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DRAFT

Minutes

**Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
April 12, 2024**

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1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
April 12, 2024

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

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Part A

MEETING OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

LOCATION: ALABAMA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT (ADEM) BUILDING
ALABAMA ROOM
1400 COLISEUM BOULEVARD
MONTGOMERY, ALABAMA 36110-2400
DATE: FRIDAY, APRIL 12, 2024
TIME: 11:00 A.M.

REPORTED BY: JEANA S. BOGGS, CCR
Commissioner for the
State of Alabama at Large

1 APPEARANCES
2 COMMISSION MEMBERS PRESENT:
3 A. FRANK MCFADDEN, P.E., CHAIR
4 KEVIN MCKINSTRY, VICE CHAIR
5 JOHN (JAY) H. MASINGILL, III
6 H. LANIER BROWN, II, ESQ
7 J. PATRICK TUCKER, M.D.
8 MARY J. MERRITT
9 COMMISSION MEMBERS NOT PRESENT:
10 RUBY L. PERRY, D.V.M.
11 ALSO PRESENT:
12 LINDSAY BARTON, ESQ., EMC LEGAL COUNSEL
13 SHAWN SIBLEY, ESQ., EMC LEGAL COUNSEL
14 LANCE LEFLEUR, ADEM DIRECTOR
15 DEBI THOMAS, EMC EXECUTIVE ASSISTANT
16
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1 MR. MCFADDEN: Okay. Welcome,
2 everyone, to the April 12th meeting of
3 the Alabama Environmental Management
4 Commission. And we'll call the meeting
5 to order and acknowledge we do have a
6 quorum, so we're good to go.
7 Item 1 on the agenda,
8 consideration of the minutes held on
9 February the 9th, 2024, the Chair notes
10 that the agenda, Item 1, is consideration
11 of these minutes. And that I'll
12 entertain a motion regarding the minutes.
13 MR. MASINGILL: We adopt the
14 minutes.
15 DR. TUCKER: I second.
16 MR. MCFADDEN: All right.
17 Seconded. Any discussion?
18 (No response).
19 MR. MCFADDEN: Okay. No
20 discussion. I call for the question.
21 All in favor of adopting the minutes,
22 raise your hand.
23 (All Commission Members

1 raising hands).
2 MR. MCFADDEN: Any opposed?
3 (No response).
4 MR. MCFADDEN: Okay. It's
5 unanimous. Thank you.
6 Item Number 2, Report from the
7 Director, Lance.
8 MR. LEFLEUR: Good morning, all,
9 and good morning to all who are in
10 attendance at this fourth meeting of the
11 Alabama Environmental Management
12 Commission for FY-2024.
13 Today's report, as has been done
14 for a number of years, will focus on the
15 latest publicly available EPA-generated
16 compliance and enforcement metrics that
17 compare the Department's performance
18 against the rest of the states in the
19 nation. This is one of the methods we
20 use to analyze and optimize our
21 performance.
22 Next, you will see some photos
23 from the ribbon cutting at the new

<p style="text-align: right;">Page 5</p> <p>1 Coastal Office in Mobile that is now in 2 full operation. And, finally, I will 3 report on several personnel matters. 4 Analyzing the rates of 5 compliance with permits and the rate of 6 necessary enforcement actions for our 7 regulated industries in Alabama compared 8 to the rest of the nation is an important 9 way that we measure our performance. 10 This EPA-provided analysis 11 examines the Air, NPDES, Drinking Water, 12 and Hazardous Waste Programs. The tool 13 uses standard quantifiable metrics that 14 allow for state-to-state comparisons and 15 the development of national averages. 16 As you may recall from years 17 past, the format for reviewing each 18 program metrics is to look at the size of 19 the universe of the regulated facilities, 20 then to compare the rate of inspections, 21 informal enforcement actions, and 22 Significant Non-Compliance to the rest of 23 the nation. This format was chosen to</p>	<p style="text-align: right;">Page 6</p> <p>1 highlight that our objective is for 2 regulated facilities to comply with the 3 requirements of the environmental permits 4 and regulations issued by the Department. 5 By looking at noncompliance metrics, we 6 are, in effect, looking at compliance. 7 When we speak of compliance and 8 enforcement, we are referring to the 9 compliance with permits developed by the 10 Department in accord with carefully 11 developed environmental standards and 12 enforcement actions when conditions in 13 those permits and regulations are not 14 met. 15 Now to the dashboard slides that 16 analyze compliance with and enforcement 17 of environmental permit requirements. As 18 we begin, let me note that this 19 presentation will have essentially the 20 same information as the graphs that 21 appear at the end of the ADEM Update 22 memorandum you receive before each 23 Commission meeting. However, the graphs</p>
<p style="text-align: right;">Page 7</p> <p>1 in the Update memorandum are as they 2 appear on the EPA website, and they do 3 not use a common format, so we have 4 restructured them to be in a common 5 format for this report. 6 To help identify the program 7 that is the subject of the graph, each 8 individual graph, we will be using a 9 color code where blue is air, green is 10 water, orange is drinking water, and 11 brown is land. 12 First, we will look at the size 13 of the regulated universe over time for 14 each of the four program areas. 15 In Alabama, two local 16 programs -- local air programs were 17 grandfathered as standalone entities when 18 the Clean Air Act became law in 1970. 19 They operate independently of the ADEM 20 State Program, although ADEM does provide 21 substantial technical and other 22 assistance to them. 23 The universe of regulated Air</p>	<p style="text-align: right;">Page 8</p> <p>1 facilities under the ADEM Program is down 2 from 561 to 527 between 2015 and 2023, 3 about a 6% drop. The slowly declining 4 trend continued in 2023 with 533 in 2022 5 to the 527 in 2023. The decline is 6 primarily the result of some major 7 sources closing over the years and other 8 facilities reducing their emissions to 9 the point that they are no longer in the 10 universe of federally reportable 11 facilities. Facilities reducing their 12 emissions to the point they are no longer 13 reportable is in itself a very desirable 14 environmental outcome. 15 In the Water media, you can see 16 the number of regulated facilities was 17 generally steady at under 11,000, then a 18 slow increase with an interruption in 19 2021, a COVID influenced year. The 20 increasing trend resumed in 2022 and 2023 21 with an increase of more than 1,000, or 22 nearly 9%. There are now more than 23 12,000 regulated facilities. That rapid</p>

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1 increase in 2023 is a result of increased
 2 construction activity requiring increased
 3 construction stormwater permits. Since
 4 construction is cyclical, the increase
 5 may be temporary.

6 In Drinking Water, the universe
 7 has been on a slow decline from 590 in
 8 2015 to 571 in 2023, about a 3.2%
 9 decrease. The decline is due to the
 10 closing of several transient systems,
 11 which are those at locations like RV
 12 parks or state parks and due to several
 13 water systems merging with other systems.
 14 571 is a relatively small number of
 15 drinking water systems. In the case of
 16 drinking water, the smaller number of
 17 facilities that are of larger size is
 18 beneficial because larger facilities have
 19 improved access to management and other
 20 resources.

21 The universe of Hazardous Waste
 22 facilities steadily increased from 5,060
 23 in 2015 to about 5,400 in 2023. The

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1 nearly 7% increase is attributable in
 2 large part to a 2019 national enforcement
 3 settlement agreement that caused
 4 pharmacies and other retail facilities
 5 selling pharmaceuticals to report as
 6 Hazardous Waste generators.

7 To recap, the universes of
 8 permitted facilities for Air and Drinking
 9 Water are slowly declining, while the
 10 universes of permitted facilities for
 11 Water and Hazardous Waste are slowly
 12 increasing.

13 Next is inspections. Results
 14 show that inspecting is the most
 15 important tool to obtain compliance with
 16 environmental permits and requirements in
 17 Alabama.

18 The following graphs will show
 19 inspection rates for each of the four
 20 media. The different programs have
 21 different names for the inspection
 22 activities such as Full Compliance
 23 Evaluation or Facilities Inspected, or

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1 Site Visits or Inspection Coverage due to
 2 the slightly different terminology used
 3 in the various federal enabling statutes.
 4 The graphs will use the term
 5 "inspections" for all media.

6 The blue bars represent the
 7 inspection rate of all facilities during
 8 the last nine years for the Department's
 9 Air Program. The dashed red line
 10 represents the average inspection rate
 11 for the nation. As you can see, Alabama
 12 continues to have an inspection rate that
 13 is nearly four times the national average
 14 and, apart from 2020, a COVID year, shows
 15 a slowly increasing trend slightly over
 16 98%. I would note that the national
 17 trend is declining slightly while ADEM's
 18 trend is slowly increasing.

19 The green bars for the Water
 20 program, although declining in recent
 21 years, consistently show an inspection
 22 rate for all facilities that is nearly
 23 2-1/2 times better than the national

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1 average shown by the red dashed line.
 2 The orange bars for the Drinking
 3 Water Program show an inspection rate of
 4 more than 99% for all regulated
 5 facilities, making it about three times
 6 the national average shown by the red
 7 dashed line.

8 Closing out inspections, the
 9 brown bars for the Hazardous Waste
 10 Program show a rate for all inspections
 11 that is two to three times the national
 12 average.

13 As far as inspections are
 14 concerned, all media have inspection
 15 rates that are two to four times the
 16 national average, which shows the
 17 importance we place on inspections as a
 18 tool to achieve compliance.

19 The enforcement group of graphs
 20 highlights the second most important
 21 element after inspections in our strategy
 22 to achieve compliance. It has been our
 23 strategy to utilize education, including

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1 informal enforcement, to obtain a higher
 2 level of compliance. Research has shown
 3 that inspections and technical
 4 assistance, which is education, are the
 5 biggest contributors to compliance.
 6 Most violations are not
 7 intentional. They are many times the
 8 result of either not knowing what is
 9 required under the permits, accidents, or
 10 mistakes. Informal enforcement is one
 11 form of education that helps avoid those
 12 situations. As noted in the past,
 13 informal enforcement is also a more cost
 14 effective alternative without sacrificing
 15 compliance results.
 16 EPA enforcement data was used to
 17 create the following graphs showing the
 18 relationship between informal and formal
 19 enforcement actions.
 20 In this Air program graph, the
 21 blue columns represent the percentage of
 22 all enforcement actions that are informal
 23 and the dashed red line represents the

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1 average percentage for the nation. As
 2 you can see, except for 2022, ADEM
 3 consistently has a higher rate of
 4 informal enforcement than the rest of the
 5 nation. Both the Department and the
 6 national trend lines are essentially
 7 flat.
 8 In the Water Program, the
 9 percentage of informal actions is again
 10 higher than the national average
 11 represented by the red dashed line. Our
 12 trend is essentially flat around -- at
 13 around 95%. The rest of the nation is
 14 closing in on us with a rate approaching
 15 85%. Of course, some formal enforcement
 16 will always be required, so we are not
 17 likely to go beyond our 95% level.
 18 As you can see in this graph,
 19 both ADEM and the rest of the nation have
 20 very high rates of informal enforcement.
 21 The informal enforcement trend for our
 22 Drinking Water Program is flat and peaked
 23 out at a rate above the dashed red line,

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1 representing the national average that is
 2 also essentially flat.
 3 Hazardous Waste, like other ADEM
 4 programs, shows a high rate of informal
 5 enforcement that yields high levels of
 6 compliance. This program has employed a
 7 rate of informal enforcement that is
 8 similar to that of other ADEM programs
 9 and is on par with the national average.
 10 We will continue to apply emphasis on
 11 informal enforcement and outreach to
 12 Hazardous Waste facilities to enhance the
 13 compliance rates in our Hazardous Waste
 14 Program.
 15 Overall, ADEM has high rates of
 16 informal enforcement and the rest of the
 17 nation is approaching similar levels.
 18 This final group of dashboard
 19 slides will look at the rates of
 20 Significant Non-Compliance, commonly
 21 referred to as "SNC." The different
 22 programs use different terminology such
 23 as High Priority Violations or Priority

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1 Enforcement Systems to describe this type
 2 of noncompliance. However, for ease of
 3 presentation, we will use the term "SNC"
 4 to identify all violations that are of a
 5 more serious nature and thus are a cause
 6 for heightened concern. The objective of
 7 all environmental programs is to have a
 8 low noncompliance rate, which is
 9 synonymous with a high compliance rate.
 10 This group of slides -- graphs is where
 11 we'll see if our strategy of high rates
 12 of inspections and informal enforcement
 13 is showing results.
 14 Beginning with Air, the blue
 15 bars represent the percentage of
 16 inspections that result in a Significant
 17 Non-Compliance or (SNC) finding for
 18 Alabama facilities, and the dashed red
 19 line represents the national average.
 20 Both the Department and the rest of the
 21 nation have very low rates of Significant
 22 Non-Compliance in Air. These are the
 23 lowest of any media. The SNC rate for

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1 Alabama is typically about 1 1/2 percent,
 2 which is about two-thirds of the national
 3 average.
 4 The Water Program has a SNC rate
 5 as a percentage of inspections conducted
 6 that is exceptionally low compared to the
 7 rest of the nation. The rate is about
 8 one-fourth the national average and
 9 continues to trend favorable.
 10 The Drinking Water Program has a
 11 SNC rate of about one-sixth the national
 12 average, the dashed red line. The slight
 13 increase in 2022 is attributable to
 14 several systems that had a temporary
 15 issue with controlling disinfectant
 16 byproducts that occur when disinfectants
 17 used to treat the water react with
 18 naturally occurring organic material
 19 during distribution of the water.
 20 As you see, the Hazardous Waste
 21 Program is the one area where we are
 22 above the national average in the
 23 percentage of inspections showing

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1 incidence of Significant Non-Compliance,
 2 and we want to be below the national
 3 average.
 4 The Hazardous Waste Program
 5 primarily focuses on the management of
 6 hazardous waste handling sites, the
 7 implementation of measures to prevent new
 8 hazardous material releases, and the
 9 remediation of past hazardous material
 10 releases. For decades, we have had no
 11 substantial new hazardous waste sites
 12 created in Alabama that require cleanup,
 13 and many legacy sites have been cleaned
 14 up. However, in the Hazardous Waste
 15 Program, incidents of noncompliance
 16 classified as significant do occur.
 17 Incidents of Significant Non-Compliance
 18 typically involve exceeding the maximum
 19 number of days hazardous waste can be
 20 stored at a location and/or repeated
 21 occurrence of minor violations such as
 22 poor record keeping and labeling.
 23 At 8.3%, this year's percentage

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1 rate shows a slight decrease over last
 2 year's 9.3% rate, while the national
 3 average is up slightly, but we are not
 4 where we want to be. The 8.3% represents
 5 twelve facilities in Significant
 6 Non-Compliance out of a universe of 145
 7 large facilities inspected. More
 8 importantly, none of the SNCs identified
 9 have been found to result in harm to
 10 human health or the environment. EPA has
 11 reviewed some indications that SNC
 12 reporting protocols are not consistent
 13 among states, which may skew national
 14 comparisons, but has not yet been able to
 15 pinpoint any reason for the elevated SNC
 16 level at the Department. In fact, the
 17 most recent review of our RCRA program
 18 was very complimentary, especially for
 19 having met all work plan requirements.
 20 Nevertheless, the Land Division efforts
 21 to reduce Hazardous Waste SNC rate in the
 22 future will continue through a
 23 stepped-up, targeted education program,

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1 including video format instruction on the
 2 most common violations and how to avoid
 3 them. The program will also provide
 4 one-on-one training sessions with the
 5 treatment, storage, and disposal
 6 facilities, which are the largest
 7 hazardous waste handlers, as well as
 8 joint sessions with their customers that
 9 represent the next largest handlers. We
 10 will continue to address all violations
 11 with appropriate enforcement actions.
 12 So, with the exception of
 13 Hazardous Waste, the Significant
 14 Non-Compliance rates in Alabama are
 15 significantly lower than the rest of the
 16 nation.
 17 To summarize: The number of
 18 regulated facilities in Alabama is
 19 generally steady, with slight increases
 20 in the Water and Hazardous Waste media
 21 and slight decreases in the Air and
 22 Drinking Water media. High inspection
 23 rates are being implemented across all

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1 programs. The Department emphasizes
 2 informal enforcement, a form of
 3 education. Alabama has very low rates of
 4 Significant Non-Compliance compared to
 5 the rest of the nation in the Air, Water
 6 and Drinking Water Programs. An enhanced
 7 inspection and instructional program for
 8 facilities covered by the Hazardous Waste
 9 Program is being implemented to reduce
 10 the rate of Significant Non-Compliance.
 11 And, overall, the Department outperforms
 12 the rest of the nation in compliance and
 13 enforcement with long-term trends in key
 14 metrics that are generally favorable.

15 These metrics are consistent
 16 with the trends in non-statistical
 17 environmental quality measures over many
 18 years, highlighted in my periodic reports
 19 on the "State of the Environment in
 20 Alabama." They are also consistent with
 21 EPA, regulated industry, and independent
 22 research groups findings that Alabama is
 23 one of the top environmental performers

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1 in the planning, funding, design and
 2 construction process for 13 years. You
 3 see in this photo the ribbon cutting
 4 ceremony that took place on March 28.
 5 There were more than 100 guests,
 6 including a representative for Governor
 7 Ivey, area mayors, individuals
 8 representing Alabama US Senate and
 9 House members, Chair of the Mobile
 10 County Commission, Director of the
 11 Federal RESTORE Council,
 12 representatives from numerous federal
 13 and state agencies and environmental
 14 organizations, not to mention
 15 Commission members.

16 In this photo, you can see
 17 Commissioners Mary Merritt on the left,
 18 Dr. Patrick Tucker in the center front,
 19 and Chair Frank McFadden to the right
 20 in the front. I can't quite pick out
 21 Commissioner Kevin McKinstry, who is
 22 back in the crowd somewhere. Can you
 23 find yourself in that photo?

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1 in the nation.

2 While the State overall has
 3 an enviable environmental record, there
 4 are occasionally serious environmental
 5 issues that can and do cause great
 6 concern in local communities.
 7 Typically each year there are several.
 8 This year, heavy rains have caused
 9 concern with local sanitary sewer
 10 overflows. Aging individual and public
 11 wastewater handling systems have been a
 12 matter of heightened concern, as well
 13 as concerns with per and
 14 polyfluoroalkyl substances. We address
 15 these through various funding programs
 16 or regulatory and enforcement actions
 17 and cover them in my reports to you or
 18 in the news releases.

19 Next, I am pleased that with
 20 the exception of when I report on the
 21 sale of the old perimeter road
 22 facility, this will be the final report
 23 on the new Coastal Office that has been

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1 MR. MCKINSTRY: No, no.
 2 MR. LEFLEUR: Okay. All right.
 3 MR. MCKINSTRY: I'm in there,
 4 though.
 5 MR. LEFLEUR: It's not just me.
 6 MR. MCKINSTRY: I'm in there.
 7 MR. LEFLEUR: Okay. He is in
 8 there. He is in there.

9 Here you see the actual ribbon
 10 cutting with left to right: Tim
 11 Harrison, President of Harrison
 12 Construction, the builder; Amy Hunter,
 13 with the Alabama Department of
 14 Conservation and Natural Resources; Sandy
 15 Stimpson, Mayor of Mobile; Jeff Collier,
 16 Mayor of Dauphin Island; John Baker,
 17 President of Thompson Engineering, the
 18 parent of the Architectural firm,
 19 Watermark, the designer of the building;
 20 yours truly; Henry Barnes, Mayor of Bayou
 21 La Batre. You can see the top of the
 22 head of Merceria Ludgood, Chair of the
 23 Mobile County Commission; our own Marilyn

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1 Elliott; and Mary Walker, Director of the
 2 Gulf Coast Ecosystem Restoration Council,
 3 the major provider of the funding to
 4 build the facility.

5 As noted at the ribbon cutting,
 6 the facility has a number of
 7 environmentally friendly features,
 8 including rubber modified asphalt paving,
 9 rainwater retention to recharge
 10 groundwater, electric vehicle charging
 11 stations, recycled scrap tire material
 12 for the walking track, preservation of
 13 mature trees on the side, plantings of
 14 native trees, bushes and grasses,
 15 extensive use of natural light in both
 16 the office and laboratory areas, and LED
 17 lighting throughout.

18 As is our practice, when
 19 personnel achieve a significant milestone
 20 in their professional development, they
 21 are recognized for that achievement.
 22 This is an important element in our
 23 strategic and operating plans to

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1 changes among our more seasoned
 2 personnel.

3 When I came to the Department
 4 nearly 14 years ago, Marilyn Elliott had
 5 already been with the Department for more
 6 than 30 years, with more than ten of
 7 those serving as Deputy Director. Now
 8 after more than 45 years of service,
 9 including 25 as Deputy Director, as of
 10 March 1st, Marilyn assumed the position
 11 of Senior Advisor in order to facilitate
 12 a smooth transition to a new Deputy
 13 Director. Without question, Marilyn has
 14 contributed more to the significant
 15 successes of the Department than any
 16 other individual. On a personal note,
 17 she guided me through the process of
 18 environmental regulation. She
 19 consistently met or exceeded my every
 20 expectation. She plans to retire on
 21 December 31, 2024, when she has completed
 22 her final assignment of leaving the
 23 Department in the hands of a

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1 encourage professional development.

2 Today, I am pleased to recognize
 3 three individuals who have completed the
 4 rigorous process of education, work
 5 experience, and testing to earn the
 6 designation of Professional Engineer.
 7 Ricky Minor in our Land Division. Would
 8 you please stand.

9 (Mr. Minor standing).

10 MR. LEFLEUR: Robert Compton
 11 earned his PE in 2022, but we missed
 12 introducing him so belatedly.

13 Please stand and be recognized.

14 (Mr. Compton standing).

15 MR. LEFLEUR: Scott Jackson in
 16 our Water Division is out of the country,
 17 so we will recognize him at a future
 18 meeting.

19 Congratulations.

20 (Applause).

21 MR. LEFLEUR: These are the
 22 future leaders of ADEM.
 23 I also want to note some recent

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1 well-mentored new Deputy Director.

2 Marilyn, would you please stand
 3 and receive our heartfelt thank you for
 4 your service.

5 (Ms. Elliott standing).

6 (Applause).

7 MR. LEFLEUR: That's going to be
 8 a hard record to beat. Very hard record
 9 to beat.

10 Our new Deputy Director is
 11 Jeffrey Kitchens, who has been with the
 12 Department 30 years, having served in the
 13 Air, Land and Water Divisions. For the
 14 last twelve years, he has been in our
 15 Water Division most recently serving as
 16 the Water Division Chief. You may well
 17 recognize Jeff since he has from time to
 18 time made presentations before the
 19 Commission.

20 Jeff, would you stand and be
 21 recognized.

22 (Mr. Kitchens standing).

23 (Applause).

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1 MR. LEFLEUR: He's got big shoes
2 to fill, but he's got big feet.
3 And replacing Jeff as the Water
4 Division Chief is Daphne Lutz, who has
5 also been with the Department for 30
6 years, including 17 years in the Water
7 Division, most recently as Chief of the
8 Industrial and Municipal Branch.
9 Daphne, would you please stand.
10 (Ms. Lutz standing).
11 (Applause).
12 MR. LEFLEUR: So, with that,
13 that concludes my report, and I'll be
14 happy to answer any questions you may
15 have.
16 MR. MCFADDEN: It sounds like
17 we're doing well. Well, I'm glad you
18 didn't take the pictures of the eating
19 lunch at the Coastal Office opening.
20 MR. LEFLEUR: I know better than
21 that. Yeah, I know better than that.
22 MR. MCFADDEN: But it is a very
23 nice office. And thanks for all the hard

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1 in a nice area. It's right next to the
2 Coast Guard Base on the Bay, wetlands
3 right behind it, I mean, and it's all
4 open. Watermark did a great job with the
5 architecture to have that. I mean, it's
6 like you get up wanting to go to work in
7 that office no matter what you're doing.
8 You know, it's just a great place to
9 work.
10 So, that's great for
11 retention -- well, recruitment and
12 retention also. So, the side benefits of
13 some of that, not just being a pretty
14 building. So, thanks for the good work
15 on that.
16 And, Marilyn, thanks for a lot
17 of good, hard work over the years. And
18 you're not going too far, because I know
19 you live here in Montgomery. So, I will
20 have to drag you back over here and get
21 Jeff out of the ditch occasionally.
22 And, Jeff, thank you for
23 stepping up and willing to take that. I

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1 work, Lance. It took a long time to get
2 that done.
3 And Marilyn and I both were
4 working here back in the early days of
5 this agency when we would have died and
6 gone to heaven to have had a facility
7 like that to operate. Of course, all the
8 new technology makes it automation
9 better, precision, accuracy better, and
10 all.
11 So, anyway, great job on that,
12 Lance. And I don't know if it's proper
13 to get a motion to have a side Commission
14 Office in that building because it's
15 three miles from my office, and it
16 probably would not go with the Ethics
17 Commission, so we won't do that.
18 MR. LEFLEUR: Well, the
19 Commission members are invited to visit
20 the office at any time. Most of y'all
21 have had an opportunity and a few have
22 not. But it's very nice.
23 MR. MCFADDEN: But, yeah, it's

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1 know you're going to do a great job.
2 And, Daphne, who we worked with
3 for a number of years, and great choice
4 to come in behind you. So, great. Thank
5 you-all very much.
6 MR. LEFLEUR: Thank you.
7 MR. MCFADDEN: Okay. Item --
8 that's Item 2. Item 3, Report from the
9 Commission Chair. I have no report for
10 you today. And so we'll go to Item 4,
11 which is the National Salvage and Service
12 Corporation, is the Petitioner versus
13 ADEM, Respondent -- it's EMC Docket
14 Number 22-04 -- and referenced ADEM
15 Administrative Order 22-079-AP issued on
16 May 18, 2022, to National Salvage and
17 Service Corporation, Selma, Dallas
18 County, Alabama. We'll refer to this
19 today "National Salvage," or the
20 "Petitioner." So, that's who it is. And
21 they are appealing an administrative
22 order decision.
23 So, I'll note that this item on

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1 the agenda before the Commission is
 2 objections to the recommendation of the
 3 Hearing Officer and request for oral
 4 argument, the Petitioner's proposed
 5 order, ADEM's reply to Petitioner's
 6 objections to recommendation of the
 7 Hearing Officer, and the Department's
 8 proposed order to the Hearing Officer's
 9 recommendations.

10 If you don't remember all that,
 11 see me after the meeting. That's a
 12 mouthful.

13 The Chair also notes that the
 14 Hearing Officer, with supporting findings
 15 of fact and conclusions of law,
 16 recommends that the Commission sustain
 17 the Department's findings and approve its
 18 actions in Administrative Order Number
 19 22-079-AP, issued to National Salvage and
 20 Service Corporation.

21 Secondly, the Petitioner
 22 proposes that the Commission adopt the
 23 findings of fact and conclusions of law

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1 MS. HEMBREE: Yes.

2 MR. MCFADDEN: Okay. We do
 3 have. And we do have the Department's
 4 representative on that, attorney also.

5 So, what's the delight of the
 6 Commission?

7 MR. BROWN: I move to grant the
 8 request for oral argument and, without
 9 time limits, they can talk too long and
 10 hang themselves if they want to.

11 DR. TUCKER: Second that motion.

12 MR. MCFADDEN: Okay. Do we have
 13 any discussion on the motion? I would
 14 add, do we want to give it an open-ended
 15 timeline, Lanier or set it to --

16 MR. BROWN: Since you are
 17 presiding over these proceedings, you can
 18 cut them off at any time.

19 MR. MCFADDEN: Well, let's try
 20 to stay within ten minutes if we can do
 21 that.

22 So, all right. So, any more
 23 discussion? Anybody else have any ideas

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1 set forth in the Petitioner's proposed
 2 order and find that the Petitioner did
 3 not violate ADEM's open burning
 4 regulations when lightning ignited a fire
 5 at the facility on August 1st, 2021, and
 6 disapprove ADEM Administrative Order
 7 Number 22-079-AP.

8 And, lastly, ADEM proposes that
 9 the Commission adopt the findings of
 10 fact, conclusions of law, and
 11 recommendations of the Hearing Officer to
 12 the Environmental Management Commission
 13 and reject the Petitioner's proposed
 14 order.

15 So, I'll note, first, that we
 16 will entertain a motion from the
 17 Commission regarding the Petitioner's
 18 request for oral argument adding that the
 19 Commission may want to include in the
 20 motion a set time to be allotted for each
 21 party in the oral argument.

22 So, we do have Petitioner's
 23 counsel here, a representative?

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1 on that?

2 (No response).

3 MR. MCFADDEN: All right. Call
 4 for the question. All those in favor of
 5 allowing oral arguments for as reasonable
 6 time as we can to be about ten minutes,
 7 raise your hand.

8 (All Commission Members
 9 raising hands).

10 MR. MCFADDEN: Any opposed?
 11 (No response).

12 MR. MCFADDEN: All right. The
 13 motion carries.

14 MS. THOMAS: Frank, I do have an
 15 order related.

16 MR. MCFADDEN: We've got to sign
 17 that before we talk. Okay.

18 Yeah, yeah. Just a point of
 19 order. The Petitioner's attorney will go
 20 first in this, followed by Respondents,
 21 or ADEM's attorney.

22 We're all good, Debi, with that.
 23 Okay. Okay. We'll let the

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1 Petitioner's attorney go first. Please
 2 identify yourself.
 3 MS. HEMBREE: My name is Grace
 4 Hembree. I'm with Balch and Bingham, and
 5 we represent Petitioner National Salvage
 6 in this case. Thank you for granting our
 7 motion, Mister Chairman and
 8 Commissioners, and I promise I will keep
 9 this under ten minutes.
 10 As you know, this matter
 11 involves a large fire that was ignited by
 12 lightning when it struck a pile of
 13 railroad ties at the National Selma
 14 facility. The issue on appeal before the
 15 Hearing Officer was whether National
 16 ignited that fire.
 17 The Commission should not adopt
 18 the Hearing Officer's recommendations for
 19 two main reasons: First, the
 20 Administrative Order should not be upheld
 21 because National did not ignite the fire.
 22 Lightning is what caused the fire.
 23 Second, the civil penalty

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1 The Hearing Officer's job was to
 2 determine whether the evidence presented
 3 at the hearing supported the violations
 4 outlined in the Administrative Order.
 5 Because the Hearing Officer found that
 6 National maintained the fire instead of
 7 finding that National ignited the fire,
 8 the Hearing Officer's recommendation
 9 should not stand. The Hearing Officer's
 10 recommendation to uphold the
 11 Administrative Order was based entirely
 12 on this finding that National maintained
 13 the fire. Even if ADEM had put the word
 14 "maintain" in the order, there is no
 15 evidence to support the conclusion that
 16 National maintained the fire.
 17 The Hearing Officer pointed to
 18 National storage practices and found that
 19 National's failure to follow its
 20 self-imposed storage practices was
 21 evidence that National maintained the
 22 fire. However, the Hearing Officer did
 23 not make a finding that the storage

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1 imposed in the Administrative Order is
 2 unduly punitive and unreasonable. We are
 3 asking the Commission to disapprove the
 4 Administrative Order. First, the
 5 Commission should disapprove the
 6 Administrative Order because National did
 7 not ignite the fire. The Department, the
 8 Hearing Officer and National all agree
 9 that lightning started the fire. That
 10 fact alone is dispositive here.
 11 As the Commission knows, ADEM's
 12 open burning regulations prohibit a
 13 person from igniting, causing to be
 14 ignited, permitting to be ignited, or
 15 maintaining an open fire. In the
 16 Administrative Order, ADEM only charged
 17 National with permitting railroad ties to
 18 be ignited. ADEM did not make any
 19 finding that National violated the
 20 regulations by maintaining a fire. Those
 21 prohibitions on permitting a fire and
 22 maintaining a fire are two distinct
 23 prohibitions in the regulations.

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1 practices were improper, and this is
 2 understandable because the evidence
 3 showed that National storage practices at
 4 the time of the fire were consistent with
 5 industry standards and did not violate
 6 any fire codes.
 7 Most notably, though, is that
 8 the Department's open burning regulations
 9 do not establish storage practices or
 10 adjust general fire prevention. In fact,
 11 as the Department has admitted, it does
 12 not have the authority to establish or
 13 enforce fire prevention standards. The
 14 State Legislature has granted the State
 15 Fire Marshal the exclusive authority over
 16 fire prevention in the State of Alabama.
 17 The Department has mentioned, as
 18 you've read, that there is legal
 19 precedence allowing it to enforce
 20 violations of the open burning
 21 regulations based on improper storage
 22 practices. But that is not what those
 23 cases say. The first case that ADEM

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1 relies on is not controlling here because
2 that case is based on an Illinois law
3 that is not the same as ADEM's open
4 burning regulations and is more broad
5 than ADEM's regulations.
6 The second case that ADEM relies
7 on in its response to National's
8 objections is a case that involved ADEM's
9 open burning regulations. However, that
10 case is not helpful either because that
11 case -- in that case, the fire's ignition
12 was directly due to the storage practices
13 that the owner put in place. The owner's
14 actions in that case violated the
15 regulations because those actions caused
16 the material to ignite through
17 spontaneous combustion. A lightning
18 strike is not analogous to material that
19 is ignited through spontaneous
20 combustion.
21 So, the second case that ADEM
22 points you to does not set a precedent
23 here, and evidence at the hearing

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1 personal beliefs about the Department's
2 penalty calculation. However, the
3 Hearing Officer also stated that he was
4 not in a position to say that the
5 Department erred, but that is the exact
6 position that the Hearing Officer is
7 supposed to be in when reviewing the
8 penalty amount under a de novo standard.
9 In fact, ADEM's regulations expressly
10 grant the Commission authority to
11 decrease a penalty based on evidence
12 presented at the hearing.
13 In his analysis, the Hearing
14 Officer considered each of the penalty
15 factors that is set forth in the Alabama
16 code. The Hearing Officer stated that
17 the Department's penalty calculation was
18 somewhat disjointed in this case. The
19 Hearing Officer went on to correctly note
20 that the three violations listed in the
21 penalty calculation sheet were based on
22 three separate violations of three
23 separate sections of the regulations.

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1 established that spontaneous combustion
2 was not a factor in this fire.
3 The second reason the Commission
4 should not accept the Hearing Officer's
5 recommendation is because the penalty
6 imposed is unreasonable and grossly
7 disproportionate to the penalties imposed
8 by the Department for other open burning
9 violations. The Hearing Officer's
10 recommendation errs by applying the wrong
11 standard of review when analyzing ADEM's
12 penalty calculations in this case.
13 The Rules of Procedure set forth
14 in Division 335-2 of ADEM's
15 Administrative Code require the hearing
16 to be conducted as a de novo proceeding.
17 As you know, de novo review is review
18 without assumptions of correctness.
19 Instead of applying that standard, the
20 Hearing Officer said that he deferred to
21 ADEM's penalty calculation.
22 ADEM would have you believe that
23 the Hearing Officer simply stated his

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1 However, without explanation, the Hearing
2 Officer simply deferred to ADEM's post
3 hoc argument that the three violations
4 listed in the penalty calculation sheet
5 were actually based on three arbitrary
6 days that the fire burned. Even if ADEM
7 had properly issued the civil penalty
8 based on three days that the fire burned,
9 the penalty amount imposed here far
10 exceeds the penalties imposed for other
11 violations of the open burning
12 regulations.
13 In this case, ADEM imposed the
14 maximum possible statutory penalty.
15 However, National presented evidence at
16 the hearing showing the civil penalties
17 imposed for other violations of the open
18 burning regulations were significantly
19 lower than the penalty imposed here.
20 Here, ADEM is imposing a civil
21 penalty of \$75,000. But in other orders
22 discussed during the hearing, ADEM never
23 imposed a civil penalty for more than

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1 \$6,000.

2 As ADEM admitted, the Department

3 is required to treat similar cases

4 similarly when taking enforcement actions

5 and to issue civil penalties objectively

6 and consistently. The imposition of a

7 penalty that is 25 times higher than some

8 penalties issued for other similar

9 violations certainly does not show that

10 the Department is treating this case in a

11 similar manner as it has other cases. In

12 fact, most of the other civil penalties

13 discussed during the hearing were imposed

14 to people who intentionally ignited fire.

15 National did not intentionally set this

16 fire. It was caused by lightning.

17 The Hearing Officer's

18 recommendation noted that there was no

19 evidence of any irreparable harm to the

20 environment or measurable threat to

21 public health or safety. He also noted

22 that National fully cooperated with

23 emergency responders and made efforts to

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1 mitigate the effects of the fire, and

2 National suffered greatly when the fire

3 destroyed the railroad tie inventory.

4 The financial impact of the fire

5 is still affecting National, so National

6 may not have the ability to pay the civil

7 penalty in the near future if the civil

8 penalty is not lowered.

9 That was a lot of information

10 and I know that we had a lot of filings,

11 so I'm happy to answer any questions that

12 I didn't cover in my presentation.

13 MR. MCFADDEN: You mentioned the

14 fine was 25 times higher than the \$6,000.

15 Was that --

16 MS. HEMBREE: No, not the --

17 MR. MCFADDEN: Did I

18 misunderstand the --

19 MS. HEMBREE: Yes. I'm sorry.

20 So, it is 25 times higher than some of

21 the penalties. \$6,000 was just the

22 highest penalty that we identified that

23 had been issued. But there are some that

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1 minimize the effects to the environment.

2 Therefore, National's conduct

3 does not justify a civil penalty of

4 \$75,000. ADEM failed to meet its burden

5 to justify why it treated National

6 differently when issuing this civil

7 penalty, and the Hearing Officer's

8 recommendation did not address at all the

9 fact that ADEM failed to meet this

10 burden.

11 Therefore, we are asking the

12 Commission to step in and apply reason

13 and consistency in this matter. We are

14 asking the Commission to disapprove the

15 administrative order in full. But if the

16 Commission upholds the order, we ask that

17 you lower the penalty amount so that it

18 is consistent with other penalties issued

19 for other violations of the open burning

20 regulations.

21 As discussed in the Hearing

22 Officer's recommendation, National

23 cooperated with all State agencies to

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1 were 25 times lower for similar

2 violations to this one. And those are

3 laid out in our post-hearing brief.

4 There's examples of all of those cases

5 that we located showing examples of the

6 penalty amounts.

7 MR. MCFADDEN: Now, with the

8 excessive inventory coming into the

9 facility, it seemed like it was normally

10 you keep 50 bundles and it was, like, 400

11 bundles or something, up to two million

12 railroad ties that were coming in. And

13 yet your outgo of that to the paper mill,

14 I think, is one of your major sources.

15 Some was going to South America and some

16 to maybe Lowe's and Home Depot if they're

17 good, or whatever, wherever they were

18 going. Why was that not cut off if you

19 were having that supply chain issue,

20 which is recognizable during that time of

21 COVID, and continue to pull that material

22 in?

23 MS. HEMBREE: Right. So, they

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1 had a contract that they had to uphold,
2 but they were taking measures to divert
3 some of that inventory that was coming
4 in. They were sending it to other
5 facilities. And that's part of the
6 reason that they acquired that client in
7 South America, was to get some of the
8 inventory off site. And it was a large
9 amount of inventory that was higher than
10 usual. But like I mentioned, it was --
11 they were still maintaining the inventory
12 that they had in a manner that was in
13 line with and, in some cases, better than
14 the general industry standards that are
15 in place for storing this type of
16 material.
17 MR. MCFADDEN: Do you have a
18 question?
19 MR. BROWN: Yes. You mentioned
20 the State Fire Marshal has the
21 responsibility to set -- or the authority
22 to set storage -- outside storage
23 regulations. Was there any regulation

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1 it, the primary objection that National
2 Salvage has is that obviously they didn't
3 ignite the fire, maintain or permit the
4 fire. That's your main position?
5 MS. HEMBREE: Well, our main
6 position is that we did not permit the
7 fire to be ignited. The Administrative
8 Order only alleges that we permitted the
9 fire to be ignited. It does not allege
10 that we maintained the fire or caused the
11 fire or ignited it.
12 So, our position is that we did
13 not violate the -- what is set forth in
14 the Administrative Order. If ADEM wanted
15 to claim that we violated open burning
16 regulations by maintaining the fire, they
17 would have to issue another proposed
18 order that provided notification of that
19 violation.
20 MR. BROWN: Thank you.
21 MR. MCFADDEN: Does anyone else
22 have any questions for Ms. Hembree?
23 (No response).

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1 that applied to this site that was
2 violated?
3 MS. HEMBREE: Not that we have
4 identified. There were some. There are
5 fire codes that the State Fire Marshal
6 has adopted, but we were not able to
7 identify any of those that were violated
8 because of our storage practices.
9 MR. BROWN: That would apply to
10 how you store these items outside?
11 MS. HEMBREE: Yes. How you
12 store to use railroad ties outdoors.
13 MR. MCFADDEN: National Fire
14 Protection Association, if I'm saying
15 that right, has guidelines for that. I
16 don't know if it's applicable, that they
17 are required, or if it's just guidance
18 documents, or whatever.
19 MR. BROWN: But it's not
20 regulations.
21 MR. MCFADDEN: It's not
22 regulations.
23 MR. BROWN: But as I understand

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1 MR. MCFADDEN: Okay. Thank you.
2 We appreciate you coming.
3 So, now we'll hear from the
4 hearing officer.
5 MR. THRASH: I'm not the Hearing
6 Officer. I'm an attorney that represents
7 the Department. I'm James Thrash.
8 MR. MCFADDEN: For the
9 Respondent.
10 MR. THRASH: For the Respondent,
11 yes.
12 MR. MCFADDEN: Okay.
13 MR. THRASH: Okay. Thank you
14 for allowing me the opportunity to speak
15 with you this morning. And I just want
16 to let everyone know that here in this
17 very room the Hearing Officer heard about
18 eight hours' worth of testimony on the
19 day of the hearing. He had the
20 opportunity to listen to every witness,
21 ask questions, and reviewed over 60
22 exhibits, reviewed all the parties'
23 briefs, and he wrote his recommendation.

1 And we are here to encourage the
2 Commission to adopt the recommendation of
3 the Commission -- I mean, the Hearing
4 Officer.

5 First of all, National said that
6 they did not ignite the fire at the
7 crosstie yard. And Ron Gore, the Chief
8 of the Air Division, he testified to that
9 very point. And he said that it's not
10 relevant that the fire was started by
11 lightning because National was not being
12 penalized for that initial first pile of
13 crossties that caught on fire, but they
14 were being penalized for the entire yard
15 full of crossties that caught on fire
16 over the next two to three days. And
17 that's relevant for several reasons and
18 because that goes back to their storage
19 practices.

20 And in this particular case,
21 National had a storage practice where
22 they kept 10,000 crossties to a pile, and
23 those piles were separated by 300 feet.

1 increasing, National did several things
2 that led to this fire being hotter in a
3 more intense fire. First of all, they
4 made all their stacks taller. Then they
5 expanded their tie yard by 16 acres,
6 which was about a 65% increase in the
7 size of their tie yard. Yet they went
8 from four to 500,000 crossties to 2.1
9 million crossties, which was a four to
10 500% increase in inventory on their lot.
11 And as a result, they filled in the fire
12 break and the rows. They extended all
13 their rows. They placed crossties on the
14 edge of the woods, and they placed
15 crossties along the side of the railroad
16 track. There was crossties everywhere
17 out there on that yard. And once they
18 got started -- and they knew that a
19 crosstie was a good alternative fuel,
20 because crossties burn very hot. They
21 have a higher BTU than normal wood.

22 And once they got started, the
23 fire department couldn't put them out

1 And beginning in 2019, prior to COVID,
2 their inventory began to increase
3 substantially. Historically, they kept
4 four to 500,000 crossties on that yard.
5 And at the time of the fire, there were
6 2.1 million crossties on that yard. And
7 the spacing between those piles had gone
8 from 300 feet down to 15- to 30 feet.
9 And as a result, National had created
10 piles of crossties that were susceptible
11 to a fire spreading or jumping from pile
12 to pile because of their management
13 practices with their crosstie inventory.
14 And that's the -- that's what this case
15 is all about, is all of those crossties
16 burning. If they had just that one pile
17 that got struck and ignited by lightning,
18 burned and went out, we wouldn't be here
19 today. But it's because of those other 2
20 million crossties that burned, or 1.75
21 million, whatever that number is, that
22 burned, that's why we're here today.

23 When their inventory started

1 because, first of all, they didn't have
2 enough room to work in because the fire
3 breaks had been, you know, decreased by
4 90%. They've gone from 300 feet to 30
5 feet.

6 And so, I think it is their
7 storage practices that caused all of
8 this. And this is what we're here
9 talking about today.

10 And then if we want to address
11 the civil penalty in this case, I want to
12 point out to you a little testimony that
13 Mr. Gore gave concerning the pollutants
14 that were admitted into the air. He
15 testified that based on some calculations
16 he made -- and he was cross-examined by
17 all the attorneys -- it says there were
18 2400 tons of fine particulate matter
19 emitted in the air; 11,500 tons of carbon
20 monoxide; 400 tons of nitrogen oxide, all
21 admitted into the air. And by
22 definition, smoke is an air pollutant.

23 And we're not talking about some

1 tree trimming service or a small fire
2 like that. We're talking about 2.1
3 million crossties that burned and
4 admitted those substantial amounts of
5 pollutants into the atmosphere.

6 There is no other similar case
7 to this that's been addressed in Alabama
8 because this is a substantial amount of
9 pollutants, and there's never been a case
10 similar to it before. Yeah, there's been
11 a lot of smaller fires, but none of this
12 magnitude.

13 And for that reason, we would
14 ask that the Commission adopt the Hearing
15 Officer's order or his recommendation is
16 the Commission's order today. And if you
17 have any questions, I'll be happy to
18 address them.

19 MR. BROWN: What is the -- I
20 guess, you know, I'm no lawyer, so I'm
21 stuck on the words. But what is the --
22 you know, there was a fire I understand,
23 but what regulation did they violate?

1 MR. THRASH: They violated the
2 open burning statute, which --

3 MR. BROWN: In terms of their
4 storage, I guess, is -- the conduct --
5 the conduct is what I hear you saying is
6 the piles were too close together.

7 MR. THRASH: They violated what
8 is a best management practice or a
9 company practice that they had in effect,
10 and all BMP's are not codified.

11 MR. BROWN: Oh, I understand
12 that.

13 MR. THRASH: So, it's a standard
14 management practice in that industry to
15 space out this type of material, and they
16 had that in effect. But what happened
17 is, they would not say no to the railroad
18 continuing to bring ties. So, as they
19 got more and more ties, if you go back
20 and read the testimony, they say we had
21 to adjust our practices. We adjusted and
22 adjusted and adjusted our practices every
23 day, which basically meant they were

1 violating their own practice every day.
2 Because a standard, you should make the
3 yard meet the standard that the company
4 has concerning storage practices, not
5 make your standard meet the conditions on
6 the yard. I mean, otherwise, it's not a
7 standard.

8 MR. MCFADDEN: But you said this
9 case revolved around the storage factor.
10 Isn't the case really about it boils down
11 to one word? Did they maintain the fire
12 in 335-3-3.01? That's why we're here,
13 isn't it?

14 MR. THRASH: Well, they maintain
15 the fire because instead of the fire
16 burning to a fire break and going out, it
17 continued to jump like a domino effect
18 across the yard. And they were not able
19 to put it out. They were not able to --

20 MR. MCFADDEN: And I think
21 somewhere, the Hearing Officer or one of
22 y'all, defined what "maintain" is from
23 Marion Webster dictionary. And it's --

1 I'm quoting, "to keep in an existing
2 state or to continue."

3 So, you know, I -- I'm kind of
4 hung up on that word, because a word is
5 not just a word out of the dictionary.
6 It has to be in context. And if a text
7 is not in context, it's a pretext,
8 whatever you want it to say, as an old
9 saying.

10 But in this case, you know, I'm
11 just wondering, how were they keeping it
12 in existence or to continue when they
13 were actually out there putting the fire
14 out, helping the first responders put it
15 out? I'm just having trouble with that.

16 MR. THRASH: Well, there was
17 never any testimony that they helped the
18 first responders put the fire out. The
19 Fire Department showed up and tried to
20 put it out, but National Savage never
21 did.

22 MR. MCFADDEN: I read in
23 depositions or in some document that they

1 had their personnel out there in that
 2 two-week period. If I'm wrong --
 3 MR. THRASH: That was -- the
 4 fire burned for over a month, and they
 5 were only penalized for three days.
 6 Yes, two and three, four weeks
 7 later they would go out there with a
 8 water truck and put out hotspots daily.
 9 But for the three days that it was a
 10 conflagration out there, they did not
 11 try, nor the Fire department tried to put
 12 the fire out because it's too hot.
 13 MR. BROWN: I think "maintain"
 14 is something that would, in my mind, be
 15 an affirmative act that, you know, we, by
 16 maintaining the fire and continuing to
 17 feed the fire, prevent the fire from
 18 going out. That's maintained, you know.
 19 I maintain my lawn by going out, cutting
 20 the grass, weed eating and doing all of
 21 that.
 22 MR. MCFADDEN: You don't have
 23 that done?

1 to a fire, jumping the fire breaks and
 2 spreading instead of burning to the end
 3 of the fire break and going out. That
 4 was their affirmative conduct in this
 5 case.
 6 MR. MCKINSTRY: How much did
 7 they expand the yard? You said they --
 8 MR. THRASH: They expanded the
 9 yard by approximately 16 acres, which is
 10 about a 65% expansion, but they increased
 11 their inventory four to 500%.
 12 MR. MCKINSTRY: And was that --
 13 there was no other footprint left on the
 14 yard to expand?
 15 MR. THRASH: No, sir. In fact,
 16 they had run out of room, and they
 17 started putting crossties up and down the
 18 railroad and in the edge of the woods.
 19 MR. MCKINSTRY: And do these --
 20 I mean, do these storage sites have to --
 21 are they permitted or in any way, would
 22 they have the -- would they -- did they
 23 have the option to buy or lease more land

1 MR. BROWN: Yeah. But, you
 2 know, and so I guess that's for me, you
 3 know, to say that they permitted a fire
 4 or maintained a fire, I'm just not saying
 5 that, you know, a fire caused by
 6 lightning is something that, you know,
 7 that they are maintaining. You know, you
 8 maintain a fire on the old steam trains
 9 by continuing to shovel coal in them.
 10 MR. THRASH: Well, in this
 11 particular case, what happened is their
 12 affirmative act was when they created
 13 these piles that were too close together
 14 and were not sufficiently spread apart so
 15 that the fire breaks would work. And
 16 basically what they did when they did
 17 that, they lit a long fuse on the end of
 18 a stick of dynamite. And once that fire
 19 got started, it just kept burning every
 20 single pile in the entire yard until it
 21 burned two million crossties.
 22 So, their affirmative act was in
 23 and creating piles that were susceptible

1 to store these extra crossties on instead
 2 of piling them?
 3 MR. THRASH: I'm not sure about
 4 that, but they certainly had the option
 5 to stop taking additional crossties.
 6 MR. MCFADDEN: Okay. Any other
 7 questions or anything else for Mr.
 8 Thrash?
 9 (No response).
 10 MR. MCFADDEN: Thank you very
 11 much.
 12 MR. THRASH: Thank you.
 13 MR. MCFADDEN: Okay. We have a
 14 couple of options on motions here. So,
 15 the Chair notes that I'll entertain a
 16 motion from the Commission regarding the
 17 recommendation of the Hearing Officer or
 18 the Petitioner's proposed order.
 19 Do we need to read that proposed
 20 order?
 21 MR. SIBLEY: Yes, sir. That's
 22 on the Petitioner, yes, sir.
 23 MR. MCFADDEN: I mean, we have

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1 all read it, but I didn't know if we
 2 needed to repeat that here or not. I
 3 have it here. Do we want to read the
 4 whole thing or just the summary of what
 5 they're asking for?
 6 MR. SIBLEY: Read the summary.
 7 MR. MCFADDEN: Okay. The
 8 proposed summary of the proposed order
 9 that the Petitioner would like reads as
 10 follows: "Therefore, the Commission
 11 hereby orders, adjudges and decrees as
 12 follows: That the findings of fact and
 13 conclusions of law set forth in herein
 14 are adopted. That National did not
 15 violate ADEM's open burning regulations
 16 when lightning ignited a fire at the
 17 facility on August 1st, 2021; that the
 18 Commission hereby disapproves final
 19 Administrative Order Number 22-079-AP in
 20 its entirety, and that this action has
 21 been taken; and this order shall be
 22 deemed rendered effective as of this date
 23 as shown."

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1 standard, that is the storage facilities,
 2 the storage condition.
 3 DR. TUCKER: But they admitted
 4 they violated their own practice
 5 standards, and they certainly had the
 6 option to store off site somewhere else
 7 by leasing some additional property.
 8 MR. BROWN: I agree. But we --
 9 we enforce government regulation and not
 10 their practices, their perceived policies
 11 and procedures. That's my -- my issue.
 12 MR. MCFADDEN: Yeah, I think it
 13 does come down to "maintain." I think
 14 that word -- I think that's been key and
 15 one of the key facts here. What does
 16 that mean? And it's -- yeah, several
 17 ways to take that. So, anybody else?
 18 (No response).
 19 MR. MCFADDEN: We have the
 20 motion on the table and seconded.
 21 Okay. I'll call for the
 22 question. All those in favor of adopting
 23 the findings of fact and conclusions of

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1 That's the proposed order by the
 2 Petitioner.
 3 And so, we can move to adopt the
 4 findings of fact, conclusions of law and
 5 recommendation of the Hearing Officer or
 6 move to adopt the Petitioner's proposed
 7 order.
 8 DR. TUCKER: I would move to
 9 adopt the recommendation of the Hearing
 10 Officer.
 11 MR. MCKINSTRY: Second.
 12 MR. MCFADDEN: Okay. We have a
 13 motion to move to adopt the findings of
 14 fact and conclusions of law and
 15 recommendations of the Hearing Officer,
 16 and we have a second. Are there any
 17 discussions on that? Any further
 18 discussion?
 19 MR. BROWN: I'm still hung up on
 20 "permit" and "maintain" and how
 21 government can -- how the government can
 22 impose a penalty for conduct that in and
 23 of itself does not violate any government

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1 law and recommendation of the Hearing
 2 Officer, raise your hand.
 3 (Commission Members
 4 McKinstry, Masingill, Tucker
 5 and Merritt raised hands).
 6 MR. MCFADDEN: Those opposed?
 7 (Commission Members Brown and
 8 McFadden raised hands).
 9 MR. MCFADDEN: Okay. I believe
 10 it passes, four to two. It's definitely
 11 a tough question.
 12 We appreciate the hard work of
 13 the Hearing Officer and the Department.
 14 I think Lanier brought up some good
 15 points about that. And we have to
 16 enforce regulations, and this will get
 17 sorted out.
 18 Okay. That's item -- agenda
 19 Item Number 4.
 20 Agenda Item Number 5, Other
 21 Business. Any other business to come
 22 before the Commission?
 23 (No response).

1 If not, Item Number 6, Future
 2 business sessions. Chair notes the date
 3 of the next Commission meeting is June
 4 14th, 2024. And do we -- Is everyone
 5 okay with that date for now? I know our
 6 schedules change, but -- so, that looks
 7 good.
 8 So, we do have Commissioners
 9 available for that date.
 10 (Commission Members
 11 affirmative response).
 12 MR. MCFADDEN: All right.
 13 Public Comment Period, do we have anybody
 14 signed up to speak?
 15 MS. THOMAS: No, sir.
 16 MR. MCFADDEN: Nobody signed up
 17 to speak?
 18 (No response).
 19 MR. BROWN: I move to adjourn.
 20 MR. MCFADDEN: I've got to turn
 21 that page first. I've turned the page to
 22 adjournment. Okay.
 23 MR. BROWN: I've seen it enough.

1 MR. MCFADDEN: I know. All
 2 right. We have a motion. I need a
 3 second motion.
 4 MR. MASINGILL: Second.
 5 MR. MCFADDEN: A motion and a
 6 second to adjourn. Any discussion?
 7 (No response).
 8 MR. MCFADDEN: No discussion.
 9 All right. All who are in favor of
 10 adjourning, raise your hand.
 11 (All Commission Members
 12 raising hands).
 13 MR. MCFADDEN: Okay. Opposed?
 14 (No response).
 15 MR. MCFADDEN: Nobody opposed.
 16 Thank you-all for coming.
 17
 18 (Meeting concluded at
 19 approximately 12:11 p.m.)
 20 * * * * *
 21
 22
 23

1 * * * * *
 2 REPORTER'S CERTIFICATE
 3 * * * * *
 4
 5 STATE OF ALABAMA
 6 TALLAPOOSA COUNTY
 7
 8 I, Jeana S. Boggs, Certified Professional
 9 Reporter and Notary Public in and for the State of
 10 Alabama at Large, do hereby certify on Friday, April
 11 12, 2024, that I reported the meeting in the matter
 12 of:
 13 MEETING OF THE
 14 ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
 15 ALABAMA DEPARTMENT OF ENVIRONMENTAL
 16 MANAGEMENT (ADEM) BUILDING
 17 ALABAMA ROOM
 18 1400 COLISEUM BOULEVARD
 19 MONTGOMERY, ALABAMA 36110-2400
 20
 21 That the foregoing 70 computer-printed
 22 pages contain a true and correct transcript of the
 23 meeting set out herein.

1 I further certify that I am neither of
 2 relative, employee, attorney or counsel of any of
 3 the parties, nor am I a relative or employee of such
 4 attorney or counsel, nor am I financially interested
 5 in the results thereof. All rates charged are usual
 6 and customary.
 7 I further certify that I am duly licensed
 8 by the Alabama Board of Court Reporting as a
 9 Certified Court Reporter as evidenced by the ABCR
 10 number following my name found below.
 11 This 15th day of April, in the year of our
 12 Lord, 2024.
 13
 14 *Jeana S. Boggs*
 15 Jeana S. Boggs
 16 ABCR NO. 7, Exp 9/30/2024
 17 Certified Court Reporter and
 18 Notary Public
 19 Commission expires: 8/9/2027
 20
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Part B

Attachment Index

Attachment 1 Agenda

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

**Attachment 3 Order granting Petitioner's Request for Oral Argument and allotting ten minutes for their oral argument
(Agenda Item 4)**

**Attachment 4 Order adopting Finding of Fact, Conclusions of Law, and Recommendation of Hearing Officer to the Environmental Management Commission
(Agenda Item 4)**

Attachment 1

AGENDA*
MEETING OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

DATE: April 12, 2024

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

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3. Report from the Commission Chair	2
4. <u>National Salvage and Service Corporation, Petitioner v. ADEM, Respondent</u> EMC Docket No. 22-04 (IN RE: ADEM Administrative Order No. 22-079-AP issued on May 18, 2022, to National Salvage and Service Corporation, Selma, Dallas County, Alabama)	2
5. Other business	2
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PUBLIC COMMENT PERIOD	2
Brief statements by members of the public registered to speak	2

* 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 FEBRUARY 9, 2024
2. REPORT FROM THE ADEM DIRECTOR
3. REPORT FROM THE COMMISSION CHAIR
4. NATIONAL SALVAGE AND SERVICE CORPORATION, PETITIONER V. ADEM, RESPONDENT, EMC DOCKET NO. 22-04 (IN RE: ADEM ADMINISTRATIVE ORDER NO. 22-079-AP ISSUED ON MAY 18, 2022, TO NATIONAL SALVAGE AND SERVICE CORPORATION, SELMA, DALLAS COUNTY, ALABAMA)

Before the Commission for its consideration in the above appeal are the following: (1) Recommendation of Hearing Officer to the Alabama Environmental Management Commission; (2) National Salvage and Service Corporation's Objections to the Recommendation of the Hearing Officer and Request for Oral Argument; (3) National Salvage and Service Corporation's Proposed Order; and (4) ADEM's Reply to Petitioner's Objections to Recommendation of Hearing Officer.

5. OTHER BUSINESS
6. FUTURE BUSINESS SESSION

PUBLIC COMMENT PERIOD

BRIEF STATEMENTS BY MEMBERS OF THE PUBLIC REGISTERED TO SPEAK

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






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

Attachment 2

EPA Compliance and Enforcement Metrics

1

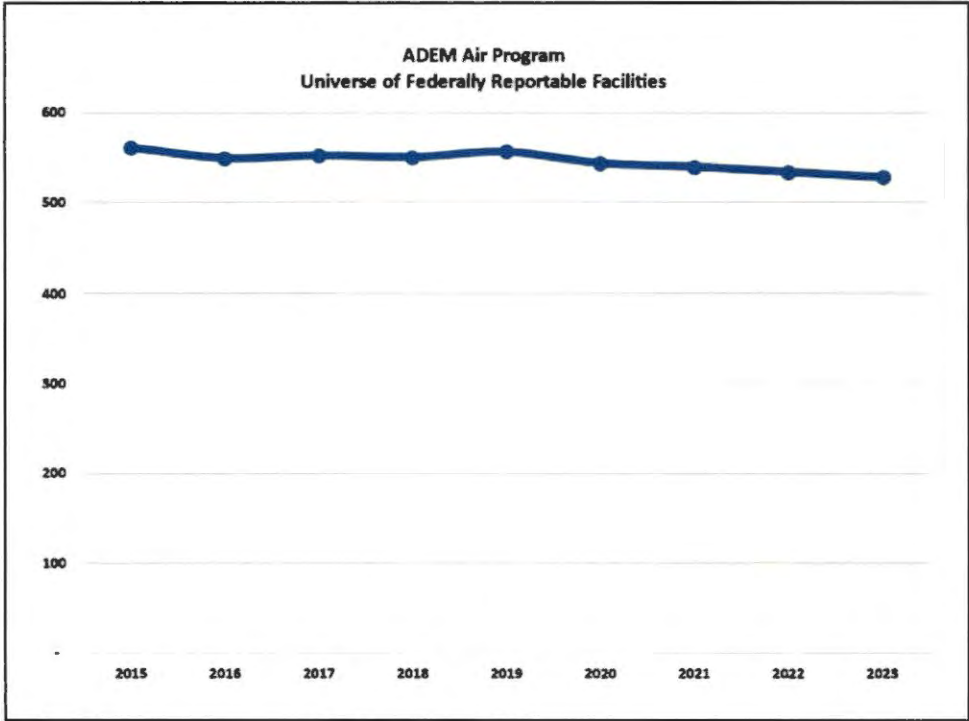
Color Legend for Graphs

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Water	
Drinking Water	
Hazardous Waste	
National Average	

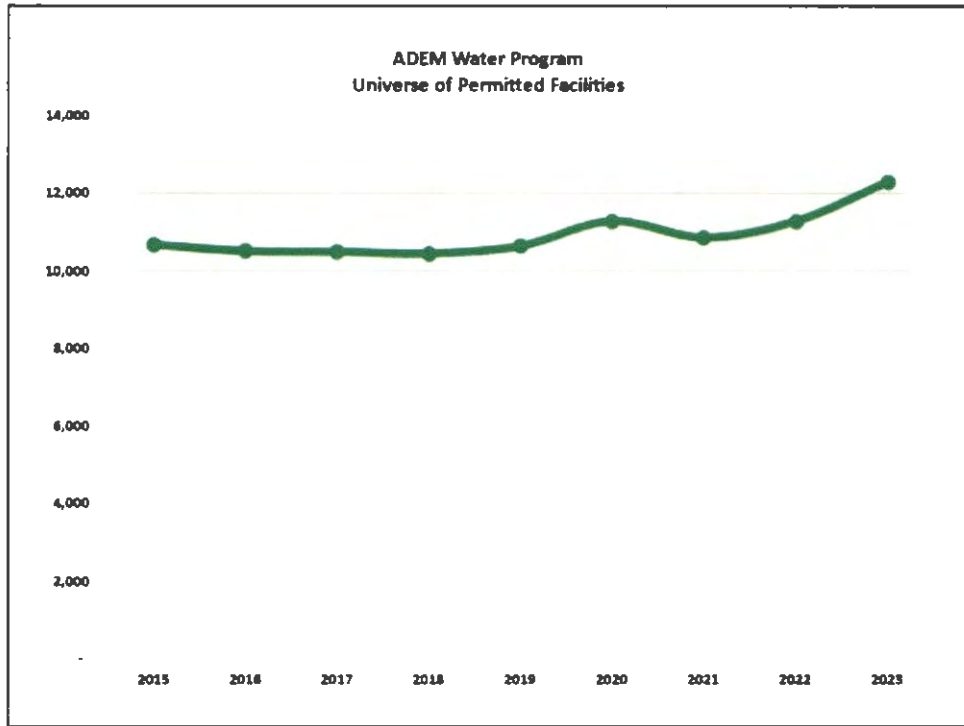
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SIZE OF UNIVERSE

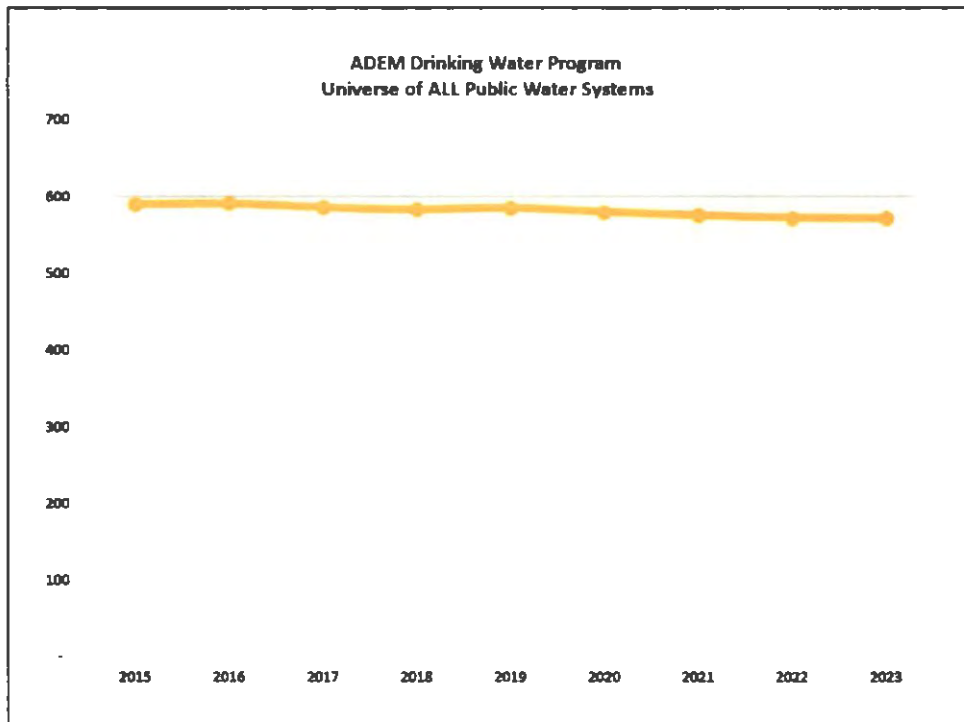
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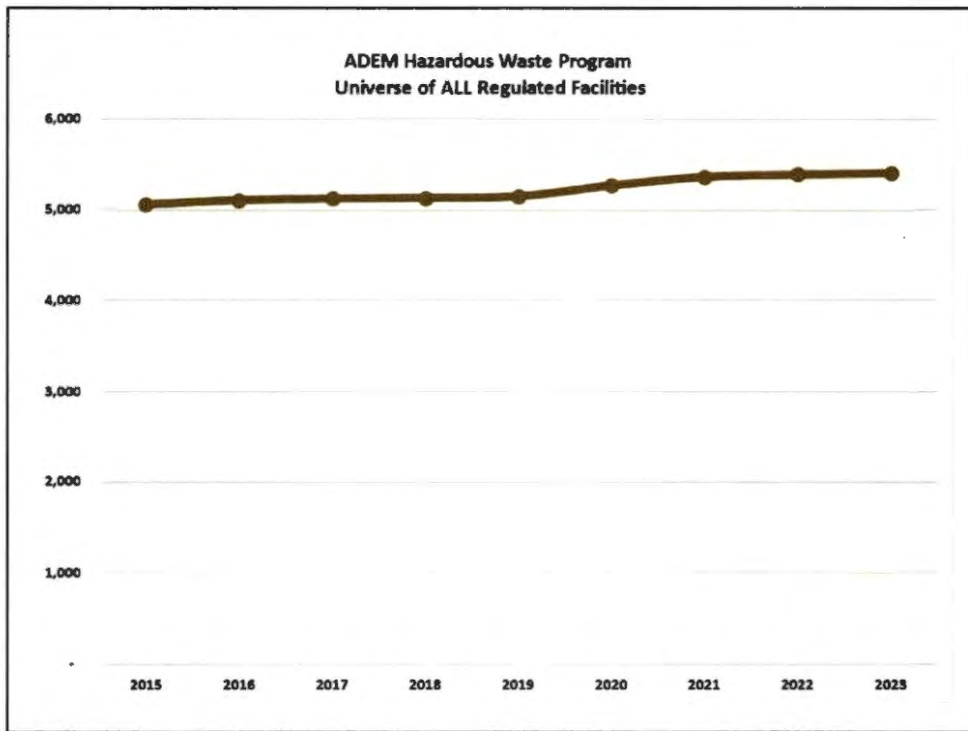
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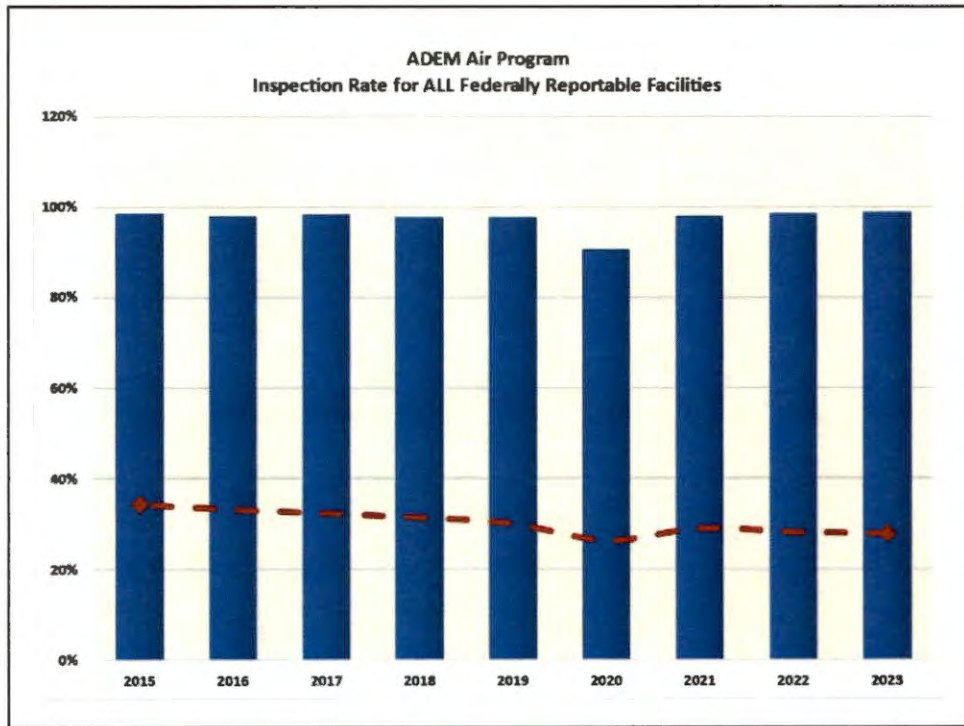


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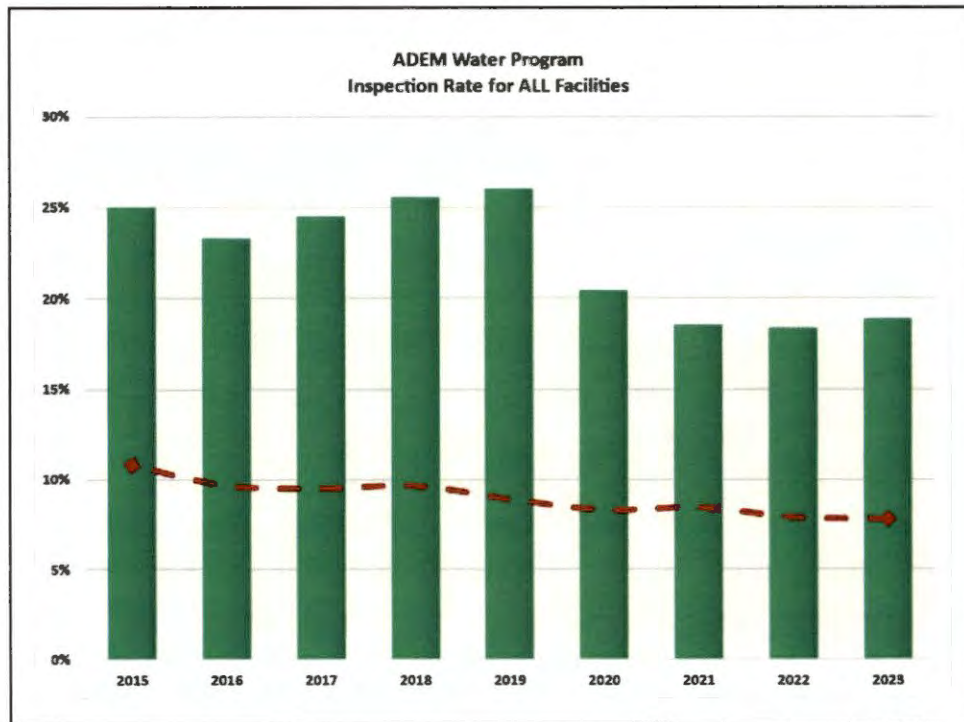
ADEM Alabama Department Of Environmental Management

INSPECTIONS

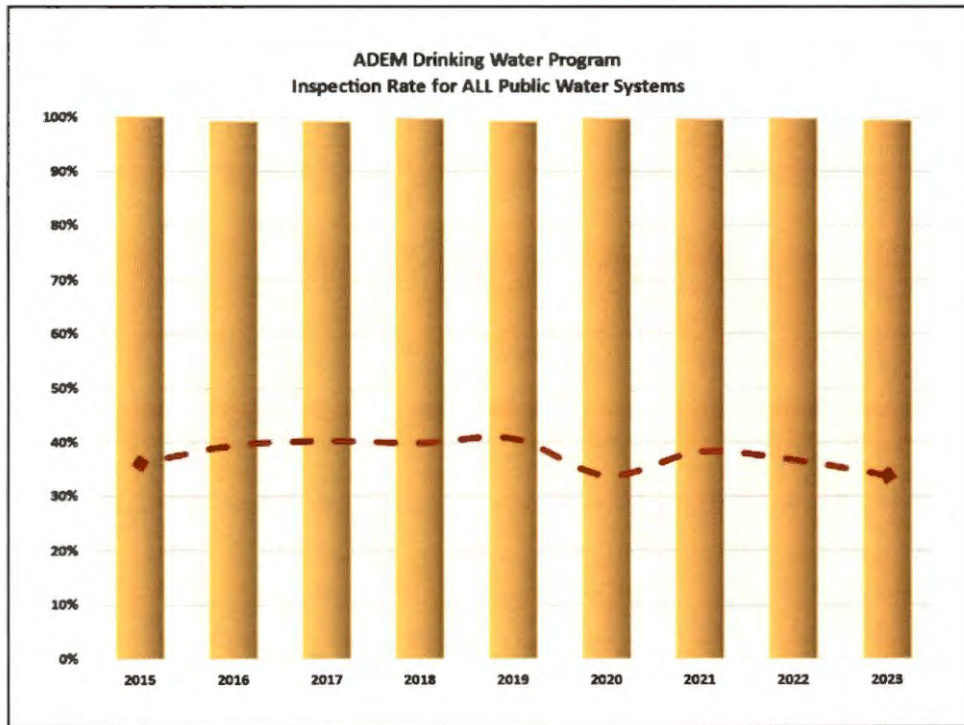
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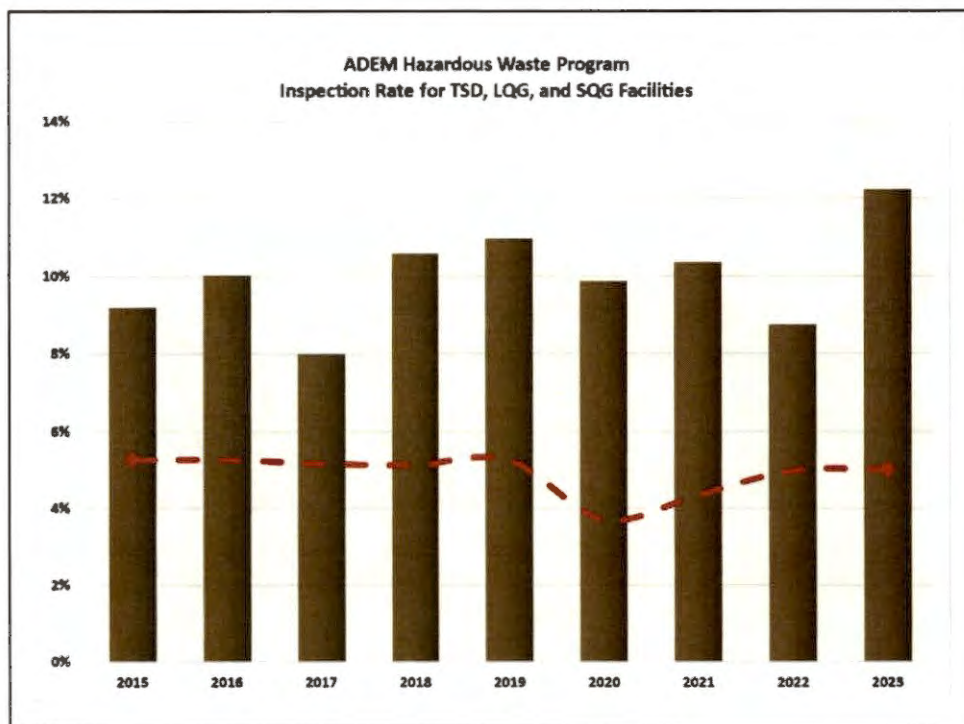
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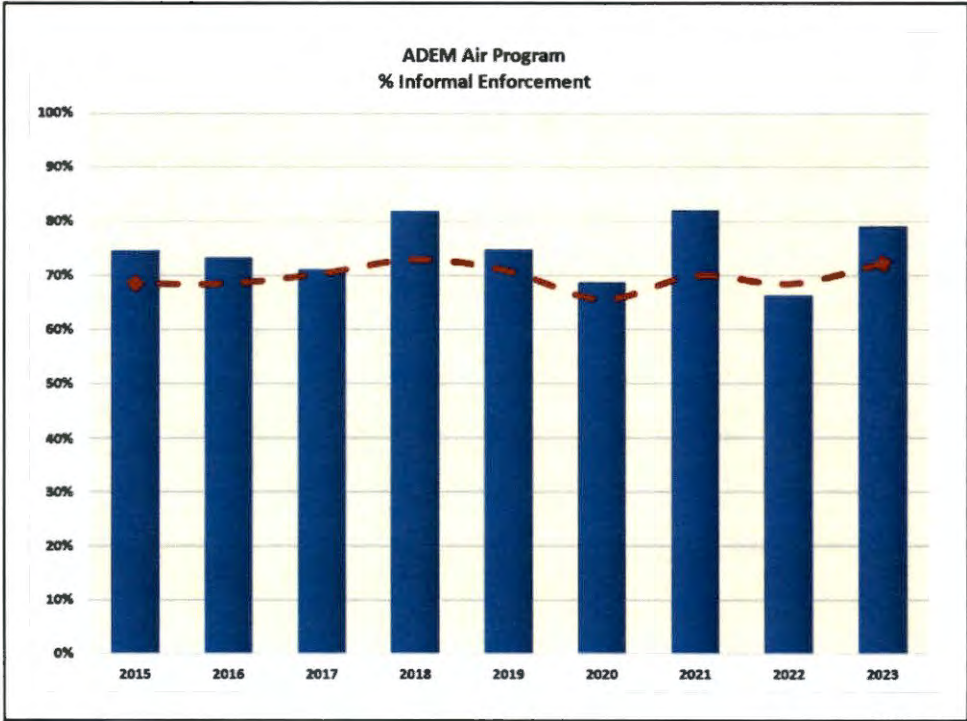
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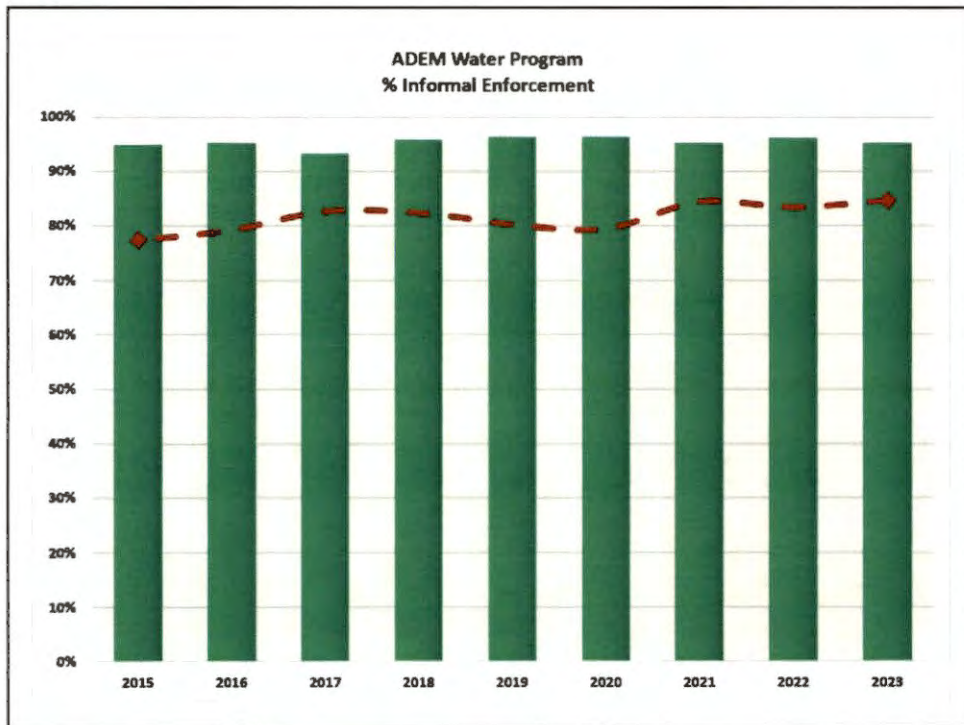
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INFORMAL ENFORCEMENT

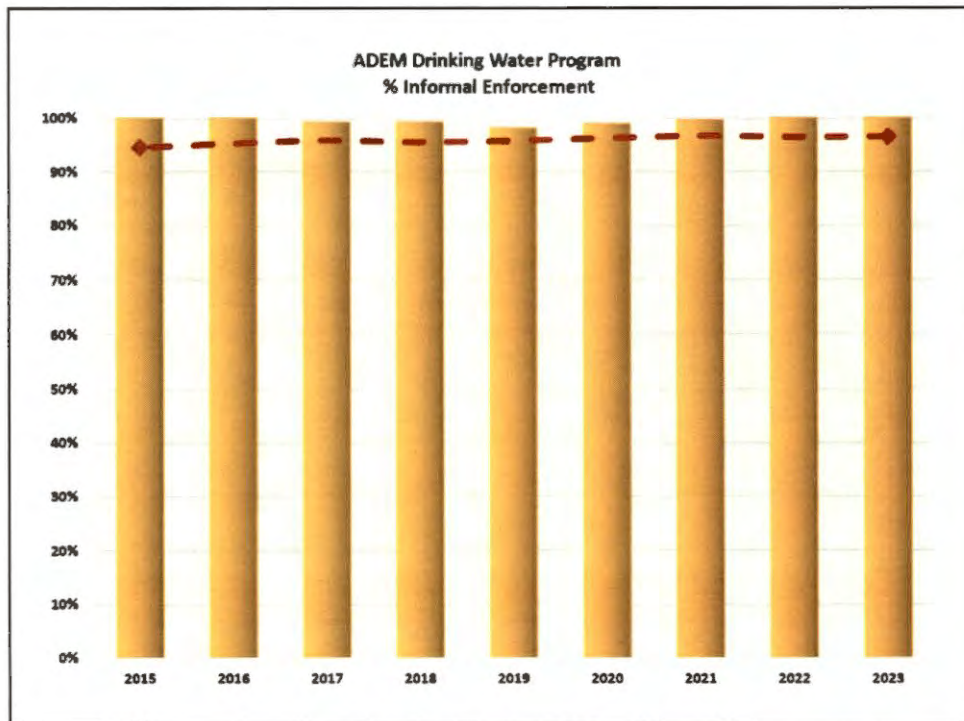
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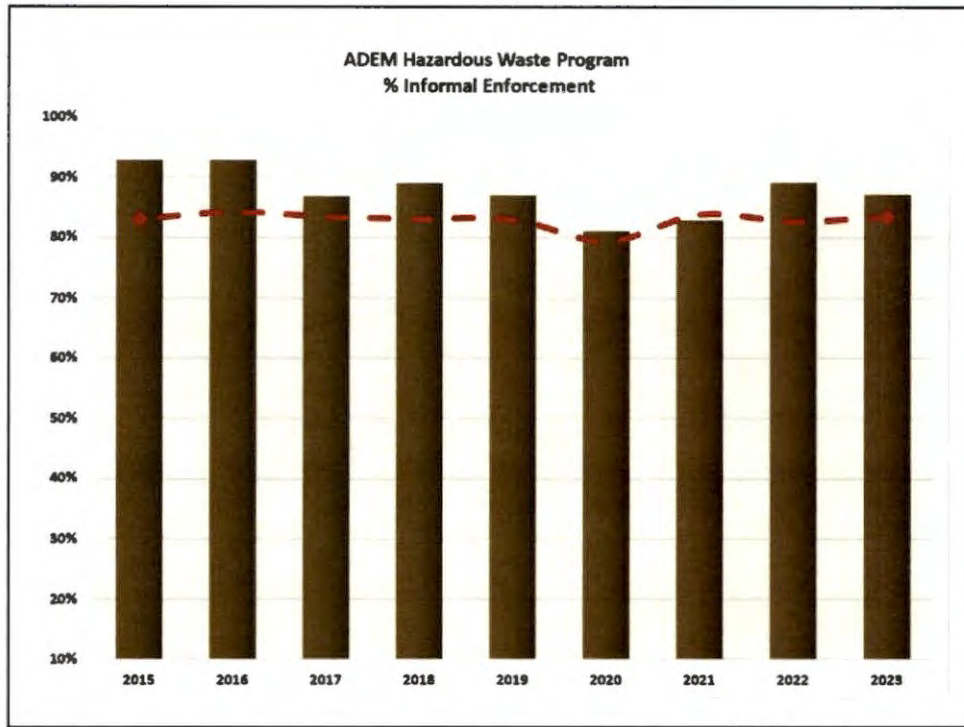
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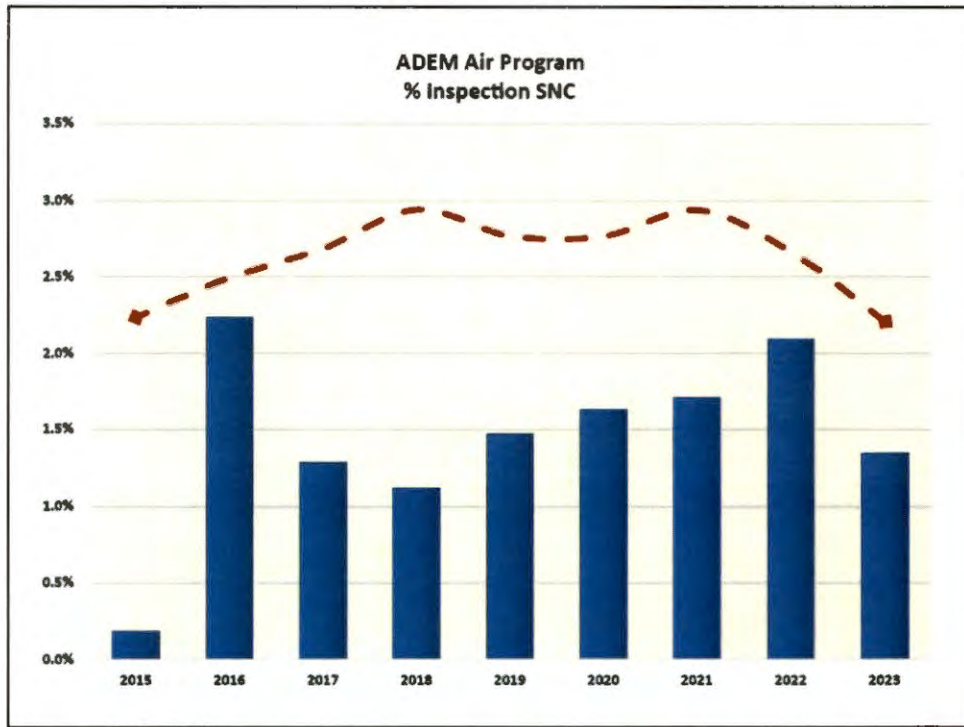


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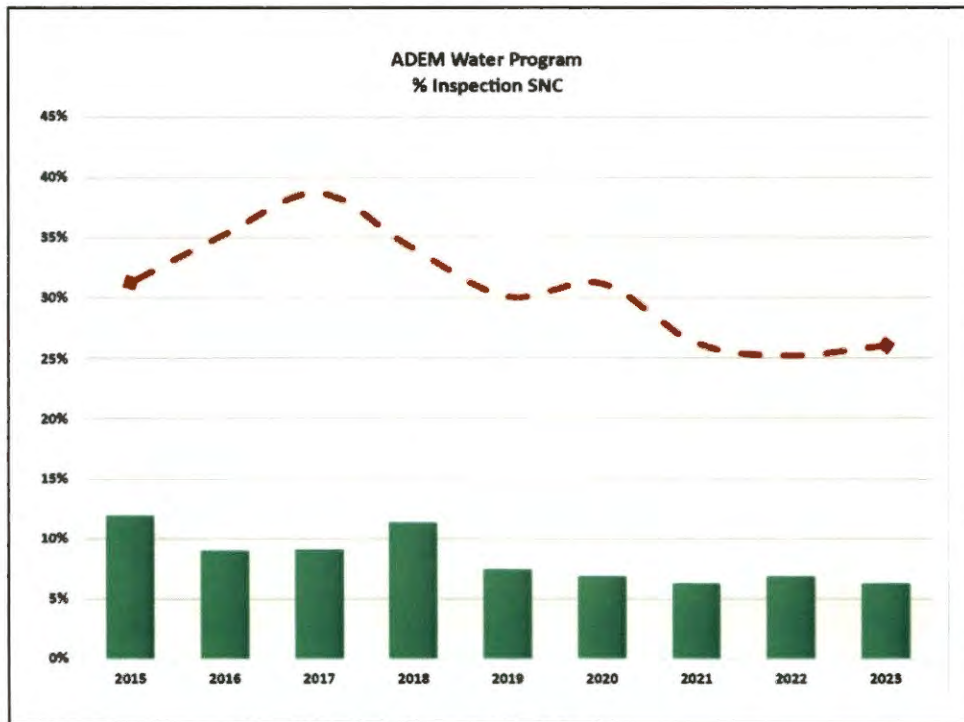
ADEM Alabama Department Of Environmental Management

**SIGNIFICANT
NON-COMPLIANCE**

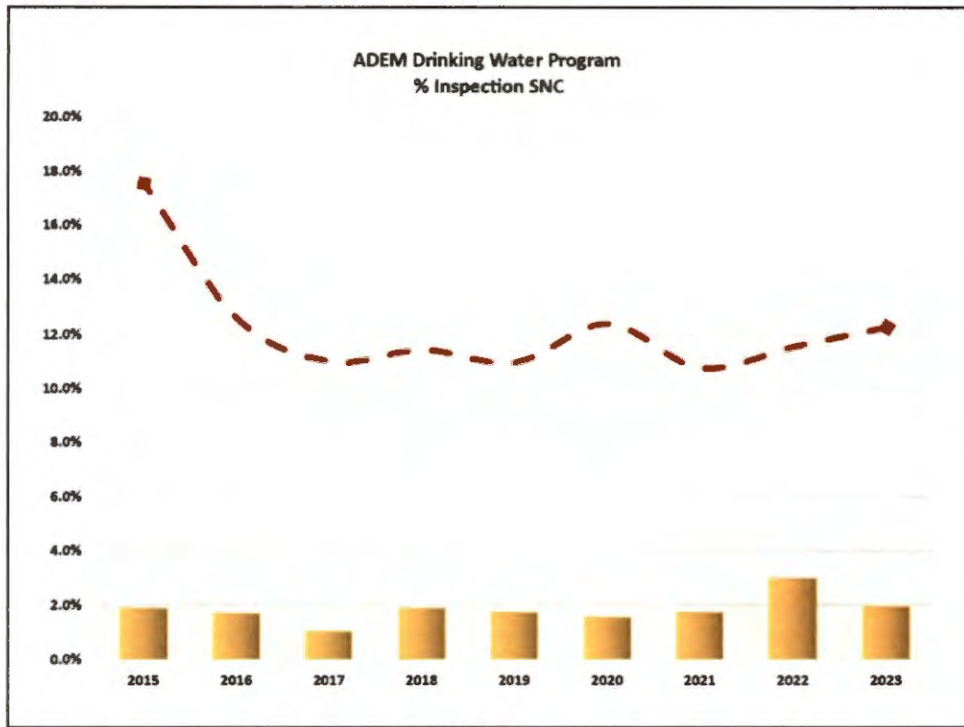
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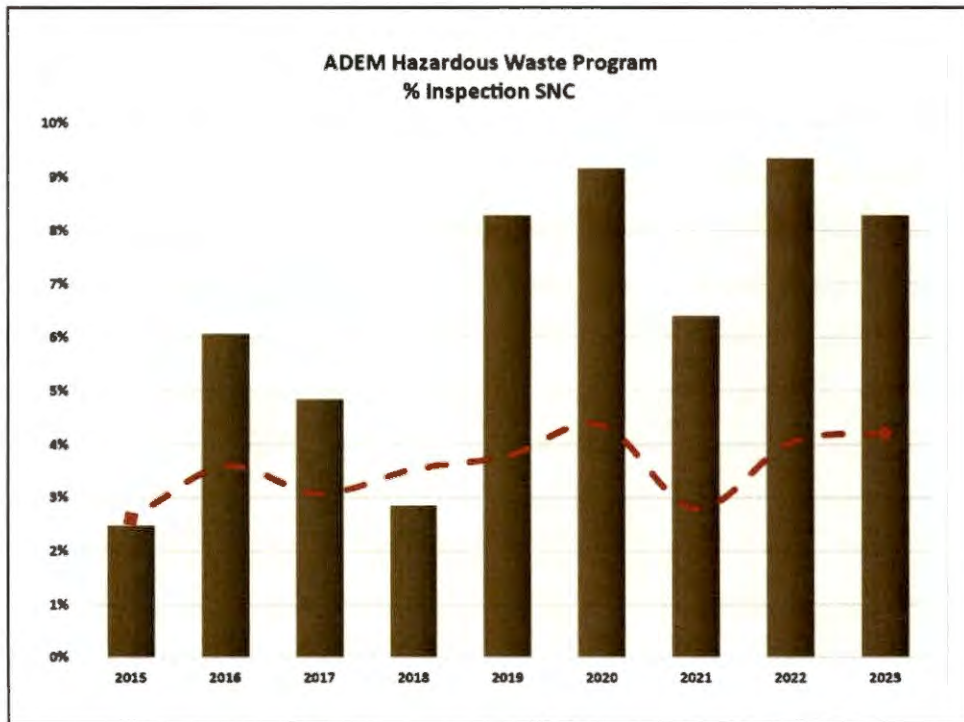
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21



22

Summary

- Regulated Universe Generally Steady
- High Rates of Inspections
- High Rates of Informal Enforce (Education)
- Low Rates of Serious Non-Compliance for Air, Water, Drinking Water
- Program to Reduce Hazardous SNCs
- Overall Out-perform Nation & Favorable Trends

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Attachment 3

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

NATIONAL SALVAGE AND SERVICE CORPORATION,)	
)	
Petitioner,	)	EMC Docket No. 22-04
	)	(IN RE: ADEM Administrative Order
vs.	)	No. 22-079-AP issued on May 18, 2022,
	)	to National Salvage and Service
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	Corporation, Selma, Dallas County,
	)	Alabama)
)	
Respondent.)	

ORDER

Before the Commission is the Petitioner's Request for Oral Argument, and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Petitioner's Request for Oral Argument is hereby granted with each Party allotted ten minutes for their oral argument; and
2. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
3. That a copy of the Order shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

Environmental Management Commission Order
Page 2

ISSUED this 12th day of April 2024.

APPROVED:



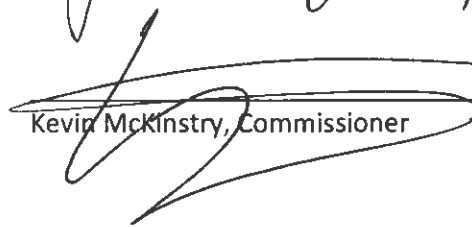
Mary J. Merritt, Commissioner



H. Lanier Brown, II, Commissioner



J. Patrick Tucker, Commissioner



Kevin McKinstry, Commissioner



John (Jay) H. Masingill, III, Commissioner

Ruby L. Perry, Commissioner



A. Frank McFadden, Commissioner

DISAPPROVED:

Mary J. Merritt, Commissioner

H. Lanier Brown, II, Commissioner

J. Patrick Tucker, Commissioner

Kevin McKinstry, Commissioner

John (Jay) H. Masingill, III, Commissioner

Ruby L. Perry, Commissioner

A. Frank McFadden, Commissioner

Environmental Management Commission Order
Page 3

ABSTAINED:

Mary J. Merritt, Commissioner

H. Lanier Brown, II, Commissioner

J. Patrick Tucker, Commissioner

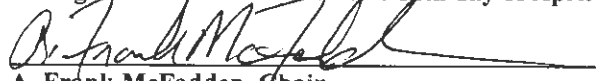
Kevin McKinstry, Commissioner

John (Jay) H. Masingill, III, Commissioner

Ruby L. Perry, Commissioner

A. Frank McFadden, 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 12th day of April 2024.**



**A. Frank McFadden, Chair
Environmental Management Commission
Certified this 12th day of April 2024**

Attachment 4

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

NATIONAL SALVAGE AND SERVICE CORPORATION,)	
)	
Petitioner,	)	EMC Docket No. 22-04
	)	(IN RE: ADEM Administrative Order
vs.	)	No. 22-079-AP issued on May 18, 2022,
	)	to National Salvage and Service
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	Corporation, Selma, Dallas County,
	)	Alabama)
)	
Respondent.)	

ORDER

Before the Commission is the Recommendation of the Hearing Officer in the above matter. Also before the Commission are the Petitioner's Objections to the Recommendation of the Hearing Officer; the Petitioner's Proposed Order; ADEM's Reply to Petitioner's Objections to Recommendation of Hearing Officer; and the Department's Proposed Order to the Hearing Officer's Recommendation. The Commission having considered the same, along with all the submissions that have been presented to the Commission in this matter, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That such Findings of Facts, Conclusion of Law, and Recommendation of the Hearing Officer to the Environmental Management Commission are hereby adopted;
2. That pursuant to the adoption of the Findings of Facts, Conclusions of Law, and Recommendations of the Hearing Officer, the Commission sustains the Department's findings and approves its action and Administrative Order No. 22-079-AP issued on May 18, 2022, to National Salvage and Service Corporation, Selma, Dallas County, Alabama; 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 Recommendation of Hearing Officer, attached hereto as Attachment A, and made a part hereof, shall be forthwith served upon the parties hereto either personally, or by certified mail, return receipt requested.

Environmental Management Commission Order
Page 2

ISSUED this 12th day of April 2024.

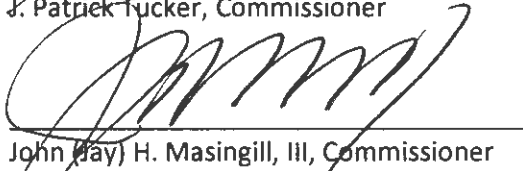
APPROVED:



Mary J. Merritt, Commissioner



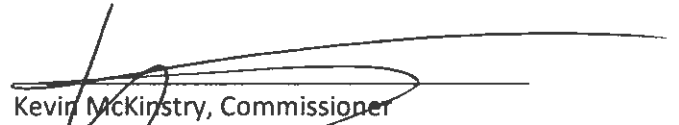
J. Patrick Tucker, Commissioner



John (Jay) H. Masingill, III, Commissioner

A. Frank McFadden, Commissioner

H. Lanier Brown, II, Commissioner



Kevin McKinstry, Commissioner

Ruby L. Perry, Commissioner

DISAPPROVED:

Mary J. Merritt, Commissioner

J. Patrick Tucker, Commissioner

John (Jay) H. Masingill, III, Commissioner



A. Frank McFadden, Commissioner



H. Lanier Brown, II, Commissioner

Kevin McKinstry, Commissioner

Ruby L. Perry, Commissioner

Environmental Management Commission Order
Page 3

ABSTAINED:

Mary J. Merritt, Commissioner

H. Lanier Brown, II, Commissioner

J. Patrick Tucker, Commissioner

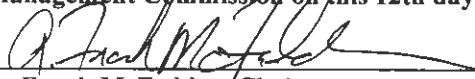
Kevin McKinstry, Commissioner

John (Jay) H. Masingill, III, Commissioner

Ruby L. Perry, Commissioner

A. Frank McFadden, 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 12th day of April 2024.**



**A. Frank McFadden, Chair
Environmental Management Commission
Certified this 12th day of April 2024**

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

RECEIVED

NATIONAL SALVAGE AND SERVICE)
CORPORATION,)
)
Petitioner,)
)
vs.)
)
ALABAMA DEPARTMENT OF)
ENVIRONMENTAL MANAGEMENT,)
Respondent.)

MAR 22 2024

**ENV.MGMT.
COMMISSION**

EMC Docket No. 22-04

RECOMMENDATION OF HEARING OFFICER TO THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

This matter proceeded to final hearing on September 26, 2023. The record subsequently closed on March 12, 2024. Both sides submitted evidence at the hearing and filed post-hearing briefs and/or proposed findings of fact and conclusions of law. After considering the evidence and the parties' filings, this Recommendation is made.

Introduction- Burden of Proof and Standard of Review

The law provides that the burden of going forward with the evidence shall be on the party requesting the hearing. In other words, the burden of proof in this case rests with the Petitioner, National Salvage and Service Corporation ("NSSC") to establish by a preponderance of the evidence that the Department's action should be modified or reversed. The hearing shall be conducted as a *de novo* proceeding and the consideration by the Commission is *de novo*. Bates Motel, Inc. v. Env't Mgmt. Comm'n, 596 So. 2d 924, 927 (Ala. Civ. App. 1991); Ala. Admin. Code R. 335-2-1-14 (6); Alabama Rivers Alliance and American Rivers. Petitioners v. Alabama Department of Environmental Management, Respondent and Alabama Power Company, Intervenor, 2006 WL 6035756, at 7.

Finding of Relevant Facts

The following facts are basically undisputed. In 2021, a fire initially ignited by lightning started a large fire at NSSC's facility in Dallas County, Alabama. The fire jumped or spread from a bundle of railroad ties and started a massive fire event throughout other bundles of ties within the facility. A contributing factor to the size and spreading of the fire was the fact that NSSC stored a larger-than-normal number of railroad ties on its premises. NSSC is in the business of purchasing, reselling and using in various forms and for a variety of purposes, railroad ties. Normally, NSSC's facility contained about 50 bundles of railroad ties but at the time of the fire event, the facility stored approximately 400 bundles. This constituted approximately 2,000,000 railroad ties stored in close proximity to each other on NSSC's grounds. NSSC explained that the collection of the large number of railroad ties was due to the effects of COVID and the related restraints on commerce at that period of time.

The undisputed evidence indicated that the fire events at NSSC's facility were eventually fully extinguished after approximately two weeks. The Department investigated the practices of NSSC and issued it a questionnaire as part of the investigation. In response to that questionnaire, NSSC, through its general counsel in consultation with other NSSC officials, stated that due to the larger than normal number of railroad ties, the normal spacing between bundles of ties could not occur and, therefore, the access lanes and spacing between bundles proved to be too narrow. While the facts are basically undisputed, the legal issues are not.

Two legal issues are in dispute: (1) whether the fire events at NSSC's facility violated ADEM Admin. Code r. 335-3-3-.01; and, if so; (2) whether the Department's Administrative Order properly assessed a \$75,000.00 penalty against NSSC for the alleged violation(s).

Conclusion of Relevant Law

ADEM Admin. Code r. 335-3-3-.01 provides in relevant part as follows: “No person shall ignite, cause to be ignited, permit to be ignited, or maintain any open fire... .” The regulation contains exceptions which are not relevant to this case, and the issue here is whether NSSC ignited, cause to be ignited, permitted to be ignited, or maintained any open fire. First, it is undisputed NSSC did not ignite the initial fire; that fire’s origin was lightning. The question instead must focus on whether NSSC did in fact “maintain” “any open fire.” While certainly NSSC did not strike the match, so-to-speak, to start the initial fire, its self-admission that its own, unprecedented storing of huge bundles of railroad ties without following its own practice of keeping proper access lanes and spacing between those bundles, supports the conclusion that NSSC permitted and allowed an open fire to be maintained. “Language used in an administration Regulation should be given its natural, plain, ordinary, and commonly understood meaning.” West Bay Watch, Inc. and George A. Tonsmeire, Petitioners v. Alabama Department of Environmental Management, Respondent and Degussa Corporation, Intervenor, 1998 WL 525564, at 8. The dictionary defines “maintain” as “to keep in an existing state” or “to continue.” *Merriam-Webster*. <https://www.merriam-webster.com/dictionary/maintain>. Retrieved March 19, 2024. The existing conditions on NSSC’s premises allowed the fire event to continue and kept it in a state of eruption, fueled and ongoing.

Taking all the evidence and facts in their totality, the Hearing Officer must conclude that NSSC’s actions or omissions did cause an open fire(s) to be maintained in violation of ADEM Admin. Code r. 335-3-3-.01, NSSC’s failure to follow its own spacing and access practices simply because it self-accumulated too many railroad ties caused, or at least permitted, the fire events to continue. The harder question is the penalty assessment in this case.

Pursuant to Ala. Code § 22-22A-5(18)c., as amended, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. In the Matter of: Danny Jones 101 Sands Street Selma, Dallas County, Alabama, 2016 WL 4432855, at 1. The Hearing Officer will analyze each factor.

The seriousness of the violation: The Department's representative, Ronald Gore, testified the violation was serious but did not cause any irreparable harm to the environment. There was no evidence that there was ever any measurable threat to the health and safety of the public. While the burning of large fires is certainly serious from the standpoint of its potential harm, there was no evidence put forward that the environment or public were in danger.

The standard of care manifested by NSSC: NSSC did not follow its own procedures. While the Hearing Officer is sympathetic to NSSC in having to deal with the tireless effects of COVID, nevertheless by NSSC's own admission, it did not follow its own standards of care which were contributing factors to the maintenance of the open fire(s).

The economic benefit which delayed compliance may have conferred upon NSSC: NSSC obtained no economic benefit from any alleged delayed compliance. To the contrary, NSSC sustained losses and cooperated fully with the Department and emergency response agencies at all times.

The nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment: The evidence indicated that after the fires occurred, NSSC

attempted to fully cooperate with emergency responders and had its own employees on-site to put out smoldering portions of the fires as they sparked. The fires were so large in size and number, however, that NSSC was left to simply attempt to contain what they could. In any event, the Department does not seem to criticize or dispute NSSC's efforts in this regard.

NSSC's history of previous violations: There was no evidence of any history of previous violations by NSSC.

NSSC's ability to pay the penalty: No evidence indicated that NSSC could not pay the proposed \$75,000.00 penalty.

Without attempting to in any way criticize Department procedure, the Department's penalty calculation was somewhat disjointed in this case. The Administrative Order seems to suggest that there were three separate violations of three regulations. While the Administrative Order issued in this case tends to indicate that the penalty amount was based on three separate regulations, the Department took the position at the hearing that it was only one violation multiplied by 3 separate days. The maximum amount for each violation being \$25,000.00, and that amount multiplied by 3 days, equals the assessed penalty of \$75,000.00.

The Hearing Officer has consistently believed that since Department personnel have much experience dealing with alleged violators and the interpretation of their own regulations, any hearing officer should be reluctant to second-guess the Department when it comes to issues such as assessment of penalties (barring some obvious injustice or glaring error). While the Hearing Officer personally believes the factors which applicable law sets forth to judge a proper penalty amount should provide a bit more grace toward NSSC than suggested by the Department's Order, the Hearing Officer is not a position to say that the Department erred and cannot say that NSSC carried its burden to warrant a modification of the

penalty amount.

Conclusion

Based on the foregoing, it is the Recommendation that the Commission sustain the Department's findings and approve its action and Administrative Order.

Done this 14th day of March, 2024.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following individual(s) by email and/or placing a copy of the same in the U.S. Mail, postage prepaid and properly addressed this 19th day of March, 2024:

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HEARING OFFICER

