Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
December 10, 2010
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 December 10, 2010.

[Signature]

John H. Lester, D.V.M.
Chair
Environmental Management Commission

Certified this 18th day of February 2011.
Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
December 10, 2010

Convened: 11:00 a.m.
Adjourned: 11:40 a.m.

Part A
Transcript

Part B
Attachment Index
Attachments 1 – 7
Part A
COMMISSIONER LESTER: We call this meeting to order.

The first agenda item is consideration of minutes of our October 15th meeting. Do I have a motion regarding the minutes?

COMMISSIONER RICHARDSON: So moved.

COMMISSIONER BROWN: Second.

COMMISSIONER LESTER: Motion second. All in favor say aye.

ALL: Aye.

COMMISSIONER LESTER: All opposed?

(No response)

COMMISSIONER LESTER: The next item is Commission will consider the election of the Chair and the members of the Personnel Committee and the Rulemaking Committee for -- each Commissioner has received a copy of all this. Nominations are for Personnel Committee, Lanier Brown as Chairman; Jim Laier and Sam Miller as members.

Rulemaking Committee, Scott Phillips, Chair; Marquita Davis and Terry Richardson as members.

Do we have a motion to adopt the Committees and Chairs?

COMMISSIONER MILLER: Moved.

COMMISSIONER RICHARDSON: Second.

COMMISSIONER LESTER: Motion second. All in favor say aye.

ALL: Aye.

COMMISSIONER LESTER: All opposed?

(No response)

COMMISSIONER LESTER: At this time, we'll have the Director's report.

MR. LEFLEUR: Good morning.
Commissioners. It's a pleasure
to be here with you this
morning.
You should have received
two memos from me recently on
rulemaking and contracts, and if
there are any questions that
come up regarding those, please
address those.

We are two months into
our fiscal year 2011 budget.
The Department is on track in
both revenues and expenditures.
ADEM has been able to manage in
these austere times in part
because of sound and efficient
practices but, also, in part,
because of prior actions to
shore up programs. An example
of this is in 2008, the passage
of the Solid Wastes and
Recyclable Materials Management
Act put the Solid Waste Division
on stronger financial footing
when it was sorely in need of
financial upgrade. Today, our
Water Division has -- today and
for some time, has been in need
of improved funding. The Water
Division depends on funding
support that ultimately comes
from the Alabama General Fund to
supplement inadequate federal
funding. This inadequate
federal funding is a nationwide
problem; it occurs in the water
programs throughout the country,
and the method to shore up that
weak program on the federal
level is to have state general
funds appropriated for that
purpose. We are all well aware
of the difficulties our general
fund in Alabama is having.
Funding in the Water Division is
going to be one of our most
significant challenges. It is
now and it will be in the
future. The stimulus money that
Alabama has used to shore up
budgets in the past couple of
years is scheduled to run out in
the spring of 2011, so the
situation is going to become
even more difficult. Needless
to say, maintaining an adequate
budget for ADEM in the 2012
fiscal year is going to be a
real challenge for us also.

As you are aware, there
are a number of new faces in the
legislature, and since we do
depend on those funds from the
General Fund, we will be working
closely with them to help these
new people understand the
important mission that ADEM has,
and we'll be doing that over the
next weeks and months to come.

As we do before each
meeting, I also sent you a memo
outlining some of the issues
we've been dealing with since
our last meeting. You'll notice
that a number of these are
repeat issues. They stay on
there for a good while, and
that's the nature of the work
that you do; a lot of it is long
term. And I welcome any
questions that you may have on
that, also.

As we close out the
calendar year 2010, I would like
to highlight some significant
comments from the past year, and
I'll do this by the divisions.
First Air. Air quality in
Birmingham continues to improve,
as it has over the past thirty
years or so, and although the
standards are as tight as
they've ever been during the past year, the Birmingham area has attained the 24-hour fine particle standard. They have been out of attainment for some time, and they have reached that attainment level. We will have a request -- We have already requested that EPA re-designate the Birmingham area to reflect that achievement. We hope to receive that re-designation before the end of 2011.

It also appears that when all the data is in from the 2010 calendar year, the Birmingham area will also attain the annual standard for fine particulates as well, so that's a -- that's a real success story in the Air Division in the Birmingham area.

In the Water Division -- In spite of our funding challenges, over the course of the past few months, the Water Division has made some significant strides in improving the Storm Water Program. We're on the verge of issuing the Phase II Municipal Separate Storm Water Sewer System, or MS4, storm water permit. This effort has involved a number of ADEM staff and numerous meetings with EPA and stakeholder groups. Its implementation will greatly improve the effectiveness of the storm water programs in the cities and counties around the state. Now, this is the Phase II, which deals with the smaller communities around the state. The Phase I will be up for consideration here in the next several months, and this will be for the larger metropolitan areas.

Additionally, we've issued a public notice for the General Storm Water permit, which we began on November the 16th. This is not the municipal side, but the remaining storm water areas.

As you may remember, ADEM has developed a general permit for storm water that incorporates the current permit by rule. We expect that this will make the program more efficient and effective, while bringing the program in line with EPA's expectations of that program.

ADEM this year has also significantly reduced backlog permits that existed in the mining and MS4 areas. We expect mining permits on hold for as long as six years and MS4 permits on hold for as long as two years will be cleared in the next few months, and that will be quite a significant help in the storm water areas to have the storm water areas to have that log jam broken. Finally, the number of major facilities which remained on the Water Division's significant noncompliance list for two consecutive quarters has been reduced from over 90 down to 52, so we're making some headway in the Water Division in spite of the funding problems.

Over in Permits and Services Division, there are ongoing efforts to -- involving coordination between Permits and Services and the Water Division.
to increase participation in our
electronic Daily Monitoring
Report, or e-DMR program. We've
made some significant progress.
We now have over 725 permittees
participating. And in
connection with this effort,
during the past year, ADEM held
a series of 15 e-DMR training
sessions across the State.
These sessions were very well
attended and resulted in more
than 200 new with, according to
those who were taking part in
this, eager e-DMR participants.
The increasing e-DMR
participation is increasing the
accuracy and the efficiency
while saving us resources
required to report using the old
paper and ink method.
As you're aware, Alabama
is one of only three states
nation to electronically
flow this data to EPA using the
Exchange Network, and this is
one of those areas where we are
doing more with less. With
tight budget times, the e-DMR
program significantly helps us
reduce workload, while giving us
more accurate and more timely
information, so this is one of
those things that's born out of
necessity but is a very
significant achievement for the
Permit and Services Division and
the Water Division.
The State Revolving Fund
Program, or SRF, within the
Permits and Services Division
earlier this year managed to
allocate its entire stimulus
funding roughly a month before
the deadline. Now, of those
funds that have been allocated,
in less than a year from signing
the loan agreements, SRF has
actually disbursed 81% of the
clean water funds and 62% of the
drinking water funds. These are
remarkable numbers, considering
the complicated nature of these
-- of some of these programs,
and ADEM is pleased to be able
to contribute to the building of
infrastructure in this State,
which was the intent of a lot of
those funds that we would at
least be able to do that.

In Field Operations
Division, during the course of
the past year, Field Operations
has also realized significant
accomplishments. Early in the
year we saw the Field Operations
and the ADEM laboratory receive
its drinking water certification
from EPA. This highlights the
high level of technical
competency and quality control
ADEM has within its laboratory
operations. Much of Field
Operations' time has been spent
on the Deepwater Horizon Oil
Spill response. Field
Operations' personnel worked
over 60,000 man hours to
successfully protect and clean
up Alabama's shoreline from the
largest natural disaster of its
country in the history of our
country.

ADEM has also managed to
significantly increase its field
presence in construction storm
water during the last year.
Having people on the ground to
recognize problems before they
become big, has helped us reduce
inspection and enforcement
delays and, thus, has helped us

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<td>at our last Commission meeting.</td>
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<td>That program has been a very</td>
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<td>successful program, an exemplary</td>
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<td>but it has turned out to be a</td>
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<td>most successful project.</td>
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<td>The last trainload of</td>
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<td>coal ash remediation waste</td>
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<td>arrived at the Arrowhead Landfill in Perry County this</td>
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<td>separate sites. Of those 83</td>
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<td>remediation projects were</td>
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<td>conducted by private contractors</td>
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<td>a successful and environmentally</td>
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<td>sound disposal of waste directed</td>
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<td>to Perry County by TVA and EPA</td>
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<td>well aware of up in Tennessee.</td>
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<td>Division this year in assessing</td>
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<td>and remediating numerous sites</td>
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<td>Branch, has worked diligently to</td>
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<td>Black Belt west of Montgomery,</td>
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<td>and this is one example of what</td>
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is becoming an increasing effort in the Environmental Justice area, and we applaud the work that's been done by those people in the Land Division. And that's my report for today. I have one more thing that I would like to report to you, and that's that John Hagood, who has been with the Commission six years? John, is it?

MR. HAGOOD: Close.

MR. LEFLEUR: John has come in during -- came to ADEM during a time there were a lot of changes taking place and he served the Department well and he served me well during my short time here. And, John, I bring all this up because he's leaving us. He is -- has another opportunity that's been presented to him and we will sorely miss him and hate for him to leave us, but his career path will be enhanced by what he's about to do, and I think he has a few words he would like to say as he comes up here. Those of you that don't know John, he's a colorful character. I think he's got some color to present to some of the people here today.

Thank you very much. If there are no questions, I'll turn it over to my colleague.

MR. HAGOOD: I appreciate it, Lance, for serving here, and I've enjoyed working with him. Some of the most fulfilling days of my life have been serving here at ADEM and especially you entrusted me with the leadership of this fine group of professional people, each and every one of whom I will miss. Especially, Ms. Marilyn Elliott, who has held my hand through a number of difficult circumstances. She's not too shy about telling me when I'm barking up the wrong tree, and I've always appreciated that and I've tried to keep her as close as I could to me, but she's does so many things, it's kind of like guarding Cam Newton. Sometimes you get away from me, and that's when you miss her the most.

The Division Chiefs, especially during the months when I was in the interim, were tremendous to me, and I really gained a new appreciation for what they do and how they do it here.

But a big part of my job has been dealing with external relations here, and when you do that job correctly, you get to know the people involved and not just the issues, and you come to be friends with them, get to know their families, and you really appreciate the job that they do, but that's not going to stop me from giving them the needle today. You have basically two groups you break down: The industry advocates and the environmental advocates. And if you're a really good industry advocate, then there is nothing better than the status quo. You are as passionate and fervent about maintaining the status quo as you are about anything. And to me, what springs to my mind are...
COMMISSIONER LESTER: John, the first of this year, I don't know if all of you remember it or not, but when Trey Glenn resigned and all, during his interim, which we worked through and got Lance as our Director, John was our Director. We were going to make him acting director, and the folks downtown said we can't make him acting director. So he served us as director during that period of time. And talking about the horse's ass, I'm a veterinarian, so I've been his doctor now for six years. We're going to miss him because of all his levity and all. He's a good guy from Eufaula, Alabama, which is where they all come from, anyway.

Our next item of business is to consider the adoption of proposed amendments to ADEM Administrative Code 335-3, Air Pollution Control Program Regulation Rule 335-3-14-.01. Call on the Department.

MR. GORE: Mr. Chair, gentlemen, as y'all may know, some time ago EPA undertook some rulemakings to start treating greenhouse gases as regulated air pollutants, whereas they have not been before, and EPA has completed the process of adopting federal rules that require pre-construction permits for large, new and modified sources of greenhouse gases. In order for ADEM to maintain primacy of the -- for the Construction Permit Program, we need to have rules that are
equivalent to EPA's. ADEM has drafted such rules, put those rules out for public comment beginning August 23rd and ending October the 6th, held a public hearing on October the 6th. We received five comments on those rules, all positive. Three of those commenters asked that ADEM recommend to you that an addendum be added to the draft rules that the Department used as a purpose, so we have not proposed any changes to the draft rules. Pending any questions from y'all, I'd like to request that y'all adopt these changes. COMMISSIONER RICHARDSON: So moved. COMMISSIONER BROWN: Second. COMMISSIONER LESTER: Motion second. All in favor, say aye.

ALL: Aye. COMMISSIONER LESTER: Approved. MR. GORE: Thank you. COMMISSIONER LESTER: Get this paperwork signed. Today, Item 6 and Item 11, NPDES-related matters, Commissioner Laier has filed a recusal form, so he cannot vote on these items. The numbers are 6 and Number 11. This will be Number 6. We move to consider the adoption of the proposed amendments to ADEM Administrative Code Division, Water, 335-6, for Regulation Rule 335-6-10-.09. Offer the Department. MR. SISK: Honorable Chair, Members of the Commission, I am Lynn Sisk, and I am the Chief of the Water Quality Branch of the Water Division. You have before you the complete hearing record, proposed changes to the Water Quality Program regulations. In August of this year, the Department initiated the rulemaking process to numeric nutrient criteria to eight reservoirs. In addition, the Department proposed use classifications in the Choctawhatchee and Tennessee River basins. Other changes were minor and administrative in nature. On October 6th, 2010, a public hearing was held to receive data, views and comments and interested persons regarding the proposed revisions. Written comments were accepted any time during the public comment period, which extended from August 18th through October 6th, 2010. During the comment period, the Department received written comments from three organizations at the hearing on October 6, 2010. One person presented oral testimony. All comments received were supportive of the Department's proposed changes. However, each organization encouraged the Department to make additional changes beyond those proposed in this rule-making. Where the Department determines new use, classifications are appropriate for other waters not included in this rule-making, the Department will propose those uses during a
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<td>1 future rulemaking.</td>
<td>1 2010, a public hearing was held to receive data, views and comments from interested persons regarding the proposed revisions. Written comments were accepted any time during the public comment hearing, which extended from September 20th through November the 4th, 2010. During the comment period, the Department received no written comment. At the hearing on November 4th, 2010, no one presented oral testimony. The Department requests that the Commission adopt the proposed revisions. I'll be happy to address any questions the Commission may have. COMMISSIONER MILLER: Move to adopt. COMMISSIONER BROWN: Second.</td>
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<td>2 As discussed in the reconciliation statement, the Department requests that the Commission adopt the proposed revisions with minor changes pursuant to comments.</td>
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<td>3 And I would be happy to address any questions you would have.</td>
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<td>4 COMMISSIONER PHILLIPS: So moved.</td>
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<td>5 COMMISSIONER BROWN: Second.</td>
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<td>6 COMMISSIONER Lester: Voted and second. All in favor say aye.</td>
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<td>(No response) COMMISSIONER LESTER: Next item is to consider the Administrative Code Division 335-7, Water Supply Program Regulations. Call on the Department. MR. HARRISON: Mr. Chair and Members of the Commission, I am Dennis Harrison and I am the Chief of the Drinking Water Branch of the Water Division. You have before you the hearing record for proposed changes to the Department's Public Water Supply Program Regulations. Administrative and technical changes were proposed in six chapters, as noted in the summary of reasons supporting the adoption of these proposed amendments. On November 4th, 2010, a public hearing was held to receive data, views and comments from interested persons regarding the proposed revisions. Written comments were accepted any time during the public comment hearing, which extended from September 20th through November the 4th, 2010. During the comment period, the Department received no written comment. At the hearing on November 4th, 2010, no one presented oral testimony. The Department requests that the Commission adopt the proposed revisions. I'll be happy to address any questions the Commission may have. COMMISSIONER MILLER: Move to adopt. COMMISSIONER BROWN: Second.</td>
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Before you today is consideration of the report of the Hearing Officer and that no objections have been filed from either side to the report of the Hearing Officer. None have been filed.

I'll entertain a motion.

COMMISSIONER BROWN: Move to adopt.

COMMISSIONER MILLER:

Second.

COMMISSIONER Lester: Motion second. All in favor say aye.

COMMISSIONER RICHARDSON: Aye.

COMMISSIONER PHILLIPS: Aye.

COMMISSIONER BROWN: Aye.

COMMISSIONER MILLER: Aye.

COMMISSIONER LESTER: Aye.

COMMISSIONER LAIER: Aye.

COMMISSIONER LESTER: Aye.

COMMISSIONER LESTER: All opposed?

COMMISSIONER RICHARDSON: (No response)

COMMISSIONER LESTER: Do any of the Commissioners have any other business?

(No response)

COMMISSIONER LESTER: If not, we'd like to note that our next meetings will be February the 18th, April the 15th, June the 17th, August the 19th, October the 21st, December the 9th at 11:00 here at this building.

If it's all right with y'all, I'll entertain a motion to stop.

COMMISSIONER PHILLIPS: Motion.

COMMISSIONER LESTER: I have a motion. Do I have a second?

COMMISSIONER BROWN: Second.

COMMISSIONER LANIER:

Second.

COMMISSIONER LESTER: All in favor say aye.
favor say aye.
ALL: Aye.

COMMISSIONER LESTER: Before our motion for adjournment, I would like to say that you have to remember the next -- this coming Friday, day week, is Debi's birthday. Debi looks after us, so we don't want to forget her. Thank you for all you do for us. A lot of this paper she sends us and, of course, the Department, too. We just couldn't do without her.

MS. THOMAS: Thank you.

COMMISSIONER LESTER: We're going to miss John, but Lance will keep everything going for you, John. No other business, this meeting is adjourned.

* * * *
(Meeting concluded at 11:40 p.m.)
* * * *

REPORTER'S CERTIFICATE

STATE OF ALABAMA
ELMORE COUNTY
I, Anita D. Griffith, Certified Court Reporter and Commissioner for the State of Alabama at Large, hereby certify that on December 10, 2010, I reported the foregoing AEMC Commission meeting, and that pages 3 through 41 contain a true and accurate transcription of the examination of said witness by counsel for the parties set out herein.
I certify that I am duly licensed by the Alabama Board of Court Reporting, as evidenced below.
I further certify that I am neither of kin nor of counsel to any of the parties to said cause, nor in any manner interested in the results thereof.
/s/Anita D. Griffith

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Attachment 3  Resolution adopting proposed amendments to ADEM
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              amendments to ADEM Administrative Code Division 335-1,
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Attachment 7  Order adopting the Report of the Hearing Officer
              (Agenda Item 11 – Southeastern Cheese, LLC v. ADEM,
              EMC Docket No. 10-06 [NPDES-Related Matter])
Attachment 1
AGENDA*  
MEETING OF THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION  
DATE: December 10, 2010       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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| 10. Lenton G. Williams v. ADEM, and Veolia ES Cedar Hill Landfill, Inc.  
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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.  
*** Commissioner Laier has filed an NPDES General Recusal form.
EMC Meeting Agenda
Page 2

1. CONSIDERATION OF MINUTES OF MEETING HELD ON OCTOBER 15, 2010

2. ELECTIONS

3. REPORT FROM THE DIRECTOR

4. REPORT FROM THE COMMISSION CHAIR

5. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO ADEM ADMINISTRATIVE CODE DIVISION 335-3, AIR POLLUTION CONTROL PROGRAM REGULATIONS

The Commission will consider proposed amendments to ADEM Administrative Code Division 335-3, Air Pollution Control Program Regulations, Rule 335-3-14-.04, Air Permits Authorizing Construction in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)], including the addition of Appendix I, Greenhouse Gas Global Warming Potentials. The proposed amendments address the greenhouse gas (GHG) tailoring rule, which was finalized by EPA on May 13, 2010. The tailoring rule establishes thresholds for GHG emissions that define when permits under the new source review and Title V Programs are required for new or existing point sources. The Department held a public hearing on the proposed amendments on October 6, 2010.

6. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO ADEM ADMINISTRATIVE CODE DIVISION 335-6, WATER QUALITY PROGRAM REGULATIONS (NPDES-RELATED MATTER***)

The Commission will consider proposed amendments to ADEM Administrative Code Division 335-6, Water Quality Program Regulations, Rule 335-6-10-.09, Specific Water Quality Criteria; Rule 335-6-10-.11, Water Quality Criteria Applicable to Specific Lakes; Rule 335-6-10-.12, Implementation of the Antidegradation Policy; and Rule 335-6-11-.02, Use Classifications. The Department held a public hearing on the proposed amendments on October 6, 2010.

7. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO ADEM ADMINISTRATIVE CODE DIVISION 335-7, WATER SUPPLY PROGRAM REGULATIONS

The Commission will consider proposed amendments to ADEM Administrative Code Division 335-7, Water Supply Program Regulations, Chapters 335-7-2; 335-7-4; 335-7-5; 335-7-6; 335-7-7; and 335-7-11, to make administrative and technical clarifying changes. The Department held a public hearing on the proposed amendments on November 4, 2010.
8. CONSIDERATION OF ADOPTION OF PROPOSED AMENDMENTS TO ADEM ADMINISTRATIVE CODE DIVISION 335-1, GENERAL ADMINISTRATION REGULATIONS

The Commission will consider proposed amendments to ADEM Administrative Code Division 335-1, General Administration Regulations, Rule 335-1-1-.07, Departmental Forms, Instructions, and Procedures. The Department held a public hearing on the proposed amendments on November 4, 2010.

9. JOHN T. DAVIS OIL COMPANY, INC. V. ADEM, EMC DOCKET NO. 10-08


10. LENTON G. WILLIAMS V. ADEM, AND VEOLIA ES CEDAR HILL LANDFILL, INC., EMC DOCKET NO. 07-03

The Commission will acknowledge Petitioner Lenton G. Williams’ withdrawal of the request for hearing in this appeal concerning Solid Waste Disposal Facility Permit No. 58-01 issued on December 29, 2006, to Veolia ES Cedar Hill Landfill, Inc., St. Clair County.

11. SOUTHEASTERN CHEESE, LLC V. ADEM, EMC DOCKET NO. 10-06 (NPDES-RELATED MATTER***)


12. OTHER BUSINESS

13. FUTURE BUSINESS SESSIONS
Attachment 2
BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

MOTION

Adopt the Committee Chairs and Members

ORDER

This cause having come before the Environmental Management Commission pursuant to
the above motion, and having considered the same, the Commission hereby ORDERS,
ADJUDGES, and DECREES as follows:

1. That the above motion is hereby adopted; and

2. That a copy of the list of Committee Chairs and Members is attached and made a
part hereof; and

2. That this action has been taken and this Order shall be deemed rendered effective
as of the date shown below.
ISSUED this 10th day of December 2010.

APPROVED:

[Signatures]
Commissioner
Commissioner
Commissioner

DISAPPROVED:

[Signatures]
Commissioner

ABSTAINED:

[Signatures]
Commissioner
Alabama Environmental Management Commission 2011 Committees

Personnel Committee
Chair: Lanier Brown
Members: Jim Laier
        Sam Miller

Rulemaking Committee
Chair: Scott Phillips
Members: Marquita Davis
        Terry Richardson
Attachment 3
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION


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

WHEREAS, the Alabama Department of Environmental Management has reviewed the oral and written submissions introduced into the hearing record, and has prepared a concise statement of the principal reasons for and against the adoption of the proposed rules incorporating therein its reasons for the adoption of certain revisions to the proposed rules in response to oral and written submissions, such revisions, where appropriate, having been incorporated into the proposed rules attached hereto; and

WHEREAS, the Environmental Management Commission has considered fully all oral and written submissions respecting the proposed amendments and the Reconciliation Statement prepared by the Alabama Department of Environmental Management.

NOW THEREFORE, pursuant to Ala. Code. §§ 22-22A-5, 22-22A-6, 22-22A-8 (2006 Rplc. Vol.), and Ala. Code. § 41-22-5 (2000 Rplc. Vol.), as duly appointed members of the Environmental Management Commission, we hereby adopt and promulgate these revisions to division 335-3 [335-3-14-.04/Air Permits Authorizing Construction in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)] (Amend); Appendix I/Greenhouse Gas Global Warming Potentials (New) of the Department’s Air Division – Air Pollution Control
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

Program rules, administrative code attached hereto, to become effective thirty-five days, unless otherwise indicated, after filing with the Alabama Legislative Reference Service.
ENVIROMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-3 - Air Pollution Control Program

IN WITNESS WHEREOF, we have affixed our signatures below on this 10th day of December 2010.

APPROVED:

[Signatures]

DISAPPROVED:

[Signatures]

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 10th day of December 2010.

John H. Lester, Chair
Environmental Management Commission
Certified this 10th day of December 2010

Page 3 of 3
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

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

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

WHEREAS, the Alabama Department of Environmental Management has reviewed the oral and written submissions introduced into the hearing record, and has prepared a concise statement of the principal reasons for and against the adoption of the proposed rules incorporating therein its reasons for the adoption of certain revisions to the proposed rules in response to oral and written submissions, such revisions, where appropriate, having been incorporated into the proposed rules attached hereto; and

WHEREAS, the Environmental Management Commission has considered fully all oral and written submissions respecting the proposed amendments and the Reconciliation Statement prepared by the Alabama Department of Environmental Management.

NOW THEREFORE, pursuant to Ala. Code. §§ 22-22A-5, 22-22A-6, 22-22A-8 (as amended), and Ala. Code. § 41-22-5 (as amended), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to division 335-6 [rules 335-6-10-.09/Specific Water Quality Criteria (Amend); 335-6-10-.11/Water Quality Criteria Applicable to Specific Lakes (Amend); 335-6-10-.12/Implementation of the Antidegradation Policy (Amend); and, 335-6-11-.02/Use Classifications (Amend)]; of the Department's Water Quality Program rules, administrative code attached hereto, to become effective thirty-five days, unless otherwise indicated, after filing with the Alabama Legislative Reference Service.
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-6- Water Quality Program Regulations
335-6-10-.09 Specific Water Quality Criteria
335-6-10-.11 Water Quality Criteria Applicable to Specific Lakes
335-6-10-.12 Implementation of the Antidegradation Policy
335-6-11-.02 Use Classifications

IN WITNESS WHEREOF, we have affixed our signatures below on this 10th day of December 2010.

APPROVED:

[Signatures]

DISAPPROVED:

[Signatures]

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 10th day of December 2010.

[Signature]
John H. Lester, Chair
Environmental Management Commission
Certified this 10th day of December 2010

ABSTAINED or RECUSED (circle one):

[Signature] Abstained
[Signature] Recused
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

WHEREAS, the Alabama Department of Environmental Management gave notice of a public hearing on the proposed revisions to ADEM Admin. Code 335-7 of the Department's Water Division's Water Supply Program Regulations in accordance with Ala. Code § 22-22A-8 (as amended) and Ala. Code § 41-22-4 (as amended); and

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

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

NOW THEREFORE, pursuant to Ala. Code. §§ 22-22A-5, 22-22A-6, 22-22A-8 (as amended), and Ala. Code. § 41-22-5 (as amended), as duly appointed members of the Environmental Management Commission, we do hereby adopt and promulgate these revisions to division 335-7 [rules 335-7-2-.11/ Stage 1 Disinfection Byproducts (Amend); 335-7-2-.17/ Cryptosporidium Monitoring and Compliance (Amend); 335-7-4-.03/ Permitting Requirements for System Additions (Amend); 335-7-4-.08/ Revocation of a Water Supply Permit (Amend); 335-7-4-.10/ Completed Project Approval (Amend); 335-7-5-.09/ Capacity Test (Amend); 335-7-5-.23/ New Groundwater Facilities (New); 335-7-6-.07/ Alternative Treatment Processes (Amend); 335-7-6-.15/ Lighting and Power Requirements (Amend); 335-7-7-.02/ Permit Requirements (Amend); and, 335-7-11-.12/ Corrosion Control Treatment Requirement (Amend)]; of the Department’s Water Supply Program rules, administrative code attached hereto, to become effective thirty-five days, unless otherwise indicated, after filing with the Alabama Legislative Reference Service.
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-7- Water Supply Program Regulations

335-7-2 Primary Drinking Water Standards
335-7-4 Permit Requirements and Procedures
335-7-5 Groundwater Sources and Treatment
335-7-6 Surface Water and Treatment
335-7-7 Distribution of Drinking Water
335-7-11 Control of Lead and Copper

IN WITNESS WHEREOF, we have affixed our signatures below on this 10th day of December 2010.

APPROVED:

[Signatures]

DISAPPROVED:

[Signatures]

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 10th day of December 2010.

[Signature]

John H. Lester, Chair
Environmental Management Commission
Certified this 10th day of December 2010

ABSTAINED:
Attachment 6
ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION


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

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

ENVIRONMENTAL MANAGEMENT COMMISSION
RESOLUTION

ADEM Admin. Code division 335-1 – General Administration Division Program

IN WITNESS WHEREOF, we have affixed our signatures below on this 10th day of December 2010.

APPROVED:

[Signatures]

DISAPPROVED:

[Signature]

This is to certify that this Resolution is a true and accurate account of the actions taken by the Environmental Management Commission on this 10th day of December 2010.

John H. Lester, Chair
Environmental Management Commission
Certified this 10th day of December 2010

ABSTAINED:
Attachment 7
BEFORE THE
ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the Matter of: )
 )
Southeastern Cheese, LLC, )
 )
Petitioner, )
 )
vs. ) EMC Docket No. 10-06
 )
Alabama Department of )
Environmental Management, )
Respondent,

ORDER

This cause having come before the Environmental Management Commission pursuant to the Report of the Hearing Officer in the above-styled appeal and having considered the same, the Commission hereby ORDERS, ADJUDGES, and DECREES as follows:

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

2. That pursuant to the adoption of the Report of the Hearing Officer, the Findings of Fact and Conclusions of Law and Recommendation contained in said Report are adopted; and

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

4. That a copy of this Order, along with a copy of the Report of the Hearing Officer, attached hereto and made a part hereof, shall be forthwith served upon each of the parties hereto either personally, or by certified mail.
ISSUED this 10th day of December 2010.

APPROVED:

[Signatures of Commissioners]

DISAPPROVED:

[Blank]

ABSTAINED:

[Blank]

RECUSED:

[Signature of 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 10th day of December 2010

John H. Lester, Chair
Environmental Management Commission
Certified this 10th day of December 2010
BEFORE THE ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

SOUTHEASTERN CHEESE, LLC,

Petitioner,

v.

THE ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,

Respondent.

DOCKET No. 10-06

REPORT OF HEARING OFFICER

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

1. INTRODUCTION AND PROCEDURAL HISTORY OF THIS PROCEEDING

The Alabama Department of Environmental Management (ADEM) issued, through its director, certain "Findings" in this proceeding dated May 18, 2010 (Order No. 10-112 WP, In the Matter of Southeastern Cheese, LLC, 92 Washington Street, Uniontown, Perry County, AL, SID Permit IU 39-53-00113). From those Findings by ADEM, Southeastern Cheese, LLC (the "Petitioner") filed a timely request for a hearing to contest the "unilateral order" (the "Findings") of ADEM, filing such with the Alabama Environmental Management Commission (the "Commission") on June 21, 2010. ADEM filed its response to the Petitioner's request for hearing on June 21, 2010.

On June 28, 2010 this matter was assigned by the Commission to the undersigned to serve as hearing officer. On July 2, 2010, both the Petitioner and ADEM agreed to waive the forty-five-day time limit for a hearing in this matter which is imposed by ADEM Admin Code R. 335-2-1 et seq. (see specifically ADEM Admin Code R. 335-2-1-.14(1) for reference). An order was entered on July 2, 2010 by the undersigned which confirmed that waiver.
This matter was set for a scheduling conference on July 22, 2010 and, by agreement, this matter was heard before the undersigned on September 22, 2010 in the Hearing Room of the Commission in Montgomery, Alabama. A jointly-proposed prehearing order was submitted by agreement of the parties and entered by the undersigned on August 30, 2010. All discovery, exhibit exchange and prehearing procedure was conducted pursuant to that prehearing order, and this case was tried and conducted pursuant to that order.

Testimony was taken in this matter, as scheduled, on September 22, 2010 and the parties presented evidence in the form of testimony and documents, all of which is made a part of this proceeding and the record in this case. At the conclusion of the evidence and after the opportunity for closing statements, the parties agreed to suspend the Rules so as to allow the undersigned and the Commission flexibility in the timing of the issuance of this report and the Commission’s order. Such agreement is reflected in the order of the undersigned dated October 8, 2010. Additionally, ADEM made an oral motion (R. 311) to reconsider a ruling by the undersigned concerning the admission of ADEM’s Exhibit “C.” A written motion to that effect was filed by ADEM on October 5, 2010 and remains pending to this date.

The transcript of these proceedings having now been prepared and transmitted to the undersigned together with all exhibits offered and admitted into evidence (along with the above-referenced ADEM’s Exhibit “C” included in its offer of proof), the undersigned has reviewed all such matters and is issuing this report.

II. STANDARD OF REVIEW

This proceeding is a de novo one, and the Environmental Management Commission essentially stands in the place of ADEM and should exercise its judgment for that of ADEM on questions of law and fact which are related to this proceeding. (See ADEM Admin. Code R. 335-2-1-.14(6)), the Joint Proposed Pre-Hearing Order entered in this cause on August 30, 2010 (the “Pretrial Order”), and Bates Motel v. Alabama Department of Management, 596 So.2d 924 (Ala.Civ.App. 1991). The Petitioner has the burden of proof to show by a preponderance of the evidence that ADEM’s actions should be modified.

III. ISSUES FOR REVIEW

The parties have agreed that the primary issue in this matter is the amount of civil penalties, if any, due to be paid by the Petitioner pursuant to Code of Alabama, 1975, §22-22A-5. Also at issue is the length of time for compliance as “contemplated by the Unilateral Order.” (See Pretrial Order, Section III, page 8)
IV. FINDINGS OF FACT

1. The Petitioner operates a plant in Uniontown, Alabama in Perry County which produces cheddar cheese by the barrel.

2. ADEM, the duly constituted department of the State of Alabama (pursuant to Code of Alabama, 1975, §22-22A-16), as a part of its responsibilities in enforcement of water pollution control regulations, is authorized to administer and enforce the provisions of the Alabama Water Pollution Control, Code of Alabama, 1975, §22-22-1, et seq.

3. ADEM issued a State Indirect Discharge ("SID"), Permit No. IU39-53-0013 ("the Permit"), to the Petitioner on August 31, 2004. That Permit established limits on discharge of pollutants from a point source designated as Outfall DSN001 from the Petitioner’s facility. This outfall was to the City of Uniontown’s wastewater treatment facility, which is a publicly-owned treatment works. This Permit required the Petitioner to monitor its discharges and submit periodic discharge monitoring reports ("DMRs") to ADEM describing the results of the monitoring. The Permit also required that the Petitioner maintain in good working order all systems used by the Petitioner to achieve compliance with the terms and conditions of the Permit.

4. The Petitioner operates its facility for the production of barrel cheese under the name of Southeastern Cheese, LLC, and it includes an operation wherein milk is processed into cheese. This plant also includes a wastewater treatment facility as a part of its operation, and the discharge from the wastewater treatment facility is sent to Uniontown’s wastewater treatment facility pursuant to the Permit issued by ADEM referenced above. In this production, a byproduct of this process is whey. That whey, when combined with other fluids from the plant, becomes a product which needs to be treated before it can be discharged into the environment.

5. On or about March 8, 2008, the record reflects that a tornado or some other unusual force of wind hit Uniontown and the Petitioner’s facility including its wastewater treatment plant and damaged a cover to one of the facility’s ponds. This pond was an anaerobic pond and the cover over it was ripped, allowing it to be exposed to oxygen in the air.

6. The DMRs submitted to ADEM by the Petitioner for the months of February through June of 2009 established that the Petitioner discharged pollutants in violation of the Permit.

7. On May 18, 2010, ADEM issued Administrative Order 10-112-WP to the Petitioner which assessed a civil penalty in the amount of $120,000 and required the Petitioner to come into compliance within 485 days from the receipt of ADEM’s order (the Findings).

8. In order to properly treat this discharge, the Petitioner designed and built an on-site wastewater treatment facility that consisted of three cell ponds and an overflow system. The evidence established that this was a complex design that was built in such a way that 90 percent of the organic compounds could be removed before discharge.
9. It was established through the testimony of Chip Crockett, who was an employee of ADEM at the time the findings were entered by the Department, that he was "the only person responsible for formulating the penalties contained in..." these orders. (R. 24) In addition, it was established that Mr. Crockett based the decision concerning the amount of the civil penalties on his professional judgment and the "six penalty factors."

10. In regard to Mr. Crockett’s professional judgment, it was established by the evidence that Mr. Crockett also relied on his experience with ADEM. Mr. Crockett was shown to be an Auburn University graduate of 1993 with a degree in agricultural engineering. Upon completion of that degree, Mr. Crockett worked for the Alabama Extension Service researching animal waste. Subsequent to that, he was employed by ADEM, working in the land division until 1999 when he left to work with a consulting group in Montgomery. None of this work involved NPDES permits or SID permits. He was subsequently re-employed with ADEM and was again assigned to the land division. However, in 2008 Mr. Crockett was assigned as chief of the NPDES enforcement branch and served in that capacity when the findings in question were made. At the time these findings were made, he had been working with NPDES permits for a period of one year, and had been in the water division for one year. (R. 28)

11. Mr. Crockett established that "harm to the environment" is the most significant consideration that is determined when making compliance and enforcement decisions. (R. 31)

12. It was established that Mr. Crockett never visited the site of the Petitioner’s plant in making a determination as to the size of the civil penalty. (R. 34) In addition, he never considered any compliance assistance review documents in his input concerning the assessment of a civil penalty.

13. There is no evidence of any environmental effects associated with the violations in question. (R. 39)

14. This civil penalty in the amount of $120,000 was assessed based on 170 violations (R. 40), and was determined based upon Mr. Crockett’s professional judgment and the "six factors.” (See an enumeration of those factors in the above-referenced Findings of ADEM dated May 18, 2010 and Code of Alabama, 1975, §22-22A-5(18)c.) Mr. Crockett did not use a mathematical formula in computing this assessment, and he did not compare the violations by the Petitioner with any other violations in calculating this penalty. Similarly, Mr. Crockett did not use any type of calculation worksheet; however, he did start with the statutory minimum of $100 per day. (R. 42-43)

15. Mr. Crockett indicated that he did consider the severity of the violations that occurred in that they ranged between one and 130 times the Permit limit, and he considered the fact that these were monthly averages. He also looked at the compliance history of the Petitioner and found that there had been violations. Mr. Crockett established that "we are assessing one penalty that addresses all of the violations collectively.” (R. 45)
16. Mr. Crockett testified that he believes the Petitioner failed to exhibit an appropriate standard of care in this case, but admitted that a Petitioner can, at times, exercise an appropriate standard of care but still exceed permit limits. He also established that other violations were removed from early proposed orders because of the tornado and that the assessed penalty was based on violations that occurred between February and June of 2009.

17. The evidence established that the Petitioner has spent approximately $426,100 in an attempt to bring the facility back into compliance. Mr. Crockett testified that he was “aware of no evidence at this point suggesting that the efforts (by the Petitioner) were inappropriate.” (R. 54) Mr. Crockett’s conclusion was that these efforts were simply efforts that did not work.

18. It was ADEM’s conclusion that the violations that occurred after February of 2009 were violations that were not connected to, or related to, the tornado.

19. The Petitioner’s operation in the production of this cheese is seasonal and generally runs during cold weather from approximately January through July although the exact months of operation vary. ADEM did not consider the seasonal nature of the Petitioner’s operation. (R. 58)

20. ADEM considered the Petitioner’s discharges, which began with its normal production cycle in 2009, as ceasing to be a “direct or residual effect of the tornado.” ADEM did not seek enforcement actions for the violations that occurred in the 2008 time frame because of the tornado. (R. 60)

21. Mr. Crockett established that the Petitioner reported to ADEM that it had spent $426,100 as of October 2009 in efforts to correct the problems and that fact was considered by ADEM in assessing the civil penalty.

22. Mr. Crockett established that ADEM, in exercising its enforcement discretion, and in consultation between Mr. Crockett and the administration, established the civil penalty at $120,000.

23. Mr. Crockett’s testimony established that ADEM considered the history of violations by the Petitioner and further established that ADEM considered the Petitioner’s ability to pay, and it was concluded that such was not a factor in this case.

24. Mr. Crockett established that he was aware of no penalty arising from a violation of an SID permit which was assessed higher than $120,000. He was not aware of any other such civil penalties as high as $40,000.

25. Mr. Crockett’s testimony established that the Petitioner has had violations in the past. Mr. Crockett established the fact that the 485 days contained in the Findings was something he approved but was a calculation made by his staff at ADEM. (R. 107)
26. The Petitioner established, through the testimony of Pat Rankin (the owner of Southeastern Cheese, LLC), that it had spent approximately 2.5 million dollars in designing and building the onsite treatment facility that was in place in March of 2008 when the tornado-like wind conditions hit. It was at that time that the cover over Pond 2 was damaged and the contents exposed to oxygen, killing the bacteria needed for treatment. Following that damage, the Petitioner dealt with its insurance adjuster in attempting to file a claim based on the wind storm. In the interim, it was established that the Petitioner avoided discharge to the Uniontown wastewater treatment plant by recirculating within the system to eliminate the discharges. The torn cover to Pond 2 was repaired by July of 2008 (R. 120), and it appears it was not until February of 2009 (R. 121) that the Petitioner began discharging to the Uniontown wastewater treatment plant.

27. It was during that interim time that the Petitioner looked at a number of alternatives to attempt to solve the wastewater problem including increasing the size of the wetlands, the employment of an outside entity called Chemtech which manufactures “bugs” or biological material used to convert wastewater into water that could be discharged to Uniontown, and other alternatives.

28. The evidence established that Chemtech was hired by the Petitioner and gave the Petitioner a guarantee that the “bugs” introduced into the system would solve the problem; however, that guarantee was never honored.

29. The Petitioner presented as one of its witnesses Jonathan Bonner, who is a consulting engineer for the Petitioner and had been working with the Petitioner since 2003 and, in fact, was the engineer who designed the Petitioner’s wastewater treatment plant. He testified that because of the tornado, the system itself encountered numerous problems which the Petitioner has endeavored to solve. Mr. Bonner explained in detail the complications and the difficulties involved in bringing the Petitioner’s operation back into compliance. He testified that they took certain corrective actions to prevent further violations by taking steps to correct the PH imbalance, augmentation in Pond 2 of anaerobic bacteria (R. 172), by investigating the possibility of enlarging the system, and by increasing the size of the overland flow system. It was Mr. Bonner’s testimony that the violations that occurred from February until June of 2009 were a “chronic effect” (R. 174) of the tornado-like wind conditions. He also testified that he had never seen an SID permit holder penalized by a civil penalty this large in his 25 years of working in this area.

30. Mr. Bonner testified that his engineering firm would need approximately four months to do the engineering study and then about a year to do the construction and another year to bring the facility into compliance.

31. Mr. Bonner admitted, under examination by the undersigned Hearing Officer, that had the Petitioner been so inclined, the engineering aspect of this component could have been conducted while this case was pending.

32. Jonathan Goode, an employee of the Petitioner, testified that the Petitioner has not employed Jonathan Bonner to begin the engineering study because it was waiting to see the result of this hearing and indicated that a $120,000 “fine” might “literally......put us out of business.”
33. The Petitioner also called Mr. Charles Horn, who is retired from ADEM and has been for ten years. Mr. Horn indicated he does some consulting work and has been engaged by the Petitioner to testify in this case following his assessment of the problems incurred by the Petitioner in compliance. Mr. Horn is an Auburn University graduate with a master’s degree from Georgia Tech. He came back to ADEM upon completion of that master’s degree in the Industrial Permit and Compliance Program. In that capacity he served in the Compliance and Enforcement Division for NPDES and SID permits (R. 236) for 14 years. Subsequently he acted as the chief of the water division for approximately 20 months and then became chief of the water division and served for 16 years. He testified that in all of this time he was involved in the formulating and assessment of civil penalties regarding NPDES and SID permits (R. 237), sometimes in his role of performing that actual assessment and sometimes in his role of an arbitrator for the final decisions on assessment.

34. Based on Mr. Horn’s review of the matters pertinent to this civil penalty, his visiting of the site and review of the operation conducted by the Petitioner, he reached an opinion concerning the civil assessment in this matter and concluded that the assessed penalty against the Petitioner is out of line with previous penalties. In coming to this determination, he reviewed the “six factors” and testified that he did not see any significant consideration in the “severity” of the violations. He noted that some of the violations cited were actually within the potential margins of error. He also noted, in relation to severity, that there were no toxic substances whatsoever involved in these violations. In regard to the standard of care, Mr. Horn established that under these circumstances the Petitioner did all that it could reasonably do. Mr. Horn also testified that he felt the Petitioner had done what it could to mitigate the problems associated with these occurrences.

35. Based on all of his considerations, Mr. Horn’s opinion was that the fine in this case was not proper and that it was out of line with fines assessed against other SID permit holders.

36. Mr. Horn testified that in all of his years working with ADEM, and in all of the years since his retirement, he was aware of civil penalties being assessed in the $15,000 to $20,000 range. He could recall nothing in the $40,000 or $50,000 range. Mr. Horn also noted there was no adverse environmental impact resulting from the Permit violations by the Petitioner. (R. 250) Mr. Horn also testified that the seasonal nature of the Petitioner’s business should have been a consideration.

37. Mr. Horn testified that in all of the assessments in which he participated at ADEM, he always used a mathematical calculation to establish a penalty and he did so 100 percent of the time. He also indicated he would use a worksheet to indicate how that calculation was made and to show where one might deviate or reduce the penalty for some given reason. (R. 261) He indicated that while such was not done in this particular case, it was always his course of conduct so that he could maintain consistency with other penalties and be able to defend his calculations if such was ever necessary.
38. At the conclusion of the Petitioner’s case, ADEM called its one witness and, in doing so, again put on the witness stand Mr. Chip Crockett from ADEM. Mr. Crockett established that a consent decree had been entered between ADEM and the City of Unontown in response to a lawsuit filed by ADEM for violations by Unontown of its permit. That consent decree established that the City of Unontown had agreed to come into compliance within 1,185 days from execution of the agreement to that effect and such would put them in compliance some time around the latter part of 2011. It was further Mr. Crockett’s testimony that if the Petitioner does not come into compliance with its Permit by that time, then ADEM “believes that the City of Unontown will not be able to meet the compliance date in its decree.” Mr. Crockett testified that the Petitioner’s violations are making it more difficult for Unontown to be in compliance. However, Mr. Crockett admitted that he did not consider Unontown’s problems in assessing the civil penalties against the Petitioner.

39. ADEM offered into evidence its Exhibit “C,” which is a noncompliance report that the Town of Unontown submitted to ADEM dated June 25, 2010. (That document was initially not allowed into evidence by the undersigned but, upon reconsideration, that document is admitted.) That document indicates that as of today, it appears ADEM has found that Unontown is out of compliance because of the Petitioner.

40. Upon questioning by the undersigned, Mr. Crockett indicated that ADEM established the compliance period of 485 days simply because that is “pretty routine” and, based on their professional judgment, that is reasonable in this particular case. Mr. Crockett did admit, however, that the actions the Petitioner would have to take in this particular case are not routine.

V. CONCLUSIONS OF LAW

I. Pending Motions

A. The undersigned has under consideration an oral motion of ADEM (and a subsequent written motion to the same effect) to reconsider an evidentiary ruling made during the hearing which denied admission into evidence ADEM’s Exhibit “C” which is a part of the record pursuant to ADEM’s offer of proof. (R. 286-7)

B. Upon further consideration by the undersigned, that ruling is reversed and the objection of the Petitioner as to the admission of ADEM’s Exhibit “C” is overruled. Exhibit “C” has been considered by the undersigned in making this report, and the Commission should consider such exhibit along with all other evidence before it.

II. Proceedings Properly Conducted

A. These proceedings have been properly conducted pursuant to the Rules and Regulations of the Alabama Department of Environmental Management, the Environmental Management Commission and Alabama law.
B. The parties have properly participated in these proceedings, being represented by legal counsel, and the parties have been afforded the opportunity to present all relevant evidence related to the issues presented.

III. Amount of Civil Penalty Assessed

A. After consideration of the "six factors" as enumerated in Code of Alabama, 1975, §22-22A-5(18)c and the application of these factors to the evidence submitted, it is the conclusion of the undersigned that:

(1) The Petitioner committed 170 violations during the period in question, and these violations are serious in nature, but there was no irreparable harm to the environment nor was there any threat to the health and safety of the public as a result of those violations.

(2) The Petitioner met the standard of care in the operation of its production plant before damage to the pond cover; however, its operation during the period in question has not met the standard of care.

(3) The Petitioner has gained some economic benefit by its continued operation of the plant in February of 2009 when the charged violations occurred. No evidence was submitted that would establish the amount of such benefit.

(4) The Petitioner made more-than-reasonable efforts to minimize and mitigate the effects of the violations on the environment, and took reasonable steps to solve its complicated and complex problem which resulted from wind damage to its system. The Petitioner continues in that effort; however, it continues to operate (seasonally) even though it is out of compliance.

(5) The Petitioner has a history of violations, but the extent, severity and frequency were not established in the record.

(6) There is little evidence as to the Petitioner’s ability to pay.

B. Based upon the above considerations and the hearing of this matter de novo, the undersigned finds that the penalty assessed by ADEM is excessive and in error. It is the finding of the undersigned that the Petitioner should be assessed a civil penalty in the amount of $35,000 for the violations charged in these proceedings. Payment of this penalty should be made to ADEM within 45 days from the final decision of the Commission, and payment should be made by certified or cashier's check and remitted to the Office of the General Counsel, Post Office Box 301463, Montgomery, AL 36130-1463.
IV. Time for Compliance

The Petitioner has had ample time to conduct its engineering study which it argues it will need in order to correct the deficiencies and come in compliance. The 485 days allowed by ADEM in its Findings for the Petitioner to comply is reasonable and should not be modified.

V. Related Conclusions

The Petitioner should comply with all other provisions of ADEM’s Findings (Order No. 10-112-WP) dated May 18, 2010 including the provisions of the “Order” section of those Findings (unless modified by the Commission) to include the provisions under subparagraphs C, D, E, F, H, I, J and K of those Findings. All times imposed upon the Petitioner by those provisions should begin to run from the date of the Commission’s final decision in this cause.

VI. RECOMMENDATION

The undersigned Hearing Officer recommends to the Commission that it enter an order and finding consistent with the evidence presented, that it adopt these Findings of Fact and Conclusions of Law, and that it enter a decision accordingly.

Done this the 17th day of November, 2010.

JAMES F. HAMPTON
Hearing Officer

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