

8/14/23

**Minutes  
Environmental Management Commission Meeting  
Alabama Department of Environmental Management Building  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2400  
June 9, 2023**

**This is to certify that the Minutes contained herein are a true and accurate account of actions taken by the Alabama Environmental Management Commission on June 9, 2023.**



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**John (Jay) H. Masingill, III, Chair**  
**Alabama Environmental Management Commission**

**Certified this 11th day of August 2023.**

**Minutes  
Environmental Management Commission Meeting  
Alabama Department of Environmental Management Building  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2400  
June 9, 2023**

**Convened: 11:00 a.m.  
Adjourned: 11:28 a.m.**

**Part A**

**Transcript  
Word Index**

**Part B**

**Attachment Index  
Attachment 1  
Attachment 2  
Attachment 3  
Attachment 4**

**Part A**



ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

1

2

3

MEETING OF THE

4

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

5

6

JUNE 9, 2023

7

11:00 a.m.

8

LOCATION: ALABAMA DEPARTMENT OF ENVIRONMENTAL

9

MANAGEMENT BUILDING

10

Alabama Room

11

1400 Coliseum Boulevard

12

Montgomery, Alabama 36110

13

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15 Court Reporter

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Elaine Scott

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ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

Pages 2..5

<p style="text-align: right;">Page 2</p> <p>1           A P P E A R A N C E S</p> <p>2   COMMISSION MEMBERS PRESENT:</p> <p>3   CHAIRMAN - John (Jay) Masingill, III</p> <p>4   A. Frank McFadden</p> <p>5   Samuel L. Miller, M.D.</p> <p>6   Kevin McKinstry</p> <p>7   Mary J. Merritt</p> <p>8   COMMISSION MEMBERS NOT PRESENT:</p> <p>9   VICE CHAIRMAN - H. Lanier Brown, Esq.</p> <p>10   Ruby L. Perry, D.V.M.</p> <p>11   ALSO PRESENT:</p> <p>12   Lindsay Dawson, EMC Legal Counsel</p> <p>13   Debi Thomas, EMC Executive Assistant</p> <p>14</p> <p>15   ADEM DIRECTOR: Lance LeFleur</p> <p>16</p> <p>17   COURT REPORTER:</p> <p>18   Elaine Scott</p> <p>19   HUSEBY ALABAMA</p> <p>20   Corporate Headquarters</p> <p>21   1230 West Morehead Street</p> <p>22   Suite 408</p> <p>23   Charlotte, NC 28208</p>	<p style="text-align: right;">Page 4</p> <p>1   responded.)</p> <p>2           CHAIRMAN MASINGILL: Motion</p> <p>3   carries.</p> <p>4           Mr. LeFleur, the</p> <p>5   director's report.</p> <p>6           MR. LEFLEUR: Good morning</p> <p>7   all. I'm not going to ask what the</p> <p>8   other guy looks like, Mr. Chairman.</p> <p>9           CHAIRMAN MASINGILL: He looks</p> <p>10   worse.</p> <p>11           MR. LEFLEUR: Well, good</p> <p>12   morning to everybody in the room. This</p> <p>13   is the fifth meeting of the Alabama</p> <p>14   Environmental Management Commission for</p> <p>15   FY 2023. There's been quite an active</p> <p>16   session of the Alabama Legislature this</p> <p>17   year. There were several legislative</p> <p>18   matters I will report on that could</p> <p>19   have a significant impact on the</p> <p>20   Department. Budgetary funding matters</p> <p>21   are at the top of that list. Also on</p> <p>22   the list are several pieces of</p> <p>23   legislation impacting certain Land</p>
<p style="text-align: right;">Page 3</p> <p>1           CHAIRMAN MASINGILL: I call</p> <p>2   the meeting of the Alabama</p> <p>3   Environmental Management Commission to</p> <p>4   order. I note we do have a quorum</p> <p>5   present.</p> <p>6           The first item on the</p> <p>7   agenda is consideration of the minutes</p> <p>8   of the meeting held on April the 14th,</p> <p>9   2023.</p> <p>10           MR. MILLER: I make the motion</p> <p>11   we accept the minutes as referenced,</p> <p>12   Mr. Chairman.</p> <p>13           CHAIRMAN MASINGILL: Do I have</p> <p>14   a second?</p> <p>15           MR. McFADDEN: Second.</p> <p>16           CHAIRMAN MASINGILL: Any</p> <p>17   discussion?</p> <p>18           (No response.)</p> <p>19           CHAIRMAN MASINGILL: Call for</p> <p>20   the question. All in favor of the</p> <p>21   motion, signify by raising your right</p> <p>22   hand.</p> <p>23           (All commissioners</p>	<p style="text-align: right;">Page 5</p> <p>1   Division programs.</p> <p>2           Today's report will also</p> <p>3   update you on activities of the working</p> <p>4   group created to review and make</p> <p>5   recommendations on how to improve the</p> <p>6   State's response to the vegetative</p> <p>7   waste fire in St. Clair County.</p> <p>8           We'll also check on the</p> <p>9   status of the new field office and</p> <p>10   laboratory being constructed in Mobile</p> <p>11   and a new air quality monitoring</p> <p>12   station also in Mobile.</p> <p>13           I'll recognize one of our</p> <p>14   personnel for achieving a significant</p> <p>15   professional milestone.</p> <p>16           For the last five years,</p> <p>17   about six percent of the Department's</p> <p>18   operating budget has come from the</p> <p>19   State's general fund budget. The</p> <p>20   Department also relies on the general</p> <p>21   fund to provide the matching funds</p> <p>22   required to obtain federal State</p> <p>23   Revolving Fund and Bipartisan</p>

<p style="text-align: right;">Page 6</p> <p>1 Infrastructure Law allocations. 2 I'm pleased to report that 3 the FY 24 general fund budget adopted 4 by the Legislature and signed by the 5 Governor provides our requested \$4 6 million of operational funds plus an 7 additional \$750,000 unrequested 8 operational funding and the necessary 9 match funds to obtain the full federal 10 State Revolving Fund and Bipartisan 11 Infrastructure Law allocations 12 available to the State. 13 In an effort to retain 14 state employees and compensate for 15 inflation, the Governor proposed and 16 the Legislature approved a two percent 17 across-the-board raise for all State 18 employees effective October 1st. 19 For approximately the last 20 year, we have been focusing on the FY 21 2025 -- funding for the fiscal year 22 2025 when a significant increase in 23 Departmental funding will be necessary</p>	<p style="text-align: right;">Page 8</p> <p>1 quality regulatory activities in 2 Alabama. 3 Those benefits include 4 assuring the water quality for our 5 citizens -- that our citizens deserve 6 for safe drinking water and 7 recreational water, relieving pressure 8 on the general fund, and providing 9 Alabama a competitive advantage in 10 attracting new industry by having 11 stable regulated industry permit fees, 12 maintaining Departmental performance 13 that keeps federal incursion to a 14 minimum, and maintaining water quality 15 that keeps industry costs to comply 16 low. 17 This has been an unusually 18 active session of the Legislature for 19 legislation that does or could affect 20 the Department. Three pieces of 21 legislation impacting the Department 22 that did pass all relate to Land 23 Division programs.</p>
<p style="text-align: right;">Page 7</p> <p>1 to cover the five years of inflation 2 and increasing federal mandates 3 primarily in the Department's water 4 program since our last funding 5 increase. 6 Although it provided 7 funding for 2024, we were disappointed 8 that the Legislature did not advance a 9 bill to provide targeted water program 10 funding for FY 2025 and beyond. It was 11 our hope to address the looming funding 12 issues for the Department well before 13 FY 2025 arrived. It was not to be. 14 While there was broad 15 support from numerous governmental, 16 business, agricultural and industry 17 groups, our message did not get to many 18 members of the Legislature in time to 19 be successful for this session. We 20 will be working with leadership in the 21 House and Senate well ahead of the 2024 22 legislative session to present the 23 benefits of adequately funding water</p>	<p style="text-align: right;">Page 9</p> <p>1 The first is an amendment 2 to the Solid Waste and Recyclable 3 Materials Act which the Department 4 operates under, when local approval is 5 required for modification of landfill 6 facilities. 7 The bill was sponsored by 8 landfill industry groups and is 9 designed to clarify which modifications 10 of landfill facilities require local 11 approval. 12 The local approval process 13 requires the local governing body to 14 formally consider specific factors that 15 impact the local community and then 16 provide public notice describing the 17 proposed action, followed by a formal 18 public comment period, and finally the 19 local governing body must consider and 20 respond to public comments before the 21 associated proposed permit modification 22 can be requested from ADEM. 23 If ADEM proposes to</p>

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

Pages 10..13

<p style="text-align: right;">Page 10</p> <p>1 approve the permit modification, then 2 an additional public notice and comment 3 period is required before the permit 4 can be issued.</p> <p>5 Provisions in the 6 previously existing Solid Waste and 7 Recyclable Materials Act dealing with 8 when local approval is required are 9 subject to varying interpretations. 10 The adoption of the amendment during 11 this session of the Legislature 12 clarifies the relevant provisions. The 13 Department supported the legislation.</p> <p>14 The second legislative 15 action passed affecting the Land 16 Division is an amendment to the 17 Brownfields Voluntary Cleanup Program. 18 The purpose of the legislation is to 19 encourage the cleanup of Brownfields 20 sites. The act relieves potentially 21 responsible parties from certain state 22 liability for future cleanup on sites 23 where the potentially responsible party</p>	<p style="text-align: right;">Page 12</p> <p>1 that removes the requirement for an 2 environmental covenant stating that the 3 site was previously contaminated and 4 subsequently remediated.</p> <p>5 The amendment is patterned 6 after a similar action removing the 7 requirement for an environmental 8 covenant regarding underground storage 9 tanks.</p> <p>10 The Department did not 11 support or oppose the current amendment 12 for removing the requirement for 13 environmental covenants on aboveground 14 storage tanks nor the previous 15 amendment removing environmental 16 covenants on the underground storage 17 tanks.</p> <p>18 Several items of proposed 19 legislation that did not pass including 20 one to make mandatory fish consumption 21 advisory and water quality notification 22 program requiring a sign at each public 23 boat ramp in every one of the</p>
<p style="text-align: right;">Page 11</p> <p>1 does a site investigation and then 2 develops and implements a cleanup plan 3 to address the specified contaminants 4 to current cleanup standards.</p> <p>5 Without the liability for 6 future cleanup costs, the Act removes 7 an impediment to the PRP selling the 8 property, which in turn increases the 9 likelihood the property can be returned 10 to productive use.</p> <p>11 The Department supported 12 the legislation because it encourages 13 the cleanup of properties that 14 previously were sitting unused and not 15 cleaned up.</p> <p>16 An additional benefit is 17 the potential to increase the tax base 18 for communities where the properties 19 exist.</p> <p>20 The third legislative 21 action that passed affecting the Land 22 Division is an amendment to the Alabama 23 Uniform Environmental Covenants Act</p>	<p style="text-align: right;">Page 13</p> <p>1 approximately 30,000 points where 2 treated waste water is discharged.</p> <p>3 Since 2018, the Department 4 has by its own initiative had in place 5 signage at all public and many private 6 boat launches in Alabama with 7 instructions on how to access helpful 8 water quality information. The access 9 methods include a QR code, internet web 10 address or live telephone contact.</p> <p>11 The information referenced 12 on the existing ADEM signage includes 13 discharge points information, fish 14 consumption advisories and much more 15 information where those engaged in 16 outdoor recreation can conveniently 17 find it.</p> <p>18 The legislators determined 19 that the current method used by ADEM 20 accomplishes the same objectives in the 21 more -- in a more reasonable way than 22 the proposed legislation.</p> <p>23 Another piece of proposed</p>

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Pages 14..17

<p style="text-align: right;">Page 14</p> <p>1 legislation that did not pass sought to  2 promote so-called Advanced Recycling by  3 statute.</p> <p>4           The Department determined  5 the beneficial issues addressed in the  6 proposed legislation are already  7 covered by ADEM rules and the statutory  8 provisions to provide further -- to  9 further promote recycling are  10 unnecessary.</p> <p>11           The most troublesome  12 portion of the proposed legislation  13 sought to exempt materials from  14 regulation that are currently  15 regulated. The Department opposed the  16 legislation due to historical problems  17 with abandoned materials from  18 unsuccessful recycling operations that  19 resulted in unauthorized dumps, which  20 under proposed legislation the  21 Department would not have had authority  22 to require cleanup.</p> <p>23           Moving on to an event that</p>	<p style="text-align: right;">Page 16</p> <p>1 ADEM, the Alabama Emergency Management  2 Agency, Alabama Forestry Commission,  3 Association of County Commissioners,  4 Alabama League of Municipalities,  5 Alabama Department of Agriculture and  6 Industries, Alabama State Senate, and  7 Alabama State House of Representatives.</p> <p>8           The objectives of the  9 working group are:  10           To review the response to  11 the vegetative waste disposal site fire  12 in St. Clair County. This included  13 each member of the working group  14 reviewing response to the fire from its  15 own agency or constituents'  16 perspective.</p> <p>17           Identify shortcomings or  18 gaps in the authority of state and  19 local governments to respond to such  20 emergencies. Part of that effort was  21 to solicit and review input from the  22 public. The group also compared the  23 existing plan for responding to this</p>
<p style="text-align: right;">Page 15</p> <p>1 has had extensive media coverage during  2 the last several months. There was  3 considerable concern from those  4 impacted by the smoke from the  5 vegetative waste fire just recently  6 extinguished in St. Clair County. And  7 rightfully so.</p> <p>8           When state and local resources  9 were determined to be inadequate, ADEM  10 reached out to EPA for assistance.  11 Although it took several steps, EPA did  12 agree to provide its contractor working  13 with EPA oversight to address the fire.</p> <p>14           This extraordinary  15 incident revealed shortcomings in the  16 ability, authority, and resources of  17 the state and local governments to  18 respond to situations that are outside  19 the scope of regulated activities but  20 nonetheless pose risks to the public.</p> <p>21           ADEM formed a working  22 group with representatives of  23 government-related entities including</p>	<p style="text-align: right;">Page 17</p> <p>1 type of emergency with the actual  2 response to the fire emergency.  3 Additional input from the Governor's  4 Office, State Department of Insurance,  5 and St. Clair County officials was  6 obtained.</p> <p>7           The working group is now  8 in the process of setting out its  9 findings including assessment of the  10 current state of relevant statutes,  11 regulations, and resource levels.</p> <p>12           And recommendations are  13 being developed for improving the  14 responsiveness to these types of  15 incidents in the future.</p> <p>16           Next, a report on the  17 status of construction of our Mobile  18 Field Office and Laboratory.</p> <p>19           Here is an earlier view of  20 the whole site before the roof was  21 complete. We were unable to take more  22 recent aerial photos due to limitations  23 on drone operations around the nearby</p>

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Pages 18..21

Page 18

1 airport. Mobile Bay and the Coast  
 2 Guard Station are just out of view  
 3 beyond the top of the photo. You can  
 4 see Broad Street at the bottom.  
 5           The boat storage building  
 6 at the rear of the site is complete.  
 7 You can see the distinctive large,  
 8 curved wall at the front of the office  
 9 area of the building, and a second  
 10 smaller curved wall about halfway back  
 11 on the right where the lab area will  
 12 begin.  
 13           The main building and lab  
 14 foundations, the building walls and the  
 15 roofing are complete. The application  
 16 of stucco on the exterior walls is  
 17 nearly complete.  
 18           Note the completed curb  
 19 and gutters around the site and parking  
 20 areas. Preparations are underway to  
 21 install the rubber-modified asphalt  
 22 made with recycled scrap tires in the  
 23 drives and parking areas.

Page 19

1           You can also see the  
 2 completed storm water retention pond to  
 3 the right.  
 4           The next two slides show  
 5 the interior wall framing being  
 6 installed. First is the conference  
 7 room at the front of the building. If  
 8 you look closely, you can see some of  
 9 the HVAC duct work.  
 10           And this next one showing  
 11 some of the framing in the office area  
 12 on the north side of the building. The  
 13 plumbing, electrical, and HVACs are  
 14 well underway and windows are being  
 15 installed.  
 16           Office furnishings have  
 17 been ordered. The project is  
 18 approximately 70 percent complete and  
 19 completion is scheduled for mid to late  
 20 summer.  
 21           This final slide is the  
 22 artist rendering of what the finished  
 23 building will look like.

Page 20

1           Another recent event in  
 2 Mobile is the pending installation of a  
 3 new PM-10 air monitor. This monitor  
 4 will complement the PM-2.5 monitors  
 5 currently operating in the Mobile area.  
 6 Particulate matter measuring 2.5  
 7 microns and smaller is the greatest  
 8 health concern. Data shows that the  
 9 PM-2.5 levels are well under control.  
 10           Several interested parties  
 11 expressed the desire to monitor  
 12 particulate matter up to the larger 10  
 13 micron measure, although data developed  
 14 over a period of many years in the past  
 15 was found not to approach the level  
 16 that would create a health concern.  
 17           Working with EPA, a plan  
 18 was developed and implemented to  
 19 revisit the PM-10 issue to confirm  
 20 previous findings. The result is  
 21 pending installation of the new PM-10  
 22 monitor.  
 23           Last, but certainly not

Page 21

1 least, I am pleased to introduce you to  
 2 Mary Catherine Muscha --  
 3           MS. MUSCHA: Muscha.  
 4           MR. LEFLEUR: Muscha -- I'm  
 5 terrible with names -- Mary Catherine,  
 6 I apologize for mispronouncing -- in  
 7 our Land Division.  
 8           As you know, we strongly  
 9 encourage our personnel to develop  
 10 professionally. One of the most  
 11 significant milestones in the  
 12 professional development of ADEM  
 13 personnel comes with the educational  
 14 achievement, work experience, and  
 15 rigorous testing necessary to earn the  
 16 title of Professional Engineer. Mary  
 17 Catherine has done that, and I take the  
 18 opportunity to have you join me in  
 19 congratulating her.  
 20           (Appause.)  
 21           MR. LEFLEUR: Thank you, Mary  
 22 Catherine. Well done.  
 23           That concludes today's



ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

Pages 22..25

Page 22	Page 24
<p>1 report. If you have any questions, I 2 will be happy to answer them. 3 CHAIRMAN MASINGILL: Thank you 4 for that report. 5 All right. The third item 6 on the agenda is a report from the 7 Commission Chair. Today I do have a 8 report. 9 It is time to start 10 another evaluation of Director 11 LeFleur's job performance as part of 12 the Commission's upcoming ADEM Director 13 job performance evaluation. 14 Written comments from the 15 EMC members will be requested via memo 16 from me. A notice providing the 17 opportunity for interested persons to 18 submit comments will be posted on 19 ADEM's website and emailed to the 20 advanced notice of the Commission 21 meetings notification list. 22 Comments on Director 23 LeFleur's job performance should cover</p>	<p>1 An objection to the Administrative Law 2 Judge's findings of fact and 3 conclusions of law and alternative 4 findings of fact and conclusions of law 5 by the EMC. 6 ADEM filed a reply to 7 Petitioner's objections -- objections 8 to recommendation of the Hearing 9 Officer and a proposed order. 10 I will entertain a motion 11 from the Commission regarding Hearing 12 Officer's proposed order on the 13 Petitioner's motion for a directed 14 verdict dated April 3rd, 2023, or 15 alternatively on Petitioner's motion 16 for directed verdict dated May 19, 17 2023. 18 MR. MILLER: Mr. Chairman, am 19 I correct in assuming that 20 Mr. Patterson is not here today? 21 CHAIRMAN MASINGILL: That's my 22 understanding. 23 MR. MILLER: Okay. Thank you.</p>
Page 23	Page 25
<p>1 the period from October 15th, 2022, to 2 July 31st, 2023, the deadline to 3 receive the comments for the upcoming 4 evaluation. A compilation of the 5 written comments received will be 6 compiled as part of that valuation 7 process. 8 All right. That brings us 9 to agenda item four, Bill Patterson 10 Construction, Inc., versus ADEM, EMC 11 Docket Number 22-02. 12 Under agenda item four, 13 the Commission has before it in this 14 matter proposed orders from the Hearing 15 Officer on the petition's motion for 16 directed verdict dated April 3rd, 2023, 17 on ADEM's motion to strike and dismiss, 18 and the Hearing Officer's report and 19 recommendations. 20 Also before the Commission 21 are filings by the Petitioner and ADEM. 22 The Petitioner filed a motion for 23 directed verdict dated May 19, 2023.</p>	<p>1 CHAIRMAN MASINGILL: Do I have 2 a motion? 3 MR. MCKINSTRY: Move to 4 approve the Hearing Officer's 5 recommendation to deny the Petitioner's 6 motion for directed verdict dated April 7 3rd, 2023. 8 CHAIRMAN MASINGILL: Do I have 9 a second? 10 MS. MERRITT: Second. 11 CHAIRMAN MASINGILL: Is there 12 any discussion? Call for the question. 13 All in favor of adopting the motion 14 signify by raising your right hand. 15 (All Commissioners 16 responded.) 17 CHAIRMAN MASINGILL: All 18 opposed? 19 (No response.) 20 CHAIRMAN MASINGILL: The 21 motion carries. 22 All right. I will next 23 entertain a motion from the Commission</p>

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

Pages 26..29

<p style="text-align: right;">Page 26</p> <p>1 regarding the Hearing Officer's 2 recommendation to deny ADEM's motion to 3 strike. Do I have a motion? 4 MR. McFADDEN: So moved. 5 CHAIRMAN MASINGILL: Do I have 6 a second? 7 MR. MILLER: Second. 8 CHAIRMAN MASINGILL: Any 9 discussion? 10 Call for the question. 11 Everyone in favor of the motion, 12 signify by raising your right hand. 13 (All Commissioners 14 responded.) 15 CHAIRMAN MASINGILL: All 16 opposed? 17 (No response.) 18 CHAIRMAN MASINGILL: The 19 motion carries. 20 I'll now entertain a 21 motion from the Commission regarding 22 the Hearing Officer's report and 23 recommendation to the Commission on the</p>	<p style="text-align: right;">Page 28</p> <p>1 a second? 2 MR. MCKINSTRY: Second. 3 CHAIRMAN MASINGILL: Any 4 discussion? 5 Call for the question. 6 All in favor of the motion, signify by 7 raising your right hand. 8 (All Commissioners 9 respond.) 10 CHAIRMAN MASINGILL: All 11 opposed? 12 (No response.) 13 CHAIRMAN MASINGILL: The 14 motion carries. 15 MS. THOMAS: We need to sign. 16 CHAIRMAN MASINGILL: Okay. 17 (All Commissioners 18 comply.) 19 CHAIRMAN MASINGILL: Is there 20 any other business? 21 MR. MILLER: I think we just 22 had two to sign or three? 23 MS. THOMAS: I'm sorry.</p>
<p style="text-align: right;">Page 27</p> <p>1 Petitioner's alternative findings of 2 fact and conclusions of law or on 3 ADEM's proposed order. 4 The Hearing Officer 5 recommends that the Commission find 6 that the Petitioner failed to meet its 7 burden of proof and approve as issued 8 ADEM's order 22-024-AP issued to Bill 9 Patterson Construction, Inc., for the 10 debris pit in Robertsedale in Baldwin 11 County, Alabama. 12 The Petitioner recommends 13 that the Commission withdraw 14 administrative order 22-024-AP and all 15 fines and costs held for naught. 16 ADEM recommends that the 17 Commission adopt the Hearing Officer's 18 recommendations in full and reject the 19 Petitioner's objection and adopt its 20 proposed order. Do I have a motion? 21 MR. MILLER: I move that we 22 accept the Hearing Officer's report. 23 CHAIRMAN MASINGILL: Do I have</p>	<p style="text-align: right;">Page 29</p> <p>1 MR. MILLER: Did We just have 2 two places to sign? 3 MS. THOMAS: Yes. Yes, sir. 4 CHAIRMAN MASINGILL: Seeing 5 none, we'll move on to agenda item six. 6 The date of the next 7 Commission meeting is August 11, 2023. 8 Are all Commissioners here planning to 9 be present? 10 MR. McFADDEN: Planning to. 11 CHAIRMAN MASINGILL: All 12 right. It's my understanding we -- 13 MS. THOMAS: No one signed. 14 CHAIRMAN MASINGILL: We did 15 not have any public comments today. So 16 I'll entertain a motion to adjourn. 17 MS. MERRITT: I move to 18 adjourn. 19 CHAIRMAN MASINGILL: Do I have 20 a second? 21 MR. MILLER: Second. 22 CHAIRMAN MASINGILL: For the 23 question: All in favor of the motion,</p>



ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
Meeting on 06/09/2023

Pages 30..32

<p style="text-align: right;">Page 30</p> <p>1 signify by raising your right hand. 2 (All Commissioners 3 respond.) 4 CHAIRMAN MASINGILL: We are 5 adjourned. 6 (The Commission Meeting ended at 7 11:28 a.m. on June 9, 2023.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23</p>	<p style="text-align: right;">Page 32</p> <p>1 This 9th day of June in the year of 2 our Lord, 2023. 3 4 <u>Elaine Scott</u> 5 Elaine Scott, CCR 6 ACCR NO. 354 Exp. 9/30/23 7 Certified Court Reporter and 8 Notary Public 9 Commission expires 11/14/23 10 11 12 13 14 15 16 17 18 19 20 21 22 23</p>
<p style="text-align: right;">Page 31</p> <p>1 REPORTER'S CERTIFICATE 2 STATE OF ALABAMA 3 TALLADEGA COUNTY 4 I, Elaine Scott, Certified Court 5 Reporter and Notary Public in and for the 6 State of Alabama at Large, certify on Friday, 7 June 9, 2023, that I reported the proceedings 8 in the matter of: 9 ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION 10 MEETING 11 and that the foregoing 32 computer-printed 12 pages contain a true and correct transcript of 13 the hearing set out herein. 14 I further certify that I am neither 15 of relative, employee, attorney or counsel of 16 any of the parties, nor am I a relative or 17 employee of such attorney or counsel, nor am I 18 financially interested in the results thereof. 19 All rates charged are usual and customary. 20 I further certify that I am duly 21 licensed as a Certified Court Reporter as 22 evidenced by the ACCR number following my name 23 found below.</p>	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: \$4..Alabama

	31st 23:2	8:18	adoption
\$			10:10
\$4 6:5	3rd 23:16	activities	
\$750,000 6:7	24:14 25:7	5:3 8:1	advance 7:8
		15:19	advanced
	7	actual 17:1	14:2 22:20
1	70 19:18	additional	advantage
10 20:12		6:7 10:2	8:9
15th 23:1	A	11:16 17:3	advisories
19 23:23	abandoned	address 7:11	13:14
24:16	14:17	11:3 13:10	advisory
1st 6:18	ability	15:13	12:21
	15:16	addressed	aerial 17:22
2	aboveground	14:5	affect 8:19
2.5 20:6	12:13	ADEM 9:22,	affecting
2018 13:3	accept 27:22	23 13:12,	10:15
2022 23:1	access 13:7,	19 14:7	11:21
2023 4:15	8	15:9,21	agency 16:2,
23:2,16,23	accomplishes	16:1 21:12	15
24:14,17	13:20	22:12	agenda 22:6
25:7	achievement	23:10,21	23:9,12
2024 7:7,21	21:14	24:6 27:16	agree 15:12
2025 6:21,	achieving	ADEM's 22:19	agricultural
22 7:10,13	5:14	23:17 26:2	7:16
22-02 23:11	across-the-	27:3,8	Agriculture
22-024-AP	board 6:17	adequately	16:5
27:8,14	act 9:3	7:23	ahead 7:21
24 6:3	10:7,20	administrative	air 5:11
	11:6,23	24:1 27:14	20:3
	action 9:17	adopt 27:17,	airport 18:1
3	10:15	19	Alabama
30,000 13:1	11:21 12:6	adopted 6:3	4:13,16
	active 4:15	adopting	8:2,9
		25:13	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: allocations..cleanup

11:22 13:6	24:14 25:6	<b>Bay</b> 18:1	<b>business</b>
16:1,2,4, 5,6,7 27:11	<b>area</b> 18:9, 11 19:11 20:5	<b>begin</b> 18:12	7:16
<b>allocations</b> 6:1,11	<b>areas</b> 18:20, 23	<b>beneficial</b> 14:5	<hr/> C <hr/>
<b>alternative</b> 24:3 27:1	<b>arrived</b> 7:13	<b>benefit</b> 11:16	<b>Call</b> 25:12 26:10
<b>alternatively</b> 24:15	<b>artist</b> 19:22	<b>benefits</b> 7:23 8:3	<b>carries</b> 4:3 25:21 26:19
<b>amendment</b> 9:1 10:10, 16 11:22 12:5,11,15	<b>asphalt</b> 18:21	<b>bill</b> 7:9 9:7 23:9 27:8	<b>Catherine</b> 21:2,5,17, 22
<b>apologize</b> 21:6	<b>assessment</b> 17:9	<b>Bipartisan</b> 5:23 6:10	<b>Chair</b> 22:7
<b>Applause</b> 21:20	<b>assistance</b> 15:10	<b>boat</b> 12:23 13:6 18:5	<b>Chairman</b> 4:2,8,9 22:3 24:18,21 25:1,8,11, 17,20 26:5,8,15, 18 27:23
<b>application</b> 18:15	<b>Association</b> 16:3	<b>body</b> 9:13, 19	<b>check</b> 5:8
<b>approach</b> 20:15	<b>assuming</b> 24:19	<b>bottom</b> 18:4	<b>citizens</b> 8:5
<b>approval</b> 9:4,11,12 10:8	<b>assuring</b> 8:4	<b>brings</b> 23:8	<b>Clair</b> 5:7 15:6 16:12 17:5
<b>approve</b> 10:1 25:4 27:7	<b>attracting</b> 8:10	<b>broad</b> 7:14 18:4	<b>clarifies</b> 10:12
<b>approved</b> 6:16	<b>authority</b> 14:21 15:16 16:18	<b>Brownfields</b> 10:17,19	<b>clarify</b> 9:9
<b>approximately</b> 6:19 13:1 19:18	<hr/> B <hr/>	<b>budget</b> 5:18, 19 6:3	<b>cleaned</b> 11:15
<b>April</b> 23:16	<b>back</b> 18:10	<b>Budgetary</b> 4:20	<b>cleanup</b> 10:17,19,
	<b>Baldwin</b> 27:10	<b>building</b> 18:5,9,13, 14 19:7, 12,23	
	<b>base</b> 11:17	<b>burden</b> 27:7	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: closely..Department

22 11:2,4, 6,13 14:22	8:9	constructed 5:10	22:23
<b>closely</b> 19:8	<b>compilation</b> 23:4	<b>construction</b> 17:17	<b>coverage</b> 15:1
<b>Coast</b> 18:1	<b>compiled</b> 23:6	23:10 27:9	<b>covered</b> 14:7
<b>code</b> 13:9	<b>complement</b> 20:4	<b>consumption</b> 12:20	<b>create</b> 20:16
<b>comment</b> 9:18 10:2	<b>complete</b> 17:21	13:14	<b>created</b> 5:4
<b>comments</b> 9:20	18:6,15,17	<b>contact</b> 13:10	<b>curb</b> 18:18
22:14,18, 22 23:3,5	19:18	<b>contaminants</b> 11:3	<b>current</b> 11:4 12:11
<b>Commission</b> 4:14 16:2	<b>completed</b> 18:18 19:2	<b>contaminated</b> 12:3	13:19 17:10
22:7,20	<b>completion</b> 19:19	<b>contractor</b> 15:12	<b>curved</b> 18:8, 10
23:13,20	<b>comply</b> 8:15	<b>control</b> 20:9	<hr/> D <hr/>
24:11	<b>concern</b> 15:3	<b>conveniently</b> 13:16	<b>data</b> 20:8, 13
25:23	20:8,16	<b>correct</b> 24:19	<b>dated</b> 23:16, 23 24:14, 16 25:6
26:21,23	<b>concludes</b> 21:23	<b>costs</b> 8:15	<b>deadline</b> 23:2
27:5,13,17	<b>conclusions</b> 24:3,4	11:6 27:15	<b>dealing</b> 10:7
<b>Commission's</b> 22:12	27:2	<b>County</b> 5:7	<b>debris</b> 27:10
<b>Commissioners</b> 16:3 25:15	<b>conference</b> 19:6	15:6 16:3, 12 17:5	<b>deny</b> 25:5 26:2
26:13	<b>confirm</b> 20:19	27:11	<b>Department</b> 4:20 5:20 7:12 8:20, 21 9:3 10:13 11:11
<b>communities</b> 11:18	<b>congratulating</b> 21:19	<b>covenant</b> 12:2,8	
<b>community</b> 9:15	<b>considerable</b> 15:3	<b>covenants</b> 11:23	
<b>compared</b> 16:22	<b>constituents'</b> 16:15	12:13,16	
<b>compensate</b> 6:14		<b>cover</b> 7:1	
<b>competitive</b>			

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: Department's..facilities

12:10 13:3	disappointed	21:13	environmental
14:4,15,21	7:7	effective	4:14 11:23
16:5 17:4	discharge	6:18	12:2,7,13,15
Department's	13:13	effort 6:13	EPA 15:10,
5:17 7:3	discharged	16:20	11,13
Departmental	13:2	electrical	20:17
6:23 8:12	discussion	19:13	evaluation
describing	25:12 26:9	emailed	22:10,13
9:16	dismiss	22:19	23:4
deserve 8:5	23:17	EMC 22:15	event 14:23
designed 9:9	disposal	23:10 24:5	20:1
desire 20:11	16:11	emergencies	exempt 14:13
determined	distinctive	16:20	exist 11:19
13:18 14:4	18:7	emergency	existing
15:9	Division 5:1	16:1 17:1,	10:6 13:12
develop 21:9	8:23 10:16	2	16:23
developed	11:22 21:7	employees	experience
17:13	Docket 23:11	6:14,18	21:14
20:13,18	drinking 8:6	encourage	expressed
development	drives 18:23	10:19 21:9	20:11
21:12	drone 17:23	encourages	extensive
develops	duct 19:9	11:12	15:1
11:2	due 14:16	engaged	exterior
directed	17:22	13:15	18:16
23:16,23	dumps 14:19	Engineer	extinguished
24:13,16		21:16	15:6
25:6		entertain	extraordinary
Director	<hr/> <b>E</b> <hr/>	24:10	15:14
22:10,12,	earlier	25:23	
22	17:19	26:20	<hr/> <b>F</b> <hr/>
director's	earn 21:15	entities	facilities
4:5	educational	15:23	9:6,10

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: fact..Identify

<b>fact</b> 24:2,4 27:2	<b>fish</b> 12:20 13:13	<b>FY</b> 4:15 6:3,20 7:10,13	<b>gutters</b> 18:19
<b>factors</b> 9:14	<b>focusing</b> 6:20		<b>guy</b> 4:8
<b>failed</b> 27:6	<b>Forestry</b> 16:2	<hr/> <b>G</b> <hr/>	<hr/> <b>H</b> <hr/>
<b>favor</b> 25:13 26:11	<b>formal</b> 9:17	<b>gaps</b> 16:18	<b>halfway</b> 18:10
<b>federal</b> 5:22 6:9 7:2 8:13	<b>formally</b> 9:14	<b>general</b> 5:19,20 6:3 8:8	<b>hand</b> 25:14 26:12
<b>fees</b> 8:11	<b>formed</b> 15:21	<b>good</b> 4:6,11	<b>happy</b> 22:2
<b>field</b> 5:9 17:18	<b>found</b> 20:15	<b>governing</b> 9:13,19	<b>health</b> 20:8, 16
<b>filed</b> 23:22 24:6	<b>foundations</b> 18:14	<b>government-</b> <b>related</b> 15:23	<b>Hearing</b> 23:14,18 24:8,11 25:4 26:1, 22 27:4, 17,22
<b>filings</b> 23:21	<b>framing</b> 19:5,11	<b>governmental</b> 7:15	<b>held</b> 27:15
<b>final</b> 19:21	<b>front</b> 18:8 19:7	<b>governments</b> 15:17 16:19	<b>helpful</b> 13:7
<b>finally</b> 9:18	<b>full</b> 6:9 27:18	<b>Governor</b> 6:5,15	<b>historical</b> 14:16
<b>find</b> 13:17 27:5	<b>fund</b> 5:19, 21,23 6:3, 10 8:8	<b>Governor's</b> 17:3	<b>hope</b> 7:11
<b>findings</b> 17:9 20:20 24:2,4 27:1	<b>funding</b> 4:20 6:8,21,23 7:4,7,10, 11,23	<b>greatest</b> 20:7	<b>House</b> 7:21 16:7
<b>fines</b> 27:15	<b>funds</b> 5:21 6:6,9	<b>group</b> 5:4 15:22 16:9,13,22 17:7	<b>HVAC</b> 19:9 <b>HVACS</b> 19:13
<b>finished</b> 19:22	<b>furnishings</b> 19:16		<hr/> <b>I</b> <hr/>
<b>fire</b> 5:7 15:5,13 16:11,14 17:2	<b>future</b> 10:22 11:6 17:15	<b>groups</b> 7:17 9:8	<b>Identify</b> 16:17
<b>fiscal</b> 6:21		<b>Guard</b> 18:2	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: impact..legislative

<b>impact</b> 4:19 9:15	<b>increases</b> 11:8	<b>interested</b> 20:10 22:17	<b>laboratory</b> 5:10 17:18
<b>impacted</b> 15:4	<b>increasing</b> 7:2	<b>interior</b> 19:5	<b>Land</b> 4:23 8:22 10:15 11:21 21:7
<b>impacting</b> 4:23 8:21	<b>incursion</b> 8:13	<b>internet</b> 13:9	<b>landfill</b> 9:5,8,10
<b>impediment</b> 11:7	<b>Industries</b> 16:6	<b>interpretation</b> s 10:9	<b>large</b> 18:7
<b>implemented</b> 20:18	<b>industry</b> 7:16 8:10, 11,15 9:8	<b>introduce</b> 21:1	<b>larger</b> 20:12
<b>implements</b> 11:2	<b>inflation</b> 6:15 7:1	<b>investigation</b> 11:1	<b>late</b> 19:19
<b>improve</b> 5:5	<b>information</b> 13:8,11, 13,15	<b>issue</b> 20:19	<b>launches</b> 13:6
<b>improving</b> 17:13	<b>Infrastructure</b> 6:1,11	<b>issued</b> 10:4 27:7,8	<b>law</b> 6:1,11 24:1,3,4 27:2
<b>inadequate</b> 15:9	<b>initiative</b> 13:4	<b>issues</b> 7:12 14:5	<b>leadership</b> 7:20
<b>incident</b> 15:15	<b>input</b> 16:21 17:3	<b>item</b> 22:5 23:9,12	<b>League</b> 16:4
<b>incidents</b> 17:15	<b>install</b> 18:21	<b>items</b> 12:18	<b>Lefleur</b> 4:4, 6,11 21:4, 21
<b>include</b> 8:3 13:9	<b>installation</b> 20:2,21	<hr/> <b>J</b> <hr/>	<b>Lefleur's</b> 22:11,23
<b>included</b> 16:12	<b>installed</b> 19:6,15	<b>job</b> 22:11, 13,23	<b>legislation</b> 4:23 8:19, 21 10:13, 18 11:12 12:19
<b>includes</b> 13:12	<b>instructions</b> 13:7	<b>join</b> 21:18	13:22 14:1,6,12, 16,20
<b>including</b> 12:19 15:23 17:9	<b>Insurance</b> 17:4	<b>Judge's</b> 24:2	
<b>increase</b> 6:22 7:5 11:17		<b>July</b> 23:2	
		<hr/> <b>L</b> <hr/>	<b>legislative</b> 4:17 7:22
		<b>lab</b> 18:11, 13	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: legislators..Municipalities

10:14	8:12,14	measuring	Mobile 5:10,
11:20	make 5:4	20:6	12 17:17
legislators	12:20	media 15:1	18:1 20:2,
13:18	Management	meet 27:6	5
Legislature	4:14 16:1	meeting 4:13	modification
4:16 6:4,	mandates 7:2	meetings	9:5,21
16 7:8,18	mandatory	22:21	10:1
8:18 10:11	12:20	member 16:13	modifications
level 20:15	Mary 21:2,	members 7:18	9:9
levels 17:11	5,16,21	22:15	monitor
20:9	MASINGILL	memo 22:15	20:3,11,22
liability	4:2,9 22:3	MERRITT	monitoring
10:22 11:5	24:21	25:10	5:11
likelihood	25:1,8,11,	message 7:17	monitors
11:9	17,20	method 13:19	20:4
limitations	26:5,8,15,	methods 13:9	months 15:2
17:22	18 27:23	micron 20:13	morning 4:6,
list 4:21,	match 6:9	microns 20:7	12
22 22:21	matching	mid 19:19	motion 4:2
live 13:10	5:21	milestone	23:15,17,
local 9:4,	materials	5:15	22 24:10,
10,12,13,	9:3 10:7	milestones	13,15
15,19 10:8	14:13,17	21:11	25:2,6,13,
15:8,17	matter 20:6,	MILLER	21,23
16:19	12 23:14	24:18,23	26:2,3,11,
looming 7:11	matters	26:7 27:21	19,21
low 8:16	4:18,20	million 6:6	27:20
	Mcfadden	minimum 8:14	move 25:3
	26:4	mispronouncing	27:21
<b>M</b>	MCKINSTRY	21:6	moved 26:4
made 18:22	25:3	Municipalities	Moving 14:23
main 18:13	measure	16:4	
maintaining	20:13		



ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: Muscha..pieces

<b>Muscha</b> 21:2, 3,4	<b>October</b> 6:18 23:1	14,20	<b>percent</b> 5:17 6:16 19:18
<hr/>	<b>office</b> 5:9	<b>ordered</b> 19:17	<b>performance</b> 8:12
<b>N</b>	17:4,18	<b>orders</b> 23:14	22:11,13, 23
<hr/>	18:8	<b>outdoor</b> 13:16	<b>period</b> 9:18
<b>names</b> 21:5	19:11,16	<b>oversight</b> 15:13	10:3 20:14 23:1
<b>naught</b> 27:15	<b>Officer</b>	<hr/>	<b>permit</b> 8:11 9:21 10:1, 3
<b>nearby</b> 17:23	23:15 24:9	<b>P</b>	<b>personnel</b> 5:14 21:9, 13
<b>nonetheless</b> 15:20	27:4	<hr/>	<b>persons</b> 22:17
<b>north</b> 19:12	<b>Officer's</b> 23:18	<b>parking</b> 18:19,23	<b>perspective</b> 16:16
<b>Note</b> 18:18	24:12 25:4	<b>part</b> 16:20	<b>petition's</b> 23:15
<b>notice</b> 9:16	26:1,22	22:11 23:6	<b>Petitioner</b> 23:21,22 27:6,12
10:2	27:17,22	<b>particulate</b> 20:6,12	<b>Petitioner's</b> 24:7,13,15 25:5 27:1, 19
22:16,20	<b>officials</b> 17:5	<b>parties</b> 10:21 20:10	<b>photo</b> 18:3
<b>notification</b> 12:21	<b>operates</b> 9:4	<b>party</b> 10:23	<b>photos</b> 17:22
22:21	<b>operating</b> 5:18 20:5	<b>pass</b> 8:22 12:19 14:1	<b>piece</b> 13:23
<b>Number</b> 23:11	<b>operational</b> 6:6,8	<b>passed</b> 10:15 11:21	<b>pieces</b> 4:22 8:20
<b>numerous</b> 7:15	<b>operations</b> 14:18 17:23	<b>past</b> 20:14	
<hr/>	<b>opportunity</b> 21:18	<b>patterned</b> 12:5	
<b>O</b>	22:17	<b>Patterson</b> 23:9 24:20 27:9	
<hr/>	<b>oppose</b> 12:11	<b>pending</b> 20:2,21	
<b>objection</b> 24:1 27:19	<b>opposed</b> 14:15		
<b>objections</b> 24:7	25:18		
<b>objectives</b> 13:20 16:8	26:16		
<b>obtain</b> 5:22	<b>order</b> 24:9, 12 27:3,8,		
6:9			
<b>obtained</b> 17:6			

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: pit..recommends

pit 27:10	previously	21 12:18	questions
place 13:4	10:6 11:14	13:22,23	22:1
plan 11:2	12:3	14:6,12,20	
16:23	primarily	23:14	R
20:17	7:3	24:9,12	
pleased 6:2	private 13:5	27:3,20	raise 6:17
21:1	problems	proposes	raising
plumbing	14:16	9:23	25:14
19:13	process 9:12	provide 5:21	26:12
PM-10 20:3,	17:8 23:7	7:9 9:16	ramp 12:23
19,21	productive	14:8 15:12	reached
PM-2.5 20:4,	11:10	provided 7:6	15:10
9	professional	providing	rear 18:6
points 13:1,	5:15	8:8 22:16	reasonable
13	21:12,16	provisions	13:21
pond 19:2	professionally	10:5,12	receive 23:3
portion	21:10	14:8	received
14:12	program 7:4,	PRP 11:7	23:5
pose 15:20	9 10:17	public 9:16,	recent 17:22
posted 22:18	12:22	18,20 10:2	20:1
potential	programs 5:1	12:22 13:5	recently
11:17	8:23	15:20	15:5
potentially	project	16:22	recognize
10:20,23	19:17	purpose	5:13
Preparations	promote	10:18	recommendation
18:20	14:2,9		24:8 25:5
present 7:22	proof 27:7	Q	26:2,23
pressure 8:7	properties	QR 13:9	recommendation
previous	11:13,18	quality 5:11	s 5:5 17:12
12:14	property	8:1,4,14	23:19
20:20	11:8,9	12:21 13:8	27:18
	proposed	question	recommends
	6:15 9:17,	25:12	27:5,12,16
		26:10	

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: recreation..session

recreation 13:16	12:4	17:11	revisit 20:19
recreational 8:7	removes 11:6 12:1	resources 15:8,16	Revolving 5:23 6:10
Recyclable 9:2 10:7	removing 12:6,12,15	respond 9:20 15:18	rightfully 15:7
recycled 18:22	rendering 19:22	responded 4:1 25:16	rigorous 21:15
recycling 14:2,9,18	reply 24:6 report 4:5, 18 5:2 6:2	26:14 responding 16:23	risks 15:20 Robertsdale 27:10
referenced 13:11	17:16 22:1,4,6,8	response 5:6 16:10,14	roof 17:20 roofing 18:15
regulated 8:11 14:15 15:19	23:18 26:22 27:22	17:2 25:19 26:17	room 4:12 19:7
regulation 14:14	representative s 15:22 16:7	responsible 10:21,23	rubber- modified 18:21
regulations 17:11	requested 6:5 9:22	responsiveness 17:14	rules 14:7
regulatory 8:1	22:15 require 9:10 14:22	result 20:20 resulted 14:19	<hr/> s <hr/>
reject 27:18	required 5:22 9:5 10:3,8	retain 6:13 retention 19:2	safe 8:6 scheduled 19:19
relate 8:22	requirement 12:1,7,12	returned 11:9	scope 15:19 scrap 18:22
relevant 10:12 17:10	requires 9:13	revealed 15:15	selling 11:7 Senate 7:21 16:6
relies 5:20	requiring 12:22	review 5:4 16:10,21	session 4:16 7:19,22
relieves 10:20	resource	reviewing 16:14	
relieving 8:7			
remediated			

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: setting..unable

8:18 10:11	slides 19:4	station 5:12	
setting 17:8	smaller	18:2	T
shortcomings	18:10 20:7	status 5:9	tanks 12:9,
15:15	smoke 15:4	17:17	14,17
16:17	so-called	statute 14:3	targeted 7:9
show 19:4	14:2	statutes	tax 11:17
showing	solicit	17:10	telephone
19:10	16:21	statutory	13:10
shows 20:8	Solid 9:2	14:7	terrible
side 19:12	10:6	steps 15:11	21:5
sign 12:22	sought 14:1,	storage	testing
signage	13	12:8,14,16	21:15
13:5,12	specific	18:5	time 7:18
signed 6:4	9:14	storm 19:2	22:9
significant	sponsored	Street 18:4	tires 18:22
4:19 5:14	9:7	strike 23:17	title 21:16
6:22 21:11	St 5:7 15:6	26:3	today 22:7
signify	16:12 17:5	strongly	24:20
25:14	stable 8:11	21:8	today's 5:2
26:12	standards	stucco 18:16	21:23
similar 12:6	11:4	subject 10:9	top 4:21
site 11:1	start 22:9	submit 22:18	18:3
12:3 16:11	state 5:22	subsequently	treated 13:2
17:20	6:10,12,	12:4	troublesome
18:6,19	14,17	successful	14:11
sites 10:20,	10:21	7:19	turn 11:8
22	15:8,17	summer 19:20	type 17:1
sitting	16:6,7,18	support 7:15	types 17:14
11:14	17:4,10	12:11	
situations	State's 5:6,	supported	U
15:18	19	10:13	
slide 19:21	stating 12:2	11:11	unable 17:21

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

Meeting on 06/09/2023

Index: unauthorized..years

unauthorized	23:16,23	7:20
14:19	24:14,16	15:12,21
underground	25:6	16:9,13
12:8,16	versus 23:10	17:7 20:17
understanding	view 17:19	worse 4:10
24:22	18:2	written
underway	Voluntary	22:14 23:5
18:20	10:17	_____
19:14	_____	Y
Uniform	W	_____
11:23	wall 18:8,	year 4:17
unnecessary	10 19:5	6:20,21
14:10	walls 18:14,	years 5:16
unrequested	16	7:1 20:14
6:7	waste 5:7	
unsuccessful	9:2 10:6	
14:18	13:2 15:5	
unused 11:14	16:11	
unusually	water 7:3,9,	
8:17	23 8:4,6,	
upcoming	7,14 12:21	
22:12 23:3	13:2,8	
update 5:3	19:2	
_____	web 13:9	
V	website	
_____	22:19	
valuation	windows	
23:6	19:14	
varying 10:9	withdraw	
vegetative	27:13	
5:6 15:5	work 19:9	
16:11	21:14	
verdict	working 5:3	

**Part B**

## Attachment Index

**Attachment 1 Agenda**

**Attachment 2 Director's Slides  
(Agenda Item 2)**

**Attachment 3 Order approving Hearing Officer's recommendation to deny the Petitioner's Motion for Directed Verdict dated April 3, 2023 and denying said Motion; approving Hearing Officer's recommendation to deny ADEM's Motion to Strike and Dismiss and denying said Motion; Attachment A, Hearing Officer's Order on Bill Patterson Construction, Inc.'s "Motion for Directed Verdict"; and Attachment B, Hearing Officer's Order on Motion of the Alabama Department of Environmental Management (ADEM) to Strike and Dismiss.  
(Agenda Item 4)**

**Attachment 4 Order adopting Findings of Fact, Conclusions of Law, and Recommendations of the Hearing Officer to the Environmental Management Commission, and Attachment – Hearing Officer's Report and Recommendation to the Commission  
(Agenda Item 4)**

**Attachment 1**



AGENDA\*  
MEETING OF THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

DATE: June 9, 2023

TIME: 11:00 a.m.

LOCATION: Alabama Department of Environmental Management (ADEM) Building  
Alabama Room (Main Conference Room)  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110-2400

<u>ITEM</u>	<u>PAGE</u>
1. Consideration of minutes of meeting held on April 14, 2023**	2
2. Report from the ADEM Director	2
3. Report from the Commission Chair	2
4. <u>Bill Patterson Construction, Inc., Petitioner v. ADEM, Respondent</u> EMC Docket No. 22-02	2
5. Other business	2
6. Future business session	2
PUBLIC COMMENT PERIOD	3
Brief statements by members of the public registered to speak	3

\* The Agenda for this meeting will be available on the ADEM website, [www.adem.alabama.gov](http://www.adem.alabama.gov), under Environmental Management Commission.

\*\* The Minutes for this meeting will be available on the ADEM website under Environmental Management Commission.

AEMC Meeting Agenda

Page 2

1. CONSIDERATION OF MINUTES OF MEETING HELD ON APRIL 14, 2023
2. REPORT FROM THE ADEM DIRECTOR
3. REPORT FROM THE COMMISSION CHAIR
4. BILL PATTERSON CONSTRUCTION, INC., PETITIONER V. ADEM, RESPONDENT, EMC DOCKET NO. 22-02

Before the Commission in the above matter are the following:

- (1) Hearing Officer's "Order on Petitioner Bill Patterson Construction, Inc.'s Motion for Directed Verdict", dated April 3, 2023 and directed to the Hearing Officer, and his recommendation that the Commission deny the Motion if the Commission deems it as a matter for it to determine, rather than the Hearing Officer.
- (2) Hearing Officer's "Order on Motion of ADEM to Strike and Dismiss" and his recommendation that the Commission deny said Motion.
- (3) Hearing Officer's "Report and Recommendation to the Commission" in which he recommends that the Commission find that the Petitioner failed to meet its burden of proof and approve as issued ADEM's Order 22-024-AP issued to Bill Patterson Construction, Inc. for a debris pit in Robertsedale, Baldwin County, Alabama.
- (4) Petitioner's "Motion for Directed Verdict", dated May 19, 2023 and directed to the Commission, and Petitioner's recommendations in the Motion that the Commission dismiss the "Findings" (Administrative Order #22-024-AP) and exonerate the Petitioner based on the adduced evidence, and the law.
- (5) Petitioner's "Objection to Administrative Law Judge's Findings of Fact and Conclusions of Law" and Petitioner's recommendations in the Objection that the Commission reject the unsupported Findings of Fact and Conclusions of Law of the Administrative Law Judge and withdraw the Findings Order.
- (6) Petitioner's alternative "Findings of Fact and Conclusions of Law by the Environmental Management Commission" and Petitioner's recommendations in the alternative Findings of Fact and Conclusions of Law that the Commission withdraw the Administrative Order (Findings) and all fines and costs be held for naught.
- (7) "ADEM's Reply to Petitioner's Objections to Recommendation of Hearing Officer" and "Proposed Order" and ADEM's recommendation in the Reply that the Commission adopt the Hearing Officer's recommendations in full and reject the Petitioner's Objection and adopt the Proposed Order.

5. OTHER BUSINESS
6. FUTURE BUSINESS SESSION

PUBLIC COMMENT PERIOD

BRIEF STATEMENTS BY MEMBERS OF THE PUBLIC REGISTERED TO SPEAK

Members of the public that wish to make a brief statement at a Commission meeting may do so by first signing in on a register maintained by the Commission office prior to each regularly scheduled meeting. The register will close ten minutes prior to convening each meeting of the Commission. Following completion of all agenda items, the Commission Chair will call on members of the public wishing to make a statement in the order their names appear on the register. Speakers are encouraged to limit their statement to matters that directly relate to the Commission's functions. Speakers will be asked to observe a three minute time limit. While an effort will be made to hear all members of the public signed on the register, the Commission may place reasonable limitations on the number of speakers to be heard. (Guideline 11, Guidelines for Public Comment).

The Guidelines for Public Comment are used in the application of ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda and Public Participation. The Guidelines for Public Comment serve to educate and inform the public as to how the Commission interprets and intends to apply the Rule. The revised Rule 335-2-3-.05 was effective October 7, 2016.

**Attachment 2**



## Alabama Department Of Environmental Management

### Benefits of Adequate Water Program Funding

- Assures safe drinking and recreational water
- Relieves pressure on General Fund
- Competitive advantage in attracting new industry:
  - Stable permit fees
  - Minimize Federal incursion
  - Good WQ = lower costs



## Alabama Department Of Environmental Management

### 2023 ADEM - Related Legislation

- Landfill local approval for modifications
- Brownfields Voluntary Cleanup Program
- Aboveground Storage Tank environmental covenants





## Alabama Department Of Environmental Management

### Emergency Response Working Group

- ADEM
- Alabama Emergency Management Agency
- Alabama Forestry Commission
- Association of County Commissioners
- Alabama League of Municipalities
- Alabama Department of Agriculture and Industries
- Alabama State Senate
- Alabama State House of Representatives



## Alabama Department Of Environmental Management

### Working Group Objectives

1. Review response to St. Clair County vegetative waste disposal site fire.
2. Identify shortcomings / gaps in responding to such emergencies.
3. Assess emergency management laws, regulations, and resource levels.
4. Recommendations to improve responsiveness to such emergencies.

**ADEM**

**Alabama Department Of  
Environmental Management**

# MOBILE FIELD OFFICE











**Attachment 3**

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

In the Matter of:	)	
	)	
Bill Patterson Construction, Inc.,	)	
Petitioner,	)	
	)	
v.	)	EMC Docket No. 22-02
	)	
Alabama Department of Environmental	)	
Management,	)	
Respondent.	)	

---

ORDER

This cause having come before the Commission pursuant to the Hearing Officer's Order on Petitioner Bill Patterson Construction, Inc.'s Motion for Directed Verdict dated April 3, 2023 and the Hearing Officer's Order on Motion of the Alabama Department of Environmental Management (ADEM) to Strike and Dismiss in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Hearing Officer's recommendation to deny the Petitioner's Motion for Directed Verdict dated April 3, 2023, in his Order on Petitioner Bill Patterson Construction, Inc.'s Motion for Directed Verdict is approved and said Motion is denied; and
2. That the Hearing Officer's recommendation to deny ADEM's Motion to Strike and Dismiss in his Order on Motion of ADEM to Strike and Dismiss is approved and said Motion is denied; and
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
4. That a copy of this Order along with a copies of the Hearing Officer's Orders, attached hereto as Attachments A and B, 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 9th day of June 2023.

APPROVED:


  
\_\_\_\_\_  
Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

  
\_\_\_\_\_  
Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

\_\_\_\_\_  
Commissioner

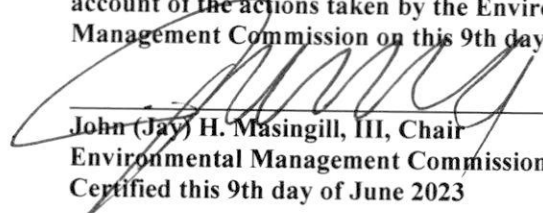
\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Commissioner

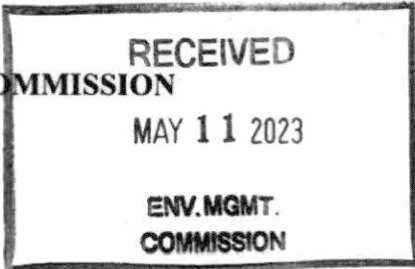
ABSTAINED:

\_\_\_\_\_  
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 9th day of June 2023.

  
\_\_\_\_\_  
John (Jay) H. Masingill, III, Chair  
Environmental Management Commission  
Certified this 9th day of June 2023

BEFORE THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION



BILL PATTERSON CONSTRUCTION, INC. )

Petitioner, )

v. )

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, )

Respondent. )

EMC DOCKET NO. 22-02

**ORDER ON PETITIONER BILL PATTERSON CONSTRUCTION, INC.'S  
"MOTION FOR DIRECTED VERDICT"**

This matter is before the undersigned by way of a "Motion for Directed Verdict" filed by Petitioner on or about April 3, 2023. The undersigned treats this Motion as a procedural matter and finds that the Motion is due to be and is hereby **DENIED**.

In the event that said Motion is treated otherwise and is deemed a matter for this Commission to determine, then it is the recommendation of the undersigned that said Motion be **DENIED**.

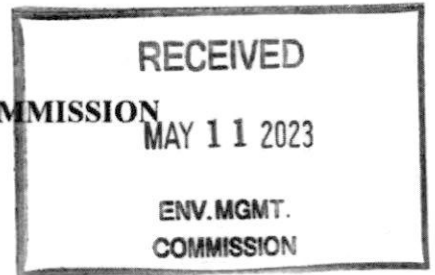
Done and entered this the 1<sup>st</sup> day of May, 2023.

  
\_\_\_\_\_  
JAMES F. HAMPTON  
Hearing Officer  
Alabama Environmental Management Commission  
4267 Lomac Street  
Montgomery, AL 36106  
(334) 213-0213 · FAX (334) 213-0266  
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(Original by mail or hand delivery and e-mail)



BEFORE THE ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

BILL PATTERSON CONSTRUCTION, INC. )
Petitioner, )
v. )
ALABAMA DEPARTMENT OF )
ENVIRONMENTAL MANAGEMENT, )
Respondent. )

EMC DOCKET NO. 22-02

ORDER ON MOTION OF THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT (ADEM) TO STRIKE AND DISMISS

This matter is before the undersigned by way of a Motion by ADEM entitled "Motion to Strike and Dismiss." This Motion seeks action by the Alabama Environmental Management Commission (hereinafter "Commission") to strike and dismiss the request for hearing to contest the pending Administrative Order in this matter No. 22-024-AP filed by Petitioner Bill Patterson Construction, Inc. (hereinafter "BPC, Inc." or "Petitioner"). There is also before the undersigned a filing by the Petitioner styled "Opposition to ADEM Motion to Dismiss."

A substantially similar Motion was filed pre-hearing that raised the same issue presented by this "Motion to Strike and Dismiss." The same basis/argument presented by the Alabama Department of Environmental Management (hereinafter "ADEM" or "Department") previously and the same basis/argument presented by the Petitioner previously are again presented here to the Commission by the respective parties. The only real difference in consideration of this matter at present and consideration previously is that it is now factually clear that William Ernest Patterson is not a licensed attorney in Alabama.

In support of its Motion, the Department cites ADEM Admin. Code r. 335-2-1-.04(5)(g) and the prior Order of this Commission in Canaan Systems, Inc. v. Alabama Department of Environmental Management, EMC Docket No. 09-06, which speaks to an issue similar to that now before the Commission. That issue, generally stated, is whether the “Request for Hearing to Contest Administrative Order No. 22-024-AP” (hereinafter “Request”) and this proceeding, should be dismissed by this Commission because the “Request” was signed by an individual that was not an attorney. The signature (person signing) is identified as the company president, and it is now clear that William Ernest Patterson signed the document and William Ernest Patterson is not a licensed attorney in Alabama.

The Petitioner in response to the Department’s “Motion to Strike and Dismiss” filed an “Opposition to ADEM Motion to Dismiss.” The argument of Petitioner regarding ADEM’s duty to notify participants regarding pleading defects is not convincing as to this particular signature issue.

Regardless, of the above, there are other factors that have been considered by the undersigned. That is, that information, immediately above the signature in question. It is clear that there is, a listing of an attorney for the Petitioner, namely Lawrence P. Sutley, PC, with an address, telephone and e-mail address that is found above and on the same page as the signature in dispute. While the undersigned does not find that the actual signature below/same page is that of Mr. Sutley, his name appears on the same page as the “signature.” Mr. Sutley sent in the “notice” green card of the United States Postal Service which is a part of Document 1 to the Commission’s file. While not “finding” that the signature on the “Request” is that of Mr. Sutley, it is clear that Attorney Sutley was involved in the filing of the “Request” and he has been involved in the proceeding on behalf of the Petitioner. The absence of a signature line for Attorney Sutley, in this particular case, does not appear to be a fatal jurisdictional defect under these limited set of facts. The undersigned has considered the prior decision of this Commission in Canaan Systems,



supra, and the other citations submitted and finds that this case is distinguishable. This case, now before the Commission, was submitted by an attorney (Sutley) with his name, address and other contact information. It would be a hyper-technicality for this set of circumstances to form the basis of a jurisdictional dismissal and the undersigned cannot so find.

For these reasons, the undersigned finds that the Department's "Motion to Strike and Dismiss" is due to be denied by the Commission. It is the recommendation of the undersigned that this Motion, in this limited set of facts, is due to be denied by the Commission.

Done and entered this the 11<sup>th</sup> day of May, 2023.

  
\_\_\_\_\_  
JAMES F. HAMPTON  
Hearing Officer  
Alabama Environmental Management Commission  
4267 Lomac Street  
Montgomery, AL 36106  
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Montgomery, AL 36110-2400  
[aemc@adem.alabama.gov](mailto:aemc@adem.alabama.gov)  
(Original by mail or hand delivery and e-mail)

**Attachment 4**

BEFORE THE ENVIROMENTAL MANAGEMENT COMMISSION OF THE ALABAMA  
DEPARTMENT OF ENVIROMENTAL MANAGEMENT

---

BILL PATTERSON CONSTRUCTION, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	EMC DOCKET NO. 22-02
	)	
ALABAMA DEPARTMENT OF	)	
ENVIRONMENTAL MANAGEMENT,	)	
	)	
Respondent,	)	
	)	

---


**ORDER**


Before the Commission is the recommendation of the Hearing Officer in the above matter. Also before the Commission are Objections to the Recommendation of the Hearing Officer. The Commission has carefully considered the Recommendation of the Hearing Officer and the Objections to the Hearing Officer's Recommendation. The Commission having considered the same, along with all the submissions that have been presented to the Commission in this matter, the Commission hereby ORDERS, ADUDGES, and DECREES as follows:


1. That such Findings of Facts, Conclusion of Law, and Recommendations of the Hearing Officer to the Environmental Management Commission are hereby adopted;
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 copies of the Recommendation of the Hearing Officer attached hereto 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 9<sup>th</sup> day of June 2023

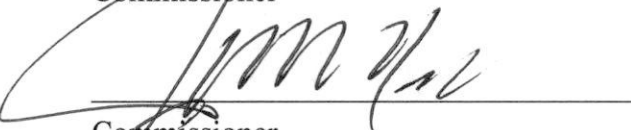
APPROVED:

  
\_\_\_\_\_  
Commissioner

  
\_\_\_\_\_  
Commissioner

  
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Commissioner

DISAPPROVED:

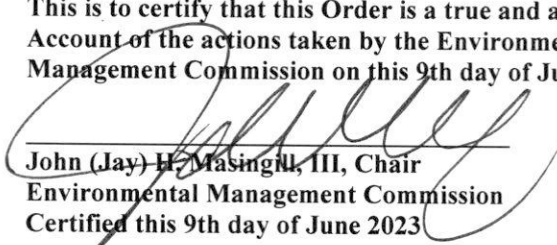
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Commissioner

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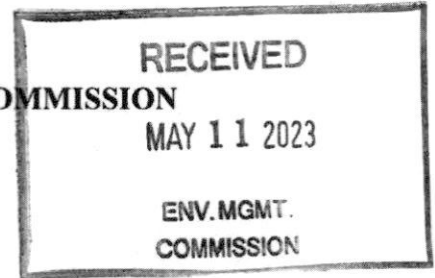
ABSTAINED:

\_\_\_\_\_  
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 9th day of June 2023.

  
\_\_\_\_\_  
John (Jay) H. Masingill, III, Chair  
Environmental Management Commission  
Certified this 9th day of June 2023

BEFORE THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION



BILL PATTERSON CONSTRUCTION, INC. )

Petitioner, )

v. )

ALABAMA DEPARTMENT OF )  
ENVIRONMENTAL MANAGEMENT, )

Respondent. )

EMC DOCKET NO. 22-02

**REPORT AND RECOMMENDATION TO THE COMMISSION**

This Report and Recommendation is submitted to the Alabama Environmental Management Commission (hereinafter "Commission") by the undersigned Hearing Officer for its consideration and adoption as it deems appropriate.

The Petitioner in this cause is Bill Patterson Construction, Inc., appearing through its President William Ernest Patterson, and represented by the Honorable Laurence P. Sutley, Attorney at Law. The Alabama Department of Environmental Management (hereinafter "ADEM" or "Department") is the Respondent which is appearing through its representative Ron Gore and represented by the Honorable James R. Thrash, Attorney at Law and the Honorable Mary-Frank Brown, Attorney at Law.

**PROCEDURAL HISTORY**

The Petitioner, Bill Patterson Construction, Inc. (hereafter "BPC, Inc." or "Petitioner"), requested a hearing in regard to the ADEM order and findings dated December 1, 2021. That order and finding is contained in this record and is ADEM's Exhibit 77 for reference. BPC, Inc. within fifteen days of that order filed a request for hearing and an Affirmative Defense document was filed therewith. ADEM raised a jurisdictional issue concerning the validity of the appeal

notice filed by BPC, Inc. raising the specific issue of the validity of that appeal notice because the signing agent for BPC, Inc. was not a licensed attorney. BPC, Inc. responded to that issue and position of ADEM with an argument that ADEM had not complied with its own rules in its failure to notify BPC, Inc. of pleading defects and thus not allowing BPC, Inc. time to cure any such alleged defects. These arguments were presented to the undersigned prior to the hearing on this matter and again post hearing. This issue is addressed by separate order/recommendation by the undersigned.

The parties stipulated and agreed to the admission of certain pre-marked and pre-filed exhibits and as a result ADEM's Exhibits 1 – 102 were admitted pursuant to the Scheduling Order. These exhibits include photographs of the Hubbard Road site, records of complaints to ADEM, inspection reports, a record of the total cubic yards of material hauled to the site, National and International Fire Codes, and the statutorily required procedural record leading up to the issuance of the Administrative Order the subject of this matter. Petitioner's Exhibit 103 was admitted by agreement of the parties.

The case was heard by the duly assigned Hearing Officer on January 9, 2023 in Montgomery, Alabama.

### **SUMMARY OF THE EVIDENCE**

As a result of Hurricane Sally which struck Baldwin County and other parts of this state, an entity known as GreenCo, Inc. (hereinafter "GreenCo") performed certain debris removal services. GreenCo contracted with BPC, Inc. to collect debris from a temporary holding site, grind the debris and then move such to its final site which in this case was owned by BPC, Inc. A total of 21,810 cubic yards of vegetative material was eventually moved to the site which is described as a dirt pit. After the process of moving debris to this final site was completed, a fire occurred that involved the vegetative material in this site.

Mr. Paul Patterson is the Fire Chief for the City of Robertsdale Fire Department and he testified that on or about March 23, 2022, his fire department was dispatched to the Patterson property because of smoke and after receiving several complaints concerning the fire and smoke. Chief Paul Patterson testified upon arrival to the site, he found there was a large material pile producing a lot of smoke and that there were two major material piles involved. He stated that in the days that followed, BPC, Inc. provided equipment on site to spread the material. He further testified the Fire Department arranged for 250,000 gallons of water to fight the fire, and despite this effort, the fire department was not able to extinguish the fire. He described the pile as being 30-40 feet high, 30 feet wide, and 40 feet long. He also stated that the material was being stored outside at the site and further that it is a known fact that this type of debris is susceptible to spontaneous heating. Chief Paul Patterson testified the fire burned for three weeks and smoldered for over a month and that no matter what direction the wind blew, it would blow smoke toward a residential area.

Chief Paul Patterson testified that he was familiar with the National and International Fire Codes. He described the debris as being located in a pit and that pit as dropping off towards the back of the pit. He further testified that there were not any fire hydrants or water available at the site but there was water available on the road right of way.

Mr. William Ernest Patterson testified that he is the President of BPC, Inc. Mr. William Ernest Patterson explained that his late father was a former owner, president and registered agent of BPC, Inc. and that the proposed order was initially sent to BPC, Inc. at his father's home address at 26710 Ernest Patterson Road, Robertsdale, Alabama. He and BPC, Inc. did not receive it by mail. Under cross-examination he acknowledged that the Secretary of State had the Ernest Patterson Road address as the registered address for BPC, Inc. and that eventually a letter with the Administrative Order was delivered to BPC, Inc.'s office at 18044 Vaughan Road,

Robertsdale, Alabama. He further stated the registered agent information with the Secretary of State has now been updated for the BPC, Inc.'s office address on Vaughan Road. This update did not take place until after the various notices were sent to BPC, Inc. at the 26710 Ernest Patterson Road address.

BPC, Inc. had contracted with GreenCo to move hurricane debris from a temporary location to a permanent disposal site on BPC, Inc.'s property. Mr. William Ernest Patterson described the property as the Hubbard Road pit and that it consisted of a giant hole in the ground. He further described the pit as not being completely flat and level, but the bottom of the pit is level enough to run a front-end loader. He also stated the sides of the pit were sloped.

Mr. William Ernest Patterson stated that the material was brought to the site and put in the pit by BPC, Inc. He agreed that 21,810.22 cubic yards of material was disposed of at the site and that would have been over 1,000 dump truck loads. He described the process of putting the material in the pit after which it was spread by a bulldozer and then more dumped and spread over and over until 21,810 cubic yards of material was placed in the pit. Mr. William Ernest Patterson further described the material as being placed into two separate piles and indicated that a truck could be driven between the two piles. He also stated that at times trucks would get stuck when raining. He testified that BPC, Inc. was paid \$2.50 a cubic yard to place the material in the pit (and store these materials) and that BPC, Inc. created the piles of debris that were susceptible to spontaneous heating. Mr. William Ernest Patterson agreed that the fire burned and smoked for over 30 days and agreed that the fire was left unattended at times. Mr. William Ernest Patterson also agreed that someone that lived close by that had asthma or any other type of health condition could be harmed by the smoke.

Chris Harris works for ADEM in the Mobile field Office and has been with the Department for 24 years and is an environmental supervisor. Mr. Harris testified that ADEM began receiving



complaints about the fire and smoke on Hubbard Road on March 23, 2021, and the Department sent an inspector to the site on March 24, 2021 and confirmed there was fire and smoke at the Hubbard Road Pit. The Department continued to receive complaints through April 5, 2021. Mr. Harris stated that he conducted an inspection on April 2, 2021 and witnessed smoke emanating from the piles of debris. Mr. Harris also testified that there was not any on site personnel from BPC, Inc. on that visit. Mr. Harris stated the site was near a residential area and that whatever direction the smoke blows it would be blowing toward a residential area. He described the size of the pile of debris as being 75-100 feet tall and 100-150 yards in length.

Mr. Harris reviewed the exhibit photographs and testified he took several of the photographs. He stated that based on his five site visits that the photographs accurately depicted the site. He described the size of one pile as being 75-100 feet tall and described another debris pile which was higher than the pit wall.

Mr. Harris made five site visits between April 2 and May 5, 2021 and that over this time the piles had become smaller as a result of the fire and that the piles were about half their original size. He stated that on three of his visits there was no personnel onsite. On May 5, 2021, Mr. Harris conducted his last site visit and confirmed that the fire was out. Mr. Harris described the ground on which the material was placed as being a dirt pit or a hole in the ground left by the removal of dirt.

Ron Gore stated that he is the Chief of the Air Division for ADEM and has been employed with the Department for 49 years. He serves as supervisor of the air program and as such one of his responsibilities was to make enforcement decisions regarding air pollution. He said that based on complaints, reports from the Mobile field Office, and news media reports, there was a serious fire going on at the BPC, Inc. site that violated the Department's open burning rules and that a formal enforcement action was deserved. A Notice of Violation (hereinafter "NOV") was

issued to BPC, Inc. on April 29, 2021 at the address on record with the Secretary of State and the NOV was returned June 2, 2021. A second NOV was issued on June 11, 2021 and was delivered at the address on record with the Secretary of State on July 1, 2021. The Department did not receive a response from BPC, Inc. On September 13, 2021 the Department sent a proposed Administrative Order to the address on record with the Secretary of State and based on United States Postal Service tracking, the order was picked up at the post office on September 30, 2021. Again, the Department did not receive a response from BPC, Inc. Subsequently, the Department started the protocols that the statute requires to issue an administrative order with a penalty. Notices of the proposed Administrative Order were published for comments on October 27, 2021, and the Department did not receive any public comments on the proposed Administrative Order after the notices were published. The Department finalized and issued the Administrative Order on December 1, 2021. When the Department did not receive a response to the mailed Administrative Order, a decision was made to hand-deliver the Administrative Order.

Mr. Gore testified to the contents of the Administrative Order including the factors considered by the Department in arriving at the penalty amount. Mr. Gore stated that he had not heard any testimony during the hearing that would rise to the level of mitigating factors that would warrant any credit towards the penalty. He stated that any time someone stores a substantial amount of vegetative and wood chipped material, they are expected to store the material in such a way that it is safe and everything on the site does not burn. Mr. Gore stated that based upon the description of the piles of material, those piles would have been susceptible to spontaneous combustion. Also, he stated that the fact that BPC, Inc. did not intentionally ignite the fire was irrelevant.

Mr. Gore further testified that BPC, Inc. was charged with one violation per day for 30 days for a violation for its permitting open burning under ADEM Admin. Code r. 335-3-1-.01

which states, "No person shall ignite, cause to be ignited, permit to be ignited, or maintain an open fire except as follows:..", in addition to violations for ADEM Admin. Code r. 335-3-1-.01(2)(b)3 and (b) 7.

### **STANDARD OF REVIEW**

ADEM Admin. Code r. 335-2-1-.27(5), which governs Hearing Officers and their responsibilities, reads as follows:

In preparing the recommendation to the Commission, 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.

The regulation above 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 Petitioner has the burden of overcoming that position. The Commission's 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.

The Petitioner has the burden of persuasion as to each matter of controversy, and, to carry this burden, must show by a preponderance of the evidence as to any issue that the Department's action should be disapproved or modified.

### **FINDINGS OF FACT**

1. The actions of ADEM following this fire event resulted in letters with the NOV, Proposed Administrative Order, and Final Administrative Order being sent to BPC, Inc's registered address with the Secretary of State's Office of 26710 Ernest Patterson Road,

Robertsdale, Alabama 36567. At least one of these mail communications was “picked up” on September 30, 2021, but there was no testimony as to who may have picked up that document at the post office. It is unfortunate that BPC, Inc. never received these notices and therefore had no opportunity to respond to ADEM’s actions. However, this unfortunate result was the product of BPC, Inc’s own neglect in not changing its address when the office operation obviously moved. The failure of BPC, Inc. to follow Alabama law regarding maintaining its proper address can not now serve as a basis for a due process argument that it was not property notified. There was no denial of due process by the actions of ADEM in handling this enforcement process.

2. ADEM’s Administrative Order was based on open burning as set forth at ADEM Admin. Code r. 335-3-1-.02(uu) which states, "Open Burning" shall mean the burning of any matter in such a manner that the products of combustion resulting from the burning are emitted directly into the ambient air without passing through an adequate stack, duct, or chimney. ADEM Admin. Code r. 335-3-1-.01 states, “No person shall ignite, cause to be ignited, permit to be ignited, or maintain an open fire except as follows:....” This was an open fire which likely was the result of spontaneous combustion. BPC, Inc. permitted the spontaneous combustion to occur in failing to properly handle and monitor the pit and this material. BPC, Inc. took little affirmative action to mitigate the spontaneous combustion of the material transported to this site.

BPC, Inc. was paid to properly dispose of this material. The material was placed in a former dirt pit by BPC, Inc. BPC, Inc. did not intentionally start the fire. BPC, Inc. did not properly manage and store the materials when it placed them in the former dirt pit. BPC, Inc. did not manage the material in a way to prevent it from becoming a serious fire hazard. It was BPC, Inc.’s acts and omissions by improperly storing and handling the material that resulted in open

burning and thus BPC, Inc. permitted the fire to be ignited within the meaning of ADEM Admin. Code r. 335-3-1-.01.

BPC, Inc. did not (at all times) have personnel on site while the fire was burning. There was smoke in the public road which could have created a traffic hazard. BPC, Inc. violated the ADEM open burning regulations as cited in ADEM Administrative Order 22-024-AP.

### CONCLUSIONS OF LAW

1. The actions by ADEM following the fire that occurred, as described above, in sending notices, NOV's and Administrative Orders to the Petitioner at its address provided and posted with the Secretary of State's Office pursuant to Code of Alabama, 1975 § 10A-1-5, *et seq.*, did not violate BPC, Inc.'s due process rights under the State Constitution of Alabama nor the United States Constitution. BPC Inc.'s own actions were the cause of any failure of notice that may have occurred.

2. BPC, Inc. was in violation of ADEM Admin. Code r. 335-3-1-.02 in its acts and omissions in failing to properly store and maintain the vegetative material on its site (pit) permitting a spontaneous combustion of the material which resulted in an open fire or open burn, for an extended period of time. This open burn or open fire damaged the environment, lasted an extended period of time, obscured visibility in surrounding areas, and disrupted the lives of people in the area resulting in numerous complaints concerning smoke.

3. The assessment of the civil penalty by ADEM in this matter occurred following due consideration of the seriousness of these violations, harm to the environment, threat to public safety, the standard of care shown by BPC, Inc., economic benefit and any mitigation efforts of BPC, Inc. These facts and the evidence presented in this matter leads to a finding that:

A. This was a serious violation by BPC, Inc. in its permitting of an unauthorized open burn of vegetative material that obscured road visibility and disrupted neighbor's lives by way of smoke. This occurred over a period of time that exceeded thirty days.

B. BPC, Inc. did not meet its obligations in regard to the standard of care for storing large amounts of combustible material and thus permitted the open fire to occur.

C. Some economic benefit resulted to BPC, Inc. in not properly storing the material. This economic benefit was minimal.

D. At and before the combustion of these materials, BPC, Inc. did little to mitigate the possible result that did in fact occur. BPC, Inc. did take action to assist in limiting the fire until it eventually extinguished itself.

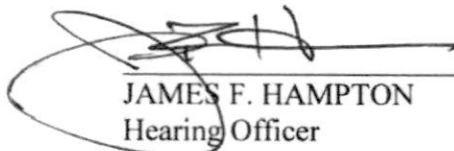
E. BPC, Inc. was not shown to have any previous history regarding open burns.

F. There was no evidence concerning BPC, Inc.'s inability to pay.

### **RECOMMENDATION**

Based upon all the evidence presented in this cause, the testimony of witnesses and the demeanor of those witnesses and the regulations and law presented, the undersigned recommends to the Commission that it find that the Petitioner failed to meet its burden of proof and that ADEM's Order 22-024-AP be approved as issued.

Done this 11<sup>th</sup> day of May, 2023.



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