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DRAFT

Minutes

Environmental Management Commission Meeting

Alabama Department of Environmental Management Building

1400 Coliseum Boulevard

Montgomery, Alabama 36110-2059

August 22, 2008

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Convened: 11:00 a.m.
Adjourned: 12:00 noon

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Transcript

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Part A

ALABAMA ENVIRONMENTAL MANAGEMENT

COMMISSION MEETING

Alabama Department of Environmental

Management Building

Alabama Room (Main Hearing Room)

1400 Coliseum Boulevard

Montgomery, Alabama

August 22, 2008 11:00 a.m.

COMMISSION MEMBERS PRESENT:

W. SCOTT PHILLIPS, CHAIR

DR. LAUREL G. GARDNER,

VICE-CHAIR

SAM H. WAINWRIGHT, P.E.

MS. ANITA L. ARCHIE

DR. JOHN H. LESTER

DR. KATHLEEN J. FELKER

KENNETH A. HAIRSTON, ESQ.

ALSO PRESENT:

DEBI THOMAS, EMC EXECUTIVE ASST.

ROBERT TAMBLING, EMC LEGAL COUNSEL

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MR. PHILLIPS: Good morning. We'll call the Environmental Management Commission Meeting to order. I'll acknowledge we have a quorum. It's good to see all of you here today.

We'll go to Agenda Item -- Agenda Item Number 1, a consideration of the minutes of the meeting held on June 27, 2008.

Do I have a motion from the Commission?

DR. GARDNER: So moved.

MR. PHILLIPS: I have a motion. Do I have a second?

DR. LESTER: Second.

MR. PHILLIPS: I have a motion and a second.

Is there any discussion?

(No response.)

MR. PHILLIPS: There being no discussion, all in favor of the motion signify by signing aye.

(Commission members in favor. of the motion so indicated.)

MR. PHILLIPS: All opposed same sign.

(No response.)

MR. PHILLIPS: Motion carries. Thank you. Moving to Agenda Item Number 2, report from our Director.

Mr. Director.

MR. GLENN: Thank you, Chairman Phillips and Commissioners. Once again, it's a pleasure to stand before you and address you on some of the -- the goings on of the Department.

Just -- just to begin, you should have received a memo from me recently regarding potential rulemaking that the Department may initiate between now and the next Commission meeting. You should also have received a listing of the recently executed contracts that --

that we went through. Lastly, just on an administrative issue regarding our budget. As we do prepare for the end of this fiscal year, which is September 30th, our budget and expenditures are on track. It is what we had predicted. And we are currently, actively engaging in the preparation of our budget management for next year, FY '09, as well as the initial planning for our 2010 budget cycle and request to the legislature. We're in the very early stages of that as well.

As you saw earlier this week, I did something a little -- little different for the rest of my remarks. I sent you a memorandum kind of going into a little more detail on some of the items that -- that have been ongoing as a Department that I'm going to touch on today. I did that in an effort -- in a hope that you

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1 would be able to -- to have a little
2 more detail at your finger tips should
3 you want it or be prepared to ask me
4 any questions along those lines, but
5 -- so I hope that was helpful. If it
6 is, I'll continue -- continue to do
7 that.
8 But the first thing I
9 want to touch on is enforcement. We
10 do continue to reap the benefits of
11 our updated enforcement strategy. All
12 our programs have adjusted in the new
13 strategy and we're seeing the positive
14 results of that. Although we are very
15 pleased with the positive effects of
16 the rewritten strategy and what it has
17 had on our enforcement, we're engaging
18 in preliminary discussions now on
19 revising the strategy in order to
20 better clarify the method for
21 calculating penalties.
22 The next issue I want to
23 highlight is a recent federal court

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1 ruling regarding the Clean Air
2 Interstate Rule, or CAIR rule, as we
3 talk about that.
4 The CAIR rules were
5 recently vacated by the federal court,
6 and this means that ADEM has a rule on
7 its books patterned after a federal
8 rule that no longer is in existence.
9 The rule was a cap-and-trade program
10 for NOx and SO2. And without the
11 federal rule, there's no federal
12 structure and mechanism to operate the
13 trade as envisioned when Alabama and
14 other states passed their rules.
15 It's unclear as to
16 whether the states can put together
17 some sort of cooperative trading
18 mechanism, whether EPA can put CAIR
19 back together again, or whether there
20 will be any congressional activity on
21 -- on this issue. But this has
22 further implications, the least of
23 which is some of our SIP processes

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1 were operating and were ongoing on the
2 assumption that CAIR would be in
3 effect. And so this is a very fluid
4 issue. There will be more of this to
5 come, but I definitely wanted to -- to
6 bring that to your attention.
7 The next item that I
8 wanted to take on is Construction
9 Stormwater. The Construction
10 Stormwater Program, as we've been
11 discussing both in these meetings and
12 individually, is in the midst of
13 several significant refinements all
14 aimed at increasing compliance at land
15 developments across the state of
16 Alabama.
17 We continue to refine our
18 business process, the way in which we
19 do our business, with a very clear
20 focus on the professionally prepared
21 Construction Best -- Management Best
22 Practices Plan, the CBMPPs --
23 Construction Best Management Practices

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1 Plan. One item that has to be
2 addressed in these plans is the volume
3 and velocity of pre-and
4 post-stormwater runoff of these sites
5 in question. So just an update to
6 that program is still going through
7 many revisions and I hope to see that
8 program further develop as we move
9 forward.
10 Next, I'd like to touch
11 very quickly on the Solid Waste
12 Regulations. Pursuant to the passage
13 of Solid Waste and Recycled Materials
14 Management Act this year the Solid
15 Waste Branch has begun drafting the
16 rules for the implementation of that
17 act. The regulations are in various
18 stages and there will be various
19 different packages of regulations that
20 come before you in -- over the next
21 several Commission meetings, and --
22 we're not anticipating any of those in
23 October, I don't believe.

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1 We are talking with
2 identified stakeholders now on the
3 Recycling Grant regs as well as
4 beginning the initial discussion and
5 development of the unauthorized dump
6 -- unauthorized dump regs in the very
7 near future. So that -- that -- the
8 implementation of the program is -- is
9 -- continues and is ongoing.
10 Next, real quick on the
11 unified strategic plan development. I
12 think each of you are well aware of
13 this, but just a general update. It's
14 first time we've been in the room
15 together since we began this effort;
16 and make sure you're aware the
17 development of this plan is underway.
18 This effort will
19 hopefully result in a cooperative
20 strategic plan that can move both the
21 Commission and the Department toward
22 the achievement of much greater
23 results. In the near future all --

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1 all of you either have had or will
2 have the opportunity to talk with the
3 Auburn Montgomery Center for
4 Government group that's helping to
5 facilitate this to begin the
6 discussion of some these big results
7 that you envisioned for this plan.
8 And over the coming weeks and months
9 following that, the Department
10 identified stakeholders and others
11 will be brought into the process to
12 prepare items for you -- to present
13 back in front of you with an expected
14 finalization of the plan in late
15 December. That is ongoing, and I
16 appreciate y'all's efforts on that
17 plan.
18 The last issue I'd like
19 to touch on real quick is one that has
20 recently -- I've see some media
21 attention and other discussion items
22 out there, and it's regarding our
23 coastal areas.

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1 The coastal structures --
2 you've heard of words such as living
3 shoreline. There's recently been an
4 increased discussion and dialog
5 regarding this and, in specific, the
6 placement of groins and jetties into
7 the coastal -- into coastal areas in
8 Alabama. A groin is a rock or a
9 wooden wall built perpendicular out
10 from the shoreline for the purpose of
11 trapping sand.
12 The concern about the
13 placement of groins regarding the
14 potential capture of sand, which may
15 interfere with the natural transport
16 of that sand, such that the down drift
17 of the sand would be going --
18 properties would be deprived of that
19 sand and, in turn, causing erosion and
20 other negative environmental effects.
21 So that's just the general issues out
22 there.
23 The placement of groins,

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1 jetties, seawalls, and the like, which
2 result in the pillaring of coastal
3 water bodies, are subject to rules and
4 regulations of both the Alabama
5 Department of Conservation and Natural
6 Resources as well as ADEM. ADEM's
7 rule is found in Division 8 of our
8 regulations.
9 And our rules allow for
10 these structures where it is necessary
11 to protect an existing navigation
12 channel or for use of regional
13 benefit. Such situations, though,
14 must have no feasible nonstructural
15 alternatives and no significant impact
16 to adjacent shorelines.
17 ADEM, our Department, or
18 coastal program through promulgated
19 rule encourages shoreline
20 stabilization techniques which are
21 effective and do not adversely impact
22 the down drift property.
23 Nonstructural living

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1 shorelines, which promote the growth
2 and development of submerged aquatic
3 vegetation, which also provides a
4 habitat for shrimp and crab and fish,
5 they provide shoreline erosion
6 control, and they are strongly
7 encouraged by our rules and
8 regulations as the best alternative.
9 It's important, though,
10 to know that there are elements at
11 play here and that is that the
12 Department of Conservation and Natural
13 Resources must, independent of our
14 regulations, approve the placement of
15 any materials on a submerged
16 state-owned water bottom. So there --
17 there's another step people have to go
18 through in that process as well.
19 That concludes my report.
20 I'll be happy to answer any questions
21 you may have or address any other
22 issues.
23 (No response.)

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1 MR. PHILLIPS: Thank you,
2 Mr. Director.
3 Do I have any questions
4 from the Commission.
5 (No response.)
6 MR. PHILLIPS: Thank you very
7 much. Moving to Agenda Item Number 3;
8 report from the Commission Chair.
9 I have two items that I
10 want to bring up to the Commission;
11 one is the code of conduct that I was
12 asked to prepare and bring to the
13 Commission.
14 I have received input
15 from several Commission members,
16 although not a majority of the
17 Commission members, and I have nine
18 pages of input that I'm trying to
19 reconcile and I really need some
20 guidance from the Commission -- from
21 the full Commission. And the reason
22 for that is many of the input -- or
23 many of the items that I have received

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1 input on really appear to be more of a
2 rulemaking issue than it is really
3 putting together something through the
4 chair.
5 So what I would really
6 like to hear from the Commission at
7 this point is, if we want to proceed
8 with this, that we -- I would suggest
9 that we really need to do that through
10 our Rulemaking Committee, as opposed
11 to just the Chair. But I'd like to
12 hear if the Commission would like
13 proceed with it.
14 If you would, then what
15 I'll do is I'll get with the
16 Rulemaking Committee and turn this
17 information over to them.
18 DR. FELKER: Mr. Phillips,
19 could we refer it to the Rulemaking
20 Committee and if they felt it needed
21 action, they could decide to continue
22 or not continue; just turn it over and
23 let -- let them make that decision?

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1 MR. PHILLIPS: I'm going to
2 ask a member of the Rulemaking
3 Committee what their view of that is.
4 Mr. Hairston, you're the
5 -- you're the Committee Chair. What's
6 your thoughts?
7 MR. HAIRSTON: It would be
8 reasonable to submit it, and I can
9 tell you whether or not -- listen to
10 your thoughts and proceed forward.
11 MR. PHILLIPS: And perhaps,
12 Robert, if you can help with that, and
13 then we can know what rule constitutes
14 rulemaking -- or needed rulemaking,
15 and then we could go from there.
16 So is that your
17 suggestion?
18 DR. FELKER: Exactly.
19 Is that okay with the
20 Commission.
21 (Affirmative nods.)
22 MR. PHILLIPS: Okay. Then --
23 then that's what I will do. And I'll

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1 follow that through with probably the
2 next Monday with Robert, Rulemaking
3 Committee Chair.
4 The second item is to
5 remind you that this is August. Happy
6 Summer. But our next meeting will be
7 October. And our next meeting is when
8 we will vote Chair and Vice-Chair
9 again. So I want you to just be
10 thinking about that and be prepared
11 for in October when you come back.
12 Okay. That's all I have.
13 We'll move on to Agenda Item Number 4,
14 which is a discussion of quarry
15 permitting. I'll call from the --
16 call the Department to ask for
17 comments from them, and then we'll
18 have discussion from the Commission.
19 MR. GLENN: Thank you once
20 again, Chairman Phillips and
21 Commission.
22 I -- I was -- I've been
23 in conversation with many of you about

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1 -- about quarry permitting. We've had
2 a couple of meetings and discussions,
3 and I can go into as much detail or as
4 little as you would like.
5 There's just -- let me
6 highlight the three things I would
7 highlight very generally. Number one,
8 for a quarry operation, which is --
9 applies to -- to anything such -- from
10 sand and gravel operations to mining
11 of granite or limestone or the like is
12 -- what has been discussed.
13 They -- they require two
14 major types of permitting here -- two
15 main types of permitting: water
16 permitting to control the pollutant --
17 I mean, the discharge of pollutants
18 into water of the State; the other is
19 air permitting. And so they have to
20 go through the processes on that like
21 any other regulated entity would have
22 to go through. And, again, I can step
23 through some of those details if

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1 necessary. But suffice it to say,
2 they do have to require -- they do
3 have to have permits. The focus of
4 those permits, though, is on the air
5 quality issues and the control
6 equipment put in place and the
7 procedures and processes and the
8 housekeeping, or whatever word you
9 want to use, at that facility with
10 regard to air emissions. And,
11 likewise, water emissions is the same
12 -- same way. We go through permitting
13 processes that might result in the
14 granting of a permit that allows a
15 facility to operate and to discharge
16 water into the waters of the State
17 under certain conditions. They
18 obviously have to get these permits
19 before they operate; the air permits
20 before they install equipment like our
21 other air programs.
22 The third item, the water
23 permitting, air permitting -- the

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1 third item is I was asked to look at
2 previous legislation regarding this
3 issue and just -- just to see what --
4 what has been done. I sent you a
5 memorandum, I think it was August 8th
6 time frame, that just contained a
7 table of some of the -- the more
8 recent quarry legislation, not just
9 this past section, but reaching back a
10 few years prior to that. And as you
11 noted in that table I sent you, most
12 of that quarry legislation introduced
13 focused on what has been deemed
14 quality-of-life issues and -- that are
15 outside the scope of the Commission's
16 or Department's current regulatory
17 authority or mission as I see it. And
18 it's just something that should be
19 noted there. A lot of zoning issues
20 and placement of businesses was
21 considered in those.
22 It's also -- the other we
23 noted was -- I was asked to look at

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1 what's been the success rate of this
2 legislation, and I didn't see any that
3 made it out of the committee in the
4 House of Origin, so therefore the
5 success rate has obviously not been
6 high for these issues. But that was
7 just my very initial assessment of
8 that, and we'd be happy to follow the
9 direction of the Commission and look
10 into this further or provide you as
11 much detail as you want on -- on how
12 we administer these programs.
13 MR. PHILLIPS: Thank you,
14 Mr. Director.
15 Do we have any questions
16 from the Commission?
17 Commissioner Gardner.
18 DR. GARDNER: Mr. Glenn, could
19 you hazard a guess as to why this
20 legislation hasn't made it out the
21 Committee?
22 MR. GLENN: I -- I couldn't.
23 I mean, I'm just assuming it didn't

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1 have the votes. But outside of that,
2 I don't know the details as to why.
3 MR. PHILLIPS: Any other
4 discussion or comments?
5 DR. FELKER: Yes. I'd like to
6 --
7 MR. PHILLIPS: Commissioner
8 Felker.
9 DR. FELKER: I'd like to say a
10 few things, because I'm -- I'm sort of
11 the one that started asking the
12 questions of Mr. Glenn that -- that
13 has led to some of the -- most of
14 this.
15 And, first of all,
16 Mr. Phillips and the rest of the
17 Commission, I want to thank you for
18 putting this on the agenda and being
19 willing to discuss it. My reasons for
20 wanting to discuss it is because I had
21 received so many phone calls
22 personally from citizens in north
23 Alabama and from legislators.

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1 And when Mr. Glenn sent
2 out the list of legislation, you'll
3 note that most of those legislators
4 are from north Alabama, being Senator
5 Griffith, Representative McDaniel, and
6 Senator Butler. And so they're all
7 from north Alabama, so I thought I
8 would take a look into it.
9 And all the information
10 that I have found or correspondence
11 that I have had, has been copied to
12 every Commission member, so you-all
13 knew what was happening. And I'm just
14 going to briefly go through what we've
15 done.
16 As you all know, we held
17 a meeting with Senator Butler's office
18 to talk with him about the legislation
19 that he proposed; he proposed quite a
20 bit of it. But we also reviewed the
21 legislation composed by Representative
22 McDaniel and Senator Griffith on our
23 own to see if we could find a common

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1 theme in the legislation.
2 And, Dr. Gardner, we too
3 were trying to figure out why the
4 success rate was poor.
5 And I plan to make
6 arrangements to meet with
7 Representative McDaniel and Senator
8 Griffith and discuss the legislation
9 they propose and what their views are
10 and in the future.
11 We also solicited
12 comments from the Business Council of
13 Alabama and they, in turn, contacted
14 Vulcan, and we held a meeting with the
15 environmental representative from
16 Vulcan, as well as David Roberson,
17 just to find out how -- the quarry
18 information and how they felt.
19 And it was a very
20 successful meeting with Mr. Howle and
21 Mr. Roberson; a very positive meeting.
22 One thing Mr. Howle brought forward
23 was that they do have social

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1 responsibility policies, and they do
2 have protective measures that they use
3 when mining a quarry to help try and
4 protect the surrounding areas. And he
5 forwarded that information to me, and
6 that's all been forwarded to all of
7 you, so -- if you wanted to see that.
8 But they -- they are
9 aware that they have a responsibility
10 to protect the surrounding
11 environment. That is not enforceable.
12 It's not required in the permitting
13 process. That's something they've
14 done on their own, and I'd like that
15 -- to point that out.
16 I do have a very long
17 list of all the quarry operations in
18 the state. And I cannot say that all
19 these other places have such policies
20 or going to protective measures. The
21 -- the list was so long it would
22 really be almost impossible to have a
23 meeting with each and every one of

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1 them and find out what they were --
2 what they were doing.
3 Also the application for
4 quarry permitting is about 1,000 pages
5 long. It's very complicated. One of
6 the comments I've heard is all you
7 have to do is fill out a form, and you
8 got a quarry. Well, that's not so. I
9 -- I am personally looking at the
10 1,000-page quarry permitting
11 application. I have also solicited
12 and received confirmations from the --
13 received comments from the ADEM Reform
14 Coalition, and I'm having a meeting to
15 discuss their comments with them this
16 afternoon. And I'll be happy to send
17 out anything to rest of the Commission
18 after -- after that meeting on -- on
19 how that meeting went and what was
20 discussed.
21 At this time, I'd like to
22 ask the Commission -- if any other
23 Commissioners had any input or any

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1 advice on -- or any -- anything that
2 they would like done or not done; any
3 way that -- I don't know -- I just
4 want to hear what the rest of y'all
5 have to say.
6 MR. PHILLIPS: Thank you,
7 Dr. Felker.
8 Anything from any other
9 Commissioner?
10 MR. WAINWRIGHT: Mr. Chairman.
11 MR. PHILLIPS: Commissioner
12 Wainwright.
13 MR. WAINWRIGHT: Is there any
14 minutes available for these meetings
15 that you've held?
16 DR. FELKER: No. There were
17 no transcription of meeting minutes,
18 Mr. Wainwright, but those in
19 attendance were provided to you and
20 we'll be happy to have each of you
21 speak with -- speak to you on anything
22 that I've discussed with Mr. Howle or
23 Mr. Roberson. That's the best we can

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1 do at this point. There weren't any
2 minutes. If you would like in the
3 future meetings that we have a
4 transcriptionist there to take the
5 minutes, I'll speak to Mr. Glenn about
6 that.
7 MR. WAINWRIGHT: It would be
8 beneficial to the ones that weren't in
9 the meeting to have some minutes to
10 look at.
11 DR. FELKER: Okay. That's a
12 very good point. Thank you.
13 MR. PHILLIPS: Any other
14 comments to Commissioner Felker?
15 DR. FELKER: Okay. Well, then
16 if there are no other comments, as
17 follow up, this is what I plan to do
18 unless instructed otherwise. I would
19 like this item placed back on the
20 agenda for the December meeting just
21 to follow up on some of these other
22 meetings that I've had with our other
23 members of our legislature and any

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1 other things that come to us and then
2 review. I'd like to go over those
3 results. And I also plan to ask
4 Mr. Wainwright to put this in the
5 Strategic Plan, that we at least
6 review the quarry permitting process.
7 At this time, that's my
8 plan for the future unless I receive
9 any other input.
10 MR. PHILLIPS: Okay. Thank
11 you.
12 Moving forward, we'll
13 move to Agenda Item Number 5 where we
14 will consider the adoption of the
15 proposed amendments to Division 3 Air
16 Regulations. I'll call on the
17 Department for comments.
18 Mr. Gore.
19 MR. GORE: Thank you,
20 Mr. Chairman, ladies and gentlemen.
21 I'm Ron Gore with the Department's Air
22 Division. I'm here to request that we
23 take action on some proposed changes

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1 to the Department's air regulations
2 concerning opacity. If you will
3 indulge -- indulge me for a few
4 minutes, I'm going to give you some
5 history of how we got to this point
6 based on some rulemaking this body
7 adopted in 2003.
8 Going back into the early
9 1980's, state and federal rules
10 required that many more continuous
11 emission monitors be installed on
12 stacks than we had had back in the
13 70's. So every quarter voluminous
14 data from the opacity meters and
15 gaseous monitors were pouring into our
16 office, and we had to figure out how
17 to handle all this data.
18 So in conjunction with
19 our sister states and EPA and using
20 our own expertise, we figured out ways
21 to boil all this data down and how to
22 -- how to utilize -- utilize it for
23 enforcement purposes.

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1 So we decided after a
2 while that for continuous opacity
3 meters, that if the source turned in
4 data that showed it complied with the
5 standards 98 plus percent of the time,
6 that was an indication that the source
7 is properly maintaining and operating
8 its control equipment, and that we
9 wouldn't take any -- any further
10 enforcement action at that level.
11 We deemed this as being
12 an appropriate thing to do because our
13 state has no broad malfunction
14 provision as many states do. Some
15 people think that an emergency
16 provision that we adopted 1995 -- or
17 you adopted in 1995 is an emergency --
18 is a malfunction provision, but it's
19 not, because the decision we make
20 under any emergency provision are not
21 recognized by EPA. So, therefore, our
22 sources would have to prepare two
23 compliance reports: one complying with

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1 the state's rule and one complying
2 with EPA's rules. So as a practical
3 matter, our sources report their
4 compliance status using EPA's rules.
5 So in Alabama what that
6 means is that short-term emission
7 exceedances has to be reported to the
8 state and the EPA as violations. And
9 in many of our sister states a similar
10 situation could be reported as an
11 excused malfunction; that would not be
12 reported as a malfunction.
13 Very soon after we
14 adopted this practice of the 2 percent
15 exemption, EPA reaches forth to
16 develop its own policy about how to
17 handle all of this voluminous data.
18 And they decided that a 5 percent
19 threshold would be allowed. In other
20 words, we said 2 percent was the
21 threshold, EPA said 5 percent, and
22 EPA's policy about how to handle this
23 data continues to this day; 5 percent

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1 allowance.
2 In the 1990's another
3 development occurred which changed the
4 way we looked at the -- this
5 voluminous data. Some EPA rules and
6 some ADEM rules came along that in
7 effect made these opacity monitors an
8 additional compliance measurement
9 technique for opacity. In the past,
10 an EPA method called Method 9, which
11 involves use of a trained human
12 eyeball was the way to determine
13 opacity. When these new rules came
14 along, the opacity meter data, in
15 effect, became a de facto additional
16 use of the concept.
17 And yet another
18 development in the 2000's was that we
19 began receiving comments from
20 environmental groups and others that
21 if we're going to have practices,
22 policies, and procedures that were
23 applied broadly across our regulated

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1 community that we ought to codify
2 those practices as rules. And so for
3 that reason and the others I mentioned
4 above, we asked that you adopt the
5 2 percent exemption in 2003 as a rule,
6 and you did so.
7 Before we had asked you
8 to do that rulemaking change in 2003,
9 as we always do when we're going to be
10 submitting those rules to EPA as a
11 possible revision to the State
12 Implication Plan, we asked EPA whether
13 those rules were going to be
14 approvable at the federal level. And
15 every indication was, including in
16 writing, that EPA would approve those
17 changes. However, they changed their
18 minds and have never approved that
19 change that you made in 2003.
20 So now we have a
21 disharmony between the federal opacity
22 rules, which is the rules as they
23 existed prior to 2003, which I'm

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1 calling 2002's version, and the state
2 rule which is the 2003 version that
3 you adopted. So after EPA changed its
4 mind, we started having dialog with
5 EPA on what could we do to
6 re-harmonize the state and the federal
7 opacity rules.
8 And after three years of
9 discussion, EPA proposed in the
10 Federal Register that if -- if ADEM
11 and the EMC adopted rules that did
12 three major things, they felt like
13 they could approve our SIP revision.
14 One was to make the monitors clear and
15 the sole reference method. The
16 once-per-hour exemption that has been
17 place in both the 2000 and 2003
18 version would be eliminated, and the
19 number of readings over 20 percent a
20 day that would be allowed would be
21 capped at 24.
22 Since that proposal in
23 April of 2007, in discussions with EPA

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1 we added yet one more additional piece
2 of stringency to the -- to the
3 proposed rule and that is an average
4 daily opacity cap.
5 So those changes
6 constitute the changes to the 2002
7 rule that are you before you now as
8 the 2008 version of the rules. And
9 we've received assurance from EPA that
10 this time, if we adopt the rule
11 through your action and we submitted a
12 SIP revision, they will approve it.
13 On August the 8th, Mr.
14 Glenn sent you a memo, which has some
15 attachments to it, and one of those
16 attachments is the spreadsheet you see
17 on the monitors and on this piece of
18 poster board. If you look at the 2008
19 version of the rule and compare it to
20 the rule that's on the state books
21 right now, the 2003 version, it's very
22 clear that you would be adopting a
23 more stringent rule than the 2002

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1 version. It allows less hours of
2 exceedance per quarter, less percent
3 of exceedances per quarter, less
4 average daily opacity and less average
5 quarterly opacity.
6 So there's no doubt that
7 this 2003 version would be made more
8 stringent by the 2008 version. If you
9 want to compare to 2008 version to the
10 2002 -- pre-2003, it's kind of a mixed
11 bag. You can see that the 2008
12 version does allow less hours per
13 quarter and less percent per quarter.
14 But it does allow two
15 things that you could view to be less
16 stringent, and that is it allows the
17 emission to be bunched up in a shorter
18 period of time, like over a day or
19 two. And it does allow some
20 exceedance between 40 percent and 100
21 percent. The previous rule allowed
22 nothing above 100 percent.
23 But we think that those

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1 weaknesses, if you want to call them,
2 are mitigated by the fact that we
3 added an average daily opacity thing
4 that -- which means that the allowed
5 daily opacity is no longer what it was
6 in pre-2003, and the same is true on
7 the average quarterly opacity.
8 There's also been concern
9 expressed that if this rule were
10 adopted that air quality would be
11 negatively effected, especially in our
12 non-attainment areas. We don't
13 believe that to be true for several
14 reasons. First, all the permits for
15 the sources -- to be subject to this
16 rule have a condition that says the
17 air pollution equipment has to be
18 operated optimally at all times. That
19 means you can't get to the end of a
20 quarter and say I'm meeting this
21 2 percent by a wide a margin; I will
22 either not operate or not maintain my
23 air pollution control equipment.

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1 Second, the particulate
2 matter mass standards, which are
3 really what determines what levels of
4 particulate matter there is in the
5 ambient air, are not being changed at
6 all. Opacity is merely an indicator
7 of levels of particulate matter.
8 The third thing is that
9 when we analyze the filters in these
10 non-attainment areas to determine
11 where the particles come from that
12 cause non-attainment, the types of
13 particles we find on these filters are
14 dominated by the types of particles
15 that these stacks emit. They're
16 dominated by particles formed in the
17 air from gaseous emissions and from
18 automobiles and from forest fires.
19 And last, as I mentioned
20 earlier, we think that an additional
21 safeguard to that is the average
22 opacity on both the daily and
23 quarterly basis are no different from

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1 what it was before.
2 So we held a public
3 comment period on this proposed
4 rulemaking that ran from June 23rd to
5 August the 6th. A public hearing was
6 held in this room on August the 6th.
7 We did receive oral comments at the
8 hearing and written comments. You've
9 been provided a reconciliation of
10 those comments a couple of weeks ago.
11 And thank you for
12 indulging me and pending any
13 questions, I request you act on this
14 change.
15 MR. PHILLIPS: Thank you,
16 Mr. Gore.
17 Do I have any questions
18 from the Commission for Mr. Gore?
19 DR. GARDNER: Yes.
20 MR. PHILLIPS: Commissioner.
21 DR. GARDNER: Mr. Gore, my
22 understanding is that along with the
23 regulations, the companies that are

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1 regulated by the Division 3 rules that
2 we're looking at also are regulated by
3 several other divisions besides this
4 division; is that correct?
5 MR. GORE: Many others.
6 having do with their gaseous
7 emissions, there's some acid rain
8 rules -- yeah. So they're not only
9 subject solely to Chapter 4, which
10 we're asking you to change.
11 DR. GARDNER: And so it can be
12 assumed, I would think, that if the
13 companies chose to run at 100 percent
14 opacity, which I don't think they
15 would choose to do so, but if they
16 chose to do so, that would effect some
17 of these other regulations and they
18 would be out of compliance.
19 MR. GORE: It would. But I
20 think the main thing, to answer your
21 concern, is that -- that I think I
22 mentioned -- where the permit says the
23 air pollution control equipment has to

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1 be operating optimally at all times.
2 So that -- turning off
3 the equipment and letting the opacity
4 go to 100 percent is something that
5 would be a very severe violation,
6 independent of whether you've met the
7 opacity requirements or not.
8 Does that answer your
9 question?
10 DR. GARDNER: Yes.
11 MR. GORE: Okay.
12 MR. PHILLIPS: Any other
13 questions of Mr. Gore?
14 DR. FELKER: I have several.
15 MR. PHILLIPS: Commissioner.
16 DR. FELKER: I'm sorry.
17 So this is going to
18 provide -- this new rule would provide
19 a daily average cap. In comparison to
20 the other Region 4 states, are any of
21 the other Region 4 states --
22 MR. GORE: I don't believe any
23 other state has gotten that far in

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1 making their opacity rules compliment
2 the --
3 DR. FELKER: Okay. It also
4 makes continuos monitors refers to the
5 method of compliance, and it resolves
6 the mis-alignment.
7 MR. GORE: That's correct. If
8 you -- if you act in -- favorably on
9 these rules, it would correct the
10 misalignment of the short term and the
11 long term.
12 DR. FELKER: Okay. The
13 question has been raised in some of
14 the documents provided to us that
15 modeling needs to be done. Yet when
16 you look at the paperwork, the 2007
17 Register doesn't mention modeling, so
18 it's your understanding that no
19 modeling needs to be done.
20 But if EPA says we have
21 to do modeling --
22 MR. GORE: We would do
23 modeling if EPA requested it. And we

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1 did modeling in conjunction with the
2 2003 changes made. But there's no
3 indication from EPA that any modeling
4 is required if and when we turn a SIP
5 revision over to them.
6 DR. FELKER: Okay. The
7 question has also been raised whether
8 EPA will approve this as they said
9 last time they would and then they
10 didn't. There is a letter from
11 Region 4 -- Mr. Palmer dated April 4,
12 indicating that he recommended that we
13 proceed with live data and then EPA
14 prove this rule. And there's also a
15 letter from Mr. Johnson, dated
16 July 2nd, 2008, just over a month ago
17 stating that since we put in the
18 22 percent cap that they were
19 proceeding with their part of the
20 process. We do have that
21 documentation.
22 But we really won't know
23 until they come back and say approve

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1 the --
2 MR. GORE: Until they actually
3 publish an approval in the Federal
4 Register. And every indication that
5 I've seen or heard of is that EPA will
6 approve this.
7 DR. FELKER: If they don't
8 approve just by some chance, we'll
9 revert to the 2003 rule, which is
10 approved by EPA. So in voting for
11 this in one way or the way we would
12 have a rule that approved by EPA in
13 this rule or the 2003 rule.
14 MR. GORE: Correct. If you
15 vote in favor of this rule, and if EPA
16 never approves our SIP revision, the
17 state's rules revert actually to
18 pre-2003 version forever unless you
19 reopen and change the rules.
20 DR. FELKER: Okay. Last
21 question. Sorry. Thanks for
22 indulging me. It's also been raised
23 and sent to me is information on

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1 particulate matter and health
2 concerns.
3 And it's my understanding
4 that particulate matter is actually
5 formed from precursors that are not
6 measured by the opacity monitors and
7 that this -- this does not alter the
8 particulate matter regs --
9 regulations.
10
11 MR. GORE: Yes, ma'am. As I
12 said, the emissions from these stacks
13 that cause opacity are measured to
14 some extent on our particulate
15 filters, but they're a very small
16 percentage of the amount of
17 particulate matter on the filters in
18 comparison to what's formed on the
19 gaseous emissions from these stacks
20 and some other stacks. From
21 automobile tailpipes and the particles
22 that come from home heating, open
23 burning, diesel tailpipes, car

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1 tailpipes, probably less -- much less
2 than 10 percent come from these types
3 of stacks.
4 DR. FELKER: Okay. And
5 they're not measurable by -- the
6 precursors are not measurable --
7 MR. GORE: Definitely not.
8 They're gaseous.
9 DR. FELKER: And this does not
10 effect particulate matter rules and
11 regulations; correct?
12 MR. GORE: It does not effect
13 the mass standards, which really
14 determine how much particulate matter
15 is in the air; that's correct.
16 DR. FELKER: Thank you.
17 MR. PHILLIPS: Any other
18 questions from the Commission?
19 MS. ARCHIE: I have -- I have
20 a question.
21 MR. PHILLIPS: Commissioner.
22 MS. ARCHIE: Mr. Gore, are you
23 saying that the -- that the issue of

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1 the fine particulate matter is much
2 larger than what -- what has been
3 raised as concerns in this room?
4 MR. GORE: Yes. That the --
5 the big scale rules that, both at the
6 state and the federal level, that are
7 intended to reduce particulate matter
8 levels so these non-attainment areas
9 will attain the standards, are aimed
10 primarily at these gaseous emissions
11 that Dr. Felker mentioned, not at
12 these primary particles that exit
13 these stacks.
14 MS. ARCHIE: So --
15 MR. GORE: We're trying to
16 reduce SO2 emissions, sulfur dioxide
17 emissions all over the Eastern US at
18 -- to achieving these air quality
19 standards. That's the main thrust of
20 things. And that's why Mr. Glenn
21 mentioned that this CAIR rule is so
22 important. We're hoping some can be
23 reinstated because it was a program

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1 that's designed to reduce SO2
2 emissions by at least half over the
3 Eastern half of the country, maybe
4 even more.
5 MS. ARCHIE: What is the
6 national standard right now so far --
7 MR. PHILLIPS: Someone please
8 turn your phone off, please.
9 MR. GORE: The current
10 standard -- there's two standards.
11 There's a daily max, which is 35
12 micrograms per cubic meter averaged
13 over three years; and there's an
14 annual max, which is 15 micrograms per
15 cubic meter averaged over three years.
16 MS. ARCHIE: And a lot -- a
17 lot has been raised about areas that
18 non -- non-attainment areas -- the
19 areas that are bumping up right next
20 to the area of non-attainment.
21 So would it be -- this
22 Commission -- that falls on a whole
23 different set of regulations that as a

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1 Commission we could possibly look at,
2 so far as possibly looking at our own
3 control standards, so far -- or the
4 national standards or actually looking
5 at controls to try to limit the amount
6 of fine particulate matter that comes
7 -- that comes out of the stacks or
8 whatever?
9 MR. GORE: Yes, ma'am. The
10 EPA standards have gotten so tight
11 that in the entire Eastern US, we very
12 rarely read levels over 10 of that 15
13 and about 25 or 30 of that 35. So
14 there's a big background out there of
15 these fine particles that comes from
16 everywhere.
17 And so the efforts that
18 EPA and the states are making to -- to
19 make sure the areas that are slightly
20 over the standard get back into
21 attainment, and the ones that are in
22 attainment don't bump over these big
23 scale reduction efforts, which CAIR

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1 was one, rather than localize controls
2 as a rule.
3 Does that make sense?
4 MS. ARCHIE: Yes. But it kind
5 of leads me to this.
6 You had mentioned the
7 automobiles and forest fires --
8 MR. GORE: Right.
9 MS. ARCHIE: -- and the
10 particles that come from that.
11 Do you think that that --
12 I mean, in your -- you've been at this
13 for a long, long, long time.
14 MR. GORE: Yes, ma'am, I'm
15 afraid so.
16 MR. PHILLIPS: No offense
17 intended.
18 MS. ARCHIE: Would we be --
19 would it be -- would I be out of line
20 to say that -- that our concern should
21 be looking more at diesels,
22 automobiles, forest fires, and the
23 possible effects of -- for lung,

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1 heart, asthma problems; would I be out
2 of line saying that?
3 MR. GORE: Okay. When it
4 comes to forest fires, we've learned
5 in the last 100 years that the woods
6 are going to burn sooner or later.
7 So, I mean, as the underbrush builds
8 up, it's going to catch fire sooner or
9 later. So you do it in controlled
10 burns or uncontrolled burns as they
11 have out West.
12 So forgetting forest
13 fires for a second, the other big
14 concern being cars and diesels. There
15 is a national program out there to
16 make cars and diesels cleaner, in that
17 2004 cars are ten times cleaner than
18 2003 model cars. So as the fleet
19 turnover occurs, more and more of the
20 old cars get off the road, particulate
21 matter emissions will go way down with
22 cars no matter how much we drive, how
23 much gasoline we run.

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And the same is true on diesels. Starting in 2007, diesels have to meet higher standards by a factor of 10. So there is a fix in place for the automobile and diesel side of it that's at the national level. ADEM doesn't need to do anything. EPA is handling that --

MS. ARCHIE: I guess what I'm saying is, would the greatest danger come from those automobiles than what we're looking at as far as stacks?

MR. GORE: Oh, as far as the effect on particulate levels in the non-attainment areas or attainment areas, definitely.

This a very small percentage of -- compared to cars and diesels.

MS. ARCHIE: Thank you.

MR. PHILLIPS: Any other questions to Mr. Gore?

(No response.)

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MR. PHILLIPS: I'll entertain a motion from the Commission.

DR. FELKER: I move we proceed with approval of the air regulations.

MR. PHILLIPS: I have a motion to approve the regulations in front of us.

Do I have a second?

MS. ARCHIE: Second.

MR. PHILLIPS: I have a motion and a second.

Anything further discussion?

(No response.)

MR. PHILLIPS: No further discussion.

All in favor signify by signing aye and raise your right hand.

(Commission members in favor of the motion so indicated.)

MR. PHILLIPS: All opposed same sign.

(No response.)

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MR. PHILLIPS: Motion carries.

MR. GORE: Thank you very much.

MR. PHILLIPS: Wait for a moment and sign the motion as it comes through.

As we're doing that, I know there are a lot of people here today, and maybe some that hasn't been here before. I would just ask you, while we're at a pause, if you have a cell phone, please put it on vibrate or quiet just so it doesn't distract us.

Okay. Thank you, Commissioners. Moving to Agenda Item Number 6.

We'll consider the adoption of proposed to Division 13 of our Solid Waste Regulations. And I'll call on the Department for comments.

MR. HARDY: Good morning, Mr. Chairman and members of the

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Commission. I'm Gerald Hardy, Chief of the Land Division, and I am before you today to recommend the Commission adopt revisions to the Department's Solid Waste Regulations.

The proposed amendments before the Commission today would adopt by reference the May 2008 Solid Waste Management Plan. The May 2008 Plan was completed following the 45 public -- public comment period earlier this year. The proposed regulations necessary to adopt the state plan was the subject of a public comment period that ran from June the 1st to July the 21st, 2008, and a public hearing that was held on July the 21st. No written or oral comments on these amended regulations were received.

Pending any questions you may have, the Department asks that you -- the Commission adopt these changes

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1 to the Solid Waste regulations.
2 MR. PHILLIPS: Do we have any
3 questions of Mr. Hardy before we move
4 to a motion?
5 (No response.)
6 MR. PHILLIPS: All right.
7 I'll entertain a motion
8 from the Commission to adopt the
9 proposed amendments to Division 7,
10 Solid Waste regulations.
11 DR. LESTER: So moved.
12 MR. PHILLIPS: I have a
13 motion.
14 Do I have a second?
15 DR. GARDNER: Second.
16 MR. PHILLIPS: I have a motion
17 and a second.
18 Any additional
19 discussion?
20 (No response.)
21 MR. PHILLIPS: Division --
22 excuse me, Division 13. Let me look
23 through my notes. Division 13 Solid

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1 Waste regulations.
2 Any further discussion?
3 (No response.)
4 MR. PHILLIPS: There being no
5 further discussion, all in favor of
6 the motion signify by signing aye and
7 your right hand.
8 (Commission members in favor
9 of the motion so indicated.)
10 MR. PHILLIPS: All opposed
11 same sign.
12 (No response.)
13 MR. PHILLIPS: Motion carries.
14 MR. HARDY: Thank you.
15 MR. PHILLIPS: Thank you for
16 the correction.
17 Thank you, Commissioners.
18 The next -- Agenda Item
19 Number 7, I am going to recuse myself
20 from this item and turn the meeting
21 over to the Vice-Chair, Dr. Gardner.
22 DR. GARDNER: Moving on to
23 Agenda Item 7. This is Shaun

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1 Thistlewaite, et al., versus ADEM and
2 the City of Birmingham, Intervenor.
3 We need to consider the
4 recommendation of the Administrative
5 Law Judge regarding the petitioners'
6 appeal and ADEM's approval of the City
7 of Birmingham's Solid Waste Permit
8 No. 3711 for the new Georgia Landfill,
9 which was granted on July 11th, 2006.
10 The recommendation is to approve the
11 permit.
12 I need a motion from the
13 Commission regarding either approval,
14 adoption, rejection, or modification
15 of the recommendation of the
16 Administrative Law Judge.
17 DR. LESTER: I make a motion
18 to approve.
19 MR. HAIRSTON: I second.
20 DR. GARDNER: Okay. I have a
21 motion and a second.
22 Is there any discussion?
23 (No response.)

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1 DR. GARDNER: Okay. No
2 discussion. We need to vote.
3 All in favor please
4 signify aye and raising your right
5 hand.
6 (Commission members in favor
7 Of the motion so indicated.)
8 DR. GARDNER: All opposed same
9 sign.
10 (No response.)
11 DR. GARDNER: The motion to
12 approve carries.
13 Note for the record I'm
14 turning the meeting back to Chairman
15 Phillips.
16 MR. PHILLIPS: Thank you,
17 Vice-Chair Gardner.
18 Moving on to Agenda Item
19 Number 9. This is -- this is 8. I'm
20 having troubles with numbers this
21 morning.
22 Agenda Item 8, John
23 Jordan, Senior and John

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1 Jordan, Junior, Alabama Recycling, EMC
2 Docket 08-02 and 08-03.
3 I'd like to hear from the
4 Department first, if you don't mind,
5 relative to any recommendations that
6 you may have on this item.
7 MR. SIBLEY: My name is Shawn
8 Sibley, and I represent the Department
9 in this matter. Just briefly, what
10 this -- what this is about is an
11 appeal of an administrative order that
12 was issued to John Jordan, Senior,
13 John Jordan, Junior, doing business as
14 Alabama Recycling. And what -- what
15 the Department is accusing them of
16 doing is operating a smelter without
17 obtaining permitting first.
18 When -- when the matter
19 was appealed, John Jordan, Senior
20 filed a petition for an appeal. John
21 Jordan, Junior filed notice for
22 petition for appeal.
23 Y'all addressed the

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1 deficiencies in John Jordan, Junior's
2 petition back in March, and that was
3 dismissed. What was remaining was
4 John Jordan, Senior's petition, and
5 recently the Department filed a
6 request with the Administrative Law
7 Judge to set that matter for a
8 prehearing conference. And the
9 Administrative Law Judge issued,
10 subsequently, a dismissal.
11 And, early on, the
12 Department had filed a motion to
13 consolidate the two matters, but it
14 was never formally addressed at the
15 Administrative Law Judge level. And
16 what the Department is asking the
17 Commission to do is remand the matter
18 back for a prehearing conference. We
19 feel like the matters were -- went on
20 a separate track, and they were
21 disposed of separately.
22 I think that Mr. McLaney,
23 who represents John Jordan, Senior,

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1 will probably agree with that
2 recommendation. We'll see what he has
3 to say.
4 MR. PHILLIPS: Do we have any
5 questions, or would the Commission
6 prefer that we hear from --
7 MR. HAIRSTON: Are you asking
8 that it be remanded rather than
9 dismissed?
10 MR. SIBLEY: Right. We're
11 asking that the matter be sent back to
12 the Administrative Law Judge for -- at
13 her discretion as to -- we can set a
14 prehearing or at least have a status
15 conference.
16 We feel that the cases
17 were separated. They were separated,
18 and they were not consolidated.
19 MR. HAIRSTON: Does that give
20 you what you want?
21 MR. MCLANEY: I believe so.
22 Because I was just looking at the
23 Commission's notice, and it appears

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1 that he was going to dismiss his
2 appeal also. And nobody has ever
3 objected to my pleading, and so we
4 were entitled to a hearing. So this
5 is what we need.
6 MR. PHILLIPS: So -- so you're
7 in -- you're in agreement with the
8 Department?
9 MR. MCLANEY: We're with the
10 Department. Odd, isn't it?
11 MR. PHILLIPS: All right.
12 I'll ask the Commission -- do I have a
13 motion before the Commission?
14 MR. HAIRSTON: I move we vote
15 to remand it back to Administrative
16 Law Judge for consideration.
17 MR. PHILLIPS: I have a motion
18 to remand it to the Administrative Law
19 Judge for consideration.
20 Do I have a second?
21 DR. GARDNER: Second.
22 MR. PHILLIPS: I have a motion
23 and a second.

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1 Do I have any additional
2 discussion?
3 (No response.)
4 MR. PHILLIPS: No additional
5 discussion.
6 All in favor of that
7 motion to remand it to the ALJ signify
8 by signing aye and your right hand.
9 (Commission members in favor
10 of the motion so indicated.)
11 MR. PHILLIPS: All opposed
12 same sign.
13 (No response.)
14 MR. PHILLIPS: It's remanded
15 back.
16 Agenda Item Number 9,
17 other business.
18 Do we have any other
19 business to come before the
20 Commission?
21 DR. FELKER: I have some other
22 business, and I'll try to be brief
23 about this.

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1 MR. PHILLIPS: Okay. Go
2 ahead, Commissioner Felker.
3 DR. FELKER: As you -- some of
4 you may know, I'm on the Admissions
5 Committee at the medical school at
6 UAB. And they're making a change in
7 the curriculum for the third-year
8 medical students where the students
9 are required to do a 12-week of what
10 they're calling scholarly activities,
11 which includes 12 weeks of dedicated
12 research.
13 And I was approached and
14 discussed with the Course Director
15 yesterday if possibly having these
16 students work with me. And several of
17 the students had expressed interest --
18 that they were interested in
19 environment health and knowing I had
20 this position here, would I be able to
21 arrange something. So I certainly
22 said I would, but I wanted to get
23 information and give you the

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1 information.
2 This would be a
3 third-year medical student for 12
4 weeks, and it would likely be a new
5 student every 12 weeks and rotating --
6 I have a different student every 12
7 weeks, and they would need to work on
8 a research project and write a paper
9 at the end.
10 For the most part, UAB
11 medical students have degrees in
12 biology, chemistry, engineering, or
13 physics, which I think would be very
14 valuable to ADEM. These are sharp,
15 smart students; some of the smartest
16 in the country. They would also be
17 third-year medical students, so
18 they've had at least two years of
19 medical school, which is all basic
20 science -- advanced basic science.
21 And I was asked to
22 propose or to develop some abstracts
23 to be presented to the students for

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1 projects that they might be able to
2 work on with ADEM. Immediately, I
3 thought of cancer risk and how nice it
4 would have been to have a medical
5 student to help do work with us.
6 There are some guidelines
7 they would have to follow. And in
8 working with ADEM, they would fall
9 under -- they have two guidelines:
10 one would be community and rural
11 health, and then the other would be
12 global and public health.
13 I know we have work for
14 them to do here. They could also do
15 lab research. Patient-based research,
16 I don't know how much of a role we
17 would have there. Their tests could
18 include data collection or analysis,
19 as well as critical review of
20 literature.
21 And the goal here would
22 be for them to learn more about
23 environmental health issues and public

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1 health issues, and perhaps they may
2 want a career in that. We could
3 certainly help them in that area. And
4 then we would benefit as well by the
5 results of the research that they
6 would provide for us.
7 So I've discussed this so
8 far with Mr. Phillips and Mr. Glenn.
9 And Mr. Glenn and I are going to work
10 drawing up some abstracts of things
11 that the Commission -- we would like
12 to see if the students were to come
13 and work here.
14 And I'm asking today that
15 if any of you have any ideas for
16 research that you would like one of
17 them to work on, provide it to
18 Mr. Glenn so we can come up with an
19 abstract to present to the Course
20 Director, who could then present it to
21 the students.
22 MR. PHILLIPS: Thank you.
23 All right.

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1 Any questions of
2 Dr. Felker before move on?
3 (No response.)
4 MR. HAIRSTON: What would we
5 need to do?
6 MR. PHILLIPS: I think she
7 just asked you if you have ideas about
8 abstracts to just give -- get them to
9 her or Mr. Glenn.
10 DR. FELKER: If you have any,
11 Ken -- if you have any thoughts where
12 you wanted -- something came before
13 you, and you needed some more research
14 on it regarding public health, rural
15 health, literature research, or
16 laboratory work, this person could
17 work on that and at no cost to ADEM.
18 MR. PHILLIPS: Do you have
19 that?
20 MR. HAIRSTON: Okay.
21 MR. PHILLIPS: Thank you.
22 Done?
23 DR. FELKER: (Affirmative

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1 response.)
2 MR. PHILLIPS: Okay. Thank
3 you. Thanks for bringing that.
4 Moving to Agenda Item
5 Number 10, our future business
6 session.
7 You'll note our next
8 meeting is for October the 17th.
9 Just a note from myself
10 personally, my term is up at the end
11 of September; however, the governor
12 has not named a replacement. I am
13 willing and able and will still be
14 serving until such time. However, I
15 will be out of town on October the
16 17th -- so I will be gone out of the
17 country.
18 How does that date work
19 with the rest of you?
20 DR. FELKER: I'm out of the
21 country as well, Mr. Phillips, so I
22 won't be able to make it.
23 MR. PHILLIPS: All right.

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1 That gives us five.
2 The rest of you okay?
3 (No response.)
4 MR. PHILLIPS: Have a great
5 meeting.
6 I will accept a motion
7 for adjournment.
8 DR. LESTER: So moved.
9 MR. PHILLIPS: Second?
10 DR. GARDNER: Second.
11 MR. PHILLIPS: A motion to
12 second. All in favor signify by
13 signing aye.
14 (Commission members in favor
15 Of the motion so indicated.)
16 MR. PHILLIPS: All opposed
17 same sign.
18 (No response.)
19 MR. PHILLIPS: Motion carries.
20 (Meeting is adjourned.)
21
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1 **********
2 REPORTER'S CERTIFICATE
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5 I, Mishan Williamson, Certified
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7 in and for the State of Alabama at
8 Large, do hereby certify that I
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10 reduced to typewritten form by means
11 of computer-aided transcription my
12 stenographic notes of the foregoing
13 Alabama Environmental Management
14 Commission Meeting.
15 I further certify that the
16 foregoing transcript is a true and
17 correct transcript of the proceedings
18 contained herein.
19 I further certify that I am
20 neither of kin nor of counsel to the
21 parties to said meeting, nor in any
22 manner interested in the results
23 thereof.

1 Done this, the 2nd day of
2 September, 2008.
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6 Mishan Williamson, ACCR #417
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Part B

Attachment Index

Attachment 1	**Agenda**
Attachment 2	**Resolution adopting amendments to the Division 3 – Air Regulations** **(Agenda Item 5 – Consideration of adoption of proposed amendments to the Division 3 – Air Regulations)**
Attachment 3	**Resolution adopting amendments to the Division 13 – Solid Waste Regulations** **(Agenda Item 6 – Consideration of adoption of proposed amendments to the Division 13 – Solid Waste Regulations)**
Attachment 4	**Order adopting the recommendation of the Administrative Law Judge** **(Agenda Item 7 – Shaun Thistlethwaite, et al. v. ADEM, and City of Birmingham, Intervenor, EMC Docket No. 06-08)**
Attachment 5	**Order remanding John Jordan, Sr. v. ADEM, EMC Docket No. 08-02 to the Administrative Law Judge to conduct a hearing** **(Agenda Item 8 – John Jordan, Sr. and John Jordan, Jr. d/b/a Alabama Recycling, EMC Docket Nos. 08-02 and 08-03)**

Attachment 1

Amended 8/11/08

AGENDA*

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING
Alabama Department of Environmental Management (ADEM) Building
Alabama Room (Main Hearing Room)
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2059
Friday, August 22, 2008
11:00 a.m.

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

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

1. CONSIDERATION OF MINUTES OF MEETING HELD ON JUNE 27, 2008

2. REPORT FROM THE DIRECTOR

3. REPORT FROM THE COMMISSION CHAIR

4. DISCUSSION OF QUARRY PERMITTING (NPDES-RELATED MATTER)

   This item was added to the agenda at the request of Commissioner Felker for a discussion of quarry permitting. The Commission will call on the Department for comments on the Department's quarry permitting process and its authorities regarding regulating quarries. The Department will also provide comments on recent quarry related legislation.

5. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO THE DIVISION 3 – AIR REGULATIONS

   The Commission will consider proposed amendments to the Division 3 – Air Regulations. The Department proposes to amend ADEM Administrative Code Rule 335-3-4-.01, Visible Emissions. The Department held a public hearing on the proposed amendments on August 6, 2008.

6. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO THE DIVISION 13 – SOLID WASTE REGULATIONS

   The Commission will consider proposed amendments to the Division 13 – Solid Waste Regulations. The Department proposes to amend ADEM Administrative Code rules 335-13-9-.02, Phase I Plan; 335-13-9-.03, Phase II Plan; and 335-13-9-.04, Updating and Modifying the State Solid Waste Management Plan. The Department held a public hearing on the proposed amendments on July 21, 2008.

7. SHAUN THISTLETHWAITE, ET AL. V. ADEM, AND CITY OF BIRMINGHAM, INTERVENOR, EMC DOCKET NO. 06-08

   The Commission will consider the Recommendation of the Administrative Law Judge regarding the Petitioners' appeal of ADEM's approval of the City of Birmingham's Solid Waste Permit #3711 for the New Georgia Landfill, which was granted on July 11, 2006.

8. JOHN JORDAN, SR. AND JOHN JORDAN, JR. D/B/A ALABAMA RECYCLING V. ADEM, EMC DOCKET NOS. 08-02 AND 08-03

   The Commission will consider the Recommendation of the Administrative Law Judge to dismiss EMC Docket No. 08-02 regarding Petitioner John Jordan, Sr.'s appeal of ADEM Administrative Order 08-047-AP to John Jordan, Sr. and John Jordan, Jr., d/b/a Alabama Recycling, Montgomery, Montgomery County, Air Facility No. 209-0094.

9. OTHER BUSINESS

10. FUTURE BUSINESS SESSION

Attachment 2

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

WHEREAS, the Alabama Department of Environmental Management gave notice of a public hearing on the proposed revisions to ADEM Admin. Code 335-3 of the Department's Air Division – Air Pollution Control Program Rules in accordance with Ala. Code § 22-22A-8 (2006 Rplc. Vol.) and Ala. Code § 41-22-4 (2000 Rplc. Vol.); and

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

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

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

NOW THEREFORE, pursuant to Ala. Code. §§ 22-22A-5, 22-22A-6, 22-22A-8 (2006 Rplc. Vol.), and Ala. Code. § 41-22-5 (2000 Rplc. Vol.), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to division 335-3 [335-3-4-.01/Visible Emissions (Amend)] of the Department's Air Division – Air Pollution Control Program rules, administrative code attached hereto, to become effective thirty-five days after filing with the Alabama Legislative Reference Service.

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-3 - Air Pollution Control Program

IN WITNESS WHEREOF, we have affixed our signatures below on this 22nd day of August 2008.

APPROVED:

DISAPPROVED:

ABSTAINED:

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 22nd day of August 2008.

W. Scott Phillips, Chair
Environmental Management Commission
Certified this 22nd day of August 2008.

Attachment 3

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

WHEREAS, the Alabama Department of Environmental Management gave notice of a public hearing on the proposed revisions to ADEM Admin. Code 335-13 of the Department's Land Division – Solid Waste Program Rules in accordance with Ala. Code § 22-22A-8 (2006 Rplc. Vol.) and Ala. Code § 41-22-4 (2000 Rplc. Vol.); and

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

WHEREAS, the Alabama Department of Environmental Management did not receive any written or oral comments at the public hearing or during the public comment period.

NOW THEREFORE, pursuant to Ala. Code. §§ 22-22A-5, 22-22A-6, 22-22A-8 (2006 Rplc. Vol.), and Ala. Code. § 41-22-5 (2000 Rplc. Vol.), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to division 335-13 [335-13-9-.02/Phase I Plan (Amend); 335-13-9-.03/Phase II Plan (Repeal); and 335-13-9-.04/Updating and Modifying the State Solid Waste Management Plan (Amend)] of the Department's Land Division – Solid Waste Program rules, administrative code attached hereto, to become effective thirty-five days after filing with the Alabama Legislative Reference Service.

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-13 – Solid Waste Program

IN WITNESS WHEREOF, we have affixed our signatures below on this 22nd day of August 2008.

APPROVED:

DISAPPROVED:

ABSTAINED:

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 22nd day of August 2008.

W. Scott Phillips, Chair
Environmental Management Commission
Certified this 22nd day of August 2008.

Attachment 4

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

In the Matter of:	)	
	)	
Shaun Thistlethwaite, et al.,	)	
	)	
Petitioners,	)	
	)	EMC Docket No. 06-08
vs.	)	(ADEM Administrative Action: ADEM's approval
	)	of the City of Birmingham's Solid Waste Permit
Alabama Department of	)	#3711 for the New Georgia Landfill, which was
Environmental Management,	)	granted on July 11, 2006)
	)	
Respondent,	)	
	)	
and	)	
	)	
City of Birmingham,	)	
	)	
Intervenor.	)	

ORDER

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

1. That the Recommendation of the Administrative Law Judge is hereby adopted; and

2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and

3. That a copy of this Order, along with a copy of the Recommendation of the Administrative Law Judge attached hereto as Exhibit A and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 22nd day of August 2008.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 22nd day of August 2008.

Laurel G. Gardner, Vice Chair
Environmental Management Commission
Certified this 22nd day of August 2008.

EXHIBIT A

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

In the Matter of:	)	
	)	
Shaun Thistlethwaite, et al.,	)	EMC Docket No. 06-08
	)	
Petitioners,	)	[Administrative Action: ADEM's approval of the City of Birmingham's Solid Waste Permit #37-11 for the New Georgia Landfill, which was granted on July 11, 2006)
	)	
vs.	)	
	)	
Alabama Department of Environmental Management	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
CITY OF BIRMINGHAM,	)	
	)	
Intervenor.	)	

AUG 2008
REC
ENV. MGMT.
COMMISSION

RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

I. ADMINISTRATIVE BACKGROUND

1. This matter is before the undersigned Administrative Law Judge (ALJ) (pursuant to ADEM Admin. Code R. 335-2-1-.27) for a recommendation to the Alabama Environmental Management Commission (EMC) concerning a challenge by the Petitioners (Shaun Thistlethwaite, et al.) to an administrative action by the Alabama Department of Environmental Management (ADEM/Department/Respondent) whereby the latter issued a renewal/modification Solid Waste Facility Disposal Permit (Permit #37-11) on 11 Jul 06 to the City of Birmingham, Alabama (Intervenor) New Georgia

Landfill, Inc. (NGL) for the construction and operation of two new waste disposal cells at an existing landfill in Jefferson County, Alabama.

2. The Petitioners filed a request for hearing contesting the issuance of the Permit on 9 Aug 06. The Intervenor filed its "The City Of Birmingham's Motion For Leave To Intervene" on 6 Sep 06. (Administrative Law Judge File (ALJF) #1) (That motion was granted on 6 Sep 06 (ALJF #1).) The Respondent and the Intervenor contend that the design for the new cell, the municipal solid waste, is intended to comply with regulations promulgated by the EMC with respect to federal requirements under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The Petitioners bear the burden of proof and persuasion on the factual and legal issues they seek to present. The Petitioners' burden is to prove, by a preponderance of the evidence, that ADEM's action (in issuing the Permit) should be modified or disapproved. (ADEM Admin. Code R. 335-2-1-.27(5); see also the *Arguments* section of the 3 Oct 06 Joint Pre-Trial Order (JPO) signed by the undersigned after the contents thereof were agreed to by all the parties. (ALJF #2) Accordingly, and as specified in the JPO, the Petitioners' burden applies to each of the factual and legal issues described in the JPO.

3. The hearing in this cause was bifurcated and was held in the Alabama State House, 11 South Union Street, Montgomery, Alabama; the first day of the hearing was held on 31 Oct 07; the second day of the hearing was held on 21 May 08. There are two transcripts relative to this bifurcated hearing, one for each of the two days of the hearing.

a. Counsel for the Petitioners were Kimberly T. Thomason, Esquire, and Rebecca Wright Pritchett, Esquire.

b. Counsel for the Respondent were James R. Thrash, Esquire, and Rebecca E. Patty, Esquire.

c. Counsel for the Intervenor were James D. Love, Esquire; Julie Barnard, Esquire; Thomas Bentley, III, Esquire; and Brandy Murphy Lee, Esquire.

4. The Respondent's post-hearing brief (ALJF #3) was received in the Office of Administrative Hearings (OAH) on 17 Jun 08; the Intervenor's post-hearing brief (ALJF #4) was received on 18 Jun 08; the Petitioner's post-hearing brief (ALJF #5) was received on 20 Jun 08.

II. ISSUES

The issues presented in this matter are:

1. Whether ADEM (Respondent) and the City of Birmingham (Intervenor) violated (by failing to consider the six factors listed) the following sections of the Code of Alabama, 1975:

a. Section 22-27-40;

b. Section 22-27-42;

c. Section 22-27-47; and

d. Section 22-27-48?

(NOTE: The "six factors" are listed on page 5 of the 3 Oct 06 JPO/ALJF #2)

2. Whether ADEM (Respondent) failed to consider the condition of the closed landfill at the New Georgia Landfill (NGL) site?

III. STANDARD OF REVIEW

1. ADEM Admin. Code R. 335-2-1-.27(5), which concerns hearing officers and their responsibilities, reads as follows:

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

2. The above-cited Regulation establishes that, while the hearing should be conducted as a *de novo* hearing as far as the admission of evidence into the record, there is a presumption that the Department's administrative action is correct, and the Petitioners have the burden of overcoming that position. (*See* ADEM Admin. Code R. 335-2-1-.14; Fort Morgan Civil Association, et al. v. ADEM, Docket Nos. 97-08 and 97-10; Four Seasons of Romar Beach v. ADEM, Docket No. 94-14, Page 5; Frank J. Raue, Jr. v. ADEM, Docket No. 97-01, page 2 ("While the submission of additional evidence is in order, the burden remains with the Petitioner to prove the Agency's position incorrect.") The Commissions' rules specify that, in order to prevail, a Petitioner must persuade the Commission by a "preponderance of the evidence" that the Department's action should be disapproved or modified. (ADEM

Admin. Code R. 335-2-1-.27(5); Bates Motel v. Env'tl Mgmt. Com'n, 596 So.2d 924, 927 (Ala. Civ. App. 1991), cert. denied May 1, 1992.)

3. In the case sub judice, the Petitioners must prove the Department's position on ADEM Solid Waste Facility Permit No. 37-11 was incorrect, or that the Department's action should be disapproved or modified.

IV. FINDINGS OF FACTS

1. Although the suggested JPO submitted by the parties was modified somewhat after receipt by the undersigned (e.g., the deadline dates, etc.), the above-referenced 3 Oct 06 official JPO is labeled as ALJF #2. In that JPO, the following positions are stated:

a. Position of Shaun Thistlethwaite, et al. (Petitioners)

"A. *Petitioners' Position (allegations of errors)*

1. Background

The New Georgia Landfill (NLG in North Birmingham was opened in 1955, operating as an open dump until the City of Birmingham (City) obtained a Solid Waste Disposal Permit in 1971 for an unlined landfill. In 1994, the City sought approval to modify the permit to construct a 30.5 acre Subtitle-D cell on a portion of the landfill. On Nov. 2, 1998, ADEM issued Solid Waste Disposal Permit No. 37-11 approving the permit. Two months later, the City requested a modification to re-designate the entire 30.5 acres as a construction/demolition [c/d] landfill. On June 25, 1999, the permit was modified to only accept c/d waste. On Nov. 1, 2003, the

permit for the c/d facility expired, leaving the site without any permit. Yet, on Nov. 17, 2003, the City submitted a permit for a "modification" at the NGL, despite the lack of an existing permit to modify. This permit was identical to the 1994 permit for the 30.5 acre Subtitle-D cell. Due to errors in the submission process, the City had to resubmit the application in 2005. Prior to the ADEM public hearing on this submission, a private engineer hired by petitioners detected flaws in the design of the proposed liner, the same liner that ADEM approved of in the 1994 process. The City resubmitted the application again in 2006. A public hearing with ADEM was held on March 28, 2006. ADEM granted the permit for the NGL on July 11, 2006."

b. Position of ADEM (Respondent)

"B. *ADEM's Position*

1. In response to alleged errors 2a and 2b above, [see pages 4-7 of the 3 Oct 06 JPO/ALJF #2], it is ADEM's position that it complied with all laws and regulations, including the provisions of ALA. CODE §22-27-48 concerning local approval by the City of Birmingham, in renewing/modifying the permit made the subject of this matter. Petitioners in part base their issue on the assumption that local approval is required for renewal permits, modifications or changes in cell design at this permitted location. It is ADEM's position that once local governmental approval is obtained there is no statutory limitation on the length of time in which operators must submit an application to the Department for the modification of

a permit for new or existing solid waste management or disposal facilities. (Attorney General's Opinion dated September 18, 2000).

2. In response to alleged errors 2c and 2d above, [see pages 7-8 of the 3 Oct 06 JPO/ALJF #2], it is ADEM's position that it complied with all laws and regulations, including Environmental Justice and Title VI, in renewing/modifying the permit made the subject of this matter. The Department's position is that it does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in the administration of its programs or activities, in accordance with applicable laws and regulations. ADEM does not site landfills. This responsibility lies with the local host government."

c. Position of the City of Birmingham (Intervenor)

"C. *Intervenor's Position*

1. Overview

a. The City of Birmingham had an existing permit when ADEM allowed the permit modification.

b. The City of Birmingham's Solid Waste Management Plan has been and continues to be effective since its approval by ADEM in 1991.

c. Section 22-27-48(a) of the Alabama Code (1975) does not require local approval for permit modifications for certain limited purposes including 'changing liner and leachate collection, changes in waste streams from within the facility's designated service area, changes in

sequence of fill, changes to incorporate new technology and changes intended to bring a facility into compliance with statutes and regulations.'

d. The City of Birmingham previously considered the appropriate statutory factors.

e. The City of Birmingham considered all appropriate matters during the modification process.

f. The groundwater monitoring wells at the New Georgia Landfill are sufficient, uncontaminated and/or meet ADEM standards.

g. The City of Birmingham has not violated Title VI of the Civil Rights Act of 1964.

h. The City of Birmingham contends that the petitioners created any changed conditions by coming to an existing permitted landfill."

2. A summarized version of the various testimonies rendered are as follows:

a. Mr. Jim Lowery (NOTE: The Transcript (T.) references herein will refer to either the first transcript of the 31 Oct 07 hearing or to the second transcript of the 21 May 08 hearing.)

(1) He is the Mayor of the City of Fultondale and has been Mayor for the post eleven years. The City employed the engineering firm of Malcolm Pirnie to represent it with regard to the City of Birmingham's NGL permit. (Transcript page (T.) 53-54) This witness was shown Respondent's

Exhibit 1 and asked about it. Mayor Lowery stated that it is an agreement entered into by the City of Fultondale, a City Resolution, authorizing them to enter into an agreement with Malcolm Pirnie Engineering Firm (MPEF). (T. 56) The witness was shown Respondent's Exhibit 2, but does not specifically recall seeing it. (Tr. 57) The witness admitted that he was familiar with the NGL location and how it adjoins the City of Fultondale. (Tr. 57) The witness also stated that as Mayor, he has ridden in the area of the landfill and met with citizens. (T. 57-58) The witness described the area as being beautiful with Five Mile Creek running through it, but that the NGL site sits atop a steep hill. (T. 58) The Mayor stated that he feared garbage will run downhill and the creek is at the bottom of the NGL site. The witness testified that the Chapel Hills subdivision was built when the NGL landfill was not operational. (T. 59) There was no activity at the time. (T. 61) The witness described the area as residential and state he has no knowledge of any other landfills in the immediate area. (T. 61)

(2) The witness admitted he had heard of the Think Pink, Inc. Landfill but that it would not be considered within the general vicinity of the NGL. (T. 62) The Mayor also testified as to the existence of the Waste Management landfill and the fact that the City of Fultondale used the Waste Management landfill for some of their disposal. (T. 62) The Mayor admitted that the Waste Management landfill was close to the Chapel Hills subdivision and in fact that the NGL was close as well. (T. 63) The witness was shown Respondent's Exhibit 3, and he disputed the accuracy of the map marked as

Respondent's Exhibit 3; but he did admit that, other than a missing buffer zone, it is close to being right. (T. 65) The Mayor admitted that at some point in his eleven years as Mayor of the City of Fultondale, he became aware that the City of Birmingham made an application for a municipal solid waste landfill. (T. 69-70) The witness was shown Respondent's Exhibit 4. The witness identified his signature at the bottom of the document. (T. 71) The witness stated that he cannot recall being at any meetings regarding the landfill or signing any document as Mayor in the form of comments on ADEM's permit. (T. 74) The witness also recalled other events and letters signed by him. (T. 74-79) The Mayor agreed that the Chapel Hills subdivision is surrounded by two landfills. (T. 80) The Mayor testified that the City of Birmingham's seeking the permit for the landfill caused the City of Fultondale to hire Malcolm Pirnie Engineering Firm (MPEF). (T. 82)

(3) On cross-examination by the City of Birmingham, the Mayor testified that he discussed the City of Fultondale's representation by MPEF with Mr. Patrick Flannelly of MPEF. (T. 84) On cross-examination by Mr. Love, the Mayor stated that MPEF sent New Georgia Landfill Strategic Documents to stop the reopening of the New Georgia Landfill, and that no landfill will have the optimum outcome. The witness did not recall if he adopted the document. (T. 90) The witness objected to the City of Birmingham opening a landfill near the subdivision; however, he admitted that there is a landfill (Waste Management) that the City is receiving funds from. (T. 91)

(4) The Mayor stated that the City of Fultondale did request a buffer zone, and passed a resolution authorizing USA Waster Service. (T. 92) The witness did not initially remember the language in the Resolution which read: "Whereas, the city will support the permitting and construction of the planned facility and any future expansion and related operation." upon further review, he admitted that he had, in fact, read it and that it was his document. (T. 93)

(5) The witness admitted that the City of Fultondale would get a host fee from the Waste Management Landfill. (T. 96) The witness stated that Chapel Hills is downstream, and that is a concern. (T. 96) The Mayor stated that Waste Management is on both sides of the creek, but he does not know exactly where they are operating. (T. 97)

b. Mr. Shaun Thistlethwaite

(1) He has resided at 3374 Chapel Hills Parkway in Fultondale, Alabama since October, 2004. (T. 123) He is employed as a teacher at the Altamont School in Birmingham. (T. 123) He learned of the new proposal to the NGL two to three months after reading about it in a letter written by Dr. Gregory. In response to the proposal to the NGL, he formed an organization called "Friends of Five Mile Creek." (T. 124) He testified that he was not made aware of any public meetings and did not attend any public meetings that were held to discuss the proposed landfill. (T. 125) He stated that, in response to the landfill proposal, "we" undertook a file review in March, 2005, to make sure that the landfill was up to code. (T. 125) He stated that

Dr. Gregory, and other members, found some problems with the landfill, and that was brought to the attention of ADEM. He stated that "their" concern was if the landfill were permitted, it was going to be done properly.

(2) He testified that "we" submitted written comments to ADEM after ADEM's hearing on the Permit. (T. 127) He testified that his concerns about the landfill are that it is on top of a hill, and on top of mines and it also borders a creek. He had concerns about contamination in the creek. His group's primary concern is the health of the residents and the environment of the area. (T. 129) He testified that his concerns for his own property were contamination, smells, odors, dust, dirt, and all the undesirables that go with the landfill. (T. 129)

(3) On cross examination, he admitted that his wife was aware that a former landfill had been on the site adjacent to their new home, but that he was not so aware. (T. 132) He stated that his compliant has to do with the new landfill, but that he considers the new and old landfill to be connected to each other. He admitted that he is aware that the ADEM permit requires zero discharge to the creek, but he is aware that EPA states that all landfills leak. (T. 136) He testified that in his opinion, the City of Birmingham did not receive proper local approval. (T. 137) He admitted that Respondent's Exhibit 7 (the 1994 Certificate of Local Approval for Solid Waste Management Facilities) states that the City of Birmingham considered the statutorily required six factors. (T. 141) He testified that Five Mile Creek runs not only adjacent to the NGL site, but it also runs adjacent to the Waste Management

Landfill site. (T. 145) He testified that he and his group had not filed any kind of complaints or legal actions against the Waste Management Facility. (T. 148) He stated that he believes that the NGL site is not in compliance with state laws and regulations. (T. 149)

(4) He admitted that his allegation of groundwater contamination is a "threatened injury," and he admitted he has no evidence that his property has actually witnessed groundwater contamination. (T. 149-150) He stated that he could distinguish potential contamination from the NGL site from the Waste Management site, based on the Waste Management site being upstream. (When ADEM's counsel reminded him that he was talking about "groundwater" not "surface water flow," the witness responded, "I mean the creek flows from this direction to this direction.") (T. 150) He admitted that he has not experienced any odors at his property, nor any dust or dirt. (T. 151) He also admitted he has not encountered any traffic problems or seen any garbage trucks. (T. 151) He admitted that he attended the hearing, made public comments, and submitted written comments at the ADEM public hearing for the NGL. (T. 156-157) He admitted that he is alleging that the City of Birmingham did not have a public comment period for the landfill cells at issue in the hearing sub judice. (T. 158)

(5) On cross examination by the Intervenor (the City of Birmingham), he stated that his property and the NGL were both elevated above Five Mile Creek. (T. 160) He admitted that he has no knowledge about what Waste Management does, and he cannot answer counsel's question as to

whether he has concerns about Waste Management's potential contamination of the creek. (T. 163) He admitted that he has no problem with potential contamination by the Think Pink, Inc. Landfill. (T. 164) He admitted that there was dust and dirt being created by the construction of the Chapel Hills subdivision. (T. 164-165) He admitted that he is not complaining of anything presently coming from the NGL site, and that all of his complaints are "potential." (T. 165)

c. Ms. Melissa Thal

(1) She has resided at 3374 Chapel Hills Parkway in Fultondale, Alabama since October, 2004 and is married to Mr. Shaun Thistlethwaite. (T. 176) She further testified that she is a graduate student at the University of Alabama - Birmingham, and receives a stipend. (T. 176) She admitted that she did some "Google" research prior to moving into the Chapel Hills neighborhood, and she saw that the landfill existed. She testified that she also saw that the landfill had been closed, and it was supposedly remediated. (T. 177)

(2) She testified that she found out about the new proposed cells after she moved in and after she received a letter from the home owner's association. (T. 177) She testified that she and her husband understood that all landfill liners will eventually leak, and that this one will eventually contaminate the creek. She testified that she and her husband use the creek for hiking. (T. 180) She testified that she believes there is already contamination in the creek from the old landfill cell. (T. 180)

(3) On cross examination by ADEM's counsel, she testified that in her "Google" search prior to moving into the Chapel Hills subdivision, she did locate the NGL site and knew that it was 700 acres. (T. 182) She stated that she did not find the Waste Management site in her search, and had not heard, prior to today's hearing, of the Think Pink Landfill site. (T. 182) She stated that she had notice of the existence of the old landfill, next to the subdivision she was moving into, but she had not checked into the permitting status of said landfill. (T. 183) She testified that an internet research is not very reliable. (T. 184)

(4) On cross examination by counsel for the City of Birmingham, she admitted that she "Google searched" the area they were moving to because she wanted to know about the neighborhood where she was about to buy a house. (T. 185) She stated that she had not seen any dump trucks from the landfill and did not know where the entrance to the landfill was. (T. 186-187)

d. Dr. Brian Gregory

(1) He testified that he has resided at 480 Enclave Circle since August, 2002, and prior to that he lived in Illinois. (T. 188) He stated that he was not familiar with the area when he moved here, and that he spent about a day and a half looking for a house. (T. 189) He testified that he is employed by Samford University as a Professor of Chemistry. (T. 190)

(2) He was not testifying as an expert witness, but as a fact witness only. (T. 190) He testified that his home is adjacent to Five Mile

Creek and that across and up a slope from his property is the NGL site. (T. 190-191) He was made aware by neighbors of a July 2004 notice of an ADEM public hearing regarding the NGL site. (T. 191) He testified that he began looking into the NGL permits in 2004, and he made a trip to ADEM for a file review of the NGL ADEM file. (T. 192) He admitted that he was aware of the various meetings held by ADEM, and he spoke at some of those meetings and he also submitted written comments following said meetings. (T. 192) He testified that the NGL site will impact his view of the creek, and that he worries about contamination. (T. 195)

(3) He testified about the NGL facility file containing information concerning contamination in the wells of the old landfill site, and his being worried about the new cell being closer to the creek. (T. 196) He testified that it is distressing to think his property is essentially contaminated. (T. 198) He testified that he does not want landfill waste washing up on his property. (T. 199) He testified that when he was looking into information, he found that the companies that make landfill liners rate them for ten to twenty years. (T. 199) He stated that information in the ADEM file showed that the surface water and groundwater drainage plan for the cell were toward the creek. (T. 199) He testified that his understanding is that if surface water goes toward the creek, so would leachate. (T. 199) He admitted that he cannot answer whether contamination of soil, groundwater, or surface water in the vicinity of his property will result even if the liner never leaks. (T. 200)

(4) On cross examination by ADEM's counsel, he testified that he was not alleging any diminution in the value of his home. (T. 203) He testified that his property values have gone up since he purchased his home. (T. 204)

(5) On further cross examination by counsel for the City of Birmingham, he testified that he did not know if he owned the part of Five Mile Creek that ran through his property. (T. 206)

(6) On re-direct by his attorney, he testified he did not understand the term "riparian rights." (T. 209)

e. Mr. Phil Davis

(1) He stated that he was Chief of the Waste Programs Branch in the Land Division of ADEM, and that he was responsible for overseeing the implementation of the state's hazardous waste, solid waste, and scrap tire programs. (T. 212) He stated that the New Georgia site had applied for permit renewal and modification under the solid waste program. His responsibilities regarding the permitting of the New Georgia Landfill site were to oversee the final processing of the application, the issuance of the public notice, and the issuance of the permit. (T. 212-213) He stated that his responsibilities over solid waste began on 1 Feb 06, and that he had not done any work on the old site. (T. 213) He stated that there was an old sanitary landfill at this site that was closed and had ceased taking waste in the 90s. In the mid 90s, the City of Birmingham processed local approval, and submitted

to ADEM a request for a permit for a new landfill, compliant with Subtitle D regulations at this same site. (T. 213)

(2) He explained that Subtitle D is the section of the National Resource Conservation Recovery Act (NRCRA) that deals with the disposal of nonhazardous solid waste. (T. 213-214) He identified Petitioner's Exhibit 1 as a copy of the ADEM permit with a cover page dated 2 Nov 98, an expiration date of 1 Nov 03, and that it appeared to be a complete permit. (T. 214-215) He stated that the permit had been modified, that the copy given to him showed two modification dates (one in 1999 and one in 2000). He believed that the '99 modification downgraded the landfill, as originally designed, from receiving household garbage or municipal solid waste down to a construction and demolition debris (C&D) landfill. He explained the difference between a Municipal Solid Waste (MSW) permit and a C&D permit. He stated that there were a number of differences in the requirements for each type of landfill; one being that the MSW landfills fall under the requirements of Subtitle D or RCRA. Those requirements include a number of siting criteria that have to be met, as well as monitoring requirements that are required of all MSW landfills, but not necessarily required of other types of landfills (e.g., groundwater monitoring). (T. 216)

(3) He stated that this landfill had never operated under the 1998 permit. It did not go through a closure plan during that time, because the landfill covered by this permit was not constructed or accepted waste, and there was nothing to cap since it was not constructed. (T. 218) He

stated that there was a previous landfill on this site that had operated since the '50s, and that he thought it had ceased taking waste in the mid '90s, but he was not sure of the exact dates. (Tr. 218) He stated that one of the requirements Subtitle D, when passed by Congress, was to close all the old, unlined sanitary landfills that were around the country that had operated legally prior to the new statutes and replace those with the Subtitle D compliant landfills. (T. 218-219) He stated that this understanding was that the old sanitary landfill was on the same site as the New Georgia Landfill. (T. 219) He stated that the permit that was issued (and under appeal in the case sub judice) primarily concerns the construction and operation of the New Georgia Landfill. He thought there were some requirements to maintain the groundwater monitoring that is required to occur on the old closed sanitary landfill, but the permit here at issue addressed the new landfill. (T. 220)

(4) He stated that there was a requirement that renewal applications be filed 180 days prior to the expiration of the permit. (T. 219) He confirmed and stated that his understanding was that the City of Birmingham had not filed a request for permit renewal 180 days prior to 1 Nov 03. He was not sure of the exact date the City of Birmingham had filed their renewal request, but believed they had filed a request for renewal sometime in early May of 2003. (T. 220)

(5) He explained the process for filing a request for a permit renewal with ADEM. He stated that an applicant completes the appropriate departmental permit application forms with whatever other

information would be necessary to process the renewal, and the applicant submits that to the Department, sometimes with the appropriate fees. Many times, ADEM notifies the applicant of the appropriate fees because there are a number of things in ADEM's fee regulations that are additive in nature. He stated that the City of Birmingham would have filed for a permit renewal of a C&D. (T. 221) He confirmed that he had previously seen the document marked as Petitioner's Exhibit 2, and that it could be found in the file. He testified that the letter and attachments would meet the requirement of filing a renewal application. (T. 222)

(6) He identified, from the application form, that it was a solid waste permit application dated 5 May 03, and the ADEM stamped date represented the date this package was received by the Land Division. (T. 222-223) He confirmed that the applicant would have had to file 180 days prior to 1 Nov 03 in order to comply with the requirements and regulations. His understanding was that 15 May is less than 180 days from 1 Nov 03. (T. 223)

(7) He confirmed that the letter showed that the applicant did enclose the permit fees, that the $6,400.00 fee would be an application for the renewal of an MSW landfill, which is what the applicant was initially permitted as, the waste stream for which they were initially permitted, and that they had downgraded the waste stream to a C&D. (T. 224)

(8) He stated that the regulations do not prescribe, or have prescriptive language as to, what happens if the 180 day renewal deadline is missed. He stated that the 180 days is an administrative deadline so that

the department can manage workload and schedule those kind of things. He agreed that the 180 days is an administrative deadline, and that in the administrative regulations, it prescribes to 180 days prior to expiration of the existing permit. (T. 225)

(9) He affirmed that he was familiar with what happens with a permit which does not meet ADEM's deadline within other ADEM programs. As an example, he stated that he had worked in the Water Division MPDS program for six years, and the Air Division for eight years. He explained that in the Water Division, there is a similar 180-day requirement; on a permit renewal application, the 180 days is there so that the department can ensure that applications are received in a manner that would allow for the processing of the application by the staff prior to the permit's expiration; there is a similar 180 days requirement in the MPDS permit rules. (T. 226) He explained that the 180-day requirement is handled as a case-by-case judgment call at the discretion of ADEM. He stated that there have been a number of situations in which an applicant did not apply within the 180 days of their permit expiration; at the expiration, in an operating situation, the applicant may continue to be allowed to operate. In other situations, there may be information necessary for ADEM to determine whether or not the applicant should be allowed to continue to operate based on circumstances, compliance history, and ongoing operational factors. (T. 226)

(10) He stated that the NGL, at the time, was not operating and was not accepting waste. The 180 days then would be no real operational

issue regarding its renewal. He stated that the 180 days really did not mean anything because the renewal application could not be processed within that time frame. (T. 227-228) He stated that he thought that the water regulations have a specific language that the permit is automatically extended, provided the applicant meets the 180 days. The regulations did not say that if the applicant does not meet the 180 days, then the permit is automatically void. (T. 228)

(11) In comparison to the water regulation's language, he stated that the solid waste regulations do say, "continuing operations if they apply appropriately for renewal." But it does not specifically say the converse, it does not say that the permit is automatically voided. He explained that ADEM interprets and looks at each case in which an applicant does not meet the 180 days as an enforcement, or potential enforcement, situation on how critical the 180 days are to the processing of the application. (T. 228-229) He agreed that if an existing permit was being upgraded from a C&D to an MSW, it was a major modification. He explained that a major modification would require specific public notice, if necessary under the statute for local approval, and other administrative requirements. This applies, as opposed to a minor modification, which would be a downgrade from MSW, for instance, to C&D. (T. 229) He stated that in this instance, local approval was not required because the local approval had already been granted many years earlier in the initial local approval process for this site. The City of Birmingham had granted local approval for an MSW landfill. He explained that it downgraded to what

their waste stream was going to be which did not void the local approval. (T. 230) He explained that if the City of Birmingham were going to make a modification to the permit of any kind, the same administrative 180 days requirement would apply for the modification, whether it was a major or minor modification. He stated that in this case, the real change would be from a construction standpoint because the cell had never been built. (T. 230-231)

(12) He confirmed that the May 5 letter that had been marked as Petitioner's Exhibit 1 would have simply been for the renewal of the application or of the permit. He stated it appeared that this would have been the fees attributable to the major modification. (T. 234) He stated that it went to public notice either late February or early March 2006. (T. 234) He speculated that the reason it took so long from the time the initial 17 Nov 03 application was received fro a major modification, was due to workload and staffing issues, and that he thought there may have been some design and application issues with this particular site. (T. 235)

(13) He explained the process differences when applying for a new MSW permit versus a major modification. He stated that the administrative processes, and to some extent the technical processes, are very similar depending on the scope of the modification. In this case, modifying an existing landfill to add MSW cells to an existing C&D landfill, the two processes would be very similar, akin to developing a new landfill. The difference in this case, would be that local approval had already been obtained for an MSW landfill at this site. Local approval is one step that is normally a process that is

required for a new or for a major modification and in this case, they utilized that local approval. (T. 241) He affirmed that he had testified that going from a C&D to a MSW was a major modification. He affirmed that local approval would be required for a major modification. He explained that, because the local approval that was granted for this applicant (i.e., the City of Birmingham) in '94-'95 was still in effect for an MSW landfill, local approval for a new major modification would not be required. He stated that, because the City of Birmingham had local approval from the appropriate local host government for an MSW landfill at this particular site, the City's local approval remained valid. He confirmed that he said that the City had local approval for this major modification. (T. 242-243) He explained that ADEM did not grant local approval, that local approval was granted by local host governments. He stated that ADEM did not consider the changed circumstances since the '94 local approval was granted by the host government, because ADEM does not grant the local approval. He confirmed that the local approval is a function given to the local host government by the Alabama Legislature.

(14) He affirmed that ADEM did follow the rules and regulations, that ADEM's regulations require only that an applicant submit proof of its local host government's approval as part of its permit application, and that the local approval was looked at primarily for form. (T. 243-244) He stated that ADEM looked at the approval primarily for form, that is, that a public hearing was held in accordance with statute, that a copy of the

governing body's resolution was submitted, that it was for the same property, and to the same applicant for the same project.

(15) He affirmed that a statement of consistency with the Regional Planning Commission's plan was required in this case, and that he believed it was also submitted. He stated that he did not know the dates the public comment period ended in this case on this permit. He stated that it would be at least 35 days after it began, but in this case, he believed it went a few days longer. He mentioned that ADEM would normally leave the public comment period open for five to seven days after the hearing date. He stated that ADEM's solid waste staff was responsible for responding to those public comments, and that he had signed the letter. (T. 244) He stated that there is an unlined sanitary landfill on this site which had been there since the '50s or '60s, which they have groundwater data showing groundwater monitoring parameters above background, and that there are groundwater pollutants that have been monitored and seen from the old landfill. (T. 245) He stated that ADEM's rules required that landfills which are closed as a result of the Subtitle D regulations conduct post closure groundwater monitoring. He stated that this was not a requirement under Subtitle D, but was required in Alabama, and that the old closed New Georgia sanitary landfill conducts that groundwater monitoring. He stated that ADEM did not have a post-closure permitting program that would establish any kind of values or limits for violations. He stated that this was something ADEM did primarily as a monitoring and detection program. He explained that there was nothing

prescribed in the regulations if groundwater contamination was detected by the detection program. ADEM had very prescriptive language for groundwater monitoring that is required of the permit that applies to the new cell in accordance with Subtitle D. However, for an old post-closure monitored landfill like this one, it's primarily monitoring. He stated that it was not surprising to see some leakage in an old unlined cell since there is no liner system to prevent the leakage. He stated that the groundwater monitoring was there to monitor and to see what those levels are. (T. 246) He stated that the old landfill was being sampled as it was required to be, and that the new landfill had a monitoring network of both up and down gradient levels.

(16) On cross-examination by ADEM, he identified Respondent's Exhibits 7 and 8. He stated that he did recognize the documents, and that they appeared to be part of the local host government approval documentation. He confirmed that this documentation was the documentation that ADEM normally requires of an applicant in order to comply with Section 22-27-48, Code of Alabama 1975 (2006 Rplc. Vol). He stated that this documentation included the resolution by the local body, proof of public notice publication and of public hearing, and a discussion of the factors required under the Code. He confirmed that the certificate of local approval did reflect that those six factors were considered by the council members. He affirmed that, in his opinion and on behalf of ADEM, the City of Birmingham had complied with the local governmental, or host governmental, approval sections of the Code of Alabama and ADEM's regulations. He identified

Respondent's Exhibit 9 as being a letter from the Birmingham Regional Planning Commission to Mayor Richard Arrington of Birmingham. He confirmed that this document had been referred to many times as a statement of consistency. He acknowledged that this document had been made part of the City of Birmingham's application. He confirmed that this particular statement of consistency met the regulatory and statutory requirements for ADEM if it had been submitted as part of the application. He stated that the statute actually prohibits ADEM's considering an application without the local approval; and ADEM's regulatory requirement requires that the statement of consistency be included. He confirmed that Respondent's Exhibit 9 was from the Birmingham Regional Planning Commission, and that Respondent's Exhibit 9 brought the City of Birmingham into compliance with the Code requirements for approval from the local Regional Planning Commission. He stated that the statute requires an applicant to obtain a statement of consistency, and this would suffice to meet that requirement. He affirmed that, in his opinion, ADEM had complied with all the rules and regulations necessary to move forward and to consider the City of Birmingham's application for renewal/modification in this case. (T. 252-254)

(17) He stated that, based on his reading of Respondent's Exhibit 10 (a letter dated 5 May 03), it appeared to be a request for a renewal of the referenced New Georgia Landfill. He stated that by looking at the letter, it did not appear that ADEM received an application for modification at that time, and that the fee submitted was for a renewal rather than for a modification. (T.

256) He was shown Respondent's Exhibit 11, and he then stated that he recognized the document. He identified the document as the Solid Waste Disposal facility permit for the City of Birmingham, New Georgia Landfill issued 11 Jul 06. He confirmed that the landfill permit covered both MSW disposal and C&D disposal, and that the two applications had been merged into this one permit. He stated that this permit application was based on requirements for both a C&D disposal area, as well as an MSW disposal area, and that each type of application would have different components. He agreed that, in his opinion, this permit properly protected the environment and human health in compliance with all of ADEM's rules and regulations. (T. 256-257) He confirmed that the MSW permit was never voided or rescinded by ADEM, and that it had only been modified to make those changes. He confirmed that it would be correct to say that the MSW permit remained in effect, and that the requirements of the landfill changed because the requirements associated with operating a C&D debris landfill are less stringent than those associated with the MSW landfill. He stated that the terms of the permit would have changed, but that there would be no necessary reason to change the actual type of permit. (T. 258-259)

(18) He confirmed that the overall permit, at the time the City of Birmingham applied for a renewal, shows that the latter still had an MSW permit in place. He stated that, looking at this permit, the modification still included the requirements you would find for MSW landfills regarding liner design, and he noted that information could be found on page 15 of that

permit. He explained that if the City had wanted to upgrade to an MSW type cell, the City would effectively modify the waste stream that was allowed, (which is what they had done). He explained that the major modification process the City underwent allowed them to go from a MSW waste stream to a C&D debris waste stream and to return back up. (T. 260) He explained that the City would only have been required to obtain local approval, if they had gone beyond the scope of the local approval that was granted back in 1994 or 1995 for a certain number of acres within this 700-some-odd acre site at New Georgia. He stated that as long as the City stayed within the confines of the local approval granted, then that local approval would still be valid. He stated that there were 750 acres at this location, and that the City was originally granted local approval in this particular case for a 30.5 acre disposal of municipal solid waste. He confirmed that if the City had wanted to go back to an MSW prior to the expiration of the 1998 permit, it would have only involved submitting an application in a new waste stream to ADEM; then the local approval would not be required as long as the modification was still envisioned and compliant with the terms of the original local host government approval. (T. 261-263)

(19) He acknowledged that during the two and one half, to three years or so, before ADEM actually acted on and issued a new permit in this case, it was his understanding that the City was not actively operating at this landfill, and that the City had not placed any C&D type debris in the cell, and that it was never constructed. Since the landfill was not being operated,

he confirmed that at no time was the environment or human health ever in jeopardy. He stated that no waste was being taken there. (T. 263)

(20) On re-direct by Petitioner's counsel, he explained that if the modification had occurred, or if it had been requested prior to the expiration of the permit, it would have been processed solely as a modification. However, in this case, the modification was requested and processed along with the renewal of the application or of the permit. He stated that the permit's expiring only meant that there was a permit action that needed to be taken in terms of the renewal. Accordingly, the modification which would undergo a similar public involvement process, and a similar opportunity for comment, those (modification and renewal) could go together, rather than being done as a separate process. He explained that if the modification had been processed prior to the renewal, it would have had its own public process; and the permit modified, and then the renewal would have occurred at whatever date. He stated that he did not know if they (modification and renewal) were filed simultaneously. He stated that, from ADEM's standpoint/perspective, it did not matter when the request for modification was filed; if the department was processing a renewal, it would be more efficient to process the modification in conjunction with the renewal.

(21) He identified Petitioner's Exhibit 8 as a memorandum to potential applicants for solid waste permits within Alabama (written by ADEM) which basically outlined the steps necessary for obtaining those types of permits. He confirmed that it did say that a major modification required

local approval and a statement of consistency. He confirmed that in this case, the upgrade to a MSW was a major modification and that the requirement for local approval was part of it. (T. 266-267) He was referred to Exhibit R-10, and he then confirmed that page 1 of that document was a solid waste application for a facility type MSW landfill, and that the renewal was received in May.

f. Mr. Jason Hughes

(1) He stated his full name was Jason Mark Hughes. (T. 32) He stated that he is a licensed professional geologist in the State of Alabama. He confirmed he is a project hydrogeologist for the engineering firm of Malcolm Pirnie. (T. 33) He explained that a hydrogeologist is involved with the study of groundwater, the hydraulic flow of groundwater, and contaminant investigations. (T. 34) He defined his area of expertise as being contaminant hydrogeology and groundwater supply. He testified that he was a hydrogeologist at ADEM, with his final classification being that of Geologist II. (T. 34-35)

(2) He opined that: "First, as required by the regulations, the permittee or the operator, owner and operator, are required to submit a statistical analysis plan to the Department. I didn't find, through my review of information provided by Counsel or information requested from ADEM, that that statistical analysis plan has been submitted. Two, I formed an opinion that the statistical analysis method for groundwater that the facility is currently using is not appropriate for the facility. Three, I identified where the

proper procedures haven't been followed for a statistical significant increase in the groundwater data." (T. 40-41)

(3) He further testified that there were documents not present in the ADEM file that were present in the NGL file, and that it would have been important for him to review those documents. (T. 43) He admitted that the files he could not get at ADEM, he did get at the New Georgia Landfill offices. (T. 45) The witness stated that he had not seen a statistical analysis plan yet, and that he had determined that there was groundwater contamination at the NGL site. (T. 45-46) He also testified that the sources of the volatile organic compounds (VOCs) and the SVOCs at the New Georgia Landfill were never determined.

(4) He stated that, per the reports that he reviewed, NGL was using an intrawell control chart, and in his opinion that was not the correct method. He felt that it was not the correct method because an "intrawell method" takes data from each well and compares it to itself. He stated that if you have a contaminated well, you're comparing contaminated water to potentially contaminated water, and you don't see that statistical difference in the data. (T. 46-47) He stated that EPA guidance states that intrawell control charts should not be used in wells that have shown contamination in the past/historic evidence of contamination. (T. 48)

(5) He testified that there had been statistically significant increases reported, but the required follow-up, was not done. (T. 50) He stated that, in his opinion, the current groundwater monitoring well system (the

physical system) at the NGL is "acceptable plus that well" for the detection of contaminants, although he recommended one additional well for the western component of flow. Again, he agreed that the physical system is acceptable plus the one additional well, but in his opinion the data processing is not acceptable. (T. 51)

(6) On cross-examination by the Intervenor's counsel, he admitted that he was a hydrogeologist, but not an engineer, and none of his opinions are based on any engineering defects for the construction of the cells at the NGL site. He agreed that people in his field can disagree about the number of wells needed for a cell. (T. 94)

g. Mr. Mark Dolan

(1) His occupation is that of engineer, and he is currently employed by Volkert & Associates in the position of Vice President. He has been with Volkert & Associates since 1992. (T. 123) He testified that Volkert was retained in 1993 to permit, design, and construct a lined facility at the NGL site according to ADEM's regulations. (T. 124) He affirmed that Volkert Company monitored the construction of the landfill to ensure that it was consistent with ADEM rules and regulations.

(2) He testified that the NGL was constructed in a manner consistent with the federal environmental rules and regulations that were in effect at the time of the construction, and that the landfill was constructed in a manner designed to protect the public health and safety. (Tr. 125-126)

h. Mr. Ron Hicks

(1) He testified that his full name is Ronald Edmond Hicks, and that he has a Bachelor of Science in Geology. He stated that he began working for ADEM in January '91 and retired from the State in October of '05. (T. 132) He testified that at the time of his employment with the State, he was a licensed geologist. He explained that while at ADEM, he worked as a hydrogeologist for the Groundwater Branch of the Water Division. (T. 133) He stated that he did hydrogeologic evaluations for several of the different ADEM programs, but for a couple of years, he was exclusively on solid waste issues, which entailed completing the hydrogeologic evaluations for landfills throughout the state. (T. 134)

(2) He testified that any hydrogeologic evaluation requires a landfill visit or a site visit. (T. 135) He explained that he was very involved with the NGL permitting process. He explained that he was responsible for completing the review process for the NGL. He testified that his first review was in '93, and from then until '05 when he retired, he would have completed the review of any one of the hydrogeologic evaluations that came through.

(3) He explained that ADEM Land Division has the responsibility for evaluating and issuing a permit. ADEM Land Division requests reviews by the geologist in the Groundwater Branch. The Groundwater Branch completes a review, makes recommendations, and then returns those to ADEM Land Division. (T. 137) He explained that once ADEM Land Division requests a hydrogeologic evaluation, Subtitle D is a pretty cumbersome document. Accordingly, many years ago, he weeded through and

picked out those items that had to do with hydrogeology/groundwater. Between himself and ADEM Land Division, ADEM decided those things that should be reviewed via hydrogeologic evaluation. He explained that the first page of the attachment is the regulations cited; the second line is the requirements needed for that particular item; the third line is the location in the application; and then the final line is any comments that the ADEM evaluator wants to make. He testified that the chart he created was based on the federal regulations, as well as on ADEM requirements. He explained that he filled that chart out when he was processing the evaluation, or performing the evaluation, as requested by ADEM Land Division for the New Georgia Landfill. He explained that the process is a progression and not a vacuum. He explained that the progression will include some of the charts, which are not very well filled out, and those go back to ADEM Land Division. He stated that ADEM Land Division, as part of its review process, will request other information from the applicant to fill in the blanks. He testified that when the chart is finally completed to ADEM Land Division's satisfaction, then ADEM Land Division moves forward. (T. 139-141)

(4) He explained that as part of his permit evaluation as a hydrogeologist, he considered and analyzed how many monitoring wells were needed for this particular NGL site. He testified that he determined that there were already nine monitoring wells on site, that he thought three more were submitted, and he then decided that was adequate for the NGL site. He explained that ADEM regulations minimally require, with respect to monitoring

wells, one up gradient and two down gradient. He explained that he and ADEM Land Division, as a result of his analysis, determined that more than one up gradient and two down gradient monitoring wells were needed at this particular location. (T. 143-144) He testified that, in his opinion, the monitoring wells at the NGL site are adequate according to federal regulations. (T. 145) He explained that the fact that another geologist may have an opinion (i.e., that more monitoring wells are needed on this particular site) was a debatable matter. (T. 145)

(5) He explained that ADEM can make requests, as time goes on, that more monitoring wells be installed as more information becomes available. (T. 146) He noted that ADEM actually has the power to require additional monitoring wells, from time to time, as ADEM sees fit, depending on what information is received and how the landfill is going. (T. 146-147) He testified that, as a part of his analysis and evaluation, the City submitted a statistical analysis plan, and proposed using an intrawell method. (T. 149) He explained that there are four methods that have their own advantages and disadvantages; they all give good information, and they will all come to the same result if used properly. He explained that the regulations require that one of those four methods be used (but the regulations do not require which one to use). He testified that an intrawell is acceptable. (T. 153)

(6) He testified that, on several occasions, he went out to the NGL site during his during his evaluation process. (T. 154) He testified that, based on his evaluations and recommendations on the NGL permit, he

made a determination to recommend permitting. (T. 156-157) He testified that, in his opinion, as a part of his evaluation of this site, the permit, the permit application, and the materials submitted with it were all proper as per the permit issued by ADEM to the City for the NGL. He testified, again, that ADEM can require the City to put in more wells at the NGL site. (T. 164-165) He testified, with respect to the statistical analysis plan, that in his expert opinion, there should be no concern or problem with the plan submitted by the City. (T. 165-166)

i. Mr. Jonathan Crosby

(1) He testified that his full name is Jonathan Edward Crosby, and that he has been employed at ADEM for the past ten years. He stated that he currently holds the position of Environmental Engineer Specialist Senior. (T. 177-178) He testified that the main portion of his responsibilities at ADEM include inspecting landfills, reviewing permits, and the permitting process for landfills. (T. 178) He explained that he took over the NGL permit file in late 2005. (T. 177) He explained that when he took over that facility, there were two issues: one was permit renewal, and another one was permit modification to upgrade one of their C&D cells to an MSW cell. (T. 179) He testified that, in his opinion, the permit and the permit modification as issued by ADEM complied with all of ADEM's rules and regulations. (T. 180)

(2) He explained that at some point during the review process, he had requested that the City do some things that he thought were required, or in addition to what they had submitted. He explained that when

he first took over the permit review, it was currently in the process of leading to a public hearing, which the previous engineer had started. During the public comment period, a telephone comment was made that expressed a problem with the help model that was submitted. He specifically explained the problem as being one concerning the depth of leachate being over the allowable line. He agreed with the telephone comment, and he stopped the public hearing process. He testified that he required the City to redesign the help model so that it would comply with ADEM regulations. The specific ADEM regulation requires that a permittee may only have 11.8 inches of leachate over the line.

(3) He explained that the second thing he reviewed was requiring the City to do a seismic analysis for the site, which was in addition to what they had already submitted. (T. 179-181) He testified that during the review process, if he saw a problem and required something of the City to correct that problem, the City always complied with his request in order to bring the landfill into what he considered necessary for the NGL to be compliant with ADEM's rules and regulations. He testified that, in his expert opinion, the NGL permit, as issued, complied with all the laws in the State of Alabama, and the rules and regulations of ADEM. He testified that after sitting through the entire hearing sub judice, he has not heard anything from any of the Petitioners, or the City's experts or witnesses, that would cause him to change his opinion. (T. 182-183)

V. CONCLUSIONS OF LAW

1. As to the above-presented positions of the Petitioners, (as noted in the JPO/ALJF #2), it appears that ADEM, pursuant to its statutory obligations, did consider all of the requisite factors set out in Sections 22-27-40, 22-27-42, 22-27-47, and 22-27-48, Code of Alabama 1975 (2006 Rplc. Vol.)

2. The pertinent portion of the above-cited Section 22-27-48 states that ADEM "may not consider an application for a new or modified permit for a facility unless such application has received approval by the affected unit of local government [in the instant case, the City of Birmingham] having an approved plan." On 24 Jan 95, the Birmingham City Council adopted Resolution No. 117-95 granting "host-government" approval for the landfill. The approved site consists of seven hundred and fifty acres with the construction of an RCRA Subtitle-D landfill by developing a 30.5 acre waste disposal cell with a composite liner system, groundwater and explosive gas monitoring system, a leachate collection system, and run-on/run-off control systems.

a. Subsequently, on 2 Nov 98, after an appropriate review, ADEM issued a Solid Waste Disposal Facility Permit for municipal solid waste to the City for the NGL with the expiration date of 1 Nov 03. The permit was modified down to C&D waste on 25 Jun 99. The landfill was not operated during the permitted times, nor during the renewal period.

b. The application for renewal of the permit dated 5 May 03, is prima facie proof that it was timely submitted by the City. At most, the allegations made by the Petitioners create a factual question as to whether the application by the City was timely submitted. For this reason, and others addressed herein, ADEM had the authority to move forward with processing same. ADEM, after an appropriate review of the permit renewal application, issued a renewal/modified Solid Waste Disposal Facility Permit to the City for the NGL on 11 Jul 06.

3. The Petitioners also alleged that they were denied due process in that "host-government" approval was not again obtained before requesting the renewal/modified permit, and that a statement of consistency was also not resubmitted.

a. While the Petitioners correctly cited the six (6) factors ADEM should consider in determining whether to recommend approval of the proposed issuance of or modification of a new or existing solid waste management site, they failed to include the exceptions which require no local approval for permit modifications. Section 22-27-48(a), as cited above, reads, in pertinent part, as follows:

> The application of the plan for local approval shall not apply to simple renewals of a permit which is to be otherwise unchanged. <u>Further, there shall be no requirement for local review and approval of permit modifications for the limited purposes of changing liner and leachate collection design, changes in waste streams from within the facility's designated service area, changes in sequence fill, changes to incorporate new technology and changes intended to bring a</u>

facility into compliance with statutes and regulations. (Emphasis added)

b. The current permit modification changes its predecessor modification from a non-liner C/D landfill to a 30.5 acre municipal solid waste disposal cell with a composite liner system, groundwater and explosive gas monitoring system, a leachate collection system, and run-on/run-off control systems. The current permit modification changes its predecessor modification from a C/D waste stream to a MSW all within the facility's designated service area. This same revelation of undisputed facts also encompasses the exception to renewed local approval for changes in sequence fill.

c. Furthermore, the current permit modification changes the preceding modification to allow for changes to incorporate new technology and changes intended to bring the MSW cell into compliance with statutes and regulations pursuant to (RCRA) Subtitle-D and corresponding ADEM regulations.

d. Pursuant to the above-cited Section 22-27-48(b), because no local approval was required for this permit modification, based on the exceptions cited above, a statement of consistency would also not be required. Only upon obtaining local approval (when required) shall an applicant be required to obtain a statement of consistency.

e. Also, the local approval granted by the City in 1995 included an RCRA Subtitle D disposal cell, and the public was afforded the opportunity

to comment and participate in the decision-making process for the potential landfill development.

f. If there were any possible error regarding local approval and the alleged denial of procedural due process to the Petitioners, that error has been cured by their participation in the *de novo* appeals process. During this process, the Petitioners have had full opportunity to present any information which could have been presented at a public hearing. Nothing would be gained by invalidating the permit so that the City can conduct a local approval hearing. Such an invalidation would only cause a delay in approving two new cells at the NGL site which are needed in the City, and which are based on a valid ADEM permit.

g. Accordingly, then, the Petitioners' allegation that they were denied due process in that "host-government" approval was not again obtained before requesting the renewal/modified permit, and that a statement of consistency was also not resubmitted is incorrect; and as such, Petitioners' challenge to ADEM Permit No. 37-11 is due to be, and should be, denied.

4. The sole procedural issue raised by the Petitioners appears to be that the Permit expired on 1 Nov 03, leaving the site without a permit, and as a result the City should have to begin again with a new application which would require new local approval. However, it appears the City submitted its application on 5 May 03, which was prior to the 1 Nov 03 expiration date. Pursuant to the permit, all conditions therein would remain in effect beyond the permit's expiration date if the Permittee has submitted a timely and

complete application and ADEM has not made a final permit decision regarding the renewal application. "[T]he decision regarding when an application is complete is an 'internal procedure' which is beyond the scope of the EMC's jurisdiction to review administrative actions." Legal Environmental Assistance Foundation v. ADEM, EMC Docket 03-09 (AEMC 29 Jun 04) (See also Root v. ADEM, EMC Docket No. 98-20 (1999); "Living," 2003 WL 1957880, at 4-5.)

a. Furthermore, in the alternative, assuming that the City submitted its renewal application with ADEM fewer than 180 days before the permit would have expired, it is rhetorically asked whether ADEM would have the legal authority to accept and process a permit renewal application that was not filed at least 180 days before the existing permit expired? ADEM Admin. Code R. 335-13-5-.02(3) requires that "Request for extension, renewal, or a new permit for any landfill unit shall be filed with the Department by the operating agency at least 180 days prior to expiration date for existing permits." This is a procedural rule for the benefit of both ADEM and for the permit holders (with the primary purpose of the 180 day filing requirement being to provide for the efficient administration and processing of permit applications).

b. The provision of the administrative rule at issue here imposes an obligation on the permit holder, not the agency, to comply with a filing requirement. ADEM Admin. Code R. 335-13-5-.02(5) states "Effect of Non-Compliance (a) As determined by the Director, substantial non-compliance with Department regulations or permits at any facility owned or operated by the applicant, including any facility for which the pending permit application is

requested, will be grounds for denial of the application. . .until such non-compliance is corrected." This provision clearly grants to the Director the discretion to accept an untimely submitted renewal application for processing. Moreover, nothing in the text of the Rule requires ADEM to reject a renewal application that is not filed timely. The Supreme Court of Oregon in ONRC Action v. Columbia Plywood, Inc., 332 Or. 216, 26 P.3d 142 (2001), an analogous case (which, while not controlling, is somewhat persuasive), held that the Department of Environmental Quality of Oregon has the legal authority to accept and process permit renewal applications that do not meet the 180-day filing requirement.

5. During a portion of the hearing sub judice (held on 31 Oct 07), Mr. Phil Davis, Chief of the Waste Programs Branch of the Land Division of ADEM, testified that the 180 day renewal deadline is an administrative deadline for the convenience of ADEM in order to manage workload, schedules, etc. (T. 226)

a. Mr. Davis testified regarding the 180-day renewal deadline as follows:

> Q. Okay. If an applicant or an operator misses a renewal deadline, what does that do to his existing permit if he's beyond the 180 days?
>
> A. Well, the regs do not prescribe what the - - what happens. There's no prescriptive language in the regulations. It's at the discretion of the department as to - - the 180 days is really an administrative deadline so that the department can manage workload, schedule, those kinds of things.

Q. It's an administrative deadline. Isn't it in the administrative regulations?

A. It is.

Q. And that prescribes 180 days prior to expiration of the existing permit?

A. That's correct.

Q. Okay. Are you familiar with regulations in other departments that specifically deal with what happens with a permit if they don't meet their deadline?

A. Within other programs within ADEM?

Q. Yes.

A. Yes.

Q. Give me an example of one of those.

A. I worked in the Water Division in the MPDS program for six years, and I worked in the Air Division for eight years. In the Water Division, there's a similar 180-day requirement. On a permit renewal application, again, the 180 days is there so that the department can ensure that applications are received in a manner that would allow for the processing of the application by the staff prior to the expiration. And that's not unique to the Solid Waste Program. As I said, the 180 days, there's a similar requirement in the MPDS permit rules.

Q. Okay. So if - - so what happens?

A. Well, it's a case-by-case judgment, as I said. It's kind of at the discretion of the department. We've got a number of situations where an applicant did not apply within the 180 days. And at the expiration, in an operating situation, they may continue to be allowed to operate. In

other situations, there may be information that is necessary for the department to determine whether or not they should be allowed to continue to operate based on circumstances, compliance history, and ongoing operational factors. In the case of New Georgia - - and, again, not being involved in 2003, just talking from a general sense - - this landfill was at the time not operating, was not accepting waste. So the 180 days, there would be no real operational issues regarding its renewal. And, quite honestly, at the time, the permitting workload of the solid waste group was quite large due to some factors that had happened prior to that and some personnel moves. So the 180 days really didn't mean anything because we, quite frankly, weren't going to process the renewal application within that time frame anyway.

Q. Do the water regs provide specifically that the department can make exceptions under certain circumstances?

A. The water regs, I think, have a specific language that the permit is automatically extended provided the applicant meets the 180 days. It does not say that if the applicant does not meet the 180 days, then the permit is automatically void.

Q. But it does have specific language that provides for the extension; is that correct?

A. Yes.

Q. Does solid waste have similar - - solid waste regs have similar language?

A. The solid waste regs do say that - - effectively that - - continuing operations if they apply appropriately for renewal. But, again, it doesn't specifically say the converse. It does not say that the permit is automatically voided. And as a practical matter, the department doesn't' necessarily interpret it that way. Each case - - if

an applicant does not meet the 180 days, each case is looked at as an enforcement or potential enforcement situation on how critical is that 180 days to the processing of the application.

Q. Okay. Let's talk about this permit or permitting in general. If an existing permit is being upgraded from a C&D to and MSW, is that considered a major modification?

A. It is.

Q. And what requirements go along with that upgrade, that major modification?

A. As far as administrative requirements of the permitting?

Q. Yes.

A. Okay. A major modification would require specific public notice, would require – if necessary under the statute – local approval, other administrative requirements. As opposed to a minor modification, which would be a downgrade from MSW, for instance, to C&D.

Q. Okay. Why wasn't local approval required in this instance?

A. Local approval in this instance had been already granted. It was required. It had been granted many years earlier in the initial local approval process for this site. The City of Birmingham had granted local approval for a municipal solid waste landfill on these 700 acres.

Q. And then did it downgrade it subsequent to that local approval?

A. It downgraded what, as a practical matter, their waste stream was going to be. It didn't void the local approval.

Q. All right. If the city was operating under C&D permit, when did it have to file for a major modification?

A. Well, major modification, the only requirement in that case, if they were going to make a modification to the permit of any kind, whether it was a major mod or minor mod, would be they would still have that same administrative 180 days to apply for whatever modification there was going to be.

(T. 225-231)

c. Also, the above-cited Section 22-27-48(a) does not set forth a limitation on the length of time within which an application should be submitted to ADEM. ADEM requested, and obtained, an opinion from the Office of the Attorney General, State of Alabama (AGO) on this issue in September of 2000, and has been operating under the guidance of that opinion. The AGO issued its opinion dated 18 Sep 2000, stating "There is no statutory limitation on the length of time in which operators must submit an application to the Alabama Department of Environmental Management for the modification of a permit for new or existing solid waste management or disposal facilities." Therefore, the "host governmental," or local approval. given in reference to the matter here at issue on 24 Jan 95 is legally sufficient for the permit at issue in this cause and, as such, Petitioners' challenge to ADEM Permit No. 37-11 on this issue is due to be, and should be, denied.

6. With regard to ADEM's having discharged its duty according to state law, and the ADEM regulations with regard to the ADEM review of the

permit application and the administrative decision, that issuance of said Permit appears to have been appropriate. The following witnesses testified as follows:

a. Mr. Phil Davis, Chief of the Waste Programs Branch in the Land Division of ADEM:

> Q. Okay. In your opinion, has the department complied with all the rules and regulations that are necessary to move forward and consider the application of the City of Birmingham for its renewal/modification applications in this case?
>
> A. Absolutely.
>
> (T. 254)

b. Mr. Jonathan Crosby, an Environmental Engineer Specialist Senior for the ADEM:

> Q. Okay. And you reviewed Birmingham's permit and all the information that was submitted along with that permit?
>
> A. With the permit modes and review, yes.
>
> Q. Okay. And were - - and are you of the opinion that the - - the permit and the permit modification as issued by the Department of Environmental Management complies with all of the Department's rules and regulations?
>
> A. Yes.
>
> Q. In fact, at some point did - - did you have to request that the City of Birmingham do some things that you thought were required or in addition to what they had submitted and ask them to redo their permit?
>
> A. Yes.
>
> (T. 179-180)

c. Mr. Ron Hicks, expert witness for the City of Birmingham and former hydrogeologist for the Groundwater Branch of the Water Division of ADEM:

> A. That's a hydrogeologic evaluation; it's dated January 26, '96, and it's from me, as a hydrogeologist in the hydrogeologist in the hydrogeology unit, and it's to a Gerald Hardy, who was the chief of the engineering branch. The hydrogeologist basically works as an in-house consultant for the Land Division. The Land Division has the responsibility for evaluating and issuing a permit. The Land Division requests reviews by the - - by the geologist in the groundwater branch. We do a review and we make recommendations and we return those to the Land Division. Now, the Land Division doesn't have to take our recommendations. As a practical matter, they normally do, obviously. I mean, that's what, you know - - but they don't have to. It's their responsibility to use their best judgment. So in the process of the permitting procedure, they requested a hydrogeologic evaluation from me, from Hydrogeologic Unit. In the process for a landfill application, I went through the - - many years ago, I went through the Subtitle D regs and made a list of every single item that has to do with groundwater.
>
> Q. Before you continue - -
>
> A. Yes.
>
> Q. - - would you consider yourself as an expert in hydrogeology with respect to landfills?
>
> A. I - - yeah, I guess so. Yeah. Yes.
>
> (Proffer of the witness as an expert. Granted by the Hearing Officer)
>
> Q. Mr. Hicks, if you could, continue with describing what Exhibit I-4 is for the Court.

A. Okay, Once the Land Division requests a hydrogeologic evaluation - - Subtitle D is a pretty cumbersome document, and so many years ago, I weeded through and picked out those items that had to do with hydrogeology, groundwater. Between myself and the Land Division, we decided those things should be reviewed for a hydrogeologic evaluation. If you notice on the first page of the attachment to that, the first line is regulations cited, and the second is the requirements needed for that particular item; the third is the location in the application, and then finally any comments that the ADEM person evaluating it wants to make.

Q. And this is a chart that you created based on the federal regulations as well as ADEM requirements?

A. Well, it's a - - it's - - these were developed by the federal government; but ADEM has primacy, so these are our regulations. Well, these are ADEM's regulations.

Q. Is it your understanding that those as delineated on the chart that is attached to Exhibit I-4 represent the issues relating to groundwater and landfills with respect to federal law?

A. That's correct.

Q. And if you could, that chart, which is behind or is a part of Exhibit I-4, did you, in fact, fill that chart out when you were processing the evaluation or performing the evaluation as requested by the landfill division for the New Georgia Landfill?

A. Yes. Quite - - quite - - it's very common. This is a progression. This isn't just kind of in a vacuum. And the progression will include some of these that are - - quite often are not very well filled out, and that goes back to the Land Division. The Land Division, as part of their review process, will request other information to fill in the blanks. And then finally, when the chart is filled out to their satisfaction, then they move forward.

Q. So the chart - - you start with an empty chart, per se - -

A. Right, right.

Q. - - and you get the permit application and the materials that are submitted along with the permit and evaluate those and analyze those with respect to your chart and the regulations that are - -

A. Right.

Q. - - related to the groundwater. And then as the process proceeds, you, being ADEM, may request additional information from, in this instance, the City of Birmingham, in order to fill in whatever blanks or questions that you may have relating to the regulations; is that correct?

A. Almost always do. Not just may, but almost always do. Right. Yeah.

Q. And in this case, was it any different that you normally - -

A. No. No, same process.

Q. And did you, as a part of your evaluation on the New Georgia Landfill permit, evaluate all of the regulations as prescribed?

A. Yes.

Q. And did you - - did the City of Birmingham comply or provide whatever information you requested in order to comply with the regs?

A. You know, as I recall. I can't remember specifics back that far, but had there been any differences, they would have been handled, and so obviously they were handled.

(T. 137-143)

d. Mr. Mark Dolan, witness for the City of Birmingham, is an engineer with Volkert & Associates (He has been with Volkert since December 1992 and currently holds the title of Vice President.):

> A. We were retained in 1993 to permit, design, and construct a lined facility according to regulations.
>
> Q. And have you created a map concerning the area around the New Georgia Landfill?
>
> A. Yes.
>
> Q. Is that map in front of you - -
>
> A. Yes.
>
> Q. - - right here today?
>
> A. Yes, yes.
>
> Q. And that was created by Volkert?
>
> A. Yes.
>
> (Document marked for identification as Intervenor's Exhibit No. 3.)
> Q. Mr. Dolan, did Volkert Company construct the landfill consistent with the ADEM rules and regulations?
>
> A. We didn't actually construct it. We - - we monitored the construction, and yes, it was.
>
> Q. And in monitoring the construction, did you determine that it was constructed consistent with the ADEM rules and regulations?
>
> A. Yes, sir.
>
> Q. And was the landfill constructed consistent with the federal environmental rules and regulations that were in effect at the time of the construction?

A. Yes.

Q. Was the landfill constructed in a manner designed to protect the public healthy - - public health and safety?

A. Yes.

(T. 125-126)

7. Therefore, from the testimonies, facts, and legal arguments set forth above, it is clearly established that the issuance of ADEM Permit No. 37-11 was appropriate under federal, state, and ADEM regulations. ADEM Solid Waste Disposal Facility Permit No. 37-11 is due to be, and should be, upheld as issued.

8. It is again noted that the hearing sub judice is a de novo hearing. (ADEM Admin. Code R. 335-2-1-.14(6). Accordingly, because this is a de novo hearing, it is the merits of the permit itself at issue, not the actions of ADEM leading up to the permitting decision. (Root v. ADEM, et al., EMC Docket No. 98-20 at *5, (citations omitted).) Alleged procedural errors on the part of ADEM are irrelevant. Id. (citations omitted). This is because the de novo nature of this proceeding renders moot the questions about permitting procedures. In this hearing, the Petitioners have the burden of proof (by a preponderance of the evidence) to show that ADEM's action should be modified or disapproved. (ADEM Admin. Code R. 335-2-1-.27(5)) The burden remains with the Petitioners to show that the challenged permit is incorrect, and the Petitioners "must establish by a preponderance of the evidence that it is more likely than

not that the permits violate applicable regulations." (Root, at *5) The Petitioners alleged that ADEM violated its rules and regulations by permitting the NGL site, and further that the intrawell method approved by ADEM in the Permit should have been an "interwell method." The Petitioners have failed to allege and prove a justiciable claim with regard to the foregoing, and therefore, the Petitioners' allegations fail and ADEM Solid Waste Disposal Facility Permit No. 37-11 is due to be, and should be, upheld as issued.

9. It is also noted that Mr. Jason Hughes, the expert witness for the Petitioners, admitted that, while he had visited the office at the NGL site to review monitoring records, he had not toured the NGL site. (T. 74-75) Mr. Hughes admitted that the minimum ADEM regulations requirements for monitoring at any landfill site are one well up gradient and two wells down gradient. (T. 79-80)

a. Mr. Hughes testified that an intrawell monitoring method is an acceptable method of well monitoring, and that he recommended several intrawell monitoring methods for sites seeking renewal permits while he was at ADEM. (T. 79) He reiterated, when asked, that the intrawell system of monitoring is acceptable under the ADEM regulations. (T. 83) Mr. Hughes admitted that he thought the current NGL monitoring system would be acceptable with the addition of one more monitoring well. (T. 83) Mr. Hughes agreed that experts can disagree on which monitoring system is appropriate for a site. (T. 94) Mr. Hughes merely expressed his opinion as a hydrogeologist,

not as an engineer, concerning engineering defects in the construction of the cells at the NGL site. (T. 94)

b. Because of his admission that he had not toured the NGL site to assist in the formation of his expert opinions as a hydrogeologist, his opinions are somewhat suspect. That suspicion magnifies the fact that experts can disagree (e.g., as to the "intrawell" system monitoring versus the "interwell") and such appears to be a contributing factor in his disagreement with other experts. Also, Mr. Hughes admitted that he had approved the intrawell method for landfills for applicants seeking renewing their permits while he was working at ADEM. Accordingly, his assertions now that this method is somehow not appropriate for the NGL site are less than convincing. It is also noted that he agreed that ADEM can modify the Permit after it is issued.

10. Mr. Ron Hicks testified that he worked for the ADEM as a hydrogeologist for at least 13-14 years. (T. 134) He testified that any hydrogeologic evaluation requires a landfill visit, or a site visit. (T. 134) Mr. Hicks testified that he has been out to the NGL site several times for his evaluation process. (T. 154) In his expert opinion, he testified that the NGL site has the appropriate number of monitoring wells.

a. He testified as follows:

> Q. Did you, in a part of your permit evaluation or evaluation as a hydrogeologist, consider and analyze how many monitoring wells were needed for this particular New Georgia Landfill [NGL] site?

A. Yes.

Q. The 30.5 acres?

A. Yes.

Q. And what did you determine?

A. I think there were already nine on site, and I think three more were submitted. And I think we decided that was adequate.

Q. And what do the regulations require with respect to monitoring wells?

A. One up gradient, two down gradient.

Q. And you and ADEM, as a result of your analysis, determined that more than one up gradient and two down-gradient monitoring wells were needed at this particular location?

A. More than two down - - I don't know how many up gradient. There might be one or might be more than one. I don't remember.

Q. But there are –

A. They're sufficient. It's adequate, yes.

Q. The monitoring wells at the New Georgia Landfill site are adequate according to federal regulations?

A. And in my opinion, yes.

(T. 143-145)

b. In essence, then, Mr. Hicks' expert opinion was that the conditions of the old capped unlined landfill at the NGL site were taken into consideration based on the number of wells required (in excess of the minimum one up gradient and two down-gradient). Consideration was also given to the adequacy of the intrawell monitoring system.

VI. CONCLUSION

Based on the foregoing analysis of all the evidence (testimonial and documentary) and the cited rules, regulations, statutory and case law presented, it is clear that the Petitioners have not carried their burden of establishing violations of ADEM's statutes or regulations. Accordingly, the ADME Solid Waste Facility Permit No. 37-11 is due to be, and should be, approved as issued.

VII. RECOMMENDATION

1. Based on the foregoing analysis of all the evidence (testimonial and documentary) and the cited rules, regulations, statutory and case law presented, it is hereby recommended that the ADEM Solid Waste Facility Permit No. 37-11 be approved as issued.

2. The issues presented be answered in the NEGATIVE.

DONE this the 5th day of August 2008.

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NOTE:

This is not a final decision. No rights are finally determined until the Environmental Management Commission decides whether to accept, reject or modify this Recommendation. Appeal time runs from the time of the Environmental Management Commission's decision.

Attachment 5

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

In the Matter of:	)	
	)	
John Jordan, Sr. and	)	EMC Docket No. 08-02
John Jordan, Jr.,	)	(ADEM Administrative Action: ADEM
d/b/a Alabama Recycling,	)	Administrative Order 08-047-AP issued to
	)	John Jordan, Sr. and John Jordan, Jr., d/b/a
Petitioners,	)	Alabama Recycling, Montgomery, Montgomery
	)	County, Air Facility No. 209-0094)
vs.	)	and
	)	EMC Docket No. 08-03
Alabama Department of	)	(ADEM Administrative Action: ADEM
Environmental Management,	)	Administrative Order 08-047-AP issued to
	)	John Jordan, Sr. and John Jordan, Jr., d/b/a
Respondent.	)	Alabama Recycling, Montgomery, Montgomery
	)	County, Air Facility No. 209-0094)

ORDER

This cause having come before the Environmental Management Commission pursuant to the Recommendation of the Administrative Law Judge to dismiss the appeal by John Jordan, Sr. of ADEM's above-referenced administrative action for EMC Docket No. 08-02 and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That EMC Docket No. 08-02 is hereby remanded to the Administrative Law Judge to conduct a hearing; and

2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and

3. That a copy of this Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 22nd day of August 2008.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 22nd day of August 2008.

W. Scott Phillips, Chair
Environmental Management Commission
Certified this 22nd day of August 2008.