

5/6/09

**DRAFT**  
**Minutes**

**Environmental Management Commission  
Strategic Planning Ad Hoc Committee Meeting  
Alabama Department of Environmental Management Building  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2059  
April 17, 2009**



**DRAFT**  
**Minutes**

**Environmental Management Commission**  
**Strategic Planning Ad Hoc Committee Meeting**  
**Alabama Department of Environmental Management Building**  
**1400 Coliseum Boulevard**  
**Montgomery, Alabama 36110-2059**  
**April 17, 2009**

**Convened: 10:00 a.m.**

**Adjourned: 10:15 a.m.**

**Part A**

**Transcript**

**Part B**

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**Attachments 1 – 2**



**Part A**



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ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
STRATEGIC PLANNING AD HOC COMMITTEE  
MEETING  
ALABAMA DEPARTMENT OF ENVIRONMENTAL  
MANAGEMENT BUILDING  
ALABAMA ROOM (MAIN HEARING ROOM)  
1400 COLISEUM BOULEVARD  
MONTGOMERY, ALABAMA  
APRIL 17, 2009 10:00 a.m.

COMMITTEE MEMBERS PRESENT:

SAM H. WAINWRIGHT, P.E., CHAIR  
DR. JOHN H. LESTER

COMMITTEE MEMBERS NOT PRESENT:

KENNETH A. HAIRSTON, ESQUIRE

ALSO PRESENT:

ONIS "TREY" GLENN, III, ADEM DIRECTOR  
ROBERT TAMBLING, EMC LEGAL COUNSEL  
DEBI THOMAS, EMC EXECUTIVE ASSISTANT

1 MR. WAINWRIGHT: I would like to  
2 call the meeting of the Strategic Planning  
3 Ad Hoc Committee to order. The first item  
4 of business is consideration of minutes of  
5 our meeting on December the 12th, 2008.

6 MR. LESTER: Move to approve  
7 them.

8 MR. WAINWRIGHT: I'll second.  
9 All in favor, aye?

10 (All ayes.)

11 MR. WAINWRIGHT: Motion passes.

12 The next item is the discussion  
13 of the reconciliation statements of the  
14 proposed amendments to Division 1 of  
15 General Administrative Regulations and  
16 Division 2, the Environmental Management  
17 Commission Regulations. This  
18 reconciliation was prepared by attorneys  
19 for the agency and EMC. Mr. Tambling and  
20 Mr. Hagood -- in cooperation with Mr.  
21 Hagood. You read the reconciliation  
22 statements. Just the first one is the main  
23 one as we just changed the wording slightly



1 so that they can do -- the EMC can perform  
2 a strategic plan at any time, but they must  
3 do it every five years rather than limiting  
4 it to every five years. So if something  
5 arises they need to amend it, it can be  
6 done before the five year period, so that  
7 was requested by Dr. Felker. And the other  
8 item is just an answer to a statement that  
9 this would interfere with people filing  
10 requests for rule change, and the  
11 reconciliation statement addresses that and  
12 finds that it does not prevent that. If  
13 there's -- do you want some discussion on  
14 it?

15 MR. LESTER: Unless, Robert, do  
16 you have any?

17 MR. TAMBLING: I have nothing to  
18 add.

19 MR. WAINWRIGHT: Then I guess we  
20 need a vote then on the reconciliation  
21 statement for amendments to Division 1.

22 MR. LESTER: Make a motion to  
23 approve the assignment of commission.

1 MR. WAINWRIGHT: Recommendation?

2 MR. LESTER: Yes.

3 MR. WAINWRIGHT: I'll second  
4 that. All in favor.

5 (All ayes.)

6 MR. WAINWRIGHT: Debi, do you  
7 have that in one motion for both items or  
8 separate motions?

9 MS. THOMAS: I have it in one  
10 order to take care of both.

11 MR. WAINWRIGHT: So that would  
12 be -- let's reword that motion to include  
13 Division 1 and Division 2.

14 MR. LESTER: Agree.

15 MR. WAINWRIGHT: All in favor say  
16 aye.

17 (All ayes.)

18 MR. WAINWRIGHT: Motion carries.  
19 Before we adjourn, I want to thank the  
20 director, Mr. Robert Ashurst, for their  
21 efforts in preparing the strategic plan,  
22 Robert Tambling and John Hagood for their  
23 efforts in the reconciliation, and Dr.

1 Lester and Mr. Hairston for their support  
2 and the strategic planning committee  
3 members. Once we have approved these  
4 changes, our Strategic Planning Committee  
5 will have finished the tasks we were  
6 assigned, and we will no longer exist, so  
7 we do need to recommend to the Commission  
8 this morning that once these tasks are  
9 finished that we be -- that the committee  
10 be dissolved, so we'll do that at the  
11 regular meeting. Is there any other item  
12 to be presented to the committee? Hearing  
13 none, motion to adjourn is in order.

14 MR. LESTER: So moved.

15 MR. WAINWRIGHT: Second. We  
16 adjourn.

17 (The hearing was concluded at  
18 10:15 a.m.)

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CERTIFICATE

STATE OF ALABAMA

TALLADEGA COUNTY

I, the undersigned, a CSR, RPR, CRR and Notary Public of the State of Alabama at Large, hereby certify that the proceedings in the herein matter were taken at the time and place therein stated; that the proceedings were reported by me, court reporter and disinterested person, and were thereafter transcribed by means of computer-aided transcription; that the foregoing is a complete and true record of said witness.

I further certify that I am not of counsel or attorney for either or any of the parties in the foregoing proceedings and caption named, or in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF set my hand and affixed my seal this 30th day of April, 2009.

Mitzi Smith /ca

Mitzi Smith, ACCR# 117, RPR, CRR  
Notary Public State of Alabama

My Commission Expires: August 12, 2010

<p style="text-align: center;"><b>A</b></p> <p><b>ACCR</b> 6:20  <b>Ad</b> 1:2 2:3  <b>add</b> 3:18  <b>addresses</b> 3:11  <b>ADEM</b> 1:19  <b>adjourn</b> 4:19 5:13              5:16  <b>Administrative</b>              2:15  <b>affixed</b> 6:15  <b>agency</b> 2:19  <b>Agree</b> 4:14  <b>Alabama</b> 1:1,4,6,8              6:3,6,20  <b>amend</b> 3:5  <b>amendments</b> 2:14              3:21  <b>answer</b> 3:8  <b>approve</b> 2:6 3:23  <b>approved</b> 5:3  <b>April</b> 1:9 6:15  <b>arises</b> 3:5  <b>Ashurst</b> 4:20  <b>assigned</b> 5:6  <b>assignment</b> 3:23  <b>ASSISTANT</b> 1:21  <b>attorney</b> 6:12  <b>attorneys</b> 2:18  <b>August</b> 6:22  <b>aye</b> 2:9 4:16  <b>eyes</b> 2:10 4:5,17  <b>a.m</b> 1:9 5:18</p> <hr/> <p style="text-align: center;"><b>B</b></p> <p><b>BOULEVARD</b> 1:7  <b>BUILDING</b> 1:5  <b>business</b> 2:4</p> <hr/> <p style="text-align: center;"><b>C</b></p> <p><b>call</b> 2:2  <b>caption</b> 6:13,14  <b>care</b> 4:10  <b>carries</b> 4:18  <b>cause</b> 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**Part B**





## **Attachment Index**

**Attachment 1**

**Agenda**

**Attachment 2**

**Order adopting motion to recommend the Reconciliation Statements for Division 1 and 2 to the Commission**

**(Agenda Item 2 – Discussion and consideration of Reconciliation Statements for proposed amendments to the Division 1 – General Administration Regulations and the Division 2 – Environmental Management Commission Regulations)**



**Attachment 1**



3/26/09

AGENDA\*  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
STRATEGIC PLANNING AD HOC COMMITTEE MEETING  
Alabama Department of Environmental Management Building  
Alabama Room (Main Hearing Room)  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2059  
April 17, 2009  
10:00 a.m.

<u>ITEMS</u>	<u>PAGE</u>
1. Consideration of minutes of meeting held on December 12, 2008	2
2. Discussion and consideration of Reconciliation Statements for proposed amendments to the Division 1 -- General Administration Regulations and the Division 2 - Environmental Management Commission Regulations	2
3. Other business	2

\* The Agenda for this meeting will be available on the ADEM website, [www.adem.alabama.gov](http://www.adem.alabama.gov), under EMC Information and Calendar of Events.

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

1. CONSIDERATION OF MINUTES OF MEETING HELD ON DECEMBER 12, 2008
2. DISCUSSION AND CONSIDERATION OF RECONCILIATION STATEMENTS FOR PROPOSED AMENDMENTS TO THE DIVISION 1 – GENERAL ADMINISTRATION REGULATIONS AND THE DIVISION 2 – ENVIRONMENTAL MANAGEMENT COMMISSION REGULATIONS

The Committee will discuss and consider Reconciliation Statements of public comments to recommend to the full Commission for proposed amendments to the ADEM Administrative Code Division 1 – General Administration Regulations, R. 335-1-1-.03(4), (5), and (6), and the Division 2 – Environmental Management Commission Regulations, R. 335-2-2-.05. The proposed amendments to R. 335-1-1-.03(4), (5), and (6) establish a process for updating the Unified Strategic Plan (USP) and the proposed amendments to R. 335-2-2-.05 add a new paragraph (h) to include consideration of the relevance and relation of a proposed rule to the most recent USP as an item that the Commission may take into account when it considers petitions for rulemaking.

3. OTHER BUSINESS

**Attachment 2**





BEFORE THE  
STRATEGIC PLANNING AD HOC COMMITTEE  
OF THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

MOTION

Recommend Reconciliation Statements for Divisions 1 and 2 to the Commission

ORDER

This cause having come before the Strategic Planning Ad Hoc Committee pursuant to the above motion, and having considered the same, the Committee hereby ORDERS, ADJUDGES, and DECREES as follows:

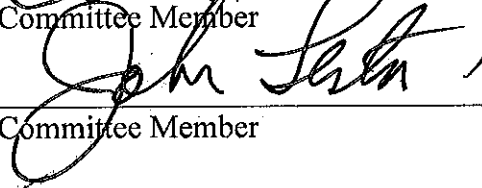
1. That the above motion is hereby adopted; and
2. That this action has been taken and this Order shall be deemed rendered effective

as of the date shown below.

ISSUED this 17th day of April 2009.

APPROVED:

  
\_\_\_\_\_  
Committee Member

  
\_\_\_\_\_  
Committee Member

\_\_\_\_\_  
Committee Member



**RECONCILIATION STATEMENT FOR  
DIVISION 1 - GENERAL ADMINISTRATION REGULATIONS  
CHAPTER 335-1-1 - ORGANIZATION**

The Commission received a written comment from Kathleen Felker, M.D., dated January 9, 2009 (Exhibit A-1). The comment addressed the Commission's proposed Rule 335-1-1-.03(4), (5), and (6).

**COMMENT:** First, under §335-1-1-03 (4), the proposed rule states that plan updates can *begin* no sooner than every five years by including the phrase "but in no event more frequently than every fifth year after the last notice as outlined herein". The process (including the operating plan) should be *completed* every 5 years to avoid the possibility of a stagnant planning process. This would mean the update would begin every four years or with enough lead time to get it finished by the 5th year.

Additionally, I would also like some mechanism through which the Commission can, by a majority of votes, update the plan earlier if they deem necessary. As the rule is proposed, there will be no procedure for addressing large scale emerging issues.

**RESPONSE:** The Strategic Planning Ad Hoc Committee of the Environmental Commission has amended the proposed rule to reflect Dr. Felker's comments as follows:

(4) Beginning with Fiscal Year 2009, and periodically as needed for the effective execution of statutory mandates, but in no event more frequently than and at least every fifth year after the last notice as outlined herein, and in accordance with all applicable statutes and regulations, the Director shall deliver to the Commission a notice of intent to update the Unified Strategic Plan under which the Commission and Department operate. The notice shall contain the Department's summary of departmental goals, timeline for plan development, and a brief explanation of methodology for updating the Unified Strategic Plan. Any and all updates to the Unified Strategic Plan shall be completed within one year of the Director's notice.

(5) Upon receipt of the notice delivered according to paragraph (4) of this rule, the Commission shall appoint a special ad hoc committee to oversee the Department's development and implementation of the planning process.

(6) Any final Unified Strategic Plan produced according to this process shall be approved by the Commission.

As currently drafted, the proposed rule ensures that the process for updating the Unified Strategic Plan will be commenced **at least every fifth year**. This change will provide the Commission with the authority to update the Unified Strategic Plan sooner than every fifth year "as needed for the effective execution of statutory mandates".

The Commission received written comments, dated February 4, 2009, jointly submitted by Adam R. Snyder, Executive Director of Conservation Alabama Foundation, Friends of the Little Cahaba, and the North Alabama Citizens for Environmental Protection (Exhibit A-2), addressing the Commission's proposed Rule 335-1-1-.03(4), (5), and (6).

**COMMENT:** Conservation Alabama opposes the proposed revisions for the following reasons.

First, a unified strategic plan should reflect the goals and desires of the board of directors and their designated director. Over the course of the last four years, all seven positions on the Alabama Environmental Management Commission have come up for renewal or replacement by the Governor. Additionally, the AEMC fired the former director and hired a replacement. Had such a rule been in place five years ago, neither the Commission nor Director would have had the ability to set a new direction for the agency until the previous strategic plan had expired. Theoretically, the AEMC hands would have been tied to carry out the wishes of an AEMC and director who had been removed from office.

Additionally, while most strategic plans have short-term and long-term goals over a specific time period, those goals should be reviewed and revised as necessary. Dramatic changes in funding, federal and state law, personnel, or even expedited achievement of organizational goals could necessitate a revision of a strategic plan prior to the original timeframe set forth. A strategic plan is not something the AEMC should do as part of a five-year obligation; strategic goal-setting should be done regularly in context of the current political, financial, and environmental climate.

By establishing a rule to revise the strategic plan only every five years, the AEMC is limiting its own ability to set strategic direction for itself and the agency. The AEMC will not be flexible to answer new and pressing issues that may face the commission and agency that were not foreseen at the time of drafting the plan.

Furthermore, by tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years, the AEMC limits the ability of the public to bring forth rulemaking before the commission. Over the course of the last five years, several dozen environmental organizations, including the Conservation Alabama Foundation, came into existence. Therefore, our organization and others would not have had the ability to influence the content of a strategic plan established five years ago. Our request for rulemaking today should not be precluded, simply because our organization did not exist five years ago to suggest that certain issues be included in the strategic plan.

Overall, the individually proposed rules limit the ability of the commission and the public to impact the strategic direction of the commission and the agency. Combined, the two rules make it nearly impossible for the public to engage the commission on pressing issues of the day. First, citizen organizations must exist at the time the strategic plan is revised and they would need to ensure that the AEMC include all unforeseeable issues in its every-five-year strategic plan. Then, and only then, would a citizen petition overcome the requirement that it be relevant and in relation to the current unified strategic plan.

We oppose the proposed revisions because they limit the ability of the AEMC to adapt strategically to changing times, and because the proposed rules limit the ability of citizens and citizen organizations to petition the AEMC to consider changes to its rules.

**RESPONSE:** This comment is addressed by the Response set forth above to the written comments submitted by Dr. Kathleen Felker.

The Commission received written comments dated February 4, 2009, from Cindy Lowry, Executive Director of the Alabama Rivers Alliance (Exhibit A-4), addressing the Commission's proposed Rule 335-1-1-.03(4), (5), and(6).

**COMMENT:** The Alabama Rivers Alliance supports the position of the Conservation Alabama Foundation in opposing the proposed revisions.

As a citizen-based organization partnering with a network of over 60 local watershed groups across the state, we believe it is of utmost importance that public agencies, particularly those involved with regulatory activities, strive to consistently improve the ability for the public to be involved with the decisions that impact their lives. As an agency charged with protecting public health and environmental quality, this concept of public involvement is even more pressing.

As put forth by Conservation Alabama Foundation, the act of tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years limits the ability of the public to bring forth rulemaking before the commission. The ability of citizens to petition the AEMC for rule-making changes and improvements is essential to ensuring that the AEMC and ADEM are aware of issues important to the health and environment of the people of Alabama.

Furthermore, as an agency that is consistently under funded and under staffed, having the eyes and ears of citizens on the ground to bring forth important rule-making issues is even more important.

We also concur with the other points articulated in Conservation Alabama Foundation's comments. I appreciate your consideration of these comments and urge you to oppose the proposed revisions.

**RESPONSE:** Again, this comment is addressed by the Response set forth above to the written comments submitted by Dr. Kathleen Felker.

The Commission received written comments dated February 4, 2009, from Casi Callaway, Executive Director and Baykeeper and from Donna Jordan, Programs Director, on behalf of Mobile Baykeeper (Exhibit A-3), addressing the Commission's proposed Rule 335-1-1-.03(4), (5), and (6).

**COMMENT:** We are Mobile Baykeeper, an eleven year old nonprofit organization with the mission of providing citizens a means to protect the beauty, health and heritage of the Mobile Bay watershed. We are submitting comments on the Department's proposed revisions to ADEM Admin. Code R. 335-1-1-.03, Organization and Duties of the Commission, to add paragraphs (4), (5), and (6) to establish a process for updating the Unified Strategic Plan (USP), and ADEM Admin. Code R. 335-2-2-.05(h), Consideration of Petition, to add consideration of the relevance and relation of a proposed rule to the most recent Unified Strategic Plan on behalf of our board, officers, staff, and more than 3500 members.

In our estimation, the establishment of a rule by the Alabama Environmental Management Commission to revise the strategic plan once every five years will severely limit the flexibility of the AEMC to address ever-changing environmental issues within the state. A good strategic plan will have short-term and long-term goals over a specific time period, with the allowance that these goals be reviewed and revised as necessary. Strategic goal-setting should be done regularly in context of the current political, financial, and environmental climate, not as an arbitrary five year obligation.

Additionally, the AEMC will limit the opportunity of the public to present rulemaking to the commission by tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years. It is unacceptable to us to limit the impact that the public has to strategic direction of the Department. The public should be able to directly petition the commission to address the current issues going on within the state, which will be impossible with the addition of these revisions to ADEM Admin. Code Divisions 1 and 2.

We assert that the AEMC strategic plan should be a living document, able to be changed as necessary to focus on the environmental needs of the state of Alabama and protect our natural resources. As such, we must insist that these proposed revisions not be adopted as they limit the ability of the AEMC to adapt strategically over time as well as limiting the ability of the public to petition the AEMC to consider changes to its rules.

**RESPONSE:** To the extent this comment addresses the proposed adoption of paragraphs (4), (5), and (6) to Rule 335-1-1-.03, the Strategic Planning Ad Hoc Committee finds that this comment is sufficiently addressed by the Response set forth above to the written comments submitted by Dr. Kathleen Felker.

After thoroughly reviewing each comment, the Strategic Planning Ad Hoc Committee is satisfied that the current version of proposed Rule 335-2-2-.03(4), (5), and (6) satisfactorily addresses the concerns set forth in the above-referenced written comments. The Strategic Planning Ad Hoc Committee recommends no further changes to the proposed rule. This reconciliation statement is hereby submitted on this 17<sup>th</sup> day of April 2009.

Sam H. Wainwright  
Chair, Strategic Planning Ad Hoc Committee  
Environmental Management Commission





**RECONCILIATION STATEMENT FOR  
DIVISION 2 - ENVIRONMENTAL MANAGEMENT COMMISSION REGULATIONS  
CHAPTER 335-2-2 - PETITIONS FOR RULEMAKING**

The Commission received a written comment from David A. Ludder, dated February 2, 2009 (Exhibit A-1). The comment addressed the Commission's proposed revision to Rule 335-2-2-.05.

**COMMENT:** The Alabama Environmental Management Commission has proposed to amend ADEM Admin. Code R. 335-2-2-.05 which identifies several factors the Commission may consider when reviewing a petition for rulemaking. These comments address what I believe are legal limitations on the proposed rule amendment that would authorize the Commission to consider "the relevance and relation of a proposed rule to the most recent Unified Strategic Plan...."

*Code of Alabama* § 41-22-8, premised largely on the Iowa Administrative Procedure Act, authorizes any person to petition the Environmental Management Commission to engage in rulemaking. This provision is "intended to provide the members of the public with a mechanism for affecting the content of an agency's rules," Commentary to *Code of Alabama* § 41-22-8. This mechanism allows any person to induce the agency "to engage in a reasoned reconsideration of the existing state of the law and to change it if, ... that seems appropriate," Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law The Rulemaking Process*, 60 Iowa L. Rev. 731, 894-95 (1975). *Code of Alabama* § 41-22-8 requires that an agency give fair consideration to the propriety of issuing the proposed rule. It does not require the agency to take a stand on the substantive issues that might prompt the proposal of a rule. See *Community Action Research Group v. Iowa State Commerce Comm'n*, 275 N.W.2d 217 (Iowa 1979), See also Barfield, *Iowa Administrative Procedure Act, Part I*, 60 Iowa L. Rev. 731, 891-895 (April 1975). Thus, the Commission may decline to initiate rulemaking proceedings and deny a petition for rulemaking for reasons outside any exploration of the merits of an environmental issue, such as pending legislative action relating to the issue or imminent federal or state rulemaking on the issue.

If the Commission has expressed in the strategic plan an intent to give imminent consideration to amending existing rules which are the subject of a petition for rulemaking, the Commission could legitimately deny the petition. However, the Commission should not deny a petition for rulemaking because the strategic plan merely suggests the *possibility* of rulemaking at an *indefinite or distant time* (e.g., five years) in the future. The Commission should deny a petition only when it has concrete plans to address the subject of the petition in the very near future.

The Commission cannot use the *absence* of a subject in the strategic plan as a basis to deny a petition for rulemaking. To do so would allow the Commission to adopt a strategic plan that would subvert the policy of *Code of Alabama* § 41-22-8 and effectively deprive persons of their

statutory right to induce the agency “to engage in a reasoned reconsideration of the existing state of the law and to change it if, ... that seems appropriate.” “An administrative agency cannot usurp legislative powers or contravene a statute. \* \* \* A regulation cannot subvert or enlarge upon statutory policy. \* \* \*.” *Ex parte Jones Manufacturing Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (citations omitted).

The proposed rule amendment cannot be used to subvert the right of persons to petition the Commission for the adoption or amendment of rules as provided in *Code of Alabama* § 41-22-8.

**RESPONSE:** The proposed amendment to Rule 335-2-2-.05 is but one of several factors that the Commission may take into account when giving fair consideration to any petition for rulemaking made and filed in accordance with Rule 335-2-2-.04. Applying any factors listed in Rule 335-2-2-.05 as reasons for denial of a petition will be at the discretion of the Commission. Consideration of these factors in no way deprives a person of their right to induce the agency “to engage in a reasoned reconsideration of the existing state of the law and to change it if, ... that seems appropriate.” *Ex parte Jones Manufacturing Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (citations omitted).

The Commission received written comments, dated February 4, 2009, jointly submitted by Adam R. Snyder, Executive Director of Conservation Alabama Foundation, Friends of the Little Cahaba, and the North Alabama Citizens for Environmental Protection (Exhibit A-3), addressing the Commission’s proposed revision to Rule 335-2-2-.05.

**COMMENT:** Conservation Alabama opposes the proposed revisions for the following reasons.

First, a unified strategic plan should reflect the goals and desires of the board of directors and their designated director. Over the course of the last four years, all seven positions on the Alabama Environmental Management Commission have come up for renewal or replacement by the Governor. Additionally, the AEMC fired the former director and hired a replacement. Had such a rule been in place five years ago, neither the Commission nor Director would have had the ability to set a new direction for the agency until the previous strategic plan had expired. Theoretically, the AEMC hands would have been tied to carry out the wishes of an AEMC and director who had been removed from office.

Additionally, while most strategic plans have short-term and long-term goals over a specific time period, those goals should be reviewed and revised as necessary. Dramatic changes in funding, federal and state law, personnel, or even expedited achievement of organizational goals could necessitate a revision of a strategic plan prior to the original timeframe set forth. A strategic plan is not something the AEMC should do as part of a five-year obligation; strategic goal-setting should be done regularly in context of the current political, financial, and environmental climate.

By establishing a rule to revise the strategic plan only every five years, the AEMC is limiting its own ability to set strategic direction for itself and the agency. The AEMC will not be flexible to answer new and pressing issues that may face the commission and agency that were not foreseen at the time of drafting the plan.

Furthermore, by tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years, the AEMC limits the ability of the public to bring forth rulemaking before the commission. Over the course of the last five years, several dozen environmental organizations, including the Conservation Alabama Foundation, came into existence. Therefore, our organization and others would not have had the ability to influence the content of a strategic plan established five years ago. Our request for rulemaking today should not be precluded, simply because our organization did not exist five years ago to suggest that certain issues be included in the strategic plan.

Moreover, the Commission cannot use the absence of a subject in the strategic plan as a basis to deny a petition for rulemaking. To do so would allow the Commission to adopt a strategic plan that would subvert the policy of Code of Alabama § 41-22-8 and effectively deprive persons of their statutory right to induce the agency "to engage in a reasoned reconsideration of the existing state of the law and to change it if, ... that seems appropriate." "An administrative agency cannot usurp legislative powers or contravene a statute, \* \* \* A regulation cannot subvert or enlarge upon statutory policy. \* \* \*." *Ex parte Jones Manufacturing Co., Inc.*, 589 So.2d 208, 210 (Ala. 1991) (citations omitted).

Overall, the individually proposed rules limit the ability of the commission and the public to impact the strategic direction of the commission and the agency. Combined, the two rules make it nearly impossible for the public to engage the commission on pressing issues of the day. First, citizen organizations must exist at the time the strategic plan is revised and they would need to ensure that the AEMC include all unforeseeable issues in its every-five-year strategic plan. Then, and only then, would a citizen petition overcome the requirement that it be relevant and in relation to the current unified strategic plan.

We oppose the proposed revisions because they limit the ability of the AEMC to adapt strategically to changing times, and because the proposed rules limit the ability of citizens and citizen organizations to petition the AEMC to consider changes to its rules.

**RESPONSE:** To the extent this comment addresses the proposed revision to Rule 335-2-2-.05, the Strategic Planning Committee finds that this comment is sufficiently addressed by the Response set forth above to the written comments submitted by Mr. David Ludder.

The Commission received written comments dated February 4, 2009, from Cindy Lowry, Executive Director of the Alabama Rivers Alliance (Exhibit A-5), addressing the Commission's proposed revision to Rule 335-2-2-.05.

**COMMENT:** The Department proposes to revise ADEM Admin. Code R. 335-1-1-.03, Organization and Duties of the Commission, to add paragraphs (4), (5), and (6) to establish a process for updating the Unified Strategic Plan (USP), and ADEM Admin. Code R. 335-2-2-.05(h), Consideration of Petition, to add consideration of the relevance and relation of a proposed rule to the most recent Unified Strategic Plan.

The Alabama Rivers Alliance supports the position of the Conservation Alabama Foundation in opposing the proposed revisions.

As a citizen-based organization partnering with a network of over 60 local watershed groups across the state, we believe it is of utmost importance that public agencies, particularly those involved with regulatory activities, strive to consistently improve the ability for the public to be involved with the decisions that impact their lives. As an agency charged with protecting public health and environmental quality, this concept of public involvement is even more pressing.

As put forth by Conservation Alabama Foundation, the act of tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years limits the ability of the public to bring forth rulemaking before the commission. The ability of citizens to petition the AEMC for rule-making changes and improvements is essential to ensuring that the AEMC and ADEM are aware of issues important to the health and environment of the people of Alabama.

Furthermore, as an agency that is consistently under funded and under staffed, having the eyes and ears of citizens on the ground to bring forth important rule-making issues is even more important.

We also concur with the other points articulated in Conservation Alabama Foundation's comments. I appreciate your consideration of these comments and urge you to oppose the proposed revisions.

**RESPONSE:** This comment is sufficiently addressed by the Response set forth above to the written comments submitted by Mr. David Ludder.

The Commission received written comments dated February 4, 2009, from Casi Callaway Executive Director and Baykeeper, and from Donna Jordan, Programs Director, on behalf of Mobile Baykeeper (Exhibit A-4), addressing the Commission's proposed revision to Rule 335-2-2-.05.

**COMMENT:** We are Mobile Baykeeper, an eleven year old nonprofit organization with the mission of providing citizens a means to protect the beauty, health and heritage of the Mobile Bay watershed. We are submitting comments on the Department's proposed revisions to ADEM Admin. Code R. 335-1-1-03, Organization and Duties of the Commission, to add paragraphs (4), (5), and (6) to establish a process for updating the Unified Strategic Plan (USP), and ADEM Admin. Code R. 335-2-2-.05(h), Consideration of Petition, to add consideration of the relevance and relation of a proposed rule to the most recent Unified Strategic Plan on behalf of our board, officers, staff, and more than 3500 members,

In our estimation, the establishment of a rule by the Alabama Environmental Management Commission to revise the strategic plan once every five years will severely limit the flexibility of the AEMC to address ever-changing environmental issues within the state. A good strategic plan will have short-term and long-term goals over a specific time period, with the allowance that these goals be reviewed and revised as necessary. Strategic goal-setting should be done

regularly in context of the current political, financial, and environmental climate, not as an arbitrary five year obligation.

Additionally, the AEMC will limit the opportunity of the public to present rulemaking to the commission by tying the approval or disapproval for rulemaking to a strategic plan that can only be impacted every five years. It is unacceptable to us to limit the impact that the public has to strategic direction of the Department. The public should be able to directly petition the commission to address the current issues going on within the state, which will be impossible with the addition of these revisions to ADEM Admin. Code Divisions 1 and 2.

We assert that the AEMC strategic plan should be a living document, able to be changed as necessary to focus on the environmental needs of the state of Alabama and protect our natural resources. As such, we must insist that these proposed revisions not be adopted as they limit the ability of the AEMC to adapt strategically over time as well as limiting the ability of the public to petition the AEMC, to consider changes to its rules.

**RESPONSE:** To the extent this comment addresses the proposed revision to Rule 335-2-2-.05, the Strategic Planning Committee finds that this comment is sufficiently addressed by the Response set forth above to the written comments submitted by Mr. David Ludder.

The Commission received written comments delivered via electronic mail dated February 2, 2009, from Michael William Mullen, Director, Choctawhatchee Riverkeeper, on behalf of Choctawhatchee Riverkeeper Inc. (Exhibit A-2), addressing the Commission's proposed revision to Rule 335-2-2-.05.

**COMMENT:** The Alabama Environmental Management Commission has proposed to amend ADEM Admin. Code P. 335-2-2-05 which identifies several factors the Commission may consider when reviewing a petition for rulemaking. Choctawhatchee Riverkeeper, Inc. agrees with and supports comments submitted by David Ludder (see attachment). The proposed rule amendment cannot legally be used to subvert the right of persons to petition the Commission for the adoption or amendment of rules as provided in *Code of Alabama* § 41-22-8.

**RESPONSE:** This comment is sufficiently addressed by the Response set forth above to the written comments submitted by Mr. David Ludder.

After thoroughly reviewing each comment, the Strategic Planning Ad Hoc Committee is satisfied that the responses satisfactorily address the concerns set forth in the above-referenced written comments. The Strategic Planning Ad Hoc Committee recommends no further changes to the proposed rule. This reconciliation statement is hereby submitted on this 17<sup>th</sup> day of April 2009.

Sam H. Wainwright  
Chair, Strategic Planning Committee  
Environmental Management Commission