

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

Petitioners]

_____ /

I. Nature of Petition

1. This is a petition to the Administrator of the United States Environmental 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.

II. Jurisdiction and Authority

2. The Administrator of the United States Environmental Protection Agency initially granted approval of the State of Alabama's National Pollutant Discharge Elimination System (NPDES) permit program pursuant to 33 U.S.C. § 1342 on October 19, 1979. *See* 44 Fed. Reg. 61452 (1979).

3. Section 402(c)(3) of the Clean Water Act, 33 U.S.C. § 1342(c)(3), authorizes the Administrator of the United States Environmental Protection Agency to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for Alabama upon determining that the State of Alabama is not administering the program in accordance with the requirements of Section 402 of the Clean Water Act, 33 U.S.C. § 1342.

4. 40 C.F.R. § 123.64(b) provides that the Administrator of the United States Environmental Protection Agency may order the commencement of proceedings to determine whether to withdraw approval of the National Pollutant Discharge Elimination System (NPDES) permit program for the State of Alabama in response to a petition from an interested person alleging failure of the State to comply with the requirements of 40 C.F.R. Part 123 and the memorandum of agreement between the State the U.S. Environmental Protection Agency as set forth in 40 C.F.R. § 123.63 (criteria for withdrawal of State programs).

5. 40 C.F.R. § 123.64(b)(1) provides that the Administrator of the United States Environmental Protection Agency shall respond in writing to any petition to commence withdrawal proceedings.

III. Petitioners and Their Interests

6. The persons filing this petition are as follows:

Alabama Rivers Alliance, Inc.

Cindy Lowry, Executive Director
2027 Second Avenue North, Suite A
Birmingham, Alabama 35203
Telephone: (205) 322-6395
Website: www.alabamarivers.org

Mission: To protect Alabama's rivers through water quality and quantity policy advocacy, grassroots organizing, and the providing of information to citizens in order to achieve clean and healthy watershed ecosystems, healthy people, strong economies, and a functioning democratic system of government in Alabama.

Members: 700 individuals; 35 organizations

ADEM Reform Coalition

Adam Snyder, Co-Chair
Casi Callaway, Co-Chair

Mission: To reform the Alabama Department of Environmental Management, including its mission, mandate, leadership and capacity, to protect and restore the environment, safeguard human health, and ensure environmental justice in accordance with the will of the citizens of Alabama.

Members: 40 organizations

Friends of Hurricane Creek

John Wathen, Creekkeeper
P.O. Box 40836
Tuscaloosa, Alabama 35404
Telephone: (205) 507-0867

Mission: Dedicated to the protection, preservation, and restoration of Hurricane Creek and its watershed.

Members: 180 individuals

Mobile Baykeeper, Inc.

Casi Callaway, Baykeeper & Executive Director
300 Dauphin Street, Suite 200
Mobile, Alabama 36602
Phone: (251) 433-4229
Website: www.mobilebaykeeper.org

Mission: To provide citizens a means to preserve and protect the beauty, health and heritage of the Mobile Bay watershed

Members: 3,500 individuals

Black Warrior Riverkeeper, Inc.

Nelson Brooke, Riverkeeper

712 37th Street South

Birmingham, Alabama 35222

Telephone: (205) 458-0095

Website: www.BlackWarriorRiver.org

Mission: To protect and restore the Black Warrior River and its tributaries.

Members: 1,919 individuals

Choctawhatchee Riverkeeper, Inc.

Mike Mullen, Riverkeeper

P.O. Box 6734

Banks, Alabama 36005-6734

Telephone: (334) 807-1365

Website: <http://sites.google.com/site/chocrivkeeper/>

Mission: To protect and restore the ecological health of the Choctawhatchee River, its tributaries and the surrounding terrestrial systems that constitute the watershed.

Members: 30 individuals

Friends of the Locust Fork River

Sam Howell, President

P.O. Box 245

Hayden, Alabama 35079

Telephone: (205) 681-4751

Website: www.flfr.org

Mission: To preserve the natural integrity of the river in its free-flowing state, and to that end, the lifestyle of the community that surrounds it.

Members: 250 individuals

Coosa River Basin Initiative, Inc.

Joe Cook, Riverkeeper

408 Broad Street

Rome, Georgia 30161

Telephone: (706) 232-2724

Website: www.coosa.org

Mission: To Inform and empower citizens so that they may become involved in the process of creating a clean, healthy and economically viable Coosa River Basin.

Members: 800 individuals

Alabama Environmental Council

Michael Churchman, Executive Director

2431 Second Avenue North

Birmingham, Alabama 35203

Telephone: (205) 322-3126

Website: www.aeonline.org

Mission: To engage citizens toward sustainable living and stewardship of the environment; to organize and empower Alabamians to preserve the environment in a manner that is mindful of current and future generations.

Members: 750 individuals

The Sierra Club-Alabama Chapter

Robert W. Hastings, Vice Chair

141 North Northington Street

Prattville, Alabama 36067

Telephone: (334) 491-0780

Website: <http://alabama.sierraclub.org>

Mission: To explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Members: 3,300 individuals

Sand Mountain Concerned Citizens, Inc.

Willard Jones, President

P.O. Box 428

Ider, Alabama 35765

Telephone: (256) 657-5704

Mission: To oppose the proliferation of corporate factory hog farms in densely populated rural areas, near rivers and streams and recreational waters, and near drinking water supplies; to direct the State of Alabama to improve and enforce the CAFO regulations; to protect the social infrastructure of Rural Alabama.

Members: 50 members

Conservation Alabama Foundation, Inc.

Adam Snyder, Executive Director

P.O. Box 130656

Birmingham, Alabama 35213-0656

Telephone: (205) 533-6178

Website: www.conservationalabamafoundation.org

Mission: To build the ability of Alabama citizens and organizations to promote conservation through government and civic action.

Members: 200 individuals

Cahaba Riverkeeper

Myra Crawford, Riverkeeper
4650 Old Looney Mill Road
Birmingham, Alabama 35243
Telephone (205) 967-2600

Website: www.cahabariverkeeper.org

Mission: To defend the ecological integrity of the Cahaba River and tributaries and watershed. Cahaba Riverkeeper seeks to ensure clean water, a healthy aquatic environment, and the recreational and aesthetic values of the Cahaba.

Members: 62 individuals

The Friends of Big Canoe Creek

Doug Morrison
P.O. Box 10
Springville, AL 35146
Telephone: (205) 467-7620

Mission: To protect and preserve Big Canoe Creek and its tributaries for the benefit of its communities and health of the watershed.

Members: 30 individuals

7. Members of the Petitioners use and enjoy the surface waters within the State of Alabama for swimming, boating, canoeing, fishing, nature observation, and other uses. The failure of the State of Alabama to administer the National Pollutant Discharge Elimination System (NPDES) permit program for Alabama in accordance with the requirements of Section 402 of the Clean Water Act, 33 U.S.C. § 1342, and in compliance with the requirements of 40 C.F.R. Part 123 and the *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated) (Exhibit A-1), threatens to allow degradation of water quality and to adversely affect the above-mentioned uses.

IV. Grounds

A. Failure of State to ensure that monitoring data are entered into the Permit Compliance System [Memorandum of Agreement; 40 C.F.R. §§ 123.21(a)(4), 123.24, 123.63(a)(4)]

8. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

9. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section IV (Exhibit A-1) requires the State of Alabama to operate a timely and effective compliance monitoring system, via the Permit Compliance System (PCS), to track compliance of permittees with permit conditions. The State of Alabama is required to ensure that monitoring data are entered into the Permit Compliance System (PCS) with the necessary quality assurance to achieve a 95 percent entry accuracy rate. *Id.*

10. During FY 2008, the State of Alabama achieved a 44.40% entry rate into the Permit Compliance System (PCS) for discharge monitoring reports for non-major dischargers and a 79.60% entry rate into the Permit Compliance System (PCS) for correctly coded effluent limitations for non-major dischargers. *Data Completeness Table (FY 2008)* (Exhibit A-2).

11. As demonstrated herein, the State of Alabama has failed to comply with the monitoring data entry accuracy rate 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), Section IV (Exhibit A-1).

12. 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).

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)]

13. A State NPDES program is required to exercise control over activities required to be regulated, including the issuance of permits.

14. The State of Alabama has failed to issue NPDES permits for dischargers with expired permits that are not administratively continued. *Partial List of Facilities with Individual Permits that are Expired and Not Administratively Continued* (Exhibit B-1).

15. 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 registrations. For example:

ALR165846 SDW, Inc.

SDW, Inc. was initially granted NPDES Registration ALR165846 on September 1, 2004 for construction disturbance within the Williamsburg subdivision. This registration expired on August 31, 2005. (Exhibit B-2). NPDES Registration ALR165846 was reissued to SDW, Inc. on August 4, 2005 for construction disturbance on 14.5 acres within the Williamsburg subdivision. This registration expired on August 31, 2006. (Exhibit B-3). A Warning Letter was issued by ADEM on July 9, 2007. (Exhibit B-4). A Notice of Violation was issued by ADEM on January 18, 2008. (Exhibit B-5). NPDES Registration ALR165846 was granted to SDW, Inc. on January 28, 2008 for construction disturbance on 4.9 acres within the Williamsburg subdivision. This registration expired on August 31, 2008. (Exhibit B-6). Order 08-203-MNPS was issued by ADEM on September 5, 2008 citing failure to maintain a valid registration on one day. (Exhibit B-7). NPDES Registration ALR165846 was granted to SDW, Inc. on June 10, 2009 for construction disturbance on 4.9 acres within the Williamsburg subdivision. This acreage included Lots 1, 18, 19, 23, 28, 30, 31, 46 and 47. This registration expired on August 31, 2009. (Exhibit B-8). SDW, Inc. engaged in construction

disturbance activity without a valid registration from September 1, 2006 to January 27, 2008 (514 days) and from September 1, 2008 to June 9, 2009 (282 days). (Exhibit B-9). Despite that construction disturbance activity was continuing on-site after August 31, 2009 (Exhibit B-10) and that reclamation remained incomplete (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. (Exhibit B-13).

ALR16B471 Builders Group Development, LLC

Builders Group Development, LLC was initially granted NPDES Registration ALR16B471 on October 4, 2006 for construction disturbance on 50.3 acres within the Camden Lake Subdivision. This registration expired on October 3, 2007. (Exhibit B-14). NPDES Registration ALR16B471 was granted to Builders Group Development, LLC on November 27, 2007 for construction disturbance on 9.9 acres within the Camden Lake subdivision. This registration expired on October 3, 2008. (Exhibit B-15). Builders Development Group, LLC engaged in construction disturbance activity without a valid registration from October 4, 2007 to November 27, 2007 (54 days). Despite that construction disturbance activity continued in the Camden Lake subdivision after October 3, 2008, and reclamation remained incomplete (Exhibits B-16, B-17, B-18, B-19), the State of Alabama failed to require that Builders Development Group, LLC obtain and maintain a valid registration or cease operations. No enforcement action was taken by ADEM.

ALR168117 SDW, Inc.

SDW, Inc. was initially granted NPDES Registration ALR168117 on August 1, 2005 for construction disturbance on 7.0 acres within the Huntland Gardens subdivision. This registration expired on July 1, 2006. (Exhibit B-20). Warning Letters were issued by ADEM on January 23, 2007 and July 9, 2007. (Exhibits B-21 and B-22). A Notice of Violation was issued by ADEM on January 2, 2008. (Exhibit B-23). NPDES Registration ALR168117 was granted to SDW, Inc. on January 28, 2008 for construction disturbance on 4.9 acres within the Huntland Gardens subdivision. This registration expired on July 31, 2008. (Exhibit B-24). Consent Order 08-201-CMNPS was issued by ADEM on September 5, 2008 citing failure to maintain a valid registration on an unspecified number of days. (Exhibit B-25). NPDES Registration ALR168117 was granted to SDW, Inc. on June 25, 2009 for construction disturbance on 4.9 acres within the Huntland Gardens subdivision. This registration expired on July 31, 2009. (Exhibit B-26). SDW, Inc. engaged in construction disturbance activity without a valid registration from July 2, 2006 to January 27, 2008 (575 days) and from August 1, 2008 to June 24, 2009 (328 days).

ALR169357 Woodland Place, LLC

Woodland Place, LLC was initially granted NPDES Registration ALR169357 on January 13, 2006 for construction disturbance on 14.5 acres within the Woodland Place subdivision. This registration expired on January 12, 2007. (Exhibit B-27). A Warning Letter was issued by ADEM on January 19, 2007. (Exhibit B-28). NPDES Registration ALR169357 was granted to Woodland Place, LLC on February 26, 2007 for construction disturbance on 14.5 acres within the Woodland Place subdivision. This registration expired on January 12, 2008. (Exhibit B-29). A Notice of Violation was issued by ADEM on January 25, 2008. (Exhibit B-30). NPDES Registration ALR169357 was granted to Woodland Place, LLC on February 20, 2008 for construction disturbance on 14.5 acres within the Woodland Place subdivision. This registration expired on January 12, 2009. (Exhibit B-31). Consent Order 08-202-CMNPS was issued by ADEM on September 5, 2008 citing failure to maintain a valid registration on two days. (Exhibit B-32). Woodland Place, LLC engaged in construction disturbance activity without a valid registration from January 13, 2007 to February 25, 2007 (44 days) and from January 13, 2008 to February 19, 2008 (38 days).

ALR168018 JD Development, LLC

JD Development, LLC was initially granted NPDES Registration ALR168018 on December 19, 2005 for construction disturbance on 30.0 acres within the Washington subdivision. This registration expired on December 18, 2006. (Exhibit B-33). NPDES Registration ALR168018 was granted to JD Development, LLC on March 28, 2007 for construction disturbance on 30.0 acres within the Washington subdivision. This registration expired on December 18, 2007. (Exhibit B-34). A Notice of Violation was issued by ADEM on January 31, 2007 and January 18, 2008. (Exhibits B-35 and B-36). NPDES Registration ALR168018 was granted to JD Development, LLC on February 28, 2008 for construction disturbance on 30.0 acres within the Washington subdivision. This registration expired on December 18, 2008. (Exhibit B-37). Consent Order 08-204-CMNPS was issued by ADEM on September 5, 2008 citing failure to maintain a valid registration on two days. (Exhibit B-38). JD Development, LLC engaged in construction disturbance activity without a valid registration from December 19, 2006 to March 27, 2007 (99 days) and from December 19, 2007 to February 27, 2008 (71 days).

ALR165712 Southland Holdings, LLC

Southland Holdings, LLC was initially granted NPDES Registration ALR165712 on August 24, 2004 for construction disturbance on 20 acres within the Barret's Trace subdivision. This registration expired on August 23, 2005. (Exhibit B-39). NPDES Registration ALR165712 was granted to Southland Holdings, LLC on June 9, 2006 for construction disturbance on 11.0 acres within the Barret's Trace subdivision. This registration expired on August 23, 2007. (Exhibit B-40). A

Notice of Violation was issued by ADEM on February 20, 2008. (Exhibit B-41). Southland Holdings, LLC engaged in construction disturbance activity without a valid registration from August 24, 2005 to June 8, 2006 (289 days) and after August 23, 2007.

ALR164521 Trick Construction and Development

Trick Construction and Development was initially granted NPDES Registration ALR164521 on March 12, 2004 for construction disturbance on 4.9 acres within the Covington Villas subdivision. This registration expired on March 9, 2005. (Exhibit B-42). NPDES Registration ALR164521 was granted to Trick Construction and Development on March 8, 2005 for construction disturbance on 4.9 acres within the Covington Villas subdivision. This registration expired on March 9, 2006. (Exhibit B-43). NPDES Registration ALR164521 was granted to Trick Construction and Development on May 19, 2006 for construction disturbance on 4.9 acres within the Covington Villas subdivision. This registration expired on January 31, 2007. (Exhibit B-44). NPDES Registration ALR164521 was granted to Trick Construction and Development on July 9, 2008 for construction disturbance on 4.9 acres within the Covington Villas subdivision. This registration expired on March 9, 2009. (Exhibit B-45). No enforcement action was taken by ADEM. Trick Construction and Development engaged in construction disturbance activity without a valid registration from March 10, 2006 to May 18, 2006 (70 days) and February 1, 2007 to July 8, 2008 (524 days).

ALR10638 Jones Property, LLC

Jones Property, LLC was initially granted NPDES Registration ALR10638 on April 19, 2002 for construction disturbance on 20.4 acres within the Crossings subdivision. This permit expired on July 31, 2002. (Exhibit B-46). NPDES Registration ALHA02077 was granted to Jones Property, LLC on April 15, 2003 for construction disturbance on 20.4 acres within the Crossings subdivision. This registration expired on April 14, 2004. (Exhibit B-47). NPDES Registration ALHA02077 was granted to Jones Property, LLC on April 12, 2004 for construction disturbance on 30.6 acres within the Crossings subdivision. This registration expired on April 14, 2005. (Exhibit B-48). NPDES Registration ALR162077 was granted to Jones Property, LLC on March 28, 2005 for construction disturbance on 30.6 acres within the Crossing subdivision. This registration expired on April 14, 2006. (Exhibit B-49). NPDES Registration ALR162077 was granted to Jones Property, LLC on April 4, 2006 for construction disturbance on 30.6 acres within the Crossings subdivision. This registration expired on April 13, 2007. (Exhibit B-50). NPDES Registration ALR162077 was granted to Jones Property, LLC on April 9, 2007 for construction disturbance on 30.6 acres within the Crossings subdivision. This registration expired on April 13, 2008. (Exhibit B-51). NPDES Registration ALR162077 was granted to Jones Property, LLC on March 28, 2008 for

construction disturbance on 30.6 acres within the Crossings subdivision. This registration expired on April 13, 2009. (Exhibit B-52). No enforcement action was taken by ADEM. Jones Property, LLC engaged in construction disturbance activity without a valid registration from August 1, 2002 to April 14, 2003 (257 days) and from April 15, 2004 to March 27, 2005 (347 days).

ALR162991 RBC Development, Inc.

RBC Development, Inc. was initially granted NPDES Registration ALR162991 on August 5, 2003 for construction disturbance on 5 acres within the Sommer Brooke subdivision. This registration expired on August 4, 2004. (Exhibit B-53). NPDES Registration ALR162991 was granted to RBC Development, Inc. on November 3, 2004. This registration expired on August 4, 2005. (Exhibit B-54). Notices of Violation were issued by ADEM on October 7, 2005, November 28, 2005 and June 14, 2007. (Exhibits B-55 to B-57). Order 10-032-WP was issued by ADEM on December 10, 2009 citing failure to maintain a valid registration from August 28, 2008 to October 29, 2009 (428 days). (Exhibit B-58). RBC Development, Inc. engaged in construction disturbance activity without a valid registration from August 5, 2005 to December 15, 2009 (1,594 days).

16. As demonstrated herein, the State of Alabama has failed to exercise control over activities required to be regulated, including the issuance of permits.

17. 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).

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)]

18. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

19. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region*

IV (undated), Section II.A. (Exhibit A-1) requires that the State of Alabama process in a timely manner and propose to issue, reissue, modify or deny NPDES permits.

20. The State of Alabama has failed to issue, reissue, modify or deny NPDES permits for dischargers with permits that have been administratively continued for more than one year. *Partial List of Facilities with Individual Permits that were Administratively Continued for More than One Year* (Exhibit C).

21. As demonstrated herein, the State of Alabama has failed to process in a timely manner and propose to issue, reissue, modify, or deny NPDES permits 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), Section IV (Exhibit A-1).

22. 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).

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)].

23. State NPDES programs under 40 C.F.R. Part 123 must have legal authority to implement 40 C.F.R. § 122.44(d)(1)(vii)(B) and must be administered in conformance with 40 C.F.R. § 122.44(d)(1)(vii)(B). 40 C.F.R. § 123.25(a)(15).

24. 40 C.F.R. § 122.44(d)(1)(vii)(B) provides that 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 for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. § 130.7.

25. In October 2004, the U.S. Environmental Protection Agency (EPA) - Region 4 published a TMDL for the Hurricane Creek watershed. *Total Maximum Daily Load for Metals, Pathogens and Turbidity in the Hurricane Creek Watershed* (U.S. EPA, Region 4, October 2004) (Exhibit D). The TMDL notes as follows:

Although Cottondale Creek is not an explicitly listed segment on the State's 303(d) list, both stations sampled by EPA in that subwatershed indicated biological impairment based on habitat scores and samplings of the benthic macro-invertebrate communities. During a visit by EPA to the watershed in September 2003, the water was obviously turbid due to sediment loads in the stream, even though it had not rained in days. Water quality issues in Cottondale Creek may influence the overall biological health of stations HC-1 and H-1, which are downstream of the confluence with Cottondale Creek. Stations HC-1 and H-1 were rated as impaired by EPA in August 2000 based on an assessment of benthic macro-invertebrate communities.

Id. at 17.

26. *Total Maximum Daily Load for Metals, Pathogens and Turbidity in the Hurricane Creek Watershed* prescribes a wasteload allocation for turbidity caused by stormwater dischargers, e.g., construction stormwater (CSW) sites. That allocation calls for a 32% reduction in turbidity in Hurricane Creek to meet a target of 60.8 NTUs. The TMDL then prescribes the means to be employed to achieve this turbidity reduction as follows:

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.

Id. at 22.

27. Subsequent to publication of *Total Maximum Daily Load for Metals, Pathogens and Turbidity in the Hurricane Creek Watershed* in October 2004, the State of Alabama authorized or re-authorized construction stormwater (CSW) dischargers to continue operations in the Hurricane Creek watershed without any change in Best Management Practices (BMPs) necessary to achieve an aggregate 32% reduction in turbidity and without any explanation published in a fact sheet of the reasons the State of Alabama expects the current BMPs to achieve an aggregate 32% reduction in turbidity. These authorizations and re-authorizations are identified in Table 1.

TABLE 1			
NPDES Registrant	NPDES Registration Number	Issuance/ Reissuance Dates	Receiving Water
Builders Group Development, LLC Camden Lake Subdivision	ALR16B471	10/4/2006 11/27/2007	UT of Cottondale Cr
SDW, Inc. Williamsburg Subdivision	ALR165846	8/4/2005 1/28/2008	UT of Cottondale Cr
SDW, Inc. Huntland Gardens Subdivision	ALR168117	8/1/2005 1/28/2008	UT of Cottondale Cr
Woodland Place, LLC Woodland Place Subdivision	ALR169357	1/13/2006 2/26/2007 2/20/2008	UT of Cottondale Cr
JD Development, LLC Washington Subdivision	ALR168018	12/19/2005 3/28/2007 2/28/2008	UT of Cottondale Cr
Southland Holdings, LLC Barrett's Trace Subdivision	ALR165712	6/9/2006 08/23/2007	UT of Cottondale Cr
Ala. Dep't of Transp. ST-063-999-010 (Buttermilk Road Expansion)	ALR16ECEP	12/15/2008	UT of Cottondale Cr

Crown Properties, LLC Legacy Park Subdivision	ALR164548	5/16/2005	UT of Hurricane Cr
Eastview Church, Inc. Eastview Church	ALR16EB38	4/14/2008	UT of Cottondale Cr
Trick Construction and Dev. Covington Villas Subdivision	ALR164521	3/8/2005 5/19/2006 7/9/2008	UT of Cottondale Cr
Jones Property, LLC The Crossings Subdivision	ALR162077	3/28/2005 4/4/2006 4/9/2007 3/28/2008	UT of Cottondale Cr

28. As demonstrated herein, 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).

29. 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).

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)]

30. State NPDES programs under 40 C.F.R. Part 123 must have legal authority to implement the public notice requirements of 40 C.F.R. § 124.10(d) and must be administered in conformance with the public notice requirements of 40 C.F.R. § 124.10(d). 40 C.F.R. § 123.25(a)(28).

31. 40 C.F.R. § 124.10(a)(ii) requires that public notice of preparation of a draft permit be published. 40 C.F.R. § 124.10(d) mandates that the public notice shall include 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); “[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 “a *general description of the location of each existing or proposed discharge point* and the name of the receiving water and the sludge use and disposal practice(s) and the location of each sludge treatment works treating domestic sewage and use or disposal sites known at the time of permit application.” 40 C.F.R. § 124.10(d)(vii) (emphasis added).

32. The State of Alabama failed to include in public notices (from January 17, 2008 to December 15, 2009) “a general description of the location of each existing or proposed discharge point” as required by 40 C.F.R. §§ 123.25(a)(28) and 124.10(d)(vii). *Notices of Application for National Pollutant Discharge Elimination System Permit for Discharge into Waters of the State of Alabama and Request for Comments* (ADEM, Jan. 17, 2008 to Nov. 17, 2009) (Exhibit E).

33. As demonstrated herein, the State of Alabama has failed to provide public notice of outfall locations as required by 40 C.F.R. §§ 124.10(d)(vii) and 123.25(a)(28).

34. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including 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).

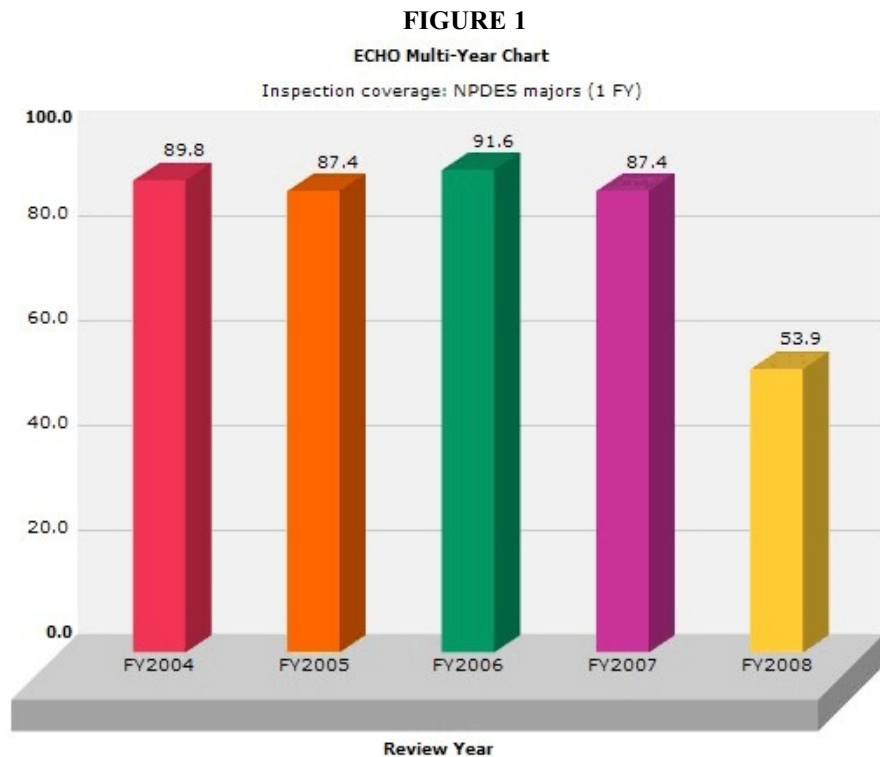
**F. Failure of State to inspect and monitor activities subject to regulation:
Major dischargers [40 C.F.R. §§ 123.26(e)(5), 123.63(a)(3)(iii)]**

35. State NPDES programs under 40 C.F.R. Part 123 must have compliance and evaluation programs that have procedures and ability for inspecting the facilities of all major dischargers at least annually. 40 C.F.R. § 123.26(e)(5).

36. The State of Alabama has adopted and is implementing a policy whereby only 50% of all major dischargers will be inspected each year. *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 5, 2009) (Exhibit F-1). Thus, each major discharger will be inspected once every two years rather than annually.

37. The State of Alabama failed to inspect 153 (80.1%) of all 191 major dischargers in FY 2009. *Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2009* (Exhibit F-2).

38. The State of Alabama failed to inspect 46.1% of all major dischargers in FY 2008. *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). *See also 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) (Exhibit F-4) (The State of Alabama failed to inspect 81 (43%) of all 190 major dischargers in FY 2008); *Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2008* (Exhibit F-5) (The State of Alabama failed to inspect 84 (44%) of all 190 major dischargers in FY 2008). As shown in Figure 1 below, this represents a significant decline in inspections of major dischargers from previous years.



Source: <http://www.epa-echo.gov/echo/cwa/data/AL.html>

39. The State of Alabama failed to inspect 12.6% of all major dischargers in FY 2007. *State Review Framework - CWA Data for Alabama , State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). *See also Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2007* (Exhibit F-6) (The State of Alabama inspected 161 major dischargers in FY 2007).

40. The State of Alabama failed to inspect 8.4% of all major dischargers in FY 2006. *State Review Framework - CWA Data for Alabama , State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). *See also Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2006* (Exhibit F-7) (The State of Alabama inspected 160 major dischargers in FY 2006).

41. The State of Alabama failed to inspect 12.6% of all major dischargers in FY 2005. *State Review Framework - CWA Data for Alabama , State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). *See also Permit Compliance System Report - Inspection Dates of Major Dischargers FY 2005* (Exhibit F-8) (The State of Alabama inspected 161 major dischargers in FY 2005).

42. As demonstrated herein, the State of Alabama does not have compliance and evaluation programs that have procedures and ability for inspecting the facilities of all major dischargers at least annually as required by 40 C.F.R. § 123.26(e)(5).

43. Where the State's enforcement 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)(3)(iii).

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

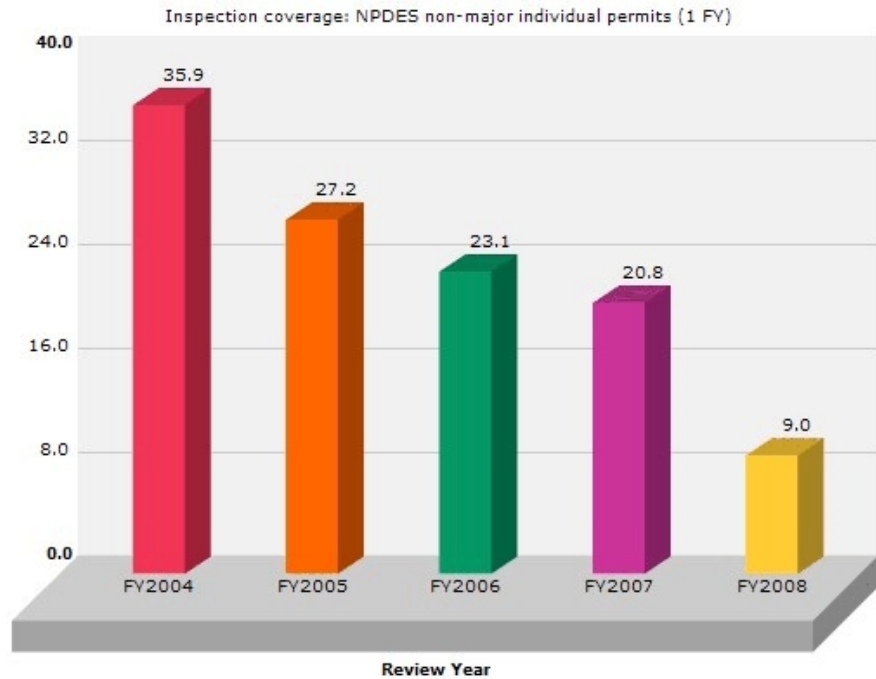
44. State NPDES programs under 40 C.F.R. Part 123 must maintain a program for periodic inspections of the facilities and activities subject to regulation. 40 C.F.R. § 123.26(b)(2).

45. 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. *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 5, 2009) (Exhibit F-1). 80% of all non-major dischargers with individual permits will not be inspected each year. At this rate, each non-major discharger with an individual permit will be inspected once every 5.0 years on average.

46. The State of Alabama failed to inspect 91.0% of all non-major dischargers with individual NPDES permits in FY 2008. *State Review Framework - CWA Data for Alabama , State Trends Report* (U.S. EPA, July 14, 2009) (Exhibit F-3). At this rate, each non-major discharger with an individual NPDES permit would be inspected once every 10.5 years on average. As shown in Figure 2 below, this represents a significant decline in inspections from previous years.

FIGURE 2

ECHO Multi-Year Chart



Source: <http://www.epa-echo.gov/echo/cwa/data/AL.html>

47. The State of Alabama failed to inspect 79.2% of all non-major dischargers with individuals NPDES permits in FY 2007. *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). In CY 2007, there were 1,379 non-major dischargers with individuals NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2007) (Exhibit G-1).

48. The State of Alabama failed to inspect 76.9% of all non-major dischargers with individuals NPDES permits in FY 2006. *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). In CY 2006, there were 1,359 non-major dischargers with individuals NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2006) (Exhibit G-2).

49. The State of Alabama failed to inspect 72.8% of all non-major dischargers with individuals NPDES permits in FY 2005. *State Review Framework - CWA Data for Alabama , State Trends Report* (U.S. EPA, July 14, 2009) (Exhibit F-3). In CY 2005, there were 1,402 non-major dischargers with individuals NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2005) (Exhibit G-3).

50. The State of Alabama failed to inspect the following facilities as indicated:

Permit Number	Permittee	Facility	Inspection
AL0073661	Birmingham Coal and Coke Co Inc	Crossroad Mine	No record since 2005
AL0029289	Drummond Company Inc	Short Creek Mine	No record
AL0070246	Twin Pines Coal Company Inc	Twin Pines Mine #1	No record since 2005
AL0059447	Taft Coal Sales and Associates Inc	Wolf Creek Mine	No record
AL0074331	Tuscaloosa Resources Inc	Blue Goose Mine	No record
AL0074152	Tuscaloosa Resources Inc	Carter Mine #2	No record
AL0026964	Drummond Company Inc	Mill Creek Mine	No record
AL0077402	Reed Minerals Inc	Nicholas Mine	No record
AL0030546	Chevron Mining Inc	North River Underground Mine	No record since 2002
AL0026875	Oak Grove Resources LLC	Oak Grove Mine	No record since 2005
AL0047198	Cordova Clay Company Inc	Riceton Hill Mine	No record since 2003
AL0061034	Moss Levin Joint Venture	Flatwood Mine	No record
AL0070742	Taft Coal Sales and Associates Inc	Gayosa Mine	No record
AL0077542	Birmingham Coal and Coke Co Inc	Gooden Creek Mine	No record since 2005
AL0063525	Birmingham Coal and Coke Co Inc	Grace Chapel Mine	No record

AL0072613	New Acton Coal Mining Co Inc	Jap Creek Mine	No record since 2003
AL0072605	New Acton Coal Mining Co Inc	Hay Valley Mine	No record since 2003
AL0066966	Birmingham Coal and Coke Co Inc	Mary Lee Mine	No record

51. The State of Alabama has adopted and is implementing a policy whereby only 10% of all known construction stormwater (CSW) dischargers will be inspected each year. *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 12, 2009) (Exhibit G-4). At this rate, each construction stormwater (CSW) discharger will be inspected once every 10 years on average. Most construction sites are completed long before 10 years. Therefore, most construction stormwater (CSW) dischargers will not be inspected during their active operation.

52. In FY 2009, the State of Alabama performed 1,297 inspections of construction stormwater (CSW) dischargers. *Electronic mail communication from Azure Jones to David A. Ludder* (Dec. 4, 2009) (Exhibit G-5). The number of active construction stormwater (CSW) dischargers in the State of Alabama during FY 2009 is unknown to the Alabama Department of Environmental Management. *Id.*

53. In FY 2008, the State of Alabama performed 3,523 inspections of construction stormwater (CSW) dischargers. *Electronic mail communication from Azure Jones to David A. Ludder* (Dec. 4, 2009) (Exhibit G-5). The number of active construction stormwater (CSW) dischargers in the State of Alabama during FY 2008 is unknown to the Alabama Department of Environmental Management. *Id.*

54. In FY 2007, the State of Alabama performed 4,293 inspections of construction stormwater (CSW) dischargers. *Electronic mail communication from Azure Jones to David A.*

Ludder (Dec. 4, 2009) (Exhibit G-5). The number of active construction stormwater (CSW) dischargers in the State of Alabama during FY 2007 is unknown to the Alabama Department of Environmental Management. *Id.* However, one report indicates that there were 6,792 active construction stormwater (CSW) registrations in the State of Alabama on May 15, 2007.

Construction Stormwater Program Update, 2007 Business Council of Alabama Environment and Energy Conference (ADEM, 2007) (excerpt) (Exhibit G-6).

55. In FY 2006, the State of Alabama performed 3,365 inspections of construction stormwater (CSW) dischargers. *Electronic mail communication from Azure Jones to David A. Ludder* (Dec. 4, 2009) (Exhibit G-5). The number of active construction stormwater (CSW) dischargers in the State of Alabama during FY 2006 is unknown to the Alabama Department of Environmental Management. *Id.*

56. In FY 2005, the State of Alabama performed 3,583 inspections of construction stormwater (CSW) dischargers. *Electronic mail communication from Azure Jones to David A. Ludder* (Dec. 4, 2009) (Exhibit G-5). The number of active construction stormwater (CSW) dischargers in the State of Alabama during FY 2005 is unknown to the Alabama Department of Environmental Management. *Id.*

57. The State of Alabama has adopted and is implementing a policy whereby only 60 concentrated animal feeding operation (CAFO) dischargers will be inspected each year. *Electronic mail communication from Richard Hulcher to David A. Ludder* (Oct. 13, 2009) (Exhibit G-7). There are currently 464 registered concentrated animal feeding operation (CAFO) dischargers in the State of Alabama. *AFO/CAFO Approved Notice of Registrations (NOR) List* (ADEM, Jan. 5, 2010) (Exhibit G-8). The number of registered concentrated animal feeding

operation (CAFO) dischargers in the State of Alabama ranged from 450 to 525 during 2005 to 2009. *Electronic mail communication from Richard Hulcher to David A. Ludder* (Oct. 13, 2009) (Exhibit G-7). At the rate of 60 inspections per year, each of the currently registered concentrated animal feeding operation dischargers will be inspected once every 7.7 years on average.

58. The State of Alabama inspected only 113 of the registered concentrated animal feeding operation (CAFO) dischargers in FY 2009. *Electronic mail communication from Azure Jones to David A. Ludder* (Oct. 27, 2009) (Exhibit G-9).

59. The State of Alabama inspected only 109 of the registered concentrated animal feeding operation (CAFO) dischargers in FY2008. *Electronic mail communication from Azure Jones to David A. Ludder* (Oct. 27, 2009) (Exhibit G-9).

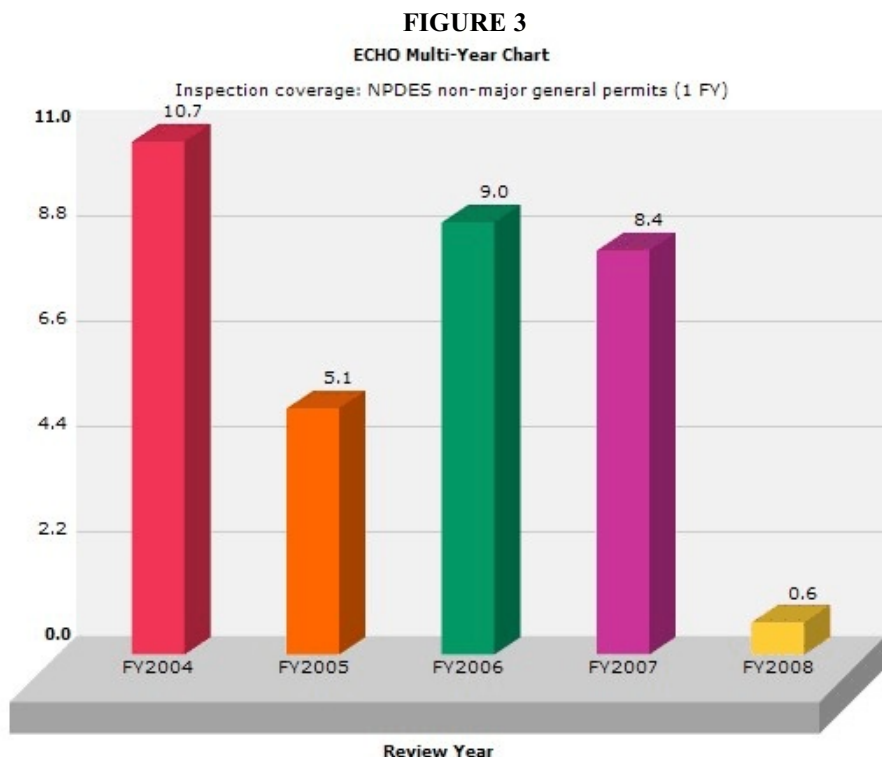
60. The State of Alabama inspected only 111 of the registered concentrated animal feeding operation (CAFO) dischargers in FY2007. *Electronic mail communication from Azure Jones to David A. Ludder* (Oct. 27, 2009) (Exhibit G-9).

61. The State of Alabama inspected only 176 of the registered concentrated animal feeding operation (CAFO) dischargers in FY2006. *Electronic mail communication from Azure Jones to David A. Ludder* (Oct. 27, 2009) (Exhibit G-9).

62. The State of Alabama inspected only 113 of the registered concentrated animal feeding operation (CAFO) dischargers in FY2005. *Electronic mail communication from Azure Jones to David A. Ludder* (Oct. 27, 2009) (Exhibit G-9).

63. The State of Alabama failed to inspect 99.4% of all non-major dischargers with general NPDES permits in FY 2008. *State Review Framework - CWA Data for Alabama*, State

Trends Report (U.S. EPA, Jan. 5, 2010) (Exhibit F-3). There are currently 6,049 non-major dischargers with general NPDES permits. *Id.* At this FY 2008 rate of inspections, each of the non-major dischargers covered by a general NPDES permit will be inspected once every 167 years on average. As shown in Figure 3 below, this represents a significant decline in inspections of non-major dischargers covered by general NPDES permits from previous years.



Source: <http://www.epa-echo.gov/echo/cwa/data/AL.html>

64. As demonstrated herein, 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).

65. Where the State's enforcement 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)(3)(iii).

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)]

66. 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, 40 C.F.R. § 123.26(b)(4); and must provide assurance that the State will investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in 40 C.F.R. §123.26(b)(4). 40 C.F.R. §123.27(d)(2)(i).

67. The State of Alabama provides no information on violation reporting procedures on the website for the Alabama Department of Environmental Management or elsewhere.

68. The State of Alabama 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.

69. As demonstrated herein, the State of Alabama has failed to comply with the public participation requirements of 40 C.F.R. §§ 123.26(b)(4) and 123.27(d)(2)(i).

70. Where the operation of the State program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to comply with the public participation requirements of 40 C.F.R. §§ 123.26(b)(4) or 123.27(d)(2)(i), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(2)(iii).

I. Failure of State to monitor activities subject to regulation [40 C.F.R. §§ 123.26, 123.63(a)(3)(iii), 123.63(a)(4); Memorandum of Agreement]

71. 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).

72. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

73. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section II.A. (Exhibit A-1) requires the State of Alabama to comprehensively evaluate and assess compliance with compliance schedules, effluent limitations, and other conditions in NPDES permits.

74. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section IV (Exhibit A-1) requires the State of Alabama to operate a tracking system capable of determining if the required self-monitoring reports are submitted on time; the submitted reports are complete; and permit conditions are met.

75. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section IV (Exhibit A-1) requires the State of Alabama to conduct a timely and

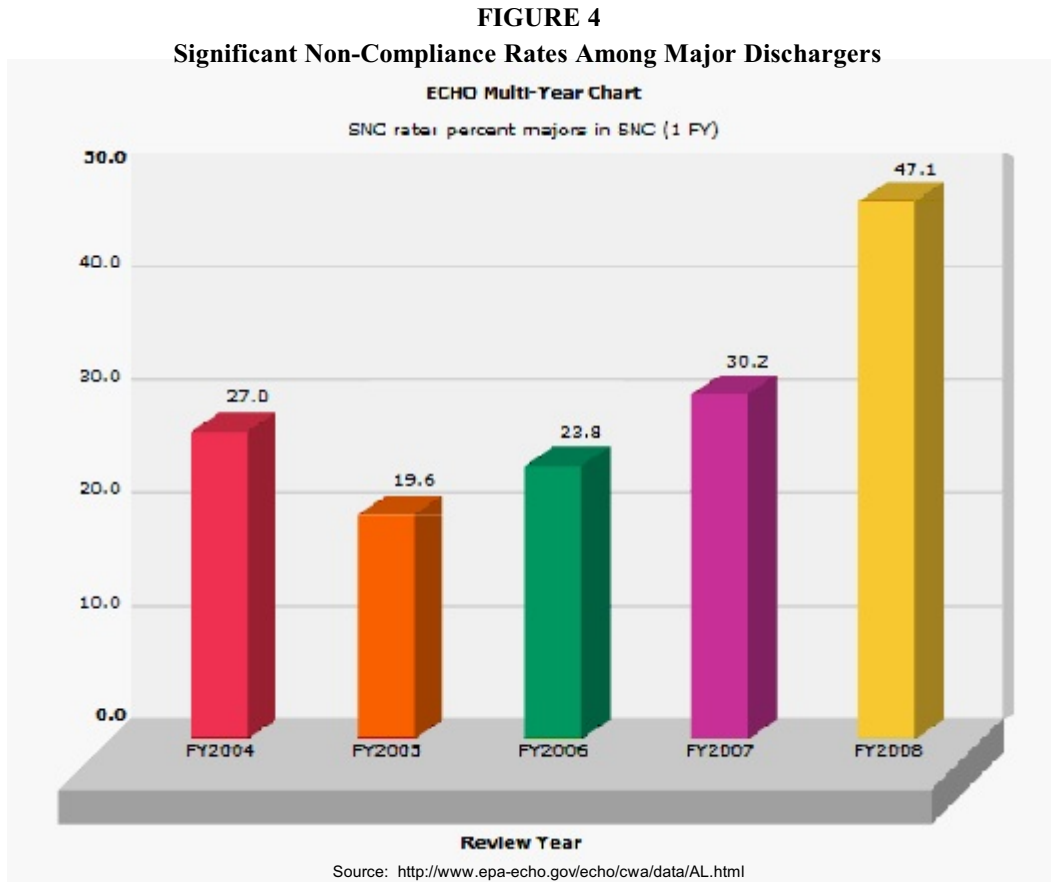
substantive review of all self-monitoring reports received and to evaluate the permittee's compliance status.

76. *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 (Exhibit A-1) requires the State of Alabama to screen all Discharge Monitoring Reports (DMRs) from permittees to determine the level and frequency of all violations.

77. *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 (Exhibit A-1) requires the State of Alabama to evaluate instances on noncompliance by all "major" permittees and P.L. 92-500 "minor" permittees within 30 days of the identification of a violation; determine the appropriate initial response, and document any action taken/not taken, including the technical reason. The date of identification of the violation is the point at which the State enforcement staff learn of the violation.

78. In April 2008, the State of Alabama instituted a policy whereby Discharge Monitoring Reports (DMRs) submitted by major dischargers will be reviewed only once every 2 years as part of a "compliance evaluation." *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 5, 2009) (Exhibit F-1). Only after these reviews take place will a compliance determination be made and an enforcement response be taken. *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Sept. 4, 2007) at 2-5 (Exhibit I-1). This policy has and will continue to delay enforcement responses for self-reported violations.

79. The foregoing “compliance evaluation” policy and *Compliance and Enforcement Strategy* have contributed to an increased Significant Non-Compliance rate among major dischargers as reflected in Figure 4 below.



80. Implementation of the “compliance evaluation” policy for major dischargers is illustrated in the following examples:

AL0043168 City of Demopolis (Major)

The City of Demopolis operates the Demopolis WWTP under NPDES Permit No. AL0043168. The City submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in March and July 2008. (Exhibits I-2 and I-3). These DMRs were received by ADEM on or before April 21, 2008 and August 29, 2008. ADEM completed a comprehensive compliance evaluation in August 2009. On August 19, 2009, ADEM issued a Notice of Violation for the March 2008 and July 2008 violations. (Exhibit I-4).

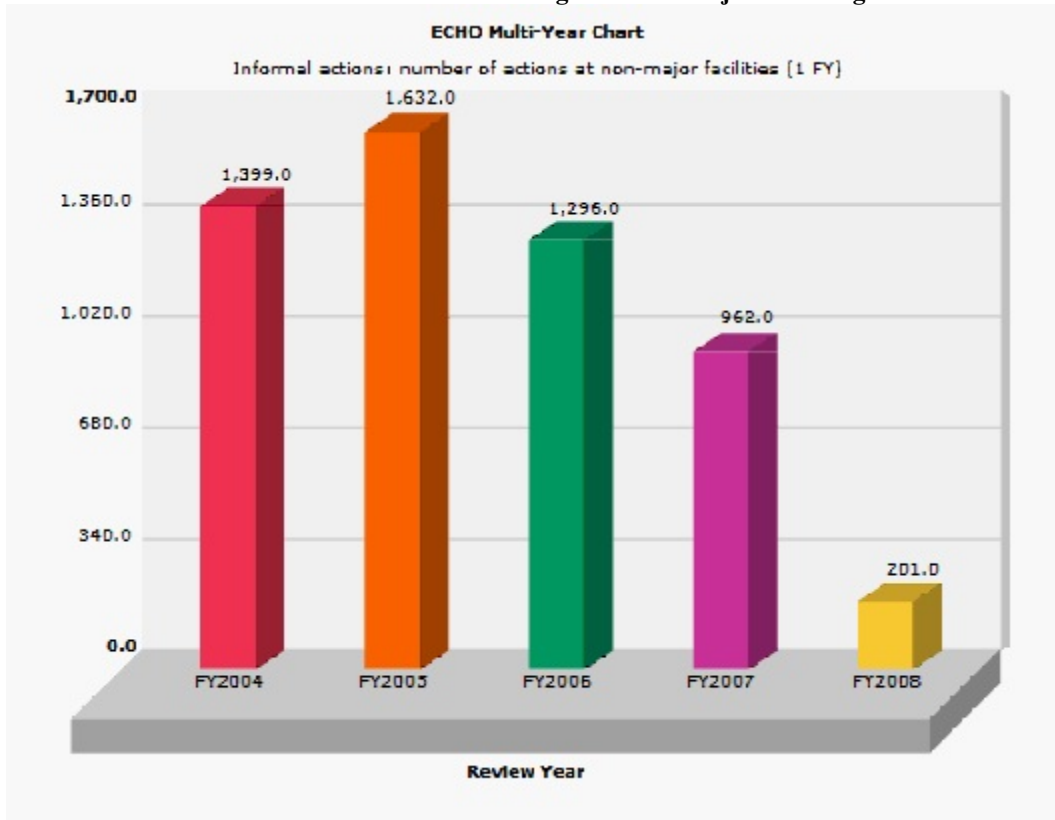
AL0047503 City of Evergreen (Major)

The City of Evergreen operates the Evergreen Lagoon under NPDES Permit No. AL0047503. The City submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in June 2008 (Exhibit I-12), September 2008 (Exhibit I-13), November 2008 (Exhibit I-14), December 2008 (Exhibit I-15), and April 2009 (Exhibit I-16). ADEM completed a comprehensive compliance evaluation in October 2009. On November 6, 2009, ADEM issued a Warning Letter for these violations. (Exhibit I-17).

81. In April 2008, the State of Alabama instituted a policy whereby Discharge Monitoring Reports (DMRs) submitted by non-major dischargers will be reviewed only once every 5 years as part of a “compliance evaluation.” *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 5, 2009) (Exhibit F-1). Only after these reviews take place will a compliance determination be made and an enforcement response be taken. *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Sept. 4, 2007) at 2-5 (Exhibit I-1). This policy has and will continue to delay enforcement responses for self-reported violations.

82. The foregoing “compliance evaluation” policy and *Compliance and Enforcement Strategy* have contributed to a decrease in informal enforcement actions against non-major dischargers in violation as reflected in Figure 5 below.

FIGURE 5
Informal Enforcement Actions Against Non-major Dischargers



Source: <http://www.epa-echo.gov/echo/cwa/data/AL.html>

83. Implementation of the “compliance evaluation” policy for major dischargers is illustrated in the following examples:

AL0023701 City of Camden (Non-major)

The City of Camden operates the Camden North WWTP under NPDES Permit No. AL0023701. The City failed to submit Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) for March 2008 and May 2009 and failed to report results for Total Suspended Solids Percent Removal in February 2008. ADEM completed a comprehensive compliance evaluation in October 2009. On November 12, 2009, ADEM issued a Warning Letter for the February 2008, March 2008, and May 2009 violations. (Exhibit I-5).

AL0055247 City of Birmingham (Non-major)

The City of Birmingham operates the Eastern Area Landfill under NPDES Permit No. AL0055247. The City submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in September 2007 (Exhibit I-6), January 2008, February

2008, March 2008, August 2008 (Exhibit I-7), October 2008, December 2008 (Exhibit I-8), January 2009, February 2009, and March 2009 (Exhibit I-9). ADEM completed a comprehensive compliance evaluation in October 2009. On October 14, 2009, ADEM issued a Notice of Violation for these violations. (Exhibit I-10).

AL0078387 Alabama River Partners, LLC

Alabama River Partners, LLC operates the Lowndes County Borrow Pit under NPDES Permit No. AL0078387. The permittee failed to submit quarterly Discharge Monitoring Reports (DMRs) for the 4th Quarter 2007, 1st Quarter 2008, 2nd Quarter 2008, 3rd Quarter 2008, 4th Quarter 2008, 1st Quarter 2009, 2nd Quarter 2009, and 3rd Quarter 2009. ADEM completed a comprehensive compliance evaluation in November 2009. On November 24, 2009, ADEM issued a Notice of Violation for these violations. (Exhibit I-11).

AL0023906 Alabama Dept. of Conservation and Natural Resources (Non-Major)

The Alabama Department of Conservation and Natural Resources operates the Lakepoint Resort State Park Lagoon under NPDES Permit No. AL0023906. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in December 2007 (Exhibit I-18), February 2008 (Exhibit I-19), April 2008 (Exhibit I-20), October 2008 (Exhibit I-21), December 2008 (Exhibit I-22), and January 2009 (Exhibit I-23). ADEM completed a comprehensive compliance evaluation in November 2009. On November 23, 2009, ADEM issued a Notice of Violation for these violations. (Exhibit I-24).

AL0027928 Alabama Department of Transportation (Non-major)

The Alabama Department of Transportation operates the I-65 Rest Area Northbound Lagoon under NPDES Permit No. AL0027928. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in August 2008; failed to report for a required parameter (TKN) in January 2009 (Exhibit I-25), February 2009 (Exhibit I-26), and March 2009 (Exhibit I-27); and failed to submit Discharge Monitoring Reports (DMRs) for the 2nd Quarter 2008, 4th Quarter 2008, and 2nd Quarter 2009. ADEM completed a comprehensive compliance evaluation in November 2009. On November 9, 2009, ADEM issued a Warning Letter for these violations. (Exhibit I-28).

AL0025399 Black Warrior Minerals, Inc. (Non-major)

Black Warrior Minerals, Inc. operates the Manchester Mine under NPDES Permit No. AL0025399. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in November 2007 (Exhibit I-29), February 2008 (Exhibit I-

30), March 2008 (Exhibit I-31), April 2008 (Exhibit I-32), May 2008 (Exhibit I-33), and August 2008 (Exhibit I-34). ADEM completed a comprehensive compliance evaluation in October 2009. On October 6, 2009, ADEM issued a Warning Letter for these violations. (Exhibit I-35).

AL0044008 Washington County Board of Education (Non-major)

The Washington County Board of Education operates the McIntosh High School Lagoon under NPDES Permit No. AL0044008. The permittee failed to submit Discharge Monitoring Reports (DMRs) for the 4th Quarter 2007, 1st Quarter 2008, 3rd Quarter 2008, 1st Quarter 2009, 2nd Quarter 2009, and 3rd Quarter 2009. ADEM completed a comprehensive compliance evaluation in November 2009. On December 2, 2009, ADEM issued a Warning Letter for these violations. (Exhibit I-36).

AL0048348 Beaird Mining & Minerals Co., Inc. (Non-major)

The Beaird Mining & Minerals Co., Inc. operates the Cane Creek Mine under NPDES Permit No. AL0048348. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in March 2008 (Exhibit I-37), April 2008 (Exhibit I-38), and February 2009 (Exhibit I-39). ADEM completed a comprehensive compliance evaluation in October 2009. On October 21, 2009, ADEM issued a Warning Letter for these violations. (Exhibit I-40).

AL0050661 Tuscaloosa County Board of Education (Non-major)

The Tuscaloosa County Board of Education operates the Northside High School Lagoon under NPDES Permit No. AL0050661. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) showing discharge violations in April 2008 (Exhibit I-41), November 2008 (Exhibit I-42), December 2008 (Exhibit I-43), February 2009 (Exhibit I-44), March 2009 (Exhibit I-45), April 2009 (Exhibit I-46), May 2009 (Exhibit I-47), and September 2009 (Exhibit I-48). ADEM completed a comprehensive compliance evaluation in November 2009. On November 24, 2009, ADEM issued a Notice of Violation for these violations. (Exhibit I-49).

AL0053091 Tiger Sul Products LLC (Non-major)

Tiger Sul Products LLC operates a plant under NPDES Permit No. AL0053091. The permittee submitted Discharge Monitoring Reports (DMRs) to the Alabama Department of Environmental Management (ADEM) that failed to include data for required parameter in February 2008 (Exhibit I-50), June 2008 (Exhibit I-51), August 2008 (Exhibit I-52), December 2008 (Exhibit I-53), March 2009 (Exhibit I-54), May 2009 (Exhibit I-55), and June 2009 (Exhibit I-56). ADEM completed

a comprehensive compliance evaluation in November 2009. On November 6, 2009, ADEM issued a Notice of Violation for these violations. (Exhibit I-57).

84. In CY 2007, the State of Alabama conducted 704 (51%) compliance reviews of 1,379 non-major dischargers with individual NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2007) (Exhibit G-1).

85. In CY 2006, the State of Alabama conducted 676 (50%) compliance reviews of 1,359 non-major dischargers with individual NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2006) (Exhibit G-2).

86. In CY 2005, the State of Alabama conducted 591 (42%) compliance reviews of 1,402 non-major dischargers with individual NPDES permits. *Annual Noncompliance Report for NPDES Non-Majors - State of Alabama* (U.S. EPA, 2005) (Exhibit G-3).

87. The State of Alabama has adopted and is implementing a policy whereby only 10% of all known construction stormwater (CSW) dischargers will be comprehensively evaluated and assessed each year. *Electronic mail communication from Chip Crockett to David A. Ludder* (Oct. 12, 2009) (Exhibit G-4). At this rate, each construction stormwater (CSW) discharger will be comprehensively evaluated and assessed once every 10 years on average. Most construction sites are completed long before ten years. Therefore, most construction stormwater (CSW) dischargers will not be comprehensively evaluated and assessed during their active operation.

88. The State of Alabama has adopted and is implementing a policy whereby only 60 concentrated animal feeding operation (CAFO) dischargers will be comprehensively evaluated and assessed each year. *Electronic mail communication from Richard Hulcher to David A. Ludder* (Oct. 13, 2009) (Exhibit G-7). There are currently 464 registered concentrated animal feeding

operation (CAFO) dischargers in the State of Alabama. *AFO/CAFO Approved Notice of Registrations (NOR) List* (ADEM, Jan. 5, 2010) (Exhibit G-8). The number of registered concentrated animal feeding operation (CAFO) dischargers in the State of Alabama ranged from 450 to 525 during 2005 to 2009. *Electronic mail communication from Richard Hulcher to David A. Ludder* (Oct. 13, 2009) (Exhibit G-7). At the rate of 60 inspections per year, each of the currently registered concentrated animal feeding operation dischargers will be comprehensively evaluated and assessed once every 7.7 years on average.

89. As demonstrated herein, the State of Alabama has failed to comprehensively evaluate and assess compliance with compliance schedules, effluent limitations, and other conditions in NPDES permits; failed to conduct a 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 all violations; and failed to evaluate instances on noncompliance by all "major" permittees and P.L. 92-500 "minor" permittees within 30 days of the identification of a violation 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), Sections IV and V (Exhibit A-1).

90. 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).

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)]

91. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

92. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section II. A. (Exhibit A-1) requires the State of Alabama to maintain a vigorous program of taking timely and appropriate enforcement action against permittees in violation of compliance schedules, effluent limitations, pretreatment standards and requirements, and all other permit conditions.

93. The State of Alabama failed to take any enforcement action against the violators of permits and program requirements identified in *Partial List of Failure to Take Enforcement Action Against Violators of Permits and Program Requirements* (Exhibit J-1).

94. For major dischargers, timely enforcement action begins with a written notice of violation to a violator within thirty (30) days after the State becomes aware that the discharger failed to submit a date-related report; failed to submit a self-monitoring report; or failed to meet an effluent limitation. The State is expected to have initiated enforcement actions to achieve compliance by the time the major discharger appears on the Quarterly Noncompliance Report (QNCR). Prior to a permittee appearing on the subsequent QNCR for the same instance of noncompliance, the permittee should be in compliance or the State should have taken formal enforcement action, *i.e.*, issued a unilateral administrative order or consent administrative order.

If a notice of violation is not applicable or effective, timely enforcement action also includes follow-up with other enforcement mechanisms to ensure permit and program compliance.

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 (Exhibit A-1).

95. The State of Alabama failed to take *timely* enforcement action against the major dischargers identified in *Partial List of Untimely Enforcement Actions Taken Against Major Dischargers* (Exhibit J-2). In many cases, the State failed to issue a written notice of violation to a violator within thirty (30) days after the State became aware that the major discharger failed to submit a date-related report; failed to submit a self-monitoring report; or failed to meet an effluent limitation. In other cases, where a notice of violation was not effective, the State failed to timely follow-up with formal enforcement mechanisms (*i.e.*, administrative order or lawsuit) against the major discharger to ensure permit and program compliance.

96. The State of Alabama failed to take *appropriate* enforcement action against the major dischargers identified in *Partial List of Inappropriate Enforcement Actions Taken Against Major Dischargers Title* (Exhibit J-3). In many cases, the State repeatedly took informal enforcement actions (*e.g.*, issued Warning Letters and Notices of Violation) that were previously not effective in securing compliance. In other cases, the State repeatedly issued administrative orders that were previously not effective in securing compliance. In other cases, the State allowed excessive compliance schedules.

97. For non-major dischargers, timely enforcement action should be taken as quickly as possible. If a notice of violation is not applicable or effective, timely enforcement action also

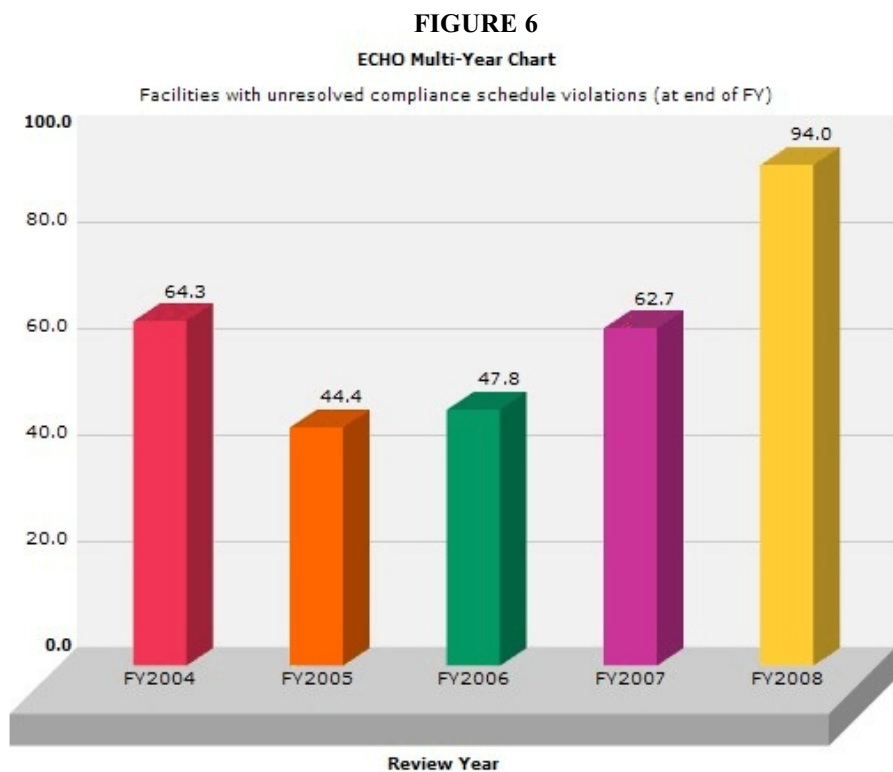
includes follow-up with other enforcement mechanisms to ensure permit and program compliance. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (undated), Section V (Exhibit A-1).

98. The State of Alabama failed to take *timely* enforcement action against the non-major dischargers identified in *Failure to Take Timely Enforcement Action Against Non-major Dischargers* (Exhibit J-4). In many cases, 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; or failed to meet an effluent limitation. In other cases, where the enforcement action was not effective, the State failed to timely follow-up with formal enforcement mechanisms (*i.e.*, administrative order or lawsuit) against the discharger to ensure permit and program compliance.

99. The State of Alabama failed to take *appropriate* enforcement action against the non-major dischargers identified in *Partial List of Inappropriate Enforcement Action Taken Against Non-major Dischargers* (Exhibit J-5). In many cases, the State repeatedly took informal enforcement actions (*e.g.*, issued Warning Letters and Notices of Violation) that were previously not effective in securing compliance. In other cases, the State repeatedly issued administrative orders that were previously not effective in securing compliance. In other cases, the State allowed excessive compliance schedules.

100. The State of Alabama failed to take appropriate enforcement action against the major and non-major dischargers in violation of compliance schedules established by administrative orders identified in *Partial List of major and non-major dischargers in violation of*

compliance schedules established by administrative orders (Exhibit B-1). In most cases the State took no action or ineffective informal action against dischargers found to be in violation of compliance schedules. In recent years this has led to a compounding problem where dischargers remaining in violation for multiple years as shown in *State Review Framework - CWA Data for Alabama, State Trends Report* (U.S. EPA, Jan. 5, 2010) (Exhibit F-3) and depicted in Figure 6 below.



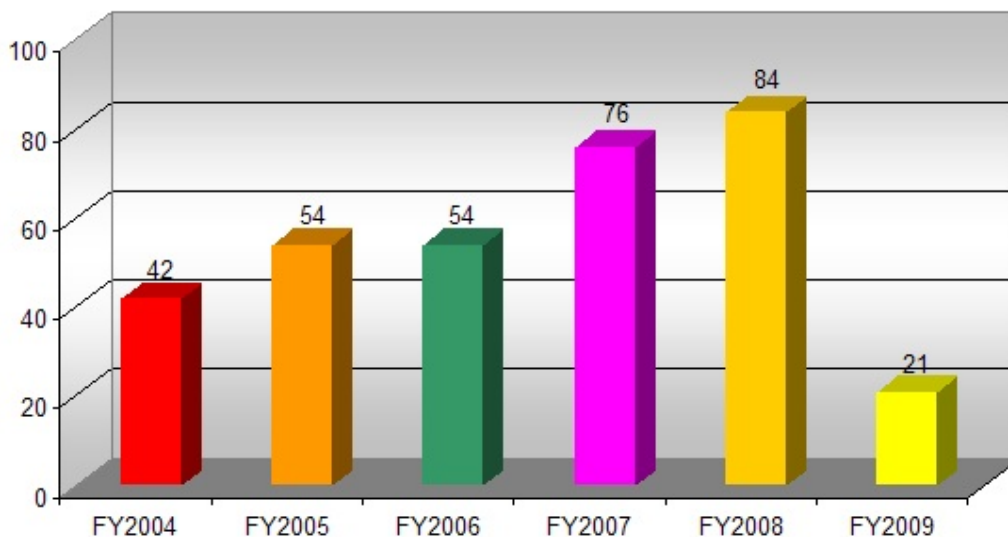
Source: <http://www.epa-echo.gov/echo/cwa/data/AL.html>

101. Under *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Sept. 4, 2007) (Exhibit I-1), as many as 10 minor violations may be accumulated in a 12-month period before a decision to pursue any enforcement action is required. Minor violations are described as “violations of a documentary, technical, or programmatic nature that do not harm nor have the potential to harm the environment or human health . . .”

102. Under *Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Sept. 4, 2007) (Exhibit I-1), no more than one Warning Letter may be issued to a violator in a 12-month period and no more than one Notice of Violation may be issued to a violator in a 12-month period. However, the *Compliance and Enforcement Strategy* fails to dictate what enforcement response the Alabama Department of Environmental Management will pursue if violations continue after issuance of a Warning Letter or Notice of Violation.

103. As shown in Figure 7 below, the number of administrative penalty orders issued by the Alabama Department of Environmental Management declined precipitously in 2009.

FIGURE 7
State Administrative Penalty Orders



104. As demonstrated herein, 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* (undated), Section V (Exhibit A-1).

105. 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).

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)]

106. 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.

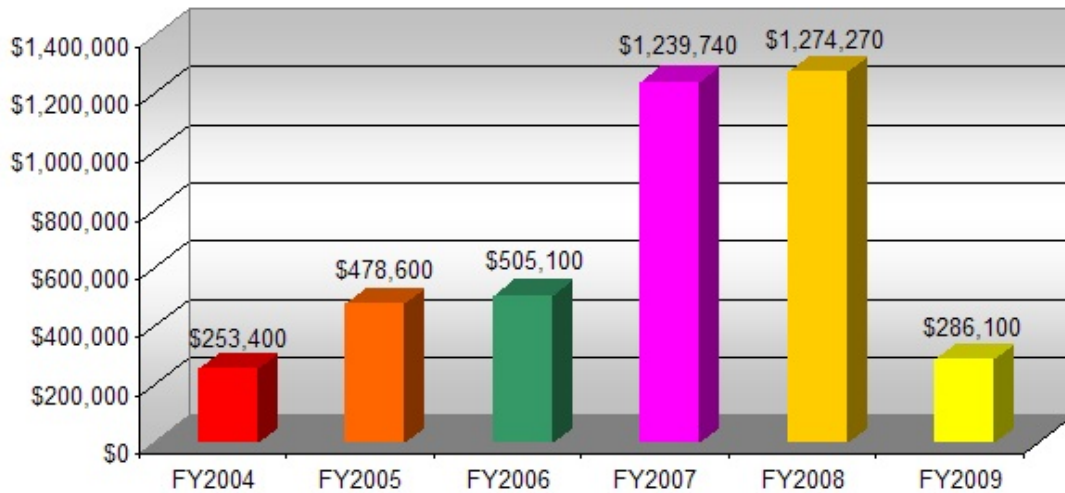
107. The U.S. Environmental Protection Agency counts a violation of a weekly average and monthly average discharge limitation as a violation for each day of the week or month. *Interim Clean Water Act Settlement Policy* (U.S. EPA, 1995) at Attachment 1 (Exhibit K-1). *See e.g., Atlantic States Legal 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). Each violation is subject to a penalty.

108. 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, rather than as a violation for each day of the week or month. *See e.g., 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) (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) (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) (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) (Exhibit K-5). *But see State of Alabama ex rel Troy King v.*

Town of New Brockton Water and Sewer Board, Case No. 71-CV-2009-900093 (Complaint filed Nov. 4, 2009) (Exhibit K-6) (counting violations of average limits as multiple days of violation).

109. As shown in Figure 8 below, penalties assessed and agreed to by the Alabama Department of Environmental Management have declined precipitously in 2009.

FIGURE 8
State Administrative Penalties



110. As demonstrated herein, the State of Alabama has failed to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c).

111. Where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

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)]

112. 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.

113. The State of Alabama fails to identify all violations and all violation-days when determining a penalty amount. For example, in Consent Order 09-104-CWP (Exhibit L-1), the Alabama Department of Environmental Management cited the City of Tuscaloosa for failing to obtain a permit reissuance by September 1, 2005 and alleged that “all discharges . . . have been unpermitted since the expiration date of the Permit.” However, the Department failed to identify on how many days the unpermitted discharges occurred. The likely number of unpermitted discharges and violation-days was 1,468 (Sept. 1, 2005 to Sept. 8, 2009). (Exhibit L-2). The Department also cited the City of Tuscaloosa for failure to submit TKN monitoring data in a timely manner and indicated the dates when the data were received. However, the Department failed to identify when the data were due. After ascertaining the TKN data due dates and receipt dates, the number of violation-days was determined to be 9,171. (Exhibit L-2). The Department also cited the City of Tuscaloosa for failure to submit Discharge Monitoring Reports for one outfall. However, the Department failed to identify when these violations commenced and ended. Finally, the Department cited the City of Tuscaloosa for unpermitted sanitary sewer overflow (SSO) discharges “from January 2007 through June 2009.” However, the Department failed to identify when these discharges occurred and how many there were. A review of SSO reports submitted to the Department by the City indicates that there were 23 such violation-days. (Exhibit S-8). Despite the submission of public comments providing a detailed accounting of violation-days, the Department assessed the City of Tuscaloosa a penalty of \$8,200 with an option to reduce the penalty by performing a Supplemental Environmental Project (SEP). In its response to comments, the Department indicated that “[t]he penalty assessed in this matter is consistent with the minimum penalty amount required by law.” (Exhibit L-3). Ala. Code § 22-

22A-5 imposes a \$100 minimum penalty per violation per day. Thus, at most, the Department found the City committed only 82 violations (82 violations x \$100/violation = \$8,200).

114. Similarly, in Order 08-203-MNPS (Exhibit B-7), the Alabama Department of Environmental Management cited SDW, Inc. for the following violations:

Violation	Dates	Violation-Days
Failure to maintain valid registration	Dec. 18, 2007	1
Failure to submit QCP certification per July 6, 2006 Notice of Violation	Aug. 12, 2006 to May 16, 2008	644
Failure to submit QCP certification per Jan. 28, 2008 Notice of Violation	Feb. 22, 2008 to May 16, 2008	85
Failure to implement and maintain effective BMPs	May 25, 2006; Dec. 18, 2007	2
Off-site sediment accumulation	May 25, 2006	1
TOTAL		733

For these violations, the Order assessed a penalty of \$20,000. Order 08-203-MNPS was appealed to the Alabama Environmental Management Commission in *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, AEMC Docket No. 09-02 (filed Oct. 2, 2008). The evidence presented at hearing showed the following additional violations:

Violation	Dates	Violation-Days
Failure to maintain valid registration	Sept. 1, 2006 to Dec. 17, 2007	473
	Dec. 19, 2007 to Jan. 27, 2008	40
	Sept. 1, 2008 to Sept. 5, 2008	5
Failure to submit QCP certification per July 6, 2006 Notice of Violation	May 17, 2008 to Sept. 5, 2008	112
Failure to submit QCP certification per January 28, 2008 Notice of Violation	May 17, 2008 to Sept. 5, 2008	112

Failure to submit annual summary of inspections with Jan. 31, 2007 registration renewal	Jan. 31, 2007 to Sept. 5, 2008	584
TOTAL		1326

The appeal of Order 08-203-MNPS was dismissed by the Alabama Environmental Management Commission in *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, AEMC Docket No. 09-02 (Order dismissing appeal for lack of standing, Aug. 21, 2009) (Exhibit L-4) without addressing the evidence of additional violations. The Commission's action has been appealed to Circuit Court of Montgomery County in *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, Case No. 03-CV-2009-001320 (filed Aug. 26, 2009) (Exhibit L-5).

115. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

116. As demonstrated herein, the State of Alabama has failed to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c).

117. Where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

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

118. 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.

119. Administrative and judicial penalties under the Clean Water Act shall be assessed for violations occurring up to five years prior to the administrative or judicial action. 28 U.S.C. §

2462. See e.g., *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 88 n.14 (2nd Cir. 2006); *United States v. Banks*, 115 F.3d 916, 918 (11th Cir.1997); *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74-76 (3rd Cir. 1990); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524 (9th Cir.1987).

120. Administrative and judicial penalties under the Alabama Environmental Management Act may be assessed for violations occurring up to two years prior to commencement of the administrative or judicial action. Ala. Code § 22-22A-5(18)c.

121. The State of Alabama does not 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.

122. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

123. As a result, the State of Alabama has failed to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c).

124. Where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

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

125. 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.

126. Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3), requires that the U.S. Environmental Protection Agency take into account the “economic benefit or savings (if any) resulting from the violation” in determining the penalty to be assessed for violations. Clean Water Act § 309(d), 33 U.S.C. § 1319(d), requires that the federal courts consider “the economic benefit (if any) resulting from the violation” in determining the penalty to be assessed for violations.

127. “Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations.” *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir. 1990).

[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the “benefit component” of the penalty.

Policy on Civil Penalties (EPA, Feb. 16, 1984) (Exhibit N-1).

128. Typically, the benefit component is represented by the present value of avoided costs of compliance (*e.g.*, avoided operation and maintenance costs) plus the potential return on investment of avoided costs of compliance and the potential return on investment of delayed costs of compliance (*e.g.*, interest on delayed capital expenditures). *Economic Benefit: Context, Theory and Methodology* (U.S. EPA) (Exhibit N-2). Delayed capital expenditures are those expenditures which should have been made to maintain compliance.

129. “The standard method . . . for calculating the economic benefit from delayed and avoided pollution control expenditures is through the use of the [EPA’s] BEN model.” *Economic*

Benefit: Context, Theory and Methodology (U.S. EPA) (Exhibit N-2). “The best evidence of what the violator should have done to prevent the violations, is what it eventually does (or will do) to achieve compliance.” *Interim Clean Water Act Settlement Policy* (U.S. EPA, Mar. 1, 1995) (Exhibit K-1).

130. Although Ala. Code § 22-22A-5(18)c. requires that the Alabama Department of Environmental Management consider “the economic benefit which delayed compliance may confer upon [the violator],” in determining the amount of any penalty, the Department 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.” *See e.g.*, Order 08-203-MNPS (Exhibit B-7), Consent Order 08-201-CMNPS (Exhibit B-25), Consent Order 08-202-CMNPS (Exhibit B-32), Consent Order 08-204-CMNPS (Exhibit B-38), Consent Order 09-104-CWP (Exhibit L-1). A review of all 13 penalty orders issued by the Department under the Alabama Water Pollution Control Act between October 1, 2008 and June 18, 2009 shows that all 13 orders included the same conclusion that the Department has been “unable to ascertain” if there has been a significant economic benefit conferred on the violator. *See* Order 09-001-WP (Exhibit N-3), Consent Order 09-002-CWP (Exhibit N-4), Order 09-005-WP (Exhibit N-5), Order 09-007-WP (Exhibit N-6), Consent Order 09-022-CWP (Exhibit N-7), Consent Order 09-023-CWP (Exhibit N-8), Consent Order 09-024-CWP (Exhibit N-9), Consent Order 09-025-CWP (Exhibit N-10), Consent Order 09-026-CWP (Exhibit N-11), Consent Order 09-034-CWP (Exhibit N-12), Consent Order 09-

042-CWP (Exhibit N-13), Consent Order 09-043-CWP (Exhibit N-14), and Consent Order 09-061-CWP (Exhibit N-15).

131. Administrative penalties assessed by the State of Alabama for violations routinely include no amount for the economic benefit which delayed compliance may confer upon the violator.

132. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

133. As a result, the State of Alabama has failed to assess, seek or agree to civil penalties appropriate to the violation as required by 40 C.F.R. § 123.27(c).

134. Where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

O. Failure of State to seek adequate enforcement penalties: Degree of culpability [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

135. 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.

136. Clean Water Act § 309(g)(3), 33 U.S.C. § 1319(g)(3), requires that the U.S. Environmental Protection Agency consider the "degree of culpability" of the violator in determining the penalty to be assessed for violations. The U.S. Environmental Protection Agency has construed this to mean the "degree of willfulness and/or negligence." *Policy on Civil Penalties* (EPA, Feb. 16, 1984) (Exhibit S-12); *A Framework Approach for Statute-Specific*

Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties (EPA, Feb. 16, 1984) at 17-19 (Exhibit O-1).

137. Ala. Code § 22-22A-5(18)c. requires that the Alabama Department of Environmental Management consider “the standard of care manifested by such person” in determining the amount of any penalty. The standard of care required by law of all dischargers is one of “strict liability.” This standard of care requires unconditional full compliance. Every violation is the result of a deviation from the strict liability standard of care. The “standard of care manifested by such person” requires that the Department characterize the care exhibited by the violator, *i.e.*, the extent to which the violator deviated from the strict liability standard of care. It is not sufficient to simply conclude that the violator failed to achieve the strict liability standard of care.

138. Administrative penalty orders issued by the Alabama Department of Environmental Management routinely conclude 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. *See e.g.*, Order 08-203-MNPS (Exhibit B-7), Consent Order 08-201-CMNPS (Exhibit B-25), Consent Order 08-202-CMNPS (Exhibit B-32), Consent Order 08-204-CMNPS (Exhibit B-38), Consent Order 09-104-CWP (Exhibit L-1), Consent Order 09-002-CWP (Exhibit N-4), Order 09-005-WP (Exhibit N-5), Order 09-007-WP (Exhibit N-6), Consent Order 09-022-CWP (Exhibit N-7), Consent Order 09-023-CWP (Exhibit N-8), Consent Order 09-024-CWP (Exhibit N-9), Consent Order 09-025-CWP (Exhibit N-10), Consent Order 09-026-CWP (Exhibit N-11), Consent Order 09-034-CWP (Exhibit N-12), Consent Order 09-042-CWP (Exhibit N-13), Consent Order 09-043-CWP

(Exhibit N-14), and Consent Order 09-061-CWP (Exhibit N-15). These conclusions fail to describe the standard of care manifested by the violators.

139. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

140. As a result, the State of Alabama has assessed inadequate penalties for violations because the Department routinely fails to consider the standard of care manifested by violators.

141. Where the State's enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

P. Failure of State to seek adequate enforcement penalties: Consistency with past penalties [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

142. 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.

143. Ala. Code § 22-22A-5(18)c. prescribes the "criteria" that the State of Alabama must consider in determining a penalty amount. *See Alabama Dep't of Env'tl. Mgmt. v. Wright Bros. Constr. Co., Inc.*, 604 So.2d 429 (Ala. Civ. App. 1992); *Alabama Dep't of Env'tl. Mgmt. v. Teasley-Mill Water System, Inc.*, 537 So.2d 57 (Ala. Civ. App. 1988). These criteria are:

- minimum penalty of \$100 per day per violation;
- 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;
- maximum penalty of \$25,000 per day per violation

Consideration of any other criteria is not authorized by Ala. Code § 22-22A-5(18)c.

144. In determining penalty amounts, the Alabama Department of Environmental Management routinely considers, and places heavy emphasis on, consistency with previous penalty assessments for similar violations. *See Memorandum #105: Compliance and Enforcement Strategy* (ADEM, Sept. 4, 2007) at 9 (Exhibit I-1) (“proposed penalties shall take into account “Departmental practices on other cases of a similar nature.”). For example, one Department employee recently testified:

- Q. Did you or what if anything did you do to determine the appropriate -- or the \$20,000 penalty amount?
- A. Basically if you look at paragraphs A, B, C, D, E, F, and G, that describes the process. That describes the evaluation that we made relative to the six penalty factors. And I was responsible for the determination of the penalties using these factors.
- Q. Okay. Did you make any effort to calculate the number of violations and number of days of violation and apply a minimum penalty to those numbers and days?
- A. As you've described here the 514 days, et cetera, no.
- Q. Okay. And it was you that developed the \$20,000 penalty?
- A. Correct.
- Q. Not someone above you?
- A. No. No. And this penalty was developed in light of the six penalty factors in consultation with the Birmingham staff and applying my historical knowledge of

the penalties that we had assessed during the period of 1996 to the time of this order because that's -- that was one of my functions statewide. I served as the levelizer to be sure that we were consistent in applying -- assessing penalty.

Q. All right.

A. Be sure we were equitable, treated similar situations similarly.

Q. Okay.

A. That we were consistent.

Q. Any more?

JUDGE COTTER: Any more synonyms.

THE WITNESS: No, I just want to get my point across. Consistency is important to me.

Testimony of Steven Jenkins, Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.,

EMC Docket No. 09-02 (May 6, 2009).

145. Consistency with previous penalty assessments is not a criterion that may lawfully be considered in determining penalty amounts. 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.

146. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

147. As a result, 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.

148. Where the State’s enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

Q. Failure of State to seek adequate enforcement penalties: Stipulated penalties for future violations [40 C.F.R. §§ 123.27(c), 123.63(a)(3)(ii)]

149. 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.

150. 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 future violations.

151. As shown in Figure 8 above, penalties assessed and agreed to by the Alabama Department of Environmental Management have recently suffered a precipitous decline.

152. As a result, the State of Alabama assesses inadequate stipulated penalties for future violations.¹

¹ Petitioners contend that the inclusion of stipulated penalties in consent orders for future violations is beyond ADEM’s statutory authority. Ala. Code § 22-22A-5(18) authorizes the issuance of an order assessing a civil penalty “to any person who violates” environmental requirements. “Civil penalties may be assessed under this subdivision for any violation occurring within two years *prior to the date of issuance of an order* under paragraph a. of this subdivision or commencement of such civil action under paragraph b. of this subdivision.” Ala. Code § 22-22A-5(18)c. (emphasis added). “Before issuing any consent or unilateral order under this section, the department shall cause public notice to be published for one day in a newspaper of general circulation in the area where the alleged *violation occurred* and on the website of the department for the duration of the comment period;” Ala. Code § 22-22A-5(18)a. (emphasis added). “Where the department has issued an order finding that *a violation has occurred* and assessing a civil penalty, the person subject thereto shall . . . pay the penalty” within a prescribed period of time. Ala. Code § 22-22A-5(18)c. (emphasis added). It is clear from the plain language of Ala. Code § 22-22A-5(18) that ADEM may assess a civil penalty only for *past* violations. *See Cahaba River Society v. Gold Kist, Inc.*, No. 2:01-CV-01725, slip op. at 23-25 (N.D. Ala. July 30, 2002) (questioning ADEM’s authority to assess stipulated penalties for future violations).

In addition, Ala. Code § 22-22A-5(18)c. requires that “[i]n determining the amount of *any* penalty, consideration shall be given to 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
(continued...)

153. Where the State’s enforcement program fails to comply with the requirements of 40 C.F.R. Part 123, including failure to seek adequate enforcement penalties, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a)(3)(ii).

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

154. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

¹(...continued)

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.” (Emphasis added). Ala. Code § 22-22A-5(18)a. requires that “[a]ny order issued under this paragraph shall include findings of fact relied upon by the department in determining the alleged violation and the amount of the civil penalty . . .” ADEM cannot apply these factors to circumstances that are presently unknown, *i.e.*, future violations. *See Cahaba River Society v. Gold Kist, Inc.*, No. 2:01-CV-01725, slip op. at 24 (N.D. Ala. July 30, 2002) (“[B]ecause the subject violations have not yet occurred, there is virtually no way for an interested third party to argue or marshal evidence at that point to show that the amount to be assessed by ADEM is inappropriate in light of all the factors ADEM is statutorily required to consider under § 22-22A-5(18)(c) It is only after a violation actually occurs that the attendant circumstances informing these factors can be assessed, and it is only at that time that it may be apparent that the stipulated penalty amount does not fit the seriousness of the violation, or the violators culpability.”). ADEM cannot make the required findings of fact applying the penalty factors to support a stipulated penalty if the violations have not yet occurred.

In addition, public notice of a proposed penalty order “shall reasonably describe the nature and location of the alleged violation and the amount of civil penalty proposed, contain a summary of any proposed corrective measures, provide instructions for obtaining a copy of the proposed order, and indicate that persons may submit written comments to the department and request a hearing on the proposed order within 30 days of the first date of publication.” Persons cannot submit meaningful comments on a proposed penalty amount or the application of the penalty factors if the violation has not yet occurred.

The plain language of Ala. Code § 22-22A-5(18) requires that penalties only be assessed for *past* violations. An agency interpretation that subverts statutory policy is impermissible. *Ex parte Crestwood Hosp. and Nursing Home, Inc.*, 670 So.2d 45, 47 (Ala. 1995) (administrative agency cannot usurp legislative powers or contravene a statute); *Ex Parte Jones Mfg. Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (administrative regulation cannot subvert or enlarge upon statutory policy); *Pleasure Island Ambulatory Ctr. v. State Health Planning and Dev. Agency*, Nos. 2070404, 2070424, 2008 Ala. Civ. App. LEXIS 679, *8 (Ala. Civ. App. Oct. 24, 2008) (administrative interpretation cannot usurp legislative powers or contravene statute); *Overnite Transp. Co. v. McDuffie*, 933 So.2d 1092, 1098-1099 (Ala. Civ. App. 2005) (administrative regulation may not usurp legislative power or subvert or enlarge upon statutory policy).

155. *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. (Exhibit A-1) requires the State of Alabama to timely prosecute cases of NPDES violations.

156. In each of the following instances, the State failed to timely prosecute the cases.

AL0051349 Alabama Department of Corrections

Draper Correctional Facility Lagoon - Elmore, AL

Mortar Creek

Violations commenced on or before 2/2002. ADEM issued Consent Order 02-148-CWP on 4/24/2002 requiring compliance with 1,095 days and assessing no penalty for past violations. (Exhibit R-1). State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit transferred to Clearwater Solutions, LLC effective 1/14/2008. State filed suit on 7/11/2008. *State of Alabama ex rel Troy King v. Clearwater Solutions, LLC*, Case No. 03-CV-2009-900729. (Exhibit R-4). Order on Settlement Agreement entered on 9/14/2009 requiring diversion of wastewater to City of Wetumpka WWTP within 730 days and assessing a \$14,000 penalty (also for AL0043451) for past violations. (Exhibit R-5). Violations continue. Permit transfer and litigation against new permittee do not moot State's claim for penalties against Alabama Department of Corrections for past permit and order violations.]

AL0043451 Alabama Department of Corrections

Elmore Correctional Facility Lagoon - Elmore, AL

Callaway Creek

Violations commenced on or before 1/2002. ADEM issued Consent Order 02-149-CWP on 4/24/2002 requiring compliance within 1,095 days and assessing no penalty for past violations. (Exhibit R-6). State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit transferred to Clearwater Solutions, LLC effective 1/14/2008. Violations continued. Citizen notice of intent to sue Clearwater Solutions, LLC for 2,071 violation-days served on 4/21/2008. State filed suit on 7/11/2008. *State of Alabama ex rel Troy King v. Clearwater Solutions, LLC*, Case No. 03-CV-2009-900729. (Exhibit R-4). Order on Settlement Agreement entered on 9/14/2009 requiring diversion of wastewater to City of Wetumpka WWTP within 730 days

and assessing a \$14,000 penalty (also for AL0051349) for past violations. (Exhibit R-5). Permit transfer and litigation against new permittee do not moot State's claim for penalties against Alabama Department of Corrections for past permit and order violations.]

AL0053180 Alabama Department of Corrections

Farquar State Cattle Ranch Lagoon - Hale County, AL
Big German Creek

Violations commenced on or before 1/2003. State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit reissued to Alabama Utility Services, LLC effective 8/1/2007. Violations continue. Permit reissuance does not moot State's claim for penalties against Alabama Department of Corrections for past permit violations.]

AL0046744 Alabama Department of Corrections

Fountain/Holman Correctional Facility Lagoon - Atmore, AL
Wetweather Creek

Violations commenced on or before 5/2002. State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit reissued to City of Atmore effective 12/1/2007. Violations continue. Permit reissuance does not moot State's claim for penalties against Alabama Department of Corrections for past permit violations.]

AL0048461 Alabama Department of Corrections

Limestone Correctional Facility Lagoon - Capshaw, AL
Limestone Creek

Violations commenced on or before 1/2003. State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit transferred to Limestone County Water and Sewer Authority effective 7/6/2007. Permit transfer does not moot State's claim for penalties against Alabama Department of Corrections for past permit violations.]

AL0051403 Alabama Department of Corrections

Red Eagle Honor Farm Lagoon - Montgomery, AL
Tallapoosa River

Violations commenced on or before 6/2003. State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No.

03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit reissued to Alabama Utility Services, LLC effective 7/1/2007. Violations continue. Permit reissuance does not moot State's claim for penalties against Alabama Department of Corrections for past permit violations.]

AL0043494 Alabama Department of Corrections

St. Clair Correctional Facility WWTP - Springville, AL
Little Canoe Creek

Violations commenced on or before 1/2003. ADEM issued Consent Order 04-006-CWP on 10/23/2003 requiring compliance within 730 days and assessing no penalty for past violations. (Exhibit R-7). State filed suit on 8/10/2005. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2005-002019. (Exhibit R-2). Placed on court administrative docket (inactive status) on 1/5/2006 where it remains. (Exhibit R-3). [Note: Permit transferred to Utility Board of the Town of Odenville effective 7/30/2007. Permit transfer does not moot State's claim for penalties against Alabama Department of Corrections for past permit violations.]

AL0063797 City of Dadeville

Dadeville WWTP - Dadeville, AL
Chattasofka Creek

Violations commenced on or before 7/2002. Notice of Violation issued by ADEM on 6/4/2004. Violations continued thereafter. Notice of Violation issued by ADEM on 9/18/2006. Violations continued thereafter. Citizen notice of intent to sue served on 3/9/2007 for 1,497 violation-days. State filed suit on 5/4/2007. *State of Alabama ex rel Troy King v. City of Dadeville*, Case No. 62-CV-2007-000050 (pending). (Exhibit R-8). Docket shows little activity. (Exhibit R-9). [Note: ADEM issued Consent Order 07-106-CWP on 5/9/2007 requiring full compliance within 365 days and assessing a \$6,500 penalty for past violations. (Exhibit R-10). Violations continued thereafter.]

AL0055409 East Walker County Sewer Authority

East Walker County WWTP - Dora, AL
Mulberry Fork

Violations commenced on or before 4/1999. ADEM issued Consent Order 01-192-CWP on 8/2/2001 requiring compliance within 1,080 days and assessing a \$4,000 penalty for past violations. (Exhibit R-11). Violations continued thereafter. ADEM filed suit on 10/24/2005. *Alabama Dep't of Env'tl. Mgmt. v. East Walker County Sewer Auth.*, Case No. 64-CV-2005-000623 (pending). (Exhibit R-12). Docket shows no disposition. (Exhibit R-13). [Note: Warning Letter issued by ADEM on 3/27/2007.]

AL0057029 Water Works and Sewer Board of the City of Hanceville

Hanceville WWTP - Hanceville, AL

Mud Creek

Violations commenced on or before 5/2004. ADEM issued Consent Order 07-018-CWP on 11/22/2006. (Exhibit R-14). Violations continued thereafter.

ADEM issued Order 08-113-WP on 3/11/2008. (Exhibit R-15). ADEM filed suit on May 27, 2008. *Alabama Dep't of Env'tl. Mgmt. v. Water Works and Sewer Bd. of the City of Hanceville*, Case No. 25-CV-2008-000170 (pending). (Exhibit R-16). Docket shows trial date has been set and continued four times. (Exhibit R-17).

157. As demonstrated herein, the State of Alabama has not timely prosecuted timely prosecute cases of 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. (Exhibit A-1).

158. 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).

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

159. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

160. *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. (Exhibit A-1) requires the State of Alabama to take prompt action where dischargers violate consent decrees.

161. In each of the following instances, the State failed to take prompt action where dischargers violate consent decrees:

AL0021491 Town of Wilsonville

Wilsonville WWTP - Wilsonville, AL

Unnamed Tributary to Dry Branch

Violations commenced on or before 5/2004. Informal enforcement action by ADEM on 9/22/2005. Violations continued thereafter. ADEM filed suit on 5/15/2006. *Alabama Department of Environmental Management v. Town of Wilsonville*, Case No. 58-CV-2006-000600. (Exhibit S-1). Court Order entered on 1/16/2007 requiring compliance by 11/30/2007 and assessing a \$8,600 penalty for past violations. (Exhibit S-2). Violations continued thereafter. (Exhibit S-3).

AL0023400 Winfield Water Works and Sewer Board

Winfield WWTP - Winfield, AL

Luxapallila Creek (East Branch)

Violations commenced on or before 4/1998. ADEM filed suit on 6/10/2003. *Alabama Department of Environmental Management v. Winfield Water Works and Sewer Board*, Case No. 49-CV-2003-000109. (Exhibit S-4). Consent Decree entered on 8/10/2004 requiring compliance by the date indicated in a future compliance plan and assessing a \$12,750 penalty for past violations. (Exhibit S-5). Informal enforcement action by ADEM on 12/6/2005. Violations continued thereafter. Warning Letter issued by ADEM on 11/20/2006. Notice of Violation issued by ADEM on 11/21/2006. Violations continued thereafter. Warning Letter issued by ADEM on 3/12/2007. Violations continued thereafter. Warning Letter issued by ADEM on 4/19/2007. Violations continued thereafter. Informal enforcement action by ADEM on 5/16/2007. Violations continued thereafter. ADEM issued Order 07-158-WP on 8/27/2007 requiring compliance within 365 days and assessing a \$9,900 penalty for past violations. (Exhibit S-6). Violations continued thereafter. ADEM issued Consent Order 09-071-CWP on 4/16/2009 requiring compliance by 7/1/2009 and assessing no penalty for past violations. (Exhibit S-7).

AL0023418 Jasper Water Works and Sewer Board, Inc. (Major)

Jasper WWTP - Jasper, AL

Town Creek

Violations commenced on or before 2002. State and ADEM filed suit on 10/4/2002. *State of Alabama ex rel Bill Pryor v. Jasper Water Works and Sewer Bd.*, Case No. 64-CV-2002-000654. Consent Decree entered on 5/5/2003 requiring compliance with 1,095 days. Violations continued thereafter. Notice of Violation issued by ADEM on 3/30/2007. Violations continued thereafter. Warning Letter issued by ADEM on 5/2/2007 and 5/21/2007. Violations

continued thereafter. ADEM issued Order 08-064-WP on 12/19/2007 requiring compliance within 365 days and assessing a penalty of \$9,200. Violations continued thereafter. No further enforcement action.

162. As demonstrated herein, the State of Alabama has 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. (Exhibit A-1).

163. 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).

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)]

164. Clean Water Act § 304(i)(2)(D), 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; emphasis added).

165. 40 C.F.R. § 123.25(c) provides:

State NPDES programs shall ensure that any board or body which approves all or portions of permits *shall not include as a member* any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.

(1) For purposes of this paragraph:

(i) “Board or body” includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.

(ii) “Significant portion of income” means 10 percent or more of gross personal income for a calendar year, except that it means 50 percent or more of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving that portion under retirement, pension, or similar arrangement.

(iii) “Permit holders or applicants for a permit” does not include any department or agency of a State government, such as a Department of Parks or a Department of Fish and Wildlife.

(iv) “Income” includes retirement benefits, consultant fees, and stock dividends.

(2) For purposes of paragraph (c) of this section, income is not received “directly or indirectly from permit holders or applicants for a permit” when it is derived from mutual fund payments, or from other diversified investment for which the recipient does not know the identity of the primary sources of income.

(Emphasis added).

166. “All State programs must have conflict of interest protections which are at least as stringent as those of the [Clean Water Act].”

This statutory prohibition against conflicts of interest has been a problem in a number of States. Some States require permitting boards to have representatives of the regulated public. Other State boards are elected and could include members who receive income from permittees. These States’ approaches are inconsistent with the explicit language of the Act. States must either establish the federal conflict prohibition or the Board must delegate its permitting and enforcement powers to a position that is prohibited from conflicts. *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) (emphasis added) (Exhibit T-1).

167. The State of Alabama must certify to the United States Environmental Protection Agency that the Director of the Alabama Department of Environmental Management (and any delegates) and the members of the Environmental Management Commission are in compliance

with the conflict of interest provisions of 40 C.F.R. § 123.25(c). It is incumbent upon the State of Alabama to make specific determinations regarding the qualification of the Director (and any delegates) and the members of the Commission. *See General Counsel Opinion* (U.S. EPA, Feb. 14, 1973) (Exhibit T-2), reprinted in *National Pollutant Discharge Elimination System State Program Guidance*, Vol. III (U.S. EPA, 1986).

168. Ala. Code § 22-22A-5(10), authorizes the Director of the Alabama Department of Environmental Management to approve and issue, in the first instance, all National Pollutant Discharge Elimination System (NPDES) permits issued by the Department. Ala. Code § 22-22A-4(b) authorizes the Director to delegate his authority to issue permits to employees of the Department. The Director has delegated his authority to issue NPDES permits to the Chief of the Water Division.

169. Ala. Code § 22-22A-7(c), authorizes the Environmental Management Commission to hear appeals of administrative actions of the Alabama Department of Environmental Management, including appeals of National Pollutant Discharge Elimination System (NPDES) permits and orders issued by the Alabama Department of Environmental Management, and to approve, modify or disapprove such permits and orders.

170. The plain and unambiguous language of Clean Water Act § 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D), and 40 C.F.R. § 123.25(c) require that the Director, the Chief of the Water Division, and members of the Environmental Management Commission comply with the conflict of interest provisions or not serve.

171. Ala. Code § 22-22A-6(j) provides that “[m]embers of the Environmental Management Commission shall meet all requirements of . . . the conflict of interest provisions of applicable federal laws and regulations.”

172. The State of Alabama has not certified to the U.S. Environmental Protection Agency that the Director of the Alabama Department of Environmental Management and the Chief of the Water Division comply with the requirements of Clean Water Act § 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D), and 40 C.F.R. § 123.25(c).

173. 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 requirements of Clean Water Act § 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D), and 40 C.F.R. § 123.25(c).

174. On October 15, 1996, the Environmental Management Commission adopted a resolution requiring that its members annually complete and file an NPDES Conflict of Interest Disclosure Form demonstrating the absence of any conflict with the provisions of Clean Water Act § 304(i)(2)(D), 33 U.S.C. § 1314(i)(2)(D), and 40 C.F.R. § 123.25(c). Alternatively, the resolution provides that a commissioner with a conflict may execute and file a General Recusal Form precluding the member from acting on any NPDES-related matter for the duration of the conflict and for two years after the cessation of the conflict. *Resolution* (Exhibit T-3).

175. In a letter dated April 22, 1997, then Administrator of the U.S. Environmental Protection Agency Carol M. Browner determined that this disclosure and recusal process “was appropriate under the [Clean Water Act] and EPA policy.” *Letter from Carol M. Browner to*

David A. Ludder (Apr. 22, 1997) (Exhibit T-4). Petitioners submit that this determination was unlawful and should not be adhered to.

176. Riley Boykin Smith served as a member of the Environmental Management Commission from December 16, 2002 to September 30, 2006. Riley Boykin Smith received a significant portion of his income directly or indirectly from NPDES permit holders or applicants for NPDES permits. Riley Boykin Smith executed two General Recusal Forms during his tenure on the Commission and continued to remain a member of the Commission. *General Recusal Form* (Feb. 22, 2005) (Exhibit T-5) and *General Recusal Form* (Jan. 11, 2006) (Exhibit T-6).

177. The State of Alabama has not provided a procedure to ensure that persons who do not comply with the conflict of interest provisions of 33 U.S.C. § 1314(i)(2)(D) and 40 C.F.R. § 123.25(c) do not remain as members of the Environmental Management Commission.

178. When a State NPDES program no longer complies with 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).

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)]

179. State programs under 40 C.F.R. Part 123 must have the authority to assess or sue to recover in court civil penalties. 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. 40 C.F.R. § 123.27(a)(3).

180. 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); *Lyons v. River Road Constr., Inc.*, 858 So.2d 257, 261 (Ala. 2003). 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 Hospital Bd. v. Epperson*, 378 So.2d 696, 697 (Ala. 1979). Although State *officials* may be made defendants to compel the performance of legal duties or to obtain a declaratory judgment, State officials may not be required to pay money from the public treasury.

181. The State of Alabama may not recover civil penalties in State court from State agencies or officials for violations of State program requirements. *State of Alabama ex rel Troy King v. Alabama Dep't of Corrections*, Case No. 03-CV-2009-000294 (Exhibits U-1, U-2, and U-3).

182. As demonstrated herein, 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).

183. Where the State's legal authority no longer meets the requirements of 40 C.F.R. §123.27(a)(3) because the State has failed to promulgate or enact new authorities when necessary or because of action by a State legislature or court striking down or limiting State authorities, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a).

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)]

184. State programs under 40 C.F.R. Part 123 must have legal authority to implement 40 C.F.R. § 122.26 (storm water discharges). 40 C.F.R. § 123.25(a)(9).

185. Permits must be obtained for all discharges from large and medium municipal separate storm sewer systems. 40 C.F.R. § 122.26(a)(3). To qualify for a permit, a large or medium municipal separate storm sewer system must demonstrate that it can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables it at a minimum to:

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

(B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;

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

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

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

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

See also Letter from James D. Giattina, U.S. EPA to James McIndoe, ADEM (March 20, 2008)

(Exhibit V).

186. 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.

187. Ala. Code § 11-89C-12 prohibits any governing body from initiating any action to enforce its ordinances or resolutions 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.

188. Ala. Code §§ 11-89C-11 and 11-89C-12 limit the authority of governing bodies to require compliance with conditions in ordinances, permits, contracts, or orders.

189. As demonstrated herein, the State's legal authority does not meet the requirements of 40 C.F.R. § 123.25(a)(9).

190. Where the State's legal authority no longer meets the requirements of 40 C.F.R. §123.25(a)(9) because the State has failed to promulgate or enact new authorities when necessary or because of action by a State legislature or court striking down or limiting State authorities, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a).

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)]

191. All State programs under 40 C.F.R. Part 123 must have legal authority to implement 40 C.F.R. § 122.4(i) and must be administered in conformance 40 C.F.R. § 122.4(i), except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements. 40 C.F.R. § 123.25(a)(1).

192. 40 C.F.R. § 122.4(i) provides that no NPDES permit may be issued

To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by sections 301(b)(1)(A) and 301(b)(1)(B) of CWA, and for which the *State* or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under §124.56(b)(1) of this chapter.

193. In *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007 (9th Cir. 2007), the Court construed 40 C.F.R. § 122.4(i) as follows:

The regulation does provide for an exception where a TMDL has been performed and the owner or operator demonstrates that before the close of the comment period two conditions are met, which will assure that the impaired waters will be brought into compliance with the applicable water quality standards. The plain language of this exception to the prohibited discharge by a new source provides that the exception does not apply unless the new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards.

The EPA argues that under the requirements of clause (1), there are sufficient remaining load allocations to allow for the discharge because the TMDL provides a method by which the allocations could be established to allow for the discharge. There is no contention, however, that these load allocations represent the amount of pollution that is currently discharged from the point sources and nonpoint sources, and there is no indication of any plan that will effectuate these load allocations so as to bring Pinto Creek within the water quality standards. The TMDL merely provides for the manner in which Pinto Creek *could* meet the water

quality standards if all of the load allocations in the TMDL were met, not that there are sufficient remaining pollutant load allocations under existing circumstances.

With regard to the requirements of clause (2), the EPA argues that the requirement of “compliance schedules” pertains only to point sources for which there is a permit. This does not correspond to the plain language of clause (2), which provides “the existing discharges into that segment [of Pinto Creek] are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.” 40 C.F.R. § 122.4(i)(2) (2000).

* * *

* * * The plain language of clause (2) of the regulation, instead, provides that existing discharges into that segment (of the waters) are “subject to *compliance schedules* designed to bring the segment into compliance with applicable water quality standards.” 40 C.F.R. § 122.4(i)(2) (2000) (emphasis added). This is not a complete ban but a requirement of schedules to meet the objective of the Clean Water Act.

Id. at 1012-1013.

194. In *Friends of Hurricane Creek v. Alabama Department of Environmental Management*, EMC Docket No. 08-07, the Department submitted a Post-Hearing Brief of the Alabama Department of Environmental Management which argues to the Hearing Officer appointed by the Environmental Management Commission that (1) Ala. Admin. Code R. 335-6-6-.04(h) does *not* incorporate by reference 40 C.F.R. § 122.4(i); and (2) 40 C.F.R. § 122.4(i) does *not* apply to sources discharging into waters for which the EPA has developed a TMDL. (Exhibit W-1). *See also* Motion for Partial Summary Judgment of the Alabama Department of Environmental Management (Ala. Admin. Code R. 335-6-6-.04(h) does *not* incorporate by reference either 40 C.F.R. § 122.4(i) or 40 C.F.R. §122.44(d)(1)(vii)(B) and 40 C.F.R. §§ 122.4(i) and 122.44(d)(1)(vii)(B) do not apply to sources discharging to waters for which the EPA has developed a TMDL. (Exhibit W-2). In essence, the Department admits that it lacks legal

authority to implement 40 C.F.R. § 122.4(i) and is not required to administer its permitting program in conformance 40 C.F.R. § 122.4(i).

195. As demonstrated herein, the State's legal authority does not meet the requirements of 40 C.F.R. § 123.25(a)(1).

196. Where the State's legal authority no longer meets the requirements of 40 C.F.R. §123.25(a)(1) because the State has failed to promulgate or enact new authorities when necessary or because of action by a State legislature or court striking down or limiting State authorities, the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a).

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

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

198. In 2004, the State of Alabama administered 1,667 permits for non-stormwater facilities. EPA ECHO database as of January 11, 2010, *available at* http://www.epa-echo.gov/echo/compliance_report_water_icp.html. Today Alabama administers over 9,400 NPDES permits consisting of 1,064 individual permits of which 191 are listed as major facilities. *Permitting for Environmental Results (PER): NPDES Profile: Alabama and Indian Country*, p. 2, (U.S. EPA, March 10, 2005). This is an increase of over 7,773 permits since 2004 due in large part to recent stormwater monitoring requirements.

199. From FY 2005 through 2007 the state provided 30 Full Time Equivalents (FTEs) to the NPDES program (excluding enforcement operations). *Electronic mail communication*

from James McIndoe, Chief, Water Division, Alabama Department of Environmental Management (Dec. 18, 2009). (Exhibit X-1). In comparison, from 1999 to 2003, EPA Region 4 reported NPDES FTEs between 46 and 50 despite the fact that the agency had delegated NPDES permit program authority and responsibility to each state in the Region. *Report No. 2005-S-00001:Congressional Request Regarding EPA Clean Water Enforcement Actions*, Appendix C, p. 10., (EPA: Office of the Inspector General, Oct. 18, 2004), *available at* <http://www.epa.gov/oig/reports/2005/20041018-2005-S-00001.pdf>. Alabama reduced the number of FTEs for the NPDES program from 30 in 2007 to 26 in 2008. Twenty-six FTEs is roughly equivalent to 361 permitted facilities or 7.35 major facilities per employee assigned to the program.

200. EPA's guidance to states on the NPDES program provides:

Resource problems include inadequate funding and insufficient or inadequately trained personnel...A shortage of qualified personnel can have an appreciable negative impact on program administration, particularly when there is a lack of qualified permit writers or properly trained inspectors. Resource deficiencies frequently will lead to serious problems in other aspects of program administration, leaving the state unable to properly operate the program. In such cases, EPA must require that proper funding and staffing be provided by the state as a condition of continued program approval.

National Pollutant Discharge Elimination System State Program Guidance, Vol. I at 6-4 (EPA, 1986).

201. Due in part to the lack of adequate manpower, inspections of major facilities decreased by 38% over the last five years and inspection of facilities with individual permits decreased from 28.3% in fiscal year 2005 to 9.5% in FY 2008. Similarly, the numbers of non-major facilities which failed to submit required discharge monitoring reports increased from 6 in

FY 2005 to 676 in FY 2008 while the percentage of NPDES facilities with unresolved compliance schedule violations increased 58.5% over this same period. With this, the numbers of both informal and formal enforcement actions decreased while the percent of major facilities in significant non-compliance has risen sharply. *Compliance & Enforcement in the Alabama Npdes (Water Pollution Control) Program Adem Reform Coalition: Disturbing Negative Trends*, Presentation to the Alabama Environmental Management Commission (David Ludder, Aug. 21, 2009. (Exhibit X-2).

202. As demonstrated herein, the State of Alabama has failed to provide adequate manpower as required to meet minimum requirements under 33 U.S.C §1314(i)(2)(D) and § 1342(b).

203. Where the State fails to provide adequate manpower as required to meet minimum requirements under 33 U.S.C §1314(i)(2)(D) and § 1342(b), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a).

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

204. States are required to provide adequate funding necessary to effectively carry out the minimum requirements set forth under 33 U.S.C § 1342(b).

205. State of Alabama funding for the NPDES program increased from \$6,122,484 in FY2002 to \$10,176,960 in FY 2009. *Electronic mail communication from James McIndoe, Chief, Water Division, Alabama Department of Environmental Management* (Dec. 18, 2009). (Exhibit X-1) However, during this period federal funding remained relatively steady while the number of permits increased over 500% from 1,667 facilities in 2004 to over 9,400 in 2010.

Compare Permitting for Environmental Results (PER): NPDES Profile: Alabama and Indian Country, p. 2, (U.S. EPA, Mar. 10, 2005) with EPA ECHO database search conducted on January 11, 2010, available at http://www.epa-echo.gov/echo/compliance_report_water_icp.html.

206. During this period, inspections of major dischargers decreased by 38% and inspection of non-major dischargers with individual permits decreased by 18.8%. Dischargers with unresolved compliance schedule violations increased 58.5% and the percentage of major dischargers in significant non-compliance rose sharply. *Compliance & Enforcement in the Alabama Npdes (Water Pollution Control) Program Adem Reform Coalition: Disturbing Negative Trends*, Presentation to the Alabama Environmental Management Commission (David Ludder, Aug. 21, 2009. (Exhibit X-2).

207. In response to these falling numbers, former ADEM Director Trey Glenn reported that the Department was dealing with “static resources,” saying: “the people who gave us the money and tells us which things to inspect told us to inspect less ... they gave us less money for that.” *Transcript of Alabama Environmental Management Commission Meeting*, Aug. 21, 2009.

208. As demonstrated herein, the State of Alabama failed to provide adequate funding as required to meet minimum requirements under 33 U.S.C § 1314(i)(2)(D) and § 1342(b).

209. Where the State’s NPDES permit program fails to provide adequate funding to meet minimum requirements under 33 U.S.C § 1314(i)(2)(D) and § 1342(b), the State must take corrective action or suffer program withdrawal. 40 C.F.R. § 123.63(a).

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

210. A State NPDES program shall include a Memorandum of Agreement with the Regional Administrator of the U.S. Environmental Protection Agency as required by 40 C.F.R. §123.24. 40 C.F.R. § 123.21(a)(4).

211. *National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency Region IV* (Exhibit A-1) provides that the State of Alabama shall “[c]reate and maintain to the maximum extent possible . . . the resources required to carry out all aspects of the NPDES program.”

212. According to EPA’s NPDES program guidance,

[o]perating such a comprehensive program requires... properly trained personnel in numbers sufficient to meet the program’s needs and adequate resources.... Resource deficiencies frequently will lead to serious problems in other aspects of program administration, leaving the state unable to properly operate the program. In such cases, EPA must require that proper funding and staffing be provided by the state as a condition of continued program approval.

National Pollutant Discharge Elimination System State Program Guidance, Vol. I at 6-2,4 (EPA, 1986).

213. The State of Alabama has failed to provide adequate manpower as required to meet minimum requirements under 33 U.S.C § 1314(i)(2)(D) and § 1342(b).

214. The State failed to provide adequate funding as required to meet minimum requirements under 33 U.S.C §§ 1314(i)(2)(D) and 1342(b).

215. As demonstrated herein, the State of Alabama has failed to “[c]reate and maintain to the maximum extent possible . . . the resources required to carry out all aspects of the 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* (Exhibit A-1).

216. 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).

V. Request for Relief

Wherefore, the Petitioners 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,

David A. Ludder
LAW OFFICE OF DAVID A. LUDDER, PLLC
9150 McDougal Court
Tallahassee, Florida 32312-4208
Phone: (850) 386-5671
Fax: (206) 888-5671
E-mail: DavidALudder@enviro-lawyer.com

Mitch Reid
ALABAMA RIVERS ALLIANCE, INC.
2027 2nd Avenue North, Suite A
Birmingham, Alabama 35203
Phone: (205) 322-6395
Fax: (205) 322-6397
E-mail: mreid@alabamarivers.org

Attorneys for Petitioners