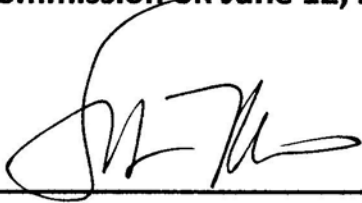


8/18/20

**Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
June 12, 2020**

This is to certify that the Minutes contained herein are a true and accurate account of actions taken by the Alabama Environmental Management Commission on June 12, 2020.

A handwritten signature in black ink, appearing to read 'S. Miller', is written over a horizontal line.

**Samuel L. Miller, Chair
Alabama Environmental Management Commission**

Certified this 14th day of August 2020.

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
June 12, 2020

Convened: 11:02 a.m.
Adjourned: 12:34 p.m.

Part A

Transcript
Word Index

Part B

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Part A

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING
Meeting on 06/12/2020

1 ALABAMA ENVIRONMENTAL MANAGEMENT
2 COMMISSION MEETING

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11 ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

12 Alabama Room

13 1400 Coliseum Boulevard

14 Montgomery, Alabama 36110-2400

15 June 12, 2020

16 11:02 a.m.

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25 Taken by: Victoria M. Castillo, ACCR No. 17

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<p style="text-align: right;">Page 2</p> <p>1 A P P E A R A N C E S</p> <p>2</p> <p>3 COMMISSION MEMBERS PRESENT:</p> <p>4 John (Jay) H. Masingill, III</p> <p>5 Kevin McKinstry</p> <p>6 Mary J. Merritt</p> <p>7 Samuel L. Miller, M.D., Chair</p> <p>8 Ruby L. Perry, D.V.M.</p> <p>9 Thomas P. Walters, P.E.</p> <p>10</p> <p>11 COMMISSION MEMBER NOT PRESENT:</p> <p>12 H. Lanier Brown, II, Esq., Vice Chair</p> <p>13</p> <p>14 ALSO PRESENT:</p> <p>15 Robert Tambling, AEMC Legal Counsel</p> <p>16 Debi Thomas, AEMC Executive Assistant</p> <p>17 Lance R. LeFleur, ADEM Director</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>1 raising our right hand.</p> <p>2 So all in favor, please raise your</p> <p>3 right hand.</p> <p>4 (All Commissioners raise their</p> <p>5 hands.)</p> <p>6 DR. MILLER: All opposed, same</p> <p>7 sign.</p> <p>8 (No response.)</p> <p>9 DR. MILLER: The minutes are</p> <p>10 accepted.</p> <p>11 Next item on the agenda is our</p> <p>12 report from Director LeFleur. Director LeFleur,</p> <p>13 we give you the floor.</p> <p>14 MR. LeFLEUR: If you will</p> <p>15 indulge me, I'm going to lower my mask while I</p> <p>16 speak so you-all can hear me and so my glasses</p> <p>17 won't fog. Dual reason here.</p> <p>18 Good morning to all and welcome.</p> <p>19 The April 10th Commission meeting was canceled so</p> <p>20 this is the fourth meeting of the Alabama</p> <p>21 Environmental Management Commission for fiscal</p> <p>22 year 2020. And everyone's attention is on COVID-</p> <p>23 19 disease caused by the coronavirus. My report</p> <p>24 today will be very brief to minimize the</p> <p>25 potential exposure for those in the audience.</p>
<p style="text-align: right;">Page 3</p> <p>1 (WHEREUPON, proceedings began at</p> <p>2 11:02 a.m.)</p> <p>3 DR. MILLER: I'm going to call</p> <p>4 the meeting to order, the 6/12/2020 meeting of</p> <p>5 the Environmental Management Commission. We do</p> <p>6 have a quorum present. Vice Chair Brown was</p> <p>7 unable to make it this morning, but everyone else</p> <p>8 is here.</p> <p>9 Our first agenda item is to consider</p> <p>10 the meeting minutes from February 14th, 2020,</p> <p>11 which is the last meeting. We did not have the</p> <p>12 April meeting, as you will recall.</p> <p>13 I will entertain a motion from the</p> <p>14 Commissioners to accept or reject these minutes.</p> <p>15 MR. MASINGILL: I move that we</p> <p>16 adopt the minutes of the February 14th, 2020</p> <p>17 Commission meeting as circulated.</p> <p>18 DR. PERRY: I will second the</p> <p>19 motion.</p> <p>20 DR. MILLER: All right. We have</p> <p>21 a motion and a second. Is there any discussion?</p> <p>22 (No response.)</p> <p>23 DR. MILLER: If not, I will call</p> <p>24 for the question. And we have been requested</p> <p>25 since we're wearing masks and so forth to vote by</p>	<p style="text-align: right;">Page 5</p> <p>1 The work of the Department was</p> <p>2 deemed to be an essential function of state</p> <p>3 government that needs to continue to the maximum</p> <p>4 degree possible during the COVID-19 pandemic.</p> <p>5 Our essential function is set out in our mission</p> <p>6 to assure a safe, healthful, and productive</p> <p>7 environment. In the performance of our work, the</p> <p>8 health and safety of our personnel is primary.</p> <p>9 To protect our personnel, all safety measures</p> <p>10 recommended by CDC and the Alabama Department of</p> <p>11 Public Health are being practiced. The</p> <p>12 Governor's shelter in place authorized state</p> <p>13 employees to telework. The Department is highly</p> <p>14 automated and well positioned to implement a</p> <p>15 telework program. A number of procedures were</p> <p>16 put in place to carry on the Department's work</p> <p>17 with the maximum reliance on telework. Those</p> <p>18 procedures include minimal on-site presence,</p> <p>19 rotating on-site work schedules to achieve all</p> <p>20 essential functions, minimizing congregating, and</p> <p>21 face-to-face meetings, and daily communication by</p> <p>22 each employee with his or her supervisor.</p> <p>23 Systems support has been provided to</p> <p>24 enable telework, including: A virtual private</p> <p>25 network for each employee working remotely to</p>

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1 maintain security. As resources allow, laptop
2 computers are made available to those who do not
3 already have a work laptop. We're still working
4 on technical issues with those who don't have
5 access to high-speed Internet and ways to avoid
6 caller ID disclosure of personal telephone
7 numbers to work contacts. Microsoft Teams,
8 Skype, and Zoom Internet conferencing
9 applications are being utilized. Incoming
10 telephone calls are automatically forwarded to
11 individuals working remotely.

12 Performance is an important
13 consideration in a teleworking program. Each
14 division is tracking quantitative and qualitative
15 productivity measures. Performance results fall
16 into two categories. First, those areas with
17 little or no loss of productivity. These include
18 permit writing, IT work, automated remote
19 reporting, document reviews, processing of
20 enforcement actions, engineering,
21 intergovernmental communications, maintenance,
22 and other activities where face-to-face
23 interaction is not required. These are at normal
24 levels and in some cases productivity is above
25 normal levels. In our Office of General Counsel,

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1 legal matters are also being addressed as normal
2 including the increased workload responding to
3 the increased number of lawsuits, appeals, and
4 petitions being filed by environmental groups
5 during the coronavirus crisis.

6 Second, areas where productivity has
7 dropped include inspections, sample collections,
8 and associated lab analyses. Although EPA has
9 indicated it will make allowances for reduced
10 inspections during the pandemic, the Department
11 is developing plans to make up lost ground on
12 inspections. Overall, productivity appears to be
13 greater than 80 percent of normal. This is only
14 possible because no employee furloughs have been
15 mandated.

16 By continuing to perform our
17 essential functions, ADEM is accomplishing its
18 mission. Regulated industries in Alabama are
19 being required to meet their environmental
20 obligations. As a result, industry should have
21 no environmental regulatory matters delaying the
22 restarting of operations.

23 The Department has taken advantage
24 of an excellent opportunity to assess more modern
25 work methods that maintain productivity, build

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1 morale, and help retain the next generation of
2 engineers and scientists.

3 The Department's major initiatives
4 and financial condition have not been materially
5 impacted during these extraordinary times. We
6 continue to be on schedule with the extensive
7 computer systems upgrade that will carry us well
8 into the future. The final phase of the
9 Birmingham field office upgrade that will
10 modernize our lab facilities remains on the same
11 schedule we had before the pandemic. And the new
12 Mobile facility to house our Mobile Field Office
13 and Coastal Program is progressing as planned.

14 Although it is anticipated there
15 will be a slight decline in permit fee income due
16 to reduced economic activity, our FY 2020 federal
17 and state budgets are currently in good shape to
18 weather the storm. The FY 2021 General Fund
19 budget passed the legislature and was signed by
20 the Governor. It appropriates the same funding
21 for ADEM as the prior year. And that along with
22 other funding sources will be adequate to fund
23 all current activities of the Department.

24 Despite the pandemic, our people
25 continue to work on professional development. I

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1 am pleased to report that Devin Jenkins in our
2 Land Division has achieved an important career
3 milestone by earning his designation of
4 Professional Engineer. He is not in the room
5 today, but I will introduce him at a future
6 Commission meeting.

7 Devin, congratulations to you.

8 That concludes this abbreviated
9 report. I will be pleased to answer any
10 questions you may have.

11 DR. MILLER: Any questions?
12 (No response.)
13 DR. MILLER: Thank you,
14 Director.

15 MR. LeFLEUR: Thank you.

16 DR. MILLER: It is now time for
17 us to begin evaluation of Director LeFleur's
18 performance for the last year. We last did an
19 evaluation October of 2019. And so what we would
20 like to do is ask the Personnel Committee to
21 provide a report to us at the October meeting.
22 We would like for them to ask for comments from
23 Commissioners, the public, environmental groups.
24 Anyone who'd like to comment, please do so and we
25 will certainly circulate those comments among the

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1 Commission. Let's see now, our Personnel
 2 Committee is headed by --
 3 MR. WALTERS: Me.
 4 DR. MILLER: -- Tom. Tom, would
 5 you take that on as a project then?
 6 MR. WALTERS: Absolutely.
 7 Absolutely.
 8 DR. MILLER: All right. And we
 9 will send out some deadlines as far as providing
 10 comments to the Commission and the Committee
 11 regarding Director LeFleur's performance.
 12 Our next item on the agenda is Black
 13 Warrior Riverkeeper versus ADEM and Metalplate
 14 Galvanizing, L.P. This is EMC Docket No. 19-01.
 15 We are going today to consider the Hearing
 16 Officer's report -- I can't talk with this thing
 17 on. I'm sorry -- the Hearing Officer's report
 18 and also possibly oral arguments from the
 19 attorneys from both sides. The Department and
 20 the Intervenor submitted replies to the
 21 Petitioner's objections.
 22 I will entertain a motion regarding
 23 the Petitioner's request for oral argument and
 24 limiting the amount of time to be allotted to
 25 this oral argument.

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1 Is there anyone who'd like to make a
 2 motion or --
 3 MR. MASINGILL: Move we grant
 4 the Petitioner's request for oral arguments and
 5 allow a maximum of 10 minutes for each party in
 6 oral arguments.
 7 DR. MILLER: All right. Is
 8 there a second to that?
 9 DR. PERRY: Second to the
 10 motion.
 11 DR. MILLER: We have a motion
 12 and a second. Is there any further discussion?
 13 (No response.)
 14 DR. MILLER: If not I'm going to
 15 call for the question. We have a motion and a
 16 second to provide the Petitioner's request for
 17 oral argument for a maximum of 10 minutes. All
 18 in favor, say aye, or raise our hand aye. Sorry.
 19 (All Commissioners raise their
 20 hands.)
 21 DR. MILLER: And all opposed,
 22 raise your hand again. Okay.
 23 (No response.)
 24 DR. MILLER: All right.
 25 Ms. Dillard, we are going to allot you 10

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1 minutes. And I would encourage you to if
 2 possible -- we have had your objections
 3 circulated to the Commission and all have had a
 4 chance to read and study those. And I would
 5 encourage you if you have different information
 6 to please provide that. Welcome.
 7 MS. DILLARD: Thank you. And
 8 with the Commission's permission, I'd like to
 9 take my mask off during argument. Thank you for
 10 granting argument. My name is Eva Dillard and I
 11 represent the Petitioner, Black Warrior
 12 Riverkeeper, in this matter. We are a
 13 citizen-placed nonprofit dedicated to improving
 14 water quality habitat and recreation, not to
 15 mention public health. Throughout the Black
 16 Warrior watershed there is a significant
 17 residential population around the two Metalplate
 18 facilities that are the subject of this appeal.
 19 If you look to the bottom of this slide, you will
 20 see an area outlined in purple. Near this area
 21 there is a Birmingham public housing complex.
 22 There's a Jefferson County Head Start center.
 23 There are churches. There's a park. And other
 24 residential uses. Over here for Metalplate
 25 Number 2, which is outlined in brown, there are

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1 single-family homes around that.
 2 Why does that matter? We're having
 3 a national conversation right now about racism
 4 and it's legacy. Studies show that pollution
 5 disproportionately affects people of color and
 6 people in low income communities. That's because
 7 historically those permitting requirements and
 8 exclusionary zoning laws have funneled racial
 9 ethnic minorities into areas with a greater
 10 degree of environmental degradation. And that is
 11 true of the areas around the two Metalplate
 12 Galvanizing plants.
 13 According to EPA's Environmental
 14 Justice mapping and screening tool which
 15 calculates burdens, the areas around Plant 1 and
 16 Plant 2 have an index of 95.3 and 95 for
 17 wastewater discharge concerns. These concerns
 18 place these areas -- these areas around these
 19 facilities among the nation's worst five percent.
 20 These are some discharges from Plant
 21 2. These are some discharges from Plant 1. One
 22 constant over the 20 years is that Metalplate has
 23 been permitted to operate these two plants with
 24 significant concentrations of zinc in their
 25 stormwater. Congress explicitly intended for

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1 industrial stormwater dischargers like Metalplate
 2 to comply strictly with permitting requirements
 3 and state water quality standards. However,
 4 these permits as written do not comply with the
 5 Clean Water Act.

6 In the interest of time we will
 7 stand on the objections that we detailed in our
 8 filing. But I do want to highlight a couple of
 9 the key points that I think offer the Commission
 10 the clearest path to a remand of the permit,
 11 which is what we think you should vote to do.

12 A permit writer starts by developing
 13 technology-based effluent limitations. Which, as
 14 you know, are exactly what they sound like.
 15 They're based on the availability and cost of
 16 pollution control technology. EPA has national
 17 categorical standards for some industries, for
 18 others it does not. Where it does not, the
 19 permit writer like ADEM must apply certain
 20 factors. They use best professional judgment,
 21 but must apply these mandatory factors. These
 22 are those factors. We set them out in our
 23 filing. Even though ADEM has considerable
 24 discretion in evaluating the relevant factors and
 25 determining the weight to be afforded each, ADEM

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1 must apply those factors. And the record
 2 reflects that ADEM did not. The Hearing
 3 Officer's recommendation that the permit be
 4 sustained on this point is plainly erroneous and
 5 inconsistent with applicable law. Whereas here
 6 technology-based effluent limitations are not
 7 enough to protect water quality, ADEM must take
 8 another step and develop water quality based
 9 effluent limitations. They are developed to
 10 achieve compliance with the established water
 11 quality standards.

12 Technological feasibility and
 13 economic reasonableness are not factors that are
 14 considered in developing these limitations. The
 15 parties agree that a water quality based effluent
 16 limitation is required for these permits.

17 ADEM's water quality based effluent
 18 limitations, or WQBELs, fail to comply with the
 19 Clean Water Act in a number of critical respects.
 20 First, they add nothing to the technology-based
 21 effluent limitations. Both rely on BMPs, zinc
 22 minimization monitoring. Here is the WQBEL. And
 23 you will see highlighted in white zinc
 24 minimization, BMPs, and monitoring.

25 For the technology-based effluent

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1 limitation, the same. BMPs, zinc minimization,
 2 and monitoring. The whole idea behind a water
 3 quality based effluent limitation is it is
 4 required when the technology-based limitation is
 5 not stringent enough to protect water quality.
 6 So you can't have a water quality based effluent
 7 limitation that's identical to the technology
 8 limitation, because that doesn't comply with the
 9 Clean Water Act. Here, just like in the case we
 10 cited, the technology-based limitation and the
 11 water quality based limitation are
 12 indistinguishable. The record demonstrates that
 13 the water quality based effluent limitations in
 14 these permits add nothing of substance to the
 15 technology limitations. And the Hearing
 16 Officer's recommendation that they be sustained
 17 on this point is plainly erroneous and
 18 inconsistent with applicable law.

19 Another reason ADEM's WQBEL fails to
 20 protect water quality in the receiving streams is
 21 that the WQBEL doesn't address the actual
 22 receiving streams. Metalplate and ADEM would
 23 have you believe that Village Creek is the point
 24 of compliance. It is not. The permit also must
 25 protect water quality in the receiving streams.

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1 It does not -- Riverkeeper offered evidence that
 2 on occasion the streams below these plants are
 3 not meeting water quality standards. And
 4 Metalplate's own sampling and testing shows
 5 excessive concentration of zinc in the stormwater
 6 that the low flow streams below these plants
 7 simply cannot assimilate.

8 Again, the water quality based
 9 effluent limitation fails to provide how, when,
 10 or whether the zinc management plans that ADEM
 11 wrote will ensure the receiving streams, the
 12 streams immediately below the plants, will meet
 13 the state's acute water quality standards for
 14 zinc.

15 Another reason these permits failed
 16 to comply with the Clean Water Act is that
 17 numeric limits are feasible here. The Clean
 18 Water Act authorizes the use of BMPs under
 19 certain situations. But only one authorizes BMPs
 20 in place of numeric effluent limitations and that
 21 is when those limitations are infeasible. ADEM
 22 states that numeric limits are infeasible here
 23 because stormwater events are unpredictable with
 24 varying discharge rates and pollution loadings
 25 with different flows in the receiving

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<p align="right">Page 18</p> <p>1 waterbodies. However, ADEM's Stormwater Branch 2 routinely develops and applies numeric criteria 3 to the stormwater runoff being discharged by 4 surface mines. Just like Metalplate's 5 discharges, they are precipitation driven. With 6 no way to estimate how or when they will 7 discharge, what the pollution concentrations in 8 those discharges are, or what the existing water 9 quality is in the receiving stream just like 10 Plant 1 and Plant 2.</p> <p>11 Moreover, Metalplate Galvanizing 12 runs a similar galvanizing operation in Atlanta. 13 That plant has a numeric limit based upon that 14 state's acute water quality criterion for zinc 15 because an extensive suite of BMPs there just 16 didn't work. ADEM failed to develop a numeric 17 limitation for zinc tied to the acute water 18 quality standards, despite the fact that Georgia 19 did and despite the fact that ADEM developed 20 similar limitations for surface minings. And I 21 don't understand how it can be feasible to have a 22 numeric limit in Georgia and not have one in 23 Alabama.</p> <p>24 ADEM also failed to establish a 25 valid compliance schedule for the permits.</p>	<p align="right">Page 20</p> <p>1 permit issuance, Metalplate is still working on 2 revising those plans. The latest iteration was 3 in February of this year. So there still isn't 4 even a final plan -- or final water quality based 5 effluent limitation under these permits. That is 6 another basis for the Commission to remand these 7 permits.</p> <p>8 In sum, the permits failed to comply 9 with the Clean Water Act because the 10 technology-based effluent limitation is not valid 11 because it doesn't apply the mandatory factors. 12 There's not a valid water quality based effluent 13 limitation because the water quality based 14 effluent limitation adds nothing to the 15 technology limitation, fails to protect the 16 receiving streams. Numeric limits are feasible. 17 The compliance schedule fails to meet 18 regulations. And public participation in 19 developing the water quality based effluent 20 limitation was denied.</p> <p>21 The EMC must remand the permits to 22 ADEM for correction. By postscript, every time I 23 have a filing I update the compliance information 24 for Metalplate Galvanizing. I know it began some 25 two years after these permits were issued -- it</p>
<p align="right">Page 19</p> <p>1 Typically, permits require compliance upon 2 issuance. If ADEM is going to postpone 3 compliance with water quality standards, they 4 have to obey the regulations that set out what a 5 compliance schedule must contain. A compliance 6 schedule under the regulations has many 7 requirements, as you can see from the words 8 (unintelligible) up there. Unfortunately, the 9 permit record here shows that ADEM did not 10 include any of those. The record demonstrates 11 that ADEM had none of the statutory requirements 12 for a compliance schedule in the permits. And 13 that is another reason for the Commission to 14 remand these permits to ADEM.</p> <p>15 Finally, ADEM failed to comply with 16 the Clean Water Act's public participation 17 requirements. Public participation in the 18 development of any effluent limitation 19 established by any state shall be provided. The 20 permits provide that the zinc management plans 21 which are the water quality based effluent 22 limitations will be developed in the future as 23 Metalplate determines that approach violates the 24 public participation requirements in the Clean 25 Water Act. I note that almost two years post</p>	<p align="right">Page 21</p> <p>1 will be two years in September. They are still 2 discharging significant concentrations of zinc at 3 both Plant 1 and at Plant 2. And these 4 discharges are not being adequately controlled by 5 the permits. Despite the zinc management plans, 6 the most recent data shows that Metalplate is 7 discharging zinc concentrations that are as much 8 as 240 times and 517 times the state's acute 9 water quality criteria for zinc. This is based 10 on Metalplate's own sampling.</p> <p>11 It is past time for ADEM to write 12 permits that comply with the Clean Water Act. We 13 ask you to vote to reject the Hearing Officer's 14 recommendations and remand these permits to ADEM. 15 Thank you.</p> <p>16 DR. MILLER: Thank you. Do we 17 have anybody from the Department who would like 18 to respond to this? Oh, we do?</p> <p>19 MS. BLANTON: Good morning, 20 Chair Miller and Commissioners. My name is 21 Carrie Blanton. Monica Jayroe and I represent 22 the Department in this matter. The hearing 23 officer has recommended that the Commission deny 24 the relief requested in Riverkeeper's notice of 25 appeal, deny Riverkeeper's motion for summary</p>

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1 judgment, grant the Department and Metalplate's
 2 motion for summary judgment, and approve both of
 3 Metalplate's permits as issued. The Department
 4 urges you to adopt these recommendations in full.
 5 Riverkeeper's objections merely reiterate the
 6 original issues and request for relief raised in
 7 its permit appeal and has later expanded through
 8 its motion for summary judgment.

9 The Department in turn has responded
 10 to all of these objections through its own motion
 11 for summary judgment, subsequent response to
 12 pleadings, and in oral argument. Thus, these
 13 objections raise no issues to which the Hearing
 14 Officer has not already fully considered before
 15 making his report and recommendation to you.
 16 Riverkeeper bore the burden to prove the permits
 17 were improper. And based on the record before
 18 you, the Hearing Officer found the Petitioner
 19 failed to satisfy that burden.

20 The crux of Riverkeeper's appeal and
 21 the heart of these objections today are to
 22 convince the Commission to compel the Department
 23 to put numeric effluent limits for zinc in
 24 Metalplate's permits for its stormwater
 25 discharges. The bottom line is that it's

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1 infeasible for the Department to calculate a
 2 scientifically justifiable numeric limit for zinc
 3 in these two permits. And that's okay.

4 Numeric effluent limits for zinc on
 5 Metalplate's stormwater discharges are not
 6 required by any statute or regulation. And
 7 they're not necessary for these permits to be
 8 protective of water quality. Not only are
 9 numeric effluent limits not required, but the
 10 applicable regulations expressly envision
 11 circumstances in which non-numeric limitations,
 12 such as best management practices, are
 13 appropriate to control the discharges of
 14 pollutants including circumstances such as these
 15 where numeric effluent limits are infeasible.

16 Depositions of the permit writer and
 17 Departmental experts in the record before you
 18 describe in detail why it is infeasible for them
 19 to calculate a scientifically justifiable numeric
 20 limit for these permits. The Hearing Officer
 21 agreed with that finding of infeasibility,
 22 notwithstanding Riverkeeper's arguments, and
 23 noted the Department provided ample evidence
 24 showing it was within its regulatory authority in
 25 its imposition of nonnumeric effluent limits to

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1 carry out the purposes and intent of the Alabama
 2 Water Pollution Control Act.

3 As this Commission has previously
 4 held, the Department cannot be held in error for
 5 failing to require something which is not
 6 required by statute or regulation. Moreover, the
 7 zinc minimization plans required by these permits
 8 are consistent with the Village Creek total
 9 maximum daily load's goal of achieving overall
 10 zinc reductions in the watershed from all
 11 stormwater sources. The success of the TMDL's
 12 implementation through our NPDES permitting
 13 program is measured by improvements in water
 14 quality.

15 Water quality monitoring performed
 16 by the Department has revealed that Village Creek
 17 is no longer impaired for zinc indicating the
 18 Department's approach to targeting zinc
 19 reductions in the watershed has proven to be
 20 successful. The record supports the findings
 21 that the final permits comply with the applicable
 22 regulations, are consistent with the goals of the
 23 Village Creek TMDL, and were developed to be
 24 protective of water quality.

25 For these reasons, the Department

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1 respectfully asks the Commission to adopt the
 2 Hearing Officer's recommendations in full and
 3 reject Petitioner's objections. Thank you.

4 DR. MILLER: Thank you. Do we
 5 have anybody who is speaking for Metalplate?

6 MR. ZYGMONT: Yes, sir.

7 DR. MILLER: I think we do.

8 MR. ZYGMONT: Thank you,
 9 Commission, for the opportunity to speak. My
 10 name is Max Zygmont. I am counsel to Metalplate
 11 in this matter. And I will try to be as brief as
 12 possible. First I'd like to say Metalplate of
 13 course wholeheartedly endorses everything that
 14 you have just heard from Ms. Blanton. And we of
 15 course appreciate you also allowing me just a few
 16 minutes here to highlight some additional key
 17 information that supports the Commission's -- or
 18 should support the Commission's adoption of Judge
 19 Hampton's recommendations that the permits issued
 20 to Metalplate be upheld as written.

21 So I have three key points to make.
 22 And the first and third of which will be
 23 especially brief. But those three points are
 24 that Metalplate's Atlanta plant, yes, it's
 25 subject to numeric effluent limitations for zinc

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1 for stormwater, but that doesn't necessarily mean
 2 that those are limits feasible for its Birmingham
 3 plants.

4 The second point is that
 5 Riverkeeper's allegations of historical
 6 compliance issues are simply irrelevant to the
 7 issue at hand here, which is the lawfulness of
 8 the permits issued at this time.

9 And the final point is that these
 10 permits are consistent with the TMDL and water
 11 quality based permitting requirements.

12 So first, about the Atlanta plant.
 13 Yes, as I noted the Atlanta plant is subject to
 14 stormwater limitations that are numeric effluent
 15 limitations for zinc. But, again, that doesn't
 16 mean that those same sorts of numeric effluent
 17 limitations are feasible for the Birmingham
 18 plants. The Atlanta plant has -- as Ms. Dillard
 19 highlighted -- is obviously in a different state,
 20 subject to a different regulator. But those
 21 aren't the only differences. Of course, being in
 22 that different state, it has a location that's
 23 unique to it, has its own layout, its own
 24 geology, its own topography, its own surrounding
 25 land uses. In fact, even the Birmingham

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1 facilities have some significant differences
 2 among them.

3 So what that means is I think that
 4 an analogy might be helpful. But the Atlanta
 5 plant and the Birmingham plants, they're all
 6 Chevys, right? But owning a Chevy doesn't mean
 7 you know what you can do with the vehicle, you
 8 know? Like, Chevy Tahoe and a Camaro, they're
 9 both Chevys, they run on gas, they're V8s. You
 10 know, some of their interior features even look
 11 the same. They have similar technology in them.
 12 But I can go four-wheel driving in one or tow a
 13 boat in one. And, you know, I can't, but maybe
 14 somebody else could slide the Camaro around the
 15 track going 160 miles an hour. So knowing it's a
 16 Chevy doesn't mean that you know what is feasible
 17 with that particular Chevy. So too -- with these
 18 facilities.

19 So without having evidence in the
 20 record to explain why despite those inherent
 21 differences in the facility the Atlanta
 22 experience maps onto the Birmingham plants,
 23 there's no evidence to conclude that the Atlanta
 24 plant and what has happened there is relevant in
 25 any way, shape, or form to what's feasible in

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1 Birmingham. And that sort of evidence to connect
 2 those dots is not in the record. And as a
 3 result, for purposes of this case, what has
 4 occurred at the Atlanta plant is simply
 5 irrelevant.

6 So the second point I'd like to hit
 7 is sort of the water quality point. Village
 8 Creek, as the record before you reflects and we
 9 have written about, is attaining water quality
 10 criteria for zinc that's been demonstrated in the
 11 Department's recent monitoring initiative in
 12 connection with Village Creek. And not only is
 13 it attaining water quality standards, it's
 14 attaining them more than an order of magnitude
 15 according to the water quality chief. And of
 16 course attaining those water quality standards
 17 for zinc was the very purpose of the TMDL.

18 Importantly, that water quality
 19 improvement over the, you know, 15 years or so
 20 since the establishment of TMDL -- a lot of
 21 stakeholders have input into achieving that.
 22 While the bulk of that improvement was occurring,
 23 Metalplate had its old permits, which are less
 24 strict than the current permits. Riverkeeper
 25 critiques the permits, but the zinc minimization

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1 plan requirements include a zinc focus that was
 2 not previously present in the permitting that
 3 Metalplate was subject to. The monitoring
 4 requirements are three times -- three times as
 5 intense as they were before.

6 So what does that mean for us? The
 7 fact that the permits are more strict and water
 8 quality criteria are already being met in Village
 9 Creek and the TMDL's purpose is satisfied, means
 10 that these newer, stricter permits are
 11 necessarily consistent with the water quality
 12 requirements for Village Creek as well as the
 13 Village Creek TMDL.

14 Now, Riverkeeper has also emphasized
 15 that Village Creek isn't the only water that's
 16 relevant for purposes of these permits. And
 17 while that's true, because Metalplate's
 18 stormwater first flows through at Plant 1, an
 19 unnamed tributary to Village Creek, and in Plant
 20 2, an unnamed tributary to Avondale Creek,
 21 focusing on those waters doesn't really change
 22 the analysis.

23 Let's talk about Plant 1 first.
 24 Ms. Dillard showed you some discharge numbers of
 25 zinc associated with Plant 1. An important thing

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<p style="text-align: right;">Page 30</p> <p>1 to recognize about Plant 1 that you might not 2 pick up on from Riverkeeper's papers is at Plant 3 1 Metalplate's stormwater first falls into the 4 Birmingham sewer system where it commingles with 5 stormwater from part of the greater Birmingham 6 area. Before, eventually, two different 7 Birmingham sewer pipes -- one carrying 8 Metalplate's stormwater commingled with other 9 stormwater, the other carrying general urban 10 stormwater -- they both empty into the unnamed 11 tributary to Village Creek. And it's what the 12 water quality is at that point and what the 13 influence of Metalplate's discharge is at that 14 point at the unnamed tributary, not in the sewer 15 system. That's the question that matters. And 16 there's very little evidence or data on that 17 question. However, what evidence and data that 18 there is, in fact it's Riverkeeper's data, shows 19 that Metalplate's discharge from Plant 1 doesn't 20 really move the needle from a water quality 21 standpoint in the unnamed tributary to Village 22 Creek.</p> <p>23 Why do I say that? Riverkeeper on 24 one event sampled water from both of those pipes 25 that I mentioned that empty into and essentially</p>	<p style="text-align: right;">Page 32</p> <p>1 Commission to conclude that the permit for Plant 2 1 will necessarily cause water quality standard 3 exceedances in the unnamed tributary to Village 4 Creek. And, consequently, the Plant 1 permit is 5 consistent with water quality requirements.</p> <p>6 Similarly at Plant 2. Plant 2 is 7 not the only source of stormwater to the unnamed 8 tributary to Avondale Creek. So, again, because 9 of the conceded ubiquity of zinc in the urban 10 environment, again, Mr. Johnson testified that in 11 short a robust scientific water quality study 12 would be needed to determine whether and the 13 extent to which the unnamed tributary to Avondale 14 Creek may not be attaining water quality 15 standards. And, again, whether that would be 16 attributable in any way to Metalplate.</p> <p>17 So at Plant 2, just as a Plant 1, 18 our view of the evidence is that Riverkeeper has 19 failed to demonstrate again that Plant 2 20 discharges under the permit will cause or 21 contribute to water quality exceedances.</p> <p>22 Now, the final point is with respect 23 to historical allegations that Riverkeeper has 24 identified. So this case is about the lawfulness 25 of these permits right now. And, nevertheless,</p>
<p style="text-align: right;">Page 31</p> <p>1 begin the unnamed tributary to Village Creek. 2 And Riverkeeper's own expert identified those 3 sample results as quote, unquote similar in terms 4 of the zinc content. The reality is that zinc 5 can be measured and dissolved in total. For one 6 of those measurements the pipe that actually did 7 not have Metalplate's stormwater in it had more 8 zinc as compared to the pipe that did have 9 Metalplate. And for the other measure it was 10 about the same.</p> <p>11 What does that tell us? That tells 12 us that as Chris Johnson, the Water Branch Chief, 13 testified, zinc is ubiquitous in the urban 14 environment. And in fact Riverkeeper's expert 15 agreed with that. In fact, this evidence shows 16 us that the zinc in the urban environment is so 17 ubiquitous and the volume of flow at the MS4 is 18 so significant that by the time Metalplate's 19 stormwater mixes with all of that, you can't 20 discern what influence the Metalplate stormwater 21 is or isn't having. It's just not moving the 22 needle for water quality in the unnamed tributary 23 to Village Creek.</p> <p>24 So there just isn't evidence in the 25 record that would allow Judge Hampton or the</p>	<p style="text-align: right;">Page 33</p> <p>1 Riverkeeper continues to emphasize allegations 2 that are in some cases nearly 10 years old and 3 occurred under other permits. But the reality 4 now is that Metalplate is demonstrating a 5 commitment to compliance and is working to 6 continually improve. So you've heard the much 7 maligned zinc minimization plan that Riverkeeper 8 has referenced. ADEM has expressly authorized 9 and approved Metalplate to proceed with some of 10 the most significant aspects of those plans and 11 committing Metalplate to a path for significant 12 capital investments at both plants to reduce zinc 13 discharges. So as testified to by ADEM these 14 permits called for the company to do the work to 15 further drive down zinc discharges and further 16 improve water quality and Metalplate is doing the 17 work. Without any -- unless there are any 18 questions, that will conclude my remarks.</p> <p>19 DR. MILLER: I'd like to ask if 20 any -- excuse me -- if any of the Commissioners 21 have questions for any of the three attorneys, 22 we'd certainly like to open the floor to that. 23 Are there any questions for any of the attorneys?</p> <p>24 (No response.) 25 DR. MILLER: Apparently not.</p>

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<p>1 All right. At this point we need to see if we 2 can get a motion to either adopt the Hearing 3 Officer's report or recommend that the 4 Petitioner's alternative order be instituted. 5 I'm opening the floor for a motion. 6 MR. WALTERS: I move we adopt 7 the Hearing Officer's Report and Recommendations 8 to the Commission. 9 DR. MILLER: We have a motion to 10 accept the Hearing Officer's Report. 11 Do I have a second? 12 MS. MERRITT: I second. 13 DR. MILLER: And a second. 14 Is there any further discussion that 15 we need to have regarding this motion? 16 (No response.) 17 DR. MILLER: All right. We will 18 call for the question. All in favor of the 19 motion to accept the Hearing Officer's Report, 20 please signify by raising your right hand. 21 (All Commissioners raise their 22 hands.) 23 DR. MILLER: All opposed, same 24 sign. 25 (No response.)</p>	<p>1 raising your right hand. 2 (All Commissioners raise their 3 hands.) 4 DR. MILLER: All opposed, same 5 sign. 6 (No response.) 7 DR. MILLER: Is that Mr. Ludder 8 I see back there? 9 At this point I think what we're 10 going to do is ask Mr. Ludder to go first and 11 then ADEM and City of Dothan can decide who wants 12 to go second and third. 13 Mr. Ludder, welcome. Thank you very 14 much for being here. 15 MR. LUDDER: Thank you, 16 Mr. Chairman. With the Commission's permission, 17 I will lower my mask too, but especially -- if 18 you have an objection, Mr. Masingill? 19 MR. MASINGILL: No. 20 MR. LUDDER: Thank you. 21 I represent the residents who 22 appealed the permit modification issued by the 23 Department for the Dothan Sanitary Landfill. The 24 Hearing Officer has ruled that the permit should 25 be disapproved by the Commission. This is the</p>
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<p>1 DR. MILLER: The Hearing 2 Officer's Report is accepted. 3 Our next agenda item is number five, 4 Bobby Lewis, et al., versus ADEM and the City of 5 Dothan, EMC Docket No. 19-06. We will consider 6 the Report of the Hearing Officer, which includes 7 findings of facts, conclusion of law, and the 8 recommendation. We have objections from 9 Petitioners, we have an ADEM response, and an 10 Intervenor's response. 11 First, I'd like to open the floor to 12 ask the Commissioners if we would like to grant 13 oral objections by the attorneys to this report. 14 I will open the floor to -- 15 MR. MASINGILL: Move to grant 16 the request for oral argument and allot a maximum 17 of seven minutes for each party in oral argument. 18 DR. MILLER: Okay. Do we have a 19 second? 20 DR. PERRY: I second the motion. 21 DR. MILLER: Have a second. 22 Any further discussion? 23 (No response.) 24 DR. MILLER: All in favor of 25 allowing oral arguments, please signify by</p>	<p>1 same Hearing Officer that handled the Riverkeeper 2 case. He recommended disapproval on the basis of 3 two issues that he ruled in our favor on, but he 4 also ruled against us on four other issues. And 5 so we have filed objections on those four other 6 issues, but we certainly support his conclusion 7 on the first two issues. But given that those 8 first two issues are going to be the main 9 argument as to whether or not you decide to 10 approve or disapprove it or accept or reject his 11 recommendation, I'm going to focus my argument on 12 those first two issues. 13 Before I do that, however, let me -- 14 you-all know that the hearing record in this case 15 was some 1800 pages, representing 24 witnesses 16 and over 100 exhibits. There were multiple 17 briefs filed, objections filed, responses filed. 18 It's a very large record. I want to remind you 19 that your rules require you to recuse yourself 20 from voting on any appeal where you have not read 21 and considered the entire record. So if you 22 haven't read those 1800 pages, if you haven't 23 looked at those 100 exhibits and looked at all 24 the documents filed by the lawyers, you are 25 supposed to recuse yourself from voting. And I</p>

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1 trust that you will do so if that's the
 2 situation.

3 The two arguments -- the two issues
 4 that the Hearing Officer agreed with us on was
 5 that the City of Dothan did not demonstrate that
 6 it had obtained host government approval of the
 7 ADEM application. Now, the fundamental issue on
 8 that -- the fundamental disagreement on that
 9 issue is an interpretation of the statute. The
 10 statute in fact says that the Department may not
 11 consider an application for a modified permit for
 12 a facility unless such application has received
 13 approval pursuant to this section by the affected
 14 local governing body.

15 So the focus -- the debate falls on
 16 the words "such application." What does that
 17 refer to? Does it refer to the immediately
 18 preceding reference to the Department may not
 19 consider an application for a modified permit, or
 20 does it refer to some other application? Well,
 21 the Courts in Alabama have decided what the
 22 meaning of the word "such" is. It's an adjective
 23 and it's used when referenced to a previously
 24 mentioned category or thing -- is in the
 25 language. And so in this case -- and in fact the

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1 Court was interpreting the same statute but a
 2 different subsection when it came to this
 3 decision about what such means. And they said if
 4 you look at such -- I mean, if such is there,
 5 it's referring to something immediately preceding
 6 that. In this case the language that such refers
 7 to is the ADEM permit application.

8 Now, there is argument and there's
 9 also Court authority that you have to look at the
 10 whole statute, not just one subsection of the
 11 statute, to figure out what's meant. In this
 12 case if you look at the whole statute, that also
 13 supports the idea that the application that the
 14 City has to approve is not some other
 15 application, but the ADEM application. The City
 16 did not -- the evidence is conclusive that the
 17 City did not approve the ADEM application. The
 18 ADEM application didn't even exist when the City
 19 issued its host government approval. So they
 20 could not have.

21 Given the time, I'm going to have to
 22 move on to the second issue which has to do with
 23 the obtaining sufficient measurements of
 24 groundwater -- groundwater elevations beneath the
 25 landfill. Your rules establish the requirements

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1 for how that's to be done. And it says that you
 2 have to take two measurements during each of
 3 three consecutive months of February, March, and
 4 April, and none of those measurements can be less
 5 than 12 days apart.

6 Well, in fact, the measurement that
 7 the application shows that the City did not
 8 comply with that. They submitted a whole host of
 9 data -- a lot of it outside the period of
 10 February, March, and April. The Courts have said
 11 that agencies are required to vigorously apply
 12 their rules. There's no option here to look at
 13 expert evidence. If the rules say what they say
 14 and they didn't comply with the rule, doesn't
 15 matter what the experts say. If they didn't
 16 submit the required information, that should be
 17 the end of it.

18 Now, lastly, let me just say that
 19 that I think it's probably a rare situation where
 20 the Hearing Officer recommends disapproval of a
 21 permit in this case. The Hearing Officer said at
 22 the end of his recommendation that the
 23 undersigned cannot recommend that the Commission
 24 approve actions that do not comply with ADEM
 25 regulations. He concluded that this application

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1 with respect to host government approval and
 2 these groundwater elevation measurements do not
 3 comply after multiple days. I think we were here
 4 eight days of testimony. That was his
 5 conclusion. With that, my time is up and I will
 6 retire.

7 DR. MILLER: All right. Thank
 8 you, Mr. Ludder.

9 MR. LUDDER: Thank you.

10 DR. MILLER: Now are we going to
 11 hear from the Department or City of Dothan next?

12 MR. COX: City of Dothan, Your
 13 Honor. Your Honor. Sorry.

14 Thank you. My name is Buddy Cox,
 15 and I represent the City of Dothan. And Dothan
 16 objects to the Hearing Officer's recommendations
 17 that the Commission disapprove the Department's
 18 decision permitting the City to expand its
 19 municipal landfill. The City has worked to
 20 obtain a permit to expand its existing landfill
 21 for a long time, as you know from reading the
 22 record.

23 Two issues prompted the Hearing
 24 Officer to recommend the Commission disapprove
 25 the modification to the permit. And the City

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<p align="right">Page 42</p> <p>1 would submit to you that in this instance the 2 Hearing Officer got both those recommendations 3 wrong. The first does have to do with host 4 government approval. The City obtained host 5 government approval to expand the existing 6 landfill on September 16th, 2014. No additional 7 host government approval was necessary. The City 8 wears two hats here. It wears the hat as the 9 applicant as well as the host government. It 10 continued to approve the permit through 11 budgeting, through approval of engineering 12 contracts, and like in its role as the applicant. 13 But the host government approval to expand the 14 landfill was issued in 2014 and that's all that 15 was necessary. 16 And that's because the Alabama 17 legislature created a clear line between what 18 host governments determine and what ADEM 19 determines. They basically laid out six factors 20 that the host government has to consider before 21 issuing approval of a new or expansion of an 22 existing landfill. It is absolutely clear that 23 in 2014 the City made a determination as to each 24 of those six factors, had a public hearing as 25 they were required to do. No, the landfill</p>	<p align="right">Page 44</p> <p>1 section language in 22-27-48, it's important -- 2 it refers to the six criteria host governments 3 are required to look at. It doesn't apply to the 4 specific application. 5 The other issue is during ADEM's 6 process they can ask for more information. If 7 they do, does it have to go back to the host 8 government and get another approval? Because 9 additional information requested by ADEM becomes 10 part of the application. So I think the Hearing 11 Officer absolutely got that wrong. 12 And as for groundwater, the Hearing 13 Officer also recommended that the permit not be 14 approved because the City failed to collect the 15 222 sampling required for February, March, and 16 April. The undisputed expert testimony is that 17 the sample the City collected on January 28th was 18 not significant for making a determination as to 19 whether the groundwater level would be less than 20 five feet below the bottom of the liner. And 21 that's the purpose of this statute. 22 And the City did more than that. 23 Because the City has an existing landfill that 24 they continue to monitor, they kept looking at 25 the groundwater after they did the initial</p>
<p align="right">Page 43</p> <p>1 design was not complete at that time. But the 2 City authorized the expansion of the footprint of 3 the landfill and they authorized where it was to 4 be located. That's what they were assigned to do 5 by the legislature is to consider those six 6 factors. They considered it all. The Petitioner 7 offered no evidence that they failed to do any of 8 those -- look at any of those factors. 9 And the other thing is what would 10 happen to ADEM if you accept this recommendation 11 of the Hearing Officer? They're no longer going 12 to be able to accept an applicant's evidence as 13 to whether the host government approval has been 14 given or not. They're going to have to go behind 15 that. And that's not the purpose of the law. 16 The purpose of the law was basically to protect 17 ADEM from expending their resources, time, and 18 effort in looking at landfills if the host 19 government didn't support the landfill in the 20 first instance. It's an if then can situation. 21 If the host government approves it, then ADEM can 22 expend their resources to evaluate the actual 23 application. And that's what happened here. 24 So we just think that the Hearing 25 Officer got it wrong. That pursuant to this</p>	<p align="right">Page 45</p> <p>1 sampling in January, February, March, and April. 2 And any time they took a sample that actually 3 showed the groundwater level higher, they 4 considered that as part of their application. 5 They didn't just stop with January, February, or 6 March. The way the Hearing Officer interprets 7 this, it would basically preclude somebody from 8 using a piece of data that showed that the 9 groundwater potential could raise higher than 10 what is reported in January, February, or 11 March -- or February, March, and April, excuse 12 me. 13 And it's important to recognize that 14 this is a confined aquifer. This is the Lisbon 15 aquifer. This is the groundwater potential. 16 This is when you stick a hole through the 17 confining layer and the groundwater rises up in 18 an artesian situation. 19 All the evidence indicated that that 20 would happen if the confining layer was somehow 21 invaded or was compromised. That's not going to 22 happen here. So we know that all of the 23 testimony was ADEM was convinced that there was 24 going to be much more than a five-foot separation 25 between the actual groundwater, the Lisbon</p>

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1 aquifer, and the bottom of the liner.
 2 So given that testimony, given that
 3 the Hearing Officer basically I think failed to
 4 understand how the City used all the data they
 5 were collected to make an informed decision that
 6 was presented to ADEM -- and Whit Slagle and
 7 other Department witnesses testified to -- that
 8 they had more than sufficient information to
 9 evaluate the permit application and determine
 10 that it substantially met all the criteria of the
 11 permit, including maintaining that five-foot
 12 separation between the bottom of the liner and
 13 the top of the groundwater.
 14 And because of those errors we ask
 15 that the Commission not adopt the Hearing
 16 Officer's Report or recommendation but that they
 17 approve the Petitioner's alternative order, which
 18 would approve the permit issued by the
 19 Department.
 20 The last thing I want to say in my
 21 remaining time is that this was an appeal of both
 22 the existing permit -- renewal of the existing
 23 permit and the expansion or modification of the
 24 permit. The Hearing Officer wasn't clear in his
 25 proposed order about the renewal of the existing

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1 permit. But if you read the order, there's no
 2 finding of fact. Host government approval and
 3 the groundwater application for the expansion of
 4 the landfill, it should have no effect at all on
 5 the renewal of the existing permit. So if the
 6 Commission is not convinced that the permit
 7 should be approved, we would ask that you clarify
 8 the Hearing Officer's Report and make sure that
 9 the renewal of the existing permit is allowed.
 10 So thank you very much.
 11 DR. MILLER: Thank you.
 12 I am going to now ask Mr. Carter
 13 from the Department to step forward.
 14 MR. CARTER: Okay. Is it okay
 15 if I remove my mask?
 16 DR. MILLER: Yes, please do.
 17 MR. CARTER: Thank you, Chairman
 18 Miller, members of the Commission, my name is
 19 Todd Carter with the Office of General Counsel.
 20 I can put my glasses back on. They won't fog up
 21 anymore. And what we're here today to basically
 22 discuss with you are the objections that we filed
 23 to the Hearing Officer's Report and most
 24 importantly answer any questions the Commission
 25 may have on this matter.

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1 The permit had the necessary local
 2 approval. I think the City, their argument a
 3 while ago, we concur with that argument. On
 4 September 16th, 2014, they passed a resolution.
 5 That resolution allowed for the expansion of the
 6 landfill within the boundaries and also
 7 specifically included a citation to Alabama Code
 8 22-27-48. That they considered those six
 9 criteria in their decision. At that point that
 10 was local host government approval.
 11 The Hearing Officer failed to
 12 properly recognize that role. What he has based
 13 in his recommendation said that -- focused on
 14 such application and basically implied that the
 15 ADEM application must be submitted for
 16 consideration about the local host government.
 17 That application is 600-plus pages long. It
 18 is -- it doesn't include any of the information
 19 that they would have to consider under Section
 20 48(c) of the code.
 21 So the City didn't have the time,
 22 the expertise, or any -- to look at and evaluate
 23 that information in their decision. Their
 24 decision was based on the six criteria found in
 25 the code. And all those criteria go toward the

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1 local planning process and land use concerns.
 2 Now, what I think Mr. Ludder
 3 referred to, by them -- the Hearing Officer
 4 focusing in on that narrow section of that
 5 sentence in the statute, such application -- in
 6 our briefs we do cite a case. It's Department of
 7 Revenue versus the City of Huntsville. And what
 8 that case does is say you have to look at the
 9 entire statute. You can't just pick pieces out
 10 of it to determine a meaning. And that's -- the
 11 word application is used throughout that statute.
 12 And then also I think Mr. Cox
 13 referred to it in his arguments. What the
 14 Hearing Officer has done now is created a
 15 basically unworkable process. You know, the
 16 application had to go before the City. They have
 17 to put it through a public comment period, public
 18 hearing. And then once they approve it, it's
 19 included in the ADEM application. It's a part of
 20 the ADEM application. And then it would come to
 21 ADEM. ADEM looks at it, evaluates it, goes
 22 through a comment -- a public notice comment
 23 period. Based on that public notice and comment
 24 period, if there are changes made in that
 25 application, it goes back to local approval. And

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1 every time that happens there's a possibility of
 2 changes being made. So it basically can be put
 3 into an endless loop, an unworkable process. And
 4 basically it -- one of -- the case we cited in
 5 our briefs, the Ex Parte Hayes, the Courts said,
 6 If the legislature -- or in a situation where the
 7 Courts are asked to interpret a statute. And if
 8 they got one interpretation that is workable and
 9 fair and one interpretation that is unworkable
 10 and unjust, they assume that the legislature
 11 intends that the statute is to be workable and
 12 fair. And that's the way they rule.

13 And in this situation I think what
 14 the Hearing Officer left us with is an unworkable
 15 situation and something that would be very unfair
 16 to the regulated community and the potential
 17 permittees. His recommendation overturns long-
 18 standing interpretations and threatens
 19 uncertainty in the permitting process.

20 So based on that we would ask that
 21 the Commission reject that recommendation on the
 22 Hearing Officer and adopt alternate findings and
 23 facts and conclusions of law as submitted by the
 24 City and adopted by the Department.

25 Now, on the groundwater issue, we

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1 know what the requirements are under the statute.
 2 Now, there's some talk. Our argument in our case
 3 was substantial compliance. That based on the
 4 data presented by the City and evaluated by our
 5 personnel here at ADEM, the permit was in
 6 substantial -- excuse me -- the application was
 7 substantial compliance with the regulations. So
 8 at that point, and I think what the experts
 9 testified to during the hearing, is that that
 10 three-day window -- three days of January prior
 11 to February was nonsignificant.

12 Well, what exactly do they mean by
 13 saying nonsignificant? Because I know that may
 14 be a question you have. First, it goes back to
 15 site characterization. As Mr. Cox referred to,
 16 groundwater is at the Lisbon aquifer. We know
 17 where the groundwater is. You have to punch a
 18 hole into it. Artesian rise causes it to come
 19 up. Well, in what -- I think the testimony was
 20 during the hearing -- is a conservative measure,
 21 they took the top -- the measurements of all
 22 those wells, which included the Artesian rise and
 23 factor -- took the highest measurements for not
 24 just three months but for a long time and to
 25 figure out where the elevation for the bottom of

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1 that liner needed to be. So in light of that,
 2 that three-day difference is nonsignificant in
 3 the eyes of the expert geologist that testified.

4 Now, one of the other issues that
 5 the geologist talked about was recharge. The
 6 aquifer under both -- the Lisbon aquifer doesn't
 7 recharge based on the rainfall from that
 8 landfill. That aquifer is recharged many
 9 miles -- 10, 100 miles away. And so there's not
 10 a situation where the February, March, and April
 11 readings are significant as it applies to
 12 recharging that aquifer.

13 Okay. The experts all agree it was
 14 undisputed. We also cited in our case the
 15 Plumber/Steamfitter case. I think it's very
 16 interesting. It's very similar issues. It was a
 17 situation where the Department in a permitting
 18 decision decided to go against -- to not require
 19 the testing for benzene and arsenic at an -- at
 20 the plastic facility out at Burkville. Well, in
 21 that situation, they say basically the law does
 22 not concern itself with trifling matters. And also
 23 that that principle right there applies in the
 24 administrative setting as well. And what they
 25 held is that the Department nor the Commission

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1 erred by taking that part and not including that
 2 as a requirement under that permit.

3 Okay. The Hearing Officer's
 4 conclusions toward groundwater elevates form over
 5 substance so that the permit is protective of
 6 groundwater. And we would ask you to reject that
 7 finding as well of the Hearing Officer and accept
 8 the permit approval. I see my time is up, and I
 9 will be happy to entertain any questions that
 10 Commission members may have.

11 DR. MILLER: We certainly would
 12 like to open the floor to any of the three
 13 attorneys to be questioned. Does anybody have
 14 any questions? Our geologist raised his hand.

15 MR. MASINGILL: Mr. Cox, do you
 16 have copy of your proposed alternate findings of
 17 fact and conclusion in front of you?

18 MR. COX: I do.

19 MR. MASINGILL: This is just
 20 something with reading all this information.
 21 Turn to page 7 of that document, the third
 22 paragraph down. Let me know --

23 MR. COX: I'm getting there.
 24 I'm sorry.

25 MR. MASINGILL: I understand

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1 most of these are --

2 MR. COX: Page 7?

3 MR. MASINGILL: Page 7, third

4 paragraph. I think this is just a typo and I

5 just wanted to ask you. In the third paragraph,

6 the last two words -- pen fitted, I think

7 probably that should be permitted. Is that

8 correct?

9 MR. COX: Yes, it should be

10 permitted.

11 MR. MASINGILL: I thought that

12 was your intent. And then on page 11, the large

13 paragraph in the middle of the page starting with

14 the word permeability, the next to the last line,

15 right at the end of that line it says --

16 MR. COX: Oh, I see what you're

17 saying. Should be less than, or it should be --

18 it's --

19 MR. MASINGILL: Well, in the

20 Hearing Officer report it was permeability of 10

21 to the minus 5th centimeters per second. Of

22 course you had LE --

23 MR. COX: Should be 10 to the

24 minus 5th.

25 MR. MASINGILL: Just wanted to

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1 clarify the record there.

2 MR. WALTERS: Mr. Chairman, I

3 have a question. I don't know who is the most

4 appropriate to answer. But picking up on

5 Mr. Cox's comment about existing permit and

6 modified permit. So does the City have an

7 existing landfill permit?

8 MR. COX: Yes, sir, they do.

9 They have had an existing permit since 1987 for

10 this --

11 MR. WALTERS: So it's still

12 in --

13 MR. COX: It's been renewed

14 every -- it's been renewed several times.

15 Director LeFleur says five times.

16 MR. LeFLEUR: Five years.

17 MR. COX: It's a five-year

18 permit so it gets renewed every fifth year.

19 MR. WALTERS: So really that's

20 kind of not an issue? The issue is the

21 modification?

22 MR. COX: Well, the issue is

23 that the renewal and the modification were issued

24 in the same permit. It's permit number 35-06.

25 And if the action of the Commission is to

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1 disapprove that permit, then that would also

2 affect the renewal even though there's no finding

3 of fact that would indicate that that would be

4 appropriate.

5 MR. WALTERS: I see. I

6 understand. Thank you.

7 DR. MILLER: Do we have any

8 other questions?

9 (No response.)

10 DR. MILLER: Well, we have

11 several options to consider here. Number one, we

12 could move to adopt the Report of the Hearing

13 Officer. Secondly, we can move to approve the

14 Petitioner's proposed order. And, third, we can

15 move to approve the Department's proposed order.

16 Fourth, we could move to approve the Intervenor's

17 proposed order and the corrected Intervenor's

18 Alternative Findings of Fact and Conclusions. Or

19 we could move to approve an Intervenor's proposed

20 conditional order and the corrected Intervenor's

21 Alternative Findings of Fact and the Conclusions.

22 Personally, I don't think that the

23 last option, a conditional order, would be an

24 appropriate thing for us to consider. I'm not

25 sure if we have the ability or the expertise to

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1 do that. So I will open the floor for proposals

2 and motions to approve one of the four -- or,

3 well, actually, the five options.

4 Do I have a motion?

5 MR. MASINGILL: Move to approve

6 the Department's proposed order.

7 DR. MILLER: We have a motion to

8 approve the Department's proposed order. Do we

9 have a second to that motion?

10 DR. PERRY: Second the motion.

11 DR. MILLER: And we have a

12 second.

13 Any further discussion?

14 MR. WALTERS: Could we clarify

15 what the Department's proposed order is? I guess

16 I'm -- it honestly bothers me a little bit -- I

17 like to have all Is dotted and Ts crossed. And

18 it bothers me encouraging something that deviates

19 from the stated regulations. And although from

20 the pragmatic standpoint, I'm thoroughly

21 convinced that what has been proposed and is

22 reasonable and sound judgment and technically

23 speaking. Even the part about the City's

24 endorsement of the game plan. That -- I'm

25 thoroughly convinced that's the intent. But it

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1 just bothers me that we're going to be -- if I'm
 2 understanding the Department's proposed order,
 3 which -- please pardon me because I've got about
 4 9,000 documents here, trying to keep track of
 5 what's what. So if -- that's it. Okay. I do
 6 encourage the City in the future to please follow
 7 the regulations to the letter. And also if
 8 you're going to submit something, please review
 9 it so that we're not having to fix your typos.
 10 Thank you.

11 DR. MILLER: Todd Carter, would
 12 you like to comment on Mr. Walters' thoughts?

13 MR. CARTER: Just, Chairman
 14 Miller and members of the Commission, I -- one of
 15 the other things, just as a side before it slips
 16 my mind, we would also -- there was a need to
 17 adopt alternate findings of facts or conclusions
 18 of law if the Commission so sees to adopt the
 19 proposed order issued by the Department. In our
 20 proposed order basically what we're asking the
 21 Commission to do is to do that, to adopt the
 22 findings -- the alternate findings of fact,
 23 conclusions of law submitted by the City and as
 24 well concurred upon by the Department. Now, what
 25 this would be -- what this would entail would be

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1 the Commission rejecting the recommendations of
 2 the Hearing Officer as to those two issues and
 3 basically allowing -- I mean, voting to approve
 4 the permit and renewal of the permit for the City
 5 of Dothan. And, now -- and I'm sorry I've kind
 6 of forgotten what the question may have been
 7 particularly about.

8 DR. MILLER: Well --

9 MR. WALTERS: It wasn't so much
 10 a question. It was just a comment that the
 11 application didn't follow the regulations to the
 12 letter of the law.

13 MR. CARTER: Oh, absolutely,
 14 sir. And that's what --

15 MR. WALTERS: It bothers me.

16 MR. CARTER: And we have
 17 recognized that in this situation. And that's
 18 one of those things I think we're going to -- but
 19 we -- like, in this particular situation, I think
 20 the evidence was so overwhelming as toward the
 21 characterization of the groundwater that when
 22 that was realized that we felt safe with -- and
 23 that that groundwater was protected under the
 24 requirements of the permit.

25 MR. WALTERS: I agree with that

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1 conclusion also. And if that's something that's
 2 within our authority and power to kind of offer
 3 that judgment, then I'm good with it.

4 MR. CARTER: Yes, sir. And it
 5 is within the law. That's why I offered the case
 6 of the Plumbers and Steamfitters versus ADEM. In
 7 that situation it says we do have that
 8 discretion.

9 DR. MILLER: Robert, are you
 10 satisfied with the motion as it is stated or do
 11 we need to amend the motion?

12 MR. TAMBLING: I think it would
 13 be in your best interest to clarify the motion,
 14 if the Commissioners can do that.

15 DR. MILLER: Could you suggest
 16 some wording perhaps? Would that be a bad thing
 17 to do?

18 MR. MASINGILL: To clarify -- I
 19 would think we ought to order a judgment and
 20 decree that the findings of fact and conclusions
 21 of law of recommendations of the Hearing Officer
 22 to the Commission are hereby rejected. And this
 23 is from the Hearing Officer. And that we approve
 24 alternate findings of fact, conclusions of law,
 25 and recommendation that was presented by the City

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1 of Dothan and that were supported by the
 2 Department. Also, the Department issuance of the
 3 renewal and modification of the permit complied
 4 with the applicable statutes and regulations and
 5 that the Commission therefore approved the
 6 renewal and modification of the permit.

7 DR. MILLER: Robert.

8 MR. TAMBLING: Commission
 9 members, I think, again, what you have before you
 10 are essentially four options. You can either
 11 approve or reject the Hearing Officer's findings
 12 of facts, conclusions of law, and recommendation.
 13 You can adopt the Petitioner's proposed order in
 14 this case, Mr. Ludder's. You can -- which would
 15 be to modify, I believe, the Hearing Officer's
 16 Report. Or you can adopt the City of Dothan's
 17 proposed findings of fact, conclusions of law,
 18 and that would also be the modified Hearing
 19 Officer's Report. Or the Department's proposed
 20 order, which would be to modify the Hearing
 21 Officer's Report by adopting the City of Dothan's
 22 findings of facts and conclusions of law. I
 23 think those are your options.

24 Ultimately, you know, your options
 25 are to adopt, reject, or modify. And I don't

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1 think what you're proposing here is to reject. I
 2 think what you're proposing here to do is to
 3 modify. And my sense is that what you're
 4 proposing here to do is to modify by accepting
 5 the Department's order, which incorporates the
 6 City of Dothan's finding of facts, conclusions of
 7 law, and recommendation. And I apologize that
 8 it's that complicated, but that's the way it
 9 seems to me. And I'm not going to, you know,
 10 suggest that as a motion. But I think that's
 11 where you're going with this. Is that -- I can't
 12 make the motion for you.

13 MR. MASINGILL: That's what I
 14 was trying --

15 DR. MILLER: Would you attempt
 16 to restate your motion?

17 MR. MASINGILL: I will do that.
 18 Yes, I move that we modify and that -- in
 19 essence, what Mr. Tambling stated, that we modify
 20 the petition and that we accept the findings of
 21 fact, conclusions of law, and recommendations --
 22 the alternate findings of fact, conclusion of
 23 law, recommendation that was stated by the City
 24 of Dothan.

25 MR. TAMBLING: Give me a second

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1 to write it down and I will present to all of the
 2 sides so they can see it, if that's -- if that's
 3 what you're trying to say, and we can go move
 4 forward with it.

5 DR. MILLER: Okay. Good idea.
 6 I must admit in going through this tremendous
 7 record of documents that I started off with water
 8 and then it went to black coffee and then I
 9 started thinking about whiskey, but I never quite
 10 got there. My eyes were crossed and my brain was
 11 fried by the time I got through with all that
 12 stuff. But this certainly is an extremely
 13 complicated case and one that we may hear about
 14 again.

15 MR. TAMBLING: It seems to me
 16 that what Commissioner Masingill is offering to
 17 do is modify the Hearing Officer's Report by
 18 moving to adopt the Department's proposed order
 19 adopting the City's findings of facts and
 20 conclusions of law and recommendations. Is that
 21 you-all's understanding?

22 DR. PERRY: Could you repeat
 23 that in the microphone, please?

24 MR. TAMBLING: Yes. My
 25 understanding is that Commissioner Masingill is

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1 offering the following motion: To modify the
 2 Hearing Officer's Report in this case by adopting
 3 the Department's proposed order, which in turn
 4 adopts the City's findings of facts and
 5 conclusions of law and recommendation. It is
 6 convoluted, but that is my understanding of what
 7 is before you at this point.

8 DR. MILLER: Okay. Do you want
 9 to hand that piece of paper to Commissioner
 10 Masingill or has he already got it written down?

11 MR. MASINGILL: I hope I do.
 12 Thank you, Robert.

13 MR. WALTERS: Before you do
 14 that -- I'm sorry. So is the -- once again, the
 15 more I look at these the more I confuse these
 16 documents. So the ultimate findings of fact,
 17 conclusions of law, and recommendations as
 18 presented by the City and by the Department, is
 19 that -- I'm trying to find that document. I
 20 think this is it. Is that document file number
 21 113?

22 MR. MASINGILL: You're talking
 23 about the City?

24 MR. WALTERS: Yes.

25 MR. MASINGILL: That was 114.

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1 MR. WALTERS: 114?

2 MR. MASINGILL: I think so,
 3 Tom.

4 MR. WALTERS: Good. Thank you.
 5 Because I didn't like the language in 113 because
 6 it got into that conditional part. That was of
 7 concern. I didn't want us to be -- I got you --
 8 I'm with you now. I'm on the -- I'm on the --
 9 I'm on the thing. Yes.

10 MR. MASINGILL: Okay. I move
 11 we modify the Hearing Officer report by adopting
 12 the Department's proposed order which in turn we
 13 would -- in essence we would be approving the
 14 alternate findings of fact and conclusion of law
 15 and recommendations that the City of Dothan was
 16 proposing.

17 MR. TAMBLING: Yes.

18 DR. MILLER: Do I have a
 19 second?

20 DR. PERRY: I remain with the
 21 second that I stated before.

22 DR. MILLER: We have a motion
 23 and a second. Do we have any further discussion
 24 or questions for the attorneys?
 25 (No response.)

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1 DR. MILLER: If not, I will
 2 call for the question. All in favor of
 3 Commissioner Masingill's motion, please signify
 4 by raising your right hand.
 5 (All Commissioners raise their
 6 hands.)
 7 DR. MILLER: All opposed, same
 8 sign?
 9 (No response.)
 10 MS. THOMAS: I will have to
 11 obviously revise the front page, but I do have a
 12 signature page that will work.
 13 DR. MILLER: Okay. That will
 14 be fine.
 15 Your next item is agenda item number
 16 6, Jeffrey Alan Wade versus ADEM. Docket number
 17 20-03. We have a report from the Hearing Officer
 18 which recommends that that request for a hearing
 19 be dismissed. And I will entertain a motion from
 20 the Commission to either adopt or disapprove the
 21 report of the Hearing Officer.
 22 MR. MCKINSTRY: I move we adopt
 23 the report of the Hearing Officer.
 24 DR. MILLER: Do I have a
 25 second?

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1 DR. PERRY: Second.
 2 DR. MILLER: Hearing a motion
 3 and a second and we'll ask for any further
 4 discussion.
 5 (No response.)
 6 DR. MILLER: I call for the
 7 question. The motion is to approve the report of
 8 the Hearing Officer. All in favor -- I started
 9 to say -- raise your right hand.
 10 (All Commissioners raise their
 11 hands.)
 12 DR. MILLER: All opposed, same
 13 sign.
 14 (No response.)
 15 DR. MILLER: Okay. Do we have
 16 any other business that we need to consider at
 17 this time?
 18 (No response.)
 19 DR. MILLER: What about do we
 20 have any conflicts for the date of August 14th,
 21 2020, for the next Commission meeting?
 22 MR. WALTERS: Well, I did.
 23 DR. MILLER: You did?
 24 MR. WALTERS: I did -- I don't
 25 think I'm going to get to do it though. I won

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1 the lottery to play the old course at St. Andrews
 2 that week, but I don't think I'm going to get to
 3 go.
 4 DR. MILLER: If that comes
 5 about, that's absolutely going to be an excused
 6 absence.
 7 MR. WALTERS: I will be
 8 excused? We're hoping that we can get to do it
 9 next year. But, so, potential that I --
 10 (Off-record discussion.)
 11 DR. MILLER: As far as I know,
 12 we had no requests for the three-minute public --
 13 MS. THOMAS: No requests.
 14 DR. MILLER: Okay. All right.
 15 I will now entertain a motion to adjourn.
 16 DR. PERRY: So moved.
 17 MR. WALTERS: Second.
 18 DR. MILLER: All opposed, no.
 19 (No response.)
 20 DR. MILLER: Our meeting is
 21 adjourned. Thank you very much.
 22 (Proceedings concluded at
 23 12:34 p.m.)
 24 *****
 25

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1 STATE OF ALABAMA)
 2 COUNTY OF ELMORE)
 3
 4
 5 I hereby certify that the above
 6 proceedings were taken down by me and transcribed
 7 by me using computer-aided transcription and that
 8 the above is a true and accurate transcript of
 9 said proceedings taken down by me and transcribed
 10 by me.
 11 I further certify that I am neither
 12 of kin nor of counsel to any of the parties nor
 13 in anywise financially interested in the outcome
 14 of this case.
 15 I further certify that I am duly
 16 licensed by the Alabama Board of Court Reporting
 17 as a Certified Court Reporter as evidenced by the
 18 ACCR number following my name found below.
 19
 20
 21
 22 *Victoria Castillo*
 23
 24 VICTORIA CASTILLO, ACCR #17, 9/30/20
 25 FREELANCE COURT REPORTER

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ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION MEETING

Meeting on 06/12/2020

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Part B

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Attachment 1 Agenda

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

**Attachment 3 Order granting Petitioner's request for oral argument
(Agenda Item 4)**

**Attachment 4 Order adopting Hearing Officer's Report and Recommendation to the
Commission
(Agenda Item 4)**

**Attachment 5 Order granting the Petitioners', Department's, and Intervenor's requests for
oral argument
(Agenda Item 5)**

**Attachment 6 Order (1) modifying Report of Hearing Officer by adopting the Department's
Proposed Order; (2) adopting the alternate Findings of Fact and Conclusions
of Law proposed by the City of Dothan; and (3) approving renewal and
modification of Permit #35-06
(Agenda Item 5)**

**Attachment 7 Order adopting Report of Hearing Officer
(Agenda Item 6)**

Attachment 1

Amended 6/2/20

AGENDA*
MEETING OF THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION

DATE: June 12, 2020

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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* 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 14, 2020
2. REPORT FROM THE ADEM DIRECTOR
3. REPORT FROM THE COMMISSION CHAIR
4. BLACK WARRIOR RIVERKEEPER, INC. V. ADEM, AND METALPLATE GALVANIZING, L.P., EMC DOCKET NO. 19-01 (NPDES-RELATED MATTER)

The Commission will consider in the above-referenced matter the Hearing Officer's *Report and Recommendation to the Commission*, which includes Findings of Fact, Conclusions of Law, and a Recommendation.

On September 27, 2018, Petitioner Black Warrior Riverkeeper, Inc. appealed NPDES Permits AL0080403 and AL0080411 issued by ADEM to Metalplate Galvanizing, L.P. on August 29, 2018.

5. BOBBY LEWIS, ET AL. V. ADEM, AND CITY OF DOTHAN, EMC DOCKET NO. 19-06

The Commission will consider in the above-referenced matter the *Report of Hearing Officer*, which includes Findings of Fact, Conclusions of Law, and a Recommendation.

On June 4, 2019, the Petitioners appealed ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 issued by ADEM to the City of Dothan on May 6, 2019.

6. JEFFREY ALAN WADE V. ADEM, EMC DOCKET NO. 20-03

The Commission will consider in the above-referenced matter the *Report of Hearing Officer*, which includes Findings of Fact, Conclusions of Law, and a Recommendation.

On April 10, 2020, Petitioner Jeffrey Alan Wade appealed ADEM's denial of the Grade I Water Operator Certification to Jeffrey Alan Wade, Sylvan Springs, Alabama.

7. OTHER BUSINESS
8. 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



ADEM COVID-19 Response

- Essential Function
- Mission to assure a safe, healthful, and productive environment
- Health and safety of personnel primary
- Practice all recommended safety measures



Telework

- State of emergency authorized telework
- ADEM well positioned to telework
- Telework procedures implemented:
 - Minimum onsite presence
 - Rotating onsite work schedules
 - Minimize congregating & face-to-face meeting
 - Daily communication with supervisors



Telework

- Systems support to enable effective telework
 - Virtual Private Network (VPN)
 - Laptops
 - High-speed internet and caller ID issues
 - “Microsoft Teams”, “Skype”, “Zoom”
 - Automatic call forwarding



Telework Results

- Track quantitative and qualitative performance measures
- Performance results:
 - Areas with little or no loss of productivity
 - Areas showing loss of productivity
 - Overall productivity >80%
- No employee furloughs



Alabama Department Of Environmental Management

Telework Results

- ADEM accomplishing mission.
- Regulated industry meeting environmental obligations.
- Regulated industry environmentally ready to restart.
- ADEM testing more modern work methods and improving morale.



Alabama Department Of Environmental Management

Major Initiatives and Budget

- Major initiatives continue on schedule:
 - Computer system upgrade
 - Birmingham Field Office upgrade
 - New Mobile Field Office
- FY 2020 Federal & State budgets can adapt
- FY 2021 State General Fund appropriation on target

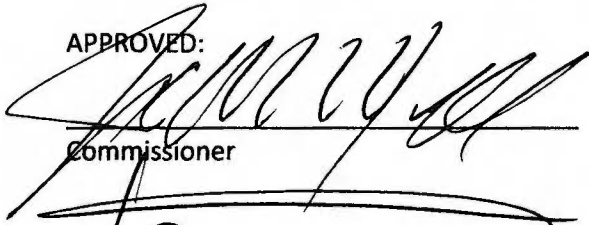
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Environmental Management Commission Order
Page 2

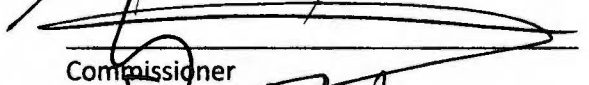
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ENVIRONMENTAL MANAGEMENT COMMISSION

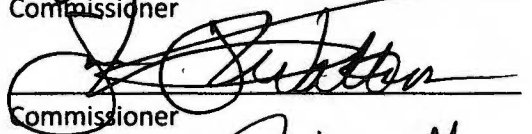
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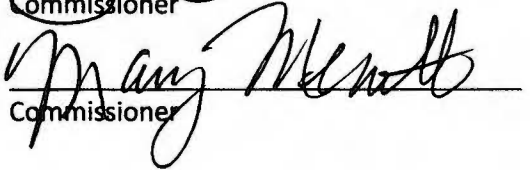
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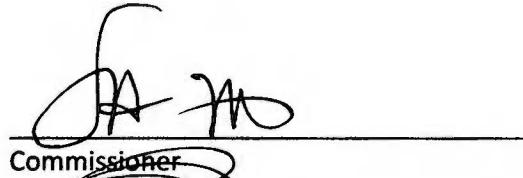
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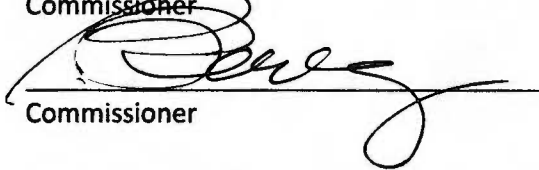
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DISAPPROVED:

Commissioner

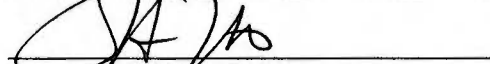
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ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 12th day of June 2020.



Samuel L. Miller, Chair
Environmental Management Commission
Certified this 12th day of June 2020

Attachment 4

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

IN THE MATTER OF:)	
)	
BLACK WARRIOR RIVERKEEPER, INC.,)	
PETITIONER,)	
)	EMC DOCKET NO. 19-01
V.)	
)	NPDES PERMIT NOS. AL0080403
ALABAMA DEPARTMENT OF)	AND AL0080411
ENVIRONMENTAL MANAGEMENT,)	
RESPONDENT,)	
)	
AND)	
)	
METALPLATE GALVANIZING, L.P.,)	
INTERVENOR)	

ORDER

Before the Commission is the Hearing Officer's Report and Recommendation to the Commission. Also before the Commission are the Petitioner's Objections to the Hearing Officer's Report and Recommendation to the Commission and the Department's and the Intervenor's Replies to the Objections. Having considered the Hearing Officer's Report and Recommendation to the Commission, the Objections, and the Replies, along with all the submissions presented to the Commission in this matter, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Hearing Officer's Report and Recommendation to the Commission is hereby adopted;
and
2. That pursuant to the adoption of the Hearing Officer's Report and Recommendation to the Commission, the Commission finds that there is no genuine issue of material fact as to Black Warrior Riverkeeper, Inc.'s claims and ADEM and Metalplate Galvanizing, L.P. are entitled to judgment as a matter of law; and
3. That the relief requested in Black Warrior Riverkeeper, Inc.'s notice of appeal and its Motion for Summary Judgment are denied; and
4. That ADEM's and Metalplate Galvanizing, L.P.'s Motions for Summary Judgment are granted; and
5. That Metalplate Galvanizing, L.P.'s NPDES Permit Nos. AL0080403 and AL0080411 are approved as issued: and
6. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
7. That a copy of this Order along with a copy of the Hearing Officer's Report and Recommendation to the Commission, attached hereto as Exhibit A, and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 12th day of June 2020.

ENVIRONMENTAL MANAGEMENT COMMISSION

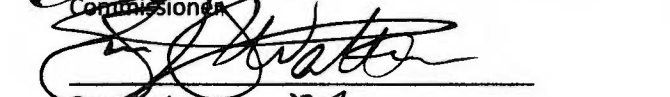
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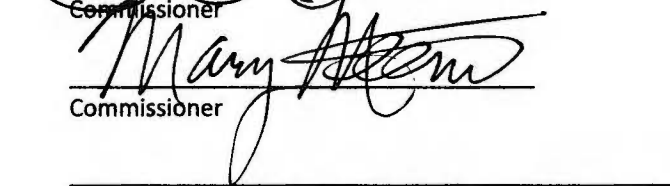
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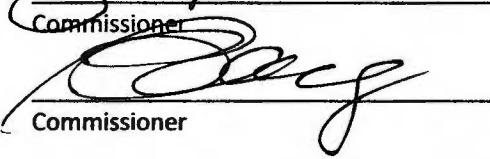
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Commissioner



Commissioner



Commissioner

Commissioner

DISAPPROVED:

Commissioner


Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 12th day of June 2020.

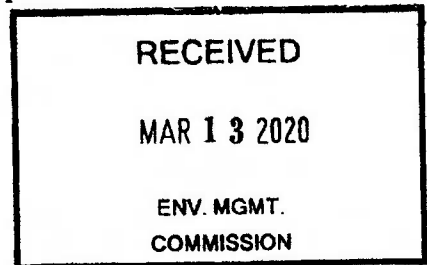


Samuel L. Miller, Chair
Environmental Management Commission
Certified this 12th day of June 2020

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

BLACK WARRIOR RIVERKEEPER, INC.,)
)
 Petitioner,)
)
 v.)
)
 ALABAMA DEPARTMENT OF)
 ENVIRONMENTAL MANAGEMENT,)
)
 Respondent,)
 and)
)
 METALPLATE GALVANIZING, L.P.,)
)
 Intervenor.)

EMC DOCKET No. 19-01
NPDES PERMIT Nos. AL0080403
and AL0080411



REPORT AND RECOMMENDATION TO THE COMMISSION

This matter is before the undersigned Hearing Officer on cross motions for summary judgment filed by Petitioner Black Warrior Riverkeeper, Inc. (“Riverkeeper” or “Petitioner”), Respondent Alabama Department of Environmental Management (“ADEM” or “Department”) and Intervenor Metalplate Galvanizing, L.P. (“Metalplate”). Responses and replies to the motions were filed by all parties (“Parties”). The Parties have agreed to have this matter decided on “Summary Judgment.” Based upon that agreement, the Parties’ “Joint Statement of Material Facts Not in Dispute” and their “Joint Waiver of Evidentiary Hearing,” the undersigned recommends that this matter should be decided pursuant to ADEM Admin. Code 335-2-1-.22 (Summary Judgment). The Hearing Officer finds, and recommends to the Alabama Environmental Management Commission (“the Commission”), that there is no genuine issue of material fact. After considering the motions and all the submissions by the Parties, together with the oral

arguments heard November 13, 2019, the undersigned Hearing Officer enters this Report and Recommendation to the Commission.

Procedural Process

On August 29, 2018, ADEM issued NPDES Permit AL0080403 and AL0080411 (“the Permits”) to Metalplate. The Permits were administratively modified to correct administrative errors on September 18, 2018, for Plant 1 and September 17, 2018, for Plant 2. Riverkeeper appealed the issuance and substance of the Permits on September 27, 2018.

The evidence in this matter came before the undersigned Hearing Officer in the form of Motions for Summary Judgment, Responses and Replies to those Motions, and a jointly filed Statement of Undisputed Facts. The undersigned Hearing Officer heard oral arguments on the motions November 13, 2019. The Parties have jointly agreed to have this matter decided on summary judgment.

In addition to the above, the Parties indicated to the undersigned that they could not agree upon the admission of evidence regarding certain sampling performed by Petitioner in relation to this matter. That dispute gave rise to a Motion to Strike, filed by ADEM, of that sampling evidence. That motion prompted significant and well written briefs, argument and supporting documents from all Parties in support of their individual positions. A separate order has been entered by the undersigned which denies ADEM’s Motion to Strike that sampling evidence. The denial of that motion should not be read as any finding as to the validity of the sampling evidence that was the subject of the motion, but only that the undersigned felt that it should not be stricken or excluded. As noted below, the undersigned finds that ADEM’s argument concerning the reliability of this sampling evidence, and the process by which it was gathered, were persuasive, even in the face of the Petitioner’s responsive arguments. While the undersigned has denied the

Department's Motion to Strike that evidence from consideration, there is a great question as to how much weight should be given to that sampling evidence. The undersigned finds that sampling unpersuasive. The Commission can make its own decision as to how much weight should be given that sampling evidence that was in dispute. A recommendation to that effect is given below to the Commission.

FINDINGS OF FACT

1) In the 2008 Consent Order, Order No. 08-146-CWP, the Department required Metalplate to apply for individual NPDES permits to replace its General Permits.

2) On August 29, 2018, ADEM issued Metalplate the Permits authorizing stormwater discharges from two hot-dip galvanizing facilities in Jefferson County, Alabama.

3) For Plant #1, NPDES Permit No. AL0080403 authorizes stormwater discharges from outfalls DSN001 and DSN002 to an Unnamed Tributary ("UT") to Village Creek.

4) For Plant #2, NPDES Permit No. AL0080411 authorizes stormwater discharges from outfall DSN001 and DSN002 to an UT to Avondale Creek.

5) Both Permits include the following conditions and limitations:

- a. Permit Condition I.A. requires Metalplate to monitor bimonthly for pH, Total Suspended Solids, Oil and Grease, Dissolved Zinc, and Flow.
- b. Permit Condition I.A. places a daily maximum limitation on Oil and Grease of 15 mg/l.
- c. Permit Condition I.A. requires Metalplate to monitor quarterly for Total Phosphorus, Total Organic Carbon, Total Cyanide, Total Recoverable Arsenic, Total Recoverable Iron, Total Recoverable Nickel, Total Recoverable Silver,

Total Recoverable Aluminum, Total Recoverable Cadmium, Total Recoverable Lead, Total Recoverable Chromium, Total Recoverable Copper, Toluene, Benzene, and Ethylbenzene.

- d. Permit Condition I.A. states “the discharge shall have no sheen, and there shall be no discharge of visible oil, floating solids, or visible foam in other than trace amounts.”
- e. Permit Condition I.C. requires Metalplate to submit the results of its monitoring in its discharge monitoring reports (“DMRs”).
- f. Permit Condition II.D.4. requires Metalplate to comply with ADEM Admin. Code Chapter 335-6-6 and does not authorize noncompliance with “any Laws of the State of Alabama or the United States of America or any regulations or rules implementing such laws.”
- g. Permit Condition III.F.1.-3. specifies that the Department may modify the permit or prohibit the discharge if a discharge is identified as causing or contributing to a condition in contravention of state water quality standards.
- h. Permit Condition IV.C.1. requires Metalplate to develop a Zinc Minimization Plan (“ZMP”) “which identifies the potential sources of zinc in the stormwater runoff from the facility and proposes a plan to reduce the impact of those sources ... including an implementation schedule for any changes proposed.”
The Department may require modifications to the ZMP if it determines the ZMP is not sufficient. Permit Condition IV.C.2. requires Metalplate to implement any and all changes proposed in the ZMP within 180 days of the Department’s acceptance of the ZMP, unless an alternative timeline is approved. Permit

Condition IV.C.3. requires Metalplate to include a monitoring component in the BMP plan to assess the effectiveness of the BMPs in achieving zinc reductions.

6) AL0080403 and AL0080411 do not authorize the discharge of process wastewater.

7) AL0080403 and AL0080411 contain discharge limitations for zinc.

8) ADEM Admin. Code r. 335-6-6-.14(e)(1)(iii) requires that when “the Director determines that a discharge will cause, have a reasonable potential to cause, or contribute to an exceedance of a narrative or numerical water quality standards for an individual pollutant, the permit shall contain a discharge limit for that pollutant.”

9) “Discharge limitation” is defined as “*any* restriction imposed by the Director on quantities, discharge rates, concentrations or other characteristics of ‘pollutants.’” ADEM Admin Code. r. 335-6-6-.02(o).

10) ADEM conducted a reasonable potential analysis when drafting the Permits.

11) The historical data submitted by Metalplate, as well as the applicability of a zinc TMDL, established that the Department, qualitatively determined that Metalplate’s stormwater discharges had the reasonable potential to cause or contribute to a zinc water quality exceedance.

12) ADEM determined a reasonable potential existed for zinc, but not for any other pollutant of concern. Based upon this determination, the Permits include water quality based non-numeric effluent limits for zinc.

13) To control or abate Metalplate’s discharges of zinc and protect water quality, the individual Permits established non-numeric limitations, including a zinc minimization plan and enhanced Best Management Practices (BMPs), both of which are subject to Departmental review. The individual Permits also increased monitoring frequency from bi-annually (as required by the General Permits) to bi-monthly to measure the effectiveness of additional control measures.

14) The calculation of a numeric effluent limitation for zinc in Metalplate's stormwater discharges is not currently feasible.

15) The Environmental Protection Agency's (EPA) effluent limitation guidelines for Metalplate's industrial category do not include numeric effluent limitations for zinc in stormwater.

16) ADEM may modify either permit if ADEM receives information showing the Permit is not protective of water quality.

17) ADEM does not have information indicating the Permits are not protective of water quality.

18) The Village Creek watershed, which encompasses the receiving streams for Metalplate's discharges, is listed as impaired for zinc and is subject to a total maximum daily load ("TMDL").

19) The Final TMDL for Metals (Zinc), pH and Siltation in the Village Creek Watershed (2005) expresses a goal of achieving an overall reduction in zinc.

20) The zinc data for Village Creek collected by the Department in 2019 demonstrates that Village Creek is meeting the applicable water quality criteria for zinc.

21) The Permits' effluent limitations for zinc are consistent with the assumptions and requirements of the Village Creek TMDL.

CONCLUSIONS OF LAW

A. Legal Standards

The Commission will decide this appeal of the administrative action of ADEM *de novo*. ADEM Admin. Code r. 335-2-1-.14(6). Riverkeeper has the burden of going forward with the

evidence. Riverkeeper must show by a preponderance of the evidence that the Permits should be remanded to ADEM for modification. ADEM Admin. Code r. 335-2-1-.27(5).

The undersigned has the authority to render an accelerated recommendation on all or any part of the proceeding pursuant to ADEM Admin. Code r. 335-2-1-.22. The Parties here have explicitly agreed to this accelerated recommendation.

In this situation, the initial burden is upon the moving party to make a prima facie showing that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. Where the moving party makes a prima facie showing, the non-movant must come forward with specific material facts contradicting and overcoming the motion. *See Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 05-01, 2006.

The Department is entitled to deference in its interpretation and application of its regulations in issuing these Permits. "Interpretations of an act by the administrative agency ... are to be given great weight by the reviewing court." *City of Brundidge v. Ala. Dep't Env'tl. Mgmt.*, 218 So. 3d 798, 815 (Ala. Civ. App. 2016); *Hulcher v. Taunton*, 388 So. 2d 1203, 1206 (Ala. 1980). Further, "an agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation." *Ferlist v. Ala. Medicaid Agency*, 481 So. 2d 400, 403 (Ala. Civ. App. 1985). Likewise, the agency's interpretation must stand "unless it is plainly erroneous or inconsistent with the regulation." *Brunson Constr. & Env'tl. Servs., Inc. v. City of Prichard*, 664 So. 2d 885, 890 (Ala. 1995) (internal quotation and citation omitted).

B. Petitioner's Standing

Riverkeeper timely filed this request for a hearing before the Commission, pursuant to Ala. Code §§ 22-22A-6(a)(4), 22-22A-7(c) and ADEM Admin. Code r. 335-2-1-.01 and r. 335-2-1-.05, to contest the issuance of the Permits.

Riverkeeper is located at 712 37th Street South, Birmingham, Alabama 35222-3206. Riverkeeper is a nonprofit membership corporation with over 4,000 members that is dedicated to restoring and protecting the Black Warrior River and its tributaries. Riverkeeper actively supports effective implementation and enforcement of environmental laws, including the federal Clean Water Act ("CWA") and the Alabama Water Pollution Control Act ("AWPCA"), together with their implementing regulations, on behalf of and for the benefit of its members. Village Creek is a tributary of the Locust Fork of the Black Warrior River.

Riverkeeper members have shown that they use and enjoy Village Creek, including areas in, around and below Plant 1 and Plant 2. The testimony establishes that Riverkeeper and its members have suffered a threatened or actual injury. The declarations by Riverkeeper members establish that these individuals have in the past used and are planning in the future to continue to use the waters of Village Creek and its tributaries for aesthetic and recreational enjoyment, and educational and professional pursuits. Riverkeeper members detail the adverse effects they have suffered and will suffer from ADEM's failure to write proper permits to limit the continuing industrial pollution of Village Creek and its tributaries.

Petitioner has established standing sufficient to participate in the proceeding.

C. Technology-Based Effluent Limitations

ADEM is required to develop technology-based effluent limitations for NPDES permits.

"Each NPDES permit shall include conditions meeting the following requirements where applicable: (a) Technology-based effluent limitations

and standards based on effluent limitations and standards promulgated under Section 301 of the FWPCA or new source performance standards promulgated under Section 306 of the FWPCA, or case-by-case effluent limitations determined under Section 402(a)(1) of the FWPCA when technology-based standards or new source performance standards have not been promulgated, or on a combination of the two. Application of technology-based effluent limitations shall be in accordance with 40 CFR Part 125 (2007) Subpart A.” See “Joint Statement of Material Facts Not In Dispute” filed by the Parties.

The Department is allowed to base its technology-based effluent limitations on its best professional judgment when EPA established effluent guidelines are not applicable. Here, the Department was not required to employ the complete 40 CFR § 125.3 analysis to arrive at its effluent limitations. Established effluent guidelines in existence applied to some part of Metalplate’s discharge. However, those guidelines do not apply to other portions of Metalplate’s discharge. That leaves the Department to employ the best professional judgment analysis to arrive at appropriate technology-based limits. The Department was allowed to base its technology-based limits on best professional judgment to conclude that conventional stormwater measures, or best management practices were appropriate technology-based limitations. The Department’s use of non-numeric technology-based limits for the control or abatement of issues with stormwater discharge is consistent with the EPA’s analysis of the Iron and Steel Manufacturing category, EPA’s General Permit, as well as industry standards on effective means of controlling stormwater. Effluent limitations are not required to be numeric. Because of this fact, the allegations regarding matters not included in pertinent regulations or statutes, do not serve as a basis for disapproving a permit. Further, in cases such as this, where the Department used its own professional judgment, the manner in which it applied judgment is not a sufficient basis for vacating or mediation of a permit in the proceeding. For these reasons, the Department is entitled to summary judgment on the issue.

Petitioner similarly alleges that the Department also failed to conduct reasonable potential analysis and that numeric analysis should have been performed. That allegation involving the manner in which the Department conducted this analysis is not appropriate for the permit appeal. The evidence shows that the Department conducted the analysis for all pollutants of concern when it issued the Permits. The Department did what was required by the regulations as to reasonable potential analysis and satisfied the regulatory requirements.

For these reasons, the Department is entitled to summary judgment on this issue.

D. Water Quality-Based Limitations for Permits

ADEM must include additional or more stringent permit requirements anytime such are necessary to achieve the water quality standards established under Section 303 of the Clean Water Act. The Permits each contain non-numeric water-quality based effluent limitations (WQBEL) for zinc. The Permits' rationales state the following basis for these water-quality based effluent limitations:

"ZINC MINIMIZATION PLAN

Due to elevated levels of zinc in the facility's monitoring, the facility will be required to submit an engineering report within 90 days and an updated BMP Plan to the Department within 180 days from the effective date of the permit. Specific requirements are found in Part IV.C of the Permit."

See paragraph 39 of the Parties' "Joint Statement of Material Facts Not In Dispute."

The listed Permits' rationale does not provide a sufficient basis to support Petitioner's argument. The rationale provides some explanation for the development of a permit, however, the final Permit itself contains the terms and conditions that are subject to the appeal. Perhaps ADEM could have set out more in describing or setting forth the facts as well as the legal and policy questions it considered in preparing these Permits. The failure of the Department to set out more may have made the Petitioner's job in pursuing the appeal more difficult, or perhaps not.

Regardless, the Department was not required to do so. It is the requirement of the undersigned (and the Commission) to assess the adequacy (in relation to the regulations and law) of the terms and conditions of the Permits that were issued.

The terms of these Permits prohibit the violation of narrative water quality standards. They also contain a provision for modification, if necessary, to assess the maintenance of water quality standards. Whether Metalplate complies with the requirements of these Permits is something that should be monitored closely but future compliance is not a basis for attacking the terms of the Permits on this appeal.

The Department is required to establish water quality-based effluent limitations when the Department determines that such are necessary to achieve water quality standards. The allegations that the Department failed to establish effluent limitations for zinc and to control all pollutants which will cause, or have a reasonable potential to cause (or contribute) to an exceedance of a water quality standard because it failed to impose a numeric limitation on Metalplate's stormwater discharges, are not persuasive.

Such allegations are not supported by 40 CFR § 122.44(k) which expressly envisions circumstances in which best management practices are appropriate to control or abate the discharge of pollutants, such as where "numeric effluent limitations are infeasible." The Department has determined that the calculation of numeric effluent limitations for zinc stormwater discharges in Metalplate's Permits is infeasible. The undersigned agrees with that finding of infeasibility notwithstanding the argument of the Petitioner. Stormwater situations are highly unpredictable. The flows are variable. The effluent concentrations are variable. The stormwater events are very unpredictable. They result in varying discharge rates. They result in varying pollutant levels in the discharge. And they result in very different flows in the receiving waterbodies. The Department

has provided ample evidence showing it was within its regulatory authority in its imposition of non-numeric WQBELs to carry out the purposes and intent of the Alabama Water Pollution Control Act and the Federal Water Pollution Control Act. ADEM has required Metalplate to develop and implement ZMPs, enhanced BMPs, and significantly increase its monitoring frequency from semiannual to bimonthly for the zinc parameter to measure the effectiveness of the ZMPs and enhanced BMPs. This is consistent with the goal of achieving overall reductions in zinc from stormwater sources as well as EPA's iterative approach to permitting industrial stormwater point sources. In addition, the Department has the authority to reopen the Permits to include additional conditions or limitations if determined necessary based on future information.

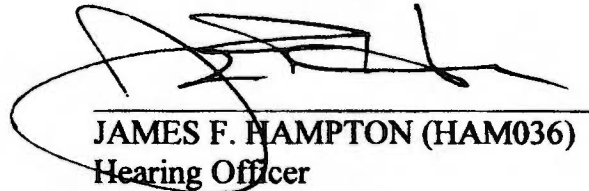
Zinc concentrations reflected in Metalplate's discharges have been elevated. ADEM has appropriately required Metalplate to be subject to the terms of more stringent individual Permits that target greater reductions in zinc and increased Departmental oversight. Anticipated violations are not appropriate for consideration here regarding the question of whether the Final Permits, as issued, comply with the applicable regulations and were developed to be protective of water quality. For these reasons the remaining issues raised by the Petitioner are similarly subject to ADEM's Motion for Summary Judgment.

RECOMMENDATION

The Hearing Officer finds, and recommends to the Commission, that there is no genuine issue of material fact as to the Petitioner's claims and that the Department and Metalplate are entitled to judgment as a matter of law. The Hearing Officer recommends that the relief requested in Petitioner's notice of appeal and its Motion for Summary Judgment be **DENIED**. The Hearing Officer further recommends that Metalplate's and the Department's Motions for Summary

Judgment be **GRANTED**. The Hearing Officer recommends the Commission approve Permits as issued.

Done this 13th day of March, 2020.



JAMES F. HAMPTON (HAM036)
Hearing Officer
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HAND DELIVERY

Debi Thomas

Alabama Environmental Management Commission

1400 Coliseum Boulevard

Montgomery, AL 36110-2059

Attachment 5

ISSUED this 12th day of June 2020.

ENVIRONMENTAL MANAGEMENT COMMISSION

APPROVED:



Commissioner



Commissioner



Commissioner



Commissioner



Commissioner



Commissioner

Commissioner

DISAPPROVED:

Commissioner

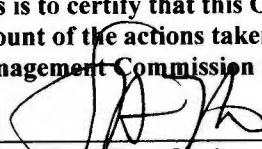
Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate
account of the actions taken by the Environmental
Management Commission on this 12th day of June 2020.



Samuel L. Miller, Chair
Environmental Management Commission
Certified this 12th day of June 2020

Attachment 6

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

IN THE MATTER OF:)	
)	
BOBBY LEWIS, et al.,)	
PETITIONERS,)	
)	
V.)	EMC DOCKET NO. 19-06
)	
ALABAMA DEPARTMENT OF)	SOLID WASTE DISPOSAL
ENVIRONMENTAL MANAGEMENT,)	FACILITY PERMIT NO. 35-06
RESPONDENT,)	
)	
AND)	
)	
CITY OF DOTHAN,)	
INTERVENOR.)	

ORDER

Before the Commission is the Report of the Hearing Officer, which includes Findings of Fact, Conclusions of Law, and a Recommendation. Also before the Commission are Objections to the Report of the Hearing Officer, and Replies to the Objections. Having considered the Report of the Hearing Officer, the Objections, and Replies, 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 the Report of the Hearing Officer is hereby modified by adopting the Department's Proposed Order which in turn adopts the alternate Findings of Fact and Conclusions of Law that the City of Dothan proposed;
2. That the alternate Findings of Fact and Conclusions of Law that the City of Dothan proposed and adopted by the Department as part of its objections to the Report of the Hearing Officer are expressly adopted by the Commission and the final decision of the Commission in this matter;
3. That the Department's issuance of the renewal and modification of Permit No. 35-06 complied with applicable statutes and regulations;
4. That the Commission approves the renewal and modification of Permit No. 35-06;

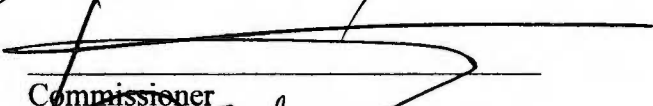
5. That this action has been taken and this Order shall be deemed rendered final and effective as of the date shown below; and

6. That a copy of this Order, along with a copy of the Findings of Fact, Conclusions of Law and Final Decision of the Commission, attached hereto and made a part hereof, shall be forthwith served upon each of the Parties hereto either personally, or by Certified Mail, Return Receipt Requested.

APPROVED:



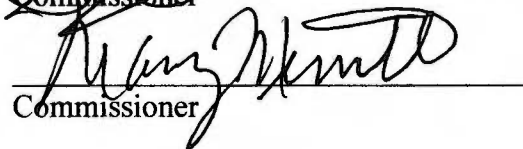
Commissioner




Commissioner



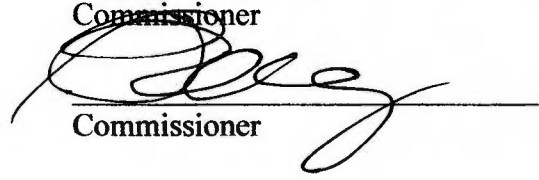
Commissioner



Commissioner



Commissioner



Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

Commissioner

ABSTAINED:

Commissioner

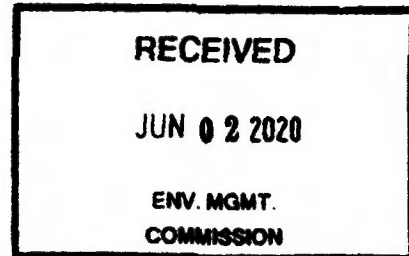
This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 12th day of June 2020.



Samuel L. Miller, Chair
Environmental Management Commission
Certified this 12th day of June 2020

**BEFORE THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION**

BOBBY LEWIS, et al.,)
)
 Petitioners,)
)
 v.) EMC DOCKET NO. 19-06
)
 ALABAMA DEPARTMENT OF)
 ENVIRONMENTAL MANAGEMENT,)
)
 Respondent,)
)
 CITY OF DOTHAN, ALABAMA,)
)
 Intervenor.)



**PROPOSED ALTERNATIVE FINDINGS OF
FACT AND CONCLUSIONS**

COMES NOW the undersigned Hearing Officer, duly employed by the Environmental Management Commission (hereafter Commission), to conduct the hearing and all related proceedings pertinent to this matter, and respectfully submits this report which includes Findings of Fact, Conclusions of Law and Recommendation. This report is submitted pursuant to Rule §335-24 -.27 of ADEM Administrative Code and is submitted along with the entire record of these proceedings, including a complete transcript of the hearing, all documents allowed into evidence, and other relevant briefs and submissions of the parties. This report is submitted to the Commission on the date indicated below.

I. INTRODUCTION AND PROCEDURAL HISTORY OF THIS PROCEEDING

The formal process of this matter began with the Alabama Department of Environmental Management's (hereinafter ADEM or Department) issuance of a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan (hereinafter City) on May 6, 2019. On June 4, 2019, Bobby Lewis, Michael Del Vecchio, David F. Del Vecchio, Peggy R. Del Vecchio, William P. Novack, Tara Novack, and Erece Reese, collectively referred to as Petitioners, timely filed a request for hearing in this matter to contest the issuance of this permit. Intervenor, City, filed a motion to intervene in this matter, and that motion was granted on August 12, 2019.

The Department issued this latest version of Permit 35-06 to the City on May 6, 2019, which allows the City to continue to use the existing landfill for disposal and to expand the existing landfill to dispose of solid waste in its expanded Landfill. On June 4, 2019, Petitioners timely filed their request for hearing to contest the Department's administrative action. See Ala. Code §22-22A-7(c)(1); ADEM Admin. Code 335-2-1-.04(1).

The present administrative action follows two others in 2016 and 2018 that modified the existing permit to grant permission for the City to expand its existing Landfill. The Department rescinded both of those modifications. Ultimately, in 2018, the City submitted to the Department both an application to renew its existing permit and shortly thereafter, a revised application for the requested modification.

The parties filed various motions relating to discovery and other procedural matters. The undersigned has ruled on all these motions.

The undersigned received testimony from approximately twenty-four witnesses and received numerous exhibits over eight days of hearings held at the Department; August 19-21, 22, and September 16-19. Following the hearings, parties submitted briefs, argument and proposed

Findings of Fact and Conclusions of Law to the undersigned Hearing Officer for consideration. The undersigned has considered all of the evidence and submissions in issuing this report and recommendation.

II. THE ISSUES

Petitioners in this cause raise at least a dozen issues and allegations of error in the Department's issuance of this permit renewal and modification. These issues were addressed in briefs and are detailed and discussed below. They include issues related to procedural requirements, groundwater standards, design and operating standards, variances and compliance with Title VI of the Civil Rights Act of 1964. These were all issues considered by the undersigned in the review of the matter.

III. STANDARD OF REVIEW

ADEM Admin. Code r. 335-2-1-.14 provides that this hearing shall be conducted as a *de novo* proceeding. Under ADEM Admin. Code r. 335-2-1-.27(5), the burden shall rest with the petitioner to show by a preponderance of the evidence that the Department's action should be modified or disapproved. That is, the ADEM's determinations must stand unless the petitioners present the greater weight of the evidence. *See Jenkins v. State*, 972 So.2d 165, 167 (Ala. Crim. App. 2005) (adopting the definition of "preponderance of the evidence" set forth in Black's Law Dictionary, which defines the term as "[t]he greater weight of the evidence."). The undersigned has considered all the evidence and argument submitted by the parties, observed and judged the demeanor of the witnesses and considered the standard of review in reaching these findings.

IV. FINDINGS OF FACT

Bobby Lewis, an admitted opponent of the Landfill, lives across the road from the Landfill property. Mr. Lewis's complaints stem from when the existing Landfill was in full operation; the problems have improved since the Landfill has reduced operations. He attributes loss of enjoyment

of his property, physical effects due to odors, dust, noise, buzzards and disease vectors, as well as reduced property values, to the Landfill. He lives closer to the existing Landfill, which is almost at the end of its life. Operations in the expanded section will be farther away from him.

Petitioner Michael Del Vecchio lives on property adjoining the Landfill property to the south. He complains of odors, dust and noise, which he says, reduces the enjoyment of his property and causes physical effects. Michael Del Vecchio observes buzzards, vectors, and other animals, which he attributes to the Landfill. Operations in the expanded section of the Landfill will be closer to his home.

Petitioner David F. Del Vecchio, father of Michael Del Vecchio, lives on property adjoining the Landfill property to the south. David Del Vecchio complains of odors, dust and noise, which, he says, reduces the enjoyment of his property and causes physical effects. He also contends that the Landfill has caused flooding on his property and reduced its value. Operations in the expanded section of the Landfill will be closer to his home.

Petitioner Peggy R. Del Vecchio, wife of David Del Vecchio, lives on property adjoining the Landfill property to the south. She complains of odors, dust and noise, which she claims reduces the enjoyment of the property and causes physical effects. Ms. Del Vecchio has observed buzzards, vectors, and other animals which she attributes to the Landfill. Operations in the expanded section of the Landfill will be closer to her home.

Petitioner William R. Novack, son-in-law of David and Peggy Del Vecchio, lives south of the Landfill property. He complains of odors, dust and noise from the Landfill, which he claims reduces the enjoyment of his property. The noise causes him trouble with sleeping. Mr. Novack also claims that the development of the Landfill expansion has caused flooding on the property. Operations in the expanded section of the Landfill will be closer to his home.

Petitioner Tara Novack, wife of William, daughter of David and Peggy Del Vecchio, and sister of Michael Del Vecchio, lives south of the Landfill property. She complains of odors, dust and noise, which reduces the enjoyment of the property and causes physical effects. She has also observed buzzards and other animals which she attributes to the Landfill. She claims that the Landfill has reduced the value of her property. Operations in the expanded section of the Landfill will be closer to her home.

Petitioner Erece Reese did not testify. There was no evidence about her in regard to complaints or issues with the proposed expanded operations.

Petitioners, except for Erece Reese, testified that they have suffered, to some degree, from odors, from the operations of the subject Landfill, that interfere with the enjoyment and use of their property. Their testimony appeared intended to show that they are subject to fugitive dust, vectors and noises because of the proximity of their property to the Landfill. They testified that such problems will continue with the expansion of the Landfill.

On October 21, 2013, ADEM issued a renewal of Solid Waste Disposal Facility Permit No. 35-06. The size of the permitted facility was 78 acres and the size of the permitted municipal solid waste landfill unit was 55 acres.

On April 1, 2014, the City engaged CDG Engineers and Associates, Inc. to perform professional services for the design and permitting of an expansion to the City of Dothan Sanitary Landfill.

On August 2, 2014, the City published in the Dothan Eagle a "Notice of Public Hearing to Accept Comment Concerning Approval of a Modification to the City of Dothan Landfill." The notice stated that "[p]ublic comment is being accepted in relation to the facility's request for local approval to expand the facility boundary."

On September 2, 2014, the City held a public hearing “to discuss the City of Dothan’s Landfill Expansion.” During the hearing, Daniel Wells of CDG Engineers and Associates, Inc. stated that the permitting plans should be completed by the end of 2014. Ernie Stokes, Chief Civil Engineer for the City, estimated the plans would be submitted to ADEM in January, 2015.

On September 16, 2014, the Board of Commissioners of the City adopted Resolution No. 2014-246 approving “the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres.”

On September 16, 2014, Public Works Director Jerry Corbin reported to the Board of Commissioners of the City that the proposed Landfill expansion is in the design phase. On September 16, 2014, the proposed expansion of the City of Dothan Sanitary Landfill was still in the preliminary design phase.

As of September 16, 2014, CDG Engineers and Associates, Inc. had not presented to the City a proposed application to be submitted to ADEM for expansion of the City of Dothan Sanitary Landfill.

On January 26, 2015, the City submitted to ADEM an application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 534 acres, to expand the size of the permitted existing municipal solid waste Landfill unit from 55 acres to 75.6 acres, and to add a new permitted 13.6-acre construction and demolition landfill unit.

Resolution No. 2014-246 was included in the January 26, 2015 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) submitted to ADEM on January 26, 2015.

On January 8, 2016, ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 534 acres, to expand the size of the permitted existing municipal solid waste Landfill unit from 55 acres to 75.6 acres, and to add a new permitted 13.6-acre construction and demolition landfill unit.

On June 10, 2016, ADEM rescinded the January 8, 2016 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

On November 16, 2016, the City submitted to ADEM a revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522 acres, to expand the size of the ~~pen-fitted~~ permitted existing municipal solid waste Landfill unit from 55 acres to 71.1 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit.

The November 16, 2016 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) included the same “local approval for the property expansion on September 16, 2014.”

On or about March 1, 2017, the City submitted to ADEM a revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit.

On November 1, 2017, ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from

55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit.

On April 18, 2018, the City submitted an application (ADEM Form 439) to ADEM to renew Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

On April 24, 2018, ADEM rescinded the November 1, 2017 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

During the Spring and Summer of 2018, the City submitted to ADEM a four-part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. Part two was ADEM Form 439 submitted to ADEM on May 5, 2018. Part three was an “Operations Manual for Dothan Landfill” (revised July 2018) submitted to ADEM on or about July 18, 2018. Part four was “Major Modification Plans for the Dothan Landfill” (July 2018) submitted to ADEM on July 18, 2018. The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit.

The site of this landfill expansion lies over a relatively impermeable residuum, a soil derived from bedrock, with a very high clay content.

This residuum is the confining layer for an artesian aquifer beneath it known as the Lisbon formation. The Lisbon is the first zone of saturation, an element in the ADEM definition of groundwater.

An artesian aquifer exists under confined conditions; an impermeable layer prevents the groundwater from rising up higher.

An artesian aquifer is recharged by rainfall upgradient from the aquifer and outside the area. Rainfall takes a "long time" to affect the groundwater.

When this artesian aquifer is penetrated, the water level may rise up in the casing because the pressure of water is greater than atmospheric pressure. Unless the confining layer is penetrated, the water will not rise above the confining layer.

While the water rise in the wells or piezometers may change seasonally or over time, the original water level will remain below the confining layer unless the confining layer is penetrated.

During January 23-24, 2012, the City or its consultants drilled four exploratory holes (piezometers) in the area of the proposed expansion. These piezometers were designated PZ-20, 27, 28, and 29.

The City's groundwater consultants, TTL, measured the water level in these piezometers and monitoring wells MW-9, DW-2, MW-10, MW-12 on the following dates: January 28, February 20, March 17 and 31, and April 16 and 28, all in 2014.

ADEM Admin. r. 335-13-4-.11 schedules these measurements to coincide with the wettest months of the year, normally expected to be February, March and April. The first of the measurements was three days outside the three-month window described in ADEM Admin. r. 335-13-4-.11(a)(2).

The City's groundwater consultants drilled ten other piezometers in May 2014. They have taken semi-annual measurements since.

The water level rose in every single well drilled from three and a half to thirteen feet.

The piezometers identified in the City's application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) as PZ-20, PZ-21, PZ-27, PZ-28, and PZ-29 are

in the area of the proposed cell or liner system of the proposed municipal solid waste landfill expansion.

A portion of the expansion of the municipal landfill is located in 2.25 acres of former wetlands. The U.S. Army Corps of Engineers (hereinafter Corps) regulations define “wetlands” as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 CFR § 328.3(b).

On April 10, 2015, the City submitted an application to the Corps for a permit under Section 404 of the Clean Water Act to discharge fill material, i.e., approximately 11,000 cubic yards of “sand-clay structural fill with liner” into 2.25 acres of wetlands, 890 linear feet of ephemeral stream, and 270 feet of intermittent stream. The City also requested a Water Quality Certification of the proposed permit from the Department under Section 401 of the Clean Water Act. The Corps published a notice of both requests.

On September 22, 2015, in conjunction with the expansion of the City of Dothan Sanitary Landfill, the Department issued a conditional Section 401 water quality certification to the Corps and City for the proposed fill of wetlands and water bottoms . The conditions of the certification were intended to minimize adverse impacts to State waters. There was no appeal from this certification.

On November 9, 2015, the Corps issued Permit No. SAM-2014-00770-JSC to the City for the discharge of fill material into 2.25 acres of wetlands, 890 linear feet of ephemeral stream, and 270 feet of intermittent stream to support construction of an expansion to the existing Dothan Landfill. There was no appeal from the Corps’ permit.

ADEM regulation 335-6-6-.03 exempts activities permitted by the Corps under Section 404 of the Clean Water Act.

The Department does not require a separate permit to fill in the wetlands.

Under the Corps' Permit, the City completed filling this area on December 5, 2017.

When the City filled the wetlands, they were no longer a water of the state.

At the time Department published notice of this permit, there were no longer any wetlands in the area of the Landfill expansion.

Department rules allow for an alternate liner design. City sought permission to use an alternate different liner design than that described in the regulations — “default design.” The “default design” consists of two components: a minimum 40 mil flexible membrane liner overlaying a two-foot layer of compacted soil with a hydraulic conductivity of no more than 10^{-7} cm/sec, and a flexible membrane liner made of High Density Polyethylene (HDPE). As an “alternate design,” the City proposed a 60 mil HDPE liner, a geosynthetic clay liner with a permeability of 5×10^{-8} cm/sec, and 12 inches of compacted clay with a permeability of 10^{-5} cm/sec. The alternate design, then, adds a geosynthetic clay liner to a thinner soil layer.

The City submitted a copy of the results of the Hydrological Evaluation of Landfill Performance (HELP) model, developed by the US Army Engineer Waterways Experiment Station for the US EPA. The HELP model, demonstrates that the leakage rate for the alternate liner design was less than that for the regulation design.

The liner design described in the regulations would meet the standards for groundwater protection in the rules. Thus, a lower leakage rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18.

In accordance with the regulation, the permit specifies that the working face slope of the Landfill expansion be 4 to 1; that is four feet of run to every one foot of rise. This specific language controls any language to the contrary in the City's Operating Plan.

Petitioners smell unpleasant odors at their homes that they attribute to the Landfill. Petitioners have curtailed their outdoor activities, at times, due to outside odor, though they have lived near the existing Landfill for years.

Petitioners claim physical effects but present no scientific or medical evidence showing that the odors are the cause of any physical malady.

Measuring objectionable or unpleasant odor is difficult and subjective.

The Department requires work practices to minimize odors at landfills. These work practices include cover requirements and buffer zones.

The permit requires six inches of compacted earth cover at the conclusion of each working day for the municipal waste. The permit requires the same cover material for the construction/demolition but at the conclusion of each week.

The permit also requires a 100-foot buffer zone around the disposal area. This method of cover along with buffer zones are common permit conditions throughout the state and the landfill industry. There was no evidence that the Department has encountered a case where those work practices were not sufficient to control odors.

This Landfill, like all other municipal landfills, is subject to unannounced inspections once per quarter. There was no evidence that ADEM inspectors had seen indications of a pattern of the waste being left uncovered.

The Department now inspects a portion of landfills either before or after hours to ensure that operators place the required cover on disposed waste. If there are future complaints about the

Landfill, the Chief of the Solid Waste Branch expects to ask for an additional inspection of the Landfill before or after operating hours to see if the Landfill is covering waste properly.

After a landfill reaches a certain threshold of emissions — either calculated from the size of landfill or measured — the landfill must install an extensive gas collection system to reduce organic emissions, thus minimizing odors.

The Operations Manual provides that following the permit modification, the landfill will submit a permit package as a Major Source and will comply with applicable permitting requirements and regulations of the Clean Air Act.

The evidence does not establish that the *conditions of the permit themselves* — its work practices and technology based standards — are insufficient to control odor from existing in such extent and duration as would or tend to be injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property.

The Operating Plan incorporated in the Permit specifies the use of all-weather haul roads at the Landfill. This type of road reduces the amount of dust generated.

The Operating Plan also specifies a water truck for firefighting.

A Department staff member has observed the City using a water truck for dust suppression.

The buffer zone also functions as an area for dust to settle out of the air.

The evidence does not establish that the permit conditions are insufficient to control fugitive dust.

Petitioners have seen buzzards, flies and coyotes on their property that they attribute to the Landfill.

There was insufficient evidence linking the sighting of coyotes with the Landfill. There is a 94-acre wooded area west of the Del Vecchios' property.

The permit contains conditions that address disease vectors: cover requirements, requirements that wastes that could encourage vector breeding shall not be left uncovered at the site, and requirements to regrade areas where stagnant water accumulates.

The City did not request to use alternate cover materials nor does the permit authorize their use.

The permit does not address the practice of “peeling back” cover.

By its terms, the permit specifically requires the City to “operate and maintain the disposal facility consistent with the Application, this permit, and Div. 335-13.”

By its terms, the Permit specifically provides that it does not authorize injury to person nor property.

All Petitioners who appeared and testified live as close as or closer to the Landfill than other persons do in a one-mile radius and are white.

Those white Petitioners are among those living closer to the Landfill than those of the Burkett subdivision, whose population is almost all African-American.

Depending on distance, the Landfill will affect individuals living within this one-mile radius differently.

Though a large majority of persons that live in a one-mile radius of the Dothan Landfill are African-American, there is no showing that the Landfill has a discriminatory effect on minorities.

It was not established by the Department’s outreach procedures caused a discriminatory effect on minorities. Indeed, the overwhelming evidence shows that the Department’s notice caused a cascade of publicity that gave more than adequate notice to minorities living near the Landfill.

V. CONCLUSIONS OF LAW

1. Petitioners, except for Erece Reese, have established that they are aggrieved parties under Code of Alabama, 1975 § 22-22A-7(c), having shown that they suffer to some extent from the presence of the Landfill. Petitioners filed a timely “Request for Hearing” as required.

2. Petitioners have established that they suffered or are likely to suffer adverse effects from operation of the City of Dothan Sanitary Landfill authorized by the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). Accordingly, Petitioners are considered aggrieved persons and are entitled to a hearing before the Environmental Management Commission to contest the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019).

3. Ala. Admin. Code rs. 335-13-5-.03(2)(b) and 335-13-5-.04(3)(b) provide that a permit may be issued only if the application demonstrates compliance with Ala. Admin. Code div. 335-13.

4. Ala. Admin. Code 335-13-5-.02 outlines the procedures for obtaining permits:

Permit Application. Existing and proposed landfill units shall obtain permits to construct and/or operate in accordance with the following:

(1) **Application Requirements.** Landfill units proposed after the effective date of this Division shall submit the following in order to request a permit:

* * *

(b) Documentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48.

5. While Ala. Code 1975 § 22-27-48 requires host government approval before the Department can consider an application for a modified permit, it does not require that an applicant submit to the local governing body the technical information that is required by the Department.

Rather, § 22-27-48(b) provides that the local governing body must provide approval “pursuant to this section.”

6. Indeed, the engineering and operational materials considered by the Department are not relevant to the criteria prescribed by § 22-27-48 for consideration by the local governing body “[i]n determining whether to recommend approval of the proposed . . . modification of a new or existing solid waste management site,” which are as follows:

- (1) The consistency of the proposal with the jurisdiction's solid waste management need as identified in its plan.
- (2) The relationship of the proposal to local planned or existing development or the absence thereof, to major transportation arteries and to existing state primary and secondary roads.
- (3) The location of a proposed facility in relationship to existing industries in the state that generate large volumes of solid waste, or the relationship to the areas projected for development of industries that will generate solid waste.
- (4) Costs and availability of public services, facilities and improvements required to support a proposed facility and protect public health, safety, and the environment.
- (5) The impact of a proposed facility on public safety and provisions made to minimize the impact on public health and safety.
- (6) The social and economic impacts of a proposed facility on the affected community, including changes in property values, and social or community perception

§ 22-27-48(c)(1) – (c)(6).

7. This division of responsibilities is considered one of the advantages of Alabama's solid waste landfill permitting process. (Final Report, Administrative & Technical Support in Evaluating Public Input on Potential Enhancements to the State Solid Waste Program, available at <http://www.adem.state.al.us/programs/land/swreport/PhaseI/FinalReport.pdf>) (“Another advantage of Alabama's current landfill permitting process is the separation of authorities and responsibilities between the [Host Government Authority] and [Regional Planning Commission], and the state's environmental regulator ADEM. . . . This “firewall” separates issues and decisions

predominantly in the political domain from issues and decisions related to the technical design and operation of the proposed landfill.”).

8. The City’s application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 and the September 16, 2014 host government approval satisfied the requirements of Ala. Admin. Code r. 335-13-5.02 and Ala. Code 1975 § 22-27-48(b). Accordingly, the modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 was issued in compliance with Ala. Admin. Code rs. 33513-5-.03(2) and 335-13-5-.04(3).

9. Ala. Admin. Code rs. 335-13-5-.03(2)(b) and 335-13-5-.04(3)(b) provide that a permit may be issued only if the application demonstrates compliance with Ala. Admin. Code div. 335-13.

10. Ala. Admin. Code r. 335-13-4-.11(a)(2) provides:

For purposes of designing the bottom elevation of the liner system, the applicant shall measure the ground water elevation at the location of the proposed cell or liner system. Such determinations shall be based on groundwater measurements taken in the area of the proposed cell or liner system as approved by the Department. At each measuring location, the applicant shall obtain a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period. Having obtained the measurements, the applicant shall design the facility so that the bottom elevation of the liner shall be a minimum of five feet above the highest measured groundwater level. The applicant shall submit to the Department all data known to exist concerning groundwater elevations at the landfill site and shall submit to the Department a location map showing all monitoring wells or piezometers and drilling logs for all monitoring wells or piezometers used to obtain any groundwater elevation data that is submitted. Nothing herein shall prevent the Department from requiring additional groundwater measurements or from requiring an additional buffer as it may deem appropriate with respect to a particular site.

11. The term “groundwater” is defined as “water below the land surface in the zone of saturation.” Ala. Admin. Code r. 335-13-1-.03(58). The term “saturated zone” is defined as “that

part of the earth's crust in which all voids are filled with water." Ala. Admin. Code r. 335-13-1-.03(122).

12. Ala. Admin. Code r. 335-13-4-.11(a)(2) prescribes the methodology that applicants must use to demonstrate that there is a minimum of five feet of separation between the bottom of the liner system and highest measured groundwater level.

13. Ala. Admin. Code r. 335-13-4-.11(a)(2) requires that the elevation of the liner system shall be measured from the *bottom* of the liner system.

14. Ala. Admin. Code r. 335-13-4-.11(a)(2) requires that groundwater measurements shall be taken in the area of the proposed cell or liner system as approved by ADEM.

15. Ala. Admin. Code r. 335-13-4-.11(a)(2) requires that the highest measured groundwater level shall be the highest measured level among those measurements that include at least two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period.

16. Because confined groundwater never rises above the confining layer, the January 28 measurement was not a significant variation from the February-March-April testing period.

17. The Department had discretion to consider the January 28 measurement along with all of the other measurements of groundwater in satisfaction of the requirements. *See* Ala. Admin. Code r. 335-13-4-.11(a)(1) ("Certain requirements contained in 335-13-4-.01 through 335-13-4-.20 may be enhanced or reduced by the Department as deemed necessary to comply with the Act and this Division"); *cf.* ADEM Admin. Code r. 335-13-14-.07 ("As determined by the Director, substantial non-compliance with Department regulations will be grounds for denial of application.").

18. The City's application for modification of Solid Waste Disposal Facility Permit No. 35-06 demonstrates that the City obtained groundwater elevation measurements in substantial compliance with the methodology prescribed in Ala. Admin. Code r. 335-13-4-.11(a)(2).

19. The City's application to renew Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code r. 335-13-4-.11.

20. The City's application to modify Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code R. 335-13-4-.11.

21. The Permit complies with Department regulations governing wetlands. There are no existing wetlands or streams in the area of the Landfill expansion. This current permit, then, does not authorize a landfill unit in violation of ADEM Admin. Code r. 335-13-4-.01(2)(c). Nor does it authorize any fill or discharge to waters of the State including wetlands. Because there are no longer waters of the State at this site, any issue about the need for a separate water permit from the Department is outside the scope of the permit and thus this hearing. Besides, requiring a water permit — especially after the Department imposed conditions in its Water Quality Certification — would serve no purpose. The Department, here, had discretion not to require a pointless expenditure of effort.

22. The permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama's regulations and the Alabama State Implementation Plan as it concerns includes odor and fugitive dust.

23. The predecessor of Alabama's regulations governing fugitive dust, now codified at ADEM Admin. Code r. 335-3-4-.02, was declared unconstitutional in *Ross Neely Exp., Inc. v. Ala. Dept. Env'tl. Mgmt.* (Ala. 1983). But, as Petitioners failed to meet their burden of proof on this

issue, it is unnecessary to consider the effect of the *Ross Neely* case on the State Implementation Plan adopted by the EPA.

24. The Permit contains measures to prevent the breeding and accumulation of disease vectors as required by ADEM Admin. Code r. 335-13-4-.22(2)(d).

25. The Permit complies with Department cover standards. ADEM Admin Code r. 335-13-4-.22; 335-13-4-.23. The Permit does not authorize alternative cover materials, so any error alleged on this basis is not yet ripe for consideration. Likewise, the permit does not speak to “peeling back cover”- a practice not addressed by the cover rules. Petitioners’ dispute is with how the Department interprets and enforces the cover rules.

26. The Permit did not grant a variance from the required slope for the working face — the permit requires a slope as prescribed in the regulations. Petitioners cannot complain about a variance the Department never granted. Enforcement provisions are applicable.

27. The Petitioners failed to prove that the alternate liner design violates the Department’s regulations.

28. For the foregoing reasons, the permit does not authorize an unauthorized dump.

29. The Petitioners failed to meet their burden of proof to establish that the design operations will create a nuisance, or is inconsistent with the Solid Wastes and Recyclable Materials Management Act or Ala. Admin. Code div. 335-13.

30. The Petitioners failed to meet their burden of proof to establish that the renewal and modifications of the permit will have a disparate impact on persons of the Black race, or that the Department’s efforts to engage the public constituted unlawful discrimination. Thus, Petitioners failed to show that the issuance of the May 6, 2019 permit violated Title 40 CFR 7.35 (b).

VI. RECOMMENDATION

The undersigned has reviewed all testimony, exhibits, briefs, photographs and arguments presented and, based upon the entire record of this proceeding, the undersigned finds that the Petitioners failed to satisfy their burden of proof as to all issues raised.

Therefore, it is the recommendation of the undersigned that renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 is due to be approved by the Environmental Management Commission..

The undersigned recommends that the Commission issue an order consistent with the findings and conclusions stated above.

Respectfully submitted on this the 2nd day of June, 2020, by filing with the Alabama Environmental Management Commission for service by the Commission to all parties.

Attachment 7

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

IN THE MATTER OF:)	
)	
JEFFREY ALAN WADE,)	
)	
PETITIONER,)	
)	EMC DOCKET NO. 20-03
V.)	
)	
ALABAMA DEPARTMENT OF)	
ENVIRONMENTAL MANAGEMENT,)	
)	
RESPONDENT.)	

ORDER

Before the Commission is the Report of Hearing Officer, which includes Findings of Fact, Conclusions of Law, and a Recommendation. Based upon a review of the documentary evidence, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

1. That the Report of Hearing Officer is hereby adopted; and
2. That pursuant to the adoption of the Report of Hearing Officer, the Request for Hearing is dismissed; and
3. That this action has been taken and this Order shall be deemed rendered effective as of the date shown below; and
4. That a copy of this Order along with a copy of the Report of Hearing Officer, attached hereto as Exhibit A, and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail, return receipt requested.

ISSUED this 12th day of June 2020.

ENVIRONMENTAL MANAGEMENT COMMISSION

APPROVED:



Commissioner




Commissioner



Commissioner



Commissioner



Commissioner



Commissioner

Commissioner

DISAPPROVED:

Commissioner

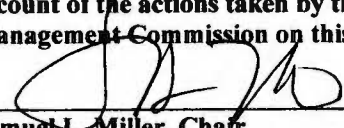
Commissioner

Commissioner

ABSTAINED:

Commissioner

This is to certify that this Order is a true and accurate account of the actions taken by the Environmental Management Commission on this 12th day of June 2020.



Samuel L. Miller, Chair
Environmental Management Commission
Certified this 12th day of June 2020

**BEFORE THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION**

JEFFREY ALAN WADE,)

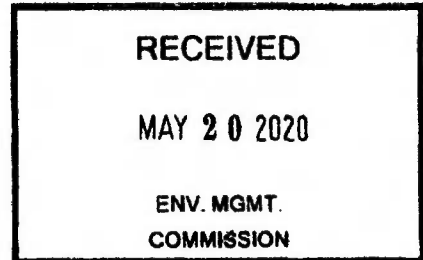
Petitioner,)

vs.)

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,**)

Respondent.)

EMC DOCKET NO. 20-03



REPORT OF HEARING OFFICER

COMES NOW the undersigned Hearing Officer, duly employed by the Environmental Management Commission (hereafter Commission) to conduct the hearing and all related proceedings pertinent to this matter, and respectfully submits this report which includes Findings of Fact, Conclusions of Law and Recommendation. This report is submitted pursuant to Rule §335-2-1-.27 of ADEM Administrative Code and is submitted along with the entire record of these proceedings. That record consists primarily of pleadings as no hearing was held and no testimony was presented in this cause. This report is submitted to the Commission on the date indicated below.

I. INTRODUCTION AND PROCEDURAL HISTORY OF THIS PROCEEDING

The formal process of this matter before the undersigned began with the Petitioner's, Jeffrey Alan Wade (hereinafter Wade), letter to the Commission dated April 3, 2020 and received by the Commission on April 10, 2020. In this letter, Wade made a request for a hearing

to “reevalute” his application for “Grade I certification.”

A Notice of Pleading Defects was filed by the Respondent, Alabama Department of Environmental Management (hereinafter ADEM), pursuant to r. 335-2-1-.04(7). That motion appears to have been timely. No response was forthcoming from Wade. On May 4, 2020, ADEM filed a Motion to Dismiss for Wade’s failure to respond to ADEM’s Notice of Pleading Defects.

II. THE ISSUES

Is ADEM entitled to a dismissal of the matter pursuant to r. 335-2-1-.04(7)?

III. THE COMMISSION REVIEWS ADEM’S ACTION ON A DE NOVO BASIS

IV. FINDINGS OF FACT

Because of the nature of this proceeding, there are few “facts” to be addressed outside of the pleadings in this matter. The record consists exclusively of the pleadings and some correspondence. The record shows that Wade did file a timely request for hearing which was received by the Commission on April 10, 2020. Subsequent to that, there were limited phone calls and e-mails between Wade, the undersigned and the Department’s attorney, A. Todd Carter. In that communication, the undersigned referred Wade to the applicable rules.

On April 17, 2020, the Department filed a “Notice of Pleading Defects.” Mr. Wade received that “Notice of Pleading Defects” and a subsequent e-mail from the undersigned indicating that a response was needed from Wade.

No response was filed by Wade, and the Department filed a “Motion to Dismiss” on May 4, 2020. To date, there is still no response from Wade.

V. CONCLUSIONS OF LAW

Rule 335-2-1-.04(7) requires a petitioner such as Wade to cure all identified defects in pleadings within 10 days. Failure to do so “shall deem the original filing an improper request and will not preserve that person’s right to a hearing.” 335-2-1-.07. Wade failed to cure the defects.

VI. RECOMMENDATION

Based upon the complete record in this cause and based upon Wade’s failure to respond to the Department’s “Notice of Pleading Defects,” it is recommended that the Petitioner’s “Request for Hearing” be dismissed.

Done this 20th day of May, 2020.



James F. Hampton
Hearing Officer