9/7/16

DRAFT

Minutes
Meeting of the
Rulemaking Committee of the
Alabama Environmental Management Commission
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
August 19, 2016

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Alabama Environmental Management Commission
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Montgomery, Alabama 36110-2400
August 19, 2016

Convened: 10:00 a.m.
Adjourned: 10:15 a.m.

Part A

Transcript
Word Index

Part B

Attachment Index
Attachment 1
Attachment 2
Attachment 3
Attachment 4

Part A

* * * * * * *

RULEMAKING COMMITTEE
OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION

ALABAMA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT
Alabama Room
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400

August 19, 2016
10:00 a.m.

* * * * * * *

Taken by: Bridgette W. Mitchell,
ACCR 231

* * * * * * *

APPEARANCES

COMMISSION MEMBERS PRESENT:
W. Scott Phillips, Chair
Mary J. Merritt
Terry D. Richardson, Ph.D.

ALSO PRESENT:
Robert Tambling, EMC Legal Counsel
Debi Thomas, EMC Executive
Assistant

CHAIRMAN PHILLIPS: Good morning. I'd like to call to order the August 19, 2016 Rulemaking Committee meeting. I acknowledge that we have a quorum.

Agenda Item No. 1 is the Consideration of minutes of the meeting held on June 17, 2016. I'll entertain a motion from the Committee regarding the minutes.

DR. RICHARDSON: I move to adopt the minutes of the June 17, 2016 Committee meeting.

MS. MERRITT: Second.

CHAIRMAN PHILLIPS: Any discussion?

(No response.)

CHAIRMAN PHILLIPS: No discussion. Call for the question. All in favor, signify with the sign "aye."

(Unanimous.)

CHAIRMAN PHILLIPS: Same sign against.

(No response.)

CHAIRMAN PHILLIPS: Motion carries.

We'll move to Agenda Item No. 2, the Committee reconciliation of public comment on the proposed revisions to ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda and consideration of the Committee's recommendation to the full Commission regarding the proposed revisions.

The draft reconciliation statement was included in the record for the proposed rule. The draft reconciliation statement contains the public comments, responses to public comments, and the proposed recommendations of the Rulemaking Committee to the full Commission. A draft of the guidelines for the public comment is an attachment to the draft reconciliation statement. Those proposed recommendations of the Rulemaking Committee to the full

Page 5

1 Commission are in the draft
2 reconciliation statement and is that no
3 further changes be made to the proposed
4 revisions to the rule.
5 I'll entertain a motion from the
6 Committee regarding the reconciliation
7 statement and proposed recommendation of
8 the Rulemaking Committee to the full
9 Commission that no further changes be
10 made to Proposed Rule 335-2-3-.05,
11 Agenda.
12 DR. RICHARDSON: I move to adopt
13 the reconciliation statement and
14 recommend to the Commission that no
15 further changes be made to the proposed
16 revision to Rule 335-2-3-.05,
17 Agenda.
18 MS. MERRITT: I second that
19 motion.
20 CHAIRMAN PHILLIPS: I have a
21 motion and a second. Is there any
22 further discussion?
23 (No response.)

Page 6

1 CHAIRMAN PHILLIPS: Being no
2 further discussion, all in favor signify
3 with the sign "aye."
4 (Unanimous.)
5 CHAIRMAN PHILLIPS: All opposed?
6 (No response.)
7 CHAIRMAN PHILLIPS: Motion
8 carries.
9 We have an order to sign, Debi?
10 MS. THOMAS: Yes, sir.
11 CHAIRMAN PHILLIPS: Moving to
12 Agenda Item No. 3, our Committee will
13 discuss the draft of the guidelines for
14 public comment and that the draft
15 guidelines for public comment will be
16 used in the application of the proposed
17 EMC Regulation 335-2-3-05 --.05, --
18 Agenda. The Committee will also consider
19 the Committee's recommendation to the
20 full Commission regarding the draft of
21 the guidelines for public comment. The
22 draft guidelines were attached to the
23 draft reconciliation statement in the

Page 7

1 record for the proposed revisions to the
2 rule, so I'll call for discussion by our
3 Committee regarding the draft guidelines
4 and any additional changes that the
5 Committee may want to propose. Any
6 discussion?
7 MS. MERRITT: I don't have any.
8 DR. RICHARDSON: Mr. Chair, I see
9 that we're down to just minor little
10 editorial changes, and I just don't
11 really have anything else to add.
12 CHAIRMAN PHILLIPS: I would
13 agree. I think we're just down to some
14 wordsmithing at this point. I don't
15 think any substantive changes have been
16 discussed. So with that and those
17 changes that we've discussed, I'll
18 entertain a motion from the Committee
19 regarding those proposed amendments to
20 the draft guidelines for public comment
21 and the Committee's recommendation to the
22 full Commission regarding the draft
23 guidelines. Do I have a motion?

Page 8

1 MS. MERRITT: I move to adopt the
2 proposed amendment to the draft
3 guidelines for the public comment and
4 recommend adoption of the draft
5 guidelines to the full Commission.
6 DR. RICHARDSON: I'll second that
7 motion.
8 CHAIRMAN PHILLIPS: Have a motion
9 and a second. Any further discussion?
10 (No response.)
11 CHAIRMAN PHILLIPS: All in favor
12 signify with the sign "aye."
13 (Unanimous.)
14 CHAIRMAN PHILLIPS: All opposed?
15 (No response.)
16 CHAIRMAN PHILLIPS: Motion
17 carries.
18 Moving to Agenda Item No. 4, which
19 is the Discussion and consideration of
20 Committee's recommendation to the full
21 Commission regarding draft forms for the
22 Commission meetings for the public to
23 request to make presentations and to

Page 9

1 register to make brief statements. I
2 want to open up for discussion here on
3 that topic. So any discussion that we
4 need to have as a Committee?
5 (No response.)
6 CHAIRMAN PHILLIPS: I'm going to
7 throw out, then, that from a form for the
8 presentation, we've outlined pretty
9 clearly in the -- in the new rule that
10 we're proposing and in the draft
11 guidelines, so I'm not quite sure that we
12 really need those forms at this point. I
13 think we'd be better off operating with
14 what we have, and then if we do need it,
15 going out to Rulemaking relative to that
16 form.
17 DR. RICHARDSON: Mr. Chairman,
18 that was going to be my suggestion, is
19 that we just try it like it is for now.
20 And if we decide we need to implement
21 forms, we can do so. I think the
22 Commission has functioned quite some time
23 now without forms. We'll just see how it

Page 10

1 goes.
2 MS. MERRITT: I agree.
3 CHAIRMAN PHILLIPS: So does
4 anyone have a motion for us to consider
5 relative to that?
6 (No response.)
7 CHAIRMAN PHILLIPS: I don't
8 really think we need one if we haven't
9 had a discussion. If we're clear we're
10 good without it, I don't know that we
11 need a recommendation.
12 MS. MERRITT: That we adopt one.
13 CHAIRMAN PHILLIPS: Yeah. All
14 right. Moving to Agenda Item No. 5,
15 Discussion on the process of rulemaking
16 that we would follow as a committee on
17 the policy issue of environmental justice
18 to determine what, if any, action the
19 Committee should take.
20 I will call on the Committee for
21 discussion.
22 DR. RICHARDSON: Mr. Chairman,
23 since we opened this issue, there has

Page 11

1 been some ongoing litigation with the
2 Department involving Title VI issues.
3 And while we fully understand and
4 appreciate that environmental justice and
5 Title VI are not exactly the same thing,
6 there are some intermingling issues
7 involved with that. And as a result, I'm
8 going to move to suspend the examination
9 of the policy issue of environmental
10 justice until such time as the
11 environmental justice and Title VI
12 litigation pending with the Department is
13 resolved.
14 MS. MERRITT: I second that. I
15 second that motion.
16 CHAIRMAN PHILLIPS: So the motion
17 is to suspend looking at policy of
18 environmental justice until such time as
19 those litigations are completed?
20 DR. RICHARDSON: That's correct.
21 CHAIRMAN PHILLIPS: All right.
22 Any additional discussion?
23 (No response.)

Page 12

1 CHAIRMAN PHILLIPS: Being no
2 additional discussion, all in favor
3 signify with the sign "aye."
4 (Unanimous.)
5 CHAIRMAN PHILLIPS: All opposed,
6 same sign.
7 (No response.)
8 CHAIRMAN PHILLIPS: Motion
9 carries.
10 Agenda Item No. 6, Other business.
11 Is there any other business to come
12 before the Committee?
13 MS. MERRITT: I don't have any.
14 DR. RICHARDSON: None that I know
15 of.
16 CHAIRMAN PHILLIPS: Move to
17 Agenda Item No. 7, which is Future
18 Rulemaking Committee meeting. In light
19 of the last motion that we just made, we
20 don't have any other pending business
21 before the Committee, so I would propose
22 that we not have another one until we do.
23 DR. RICHARDSON: Sounds like a

1 reasonable suggestion to me. And I guess
2 we will await guidance from you as to
3 when we need to schedule another one.
4 CHAIRMAN PHILLIPS: Is that okay
5 with you?
6 MS. MERRITT: Yeah. That's -- I
7 agree.
8 CHAIRMAN PHILLIPS: Okay. I'll
9 entertain a motion to adjourn.
10 DR. RICHARDSON: So moved.
11 MS. MERRITT: Second.
12 CHAIRMAN PHILLIPS: All in favor
13 signify with the sign "aye."
14 (Unanimous.)
15 CHAIRMAN PHILLIPS: Meeting is
16 adjourned.
17
18 (The hearing concluded at
19 10:15 a.m., on August 19, 2016.)
20
21
22
23

1 REPORTER'S CERTIFICATE
2
STATE OF ALABAMA)
3)
ELMORE COUNTY)
4
5
6 I do hereby certify that the above
and foregoing transcript was taken down
7 by me in stenotype, and the questions and
answers thereto were transcribed by means
8 of computer-aided transcription, and that
the foregoing represents a true and
9 correct transcript of the testimony given
by said witness.
10
11 I further certify that I am neither
of counsel, nor any relation to the
12 parties to the action, nor am I anywise
interested in the result of said cause.
13
14
I further certify that I am duly
15 licensed by the Alabama Board of Court
Reporting as a Certified Court Reporter
16 as evidenced by the ACCR number following
my name below.
17
18
19 /s/ Bridgette W. Mitchell
Bridgette W. Mitchell
20 Certified Court Reporter and
Commissioner for the State of
21 Alabama at Large
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22 MY COMMISSION EXPIRES 12/19/17
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18 Bridgette W. Mitchell

19 /s/ Bridgette W. Mitchell
Bridgette W. Mitchell
20 Certified Court Reporter and
Commissioner for the State of
21 Alabama at Large
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23

A

acknowledge (1) 3:4
action (1) 10:18
add (1) 7:11
additional (3) 7:4;11:22;12:2
ADEM (1) 4:5
adjourn (1) 13:9
adjourned (1) 13:16
Administrative (1) 4:6
adopt (4) 3:10;5:12;8:1;10:12
adoption (1) 8:4
against (1) 3:22
Agenda (11) 3:5;4:3,8;5:11,17;6:12,18;8:18;10:14;12:10,17
agree (3) 7:13;10:2;13:7
amendment (1) 8:2
amendments (1) 7:19
application (1) 6:16
appreciate (1) 11:4
attached (1) 6:22
attachment (1) 4:20
August (2) 3:2;13:19
await (1) 13:2
aye (5) 3:19;6:3;8:12;12:3;13:13

B

better (1) 9:13
brief (1) 9:1
business (3) 12:10,11,20

C

call (4) 3:2,18;7:2;10:20
can (1) 9:21
carries (4) 4:2;6:8;8:17;12:9
Chair (1) 7:8
CHAIRMAN (31) 3:1,14,17,21;4:1;5:20;6:1,5,7,11;7:12;8:8,11,14,16;9:6,17;10:3,7,13,22;11:16,21;12:1,5,8,16;13:4,8,12,15
changes (7) 5:3,9,15;7:4,10,15,17
clear (1) 10:9
clearly (1) 9:9
Code (1) 4:6
comment (7) 4:5,20;6:14,15,21;7:20;8:3
comments (2) 4:15,16
Commission (12) 4:7,10,19;5:1,9,14;6:20;7:22;8:5,21,22;9:22
Committee (20) 3:3,8,12;4:4,18,23;5:6,8;6:12,18;7:3,5,18;9:4;10:16,19,20;12:12,18,21
Committee's (4) 4:9;6:19;7:21;8:20
completed (1) 11:19
concluded (1) 13:18
consider (2) 6:18;10:4
Consideration (3) 3:6;4:9;8:19
contains (1) 4:15

D

Debi (1) 6:9
decide (1) 9:20
Department (2) 11:2,12
determine (1) 10:18
discuss (1) 6:13
discussed (2) 7:16,17
discussion (15) 3:15,18;5:22;6:2;7:2,6;8:9,19;9:2,3;10:9,15,21;11:22;12:2
down (2) 7:9,13
DR (10) 3:10;5:12;7:8;8:6;9:17;10:22;11:20;12:14,23;13:10
draft (17) 4:12,14,19,21;5:1;6:13,14,20,22,23;7:3,20,22;8:2,4,21;9:10

E

editorial (1) 7:10
else (1) 7:11
EMC (1) 6:17
entertain (4) 3:7;5:5;7:18;13:9
Environmental (6) 4:6;10:17;11:4,9,11,18
exactly (1) 11:5
examination (1) 11:8

F

favor (5) 3:19;6:2;8:11;12:2;13:12
follow (1) 10:16
form (2) 9:7,16
forms (4) 8:21;9:12,21,23
full (8) 4:10,18,23;5:8;6:20;7:22;8:5,20
fully (1) 11:3
functioned (1) 9:22
further (6) 5:3,9,15,22;6:2;8:9
Future (1) 12:17

G

goes (1) 10:1
Good (2) 3:1;10:10
guess (1) 13:1
guidance (1) 13:2
guidelines (11) 4:19;6:13,15,21,22;7:3,20,23;8:3,5;9:11

H

hearing (1) 13:18
held (1) 3:7

I

implement (1) 9:20
included (1) 4:13
intermingling (1) 11:6
involved (1) 11:7
involving (1) 11:2
issue (3) 10:17,23;11:9
issues (2) 11:2,6
Item (7) 3:5;4:3;6:12;8:18;10:14;12:10,17

J

June (2) 3:7,11
justice (5) 10:17;11:4,10,11,18

L

last (1) 12:19
light (1) 12:18
litigation (2) 11:1,12
litigations (1) 11:19
little (1) 7:9
looking (1) 11:17

M

Management (1) 4:7
may (1) 7:5
meeting (5) 3:3,6,12;12:18;13:15
meetings (1) 8:22
MERRITT (10) 3:13;5:18;7:7;8:1;10:2,12;11:14;12:13;13:6,11
minor (1) 7:9
minutes (3) 3:6,9,11
morning (1) 3:1
motion (17) 3:8;4:1;5:5,19,21;6:7;7:18,23;8:7,8,16;10:4;11:15,16;12:8,19;13:9
move (6) 3:10;4:3;5:12;8:1;11:8;12:16
moved (1) 13:10
Moving (3) 6:11;8:18;10:14

N

need (7) 9:4,12,14,20;10:8,11;13:3
new (1) 9:9
None (1) 12:14

O

off (1) 9:13
one (4) 10:8,12;12:22;13:3
ongoing (1) 11:1
open (1) 9:2
opened (1) 10:23
operating (1) 9:13
opposed (3) 6:5;8:14;12:5
order (2) 3:2;6:9
out (2) 9:7,15
outlined (1) 9:8

P

pending (2) 11:12;12:20

PHILLIPS (29)
3:1,14,17,21;4:1;
5:20;6:1,5,7,11;7:12;
8:8,11,14,16;9:6;10:3,
7,13;11:16,21;12:1,5,8,
16;13:4,8,12,15
point (2)
7:14;9:12
policy (3)
10:17;11:9,17
presentation (1)
9:8
presentations (1)
8:23
pretty (1)
9:8
process (1)
10:15
propose (2)
7:5;12:21
proposed (13)
4:5,11,14,17,22;5:3,
7,10,15;6:16;7:1,19;
8:2
proposing (1)
9:10
public (10)
4:4,15,16,20;6:14,15,
21;7:20;8:3,22

Q

quite (2)
9:11,22
quorum (1)
3:4

R

really (3)
7:11;9:12;10:8
reasonable (1)
13:1
recommend (2)
5:14;8:4
recommendation (6)
4:10;5:7;6:19;7:21;
8:20;10:11
recommendations (2)
4:17,22
reconciliation (8)
4:4,12,14,21;5:2,6,
13;6:23
record (2)
4:13;7:1
regarding (8)
3:8;4:11;5:6;6:20;
7:3,19,22;8:21
register (1)
9:1
Regulation (1)
6:17
Regulations (1)
4:7
relative (2)
9:15;10:5
request (1)
8:23
resolved (1)
11:13
response (10)
3:16,23;5:23;6:6;
8:10,15;9:5;10:6;
11:23;12:7
responses (1)
4:16
result (1)
11:7
revision (1)
5:16
revisions (4)
4:5,11;5:4;7:1
RICHARDSON (10)
3:10;5:12;7:8;8:6;
9:17;10:22;11:20;
12:14,23;13:10
right (2)
10:14;11:21
Rule (7)
4:8,14;5:4,10,16;7:2;
9:9
Rulemaking (7)
3:3;4:18,23;5:8;
9:15;10:15;12:18

S

Same (3)
3:21;11:5;12:6
schedule (1)
13:3
Second (8)
3:13;5:18,21;8:6,9;
11:14,15;13:11
sign (8)
3:19,21;6:3,9;8:12;
12:3,6;13:13
signify (5)
3:19;6:2;8:12;12:3;
13:13
Sounds (1)
12:23
statement (7)
4:12,15,21;5:2,7,13;
6:23
statements (1)
9:1
substantive (1)
7:15
suggestion (2)
9:18;13:1
sure (1)
9:11
suspend (2)
11:8,17

T

THOMAS (1)
6:10
throw (1)
9:7
Title (3)
11:2,5,11
topic (1)
9:3
try (1)
9:19

U

Unanimous (5)
3:20;6:4;8:13;12:4;
13:14
up (1)
9:2
used (1)
6:16

V

VI (3)
11:2,5,11

W

without (2)
9:23;10:10
wordsmithing (1)
7:14

0

05 (1)
6:17

1

1 (1)
3:5
10:15 (1)
13:19
17 (2)
3:7,11
19 (2)
3:2;13:19

2

2 (1)
4:3
2016 (4)
3:3,7,11;13:19

3

3 (1)
6:12
335-2 (1)
4:6
335-2-3-05 (4)
4:8;5:10,16;6:17

4

4 (1)
8:18

5

5 (1)
10:14

6

6 (1)
12:10

7

7 (1)
12:17

Part B

Attachment Index

Attachment 1 **Agenda**

Attachment 2 **Order to adopt motion to adopt Reconciliation Statement and recommend to the full Commission that no further changes be made to the proposed revisions to Rule 335-2-3-.05, Agenda with Attachments to Order – Draft Reconciliation Statement and Draft Guidelines for Public Comment (Agenda Item 2)**

Attachment 3 **Order to adopt motion to adopt the proposed amendments to the Draft Guidelines for Public Comment and recommend adoption of the Draft Guidelines for Public Comment to the full Commission with Attachment to Order – Amended Draft Guidelines for Public Comment (Agenda Item 3)**

Attachment 4 **Order to adopt motion to suspend examination of the policy issue of environmental justice until such time as the environmental justice and Title VI litigation pending with the Department (*Anthony Keith et al. v. Lance R. LeFleur et al.*, CV-2016-900939) is resolved (Agenda Item 5)**

Attachment 1

Amended 8/5/16

AGENDA*
MEETING OF THE
RULEMAKING COMMITTEE
OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
DATE: August 19, 2016
TIME: 10:00 a.m.
LOCATION: Alabama Department of Environmental Management (ADEM) Building
Alabama Room (Main Conference Room)
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400

	ITEMS	PAGE
1.	Consideration of minutes of meeting held on June 17, 2016**	2
2.	Committee reconciliation of public comment on proposed revisions to ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda and consideration of the Committee's recommendation to the full Commission regarding the proposed revisions	2
3.	Discussion of draft guidelines to the application of proposed amended ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda and consideration of the Committee's recommendation to the full Commission regarding the draft guidelines	2
4.	Discussion and consideration of the Committee's recommendation to the full Commission regarding draft forms for Commission meetings for the public to request to make presentations and to register to make brief statements	2
5.	Discussion on the process the Rulemaking Committee will follow to examine the policy issue of environmental justice and to determine what, if any, action the Committee should take	2
6.	Other business	2
7.	Future Rulemaking Committee meeting	2

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

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

1. CONSIDERATION OF MINUTES OF MEETING HELD ON JUNE 17, 2016

2. COMMITTEE RECONCILIATION OF PUBLIC COMMENT ON PROPOSED REVISIONS TO ADEM ADMINISTRATIVE CODE 335-2, ENVIRONMENTAL MANAGEMENT COMMISSION REGULATIONS, RULE 335-2-3-.05, AGENDA AND CONSIDERATION OF THE COMMITTEE'S RECOMMENDATION TO THE FULL COMMISSION REGARDING THE PROPOSED REVISIONS

   The Committee will consider the Draft "Reconciliation Statement for Record of Comments Received During the Public Comment Period and Hearing Held on Proposed Revisions to ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda." The Committee will also consider its recommendation to the full Commission regarding the proposed revisions.

3. DISCUSSION OF DRAFT GUIDELINES TO THE APPLICATION OF PROPOSED AMENDED ADEM ADMINISTRATIVE CODE 335-2, ENVIRONMENTAL MANAGEMENT COMMISSION REGULATIONS, RULE 335-2-3-.05, AGENDA AND CONSIDERATION OF THE COMMITTEE'S RECOMMENDATION TO THE FULL COMMISSION REGARDING THE DRAFT GUIDELINES

   The Rulemaking Committee will discuss the draft of guidelines that would be used in the application of proposed amended ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda. The guidelines would serve to educate and inform the public as to how the Commission interprets and intends to apply this Rule. The Committee will also consider its recommendation to the full Commission regarding the draft guidelines.

4. DISCUSSION AND CONSIDERATION OF THE COMMITTEE'S RECOMMENDATION TO THE FULL COMMISSION REGARDING DRAFT FORMS FOR COMMISSION MEETINGS FOR THE PUBLIC TO REQUEST TO MAKE PRESENTATIONS AND TO REGISTER TO MAKE BRIEF STATEMENTS

   The Rulemaking Committee will discuss the draft forms for Commission meetings for the public to request to make presentations and to register to make brief statements. The Committee will also consider its recommendation to the full Commission regarding the draft forms.

5. DISCUSSION ON THE PROCESS THE RULEMAKING COMMITTEE WILL FOLLOW TO EXAMINE THE POLICY ISSUE OF ENVIRONMENTAL JUSTICE AND TO DETERMINE WHAT, IF ANY, ACTION THE COMMITTEE SHOULD TAKE

   The Rulemaking Committee will discuss the process the Rulemaking Committee will follow to examine the policy issue of environmental justice and to determine what, if any, action the Committee should take.

6. OTHER BUSINESS

7. FUTURE RULEMAKING COMMITTEE MEETING

Attachment 2

BEFORE THE
RULEMAKING COMMITTEE
OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

MOTION

Adopt the Reconciliation Statement and Recommend to the full Commission

that no further changes be made to the proposed revisions to Rule 335-2-3-.05, Agenda

ORDER

This cause coming before the Rulemaking Committee pursuant to the referenced motion, it is hereby ORDERED:

That the referenced motion is hereby adopted; and

That in accordance with the referenced motion the Rulemaking Committee adopts the attached Reconciliation Statement for Record of Comments Received During the Public Comment Period and Hearing Held on Proposed Revisions to ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda and will recommend to the full Environmental Management Commission that no further changes be made to the proposed revisions to Rule 335-2-3-.05, Agenda; and

That this action has been taken and this Order issued by the Rulemaking Committee effective August 19, 2016.

ISSUED this 19th day of August 2016.

RULEMAKING COMMITTEE

APPROVED:

Mary J. Merritt
Committee Member

Terry D. Richardson
Committee Member

W. Scott Phillips
Committee Member

DISAPPROVED:

Committee Member

Committee Member

This is to certify that this Order is a true and accurate account of the actions taken by the Rulemaking Committee on this 19th day of August 2016.

W. Scott Phillips

W. Scott Phillips, Chair
Rulemaking Committee
Certified this 19th day of August 2016

DRAFT

Reconciliation Statement for Record of Comments Received During the Public Comment Period and Hearing Held on Proposed Revisions to ADEM Administrative Code 335-2, Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda

The Alabama Environmental Management Commission initiated the rulemaking process to consider proposed revisions to Environmental Management Commission Regulations, Rule 335-2-3-.05, Agenda, regarding Commission meeting agendas and requests from the public to make presentations at Commission meetings.

On June 16, 2016, a public hearing was held to receive data, views, and comments from interested persons regarding the proposed revisions to Rule 335-2-3-.05. Written comments were accepted during the public comment period, which extended from April 24 through June 16, 2016.

During the comment period, the Commission received written comments from David A. Ludder, dated June 16, 2016 (Exhibit A-1). The comments were submitted on behalf of the Environmental Defense Alliance, Choctawhatchee Riverkeeper, Inc., GASP, Black Warrior Riverkeeper, Inc., and Friends of Hurricane Creek.

COMMENTS CONCERNING PROPOSED REVISIONS TO RULE 335-2-3-.05

Comment: I. Description of Presentation

As amended, Rule 335-2-3-.05(2) would provide that "members of the public . . . must . . . submit to the Commission Office . . . a description of their presentation." As amended, Rule 335-2-3-.05(2) would also provide that "[w]ritten requests must include . . . a description of the matter to be presented." The language used to describe what has to be submitted is imprecise and likely to create confusion. On the one hand, the first sentence says to describe the presentation; on the other hand, the second sentence says to describe the matter to be presented. What degree of specificity and detail is expected? Will a description of the general subject matter suffice (*e.g.*,"Construction Stormwater Pollution in Dallas County")? Is a more detailed description required (*e.g.*, "Failure to install and maintain erosion controls at (location or site); offsite sediment transport resulting in pollution of (named creek); and ADEM's failure to enforce construction stormwater requirements")? Is even greater detail required? If the Commission does not revise the language to be more precise, it should explain in the response to comments how it intends to implement the rule language.

Response: The proposed amendment to the Rule 335-2-3-.05(2) does not in any way alter the requirement of the existing Rule that members of the public wishing to make presentations submit to the Commission office a written request along with a description of the matter to be addressed before the Commission. Thus, nothing more or less is required from members of the public under the proposed Rule than is now required under the existing Rule.

Comment: II. Unbridled Discretion

Rule 335-2-3-.05(2) provides that "[t]he Commission may, *at its discretion*, approve, deny, and/or table presentation requests." (Emphasis added). Such unbridled discretion, especially when constitutional freedoms may be abridged, is problematic.

Art. I, § 4, Ala. Const. 1901 (Off. Recomp.) provides: "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Similarly, U.S. Const. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment was made applicable to the states by U.S. Const. amend. XIV.

In Kunz v. New York, 340 U.S. 290 (1951), the Court condemned "an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York." Id. at 293. The Court said, "New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action." Id. at 295.

In Niemotko v. Maryland, 340 U.S. 268 (1951), the Court condemned a city practice of requiring permits for the use of a public park for public discourse "whereby all authority to grant permits for the use of the park is in the Park Commissioner and the City Council. No standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power; no substantial interest of the community to be served." Id. at 272. "The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." Id. "[T]he lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permits was a denial of equal protection." Id. at 273.

In Staub v. City of Baxley, 355 U.S. 313 (1958), the Court once again condemned a City's prior restraint on the exercise of free speech as unconstitutional where the officials authorized to permit speech were given uncontrolled discretion. The Court explained: "It will also be noted that the permit is not to be issued as a matter of course, but only upon the affirmative action of the Mayor and Council of the City. They are expressly authorized to refuse to grant the permit if they do not approve of the applicant or of the union's 'effects upon the general welfare of citizens of the City of Baxley.' These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit. *Cf.* Niemotko v. Maryland, 340 U.S. 268, 271-273. It is thus plain that they act in this respect in their uncontrolled discretion."

"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Id. at 322.

The Court continued: "It is undeniable that the ordinance authorized the Mayor and Council of the City of Baxley to grant "or refuse to grant" the required permit in their uncontrolled discretion. It thus makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays 'a forbidden burden upon the exercise of liberty protection by the Constitution.' " Id. at 325.

In the case of Rule 335-2-3-.05(2), the Commission proposes to adopt a rule allowing itself unbridled discretion to approve, deny, and/or table presentation requests. The lack of any content-neutral standards governing the exercise of discretion renders the rule a prior restraint on free speech in

contravention of Art. I, § 4, Ala. Const. 1901 (Off. Recomp.) and U.S. Const. amend. XIV. And any arbitrary and discriminatory denial or tabling of a presentation request would be a denial of equal protection. The proposed rule should be revised to articulate the content-neutral standards by which the Commission may deny or table a presentation request. Moreover, the proposed rule should be revised to require that the Commission declare the content-neutral standards that justify any specific decision to deny or table a presentation request.

Response: The proposed Rule before the Commission is not devoid of standards or guidelines such that Commission action to approve, deny, and/or table presentation requests from the public would constitute an act of unbridled discretion resulting in a violation of First Amendment freedoms guaranteed by the U.S. Constitution and the Alabama Constitution of 1901. To the contrary, the existing and proposed Rules and the proposed Guidelines for Public Comment provide numerous reasonable standards and considerations to guide the Commission's discretion when making such decisions. Rule 335-2-3-.05(3) "specifically discourages the members of the Commission from engaging in the non-deliberative discussion of any case or legal proceeding pending before the Commission . . . ." This language remains unchanged in the proposed Rule. Section .05(3) of the proposed Rule further constrains the Commission from engaging in the non-deliberative discussion of any "matter involving the Commission that is the subject of any ongoing case or legal proceeding." In addition, Section .05(3) admonishes the Commission not to allow parties to such proceedings and members of the general public to use the public participation opportunities provided by the Commission "to circumvent administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment to the Commission in a formal manner designed to provide due process to all parties." All of these mandates prescribed by the existing Rule and carried forward in the proposed Rule will guide the Commission's discretion when deciding whether to approve, deny, and/or table presentation requests that are submitted to the Commission office.

There are also procedural requirements in the proposed Rule to guide the Commission's discretion. Section .05(2) of the proposed Rule requires the Commission, before approving a presentation request, to ensure that the presentation request has been submitted in a timely manner to the Commission office (not later than 14 days prior to the next regularly scheduled Commission meeting), and that the request satisfies the minimum requirements of the Rule, including that the request must be in writing, must include the name, address, telephone number and, if applicable, email address, and that it must include a description of the matter to be presented.

The Commission's proposed Guidelines for Public Comment (attached), if adopted, will serve to further inform and educate members of the public as to how the Commission interprets Rule 335-2-3-.05 and how the Commission intends to exercise its discretion when applying the Rule. Although not binding, the proposed Guidelines will facilitate the exchange of information between the public and Commission members by, among other things: encouraging time limits on presentations (proposed Guideline 1); advising speakers that their presentations be relevant, factual, and that the topic of any presentation be directly related to the Commission's functions (proposed Guideline 2-4); proposing that speakers first pursue all reasonable opportunities made available through the Department to address their concerns (proposed Guideline 5); suggesting that, if possible, specific names of individuals and corporations be omitted from presentations (proposed Guideline 6); suggesting the submittal of a well organized presentation outline to the Commission in advance of the presentation (proposed Guideline 7); and suggesting that, in lieu of presentations, members of the public may feel free to submit written comments to the Commission or Director of the Department (proposed Guideline 10). If the Commission denies a presentation request due to nonconformity with the Rule, the presentation request may be resubmitted to the Commission provided the nonconformity is corrected (Guideline 9).

Finally, to the extent that regularly scheduled meetings of the Commission provide a limited, rather than a traditional forum for public participation, the Commission may be allowed to place restrictions on the content and manner of presentations made at Commission meetings. The federal courts typically apply a forum analysis to determine whether a state governmental entity, such as the Alabama Environmental Management Commission, may place limitations on speech. Christian Legal Soc. Chapter of the University of Virginia, 515 U.S. 819, 679 (1995). In a limited public forum, the State or one of its agencies may "legally preserve the property under its control for the use to which it is dedicated. The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819, 829 (1995) (*citing* Lamb's Chapel v. Center Moriches Union Free Sch. Dist. 508 U.S. at 392-393 (1995)). A restriction based on subject matter "may be permissible if it preserves the purposes of that limited forum." *Id.* at 820. "A state may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 46. Thus, the State or its agencies may, by regulation, restrict speech in a limited public forum, as long as the regulation "(1) does not discriminate against speech on the basis of view point and (2) is reasonable in light of the purpose served by the forum." Fairchild v. Liberty Independent School Dist. 597 F.3d 747, 758 (2010) (*citing* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 37 (1983)). The proposed Rule and Guidelines for Public Comment satisfy both of these judicially mandated requirements.

Comment: III. Prohibited discussions

Rule 335-2-3-.05(3) is confusing at best and has been the subject of past controversy. The proposed amendment only compounds the confusion. The amendment provides: "While the Commission encourages public participation at its meetings, for reasons of fairness and due process to the parties in administrative and legal proceedings involving the Commission, it specifically discourages the members of the Commission from engaging in the non-deliberative discussion of any case or legal proceeding pending before the Commission, or of any decision by the Commission or matter involving the Commission or Department that is the subject of ~~in~~ any ongoing case or legal proceeding ~~pending appeal before the Courts of this State~~. Parties to such proceedings and members of the general public shall not be permitted to use the public participation opportunities herein provided by the Commission to circumvent administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment to the Commission in a formal manner designed to provide due process to all parties."

Existing Rule 335-2-3-.05(3) establishes requirements addressed to two groups: "members of the Commission" and "parties and members of the general public."

A. Members of the Commission

For reasons of fairness and due process to the parties in "administrative and legal proceedings" involving the Commission, the rule discourages *the Commission* from engaging in non-deliberative discussions of any of the following:

(1) any base or legal proceeding pending before the Commission [this certainly includes any administrative appeal];

(2) any decision by the Commission that is the subject of any ongoing case or legal proceeding [this certainly includes any ongoing judicial appeal of a Commission decision in an administrative appeal];

(3) any matter involving the Commission that is the subject of any ongoing case or legal proceeding; and

(4) any matter involving the Department that is the subject of any ongoing case or legal proceeding [this should not be construed to include matters involving the Department that are not the subject of "administrative and legal proceedings involving the Commission"].

Items (3) and (4) are proposed additions. The plain language of item (4) requires that it exclude matters involving the Department that are not the subject of "administrative and legal proceedings involving the Commission." Thus, public presentations on any matter involving the Department that is not the subject of an administrative or legal proceeding involving the Commission, are permissible.

B. Parties and members of the general public

To protect the due process rights of parties, Rule 335-2-3-.05(3) directs that *parties and the general public* "shall not be permitted to use the public participation opportunities herein provided by the Commission to circumvent administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment *to the Commission* in a formal manner . . .." (Emphasis added). The only proceedings where the presentation of testimony, evidence, or comment *to the Commission* in a formal manner are authorized are (1) administrative appeals pending before the Commission; and (2) rulemaking pending before the Commission. Notably, the existing rule does not prohibit parties or the general public from using the public participation opportunities provided by the Commission in Rule 335-2-3-.05 to discuss matters pending before the U.S. Environmental Protection Agency (*e.g.*, discrimination complaints or program withdrawal petitions) or the Federal or State judiciary (*e.g.*, citizen suits). Such discussions would not circumvent any administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment *to the Commission* in a formal manner. Thus, neither the existing rule nor the proposed amended rule authorize the Commission to deny presentation requests by parties or the general public concerning matters pending before the U.S. Environmental Protection Agency or Federal or State judiciary.

Response: As the Department's oversight body, the Commission is required by statute to select a director for the Department, and is required to establish, adopt, promulgate, repeal and/or suspend any rules, regulations, or standards for the Department that may be applicable to the State as a whole or any of its geographic parts. Ala. Code 1975, § 22-22A-6(a)(1) and (2). The Commission is also required to develop environmental policy for the state and hear and determine appeals of administrative actions. Ala. Code 1975, § 22-22A-6(a)(3) and (4). The Department, in turn, must implement the rules, regulations, standards, and policies that are approved by the Commission along with decisions made by the Commission in contested administrative cases. Ongoing litigation or pending legal proceedings that involve only the Department and not the Commission (such as proceedings pending before the U.S. Environmental Protection Agency) are likely to shape and impact future Commission actions and how the Commission and, by extension, the Department carry out their respective functions. Those proceedings should not be adversely influenced or affected by comments made by Commission members during the public comment period, nor should Commission members be "drawn out" or otherwise be placed in a situation where they might feel obliged to comment on matters that are the subject of such proceedings. Section .05(3) of the proposed Rule discouraging Commission members from engaging in the non-deliberative discussion of any "matter involving the Commission or Department that is the subject of any ongoing case or legal proceeding" provides a sensible and straightforward safeguard that is designed to prevent this from happening.

Comment: IV. Conclusion

Existing Rule 335-2-3-.05 and the proposed amendment thereto are in need of significant revision to address constitutional issues and improve clarity.

Response: The proposed Rule does not require revision or clarification, nor does it violate the U.S. Constitution or the Alabama Constitution of 1901.

After thoroughly reviewing each comment, the Rulemaking Committee is satisfied that the responses satisfactorily address the concerns set forth in the above-referenced written comments. The Rulemaking Committee recommends no further changes to the proposed revisions to the Rule. This reconciliation statement is hereby submitted on this 19th day of August 2016.

W. Scott Phillips
Chair, Rulemaking Committee
Environmental Management Commission

ATTACHMENT TO DRAFT RECONCILIATION STATEMENT

DRAFT GUIDELINES FOR PUBLIC COMMENT

The Commission wishes to facilitate the exchange of information between the Commission and the public in a manner that will enable the Commission to better serve the people of this State and their environment. To do so, the Commission has adopted the following guidelines to the application of EMC Rule 335-2-3-.05, Agenda and Public Participation. These guidelines will serve to educate and inform the public as to how the Commission interprets and intends to apply this Rule. The Commission believes that these guidelines will lead to a fair and consistent application of the Rule which will, in turn, promote a forum that is both suitable and conducive for responsible public participation.

1. Presentations should not exceed ten minutes. Presenters are therefore encouraged to state their most important points first and should understand that when the ten minute time limit has elapsed, they will be asked to conclude their presentation.

2. The topic of any presentation made to the Commission should be related directly to the Commission's functions. The Environmental Management Act defines the Commission's functions as (a) establishing rules, regulations, and environmental standards; (b) developing statewide environmental policy; (c) hearing appeals of administrative actions; and (d) selecting the ADEM Director. Topics outside of the scope of the Commission's defined functions will not be allowed. The Commission will not allow presentations advancing political agendas or presentations promoting the political or financial interests of any specific group(s) or individual(s).

3. The presentation of current and timely information is encouraged by the Commission. Presenting repetitive, irrelevant, or outdated information is neither productive, nor a good use of Commission time. The Commission requests that speakers provide relevant, accurate, and current data and information. In addition, speakers should be prepared to provide sources for data and information presented if requested. Presentation requests that raise topics that have already been thoroughly addressed through previous presentations are likely to be denied unless new and substantive information is provided.

4. All data presented should be factual. All data and data collection methods should be referenced and should be attributable to generally accepted reliable sources. Speakers should be mindful when presenting information not to violate any professional licensure or certification requirements.

5. The Commission's time should not be spent hearing matters that most appropriately should be initially addressed by the Department. Those wishing to make presentation requests before the Commission should first pursue all reasonable opportunities made available through the Department and its Director for addressing concerns. Failure to do so may result in a denial of the presentation request.

6. The Commission requests, when at all possible, that specific names of individuals or corporations be omitted from presentations. Any specific complaints mentioning individuals or corporations should be provided to the Director of the Department.

7. In order the help the Commission prepare and better understand the topic to be addressed, the Commission may request that those wishing to address the Commission submit a well organized outline of their presentation along with copies of any supporting documents they intend to use during the presentation. If, during the presentation, the outline submitted is not adhered to and the speaker strays from the subject identified in the outline, this will be noted by the Chair and the speaker may be asked to return to the subject of the presentation as reflected in the outline. If an outline and supporting documents are not provided, then the Commission may table the presentation request until such time as an outline and supporting documents are submitted.

8. Questions and comments from Commission members during or following a presentation are allowed and should be expected. Commission members are free to ask any questions believed necessary regarding the presentation.

9. The Commission, at its discretion, may approve, deny, table, or take no official action whatsoever on a presentation request. Those requesting to make presentations should not attend a Commission meeting with the expectation that their request will be automatically granted. Presentation requests that are approved may be placed on the agenda for subsequent (generally the following) regularly scheduled meeting of the Commission. Presentation requests that are denied due to a failure to conform to the Rule or Guidelines may be resubmitted to the Commission provided that the nonconformity is corrected.

10. Members of the public wishing to engage the Commission should feel free to submit written comments and other materials to the Commission office or the Director of the Department in lieu of presentation requests. Written comments submitted to the Commission office will be carefully read by Commission members and will be given the same weight and consideration as the presentations made during Commission meetings.

11. Members of the public that wish to make brief statements 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 five 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 statements in the order their names appear on the register. Speakers are encouraged to limit their statements 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.

Attachment 3

BEFORE THE
RULEMAKING COMMITTEE
OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

MOTION

Adopt the proposed amendments to the Draft Guidelines for Public Comment and

Recommend adoption of the Draft Guidelines for Public Comment to the full Commission

ORDER

This cause coming before the Rulemaking Committee pursuant to the referenced motion, it is hereby ORDERED:

That the referenced motion is hereby adopted; and

That in accordance with the referenced motion the Rulemaking Committee adopts the proposed amendments to the Draft Guidelines for Public Comment and will recommend to the full Commission that the Commission adopt the Draft Guidelines for Public Comment; and

That this action has been taken and this Order issued by the Rulemaking Committee effective August 19, 2016.

ISSUED this 19th day of August 2016.

RULEMAKING COMMITTEE

APPROVED:

Mary J. Smith
Committee Member

Terry D. Richardson
Committee Member

W. Scott Phillips
Committee Member

DISAPPROVED:

Committee Member

Committee Member

This is to certify that this Order is a true and accurate account of the actions taken by the Rulemaking Committee on this 19th day of August 2016.

W. Scott Phillips

W. Scott Phillips, Chair
Rulemaking Committee
Certified this 19th day of August 2016

DRAFT GUIDELINES FOR PUBLIC COMMENT

The Commission wishes to facilitate the exchange of information between the Commission and the public in a manner that will enable the Commission to better serve the people of this State and their environment. To do so, the Commission has adopted the following guidelines to the application of EMC Rule 335-2-3-.05, Agenda and Public Participation. These guidelines will serve to educate and inform the public as to how the Commission interprets and intends to apply this Rule. The Commission believes that these guidelines will lead to a fair and consistent application of the Rule which will, in turn, promote a forum that is both suitable and conducive for responsible public participation.

1. Presentations should not exceed ten minutes. Presenters are therefore encouraged to state their most important points first and should understand that when the ten minute time limit has elapsed, they will be asked to conclude their presentation.

2. The topic of any presentation made to the Commission should be related directly to the Commission's functions. The Environmental Management Act defines the Commission's functions as (a) establishing rules, regulations, and environmental standards; (b) developing statewide environmental policy; (c) hearing appeals of administrative actions; and (d) selecting the ADEM Director. Topics outside of the scope of the Commission's defined functions will not be allowed. The Commission will not allow presentations advancing political agendas or presentations promoting the political or financial interests of any specific group(s) or individual(s).

3. The presentation of current and timely information is encouraged by the Commission. Presenting repetitive, irrelevant, or outdated information is neither productive, nor a good use of Commission time. The Commission requests that speakers provide relevant, accurate, and current data and information. In addition, speakers should be prepared to provide sources for data and information presented if requested. Presentation requests that raise topics that have already been thoroughly addressed through previous presentations are likely to be denied unless new and substantive information is provided.

4. All data presented should be factual. All data and data collection methods should be referenced and should be attributable to generally accepted reliable sources. Speakers should be mindful when presenting information not to violate any professional licensure or certification requirements.

5. The Commission's time should not be spent hearing matters that most appropriately should be initially addressed by the Department. Those wishing to make presentation requests before the Commission should first pursue all reasonable opportunities made available through the Department and its Director for addressing concerns. Failure to do so may result in a denial of the presentation request.

6. The Commission requests, when at all possible, that specific names of individuals or corporations be omitted from presentations. Any specific complaints mentioning individuals or corporations should be provided to the Director of the Department.

7. In order ~~the~~ to help the Commission prepare and better understand the topic to be addressed, the Commission may request that those wishing to address the Commission submit a well organized outline of their presentation along with copies of any supporting documents they intend to use during the presentation. If, during the presentation, the outline submitted is not adhered to and the speaker strays from the subject identified in the outline, this will be noted by the Chair and the speaker may be asked to return to the subject of the presentation as reflected in the outline. If an outline and supporting documents are not provided, then the Commission may table the presentation request until such time as an outline and supporting documents are submitted.

8. Questions and comments from Commission members during or following a presentation are allowed and should be expected. Commission members are free to ask any questions believed necessary regarding the presentation.

9. The Commission, at its discretion, may approve, deny, table, or take no official action whatsoever on a presentation request. Those requesting to make presentations should not attend a Commission meeting with the expectation that their request will be automatically granted. Presentation requests that are approved may be placed on the agenda for subsequent (generally the following) regularly scheduled meeting of the Commission. Presentation requests that are denied due to a failure to conform to the Rule ~~or Guidelines~~ may be resubmitted to the Commission provided that the nonconformity is corrected.

10. Members of the public wishing to engage the Commission should feel free to submit written comments and other materials to the Commission office or the Director of the Department in lieu of presentation requests. Written comments submitted to the Commission office will be carefully read by Commission members and will be given the same weight and consideration as the presentations made during Commission meetings.

11. Members of the public that wish to make a brief statement~~s~~ 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 ~~five~~ 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~~s~~ in the order their names appear on the register. Speakers are encouraged to limit their statement~~s~~ 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.

Attachment 4

BEFORE THE
RULEMAKING COMMITTEE
OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

MOTION

Suspend examination of the policy issue of environmental justice until such time as the environmental justice and Title VI litigation pending with the Department (*Anthony Keith et al. v. Lance R. LeFleur et al., CV-2016-900939*) is resolved

ORDER

This cause coming before the Rulemaking Committee pursuant to the referenced motion, it is hereby ORDERED:

That the referenced motion is hereby adopted; and

That in accordance with the referenced motion the Rulemaking Committee suspends examination of the policy issue of environmental justice until such time as the environmental justice and Title VI litigation pending with the Department (*Anthony Keith et al. v. Lance R. LeFleur et al., CV-2016-900939*) is resolved; and

That this action has been taken and this Order issued by the Rulemaking Committee effective August 19, 2016.

ISSUED this 19th day of August 2016.

RULEMAKING COMMITTEE

APPROVED:

Mary Meneth
Committee Member

Terry D. Richardson
Committee Member

W. Scott Phillips
Committee Member

DISAPPROVED:

Committee Member

Committee Member

This is to certify that this Order is a true and accurate account of the actions taken by the Rulemaking Committee on this 19th day of August 2016.

W. Scott Phillips
W. Scott Phillips, Chair
Rulemaking Committee
Certified this 19th day of August 2016