

10/13/20

**Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
August 14, 2020**

This is to certify that the Minutes contained herein are a true and accurate account of actions taken by the Alabama Environmental Management Commission on August 14, 2020.

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

Samuel L. Miller, Chair
Alabama Environmental Management Commission

Certified this 9th day of October 2020.

Minutes
Environmental Management Commission Meeting
Alabama Department of Environmental Management Building
1400 Coliseum Boulevard
Montgomery, Alabama 36110-2400
August 14, 2020

Convened: 11:00 a.m.
Adjourned: 12:15 p.m.

Part A

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Part A

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
Meeting on 08/14/2020

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ALABAMA ENVIRONMENTAL MANAGEMENT
COMMISSION MEETING

August 14, 2020

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THE FOLLOWING COMMISSION MEETING was taken
stenographically by Shannon P. Yost, Certified
Court Reporter and Commissioner for the State of
Alabama at Large, at the Alabama Department of
Environmental Management Building, 1400 Coliseum
Boulevard, Montgomery, Alabama, on the 14th day of
August, 2020, commencing at 11:00 a.m., Central.

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ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
Meeting on 08/14/2020

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<p>1 APPEARANCES:</p> <p>2</p> <p>3 COMMISSION MEMBERS PRESENT:</p> <p>4 Samuel L. Miller, M.D., Chair</p> <p>5 Ruby L. Perry, D.V.M.</p> <p>6 Mary Merritt</p> <p>7 H. Lanier Brown, II, Esquire, Vice Chair</p> <p>8 John (Jay) H. Masingill, III</p> <p>9 Kevin McKinstry</p> <p>10 Thomas P. Walters, P.E.</p> <p>11</p> <p>12 ALSO PRESENT:</p> <p>13 Debi Thomas, AEMC Executive Assistant</p> <p>14 Robert Tambling, AEMC Legal Counsel</p> <p>15 Lance LeFleur, ADEM Director</p> <p>16 Stephen Cobb, ADEM Land Division Chief</p> <p>17 Shawn Sibley, ADEM General Counsel</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>1 DR. MILLER: All opposed, same</p> <p>2 sign.</p> <p>3 (No response.)</p> <p>4 DR. MILLER: All right. That</p> <p>5 motion is passed.</p> <p>6 Now, our next item is a report from</p> <p>7 the ADEM Director, Mr. LeFleur.</p> <p>8 MR. LEFLEUR: With your indulgence,</p> <p>9 I have removed my mask so I can be heard</p> <p>10 and don't fog up my glasses.</p> <p>11 DR. MILLER: Well, we won't call</p> <p>12 the capitol police.</p> <p>13 MR. LEFLEUR: Thank you.</p> <p>14 Good morning, Commissioners, and</p> <p>15 welcome to all those present for the</p> <p>16 fifth and final meeting of the Alabama</p> <p>17 Environmental Management Commission for</p> <p>18 fiscal year 2020.</p> <p>19 As you know, the Department is</p> <p>20 comprised of five divisions plus our</p> <p>21 Office of General Counsel. Past reports</p> <p>22 have repeatedly addressed the activities</p> <p>23 of our Air, Water, and Land divisions.</p> <p>24 Today's report will primarily focus on</p> <p>25 our Field Operations Division.</p>
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<p>1 DR. MILLER: Okay. I'm going to</p> <p>2 call the meeting of the Environmental</p> <p>3 Management Commission August 14th</p> <p>4 meeting to order. And our first item is</p> <p>5 to consider the meeting minutes from the</p> <p>6 meeting of June 12th, 2020. These have</p> <p>7 been circulated to the other Commission</p> <p>8 members.</p> <p>9 Do I have a motion regarding the</p> <p>10 minutes?</p> <p>11 MR. MASINGILL: Move to adopt the</p> <p>12 minutes of the June 12th, 2020</p> <p>13 Commission meeting as circulated.</p> <p>14 DR. MILLER: All right. Is there a</p> <p>15 second?</p> <p>16 MS. MERRITT: Second.</p> <p>17 DR. MILLER: All right. We have a</p> <p>18 motion and a second. Any discussion?</p> <p>19 (No response.)</p> <p>20 DR. MILLER: If not, I'm going to</p> <p>21 call for the question. All in favor of</p> <p>22 accepting the minutes, signify by</p> <p>23 raising your right hand.</p> <p>24 (All Commissioners raise their</p> <p>25 right hand.)</p>	<p>1 At a future Commission meeting, I</p> <p>2 plan to focus on the remaining division,</p> <p>3 which is our Permits and Services</p> <p>4 Division. Today, we will highlight the</p> <p>5 major functions of Field Operations and</p> <p>6 update you on some of the current issues</p> <p>7 involving that organization.</p> <p>8 Field Operations is the largest</p> <p>9 division in terms of the number of</p> <p>10 personnel. This reflects both the</p> <p>11 diversity and -- of its responsibilities</p> <p>12 and the extensive support it provides to</p> <p>13 other divisions. The Field Operations</p> <p>14 Division is responsible for oversight of</p> <p>15 our field offices where most of the</p> <p>16 inspections and sampling take place,</p> <p>17 emergency response to environmental</p> <p>18 events. Field Operations operates our</p> <p>19 laboratory facilities that analyze</p> <p>20 wastewater from NPDES facilities,</p> <p>21 drinking water, and fish tissue samples.</p> <p>22 The Division oversees ambient air and</p> <p>23 water quality testing and monitoring,</p> <p>24 and Field Operations also administers</p> <p>25 the ADEM Coastal Program, as well as the</p>

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<p>1 (All Commissioners raise their 2 right hand.) 3 DR. MILLER: All opposed, same 4 thing. 5 (No response.) 6 DR. MILLER: All right. We're 7 going to give this just a second to make 8 its way around. 9 All right. Our next is the 10 consideration of the Petition to Amend 11 Alabama Administrative Code 335-2-1-.12, 12 Subpoenas, EMC rulemaking petition 13 20-01. Petitioner is the Environmental 14 Defense Alliance. We will consider this 15 proposed petition today. I will remind 16 everyone that we either can vote yes or 17 no, but we cannot amend the petition. 18 I'd like to call on Mr. David 19 Ludder to come and give us his 20 presentation. Mr. Ludder. 21 MR. LUDDER: Thank you, 22 Mr. Chairman. With the Commissioners' 23 permission... 24 I was here two months ago -- well, 25 first, let me thank the Commission. I</p>	<p>1 subpoenas to call witnesses for the 2 hearing. The City of Dothan informed me 3 that some of the witnesses that I had 4 subpoenaed may not show up because I 5 didn't tender fees for travel or 6 attendance at the hearing. They were 7 under the impression that I was required 8 to tender those fees with the subpoena. 9 Indeed, the Commission's rules 10 essentially do require that. They do 11 require the person seeking a subpoena to 12 tender fees. However, the statute, 13 which supercedes your rules, says it's 14 the Commission's -- excuse me -- it's 15 the Department's responsibility to pay 16 fees for travel and attendance of 17 witnesses, not the person seeking the 18 subpoena. Case law in this state is 19 absolutely clear that if a rule is 20 inconsistent with the statute, the rule 21 is invalid. The rule is a nullity. And 22 the Hearing Officer agreed. I asked him 23 for clarification of what our 24 responsibility was with respect to fees. 25 I pointed out to him the statute, and he</p>
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<p>1 inquired of the Commission whether I 2 could participate in this meeting 3 remotely and the offer was made to me 4 that I could do that and I appreciate 5 that offer. 6 One of the reasons that I chose to 7 decline and to come is because two 8 months ago, I came here and I saw the 9 measures that were being taken for 10 social distancing and masking, and I was 11 impressed. Today, I'm not so impressed. 12 The people who delivered your water 13 glasses, two people were unmasked. They 14 were walking the hallways unmasked. And 15 given the Governor's order, I was 16 particularly surprised at that, but so 17 be it. That's for, I guess, the 18 Director to determine what he wants to 19 do. 20 This petition is the result of an 21 experience I recently had in the 22 prosecution of a challenge to the Dothan 23 landfill permit, which you heard and 24 decided several months ago. During that 25 proceeding, I requested and was granted</p>	<p>1 agreed it was the Department's 2 responsibility to pay those fees and 3 issued a ruling to that effect. So we 4 survived that -- that issue in that 5 case. 6 But your rule remains there, and 7 this petition seeks to amend the rule to 8 make it consistent with the statute. 9 We've tried painstakingly to make it say 10 only what the statute says. And I don't 11 think there's any question in my mind. 12 The rule is not valid as it stands, 13 needs to be amended to be consistent 14 with the statute. 15 As I pointed out in the petition, 16 this rule was adopted in 1994. At that 17 time, there was an effort by the 18 Department to shift responsibility for 19 costs of hearings to persons bringing -- 20 making the request for hearings. At 21 that time, the Department and the 22 Commission adopted the Department's 23 recommendation at that time to even 24 shift attorneys' fees to the losing 25 party, which almost always is the party</p>

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1 who requested the appeal. That proposal
2 was rejected or withdrawn by the
3 Department at that time in 1994, but the
4 proposal to shift the cost for witness
5 travel and attendance fees did pass --
6 pass the Commission and was adopted in
7 1994. And as I say, I think that is an
8 unlawful rule. It's a nullity. It
9 won't survive a legal challenge, didn't
10 survive the Hearing Officer's review,
11 and I would only ask that you would
12 grant the petition and start proceedings
13 to amend that rule to be consistent with
14 the statute.

15 If you have any questions, I'll be
16 happy to take them.

17 DR. MILLER: So by this, are you
18 asking that you have a west coast
19 consultant that charges X dollars per
20 hour that the Department would pay for
21 that?

22 MR. LUDDER: No. The witness fees
23 are almost trivial. Travel fees are --
24 I forget what their rates are for
25 travel.

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1 MR. BROWN: A nickel a mile.
2 MR. LUDDER: Pardon me?
3 MR. BROWN: A nickel a mile.
4 MR. LUDDER: Yeah, that sounds
5 right. A nickel per mile, which is, you
6 know, insignificant. The other fee, I
7 think it's a per-day fee for attendance.
8 I don't recall. Do you know what that
9 is? It's, again, something very
10 insignificant.

11 MR. BROWN: I think it's five
12 bucks, but I can't remember.

13 MR. LUDDER: Yeah. Yeah. It's a
14 small amount. Nevertheless, those fees
15 are supposed to be paid by the
16 Department. That's what the law says,
17 and you can't do less than what the law
18 says.

19 Any other questions?

20 DR. MILLER: So in other words,
21 you're not asking for a professional
22 fee. You're just asking for travel and
23 a \$5 per diem? Is that being denied at
24 this time?

25 MR. LUDDER: Not at this time, no,

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1 no. It was -- it was -- the City of
2 Dothan sought to have those costs
3 shifted to the Petitioners in that case.
4 There's going to be other cases.
5 There's going to be other situations
6 where subpoenas are requested. As I
7 say, it is an insignificant amount, but,
8 nevertheless, it's required to be paid
9 by the Department. You just can't -- I
10 mean, you really can't leave this rule
11 on the books. You can't enforce the
12 rule, so change it to what the law says.
13 Like I say, it's an insignificant
14 amount. The amount is set by law. As
15 the Commissioner said, I think it's five
16 cents per mile, which is really
17 insignificant. And the daily fee is
18 also insignificant, but it's there. And
19 in the case of the Dothan situation, we
20 had already issued and served the
21 subpoenas without tendering fees. Now,
22 if we had been required to tender fees,
23 we may have had to go back to the
24 Hearing Officer to get a new subpoena
25 and serve it with the fees or make some

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1 other arrangement.

2 DR. MILLER: Why wouldn't we just
3 submit the fee at the time you asked for
4 the subpoena?

5 MR. LUDDER: Well, you would under
6 the Department's -- under the
7 Department's current rule, that's what
8 you should do, but that rule is invalid,
9 so I didn't do it. I did it according
10 to the statute. I got the Hearing
11 Officer to issue a subpoena. We had the
12 subpoena served. That's all we had to
13 do under the statute. We didn't have to
14 do more. And the Hearing Officer
15 essentially said those witnesses have to
16 honor the subpoenas even without fees
17 because it's the Department's
18 responsibility to pay the fees.

19 Any other questions?

20 DR. MILLER: Any other questions?
21 (No response.)

22 MR. LUDDER: Thank you.

23 DR. MILLER: Thank you very much.
24 We'd like to call on the
25 Department's response, please.

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<p>1 MR. SIBLEY: Good morning, 2 Mr. Chair. My name is Shawn Sibley. 3 I'm General Counsel for the Agency. You 4 know, one thing that Mr. Ludder pointed 5 out and used as an example is the 6 Commission followed the law. Your 7 Hearing Officer followed the law in 8 granting the subpoenas irregardless of 9 the cost. And keep in mind that this 10 rule has been in place for 26 years. It 11 may not be consistent with the law, but 12 its application has been consistent. 13 So having said all that, you know, 14 y'all have followed the law even though 15 that there's inconsistency on the rule. 16 One thing -- you know, one thing 17 that I have concern about is this could 18 be applied, as worded, by the ADA to 19 expert witness fees, which, you know, 20 \$300 an hour. You know, Mr. Ludder says 21 that it's not, but there are other 22 parties that could interpret it that 23 way. And so, you know, the Commissioner 24 that's an attorney on the end here, he 25 aptly pointed out, you know, that it's</p>	<p>1 basis of Mr. Ludder's petition. 2 MR. SIBLEY: It is inconsistent. 3 It is inconsistent, but the application 4 of it by you guys and past Commissions 5 has been consistent with the law. 6 MR. BROWN: With the statute? 7 MR. SIBLEY: With the statute. 8 Your Hearing Officer followed the law. 9 MR. BROWN: So if it were -- and we 10 can't do this, but if, instead of for 11 attendance and travel, it said the cost 12 in Code of Alabama 12-19-131, it would 13 be appropriate? 14 MR. SIBLEY: Right. And consistent 15 with Alabama Rules of Civil Procedure 16 45, which is the hundred-mile radius 17 requirement. In other words, you don't 18 start paying until you're a hundred 19 miles out from where you have to appear. 20 So having said that, we don't like the 21 way it's worded right now, I mean, from 22 the Department's standpoint. 23 Any other questions? 24 DR. MILLER: Any other questions? 25 MR. BROWN: No. Thank you.</p>
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<p>1 nominal. It's a nickel a mile. It's a 2 \$1.50 per day on per diem. That's what 3 12-19-131 sets out. That's a code 4 section that applies to the courts. So 5 it's very nominal. The only concern we 6 have as an agency is having to pay those 7 exorbitant expert witness fees for other 8 parties. And, you know, the main flaw 9 that we see in the wording of their 10 petition to amend this rule is they 11 don't include mileage. You know, 12 Mr. Ludder struck out mileage. 13 I think whenever you talk about 14 travel costs and when the court does and 15 the Alabama Rules of Civil Procedure, 16 travel is always accompanied by mileage. 17 And so that's our concern. Just like, 18 Mr. Chair, as you pointed out, you can 19 only give it a thumbs up or a thumbs 20 down as a Commissioner. That's our only 21 concern about this rule as it's 22 proposed, is that it could open the 23 door. 24 MR. BROWN: It sounds to me that 25 you're essentially agreeing with the</p>	<p>1 DR. MILLER: All right. 2 Mr. Ludder, would you like to speak 3 again? 4 MR. LUDDER: I would. I would. 5 DR. MILLER: Sure. Come on up. 6 MR. LUDDER: It sounds like the 7 fundamental issue is the wording that 8 the Department does not like. But the 9 statute says what it says. Fees of 10 witnesses for attendance and travel 11 shall be the same as fees of witnesses 12 before the courts of record and shall be 13 paid from the funds of the Department. 14 It says nothing about mileage. It says 15 travel. 16 When I revised or suggested a 17 revision in the Department's rule, I 18 essentially mirrored this statutory 19 language. If you're going to tweak the 20 statutory language, you might make a 21 mistake. We're entitled to have a rule 22 that reflects what the statute requires. 23 The statute -- the statutory language is 24 on page 3 of the petition. You can read 25 that for yourselves. It says nothing</p>

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<p>1 about mileage. It says travel. We've 2 used the exact same words in the 3 proposed rule. So, again, I would 4 suggest that you not deviate from the 5 statutory language. It's pretty clear. 6 DR. MILLER: Mr. Sibley, do you 7 have any other -- 8 MR. SIBLEY: Yes, sir. I take 9 issue with Mr. Ludder. You, as a 10 Commission -- y'all have the authority 11 to implement and to promulgate rules to 12 implement this statute, and y'all have 13 done that earlier in that regulation as 14 to what you evaluate, as to whether or 15 not you grant subpoenas or not. It says 16 that you may grant subpoenas. You don't 17 have to. In other words, that's 18 discretionary, and it's up to y'all as a 19 Commission, through your Hearing 20 Officer, to do that. And so for 21 Mr. Ludder to say that you don't have 22 authority to refine that, I think 23 that -- I disagree with that. You do. 24 And, you know, the reason why we 25 have a concern is because there was</p>	<p>1 loser pay, but also what it did is it 2 made it consistent with the Rules of 3 Civil Procedure. It made it consistent 4 with the statute that applies with the 5 courts. And so that -- you know, so to 6 say that it's totally out of line -- 7 it's not out of line. It's consistent 8 with the Rules of Civil Procedure. The 9 statute applies to courts and costs. 10 Now, we admit that it doesn't follow the 11 letter of the law in the Alabama 12 Environmental Management Act, which, by 13 the way, was passed in 1982. The Rules 14 of Civil Procedure were later -- refined 15 later, and then the Alabama 16 Administrative Procedures Act was 17 adopted later. So you've got to 18 remember this wording precedes those 19 other laws. So to say that it was 20 purely as a result of loser pays in 1994 21 is not necessarily accurate. 22 DR. MILLER: So are you saying that 23 the '82 version was superceded by the 24 '94 version, so that is what that 25 expressed?</p>
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<p>1 another appeal that was pending that 2 y'all heard about the same time as the 3 Dothan landfill permit appeal. And 4 during that appeal, one of the attorneys 5 for that environmental organization made 6 the proposal that we pay expert witness 7 fees for their expert, and that's our 8 concern. You know, under the wording 9 right now -- now, Mr. Ludder may say, on 10 behalf of his client, that, no, that's 11 not what they mean. Well, I think there 12 may be another organization that may 13 feel different. So as far as we're 14 concerned, mileage is used consistently 15 in the Alabama Rules of Civil Procedure 16 along with travel in that code section, 17 12-19-131. And even though the APA, 18 which is the Alabama Administrative 19 Procedures Act -- even though it doesn't 20 apply, that part of the APA is carved 21 out for the Department and for the 22 Commission, but it is consistent, too. 23 So one of the things that 24 Mr. Ludder also mentioned that in 1994 25 when this rule was amended, it was a</p>	<p>1 MR. SIBLEY: Well, no. When you 2 look at the provision in the management 3 act, it says what it says, but it also 4 makes reference to what the courts do. 5 And as far as what the courts do, it's 6 changed over time. Okay? And so -- so 7 to answer your question, no, the 8 statute -- the management act says what 9 it says, but what it refers to has 10 changed over time. 11 DR. MILLER: Okay. Are there any 12 other questions for Mr. Ludder? 13 MR. WALTERS: I've got a question 14 for Mr. Ludder. I guess this mention 15 that this issue was instigated by 16 Dothan -- has this happened before? I 17 mean, I'm sure this is not the first 18 time that you've had hearings and 19 subpoenas. I mean, I've only been on 20 the Commission a short period of time, 21 but I'm certainly getting the impression 22 that you've been active in -- 23 MR. LUDDER: I'm trying to 24 recall -- 25 MR. WALTERS: Just curious.</p>

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<p>1 MR. LUDDER: Yeah. I've had a 2 number of appeals, and I believe, in at 3 least one other appeal I've secured 4 subpoenas for witnesses, I don't recall 5 this coming up. I believe in that case, 6 if my memory's right, I believe I 7 actually did tender fees with the 8 subpoenas, you know, essentially not 9 knowing or not reviewing the statute at 10 that time. I just went by the rule. 11 The issue is it's going to come up 12 again. I guarantee it. I'm going to be 13 filing more appeals on behalf of my 14 clients, and I'm sure that we're going 15 to be subpoenaing witnesses. There's no 16 point in going through this exercise. 17 Really, the essential difference -- I 18 mean, the statutory language refers to 19 the fees that are required by the 20 courts. So anyone who applies this 21 language is going to have to look to 22 what the courts do, you know, as far as 23 how much they're entitled to and what 24 they're entitled to. They're going to 25 have to look at those court</p>	<p>1 witness can be required to pay -- a 2 person can be required -- the courts can 3 require an expert witness to pay -- can 4 require a party to pay for an expert 5 witness' time in some cases for 6 depositions, certainly. This is 7 testimony. This is like trial 8 testimony. And if there's a 9 clarification that they want to make to 10 exclude expert witnesses, that's fine. 11 That's not our intention. The intention 12 here is to shift who pays. That's all. 13 That's all our intention is, shift who 14 pays. 15 In the case of Dothan, there were 16 experts that were subpoenaed. There was 17 no intention to make them recover expert 18 witness fees. I'm sure they didn't 19 invoice the Department for expert 20 witness fees. The only -- only 21 discussion at the time was how much does 22 it cost. How far do you have to travel, 23 and how much do you pay per day? Those 24 are nominal amounts. As I said, the 25 only real issue is who pays, not so</p>
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<p>1 requirements. The issue, really, here 2 is who's going to pay the fee. The 3 statute says the Department has to pay 4 it. The rule says the person seeking 5 the subpoena has to pay it, and that's 6 what the Hearing Officer said. The 7 Hearing Officer said, no, it's not the 8 person asking for the subpoena; it's the 9 Department. The Hearing Officer said 10 witnesses are going to have to comply 11 with the subpoenas, and if the witnesses 12 want, they can come back to the 13 Department later and essentially invoice 14 the Department for the fees. That's 15 really the issue. Who pays? I don't 16 think it's an issue of what's required. 17 I mean, this issue about paying experts, 18 I think, is a red herring because the 19 statute says you look to the court 20 requirements, and the court requirements 21 don't require payment of expert witness 22 fees in terms of travel and attendance. 23 I should say that perhaps -- perhaps I'm 24 misspeaking on that. I think there is 25 some -- in some situations, an expert</p>	<p>1 much -- I don't think we have a 2 disagreement about what it's to be paid 3 for, just simple mileage and simple 4 attendance fee. 5 DR. MILLER: Lanier, could I get 6 your comments on what you're thinking? 7 MR. BROWN: I get paid a lot for my 8 thoughts. I mean, it's obviously 9 inconsistent, the rule versus the 10 statute, and the statute would prevail. 11 And as I understand it, we have -- the 12 Department has followed the statute 13 except in this one instance in the 14 Dothan matter; is that correct? 15 MR. SIBLEY: Well, Your Honor -- 16 Commissioner, you, as a Commissioner -- 17 your Hearing Officer followed the law 18 when they issued the subpoenas. So, you 19 know, again, y'all have applied it 20 consistently, so they followed the law, 21 or the Hearing Officer did. So if that 22 answers your question... 23 DR. MILLER: The question I have is 24 if we amend this, what's to prevent 25 someone from California or New York or</p>

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<p>1 whatever submitting and demanding 2 payment for his expert witness fees? 3 That's very concerning to me. 4 MR. BROWN: Or first class airfare. 5 MR. SIBLEY: I'm sorry. 6 MR. BROWN: Or his first class 7 airfare. 8 MR. SIBLEY: Right. And I think 9 Mr. Ludder acknowledged that y'all could 10 probably change the rule and say no 11 expert witness fees. That would be in 12 your prerogative to do that. 13 That's just the concern that the 14 Department has. It's not so much the 15 Department is worried about paying 16 nominal witness fees, a nickel a mile, 17 \$1.50 per diem. It's the \$300 per hour. 18 That's the issue that we have. And, 19 again, that came up in another case, not 20 really related to subpoenas, but it came 21 up. And counsel for that one party was 22 like, you know, how do we invoice the 23 Department \$300 an hour for an expert 24 witness? That's our concern. 25 DR. MILLER: Any other questions or</p>	<p>1 MR. MASINGILL: Second. 2 DR. MILLER: A motion and a second. 3 Any further discussion before -- 4 MR. BROWN: Yes. Which is the 5 quicker way, assuming this is going to 6 be adopted to -- I mean, revised that 7 Mr. Ludder's proposal is going to be 8 altered to address the Department's 9 concern? Would it be quicker to deny 10 this and let Mr. Ludder refile another 11 one or to go to rulemaking? You can 12 answer. Somebody. Both of you. 13 MR. TAMBLING: Commissioner Brown, 14 I think the only option you have is to 15 approve or deny this rule. If you 16 choose to deny it, I think you can 17 encourage the Department and Mr. Ludder 18 to get together and come up with 19 something different. 20 MR. WALTERS: That's consistent 21 with my thinking. I just didn't know if 22 I could promote that. 23 MR. TAMBLING: Does that answer 24 your question? 25 MR. BROWN: Sort of. I was asking,</p>
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<p>1 comments? 2 (No response.) 3 DR. MILLER: Okay. Well, we have a 4 choice, a very clear choice. We can 5 either initiate rulemaking proceedings, 6 or we can deny the petition and state 7 why we're denying it. 8 Is there any other questions or 9 comments before we decide this question? 10 (No response.) 11 DR. MILLER: Well, I will entertain 12 a motion from the Commission to either 13 refer to rulemaking or deny the 14 petition. 15 Do I have a motion? Don't 16 everybody speak at once. 17 MR. WALTERS: I motion that we deny 18 the petition. Do I need to explain why? 19 DR. MILLER: You can if you'd like. 20 MR. WALTERS: Well, I think the 21 wording of the petition is what causes 22 me concern, and, therefore, I motion 23 that we deny the petition. 24 DR. MILLER: Okay. Do we have a 25 second to that motion?</p>	<p>1 you know, there's -- if we deny it and 2 then it was represented and brought 3 straight to the Commission, would we be 4 able to act quicker than if we sent it 5 through the rulemaking committee? 6 MR. TAMBLING: I'll let you go 7 ahead. 8 MR. LUDDER: If you were to grant 9 this petition, what you do is you 10 propose a rule. 11 MR. BROWN: Right. 12 MR. LUDDER: You don't adopt a 13 rule. You merely propose it. In that 14 proposal process, you can take suggested 15 revisions. The Department can comment 16 we suggest a different wording. Then 17 when it comes time, you adopt a rule, 18 either the rule as proposed or as 19 revised. 20 So you can grant the petition, go 21 to hearing on this proposed rule, take 22 comments to revise it, and then adopt 23 the revision. That would be the most 24 expedient way to get there. 25 DR. MILLER: Thank you. Well, we</p>

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<p>1 have a motion and a second. 2 MR. SIBLEY: I would like to 3 respond to that if I could. 4 DR. MILLER: Oh, sure. 5 MR. SIBLEY: If that's all right. 6 You know, one thing that Mr. Ludder 7 didn't mention is that it's 8 substantially changed from the way he 9 worded it -- now, which I don't expect 10 it to be but it could be -- then it 11 changes the complexion of it, and then 12 you would need to start over anyway. 13 So I would offer up that probably 14 the best thing to do is to -- you know, 15 if you deny it here and just ask the 16 Department to come up with another 17 proposal, it would go out on public 18 notice, and Mr. Ludder, as well as the 19 public, will have input into what it is. 20 And then, you know, if y'all want us to 21 get up with Mr. Ludder, we'll have it in 22 play and it will be just like we want 23 it. So I would offer up that if you 24 deny it today, you could ask the 25 Department to submit a petition for</p>	<p>1 only question we have is an up or down 2 vote. We can suggest that the 3 Department, you know, initiate some 4 talks with various parties and see if 5 they can come up with something. If so, 6 we will certainly look at that. But 7 today, our only objective is to either 8 vote, yes, please send it to rulemaking 9 or, no, deny the petition. 10 We have a motion to deny the 11 petition and a second. Are there any 12 further discussions or any further 13 motions? 14 MS. PERRY: I do have a question. 15 When it goes to rulemaking, what does 16 that mean? As far as when it goes to 17 rulemaking, that extends the process, 18 the length of time? What does it mean 19 when you say that? 20 DR. MILLER: Well, we have a 21 personnel committee, and we have a 22 rulemaking committee. So they would 23 submit it to the rulemaking committee 24 who would have hearings, have public 25 comment. And then if they decided that</p>
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<p>1 rulemaking. I think it -- you know, 2 depending on what it says, it would 3 probably be quicker to do that. 4 That's -- that's my opinion. 5 MR. TAMBLING: I think both parties 6 are correct. I think it has to be 7 whatever -- whatever you come up with 8 after -- if you were to allow this rule 9 to go through rulemaking, whatever your 10 final rule is has to be a logical 11 outgrowth of your original rule. If 12 it's substantially different, 13 Mr. Sibley's right, you have to start 14 over. So it's really up to you. 15 MR. BROWN: Yeah. I just wanted 16 days. You know, I'm just thinking about 17 time, not procedural or substance. But 18 the rule should be consistent with the 19 statute. 20 MR. WALTERS: I do like the idea of 21 what Chuck said about -- I like the idea 22 of the Department taking the lead and 23 eliminating these inconsistencies. 24 DR. MILLER: Well, unfortunately -- 25 or fortunately or unfortunately, the</p>	<p>1 a rule needed to be made, they would 2 make it, and then there's a whole list 3 of steps after that before it could 4 actually become a rule. That's sort of 5 a simplified version. Is that -- am I 6 correct in saying that? It's not just, 7 you know -- 8 MS. PERRY: Huh? 9 DR. MILLER: It's not a simple 10 concept. That's for sure. But it's not 11 unworkable either. 12 All right. Well, I'm going to call 13 for the question. All in favor of the 14 motion to deny the petition, please 15 signify by raising your right hand. 16 (All Commissioners raise their 17 right hand except Commissioner 18 Merritt and Commissioner Brown.) 19 DR. MILLER: All oppose, same 20 thing. 21 (Commissioner Merritt and 22 Commissioner Brown raise their 23 right hand.) 24 DR. MILLER: Okay. And, again, we 25 invite you-all to get together and try</p>

ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
Meeting on 08/14/2020

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<p>1 to come up with a facilitory likeness. 2 MR. BROWN: I think when I first 3 started speaking, I solved the problem. 4 So hopefully y'all can -- everybody can 5 be happy. 6 DR. MILLER: All right. Is there 7 any other business that needs to come 8 before the Commission? 9 MS. THOMAS: Chair Miller, I need 10 to get y'all to sign the order for that 11 petition. 12 DR. MILLER: Yes. We'll wait and 13 get that done. 14 MS. THOMAS: This will need a new 15 front page, and that's the signature 16 page. 17 DR. MILLER: All right. Our next 18 meeting is scheduled for October 9th, 19 2020. 20 Is there anyone that has a conflict 21 with that date that you know of at this 22 point? 23 MR. BROWN: Negative. 24 DR. MILLER: Okay. We have been -- 25 we're expecting everyone to be here on</p>	<p>1 REPORTER'S CERTIFICATE 2 3 STATE OF ALABAMA, 4 ELMORE COUNTY, 5 6 I, Shannon P. Yost, Certified Shorthand 7 Reporter and Commissioner for the State of 8 Alabama at Large, do certify that I reported 9 the Alabama Department of Environmental 10 Management Commission Meeting held on August 14, 11 2020. 12 The foregoing computer-printed pages 13 contains a true and correct transcript of 14 said meeting. The reading and signing of same 15 is hereby waived. 16 17 I further certify that I am neither of 18 kin nor of counsel to the parties to said 19 cause, nor in any manner interested in the 20 results thereof. 21 22 This 1st day of September, 2020. 23 24 25</p>
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<p>1 October the 9th. We have no one 2 registered for the public comment 3 period. So in that case, I will 4 entertain a motion to adjourn. 5 MR. BROWN: So moved. 6 DR. MILLER: Seconded? 7 MR. WALTERS: Second. 8 DR. MILLER: All in favor say aye. 9 (All Commissioners raise their 10 right hand.) 11 DR. MILLER: We're adjourned. 12 Thank you. 13 (At which time, the commission 14 meeting concluded at approximately 15 12:15 p.m., Central.) 16 17 18 19 20 21 22 23 24 25</p>	<p>1  2 Shannon P. Yost, 3 Certified Shorthand Reporter 4 and Commissioner for the 5 State of Alabama at Large 6 My Commission Expires 6/9/2021 7 ACCR #158 - Expires 9/30/2021 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

Attachment 5

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

In the matter of:)	
)	
Petition to Amend Ala. (ADEM))	EMC Rulemaking Petition 20-01
Administrative Code Rule 335-2-1-.12, Subpoenas)	
Petitioner – Environmental Defense Alliance)	

MOTION

Deny the petition

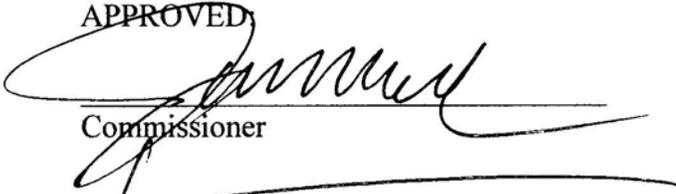
ORDER

This cause coming before the Commission pursuant to the above-referenced petition for rulemaking and arguments supporting the petition, and the position of the Alabama Department of Environmental Management having been considered, it is hereby ORDERED:

1. That the above motion is hereby adopted; and
2. That the petition for rulemaking will adversely impact the overall regularly scheme of the Department and fail to promote the underlying public policies of the statutes and rules which the Department administers [see ADEM Admin. Code Rule 335-2-2-.05(g)]; and
3. That pursuant to the adoption of the above motion and based upon the above reason and on consideration of the views of the Director of the Department [see ADEM Admin. Code Rule 335-2-2-.05(a)], the petition for rulemaking is hereby denied; and
4. That this action has been taken and this order issued by the Alabama Environmental Management Commission effective August 14, 2020; and
5. That a copy of this order shall be served upon the parties either personally or by certified mail, return receipt requested.

ISSUED this 14th day of August 2020.

APPROVED:


Commissioner

Commissioner

Commissioner

Commissioner


Commissioner

Commissioner

Commissioner

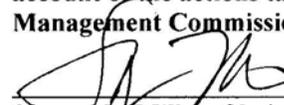
DISAPPROVED:

Commissioner

Commissioner

Commissioner

This is to certify that this Order is a true and accurate
account of the actions taken by the Environmental
Management Commission on this 14th day of August 2020.


Samuel L. Miller, Chair
Environmental Management Commission
Certified this 14th day of August 2020