10/24/11

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
August 19, 2011

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 August 19, 2011.

Chair
Environmental Management Commission

Certified this 21st day of October 2011.

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
August 19, 2011

Convened: 11:00 a.m.
Adjourned: 11:23 a.m.

Part A

Transcript

Part B

Attachment Index

Attachments 1 – 4

Part A

ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING

ALABAMA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT (ADEM) BUILDING

MAIN CONFERENCE ROOM
1400 COLISEUM BOULEVARD
MONTGOMERY, ALABAMA

AUGUST 19, 2011

11:00 A.M.

COMMISSION MEMBERS PRESENT:

DR. JOHN H. LESTER, CHAIR
H. LANIER BROWN, II
DR. JAMES E. LAIER
SAMUEL L. MILLER, M.D.
DR. TERRY D. RICHARDSON

COMMISSION MEMBERS NOT PRESENT:
W. SCOTT PHILLIPS
MARQUITA FURNESS DAVIS

ALSO PRESENT

ROBERT TAMBLING, EMC Legal Counsel
DEBI THOMAS, EMC Legal Assistant

DR. LESTER: At this time, we'll call the meeting to order. First item is to -- the minutes from our last meeting on June 24th. Do I have a motion?

DR. LAIER: Move to approve.

DR. LESTER: Second?

MR. BROWN: (Motions.)

DR. LESTER: Motion seconded. Any discussion on it? All in favor, say "aye."

ALL: Aye.

DR. LESTER: All opposed? At this time, we'll call the Director for his comments.

MR. LEFLEUR: Thank you, Mr. Chairman. Do you need this -- is this mike on? Do you need it on?

MS. THOMAS: It should be on. Russell, can you check on the mike?

MR. LEFLEUR: Thank you. Good morning, Commissioners. Let me

bring you up to date on where we stand on several ongoing matters and then revisit an initiative we reported on previously.

In the ongoing matters, as you can see in your materials, the Department continues to operate within its budget in spite of mid-budget-year cuts at both federal and state level. This is being accomplished by continuing efforts toward greater automation, greater use of general permits rather than permits by rule, and delaying filling staff positions until the latest prudent moment.

An additional work flow change designed to improve efficiency has been implemented since your last meeting. Inspection and enforcement activities for the Construction Stormwater Program have now been completely handed off to the Field Operations Division.

This will streamline that activity by eliminating duplication of

Page 5

effort and reducing the time to bring sites into compliance. Sites found to be out of compliance will be given formal notification of noncompliance and then allowed reasonable time to come into compliance, after which if noncompliance continues, they will be assessed penalties.

Another ongoing matter is the proposal to increase permit fees, which we've discussed previously. The process to implement permit fee increases, which we reported previously the Department would be undertaking, has now begun. This, like previously-mentioned activities, will help keep the Department on acceptable financial footing.

We completed visits with major impacted groups to explain the basis for the 19 percent fee increase and emphasized the importance of maintaining adequate funding of the Department to

Page 6

assure continued environmental oversight at the state level rather than at the federal level.

Public notice for the proposed fee increase began on August the 7th. Public hearing will be held on September the 21st, and if there are no delays, this matter will come before you on October the 21st for rulemaking. We anticipate implementing the new fee schedules in December of this year. There's been minimal negative response received from the regulating community.

The final ongoing matter I would like to bring up is the status of the BP oil spill response. The Department continues to be the only agency with a full-time, on-scene presence. Our investment in this effort is approaching 40,000 work hours. The final punch list of open items to be completed before stand-down of the response is currently being negotiated.

Page 7

Included on the list are mapping and funding, removal of submerged oil mats, completion of tar removal from the west end of Dauphin Island after the temporary stand-down for bird and turtle nesting season, and providing for cleanup of future tar ball landings, and finally, emergency plans for cleanup of oil debris following any tropical weather event. We anticipate final closeout of the response phase to take place November 30th of this year.

Now, I'd like to address an initiative that we have previously had conversations about in Commission Meetings, and that initiative is the importance of relationships with outside groups to help the Department accomplish its objectives.

While the primary objective of building these relationships is to more effectively accomplish our work, an additional benefit of this approach is

Page 8

that it helps build the general public's confidence in the work that we do. I'm going to briefly describe our efforts to build relationships with four important groups: The environmental community, the media, the EPA, and the regulating community.

Environmental community first. For the past year, it's been our routine to meet quarterly with all interested environmental groups to exchange information and to address their concerns. These meetings have led to greater understanding on both sides and to several tangible advances in our environmental efforts.

One of the most significant achievements to date has been the creation and the implementation of the new web-based complaint system. In conjunction with E-file, this new system allows anyone who is aware of a violation to register a complaint electronically

Page 9

and then track that complaint to its eventual conclusion.

One of the department's public relations specialists will soon be setting up a series of statewide meetings to train interested members of the public in the use of the new complaint system and E-file. An engaged public is not only a way for the Department to move more effectively and focus on sites that need attention; it also is an indicator of public buy-in to the work we're doing.

For the media group, public support of the function -- excuse me -- public support is a function of the public's confidence in the work that we're doing. We must first and foremost do work that's worthy of public confidence; then help the public become informed on that work. While the Department has areas -- welcome, Commissioner.

MR. BROWN: Thank you.

Page 10

MR. LEFLEUR: While the Department has areas for improvement, which are being addressed, it also has a 30-year history of solid accomplishment. The media plays a key role in informing the public not only about what is being done to improve the Department and the environment, but also highlighting these past accomplishments. For these reasons, the media is a group we are reaching out to. In the coming year, a special effort will be made to engage in frank, open conversation with editorial boards and news organizations throughout the state.

The next group that we are reaching out to is EPA. For better or for worse, the Department is inextricably tied to the Environmental Protection Agency. Often, they supply needed funds and helpful counsel. On occasion, they take independent action that hinders our efforts. Failure to maintain a healthy relationship with EPA can endanger

Page 11

maintaining state control over our environmental programs.

The Department has established an understanding with EPA that our actions will be guided by sound science, statutory authority, and adherence to a proper rulemaking process. In those cases, when these conditions are not present, we will respectfully be at odds with EPA.

While there are several outstanding issues with EPA, the relationship is frank, open, and cooperative. We will continue to foster better relations with EPA.

Finally, the regulating community. The regulating community is, quite legitimately -- has legitimate concerns in seeking predictability, even-handed enforcement of rules, and a voice when changes are to be made.

It is a priority for the Department to reach out to the regulating

Page 12

community to inform them early when changes are anticipated and to organize our enforcement activities to quickly identify noncompliance.

I reported earlier on our meetings with various impacted groups to give early notice of fee increases being proposed for December of this year. We are also working closely with the regulating community on the implementation of the important EDMR program we have focused on in previous Commission Meetings.

Rapid and even-handed enforcement is important to the regulating community, as well as to the Department, for many reasons including the minimization of any penalties for inadvertent compliance and for the regulating community to prevent unfair competition by those who are not complying with the rules.

The recent streamlining of

Page 13

the enforcement activities discussed earlier also is a step toward achieving rapid, even-handed enforcement. The objective of the Department is to obtain 100 percent compliance with permit conditions by the regulating community. Efforts will continue to build productive relationships with the regulating community to accomplish this goal.

Today's bare-bones budgets have only increased the importance of fostering all these relationships that I've been discussing. Tight budgets have also strained some of these relationships. I want to bring up two examples of relational programs that are under considerable pressure that's resulting from these budget times that we're in.

These two are the Concentrated Animal Feeding Operations, or CAFO program, and Alabama Water Watch. In the case of the CAFO program, it has

Page 14

been a model program EPA and other states are using as a standard. One reason for wide acceptance is the historical funding of a targeted line item -- by a targeted line item in ADEM's State General Fund Budget.

Elimination of the targeted line item in the fiscal year 2012 budget will require fee recovery that will substantially impact the already narrow margins for farming interests throughout the state. This has undermined our -- the willingness of the agricultural community to be covered by this program.

Alabama Water Watch has been a highly successful and valuable program that targets the very difficult-to-control, non-point source pollution problem in our watersheds. Unpaid volunteers are trained to sample bodies of water and provide the results to ADEM so we can target for in-depth

Page 15

investigations in areas where anomalies occur.

School children participate in the monitoring of streams near their schools, and for the rest of their lives, they remember the experience and are better environmental citizens for it. Changing mindsets is how we take the next step in improving the environment, especially in our watersheds.

Alabama Water Watch is the type organization that works methodically in partnership with ADEM toward solutions. For nearly 20 years, ADEM has used federal funds to support this grant program. EPA unexpectedly eliminated a large portion of the grant funds for this year when we were nearly two-thirds through the budget year. The upcoming budget year is anticipated to be worse than this year.

ADEM will have very limited federal grant funds to support Alabama

Page 16

Water Watch and the many other valuable programs where we have partnered with others. Our reduced state budget precludes that as a souse of funding.

To overcome these challenges, we'll be seeking ways to reduce the cost of operating the programs, the encouraging federal and state entities to recognize the value of the programs and consider restoring funding, and finally, we'll be approaching outside funding sources. The takeaway on relationships is that we understand their importance; we work to build them, and we are focused on ways to overcome the strains created by current economic conditions.

I'd like to close with a final word, and this is where I'd like to ask your indulgence in displaying your photos and brief biographies out in the lobby. I know y'all are reluctant to have your capabilities brought up, but I

Page 17

would like to do so.
I think it's important to highlight the wisdom of the legislature in providing for specific training and expertise requirements for those serving as Commissioners. I'm also quite pleased to highlight the considerable credentials the Commission Members possess in the areas of demonstrated dedication to public service, concern for the people of Alabama, seasoned leadership, and community involvement.
Thank you for serving, and thank you for the opportunity you provide me to serve in this capacity. If there are any questions, I'd be pleased to answer them.
DR. LESTER: Any questions?
MR. LEFLEUR: Thank you.
DR. LESTER: Thank you. And I'd just like to thank you and the Department for keeping us in the budget this budget year. Got another month and

Page 18

a half. I hope we can make it.
MR. LEFLEUR: Hopefully.
DR. LESTER: State cut our budget, but folks don't realize how much EPA has cut us too. We were doing the same budget we've done for the last six years.
MR. LEFLEUR: That's correct.
DR. LESTER: Also, Debi, for the record, we do have a quorum. We had a quorum before Brown got here, but I wanted to wait so his name could be included on the members present. We have a quorum.
Also, to remind the Commissioners that our next meeting, we have election of the Chair and the Vice-Chair.
Our next item of business is to consider the Adoption of Proposed Additions and Amendments to ADEM's Administrative Code Division 335-6, Water

Page 19

Quality Program, Groundwater/Underground Injection Control (UIC regulations).
MS. MASSEY: Good morning. My name is Sonja Massey. I'm Chief of the Groundwater Branch in the Land Division of ADEM.
You have in the information provided to you Proposed Revisions to Division 6, Chapter 335-6-8 of the ADEM Administrative Code. This chapter contains administrative procedures for groundwater and the Underground Injection Control program for which the Department has obtained primacy from EPA.
December 10th, 2010, the EPA issued final requirements for the Underground Injection Control program for Carbon Dioxide Geologic Sequestration, or Class VI injection wells. This is a new well classification which EPA has established for this purpose.
If the State of Alabama is to obtain primacy from EPA for the

Page 20

regulation of Class VI wells, the Department must incorporate the federal Class VI injection-well requirements into the Department's Administrative Code.
The rulemaking proposal you have before you incorporates the federal requirements for Class VI injection wells in Chapter 335-6-8. It also provides for additional requirements for Class V experimental wells for experimental technologies relating to carbon dioxide injection for carbon sequestration.
All other rule amendments in this chapter are to reflect the changes in numbering sequence, clarifying existing language, and correcting typographical errors. Rulemaking public notice requirements have been completed, and a public hearing was held July 11th, 2011. No comments were received.
The Department recommends that the proposed rule revisions be adopted, and I'll be glad to answer any

Page 21

questions that you may have.
DR. LESTER: Any questions from the Commission? Thank you.
Now I'll entertain a motion from the Commission regarding this proposed addition and amendment to the UIC regulation.
MR. BROWN: Move to accept.
DR. MILLER: Second.
DR. LESTER: Motion and second. All in favor, say "aye."
ALL: Aye.
DR. LESTER: All opposed? Thank you, ma'am. You did a great job on this. I don't think -- sometimes people don't realize how much information we all have. Take a pickup truck to carry it home. The good thing is, now we're going from paper to electronic, which is first going to save us a lot of money, but it gets the information to us instantly.
Next item is U.S. Real Estate - a Division of United States

Page 22

Steel Corporation, versus ADEM, Docket 11-01. We will acknowledge the Petitioners withdrew their request for a hearing.
Next is Reynolds Inliner, L.L.C., versus ADEM, Docket No. 11-4. And also, we will acknowledge the Petitioner's withdrawal of a request for a hearing.
Next item is the Wynlake Development, L.L.C., versus ADEM. It's Docket No. 11-07. And at this time, we will -- the Commission will consider the order and recommendation of the hearing officer. Also, the Petitioners filed objections to the order recommendation of the hearing officer, and the Department has filed a reply to the Petitioner's objection. What's the pleasure of the Commission?
DR. RICHARDSON: Move to adopt.
DR. LESTER: We have a

Page 23

motion.
MR. BROWN: Second.
DR. LESTER: All in favor, say "aye."
ALL: Aye.
DR. LESTER: All opposed.
Next item is Black Warrior Riverkeeper, L.L.C., versus ADEM and Shepherd Bend, L.L.C./Intervenor, Docket No. 09-04. Petitioner has -- we will consider the Report of the Hearing Officer. Also, the Petitioner filed objections to the Report of the Hearing Officer, Alternative Finding In Fact and Conclusion of Law, and Proposed Order to Adopt Petitioner's Alternate Findings of Fact Conclusion of Law, and vacate the NPDES permit issued to Shepherd Bend for the reasons stated in the alternate finding of fact and conclusion of law.
The Department filed a reply to the Petitioner's objection, and the Intervenor filed responses to the

Page 24

Petitioner's objection and to the Petitioner's ultimate findings of facts and conclusions of law. At this time, I'll entertain a motion.
DR. MILLER: Mr. Chairman, I recommend we accept the Hearing Officer's report.
DR. LESTER: I have a motion. Do I have a second?
DR. RICHARDSON: Second.
DR. LESTER: Motion and second. All in favor, say "aye."
ALL: Aye.
DR. LESTER: All opposed.
Come to one of these meetings, you don't know what's going to happen. Unusual thing happened before the meeting. Our young lady here who takes our -- everything down came up to Dr. Miller and told her, years ago, when she was a little girl, he fixed her broken leg.
DR. MILLER: She's still

walking.

DR. LESTER: And married. She had to give her first name, real -- her real name -- but her name. Glad you could make that so I could hear it.

Our next meeting date will be October the 21st. All the Commissioners, any problem with it? If not, we'll have our meeting on October the 2st. I'll have a motion to adjourn.

DR. MILLER: So move.

DR. RICHARDSON: Second.

DR. LESTER: All in favor, say "aye."

ALL: Aye.

DR. LESTER: All opposed?

(The meeting was adjourned.)

* * * * * * * *

REPORTER'S CERTIFICATE

* * * * * * * *

STATE OF ALABAMA
COUNTY OF MONTGOMERY

I, Jenny Cone, Certified Shorthand Reporter and Notary Public in and for the State of Alabama at Large, do hereby certify that the foregoing is a true and accurate excerpt of the proceedings as taken stenographically by me at the time and place aforementioned.

This 28th day of August, 2011.

_____

Jenny Cone
Reporter and Notary Public
State of Alabama at Large

* * * * * * * *

REPORTER'S CERTIFICATE

* * * * * * * *

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Jenny Cone, Certified Shorthand Reporter and Notary Public in and for the State of Alabama at Large, do hereby certify that the foregoing is a true and accurate excerpt of the proceedings as taken stenographically by me at the time and place aforementioned.

This 28th day of August, 2011.

Jenny Cone / MTR

Jenny Cone

Reporter and Notary Public

State of Alabama at Large

Part B

Attachment Index

Attachment 1	**Agenda**
Attachment 2	**Resolution adopting additions and amendments to ADEM Admin. Code Division 335-6, Water Quality Program, Groundwater/Underground Injection Control (UIC) Regulations** **(Agenda Item 4 – Consideration of adoption of proposed additions and amendments to ADEM Admin. Code Division 335-6, Water Quality Program, Groundwater/Underground Injection Control [UIC] Regulations)**
Attachment 3	**Order adopting the Order/Recommendation of the Hearing Officer** **(Agenda Item 7 – Wynlake Development, LLC v. ADEM, EMC Docket No. 11-07 [NPDES-Related Matter])**
Attachment 4	**Order adopting the Report of Hearing Officer** **(Agenda Item 8 – Black Warrior Riverkeeper, Inc. v. ADEM, and Shepherd Bend, LLC/Intervenor, EMC Docket No. 09-04 [NPDES-Related Matter])**

Attachment 1

AGENDA*
MEETING OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
DATE: August 19, 2011
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

* The Agenda for this meeting will be available on the ADEM website, www.adem.alabama.gov, under Environmental Management Commission.

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

1. CONSIDERATION OF MINUTES OF MEETING HELD ON JUNE 24, 2011

2. REPORT FROM THE DIRECTOR

3. REPORT FROM THE COMMISSION CHAIR

4. CONSIDERATION OF ADOPTION OF PROPOSED ADDITIONS AND AMENDMENTS TO ADEM ADMIN. CODE DIVISION 335-6, WATER QUALITY PROGRAM, GROUNDWATER/UNDERGROUND INJECTION CONTROL (UIC) REGULATIONS

   The Commission will consider proposed additions and amendments to ADEM Admin. Code Division 335-6 Water Quality Program, Groundwater/Underground Injection Control (UIC) Regulations, Rules 335-6-8-.01, 335-6-8-.02, 335-6-8-.05, 335-6-8-.07, 335-6-8-.08, 335-6-8-.10, and 335-6-8-.12 through 335-6-8-.30. The revisions are being proposed to include requirements for Class VI injection wells, for geologic sequestration of carbon dioxide. The proposed additions and amendments are consistent with the federal regulations for Class VI wells. The Department held a public hearing on the proposed revisions on July 11, 2011.

5. U.S.S. REAL ESTATE – A DIVISION OF UNITED STATES STEEL CORPORATION V. ADEM, EMC DOCKET NO. 11-01 (NPDES-RELATED MATTER)

   The Commission will acknowledge the Petitioner's withdrawal of the request for hearing in this appeal concerning ADEM Admin. Order 11-006-WP issued on October 18, 2010, to U.S.S. Real Estate – a Division of U.S. Steel Corporation, Trace Crossings, Jefferson County, Alabama, NPDES Registration No. ALR160591.

6. REYNOLDS INLINER, LLC V. ADEM, EMC DOCKET NO. 11-04

   The Commission will acknowledge the Petitioner's withdrawal of the request for hearing in this appeal concerning ADEM Admin. Order 11-043-GW issued on January 4, 2011, to Reynolds Inliner, LLC, ADEM Groundwater Incident No. GW 10-10-01, Highway 24, Russellville, Franklin County, Alabama.

7. WYNLAKE DEVELOPMENT, LLC V. ADEM, EMC DOCKET NO. 11-07 (NPDES-RELATED MATTER)

   The Commission will consider the "Order/Recommendation" of the Hearing Officer in this appeal concerning ADEM Admin. Order 11-069-WP issued on March 24, 2011, to Wynlake Development, LLC, Wynlake Subdivision, Shelby County, NPDES Registration No. ALR160672.

8. BLACK WARRIOR RIVERKEEPER, INC. V. ADEM, AND SHEPHERD BEND, LLC/INTERVENOR, EMC DOCKET NO. 09-04 (NPDES-RELATED MATTER)

   The Commission will consider the "Report of Hearing Officer" in this appeal concerning ADEM's issuance of NPDES Permit AL0079162 on July 21, 2008, to Shepherd Bend, LLC, Shepherd Bend Mine, Walker County.

9. OTHER BUSINESS

10. FUTURE BUSINESS SESSION

Attachment 2

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

WHEREAS, the Alabama Department of Environmental Management gave notice of a public hearing on the proposed revisions to ADEM Admin. Code 335-6 of the Department's Water Division's Water Quality Program Rules and Regulations in accordance with Ala. Code § 22-22A-8 (2006 Rplc. Vol.) and Ala. Code § 41-22-4 (2000 Rplc. Vol.); and

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

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

NOW THEREFORE, pursuant to Ala. Code §§ 22-22A-5, 22-22A-6, 22-22A-8 (2006 Rplc. Vol.), and Ala. Code § 41-22-5 (2000 Rplc. Vol.), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to rules [335-6-8-.01/Purpose (Amend); 335-6-8-.02/Definitions (Amend); 335-6-8-.05/Prohibited Actions (Amend); 335-6-8-.07/ Permit Issuance Procedures (Amend); 335-6-8-.08/ Public Notice (Amend); 335-6-8-.10/Class V Well Permit Application Requirements (Amend); 335-6-8-.12/Permit Issuance Procedures (Amend); 335-6-8-.13/Class VI Well Applicability and General Requirements (New); 335-6-8-.14/Class VI Well Permit Application and Application Review Requirements (New); 335-6-8-.15/Class VI Well Minimum Criteria for Siting (New); 335-6-8-.16/Area of Review and Area of Review Corrective Action (New); 335-6-8-.17/Class VI Well Financial Responsibility Requirements (New); 335-6-8-.18 /Class VI Well Construction Requirements (New); 335-6-8-.19/Class VI Well Logging, Sampling and Testing Requirements Prior to Injection Well Operation (New); 335-6-8-.20/Class VI Well Operating Requirements (New); 335-6-8-.21/Class VI Well Mechanical Integrity Requirements (New); 335-6-8-.22/Class VI Well Testing and Monitoring Requirements (New); 335-6-8-.23/Class VI Well Reporting Requirements (New); 335-6-8-.24/Class VI Well Plugging Plan (New); 335-6-8-.25/Post-Injection Site Care and Site Closure Requirements (New); 335-6-8-.26/Class VI Well Emergency and Remedial

Response Requirements (New); 335-6-8-.27/Class VI Well Permit Requirements (New); 335-6-8-.28/Technical Submittals and Other Reports to the Department (Amend); 335-6-8-.29/Coordination with EPA (Amend); and 335-6-8-.30/Confidentiality (Amend)] administrative code attached hereto, to become effective thirty-five days, unless otherwise indicated, after filing with the Alabama Legislative Reference Service.

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-6- Water Quality Program Regulations

IN WITNESS WHEREOF, we have affixed our signatures below on this 19th day of August 2011.

APPROVED:

DISAPPROVED:

ABSTAINED:

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 19th day of August 2011.

John E. Lester, Chair
Environmental Management Commission
Certified this 19th day of August 2011

Attachment 3

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

In the Matter of:	)	
	)	
Wynlake Development, Inc.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	EMC Docket No. 11-07
	)	
Alabama Department of Environmental Management,	)	
	)	
Respondent.	)	

ORDER

This cause having come before the Environmental Management Commission pursuant to the "Order/Recommendation" of the Hearing Officer, "Petitioner's Objection to the Order/Recommendation of the Hearing Officer," "ADEM's Response to the Petitioner's Objection to the Hearing Officer's Recommendations," and the other documents in the record for the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the "Order/Recommendation" of the Hearing Officer is hereby adopted; and

2. That pursuant to the adoption of the "Order/Recommendation" of the Hearing Officer, the Department's "Motion to Strike and Dismiss" is granted; 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 copy of the "Order/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 19th day of August 2011.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

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 19th day of August 2011.

John H. Lester, Chair
Environmental Management Commission
Certified this 19th day of August 2011

ATTACHMENT

BEFORE THE ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

WYNLAKE DEVELOPMENT, LLC, Petitioner, vs. ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, Respondent.	)	DOCKET NO. 11-07

ORDER/RECOMMENDATION

This matter is before the undersigned on the Department's Motion to Strike and Dismiss. On or about June 13, 2011, the undersigned entered an Order/Recommendation. Due to the time limits involved in presenting this Recommendation to the Commission, with the consent of all parties, that Order/Recommendation was withdrawn. The Order/Recommendation is now re-entered.

The primary basis for the Department's Motion is Ala. Admin. Code r. 335-2-1-30, which prohibits a non-attorney from representing a party before the Commission. Hence, the Department argues that the failure of an attorney for Petitioner to sign the subject notice of appeal requires the dismissal of this matter.

The Commission's rules provide that an appeal must contain certain information. Ala. Admin. Code r. 335-2-1-04. If it does not, the Department is obligated to notify the appealing party of the information which is lacking and must do so within five (5) days from the receipt of the appeal. Ala. Admin. Code r. 335-2-1-004(7). One of the requirements listed in the Commission's rules is that the appeal must contain an "original signature of the party making such request or such person's attorney." Ala. Admin. Code r. 335-2-1-04(5). Noting in the record indicates the Department filed any notice of pleading defects to give

Petitioner an opportunity to correct the defect. However, the Department, in essence, argues that as a matter of law, there was no appeal filed due to Petitioner's failure to have an attorney sign the notice of appeal.

Among its contentions, Petitioner argues that although the notice of appeal was not signed by Petitioner's attorney, the notice listed the Petitioner's attorney's name on the notice and such should meet the spirit of the Department's rule. Further, Petitioner argues that such technicalities should not be invoked to cause such a severe sanction as a dismissal. Accordingly, Petitioner argues that equity and fairness should excuse the fact that Petitioner did not get an attorney to sign the notice of appeal.

At least in the context of an administrative proceeding as this, the undersigned fundamentally agrees with the Petitioner's position from a practical standpoint. However, based on precedent, the undersigned is bound to agree with the Department's position from a legal standpoint. See Canaan Systems, Inc. v. Department, EMC Docket No. 09-06, 2009 WL 2634671 (August 21, 2009) (In Canaan Systems, on an identical issue, the Petitioner there made similar arguments to Petitioner's arguments here. However, a majority of the Commission sided with the Department).

Therefore, the undersigned RECOMMENDS that the Department's Motion to Strike and Dismiss be GRANTED.

Petitioner shall have until August 1, 2011 to file objections to this Recommendation and the Department may file any reply by August 11, 2011.

Done this 20th day of July, 2011.

R. Rainer Cotter, III
Hearing Officer

PO Box 310910
Enterprise, Alabama 36331
Ph. 334-347-2626
Fax 334-393-1396
Email: rrc@enterpriselawyers.com

cc: (By U.S. Mail and Email)

Debi Thomas, Executive Assistant- dst@adem.state.al.us
James Wright- jlw@adem.state.al.us
Schulyer K. Espy- sespy@adem.state.al.us
Laura Eubank- leubank@adem.state.al.us
Billy R. Weathington- bw@weathington-moore.com

Attachment 4

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

In the Matter of:	)	
	)	
Black Warrior Riverkeeper, Inc.,	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Alabama Department of	)	
Environmental Management,	)	EMC Docket No. 09-04
Respondent,	)	
	)	
and	)	
	)	
Shepherd Bend, LLC,	)	
Intervenor.	)	

ORDER

This cause having come before the Environmental Management Commission pursuant to the "Report of Hearing Officer;" "Petitioner's Objections to Report of Hearing Officer;" "Petitioner's Alternative Findings of Fact and Conclusions of Law;" Petitioner's "Proposed Order;" "The Alabama Department of Environmental Management's Reply to Petitioner's Objections to Report of Hearing Officer;" "Shepherd Bend, LLC's Brief in Response to Petitioner's Objections to Report of Hearing Officer;" and "Shepherd Bend, LLC's Response to Petitioner's Alternative Findings of Fact and Conclusions of Law," and the other documents in the record for the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the "Report of Hearing Officer" is hereby adopted; and

2. That pursuant to the adoption of the "Report of Hearing Officer," the Findings of Fact and Conclusions of Law and Recommendation contained in said Report are adopted; 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 copy of the "Report of 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 19th day of August 2011.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

ABSTAINED:

Commissioner

RECUSED:

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 19th day of August 2011.

John H. Lester, Chair
Environmental Management Commission
Certified this 19th day of August 2011

ATTACHMENT

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

BLACK WARRIOR RIVERKEEPER, INC.,	)	
Petitioner,	)	
vs.	)	DOCKET NO. 09-04
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
Respondent, and	)	
SHEPHERD BEND, LLC,	)	
Intervenor.	)	

REPORT OF HEARING OFFICER

The undersigned Hearing Officer, duly employed by the Environmental Management Commission (the Commission) to conduct the hearing and all related proceedings pertinent to this matter, offers this report which includes Findings of Fact, Conclusions of Law and Recommendations. This report is submitted pursuant to Rule 335-2-1-.27 of ADEM Admin Code and is submitted along with the entire record of these proceedings including a complete transcript of the hearing, all documents allowed into evidence, and other relevant briefs and submissions of the parties.

I. INTRODUCTION AND PROCEDURAL HISTORY OF THIS PROCEEDING

This matter is before the Commission by way of a somewhat unusual procedural history and, because of that, a review of that history is an important consideration.

The Alabama Department of Environmental Management (ADEM) issued to Shepherd Bend, LLC (Shepherd Bend) a National Pollution Discharge Elimination System (NPDES) permit (Permit) on July 21, 2008. Subsequently, on December 22, 2008, Black Warrior Riverkeeper, Inc. (BWR) filed a request for a hearing before the Commission to contest the issuance of that permit. A hearing officer was appointed to hear this matter.

Subsequently ADEM moved to dismiss BWR's appeal, which was denied on February 24, 2009. On that same date, Shepherd Bend filed a Motion to Intervene. In March of 2009, all three parties (ADEM, BWR and Shepherd Bend) filed motions for summary judgment (Rule 335-2-1-.22). On July 31, 2009, the hearing officer entered a recommendation to the Commission to grant ADEM's Motion for Summary Judgment, to grant Shepherd Bend's Motion for Summery Judgment, and to dismiss the appeal.

After objections to the recommendation of the hearing officer were filed by BWR with responses from ADEM and Shepherd Bend, the Commission heard arguments and issued an order dated October 16, 2009. That order returned the proceeding to a "Hearing Officer to be appointed by the Commission" for a hearing upon the questions of:

> "(1) whether BWR is aggrieved by ADEM's administrative action, and
>
> (2) whether there is preponderating evidence that the administrative actions of the Department authorize discharges of pollutants which, upon discharge, will either cause or contribute to a detectable contravention of State water quality standards."

On November 18, 2009, a second hearing officer (the undersigned) was appointed to these proceedings consistent with the above-referenced order of the Commission. Normal pretrial motions were filed by the parties and ruled upon by the undersigned hearing officer. The proceedings went to hearing February 22-24, 2011 on the above issues and the issue of whether the NPDES permit had expired. At the hearing, ADEM renewed its motion to exclude any evidence related to design and construction of water pollution control improvements related to the Birmingham Water Works Board's (BWWB) rights at Mulberry Fork. Until today, that motion remains pending and is denied by this Order.

II. FINDINGS OF FACT

1. The evidence before the undersigned hearing officer establishes that Shepherd Bend applied for an NPDES permit from ADEM and, following routine procedures which included a comment period, that permit was issued to Shepherd Bend on July 21, 2008 as Numbered Permit AL0079162. A request for a hearing to contest the issuance of this permit was filed by BWR.

2. BWR is a corporation with approximate 1,900 members which has, as its general mission, to protect and restore the Black Warrior River and its tributaries. (R. 20) Individual members of BWR regularly use and enjoy the Black Warrior River, to include the Mulberry Fork, together with its tributaries in various ways upstream and downstream from the proposed outfall site. Its members testified before the undersigned that they regularly use and enjoy this

portion of the river for both business and recreational activities including canoeing, boating, swimming, fishing and other general pleasure use and hope to continue to enjoy the river in that fashion in the future. The members of BWR not only use the river in these fashions (or fashions similar to those described), but also attempt to police and monitor this river for pollution and problems of any type. Some of the members of BWR testified that they feared the issuance of this permit would hinder their use of the river in the future and believed that use is threatened by the discharges allowed by this permit.

3. Shepherd Bend's NPDES permit was issued on July 21, 2008. (R. 62; Hearing Exhibit 21) That NPDES permit expires 18 months after its issuance if construction was not begun within that time period.

4. It appears clear from the evidence presented that Shepherd Bend conducted the following activities at this site:

   A. In August of 2006 Shepherd Bend began to explore the use of this property and began to assess it for potential mining operations. During this exploratory phase in 2006, Shepherd Bend utilized existing roads and performed minimum road access for the purpose of this assessment.

   B. In March of 2007, Shepherd Bend commissioned a groundwater assessment on the site that included installation of groundwater wells with regular monitoring continuing. Information regarding the

monitoring of the wells and groundwater assessment was included in the permit application.

C. In October of 2007, Shepherd Bend commissioned a surface water assessment on the site.

D. From approximately September of 2008 to December of 2009, Shepherd Bend continued to gather baseline information for a surface coal mining application and continued surface and groundwater activities, information gathering about the land site and adjacent properties, evaluation of design plans and numerous other activities.

5. ADEM Admin. Code R. 335-6-6-.02(g) gives a definition of "Construction" which specifically includes "any placement, assembly, or installation of facilities or equipment." It appears from the record that most of this activity had been performed or conducted by Shepherd Bend prior to the issuance of the permit now in question. After this permit was issued, Shepherd Bend put up signs at the site and installed locks on the existing gate. Roads on the site were in place at that time, although not constructed by Shepherd Bend.

6. Shepherd Bend was, during the 18 months in question, subject to regulations not only from ADEM but also from the Alabama Surface Mine Commission, and those regulations limit some of the activities that Shepherd Bend could conduct on the site.

7. Shepherd Bend placed signs on the property in question after July 21, 2008 (the date of issuance of the permit itself) and it appears a gate on the site was already in place prior to the issuance of the permit (and remained in place during the 18-month period in question). The same can be said for the roads on the proposed mining site. Shepherd Bend did not clear land, did not construct any additional roads, and no other or additional construction took place after the permit was issued. Shepherd Bend did not begin to acquire any property rights or surface rights for the mine until April of 2010.

8. ADEM completed its water quality analysis using information obtained from the permit application, together with pertinent water quality data for the Mulberry Fork collected by the Department. This analysis took into consideration a range of river water quality conditions, together with intake volumes and mining discharge conditions. Based on this, ADEM's water quality branch determined that the quality of water would not be significantly affected by this proposed permit. (The undersigned hearing officer takes into consideration the pertinent facts related to this issue on a de novo basis and gives no presumption of correctness or presumption of any kind to either party.)

9. The permit in question before this Commission authorizes discharges of pollutants from 29 separate outfalls into the Mulberry Fork of the Black

Warrior River, together with its unnamed tributaries to the Mulberry Fork and unnamed tributaries to Barton Creek. It appears from the record that these receiving waters are classified for "public water supply" and/or "fish and wildlife" uses. This permit does not authorize any direct discharges to the Black Warrior River, nor does it authorize any discharges to waters listed on Alabama's Clean Water Act §303(d) list of impaired waters. The facts do not establish exactly how many outfalls Shepherd Bend will construct and operate, but the discharge limitations in place are consistent with the Environmental Protection Agency's surface coal mining technology-based effluent limitations set forth at 40 CFR Part 434. The permit contains precipitation event discharge limitations, and such are part of the EPA's national effluent guidelines. The precipitation event discharge limitations under this permit do not automatically apply, and for those limitations to apply Shepherd Bend would have to submit a written claim of exemption to ADEM which would have to be considered by ADEM and granted before such would apply.

10. This permit does not contain limitations on chlorides, sulfides, total dissolved solids (TDS) or aluminum, which are commonly associated with acid mine drainage. Under this permit ADEM may modify the terms of the permit if, in the future, it is shown to ADEM's satisfaction that the permit is not protective of water quality.

11. The tests of the soils and surrounding coal seam at Shepherd Bend have determined that the soils at Shepherd Bend are not acid-producing soils. Additionally, TDS, sulfate, chloride and aluminum are not expected to be discharged from any Shepherd Bend outfalls under this permit at any level that would tend to violate water quality criteria. It appears the discharge from the surface mine will largely be in the form of dirt from the mine site, and any substances that would not constitute dirt are not expected to be measurable amounts.

12. Although under appeal it appears that the Alabama Surface Mining Commission issued Shepherd Bend a permit numbered P-39465-64-15-S restricting the surface mining area to 286 acres.

III. CONCLUSIONS OF LAW

A. Aggrieved Parties. Alabama law makes clear through the ADEM Admin. Code R. 335-2-1, et seq. that one of the requirements for participating in this process is that a party be a "person aggrieved" by an administrative action of the Department. That issue is often discussed in those proceedings as an issue of "standing" and, while those two terms may not be identical, the pertinent issue here for consideration on return from the AEMC's findings is whether BWR is an aggrieved party under these rules sufficient to allow it to participate in this proceeding. Although not necessarily making a finding to that effect, the undersigned believes this issue could be one that is "jurisdictional in nature" (as standing is) and therefore

such can be raised at any time. "Aggrieved" as it applies to BWR requires a finding that at least one member of the organization suffers a concrete injury in fact as a result of the issuance of this permit.

By the evidence presented by BWR, it is the finding and conclusion of the undersigned hearing officer that BWR has established that it is an aggrieved party sufficient to meet the standards of ADEM Admin. Code R. 335-2-1, et seq. BWR has established, by legal evidence, that it and its members' use and enjoyment of the Black Warrior River is threatened by discharges under the permit, at least sufficiently to establish that it is an aggrieved party suitable for participation in this proceeding. It is the specific finding of the undersigned hearing officer that BWR is an aggrieved party under ADEM Admin. Code R. 335-2-1-02(b) and it could be said that BWR has suffered a threatened or actual injury in fact. (See also *Fowl River Protective Association*, 572 So.2d at 456).

B. Permit Validity. It is clear that the administrative regulations of ADEM establish that an NPDES permit issued under these circumstances to a "new discharger" or "new source" shall expire 18 months after issuance if "construction" has not begun during that same 18-month period. ADEM Admin. Code R. 335-6-6-.05(2) goes on to say that this period "shall be tolled by any administrative or judicial stay." The parties agree that this particular rule is applicable and that Shepherd Bend fits into the category of a "new discharger" or "new source"; however, they disagree as to whether construction has actually begun. Shepherd Bend contends that the facts of this case and the evidence before the

undersigned hearing officer, and now the Commission, clearly indicate that it met its requirement to begin construction within that 18-month time period. To the contrary, BWR contends that construction was not begun within that time frame. The Department appears to take no position on this particular matter.

These same rules also give a definition of the term "construction" which is found in ADEM Admin. Code R. 335-6-6-.02 and which reads as follows:

> "(g) Construction means that the owner or operator has:
>
> 1. begun, or caused to begin as a part of a continuous on-site construction program:
>
> (i) any placement, assembly, or installation of facilities or equipment; or
>
> (ii) significant site preparation work including clearing, excavating, or removal of existing buildings, structures or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment, or
>
> 2. entered into a binding contractual obligation for the purpose of placement, assembly, or installation of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility, engineering and design studies do not constitute a contractual obligation under the paragraph."

The undersigned hearing officer is not entirely convinced of the rationale of the hearing officer in *Waltham, et al. v. Alabama Department of Environmental Management,* EMC Docket Number 00-06, 2000 WL 1006329 (May 8, 2000) where this almost-identical issue was being litigated. There the hearing officer appeared to have determined that the building of a road, installation of a gate and the collection of water samples which included the construction of monitoring wells was, in all, sufficient to meet the definition of beginning "construction" under these Rules. However, the undersigned hearing officer is convinced that the adoption of that hearing officer's recommendation and thus the adoption of his rationale by this Commission is a previous ruling which should not be ignored by the undersigned. Based on that finding, it appears that the Commission should remain consistent in its ruling and, based on that decision, it is the conclusion of the undersigned hearing officer that Shepherd Bend did, indeed, meet the definition of construction activities sufficient to satisfy the Rules.

It should be noted here that, notwithstanding the above language, it does appear that Shepherd Bend's placement or installation of groundwater wells that have been the subject of ongoing monitoring (see Exhibit 159, which shows illustration of groundwater wells that have been placed, assembled and installed on the site) does indeed fit the precise definition of ADEM Admin. Code R. 335-6-6-.02(g).

For these reasons the undersigned hearing officer concludes that the facts establish Shepherd Bend did, indeed, commence construction sufficient to satisfy the 18-month requirement of this Rule.

C. Whether There is Preponderating Evidence that the Administrative Actions of the Department Authorizes Discharges of Pollutants Which, upon Discharge, Will Either Cause or Contribute to a Detectable Contravention of State Water Quality Standards. In reviewing the Commission's instructions on return of the proceedings, it appears that one must look to the Permit limitations in order to comply with those instructions. The Permit imposes EPA's uniform national effluent limitation guidelines for surface coal mines. (Ex. 116; 2/23 Tr. 230; 40 CFR Part 434) ADEM's NPDES regulations require Shepherd Bend's permit to meet: (1) EPA's National Effluent Limitation Guidelines for surface coal mines at 40 CFR Part 434, (2) any limitation necessary to protect water quality, or (3) any applicable TMDL, whichever of the three is most stringent. (ADEM Admin. Code R. 335-6-6-. 14) There is no TMDL for any receiving water at issue, and ADEM saw no need to set any limits more restrictive than the National Effluent Limitation Guidelines to protect water quality.

In addition to *numeric* criteria, ADEM's water quality regulations include *narrative* criteria commonly known as the "free froms." In general, these narrative criteria dictate that State waters will be "free from" various pollutants in amounts that will "cause or contribute to" an impairment of classified use of a given water body. (See ADEM Admin. Code R. 335-6-10-.06)

Again, this case is in an unusual procedural posture. What the Commission has instructed the undersigned Hearing Officer to determine is whether there is a preponderance of evidence that this permit will authorize discharges of pollutants which will, upon discharge, cause or contribute to a detectable contamination of State water quality standards as stated above.

1. Precipitation Events. One of the issues raised deals with the permit's exemption for limits on iron, manganese and Total Suspended Solids during precipitation events. Precipitation event discharge limitations are an alternate set of limitations afforded a facility under certain conditions, and they do not automatically apply. (2/23 Tr. 22-7229. See also 40 CFR Part 434) They are a facet of EPA's uniform national effluent limitations for surface coal mines. Here, based on the instructions given, the undersigned must determine whether the evidence establishes that the permit authorizes discharges which will cause or contribute to a detectable contravention to the water quality standards.

A permittee claims an exemption from generally applicable discharge limitations or post-mining discharge limitations after an applicable precipitation event; i.e., after the fact. (Ex. 116, pp. 5-8) Thus, even if a permittee claims the exemption and it is granted, that permittee is only exempted from compliance with EPA's national uniform effluent limitations. In other words, what might otherwise have been limits violations for that permittee would not be limits violations for that permittee if ADEM grants the exception.

It is important to note that even if ADEM grants the exemption, the permittee must still comply with water quality standards.

There is other substantial evidence in this records that is contradictory, confusing and, in some instances inconclusive; however, the undersigned hearing officer has determined that it has not been established that there is a preponderance of evidence that shows that there will be a detectable contravention of water quality standards based upon the precipitation event exemptions. The undersigned urges the Commission, with all of its collective expertise and knowledge, to examine this determination carefully in light of the contradictory evidence.

2. Absence of Limits for Sulfates, Chlorides, Aluminum and TDS. The question again is whether the absence of such limits will contribute to a detectable contravention of State water quality standards. The undersigned hearing officer is not convinced from the record that the absence of such limits will so contribute. While coal mines may contribute such, it has not been established to the undersigned's satisfaction (by a preponderance of the evidence) that such will occur. What a mine will discharge depends, in some respects, on what is in the dirt or rock at the mine, meaning that generally speaking, if something is not in the dirt at a mine, it is not expected to be discharged from the mine in a measurable amount. (2/223 Tr. 252) Sulfates, chlorides, aluminum and TDS are virtually always associated with acid mine drainage because they are not naturally occurring and acidity is required to bring them out. (2/24 Tr. 175-178) If the mine has no acidic condition, the opportunity for those constituents to form is very low. (2/24 Tr. 175-176) That is not to say

that such a discharge is impossible; indeed, the undersigned hearing officer believes that such is possible, but based upon the test of "preponderating evidence" the undersigned cannot make a finding simply on the basis of possibility. (Again, here the evidence was contradictory and the Commission should use its expertise to review it carefully and make its own independent determination.)

It should be noted that this permit includes discharge limitations for common metals which are related to coal mine operations. There is evidence that the treatment technologies for such, which include iron and manganese, are the same as the treatment for aluminum. Again, the undersigned does not find a preponderance of evidence that these pollutants will be discharged in a manner that will cause or contribute to a detectable contravention of State water quality standards. Again, the Commission should review this recommendation carefully.

IV. RECOMMENDATION

Because of the somewhat unique nature of this case having been returned to the undersigned Hearing Officer for a hearing on certain questions, it is submitted by the undersigned that such hearing has taken place and evidence has been presented by the parties on those questions. Although the Commission's order dated October 16, 2009 did not expressly direct the undersigned hearing officer to make a determination or recommendation on these questions, but rather to simply hold a hearing on these questions, it is unclear whether the Commission desires such from the undersigned. As noted above, there are

findings of fact and conclusions of law on these questions and, as such, the task at hand has been completed as directed.

Out of an abundance of caution, the undersigned Hearing Officer nevertheless offers the following recommendations should the Commission desire the same. As to whether Shepherd Bend continues to operate under a viable permit (an issue that was not part of the Commission's remand instructions), the undersigned recommends that question (if it is to be considered by the Commission) be answered in the affirmative. Further, the undersigned Hearing Office recommends that the Commission find that BWR is an aggrieved party under ADEM's administrative regulations and further recommends that there is not a preponderance of evidence that the permit in question authorizes discharges of pollutants which, upon discharge, will either cause or contribute to a detectable contravention of State water quality standards.

Respectfully submitted this the 20th day of July, 2011.

JAMES F. HAMPTON
Hearing Officer

Debra S. Thomas
James Wright, Esq.
Schuyler Espy, Esq.
Catherine Wannamaker, Esq.
Gilbert B. Rogers, Esq.
W. Anthony Davis, III, Esq.
Richard E. Davis, Esq.
Amber M. Whillock, Esq.