

BEFORE THE ADMINISTRATOR OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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, SAND
MOUNTAIN CONCERNED CITIZENS, INC.,
CONSERVATION ALABAMA
FOUNDATION, INC., CAHABA
RIVERKEEPER, and THE FRIENDS OF BIG
CANOE CREEK

Petitioners,

**REPLY OF PETIONERS TO THE RESPONSE OF THE
ALBAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

I. INTRODUCTION

1. On January 14, 2010, Petitioners representing 14 organizations and hundreds of citizens of the State of Alabama submitted a petition to the Administrator of the United States Environment Protection Agency for the issuance of an order commencing proceedings to determine whether to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the state of Alabama because the operation of the state program fails to comply with the requirements of 40 C.F.R. Part 123. The Alabama Department of Environmental Management (ADEM) filed a response to the Petition on April 8, 2010. The Department's response

purports to address each of the 26 grounds presented in the Petition. In reality, ADEM's response serves only to misdirect and obfuscate rather than provide a serious explanation of the numerous, well-documented deficiencies that the Petition identifies in the State's NPDES program. Petitioners submit this reply as an attempt to clarify any confusion created by ADEM's response as well as to address the Department's unfounded allegations of impropriety and deceit.

2. In the interim between ADEM's response and this reply, Petitioners have made every effort to meet and establish a dialogue with ADEM in order to address the systemic problems in the State's program in the hope of finding some common ground for resolution of these issues. ADEM has rebuffed every effort to communicate regarding the Petition. This posturing on the part of the State agency is unfortunate and it leaves the Petitioners with no choice but to reply formally to ADEM's response.

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II. GROUNDS

A. Failure of State to ensure that monitoring data are entered into the Permit Compliance System [Memorandum of Agreement; 40 C.F.R. §§ 123.24, 123.63(a)(4)]

3. In the Petition, Petitioners allege that during Fiscal Year 2008 (October 2007-September 2008), the State of Alabama failed to achieve a 95% data entry accuracy rate for non-major dischargers as required by the *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated). Petition at 7-8; Pet. Exhibit A-1 at 8. Although this *Memorandum of Agreement* was superseded by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), the new *Memorandum of Agreement* did not materially change this obligation. The new *Memorandum of Agreement* provides:

The State will ensure that monitoring and evaluation data are entered directly into ICIS-NPDES or into a data management system which is uploaded into ICIS-NPDES. Data entry and accuracy rates will be as established in the State 106 Workplan.

ADEM Exhibit A-1 at 17. The *State 106 Workplan for Fiscal Year 2008* provides that the State shall “[m]aintain DMR entry rate of at least 95%. Pet. Exhibit A-3 at 29. The evidence of the State’s failure to achieve a 95% data entry accuracy rate for non-major dischargers is an EPA report indicating that the data entry rate for non-major dischargers is only 44.40%. Pet. Exhibit A-2.

4. ADEM does not dispute that it “has not achieved the 95% accuracy rate for non-

major dischargers.” ADEM Response at 11. In fact, ADEM admits that its data entry rate for non-major dischargers is only 44.40% as alleged by Petitioners. *Id.* ADEM’s arguments in opposition to the Petition are simply that (1) ADEM does better than most other states and (2) ADEM has implemented system improvements that are expected to result in improved performance.

5. Whether the data entry rates for non-major dischargers achieved by other states are worse than Alabama’s is irrelevant to the disposition of the Petition. The Petition seeks to commence proceedings to withdraw approval of *Alabama’s* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama’s program. Moreover, it should be obvious that another state’s lesser data entry rate does not justify Alabama’s failure to comply with the Memorandum of Agreement.

6. Finally, ADEM does not provide any evidence to support its contention that implemented system improvements are expected to result in improved performance vis-à-vis data entry requirements for non-major dischargers. ADEM does not describe the implemented system improvements or how they are expected to achieve improved data entry rates for non-major dischargers.

7. It is uncontested that the State of Alabama has failed to comply with the DMR data entry requirements for non-major dischargers included in the *Memorandum of Agreement*. Where the State program fails to comply with the terms of the *Memorandum of Agreement* required under 40 C.F.R. §123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and

other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

B. Failure of State to exercise control over activities required to be regulated, including failure to issue permits [40 C.F.R. §§ 123.63(a)(2)(i)]

8. In the Petition, Petitioners allege that the State of Alabama has failed to issue NPDES permits for dischargers with expired permits that are not administratively continued. Petition at 8, 12, Pet. Exhibit B-1.

9. The Petitioners provided a “partial list” of facilities which had expired on or before July 31, 2009 and which had not been closed, terminated, reissued, or administratively continued. Pet. Exhibit B-1. Petitioners noted that the data were compiled from three electronic databases (maintained by EPA and ADEM) that may not be 100% complete or accurate. The list identifies 115 facilities, of which 16 discharge into impaired waters. ADEM correctly notes that of these five permits were issued to Gulf of Mexico drilling operations. It should also be noted that one permit, AL0070742, was incorrectly identified as being expired when a current permit had been issued on October 31, 2007. Of the remaining 109 permits, ADEM indicates that they administratively extended 39, and terminated or “closed” 20. Forty-eight permits remain which are expired and have not been administratively continued, terminated or revoked.

10. ADEM Exhibit B-11 provides ADEM’s response to Pet. Exhibit B-1. Petitioners reply to ADEM’s Exhibit B-11 as follows:

AL0074233 K and S Sand and Gravel, Inc.

Permit expiration date 8/31/2007. ADEM denied a request for voluntary termination of this permit on 3/3/2008 due to deficiencies with the required remediation of the site. ADEM Exhibit B-11. The permit

has been expired now for 3 years and 1 month.

AL0074900 Miller Contract LLC.

Permit expiration date 10/31/2007. ADEM's efile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/5/2007 application due date. ADEM indicates that an application was received on 5/8/07 and that the permit has been delayed due to an April 2008 reorganization. ADEM Exhibit B-11. ADEM indicates that a draft permit was expected during the 2nd quarter of CY2010. Id. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 10 months.

AL0074985 Stacey Construction Company

Permit expiration date 10/31/2007. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/5/2007 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 10 months.

AL0066851 J.D. Dollar

Permit expiration date 12/31/2007. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 7/4/2007 application due date. ADEM issued a Notice of Violation for failing to submit a timely renewal application on 12/16/2008. Pet. Exhibit B-59. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 9 months.

AL0070807 Southeastern Sand and Gravel, LLC.

Permit expiration date 3/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/3/2007 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 6 months.

AL0075094 Birmingham Coal and Coke Company

Permit expiration date 6/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 3 months.

AL0075591 Highway Aggregates LLC

Permit expiration date 7/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 2 months.

AL0075442 Frontier Processing, Inc.

Permit expiration date 7/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not

contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 2 months.

AL0074560 J Mays LLC.

Permit expiration date 9/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 4/3/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years.

AL0075655 De Kalb County Commission

Permit expiration date 9/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 4/3/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years.

AL 0049760 Highmount Black Warrior Basin Company

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/4/2008 application due date. ADEM indicates that a renewal application was received on 8/1/2008 and that the permit has been delayed due to reorganizational delays in April 2008 and discussions with EPA regarding coalbed methane permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 11 months.

AL0071498 229 Materials LLC.

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/4/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 11 months.

AL0072192 Ronnie Wells Backhoe Service

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/4/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 11 months.

AL0075281 Jerry Williams Excavating

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/4/2008 application due date. ADEM issued a Notice of Violation on 5/19/2009 for, among other things, failing to submit a timely renewal application. Pet. Exhibit B-60. ADEM indicates that a renewal application was received on 6/3/2009 and that permit is delayed due to incomplete information

needed to process the application. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 11 months.

AL0075884 Rodney Jones

Permit expiration date 11/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 6/3/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 10 months.

AL0043524 Pickens Coal, Inc.

Permit expiration date 12/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 7/4/2008 application due date. ADEM issued a Notice of Violation for failure to submit a timely renewal application on 1/6/2009. Pet. Exhibit B-61. ADEM indicates that this permit has been delayed due to reorganizational delays in April of 2008 and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 9 months.

AL0072605 Reed Minerals, Inc.

Permit expiration date 12/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 7/4/2008 application due date. ADEM indicates that a renewal application was received on 11/25/2008 and that this permit has been delayed due to reorganizational delays in April of 2008 and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 9 months.

AL0029475 Jim Walters Resources

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date. ADEM indicates that a renewal application was received on 12/12/2008 and that the permit has been delayed due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 8 months.

AL0068527 Landry Company

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 8 months.

AL0040487 Frit Car and Equipment, Inc.

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date. ADEM indicates that a renewal application was received on 12/1/2008 and was delayed due to the April 2008 reorganizational delays. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 7 months.

AL0003735 Nucor Steel Birmingham, Inc.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/02/2008 application due date. ADEM indicates that a renewal application was received late on 10/03/2008 and that this permit has been delayed due to reorganizational delays and "complex permitting issues." ADEM Exhibit B-11. A correspondence dated 10/29/2008 indicates that as of that date ADEM had not yet received a complete application due to absent or incomplete discharge data and absent or incomplete anticipated discharge flow data. Pet. Exhibit B-71. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0054186 MS and R Equipment Company, Inc.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that an application was received on 1/15/2009 and that this permit has been delayed due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0059234 Swan Lake Trailer Park

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that no renewal application has been received. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0062855 Huxford Pole and Timber Company, Inc.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that an application was received on 10/16/2008 and that this permit has been delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 10/27/2008. Pet. Exhibit B-62. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. ADEM Exhibit B-11. There is no indication that a second draft permit has been issued. The permit has been expired now for 1 year and 6

months.

AL0064050 Southeastern Sand and Gravel, LLC.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that no renewal application has been received. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0065536 Stanton Sand and Gravel, Inc.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that no renewal application has been received. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0066371 William F. Morris

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that no renewal application has been received. ADEM Exhibit B-11. ADEM issued a Notice of Violation for failure to submit a timely application on 2/19/2010. Pet. Exhibit B-63. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 6 months.

AL0076104 Miller Contracting LLC.

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that a renewal application was received on 12/9/2009 and that this permit has been delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 7/16/2010. The permit has been expired now for 1 year and 6 months.

AL0066842 New Action Coal Mining Co., Inc.

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date. ADEM indicates that an application was received on 12/31/2008 and that this permit has been delayed due to reorganizational delays in April 2008 and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. Id. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 5 months.

AL0067831 Chemical Lime Company of Alabama

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not

contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 5 months.

AL0048488 Alabama Department of Conservation and Natural Resources

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that an application was received on 7/10/2009 and that this permit has been delayed due to the permittee failure to provide sufficient processing fees. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 7/1/2010 and revised on 9/23/2010. The permit has been expired now for 1 year and 4 months.

AL0072257 Blount Springs Materials, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that an application was received on 2/23/2009 and that this permit has been delayed due reorganizational delays in April 2008. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0076252 Geomet, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received late on 12/3/2008 and that this permit has been delayed due to reorganizational delays in April 2008 and discussions with EPA regarding coalbed methane permits. ADEM Exhibit B-11. ADEM indicated that a revised permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0063525 Birmingham Coal and Coke Company

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that no renewal application has been received. ADEM Exhibit B-11. ADEM issued a Notice of Violation for failure to submit a timely renewal application on 10/14/2009. Pet. Exhibit B-64. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 3 months.

AL0048071 Zarin Visram

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM issued a Notice of Violation for, among other things, failure to submit a timely application on 12/7/2009. Pet. Exhibit B-65. ADEM indicates that no application has been received. ADEM Exhibit B-11. There is no indication that a draft permit has been issued.

The permit has been expired now for 1 year and 3 months.

AL0057592 Cherokee County Water Authority

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM indicates that a renewal application was received on 2/8/2010. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 8/10/2010. The permit has been expired now for 1 year and 2 months.

AL0065170 Cooper Marine and Timberlands

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. A new permit was issued on 2/26/2010. The permit was expired for 10 months.

AL0000060 C.A. Langford Company, Inc.

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/4/2008 application due date. ADEM indicates that a renewal application was received late on 12/29/2008 and that this permit was delayed due to reorganizational delays. ADEM Exhibit B-11. A new permit was issued to the permittee on 4/29/2010. The permit was expired for 1 year and 6 months.

AL0044296 Dallas County Board of Education

Permit expiration date 6/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2008 application due date. ADEM issued a Notice of Violation for failure to submit a timely renewal application on 11/19/2008. Pet. Exhibit B-66. ADEM issued a Notice of Violation for, among other things, failure to submit a timely application on 10/20/2009. Pet. Exhibit B-67. ADEM indicates that a renewal application was received on 11/13/2009. ADEM Exhibit B-11. A new permit was issued on 4/27/2010. The permit was expired for 1 year and 9 months.

AL0044300 Dallas County Board of Education.

Permit expiration date 3/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/3/2007 application due date. ADEM issued a Notice of Violation for, among other things, failure to submit a timely application 10/20/2009. Pet. Exhibit B-67. ADEM indicates that a renewal application was received on 11/13/2009. ADEM Exhibit B-11. A new permit was issued on 4/27/2010. The permit was expired for 2 years.

AL0023906 Alabama Department of Conservation and Natural Resources

Permit expiration date 1/31/2009. ADEM issued a Notice of Violation for failure to submit a timely renewal application on 11/23/2009. Pet. Exhibit B-68. A new permit was issued on 8/24/2010. The permit was expired for 1 year and 7 months.

AL0024171 Town of Wedowee WS and GB

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date. ADEM indicates that a renewal application was received on 9/17/2008. ADEM Exhibit B-11. A new permit was issued on 9/23/2010. The permit was expired for 1 year and 4 months.

AL0049719 Marshall County Land Company

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date. ADEM indicates that a renewal application was received on 8/18/2009. ADEM Exhibit B-11. A new permit was issued on 5/25/2010. The permit was expired for 1 year and 3 months.

AL0057975 Ashville Manor, Inc.

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM indicates that a renewal application was received on 12/23/2009. ADEM Exhibit B-11. A new permit was issued on 6/24/2010. The permit was expired for 10 months.

AL0065226 Valley Lumber Company, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received on 8/14/2009 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A new permit was issued on 4/30/2010. The permit was expired for 10 months.

AL0066630 Township Services Corporation

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. A new permit was issued on 8/24/2010. The permit was expired for 1 year and 2 months.

AL0070289 Bunn Brothers Materials, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received on 4/14/2009 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM issued a Notice of Violation for, among other things, failure to submit a timely renewal application on 3/9/2009. Pet. Exhibit B-69. A new permit was issued on 9/29/2010. The permit was expired for 1 year and 3 months.

AL0072338 Rogers Group, Inc.

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 4/10/2009 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A new permit was issued on 9/29/2010. The permit was expired for 1 year and 2 months.

AL0075671 Madison Materials, Inc.

Permit expiration date 7/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/31/2009 application due date. ADEM indicates that a renewal application was received on 2/10/2009 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A new permit was issued on 3/30/2010. The permit was expired for 8 months.

AL0075680 Madison Materials, Inc.

Permit expiration date 7/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/31/2009 application due date. ADEM indicates that a renewal application was received on 2/10/2009 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A new permit was issued on 3/30/2010. The permit was expired for 8 months.

AL0076002 Rock Products, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2008 application due date. ADEM indicates that a renewal application was received on 12/18/2008 and that the permit was delayed due to reorganizational delays in April 2008. ADEM Exhibit B-11. A new permit was issued on 4/29/2010. The permit was expired for 11 months.

AL0025585 Alldyne Powder Technologies

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM indicates that the permit was closed in September 2009. ADEM Exhibit B-11. An inspection report dated 5/18/2010 indicates that the permit has been administratively extended. Pet. Exhibit B-70. The permit has been expired now for 1 year and 2 months.

AL0023094 Mobile Area Water and Sewer System

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM indicates that an application was received on 1/23/2009 and the permit was extended due to "water quality modeling issues." The permit has been expired now for 1 year and 2 months.

AL0048861 City of Alexander City

Permit expiration date 1/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2007 application due date. ADEM indicates that an application was received on 7/16/2007 and that this permit was administratively extended due to reorganizational delays and the start-up of a new NPDES database. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 8 months.

AL0054879 Lawrence County Board of Education

Permit expiration date 6/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2008 application due date. ADEM indicates that an application was received on 12/26/2007 and that this permit was administratively extended due to "issues with the Flint River TMDL". ADEM Exhibit B-11. A draft permit was issued to the permittee on 1/17/2008. The permit has been expired now for 2 years and 3 months.

AL0057428 City of Huntsville

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that an application was received on 9/11/2008 and that this permit was administratively extended due to reorganizational delays and the start-up of a new NPDES database. ADEM Exhibit B-11. A draft permit was issued to the permittee on 7/19/2010. The permit has been expired now for 1 year and 4 months.

AL0022659 Gadsden Wastewater and Sewer Board

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date. ADEM indicates that an application was received on 8/15/2008 and that this permit was administratively extended. ADEM Exhibit B-11. A new permit was issued on 6/24/2010. The permit was expired for 1 year and 1 month.

AL0045993 City of Pell City

Permit expiration date 6/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2008 application due date. ADEM indicates that an application was received on 12/20/2007 and that this permit was administratively extended. ADEM Exhibit B-11. A new permit was issued on 6/25/2010. The permit was expired for 1 year and 11 months.

AL0055042 City of Huntsville

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date other than a completed "NPDES and SID Fee Sheet" dated

9/11/2008. Pet. Exhibit B-72. ADEM indicates that an application was received on 9/11/2008 and that this permit was administratively extended due to reorganizational delays and the start-up of a new NPDES database. ADEM Exhibit B-11. A new permit was issued to the permittee on 9/23/2010. The permit was expired for 1 year and 4 months.

AL0076309 Glidewell Specialties Foundry Co.

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 12/31/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 4/30/2010. The permit has been expired now for 1 year and 3 months.

AL0002241 Cagles, Inc.

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 12/23/2008 and that this permit has been administratively extended due to incomplete information. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 3 months.

AL0020192 Albertville Municipal Utilities Board

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date. ADEM indicates that a renewal application was received on 10/31/2008. ADEM Exhibit B-11. A new permit was issued on 6/24/2010. The permit was expired for 1 year and 1 month.

AL0022837 Drummond Company, Inc.

Permit expiration date 12/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 7/4/2008 application due date. ADEM indicates that a renewal application was received on 6/23/2008 and that this permit has been administratively extended due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 9 months.

AL0023086 Mobile Area Water and Sewer System

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM indicates that a renewal application was received on 1/23/2009 and that this permit has been administratively extended due to reorganizational delays and the startup of a new NPDES database. ADEM Exhibit B-11. A draft permit was submitted to the permittee

on 8/10/2010. The permit has now been expired for 1 year and 1 month.

AL0023272 Degussa Corporation

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date. ADEM indicates that a renewal application was received on 8/23/2008 and that this permit has been administratively extended due to reorganizational delays and "complex permitting issues at the site." ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 7 months.

AL0024911 Alabama Department of Transportation

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/1/2008 application due date other than a completed "NPDES and SID Fee Sheet" dated 10/24/2008. Pet. Exhibit B-73. ADEM indicates that an application was received on 10/24/2008 and that this permit was administratively extended. ADEM Exhibit B-11. A new permit was issued to the permittee on 9/23/2010. The permit was expired for 1 year and 4 months.

AL0042960 Barfield Health Care, Inc.

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date other than a completed "NPDES and SID Fee Sheet" dated July 2008, Pet. Exhibit B-74, and a correspondence from ADEM to the permittee dated 9/17/2008 stating that department had not received the required application fees. Pet. Exhibit B-75. ADEM indicates that a renewal application was received on 1/31/2008 and that this permit was administratively extended. ADEM Exhibit B-11. A new permit was submitted to the permittee on 5/27/2010. The permit was expired for 1 year and 3 months.

AL0044067 City of Eutaw

Permit expiration date 12/31/2007. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 7/4/2007 application due date. ADEM's Efile system provides a correspondence from ADEM to the permittee dated 2/11/2009 indicating that as of that date the department had not yet received the required processing fees. Pet. Exhibit B-76. Correspondence from ADEM to the permittee dated 8/12/2009 indicates that as of that date ADEM had still not received the required processing fees. Pet. Exhibit B-77. A completed "NPDES and SID Fee Sheet dated 11/3/2009 indicates that as of that date ADEM had received the required processing fees. Pet. Exhibit B-78. ADEM indicates that a renewal application was received on 6/26/2007 and that this permit was administratively extended due insufficient fees and a need for additional water quality modeling. ADEM Exhibit B-11. A new permit was issued to the permittee on 6/24/2010. The permit was expired for 2 years and 5 months.

AL0048593 Decatur Utilities

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that a renewal application was received on 9/11/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008 and the startup of a new NPDES database. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has now been expired for 1 year and 6 months.

AL0053601 Lafarge Aggregates Southeast

Permit expiration date 6/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2008 application due date. ADEM indicates that a renewal application was received on 12/31/2007 and that this permit has been administratively extended due to reorganizational delays. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 3 months.

AL0055379 Bayou La Batre Utility Board

Permit expiration date 7/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2008 application due date. ADEM indicates that a renewal application was received on 12/17/2007 and that this permit has been administratively extended due to construction of the new wastewater plant in Bayou La Batre. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 2 years and 2 months.

AL0056073 Chemical Lime Company of Alabama

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date. ADEM indicates that a renewal application was received on 8/23/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 7 months.

AL0056839 Utility Board of Rainbow City

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date. ADEM indicates that a renewal application was received on 7/28/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008, the start up of a new NPDES Management System database, and water quality modeling issues. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 8 months.

AL0056855 City of Huntsville

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date other than a completed "NPDES and SID Fee Sheet" dated 12/14/2009. Pet. Exhibit B-79. ADEM indicates that an application was received on 5/12/2008 and that this permit was administratively extended. ADEM Exhibit B-11. A new permit was issued to the permittee on 6/24/2010. The permit was expired for 1 year and 4 months.

AL0057100 City of Tuscumbia

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. Correspondences from ADEM to the permittee dated 12/31/2009 and 3/8/2010 indicated that the application was incomplete due to insufficient processing fees. Pet. Exhibits B-80, X81. ADEM indicates that a renewal application was received on 9/2/2008 and that this permit has been administratively extended due to water quality modeling issues. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 9/22/2010. The permit has been expired now for 1 year and 6 months.

AL0057657 City of Attalla

Permit expiration date 1/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 8/4/2008 application due date. ADEM indicates that a *modification* application was received on 2/9/2004 and that this permit has been administratively extended due to water quality modeling issues and TMDL development. ADEM Exhibit B-11. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 8 months.

AL0063509 Union Foundry Company

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 12/31/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. A draft permit was submitted to the permittee on 8/10/2010. The permit has been expired now for 1 year and 3 months.

AL0064599 Alabama Power Company

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 12/31/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. A draft permit was submitted to the permittee on 6/18/2010. The permit has been expired now for 1 year and 3 months.

AL0071790 Alabama Department of Transportation.

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/1/2009 application due date. ADEM indicates that a renewal application was received on 12/18/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 3 months.

AL0072214 Vulcan Construction Materials

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2009 application due date other than a completed "NPDES and SID fee sheet" dated 1/22/2010. Pet. Exhibit B-82. ADEM indicates that a renewal application was received on 1/22/2009 and that the permit was administratively extended due to reorganizational delays in April 2008. A new permit was issued on 3/30/2010. The permit was expired for 7 months.

AL0072435 City of Huntsville

Permit expiration date 4/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 11/3/2008 application due date. Correspondence from ADEM to the permittee dated 3/18/2010 indicated that as of that date the application was incomplete due to insufficient processing fees. Pet. Exhibit B-83. ADEM indicates that a renewal application was received on 8/17/2008 and that the permit was administratively extended due to reorganizational delays in April 2008 and the start up of a new NPDES management system. ADEM Exhibit B-11. A draft permit was submitted to the permittee on 9/8/2010. The permit has been expired now for 1 year and 4 months.

AL0072524 Twin Pines Company

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received on 12/2/2008 and that this permit has been administratively extended due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0073067 MS and R Equipment Company, Inc.

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/2/2009 application due date. ADEM indicates that a renewal application was received on 12/4/2008 and that this permit has been administratively extended due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has

been issued. The permit has been expired now for 1 year and 2 months.

AL0075809 Cherokee Mining LLC.

Permit expiration date 10/31/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 5/5/2008 application due date. ADEM indicates that a renewal application was received on 4/29/2008 and that this permit has been administratively extended due to reorganizational delays and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year.

AL0075965 United Land Corporation

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received on 11/21/2008 and that the permit was administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a draft permit was expected during the 2nd quarter of CY2010. Id. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0076236 Twin Pines Coal Company, Inc.

Permit expiration date 5/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2008 application due date. ADEM indicates that a renewal application was received on 12/2/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008 and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0076473 Cherokee Mining LLC

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2009 application due date. ADEM indicates that a renewal application was received on 12/2/2008 and that this permit has been administratively extended due to reorganizational delays in April 2008. ADEM Exhibit B-11. ADEM indicated that a revised permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 3 months.

AL0076538 Quinton Mining, LLC

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2009 application due date. ADEM indicates that a renewal application was received on 1/2/2009 and that this permit has been administratively extended due to reorganizational delays in April 2008 and

discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0076538 Horse Creek Mining, LLC

Permit expiration date 6/30/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 1/2/2009 application due date. ADEM indicates that a renewal application was received on 1/2/2009 and that this permit has been administratively extended due to reorganizational delays in April 2008 and discussions with EPA regarding coal permits. ADEM Exhibit B-11. ADEM indicated that a revised coal permit was expected in the 2nd quarter of CY2010. There is no indication that a draft permit has been issued. The permit has been expired now for 1 year and 4 months.

AL0052213 City of Clanton

AL0052345 Perry County Water Authority

AL0053082 City of Tallassee

AL0075892 Talladega Water and Sewer Board

ADEM indicates that these permits have been terminated and that the facilities have general permits. ADEM Exhibit B-11. There is no indication on ADEM's eFile system or EPA's PCS or ECHO databases that these permits have been terminated or revoked.

AL0071064 City of Scottsboro SWDA.

Permit expiration date 11/30/2008. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 6/3/2008 application due date. ADEM indicates that this permit has been terminated and that the facility has a general permit. ADEM Exhibit B-11. There is no indication on ADEM's eFile system or EPA's PCS or ECHO databases that the permit has been terminated or revoked. A DMR report submitted by the permittee to ADEM on 7/12/2010 indicates that the permittee is continuing to discharge under this permit. Pet. Exhibit B-84. The permit has been expired now for 1 year and 10 months.

AL0002178 Department of the Army

Permit expiration date 2/28/2009. ADEM indicates that this permit was "closed" due to the issuance of a new NPDES permit from ADEM's municipal section 11/1/2004. ADEM conducted an inspection of this facility under permit AL0002178 on 4/19/2010 indicating that the facility may be continuing to discharge under this permit. Pet. Exhibit B-85. There is no indication that the permit has been legally terminated or revoked. The permit has been expired now 1 year and 7 months.

AL0042129 Dixie Springs Enterprises

Permit expiration date 3/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 10/2/2008 application due date. ADEM indicates that a renewal application was received on 2/6/2009 and that delay was due to reorganizational delays and discussions with EPA regarding coal

permits. ADEM Exhibit B-11. A review of ADEM's eFile system reveals that the permit was terminated on 1/12/2010. The Permit was expired 9 months.

AL0076414 Integra Water Creola, LLC

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. The permittee submitted a renewal application dated 3/27/2009. Correspondence dated 12/17/2009 requests termination of the permit. The permit was expired 5 months.

AL0068241 Limestone County Board of Education

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 2/1/2009 application due date. ADEM terminated the permit on 6/9/2010. Pet. Exhibit B-86. The permit was expired 11 months.

AL0056189 Merichem Chemicals and Refinery Services, LLC.

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date. ADEM indicates that the permit has been "closed." ADEM Exhibit B-11, however an inspection report dated 8/3/2010 indicates that permit remains open and states that the permittee has applied for a renewed permit. Pet. Exhibit B-87. There is no indication that the permit has been legally terminated or revoked. The permit has been expired now for 1 year and 7 months.

AL0070203 Victory, LLC.

Permit expiration date 2/28/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 9/1/2008 application due date. ADEM indicates that the permit has been "closed." ADEM Exhibit B-11.

AL0071161 E and D Land Company, Inc.

Permit expiration date 7/31/2009. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 3/1/2009 application due date. ADEM indicates that the permit has been "closed." ADEM Exhibit B-11. An inspection report dated 6/23/2009 indicates that this site is continuing to discharge from at least one outfall. Pet. Exhibit B-88. There is no indication that the permit has been legally terminated or revoked.

AL0042617 Las Brisas on the Bay.

Permit expiration date 9/30/2007. ADEM indicates that a this permit has been terminated. ADEM Exhibit B-11. ADEM's eFile system and EPA's PCS and ECHO databases do not contain any information as to the disposition of this permit.

AL0072095 Sartain Lumber Co.

Permit expiration 1/31/2009. ADEM indicates that a this permit expired and has been “closed.” ADEM Exhibit B-11.

AL0072231 Rogers Group, Inc.

Permit expiration date 5/31/2009. ADEM indicates that a this permit expired and has been “closed.” ADEM Exhibit B-11.

AL0074004 Silas Gary Borrow Pit

Permit expiration date 5/31/2006. ADEM’s eFile system and EPA’s PCS and ECHO databases do not contain any information regarding the existence of a complete and timely renewal application prior to the 12/2/2005 application due date. ADEM indicates that the permit has been “closed.” ADEM Exhibit B-11. ADEM issued a Notice of Violation dated 9/29/2006 indicating that the permittee was continuing to discharge after the permit expiration date. Pet. Exhibit B-89. Correspondence from ADEM to the permittee dated 12/28/2006 indicates that the permittee has applied for a permit renewal which was returned to the permittee due to the use of an incorrect form and insufficient processing fees. Pet. Exhibit B-90. ADEM issued a Notice of Violation dated 6/26/2007 for failure to submit DMRs which indicates that permittee was continuing to discharge under the expired permit as of this date. Pet. Exhibit B-91.

AL0074632 Tuscaloosa Resources, Inc.

Permit expiration date 5/30/2008. ADEM indicates that a this permit expired and has been “closed.” ADEM Exhibit B-11. An inspection report dated 12/11/2008 indicates that the permit area was reclaimed. Pet. Exhibit B-92. ADEM’s eFile system and EPA’s PCS and ECHO databases do not contain any further information regarding the disposition of this permit.

AL0075132 Southern Industrial Services

Permit expiration date 10/31/2008. ADEM indicates that a this permit expired and has been “closed.” ADEM Exhibit B-11. A correspondence from ADEM to the Permittee dated 12/1/2009 indicates that the department terminated the permit as of that date. Pet. Exhibit B-93.

AL0075311 Southern Alloy Corporation

Permit expiration date 10/31/2008. ADEM indicates that this permit expired and has been “closed.” ADEM Exhibit B-11.

AL0075485 Danny McMillan Logging, Inc.

Permit expiration date 7/31/2009. ADEM indicates that a this permit expired and has been “closed.” ADEM Exhibit B-11.

AL0070742 Taft Coal Sales and Associates

Permit expiration date 10/31/2012.

AL0076066 Marathon

AL0076074 Marathon

AL0076627 Hunt Oil
AL0076643 Marathon
AL0076651 Marathon

ADEM indicates that these are EPA administered permits. ADEM Exhibit B-11.

11. Additionally, Petitioners allege that the State of Alabama has failed to ensure that construction stormwater (CSW) dischargers who are engaged in construction disturbance activities or who have not completed reclamation of disturbed areas renew their expired registration. Petition at 8-12, Pet. Exhibits B-2 through B-58. In its response, ADEM fails to provide any information pertaining to this allegation. As ADEM points out, ADEM Admin. Code r. 335-6-12.11(3) requires a complete and correct NOR as well as full compliance with state construction stormwater regulation in order for the an operator to commence and/or continue construction disturbances in the absence of a renewed registration. Petitioners provided examples demonstrating specific instances where the State failed to ensure that CSW dischargers properly renewed expired registrations. Of the examples provided, ADEM submitted no response for permits ALR168117 (SDW, Inc.), ALR165712 (Southland Holdings, LLC), ALR164521 (Trick Construction and Development), and ALR10638 (Jones Property, LLC). For the remaining examples ADEM makes a point to highlight “errors” and “inaccuracies,” however ADEM consistently fails to refute Petitioners contention that these registrations stand as clear examples of the State’s failure to ensure that the CSW dischargers renew their expired registrations. To reiterate, Petitioners provide the following:

ALR165846 SDW, Inc.

This registration expired on Aug 31, 2006 without renewal or the submission of a complete and correct NOR. The registration was reissued on January 28, 2008. Petition at 8. The State failed to ensure that the operator renew the expired registration or cease operations for 514 days during which time the operator engaged in construction disturbance activity without a valid registration. This registration expired again on August 31, 2008 without renewal or submission of a complete

and correct NOR. The registration was reissued on June 10, 2009. Petition at 8. A complete and correct NOR was received by ADEM on June 10, 2009. ADEM Response at 17. The state failed to ensure that the operator renew the expired registration or cease operations for 282 days during which time the operator engaged in construction disturbance activity without a valid registration. This registration expired again on August 31, 2009 without renewal or submission of a complete and correct NOR. ADEM received a notice of termination on August 11, 2009. ADEM indicates that the department has not terminated the registration. Despite that construction disturbance activity was continuing on-site after August 31, 2009 (Pet. Exhibit B-10) and that reclamation remained incomplete (Pet. Exhibits B-11 and B-12), the State of Alabama affirmatively released SDW, Inc. from any requirement to maintain a valid registration or to complete reclamation. Petition at 9.

ALR16B471 Builders Group Development, LLC.

This registration expired on October 3, 2007 without being renewed and without the submission of a correct and complete NOR. The registration was reissued on November 27, 2007. Petition at 9. A complete and correct NOR was received by ADEM on November 27, 2007. ADEM Response at 17. The State failed to ensure that the operator renew the expired registration for 54 days during which time the operator engaged in construction disturbance activity without a valid registration.. This registration expired again on October 3, 2008 without renewal or the submission of a complete and correct NOR. Petition at 9. ADEM indicates that it has not yet received a complete and correct NOR. There is no indication that the registration has been reissued. In spite of Consent Order 08-183-CMNPS issued on July 28, 2008, the State has failed to ensure that the operator obtain and maintain a valid registration or cease operations now for 728 days.

ALR169357 Woodland Place, LLC

This registration expired on January 12, 2007, without being renewed and without the submission of a correct and complete NOR. ADEM issued a warning letter on January 19, 2007, and the registration was reissued on February 26, 2007. Petition at 10. The operator engaged in construction disturbance activities without a valid registration for 44 days. This registration expired again on January 12, 2008. ADEM issued a Notice of Violation (NOV) on January 25, 2008, and reissued the registration on February 20, 2008. Petition at 10. The operator engaged in construction disturbance activities without a valid registration for 38 days. ADEM issued Consent Order 08-202-CMNPS on September 5, 2008. Despite ADEM's previous enforcement actions, this registration expired again on January 12, 2009 without being renewed and without the submission of a correct and complete NOR. Petition at 10. A Consent decree was entered on February 25, 2010, for failure to comply with Consent Order 08-202-CMNPS. ADEM Response at 18. The operator engaged in construction disturbance activities without a valid registration for 409 days. In all, the operator engaged in construction disturbance activities without a valid registration for 491 days before being enjoined from further violations of the Alabama Water Pollution Control Act and its implementing regulations.

ALR168018 JD Development, LLC.

This registration expired on December 18, 2006, without being renewed and without the submission of a correct and complete NOR. ADEM issued an NOV on January 31, 2007, and the registration was reissued on March 28, 2007. Petition at 10. The operator engaged in construction disturbance activities without a valid registration for 99 days. This registration expired again on December 18, 2007, without being renewed and without the submission of a correct and complete NOR. ADEM issued a second NOV on January 18, 2008, and reissued the registration on February 28, 2008. Petition at 10. ADEM issued Consent Order 08-204-CMNPS on September 5, 2008. *Id.* Despite ADEM's previous enforcement actions, this registration expired again on December 18, 2009 without being renewed and without the submission of a correct and complete NOR. ADEM received an incomplete NOR on January 28, 2009, and has sent letters requesting additional information on July 8, 2009, and January 27, 2010. Pet. Exhibit B-94. There is no indication that the registration has been reissued. The State has failed to ensure that the operator obtain and maintain a valid registration or cease operation now for 652 days.

ALR162991 RBC Development, Inc.

This registration expired on August 4, 2004, without being renewed and without the submission of a correct and complete NOR. The registration was reissued on November 3, 2004. Petition at 12. The State failed to ensure that the operator renew the expired registration or cease operations for 91 days during which time the operator engaged in construction disturbance activity without a valid registration. This registration expired again on August 4, 2005 without being renewed and without the submission of a correct and complete NOR. ADEM issued NOV's on October 7, 2005, November 28, 2005, and June 14, 2007, and issued Administrative Order 10-032-WP on December 10, 2009. Petition at 12. ADEM received an incomplete NOR on December 11, 2009. ADEM Response at 20. There is no indication that the registration has been reissued. An inspection report dated May 14, 2010 indicates that the operator is continuing to engage in construction disturbance activities without a valid registration. Pet. Exhibit B-95. The state has failed to ensure that the operator obtain and maintain a valid registration or cease operations now for 1884 days.

12. As demonstrated herein, the State of Alabama has failed to exercise control over activities required to be regulated, including the issuance of permits. The consequence of this failure to ensure that permittees and operators obtain and maintain valid permits or registrations or cease operations is the continuing degradation of water quality in Alabama.

13. Where the State program fails to exercise control over activities required to be regulated under 40 C.F.R. Part 123, including failure to issue permits, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(i). Accordingly, the

EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

C. Failure of State to process in a timely manner and propose to issue, reissue, modify, or deny NPDES permits [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24 and 123.63(a)(4)]

14. In the Petition, Petitioners allege that the State of Alabama has failed to process in a timely manner and propose to issue, reissue, modify or deny NPDES permits contrary to the requirements of *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated). Petition at 12-13; Pet. Exhibit A-1 at 2. Although this *Memorandum of Agreement* was superceded by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), the new *Memorandum of Agreement* did not materially change this obligation. ADEM Exhibit A-1 at 4 (“the State will . . . [p]rocess in a timely manner and propose to issue, reissue, modify, terminate or deny State NPDES permits”).

15. The Petitioners provided a “partial” list of facilities with individual permits that have been administratively continued for more than one year without reissuance. Pet. Exhibit C. Petitioners noted that the data were compiled from three electronic databases (maintained by EPA and ADEM) that may not be 100% complete or accurate. The list identifies 12 major facilities, 10 minor facilities, and 28 municipal separate storm sewer permits in this circumstance.

16. ADEM Exhibit C-1 provides ADEM's response to Pet. Exhibit C. Petitioners reply to ADEM's Exhibit C-1 as follows:

AL0002887 Alabama Power Company (Major)

Permit expiration date January 31, 2008. ADEM indicates that "the permit should be placed on the April 2010 public notice." ADEM Exhibit C-1. ADEM failed to place a draft permit on the April 2010 public notice. ADEM also failed to place a draft permit on the May 2010 or June 2010 public notice. The draft permit was placed on public notice in July 2010. There is no indication that a final permit has been reissued. The permit has remained administratively continued now for more than 2 years and 7 months.

AL0040843 American Proteins, Inc. (Major)

Permit expiration date September 30, 2005. ADEM indicates that "the permit should be placed on the March 2010 public notice." ADEM Exhibit C-1. ADEM failed to place the permit on the March 2010 public notice. ADEM also failed to place the permit on the April 2010, May 2010, June 2010, July 2010, August 2010 and September 2010 public notice. The permit has remained administratively continued now for more than 4 years and 11 months.

AL0054640 City of Fayette (Major)

Permit expiration date August 31, 2007. ADEM notes that a draft permit was submitted to the permittee on February 10, 2010 (three weeks after the Petition was filed). A final permit was issued on May 25, 2010. The permit remained administratively continued for more than 3 years.

AL0041653 City of Hoover (Major)

Permit expiration date October 31, 2002. ADEM notes numerous activities that have been undertaken but offers no proposed notice or issuance date. Two of those activities were completed long ago: the Cahaba River Watershed nutrient TMDL was completed in September 2006 and rule revisions to clarify TMDL compliance schedule requirements were adopted in April 2008. ADEM notified the permittee on March 12, 2009 that a proposed compliance schedule for attaining compliance with the Cahaba River Watershed nutrient TMDL appeared satisfactory. The permit has remained administratively continued for more than 7 years and 10 months.

AL0023159 City of Lanett (Major)

Permit expiration date April 30, 2008. A final permit was issued on May 27, 2010. The permit remained administratively continued for more than 2 years.

AL0054666 City of Pelham (Major)

Permit expiration date March 31, 2008. ADEM notes numerous activities that have been undertaken but offers no proposed notice or issuance date. Two of those activities were completed long ago: the Cahaba River Watershed nutrient TMDL was completed in September 2006 and rule revisions to clarify TMDL compliance schedule requirements were adopted in

April 2008. ADEM notified the permittee on March 12, 2009 that a proposed compliance schedule for attaining compliance with the Cahaba River Watershed nutrient TMDL appeared satisfactory. The permit has remained administratively continued now for more than 2 years and 5 months.

AL0022578 City of Selma (Major)

Permit expiration date July 31, 2006. ADEM notes that a draft permit was noticed for comment on February 15, 2007. There is no indication that a final permit has been reissued. The permit has remained administratively continued now for more that 4 years and 1 month.

AL0067814 Enviro Services LLC (Major)

Permit expiration date April 30, 2005. ADEM notes numerous activities that have been undertaken but offers no proposed notice or issuance date. Two of those activities were completed long ago: the Cahaba River Watershed nutrient TMDL was completed in September 2006 and rule revisions to clarify TMDL compliance schedule requirements were adopted in April 2008. On February 3, 2009, ADEM requested that the permittee submit a new permit application. ADEM notified the permittee on March 12, 2009 that a proposed compliance schedule for attaining compliance with the Cahaba River Watershed nutrient TMDL appeared satisfactory. The permit has remained administratively continued now for more than 5 years and 4 months.

AL0022934 Jefferson County Commission (Major)

Permit expiration date January 31, 2006. ADEM notes numerous activities that have been undertaken but offers no proposed notice or issuance date. Two of those activities were completed long ago: the Cahaba River Watershed nutrient TMDL was completed in September 2006 and rule revisions to clarify TMDL compliance schedule requirements were adopted in April 2008. ADEM notified the permittee on March 12, 2009 that a proposed compliance schedule for attaining compliance with the Cahaba River Watershed nutrient TMDL appeared satisfactory. The permit has remained administratively continued now for more than 4 years and 7 months.

AL0022926 Jefferson County Commission (Major)

Permit expiration date September 30, 2007. A final permit was issued on February 22, 2010. No compliance schedule is included in permit. The permit remained administratively continued for more than 2 years and 4 months.

AL0020486 Tallassee (Major)

Permit expiration date April 30, 2008. A final permit was issued on May 27, 2010. The permit remained administratively continued for more than 2 years.

AL0045969 SWWC Utilities, Inc. (Major)

Permit expiration date October 31, 2002. ADEM notes numerous activities that have been undertaken but offers no proposed notice or issuance date. Two of those activities were

completed long ago: the Cahaba River Watershed nutrient TMDL was completed in September 2006 and rule revisions to clarify TMDL compliance schedule requirements were adopted in April 2008. ADEM requested a new permit application on February 3, 2009. On March 23, 2009, ADEM requested that a proposed compliance schedule for attaining compliance with the Cahaba River Watershed nutrient TMDL be confirmed or revised. The permit has remained administratively continued now for more than 7 years and 10 months.

AL0023761 City of New Hope

Permit expiration date March 31, 2008. A final permit was issued on May 25, 2010. The permit remained administratively continued for more than 2 years and 1 month.

AL0023361 City of York

Permit expiration date July 31, 2006. A final permit was issued on January 29, 2010, two weeks after the Petition was filed. The permit remained administratively continued for more than 3 years and 5 months.

AL0052841 City of York

Permit expiration date April 30, 2007. ADEM notes that the facility terminated operations in December 2009. The permit remained administratively continued for more than 2 years and 7 months.

AL0024805 Drummond Company, Inc.

Permit expiration date September 30, 2008. ADEM notes that it is in discussions with EPA over coal permits. ADEM offers no proposed notice or issuance date. The permit has remained administratively continued now for more than 1 year and 11 months.

AL0074039 Hope Coal Company, Inc.

ADEM correctly notes that this permit is not scheduled to expire until August 31, 2012.

AL0023922 Town of Berry

Permit expiration date July 31, 2007. A final permit was reissued on December 29, 2009. The permit remained administratively continued for more than 2 years and 4 months.

AL0020907 Town of Carrollton

Permit expiration date October 31, 2007. A final permit was reissued on July 29, 2010. The permit has remained administratively continued now for more than 2 years and 10 months.

AL0051845 Russell County Board of Education

ADEM notes that this permit was inactivated.

AL0059714 Town of Akron

Permit expiration date July 31, 2008. A final permit was reissued on June 25, 2010. The permit remained administratively continued for more than 1 year and 10 months.

AL0069035 Vulcan Construction Materials LP

Permit expiration date May 31, 2006. A final permit was reissued on March 30, 2010. The permit remained administratively continued for more than 4 years and 5 months.

ALS000005 Huntsville-Madison Phase I MS4

AL0000004 Montgomery/ALDOT Phase I MS4

ALS000002 Mobile Area Phase I MS4

These permits expired on September 30, 2006. ADEM indicates that extensive discussions with EPA and internal reorganization has delayed reissuance. These permits have remained administratively continued now for more than 3 years and 11 months.

AL000001 Birmingham Area Phase I MS4

Permit expired on October 31, 2006. ADEM indicates that extensive discussions with EPA and internal reorganization has delayed reissuance. This permit has remained administratively continued now for more than 3 years and 10 months.

ALR040032 Alabama Department of Corrections

ALR040002 Alabama Department of Transportation

ALR040030 Auburn University

ALR040003 City of Auburn

ALR040006 City of Decatur

ALR040007 City of Dothan

ALR040008 City of Florence

ALR040016 City of Muscle Shoals

ALR040019 City of Phenix City

ALR040023 City of Weaver

ALR040005 Colbert County Commission

ALR040026 Dale County Commission

ALR040009 Gadsden/Etowah Urbanized Area

ALR040010 Geneva County Commission

ALR040011 Lauderdale County Commission

ALR040012 Lee County Commission

ALR040013 Limestone County Commission

ALR040014 Madison County Commission

ALR040029 Maxwell AFB-Gunter Annex

ALR040035 Maxwell AFB-Maxwell Annex

ALR040015 Montgomery County Commission

ALR040025 Morgan County Commission

ALR040031 University of Alabama

ALR040033 U.S. Army Garrison-Redstone

Permit expiration date March 9, 2008. ADEM indicates that extensive discussions with EPA and internal reorganization has delayed reissuance. These permits have remained administratively

continued now for more than 2 years and 6 months.

17. The foregoing analysis demonstrates that ADEM has been incapable of reissuing “difficult” permits in a timely manner. As a result, older permits, often with inadequately protective discharge limitations and conditions, are allowed to continue in effect for many years. The consequence of this inaction by ADEM is continued failure to protect and improve water quality. The State of Alabama has failed to process in a timely manner and propose to issue, reissue, modify or deny NPDES permits contrary to the requirements of the *Memorandum of Agreement*. Where the State program fails to comply with the terms of the *Memorandum of Agreement* required under 40 C.F.R. §123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

D. Repeated issuance of permits by State which do not conform to the requirements of 40 C.F.R. Part 123 [40 C.F.R. §§123.25(a)(15), 122.44(d)(1)(vii)(B), and 123.63(a)(2)(ii)]

18. In the Petition, Petitioners allege that the State of Alabama 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). Petition at 13-16, Pet. Exhibit D. As an example, Petitioners referred to the State’s response to the 2004 *Total Maximum Daily Load for Metals, Pathogens, and Turbidity in the Hurricane Creek Watershed* (U.S. EPA, Region 4, October 2004). Pet. Exhibit D. Petitioners provided a list of 24 state issued construction stormwater registrations authorized

or re-authorized subsequent to the publication of the TMDL which clearly did not meet the prescriptions set forth in Section 6.2.1 of the TMDL. Petition Table 1 at 15-16.

19. Section 6.2.1 provides, in part:

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

Pet. Exhibit D at 22 (*emphasis added*)

20. The TMDL imposes clear requirements on the State in order for the State to rely on BMPs to meet the water quality-based effluent limitations for stormwater sources of turbidity. The TMDL requires the State to explain the reasons it expects authorized BMPs will achieve the aggregate wasteload allocations of the TMDL and to then perform ambient water quality monitoring for turbidity to determine the efficacy of those BMPs. Implicit in this TMDL is the requirement that the State first identify, and require as a permit condition, those BMPs that will achieve the aggregate wasteload allocation for storm water discharges.

21. ADEM's response to the petition highlights several shortcomings in the State's program. ADEM suggests that the department meets the requirements of the TMDL by requiring the registrant to submit, in the construction site Notice of Registration (NOR), a description of the BMP's to be utilized. ADEM Response at 24. ADEM then indicates that these proposed BMPs are reviewed by the department via a file review conducted during the processing of the NOR. *Id.* at 24-25. ADEM further indicates that they are exempt from the

explicit requirement to produce a permit fact sheet because the department utilizes a “permit by rule” process rather than an individual or general permit. *Id.* ADEM then suggests that the Department evaluates construction site activities on a “case-by-case basis” to determine whether individual permits are appropriate. *Id.*

22. Water quality-based effluent limits shall ensure that effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation of the discharge prepared by the state and approved by the EPA pursuant to 40 C.F.R. § 130.7. 40 C.F.R. § 122.44(d)(1)(vii)(B). With regard to the Hurricane Creek TMDL, ADEM’s program is clearly not consistent with the TMDL and is therefore not in compliance with 40 C.F.R. § 122.44(d)(1)(vii)(B). The TMDL sets very specific requirements that the State program in its current form does not meet. The State is required to identify those BMPs that will achieve the wasteload allocation and make implementation of these BMPs a condition of any discharge authorization. ADEM’s more general BMP requirement which places the responsibility on the registrant to identify the necessary BMPs does not suffice.

23. Under the TMDL, the State is required to provide an explicit explanation of how its chosen BMPs will meet the wasteload allocation. The State does not do this. The burden is clearly on the State to demonstrate the efficacy of any given BMP as it pertains to specific wasteload allocations in individual watersheds. A file review of a registrant’s proposed BMPs is not sufficient for this purpose. Finally, the State has an obligation under the TMDL to perform ambient water quality monitoring in order to determine whether the BMPs are “in fact achieving such aggregate wasteload allocation.” Pet. Exhibit D at 22. However, because ADEM is not

meeting its preliminary requirements to identify and explain the expectations for the BMPs required under the TMDL, the department “does not at this time have sufficient information correlating the actual effectiveness of BMPs utilized at individual construction sites [to the aggregate wasteload allocation]”. ADEM Response at 25.

24. The consequences of the failure of the State program are clear. As provided in the Petition, the State of Alabama has authorized or re-authorized at least 24 construction stormwater dischargers in the Hurricane Creek watershed without mandating *any* changes in BMPs necessary to achieve the required reduction in turbidity. Further, the State has not provided *any* explanation, in a fact sheet or otherwise, of the reasons the State of Alabama expects that the current regime of BMPs will achieve an aggregate 32% reduction in turbidity.

25. Hurricane Creek is indicative of a broader systemic failure of the State’s NPDES program in TMDL streams. ADEM’s indicates that 62% of the NPDES Permits, excluding MS4 permits covered by a TMDL approved during FY08 and prior, have been modified/issued/reissued to reflect TMDL requirements. A review of ADEM Exhibit D-1 reveals that the flaw in this statistic is that it only represents the individual or general permits which incorporate TMDL requirements. Of the 126 water bodies listed there are no actions attributed to construction stormwater registrations. Sixty-four water bodies, including all water bodies within the Hurricane Creek watershed, have no permits identified for point source reductions. When accounting for CSW operations, as ADEM must surely undertake to do as it moves forward with a construction stormwater general permit, the number of actions expands dramatically thereby significantly reducing the ratio of permit activities that incorporate TMDL requirements.

26. Whether the State chooses to call authorizations to discharge storm water pollutants “permits” or “registrations” and whether the State program is administered under individual permits, a general permit, or a “permit-by-rule” process is immaterial to the requirements set forth in the TMDL. The State is obligated under 40 C.F.R. § 122.44(d)(1)(vii)(B) to incorporate TMDL requirements in its NPDES program. As provided herein, the State has failed to incorporate TMDL requirements into its NPDES program.

27. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including repeated issuance of permits which do not conform to the requirements of 40 C.F.R. Part 123, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(ii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

E. Failure to provide required public notice of outfall locations [40 C.F.R. §§ 123.25(a)(28), 124.10(d), 123.63(a)(2)(iii)]

28. In the Petition, Petitioners allege that the State of Alabama has failed to include in public notices of draft permits “*a general description of the location of each existing or proposed discharge point and the name of the receiving water*” as required by 40 C.F.R. §§ 123.25(a)(28) and 124.10(d)(vii). Petition at 16-17. *See also National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), ADEM Exhibit A-1 at 11 (“The State shall give public notice in accordance with 40 C.F.R. Sections 124.10(c), (d) and

(e)"). The State has failed to include "a general description of the location of each existing or proposed discharge point." *See* copies of public notices from January 17, 2008 to December 15, 2009. Pet. Exhibit E.

29. ADEM's public notices include (1) the "[n]ame and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit," 40 C.F.R. § 124.10(d)(ii); (2) "[a] brief description of the business conducted at the facility or activity described in the permit application or the draft permit," 40 C.F.R. § 124.10(d)(iii); and (3) "the name of the receiving water." 40 C.F.R. § 124.10(d)(vii). Inclusion of these required items in a public notice does not satisfy the additional requirement to include "a general description of the location of each existing or proposed discharge point." 40 C.F.R. § 124.10(d)(vii).

30. ADEM's response to the Petition is that the items included in the public notices it publishes are sufficient to provide a "general" description of the location of each existing and proposed discharge point.¹ ADEM Response at 26-27. Apparently, ADEM believes that 40 C.F.R. § 124.10(d)(vii) is satisfied if the location of the facility and name of the receiving water are identified. However, ADEM ignores the plain language of 40 C.F.R. § 124.10(d) which requires that public notices include a general description of the existing and proposed discharge points *in addition to* the facility location and name of the receiving water.

31. ADEM also argues that "anyone" can obtain a very detailed description of the location of existing and proposed discharge points by accessing a website identified in the public notice. ADEM

¹ ADEM correctly states that a "general" rather than "specific" description of each existing or proposed discharge point is all that is required to be included in each notice. The Petition does not allege that the State of Alabama fails to include in public notices a "specific" description of all discharge points, but rather that the State fails to include even a "general" description of all

Response at 26-27. Once again, ADEM ignores the plain language of 40 C.F.R. § 124.10. Public notice, including a general description of all existing and proposed discharge points, is required to be provided to all persons on a mailing list, 40 C.F.R. § 124.10(c)(1)(ix), and to be published “in a manner constituting legal notice to the public under State law; . . .” 40 C.F.R. § 124.10(c)(3). Such notices do *not* include a general description of all existing and proposed discharge points and reference to a website does not satisfy the plain language of the rule. Moreover, ADEM assumes that “anyone” in Alabama has access to a computer and the internet. Only 50.5 to 55.8 percent of Alabama’s population uses the internet. *A Nation Online: Entering the Broadband Age* at Appendix Table 3, U.S. Department of Commerce (Sept. 2004), available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.htm>. “Alabama ranked forty-fourth among the 50 states on computer ownership and forty-third on home Internet access.” *Alabama Socioeconomic Briefs*, Center for Business and Economic Research, University of Alabama, available at http://cber.cba.ua.edu/rbriefs/abwin01_briefs.html.

32. The State of Alabama has failed to comply with the public notice provisions of 40 C.F.R. 124.10(d)(vii) as required by 40 C.F.R. § 123.25(a)(28) from January 2010 to September 2010. Pet. Exhibit E-2. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the public participation requirements of 40 C.F.R. § 123.25(a)(28), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES

discharge points.

program.

**F Failure of State to inspect and monitor activities subject to regulation:
Major dischargers [40 C.F.R. §§ 123.26(e)(5), 123.63(a)(3)(iii)]**

33. In the Petition, Petitioners allege that the State of Alabama failed to inspect major dischargers at least once per year as required by 40 C.F.R. § 123.26(e)(5). Petition at 17-19. The *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Pet. Exhibit F-3) demonstrates that the State of Alabama failed to inspect over 46% of major dischargers in 2008; *2008 State Summary Data for Clean Water Act National Pollutant Discharge Elimination System Majors, Fiscal Year 2008 Final Report* (U.S. EPA, July 2, 2009) (Pet. Exhibit F-4) demonstrates that the State of Alabama failed to inspect 43% of major dischargers in 2008; *Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2008* (Pet. Exhibit F-5) reveals that the State of Alabama failed to inspect 44% of major dischargers in FY 2008. In FY 2007, FY 2006, and FY 2005, the State of Alabama failed to inspect 12.6%, 8.4%, and 12.6% of major dischargers, respectively. *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Pet. Exhibit F-3).

34. ADEM does not deny the foregoing statistics. Instead, ADEM responds to the Petitioners allegations with two arguments. First, ADEM argues that Petitioners have mischaracterized a statement made by Chip Crockett in an electronic mail (Pet. Exhibit F-1) that EPA has established an inspection goal of 50% for major dischargers. ADEM Response at 27-28. Regardless of whether ADEM has adopted a “policy” of inspecting 50% of major dischargers each year or a minimum goal of inspecting 50% of major dischargers each year, the fact remains that ADEM has not inspected a large percentage of major dischargers contrary to

the requirements of 40 C.F.R. § 123.26(e)(5).

35. Second, ADEM argues that EPA only expects ADEM to inspect 50% of major dischargers each year. ADEM Response at 28. ADEM notes that recent annual Workplans prepared to obtain Clean Water Act Section 106 funds specify a minimum inspection goal of 50% of major dischargers each year. ADEM also notes that EPA's Office of Compliance and Enforcement policy establishes a similar goal. *Compliance Monitoring Strategy for the Core Program and Wet Weather Sources* (USEPA, Oct. 17, 2007) (available at <http://www.epa.gov/compliance/resources/policies/monitoring/cwa/npdescms.pdf>). Neither a Workplan developed by ADEM and EPA Region 4 nor an EPA Headquarters policy can alter the mandate for annual inspections of all major dischargers found in 40 C.F.R. § 123.26(e)(5). See *Legal Envtl. Assistance Found., Inc. v. United States Envtl. Protection Agency*, 276 F.3d 1253, 1263 (11th Cir. 2001) (EPA's construction of its regulations runs afoul of the plain language of the regulations and is therefore contrary to law). If EPA believes the annual inspection requirement should be modified, it must engage in rulemaking to amend 40 C.F.R. § 123.26(e)(5). *Warshauer v. Solis*, 577 F.3d 1330, 1337 (11th Cir. 2009) ("Congress directed [federal agencies] to follow the APA, 5 U.S.C. § 553, when . . . amending rules and regulations . . . The APA requires all federal agencies to publish proposed rules in the Federal Register in order to provide the public with notice and an opportunity to comment."). In the meantime, Alabama is required to maintain a NPDES program that includes annual inspections of all major dischargers.

36. The State of Alabama has failed to comply with the requirement for annual inspections of all major dischargers in 40 C.F.R. 123.26(e)(5). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the annual

inspection requirement of 40 C.F.R. § 123.26(e)(5), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

**G. Failure of State to inspect and monitor activities subject regulation:
Non-major dischargers [40 C.F.R. §§123.26(b)(2), 123.63(a)(3)(iii)]**

37. State NPDES programs must maintain a program for periodic inspections of the facilities and activities subject to regulation. 40 C.F.R. §123.26(b)(2). While the frequency of these inspections is not specified, the regulation provides a clear purpose for conducting these periodic inspections:

These inspections shall be conducted in a manner designed to: (i) Determine compliance or noncompliance with issued permit conditions and other program requirements; (ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and (iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information;

40 C.F.R. §123.26(b)(2)(i)-(iii).

38. The Petition demonstrates that the State of Alabama's program fails to meet federal requirements because inspections occur so infrequently that the State can not realistically determine compliance or noncompliance with permit conditions, verify the accuracy of submitted information nor verify the adequacy of sampling and monitoring activities. In many cases the period of inspection is so great that many facilities and activities are never inspected at

all. The State’s program for inspecting non-major dischargers is as follows: the State of 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 at 20-23); the State has adopted and is implementing policy whereby only 10% of all known construction stormwater (CSW) dischargers will be inspected each year (Petition at 23-24); and the State has adopted and is implementing a policy whereby only 60 concentrated animal feeding operation (CAFO) dischargers will be inspected each year (Petition at 24-25). This information was developed from multiple sources of information including *Electronic mail communication from Chip Crockett to David A. Ludder* (October 5, 2009) (Pet. Exhibit F-1) which describes ADEM’s policy to “evaluate...minors every five years roughly” in accordance with EPA FY2009 Section 106 Workplan agreement for the State of Alabama (Pet. Exhibit G-10²); *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 12, 2009) (Pet. Exhibit G-4) which describes ADEMs CSW inspection policy as requiring inspection of, at a minimum, “10% of the known universe each year”³; *Electronic Communication from Richard Hulcher to David A.*

² ADEM has not submitted their Enforcement Management System to EPA as required by the MOA. The EMS is a document outlining procedures, policies, etc., to be used by the State in conducting official business (e.g., inspections, enforcement actions, assessment of penalties, etc.). This deficiency was documented in the FY2008 § 106 Annual Report Checklist. Pet. Exhibit I-58 at 33. In the absence of a published EMS, Petitioners relied on communications with ADEM staff to ascertain ADEM’s current operating policies.

³ Interestingly ADEM freely uses the word “universe” in the both Petition Exhibits F-1 and G-4 as well as in their response to the Petition on page 37 to reference a given number of permits indentified for each year. However on page 33 of the State response they call into question the use of the term “universe” when used by Petitioners to ascertain the number of “valid registrations for each of the fiscal years 2004 through 2009” (Petition Exhibit G-5). Clearly both ADEM and the Petitioners use the term “universe” to mean permits or registrations for any given year. ADEM’s suggestion that the term can only be used by Petitioners to find a listing of current active permits on a given day is incongruent and obstructive.

Ludder (Oct. 13, 2009) (Pet. Exhibit G-7) which describes the ADEM’s CAFO inspection policy as requiring inspection of, at a minimum, “60 CAFO inspections to be performed each fiscal year”; and data reported by the EPA in *State Review Framework – CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3).

39. The Petitioners’ description of ADEM’s program for inspections of non-major dischargers is reinforced by the current MOA between EPA and the state which provides *inter alia*:

In accordance with the requirements contained in 40 C.F.R. § 123.26, the State shall maintain and implement an inspection and surveillance program to determine the compliance status of dischargers independent of information supplied by the dischargers. The State and EPA will develop, *as part of the State 106 Workplan*, an inspection plan of major dischargers proposed to be the subject of compliance audits and inspections and a projection of the number of minor dischargers to be inspected for the coming year (October through September).

* * *

Unless otherwise agreed to by EPA in writing, the state shall conduct compliance inspections as provided for in the State 106 Workplan.

National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV (April 11, 2008) p. 19 (ADEM Exhibit A-1) (emphasis added).

40. While ADEM repeatedly objects that Petitioners have “extrapolated” the State program from communications from senior officials in the department in response to specific requests for information, ADEM provides no information that suggests that these statements are incorrect nor does the department provide any information suggesting that there is another program or policy by which the State should be evaluated. Absent the existence of this undisclosed program, ADEM’s insistence that the responses of Mr. Crockett and Mr. Hulcher do

not reflect the actual state program suggests that the State of Alabama does not have a program for inspections of non-major dischargers as required under 40 C.F.R. 123.26(b)(2).

41. Regardless of whether ADEM is operating under the policy described in the Petition, ADEM's record of inspection for all classes of non-major dischargers demonstrates the State's failure under 40 C.F.R. 123.26(b)(2). ADEM does not dispute the Petition's information regarding the failure to inspect a high percentage of non-major dischargers with individual permits from FY2005 to FY2008. ADEM does not dispute the Petition's information regarding the low number of CSW inspections conducted for each year between FY2005 and FY2009 nor does the department provide any information which suggests that the number of CSW is in anyway adequate to meet the federal requirements or that the universe of valid registrations for each of the fiscal years 2004 through 2009 cannot be adequately estimated using ADEM's 2007 report *Construction Stormwater Program Update, 2007 Business Council of Alabama Environment and Energy Conference* (ADEM 2007). Pet. Exhibit G-6. ADEM does not dispute the Petition's information regarding the number of CAFO inspections conducted for each year from FY2005 to FY2009. Rather, ADEM highlights that at the current rate of inspection the department will inspect each permitted CAFO every 4.25 years rather than the Section 106 Workplan timeframe of 7.7 years. Neither timeframe is adequate for the purposes described under 40 C.F.R. §123.26(b)(2). Finally ADEM disputes the Petition's contention that the State of Alabama failed to inspect 99.4% of all non-major dischargers with general NPDES permits in FY2008. ADEM indicates that the State only has 2,835 non-major dischargers with general NPDES permits rather than the 6,049 which is reported in the *State Review Framework-CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Pet. Exhibit F-3). ADEM

provides no support for this number which is wildly divergent from previous years as reported by EPA. *Id.* EPA's report on the universe of NPDES regulated facilities for 2010 indicates that Alabama has 6,052 non-major dischargers with active general permits. *NPDES Facilities Regulated by EPA, States, and Territories* (U.S. EPA, June 2010) (Pet. Exhibit G-11). ADEM also indicates that the inspection coverage for non-major dischargers with NPDES general permits was 10.63% and 14.12% for FY2007 and FY2008 respectively rather than 8.4% and 0.6% as reported from EPA. ADEM Response at 37-38. Again, the State provides no support for these figures nor does ADEM explain the methodology by which they arrived at these numbers.

42. Additionally, ADEM insists that the State's inspection coverage for non-major individual permits is comparable to other states. This is immaterial and unconvincing. Whether the inspection coverage for non-major dischargers achieved by other states is worse than Alabama's is irrelevant to the disposition of the Petition. The Petition seeks to commence proceedings to withdraw approval of *Alabama's* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama's program. Moreover, it should be obvious that another state's lesser inspection coverage does not justify Alabama's failure to comply with the federal regulations.

43. The State of Alabama has not maintained a program for periodic inspections 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). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123,

including failure to inspect and monitor activities subject to regulation, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(ii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

H Failure of State to maintain procedures for receipt and consideration of alleged violations by public [40 C.F.R. §§ 123.26(b)(4), 123.27(d)(2)(i), 123.63(a)(2)(iii)]

44. In the Petition, Petitioners allege that the State of Alabama fails to make available information on violation reporting procedures and does not acknowledge receipt of complaints, provide complainants with copies of inspections reports, or provide complainants with copies of enforcement actions or decisions not to commence enforcement actions. Petitioners allege that these failures do not conform to the requirements of 40 C.F.R. § 123.26(b)(4) (State NPDES programs must have procedures for receiving and ensuring proper consideration of information submitted by the public about violations, must encourage public effort in reporting violations, and must make available information on reporting procedures). Petition at 27.

45. With the exception of the electronic complaint submission form on its website, ADEM has not demonstrated that it encourages public effort in reporting violations or makes available information on reporting procedures. Indeed, Petitioners, who are probably the most informed members of the “public,” are not aware of any information made available by ADEM on violation reporting procedures – except for the electronic complaint submission form. The information made available by ADEM in the electronic complaint submission form alone is not

adequate because only 50.5 to 55.8 percent of Alabama's population uses the internet, *A Nation Online: Entering the Broadband Age* at Appendix Table 3, U.S. Department of Commerce (Sept. 2004), available at <http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.htm>, and because "Alabama ranked forty-fourth among the 50 states on computer ownership and forty-third on home Internet access," *Alabama Socioeconomic Briefs*, Center for Business and Economic Research, University of Alabama, available at http://cber.cba.ua.edu/rbriefs/abwin01_briefs.html. ADEM has not identified any procedures that it makes available to the public for submission of written, fax, telephone, or in-person complaints. ADEM has failed to make available information on violation reporting procedures that would benefit the 45 to 50 percent of Alabama's population that does not have access to ADEM's website.

46. ADEM also claims that "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." ADEM Response at 40. If the foregoing procedures exist, they are, in Petitioners' experience, rarely followed. For example, Petitioner Friends of Hurricane Creek has filed numerous complaints with photographs via email regarding several construction stormwater sites impacting a sediment-impaired water. ADEM failed to perform inspections following receipt of most of these complaints and almost never contacted the complainant. Pet. Exhibits H-S1.

47. Numerous individuals who filed complaints via the complaint submission form on ADEM's website concerning a landfill never received any response from ADEM. In fact, when Petitioners' attorney made a public records request for complaints filed via the complaint

submission form concerning the landfill, ADEM's initial response was that there were none. Only after Petitioners' attorney notified ADEM's Director of this discrepancy did ADEM locate the complaints and perform an inspection of the facility.

48. Moreover, ADEM implicitly admits that it does not provide written responses to all citizen complaints submitted. Rather, ADEM states that "[t]he results of investigations are available for viewing by the public at the ADEM website or through requests for file reviews" ADEM Response at 40. Complainants should not have to own a computer with internet access or file a public records request or know the facility name or permit number to obtain a response to a complaint.

49. The State of Alabama has failed to comply with the requirements of 40 C.F.R. 123.26(e)(5) that it implement procedures for receiving and ensuring proper consideration of information submitted by the public about violations, for encouraging public effort in reporting violations, and making available information on reporting procedures. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.26(e)(5), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

I. Failure of State to monitor activities subject to regulation [40 C.F.R. §§123.26, 123.63(a)(3)(iii); Memorandum of Agreement]

50. State NPDES programs are required to have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports). 40 C.F.R. §§ 123.26(a). As ADEM has suggested this has been required now for decades. *See National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (Pet. Exhibit A-1). Although this *Memorandum of Agreement* was superseded by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), the new *Memorandum of Agreement* did not materially change this obligation.

51. The new *Memorandum of Agreement* provides:

[The State will] comprehensively evaluate and assess compliance with permit conditions (e.g. effluent limits and compliance schedules) and any applicable enforcement action as outlined in Section V of this MOA

Memorandum of Agreement, Section III. A. 5. (April 11, 2008) (ADEM Exhibit A-1 at 4);

For all major dischargers and those other dischargers or types of dischargers identified in the State 106 Workplan, the State will update ICIS-NPDES...with the information necessary to determine if

- a. any required self monitoring reports (including DMRs or other reports required to be submitted pursuant to a permit or an applicable administrative or judicial enforcement action are submitted on time;
- b. the submitted reports are complete; and
- c. the permit conditions (e.g., effluent limits and compliance schedules) of requirements of an applicable administrative or judicial enforcement action are met.

Memorandum of Agreement, Section V.B.1. (April 11, 2008) (ADEM Exhibit A-1 at 16-17)l

The State will conduct a timely and substantive review of all [self monitoring reports] and all independently gathered information to evaluate the discharger's compliance status

Memorandum of Agreement, Section V. B. 2. (April 11, 2008) (ADEM Exhibit A-1 at 17)⁴;

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 [Significant Non-Compliance], 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. This response shall be documented in the compliance and/or enforcement file *within sixty (60) days* of identification of the violation.... The date of identification of the violation is the point at which the state enforcement staff learns of the violation. *The State shall make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time.*

Enforcement actions determined to be appropriate by the State with respect to [all other violations] should be commenced and completed within a reasonable amount of time

Memorandum of Agreement, Section VI. A. 3,4. (April 11, 2008) (ADEM Exhibit A-1 at 21-22)

(*emphasis added*), and

[T]he State shall submit to EPA for review and comment a current [Enforcement

⁴ This section also refers to ADEM's Enforcement Management System. In its response ADEM states, "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." ADEM Response at 45. In fact, in the *Final State Review Framework Report – Round 2* (U.S. EPA, Region 4, Sep. 17, 2010) finds:

6. ADEM has not submitted their Enforcement Management System (EMS) to EPA, as required by Task 24 and the EPA/Alabama NPDES MOA. A copy of the EMS was viewed during the SRF on site visit. However, the EMS has not been submitted to EPA as required by the Grant Workplan (also documented in the FY 2008 § 106 Annual Report Checklist for ADEM)

SRF Report – Round 2, CWA Element 4 Completion of Commitments, pp 32-33. Pet. Exhibit I-58. This is one of several factors which led EPA to give the State an "Area for State Improvement" mark for Completion of Commitments. Given this discrepancy it is inappropriate for ADEM to stand behind its EMS as evidence of compliance with the current MOA.

Management System (EMS)]. The EMS is a document outlining procedures, policies, etc., to be used by the State in conducting official business (e.g., inspections, enforcement actions, assessment of penalties, etc.). Such procedures and policies with respect to enforcement shall be consistent with EPA's "Enforcement Response Guide" for the NPDES program and shall include application of technical review criteria for screening the significance of violations, procedures and time frames for selecting appropriate initial and follow-up response options to identified violations, and procedures for maintaining a chronological summary of all violations...

Memorandum of Agreement, Section V. E. (April 11, 2008) (ADEM Exhibit A-1 at 20)

(emphasis added)

52. ADEM has not submitted their EMS to EPA as required by the MOA. This deficiency was documented in the FY2008 § 106 Annual Report Checklist. Pet. Exhibit I-58 at 33. In the absence of a published EMS, Petitioners relied on communications with ADEM staff to ascertain ADEM's current operating policies. ADEM's current policy regarding receipt and evaluation of Discharge Monitoring Reports was described in an email correspondence between Chip Crockett, head of the NPDES Compliance and Enforcement Branch of the Water Division at ADEM, and David Ludder, Attorney for the Petitioners. Pet. Exhibit F-1. When specifically asked what constitutes a "compliance evaluation," Mr Crockett provided the following:

The 50% and 20% [inspection] goals are part of our workplan commitments and do refer to onsite inspections. A compliance evaluation typically follows after the inspection is received and evaluated by my enforcement staff. As such, the answer to your question is the same – we evaluate majors at least every 2 years and minors every five years, roughly. I say roughly because in cases where the inspection occurs very late in the year, the final evaluation may not be completed until early in the following year (e.g. an October evaluation completed after a September inspection).

Id.

53. Mr Crockett's response is clearly a description of ADEM's organizational

practice and policy. The response from Mr. Crockett regarding construction stormwater (CSW) dischargers was similar (Pet. Exhibit G-4), as was the communication from Richard Hulcher to David Ludder in response to a question forwarded to Mr. Hulcher from Mr. Crockett (Pet Exhibit G-7). ADEM provides no information that suggests that these statements are incorrect nor does the department provide any information suggesting that there is another program or policy by which the State should be evaluated. ADEM's only reference in its response to actual procedures for their compliance evaluation program is the claim that "the department reviews DMRs for all major dischargers as timely as available resources will allow." ADEM Response at 46. This statement is vague and un-measurable and is therefore clearly insufficient for the purposes of establishing the existences of a working compliance evaluation program. Unless ADEM has another, yet undisclosed, program, ADEM's insistence that the responses of Mr Crockett and Mr. Hulcher are not to be relied upon as descriptions of the State's program suggests that the State of Alabama does not actually have a program for evaluating compliance as required in the MOA and 40 C.F.R. 123.26(a) . Whether Mr Crockett was describing ADEM's policy or a minimum requirement imposed on the department by the EPA, the consequences of ADEM's program have been a systematic delay in enforcement responses for self-reported violations. Petitioners provided data compiled from EPA's ECHO database as well as 12 examples of the real world effect of ADEM's program. Petition at 29-36. ADEM made no attempt to refute any of this information.

54. Additionally, ADEM insists that the State's compliance evaluation program is

adequate simply because the numbers of informal actions are comparable to other states.⁵ This is immaterial and unconvincing. Whether the numbers of informal actions taken by other states are greater or less than the number taken by Alabama's is irrelevant to the disposition of the Petition. The Petition seeks to commence proceedings to withdraw approval of *Alabama's* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama's program. Moreover, it should be obvious that less enforcement action in another state's does not justify Alabama's failure to comply with the MOA between the State and EPA or federal regulations.

55. While ADEM's response contains several laudable propositions for future improvements, ADEM presented no information that the State currently has adequate procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittee and others. As demonstrated in the Petition, the State of Alabama has failed to comprehensively evaluate and assess compliance with permit conditions (e.g. effluent limits and compliance schedules) and any applicable enforcement action as outlined in Section V of the MOA; failed to conduct timely and substantive review of all self monitoring reports received and to evaluate the permittee's compliance status; failed to screen all Discharge Monitoring Reports (DMRs) from permittees to determine the level and frequency of violations; and, in the case of violations by a major dischargers, or other dischargers or types of dischargers identified in the state 106 Workplan, or for a violations that would cause a facility to be in [Significant Non-Compliance], the State fails to determine within thirty (30) days the appropriate

⁵ Rather than presenting evidence of a functioning State program, ADEM's graphs actually serve to highlight precisely how precipitous the fall in informal actions was between FY2005 and

initial response to the violations and, where the State has determined an enforcement action is appropriate, to commence such appropriate enforcement action within thirty (30) calendar days of its determination of the initial response; the State fails to document these responses in the compliance and/or enforcement files within sixty (60) days of identification of the violation; the State fails to make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time; and for enforcement actions determined to be appropriate by the State with respect to [all other violations] the state fails to commence and complete such actions within a reasonable amount of time as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), Sections II, IV, and V (ADEM Exhibit A-1)

56. Where the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. § 123.24, or where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including 40 C.F.R. §123.26(a) the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

J. Failure of State to maintain a vigorous program of taking timely and appropriate enforcement action [Memorandum of Agreement; 40 C.F.R. §§123.21(a)(4), 123.63(a)(4)]

FY2008. ADEM Response at 47-48.

57. The State of Alabama is required under the Memorandum of Agreement between the State and the United States Environmental Protection Agency dated April 11, 2008, to “Maintain a vigorous program of taking timely and appropriate enforcement action” against all dischargers found to be in violation of either state or federal regulations. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section III. A. 6.* (April 11, 2008) (ADEM Exhibit A-1 at 4).

58. Since the filing of the Petition, ADEM has made noticeable progress in identifying certain violations and responding with more appropriate enforcement actions (e.g., cease work orders at construction stormwater (CSW) sites). For this, ADEM should be commended. To the extent that these improvements reflect changes in official policy or procedure these should be captured in a new Memorandum of Agreement between the State and EPA.

59. Unfortunately, on the whole, the State’s program remains deficient, and, absent corrective action, warrants withdrawal of the States NPDES program. This corresponds to findings which were recently reported in the State Review Framework – Round 2 published by EPA Region 4. In this report, the EPA found that “Alabama does not take timely enforcement action for [Significant Non-Compliance (SNC)] in accordance with [Clean Water Act (CWA)] policy.” *Final State Review Framework Report – Round 2* (U.S. EPA, Region 4, Sep. 17, 2010) (Pet. Exhibit I-58 at 41). While the sampling size of the EPA’s review is troublingly small (the selected files did not contain any non-SNC violators), the data showed that 36.3% of SNCs had

untimely enforcement action, with a follow up review, conducted to test the accuracy of the data, finding that 66% of the departments enforcement actions were not timely. *Id.* The EPA asserts that “ADEM should implement procedures to ensure that timely enforcement is taken in accordance with CWA policy.” *Id.* at 42.

60. The EPA-ADEM MOA requires:

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 [Significant Non-Compliance], 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. This response shall be documented in the compliance and/or enforcement file *within sixty (60) days* of identification of the violation.... The date of identification of the violation is the point at which the state enforcement staff learns of the violation. *The State shall make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time.*

Enforcement actions determined to be appropriate by the State with respect to [all other violations] should be commenced and completed within a reasonable amount of time

If an initial response action by the State proves not to be effective in bringing the discharger into compliance within the *required of a reasonable time period*, timely and appropriate enforcement action *requires that the State or EPA shall follow up with other more significant enforcement mechanisms to achieve timely and appropriate compliance*

National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section VI. A. 3,4,5. (April 11, 2008) (ADEM Exhibit A-1 at 21-22) (*emphasis added*).

70. While allowing for an expanded level of discretion in the State’s determinations of and responses to violations the current MOA and *National Pollutant Discharge Elimination*

System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV (undated) (Pet. Exhibit A-1) which it superseded are fundamentally the same. ADEM's rote comparisons simply detract attention from the overwhelming evidence of the programs deficiencies described in the petition.⁶

71. As provided in *Partial List of Failure to Take Enforcement Action Against Violators of Permits and Program Requirements* (Pet. Exhibit J-1)⁷, the State of Alabama failed to take any enforcement action against certain violators of permits and program requirements. Of the 19 examples provided by the petition, ADEM only identified three that have had enforcement action taken after information included in the Petition was collected:

AL0003603 Mobile Paperboard Corp

Mobile, AL

Three Mile Creek (impaired water)

Violations commenced on or before 7/2006. ADEM's eFile system reveals that an ENOV was issued on 11/23/2009. Pet. Exhibit J-6.

AL0000221 National Aeronautics and Space Administration

Marshall Space Flight Center - Redstone Arsenal, AL

Unnamed Tributary of Huntsville Spring Branch

Violations commenced on or before 9/2008. Violations continued thereafter. ADEM's eFile system reveals no enforcement action.

AL0047546 Bradford Parkside Health Services

Bradford Health Services WWTP - Warrior, AL

Thomas Creek

Violations commenced on or before 2/2008 and continued through 4/2009. ADEM's eFile

⁶ For instance, the replacement of the phrase "as quickly as possible" in Section V.A.III in the original MOA with "within a reasonable amount of time" in Section VI.A.4 does very little to alter the State's responsibilities to address violations within a timeframe that allows for meaningful and effective remediation and deterrence. As demonstrated in Petition Exhibit J-4, ADEM's response to violations is neither quick nor reasonable.

⁷ ADEM's assertion that the permits in Pet. Exhibit J-1 are not major dischargers is confusing. No where in the MOA nor in Federal, or State law is ADEM provided the option to take no enforcement action solely on the basis that the violator is not a major discharger.

system reveals that an ENOV was issued on 1/12/2010. Pet. Exhibit J-7.

72. As provided in *Partial List of Untimely Enforcement Actions Taken Against Major Dischargers* (Pet. Exhibit J-2), the State of Alabama failed to take timely enforcement action against certain violators of permit and program requirements. For six of the 18 examples provided, ADEM alleges that the Petition mistakes the type of enforcement action taken. ADEM does not provide any evidence to dispute the Petitioners' allegation that the actions taken were untimely. ADEM's suggestion that EPA is "satisfied with its response to date" (ADEM Response at 55) is belied by EPA's findings in the State Review Framework. Pet Exhibit I-58.

73. As provided in *Partial List of Inappropriate Enforcement Actions Taken Against Major Dischargers* (Pet. Exhibit J-3), the State of Alabama failed to take appropriate enforcement action against certain violators of permit and program requirements. Of the 13 examples provided, ADEM alleges that the Petition mistakes the type of enforcement action taken. ADEM does not provide any evidence to dispute the Petitioners' allegation that the enforcement actions were inappropriate for securing compliance.

74. As provided in *Failure to Take Enforcement Action Against Non-major Dischargers* (Pet. Exhibit J-4), the State of Alabama failed to take timely enforcement action against certain non-major discharger that had violated permit and program requirements. Petitioners provided 94 examples of cases where the State failed to take timely enforcement action after the State became aware that the discharger failed to submit a date related report; failed to submit a self-monitoring report; failed to meet an effluent limitation; or, where previous enforcement action was not effective, the State failed to timely follow-up with formal

enforcement mechanisms. ADEM does not provide any evidence to dispute the Petitioners' allegation that their enforcement actions were timely or that the Department commenced and completed the enforcement actions in a reasonable amount of time.

75. As provided in *Partial List of Inappropriate Enforcement Action Taken Against Non-major Dischargers* (Pet. Exhibit J-5), the State of Alabama failed to take appropriate enforcement action against certain non-major dischargers that had violated permit and program requirements. Petitioners' provided 48 examples of cases where the State repeatedly took informal enforcement actions that were previously not effective in securing compliance; where the State repeatedly issued administrative orders that were previously not effective in securing compliance; or where the State allowed excessive compliance schedules. ADEM does not provide any evidence to dispute the Petitioners' allegation that their enforcement actions were inappropriate for securing compliance.

76. As provided in *Partial List of Major and Non-major Dischargers in Violation of Compliance Schedules Established by Administrative Orders* (Pet. Exhibit B-1), the State of Alabama failed to take appropriate enforcement action against certain major and non-major dischargers in violation of compliance schedules established by administrative orders. Petitioners' provided 38 examples of cases where the State took no action or ineffective informal action against dischargers found to be in violation of compliance schedules. ADEM does not provide any evidence to dispute the Petitioners' allegation that their enforcement actions were inappropriate for securing compliance.

77. The Petition also brings to light the troubling ADEM policy memorandum *Guidance Memorandum #105: Compliance and Enforcement Strategy* which has led to a

precipitous reduction in the number of administrative penalty orders issued by ADEM. (Petition at 40-41). This “strategy” “afford[s]” up to 10 minor violations in a twelve month period to regulated facilities before that facility is subject to further enforcement action. Pet Exhibit I-1 at 4. This policy is reinforced with the “guidance” that no enforcement decision is required until “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.” Pet Exhibit I-1 at 4, ADEM Response at 53. The *Compliance and Enforcement Strategy* also directs that “[i]n no event shall a facility receive more than one Warning Letter during a twelve month period without approval of such deviation by the Director,” and “[i]n no event shall a facility receive more than one NOV in a twelve month period before more stringent enforcement methods are initiated unless deviation is approved by the director.” Pet. Exhibit I-1 at 7. However, the *Compliance and Enforcement Strategy* fails to dictate what enforcement response ADEM will pursue if violations continue after issuance of a Warning Letter or Notice of Violation. This strategy quite clearly undermines ADEM’s requirements under the Clean Water Act and *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section III. A. 6.* (April 11, 2008) (ADEM Exhibit A-1 at 4). ADEM has given no indication that this policy has been revised or repealed under the current Administration.

78. Additionally, ADEM insists that the State’s program should be evaluated in light of other States. While this may indeed be instructive to the department for the purposes of seeing how other agencies are structuring their programs, it is wholly immaterial to this discussion. Whether the numbers of enforcement actions taken by other states are greater or less

than the number taken by Alabama's is irrelevant to the disposition of the Petition. The Petition seeks to commence proceedings to withdraw approval of *Alabama's* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama's program. Moreover, it should be obvious that less enforcement action in another state's does not justify Alabama's failure to comply with the MOA between the State and EPA or federal regulations.

79. As demonstrated in the Petition the State of Alabama has failed to maintain a vigorous program of taking timely and appropriate enforcement action as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV*, (April 11, 2008) (ADEM Exhibit A-1). Where the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. § 123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

**K. Failure of State to seek adequate enforcement penalties:
Computation of violations of average limits [40 C.F.R. §§ 123.27(c),
123.63(a)(3)(ii)]**

80. In the Petition, Petitioners assert that the State of Alabama fails to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c). Petition at 42-43. Specifically, Petitioners assert that in proceedings to enforce the Clean Water Act, a

violation of a weekly average and monthly average discharge limitation is counted as a violation for each day of the week or month, *see Interim Clean Water Act Settlement Policy* (U.S. EPA, 1995) at Attachment 1 (Pet. Exhibit K-1); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2 1128, 1139-1140 (11th Cir. 1990) (monthly average violations to be counted as violation of each day of month), whereas in proceedings to enforce state law, the State of Alabama has historically counted a violation of a weekly average or monthly average discharge limitation as a single violation subject to a penalty.

81. Petitioners cited a number of judicial complaints in support of their assertion. *State of Alabama ex rel Troy King v. Utilities Board of the City of Bayou La Batre*, Case No. 02-CV-2007-901219 (Complaint filed Sept. 28, 2007) (Pet. Exhibit K-2); *State of Alabama ex rel Troy King v. City of Reform*, Case No. 54-CV-2009-900044 (Complaint filed Oct. 28, 2009) (Pet. Exhibit K-3); *State of Alabama ex rel Troy King v. City of Dothan*, Case No. 38-CV-2008-900196 (Complaint filed June 10, 2008) (Pet. Exhibit K-4); *State of Alabama ex rel Troy King v. Town of Millry*, Case No. 65-CV-2009-900047 (Complaint filed Aug. 17, 2009) (Pet. Exhibit K-5). In each of these judicial complaints, the State and ADEM alleged that defendant committed violations of monthly and weekly average limits during many months and weeks and sought unspecified penalties for these alleged “violations.”⁸ The State and ADEM made no attempt to seek penalties for each day of the month or week that an average limit was violated. On the other hand, computation of violations in accordance with Clean Water Act methods would yield

⁸ The mere fact that the State and ADEM sought *unspecified* penalties does not comply with 40 C.F.R. § 123.27(c) (“A civil penalty . . . sought . . . by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation”).

greater liability for penalties. *See Mobile Baykeeper Notice of Intent to Sue Bayou La Batre* (August 1, 2007) (Pet. Exhibit K-6); *Conservation Alabama Foundation, Inc. Notice of Intent to Sue City of Reform* (August 28, 2009) (Pet. Exhibit K-7); *Conservation Alabama Foundation, Inc. Notice of Intent to Sue Town of Millry* (June 18, 2009) (Pet. Exhibit K-8).

82. In the context of administrative penalties, Petitioners have similarly found that ADEM does not count weekly and monthly average limit violations as violations for each day of the week or month. *See e.g.*, City of Rainsville, Order 10-149-CWP (July 16, 2010) (102 discharge limitation violations calculated by ADEM; minimum of 175 discharge limit violations per CWA calculation method; \$18,750 penalty assessed for discharge limit violations) (Pet. Exhibit K-9); The Town of Hayneville, Order No. 10-125-WP (June 20, 2010) (13 effluent limit violations calculated by ADEM; minimum of 184 effluent limit violations per CWA calculation method; \$4,500 penalty assessed for effluent limit violations) (Pet. Exhibit K-10); National Coal of Alabama, Inc., Consent Order 11-003-CWP (Oct. 1, 2010) (545 effluent limit violations calculated by ADEM; minimum of 9,758 effluent limit violations per CWA calculation method; \$123,500 penalty proposed for effluent limit violations and \$43,600 credit for settlement) (Pet. Exhibit K-11). *See* Letter from Black Warrior Riverkeeper to ADEM (September 3, 2010) (Pet. Exhibit K-12) (criticizing ADEM calculation of violations in National Coal of Alabama proposed order).

83. ADEM does not dispute the Petitioners' assertion that ADEM does not count weekly and monthly average limit violations as a violation for each day of the week or month. ADEM Response at 59-60. Indeed, ADEM recently explained its rationale regarding monthly average violations as follows:

ADEM Admin. Code r. 335-6-6-.02 defines the monthly average limitation as being the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges over a calendar month divided by the number of daily discharges measured during that month. Because the monthly average limitation can only be calculated once per month over the entire range of daily discharges in that month, a violation of the monthly average permit limitation can not mathematically occur more than once per month. The Department believes the number of violations cited in the Order is logical and consistent with Alabama law.

Response to Comments, Special Order by Consent between ADEM and National Coal of Alabama, Inc. (Sept. 29, 2010) (Pet. Exhibit K- 13).

84. In its Response to the Petition, ADEM asserts that (1) it is not required to count violations in the same manner as required by the Clean Water Act, and (2) penalties sought and assessed are “appropriate to the violation” because ADEM weighs violations of average limits more heavily than violations of daily limits. ADEM Response at 60.

85. 40 C.F.R. § 123.27(a)(3)(I) requires that states have authority to assess or sue to recover civil penalties “in at least the amount of \$5,000 a day *for each violation.*” (Emphasis added). For a penalty to be “appropriate” to a continuing violation, the number of days of violation must be appropriately calculated. 40 C.F.R. § 123.27(b)(1) (“The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.”). Thus, for a violation of a monthly average limit, the state must have authority to seek an aggregate penalty of \$155,000 (31 days x \$5,000 per day). Without such authority, the state NPDES program is not consistent with 40 C.F.R. Part 123. If ADEM counts a violation of a monthly average limitation as one violation, under state law it can assess a maximum of only \$25,000. Ala. Code § 22-22A-5(18)c. Accordingly,

ADEM's failure to calculate weekly and monthly average violations as a violation for each day of the week or month means that, in a case where the maximum penalty is appropriate, the aggregate penalty will not be appropriate.

86. Finally, ADEM claims that it weighs monthly average limit violations more heavily than daily limit violations but offers no evidence to support its claim. ADEM Response at 60. Available evidence demonstrates that ADEM's claim lacks merit. In *City of Rainsville*, Order 10-149-CWP (Pet. Exhibit K-9), *The Town of Hayneville*, Order No. 10-125-WP (Pet. Exhibit K-10), and *National Coal of Alabama, Inc.*, Consent Order 11-003-CWP (Pet. Exhibit K-11), ADEM Penalty Calculation Worksheets show that all effluent limit violations (daily, weekly average or monthly average) are assessed the same penalty amount, *i.e.* there is no distinction between daily and weekly average or monthly average limit violations. ADEM's contrary claim is not supported by the evidence.

88. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

L. Failure of State to seek adequate enforcement penalties: Identification of all violations [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

89. In the Petition, Petitioners assert that the State of Alabama fails to identify all violations and all violation-days in enforcement actions and, as a consequence, fails to seek adequate enforcement penalties as required by 40 C.F.R. § 123.27(c). Petition at 43-46. In addition, *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), requires that state enforcement actions are not appropriate if they do not “address all identified violations” ADEM Exhibit A-1 at 21. Petitioners cite Consent Order 09-104-CWP (Pet. Exhibit L-1) and Order 08-203-MNPS (Pet. Exhibit B-7)⁹ as examples of cases where ADEM failed to identify all violations. ADEM responds to Petitioners’ assertion by suggesting that the disagreement between Petitioners and ADEM is solely about the quality of the evidence available to support findings of violations. ADEM’s response is misleading and without merit.

90. In the case of the City of Tuscaloosa, Consent Order 09-104-CWP finds that “[a]ll discharges from Outfalls 001-1 and 002-1 into the Black Warrior River and Cribbs Mill Creek, respectively, have been unpermitted since the expiration date of the permit” (August 31, 2005), Consent Order 09-104-CWP (Pet. Exhibit L-1) at ¶¶ 7 and 10, but fails to identify any such discharges. ADEM conveniently neglects to mention that documentation of discharge data collected by the City of Tuscaloosa during the time it was unpermitted was submitted to ADEM in a Notice of Intent to Sue served by Conservation Alabama Foundation, Inc. on March 30, 2009 (Pet. Exhibit L-6). These data show discharges from January 2006 to December 2008.

⁹ *Friends of Hurricane Creek v. Alabama Dep’t of Env’tl. Mgmt.*, Docket No. 09-02 (Ala. Env’tl. Mgmt. Comm’n, *revs’d* Case No. 03-CV-2009-001320 (Montgomery County Cir. Ct. Mar. 10, 2010), *appeals docketed* Nos. 2090633/2090646 (Ala. Civ. App. Apr. 1, 2010).

Such data are publicly available. *See* Online Tracking System (OTIS) (<http://www.epa-otis.gov/cgi-bin/effluentsquery.cgi>). In fact, the data in OTIS show discharges from September 2005 through August 2009 and beyond. No doubt, ADEM has possession of or access to the same discharge data independent of the data submitted on behalf of Conservation Alabama Foundation, Inc. In addition, Consent Order 09-104-CWP finds that the City had Sanitary Sewer Overflows (SSOs) but failed to identify them. Once again, the Notice of Intent to Sue served by Conservation Alabama Foundation, Inc. on March 30, 2009 (Pet. Exhibit L-6) identified 23 specific days when SSO discharges without a permit occurred. These data were tabulated from reports submitted to ADEM by the City and publicly available on ADEM's e-File website. Pet. Exhibit S-8. Thus, ADEM failed to "address all identified violations" in Consent Order 09-104-CWP and failed to seek adequate enforcement penalties as required by 40 C.F.R. § 123.27(c).

91. With respect to Order No. 08-203-MNPS issued to SDW, Inc., ADEM responds that it could only cite SDW for best management practices (BMP) violations observed by ADEM personnel. ADEM Response at 61-62. But the Petitioners did not assert that SDW should be cited for additional BMP violations. Rather, Petitioners assert that the evidence adduced at hearing showed that SDW engaged in construction/land disturbance activity without the required NPDES registration on 519 days, whereas Order No. 08-203-MNPS cited SDW for only one day of construction/disturbance activity without the required NPDES registration. Self-inspection reports required to be created by SDW and maintained at the construction site demonstrate that SDW engaged in construction/land disturbance activity on many days during times that SDW lacked an NPDES registration. Testimony by SDW's president and inspector confirmed the violations. ADEM could have simply asked SDW for its self-inspection reports and identified

many more than one day of violation. In addition, ADEM cited SDW for failure to submit certifications of compliance by a Qualified Credentialed Professional “as of May 16, 2008.” Order 08-203-MNPS (Pet. Exhibit B-7) at ¶¶ 12 and 13. The Order failed to identify exactly when the certifications were due to be submitted and how many days SDW was in violation for failure to submit them. The testimony of ADEM employees at hearing established when the certifications were due and that SDW was in violation through September 5, 2008. The number of violation-days (953) were known to ADEM but not identified in the Order. Thus, ADEM failed to “address all identified violations” in Consent Order 09-104-CWP and failed to seek adequate enforcement penalties as required by 40 C.F.R. § 123.27(c).

92. Petitioners presented two orders to illustrate that ADEM often does not identify all violations and consequently does not seek adequate enforcement penalties as required by 40 C.F.R. § 123.27(c). Another such order is Southeastern Cheese, LLC, Order No. 10-112-WP. Pet. Exhibit L-7. Conservation Alabama Foundation commented on the draft order as follows:

Failure to Include All Violations in Enforcement Action

In Paragraph 5 of ADEM’s Findings, the Order states, “The DMRs submitted to the Department by the Permittee for the months of March 2008 through June 2009 indicate that the Permittee has discharged pollutants into the WWTP’s collection system in violation of the discharge limitations established in the Permit. The months the violations occurred along with the parameters violated are listed in Attachment 1.” However, Attachment 1 of the Order only lists violations from February 2009 (not March 2008) through June 2009. Also, neither the Order nor Attachment 1 includes the total number of violations that ADEM purports to enforce with this action. Additionally, the violations committed by the Permittee have persisted beyond June 2009, at least through November 2009, yet none of these violations were listed in the Order or Attachment 1. All of these ambiguities must be clarified in order for ADEM to effectively prosecute all of the violations for the past two years at this facility. For your convenience, the table attached to this letter summarizes all of the violations at the facility from March 2008 through November 2009 (more recent DMRs were neither available on ADEM’s efile website, nor by request with ADEM’s records office).

(Pet. Exhibit L-8). We are sure that there are many more such orders. *See e.g., Memorandum to Enforcement and Administrative Penalties Stakeholders Committee* (January 10, 2005) (Pet. Exhibit L-9).

93. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c) because the State failed to address all violations. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

M. Failure to seek adequate enforcement penalties: Two year limitation period [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

94. In the Petition, Petitioners assert that the State of Alabama fails to assess, seek or agree to administrative or judicial penalties for any violations occurring more than two years prior to the commencement of the administrative or judicial action. Indeed, the State is prohibited from doing so by Ala. Code § 22-22A-5(18)(c). On the other hand, EPA can assess, seek or agree to penalties for any violations occurring up to five years after the alleged violation. 28 U.S.C. § 2462.

95. In its response to the Petition, ADEM argues that Alabama is not required to have the same statute of limitations as applies to the Clean Water Act. ADEM Response at 63-64.

However, 40 C.F.R. § 123.27(c) requires that a civil penalty assessed, sought, or agreed upon by the State Director under 40 C.F.R. § 123.27(a)(3) shall be “appropriate to the violation.” ADEM cannot assess, seek, or agree to any penalty at all for violations that are more than two years old. The inability of ADEM to assess, seek or agree to any penalty at all for some violations does not comply with 40 C.F.R. § 123.27(c).

96. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

N. Failure to seek adequate enforcement penalties: Recovery of economic benefit [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

97. In the Petition, Petitioners assert that the State of Alabama fails to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c). Specifically, Petitioners assert that “civil penalties appropriate to the violation” requires consideration of the economic benefit resulting from failure to comply with the law. Petition at 47-50. Although Ala. Code § 22-22A-5(18)c. requires that, in determining the amount of any penalty, ADEM shall consider “the economic benefit which delayed compliance may confer upon [the violator],” ADEM routinely concludes that “[t]he Department has been unable to

ascertain if there has been a significant economic benefit conferred by the delay of compliance with permit limitations” or that “[t]he Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator’s failure to comply with applicable regulatory requirements and delayed response to the noted violations.” Petition at 49.

98. ADEM suggests that Petitioners insist that ADEM use the BEN model to calculate economic benefit. ADEM Response at 64. This is not true - nothing in the Petition suggests that BEN is the only or even the preferred method of calculating economic benefit. However, the statutory mandate that ADEM “consider” economic benefit in determining the penalty amount does not allow ADEM to merely momentarily contemplate the economic benefit. The statutory mandate also does not allow administrative officials to ignore economic benefit because they believe the resources required to determine economic benefit are excessive. *See* ADEM Response at 65. *See also Alabama Dep’t of Env’tl. Mgmt. v. Wright Bros. Constr. Co., Inc.*, 604 So.2d 429, 433 (Ala. Civ. App. 1992) (“It is obvious from the language of this section that these factors were intended to provide a list of criteria for the Department to consider prior to assessing a fine or a penalty for a violation”); *Alabama Dep’t of Env’tl. Mgmt. v. Teasley-Mill Water Sys., Inc.*, 537 So.2d 57, 58 (Ala. Civ. App. 1988) (“the criteria for assessing or recovering such a penalty are also set out by statute”). Nor does the statutory mandate allow ADEM to “holistically” consider all penalty factors at once in determining the incremental increase above the minimum penalty. ADEM Response at 65. *See Wright Bros. Constr. Co., Inc.*, 604 So.2d 429 (incremental increase in minimum penalty based on holistic approach is unlawful). ADEM’s consistent failure to determine economic benefit results in arbitrary

determinations of penalty amounts.

99. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

**O. Failure to seek adequate enforcement penalties: Degree of culpability
[40 C.F.R. §§ 123.27(c), 123.63(a)(a)(ii)]**

100. In the Petition, Petitioners assert that the State of Alabama fails to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c). Petition at 50-52. Specifically, Petitioners assert that administrative penalty orders issued by ADEM routinely fail to comply with the requirement of Ala. Code § 22-22A-5(18)c. to consider the standard of care manifested by the violator (*i.e.*, culpability) in determining the amount of the penalty. Instead, ADEM typically concludes that the violator failed to properly maintain its wastewater treatment plant to ensure compliance with permit limitations and conditions or did not exhibit a standard of care commensurate with applicable regulatory requirements. Petitioners identify seventeen such orders. Petition at 51. This, Petitioners argue, is not a statement of the standard of care manifested by the violator, but rather a statement that the

violator has failed to meet the strict liability standard of care required by state law of all dischargers. Petition at 51. ADEM's perverse interpretation and application of state law results in every violator being treated the same. That results in civil penalties that are not appropriate to the violation.

101. ADEM's response questions Petitioners' conclusion that state law imposes strict liability. ADEM Response at 67. If it does not, then the Alabama NPDES program fails to comply with 40 C.F.R. § 123.27(b)(2) ("The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act"); *Kelly v. United States Env'tl. Protection Agency*, 203 F.3d 519, 522 (7th Cir. 2000) (the Clean Water Act imposes strict liability); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir.1979) (same); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir.1979) (same); *Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir.1979) (same). ADEM misses the Petitioners' point. The purpose of the statutory requirement to consider the standard of care manifested by the violator in determining penalty amounts is to punish intentional violators more harshly than negligent violators and negligent violators more harshly than innocent violators. ADEM refuses to do this and imposes civil penalties that are not appropriate to the violation.

102. ADEM also says that the requirement of 33 U.S.C. § 1319(g) to consider "the degree of culpability" is not applicable to the State. It is made applicable to the State by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008),

ADEM Exhibit A-1 at 21-22, which says that a State enforcement action cannot be appropriate unless it “[s]eeks or imposes, where appropriate, penalties consistent with 40 C.F.R. § 123.27 and the factors set forth in Sections 309(d) [33 U.S.C. § 1319(d)] and 309(g)(3) [33 U.S.C. § 1319(g)(3)] of the CWA and applicable State statutes.”

103. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

P. Failure to seek adequate enforcement penalties: Consistency with past penalties [40 C.F.R. §§ 123.27(c), 123.63(a)(a)(ii)]

104. In the Petition, Petitioners assert that the State of Alabama fails to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c). Petition at 50-52. Specifically, Petitioners assert that the State of Alabama often assesses inadequate penalties for violations because it impermissibly considers, and places heavy emphasis on, consistency with previous penalty assessments for similar violations. Consistency with previous penalty assessments is not a criterion that may lawfully be considered in determining penalty amounts. Ala. Code § 22-22A-5(18)c. Consistency can be achieved if the State of Alabama routinely adheres to a penalty calculation methodology. However, the State of Alabama does not

have such a methodology, and instead, determines penalties on an *ad hoc* basis with heavy emphasis on consistency with previous penalties.

105. ADEM responds that, contrary to Petitioners' assertion, it has a penalty calculation methodology. ADEM Response at 68; ADEM Exhibit N-1. ADEM Exhibit N-1 is not a methodology; it is a sample penalty calculation worksheet. It does not explain *how* to determine the penalty amounts for "Seriousness of Violation & Base Penalty;" it does not explain *how* to determine a penalty amount for "Standard of Care," "History of Previous Violations," "Economic Benefit," "Mitigating Factors," "Ability to Pay," or "Other Factors." All ADEM Exhibit N-1 does is show the factors that should be considered and illustrate how the data should be presented. What is needed in Alabama is a penalty policy that informs agency personnel, regulated parties and the public *how* (*i.e.*, describe the process) ADEM will determine a penalty amount for each factor. For example, the policy should explain *how* ADEM will calculate the incremental penalty increase attributable to "Standard of Care" – Will it be a percentage of the penalty amount attributable to Seriousness of the Violation & Base Penalty amount? Will the percentage vary for different standards of care (intentional, negligent, innocent)? The policy should explain *how* ADEM will determine "Economic Benefit" and calculate the incremental penalty increase attributable to "Economic Benefit."

106. ADEM's failure to develop a penalty policy was highlighted in the *Final Report and Recommendations of the Enforcement and Administrative Penalties Stakeholders Committee to the Alabama Environmental Management Commission* (April 2005) (Pet. Exhibit P-1).

The Committee finds that:

Historically, insufficient guidance has been provided to ADEM officials on how

to calculate a penalty amount taking into consideration the six penalty factors set forth in Section 22-22A-5(18)c of the Alabama Environmental Management Act. A recently prepared document was submitted to the Committee offering further detail on what ADEM officials consider; however this document still does not provide sufficient guidance to ADEM officials on how the factors should be applied or the penalty amount calculated.

The Committee recommends that:

Guidance and methodologies be developed that are sufficient to permit ADEM officials to be consistent in the manner by which they calculate a penalty amount taking into consideration "the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty." Ala. Code § 22-22A-5(18)c. A good example of such guidance reviewed by the Committee is the Connecticut Department of Environmental Protection's Civil Penalty Policy (found at dep.state.ct.us/enf/policies/civpenpol.pdf).

Id. at 9-10.

107. EPA itself has recognized that ADEM does not have a penalty policy. In 2006

Alabama Environmental Protection Division State Review Framework Report (EPA Jan. 2007)

(Pet. Exhibit P-2), EPA said:

Notwithstanding ADEM's consideration of these six factors, ADEM does not have a written penalty policy. A key element of EPA's penalty policy not captured in the above state code is how to compute dollar amounts for each factor. Having such computations is vital to an equitable implementation of penalties.

Id. at 8.

EPA has encouraged ADEM in the past to adopt a penalty policy that meets minimum federal stringency requirements and provides for the documentation of penalty and economic benefit calculations.

Alabama has recognized the need for developing a written penalty policy and has initiated actions to address EPA's recommendations. ADEM's Director and

Deputy Director have been coordinating with the Commission in drafting a penalty policy. When finalized, EPA will monitor application of the policy to ensure that timely and appropriate enforcement responses are taken, including appropriate penalties, and where actions are not timely or appropriate, EPA will consider escalation of enforcement response as provided under the EMS and related policies.

Id. at 26.

108. In lieu of applying a penalty policy to a given violation, ADEM has elevated “consistency” with past penalties as the single most important factor to be considered in determining a penalty amount. *See Testimony of Steven Jenkins, Friends of Hurricane Creek v. Alabama Dep’t of Env’tl. Mgmt.*, EMC Docket No. 09-02 (May 6, 2009), Petition at 53-54. However, consistency with past penalties is not a factor that ADEM is authorized to consider. *See Ala. Code § 22-22A-5(18)c.* A penalty should, by happenstance, be consistent with past penalties if it is the result of applying a penalty policy in a consistent manner. This argument is in accord - not in discord - with EPA’s *Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policy on Civil Penalties* (Feb. 16, 1984) cited by ADEM. ADEM Response at 69.

109. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c) because ADEM has unlawfully considered consistency with past penalties to be the most important determinant of the penalty amount. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to

address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

Q. Failure to seek adequate enforcement penalties: Stipulated penalty for future violation [40 C.F.R. §§ 123.27(c), 123.63(a)(ii)]

110. In the Petition, Petitioners assert that the State of Alabama routinely assesses stipulated penalties for future violations without consideration of the penalty criteria in Ala. Code § 22-22A-5(18)c. to the circumstances of the violations. As a result, the State of Alabama assesses inadequate penalties for future violations. Petition at 55-56.

111. Petitioners first observe that ADEM does not have authority to assess penalties for future violations. Petition at 55 n. 1. Second, ADEM cannot determine the penalty amount without consideration of all the penalty criteria in Ala. Code § 22-22A-5(18)c. These include seriousness of the violation, efforts to mitigate or minimize effects of the violation, standard of care manifested by the violator, economic benefit to the violator, history of previous violations, and ability to pay.

112. ADEM submits that it assesses stipulated penalties for future violations only when those violations are of milestone dates imposed by the same administrative order. ADEM Response at 70. ADEM argues that all the facts and circumstances relevant to each penalty criterion are known at the time the stipulated penalty is assessed except the number of days of violation. ADEM Response at 70-71. This cannot be possible. ADEM cannot know what efforts a violator may undertake in the future to mitigate or minimize the effects of a future failure to meet a milestone date. ADEM cannot know the standard of care that will be manifested by the violator in the future in failing to meet a future milestone date. ADEM cannot

know the economic benefit that will be conferred on the violator by his failure to meet a future milestone date until that benefit accrues. ADEM cannot know the violator's history of previous violations or ability to pay on a future date. ADEM can consider these penalty criteria only after the violator fails to meet a milestone date. Moreover, the public cannot make meaningful comments on the application of penalty criteria to facts and circumstances that have not yet occurred. ADEM's failure to appropriately apply the penalty criteria to violations of milestone dates results in penalties that are not appropriate to the violations.

113. The State of Alabama has failed to seek civil penalties that are appropriate to the violation as required by 40 C.F.R. § 123.27(c) because ADEM has unlawfully considered consistency with past penalties to be the most important determinant of the penalty amount. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the requirements of 40 C.F.R. § 123.27(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

R. Failure to State to timely prosecute cases [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24, 123.63(a)(4)]

114. In the Petition, Petitioners assert that the State of Alabama has failed to timely prosecute cases for NPDES violations as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section V.C. (Pet. Exhibit A-1).

Petition at 56-60. Although this *Memorandum of Agreement* was superseded by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), the new *Memorandum of Agreement* did not materially change this obligation. ADEM Exhibit A-1 at 22 (“The State shall make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time”).

115. Petitioners cited ten cases where they allege that the State has failed to timely prosecute violators of NPDES requirements. Petition at 57-60. In seven of the cases involving the Alabama Department of Corrections, the State judicial action has been pending for five years with no obvious intention to resolve the remaining penalty claim. ADEM and the Attorney General approved the transfer of operational responsibility for treatment plants or the transfer of wastewater to other treatment plants so the Department of Corrections would not be responsible for wastewater treatment. In five of these cases, the new treatment plant operator continued to experience violations. Thus, ADEM and the Attorney General failed to prosecute the penalty claim against the Department of Corrections and failed to abate the pollution that originated from the prisons.

116. ADEM admits that it is precluded from assessing penalties against state agencies like the Alabama Department of Corrections. ADEM Response at 73-74. But ADEM does not assert that this is the reason why the State has not pursued enforcement against the Alabama Department of Corrections to completion. Whatever the reason, the fact remains that ADEM and the Attorney General have not pursued these enforcement actions to completion within a reasonable time. Moreover, their solution to the violations has been to transfer future liability

for violations to others, rather than to abate violations.

117. The State of Alabama has failed to pursue and complete all the enforcement actions it takes within a reasonable amount of time as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the *Memorandum of Agreement*, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

S. Failure of State to take prompt action where dischargers violate consent decrees [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4)]

118. In the Petition, Petitioners assert that the State failed to take prompt action where dischargers violate consent decrees as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section V.C. Petition at 60-62. Although this *Memorandum of Agreement* was superceded by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (April 11, 2008), the new *Memorandum of Agreement* did not materially change this obligation. ADEM Exhibit A-1 at 21 (“The State is

responsible for commencing and completing timely and appropriate enforcement action against dischargers in violation of . . . judicial enforcement actions”).

119. Petitioners cited three instances where the State failed to take prompt action to enforce compliance with consent decrees. In the case of Winfield Water Works and Sewer Board (AL0023400), the State obtained a Consent Decree on August 10, 2004 requiring that “the Board shall comply with all terms, conditions, and limitations of the Permit pursuant to the schedule set forth in the Compliance Plan.” Pet. Exhibit S-5. Violations continued thereafter and ADEM took multiple informal enforcement actions and issued Order 07-158-WP (Aug. 27, 2007) and later, Consent Order 09-071-CWP (April 16, 2009). Neither order admits to the existence of the previous judicial Consent Decree. ADEM did not seek enforcement of the Consent Decree (*i.e.*, pursue a contempt motion). ADEM’s failure to enforce the Consent Decree renders the Consent Decree meaningless.

120. In the case of Jasper Water Works and Sewer Board, Inc. (AL0023418), Petitioners allege that a Consent Decree was entered on May 5, 2003 requiring compliance within three years. Violations continued to occur after three years. Rather than enforce the Consent Decree, ADEM initiated a new series of informal administrative enforcement actions which failed to achieve compliance. Petition at 61-62. Then ADEM issued Order 08-064-WP on December 19, 2007 requiring that “no later than 365 days after receipt of this Order, the Permittee shall comply with the NH₃-N, FC, and TSS % removal limitations of NPDES Permit Number AL0023418.” When violations continued, ADEM filed a new lawsuit on January 14, 2010 (the same day the Petition was filed). Pet. Exhibit S-9. ADEM did not seek enforcement of the Consent Decree (*i.e.*, pursue a motion for contempt). ADEM’s failure to enforce the

Consent Decree renders the Consent Decree meaningless.

121. In the case of the Wilsonville Water Works and Sewer Board (AL0023400), a Court Order was entered on January 16, 2007 that required compliance by November 30, 2007. Pet. Exhibit S-2. Thereafter, the Board continued to experience violations. Rather than seek to enforce the Court Order (*i.e.*, pursue a motion for contempt), ADEM is preparing a new lawsuit. ADEM Response at 78. ADEM's failure to enforce the Court Order renders the Court Order meaningless.

122. In yet another case, the State and ADEM filed suit against the Vernon Water and Sewer Board on July 29, 2003 for violations occurring between July 1998 and May 2003. *State v. Vernon Water and Sewer Bd.*, No. CV-03-72 (Lamar County Cir. Ct. filed Jan. 29, 2003). Pet. Exhibit S-10. A Consent Decree was entered on November 28, 2005 requiring payment of a civil penalty of \$5,100 for all violations asserted in the Complaint. Pet. Exhibit S-11. The Decree also required compliance with the discharge limitations in NPDES Permit No. AL0024368 for Fecal Coliform, and percent removal of Total Suspended Solids and Carbonaceous Biochemical Oxygen Demand no later than four years after entry of the Decree (November 28, 2009) and all other discharge limitations immediately. Finally, the Decree required that the Vernon Water and Sewer Board submit a Compliance Plan not later than 150 days after entry of the Decree, and submit progress reports in January and July of each year. Pet. Exhibit S-11. The Board failed to comply with most of the requirements of the Consent Decree and the State and ADEM failed to enforce those requirements. See Pet. Exhibit S-12.

123. The State of Alabama has failed to pursue and complete all the enforcement actions it takes within a reasonable amount of time as required by *National Pollutant Discharge*

Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV (April 11, 2008). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the *Memorandum of Agreement*, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

T. Failure of State to provide adequate personnel qualifications [33 U.S.C. § 1314(i)(2)(D); 40 C.F.R. §§ 123.25(c), 123.63(a)]

124. In the Petition, Petitioners allege that the State of Alabama fails to comply with the conflict of interest prohibitions in 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. §§ 123.25(c). Petition at 62-66. Specifically, Petitioners allege that the State of Alabama has not provided a procedure to ensure that the Director of the Alabama Department of Environmental Management and the Chief of the Water Division comply with and continue to comply with the conflict of interest prohibitions in 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c). In addition, Petitioners allege that the procedures adopted by the State of Alabama in 1996 and approved by EPA in 1997 to ensure that members of the Alabama Environmental Management Commission comply with and continue to comply with the conflict of interest prohibitions in 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) are unlawful. The evidence presented in support of these allegations include the plain language of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c); *National Pollutant Discharge Elimination System State Program Guidance*, Vol. I at

3-23 (U.S. EPA, 1986), Pet. Exhibit T-1; *General Counsel Opinion* (U.S. EPA, Feb.14, 1973), Pet. Exhibit T-2; *Resolution*, Pet. Exhibit T-3; and *Letter from Carol M. Browner to David A. Ludder* (Apr. 22, 1997), Pet. Exhibit T-4; *Business Council of Alabama names new senior leadership team* (BCA, Dec. 29, 2009), Pet. Exhibit T-S1; *Alabama Ethics Commission 2010 Registered Lobbyist List*, Pet. Exhibit T-S2; *Business Council of Alabama website*, Pet. Exhibit T-S3; *Business Council of Alabama website*, Pet. Exhibit T-S4; *OUR VIEW: It's not appropriate for the head of Alabama's environmental commission to be a lobbyist for the state's most powerful business group* (The Birmingham News, Feb. 15, 2010), Pet. Exhibit T-S5; *Lobbying, Alabama environmental board don't mix* (Montgomery Advertiser, Feb. 12, 2010), Pet. Exhibit T-S6; *A clear conflict of interest* (The Gadsden Times, Feb. 17, 2010), Pet. Exhibit T-S7; and *State environmental council head sees no conflict in lobbying for major business group* (al.com, Feb. 11, 2010), Pet. Exhibit T-S8. In addition, *National Pollutant Discharge Elimination System State Program Guidance*, Vol. I (U.S. EPA, 1986) clearly states that “[m]inimum State program requirements also include a prohibition against interested persons serving on a State permitting agency’s board of directors or other body which approves all or portions of NPDES permits.” Id. at 1-2.

125. ADEM asserts that EPA approved the procedure adopted by the Alabama Environmental Management Commission whereby each member shall annually complete a conflict of interest disclosure form and any member with a prohibited conflict of interest may continue to serve provided he or she recuses himself or herself on all NPDES matters. ADEM Response at 80-83. Indeed, EPA has approved this procedure. *Letter from Carol M. Browner to David A. Ludder* (Apr. 22, 1997), Pet. Exhibit T-4. ADEM also asserts that the Director, Deputy

Director, Water Division Chief, and Field Operations Division Chief are required to complete the same conflict of interest form. ADEM Response at 80.

126. Petitioners contend that EPA's 1997 approval of this procedure is unlawful. 33 U.S.C. § 1314(i)(2)(D), provides 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." (Parentheses omitted). *Accord*, 40 C.F.R. § 123.25(c). The plain language of the statute mandates that individuals that have a prohibited conflict of interest may not be included on a board or body which approves permit applications or portions thereof. *See e.g., Legal Envtl. Assistance Found., Inc. v. United States Envtl. Protection Agency*, 118 F.3d 1467 (11th Cir. 1997) (agency interpretation that conflicts with plain language of statute must fall). "Some States have sought to avoid the prohibition through recusal on matters affecting the permittees. This alternative is also not acceptable." *National Pollutant Discharge Elimination System State Program Guidance*, Vol. I at 3-23 (U.S. EPA, 1986), Pet. Exhibit T-1. EPA should reconsider and withdraw its 1997 approval of the Alabama conflict of interest procedure.

127. Finally, there is no evidence known to Petitioners or presented by ADEM that ADEM has adopted and EPA has approved a procedure to prevent conflicts of interest among ADEM administrators. Even if administrators are required to complete conflict of interest forms by an unwritten or undisclosed policy or practice, there is no provision for review of such forms by anyone in authority and no provision to ensure disqualification of conflicted individuals. EPA should demand a written policy that ensures that ADEM administrators comply with 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. §§ 123.25(c).

128. The State of Alabama has failed to comply with the conflict of interest requirements of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. §§ 123.25(c). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the conflict of interest requirements of 40 C.F.R. § 123.25(c), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

U. The State's legal authority no longer meets the requirements of 40 C.F.R. Part 123: Penalties against state entities [40 C.F.R. §§ 123.27(a)(3) and 123.63(a)(1)]

129. In the Petition, Petitioners allege that the State of Alabama does not have authority to assess or sue to recover in court civil penalties against the State and any of its agencies (including state universities and colleges and county boards of education) as required by 40 C.F.R. § 123.27(a)(3). Petition at 66-67. This is because Alabama Constitution art. I § 14 prohibits the State and any of its agencies (including state universities and colleges and county boards of education) from being made a defendant in State court. *Ex parte Town of Lowndesboro*, 950 So.2d 1203 (Ala. 2006), Pet. Exhibit U-1; *Lyons v. River Road Constr., Inc.*, 858 So.2d 257, 261 (Ala. 2003), Pet. Exhibit U-2; *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2009-000294 (Montgomery Cir. Ct. May 29, 2009), Pet. Exhibit U-4. Neither the Legislature nor any other State authority may waive this constitutional immunity. *Larkins v. Dep't of Mental Health and Mental Retardation*, 806 So.2d 358, 363 (Ala.

2001); *Druid City Hosp. Bd. v. Epperson*, 378 So.2d 696, 697 (Ala. 1979).

130. ADEM does not deny that it lacks authority to assess or sue to recover in court civil penalties against the State and any of its agencies. Instead, it responds that 40 C.F.R. § 123.27(a)(3) is not specific to State defendants and Alabama has authority to assess or sue to recover penalties against any defendant *except* the State and its agencies. ADEM Response at 86.¹⁰ Any suggestion by ADEM that 40 C.F.R. § 123.27(a)(3) does not require that states have authority to assess or sue to recover civil penalties against *all* NPDES regulated entities, including state agencies, is wholly without merit.

131. 40 C.F.R. §123.27(a) provides *inter alia*:

Any State agency administering a program shall have available the following remedies for violations of State program requirements:

* * *

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows:

(i) Civil penalties shall be recoverable for the violation of *any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director*. These penalties shall be assessable in at least the amount of \$5,000 a day for each violation.

(Emphasis added). Thus, penalty authority must exist to enforce *any* permit condition, filing requirement, inspection, entry or monitoring requirement, or regulation or order. Such conditions, requirements, regulations and orders apply to “persons,” defined in 40 C.F.R. § 122.2 as “an individual, association, partnership, corporation, municipality, *State* or Federal *agency*, or an agent or employee thereof.” (Emphasis added). Therefore, NPDES programs must include

¹⁰ ADEM also asserts, without substantiation, that sovereign immunity is common among NPDES delegated states. ADEM Response at 87. Regardless of the accuracy of this assertion, the Petition is limited to the adequacy of Alabama’s NPDES program.

the authority to assess or sue to recover in court civil penalties against the State and any of its agencies.

132. The State of Alabama does not have authority to assess or sue to recover in court civil penalties against the State and any of its agencies (including state universities and colleges and county boards of education) as required by 40 C.F.R. § 123.27(a)(3). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the penalty authority requirements of 40 C.F.R. § 123.27(a)(3), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

V. The State's legal authority does not meet the requirements of 40 C.F.R. Part 123: Large and medium municipal separate storm sewer enforcement authority [40 C.F.R. §§ 123.25(a)(9) and 123.63(a)]

133. In the Petition, Petitioners allege that the State of Alabama does not provide large and medium municipal separate storm sewers systems with the full authority required by 40 C.F.R. § 123.25(a)(9). Specifically, Petitioners allege that Ala. Code §§ 11-89C-11 and 11-89C-12 impose limitations on the authority of municipal separate storm sewer systems to require compliance with conditions in ordinances, permits, contracts, or orders.¹¹ Petition at 68-69.

¹¹ Ala. Code § 11-89C-11 prohibits any governing body from initiating, commencing, or continuing any action to enforce its ordinances or resolutions pertaining to storm water discharges into separate storm sewers if the discharger is in compliance with an NPDES permit issued by the Alabama Department of Environmental Management. Ala. Code § 11-89C-12 prohibits any governing body from initiating any action to enforce its ordinances or resolutions

134. ADEM admits that these provisions impose limitations inconsistent with EPA's implementation of the stormwater provisions of the Clean Water Act. ADEM Response at 92.

135. The State of Alabama does not provide large and medium municipal separate storm sewers systems with the full authority required by 40 C.F.R. § 123.25(a)(9). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the authority requirements of 40 C.F.R. § 123.25(a)(9), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

W. The State's legal authority does not meet the requirements of 40 C.F.R. Part 123: TMDL implementation [40 C.F.R. §§ 123.25(a)(1) and 123.63(a)]

136. In the Petition, Petitioners allege that the State of Alabama's NPDES program does not have adequate legal authority to implement 40 C.F.R. § 122.4(i). The first clause of 40 C.F.R. § 122.4(i) prohibits the issuance of an NPDES permit to a new source or new discharger "if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." The second clause of 40 C.F.R. § 122.4(i) provides for an exception to the general prohibition. Where a TMDL has been developed for the receiving water segment, the issuance of an NPDES permit to a new source or new discharger that would otherwise be

pertaining to storm water discharges into separate storm sewers if the Alabama Department of Environmental Management has initiated and is proceeding with enforcement action (Notice of Violation, Order, or other action) against the discharger.

prohibited may be issued if the owner or operator demonstrates before the close of the comment period that two conditions are met:

- (1) There are sufficient remaining pollutant load allocations to allow for the discharge; and
- (2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. * * *

137. In its response to the Petition, ADEM argues that ADEM Admin. Code R. 335-6-6-.04(f) satisfies the first clause of 40 C.F.R. § 122.4(i), *i.e.*, the prohibition. It prohibits the issuance of a permit “[w]hen the imposition of conditions cannot ensure compliance with applicable water quality requirements.” Thus, although ADEM rules do not incorporate by reference the prohibition of the first clause of 40 C.F.R. § 122.4(i), R. 335-6-6-.04(f) provides an equivalent prohibition against the issuance of individual permits under ADEM Admin. Code Chap. 335-6-6.

138. In its response to the Petition, ADEM argues that ADEM Admin. Code R. 335-6-6-.14(3)(e)(8) satisfies the second clause (exception) of 40 C.F.R. § 122.4(i). ADEM Response at 94-95. The first provision of the second clause of 40 C.F.R. § 122.4(i) requires that the permit applicant demonstrate, before the close of the comment period, that there are sufficient remaining pollutant load allocations to allow for the discharge. 40 C.F.R. § 122.4(i)(1). The second provision of the second clause of 40 C.F.R. § 122.4(i) requires that the permit applicant demonstrate, before the close of the comment period, that the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with

applicable water quality standards. ADEM Admin. Code R. 335-6-6-.14(3)(e)(8) provides that “[e]ach NPDES permit shall . . . [i]ncorporate effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, consistent with the requirements of any applicable total maximum daily load allocation established pursuant to section 303(d) of the FWPCA and 40 CFR Part 130.7(2007).” This provision does not require that the permit applicant demonstrate, before the close of the comment period, that there are sufficient remaining pollutant load allocations to allow for the discharge. It also does not require that the permit applicant demonstrate, before the close of the comment period, that the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. In fact, ADEM Admin. Code R. 335-6-6-.14(3)(e)(8) does not require ADEM to consider whether there are sufficient remaining pollutant load allocations to allow for the discharge or whether the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

139. 40 C.F.R. § 122.4(i)(2) provides that “[t]he Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request.” No comparable language is provided in ADEM Admin. Code Chap. 335-6-6. Nevertheless, ADEM would have us believe that in every case it “already has adequate information to evaluate the request,” and in any case where it does not, it can request additional information from the permit applicant pursuant to ADEM Admin. Code R. 335-6-6-.08(1)(k) (ADEM may 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 . . .”). ADEM Response at 95. The essence of ADEM’s argument is that it has silently granted a universal waiver of the submission of the required information by a new source or new discharger subject only to a possible demand that additional information be submitted. This scheme is not permissible under 40 C.F.R. § 122.4(i). 40 C.F.R. § 122.4(i) requires that ADEM may grant an express waiver in regard to each permit application if it determines that it already has adequate information to evaluate the request. The State NPDES program must not only have legal authority to implement 40 C.F.R. § 122.4(i), it “must be administered in conformance with” 40 C.F.R. § 122.4(i). *See* 40 C.F.R. § 123.25(a). Alabama’s universal waiver in the exception process prescribed by 40 C.F.R. § 122.4(i) precludes ADEM from administering its program in conformance with 40 C.F.R. § 122.4(i).

140. In addition to the above-noted deficiency, the provisions of ADEM Admin. Code R. 335-6-6-.04(f) do not apply to permits granted under Chap. 335-6-12. ADEM Admin. Code R. 335-6-12-.07(4)(b) allows for denial or termination of a permit; it does not preclude the granting of a permit.

141. The State of Alabama has not demonstrated adequate legal authority to implement 40 C.F.R. § 122.4(i). Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including the authority requirements of 40 C.F.R. § 123.25(a)(1), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

X. Failure of State to provide adequate manpower [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4); 33 U.S.C. §1314(i)(2)(d)]

142. EPA's guidance to State NPDES programs, published pursuant to 33.U.S.C § (i)(2)(d) provides that "EPA must require that proper funding and staffing be provided by the State as a condition of continued program approval. Pet. Exhibit Z-1 at 6-2. Under *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section III. A. 1.* (April 11, 2008), the State of Alabama is required to "create and maintain...to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program." ADEM Exhibit A-1 at 4.

143. As demonstrated in the Petition, the State of Alabama has not maintained the staff levels necessary to adequately carry out all aspects of the State NPDES program. While program responsibilities have increased dramatically, the State has failed to respond with the necessary increase in personnel. Petition at 72-73. Petitioners sincerely applaud ADEM's continuing attempts to offset increasing shortcomings in personnel through technology and organizational efficiency. ADEM Response at 99. Unfortunately these efforts have proven insufficient. Over the last five years, ADEM's personnel shortfalls have directly resulted in a reduction of inspections of major dischargers, an increase in the percentage of major dischargers in significant non-compliance, an increase in the number of facilities which failed to submit DMRs, an increase in the percentage of regulated facilities with unresolved compliance schedule violations, and a reduction in the number of informal and formal actions issued by the

department. Petition at 74

144. ADEM insists that the State's program should be evaluated in light of other States. While this may be instructive to the department for the purposes of seeing how other agencies are structuring programs in order to maximize resources, it is wholly immaterial to this discussion. However other states are managing their NPDES programs as compared to Alabama is irrelevant to the disposition of the Petition. The Petition seeks to commence proceedings to withdraw approval of *Alabama's* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama's program. Moreover, it should be obvious that less enforcement action in another state's does not justify Alabama's failure to comply with the MOA between the State and EPA.

145. As demonstrated in the Petition the State of Alabama has failed create and maintain to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV*, (April 11, 2008) (ADEM Exhibit A-1). Where the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. § 123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

Y. Failure of State to provide adequate funding [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4); 33 U.S.C. §1314(i)(2)(d)]

146. EPA's guidance to State NPDES programs, published pursuant to 33.U.S.C § (i)(2)(d) provides that "EPA must require that proper funding and staffing be provided by the State as a condition of continued program approval. Pet. Exhibit Z-1 at 6-2. Under *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section III. A. 1.* (April 11, 2008), the State of Alabama is required to "create and maintain...to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program." ADEM Exhibit A-1 at 4.

147. As demonstrated in the Petition, the State of Alabama has not maintained the funding necessary to adequately carry out all aspects of the State NPDES program. While program responsibilities have increased dramatically, the State has failed to respond sufficiently with an increase in funding necessary to meet the minimum requirements. Petition at 74-75. Unfortunately ADEM's attempts to compensate for funding shortages through technology and efficiency have proven sufficient. Over the last five years, ADEM's funding shortfalls have directly resulted in a reduction of inspections of major dischargers, an increase in the percentage of major dischargers in significant non-compliance, an increase in the number of facilities which failed to submit DMRs, an increase in the percentage of regulated facilities with unresolved compliance schedule violations, and a reduction in the number of informal and formal actions issued by the department. Petition at 75

148. Although ADEM would compare itself to other states facing funding challenges, this comparison is irrelevant to the disposition of the Petition. The Petition seeks to commence

proceedings to withdraw approval of *Alabama's* NPDES program, not any other state program. Indeed, Petitioners have standing to seek withdrawal of only Alabama's program. Moreover, it should be obvious that less enforcement action in another state's does not justify Alabama's failure to comply with the MOA between the State and EPA.

149. As demonstrated in the Petition the State of Alabama has failed create and maintain to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV*, (April 11, 2008) (ADEM Exhibit A-1). Where the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. § 123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

Z. Failure of State to maintain, to the maximum extent possible, the resources required to carry out all aspects of the NPDES program [Memorandum of Agreement; 40 C.F.R. § 123.63(a)(4); 33 U.S.C. §1314(i)(2)(d)]

150. EPA's guidance to State NPDES programs, published pursuant to 33.U.S.C § (i)(2)(d) provides that "EPA must require that proper funding and staffing be provided by the State as a condition of continued program approval. Pet. Exhibit Z-1 at 6-2. Under *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV, Section III. A. 1.*

(April 11, 2008), the State of Alabama is required to “create and maintain...to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program.”

ADEM Exhibit A-1 at 4.

151. As demonstrated in the Petition the State of Alabama has failed create and maintain to the maximum extent possible, the resources required to carry out all aspects of the State NPDES program as required by *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV*, (April 11, 2008) (ADEM Exhibit A-1). Where the State program fails to comply with the terms of the Memorandum of Agreement required under 40 C.F.R. § 123.24, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(4). Accordingly, the EPA should require corrective action by the State of Alabama. Absent corrective action by the State of Alabama to address this and other program failures, EPA should commence proceedings to withdraw approval of the Alabama NPDES program.

III. Request for Relief

Wherefore, Petitioners maintain their request that the Administrator of the United States Environmental Protection Agency order the commencement of proceedings to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the State of Alabama in accordance with 40 C.F.R. § 123.64(b).

Respectfully submitted,

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