UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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SUBJ: Consolidated Interim Response to Three Petitions to Withdraw Alabama's Authorization to Implement the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Program

Dear Mssrs. Ludder, Reid, Vaughan and McDorman,

This letter transmits the Environmental Protection Agency's (EPA) consolidated Interim Response to three separate Petitions to Withdraw Alabama's authorization to implement the National Pollutant Discharge Elimination System (NPDES) Program. The three Petitions at issue include a Petition filed on February 19, 2002, by Wildlaw, a non-profit environmental law firm based in Alabama, a Petition filed on January 14, 2010, by the Alabama Rivers Alliance and thirteen other Alabama environmental groups in Alabama, and a Petition filed on January 23, 2010, by the Lookout Mountain Heritage Alliance.

As reflected in the attached Decision Document (Enclsoure A), the EPA has determined that many of the issues raised in the Petitions do not warrant the initiation of withdrawal proceedings. However, certain issues are being held open to give ADEM a further opportunity to address concerns raised by the Petitions.

Should you have questions regarding this matter, please contact Paul Schwartz, Associate Regional Counsel, at (404) 562-9576.

Sincerely,

Heather McTeer Toney
Regional Administrator

Enclosure

cc: Lance LeFleur, Director
ADEM

ENCLOSURE A

DECISION DOCUMENT

Interim Response to Petitions to Withdraw Alabama's National Pollutant Discharge Elimination System (NPDES) Permit Program

EPA has received a series of Petitions to Withdraw Alabama's NPDES Program. On February 19, 2002, Wildlaw, a non-profit environmental law firm based in Alabama, filed a Petition to Withdraw Approval of the National Pollutant Discharge Elimination System (NPDES) Program for Alabama. Wildlaw later submitted a number of supplements to its petition. The Wildlaw petition of February 19, 2002, was consolidated with an earlier petition also submitted by Wildlaw on October 22, 2001, which raised many of the same issues and included much of the same text. Both of these petitions were filed on behalf of Wild Alabama and the Biodiversity Legal Foundation, two environmental organizations. Also consolidated with these Petitions and Supplements was a related letter supporting the Wildlaw petition that was submitted by Mr. Edward Mudd, II, on February 12, 2002, on behalf of the Biodiversity Legal Foundation. The Wildlaw petitions and supplements, and the Edward Mudd, II, letter, are hereinafter collectively referred to as the "Wildlaw Petition."

On January 14, 2010, a Petition to Commence Proceedings to Withdraw Alabama's NPDES Program was submitted by the Alabama Rivers Alliance and thirteen other Alabama environmental groups. Supplements to this Petition were submitted to EPA on February 18, 2010, and April 23, 2012. The Alabama Rivers Alliance Petition and its supplements are hereinafter referred to as the "ARA Petition."

In addition, the Lookout Mountain Heritage Alliance submitted a letter to EPA on January 23, 2010, which complained primarily of pollution from a particular facility, but also requested that EPA remove Alabama Department of Environmental Management's NPDES permitting authority. Because of the nature of the request, EPA is treating the Lookout Mountain Heritage Alliance letter as another Petition to Withdraw Alabama's NPDES Program. This Petition will be hereinafter referred to as the "LMHA Petition."

The Wildlaw Petition, the ARA Petition, and the LMHA Petition (hereinafter collectively referred to as the "Petitions") raise many overlapping issues. Because of the overlapping issues, EPA has elected to address these petitions together. Wildlaw, Edward Mudd, II, Wild Alabama, the Biodiversity Legal Foundation, the Lookout Mountain Heritage Alliance, and the fourteen Alabama Environmental Groups that joined in the ARA Petition[1] are hereinafter collectively

[1] The fourteen Alabama environmental groups that signed the ARA Petition are the Alabama Rivers Alliance, Friends of Hurricane Creek, Black Warrior Riverkeeper, Inc., Friends of the Locust River, Sand Mountain Concerned Citizens, Inc., ADEM Reform Coalition, Choctawhatchee Riverkeeper, Inc., Cahaba Riverkeeper, The Friends of Big Canoe Creek, The Sierra Club-Alabama Chapter, Conservation Alabama Foundation, Inc., Mobile Baykeeper, Inc., Coosa River Basin Initiative, Inc., and the Alabama Environmental Council.

referred to as "Petitioners." The EPA has carefully reviewed the issues raised by the Petitions. In connection with certain grounds asserted in the Petitions, the EPA has concluded that they do not warrant initiation of program withdrawal proceedings. With respect to other issues, however, as explained below, EPA has significant concerns about the adequacy of ADEM's NPDES Program. Based on those concerns, EPA is deferring a decision on the Petitions with respect to these issues, and will work with ADEM and give ADEM an opportunity to address EPA's concerns before EPA determines whether it is necessary to order the commencement of proceedings for program withdrawal under 40 C.F.R. § 123.64(b). This document summarizes EPA's review and the bases for the Agency's determination.

BACKGROUND

Under the Clean Water Act (CWA or Act), discharges of pollutants into the nation's waters are, in general, regulated under the NPDES program, as established under Section 402 of the Act. 33 U.S.C. § 1342.[2] The CWA gives the EPA Administrator authority to issue and enforce NPDES permits. States may apply for and receive EPA approval to administer the NPDES program governing discharges into waters within their jurisdictions under Section 402(b). 33 U.S.C. § 1342(b). On October 19, 1979, EPA approved the application of the Alabama Department of Environmental Management (ADEM) to administer the NPDES program in the State of Alabama.

EPA may withdraw NPDES program approval where a State program no longer complies with the CWA and its implementing regulations and where the State fails to take corrective action. 33 U.S.C. § 1342(c); 40 C.F.R. § 123.63(a). Pursuant to 40 C.F.R. § 123.63(a), circumstances that may result in program withdrawal include:

1) Where the State's legal authority no longer meets the requirements of [40 C.F.R. Part 123], including:

   i) Failure of the State to promulgate or enact new authorities when necessary; or

   ii) Action by a State legislature or court striking down or limiting state authorities.

2) Where the operation of the State program fails to comply with the requirements of [40 C.F.R. Part 123], including:

   i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

   ii) Repeated issuance of permits which do not conform to the requirements of this part; or

   iii) Failure to comply with the public participation requirements of this part.

[2] In addition, dischargers of dredge and fill material are permitted under section 404 of the CWA. 33 U.S.C. § 1344.

3) Where the State's enforcement program fails to comply with the requirements of [40 C.F.R. Part 123], including:

i) Failure to act on violations of permits or other program requirements;

ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

iii) Failure to inspect and monitor activities subject to regulation.

4) Where the State program fails to comply with the terms of the EPA/State Memorandum of Agreement required under 40 C.F.R. § 123.24 (or in the case of a sewage sludge management program, 40 C.F.R. § 501.14 of this chapter); or

5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits (WQBELs) in NPDES permits.

The Petitions raise many issues but do not in every case frame the issues in relation to the withdrawal criteria identified above. As EPA's consideration of the Petitions must be based on the requisite criteria, EPA has construed the issues broadly in relation to the criteria for withdrawal of program approval.

The Petitioners ask EPA to withdraw approval of Alabama's NPDES program, alleging that the State is not conducting its program in accordance with the requirements of the CWA and its implementing regulations. Pursuant to 40 C.F.R. § 123.64(b)(1), EPA has conducted an informal investigation of the Petitioners' allegations to determine whether there is cause to commence formal withdrawal proceedings. As part of that investigation, EPA forwarded the Petitions and their various supplements to ADEM and requested information from the State. ADEM has provided responses to each of the Petitions. Following receipt of ADEM's responses, EPA has sought and obtained additional information from ADEM where necessary to evaluate the claims in the Petitions and develop this response.

In responding to the multiple Petitions, EPA has organized this interim response in the order in which issues are presented in the ARA Petition, which raised 26 grounds for program withdrawal, identified as Grounds A-Z. There are many overlapping issues in the Petitions, and where Grounds A-Z from the ARA Petition overlap with the issues raised in the Wildlaw and LMHA Petitions, they are addressed together. Following discussion of Grounds A-Z from the ARA Petition, the remaining, non-overlapping issues from the Wildlaw and LMHA Petitions are addressed.

Ground A: Failure of State to Ensure that Monitoring Data are Entered Into Permit Compliance System (PCS).

EPA Determination: EPA has for years raised concerns about the completeness and accuracy of data in ADEM's compliance monitoring data system. However, ADEM has made

recent efforts and commitments to improve the accuracy and completeness of its data entry in the Integrated Compliance Information System (ICIS), the successor to PCS. As a result of these efforts, ADEM has significantly improved the accuracy and completeness of its data entry. Accordingly, while EPA will continue to closely monitor ADEM performance in the entry of compliance monitoring data as part of its normal oversight responsibilities, EPA has concluded that initiation of withdrawal proceedings on this ground is not warranted.

Discussion: The ARA Petition complains of the failure of ADEM to maintain complete or accurate compliance monitoring data in PCS, EPA's former enforcement and compliance database. (EPA recently transitioned from PCS to ICIS for the states' data entry). The ARA Petition cites this problem as a failure to comply with the EPA-ADEM NPDES Memorandum of Agreement (MOA), and notes that failure "to comply with the terms of the [MOA] required under §123.24" is a basis for program withdrawal under 40 C.F.R. §123.63(a)(4). Accurate and complete data entry are integral components in an enforcement program, which can assist ADEM in focusing its enforcement resources and can also facilitate more effective citizen and EPA participation in compliance assurance efforts.

EPA's State Review Framework (SRF) Reports evaluating ADEM's compliance and enforcement program have also highlighted weaknesses in ADEM's compliance monitoring data entry program. For example, the 2010 SRF Report for ADEM listed Data Completeness as an Area for State Improvement, and Data Accuracy as an Area for State Attention. In addition, EPA has sought, and ADEM has made, commitments in its recent CWA Section 106 Grant Workplans to enter and maintain NPDES data in PCS or ICIS. While some of these commitments were not met in previous years, ADEM did fulfill all required data entry elements for the fiscal year 2011 and 2012 CWA Section 106 Grant Workplans. The Petition Supplement filed by ARA in April of 2012 states that ADEM's 2011 106 Workplan has eliminated the requirement to enter 95% of data from Discharge Monitoring Reports (DMRs) for non-major dischargers, and that the obligation to enter 95% of DMR data now only applies to major dischargers. This, however, is an erroneous statement. The 106 Workplan has never required the entry of DMR data for non-major dischargers, and the change in the 2011 Workplan was simply a clarification of this point. In previous 106 Workplans it was implied that data entry was only required for majors since the entry of effluent limits and monitoring requirements were only applicable for majors, and DMR data cannot be entered if the limits and monitoring requirements are not entered.

Some of the issues with ADEM's data entry completeness and accuracy have stemmed from incompatibility between ADEM's NPDES Management System (NMS) database and EPA's PCS database, where data entered into NMS could not be automatically uploaded into PCS but had to be manually entered a second time. The 2009 conversion by ADEM to EPA's ICIS System has resulted in improved compatibility, as permit information and DMR information can be directly transferred from NMS to ICIS. However, manual data entry of inspection and enforcement data will still be necessary.

On January 25, 2011, ADEM issued "NPDES/SID (state indirect discharge) Quality Information Reporting to ICIS", which establishes a system and procedures for ensuring that ADEM meets quality objectives for timeliness, accuracy, completeness and consistency of

NPDES program data entry into ICIS. The issuance of this document was a welcome development, and since its implementation, has drastically improved the level of enforcement data entry into the ICIS system. The improvement has been noted in the end of year grant commitment reviews for fiscal years 2011 and 2012, where ADEM met all of its data entry requirements, and is also evident in the reduction of sources appearing on EPA's quarterly Watch List report or equivalent oversight mechanism due to lack of data entry. The 2014 (Round 3) SRF Report, issued on March 31, 2014, shows that ADEM now "Meets Expectations" for Data Completeness, while Data Accuracy is still an "Area for State Improvement." Taking all of these improvements into account, EPA has determined that this ground does not warrant the initiation of withdrawal proceedings.

Ground B: Failure to Exercise Control Over Activities Required to Be Regulated.

EPA Determination: This claim is based on the alleged failure of ADEM to issue new individual NPDES permits for dischargers with expired permits that have not been administratively continued (ARA attaches a list of 115 such facilities, and its 2012 Supplement includes a list of 16 additional such permits), or to take appropriate action when active construction sites allow their coverage under the state's construction general permit to lapse (the ARA Petition includes a list of 9 examples of construction sites in Alabama that allowed their registrations under the construction general permit to lapse). EPA has determined that, while a significant number of facilities exist which have allowed their individual permit coverage to expire without submitting timely applications for renewals, and gaps in coverage have occurred for some construction sites that failed to timely renew their registrations for permit coverage, ADEM does not ignore such occurrences, and is taking appropriate investigative, enforcement and/or permitting actions to respond to lapses in permit coverage. Some of the permits listed by ARA in the Petition and Supplement are in fact now covered by reissued permits. Accordingly, this ground does not warrant the initiation of withdrawal proceedings.

Discussion: In cases where there is a delay between a permit's expiration and the issuance of a new permit, a facility typically retains permit coverage under regulatory provisions that allow for administrative continuation of the expired permit if the discharger has submitted a timely application for permit renewal. See 40 C.F.R. §122.6. This ground of the ARA Petition focuses on dischargers who, in the case of dischargers covered by individual permits, fail to submit timely applications for a renewal, and in the case of construction site owner/operators, fail to renew their registrations for coverage under the Alabama's construction general permit. EPA notes that it is not within ADEM's control to ensure that all permittees submit timely renewal applications or construction permit renewal registrations. However, the ARA Petitioners reasonably expect that ADEM will have systems in place to address situations where permittees fail to maintain permit coverage for continuing discharges.

Significantly, ADEM indicates that it routinely provides permit expiration reminder letters to holders of individual permits in an attempt to prevent late applications (and has provided some examples of such letters). Of the 115 individual permits that ARA identified in its original Petition as expired but not administratively continued, information provided by ADEM indicates that 1 permit was incorrectly identified as expired, and had been reissued in 2007, 5 are EPA-issued permits for ocean discharges, 39 have been administratively extended,

20 have been terminated, and 2 more have been issued and are currently effective, leaving 48 dischargers with expired individual permits. Of the 48 expired permits, ADEM has issued approximately five notices of violation for failing to submit timely renewal applications. Of the 48 expired permits, about half have submitted tardy permit applications which ADEM is processing, and the remainder have yet to submit renewal applications.

While ADEM's response to expired individual permits could be more effective, e.g., increased enforcement activity would likely lead to improved rates of timely renewal applications, this record does not indicate that ADEM is "failing to exercise control over activities required to be regulated," as the Petition alleges.

Similarly, with respect to the existence of construction site owner/operators who failed to maintain their registrations under the ADEM's construction stormwater permit,[3] EPA does not find that ADEM is "failing to exercise control over activities required to be regulated." As with the expired individual permits, increased ADEM enforcement would likely lead to a reduction in lapsed registrations. However, EPA does not find that ADEM is failing to address the issue. Out of the 9 examples identified in the ARA Petition, most have been subject to some inspection and/or enforcement activity by ADEM. EPA does not find the existence of some construction owner/operators who have failed to timely renew their permit registrations to indicate that ADEM is "failing to exercise control over activities required to be regulated." EPA has determined that this ground does not warrant the initiation of withdrawal proceedings.

Ground C: Failure to Process in a Timely Manner and Propose to Issue, Reissue, Modify, or Deny NPDES permits.

EPA Determination: Ground C of the ARA Petition alleges that ADEM fails to process NPDES permits in a timely manner. The ARA Petition alleges that this violates an MOA provision which requires that ADEM "process in a timely manner and propose to issue, reissue, modify or deny NPDES permits." This ground overlaps with other grounds in the ARA and Wildlaw Petitions alleging that ADEM does not have sufficient resources to properly implement the NPDES Program. While the EPA agrees that there are delays in processing permits by ADEM, the Agency does not find these delays to be a basis for withdrawal of program approval.

Discussion: In evaluating the Petitions' claims regarding ADEM's failure to timely process NPDES permits, EPA notes that some degree of permit backlog is to be expected. Some permits raise difficult issues that must be resolved before permit issuance, resulting in

[3] At the time ARA filed its Petition, ADEM permitted construction stormwater under Alabama Administrative Code Chapter 335-6-12, a general permit for construction stormwater that was established by administrative rule. Under that permit, construction site owner/operators must submit a Notice of Registration to ADEM. Under Subsection 335-6-12-.07 of the permit, registration may be granted on an annual (12 month) basis, in annual increments, or any length of time determined appropriate by the Director, provided registration does not exceed five (5) years. In the examples cited by the ARA Petition, registrations were issued for a specific time period and then allowed to lapse by the registrant, sometimes for extended periods and sometimes repeatedly. ADEM has since issued a new general permit for construction site stormwater, with an effective date of April 1, 2011, which does not require the annual re-registrations that were required under Chapter 335-6-12. There is nothing in the CWA that requires construction stormwater permit coverage to be limited to a time period less than five years. Lapses in construction site permit coverage will likely be less frequent under the new general permit.

delays that should not be attributed to weaknesses in program implementation. In EPA's oversight of NPDES program implementation of States, EPA does not expect backlogs to be eliminated entirely; rather, EPA expects states to keep permit backlog levels at reasonable levels that reflect delays associated with difficult permitting issues and not an inadequate commitment of resources.

As of August 21, 2013, ADEM is responsible for the issuance of 192 major NPDES permits and 1403 minor permits. ADEM's major NPDES permit backlog is currently 16% and the minor NPDES backlog is 8%, compared to national backlog averages of 24.1% for major permits and 16.6% for minor permits (national backlog current as of March 2013). Thus, ADEM's levels of permit backlog are below national averages and in EPA's view do not indicate that ADEM is failing to process NPDES permits in a reasonably timely manner. Further, many of the NPDES permits that have been backlogged in Alabama have involved complex issues that had to be resolved prior to issuance. For example, EPA has worked closely with ADEM to develop improved municipal separate storm sewer system (MS4) permits and improved permits for surface coal mines. In addition, ADEM has been engaged in the completion of water quality modeling work that was necessary to support the issuance of permits for facilities subject to a Cahaba River Total Maximum Daily Load (TMDL). ADEM has been actively engaged in efforts to resolve such issues and develop permits that are consistent with the CWA.

In support of its allegation that ADEM is failing to timely process and issue, reissue, modify or deny NPDES permits, the ARA Petition attaches a list of 50 permits that have been administratively continued for more than a year past their expiration date. The April 2012 Supplement identifies an additional 38 permits that have been administratively continued for more than one year since the original ARA Petition was filed. Many of the delayed permit reissuances have led to delays in TMDL implementation. ADEM's response indicates that, of the 50 administratively continued permits identified in the original ARA Petition, 2 of these permits have been terminated, 8 have been issued as draft or final permits, and 9 have been delayed while ADEM resolves TMDL or wasteload allocation (WLA) issues prior to issuance. In addition, ADEM notes that 28 of the 50 permits are for municipal separate storm sewer systems (MS4s) and ADEM has been working with EPA to upgrade its MS4 permits in response to concerns raised by EPA. ADEM recently issued a revised small MS4 general permit which, after an EPA objection, was revised to address EPA's concerns. ADEM continues to work on development of its MS4 permits for large and medium MS4s, and on May 17, 2013, published for public comment a draft MS4 permit for the City of Montgomery MS4. The public comment period was extended until July 5, 2013, and the final permit is expected to be issued soon, with other large and medium MS4 permit renewals to follow. ADEM had made a CWA Section 106 Grant commitment to issue its large MS4 permits in fiscal year 2011, but this process was delayed when the small MS4 general permit was appealed. EPA has been in regular communication with ADEM about its backlogged permits and, based on those communications, EPA finds that ADEM is making good faith and reasonable efforts to complete the processing of those permits and issue permits that meet the requirements of the CWA. EPA finds that ADEM's backlog can generally be attributed to difficulty of resolving issues that must be resolved prior to issuance, rather than to neglect on ADEM's part.

The Petitioners' frustration with ADEM's permitting delays is understandable. Many of the delayed permits relate to sources which have contributed to degradation of waters in Alabama. For example, MS4s, coal mines, and sources which discharge to waters that are subject to TMDLs are well-represented among the Petitioner's list of expired permits, and these sources have been significant sources of pollution in waters that are not meeting Alabama water quality standards. Issuance of up-to-date permits for such sources, with limits that result in significant reductions in pollutant loadings, is regarded by EPA as a high priority. However, while EPA agrees that timely issuance of these permits is an important priority, EPA does not believe that initiation of withdrawal proceedings is warranted. Rather, EPA finds that ADEM is actively engaged in efforts to issue these permits. As part of its regular oversight function, EPA will continue to work with ADEM to ensure that any continuing delay in issuing these permits is minimized.

Ground D: Repeated Issuance of Permits by State which Do Not Conform to the Requirements of 40 C.F.R. § 122.44(d)(1)(vii)(B)

EPA Determination: Ground D of the ARA Petition alleges that ADEM has repeatedly failed to issue permits which ensure that effluent limits developed to protect a water quality criterion are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA, as required by 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA finds that permits issued by ADEM have generally included effluent limits consistent with the assumptions and requirements of applicable TMDLs. Accordingly, the initiation of withdrawal proceedings on this ground is not warranted.

Discussion: In alleging that ADEM repeatedly failed to issue permits that include effluent limits consistent with the assumptions and requirements of EPA-approved wasteload allocations, ARA points specifically to the TMDL for turbidity in Hurricane Creek, and ADEM's authorization of construction site stormwater discharges to waters subject to that TMDL. The authorizations referenced by the petition were all issued under an ADEM permit by rule for stormwater discharges associated with construction. See Alabama Administrative Code Chapter 335-6-12.

The Hurricane Creek TMDL for turbidity is based on a need to reduce turbidity in Hurricane Creek by 32%. The TMDL further states: "this TMDL assumes that water quality-based effluent limitations for stormwater sources of turbidity derived from this TMDL can be expressed in narrative form (e.g., as best management practices), provided that (1) the permitting authority explains in the permit fact sheet the reasons it expects the chosen BMPs to achieve the aggregate wasteload allocation for these stormwater discharges; and (2) the state will perform ambient water quality monitoring for turbidity for the purpose of determining whether the BMPs in fact are achieving such aggregate wasteload allocation." ARA complains that 11 identified authorizations to discharge under this permit were issued without any change in pre-existing BMPs and without any explanation in a fact sheet of the reasons ADEM expects the BMPs to achieve an aggregate 32% reduction in turbidity.

ADEM indicates in its response that the permit by rule that was used to authorize the construction site discharges complained of by ARA does require additional BMPs[4] for construction discharges to impaired waters, which would include the waters subject to the Hurricane Creek TMDL. ADEM further states that the BMPs proposed by a registrant are reviewed by ADEM to ensure that pollutants of concern are addressed, and that this process was enhanced in 2008 to include file documentation of ADEM's review of BMPs for sites discharging to waters subject to a TMDL. ADEM indicates that because the discharges were authorized under a "permit by rule," no fact sheet was created, although ADEM indicates that in cases where it determines an individual permit is appropriate, a fact sheet or rationale would be created. (ADEM provided no information relating to any determinations that an individual permit would be appropriate).

In a Reply to ADEM's response, ARA contends that the measures described by ADEM simply do not meet the requirements in the TMDL and that ADEM must specifically (1) explain in a fact sheet how the BMPs required in a stormwater permit will achieve the required wasteload allocation and (2) perform ambient water quality monitoring to determine whether the BMPs are in fact achieving such aggregate wasteload allocation.

The Petitioners are correct that the permit by rule relied upon by ADEM to cover construction discharges to Hurricane Creek was not accompanied by any fact sheet or similar document explaining how effluent limits in the permit would ensure compliance with the Hurricane Creek TMDL. However, the permit by rule was issued in January of 2003, prior to the Hurricane Creek TMDL, which was published in October of 2004. The extension of coverage under an already issued general permit such as the permit by rule is not "issuance of a permit" under the CWA, and therefore was not subject to the provisions of §122.44(d)(1)(vii)(B), which applies to the development of effluent limits in permits. Further, the cited language from the TMDL was not intended to, nor could it, prohibit ADEM from providing coverage for construction sites subject to the TMDL under the already issued general permit, or to force ADEM to authorize discharges from construction sites subject to the TMDL only with individual permits.

On April 1, 2011, ADEM issued a new Construction General Permit (CGP) and no longer covers construction sites under the permit by rule referenced in the ARA Petition and discussed above. The responsiveness summary explains how the permit will ensure compliance with TMDLs: "Where TMDLs are established, the permit requires that the Construction Best Management Practices Plan (CBMPP) provide appropriate erosion and sediment controls consistent with the TMDL and WLA, where applicable, and that such plans be submitted to the Department for review prior to commencement of land disturbance. The responsiveness summary also points out that the permit prohibits any discharge which will cause an increase in the turbidity of the receiving water by more than 50 nephelometric turbidity units (NTU). The permit also prohibits a discharge where turbidity of such discharge will cause or contribute to a

[4] Section 335-6-12-.21(7) provides that construction discharges to impaired waters must be specifically authorized in writing by ADEM and gives ADEM authority to "require the implementation of additional BMPs when necessary to protect water quality," but the implementation of additional BMPs is not mandated under this provision unless specifically required by ADEM. ADEM provides no information indicating that additional BMPs were required by ADEM in particular cases.

substantial visible contrast with the natural appearance of the receiving water. See Sections 1.C. 9, 1.C.10, and 1.C. 11 of the April 1, 2011 CGP issued by ADEM.

We find that ADEM's CGP issued on April 1, 2011, includes improved requirements over the previous permit with respect to erosion and sediment controls, soil stabilization, pollution prevention measures, and TMDL implementation. TMDL implementation requirements in the CGP are set forth in Parts I.C.11, III.A.12, III.D.3(e), III.D.4.(a). Further, ADEM has explained the manner in which the permit ensures consistency with applicable TMDLs in the responsiveness summary that accompanied the final permit.

As noted above, the Hurricane Creek TMDL states that narrative (BMP) water quality based effluent limits can be used in permits for stormwater discharges to waters subject to the TMDL, provided that the state "will perform ambient water quality monitoring for turbidity for the purpose of determining whether the BMPs in fact are achieving" the aggregate wasteload allocation. The TMDL placed no time frame on conducting such monitoring, and the ambient monitoring by the State is not a condition that can be placed in a permit's effluent limit. Therefore, this requirement is not directly governed by 40 C.F.R. § 122.44(d)(1)(vii)(B), which relates to development of effluent limits in permits. The monitoring is something that the TMDL anticipated would be performed by ADEM independent of development of the effluent limits in permits, so that ADEM could evaluate implementation of the TMDL over time. It is not an aspect of the wasteload allocation itself, but rather is an implementation issue, and therefore is not enforceable through permit decisions.

The April 2012 Supplement submitted by ARA states that only 59% of the permits subject to TMDLs in Alabama have been modified, reissued, or issued to reflect applicable TMDLs. However, the obligation to include in permits effluent limits that are "consistent with the assumptions and requirements" of a TMDL's wasteload allocation does not place any specific deadline on states for reissuing permits when TMDLs have been adopted. Rather, the legal obligation to included TMDL-based limits in permits arises only at the time of permit reissuance. EPA agrees that reissuance of permits to add TMDL-based effluent limits should be a priority, but does not agree that the identified delays in reissuing some Alabama permits to implement recently adopted TMDLs is a basis for initiation of withdrawal proceedings.

EPA finds that ADEM's practice is to issue permits that do include limits to implement applicable TMDLs. With respect to the construction sites referenced in the ARA Petition, those discharges were authorized under a general permit (by rule) for construction site stormwater discharges that was issued prior to completion of the TMDL. Because ADEM's policy and general practice is to issue permits that contain effluent limits that are consistent with the assumptions and requirements of a TMDL, the initiation of withdrawal proceedings on this ground is not warranted. Rather, EPA encourages Petitioners to bring to EPA's attention any specific instances where draft permits are issued by ADEM which Petitioners believe are inconsistent with the wasteload allocation in an applicable TMDL, and such concerns can be reviewed on a case by case basis.

Ground E: Failure to Provide Required Public Notice of Outfall Locations, as Required by 40 C.F.R. § 124.10(d)(vii)

EPA Determination: Ground E of the ARA Petition alleges that ADEM fails to comply with the requirement of 40 C.F.R. § 124.10(d)(vii) that public notice of draft permits include "a general description of the location of each existing or proposed discharge point." EPA has determined that this allegation does not justify the initiation of withdrawal proceedings because ADEM does identify the receiving waters in its public notices and also includes in its public notices for draft permits a web address link to documents where more specific information about the location of proposed outfalls can be found.

Discussion: EPA regulations at 40 C.F.R. § 124.10(d)(vii) require public notices of draft NPDES permit to include "a general description of the location of each existing or proposed discharge point." ARA alleges, in Ground E of its Petition, that ADEM does not comply with this requirement. The ARA Petition includes as an Exhibit copies of public notices issued from January 17, 2008, to December 15, 2009, which lack the required description of outfall locations. ADEM responds that its public notices identify the receiving water and include a web page address where outfall location and other information about the proposed discharge can be ascertained.

The Petitioners argue in their reply to ADEM's response that ADEM's public notices fail to meet the plain terms of the regulatory requirement, because under the regulation, the general description of the location of each existing or proposed discharge point is required to be included in the public notice itself. Further, the ARA Petitioners argue, the public notice is to be provided to all persons on a mailing list and published "in a manner constituting legal notice to the public under State law; ...." 40 C.F.R. § 124.10(c)(3). The ARA Petitioners contend that simply linking to a web address where the required information can be reviewed is inadequate, especially in light of the large percentage of citizens of Alabama who do not have internet access at home.

The April 2012 Supplement to the ARA Petition states that ADEM continues to fail to provide requisite notice of the location of discharge points, noting that ADEM continues to refer readers of the public notice to a web page where the permit application can be reviewed. To illustrate the problem with ADEM's approach, the April 2012 Supplement describes specific examples which provide information in the public notice only to identify receiving waters (which are often unnamed tributaries to named streams). According to the ARA Petitioners, the information provided does not indicate the number or location of discharge points and only allows the public to narrow the discharge points down, in the two examples provided, to a 17 square mile area and a 9 square mile area.

EPA finds that ADEM's mechanism for informing the public of outfall locations, where ADEM identifies the receiving water in its public notices and includes in the public notices a web address where outfall location and other information about the discharge can be reviewed, achieves the goals of the regulatory requirement, and therefore that the initiation of withdrawal proceedings on this ground is not warranted. EPA will encourage ADEM to supplement its public notices with more specific information about outfall locations. However, the Petitioners'

argument that the regulation requires a more specific description of outfall locations in the public notice does not warrant the initiation of program withdrawal proceedings.

Ground F: Failure to Inspect and Monitor Activities Subject to Regulation (Major Dischargers)

EPA Determination: Ground F of the ARA Petition alleges that ADEM is not adequately inspecting the activities of major dischargers in accordance with 40 C.F.R. § 123.26(e)(5). Section 123.26(e)(5) requires that state NDPES compliance evaluation programs shall have procedures and ability for "inspecting the facilities of all major dischargers at least annually." This ground overlaps in part with a ground in the Wildlaw Petition based on the alleged inadequacy of ADEM's enforcement program. The ARA Petition claims that ADEM is implementing a policy of inspecting only 50% of major dischargers each year. EPA has determined that this issue does not warrant the initiation of withdrawal proceedings because ADEM has responded to and is meeting the goals of EPA's own National Compliance Monitoring Strategy ("*Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources*," EPA October 2007), which establishes a national goal of at least one inspection of each major discharger every two years.

Discussion: The ARA Petition claims that 40 C.F.R. §123.26(e)(5) requires all authorized state programs to inspect all major dischargers at least annually and that ADEM is failing to meet this requirement. ARA characterizes ADEM as having a policy of inspecting no more than 50% of major dischargers annually. ADEM responds that there is no such "policy," but that its CWA Section 106 Grant Workplan includes a commitment that ADEM will inspect a minimum of 50% of major dischargers annually. ADEM argues that there is no basis to conflate a minimum commitment in its Workplan with a policy. ADEM further argues that the 50% commitment is consistent with EPA's National Compliance Monitoring Strategy.

In its reply to ADEM's response, ARA argues that it does not matter whether ADEM's "goal" of inspecting 50% of major discharges annually can be characterized as a policy; that regardless of whether there is such a policy, ADEM is failing to inspect a significant percentage of major discharges each year. ARA further argues that EPA cannot, through issuance of a National Compliance Monitoring Strategy, eliminate the clear regulatory requirement to inspect all major dischargers every year except through a rulemaking. In the 2012 Supplement to the ARA Petition, the ARA Petitioners note that ADEM has inspected 56% of major discharges in fiscal year 2009, and 54% of major dischargers in fiscal year 2010.

EPA disagrees with ARA's interpretation of §123.25(e)(5). Under 40 C.F.R. §123.36(e)(5), State programs must have "procedures and ability for" inspecting the facilities of all major dischargers at least annually. The requirement to have procedures and ability for conducting inspections of all major dischargers annually is not equivalent to a mandate to actually conduct inspections of all major dischargers annually. EPA's Compliance Monitoring Strategy establishes inspection frequency goals that will deter noncompliance, support the

enforcement program and permitting process and protect and restore water quality. In doing so, the Compliance Monitoring Strategy provides for EPA and authorized states to direct "resources toward the most important noncompliance and environmental problems." [5] ADEM has consistently met or exceeded the national inspection frequency goals for major dischargers established in EPA's Compliance Monitoring Strategy. Accordingly, EPA has determined that the initiation of withdrawal proceedings on this ground is not warranted.

Ground G: Failure to Inspect and Monitor Activities Subject to Regulation (Non-major Dischargers)

EPA Determination: Ground G of the ARA Petition alleges that ADEM is not inspecting the activities of non-major dischargers in accordance with 40 C.F.R. § 123.26(b)(2). 40 C.F.R. §123.26(b)(2) requires that state NPDES compliance evaluation programs "maintain a program for periodic inspections of the facilities and activities subject to regulation." This ground overlaps in part with a ground in the Wildlaw Petition based on the alleged inadequacy of ADEM's enforcement program. EPA has determined that this ground does not warrant the initiation of withdrawal proceedings because the regulation does not specify any minimum percentage of non-major discharges that must be inspected at a particular frequency, and ADEM's current rates of inspecting non-major dischargers does not constitute a failure to have a program for periodic inspection of such dischargers.

Discussion: The ARA Petition claims that ADEM has a policy of inspecting only 20% of all non-major dischargers each year. ARA also claims that ADEM's inspection rates for non-major discharges with individual permits have been steadily declining, down to a 9% rate in 2008, a rate at which each non-major discharger would be inspected once every 10.5 years. ARA similarly describes what it characterizes as unacceptably low rates of inspection for construction sites (10% annually) and concentrated animal feeding operations (CAFOs) (60 per year), and non-major facilities discharging under general permits.

In its response, ADEM stated that ARA is incorrect to conflate its Workplan commitments with a "policy" of inspecting no more than the 20% of non-major individual permittees, and 10% of construction sites, and 60 CAFOs per year. ADEM further contends that even if ADEM did have such a policy, it would be fully compliant with regulatory requirements and EPA expectations. ADEM also submitted information to correct what it claims are various inaccuracies in ARA's information regarding ADEM inspection rates.

ARA's reply to ADEM's response contends that, notwithstanding the absence of a regulatory minimum frequency rate for inspecting non-major dischargers, ADEM's rate of

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[5] EPA's October 17, 2007 Memorandum, *Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather* Sources, at page 1. On pages 2-3 of the Compliance Monitoring Strategy, EPA stated: "We recognize that we are reducing longstanding inspection frequency goals in some NPDES program areas in order to direct resources toward other non-compliance and environmental problems that are currently not well addressed. These changes are appropriate to ensure an effective balance across the NPDES compliance monitoring program. We believe that this balancing provides deterrence to noncompliance in the most significant environmental areas. In addition, these changes will allow increased effort in other important NPDES program areas that we expect will result in water quality improvements in priority watersheds and water segments."

inspecting non-major dischargers cannot possibly meet the purpose of the inspection program that is specified in the regulation, which provides: "These inspections shall be conducted in a manner designed to: (i) Determine compliance or noncompliance with issued permit conditions and other program requirements; (ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and (iii) Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information."

The quoted language regarding the manner in which inspections should be designed, however, regulates only the nature of inspections that are conducted – it does not mandate that inspections must be conducted for all or any particular number of non-major dischargers. It is not clear on what basis ARA contends that ADEM's inspection rates constitute a "failure to inspect and monitor activities subject to regulation." The regulation does not specify a minimum frequency of inspections. ADEM's inspection rates for non-major discharges have been consistent with EPA's policies and ADEM's CWA Section 106 Grant Workplan. Accordingly, EPA has determined that the initiation of withdrawal proceedings on this ground is not warranted.

Ground H: Failure of ADEM to Maintain Procedures for Receipt and Consideration of Information Submitted by the Public Regarding Violations

EPA Determination: Ground H of the ARA Petition alleges that ADEM fails to comply with requirements for enabling public participation in NPDES enforcement, as required by 40 CFR § 123.26(b)(4) and 40 CFR § 123.27(d)(2)(i). Since the filing of the ARA Petition, ADEM has developed and implemented a plan for improving its citizen complaint process. Based on the recent improvements by ADEM in its handling of citizen complaints, EPA finds that ADEM is meeting the basic requirements for citizen participation in NPDES enforcement. Accordingly, EPA finds that this ground does not warrant the initiation of withdrawal proceedings.

Discussion: This ground of the ARA Petition is based on 40 CFR § 123.26(b)(4) and §123.27(d)(2)(i). 40 CFR §123.26(b)(4) requires State NPDES programs to maintain procedures for receiving and ensuring proper consideration of information submitted by the public about violations, to encourage public reporting of violations, and to make available information on reporting procedures. 40 CFR § 123.27(d)(2)(i) requires State NPDES programs to either allow citizen intervention as of right in civil or administrative enforcement actions or provide assurances that the State will investigate and provide written responses to all citizen complaints, not oppose permissive intervention when authorized under state law, and provide notice and comment opportunities on the proposed settlement of State enforcement actions. ARA asserts that ADEM provides no information to the public on violation reporting procedures on its website or elsewhere, and does not acknowledge receipt of complaints, does not provide complainants with copies of inspection reports, and does not provide complainants with copies of enforcement actions or decisions not to commence enforcement actions.

ADEM's response defends its public participation procedures for enforcement, noting that they do have a citizen complaint form on the website. EPA has confirmed that the ADEM complaint form is easy to find at http://app.adem.alabama.gov/complaints/submission.aspx, on

ADEM's website. ADEM further indicated in its response that it investigates every complaint received and makes results available on its website. ADEM also stated that its citizen complaint process is under review, and that an ADEM manager has been tasked to assess the complaint processing system and develop a more robust complaint and inquiry system. ADEM further contends that it is not required to provide responses to complaints; rather, ADEM correctly points out, 40 CFR § 123.27 allows states to either allow intervention as of right OR provide written responses to all citizen complaints. ADEM indicates that it allows intervention as of right and therefore is not required to provide written responses to citizen complaints.[6]

In its reply to ADEM's response, ARA contends that, except by including the above-mentioned electronic complaint form on its website, ADEM does nothing to encourage public reporting of violations, or otherwise make information available to the public on violation reporting procedures, as required by the regulation. The ARA Petitioners note that a significant percentage of Alabama citizens do not use the internet and therefore are not benefitted by the website form. ARA disputes ADEM's claim that every complaint is investigated because, in Petitioners' direct experience, detailed complaints with photographic evidence do not result in any ADEM inspection. Petitioners also indicate that numerous individuals who have filed complaints have never been contacted about the complaints by ADEM.

Consistent with the commitment in its response, ADEM has completed a review of its citizen complaint process and has implemented a number of improvements to its citizen complaint system. Specifically, ADEM has developed a web-based complaint system. When a citizen submits a complaint, they are assigned a tracking number which may be used to go back into the system to check on the status of their complaint. If an inspection report or enforcement action has been issued in connection with the complaint, these documents will be available to the public via ADEM's online e-File system. In addition, ADEM has dedicated a staff member in the municipal group as a complaint coordinator. Complaints can also be received by regular mail and telephone. If a complaint is called in to ADEM's complaint coordinator or to a field office, the ADEM staff will assign a complaint number so that the complainant can follow up on the complaint either online or, alternatively, through telephone inquiry. In addition, although the current MOA and ADEM's current Enforcement Strategy provide some guidance on handling complaints, ADEM has developed a Standard Operating Procedure (SOP) specifically for handling complaints, which was finalized on May 15, 2012. ADEM has also committed to continually evaluate their complaint system and make changes as appropriate.

In its 2012 Supplement, the ARA Petitioners acknowledge that ADEM has posted a new complaint page with the ability to upload photographs at http://app.adem.alabama.gov/complaints/submission.aspx, and that the submission of a complaint generates an instant complaint number which can be used to trace ADEM's response. However, the ARA Petitioners continue to claim that the system is inadequate because there is not a process that requires ADEM to keep the complainant apprised of ADEM's response, and because there are no procedures for persons without internet access to submit their complaints. However, EPA has recently confirmed with ADEM that complaints can be submitted via telephone or via regular mail. Regarding follow-up, ADEM stated that due to resource

[6] Intervention rights are provided for in civil and administrative actions under Alabama Code § 22-22A-5(18) and (19) and ADEM Admin. Code § 335-2-1-.04.

constraints they do not call back each complainant to personally update them on the status; however, if the complainant requests a call back, then ADEM will call. Whether or not a call back is requested, the status of any complaint can be checked online at any time. When a complaint is received, it is assigned a tracking number and that number can be used by any citizen in ADEM's online complaint system to access the details of the ADEM's actions to date regarding that complaint.

Based on the above-described improvements in ADEM's complaint processing system, EPA does not find that the alleged deficiencies in ADEM's complaint system warrant the initiation of withdrawal proceedings.

Ground I: Failure of ADEM to Monitor Activities Subject to Regulation (Identifying and Responding to Violations Based on Review of DMRs and Other Notices and Reports)

EPA Determination: Ground I of the ARA Petition alleges that ADEM fails to comply with a number of requirements in regulations and under the NPDES MOA between ADEM and EPA Region 4 to monitor the compliance status of NPDES permittees by tracking, reviewing, and evaluating Discharge Monitoring Reports (DMRs) and other notices and reports filed by NPDES permittees, and timely responding to identified violations. EPA finds that, while ADEM's record of evaluating compliance based on DMRs and other reports, and responding to disclosed violations, has been in need of improvement in recent years, ADEM is making improvements in its compliance evaluation process as a result of upgrades to its compliance data system and implementation of an electronic reporting system. Further, while failure to comply with requirements in a MOA can form the basis for initiation of withdrawal proceedings under 40 CFR §123.63(a)(4), the initiation of withdrawal proceedings is discretionary and not appropriate in every instance of non-compliance with a MOA requirement. In this case, EPA finds that ADEM is making good faith efforts to meet the regulatory and MOA requirements for evaluating and responding to non-compliance disclosed through DMRs and other reporting by permittees, and is undertaking steps to improve its performance on these issues. Accordingly, EPA believes it is appropriate to continue to address ADEM's performance of compliance monitoring obligations through its regular oversight role rather than through the more drastic measure of withdrawal proceedings.

Discussion: This ground of the ARA Petition focuses on a variety of enforcement related obligations imposed on ADEM by regulations and by the NPDES MOA executed by ADEM and EPA Region 4. ADEM's response notes that ARA relies on provisions of an outdated version of the MOA that has been replaced by a revision dated April 11, 2008. ARA, in its reply, notes that similar obligations are contained in the new version of the MOA.

The relevant current requirements relied upon by ARA include the following:

The requirement in 40 CFR §123.26(a) that State programs have procedures for receipt, evaluation, retention, and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports).

The requirement in Section III.A.5. of the current MOA that the State comprehensively evaluate and assess compliance with permit conditions (e.g., effluent limits and compliance schedules) and any applicable enforcement action as outlined in Section V. of the MOA.

The requirement in Section V.B.1. of the current MOA that the State update ICIS-NPDES [an EPA compliance database] ... with the information necessary to determine if:

> Any required self monitoring reports (including DMRs or other reports required to be submitted pursuant to a permit or an applicable administrative or judicial enforcement action) are submitted on time;
>
> The submitted reports are complete; and
>
> The permit conditions (e.g., effluent limits and compliance schedules) or requirements of an applicable administrative or judicial enforcement action are met.

The requirement in Section V.B.2. of the current MOA that the State conduct timely and substantive review of all [self monitoring reports] and all independently gathered information to evaluate the discharger's compliance status.

The requirements in Section VI.A.3. and 4. of the current MOA that the State determine within thirty (30) days the initial response to certain categories of facilities in "Significant Non-Compliance." This Section further requires that when the State determines that an enforcement action is appropriate, the State shall commence such enforcement action within thirty (30) calendar days of its determination of the initial response, and document the response in the enforcement file within sixty (60) days of identification of the violation.... The date of the violation is the point at which the state enforcement staff learns of the violation. The State shall make every effort to pursue and complete all the enforcement actions it takes within a reasonable amount of time. Enforcement actions determined to be appropriate by the State with respect to [all other violations] should be commenced and completed within a reasonable time.

The requirement in Section V.E. of the current MOA that the State submit to EPA for review and comment a current Enforcement Management System (EMS). The EMS is a document outlining procedures, policies, etc., to be used by the State in conducting official business (e.g., inspections, enforcement actions, assessment of penalties, etc.). Such procedures shall and policies with respect to enforcement shall be consistent with EPA's "Enforcement Response Guide" for the NPDES program and shall include application of technical review criteria for screening the significance of violations, procedures and time frames for selecting appropriate initial and follow-up response options to identified violations, and procedures for maintaining a chronological summary of all violations...

ARA complains that ADEM has violated these requirements in a variety of ways. For example, ARA states that ADEM has not yet submitted an EMS to EPA, and that ADEM does not evaluate DMRs or respond to violations disclosed in DMRs at the level or within time frames required under the MOA. ARA points to increasing rates of significant non-compliance in Alabama as a symptom of ADEM's inadequate performance of compliance evaluation and enforcement response obligations.

ADEM's response states that the MOA requires only timely and appropriate evaluation consistent with the EMS. ADEM also indicates it expects to improve its performance in evaluating DMRs as it converts to electronic reporting and modernizes its data systems. Regarding the "increasing rate of significant noncompliance" in Alabama that is cited by ARA, the vast majority of sources which appear as significant noncompliance (SNC) violations are actually only appearing to be in SNC because the DMR data has not been entered into ICIS by ADEM. This has been an ongoing issue that arises from the fact that ADEM has to maintain two databases: ADEM's internal database called NMS, and EPA's database (ICIS) which is used to detect SNCs. Previously, these two data systems could not communicate, and data had to be entered manually into each system separately, creating a strain on resources that resulted in many DMRs not getting entered into ICIS. As a result, many false SNCs were identified in ICIS, creating a false impression of increasing rates of SNC in Alabama. Recent upgrades to the ICIS system have enabled the automatic flow of data from ADEM's NMS system into ICIS. Since the flow of automatic data was enabled, ADEM's DMR entry rate has shown significant improvement and has resulted in a decreasing number of false SNCs in ICIS.

In addition, ADEM has been using numerous methods to encourage the regulated community to switch from submitting hard copy DMRs (which need to be hand-coded into the system) to electronic DMRs, which will populate NMS data fields automatically. For example, ADEM has conducted training sessions on eDMR. ADEM has also been requiring as injunctive relief in enforcement actions that facilities start submitting eDMRs. In addition, cover letters for ADEM permit issuances and renewals contain information about eDMRs, and ADEM is looking into adding an eDMR requirement to all permit renewals (unless the facility can prove why it isn't viable for their situation).

With respect to the timely review of DMRs, the findings from EPA's 2010 SRF for ADEM showed that timely action was an area for "State Improvement." In addition, EPA recommended that ADEM implement procedures to ensure that timely enforcement is taken. Since the 2010 SRF Report issuance, ADEM has made improvements in response to EPA's recommendation. For example, ADEM has implemented the following procedures to ensure that timely action is taken: (1) all DMRs are due no later than the 20th of the following month; (2) at the end of each month, ADEM uses the electronic data system to review all violations at major sources that were reported that month, along with all DMRs not received; (3) if significant violations are identified, then a full compliance evaluation is initiated and action is determined from there; (4) for general permits, compliance reviews occur during inspection. In addition, ADEM is working toward more frequent reviews using data systems and improving efficiency of reviews through use of electronic reporting. However, the SRF findings from the Round 3 SRF Report issued by EPA on March 31, 2014, notes that timely action for major NPDES facilities

remains an area for "State Improvement," as the steps taken by ADEM to address the SRF Round 2 recommendations have not fully addressed this issue.

Finally, ADEM did submit an EMS to EPA on January 30, 2011, and a revised EMS incorporating changes made in response to certain EPA comments was submitted to EPA on April 17, 2013.

In the April 2012 Supplement, the ARA Petitioners claim that even with the submittal of an EMS, ADEM still does not have specific operating policies for evaluating self-monitoring reports such as DMRs or other reports required to be submitted under permits or enforcement actions. The EMS, according to the ARA Petitioners, merely provides that management and staff have the responsibility to set compliance and enforcement priorities consistent with the EMS. The April 2012 Supplement cites EMS language indicating that staff will "periodically" review DMR information, and that, "based on the volume of the regulated universe," the review of compliance information for general permit facilities will be performed "as resources allow with priority given to impaired/TMDL waters, complaint investigations, facilities with historical compliance issues or unpermitted discharges that potentially threaten (based on best professional judgment) public health and/or water quality." To demonstrate the alleged inadequacy of ADEM's compliance monitoring, the April 2012 Supplement lists specific examples of non-compliance that were not addressed for extended periods of time. However, to a large degree the described periods of non-compliance preceded recent ADEM actions to improve its compliance monitoring program, including the adoption of the EMS.

Based on the foregoing, EPA does not find that ADEM's performance of its compliance monitoring obligations with respect to review of DMRs and other mandatory reporting by permittees, or its responses to violations identified through such compliance monitoring, are so deficient that the initiation of withdrawal proceedings on this ground is warranted, particularly in light of recent improvements by ADEM in its compliance monitoring procedures and performance. Accordingly, EPA will continue to monitor and address ADEM's performance in these areas through regular oversight.

Ground J: Failure of ADEM to Maintain a Vigorous Program of Taking Timely and Appropriate Enforcement Action

EPA Determination: Ground J of the ARA Petition alleges that ADEM fails to comply with a requirement in the MOA that ADEM maintain a vigorous program of taking timely and appropriate enforcement action against permittees in violation of compliance schedules, effluent limitations, pretreatment standards and requirements, and all other permit conditions.

EPA finds that, while ADEM has not consistently taken timely and appropriate enforcement action in response to violations of permit requirements, ADEM is making strides to improve its enforcement program and its deficiencies are not so substantial that the initiation of withdrawal proceedings is warranted. Rather, EPA has determined that a more appropriate course is to continue to monitor and address any shortcomings in ADEM's enforcement program through its regular NPDES oversight.

Discussion: In support of this ground, ARA has attached to its Petition lists of cases where ADEM allegedly failed to take timely and/or appropriate enforcement action against major and minor dischargers. This list was updated in the April 2012 Supplement to the Petition with additional, more recent cases. Examples of ADEM's alleged failures to take timely or appropriate enforcement action include situations where informal enforcement (e.g., warning letters or notices of violation) did not lead to compliance but ADEM failed to follow up with more formal enforcement, situations where violations continued for long periods of time with no enforcement response, situations where, in Petitioner's view, excessive compliance schedules were issued to violators, and situations where failures to meet compliance schedules were not addressed through formal enforcement, sometimes resulting in years-long continuation of violations. ARA claims that ADEM's Guidance Memorandum #105 allows major facilities to accumulate 10 minor violations before they will be subject to enforcement action. The ARA Petition also points to what it characterizes as a precipitous decline in administrative penalty orders in 2009.

ADEM's response notes that ARA is citing an earlier and outdated version of the MOA, and identifies the ways in which the MOA provisions relied upon by ARA have been changed. ADEM also identifies errors in the ARA Petition's description of ADEM enforcement activity (or lack thereof). ADEM claims that ARA's characterization of Guidance Memorandum #105 is incorrect, it does not extend any lenience to dischargers to accumulate minor violations – it merely provides guidance to enforcement managers on how to administer enforcement resources among competing cases and programs.

ADEM's response defends the timeliness and appropriateness of its enforcement actions. It claims that its number of enforcement actions is consistent with enforcement levels in other authorized states with similar numbers of regulated dischargers. In its response, ADEM also committed to review, within a reasonable amount of time following the response, each of the individual cases identified in the Petition as examples of untimely or inappropriate enforcement, and to address any gaps in enforcement identified through this review. ADEM completed this review and submitted to EPA on September 2, 2011, a summary of the actions taken before the Petition and actions taken since the Petition for each case identified in the Petition.

ADEM also indicates that data management challenges during a reorganization of the department, establishment of a new NPDES database, and EPA's transition from PCS to ICIS, all led to erroneous enforcement data metrics that have been relied upon by ARA. ADEM is continuing to address the data entry issues, which will lead to more accurate data and eliminate artificially negative data regarding ADEM enforcement performance.

ADEM acknowledges that its number of penalty orders dropped in 2009 and attributes this to a number of factors. First, ADEM says that it experienced an increase in public participation in the issuance of penalty orders, and the involvement of third parties resulted in delays as ADEM responded to extensive public comments and legal challenges to its actions, and consequently a decline in resources available to issue other orders. ADEM also, in 2009, increased its use of no penalty cease-and-desist orders in the construction stormwater context. While this led to a decline in the number of penalty orders, ADEM used this tool because it is

widely regarded as a more effective tool than a penalty order for bringing construction sites into compliance.

In a reply to ADEM's response, ARA acknowledges that ADEM has made noticeable progress in identifying certain violations and responding with more appropriate enforcement actions (e.g., cease work orders at construction stormwater sites). However, ARA contends that ADEM's enforcement program remains deficient on the whole. ARA cites EPA's SRF Report from September of 2010, which found that ADEM does not take timely enforcement for Significant Non-Compliance, and that ADEM should implement procedures to ensure that timely enforcement action is taken. ARA argues that, notwithstanding the use of more flexible language in the current MOA, the MOA does require enforcement actions to be taken within a reasonable time, and ADEM is failing to do so. ARA further states that ADEM has failed to provide any information to counter the many examples of untimely or inappropriate enforcement that ARA listed in the Petition. ARA also contends that comparing ADEM's enforcement record with other authorized states is irrelevant; the issue is whether ADEM's enforcement program is adequate, not whether ADEM's performance is comparable to other states. ARA asserts that, unless ADEM takes corrective action to address its failure to maintain a vigorous program of taking timely and appropriate enforcement action, EPA should commence proceedings to withdraw ADEM's NPDES program.

In the 2010 SRF report, EPA found that CWA Element 10 - Timely and Appropriate Action was an area for "State Improvement," specifically finding that "ADEM does not take timely enforcement action for their SNCs in accordance with CWA policy." EPA's recommended action for ADEM was that they should implement procedures to ensure that timely enforcement is taken in accordance with CWA policy. In addition, the 2010 Round 2 SRF report stated that EPA's Region 4 Clean Water Enforcement Branch would evaluate ADEM's progress in addressing SNC sources in a timely manner through the quarterly CWA Watch List review process, which is implemented under the §106 enforcement grant Workplan. The 2014 Round 3 SRF Report found again, despite some ADEM actions to address EPA's Round 2 SRF recommendations, that SNC's are not being addressed in a timely and appropriate manner.

After the 2010 Round 2 SRF Report, ADEM submitted an EMS to EPA which included procedures to ensure timely response to identified violations. Specifically, the EMS states that: "generally, within 30 calendar days of completion of the compliance determination, the staff will have determined the appropriate response [using best professional judgment], and any enforcement action taken will have been completed or initiated for administrative orders and judicial actions." The EMS goes on to establish that "execution of administrative orders should be within 180 calendar days from initiation, where feasible. If the noncompliance continues beyond what is considered to be a reasonable period of time for corrective measures to be effectuated, the type of formal enforcement action needed will be established. Generally, the appropriate initial response is one that results in the regulated entity being returned to compliance as expeditiously as possible."

The EMS also establishes guidelines for the timeliness of response to SNC violations. The EMS states that unless there is supportable justification, the response to SNC violations

should generally be a formal enforcement action or a return to compliance by the facility within one quarter from the date that the SNC violation is first reported on the Quarterly Non-compliance Report (QNCR). The staff, based upon the decision to pursue formal enforcement, should generally initiate formal enforcement action before the violation appears on the second QNCR, within sixty (60) days of receipt of the first QNCR.

EPA's review of recent Watch Lists has shown improvement by ADEM in addressing SNC sources in a timely fashion. EPA's Watch List reviews for fiscal years 2012 and 2013 have shown that, for the sources in SNC on the Watch List, the majority of sources each quarter either had been addressed by an ADEM formal action, had a formal action about to go on public notice or had a draft action which was undergoing legal review. So while ADEM still may not have addressed 100% of SNCs on the Watch List each quarter by having a finalized formal action in place, these recent quarters do show notable improvement over fiscal year 2011. As part of EPA's regular oversight activities, each source in SNC each quarter is discussed in detail with ADEM, and if ADEM's actions are inadequate for any given SNC violation, direct EPA enforcement action will commence.

The 2014 SRF Report indicates that, while ADEM has improved its performance in timely addressing SNC violations, ADEM is still not taking timely and appropriate enforcement action in many cases because ADEM relies on informal actions, such as Notices of Violation (NOVs) and Warning Letters, which do not meet EPA's criteria for appropriate enforcement because they do not impose injunctive relief, do not impose compliance schedules or deadlines with independently enforceable consequences for continuing non-compliance, and do not subject facilities to adverse legal consequences for non-compliance.

While EPA's review of ADEM's enforcement program performance confirms that ADEM has not always met its obligation to bring timely and appropriate enforcement actions in response to violations, ADEM is making progress in improving its performance. Therefore, EPA does not find this ground to warrant the initiation of withdrawal proceedings. EPA has been working with ADEM to further improve ADEM's performance in this area, and ADEM has been making strides to improve its enforcement program through follow-up on the cases of concern listed in the Petition, development of an EMS, and enhanced attention to potential future Watch List sources when they are identified on the QNCRs, to prevent them from showing up on the Watch List or equivalent oversight mechanism. EPA does not view each failure to meet some MOA or regulation-based NPDES program obligation as warranting the initiation of withdrawal proceedings. Rather, it is not unusual for EPA to identify areas for improvement of state programs in the course of its NPDES oversight, and to work with authorized states to address those areas. ADEM is working with EPA in good faith to address areas of concern, and EPA is mindful that this is occurring in a time of extreme stress on state government budgets. So long as ADEM continues to make strides[7] in addressing areas of concern that have been identified through the Petition and through EPA's oversight, and those areas of concern arise in the context

[7] EPA will follow closely recent reports that ADEM continues to incur significant cuts to its operating budget that could undermine its progress in this area. In light of these reports, EPA is holding open the Withdrawal Petition grounds relating to whether ADEM has sufficient funding, staff and resources to sustain an adequate NPDES program (Grounds X, Y and Z of the ARA Petition).

of a generally adequate state NPDES program, EPA does not believe that the initiation of program withdrawal proceedings is an appropriate course.

Ground K: Failure to Seek Adequate Enforcement Penalties With Respect to Violation of Weekly and Monthly Average Limits

EPA Determination: Ground K of the ARA Petition is based on the requirement in 40 C.F.R. § 123.27(c) that penalties assessed by State NPDES Programs be appropriate to the violation. ARA alleges that ADEM's failure, when assessing penalties, to count a violation of weekly average or monthly average effluent limitations as a violation for each day of the week or month for which the average was exceeded is a failure to assess penalties appropriate to the violation. EPA does not agree that the obligation to assess penalties appropriate to a violation mandates that states must follow EPA's policy of assessing penalties for each day of a week or month in which a violation of a weekly or monthly average effluent limit has occurred. EPA does agree that the state must at least have authority to assess penalties for each day of a monthly or weekly average limit violation so that adequate penalties can be obtained where a multiple day assessment is necessary to recover an adequate penalty in a particular case.[8] ADEM's legal counsel has advised EPA that, pursuant to Ala. Code 22-22A-5(18)(c), it has authority to assess penalties for multiple days of violation when a monthly or weekly average violation has occurred, and would exercise such authority when necessary, based on the particular facts of a case, to assess an adequate penalty. Accordingly, this ground does not constitute a basis for the initiation of program withdrawal proceedings.

Discussion: In support of its claim that ADEM's failure to assess penalties for each day during which a violation of a weekly or monthly average effluent limitation has occurred is a failure to assess penalties that are appropriate to the violation, ARA contrasts ADEM's practice with EPA policy, which is to count violations of average limits as multiple days of violation. ARA also cites federal court decisions upholding the treatment of violations of weekly and monthly average limits as multiple days of violation. As further support for its argument that ADEM's penalty amounts are not appropriate, ARA also notes that ADEM's overall penalty assessments dropped precipitously in 2009.

ADEM's response states that there is no authority to support ARA's claim that the Clean Water Act requires states to calculate penalties in the same manner as EPA, and the word "appropriate" cannot reasonably be read to require that states follow EPA's penalty calculation practices and policy of counting weekly and monthly average limit violations as multiple day violations. ADEM indicates that it does weigh violations of weekly or monthly average effluent limitations more heavily than violations of daily limits, and that it applies penalty criteria that do result in the calculation of penalties that are appropriate to violations.

In a reply to ADEM's response, ARA asserts that ADEM must have authority to seek penalties for each violation, which necessarily means each day of a week or month in which a weekly or monthly average limit is violated. ARA also asserts that ADEM's claim that it weighs

[8] For example, if a multiple day assessment is necessary in order to recover economic benefit obtained by the violator for a violation of a monthly or weekly average violation, ADEM should be able to use discretion to assess penalties for multiple days of violation to ensure that an adequate penalty is assessed.

monthly or weekly average limit violations more heavily than violations of daily limits is not supported by evidence, and submits a number of ADEM penalty calculation worksheets that reflect the same penalty amounts for weekly and monthly average violations as for violations of daily limits.

Significantly, in one case cited by ARA, ADEM issued a complaint characterizing violations of average limitations as multiple day violations. However, the April 2012 Petition Supplement quotes from an ADEM response to public comment on the National Coal of Alabama, Inc., Consent Order (Consent Order 11-003-CWP, October 1, 2010) in which ADEM states that a violation of the monthly average permit limitation "cannot mathematically occur more than once per month." In response to an inquiry from EPA, ADEM has indicated to EPA that, pursuant to Ala. Code 22-22A-5(18)(c), it possesses discretionary authority to assess penalties for each day of a week or month that a violation of a weekly or monthly average limit occurs, and may do so when the facts of a particular case warrant such an approach to ensure the penalty is appropriate to the violation.[9] Thus, it appears that the issue is not whether ADEM's NPDES program has the legal authority to assess multiple-day penalties for average violations, but rather that ADEM's usual practice when assessing penalties for violations of average limitations is to not assess penalties for multiple days of violation.

EPA does not interpret the regulatory requirement that state penalty assessments be "appropriate" to the violation as requiring that states adopt and implement a policy that is identical to EPA's policy of assessing a penalty for each day of a week or month in which a weekly or monthly average effluent limit is violated as a separate violation.[10] The term "appropriate" leaves significant room for flexibility and differences in approach among the states and EPA when calculating and assessing penalties, and this ground of the ARA Petition, in isolation, does not demonstrate that ADEM does not assess appropriate penalties. The State's policy of weighting violations of monthly or weekly average limitations more heavily when calculating a penalty, but not assessing a penalty for each day of week or month in which the violation occurred, coupled with ADEM's reservation of discretion to assess multiple day penalties in particular cases, does not warrant the initiation of withdrawal proceedings.

EPA notes that Grounds K through Q of the ARA Petition all raise claims that ADEM does not assess adequate enforcement penalties. Each of Grounds K through Q focuses on a different aspect of ADEM's penalty assessments which, according to ARA, results in the assessment of penalties that are inadequate. EPA has attempted to analyze the issues raised in Grounds K through Q individually, and addresses each of the grounds in separate discussions within this document. However, it is clear to EPA that the division of these grounds into separate issues artificially limits EPA's evaluation of what is perhaps a larger issue: whether ADEM's penalties, as a general matter, are adequate in amount and are based on the appropriate consideration of all relevant factors. By evaluating each of these issues separately, EPA's conclusion that particular issues affecting ADEM's penalty assessments do not warrant the

[9] ADEM acknowledges that there are no recent cases where weekly or monthly violations were assessed as multiple day violations. Instead, ADEM claims that it has simply been assigning a higher penalty value to monthly or weekly average violations than would have been assessed for a single daily limit violation.

[10] See, e.g., 43 Fed.Reg. 37078, 37083 (August 21, 1978) (discussion of "appropriate penalties" in proposed NPDES program regulations).

initiation of withdrawal proceedings does not consider whether each ground in combination with each other ground in a more general and comprehensive fashion might demonstrate an overall inadequacy in ADEM's program with respect to penalty assessments. For this reason, EPA is adding a discussion following its individual discussion of Grounds K through Q, which considers more broadly whether ADEM's penalty assessments are adequate. In fact, the Wildlaw Petition does include general allegations regarding the adequacy of ADEM penalty assessments. EPA's broader, more general discussion of whether ADEM's penalty assessments are adequate and appropriate to violations is set forth at pages 35-36, below.

Ground L: Failure to Seek Adequate Enforcement Penalties Due to Failure to Identify All Violations and Violation Days in Enforcement Actions

EPA Determination: EPA does not agree that the CWA requires that every violation must be identified in an enforcement action, or that the failure to identify every violation in an enforcement action necessarily results in a failure to seek adequate enforcement penalties. Accordingly, this allegation does not warrant the initiation of withdrawal proceedings. EPA will consider whether ADEM's failure to identify all violations in enforcement actions has contributed to any general failure to assess adequate penalties in the context of the more general analysis of the adequacy of ADEM's enforcement penalties at pages 35 - 36, below.

Discussion: The ARA Petitioners contend that ADEM's penalty assessments often fail to adequately identify and assess penalties for multi-day violations even when information is available to confirm multiple violations or violations of a long-term, continuing or repeat nature. The Petition lists a number of examples where the ARA Petitioners claim that this has occurred, resulting in what the Petitioners characterize as inadequate penalty assessments. ADEM's response indicates that it must limit its assessments to violations that it has sufficient evidence to prove. ADEM acknowledges that violations are likely to have occurred in some cases for more days than it has alleged, but ADEM indicates that it still must limit its enforcement claims to days of violation that it is able to prove with evidence. For example, ADEM notes that it might have limited the allegations in some enforcement cases to the days of violation that have been documented through inspection, and that even though such violations may have persisted for a longer duration, ADEM cannot base its enforcement action on an unverified assumption about the continuation of a violation between dates of inspection.

In its reply, the ARA Petitioners provide information from case examples undermining ADEM's suggestion that the limited number of violations alleged by ADEM in specific enforcement cases was due to evidentiary weaknesses. The Petitioners note that in one case, multiple days of violation could have been proven from a violator's own monitoring data but were still not identified by ADEM in the enforcement action. In another, multiple days of violation were easily provable for failure to maintain the required NDPES permit registration, yet ADEM only cited the violator for one day of violation. The Petitioners also add in their Reply that the NPDES MOA between Alabama and EPA requires ADEM to "address all identified violations" in its enforcement actions. Section VI.A. of the MOA does state that the State is responsible for commencing and completing timely and appropriate enforcement actions and that a "timely and appropriate" enforcement action addresses all identified violations of the laws and regulations constituting the State NPDES program ..." However, the Petitioners overread this

provision, which was not intended to ignore the inherently discretionary nature of enforcement activity. The exercise of enforcement discretion involves allocating limited enforcement resources in light of various factors, including priorities of the enforcing agency, litigation risk, environmental significance, culpability, ability to pay, and other factors. A rigid insistence that every identified violation be addressed with a penalty was not intended by the MOA's general obligation to take timely and appropriate enforcement action. Rather, the taking of an "appropriate" enforcement action inherently involves much discretion and depends on consideration of fact-specific circumstances.

Because EPA does not agree that the CWA requires ADEM to identify all violations in every enforcement action, EPA finds that ADEM's alleged failure to identify all violations and violation days in its enforcement actions does not warrant the initiation of withdrawal proceedings. However, EPA addresses the more general claim that ADEM does not assess adequate penalties at pages 35 - 36, below.

Ground M: Failure to Seek Adequate Enforcement Penalties Due to Two Year Limitation Period

EPA Determination: EPA does not agree that the CWA requires that states match the five-year statute of limitations period for recovery of penalties that applies to federal actions. Accordingly, the two year limitation period in Alabama does not create an issue that would justify the initiation of withdrawal proceedings.

Discussion: The ARA Petitioners contend that the two year limitation period applicable to claims for penalties for violations of NPDES requirements in Alabama is itself a basis for program withdrawal. However, nothing in the CWA or its implementing regulations suggests that states must match the federal limitation period of five years. The Petitioners cite regulations at 40 CFR §123.27(c), which requires that penalties assessed, sought, or agreed to by a state shall be "appropriate to the violation." However, there is nothing about the 2 year limitation period under Alabama law that prevents ADEM from obtaining a penalty that is appropriate to the violations. The shorter limitation period does place a burden on ADEM to initiate its enforcement actions under tighter time frames than a longer limitation period would allow. However, this does not prevent ADEM from assessing, seeking or agreeing to penalties that are appropriate to a violation. Accordingly, EPA has determined that this issue does not warrant the initiation of program withdrawal proceedings. EPA addresses the more general claim that ADEM does not assess adequate penalties at pages 35 - 36, below.

Ground N: Failure to Seek Adequate Enforcement Penalties Due to Failure to Recover Economic Benefit

EPA Determination: EPA shares the Petitioners' concerns about ADEM's past tendency not to calculate, document or recover economic benefit in its enforcement actions. EPA agrees that the assessment of an appropriate penalty in an enforcement action requires recovery of economic benefit if it can be calculated and if other factors (such as litigation risk or ability to pay) do not outweigh the basic principle that economic benefit should be recovered. This has been an issue that EPA has raised with ADEM in the course of its regular oversight activities

over the Alabama NPDES Program. Based on EPA's discussions with ADEM with respect to this issue, as discussed below, EPA finds that ADEM is responding in good faith and making efforts to improve its procedures for calculating and recovering economic benefit in its penalty assessments. However, EPA is deferring a determination on this issue to allow for additional time for EPA to monitor ADEM's progress in calculating and recovering economic benefit. If ADEM continues to demonstrate progress in the calculation and recovery of economic benefit, then EPA will conclude that there is no basis for initiating withdrawal proceedings. Alternatively, if the recovery of economic benefit continues to be a weakness for the ADEM NPDES enforcement program, EPA will consider the initiation of withdrawal proceedings in order to address this important issue.

Discussion: In this ground of the Petition, the Petitioners claim that ADEM's assessed penalties "routinely include no amount for the economic benefit which delayed compliance may confer upon the violator." The Petition cites examples of penalty assessments where ADEM indicated that "the Department has been unable to ascertain if there has been a significant economic benefit conferred by the delay of compliance with permit limitations," or that "the Department has been unable to ascertain if there has been a significant economic benefit conferred on the Operator by the Operator's failure to comply with applicable regulatory requirements and delayed response to the noted violations." The Petition includes as Exhibits thirteen sample penalty orders in which ADEM made similar declarations that it was "unable to ascertain" whether there had been a significant economic benefit. The April 2012 Supplement lists additional examples of enforcement cases where ADEM either did not recover any economic benefit or failed to adequately explain an economic benefit that was assessed.

The Petitioners also accurately describe the importance of recovering economic benefit in penalty assessments, because, as noted by the Eleventh Circuit Court of Appeals in Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128, 1141 (11 Cir. 1990), the recovery of economic benefit is "of key importance if the penalties are successfully to deter violations." The Petition further quotes from EPA's own Policy on Civil Penalties (EPA, February 16, 1984), which provides that "[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law."

ADEM's response asserts that ADEM does consider economic benefit when assessing penalties, but that ascertainment of economic benefit is an often difficult and resource intensive exercise. ADEM takes issue with what it characterizes as the Petitioner's insistence that ADEM use EPA's BEN model for calculating economic benefit, a methodology typically used by EPA in its own penalty calculations. However, as the Petitioner's state in their Reply, the Petition does not make the claim that ADEM must use the BEN model.[11] The Petitioners argue only that ADEM must consider economic benefit in its penalty calculations, something Petitioners claim that ADEM routinely fails to do except in a cursory fashion.

[11] ADEM also incorrectly characterizes economic benefit as "fundamentally equivalent" to "EPA's Litigation Considerations." EPA views economic benefit as a key component of a penalty calculation that is not the same as litigation considerations, and is not, as described by ADEM, a "mitigating factor." Rather, in most cases economic benefit would result in an added amount to the penalty that would otherwise be assessed.

ADEM also argues in its Response that, because EPA's Expedited Settlement Offer Program for Storm Water (Construction) (EPA, August 21, 2003) allows a deemphasizing of economic benefit in the case of first time violators, that "it is therefore incontrovertible that the Department's penalty calculation methodology is both functionally and fundamentally equivalent to EPA's." EPA does not agree with this statement. A lesser emphasis on economic benefit in the case of first time construction stormwater violations does not alter the general principle that EPA views economic benefit as a key component of penalty assessments. ADEM also claims, in one of the cases cited by Petitioners as an example of ADEM's failure to adequately consider economic benefit, "the Department lacked the clear evidence needed to quantify the economic benefit." EPA acknowledges that there may be cases where economic benefit is difficult to identify, or may not exist. However, that should not be a justification for falling back on the "unable to ascertain" basis for not including an economic benefit component in a penalty assessment too easily, particularly in cases where economic benefit is ascertainable. EPA notes that ADEM's initial response to the Petition did not identify a single instance in which ADEM has recovered a calculated economic benefit. EPA is encouraged that recently ADEM has provided a few examples of cases which included an economic benefit component.

In the September 2010 Final Round 2 SRF Report evaluating ADEM's CWA enforcement program, EPA found that ADEM "does not maintain penalty documentation in their enforcement files and no other penalty calculations were presented to EPA upon request. Thus the adequacy of the gravity and economic benefit components of EPA's penalty policy could not be examined" The SRF further indicated that "[t]his is a continuing issue from Round 1 of the SRF, and is an area for state improvement." The SRF Report included an EPA recommendation that ADEM develop and implement procedures for documentation of initial and final penalty calculations, including both gravity and economic benefit calculations, appropriately using the BEN model or other method that produces results consistent with national policy, and that such documentation should be made available for EPA review. In the State response section of the SRF report, ADEM indicated that it has developed and uses a penalty calculation worksheet to help guide its penalty calculations. Further, in the SRF Report, ADEM committed to continue to refine its penalty calculation process and submit a report within six months of the date of the final SRF report as requested in EPA's recommended actions. ADEM did submit a letter to EPA within the specified timeframe, on March 17, 2011, documenting its progress towards incorporating economic benefit into their penalty calculations in a meaningful way. ADEM stated that its effort to improve its penalty assessment methodology and better identify economic benefit in the assessed penalty has included an investigation of various economic benefit procedures in order to develop a methodology which will be consistent, efficient, reasonable and accurate. To accomplish this, ADEM states that it has been researching economic benefit procedures utilized by EPA, the Attorney General's office, and other States; and reviewing computer based and other economic benefit tools. Based on this research, ADEM has committed to document the assessment of avoided costs and the time value of money for delayed costs based on the violator's actual or estimated costs of compliance. ADEM will do this using various sources of State-specific and national compliance cost data to estimate the economic benefit where actual cost data is unavailable.

ADEM also committed to continually assess its economic benefit procedure implementation, and make changes to the economic benefit assessment methodology as appropriate based on information gathered during implementation. ADEM has also proposed to increase transparency by including documentation of economic benefit assessment in its Administrative Orders in the future. In addition, ADEM stated that it intends to begin to request actual estimates of the cost of achieving compliance in reports required under an Order. ADEM intends to use this information for comparison purposes and to improve future economic benefit assessment. On May 29, 2012, ADEM submitted three finalized Administrative Orders to EPA which included an economic benefit (BEN) assessment in the final penalty calculation for one of their program areas. Based on this information, it appears that ADEM is taking appropriate steps to begin to adequately recover and document BEN. However, EPA will continue to monitor the implementation to confirm that future ADEM Orders in all CWA program areas do incorporate the BEN information.

Notwithstanding EPA's agreement that recovery of economic benefit has been an area of weakness for ADEM, EPA believes that ADEM is responding in good faith and making efforts to improve its procedures for calculating and recovering economic benefit in its penalty assessments. EPA's recent Round 3 SRF Report, issued on March 31, 2014, notes that EPA has observed improvement in ADEM's penalty calculation and documentation practices, with better documentation of gravity and economic benefit components. However, EPA also noted in the SRF Round 3 Report that the improved practices are not applied consistently, and documentation of gravity and economic benefit in penalty calculations remains an "Area for State Attention." Accordingly, EPA is deferring a decision on this issue and will continue to monitor ADEM's progress in calculating and recovering economic benefit. If ADEM demonstrates continuing and adequate progress in the calculation and recovery of economic benefit, EPA will conclude that this ground does not constitute a basis for initiating withdrawal proceedings. Alternatively, if the recovery of economic benefit continues to be a weakness for the ADEM NPDES enforcement program, EPA will consider the initiation of withdrawal proceedings in order to address this important issue.

Ground O: Failure to Seek Adequate Enforcement Penalties Due to Failure to Adequately Consider Culpability

EPA Determination: EPA shares the Petitioners' concerns about ADEM's past tendency not to document or demonstrate that its penalty assessments reflected a weighing of culpability of the violator. This has been an issue that EPA has raised with ADEM in the course of its regular oversight activities over the Alabama NPDES Program. EPA believes that ADEM is responding in good faith and making efforts to improve its procedures for calculating penalties and documenting and explaining the basis for its penalty assessments. However, EPA will defer a determination on this issue to allow for additional time for EPA to monitor ADEM's progress in demonstrating that it is properly taking culpability into account and assessing penalties that are appropriate to the violation. If ADEM demonstrates adequate progress in the calculation of penalties and documentation of the basis for penalties during a period of continued monitoring, EPA will conclude that there is no basis for initiating withdrawal proceedings on this ground. Alternatively, if EPA determines that ADEM is assessing penalties without appropriate consideration of culpability or other factors, and without adequate documentation or explanation

of penalty assessments, EPA will consider the initiation of withdrawal proceedings in order to address this important issue.

Discussion: In this ground of the Petition, the Petitioners note that Section 309(g) of the CWA requires EPA to consider the "degree of culpability" when determining the amount of a penalty. Alabama law, at Ala. Code Section 22-22A-5(18), has its own penalty criteria that are comparable to the factors listed in Section 309(g). The Alabama criterion most similar to "degree of culpability" is "the standard of care manifested by such person." ADEM is required to consider this factor when assessing a penalty, yet according to Petitioners, ADEM routinely makes the finding that the violator "did not exhibit a standard of care commensurate with applicable regulatory requirements." As pointed out by the Petitioners, this is a finding that would be applicable to any violation, and fails to evaluate in any fact-specific way the culpability of a specific violator, or the extent to which a particular violator has deviated from the standard of care. As a result, according to Petitioners, ADEM does not assess penalties that are appropriate to individual violations.

ADEM's response indicates that ADEM does not share the Petitioners' interpretation of the phrase "the standard of care manifested by such person." ADEM contends that it is fulfilling the requirement to consider the standard of care when it "compares the violator's standard of care with what is required by law." ADEM does not answer the Petitioners' concern that this approach results in identical findings with respect to every violation. Petitioners' Reply repeats the concern that ADEM's approach results in a failure to differentiate among violations of differing culpability. Petitioners state that ADEM should consider this factor in a way that "punishes intentional violators more harshly than negligent violators, and negligent violators more harshly than innocent violators."

EPA agrees that a penalty "appropriate to the violation" requires some consideration of the culpability of the violator – whether the term used by the state is "culpability," "standard of care," "flagrancy," or some other similar term which addresses the violator's behavior and degree of effort to comply with applicable requirements. ADEM has not demonstrated that it adequately considers such information in determining the amount of its penalty assessments. It may be that ADEM does consider such information in determining the amount of penalties, but its penalty assessments have not been adequately documented or explained, at least in any records or documents that have been provided to EPA. The minimal statement regarding the standard of care that typically appears in ADEM's penalty orders really does not shed any light on the particular facts of a case. ADEM's penalty assessments have in the past been largely inscrutable, and EPA has been unable to confirm that ADEM's penalty amounts have been "appropriate to the violations," as required by 40 CFR §123.27(c).

In the September 2010 Final SRF Report evaluating ADEM's CWA enforcement program, EPA found that ADEM "does not maintain penalty documentation in their enforcement files and no other penalty calculations were presented to EPA upon request. Thus the adequacy of the gravity and economic benefit components of EPA's penalty policy could not be examined." The SRF Report further indicated that "[t]his is a continuing issue from Round 1 of the SRF, and is an area for state improvement." The SRF Report included an EPA recommendation that ADEM develop and implement procedures for documentation of initial and

final penalty calculations, including both gravity and economic benefit calculations, appropriately using the BEN model or other method that produces results consistent with national policy, and that such documentation should be made available for EPA review. In the State response section of the SRF report, ADEM indicated that it has developed and uses a penalty calculation worksheet to help guide its penalty calculations. Further, in the SRF Report, ADEM committed to continue to refine its penalty calculation process and submit a report within six months of the date of the final SRF report as requested in EPA's recommended actions.

ADEM met its commitment to submit a report regarding improvements to its penalty calculation process by submitting the report on March 17, 2011. This report states that penalty calculations are now being documented. ADEM attached an example of a penalty calculation worksheet from a recent stormwater case which describes that 6 specific penalty factors were evaluated, along with a category of "other factors." However, this penalty calculation worksheet does not describe the logic behind how the value of each factor was determined. During a November 27, 2012, meeting between EPA and ADEM, EPA was given an opportunity to review numerous penalty calculations conducted by the State and to discuss the logic applied by ADEM in its calculation. Based on the information presented as follow up to the 2010 Round 2 SRF Report and during this meeting, ADEM has made considerable progress in how they are performing and documenting penalty calculations. EPA will, however, continue to work with ADEM to assist ADEM in developing a more transparent method of penalty documentation.

The April 2012 Supplement to the Petition submitted by the ARA Petitioners lists examples of administrative penalty assessments by ADEM where the Petitioners believe ADEM has inadequately characterized the standard of care of the violator. In these examples, however, the Petitioners quote ADEM explanations of the penalty amounts which reflect that ADEM is identifying facts that are relevant to culpability or standard of care when determining penalty amounts, and enhancing penalty amounts based on these facts. While the ARA Petitioners would apparently prefer that ADEM specify the standard of care that has been demonstrated in categorical terms (e.g., negligent, reckless, knowing or intentional), EPA finds that the trend of specifying facts that are relevant to culpability or standard of care in the explanation of the penalty amount is an improvement over ADEM's previous practice of simply stating that the violators do not meet the standard of care commensurate with the applicable regulatory requirement.

The recently issued Round 3 2014 SRF Report notes that EPA has observed improvement since the 2010 SRF Report in ADEM's practice in including and documenting the rationale for the gravity component of penalty calculations, but also notes that the practice is not applied consistently. According to the 2014 Round 3 SRF Report, while ADEM has made considerable recent progress in this area, penalty calculation methodology and documentation remains an "Area for State Attention."

EPA finds that ADEM is responding in good faith and making efforts to improve its procedures for calculating penalties and documenting its penalty assessments to ensure both that penalties reflect a consideration of appropriate factors and that the basis for the calculation is adequately explained. However, EPA is deferring a decision on this ground to allow additional time to monitor ADEM's progress on these issues. If ADEM demonstrates adequate progress in

the implementation of procedures for calculating and documenting penalty assessments, and demonstrates that an appropriate analysis of penalty factors underlies its penalty assessments, then EPA will conclude that there is no basis for initiating withdrawal proceedings on this ground. Alternatively, if ADEM's penalty calculations continue to be inadequately documented and explained, EPA will consider the initiation of withdrawal proceedings in order to address this important issue.

Ground P: Failure to Seek Adequate Enforcement Penalties Due to Emphasis on Consistency with Past Penalties

EPA Determination: Ground P of the Petition alleges that ADEM fails to seek adequate enforcement penalties due to an over-emphasis on consistency in its penalty assessments, which causes a failure to take appropriate penalty factors into account and assess adequate penalties. EPA does not find any inherent problem with ADEM's efforts to ensure consistency in its penalty assessments. However, under this ground, Petitioners raise serious issues in connection with their claim that ADEM focuses so much on consistency with other penalties that it fails to apply relevant penalty factors or to assess whether the original penalties being used for comparison purposes are themselves adequate, or have any basis under the CWA's statutory penalty factors. EPA does find that ADEM's penalties determinations have often been poorly explained and documented, so it is difficult to determine whether ADEM's penalty assessments are adequate. Accordingly, EPA will defer a decision on this ground to allow additional time for EPA to monitor ADEM's progress in improving its procedures for and documentation of penalty determinations. In addition, to the extent that Petitioners are asserting, under this ground, that ADEM fails to assess adequate penalties because it fails to properly consider relevant factors, those claims are further addressed under other grounds, and in EPA's analysis of whether ADEM generally assesses adequate penalties, at pages 35 - 36, below.

Discussion: In this ground of the Petition, the Petitioners claim that ADEM overemphasizes "consistency with previous penalty assessments for similar violations" as a consideration in determining penalty amounts, and does not apply an underlying penalty calculation methodology that would lead to the assessment of a penalty appropriate or adequate for a violation. The Petitioners claim that, because of ADEM's heavy reliance on consistency, ADEM often assesses inadequate penalties.

ADEM responds that it does have a penalty calculation methodology that it uses to determine penalties, and correctly notes that EPA's own policies regarding penalty identify as a goal the achievement of consistent and equitable treatment of the regulated community.

The ARA Petitioner's reply to ADEM's response states again that ADEM does not have a penalty calculation methodology --- that what ADEM submits as evidence of its methodology is a simple penalty calculation worksheet that lists certain factors but is not accompanied by any explanation how each factor is to be applied in determining amounts.

EPA has previously recommended that ADEM develop a CWA penalty policy or develop and implement procedures for the documentation of initial and final penalty calculations, including in its Round 1 and Round 2 SRF Reports for ADEM. The development of such a

policy or procedures would provide better guidance to ADEM staff by explaining how to compute a particular dollar amount or adjust a preliminary penalty amount based on consideration of a particular penalty factor. Such a policy or procedures would further ADEM's own goal of achieving consistency in a way that would better bear scrutiny as to adequacy of a penalty, as opposed to relying to such a great extent on consistency alone. ADEM has not yet submitted to EPA a CWA penalty policy or procedures in response to EPA's recommendation, and EPA agrees with Petitioners that the absence of such a policy or procedures undermines ADEM's ability to demonstrate that its penalty determinations are adequate or appropriate.

EPA notes also that, while consistency is not a specific penalty factor under the Clean Water Act, page 3 of EPA's own Clean Water Act Settlement Penalty Policy identifies, as one of its purposes, the furtherance of a goal that "CWA penalties should be generally consistent across the country. This is desirable as it not only prevents the creation of 'pollution havens' in different parts of the nation, but also provides fair and equitable treatment to the regulated community wherever they may operate." The statutory penalty factor of "such other matters as justice may require" from Section 309(d) and (g) arguably incorporates considerations of fairness and consistency among similar violators. Thus, there is no inherent tension between efforts to achieve consistency and the assessment of adequate or appropriate penalties. The problem articulated by Petitioners, however, is that ADEM bases its penalties excessively on an evaluation of whether a penalty is consistent with penalties assessed in similar cases, which would only be appropriate if the penalties from earlier cases that are being relied upon for comparison purposes were themselves calculated appropriately. The Petitioners claim that they were not.

EPA agrees that an over-emphasis on consistency could lead to inadequate or inappropriate penalties if the prior penalties used for comparison were not themselves properly calculated. For example, a penalty that does not recapture economic benefit will not adequately deter future violations and should not be defended on the basis that it is similar to penalties assessed in other cases. As Petitioners argue, an excessive reliance on consistency could simply perpetuate the assessment of inadequate penalties. EPA agrees that an emphasis on consistency will not produce adequate penalties if baseline penalties used for comparison purposes are themselves inadequate.

EPA has noted in the course of its regular oversight of ADEM's NPDES Program, including in SRF Reports, that ADEM's procedures for calculating penalties and documenting and explaining those calculations are areas of weakness for ADEM's program. The weaknesses in ADEM's documentation and explanation of penalty determinations make it difficult for EPA to determine whether ADEM's penalties have in fact been adequate or whether an overemphasis on consistency is causing ADEM to ignore appropriate penalty factors. EPA finds, however, that ADEM is making good faith efforts to improve its procedures for calculation and documentation of penalties. EPA's most recent (Round 3) SRF Report, issued on March 31, 2014, notes that ADEM has made considerable recent progress in refining and documenting its penalty calculations, but that Penalty Calculation Methodology remains an "Area for State Attention." The 2014 Report indicates that EPA will conduct periodic on-site reviews to ensure that progress continues. Accordingly, EPA is deferring a determination regarding this ground of the Petition, and will continue to monitor ADEM's progress in improving its procedures for calculation and

documentation of penalties. If ADEM continues to show progress in its procedures for documenting and explaining penalty assessments, and can demonstrate that its penalty assessments are adequate, EPA will conclude that there is no basis for initiating withdrawal proceedings. Alternatively, if continued monitoring indicates that ADEM is overemphasizing the goal of consistency to a degree that is interfering with the application of other appropriate factors and the determination of appropriate penalties, EPA may initiate withdrawal proceedings to address this issue.

EPA notes that the concerns raised by Petitioners under this ground overlap with other grounds in the Petition asserting that ADEM does not assess adequate penalties, e.g., claims that ADEM fails to adequately consider economic benefit or culpability, or other relevant factors, and with the general claim that ADEM assesses inadequate penalties. Such issues are addressed further in EPA's analysis of the general claim that ADEM does not assess adequate penalties, at pages 35 - 36, below.

Ground Q: Failure to Seek Adequate Enforcement Penalties Due to Use of Stipulated Penalties for Future Violations

EPA Determination: Ground Q alleges that ADEM's inclusion of provisions for assessment of stipulated penalties in enforcement Consent Orders results in a failure to seek adequate penalties. EPA does not agree that there is anything in the CWA indicating that the use of stipulated penalty provisions in Consent Orders is improper. Accordingly, EPA has concluded that the initiation of withdrawal proceedings on this ground is not warranted.

Discussion: In this ground of the Petition, the Petitioners claim that ADEM's use of stipulated penalty provisions in Consent Orders results in a failure to seek adequate penalties. The Petitioners claim that the use of stipulated penalties is improper because a stipulated penalty by nature precludes consideration of appropriate penalty factors that can only be evaluated after the violation occurs and the facts of the violation are known.

ADEM acknowledges that it does use stipulated penalties in Consent Orders, claiming that such use is similar to EPA's use of stipulated penalties in enforcement actions. ADEM also indicates that it currently only uses stipulated penalties for violations of milestone dates for injunctive relief, and not for effluent limit violations or other violations of terms and conditions of a permit for which penalty factors cannot be known in advance. ADEM claims that, because it only uses stipulated penalties for failure to meet milestone dates, which are violations for which penalty factors are known in advance, its use of stipulated penalties does reflect consideration of statutory penalty factors.

The Petitioners also oppose the use of stipulated penalties on the ground that the penalty assessment is not subject to public notice and comment, as required under Alabama law. ADEM responds that its Consent Orders are subject to public notice and comment, and that at the time that the Order is noticed, any member of the public has adequate information about the nature of the violation that will be subject to stipulated penalties to evaluate whether the stipulated penalty will be adequate. ADEM asserts that the use of stipulated penalties is within its enforcement authorities under state law.

In the context of this response, EPA makes no finding regarding the consistency of ADEM's use of stipulated penalties with state law. EPA limits its evaluation of the Petition to bases for program withdrawal under the CWA. In that regard, EPA does not find any prohibition on the use of stipulated penalties in enforcement actions under the CWA. As ADEM has noted, EPA does use stipulated penalties in its own enforcement actions. EPA finds that stipulated penalty provisions can help to deter non-compliance with Consent Decrees, and can serve the government and public interest by reducing the resource burden and delay associated with seeking penalties for violations of Consent Decrees in the absence of stipulated penalty provisions. Accordingly, EPA is not initiating withdrawal proceedings on this ground of the Petition.

Grounds K through Q: Adequacy of ADEM Enforcement Penalties Generally

Grounds K through Q of the ARA Petition raise a variety of specific reasons why ARA claims ADEM's penalty assessments are inadequate. The discussion of each of these issues in isolation presents a risk that EPA would reject the Petition on isolated grounds, each of which may have an impact on penalty assessments but which might not be so significant on their own as to warrant the initiation of withdrawal proceedings, even if the combined impact of these issues might result in unacceptably low penalties. For this reason, as discussed above, in addition to evaluating each of Grounds K through Q separately, EPA has undertaken to complete a general review of whether ADEM's penalty assessments are adequate.

EPA completed its SRF Round 2 review of ADEM's enforcement program in September of 2010, culminating in the issuance of the SRF Report on September 17, 2010. The 2010 Round 2 SRF Report included findings relevant to ARA's claims that ADEM's penalty assessments are inadequate. For example, the 2010 SRF Report listed eight elements as "Areas for State Improvement," based on problems or weaknesses in ADEM's enforcement program, including two elements that relate directly to adequacy of penalties: CWA Element 11 (Penalty Calculation Method), and CWA Element 12 (Final Penalty Assessment and Collection). With respect to Element 11 (Penalty Calculation Method) and Element 12 (Final Penalty Assessment) the Round 2 SRF Report stated that penalty calculations were not contained in the files and none were provided to EPA for review. This makes it difficult for EPA to make an informed determination regarding the adequacy of ADEM's penalty assessments. For example, EPA is unable to determine if ADEM is properly assessing economic benefit or gravity-based amounts in its penalty assessments. The recently issued Round 3 SRF Report, issued on March 31, 2014, reflects significant improvement in ADEM's enforcement program. The number of elements identified as "Areas of State Improvement" have been reduced from eight to four. Two areas are identified as "Areas for State Attention," and one Area is identified as "Unable to Evaluate and Make a Finding." Five areas are identified as "Meets Expectations." Notwithstanding this improvement, concerns regarding the penalty calculation methods and documentation persist, and EPA believes that further improvements over a long period are necessary to allow EPA to make a fully informed finding as to the adequacy of ADEM's penalty assessments. The two elements that relate directly to adequacy of penalties: CWA Element 11 (Penalty Calculation Method), and CWA Element 12 (Final Penalty Assessment and Collection) are identified as "Areas for State Attention." For these reasons, just as EPA is deferring a determination with

respect to Grounds N (Failure to Recover Economic Benefit), Ground O (Failure to Adequately Consider Culpability), Ground P (Overemphasis on Consistency with Past Penalties), to allow additional time for EPA to review ADEM's progress in addressing weaknesses in its penalty calculation and documentation procedures, EPA is deferring a determination on the issue of whether ADEM generally assesses adequate penalties.

While ADEM is making an effort to improve its procedures for documenting and explaining penalty assessments, and to improve its procedures for recovering economic benefit, EPA will not reach any conclusion on this ground of the Petition until more substantial improvements in penalty calculation and documentation procedures have been demonstrated over a longer period. Further improvements in these areas will enable EPA to better evaluate the adequacy of ADEM's penalty assessments.

For the foregoing reasons, EPA is deferring a determination regarding the general adequacy of ADEM's penalty assessments, and will continue to monitor ADEM's progress in improving its procedures for calculation and documentation of penalties. During this period of additional monitoring, EPA will further evaluate whether ADEM penalty assessments are adequate, i.e., whether the assessments reflect an appropriate application of relevant penalty factors.

Ground R: Failure to Timely Prosecute Cases

EPA Determination: Ground R of the Petition is based on a requirement in the NPDES MOA between EPA and Alabama that requires the state to timely prosecute cases of NPDES violations. The Petition lists and describes ADEM's enforcement activity for ten case examples which the Petitioners claim demonstrate that ADEM has failed to timely prosecute cases. EPA finds that the information provided by Petitioners and additional information developed in EPA's own investigation do not demonstrate a widespread failure to take timely enforcement action that would justify the initiation of withdrawal proceedings.

Discussion: In this ground of the Petition, the Petitioners claim, based on ten case examples, that ADEM does not timely prosecute enforcement actions. Seven of the ten cases identified by the Petitioners involve Alabama Department of Corrections facilities. ADEM responds by pointing out that the example cases all involve judicial process which can involve long time frames for final resolution. ADEM notes that it more commonly prosecutes cases through administrative enforcement mechanisms which generally produce resolution within a shorter time frame.

ADEM further responds that the seven Department of Corrections cases on the list submitted in the Petition are actually all part of the same judicial action, so that the Petitioners' list is actually limited to four cases. With respect to the Department of Corrections matter, ADEM indicates that the permit responsibility for the facilities involved has been transferred to non-State agency operators. Accordingly, injunctive relief against the named defendants would no longer be properly imposed. The Petition asserts that, notwithstanding the reissuance of the permits to non-State agency entities, the State's claims for penalties in these cases are not mooted by that action. However, penalties are not recoverable by ADEM against fellow State

agencies under State law.[12] Thus, it is not clear what additional action ADEM should be taking in these matters. The case, at the time of the Petition's filing by ARA, had been placed in inactive status on the court's docket. Since that time, the lawsuit filed by the Attorney General against the Department of Corrections was dismissed. As of May 29, 2012, the Department of Corrections does not hold any NPDES permits for sanitary wastewater treatment facilities.

One of the other cases identified by Petitioners, involving the City of Dadeville, was resolved through a Consent Decree signed on October 29, 2009. Another case, involving the East Walker Sewer Authority, was the subject of settlement negotiations and court delays related to intervention by the Black Warrior Riverkeeper (BWR) and continuances sought by the Defendant. BWR's motion to intervene was initially denied by the Court, but then granted after a successful appeal by BWR. On February 9, 2012, this case was resolved through ADEM's issuance of a Consent Decree.

The other case identified by Petitioners, involving the City of Hanceville, was delayed due to settlement negotiations and because the City was seeking funding to implement their corrective action plan. This case was resolved through a Consent Decree, which was issued on May 25, 2010.

The Petitioners reply to ADEM's response on this Ground by pointing out that, in the Department of Corrections cases, violations continued to occur after the transfer of operational and permit responsibility to non-State agencies. Thus, Petitioners cite the lack of ADEM enforcement against the current operators as further evidence of ADEM's failure to timely prosecute cases.

As part of its regular oversight activity, EPA does regularly evaluate the timeliness of ADEM's enforcement actions. EPA's two most recent SRF reports (Round 2/ 2010 and Round 3/ 2014) both identified the criteria of "timely and appropriate enforcement actions" as an "Area for State Improvement." The 2010 SRF report found that ADEM does not take timely enforcement action for their SNCs (significant non-compliers) in accordance with CWA policy (a high percentage of reviewed SNCs had not been subject to timely enforcement action, which is defined under EPA policy as initiating enforcement "within 60 days of the SNC violation appearing on a 2nd QNCR."). The SRF Report recommended that ADEM implement procedures to ensure that timely enforcement is taken in accordance with CWA policy, and indicated that EPA Region 4's Clean Water Enforcement Branch would evaluate progress through the quarterly CWA Watch List review process.

As noted above, EPA's review of recent Watch Lists has shown improvement by ADEM in addressing SNC sources in a timely fashion. EPA has been working with ADEM to improve ADEM's performance in this area, and ADEM has been making strides to improve its enforcement program through development of an EMS and enhanced attention to potential future Watch List (or equivalent oversight mechanism) sources when they are identified on the QNCR, to prevent them from showing up on the Watch List or equivalent oversight mechanism. The 2014 SRF Report indicates that, while ADEM has improved its record of responding to SNC

[12] ADEM's inability to recover penalties from fellow State agencies is the subject of Ground U of the Petition, and is discussed below at pages 41 - 42.

violations with some form of enforcement on a timely basis, ADEM is still not taking timely and appropriate enforcement actions in response to SNC violations (emphasis added). The 2014 Report notes that ADEM has been responding to SNC violations but that ADEM relies on informal actions such as Notices of Violation (NOVs) and Warning Letters, which do not meet EPA's criteria for appropriate enforcement because they do not impose injunctive relief, do not impose compliance schedules or deadlines with independently enforceable consequences for continuing non-compliance, and do not subject facilities to adverse legal consequences for non-compliance.

While ADEM's record of timely enforcement could be improved, ADEM's record regarding timely enforcement does not reveal problems of a severity that would justify the initiation of withdrawal proceedings. Rather, EPA finds that ADEM is attempting to address deficiencies in the timeliness of its enforcement actions in good faith, and is making progress in this area. Therefore, the appropriate path for EPA is to continue to evaluate ADEM's progress as a part of its regular oversight and take action as appropriate. Accordingly, the EPA has determined that this ground of the Petition does not warrant the initiation of withdrawal proceedings.

Ground S: Failure to Take Prompt Action Where Dischargers Violate Consent Decrees

EPA Determination: Ground S of the Petition is based on a requirement in the NPDES MOA between EPA and Alabama that the state take prompt action when a discharger violates a Consent Decree. The Petition lists three examples of cases where ADEM failed to take prompt action when a discharger violated a Consent Decree. EPA finds that the information provided by Petitioners and additional information developed in EPA's own investigation do not demonstrate a widespread failure to address violations of Consent Decrees that would justify the initiation of withdrawal proceedings. Accordingly, EPA finds that initiation of withdrawal proceedings on this ground of the Petition is not warranted.

Discussion: In this ground of the Petition, the Petitioners claim, based on three case examples described in the Petition, that Alabama's NPDES program authority should be withdrawn because ADEM fails to take prompt action when dischargers violate Consent Decrees. The three examples submitted by Petitioners involve three sewage treatment plants, the Town of Wilsonville WWTP, the Winfield Water Works and Sewer Board's WWTP, and the Jasper Water Works and Sewer Board's WWTP. In all of these cases ADEM responded to violations with enforcement that culminated in Consent Decrees or Court Orders requiring compliance by specified dates. In all three cases, according to the Petitioners, ADEM failed to take prompt action when the facilities continued to violate their permits after the compliance deadlines. In some of these cases, the Petitioners describe ADEM's issuance of a series of warning letters, notices of violations and orders, and penalty assessments, in response to the violations. However, in all three cases ADEM's efforts failed to bring the violators into compliance with CWA and permit requirements.

In its response, ADEM points out that Petitioners cite only three examples of cases in which ADEM allegedly failed to take prompt action in response to violations of Consent Decrees, when ADEM has brought numerous enforcement actions during the approximate twelve year time frame reflected in the Petitioners' examples. ADEM also notes that it repeatedly took informal enforcement action in response to the examples of Consent Decree violations listed in the Petition. ADEM further states that it revised its Compliance and Enforcement Strategy (Guidance Memorandum # 105) in January of 2008 to increase the timeliness and effectiveness of its enforcement actions. The revised Guidance Memorandum provides that informal enforcement should be limited (e.g., no more than one warning letter in a 12-month period) and, when not effective to produce compliance, should be followed up with more formal enforcement action.

ADEM's response acknowledges that there may be legitimate questions about the effectiveness of its enforcement efforts in the City of Winfield Consent Decree but asserts that the revisions to Guidance Memorandum #105 have adequately addressed those issues. ADEM further asserts that as a result of ADEM's efforts, Winfield has returned to compliance. With respect to the Jasper Waterworks and Sewer Board matter, ADEM indicated in its response that it was in litigation with Jasper to address the Consent Decree violations. With respect to the third example cited by Petitioners, the Town of Wilsonville facility, ADEM stated that it was in the process of referring that matter for judicial action. However, since then, ADEM has informed EPA that their approach shifted due to case specific issues and Wilsonville was issued a Consent Order on December 12, 2010. The Consent Order provided Wilsonville with 365 days to identify the issues causing their violations, implement remedial measures, and comply with their Permit. Thus, ADEM essentially argues that the three matters cited as examples of ADEM's deficiencies are not representative of its current enforcement program and have been further addressed by ADEM. ADEM does not deny that its enforcement program could be improved, but denies that withdrawal of program authority is appropriate.

The Petitioners' reply to ADEM's response argues that ADEM should have been pursuing motions for contempt in response to the violations of Consent Decree requirements instead of issuing informal enforcement actions or filing or preparing new lawsuits. The Petitioners argue that ADEM's failure to enforce against violations of these Consent Decrees renders the Consent Decrees meaningless. The Petitioners also identify an additional example of a case in which they allege that ADEM has failed to take prompt action in response to a Consent Decree violation, the Vernon Water and Sewer Board matter. In that case, the Consent Decree gave the violator four years to achieve compliance with certain effluent limits in the permit, and required the violator to submit a Compliance Plan and regular (twice yearly) progress reports. The Petitioners claim that the violator failed to comply with most of these requirements and ADEM failed to take enforcement action.

EPA agrees that the examples of Consent Decree non-compliance submitted by Petitioners do not reflect an appropriate level of enforcement vigilance or aggressiveness of effort to return violators to compliance. However, EPA also does not believe that these examples are a fair representation of ADEM's overall enforcement effort. EPA's Round 2 (2010) SRF report notably found that ADEM was performing well in the area of ensuring a return to compliance through enforcement actions. The 2010 SRF report notes a high percentage

of enforcement files reviewed by EPA had documentation showing that the violators had returned or would return to compliance. The more recent, Round 3 (2014) SRF report found a decline in ADEM's performance in this area. For example, the 2014 report found that only 57% of enforcement responses returned, or would return, a source in violation to compliance. The national goal for this area is 100% return to compliance, and the 2014 Report identifies this as an "Area for State Improvement." However, as a whole, EPA finds that ADEM is making good faith efforts to address weaknesses in its enforcement program and that the weaknesses in the program are not so severe that the initiation of program withdrawal proceedings would be warranted on this ground.

Significantly, one action recommended in the 2010 SRF Report was the development and submittal of an EMS to EPA, which would help to guide ADEM's enforcement resources in a way that would better promote compliance and deter violations. As noted above under EPA's discussion of Ground J, ADEM has, since filing of the ARA Petition, submitted an EMS to EPA which includes procedures that are designed to ensure timely response to identified violations. Unfortunately, the EMS initially submitted was mostly silent on the issue of noncompliance with Consent Decree and Judicial Order requirements.

ADEM's EMS, which was submitted by ADEM in January of 2011, states that: "generally, within 30 calendar days of completion of the compliance determination, the staff will have determined the appropriate response [using best professional judgment], and any enforcement action taken will have been completed or initiated for administrative orders and judicial actions." The EMS goes on to establish that "execution of administrative orders should be within 180 calendar days from initiation, where feasible. If the noncompliance continues beyond what is considered to be a reasonable period of time for corrective measures to be effectuated, the type of formal enforcement action needed will be established. Generally, the appropriate initial response is one that results in the regulated entity being returned to compliance as expeditiously as possible."

ADEM's EMS provides a roadmap for selection of enforcement responses, with an increase in the formality of enforcement response for more serious and recurring violations. A judicial response is generally reserved for serious or recalcitrant violators, where less formal actions are unsuccessful or inadequate. However, the EMS does not explain how non-compliance with judicial consent orders will be addressed, and this type of action is already on the more formal end of the range of enforcement tools discussed in the EMS. The submitted EMS did not describe any specific actions that would be taken when a violator fails to comply with requirements in a judicial Order or judicial Consent Decree. This omission goes to the heart of Petitioner's allegations under Ground S. Accordingly, EPA recommended that ADEM amend its EMS to add a description of procedures and actions for addressing non-compliance with judicial orders and consent decrees. Measures such as Contempt Motions and actions to assess additional or increasing penalties as non-compliance continues are possible options for addressing such recalcitrance.

ADEM verbally agreed to incorporate this recommendation in its revised EMS, which was submitted on April 17, 2013, and it states that "any violation of a Judicial Order is SNC." In addition, it states that "in cases where litigation does not achieve compliance, the Department

may pursue additional legal options, such as filing additional complaints in circuit court, or filing of contempt of court if a settlement was previously reached in circuit court." EPA will, in the course of its regular oversight of ADEM's enforcement program, seek to determine whether ADEM is taking appropriate responsive action when a Consent Decree or judicial Order is violated. However, EPA has determined that this ground does not justify the initiation of program withdrawal proceedings.

Ground T: Failure to Comply with CWA Conflict of Interest Prohibition

EPA Determination: Ground T of the Petition is based on a requirement in Section 304(i)(2)(D) of the CWA, and implementing regulations at 40 CFR § 123.25(c), that state NPDES programs ensure that "any board or body which approves all or portions of permits shall not include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for permits. This requirement applies to members of ADEM's Environmental Management Commission, to ADEM's Director, and to the Chief of ADEM's Water Division. EPA finds that ADEM's process for complying with this requirement, which includes the execution by affected persons of a Conflict of Interest Disclosure form, and a general recusal process whereby persons with a prohibited conflict recuse themselves from consideration of NPDES-related matters, complies with the CWA. Accordingly, this ground of the Petition does not warrant the initiation of withdrawal proceedings.

Discussion: An earlier Petition to withdraw Alabama's NPDES program authority, filed by the Legal Environmental Assistance Foundation (LEAF), alleged that Alabama was not complying with the CWA's conflict of interest requirements. During EPA's investigation of the claims in that petition, ADEM and EPA worked together as ADEM developed its current procedures for disclosure of financial conflicts and recusal from consideration of NPDES matters by persons with a prohibited conflict. Ultimately, EPA agreed that such procedures adequately implemented the CWA's conflict of interest prohibition, and EPA denied the conflict of interest ground of the LEAF petition in a letter from Carol Browner to LEAF dated April 22, 1997. EPA sees no reason to revisit that determination at this time.

The Petitioners argue that EPA's prior determination regarding ADEM's conflict of interest procedures was incorrect, and that a disclosure and recusal process does not comply with CWA requirements, which absolutely prohibit persons with a conflict of interest from being members of a board or body which has NPDES permit issuing authorities. EPA stands by its prior determination that a disclosure and recusal process may be used to comply with the CWA's conflict of interest requirements.

On February 18, 2010, the Petitioner's filed a Supplement to the Petition to add allegations that a newly appointed chair of ADEM's Environmental Management Commission, Ms. Anita Archie, had a prohibited conflict of interest due to her employment with the Business Council of Alabama, an organization whose membership included many NPDES permittees. ADEM responded that Ms. Archie would file a general recusal under ADEM's conflict of interest procedures and would not participate in consideration of NPDES-related matters. In addition, ADEM's response indicates that Ms. Archie will limit her role as chairperson presiding

over meetings when NPDES matters are placed on the agenda, and would ask the Vice-Chair to state and put to vote any NPDES matters before the Commission. ADEM further states that Ms. Archie will refer requests to speak before the Commission on NPDES matters to the Vice-Chair. EPA finds that these measures are sufficient to comply with the CWA conflict of interest requirements and are consistent with EPA policy regarding those requirements. Accordingly, this ground of the Petition does not warrant the initiation of withdrawal proceedings.

Ground U: Lack of Authority to Recover Penalties From State Entities

EPA Determination: Ground U of the Petition claims that Alabama's NPDES program authority should be withdrawn because ADEM is unable to assess penalties against the State or any of its agencies. EPA does not agree that this constitutes a basis for program withdrawal, as many states operate under state constitutional or state law limitations on their authority to penalize fellow state agencies, and EPA does not believe the CWA was intended to preclude program authorization for states with an inability to assess penalties against fellow state agencies or to require constitutional or statutory amendments to address this shortcoming. EPA notes that its own enforcement authority is limited in the case of violations by fellow federal agencies and it would be incongruous to expect state agencies to surmount legal disabilities that are similar to those affecting EPA. This gap in penalty authority can be addressed through citizen and federal enforcement, and EPA has in fact targeted some state agencies for enforcement. Accordingly, EPA has concluded that withdrawal proceedings on this ground of the Petition are not warranted.

Discussion: Ground U is based on a requirement at 40 CFR §123.27(a)(3) that State NPDES programs have the ability to "assess or sue to recover in court civil penalties " including "civil penalties ... for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection entry or monitoring activities; or, any regulation or order issued by the State Director." Such penalties are required to be assessable "in at least the amount of $5,000 a day for each violation."

ADEM acknowledges that, pursuant to Alabama Constitution Article 1, § 14, it is unable to make another state agency a defendant in court, and therefore cannot sue another state agency for civil penalties for CWA violations. ADEM argues, however, that 40 CFR §123.27(a)(3) only requires that ADEM generally possess authority to assess civil penalties, and does not require that such authority be available in the case of state defendants. ADEM further argues that many other states are similarly unable to sue sister state agencies to assess penalties under applicable state law, and that program withdrawal for this common issue is inappropriate.

The Petitioners reply to ADEM's response by quoting the language of 40 CFR §123.27(a)(3), which requires State programs to have the ability to sue for civil penalties for the violation of "any" NPDES permit condition, filing requirement, inspection entry or monitoring requirement, or regulation or order. According to Petitioners, the plain language of the regulation requires that State programs have authority to obtain penalties from state agencies because "any" violation would necessarily include violations by state agencies.

EPA acknowledges that ADEM's inability to sue state agencies for civil penalties is a weakness in its enforcement program that may not fully meet the requirements of 40 CFR

§123.27(a)(3). However, EPA does not agree that the initiation of withdrawal proceedings is the appropriate response to this deficiency. Petitioners essentially argue that every state which has a state law-based inability to recover civil penalties from state agencies must make corrective changes to state constitutions or state statutes to remove the disability, or suffer program withdrawal. Forcing such changes, however, is not likely to be within the power of a state environmental agency, or in the case of constitutional amendment, even within the authority of the State's legislature. Program withdrawal is a procedure that EPA may initiate in its discretion when criteria at 40 CFR § 123.63(a) are met, but this is a discretionary act and is not required as a response to every such program deficiency. EPA finds that a more appropriate response to ADEM's inability to sue state agencies for penalties is to monitor the compliance status of state agency permittees and, where warranted, target violations by state agencies for EPA enforcement. EPA has in the past targeted state agencies, such as state Departments of Transportation, for enforcement to address the violation of NPDES permit requirements. In states where the agency responsible for enforcing NPDES requirements is not authorized to assess penalties against state agencies, EPA may pursue enforcement against state agencies when significant violations occur. However, EPA does not believe that the initiation of program withdrawal proceedings is an appropriate response.

Ground V: Limitations of Enforcement Authorities of Large and Medium Municipal Separate Storm Sewer System Owner/Operators

EPA Determination: Ground V of the Petition is based on a requirement in 40 CFR §123.25(a)(9) that State NPDES Programs implement 40 CFR §122.26, which establishes regulatory requirements for certain stormwater point source discharges. 40 CFR §122.26(d)(2)(i) provides that medium and large municipal separate storm sewer systems (MS4s) must, in their applications for NPDES permits, demonstrate that they have adequate legal authority to "control, through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by stormwater discharges associated with industrial activity." The Petitioners argue that certain Alabama legislation limits the authorities of Alabama municipalities to a degree that renders them unable to comply with this requirement. EPA initially shared the Petitioners' concerns regarding the impact of the cited Alabama legislation on implementation of the MS4 regulatory program. The legislation contains a number of provisions that, depending on their interpretation, could undermine implementation of the MS4 program to a degree that raises issues of program adequacy. For that reason, on April 15, 2011, EPA sent a letter to ADEM seeking an interpretation of the statutory provisions at issue so that EPA could properly evaluate and respond to this ground of the Petition. On May 10, 2012, ADEM provided a response to EPA's letter which indicates generally that, while some areas of uncertainty remain, Alabama municipalities possess the types of authorities that are necessary to meet MS4 permit requirements. Accordingly, EPA has determined that this ground of the Petition does not warrant the initiation of withdrawal proceedings. However, EPA will continue to closely monitor MS4 implementation in Alabama so that EPA can respond appropriately if issues later arise as to the ability of MS4 permittees to meet permit requirements under state law.

Discussion: Alabama enacted legislation in 1995 to give Alabama's medium and large MS4s the authorities they would need to comply with the Clean Water Act's MS4 permitting requirements. However, this legislation, which has been codified at Ala. Code § 11-89C,

contains a number of provisions that limit the authorities of the MS4s in ways that raise questions about their ability to comply with basic MS4 permit requirements. For example, one provision in this law, Ala. Code § 11-89C-11, bars Phase 1 municipalities from taking action to enforce their local ordinances or resolutions pertaining to stormwater discharges into the MS4 if the discharger is in compliance with an NPDES permit issued by ADEM or EPA. In addition, Ala. Code § 11-89C-12 prohibits Phase 1 municipalities from initiating any action to enforce its ordinances or resolutions pertaining to stormwater discharges into the MS4 if ADEM has initiated and is proceeding with enforcement action against the discharger. Ala. Code § 11-89C-12 further provides that any determination or resolution by ADEM with respect to an alleged violation shall be final, and such alleged violation shall not be the subject of any additional enforcement by a municipality, provided that enforcement may be pursued for continued or continuing violations.

The 1995 legislation was followed by adoption in 1997 of Alabama Act 97-931. Act 97-931 is a "Resolution" which does not have specific requirements of its own, but rather is couched as a statement of the legislative intent reflected in the earlier Act (95-775). The 1997 law provides: "the Legislature granted the authority provided in Act 95-775 with the specific prohibition that 'the rules and regulations shall not impose any additional requirements than those mandated by the EPA,' intending thereby to limit all aspects of local stormwater management programs to only those aspects absolutely required to satisfy the relevant federal laws and regulations." The 1997 Act further states that "the legislature granted the authority provided in Act 95-775 with numerous specific provisions intended to make clear that ADEM is to maintain regulatory responsibility for all sites subject to ADEM stormwater regulations and that local stormwater management programs are to rely upon ADEM for control of stormwater discharges from such sites, rather than subjecting such sites to any form of double regulation." The 1997 Act also has a statement of its intention that the expense of local stormwater management programs would be restrained by the strict limitations on the scope of such programs to that scope absolutely required by the relevant federal laws and regulations

Section 402(p)(3)(B)(iii) of the Clean Water Act requires that the NPDES permits ADEM issues to regulated MS4s include controls to reduce pollutants in stormwater discharges to the maximum extent practicable (MEP) (including controls to reduce pollutants in construction site, and industrial stormwater discharges, which may also be subject to NPDES permits issued by ADEM), while the Alabama legislature is directing ADEM to avoid double regulation and require only the absolute minimum of its MS4 permittees. The tension between these two directives is difficult to reconcile, as EPA's MS4 regulations clearly contemplate that there will be some level of double regulation.[13]

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[13] For example, 40 CFR § 122.26(d)(2)(i) requires Phase 1 MS4s to demonstrate that they have adequate legal authority, established by statute, ordinance or series of contracts, to: (A) control through ordinance, permit, contract, order or similar means, the contribution of pollutants to the municipal storm sewer by stormwater discharges associated with industrial activity and the quality of stormwater discharged from sites of industrial activity; (B) prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer; (C) control through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than stormwater; (D) control through interagency agreements among co-applicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system; (E) require compliance with conditions in ordinances, permits, contract or orders; and (F) carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance

EPA's concerns regarding this legislation were validated by the fact that a lawsuit was filed in Alabama which cited the legislation and challenged the scope of the Birmingham area's Stormwater Management Authority's authority to regulate NPDES-permitted facilities. EPA has also received anecdotal reports from Alabama MS4s in the context of EPA's own MS4 enforcement activities indicating that many Alabama MS4s are unsure of their authority to enforce local requirements against facilities that are regulated by ADEM. As noted above, EPA regulations clearly require MS4s to have local regulatory programs for such facilities.

In its response to the January 2010 Petitions, ADEM indicated that if Alabama legislation is preventing its MS4s from meeting NPDES requirements, then the appropriate response for EPA would not be to withdraw the program, but "to work with Alabama to ensure that state law is changed to ensure that all MS4 permittees are granted the authority to comply with applicable federal regulations." EPA agrees that, before making a decision about whether to initiate withdrawal proceedings, an opportunity should be provided to ADEM and the Alabama legislature to rectify any shortcomings in the Alabama MS4 program, including those attributable to legislation. Accordingly, in order to determine whether legislative change is necessary, EPA sent the April 15, 2011, letter to ADEM requesting that ADEM, after consultation with its Office of General Counsel, provide answers to a series of interpretive questions about the impact of the above-described Alabama legislation on the ability of Alabama's medium and large MS4s to comply with applicable requirements.

ADEM's response letter of May 10, 2012, declined to answer all of the questions posed by EPA on the ground that it could not definitively answer hypothetical questions without a specific factual context. However, ADEM's letter did indicate generally that Alabama municipalities possess the types of authorities that are needed to meet their obligations under MS4 permits, including the authority to regulate pollution sources that are also regulated by ADEM, and to bring enforcement actions against such entities as long as ADEM is not already pursuing enforcement for the same violations. Even when ADEM has taken an enforcement action with respect to a discharge, according to ADEM's letter, a municipality may pursue enforcement if the discharge is continuing, or if it persists beyond a compliance schedule contained in an ADEM order. Further, if a municipality seeks to pursue enforcement in connection with a violation that differs from that identified in ADEM's enforcement action, the municipality may pursue enforcement.

Based on ADEM's response, it appears that municipalities in Alabama have the ordinance-adopting and enforcement authorities that are necessary to meet MS4 permit requirements under permits that require municipal regulatory programs as a mechanism for reducing pollution to the maximum extent possible. Accordingly, EPA has determined that this ground does not warrant the initiation of withdrawal proceedings. To the extent that some uncertainty remains regarding the scope of municipal authorities, and given the possibility that regulated entities may continue to make arguments under Alabama law that a municipality seeking to regulate a pollution source to its MS4 is exceeding its legal authority, EPA will

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with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer. Clearly, the universe of pollution sources that MS4s are expected to control overlaps with pollution sources regulated by ADEM.

continue to closely monitor MS4 program implementation in Alabama. In the event that municipalities are later determined to lack authorities that are necessary for MS4 permit compliance, EPA will revisit this issue.

Ground W: Absence of Legal Authority to Implement TMDLs in NPDES Permits

EPA Determination: Ground W of the Petition claims that ADEM lacks authority to implement EPA-established TMDLs as required by 40 CFR §122.4(i) and 40 CFR §122.44(d)(1)(vii)(B). We have investigated this claim and find that ADEM does have authority to implement TMDLs in its permits, and does in fact include TMDL-based effluent limits in permits. Accordingly, EPA finds that initiation of withdrawal proceedings on this ground is not warranted.

Discussion: The Petitioners' assertion that ADEM lacks authority to implement TMDLs in NPDES Permits is based on two arguments made by ADEM in a permit appeal[14] in which certain EPA regulations, 40 CFR §122.4(i) and 40 CFR §122.44(d)(1)(vii)(B), were at issue. The arguments made by ADEM were: (1) that these regulatory provisions are not incorporated by reference into ADEM's regulations and therefore do not apply to ADEM, and (2) these regulatory provisions do not in any case apply to TMDLs established by EPA as opposed to state-issued TMDLs.

With respect to the first issue [whether ADEM is subject to 40 CFR §122.4(i) and 40 CFR §122.44(d)(1)(vii)(B)], EPA notes that, while 40 CFR §123.25 provides that State NPDES Programs "must have legal authority to implement each of [the listed regulatory provisions] and that State NPDES Programs must be administered in conformance with each," 40 CFR §123.25 also provides that States may omit or modify the listed provisions to impose more stringent requirements. Thus, EPA's focus is not on whether the Alabama regulations contain identical provisions, or specifically adopt or incorporate the federal regulations, but on whether ADEM's regulations establish requirements that are at least as stringent as the EPA regulations.

ADEM does have regulations that appear to be consistent with the EPA regulations at issue. For example, ADEM regulations prohibit the issuance of permits which "cannot ensure compliance with applicable water quality requirements" (Alabama Code 335-6-6-.04(f)). ADEM regulations also contain requirements that NPDES permits contain effluent limitations that achieve water quality standards (Alabama Code 335-6-6-.14(3)(e)) and that NPDES permits contain effluent limitations "consistent with the requirements of any applicable total maximum daily load allocation" (Alabama Code 335-6-6-.14(3)(e)(8)). Alabama regulations also contain a general prohibition (Alabama Code 335-6-6.04(h)) against the issuance of NPDES Permits that do not comply with the Clean Water Act (CWA). The requirements of the CWA include any requirements established through its implementing regulations, which would include 40 C.F.R. §§ 122.4(i) and 122.44(d)(1)(vii)(B). Thus, EPA views ADEM's NPDES regulations as consistent with Clean Water Act requirements.

[14] The Permit Appeal was Friends of Hurricane Creek v. ADEM, EMC Docket No. 08-07. EPA has reviewed the Post-hearing briefs in that matter to inform our response on this issue.

With respect to the second issue [whether 40 CFR §122.4(i) and 40 CFR §122.44(d)(1)(vii)(B) apply to EPA-established TMDLs], EPA disagrees with ADEM's interpretation that these provisions do not apply to EPA-established TMDLs. The regulations at issue refer to wasteload allocations "prepared by the state" or pollutants load allocations "performed" by a state only because the CWA places the initial obligation for TMDL development on States under Section 303 of the CWA. CWA Section 303 requires EPA to establish TMDLs when it has disapproved a state established TMDL (including when there has been a constructive submission of no TMDL based on State inaction). Section 303 further requires States to incorporate EPA-established TMDLs into their water quality plans. An EPA-established TMDL prepared in accordance with the CWA has the same legal status as a state-established TMDL; accordingly, these regulations apply to EPA-established TMDLs to the same extent as a state-established TMDL. However, based on our review of the briefs submitted by ADEM in the permit appeal, ADEM did not assert that it is not required to implement EPA-established TMDLs in NPDES permits, and in fact acknowledges that it must, pursuant to its own regulations, implement EPA-established TMDLs in permits, notwithstanding its interpretation of 40 C.F.R. §§ 122.4(i) and 122.44(d)(1)(vii)(B).

When EPA reviews ADEM's NPDES permits as part of its normal oversight role over ADEM's NPDES Program implementation, consistency with TMDL requirements is a particular focus. We have not seen any pattern of ADEM failing to implement TMDLs in its permits, whether the TMDLs are developed by the State or EPA. Further, based on our review of ADEM's regulations, EPA finds that ADEM has its own regulations which impose on ADEM the obligation to implement applicable TMDLs, whether developed by ADEM or EPA. We encourage the Petitioners to bring to EPA's attention any specific permits proposed by ADEM which Petitioners believe do not adequately implement TMDL requirements. However, we do not find the Petitioners' claim that ADEM lacks authority to implement TMDLs to be true, and therefore this ground of the Petition does not warrant the initiation of withdrawal proceedings.

Ground X, Y and Z: Failure to Provide Adequate Manpower, Funding or Resources to Implement NPDES Program

EPA Determination: EPA will address Grounds X, Y and Z of the ARA Petition in combination because they overlap to a great degree. In Grounds X, Y and Z the Petitioners allege that Alabama does not provide adequate manpower to implement its NPDES Program in a manner that meets minimum NPDES Program requirements (Ground X), that Alabama does not provide adequate funding to effectively carry out the minimum requirements for NPDES Programs (Ground Y), and that Alabama does not create and maintain to the maximum extent possible the resources required to carry out all aspects of the NPDES Program. All three of these grounds essentially come down to the same allegation – that ADEM is under-resourced to a degree that it is unable to meet its NPDES program responsibilities. These grounds also overlap with allegations in the Wildlaw Petition that "ADEM is grossly underfunded and simply is not capable of enforcing federal programs adequately." In addition to information in the Petitions about ADEM's declining resources, EPA is concerned about recent media reports that ADEM has been subject to substantial further cuts to its operating budget that could interfere with ADEM's ability to meet its NPDES program implementation obligations. Accordingly, EPA is

deferring decision on these grounds to allow for additional time to observe the impacts of recent cuts, and potential additional cuts, to ADEM's budget.

Discussion: EPA finds that an allegation of insufficient funding, staff, or resources, by itself is not a valid basis for withdrawal of a State program. EPA agrees that resources can be reduced to a point that a state is unable to implement an adequate NPDES program. However, there is no measurable standard for determining resource adequacy. The resources needed to implement an NPDES program can be affected by many variables. For example, the number of permitted facilities; miles of stream, river and coastline and the number of other water bodies (wetlands, lakes) within a state; efficiency of program implementation; complexity of state-specific industry or water quality issues; the extent of expertise among state staff; unique administrative burdens imposed under state law; and other variables can all affect the extent to which more resources are needed for program implementation.

For these reasons, EPA evaluates a claim of inadequate resources by assessing the extent to which a state is able to fulfill basic program requirements, such as keeping permitting backlogs low, inspecting regulated facilities at a rate that achieves program goals of addressing and deterring non-compliance, and addressing violations through enforcement. EPA would not initiate withdrawal proceedings on the ground that an agency is under-resourced without evidence clearly connecting resource issues to specific program deficiencies that warrant initiation of withdrawal proceedings. The federal regulations at 40 CFR 123.63, which establish the criteria for withdrawal of state authorized NPDES programs do not list inadequate funding or resources as a specific criterion for NPDES program withdrawal. Further, although the ARA Petition cites to an obligation in the ADEM-EPA NPDES Memorandum of Agreement, which provides that Alabama shall "create and maintain to the maximum extent possible ... the resources required to carry out all aspects of the NPDES program," it is unclear how compliance with this requirement is to be measured, especially in light of the fact that ADEM does not have control over its funding appropriations.

While EPA would agree that increased resources might enable ADEM to more effectively implement its NPDES responsibilities, EPA does not agree that ADEM's funding and staffing levels and trends have in the past rendered ADEM unable to fulfill its NPDES responsibilities. Past information regarding ADEM's actual performance indicates that, notwithstanding any funding constraints, ADEM has generally met its basic NPDES program implementation responsibilities. ADEM has proven over the years to be generally effective at marshalling limited resources to deliver the benefits of the NPDES program to Alabama's citizens, and the expertise and dedication of ADEM's staff and management are to be commended for this record. However, notwithstanding this history, EPA is concerned about recent reports that ADEM's funding has been substantially cut in 2012 and 2013. EPA is concerned that ADEM may be unable to continue to meets its NPDES program responsibilities in the face of these significant cuts.

A review of ADEM's performance as measured by a variety of metrics demonstrates that, at least in the past, any paucity of resources has not prevented ADEM from implementing an adequate NPDES Program. One benchmark to consider in evaluating the impact of funding levels on an NPDES program is the State's NPDES permit backlog. As of August 21, 2013,

ADEM is responsible for the issuance of 192 major NPDES permits and 1403 minor permits. ADEM's major NPDES permit backlog is currently 16% and the minor NPDES backlog is 8%, compared to national backlog averages of 24.1% for major permits and 16.6% for minor permits (national backlog current as of March 2013). Some degree of permit backlog is to be expected since some permits raise difficult issues that must be resolved before permit issuance. ADEM's levels of permit backlog are below national averages and do not rise to a level that would support a finding that ADEM is unable to carry out its NPDES responsibilities because of a lack of resources.

EPA has also reviewed information relating to the performance of ADEM's compliance and enforcement program. EPA has determined that ADEM's inspection rates are generally consistent with EPA's National Compliance Monitoring Strategy for the Core NPDES Program and Wet Weather Sources.[15] However, EPA has also identified issues of concern relating to ADEM's enforcement program that are significant enough that EPA is deferring a decision on those issues. As discussed above, EPA is deferring action on certain grounds to allow ADEM time to take responsive action, and EPA will monitor ADEM's progress in addressing those issues before taking final action on the Petition. For example, EPA has recommended that ADEM address a variety of concerns related to its penalty calculation and documentation procedures. In light of concerns about declining ADEM resources, and the possibility that outstanding enforcement issues that EPA is holding open may be related to resource constraints, EPA will also defer a decision on whether to initiate withdrawal proceedings on the insufficiency of resources grounds

In their April 12, 2012, Supplement to the Petition, the ARA Petitioners point to recent reductions in ADEM funding to further support their claim that ADEM lacks the resources necessary to implement an adequate NPDES Program. For example, the Petitioners state that ADEM's funding has been reduced by 60% from 2009 to 2012, and significant further cuts were planned for 2013 under proposals from the Governor and legislature. EPA shares the Petitioners' concern related to the ability of ADEM to absorb further cuts to its NPDES Program.

Significant further cuts were in fact made in 2013 to ADEM's funding under appropriations by the Governor and legislature; and funding for 2014 remains low. In 2013 ADEM also increased its CWA permitting fees by 50% for all permits. This fee increase has been estimated to return ADEM to its 2008 level of funding, which will help mitigate the impact of accumulating budget cuts. However, in light of uncertainty over the impact that the significant budget cuts will have on ADEM's ability to fulfill its NPDES Program implementation responsibilities, EPA is deferring a decision on the insufficiency of resources-related grounds of the Petition. EPA will continue to monitor ADEM's program implementation, including matters that may be directly affected by funding levels, such as permit backlogs and inspection and enforcement activity, and if ADEM's program implementation deteriorates due to a lack of funding EPA may decide to initiate withdrawal proceedings because resource insufficiency renders ADEM unable to comply with the requirements of 40 C.F.R. Part 123. See 40 C.F.R. § 123.63(a)(2). Alternatively, if a period of additional monitoring demonstrates that ADEM is able to meet its NPDES Program responsibilities even after

[15]The NPDES Compliance Monitoring Strategy is available at http://www.epa.gov/compliance/resources/policies/monitoring/cwa/npdescms.pdf.

absorbing the recent budget cuts, initiation of withdrawal proceedings on the insufficiency of resources grounds will not be warranted.

Remaining Issues from the Wildlaw Petition

Because of the overlapping nature of many of the issues, EPA has consolidated multiple petitions for response. However, certain issues from the Wildlaw Petition do not overlap with the issues in the ARA Petition and require a separate response. The following issues were raised by the Wildlaw Petition and overlap to a great degree with issues in the ARA petition, and have been adequately addressed in the foregoing discussion:

1. Whether ADEM is so grossly underfunded that it cannot maintain an NPDES Program which meets CWA requirements.
2. Whether ADEM's enforcement program is so weak that it does not fulfill minimal requirements for state program authorization.

However, the following issues, although they may overlap to some degree with ARA Petition issues, are specific to the Wildlaw Petition to an extent that they require a separate discussion.

1. Whether ADEM adequately listens and responds to comments and concerns from the public and from other agencies on proposed NPDES permits.
2. Whether ADEM fails to properly implement its antidegradation policy.
3. Whether ADEM's failure to consult with federal wildlife agencies concerning the impacts to species listed under the Endangered Species Act, as EPA must do when it issues NPDES permits, constitutes a basis for withdrawal of the ADEM program.
4. Whether ADEM fails to enforce its narrative water quality criteria in NPDES permits.
5. Whether ADEM adequately protects impaired and other waters from "nonpoint" source pollution.
6. Whether ADEM's procedures for the public to administratively contest NPDES permits are equivalent under the federal program.
7. Whether the action of the Alabama legislature in reversing the upgrading of an Alabama water body from an "agricultural and industrial water supply" use classification to a "limited warmwater fishery and fish and wildlife" use classification justifies withdrawal of Alabama's NPDES program.

Each of these Wildlaw Petition issues is discussed separately below.

Wildlaw Issue 1: Whether ADEM adequately listens and responds to comments and concerns from the public and from other agencies on proposed NPDES permits.

EPA Determination: ADEM's public notice and comment process is in compliance with the requirements of the CWA, and therefore this issue does not warrant initiation of state program withdrawal proceedings.

Discussion: One of the circumstances specifically referenced in the regulations as providing a potential basis for the Administrator to consider state NPDES program withdrawal is a failure of the state to comply with public participation requirements. 40 C.F.R. 123.63(iii). The requirements for public participation for state programs are found at 40 C.F.R. 123.25(a)(28 - 31). These requirements reference 40 CFR 124.11, which states that "all comments shall be considered in making the final decision and shall be answered as provided in 124.17." Sections 124.17(a)(1) and (2) require the State, at the time of final issuance, to specify which provisions, if any, of the draft permit have been changed in the final permit decision and to briefly describe and respond to all significant comments raised during the public comment period. As ADEM's response notes, ADEM does prepare written responses for all relevant comments.

The Wildlaw Petition does not demonstrate that ADEM is failing to administer an effective public participation program. The Petition includes information as to why Petitioners disagree with the responses to comments that ADEM has provided to the public in some permit matters. However, the fact that Petitioners disagree with ADEM's responses to comments does not show that there is an inadequate public participation process, or support a claim that ADEM fails to listen to or respond to comments.

To the extent that Wildlaw believes that ADEM's responses to comments in permit actions reflect a failure to follow Clean Water Act substantive requirements, it may appeal specific permits where they believe ADEM has failed to follow CWA permitting requirements. In addition, Wildlaw can (and does) raise substantive allegations supporting the withdrawal petition with respect to substantive issues raised in permit comments which it believes ADEM has not properly addressed. For example, one of the substantive disagreements that Wildlaw has had with ADEM responses to comments in particular permit actions relates to ADEM's responses to comments submitted by the U.S. Fish and Wildlife Service (FWS), which Wildlaw characterizes as a failure to consider impacts to species listed under the Endangered Species Act, and as a failure to protect the aquatic life uses of Alabama waters. These substantive issues are raised in the Petition as specific bases for withdrawal and are addressed separately below. Based on the information provided in the Wildlaw Petition and EPA's investigation, however, EPA has concluded that ADEM's underlying public participation process is consistent with the requirements of the CWA, and that the initiation of withdrawal proceedings under this ground is not warranted.

Wildlaw Issue 2: Whether ADEM fails to properly implement its antidegradation policy.

EPA Determination: Since the filing of the initial Petition, Alabama has adopted anti-degradation implementation procedures which EPA has approved. Further, while the Petition cites examples where Wildlaw has disagreed with ADEM's application of its anti-degradation policy, the information submitted fails to demonstrate that ADEM is not implementing its anti-degradation policy in a manner consistent with the Clean Water Act, as further discussed below.

Discussion: The Petition makes two allegations regarding ADEM's implementation of its anti-degradation policy. First, Petitioners assert that ADEM is not protecting all existing uses, as required by its anti-degradation policy at Alabama Administrative Code Section 335-6-10-

.04(2), which provides that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Petitioners assert that the presence of certain native species in a water body constitutes an existing use that must be protected, but that ADEM follows a practice of only implementing numeric water quality criteria and ignoring other information showing that a proposed discharge will result in mortality of an aquatic species present in the water body, and thus ADEM is failing to protect existing uses.

EPA's Water Quality Standards Handbook makes clear that the anti-degradation policy is intended to ensure protection of aquatic life uses. For example, the Handbook states:

> No activity is allowable under the anti-degradation policy which would partially or completely eliminate any existing use whether or not that use is designated in a State's water quality standards. The aquatic protection use is a broad category requiring further explanation. Non-aberrational resident species must be protected, even if not prevalent in number or importance. Water quality should be such that it results in no mortality and no significant growth or reproductive impairment of resident species. Any lowering of water quality below this full level of protection is not allowed.
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> EPA, Water Quality Standards Handbook, at page 4-5.

According to the Petition, ADEM is seeking to comply with this requirement solely by applying its numeric water quality standards criteria when issuing permits. ADEM, the Petition asserts, claims that this is sufficient to protect existing uses because the numeric criteria are established at levels determined to be protective of aquatic life. This raises the question whether, when information is submitted to ADEM showing that significant species mortality is occurring due to a specified pollutant or pollutants, including pollutants for which no numeric criteria have been adopted, ADEM has an obligation to develop effluent limits for those pollutants for which there are not numeric criteria.

In connection with this issue it is important to note that Alabama, like other states, has certain narrative water quality standards criteria designed to protect existing and designated uses, and under the CWA and NPDES regulations all NPDES permits must be consistent with these narrative criteria. For example, Alabama Administrative Code 335.6-10-.06 includes narrative criteria that State waters must be free from substances attributable to wastes which "interfere directly or indirectly with any classified water use" or which are present in "concentrations or combinations which are toxic or harmful to human, animal or aquatic life to the extent commensurate with the designated usage of such waters." Thus, this issue overlaps with Issue #4, below, relating to the Petition's allegation that ADEM fails to enforce its narrative water quality criteria.

These narrative criteria form the regulatory basis for Alabama's inclusion of whole effluent toxicity limits (WET) in permits where reasonable potential to cause or contribute to an exceedance of toxicity-based narrative criteria exists. Effluent monitoring for WET assesses the total toxic effect of a discharge and accounts for the impacts of many chemicals for which numeric criteria do not exist, or for the effects that pollutants may pose in combination with each other. Based on EPA's evaluation of ADEM's permitting practices, ADEM implements

appropriate procedures for establishment of WET limits in permits. Thus, at least in the context of WET limits, ADEM is implementing its narrative criteria. However, the Petition raises questions about whether ADEM is also implementing its narrative criteria (and designated uses) in the context of nutrient pollution, and in the context of sediment pollution from construction sites.

The Petitioners are correct that NPDES Permits must protect existing uses, included aquatic life uses, and that the Clean Water Act prohibits the issuance of permits for discharges which will cause or contribute to violations of any water quality standard, whether numeric or narrative in nature. However, neither the Petition nor EPA's investigation has demonstrated a systemic failure by ADEM to enforce these requirements. EPA encourages the Petitioners or other interested parties to comment in the future on ADEM proposed permits if there are specific instances which raise issues relating to protection of existing uses and implementation of narrative criteria. In the absence of a showing of a systemic disregard for the obligation to protect existing uses and implement narrative criteria, however, the Petitioner's concerns in this area should be raised on a permit-specific basis.[16]

The Petition also asserts that ADEM does not properly apply the anti-degradation policy requirement, as provided in Alabama Administrative Code Section 335-6-10-.04(3), that no degradation can be allowed in Tier 2 (high quality) waters absent a demonstration that "the proposed discharge is necessary for important economic or social development." According to the Petitioners, ADEM accepts without scrutiny any "demonstration" submitted by a proposed discharger claiming that an important social or economic interest requires the lowering of water quality, and ignores opposing information or information about countervailing social or economic interests that are served by maintaining water quality and may be equally important. The Petition includes, in support of this allegation, the excerpted transcript testimony of an ADEM representative during a hearing on the HarGal gold mine permit. The ADEM representative's testimony does suggest that ADEM accepts an applicant's demonstration that a discharge is necessary to support important economic or social development without applying any independent departmental judgment. For example, the following testimony is a portion of the excerpt that was presented in the Petition:

> HEARING OFFICER: What she's asking, though, is when you get negative things, do you consider that as much as you consider the positive things?
>
> THE WITNESS: In my role, we don't go – I don't go into that level of detail. This information that he submitted [referring to a letter from a County commissioner stating that the County is attempting to develop tourism related to natural resources as an industry for the locality] is – there's no facts, there's no – and even if there were, I'm not an economist. And the rule requires us to – the applicant to demonstrate. And I believe that -

[16] EPA notes that the development of effluent limits to implement narrative criteria and protect existing uses in the case of pollutants for which no numeric criteria exist, such as nutrients and siltation, poses difficult technical challenges, challenges that all states and EPA have struggled with. EPA is willing to work with ADEM and assist in the development of appropriate effluent limitations in such circumstances.

HEARING OFFICE: Well, but I think what she's getting at is you accept the positive. Do you also accept the negative and then balance the two?

THE WITNESS: I accept the negative and consider it; but from our standpoint, I'm not – we're not an economist. The rule does not require us to provide that separate economic review. So as a matter of balancing, I'm not sure what you mean. I mean, it's there, it's considered, it's part of the package.

...

Q. For your purposes, will any economic development be considered important?

A. For my purposes, as part of the application review, if the applicant can submit a demonstration that there is economic – important economic development, I accept it. I have no reason to disprove it. He says – if there's jobs, if there's this going to be built, that's economic development.

Q. Right. But you just said if he shows that it's important economic development. How do you know that he's shown economic development that is important?

A. He demonstrates. He says it's important. I don't have any reason to disbelieve it, and there's not any information that I have or have to consider that it's unimportant.

...

Q. Certainly. If the applicant submits documentation that this will be a significant economic development, is that sufficient for your process?

A. That's what the rule says. If he submits a demonstration of economic – important economic development, that's what the rule requires him to do. And he submits that, and that appears to be present, and I don't have any reason or information to believe that that is not – is somehow false or misleading or purposely false or misleading, that's what the rule requires. That's what I believe the applicant submitted in this case. That's what we reviewed, and that's what we accepted.

The testimony could be read to suggest that ADEM views its role as a simple ministerial function of confirming that the applicant has submitted a demonstration that the discharge is necessary to accommodate important economic or social development. While testimony relating to a single permit matter from many years ago is not a fair basis for evaluating ADEM's anti-degradation implementation as a whole, the testimony does raise significant concerns about how ADEM perceives its role in implementing anti-degradation. Accordingly, EPA questioned ADEM as to whether it critically reviews applicant submittals and renders an independent determination of necessity and importance, in accordance with its obligation under 40 C.F.R. §131.12.[17] EPA specifically requested that ADEM respond to the claim, based on the testimony

[17] Under 40 C.F.R. §131.12(a)(2), the state must make the finding that "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." If the State is

quoted above, that ADEM does not critically review Tier 2 antidegradation demonstrations submitted by applicants.

In its supplemental response relating to Tier 2 antidegradation determinations, ADEM acknowledges that ADEM's procedures "place the burden upon the permit applicant to make a full demonstration that the proposed discharge is necessary for important economic or social development," but that "ADEM then makes its determination based upon the information provided by the permit applicant." ADEM asserts that its own determination is made independently and includes consideration of information contrary to the applicant's demonstration. In support of this assertion, ADEM submits documentation that the alternatives analysis submitted in connection with the hearing to which the quoted testimony relates was performed by a Ph.D. professor of Business and Economics, to which ADEM reasonably accorded weight. ADEM indicates in its supplemental response that it "reviews each demonstration to ensure that it is adequately supported."

Based on ADEM's supplemental response, and the absence of further information indicating that ADEM does not fulfill its responsibilities in making anti-degradation determinations, EPA finds that Petitioners have not demonstrated that the initiation of withdrawal proceedings is warranted on this ground. EPA finds that ADEM does not accept applicant demonstrations of necessity and importance uncritically, but performs a review of applicant information and other relevant information before making an independent anti-degradation determination. Because ADEM has an approved anti-degradation policy and approved implementation procedures, and has confirmed that it makes an independent anti-degradation determination in each permit action where such review is required, EPA finds that the initiation of withdrawal proceedings on this ground is not warranted. EPA encourages Petitioners, in any case where they believe ADEM's anti-degradation determination is not supported by the record, to bring the specific matter to EPA's attention. In addition, persons disagreeing with ADEM's anti-degradation determinations with respect to specific permits may challenge the determination in a permit appeal.

Wildlaw Issue 3: Whether ADEM's failure to consult with federal wildlife agencies concerning the impacts to species listed under the Endangered Species Act, as EPA must do when it issues NPDES permits, constitutes a basis for withdrawal of the ADEM program.

EPA Determination: ADEM does not have a duty to "consult" with federal wildlife agencies regarding the Endangered Species Act (ESA) when issuing NPDES permits, and this issue does not present a basis for initiation of state program withdrawal proceedings.

Discussion: In the Petition, Wildlaw alleges that a state permitting program must be equivalent to an EPA NPDES permitting program in that the state must consult with federal wildlife agencies and consider impacts to federally listed species or their critical habitat to the same extent that the EPA must when issuing a CWA Section 402 NPDES permit. However, the CWA does not demand such equivalence. Section 7(a)(2) of the Endangered Species Act

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merely confirming that an applicant has submitted a demonstration, and not scrutinizing the demonstration and considering other countervailing information, then the state is not fulfilling its obligation to make an independent finding.

requires EPA to formally consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereinafter collectively referred to as the "Services") about the effects of federal action on threatened or endangered species or their habitats. This requirement, however, applies only to federal agencies and federal actions. See Oregon Natural Resources Council v. Hallock, 2006 Westlaw 3463432 (D. Or. 2006) (holding that the neither State of Oregon nor the EPA had a duty to comply with the consultation requirements of the ESA on a state-issued permit); National Ass'n of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007)(EPA not authorized to consider protection of threatened and endangered species in acting on application of State of Arizona for authorization to implement NPDES program); American Forest and Paper Association v. EPA, 137 F.3d 291 (5th Cir. 1998) (holding that EPA cannot condition delegation of CWA program to State of Louisiana on adherence to ESA consultation procedures). There is nothing in the CWA or its implementing regulations that extends the ESA consultation requirement to state NPDES permit actions.

The public comment process required for all state-issued NPDES permits, however, specifically provides the Services with an opportunity to comment on the impacts to federally listed species and critical habitat, and requires that the states consider any comments received. When states develop draft permits they are specifically required to provide notice and copies of draft permits to the Services. See 40 CFR 124.10(c)(1)(iv) and (e). The states are also required to specify which conditions, if any, of the draft permit have been changed in the final permit and the reasons for the change, and they are to briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing. See 40 CFR 124.17(a)(1) and (2).

Under Chapter IX.A. (1) through (6), of the January 2001 National Memorandum of Agreement (MOA) between EPA, FWS and NMFS regarding enhanced coordination under the CWA and ESA, there is an agreed upon coordination procedure where the Services can raise their concerns about federally listed species or critical habitat if they are unable to resolve identified issues with a state. These coordination procedures do not encumber the states with any obligatory ESA consultation procedures beyond the existing NPDES public notice and response to comments requirements. EPA, however, may object to state-issued permits on the ground that the permit does not adequately protect threatened or endangered species. If the state does not address EPA objections, this can lead to the passing of permit-issuing authority to EPA for the discharge at issue. See 40 CFR 123.44. However, ADEM is not required to consult with the Services regarding the ESA in the same manner as EPA. This issue, therefore, does not present grounds for the initiation of withdrawal proceedings.

Some of the claims made by Wildlaw in the section of the Petition regarding the lack of consultation with the Services are relevant to their related claim that ADEM is failing to protect existing uses (such as the presence of various aquatic species, including threatened and endangered species) and is issuing permits that result in violations of water quality standards. These claims are addressed under Wildlaw Issue # 2 (relating to anti-degradation) and Wildlaw Issue # 4 (relating to alleged failure to implement narrative criteria).

Wildlaw Issue 4: Whether ADEM fails to enforce its narrative water quality criteria in NPDES permits.

EPA Determination: The information provided in the Petition is not adequate to support a finding that ADEM is not applying its narrative water quality standards criteria in NPDES permits.

Discussion: The Wildlaw Petition includes a claim that "ADEM has no proper numeric criteria for numerous pollutants that EPA does have." However, the text of the Petition relating to this issue focuses more on an alleged failure of ADEM to properly apply its narrative criteria and protect existing uses.[18] The Petition claims that ADEM places excessive reliance upon numeric criteria as a means to judge whether an NPDES permit will protect all aquatic life forms in a receiving water body and has no process for ensuring compliance with its narrative criteria. Petitioners cite as an example the issuance of NPDES permits to the City of Hoover and Jefferson County for discharges into the Cahaba River, and allege that ADEM failed to make a diligent review of the effect of these discharges upon the receiving water. Petitioners argue that ADEM is not implementing its narrative criteria (i.e., not translating its narrative criteria into appropriate permit limits), is not protecting existing uses, and is not considering information demonstrating that solely applying the numeric criteria it has adopted is not sufficient to protect existing uses, including native and endangered species presence. In connection with this argument, Petitioners note that the Cahaba River has been documented to be impaired (is not meeting water quality standards) as a result of nutrient and siltation pollution, and they argue that ADEM is failing to issue permits which are protective of water quality, as required by the CWA.

With respect to regulatory criteria that may warrant withdrawal of a state program, consideration of these issues falls under either 40 C.F.R. 123.65(2)(ii) (repeated issuance of permits which do not conform to the requirements of this part) or 40 C.F.R. 123.63(5) (where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits (WQBELs) in NPDES permits). The information provided in the Petition and reviewed in EPA's investigation, however, is not adequate to support a finding that ADEM has failed to develop an adequate regulatory program for developing WQBELs in its NPDES permits or that ADEM is repeatedly issuing permits which do not conform to the requirements of the CWA.

EPA agrees with Petitioners that situations may arise where numeric criteria alone are not protective of designated uses or aquatic life. In some cases, numeric criteria may not exist for particular pollutants that might cause or contribute to an impairment, and a translation of a narrative criterion into a protective effluent limit may be necessary to ensure that designated uses are protected. The NPDES regulations require permitting authorities to evaluate the reasonable potential for an effluent to cause or contribute to an excursion of both numeric and narrative criteria and, where necessary, derive water quality-based effluent limitations from those criteria. However, Petitioners have not demonstrated that ADEM is failing to do so.

[18] To the extent that Petitioner does argue that ADEM's failure to adopt numeric criteria for certain pollutants is a basis for program withdrawal, the Petition is denied with respect to that issue. As ADEM has noted in its response to the Petition, ADEM has adopted appropriate numeric criteria and uses EPA's criteria guidance for pollutants not included in ADEM's rules when appropriate for developing permit limitations.

On an ongoing basis, EPA reviews selected Alabama NPDES permits when they are submitted as drafts by ADEM. As part of its review of draft NPDES permits, EPA evaluates whether ADEM is adequately implementing its water quality standards (WQS), including narrative standards, into permits in the form of water quality based effluent limits. As noted above, where reasonable potential to exceed Alabama narrative criteria exists, ADEM routinely requires WET limits in its NPDES permits. In addition, EPA has reviewed a sampling of permits issued by ADEM for discharges to Section 303(d) listed (impaired) waters and confirmed that ADEM has established water-quality based limits in such situations, including cases where the pollutant at issue does not have a numeric criterion.[19] EPA's review of Petitioners' concerns with respect to this issue did not reveal that ADEM has failed to operate its NPDES program in a manner that complies with the requirements of the CWA, such as the 40 CFR 122.63(a)(2)(ii) criteria of "repeated issuance of permits which do not conform to the requirements of this part."

The Wildlaw Petition's Fourth Supplement cites to statements ADEM officials have made regarding the legal significance of a water body segment's presence on the Section 303(d) list of impaired waters, claiming that the statements demonstrate that ADEM is not fulfilling its responsibility to include WQBELs in permits for discharges to impaired waters. The Fourth Supplement includes a statement from an ADEM brief filed in an Alabama court case, asserting that the 303(d) list:

> is not intended to prescribe any State regulatory criteria for those streams. ... Upon receipt of a permit application, the fact that a stream appears on this list does not automatically preclude a decision by the permit writer that the quality of a stream exceeds Tier 1 levels ... This formal list, therefore, merely directs the permit writer in the application process... ADEM may yet apply Tier 2 requirements despite the fact that a stream appears on the list."

Memorandum in Support of Motion to Dismiss, Legal Environmental Assistance Foundation v. ADEM (August 1, 2002, Circuit Court for Montgomery County), at pages 3-4. EPA finds nothing incorrect in the statements made in the ADEM brief, because it is true that a water body's presence on the list does not foreclose the consideration of other information by a permitting authority seeking to determine the ambient water quality in the receiving stream and the potential that a proposed discharge will cause or contribute to a violation of water quality standards. States are required to develop TMDLs for waters on the state's 303(d) list. However, when permits are issued for discharges to a water body on the 303(d) list, the permitting authority should consider all relevant information (including any data underlying the 303(d) listing decision) in determining whether a WQBEL is appropriate. For example, receiving stream data in the area of a proposed discharge may be developed after the 303(d) listing decision and may, together with information about a proposed discharge, demonstrate that the proposed discharge will not cause or contribute to a violation of water quality standards. While

[19] Examples of permits ADEM has issued with water quality-based effluent limits include Weyerhaeuser Corporation - Pine Hill facility, coal-mine permits discharging to the Hurricane Creek watershed (implementing a TMDL), the Wilsonville WWTP permit (Permit Number AL0021491), the Jefferson County Turkey Creek WWTP permit (Permit Number AL0022926), the Gadsden East permit (Permit Number AL0022659 – implementing Coosa Nutrient TMDL), Childersburg Bailey (Permit Number AL0021466 – implementing Coosa Nutrient TMDL), Oak Mountain State Park (Permit Number AL0050831 – implementing Cahaba Nutrient TMDL), and Mountain Brook HS (Permit Number AL0050971 – implementing Cahaba Nutrient TMDL).

such a scenario may not occur very often, ADEM is correct in identifying this scenario as a potential outcome of a permitting action that would not run afoul of CWA requirements.

The same brief which Petitioners cite (quoted above) as evidence that ADEM is not fulfilling its obligation to write permits protective of water quality is replete with acknowledgments that ADEM is obligated to write permits that meet water quality standards. For example, at page 3 the brief states "ADEM may not issue a permit that authorizes a violation of State water quality standards." As a whole the brief appears to confirm that ADEM recognizes its obligation to protect water quality. This basic premise is not inconsistent with the position taken in ADEM's brief that it is appropriate to examine relevant data on a permit specific basis, including data underlying the listing decision, and any subsequently developed data, to render fully informed decisions regarding the need for WQBELs in specific permits.

As noted above, difficult challenges are posed by situations where a water body is impaired by the presence of pollutants for which there are no numeric water quality criteria, such as sediments[20] or nutrients.[21] Until a TMDL is approved which establishes the water body's assimilative capacity for a pollutant and a wasteload allocation for point sources discharging to the water body, permitting authorities may lack information that would facilitate the translation of a narrative criterion into a WQBEL for a specific point source.[22] In any event, as described above, EPA's investigation indicates that ADEM is establishing WQBELs in cases where discharges have the reasonable potential of causing or contributing to a violation of water quality standards. Petitioners may disagree with ADEM's reasonable potential analysis in particular cases or with the WQBELs ultimately established by ADEM, but these are issues more appropriately addressed on a permit by permit basis, because it does not appear that ADEM is failing in a systemic way to include WQBELs in its permits when necessary to meet water quality standards.

With respect to the need for numeric nutrient criteria to support WQBEL development, EPA agrees that the development of such criteria would represent an important step that would facilitate the development of WQBELs for nutrients. However, as noted in footnote 19, above, ADEM has submitted to EPA a nutrient criteria implementation plan, which provides a detailed plan for development of nutrient criteria, including the use of Alabama-specific eco-regional reference conditions. In addition, ADEM has adopted chlorophyll-a criteria for 29 of their 41 most significant public reservoirs. Thus, ADEM is demonstrating progress in the development of numeric nutrient criteria. In light of ADEM's progress and continuing work on the

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[20] Alabama Administrative Code Section 335-6-10-.09 does establish a criterion for turbidity, which combines narrative components (no substantial visible contrast or interference with beneficial uses) with a numeric maximum (50 NTUs above background).

[21] EPA notes that ADEM has submitted to EPA a nutrient criteria implementation plan, which provides a detailed plan for development of nutrient criteria, including the use of Alabama-specific eco-regional reference conditions. In addition, ADEM has adopted chlorophyll-a criteria for 37 of their 41 most significant public reservoirs, and is likely to adopt chlorophyll-a criteria for the remaining 4 reservoirs during the next triennial review. ADEM has also completed a stream/reservoir nutrient study in the Tallapoosa Basin (2011-2012) and completed a Weeks Bay Numeric Nutrient Criteria Study in 2011-2012 (including Bon Secour Bay, Fish River, Magnolia River, Cowpen Branch, and Polecat Creek).

[22] In circumstances where calculation of a numeric WQBEL is infeasible, a permitting authority may establish BMP-based WQBELS pursuant to 40 C.F.R. §122.44(k).

development of nutrient criteria, EPA does not believe the lack of numeric nutrient criteria for streams and rivers in Alabama is indicative of a failure of the ADEM program to develop an adequate regulatory program for developing WQBELs in NPDES permits, such as would justify the initiation of withdrawal proceedings.

The Wildlaw Petitioners have expressed particular concern about nutrient and sediment impacts to the Cahaba River. The Cahaba River nutrient TMDL was approved by EPA on October 26, 2006. Since that time, ADEM has been obligated to issue permits which are consistent with the assumptions and requirements of the TMDL, and EPA's investigation indicates that ADEM is doing so. The following NPDES permits were either recently re-issued or are being prepared for re-issuance by ADEM, and contain limits implementing the TMDL:

Hoover Riverchase WWTP - AL0041653 (public notice date: 12/18/2012 – re-issued 3/26/13)
Hoover Inverness WWTP - AL0025852 (public notice date: 12/18/2012 – re-issued 3/26/13)
Cahaba River WWTP - AL0023027 (public notice date 05/15/2012 – re-issued 11/28/12)
Trussville WWTP - AL0022934 (public notice date 05/15/2012– re-issued 11/28/12).

These permits include Total Phosphorus limits consistent with the Cahaba River Nutrient TMDL, with extended compliance schedules (April 2022) to meet the TMDL requirements.

On July 15, 2012, ADEM publicly noticed proposed siltation TMDLs for siltation-impaired segments of the Cahaba River for public review and comment. The public comment period for the Cahaba River siltation TMDLs ended on September 28, 2012. Ultimately, approval and implementation of siltation TMDLs, along with continuing implementation of the Cahaba River nutrient TMDLs, will likely address the Petitioners' concerns with respect to the Cahaba River.

EPA's review indicates that ADEM, notwithstanding the difficult challenges sometimes posed in attempting to calculate appropriate WQBELs, has been in good faith implementing its water quality standards through its NPDES permits. Accordingly, EPA finds no basis for initiating withdrawal proceedings on this ground. EPA encourages Petitioners and other interested persons to make permit-specific comments if permit matters arise in which there are questions about whether ADEM is appropriately developing effluent limits to implement its water quality standards, whether those standards are numeric or narrative in nature.

Wildlaw Issue 5: Whether ADEM adequately protects impaired and other waters from "nonpoint" source pollution.

EPA Determination: The information provided in the Petition is not adequate to support a finding that ADEM has a practice of issuing NPDES stormwater permits which fail to protect water quality.

Discussion: While the Wildlaw Petition refers to "nonpoint" source pollution, it is clear from the content of the Wildlaw Petition that Petitioners are referring to stormwater point sources such as stormwater from construction sites. "Non-point" sources are not subject to NPDES permitting and therefore could not form the basis of a proceeding to withdraw a state

NPDES program. With respect to permitting of stormwater point sources such as construction sites, the petition raises significant concerns regarding the contributions of construction sites to impairments of water bodies in Alabama. However, as explained below, EPA does not find that the information presented in the Petition would justify the commencement of state program withdrawal proceedings.

Surface waters may be impaired for siltation or sediments due a variety of causes, including stream bank erosion, urban runoff, agricultural runoff and construction activities. The Wildlaw Petition argues that ADEM is not doing enough to control contributions from construction sites.

The NPDES regulations, under 40 C.F.R. 122.28(a)(2)(i), allow the permit issuing authority to issue NPDES general permits for stormwater point source discharges, and most construction sites nationally are permitted through general permits. Wildlaw argues that ADEM's decision to allow construction sites to obtain coverage under a general permit for their stormwater discharges even when the construction sites are located near impaired waters reflects a failure of ADEM's NPDES program to issue permits that protect water quality.

Stormwater sources have long been recognized by EPA as appropriate for coverage by general permits, in most cases with effluent limits in the form of Best Management Practices (BMPs) as opposed to numeric effluent limits. The use of BMP-based limits has typically been justified on the ground that stormwater discharges are due to storm events that are highly variable in frequency and duration, and stormwater discharges are not easily characterized. The inherent variability of construction stormwater discharges and lack of generally available data measuring contributions from these sources have historically made it difficult to determine with precision or certainty the actual and projected loadings for individual discharges or groups of dischargers. Accordingly, even in the context of sites discharging to impaired waters, EPA has traditionally recognized that such permits may contain limits expressed as BMPs, with numeric limits used only in rare circumstances. See EPA Memorandum, "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (November 22, 2002) ("WLAs and Stormwater Sources Memorandum").

Since the issuance of the WLAs and Stormwater Sources Memorandum in 2002, technical knowledge regarding the impacts of stormwater pollution sources on water quality has greatly increased, as has information about the efficacy of various controls on stormwater discharges and the ability to monitor pollution contributions from stormwater pollution sources. In light of this increased knowledge base, EPA has recommended that, where feasible, numeric WQBELs be included in permits for stormwater sources with the reasonable potential to cause or contribute to a violations of water quality standards. See EPA Memorandum, "Revisions to the November 22, 2002 Memorandum 'Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs'" (November 12, 2010) ("Revised WLAs and Stormwater Sources Memorandum").

Alabama's General Permit for Stormwater Discharges from Construction Activities ("Construction General Permit" or "CGP"), which was issued on April 1, 2011, long after the Wildlaw Petition was filed, covers discharges to sediment-impaired waters. However, the Alabama CGP does include a numeric effluent limit, in that discharges "where the turbidity of such discharge will cause or contribute an increase in the turbidity of the receiving water by more than 50 NTUs (nephalometric turbidity units) above background" are prohibited. According to the permit, for purposes of determining compliance with the turbidity limit, "background will be interpreted as the natural condition of the receiving water without the influence of man-made or man-induced causes. Turbidity levels caused by natural runoff will be included in establishing background levels." This permit's numeric turbidity limit represents an advance, if not in stringency, in measurability, accountability and enforceability, from the construction permit that was in place at the time of the filing of the Wildlaw Petition. However, the new construction permit's numeric turbidity limit does not appear to have been calculated as a WQBEL to specifically address waters that are already impaired for siltation, which may lack assimilative capacity for even relatively low levels of sediment discharge.

The new (2011) Alabama CGP does include a variety of additional mechanisms to ensure that BMPs are adequate to protect water quality. For example, the CGP also prohibits (1) discharges subject to a TMDL unless the discharge is consistent with the TMDL, and (2) discharges to waters listed on ADEM's most recently approved 303(d) list of impaired streams unless the discharge will not cause or contribute to the listed impairment. The 2011 CGP also requires the submittal to ADEM of a copy of the Construction Best Management Practices Plan (CBMPP) for all "priority construction sites," which includes sites discharging to waters on Alabama 303(d) list or subject to a TMDL. Priority construction sites are not authorized to discharge until ADEM has had 30 days to review the CBMPP, a period which can be extended with notice by ADEM that additional time is needed, in which case the discharge is not authorized until ADEM formally acknowledges the receipt of a complete and technically adequate CBMPP. The 2011 CGP requires permittees to implement measures or requirements to achieve the pollutant reductions consistent with an applicable TMDL. The 2011 CGP requires permittees to update the CBMPP as necessary to address new TMDLs and new 303(d) listings. The 2011 CGP requires site inspections once per month and promptly after any qualifying precipitation event (.75 inches or greater within a 24 hour period), and the site inspection must include a comprehensive observation of the site to determine and ensure that discharges do not result in a contravention of applicable water quality standards. Turbidity monitoring of the effluent and in the receiving stream at points above and below the discharge is required during any site inspection when discharge is occurring and following qualifying precipitation events if discharges occur.

While the Alabama General Permit does contain mechanisms designed to ensure that construction sites will not contribute to water quality impairments, these mechanisms lack the accountability and enforceability advantage of a numeric WQBEL that has been calculated to ensure that a discharge does not exceed a specific water body's assimilative capacity. However, the recommendation in EPA's Revised WLAs and Stormwater Sources Memorandum that stormwater permits for discharges with reasonable potential to cause or contribute to a violation of water quality standards contain numeric WQBELs where feasible reflects EPA's policy preference and is not a rule. The Memo itself merely recommends the use of numeric WQBELs

"where feasible," and leaves much discretion in the hands of the relevant permitting authority. ADEM's decision to continue to control construction stormwater discharges with WQBELs expressed as BMPs, coupled with a turbidity effluent limit of 50 NTUs above background, was within its discretion as permitting authority and does not constitute a basis for initiation of withdrawal proceedings.

Even though the water quality protection mechanisms of the Alabama CGP are adequate from a theoretical and legal sufficiency standpoint, the Petitioner raises concerns regarding ADEM's lack of resources and/or commitment to conduct enough inspections at construction sites and take appropriate enforcement actions against non-compliant construction sites. A lack of an adequate inspection and enforcement presence for construction sites would raise the potential for permittees to obtain coverage and fail to honor the permit terms, resulting in water quality impairments. The potential for failure is higher with respect to permittees who are not subject to discharge monitoring and reporting requirements that would enable ADEM to assess the impact of the discharges in the absence of an inspection. Thus, the adequacy of some of the control mechanisms in the ADEM construction general permit depends substantially on the existence of an adequate enforcement program. In this context, EPA notes that when EPA Region 4 enforcement staff have conducted inspections at construction sites in Alabama, non-compliance rates have been significant.

ADEM's inspection rates for construction sites have been consistent with goals set forth in EPA's NPDES Compliance Monitoring Strategy (2007). The Compliance Monitoring Strategy recommends that states inspect 10% of construction sites of five acres or greater in land disturbance each year, and 5% of construction sites of between one and five acres in land disturbance. ADEM has generally inspected 10% or more of all active construction sites in each year. EPA does not find that this level of inspection of construction sites constitutes a basis for concluding that ADEM is not adequately controlling pollution for stormwater point sources. Furthermore, in 2011, ADEM issued a revised general permit for small MS4s in Alabama which establishes clear requirements for MS4s to regulate and conduct regular inspections of construction sites discharging to the MS4, with heightened inspection requirements for sites discharging to impaired waters. ADEM's issuance of a new construction CGP and a new general permit for small MS4s reflect advances in ADEM's control of pollution from construction sites. These advances have continued with ADEM's recent publication of a draft MS4 permit for one of its large MS4s (Montgomery) on May 17, 2013. The Montgomery draft MS4 permit, like the ADEM general permit for small MS4s, has improved requirements for regulation and inspection by the MS4 of construction sites.

For these reasons, EPA finds that there is no basis for concluding that ADEM's permitting of construction sites discharging to impaired waters through a general permit is a basis for initiating withdrawal proceedings. Alabama's CGP does have mechanisms to address the threats to water quality posed by stormwater discharged from construction sites. Therefore, EPA has determined that this issue does not warrant withdrawal of the NPDES program for the State of Alabama.

As noted above, the mechanisms in ADEM's construction general permit for protecting water quality depend, for their success, on an active enforcement presence to ensure permit

compliance. EPA is concerned that reductions in ADEM's operating budget could interfere with its ability to maintain an adequate enforcement presence. Accordingly, EPA will continue, as part of its normal program oversight role, to review the performance of ADEM in conducting construction inspections and taking timely and appropriate enforcement action when construction site NPDES violations are discovered. EPA is deferring resolution of a number of issues raised by the Petition relating to ADEM's penalty assessments, and this will allow EPA to further assess the adequacy of penalty assessments in construction site enforcement cases. EPA has also deferred resolution of issues relating to the adequacy of ADEM's resources to implement the NPDES program, and EPA will monitor ADEM's NPDES program performance to determine if pending, significant budget cuts interfere with ADEM's ability to meet its NPDES program responsibilities. In addition, EPA will also monitor, as part of its regular oversight activity, any developments relating to questions that have persisted in Alabama about the legal authority of MS4s to control pollution from construction sites. Should ADEM fail to adequately monitor and enforce compliance with its CGP, or should Alabama law prevent MS4s from performing their assigned role in controlling discharges from construction sites, those deficiencies can be addressed directly through EPA's action on other grounds of the Petition that remain open or through EPA's regular oversight.

Wildlaw Issue 6: Whether ADEM's procedures for the public to administratively contest NPDES permits are equivalent to the federal program.

EPA Determination: ADEM's provisions for allowing the public to contest NPDES permits comply with applicable requirements for state NPDES programs, and do not constitute a basis to initiate withdrawal proceedings.

Discussion: The Wildlaw Petition asserts that the fact that Alabama's NPDES program does not include an automatic stay provision which stays the issuance of a permit pending a citizen appeal is a basis for withdrawing Alabama's NPDES program. Wildlaw argues that the Alabama appeal procedures must be equivalent to the federal program, which does include, at 40 C.F.R. §124.16, an automatic stay of contested permit conditions when an NPDES permit is challenged.

The federal regulation regarding stays of contested permit conditions at 40 C.F.R. 124.16 does not apply to state programs. A list of regulatory provisions that apply to state NPDES programs is contained at 40 C.F.R. §123.25. As is clear from this section, the appeal procedures of 40 C.F.R. §124.19, and the stay provision of §124.16, are not required elements of a state NPDES program. Instead, §123.30 prescribes the minimal requirements relating to judicial review of permit decisions for state programs:

> All states that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally issued NPDES permit (see 509 of the Clean Water Act). See also 61 FR 20980, May 8, 1996.

EPA does not agree that the lack of administrative stay authority would constitute grounds for withdrawal. 40 C.F.R. §123.30 does not mandate this level of equivalence to the federal process in defining what is an adequate opportunity for third parties to seek review of permits.

Wildlaw Issue 7: Whether the action of the Alabama legislature in reversing the upgrading of an Alabama water body from an "agricultural and industrial water supply" use classification to a "limited warmwater fishery and fish and wildlife" use classification justifies withdrawal of Alabama's NPDES program.

EPA Determination: The decision not to upgrade one waterbody's use classification is not a basis for program withdrawal.

Discussion: In the Second Supplement of the Wildlaw Petition, Wildlaw argues that it was not appropriate for the Alabama's Legislative Joint Committee on Administrative Regulation Review (Joint Committee) to disapprove the Environmental Management Commission's (Commission) adoption of ADEM's proposed upgrade of five stream segments from the use classification "Agricultural and Industrial Water Supply" to "Fish and Wildlife," in 2002. Wildlaw argues that the Joint Committee's disapproval of the upgrades was at the behest of Sloss Industries, a discharger into Five Mile Creek. According to Petitioner, Sloss Industries was responsible for repeatedly causing violations of the less stringent use classification and had argued that the usage upgrade would put them out of business. Wildlaw argues that this is another example of why the state program is not equivalent to the federal program because if EPA had adopted these stream upgrades, there is no legislative body that could veto this decision.

EPA notes that an issue relating to the use reclassification of a specific Alabama water does not constitute a basis for NPDES program withdrawal. A proposed use reclassification is an action under the State's water quality standards program, and not its NPDES program. See 40 C.F.R. §§ 131.10. The withdrawal criteria relate only to State NPDES Program Requirements in 40 C.F.R. Part 123, and do not extend to the Water Quality Program requirements in Part 131, which have their own provisions for oversight of state programs. Consequently, an issue relating to a specific use classification is not cognizable as a basis for a Petition to Withdraw an NPDES program. Procedures for public participation in state water quality standards decision-making are established at 40 C.F.R. § 131.20, and criteria applied by EPA in determining whether to approve state water quality standards submissions are set forth at 40 C.F.R. §§131.5 and 131.6. Notwithstanding the lack of a basis for program withdrawal, EPA provides the following information regarding the complained of use classification for Five Mile Creek.

The Joint Committee's action disapproved only one of five upgrades proposed by the Commission; the Joint Committee disapproved the Five Mile Creek change and proposed an amendment that would retain upgrades to the other four stream segments, and delete only the Five Mile Creek upgrade. On June 25, 2002, the Commission adopted the Committee's proposed amendment, and resubmitted Rule 335-6-11-.02, as amended, to the Legislative

Reference Service. The effective date of the rule under the Alabama Administrative Procedure Act was June 28, 2002.

With respect to the remaining Five Mile Creek segment that remained classified as Agricultural and Industrial Water Supply, that classification was disapproved by EPA and on October 23, 2002, EPA proposed a federal rule that would establish the designated use of that segment of Five Mile Creek as the "fish and wildlife" use in Alabama's water quality standards. Then, on February 25, 2003, the Alabama Environmental Management Commission adopted a revision to Chapter 335-6-11 (Water Use Classifications for Interstate and Intrastate Waters) changing the use classification of this segment of Five Mile Creek to the state's "fish and wildlife" use, and submitted the revision to EPA for review and approval by letter dated June 9, 2003. EPA notified ADEM of its approval of this revision by letter dated June 25, 2003. Thus, this issue in the Wildlaw Petition became moot at that time.

In connection with Petitioner's arguments concerning the use classification of Five Mile Creek, Petitioner also reported a lack of enforcement against Sloss Industries, which the Petition alleges has been violating its permit to discharge into that water body. Issues relating to the adequacy of ADEM's enforcement program are addressed above under other grounds of the Petition, and in any case EPA does not consider a state program's handling of a single enforcement matter to be an issue that should be addressed through program withdrawal proceedings.

In any event, the relevant segment of Five Mile Creek has been reclassified to a "fish and wildlife" use, and the earlier legislative action in preventing the upgraded use designation for Five Mile Creek does not constitute a basis for program withdrawal.

Lookout Mountain Heritage Alliance Petition

The Lookout Mountain Heritage Alliance Petition (LMHA Petition) consists of a letter submitted to EPA on January 23, 2010, primarily complaining about the environmental impact of particular facilities, but also requesting that EPA remove ADEM's NPDES permitting authority. Accordingly, EPA has recognized this letter as another withdrawal petition and has consolidated it with the ARA and Wildlaw Petitions for evaluation and response.

The LMHA Petition complains of a pattern of inadequate enforcement responses by ADEM to NPDES violations. The Petition raises particular concerns about discharges from certain Animal Feeding Operations (AFOs) located on Harrison Creek, a tributary of Little River, and ADEM's allegedly inadequate response. These allegations appear to relate to two poultry facilities doing business as Larry Gray Farms and Gray Farms. The LMHA Petition complains of pollution discharges that occurred during construction of the AFOs, and additional pollution from operation of the AFOs.

We have discussed the concerns raised in the LMHA Petition with ADEM. ADEM has acknowledged that stormwater compliance problems existed at the Gray Farms and Larry Gray Farms facilities during their construction in 2005 and 2006. ADEM conducted numerous storm-water inspections of the facilities during that period, and documented a number of violations

based on the failure to implement Best Management Practices (BMP) as required under the applicable permit, resulting in the discharge of sediment off-site. ADEM issued Notices of Violation to address the BMP violations and discharges. A series of follow-up inspections by ADEM in 2007 confirmed that the violations had been addressed and no deficiencies were observed. An additional routine inspection in 2010 also found no deficiencies.

ADEM also required the two (2) farms to obtain the National Pollutant Discharge Elimination System (NPDES) Combined Animal Feeding Operation (CAFO) permit coverage for discharges from the operations, and develop Nutrient Management Plans. However, both farms have less than 1,000 chickens, and therefore they do not meet the regulatory definition of large or medium CAFOs, nor have they been designated by ADEM as small CAFOs. Moreover, despite multiple inspections of these facilities by ADEM, no discharges of pollutants have been observed in connection with the poultry operation. Therefore, they are not subject to NPDES permitting requirements for CAFOs. ADEM approved termination of the Gray Farm's NPDES CAFO Registration on July 13, 2007, and approved termination of the Larry Gray Farm's NPDES CAFO Registration on December 1, 2006.

During the week of March 6-8, 2007, ADEM conducted a reconnaissance and sampling survey of the West Fork of the Little River, along with an unnamed tributary (referred to by locals as Harrison Creek) to the West Fork of the Little River, in DeKalb County, Alabama. This survey was conducted to determine whether water quality criteria were being met in Harrison Creek. Based on the data collected at the time of this survey, the West Fork of the Little River and Harrison Creek were both meeting applicable water quality standards.

Based on EPA's review of information related to the LMHA Petition, EPA has determined that the information in the LMHA Petition does not warrant the initiation of withdrawal proceedings. EPA does not consider a state program's handling of individual enforcement matters to be an issue that should be addressed through program withdrawal proceedings. To the extent the LMHA Petition also claims that ADEM's enforcement program is generally inadequate, that claim is adequately addressed above under various issues relating to the adequacy of ADEM's enforcement program.

CONCLUSION

For the reasons set forth above, EPA has determined that allegations in the Petitions do not warrant the initiation of withdrawal Petition, with the exception of the issues listed below, on which EPA is deferring decision. For the issues listed below, EPA will defer a decision to allow additional time for EPA to work with ADEM to address the issues and/or to allow additional time to monitor ADEM program implementation and progress with respect to these issues.

Deferred Issues:

1. General Adequacy of Penalty Assessments. This general issue is being deferred because weaknesses in ADEM's procedures for calculation and documentation of its penalty assessments make it difficult for EPA to evaluate whether penalties are

appropriate for the violations. Under this general category, there are also three sub-issues on which a determination is being deferred.

A. Failure to Seek Adequate Enforcement Penalties Due to Failure to Recover Economic Benefit (Ground N of ARA Petition).

B. Failure to Seek Adequate Enforcement Penalties Due to Failure to Adequately Consider Culpability (Ground O of ARA Petition).

C. Failure to Seek Adequate Enforcement Penalties Due to Over-emphasis on Consistency (Ground P of ARA Petition).

2. Insufficiency of Resources to Implement NPDES Program (Grounds X, Y and Z of ARA Petition).

EPA will confer with ADEM over these issues and work with ADEM to address EPA's and the Petitioners' concerns. EPA will monitor ADEM's NPDES Program implementation with respect to these issues and make a later determination as to whether NPDES Program Withdrawal Proceedings will be initiated to address these issues.

Heather McTeer Toney
Regional Administrator

Date Issued: 4/9/2014