thirty (30) calendar days of its determination of the initial response.

Ala. Exh. A-1, p. 21, ¶ 3.

4. The Petition claims that the MOA defines timely enforcement for non-major dischargers as action taken “as quickly as possible” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 38, ¶ 97). That is not true. The applicable MOA states that “[e]nforcement actions determined to be appropriate by the State with respect to any violation other than those [for majors], while

generally given lower priority, should be commenced and completed **within a reasonable amount of time.**" (Emphasis added). Ala. Exh. A-1, p. 22, ¶ 4.

Examples of the incomplete and inaccurate information used to support the allegations of failure to take timely and appropriate enforcement include:

1. The Petition claims that Alabama has failed to take any enforcement action against the list of dischargers presented as Petitioners' Exhibit J-1. Contrary to the allegation that the Department took no enforcement action against Mobile Paperboard (AL0003603), the National Aeronautics and Space Administration's Marshall Flight Center (AL0000221), and Bradford Parkside Health Services (AL0047546), enforcement actions were taken and are documented in the Department's files.⁵ In addition, ADEM documented decisions to take no enforcement action in the cases of National Coal of Alabama, Inc. (AL0074934) and SCA Tissue North America LLC (AL0074667). It should also be noted that the dischargers listed on Petitioners' Exhibit J-1 are not major dischargers.

2. The Petition misstates the types of enforcement actions taken for the City of Calera (AL0050938), the City of Dothan (AL0022756), the City of Enterprise (AL0020044), the City of Monroeville (AL0027782), Wise Alloys (AL0000035), and the City of Tuskegee (AL0025984). The Petition also fails to note that Alabama requested a stay of its action against the City of Dothan at the request of EPA and the Department of Justice. Further, the Petition does not acknowledge the administrative orders the Department recently issued to Wise

⁵ In a footnote to Petitioners' Exhibit J-3, the Petition acknowledges that the data used to support these allegations "may not be 100% complete or accurate." It should be noted that the information needed to verify this data is public record and could have been reviewed for accuracy and completeness.

Alloys and the City of Monroeville, even though notice of those pending actions was provided.

In addition to the misrepresentation of the facts regarding the terms of the MOA and the enforcement status of a number of dischargers, the Petition also implies that the Department's compliance and enforcement strategy (*Guidance Memorandum #105: Compliance and Enforcement Strategy*, Alabama Exhibit J-1) establishes a minimum number of violations that may be accumulated prior to making an enforcement decision. That is not correct. Guidance Memorandum #105 states: "If resources allow, it is expected that in the situation when a compliance determination establishes the occurrence of a major violation or an accumulation by a facility of more than 10 minor violations within one twelve month period, then an enforcement decision shall be made..." (Alabama Exhibit J-1) This, in no way, implies a minimum number of violations that may be accumulated by an NPDES discharger. This statement merely provides guidance to enforcement managers across the Department on how enforcement should be administered consistently between programs. Nothing in the Department's Compliance and Enforcement Strategy contravenes the requirements of the State/EPA MOA and grant workplan.

Erroneous information and mischaracterizations aside, Alabama offers the following information regarding its enforcement program:

Alabama ranks 11th in the nation in the number of permitted major dischargers (ECHO 2008, Metric W01A1C). It ranks 16th in the number of informal actions taken at major dischargers (ECHO 2008, Metric W01E2S) and

13th in the number formal actions taken at major dischargers (ECHO 2008, Metric W01F2S). Alabama's performance in this area is wholly consistent with that of other authorized States, especially those with comparable regulated universes.

With respect to the Petition's' objections regarding the level and type of enforcement taken by the State, it should be noted that the Alabama/EPA MOA provides the Department with the discretion to determine the appropriate level of enforcement for non-majors. Alabama ranks 10th in the nation in the number of non-major permittees (ECHO 2008, Metric W01A3C); yet it has the 16th best rate of non-compliance for non-major dischargers (ECHO 2008, Metric W01D1C). Alabama ranks 7th in the number of informal actions (ECHO 2008, Metric W01E3S) and 13th in the number of formal actions (ECHO 2008, Metric W01F4S) taken at non-major dischargers. Alabama's performance in this area is wholly consistent with that of other authorized States, especially those with comparable regulated universes.

Clearly Alabama's MOA with EPA anticipates a prioritized and comprehensive approach to enforcement that places emphasis on major dischargers. Within a reasonable amount of time following this response and consistent with our enforcement priorities and available resources, ADEM will review each of the specific cases identified by the Petition, and identify/address any gaps in enforcement. Specifically, for the Permittees listed in Petitioners' Exhibit J-2 that also appear on the USEPA NPDES "Watch List," the State's responses to the Watch List provide a current enforcement status of these Permittees. For

Permittees identified by the Petition that do not appear on the Watch List, the Department assumes that EPA is satisfied with its response to date.

With regard to compliance schedule violations, as part of the SRF Round 2 process and grant work plan negotiations, the Department has discussed this issue with EPA extensively. In its effort to address EPA's needs in this area, the Department entered a significant amount of detailed information regarding its compliance schedules for the subject time period. ADEM's research indicates that there are at least two states in Region 4 that do not provide EPA with any compliance schedule data and that the level of detail in the information the Department provides is significantly more extensive than that of the other states that do. The Department's reorganization of the NPDES program in FY2008, the establishment of a new State NPDES Database, and EPA's transition from PCS to ICIS-NPDES have all complicated the Department's data management capabilities. This has led to a number of artificially inflated enforcement data metrics, including the number of unresolved compliance schedule violations.

As part of the negotiations for the FY10 grant year, the Department and EPA have reached an agreement on a much more manageable level of detail in compliance schedule data to be provided. This, along with the Department's continued data cleanup activities should resolve this issue.

The Department's Compliance and Enforcement Strategy very clearly anticipates a graduated enforcement response appropriate to the violation. It provides very detailed information regarding the types of enforcement responses available to enforcement managers. It is true that the Strategy does not dictate

specific enforcement responses, even follow-up responses. Such specificity is inappropriate, especially on a Department-wide basis, and is not expected by the MOA or national guidance.

It is true that the Department issued fewer penalty orders in FY2009 than previous years. This is due to a number of factors. As EPA is aware, Alabama law requires an extremely robust and open process for assessing civil penalties, significantly more so than in many other states. Similar to permits, all penalty orders in Alabama are subject to public review and comment prior to issuance. FY2009 saw a significantly higher level of involvement in the order process by external third parties, many of whom include the Petitioners, as evidenced by the submission of extensive comments and the filing of administrative appeals of specific orders. These third party appeals raised significant legal challenges to the Department's civil penalty authorities. This not only delayed the specific orders being challenged but caused the Department to delay other penalty orders until it was confident these issues would be resolved.

Also in FY2009, the Department began issuing a significantly higher number of no-penalty cease-and-desist orders in its construction stormwater program. These orders can be issued much more quickly than orders with penalties because they do not require public notice. These orders can also provide as effective a deterrent to non-compliance as civil penalties on active sites where construction delays can add significant costs to the overall project. The logical result of this practice, given static resources, is a decline in the number of penalties. It should be noted that the Department's decision to institute this

practice was lauded by a number of environmental groups which are represented by the Petitioners. It is remarkable that they have chosen to challenge the Department's authorization based on the expected results of practices they supported.

Alabama's NPDES compliance and enforcement system, like all states' programs, is not perfect and has experienced many challenges in recent years, many of which were outside its control. However, as demonstrated above, the allegations contained in the Petition are based on comparisons with an inapplicable and outdated MOA, using incomplete and, in many cases, erroneous data for those comparisons. Also as discussed above, the Department's performance in the area of NPDES compliance and enforcement, while always allowing room for improvement, is wholly consistent with that of other authorized states with comparable workloads. As such, withdrawal of program authorization is completely unfounded.

At this point in the petition, the focus is shifted to a disagreement with the method by which Alabama assesses civil penalties in administrative enforcement actions. Prior to focusing on each disagreement individually, a discussion of the legal requirements applicable to ADEM's NPDES penalty calculations and the methodology ADEM uses to compute those penalties is appropriate.

Ala. Code. § 22-22A-5(18)c. sets out the only requirements ADEM must meet under state law in assessing civil penalties. It establishes the following state law requirements which ADEM must meet in assessing civil penalties:

1. There is a \$100 minimum penalty for each violation.
2. There is a \$25,000 maximum penalty for each violation.
3. There is a \$250,000 cap on penalties assessed in an administrative order.
4. Each day a violation continues constitutes a separate violation.
5. In determining the amount of a penalty, consideration must be given to:
 - a. the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public;
 - b. the standard of care manifested by such person;
 - c. the economic benefit which delayed compliance may confer upon such person;
 - d. the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment;
 - e. such person's history of previous violations; and
 - f. the ability of such person to pay such penalty.

Id. These are the only state law requirements applicable to ADEM's assessment of civil penalties.

The only federal requirement applicable to ADEM's assessment of civil penalties is found at 40 C.F.R. § 123.27(c), which requires that “[a] civil penalty assessed, sought, or agreed upon by the State Director . . . shall be appropriate to the violation.”

The requirements listed above are the extent of the legal requirements applicable to the State of Alabama with respect to the assessment of civil penalties for violations of the statutes and regulations governing Alabama's

NPDES program or violations of the terms, limitations or conditions of an NPDES permit.

The practical application of the state penalty factors by ADEM begins with the selection of a base penalty that varies with each violation according to its severity. The selection of the base penalty is based on the professional judgment of the enforcement manager and approved by the Director. The base penalty is then enhanced to account for the standard of care observed by the violator. The base penalty and the standard-of-care enhancement are fundamentally equivalent to EPA's Gravity factor and adjustments. The base penalty is further enhanced for instances of repeat violations. Mitigating factors such as economic benefit and ability to pay, which are fundamentally equivalent to EPA's "Litigation Considerations," are addressed holistically. An example of ADEM's calculation of a civil penalty is found in the penalty calculation worksheet found at Alabama Exhibit N-1. Not one thing relating to the manner in which Alabama calculates civil penalties is relevant to a discussion of program withdrawal.

K. Alabama's calculation of penalties for violations of average effluent limitations results in the assessment of adequate enforcement penalties.

The Petition contends that Alabama has failed to seek adequate enforcement penalties, first charging that because EPA counts a violation of a weekly average and monthly average discharge limitation as a violation of each day of the week or month, respectively, Alabama's method of calculating average violations is not

appropriate. This is nothing more than a policy disagreement with ADEM's method of calculating penalties for violations of weekly or monthly average discharge limitations. As authority for this position, the Petition cites EPA's *Interim Clean Water Act Settlement Policy* and Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990). Both EPA's *Interim Clean Water Act Settlement Policy* and Tyson Foods address penalties assessed pursuant to the Federal Water Pollution Control Act, 33 U.S.C. 1319(d), and neither addresses penalties assessed by a state under a state statute such as those penalties assessed by ADEM under the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1 through 22-22-14 (2006 Rplc. Vol.). The Petition cites no authority which requires a state to calculate penalties in a state NPDES enforcement action in the same manner as EPA or the federal courts. Pursuant to 40 C.F.R. § 123.27(c), the penalty simply must be "appropriate to the violation." ADEM, in fact, does weight violations of average effluent limitations more heavily than violations of daily effluent limitations, thereby resulting in higher penalties for violations of average limitations. ADEM believes this method results in penalties which are appropriate to the violation, and withdrawal of approval of Alabama's NPDES program because of ADEM's method of assessing penalties for weekly or monthly average effluent limitations violations is unsupported and improper.

L. Alabama appropriately assesses penalties for those violations which can be proven with legal evidence.

The Petition alleges that the State of Alabama fails to identify all violations and all violation-days when determining a penalty amount and asserts that the State should calculate penalties based on the “likely” number of violations and violation-days. Based on a disagreement regarding the method of determining the number of violations for which a penalty is to be assessed, the Petition argues that Alabama violates 40 C.F.R. § 123.27(c) because penalties calculated as ADEM calculates them are not “appropriate to the violation.”

Any penalty assessed by ADEM in an administrative order is subject to appeal pursuant to Ala. Code § 22-22A-7(c). In such an appeal, ADEM must prove that a violation occurred. ADEM cannot simply assert that a violation is “likely” to have occurred. There are two elements to proving a noncompliant discharge has occurred: (1) there must be a sample taken and analyzed to prove the existence of a pollutant (in the case of unpermitted discharge) or a pollutant in greater than permitted levels (in the case of a permitted discharge); and (2) there must be evidence that the pollutant was discharged into a water of the state. Without an admission by the discharger of a violation or an inspector in the field taking samples and documenting a noncompliant discharge into a water of the state, a noncompliant discharge cannot be proven. It may be that a noncompliant discharge is “likely” to have occurred. However, without legal evidence to prove that the violation occurred each and every day for which ADEM assesses a penalty, such penalty cannot withstand legal challenge.

Likewise, ADEM cannot simply assume that Best Management Practices (“BMPs”) were not in place or were inadequate over a period of time without

proof the BMPs were inadequate or nonexistent on the dates for which all violations are alleged to have occurred. BMPs may not be in place at the time an inspection occurs. If so, a violation should be noted. However, if Best Management Practices are not in place or are inadequate at a later inspection, the lack of BMPs at the later inspection does not prove that BMPs were absent or inadequate during the entire time between the inspections. BMPs must be constantly maintained and could easily be satisfactory one day and inadequate the next. Again, ADEM can only assess a penalty for those days on which it can prove, with legal evidence, that a violation occurred.

With regard to the untimely submission of reports, EPA in its *Interim Clean Water Act Settlement Penalty Policy*⁶ (Petitioners' Exhibit K-1) states that "the failure to submit a report in a timely manner should generally not be treated as a continuing violation past the month in which the report is due." (*Id.*, p. 9). Thus, even the document the Petition cites in support of its other disagreements with ADEM's penalty assessment method does not support the position advocated by Petition with regard to untimely reports, and Alabama's refusal to assess a penalty for each day a report is late does not result in a penalty which is not "appropriate to the violation."

As an example of ADEM's alleged failure to assess an appropriate penalty, the Petition cites the administrative order issued to the City of Tuscaloosa. The Petition asserts that, rather than relying on the violator's admissions or the Department's evidence, ADEM should have assessed a penalty against the City

⁶ This policy is a policy for settlement of enforcement actions brought by EPA and does not apply to state programs such as Alabama's. While the Settlement Policy does not apply to states, it is instructive of EPA's view on this matter.

of Tuscaloosa based upon “public comments providing a detailed accounting of violation-days.” While public comments should certainly be considered, public comments regarding the number of violations, without sample results, chain of custody, attestation, admission, etc., are not legal evidence upon which a penalty may be based. It would be irresponsible, unprofessional, and unfair for ADEM to base its penalty assessment on evidence which would not stand up before a hearing officer or judge. ADEM's refusal to cite violations which cannot be proven in a court of law is not a failure to seek adequate enforcement penalties but, rather, the manner in which a professional and integrous regulatory agency should operate. Withdrawal of approval of Alabama's NPDES program for failure to assess penalties for violations which cannot be proven is unfounded and irrational.

M. Alabama's statute of limitations is irrelevant to the assessment of a civil penalty for a violation.

The Petition further alleges that Alabama fails to seek adequate enforcement penalties because the statute of limitations for administrative and judicial penalties under the Clean Water Act is five years (28 U.S.C. § 2462), and the statute of limitations for administrative and judicial penalties under the Alabama Environmental Management Act is two years. Ala. Code § 22-22A-5(18)c. Alabama does not dispute that the federal statute of limitations is five years and that the relevant state statute of limitations is two years. Nor does Alabama dispute that it follows state law by applying its two-year statute of limitations.

However, Alabama does dispute the contention that by following its two-year statute of limitations, Alabama has failed to assess, seek or agree to civil

penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c). The Petition cites no authority which requires a State program to employ the same statute of limitations as federal law employs. In fact, the cases cited in the Petition indicate that other states, including California, have shorter statutes of limitations than does the Clean Water Act. A different statute of limitations does not result in penalties “inappropriate to the violation.” There is absolutely no support for withdrawal of Alabama’s NPDES program on the basis of Alabama’s statute of limitations.

N. Alabama considers economic benefit in its penalty calculations where that information is available.

According to the Petition, Alabama fails to assess adequate penalties because ADEM does not employ the BEN model to calculate economic benefit. This allegation amounts to nothing more than a policy disagreement with the way in which ADEM considers economic benefit.

While Ala. Code § 22-22A-5(18)c. requires the consideration of economic benefit in the assessment of civil penalties, nothing in federal or state law requires Alabama to determine economic benefit using the BEN model as the Petition suggests. Use of the BEN model requires considerable research to ascertain appropriate inputs into the model. Much of the information required, if available at all, is in the possession of the violator and not easily accessible by the Department. If the information is not available, assumptions must be made. If those assumptions are to withstand challenge, they must be based on engineering analyses which are resource-intensive. Alabama believes that a

balance must be struck between the resources expended to calculate penalties and the need to return the violator to compliance as swiftly as possible.

EPA's penalty calculation methodology incorporates the following approach:

***Penalty = Economic Benefit + Gravity +/- Gravity
Adjustment Factors - Litigation Considerations -
Ability to Pay - Supplemental Environmental
Projects.***

(Interim CWA Settlement Policy, USEPA, March 1, 1995)

ADEM's penalty calculation methodology is in many ways similar to the formula used by EPA, starting with the selection of a base penalty that varies according to its severity. The base penalty is enhanced by consideration of the standard of care and instances of repeated violations. Mitigating factors such as economic benefit and ability to pay, which are fundamentally equivalent to EPA's "Litigation Considerations," are addressed holistically.

Alabama's Exhibit N-1 is an example of the penalty calculation worksheet which ADEM uses to compute civil penalties. In this example the Department lacked the clear evidence needed to quantify the economic benefit, but a significant percentage of the calculated penalty addressed the history of previous violations, a factor that EPA's methodology omits. Most administrative penalty orders are issued to repeat violators. Since EPA policy allows for the de-emphasizing of economic benefit calculations for first time violators (*Expedited Settlement Offer Program for Storm Water (Construction)*); USEPA, August 21,

2003), it is therefore incontrovertible that the Department's penalty calculation methodology is both functionally and fundamentally equivalent to EPA's, without the superfluous expenditure of resources on BEN calculations. Alabama's penalty calculation methodology with regard to this factor results in penalties which are appropriate to the violations, and withdrawal of approval of Alabama's NPDES program based on Alabama's consideration of the economic benefit factor is unsupported.

O. When assessing a civil penalty, Alabama appropriately considers the standard of care manifested by the violator.

The Petition alleges that Alabama does not seek adequate enforcement penalties because of the manner in which Alabama considers the standard of care manifested by the violator in assessing civil penalties. However, the Petition confuses the Alabama requirement to consider the standard of care manifested by the violation, with the federal requirement that EPA, in assessing its penalties, consider "the degree of culpability" of the violator. The Petition cites 33 U.S.C. § 1319(g)(3), which requires EPA to consider the "degree of culpability" of the violator, and also cites two EPA documents which interpret this federal requirement. But 33 U.S.C. § 1319(g)(3) is applicable only to EPA and not to state programs. Thus, EPA's construction of "degree of culpability" as meaning the "degree of willfulness and/or negligence", as documented by the two EPA publications cited, is irrelevant to the manner in which Alabama assesses civil penalties.

The relevant state requirement is found at Ala. Code § 22-22A-5(18)c., which requires ADEM to consider the standard of care manifested by the violator.

Without any support for this assertion, the Petition claims that “[t]he standard of care required by law of all discharges is one of ‘strict liability’” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 51, ¶ 137). “Standard of care” is not defined in the Alabama Environmental Management Act, and there is no authority for the interpretation proposed in the Petition. In interpreting a statute, a court accepts an administrative interpretation of the statute by the agency charged with its administration, if that interpretation is reasonable. Ex parte State Health Planning and Development Agency, 855 So.2d 1098 (Ala. 2002); Surtees v. VFJ Ventures, Inc. 8 So.3d 950 (Ala. Civ. App. 2008). The Petition seeks to impose upon ADEM an interpretation of the standard of care manifested by the violator as being any deviation from strict liability. Although the Petition is incorrect in its interpretation of the state requirement, it is unclear why the Petition argues that ADEM’s consideration of this factor is significantly different from the standard it suggests. As Petitioners point out, ADEM, the agency charged with administering Ala. Code § 22-22A-5(18)c., often considers the standard of care by comparing the violator’s standard of care with what is required by law, concluding that the violator did not exhibit a standard of care commensurate with applicable regulatory requirements. The fact that ADEM does not put a label on that deviation is immaterial. Clearly ADEM considers the deviation from the standard that is required, and that consideration is all that is required by Ala. Code § 22-22A-5(18)c.

The argument that Alabama does not assess adequate penalties because Alabama does not use the “strict liability” language suggested when Alabama considers the standard of care manifested by the violator does not present a basis for withdrawal of Alabama’s NPDES authority; withdrawal for this reason is neither appropriate nor necessary.

P. Alabama appropriately seeks to ensure that penalties are consistent, thereby ensuring a level playing field for regulated entities.

Another variation of the claim that Alabama fails to seek adequate enforcement penalties is the claim that Alabama inappropriately seeks to ensure that penalties which are assessed are consistent. The Petition alleges that Alabama places heavy emphasis on consistency with previous penalty assessments for similar violations and that consistency with previous penalty assessments is not a criterion that may lawfully be considered in assessing civil penalties. According to the Petition, Alabama does not have a penalty calculation methodology and, instead, determines penalties on an *ad hoc* basis with heavy emphasis on consistency. As demonstrated in the previous sections discussing Alabama’s penalty calculation methodology, the accusation that Alabama does not have a penalty calculation methodology but, rather, assesses penalties on an *ad hoc* basis, is patently wrong. That methodology is described in detail above and is demonstrated in Alabama Exhibit N-1.

Although the Petition cites federal guidance in most of the allegations involving Alabama’s penalty assessment methodology, the Petition fails to cite federal guidance with regard to the claim that Alabama may not consider

consistency with previous penalties when considering the amount of a penalty assessed in an administrative enforcement action. That may be because EPA, in its *Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties* (February 16, 1984)⁷, specifically provides that one of the primary goals of EPA's civil penalty policy is "the equitable treatment of the regulated community." (*Id.*, p. 16). Additionally, the *Framework* provides that "in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly." (*Id.*, p.16). Regarding its own penalty determinations, EPA finds that "treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." (*Id.*, p. 27). Additionally, in its *Policy on Civil Penalties* (Petitioners Exhibit N-1), EPA finds that "the consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed." (p. 4). Finally, the MOA between ADEM and EPA stresses that state records should demonstrate that "enforcement actions . . . are applied in a uniform . . . manner." Alabama Exhibit A-1, p.22, ¶ 8.

The Petition is correct in its assertion that that Alabama attempts to ensure that penalties for similar violations are consistent. The Petition is incorrect in its assertion that attempting to ensure a level playing field is impermissible, and the

⁷ While the *Framework* does not apply to state programs, it is instructive of EPA's view on consistency of penalty assessments.

assertion that Alabama's effort to ensure consistency results in penalties inadequate to the violation is unsupported. Consistency with previous penalties is an appropriate factor to consider in the assessment of civil penalties, and withdrawal of approval of Alabama's NPDES program because Alabama considers consistency in its assessment of civil penalties is illogical and inappropriate.

Q. Alabama's use of stipulated penalties in consent orders is proper.

From time to time ADEM includes stipulated penalties in consent orders. ADEM's use of stipulated penalties is similar to that of EPA's in many of its enforcement actions. Currently ADEM only assesses stipulated penalties for violations of milestone dates. The Petition criticizes the use of stipulated penalties, claiming that such use does not consider the six penalty factors required by law to be considered and avoids public notice of the assessment of the penalty. In addition, the Petition charges that Alabama's statute of limitations prevents the assessment of stipulated penalties for future violations. This legal reasoning, relegated to a footnote, is faulty on all counts.

Currently ADEM only assesses stipulated penalties for violations of milestone dates and does not assess stipulated penalties for effluent violations, violations of terms and conditions of the permit, or other such violations for which the penalty factors cannot be known in advance. Because ADEM limits the use of stipulated penalties to those violations for which penalty factors can be known in advance (violations of milestone dates), and actually does consider those factors

when assessing such penalties, ADEM complies with the requirements of Ala. Code § 22-22A-5(18)c.

The Petition also contends that the assessment of stipulated penalties allows ADEM to avoid public notice of those penalties. This argument, too, is wrong. The stipulated penalties are included in the order which is put on public notice. Generally the assessment is a sliding scale: a certain penalty assessed per day for the first thirty days a milestone is missed, a larger penalty for each day during the next thirty days the milestone is missed, and so on. The only information that is missing is the number of days, if any, by which a milestone date may be missed. However, the public has the information available in the order to calculate the stipulated penalty for any given number of days by which the milestone date may be missed and, therefore, has adequate information to comment on the proposed stipulated penalties.

Finally, the Petition argues that ADEM is authorized to assess penalties only for those violations occurring within two years prior to the date of issuance of the order and, thus, cannot assess penalties for violations occurring after the issuance of the order. Ala. Code § 22-22A-5(18)c. provides that “[c]ivil penalties may be assessed under this subdivision for any violation occurring within two years prior to the date of issuance of an order. . . .” This provision is nothing more than the expression of Alabama’s two-year statute of limitations about which the Petition makes much ado in Section M. It is the manner in which statutes of limitations are commonly written and does not prohibit ADEM from

agreeing with a violator to a set amount of penalty for a specific violation if that violation occurs in the future.

ADEM's use of stipulated penalties is entirely appropriate and authorized under state law, and that use does not result in a failure to seek adequate enforcement penalties. Withdrawal of approval of Alabama's NPDES authority on this ground is entirely unfounded.

R. Alabama prosecutes cases in a timely manner.

The Petition states that Alabama's MOA with EPA (refer to Alabama Exhibit A-1 rather than the non-applicable Petitioners' Exhibit A-1) requires the State of Alabama to prosecute cases on NPDES violations in a timely manner. The relevant MOA does hold Alabama responsible "for commencing and completing timely and appropriate enforcement action" (Alabama Exhibit A-1, p. 21, ¶ 1). It does not use the word "prosecute." Clearly this provision applies to both administrative and judicial enforcement actions, and Alabama does not dispute that enforcement actions should be taken in a timely manner. However, since the examples contained in the Petition are all judicial enforcement actions and the word "prosecute" is more commonly used to refer to judicial enforcement actions, it is assumed that Section R of the Petition is limited to judicial enforcement actions and it is only those that will be addressed in this section of the Response.

Judicial enforcement actions are more costly, time-consuming, resource-intensive and slower to be resolved than administrative enforcement actions and

are generally not the preferred method of obtaining compliance. It is simply the nature of litigation that lawsuits provide more opportunity for delay than administrative actions where the regulatory agency is in charge of the schedule rather than a judge. However, in some cases, litigation may be the only enforcement measure that is appropriate, either because of the magnitude of the violations or the fact that other measures have not resulted in compliance.

Litigation may be delayed because of lengthy discovery, conflicts with the judge's or attorneys' schedules, failure on the judge's part to rule on motions or set hearings, or because the parties wish to explore settlement in an effort to reach a resolution without incurring excessive litigation costs. EPA is well aware of the length of time it takes to successfully prosecute an enforcement case in court, as Alabama and EPA have been co-plaintiffs in a number of actions that took years to resolve.

Although Alabama has prosecuted many enforcement cases over the years in federal and state courts, the Petition singles out four⁸ cases with which it finds fault in terms of the amount of time it has taken to reach resolution. It appears that the complaint about this one case involves the fact that it was brought against a State defendant against which penalties have not been assessed. In this case, the State defendant is no longer the permittee, and, thus, injunctive relief is no longer appropriate against the State defendant. As the Petition points out in its Section U, sovereign immunity prevents the assessment of civil

⁸ Although Petitioners have listed ten entries as examples of Alabama's failure to prosecute cases in a timely manner, the first seven entries are, in fact, the same lawsuit repeated seven times: State of Alabama ex rel. Troy King, Attorney General, and Alabama Department of Environmental Management v. Alabama Department of Corrections, Montgomery County Circuit Court, 03-CV-2005-002019.

penalties against a State defendant. Thus, the Petition is actually asserting in this Section that the State should be penalized for not doing that which, in Section U, the Petition itself asserts is illegal.

According to the Petition, the docket in State of Alabama ex rel. Troy King, Attorney General v. City of Dadeville, CV-2007-50, Tallapoosa County Circuit Court, “shows little activity.” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p. 59). Perhaps that is because the case was completed in 2009. A consent decree (Alabama Exhibit R-1) was signed on October 29, 2009.

The Petition’s rendition of the case filed against East Walker Sewer Authority (“EWSA”) fails to provide the complete facts. ADEM filed the suit on October 24, 2005. After resolving some service of process issues, ADEM initiated discovery, and the case proceeded normally until the Black Warrior Riverkeeper (“BWR”) filed a motion to intervene which was opposed by the defendant EWSA. The motion to intervene was denied, and BWR filed an appeal to the Alabama Court of Civil Appeals. The appeals court reversed the trial court’s denial of intervention and remanded the case to the trial court. On August 24, 2007, the trial court granted intervention.

During this time, EWSA and ADEM conducted settlement discussions, and EWSA acted on ADEM’s suggestions, completing part of a new system designed to bring it into compliance, even though a consent decree had not been finalized. Unfortunately, EWSA was unable to complete the project due to lack of funding,

but it has now received approval from the United States Department of Agriculture for additional funding to complete the project.

On December 12, 2008, BWR filed a motion for summary judgment. A hearing on the motion was set for May 5, 2009. EWSA moved for a continuance, and that was granted. An additional continuance was granted for the re-set hearing scheduled for June 10, 2009. Since then EWSA has met with both ADEM and BWR regarding settlement. USDA has released the funds to finish the project, and advertising for bids will begin the end of April. The project should be finished in approximately six or seven months. When that project is completed, Sumiton will be completely separate from the EWSA plant, and the resultant reduction in flow for the EWSA plant will be approximately 55 – 60%, which should bring the plant back into compliance. In addition, EWSA has hired a new operator to assist it in its compliance efforts.

The Petition's recitation of selected facts with regard to ADEM's lawsuit against the Water Works and Sewer Board of the City of Hanceville ("Hanceville") also does not provide a complete picture of the prosecution of that case. The lawsuit was filed less than two years ago, on May 27, 2008. Hanceville immediately approached ADEM with an eye toward resolving its compliance issues and the lawsuit.

Unfortunately, like many small cities and towns these days, Hanceville has a funding problem. Hanceville has been seeking funding for its project, applying to the Alabama Department of Economic and Community Affairs for a community development block grant. Although unable to obtain that grant, Hanceville is

continuing to pursue means of funding the project. ADEM will proceed with negotiations. A consent decree has been drafted, but entry of the consent decree has been delayed because of changes in the planned system, which may require changes in the consent decree itself.

It should be noted that ADEM has not ignored Hanceville's violations. On April 7, 2010, ADEM issued Order 10-091-WP which places a moratorium on new sewer connections and increased sanitary wastewater flows into Hanceville's sanitary sewer system. See, Alabama Exhibit R-2.⁹

S. Alabama has taken prompt action where appropriate when dischargers violate consent decrees

According to the Petition, Alabama has failed to take prompt action where dischargers violate consent decrees. Out of the numerous judicial enforcement actions that Alabama has taken over the years (the Petition looks back twelve years), only three examples are cited in which Alabama allegedly failed to take prompt action where dischargers have violated consent decrees.

In the example of the Winfield Water Works and Sewer Board, the Petition recites a number of informal enforcement actions that were issued to address the violations of the 2004 Consent Decree. It should be noted that ADEM continuously followed up violations with informal enforcement actions and then issued two administrative orders. It should also be noted that all of the informal

⁹ There are a few limited exceptions to the moratorium to provide for prior commitments and to avoid health problems as a result of the moratorium.

enforcement actions took place prior to January 1, 2008, when ADEM revised its Guidance Memorandum #105: Compliance and Enforcement Strategy. One of the concerns that drove the revision of Guidance Memorandum #105 was the need to increase the timeliness and effectiveness of ADEM's enforcement actions, and it was recognized that informal enforcement actions should be limited and, if not effective, more formal actions should be taken. As a result, the revised Guidance Memorandum #105 directs that a facility may not receive more than one Warning Letter during a twelve month period without approval of the Director and prohibits the issuance of more than one NOV in a twelve month period unless approved by the Director. *Guidance Memorandum #105: Compliance and Enforcement Strategy*, Alabama Exhibit J-1, p. 7.

Thus, while there may be some question about the effectiveness of ADEM's early efforts to address violations of Winfield's Consent Decree, Guidance Memorandum # 105 has addressed those concerns. Since the final compliance date of July 1, 2009, established in Consent Order 09-071-CWP, Winfield has had only four violations: three in July, 2009 and one in September, 2009. ADEM's enforcement efforts have brought Winfield back into compliance.

The Petition also suggests Alabama has been remiss in its follow-up regarding violations of a Consent Decree entered into by the Jasper Waterworks and Sewer Board, stating that no further enforcement took place after the issuance of Order 08-064-WP. In fact, ADEM is currently in litigation with Jasper to address the violations of the Consent Decree. Alabama Department of

Environmental Management v. Jasper Waterworks and Sewer Board, Circuit Court of Walker County, Alabama, CV-2010-900012.

The Petition cites the Town of Wilsonville as the final example of Alabama's alleged failure to take prompt action for violations of consent decrees. A compliance evaluation of that facility was performed in early 2010, and a referral for judicial action was drafted and being reviewed at the time of the restructuring of the Water Division. That referral was temporarily delayed due to the restructuring but is now being reviewed by the newly-formed Industrial/Municipal Branch of the Water Division and is expected to be referred in the near future.

While ADEM recognizes that there is always room for improvement and continuously strives to make improvements in its NPDES enforcement program, ADEM believes that the three examples used in the Petition are not representative of ADEM's efforts toward pursuing violations of consent decrees. In one case cited by the Petition, although there were numerous informal actions that did not result in compliance, compliance has been achieved, and ADEM has revised its use of informal enforcement actions to ensure prompt escalation of enforcement when necessary. In another case cited by the Petition, ADEM is currently pursuing those violations in court. In the final case cited by the Petition, further action has been temporarily delayed but should proceed in the near future.

ADEM continually reviews its procedures to determine if improvements can be made in the process of identifying cases where violations of consent decrees occur and implement any measures that are identified in that review. ADEM's

commitment to improve this process, as well as the fact that ADEM diligently takes timely follow-up actions on such violations, demonstrates that withdrawal of Alabama's NPDES authorization is unnecessary and inappropriate.

T. Alabama complies with the NPDES conflict of interest provisions as those are interpreted by EPA.

The CWA requires that “no board or body which approves permit applications or portion thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.” 33 U.S.C. § 1314(i)(2)(D). EPA's regulations at 40 C.F.R. § 123.25(c) reiterates this prohibition, although the wording is slightly different. Alabama does not dispute that this “conflict of interest” provision applies to the ADEM Director and Water Division Chief, as well as members of the Alabama Environmental Management Commission (“the Commission”). What Alabama does dispute is that Alabama is in violation of the NPDES conflict of interest provision.

First, Petitioners assert that Alabama must certify to EPA that the ADEM Director and any delegates, as well as members of the Commission, are in compliance with the NPDES conflict of interest provision. Petitioners cite no statute or regulation which requires Alabama to make such a certification. Rather, they cite an EPA General Counsel Opinion as authority for this “requirement.” However, the General Counsel Opinion cites no authority for its assertion that such a certification is required, and the opinion itself is not law.

Next, Petitioners assert that Alabama has not provided a procedure to ensure that the ADEM Director and Water Division Chief and members of the Commission comply, and continue to comply, with the NPDES conflict of interest provision, alleging that the procedures adopted by Alabama, and approved by EPA, are unlawful. This assertion is incorrect.

In July, 1995, counsel for Petitioners, on behalf of the now-defunct Legal Environmental Assistance Foundation, filed a petition for issuance of an order commencing proceedings to withdraw approval of Alabama's NPDES program, alleging, in part, that Alabama's NPDES program does not "assure that Alabama officials are and will remain in compliance with the conflict of interest provisions of the Federal Water Pollution Control Act and regulations promulgated thereunder." (*Letter from David A. Ludder to Carol M. Browner, July 10, 1995*, Alabama Exhibit T-1). In an effort to cure this oversight, ADEM worked in conjunction with EPA to establish a procedure by which the ADEM Director and Water Division Chief and members of the Alabama Environmental Management Commission could ensure present and future compliance with the NPDES conflict of interest requirements. In consultation with EPA, an NPDES Conflict of Interest Disclosure Form was developed, and that form was adopted by the EMC on October 15, 1996. EPA approved Alabama's use of the disclosure form on April 22, 1997. Since the approval of the form, members of the EMC have completed the form upon appointment and, again, each February. In addition to Commission members, ADEM's Director, Deputy Director, Water Division Chief, and Field Operations Division Chief complete the form annually.

During the discussions regarding the disclosure form and conflict of interest procedures, one issue arose with regard to the application of those procedures to the EMC. Members of the EMC are not employees, but, rather, individuals appointed by the Governor (Ala. Code § 22-22A-6(b)) who meet at least every two months (Ala. Code § 22-22A-6(f)) to decide matters before them. The Commission's powers and duties, pursuant to Ala. Code § 22-22A-6(a), are limited to selecting the ADEM director, promulgating regulations, developing environmental policy, and hearing and determining appeals of administrative actions. Ala. Code § 22-22A-6(b) establishes the qualifications for members of the EMC. They are:

(1) One member shall be a physician licensed to practice medicine in the State of Alabama and shall be familiar with environmental matters;

(2) One member shall be a professional engineer registered in the State of Alabama and shall be familiar with environmental matters;

(3) One member shall be an attorney licensed to practice law in the State of Alabama and shall be familiar with environmental matters;

(4) One member shall be a chemist possessing as a minimum a bachelor's degree from an accredited university or a veterinarian licensed to practice veterinary medicine in the State of Alabama and shall be familiar with environmental matters;

(5) One member that has been certified by the National Water Well Association Certification Program;

(6) One member shall be a biologist or an ecologist possessing as a minimum a bachelor's degree from an accredited university and shall have training in environmental matters; and

(7) One member shall be a resident of the state for at least two years but shall not be required to have any specialized experience.

Generally, the individuals who have been appointed to these positions on the Commission have been professionals who are fully employed in the practice of engineering, law, or one of the other professions specified in the statute. These very specific qualifications required by state law posed the problem of finding individuals qualified to serve on the EMC who were both knowledgeable in environmental matters but whose professional activities did not create a conflict of interest.

In its consideration of the 1995 withdrawal petition, EPA was mindful of the problem posed by the Environmental Management Act's Commission member qualification requirements. In an effort to assist Alabama in resolving this dilemma, EPA suggested the use of a "generic recusal" which

would require that any Commission member who, at the time of appointment or subsequently thereafter, has a conflict of interest under the [Clean Water Act], be barred from participating in any NPDES or related CWA matter before the Commission. The remaining Commission members (those without conflict) would handle all NPDES and CWA related matters. Any so excused Commission member would be precluded from acting on any NPDES matter for the duration of the conflict and for two years after cessation of the conflict. In a sense, the Commission, when dealing with these matters, would have a secondary composition of only those members in compliance with the conflicts prohibition.

(February 21, 1996 letter from William Anderson, Acting Regional Counsel to Olivia Jenkins, General Counsel, ADEM, Alabama Exhibit T-2)

As a result of this suggestion, the EMC developed a procedure by which any Commissioner who might have a conflict of interest with regard to NPDES matters could recuse him- or herself generally from voting on NPDES matters. See Alabama Exhibit T-3. To ensure that a recused member would not vote on

NPDES matters, the Commission secretary denotes on the Commission's agenda any NPDES-related matter.

As noted above, this procedure was adopted by the Commission on October 15, 1996, and, on April 22, 1997, EPA Administrator Carol Browner wrote counsel for the 1995 Petitioners denying the part of the petition which addressed the conflict of interest issue. (*Letter from Carol Browner to David Ludder, April 22, 1997, Alabama Exhibit T-4*). Administrator Browner noted that

the State and EPA were faced with determining a process that met both the Clean Water Act (CWA) requirements and the needs of the State. As a first step, the State clarified the filing requirement and content of an PDE-specific income disclosure form (filed by the Commission members). Given the detailed State statutory requirements for composition of the Commission and the possible inherent hardship in finding the requisite qualified individuals for Commission membership, ADEM also proposed a process requiring the filing of a general recusal by any individual who's [sic] disclosure form indicated the potential for a conflict of interest. The general recusal would apply to all NPDES matters before the Commission. EPA reviewed this option and determined that it was appropriate under the CWA and EPA policy. The disclosure and recusal process was then embodied in an October 15, 1995 resolution and approved by the Commission.

Id. Administrator Browner went on to say that the procedure proposed by Alabama "is consistent with Agency policy and has been offered to resolve problems in several States." *Id.* It is Alabama's understanding that EPA stands by its 1997 decision, and that this procedure remains acceptable.

The Petition complains that former Commission Riley Boykin Smith executed two general recusal forms during his tenure on the Commission and remained on the Commission. There is no allegation that Commissioner Smith voted on any NPDES matter. Commissioner Smith followed the procedure which was

approved by EPA and recused himself from voting on NPDES matters. The complaint against former Commissioner Smith is nothing more than dissatisfaction with a ruling unfavorable to the interests of a client the Petition's author previously represented and an attempt to revisit that issue.

On February 18, 2010, the Petition was supplemented to include charges that the Commission's Chair, Anita Archie, has developed a conflict of interest by virtue of her recent employment with the Business Council of Alabama. Since Ms. Archie assumed her new position, there has been but one meeting of the Environmental Management Commission, and during that meeting no NPDES matters were considered by the Commission. Commissioner Archie has indicated that she intends to file a general recusal form and will not vote on NPDES matters.

Because she is currently Chair of the Commission, Ms. Archie will take additional precautions to ensure the integrity of the process. The duties of the Chair are set out in ADEM Admin. Code r. 335-2-3-.03(3) and are:

- (a) To call the meeting of the Commission to order.
- (b) To preside at all meetings of the Commission.
- (c) To announce business before the Commission in proper order.
- (d) To state and put to a vote all questions that are properly brought before the Commission.
- (e) To preserve order and decorum at meetings of the Commission.
- (f) To decide all questions of Order at meetings of the Commission.

In addition to recusing herself from voting on NPDES matters, Ms. Archie will call upon the Vice-Chair to state and put to a vote any NPDES matters which come before the Commission.

In addition to the duties set forth above, the Chair also oversees the Commission's agenda. Matters which are to come before the Commission are generally filed with the Commission's Executive Assistant who develops the agenda. ADEM Admin. Code r. 336-2-3-.05(1) requires the following items be included on the Commission's agenda: "the consideration of the previous meeting's minutes, a report from the Director, committee reports, any pending recommendation from a hearing officer and other matters within the jurisdiction of the Commission." ADEM Admin. Code r. 336-2-3-.05 (4) prohibits any item from being added to the agenda which has not been submitted to the Commission's Executive Assistant at least seven days prior to the Commission meeting.¹⁰ Ala. Code § 22-22A-7(c) and the Commission's rule for hearing appeals of administrative actions, ADEM Admin. Code ch. 335-2-1, set out the deadlines for various actions regarding those appeals. The Alabama Administrative Procedures Act, Ala. Code §§ 41-22-1 through 41-22-27, sets out deadlines for the Commission's consideration of regulations proposed to be promulgated. Thus, the setting of the agenda is, for the most part, a non-discretionary duty, as most of the matters that come before the Commission are required by law to come before the Commission according to certain procedures and certain deadlines.

¹⁰ The sole exception to this prohibition is a request for stay of an administrative action pending hearing.

One discretionary matter which is performed by the Chair involves requests by the public to speak before the Commission. ADEM Admin. Code r. 335-2-3-.05(2) requires those requests be made no later than fourteen days prior to the Commission meeting, and the Chair or her designee is responsible for notifying individuals requesting to speak before the Commission of the disposition of their requests. Ms. Archie will refer all requests to speak before the Commission regarding NPDES matters to the Vice-Chair.

Based upon the above, there is no support for the withdrawal of Alabama's NPDES authority based on a claim of violation of the NPDES conflict of interest provisions.¹¹

**U. Sovereign immunity is not a ground for
withdrawal of approval of Alabama's NPDES authorization**

According to the Petition, withdrawal of approval of Alabama's NPDES authorization is appropriate because Alabama is unable to assess or sue to recover in court civil penalties against the State or any of its agencies, in violation of 40 C.F.R. § 123.27(a)(3). That requirement, however, is not specific to State defendants. 40 C.F.R. § 123.27(a)(3) simply requires that a State agency administering an NPDES program must be able to "assess or sue to recover in court civil penalties. . . ." Alabama has the legal authority to "assess or sue to recover in court civil penalties" against any defendant except the state and its agencies. See, Ala. Code § 22-22A-5(18)b.

¹¹ Of worthy note in this discussion is the fact that the EMC attempted to strengthen its Conflicts Rules some years ago, but these proposed rules were withdrawn based upon comments questioning the authority to do so by none other than the Petitioners' counsel.

Alabama does not dispute that Alabama Constitution art. I § 14 prohibits the imposition of civil penalties against the State and its agencies. Sovereign immunity is not a novel concept, and Alabama is no different than many states in the application of this common legal principle. Were sovereign immunity a basis for withdrawal of NPDES authority, there would be few state-administered NPDES programs. Withdrawal of approval of Alabama's NPDES authorization because the State and its agencies are immune from suit for civil penalties is unnecessary and inappropriate.

V. Withdrawal of Alabama's NPDES authority is not the appropriate remedy for curing any perceived deficiencies with regard to the authority of large and medium MS4s to meet the requirements of 40 C.F.R. § 122.26(d)(2)(i)

40 C.F.R. § 123.25(a)(9) requires state programs to have the legal authority to implement 40 C.F.R. § 122.26, the provision regulating stormwater discharges. Section 122.26(a) requires NPDES permits for medium and large MS4s. In order to receive an NPDES permit for a medium or large MS4, § 122.26(d)(2)(i) requires those applicants to include in their applications a demonstration that they have the legal authority, either by statute, ordinance, or contracts, to do the following:

- (A) Control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
- (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

(C) Control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;

(D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;

(E) Require compliance with conditions in ordinances, permits, contracts or orders; and

(F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

In an effort to ensure that Alabama's MS4s could meet the requirements of 40 C.F. R. § 122.26, the Alabama legislature passed Act No. 95-775, now codified as Ala. Code §§ 11-89C-1 through 11-89C-14. This statute states its purpose to be "to promote effective and efficient compliance with federal and state laws, rules, regulations, and municipal permits relating to storm water discharges into municipal separate storm sewers, and to promote and authorize the discovery, control, and elimination, wherever practicable, of that discharge at the local level. Ala. Code §§ 11-89C-1(a). The statute further states that the legislative intent is "to assist the state in its implementation of the storm water laws, and to supplement the authority of the governing bodies of all counties and municipalities in the state to enable them to implement the storm water laws."

Ala. Code §§ 11-89C-1(b). Finally, the statute expresses

the intention of the Legislature to grant the governing bodies . . . the enforcement needed in order to satisfy the requirements of storm water laws, further, to act by resolution or ordinance enforceable in their respective municipal courts or the district courts and by civil procedures in district and circuit court, including fines, penalties, damages and injunction as authorized and appropriate.

Ala. Code §§ 11-89C-1(d).

First, it should be noted that this statute has limited application. Section 11-89C-3 allows “the mayor of a municipality or the chair of a county governing body of a county or counties in which a municipality is wholly or partially situated” to form a public corporation. That public corporation is authorized, pursuant to § 11-89C-4 to do the following: “adopt necessary and appropriate policies, procedures, rules, and regulations applicable to the member governing bodies in accordance with EPA and/or ADEM permits and rules and regulations to implement the storm water laws and the functions of this chapter”; to develop remedies and procedures to enforce resolutions or ordinances adopted to address the storm water requirements; to sue and be sued; and to allow corporation officers and employees to enter private property to inspect sources of contamination. These powers only apply to those counties and municipalities which have incorporated pursuant to § 11-89C-3.

The statute also gives powers to a “governing body.” That term is defined as

The governing bodies of all Class 1 municipalities within the state and the county governing bodies in which the Class 1 municipalities are located and the governing bodies of all municipalities located within those counties, and where any such municipality is also located partially within an adjoining county, then the governing body of such adjoining county, and which governing bodies are specifically designated in 40 C.F.R. Part 122, Appendices F, G, H, or I or by ADEM pursuant to the authority delegated to it under the Clean Water Act, 33 U.S.C. Section 1251 et seq., as of August 8, 1995.

Ala. Code §§ 11-89C-2(1). A governing body is authorized to adopt rules and regulations “to regulate and control storm water discharges and eliminate the

discharge of pollutants to its municipal separate storm sewers.” Ala. Code §§ 11-89C-9(a). That section then enumerates the specific powers of governing bodies, a list which, although not identical to the wording in 40 C.F.R. § 122.26(d)(2)(i), is substantially similar. It authorizes governing bodies to:

1) Control by resolution, ordinance, contract, order, or similar means the discharge of pollutants to its municipal separate storm sewers by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity.

(2) Prohibit by resolution, ordinance, order, or similar means illicit discharges to its municipal separate storm sewers.

(3) Control by resolution, ordinance, order, or similar means the discharge to its municipal separate storm sewers of spills, dumping, or disposal of materials other than storm water.

(4) Control by interagency or intercooperation agreements among the governing bodies and other entities the discharge of pollutants from one portion of its municipal storm water system to another portion.

(5) Require compliance with conditions in resolutions, ordinances, contracts, or orders.

(6) Enter upon private property upon reasonable notice to the owner and the person in possession thereof and during normal business hours and upon the presentation of appropriate credentials for the purpose of performing investigations regarding the existence and source of contamination and determining from the owner or other appropriate individual the methods which they will employ to stop, neutralize, remove, or otherwise remedy the contamination, and as needed to determine compliance or non-compliance with permit conditions, including any prohibition of illicit discharges to its municipal separate storm sewers. Any officer, employee, or other authorized agent who performs the duties authorized under this section in accordance with provisions hereof shall be immune from arrest and prosecution for trespass while performing any legal duty pursuant to this chapter by presenting identification issued from the county or municipality authorized by the governing bodies.

In addition, §11-89C-9(e) gives governing bodies authority to establish any enforcement measures and procedures to ensure the enforcement “of rules, regulations, ordinances, or orders through actions before a municipal, district or circuit court of competent jurisdiction, including penalties for violations in accordance with Section 11-45-9.¹²” The authority to bring a civil suit for damages or injunctive relief in district or circuit court is authorized by § 11-89C-9(f), except as limited by §§ 11-89C-11 and 11-89C-12.

It is these two exceptions of which the Petition complains. Section 11-89C-11 states that

compliance with the conditions, limitations, and restrictions set forth in an NPDES permit issued by the ADEM or EPA shall be deemed to be compliance for purposes of this chapter and any ordinance or resolution adopted hereunder, and such compliance shall preclude the initiation, commencement, or continuation of any enforcement action authorized under this chapter or any ordinance or resolution.

Since the chapter applies only to those public corporations which have been formed pursuant to § 11-89C-3 and governing bodies, as that term is defined in § 11-89C-2(1), its application is limited.

Section 11-89C-12 provides that an enforcement action cannot be taken by a governing body for the alleged violation of a local ordinance or resolution pertaining to stormwater discharges if:

(1) ADEM has issued a notice of violation with respect to the same alleged violation, and is proceeding with enforcement action;

¹² Section 11-45-9 authorizes municipal ordinances to provide for penalties for violations of such ordinances.

(2) ADEM has issued an administrative order with respect to the same alleged violation, and is proceeding with enforcement action;
or

(3) ADEM has commenced and is proceeding with enforcement action or has completed any other type of administrative or civil action with respect to the same alleged violation.

That section also provides that ADEM's determination with respect to an alleged violation is final and that the governing body may not take additional enforcement action regarding that violation. Ala. Code §§ 11-89C-12(b). This prohibition is also limited, applying only to a governing body, as that term is defined in § 11-89C-2(1).

Obviously, the Alabama legislature was concerned about the duplication of efforts in this age of limited government resources. Additionally, these provisions ensure that violators will not be subject to duplicative fines for the same violation. For some time Alabama was under the impression that EPA understood this concern and had no objection to MS4s relying on ADEM's statewide construction stormwater program to comply with some of the requirements of 40 C.F.R. § 122.26(d)(2)(i). Alabama is now aware that that position has changed and that EPA now takes the position that large and medium MS4s may not rely on ADEM's statewide program to fulfill any of those responsibilities set out in 40 C.F.R. § 122.26(d)(2)(i). See Alabama Exhibit V-1.

Although these prohibitions have limited application, they nevertheless do place some restrictions on governing bodies and public corporations formed pursuant to this chapter. However, the appropriate response to these limitations on MS4 permittee authority is not to withdraw Alabama's NPDES authority but,

rather, to work with Alabama to ensure that state law is changed to ensure that all MS4 permittees are granted the authority to comply with applicable federal regulations. Clearly, with the passage of Ala. Code §§ 11-89C-1 through 11-89C-14, Alabama was trying to comply with the federal requirements for stormwater discharges. Alabama thought that EPA agreed with its approach to avoid duplication and allow MS4s to rely on ADEM's statewide construction stormwater program to fulfill some of the duties set out in 40 C.F.R. § 122.26. Alabama should not be punished for its attempt to comply with the stormwater regulations or its good-faith belief that reliance on ADEM's stormwater construction program was satisfactory for large and medium MS4s. Withdrawal of Alabama's NPDES authorization on this ground is an inappropriate and unnecessary response to this issue.

W. Alabama has the legal authority to meet the requirements of 40 C.F.R. § 122.4(i).

The Petition alleges that Alabama does not have the legal authority to meet the requirements of 40 C.F.R. § 122.4(i), and, thus, cannot meet the requirements of 40 C.F.R. Part 123 which incorporates § 122.4(i). The argument is primarily based upon a brief in which ADEM argued that ADEM Admin. Code r. 335-6-6-.04(h) does not incorporate by reference 40 C.F.R. § 122.4(i) and that the Environmental Management Commission should defer to EPA in interpreting a TMDL which EPA has developed. These arguments do not, as the Petition claims, admit that Alabama lacks legal authority to implement 40 C.F.R. § 122.4(i) or may disregard 40 C.F.R. § 122.4(i). Alabama does, in fact, have such

authority and does not take the position that Alabama may disregard the TMDL developed by EPA.

40 C.F.R. § 122.4(i) prohibits the issuance of a permit to a new source or a new discharger if the discharge will cause or contribute to the violation of water quality standards. ADEM Admin. Code r. 335-6-6-.14(3)(e) requires all NPDES permits to contain effluent limitations that achieve water quality standards, and ADEM Admin. Code r. 335-6-6-.04(f) prohibits the issuance of permits which cannot ensure compliance with applicable water quality standards. Clearly Alabama has the authority to comply with 40 C.F.R. § 122.4(i)'s prohibition of permits issued to a new source or a new discharger if the discharge will cause or contribute to the violation of water quality standards.

40 C.F.R. § 122.4(i) also provides that if a receiving water does not meet applicable water quality standards or is not expected to meet applicable water quality standards even after the application of effluent limitations promulgated pursuant to 33 U.S.C. §§ 1311(b)(1)(A) and 1311(b)(1)(B), and as a result, a total maximum daily load ("TMDL") has been developed, the owner/operator of a new source or a new discharger must demonstrate that there are sufficient remaining pollutant load allocations to allow for the discharge and that the existing dischargers into that segment of the receiving waters are subject to compliance schedules with applicable water quality standards. The demonstration need not be made, however, if the State Director already has adequate information to evaluate the request. *Id.*

There should be no question that Alabama has adequate legal authority to meet the above requirement. ADEM Admin. Code r. 335-6-6-.14(3)(e)(8) requires NPDES permits to contain effluent limitations consistent with the requirements of any applicable TMDL. ADEM Admin. Code r. 335-6-6-.08(1)(k) authorizes ADEM to require “additional reports, specifications, plans, quantitative data, bioassays, stream models, or other information reasonably required to assess the dischargers of the facility and the potential water quality impact of the discharges. . . .” Thus, ADEM is authorized to require the demonstration suggested by 40 C.F.R. § 122.4(i) where the Director does not already have such information.

40 C.F.R. § 123.25(a) specifically provides that a state is not required to implement provisions which are identical to those promulgated by EPA, as long as the state’s provisions are as stringent as EPA’s. Alabama’s provisions prohibiting issuance of permits which authorize a discharge which will contravene water quality standards and its provisions regarding discharges into receiving waters for which a TMDL has been developed are as stringent as EPA’s, as demonstrated above, and those state requirements accomplish the same result as do the federal requirements. In a March 16, 2010, letter from James D. Giattina, Region 4’s Water Protection Division Director, to R. Edwin Lamberth addressing this issue, EPA agreed that Alabama has such authority. See, Alabama Exhibit W-1. Thus, Alabama has legal authority to implement 40 C.F.R. § 122.4(i), and withdrawal of Alabama’s NPDES program authorization for the alleged lack of such authority is unjustified.

X. Alabama has provided adequate manpower to effectively carry out the minimum requirements for NPDES programs that are set out in 33 U.S.C. § 1342 (b).

The Petition asserts that “States are required by 33 U.S.C. § 1314(i)(2)(D) to provide adequate manpower in order to effectively carry out the minimum requirements for NPDES programs set forth under 33 U.S.C. § 1342(b).

Petitioners have misstated what § 1314(i)(2)(D) requires. Actually, 33 U.S.C. § 1314(i)(2)(D) says the following:

- (i) Guidelines for monitoring, reporting, enforcement, funding, personnel and manpower

The Administrator shall . . .

(2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include: . . .

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income, directly or indirectly, from permit holders or applicants for a permit).

Thus, §1314(i)(2)(D) requires the EPA Administrator to promulgate guidelines regarding funding, personnel qualifications and manpower. The Petition cites no such guidelines that Alabama has failed to meet.

Rather, the Petition proffers a multitude of statistics which purportedly demonstrate Alabama’s failure to provide adequate manpower to administer the

NPDES program properly. However, these statistics do not provide any meaningful information.

For instance, the Petition provides statistics demonstrating that the number of permits ADEM administers has increased over the years. No one disputes this. However, the fact that the number of permits has increased over the years does not translate into inadequate manpower to administer those permits. Several other things have also changed over the years: technology has improved, ADEM's use of cutting-edge technology has increased, and ADEM has developed and employed processes which result in greater efficiencies and allow ADEM to do more with less. The Petition's statistics do not reveal the impact of these factors.

The Petition also compares the number of Full Time Equivalent ("FTEs") "the state" devoted to the NPDES program from FY 2005 through 2007 to the number of FTEs EPA Region 4 devoted to the NPDES program from FY 1999 to 2003. Aside from the obvious fact that comparisons of ADEM staffing at one point in time to Region 4 staffing at another point in time are not valid comparisons, there are a number of other reasons why such comparisons are meaningless. First, the Petition states that EPA Region 4 has delegated NPDES permit program authority to each state in the Region. If that is the case, it is obvious that the responsibilities of Region 4 NPDES staff are not the same as ADEM NPDES staff, and, thus, the comparison is irrational. Additionally, the Petition acknowledges that the number used to represent ADEM NPDES staff does not include enforcement staff. The Petition does not indicate whether the number of

EPA staff presented includes enforcement staff, but, if it does, the comparison is certainly not legitimate. Why enforcement staff are excluded from the ADEM number is a mystery; surely Petitioners would agree that enforcement personnel are vital to the NPDES program, and exclusion of enforcement personnel renders the statistic worthless. Finally, although the Petition represents that the number of FTEs provided represents the number of FTEs for “the state,” the Petition has, in fact, only presented numbers related to ADEM and has excluded from consideration those FTEs devoted to the NPDES program by the Attorney General’s Office.

Although the number of permitted facilities has increased and Alabama has, like most states and, even, the federal government, had to do more with less, Alabama has nevertheless increased its effectiveness in regulating NPDES facilities and has a record of accomplishment equal to or greater than other states in Region 4, and, in many cases, the nation, including:

- Alabama has exceeded the national goal set for issuing permits.
- Alabama has for a number of years been recognized by Region 4 for maintaining a low permit backlog.
- Alabama has a permit backlog that is lower than EPA Region 4’s and two other states’ in the Region, and Alabama’s backlog is only slightly higher than the Region 4 states’ average.
- Alabama significantly exceeded the annual inspection goal of 50% of major dischargers in FY08 and FY09.

- Alabama has met or exceeded the goal for inspection of facilities discharging pursuant to NPDES general permits each year since FY04.
- Alabama's issuance of formal enforcement actions against non-major dischargers has been greater than or equal to that of other Region 4 states since FY04.
- Although Alabama is 11th in the nation in the number of permitted major dischargers, Alabama ranks 16th in the number of informal enforcement actions taken against non-major dischargers.
- Although Alabama is 10th in the nation in the number of non-major permittees, Alabama has the nation's 16th lowest rate of non-compliance among non-major dischargers.
- Alabama ranks 7th nationally in the number of informal enforcement actions and 13th nationally in the number of formal enforcement actions taken.
- In 2006, ADEM was invited to the House of Commons in London, England to receive the Green Apple Environmental Award in honor of ADEM's innovative and successful Qualified Credentialed Inspector Program.

Despite the increase in permitted facilities and the alleged manpower deficit, Alabama has used its admittedly limited resources wisely and efficiently. Due to the competent and effective manner in which Alabama has administered the NPDES program, it is clear that Alabama has adequate manpower to meet

the requirements of 33 U.S.C. § 1342(b), and withdrawal of authorization of Alabama's NPDES program because of its limited, but well-managed, resources is unnecessary and inappropriate.

Y. Alabama has provided adequate funding to effectively carry out the minimum requirements established in 33 U.S.C. § 1342(b)

Without citing any authority, the Petition claims that “[s]tates are required to provide adequate funding necessary to effectively carry out the minimum requirements set forth under 33 U.S.C. § 1342(b)” (*Petition to commence proceedings to withdraw Alabama’s authorization to administer the National Pollutant Discharge Elimination System*, p.74, ¶ 204). ADEM has been unable to find any such requirement in the Clean Water Act or its implementing regulations. Nevertheless, Alabama does not dispute that funding is important to ensure the state has adequate resources to effectively administer its NPDES program.

As the Petition notes, State funding of the NPDES program has steadily increased since FY 2002, from \$6,122,686 in that year to \$10,018,462 in FY 2009, to an estimated \$11,018,798 in FY 2010. The Petition is also correct that federal funding has not increased at the same rate as state funding during this same period -- from \$2,612,000 in FY 2002 to \$4,500,903 in FY 2009, to an estimated \$4,680,853 in FY 2010. Thus, it can hardly be said that Alabama has failed to provide adequate funding for its NPDES program.

Again, Alabama does not dispute that the number of permits has increased over the years. However, as noted in the previous section of this Response, the fact that the number of permits has increased over the years does not translate

into inadequate funding to administer those permits. As noted above, other things have also changed over the years: technology has improved, ADEM's use of cutting-edge technology has increased, and ADEM has developed and employed processes which result in greater efficiencies and allow ADEM to do more with less. These changes are not considered in the Petition's criticism of ADEM's funding.

The many accomplishments that Alabama's NPDES program can claim are listed in Section II.X. above and need not be repeated. Suffice it to say that Alabama has steadily increased its financial commitment to the NPDES program over the years and has compensated for other shortfalls by using its limited resources wisely and efficiently. Due to the competent and effective manner in which Alabama has administered the NPDES program, it is clear that Alabama has adequate funding to meet the requirements of 33 U.S.C. § 1342(b), and withdrawal of authorization of Alabama's NPDES program because of its limited, but well-managed, resources is unnecessary and inappropriate.

Z. The State of Alabama has maintained to the maximum extent possible the resources required to carry out all aspects of the NPDES program.

As the Petition notes, ADEM's MOA with EPA requires the State to "[c]reate and maintain . . . to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program. . ." (Alabama Exhibit A-1, p. 3, ¶ III.A.1.). The Petition argues that Alabama has failed to meet this requirement because Alabama has failed to provide adequate manpower and adequate

funding to meet the minimum requirements under 33 U.S.C. § 1314(i)(2)(D) and 33 U.S.C. § 1342(b). As demonstrated in Parts II. X and Y of this Response, Alabama has not failed to provide adequate manpower and funding to meet the minimum requirements of the NPDES program. Alabama's creative use of technology and its development of processes to enhance efficiencies, as well as the State's steadily increasing funding for NPDES activities, have maximized Alabama's employment of resources necessary to meet the requirements of the NPDES program. Certainly more funding would allow Alabama to increase its manpower and increase its regulatory presence. More funding, indeed, would be welcome. However, Alabama's wise use of its available manpower and funding has allowed Alabama to meet and, in many cases, exceed the requirements of the NPDES program. Withdrawal of approval of Alabama's NPDES authorization on the ground that Alabama allegedly does not maintain, to the maximum extent possible, the resources necessary to meet minimum NPDES requirements is inappropriate and pointless.

III. Conclusion

Many of the ostensible grounds for withdrawal of Alabama's NPDES authorization are based on incomplete and inaccurate information (including an outdated and inapplicable MOA) as well as misinterpretations of correspondence and apparent misunderstandings of the law. Once the complete and accurate information is reviewed, it becomes clear that:

- Alabama's data entry system is on par with or better than most states and constantly improving.

- Alabama has successfully implemented a strategy for timely issuance of permits and maintains a low permit backlog.
- Alabama's NPDES program complies with 40 C.F.R. Part 123 with respect to turbidity.
- Alabama provides appropriate notice of discharge locations.
- Alabama meets EPA's expectations with regard to the inspection and monitoring of major discharges.
- Alabama meets all requirements with regard to the inspection and monitoring of non-major discharges.
- Alabama complies with EPA's public participation requirements.
- Alabama complies with the terms of its MOA with respect to compliance determination requirements.
- Alabama has maintained a vigorous program of taking timely and appropriate enforcement action.

Other of the alleged grounds for withdrawal of Alabama's NPDES authorization set forth in the Petition represent nothing more than a political disagreement with the method by which Alabama calculates administrative penalties. There is no evidence presented that Alabama's penalty calculation method violates federal or state law. Alabama's penalty calculation method results in penalties which are appropriate to the violation, and that method fully complies with all applicable federal and state law.

A number of the allegations that Alabama's NPDES program is deficient are based simply on impatience with the time it takes to bring or resolve judicial

enforcement actions. Nothing in the Petition, however, points to any violation of state or federal requirements in this regard.

The Petition also expresses dissatisfaction with EPA's previous ruling regarding NPDES conflict of interest provisions. However, it is clear that Alabama has developed a procedure for identifying any potential conflict of interest, a method which has been approved by EPA and is followed by relevant Department employees and members of the Environmental Management Commission.

In some cases the Petition expresses dissatisfaction with Alabama law. The principle of sovereign immunity, which prevents lawsuits for penalties against state defendants, is a common legal principle and is not reason for withdrawal of Alabama's NPDES authorization. In addition, the Petition manifests displeasure that Alabama law places some prohibitions on some MS4s. In that case, withdrawal is not appropriate, but, rather, EPA and the state (and the Petitioners, also, if they choose) should work together to ensure that state law authorizes MS4s to take those actions necessary to comply with permit requirements.

The complaints regarding Alabama's supposed lack of legal authority to implement 40 C.F.R. § 122.4(i) also fail. A state is not required to implement provisions which are identical to those promulgated by EPA, as long as the state's provisions are as stringent as EPA's and, as noted in Section II.W. above, Alabama has provisions that are as stringent as 40 C.F.R. § 122.4(i)'s prohibition of permits issued to a new source or a new discharger if the discharge will cause

or contribute to the violation of water quality standards, and, thus, has the appropriate legal authority.

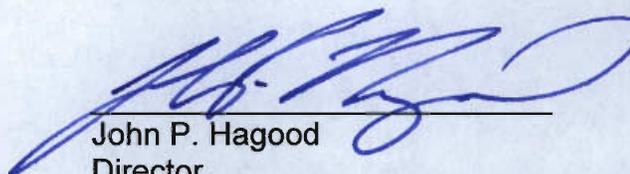
The last of the Petition's allegations center on the Petitioners' belief that Alabama does not have the manpower or resources to meet the requirements of a federally-authorized NPDES program. However, as this Response has shown, Alabama has been creative in its use of its resources and has continued to meet the requirements of an authorized program.

Alabama appreciates the Petitioners' wish to improve Alabama's NPDES program but disagrees with the conclusions the Petitioners have drawn regarding that program and strenuously objects to the suggestion that withdrawal of Alabama's NPDES authorization will result in better protection for the waters of Alabama. There is no question that the NPDES program must constantly improve; Alabama cannot stand still and rest on its achievements but must continuously identify better and more efficient ways to address the challenges before it and constantly strive to better its NPDES program. Alabama has done that, and it will continue to do so. Its efforts have shown solid results, with Alabama exceeding national goals for permit issuance, receiving recognition for its low permit backlog, exceeding annual inspection goals, ranking high nationally in the number of enforcement actions, and low nationally in the number of non-compliant dischargers and being recognized internationally for its Qualified Credentialed Inspector Program. These are not the achievements of a low-performing NPDES program; these are the achievements of an NPDES program staffed by dedicated professionals who make the most of limited resources to

ensure that Alabama's waters and its citizens receive the protection they deserve from their state environmental agency.

Alabama welcomes any constructive suggestions which could enhance its NPDES program. However, withdrawal of Alabama's NPDES authorization is unwarranted, and the petition should be denied.

Respectfully submitted,



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