

preservation, protection, and defense of the environment, specifically the Black Warrior and its tributaries and watershed. Riverkeeper was formed in 2002, and has approximately 1,600 members. Riverkeeper actively monitors and supports effective enforcement and implementation of environmental laws, including the Federal Water Pollution Control Act ("Clean Water Act") and the Alabama Water Pollution Control Act, on behalf of, and for the benefit of, its members. Members of Riverkeeper have recreated in, on, or near and have otherwise used and enjoyed the Mulberry Fork of the Black Warrior River. Riverkeeper and its members have an interest in seeing the requirements and procedures of state and federal law upheld and followed so that the organization and its members can enjoy and exercise their informational and procedural rights, including the right to educate themselves and the public about environmental concerns and policy issues affecting the Black Warrior River, as well as their right to have environmental decisions carried out in accordance with the evaluative and notice requirements of applicable law and regulation.

2. Defendant ADEM is an agency of the State of Alabama whose responsibility is to adopt and enforce rules and regulations to protect and improve the quality of Alabama's environment and the health of all its citizens.

3. Defendant Trey Glenn is the Director of ADEM and is sued in his official capacity.

4. Defendant Shepherd Bend is an Alabama corporation formed in October of 2007 for the purpose of owning and operating mines in the State of Alabama. Defendant Shepherd Bend has proposed the construction of a 1,773-acre coal mine along the banks of the Mulberry Fork of the Black Warrior River in Walker County, Alabama ("the site"). As more fully set forth below, Defendant Shepherd Bend has received an unlawfully granted permit to cover discharges from

its mining operations from Defendant ADEM. In connection with its efforts to obtain the permit, Defendant Shepherd Bend submitted false and incomplete information to ADEM.

STATEMENT OF THE FACTS

A. Facts Related to ADEM's Failure to Provide Adequate Public Notice and Access to Public Documents

5. On October 10, 2007, Shepherd Bend applied for a National Pollutant Discharge Elimination System ("NPDES") permit from ADEM to authorize the discharge of water from its mining operations into the Mulberry Fork of the Black Warrior River and certain tributaries. Shepherd Bend plans to release discharges from its mining operations within 800 feet of the Mulberry Raw Water Pump Station, a drinking water intake valve maintained by the Birmingham Water Works Board. The Mulberry Raw Water Pump Station is one of the largest sources of drinking water for the Birmingham water system.

6. Alabama and federal law require that the process for issuance of a permit be an open and public process with rights for citizen participation. *See, e.g.*, Ala. Code § 41-22-4 (2008); Ala. Admin Code r. 335-6-6-.21 (2008); 33 U.S.C. § 1342 (2008), 40 C.F.R. § 123.25 (2006).

7. In November of 2007, ADEM released a draft permit (NPDES Permit No. AL0079162) which proposed the authorization of Shepherd Bend's discharges at the site. Pursuant to the requirements of Alabama and federal law, ADEM provided a thirty day period in which the public could comment on the draft permit. *See* Ala. Admin. Code r. 335-6-6-.21(2) (2008).

8. In December of 2007, ADEM published its "Guide for Citizen Participation: How to Make Your Voice Heard on Community Environmental Issues." *See* Alabama Department of Environmental Management, Guide for Citizen Participation 27, 32 (2007), available at <http://www.adem.state.al.us/Publications/CitizensGuideFirstPrinting12-07.pdf> (last visited Dec. 18, 2008), attached hereto as Exhibit 1. In this guidance, ADEM explained the public

participation process that the agency follows. According to ADEM, the issuance of environmental permits for new facilities is a process that “require[s] public input.” *Id.* at 21. ADEM further explained that “[t]he decision to issue or deny a permit will be sent to the applicant, **and any persons who submitted public comments** or otherwise requested that they be notified of the decision.” *Id.* at 27 (emphasis added). Similarly, ADEM explained that “any person who submitted public comments [will be] notified when the permitting decision is issued “ through the issuance of a formal “Notice of Decision” to commenters that “describes whether and why the permit or other approval was issued or denied.” *Id.* at 32.

9. Riverkeeper relied on the procedures outlined in the Guide for Citizen Participation, and on past practices of ADEM that were consistent with those outlined in the Guide for Citizen Participation, during its participation in the permitting process for Shepherd Bend mine.

10. On December 13, 2007, Riverkeeper submitted comments on the draft permit and formally requested a public hearing and a response to comments. Riverkeeper’s comments raised concerns regarding the proximity of the mining operation to the drinking water intake valve and additional deficiencies in the draft permit regarding expected water quality impacts.

11. On December 14, 2007, the Birmingham Water Works Board submitted comments on the draft permit and formally requested a public hearing. *See* Letter of December 14, 2007 from Mac Underwood, Birmingham Water Works Board, to Steve Jenkins, Alabama Department of Environmental Management, attached hereto as Exhibit 2. The Birmingham Water Works Board also raised concerns regarding the proximity of the mining operation to its drinking water intake valve and additional deficiencies in the draft permit regarding expected water quality impacts. Furthermore, the letter notes that the permit’s limits on iron and manganese are not protective of drinking water uses and could result in additional operational and maintenance costs at its water

treatment facility. In its tenth comment on the permit, the Birmingham Water Works Board complained that the permit application was incomplete because the permit was missing important documents, including a Pollution Abatement/Prevention Plan ("PAP plan"), an integral and essential part of the permit. *See* Ala. Admin. Code rr. 335-6-9.03, 335-6-9-.05 (2008).

12. In February of 2008, ADEM representative Scott Hughes told a reporter with *The Birmingham News* that ADEM was evaluating Riverkeeper's request for a public hearing. *See* Kent Faulk, *ADEM Mine water decision awaited; City system opposes proposed discharge into Mulberry Fork*, THE BIRMINGHAM NEWS (Feb. 24, 2008), attached hereto as Exhibit 3.

13. On June 3, 2008, in response to a direct inquiry by Riverkeeper staff, Brian Marshall of ADEM told Riverkeeper that Shepherd Bend had withdrawn its permit application, and would be working with ADEM to apply for a new permit.

14. On June 4, 2008, Riverkeeper staff met with Brian Marshall of ADEM. Marshall told Riverkeeper that ADEM was reorganizing many divisions, including the mining and permit division affecting the Shepherd Bend permit. Marshall also informed Riverkeeper that, contrary to ADEM's representations just one day previously on June 3, 2008, ADEM was still considering the original permit application submitted by Shepherd Bend. Marshall further explained that due to the sensitive nature of the case, its complexity, its political sensitivity, and the reorganization process, ADEM had not made a decision whether to grant, deny, or request modifications in the proposed permit. Finally, Marshall explained that ADEM had not made a decision regarding Riverkeeper's and the Birmingham Water Works Board's requests for a hearing, but that he felt a hearing would be granted in this case.

15. On July 21, 2008, ADEM issued a final permit to Shepherd Bend. The final permit became effective on August 1, 2008. In connection with its issuance of the final permit, ADEM

circumvented and avoided the requirements of Alabama and federal law and ADEM's published policies so as to deprive the public, including Riverkeeper, of its legal rights.

16. In direct contravention of the requirements of Alabama and federal law and ADEM policies explained in its Guide for Citizen Participation, ADEM did not send a Notice of Decision to Riverkeeper or the Birmingham Water Works Board, parties who had commented on the permit. ADEM did not otherwise notify Riverkeeper or the Birmingham Water Works Board of its final decision to issue the permit.

17. Likewise, because of ADEM's failure to send Riverkeeper a Notice of Decision as required by Alabama and federal law and in accordance with the policies outlined in its Guide for Citizen Participation, Riverkeeper did not receive any response to its comments.

18. ADEM similarly did not provide Riverkeeper with any response to its request for a hearing on the draft permit.

19. On November 24, 2008, Riverkeeper and the Birmingham Water Works Board learned of ADEM's issuance of the final permit for Shepherd Bend. Riverkeeper learned this when a reporter from *The Birmingham News* informed them that he had heard from a reliable source at ADEM that the permit had been issued several months earlier.

20. Riverkeeper staff contacted Brian Marshall at ADEM to confirm that the permit had been issued. Marshall informed Riverkeeper that it had, and Riverkeeper requested a copy of the permit. Marshall provided Riverkeeper staff with a copy of the final permit via email on November 25, 2008.

21. On December 3, 2008, having learned of issuance of the final permit, Riverkeeper staff contacted ADEM and asked to review ADEM's file for the Shepherd Bend site pursuant to Alabama's open records laws. Riverkeeper asked to see "the actual paper file for this facility,

including all records of correspondence related to this permit.” *See* Email of December 3, 2008 from John Kinney, Riverkeeper to Azure Jones, ADEM, attached hereto as Exhibit 4.

22. On December 5, 2008, Riverkeeper staff conducted the file review. At this file review, ADEM provided Riverkeeper with a CD that ADEM claimed contained all of its files for the site. The CD contained only sixteen electronic documents. The last document included on the CD was dated March 21, 2008, four months before the final permit was issued by ADEM.

23. During the file review, Brian Marshall from ADEM explained to Riverkeeper staff that ADEM is now attempting to keep all “public” files only electronically, and that ADEM managers choose selected documents from their paper files for any given site to be placed in the electronic file. Brian Marshall explained to Riverkeeper staff that he had additional paper files for the Shepherd Bend site in his office, but that he was waiting for direction from superiors as to what should go in the electronic “public” file. In other words, the “public” file placed on the CD contained only specifically selected documents.

24. On December 9, 2008, undersigned counsel for Riverkeeper emailed Brian Marshall to confirm that Riverkeeper had been provided “all materials that ADEM had in its files for the Shepherd Bend mine project.” *See* Email from Gil Rogers, Southern Environmental Law Center, to Brian Marshall, ADEM, Dec. 9, 2008, attached hereto as Exhibit 5.

25. On December 11, 2008, Brian Marshall at ADEM responded that he had “provide[d] all documentation that I am aware of regarding the above-referenced permit.” *See* Email from Brian Marshall, ADEM to Gil Rogers, Southern Environmental Law Center, Dec. 11, 2008, attached hereto as Exhibit 6.

26. Marshall also explained that there had been no change in policy at ADEM regarding providing notice to those who had submitted comments on a draft permit. With respect to

issuance of the final permit to Shepherd Bend, however, ADEM had acted in contravention of the requirements of Alabama and federal law and ADEM's policy explained in the Guide for Citizen Participation.

27. In an article published in *The Birmingham News* on Sunday, December 14, 2008, ADEM representative Jerome Hand explained that, in direct contravention of ADEM policy announced in the Guide for Citizen Participation, ADEM had not sent out Notices of Decision or the agency's response to comments on the draft permit to Alabama citizens, like Riverkeeper, who had submitted comments on the draft permit. Hand also explained that ADEM had decided against holding a public hearing on the draft permit because the agency selected a course of action that was "best for the state." See Kent Faulk, *Birmingham Water Works, environmental group surprised permit issued to mine*, THE BIRMINGHAM NEWS, December 14, 2008, available at <http://www.al.com/news/birminghamnews/statebriefs.ssf?/base/news/1229246213102190.xml&coll=2> (last visited December 17, 2008), attached hereto as Exhibit 7.

B. Facts Related to Substantive Flaws in the Permit

1. PAP Plan

28. According to ADEM regulations, surface mine operators "shall provide the Department with a pollution abatement and/or prevention plan" Ala. Admin. Code § 335-6-9-.03 (2008). Moreover, permits "shall be based on a determination by the Department that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality." Ala. Admin. Code § 335-6-9-.05 (2008). The PAP plan is therefore the document that allows ADEM to make a judgment as to how pollution will specifically be controlled off of a site, and how water quality in the receiving waterways will be maintained.

29. In its permit application, Shepherd Bend disclosed that it was not submitting a PAP plan with its application. Shepherd Bend further disclosed that no detailed mining and engineering design plans had been submitted to the Alabama Surface Mining Commission, an agency which regulates mining activities in Alabama, but that a permit application, “with detailed plans for each proposed outfall will be submitted to A[labama] S[urface] M[in]ing C[ommission] for their approval December 2007.” See Shepherd Bend Permit application of October 10, 2007, attached hereto as Exhibit 8.

30. In its permit application, Shepherd Bend provided a Professional Engineer’s Certification regarding the status of its PAP plan. In this certification, professional engineer David Muncher certified that “a comprehensive PAP plan . . . has been prepared under my supervision for this facility utilizing effective, good engineering and pollution control practices and in accordance with the provisions of ADEM Admin. Code Division 335-6.” *Id.* at 11.

31. Alabama regulations provide that one grounds for termination of a permit is “the permittee’s failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee’s misrepresentation of any relevant facts” Ala. Admin. Code § 335-6-6-.17(c)(1)(ii) (2008).

32. The draft permit issued by ADEM did not include a PAP plan.

33. The final permit issued by ADEM does not include a PAP plan.

34. There is no PAP plan in the file produced by ADEM. In fact, ADEM has represented that it never received or reviewed a PAP plan for the Shepherd Bend site.

35. The Alabama Surface Mining Commission has not received a permit application or a PAP plan from Shepherd Bend, despite Shepherd Bend’s representations to ADEM that it would be submitting a permit application with a PAP plan to the Alabama Surface Mining Commission

in December of 2007. The Alabama Surface Mining Commission has represented that it has not received, reviewed, or approved any PAP plan for the Shepherd Bend site. *See* Letter of December 16, 2008 from Randall Johnson, Alabama Surface Mining Commission to Catherine Wannamaker, Southern Environmental Law Center, attached hereto as Exhibit 9.

36. In its response to comments appended to the final permit, ADEM did not respond to the Birmingham Water Works Board's tenth comment -- that the permit was incomplete because there was no PAP plan.

37. In response to a different comment, however, ADEM explained that the PAP plan for this facility had "been prepared by a professional engineer (PE) registered in the State of Alabama and is designed to ensure reduction of pollutants in the waste stream to a level that, if operated properly, the treated discharge will not contribute to or cause a violation of applicable State water quality standards. . ." *See* ADEM Response to Comments at 10, attached hereto as Exhibit 10.

38. Based on ADEM's representations and its public files, ADEM had never seen a copy of the PAP plan and, to date, has no copy of the PAP plan in its files.

2. Violation of Water Quality Standards

39. Pursuant to federal NPDES regulations, "[n]o permit may be issued...[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i) (2008). As a further matter, federal regulations require that every NPDES permit include conditions in order to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d) (2008).

40. While the permit otherwise established daily average and daily maximum discharge limitations on iron, manganese, and total suspended solids (“TSS”), ADEM included in the final permit exemptions from these limitations during all precipitation events. Permit at 5-8.
41. For iron, the Permit completely exempts compliance with the daily average discharge limitation during any precipitation event equal to or less than a “2-year, 24-hour precipitation event.” Id. at 6. Furthermore, the Permit increases the daily maximum discharge limitation for iron to 7.0 mg/L, from 6.0 mg/L, during any precipitation event equal to or less than a “2-year, 24-hour precipitation event.” Id. For any precipitation event greater than a “2-year, 24-hour precipitation event,” the Permit completely exempts all discharges of iron from any discharge limitation. Id. at 6-8.
42. For manganese and TSS, the Permit exempts compliance with all discharge limitations during all precipitation events. Id. at 5-8.
43. The Permit does not include any limits on several other pollutants associated with mining activity, such as Total Dissolved Solids (“TDS”), sulfates, chlorides, or aluminum.
44. As explained below, these exemptions cause or contribute to violations of Alabama water quality standards on the Mulberry Fork of the Black Warrior River, which is designated for public water supply and fish and wildlife uses.

CLAIMS FOR RELIEF

Count One (As to Defendants ADEM and Glenn – Violations of Alabama’s Open Records Act, Ala. Code §§ 36-12-2, 36-12-40, 36-12-41)

45. Riverkeeper incorporates by reference the allegations of paragraphs 1-44 as if restated here in full.

46. The purpose of Alabama's open records act is to allow private citizens to monitor the manner in which public officers discharge their public duties. *See Stone v. Consolidated Publ'g Co.*, 404 So. 2d 678, 681 (Ala. 1981); *Munger v. State Bd. for Registration of Architects*, 607 So. 2d 280, 284 (Ala. Civ. App. 1992); *Water Works & Sewer Bd. of Talladega v. Consolidated Publ'g, Inc.*, 892 So. 2d 859, 862 (Ala. 2004). "That right is the same whether the requestor is a single individual or a group of private citizens. Additionally, the public's right to access public documents does not depend upon whether the requestor intends to support or challenge the manner in which a public duty has been discharged." *Graham v. Ala. State Emples. Ass'n*, 991 So. 2d 710, 717 (Ala. Civ. App. 2007).

47. Pursuant to Ala. Code § 36-12-2 (2008), ADEM officials are required to "correctly make and accurately keep in and for their respective offices or places of business all such . . . documents, files, papers, letters and copies of letters as at all times shall afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant and from which the actual status and condition of such activities and business can be ascertained without extraneous information"

48. ADEM officials are required to keep all of these "documents, files, papers, letters and copies of letters" in a manner such that the records are "carefully protected and safely preserved and guarded from mutilation, loss or destruction." *Id.*

49. ADEM maintains that a CD provided to Riverkeeper on December 5, 2008 containing sixteen documents constitutes its entire file on the Shepherd Bend matter. *See Exhibit 6.*

50. Upon information and belief, this CD provided by ADEM does not contain all documents, files, papers, letters and copies of letters regarding the site as required by Alabama

law. The CD represented by ADEM to be the agency's entire file also contains no documents created after March 21, 2008, four months before the final permit was issued to Shepherd Bend.

51. On December 5, 2008, Brian Marshall of ADEM explained to Riverkeeper that supervisors at ADEM selectively choose documents from the paper files to be placed in an electronic file available to the public. Upon information and belief, other documents from the paper file are routinely shredded, destroyed, or otherwise excluded from public review by ADEM.

52. ADEM and Director Glenn have violated Ala. Code § 36-12-2 by not keeping all documents, files, papers, letters, and copies of letters related to the Agency's permitting activities for the Shepherd Bend matter.

53. ADEM and Director Glenn have violated Ala. Code § 36-12-2 by not ensuring that records are carefully protected, safely preserved, and guarded from mutilation, loss, or destruction.

54. Pursuant to Ala. Code § 36-12-40 (2008), "[e]very citizen has a right to inspect and take a copy of any public writing of this state" Ala. Code § 36-12-41 (2008) further provides that "[e]very public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it."

55. Pursuant to ADEM regulations, "any records, reports, rules, forms, or information obtained under the [Alabama Environmental Management Act] and the official records of the Department shall be available to the public for inspection." Ala. Admin. Code r. 335-1-1-.06(1).

56. ADEM and Director Glenn have violated Ala. Code §§ 36-12-40, 41 and Ala. Admin. Code r. 335-1-1-.06(1) by precluding Riverkeeper from inspecting and making copies of all records related to the Shepherd Bend permit, including all paper files that remain in existence.

57. The practice of excluding certain documents from a “public file” directly violates the strict terms of Alabama’s open records laws. Furthermore, such a practice deprives the public – and, specifically in this case, Riverkeeper – of a full opportunity for public participation and to make adequate, informed comments on, and to challenge, if necessary, a NPDES permit.

**Count Two (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k))**

58. Riverkeeper incorporates by reference the allegations of paragraphs 1-57 as if restated here in full.

59. By failing to provide its Notice of Decision to Riverkeeper in accordance with Alabama and federal law and ADEM’s customary practice and procedure as described in and required by the Guide for Citizen Participation, ADEM and Director Glenn have intentionally deprived Riverkeeper of its ability to appeal the final permit to the EMC as provided for by Ala. Admin. Code rr. 335-2-1-.03 and 335-2-1-.04. *See* Exhibit 7 (ADEM official noting that the agency decided not to provide notice of decision to commenters in an attempt to do what was “best for the state.”) Accordingly, Riverkeeper has been deprived of any administrative remedies to exhaust pursuant to Ala. Code § 41-22-20 (a).¹

60. Riverkeeper is aggrieved by a final decision in a contested case within the meaning of Ala. Code § 41-22-2 (a) and thus is entitled to judicial review in this Court.

¹ Concurrently with this filing, and in an attempt to make every effort to comply with applicable Alabama procedures, Riverkeeper has filed a request for a hearing on ADEM’s granting of the final permit with the Environmental Management Commission of ADEM. Riverkeeper has filed its Request for a Hearing within thirty days of actual notice of ADEM’s decision on the final permit, which Riverkeeper and others received on November 24, 2008.

61. Riverkeeper files this action within 30 days after it received notice that ADEM and Director Glenn had granted the final permit on November 24, 2008 as required by Ala. Code § 41-22-20(d). In a matter of this nature, where ADEM has conscientiously failed to comply with requirements of Alabama and federal law and its customary practice and procedure as described in and required by the Guide for Citizen Participation, the time for filing this action must be tolled until the aggrieved citizen receives actual notice of the agency's final decision.

62. By not maintaining and providing Riverkeeper access to all of its files related to the Shepherd Bend permit, ADEM and Director Glenn have violated the terms of its National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV. *See United States Env'tl. Prot. Agency, National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV* (1994) (hereinafter "MOA"), attached hereto as Exhibit 11.

63. Pursuant to this MOA, ADEM is required to "[m]aintain an adequate public file at the appropriate district or central office . . . for each permittee," which "must include at a minimum, copies of . . . [the] Permit Application . . . [and] [o]ther pertinent information and correspondence." *See* MOA at 2. As alleged above, upon information and belief, ADEM's public file provided to Riverkeeper does not provide all pertinent information and correspondence, or the permit application submitted by Shepherd Bend.

64. ADEM and Director Glenn's actions in failing to comply with the terms of the MOA, which by its own terms "defines the manner in which the National Pollutant Discharge Elimination System will be administered by the State of Alabama Department of Environmental

Management”, *see* MOA at 1, are per se unreasonable, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3), (7).

**Count Three (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code §41-22-20(k) and Ala. Admin. Code r. 335-6-6-.21)**

65. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-64 as if restated here in full.

66. Pursuant to Ala. Code §41-22-4(a) (2008), ADEM is required to adopt “methods whereby the public may obtain information or make submissions or requests” and “rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all . . . instructions used by the agency.”

67. ADEM and Director Glenn have adopted such methods and rules of practice in Ala. Admin. Code r. 335-1-1-.06 and in the agency’s Guide for Citizen Participation. As described in this document, ADEM’s formal procedures for public involvement in community environmental matters require the agency to provide a Notice of Decision to all persons who have submitted comments on a draft permit.

68. ADEM and Director Glenn failed to provide a Notice of Decision to Riverkeeper, a commenter on the draft permit, when it issued its final decision to grant the permit on July 21, 2008. On December 14, 2008, an ADEM representative affirmed that ADEM intentionally decided not to provide this notice. *See* Exhibit 7.

69. ADEM and Director Glenn’s actions in granting the final permit to Shepherd Bend without providing Riverkeeper a Notice of Decision as required by ADEM’s Guide for Citizen Participation are in violation of ADEM’s own rules, unreasonable, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3), (7).

70. ADEM and Director Glenn's actions in granting the final NPDES permit for the Shepherd Bend mine without providing Riverkeeper a Notice of Decision as required by ADEM's Guide for Citizen Participation are also made upon unlawful procedure in violation of Ala. Code § 41-22-20(k)(4).

71. ADEM and Director Glenn failed to make ADEM's response to comments available to the public when the agency refused to issue a Notice of Decision or otherwise notify commenters that a response to comments had been prepared by the agency, in violation of Ala. Admin. Code r. 335-6-6-.21.

72. ADEM's combined errors in failing to provide public notice and in failing to provide all records with respect to Shepherd Bend (as described in Count 1) are substantial and serve to delegitimize the public participation procedures under which ADEM was required to conduct the consideration and issuance of the Permit.

**Count Four (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k) and Alabama Admin. Code rr. 335-6-9.03, 335-6-9.05)**

73. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-72 as if restated here in full.

74. Alabama Admin. Code r. 335-6-9.03 (2008) provides that “all surface mine operators shall provide the Department with a pollution abatement and/or prevention plan.” (emphasis added). This is a mandatory requirement for issuance of a permit.

75. Additionally, and most importantly, “the permit to conduct any surface mining operation shall be based on a Determination by the Department that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality” Alabama Admin. Code r. 335-6-9.05 (2008) (emphasis added).

76. Shepherd Bend did not provide ADEM or Director Glenn with a PAP plan with its Permit Application.

77. To date, Shepherd Bend has not submitted the PAP Plan to either ADEM or the Alabama Surface Mining Commission.

78. Given that ADEM did not review any PAP plan for the Shepherd Bend site, ADEM and Director Glenn have unlawfully failed to make a “determination...that the pollution abatement and/or prevention plan and accompanying data submitted by the applicant is adequate to provide for protection of water quality in and adjacent to the area of operations....” Ala. Admin. Code r. 335-6-9-.05(2).

79. ADEM’s failure to review Shepherd Bend’s PAP Plan means that ADEM had no way of gauging whether Shepherd Bend’s proposed mining operation would be adequately protective of the water quality of the receiving waters when it issued the permit. The PAP Plan is the document that sets out the specific means and practices by which the permittee will achieve compliance with effluent limitations and water quality standards. Thus, without reviewing – or, for that matter, even possessing or seeing – the PAP Plan, ADEM cannot possibly ensure that Shepherd Bend will operate in compliance with such effluent limitations and water quality standards.

80. ADEM and Director Glenn’s actions in granting the final permit without requiring Shepherd Bend to submit a PAP plan are in violation of pertinent agency rules, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k) (3), (7).

81. ADEM and Director Glenn’s actions in granting the final permit for Shepherd Bend without reviewing the PAP plan and in rendering an agency determination that the PAP plan is

adequate to provide for the protection of water quality are in violation of pertinent agency rules, arbitrary, capricious, and characterized by an abuse of discretion in violation of Ala. Code § 41-22-20(k)(3),(7).

82. ADEM and Director Glenn's actions in granting the final permit for Shepherd Bend without requiring Shepherd Bend to submit a PAP plan and without rendering an agency determination that the PAP plan is adequate to provide for the protection of water quality are also made upon unlawful procedure in violation of Ala. Code § 41-22-20(k)(4).

**Count Five (As to Defendants ADEM and Glenn –
Violations of Alabama Administrative Procedure Act,
Alabama Code § 41-22-20(k))**

83. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-82 as if restated here in full.

84. ADEM and Director Glenn improperly included exemptions to discharge limitations in the final permit for iron, TSS, and manganese. Specifically, while the permit otherwise established daily average and daily maximum discharge limitations on iron, manganese, and TSS, the final permit issued by ADEM and Director Glenn exempts Shepherd Bend from complying with these limitations during all precipitation events in the final permit.

85. ADEM and Director Glenn improperly excluded discharge limitations in the permit for other mining-related pollutants such as Total Dissolved Solids (TDS), sulfates, chlorides, or aluminum.

86. Pursuant to federal NPDES regulations, “[n]o permit may be issued...[t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i) (2008). As a further matter, federal regulations require that every NPDES permit include conditions in order to “[a]chieve

water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d) (2008).

87. Pursuant to Alabama’s water quality criteria, as found in Alabama regulations, one of the “Minimum Conditions Applicable To All State Waters” is that “[s]tate waters shall be free from substances attributable to sewage, industrial wastes or other wastes 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.” Ala. Admin. Code r. 335-6-10-.06(c) (2008). Alabama regulations define “industrial waste” to mean “liquid or other wastes resulting from any process of industry, manufacture, trade or business or from the development of natural resources.” Ala. Admin. Code r. 335-6-10-.02(4) (2008).

88. Pursuant to Alabama regulations, the “Specific Water Quality Criteria” with respect to “Public Water Supply” include the following: For “[s]ewage, industrial wastes, or other wastes,” the criterion is “[n]one which are not effectively treated or controlled in accordance with Rule 335-6-10-.08.” Ala. Admin. Code r. 335-6-10-.09(2)(e) (2008). For “[t]oxic substances; color producing; ... or other deleterious substances attributable to sewage, industrial wastes, or other wastes,” the criterion is “[o]nly such amounts, whether alone or in combination with other substances...as will not render the water unsafe or unsuitable as a source of water supply for drinking...or adversely affect the aesthetic value of waters for any use under this classification.” Ala. Admin. Code r. 335-6-10-.09(2)(e)5.

89. A portion of the waters receiving discharges under Shepherd Bend’s permit are designated Public Water Supply. Ala. Admin. Code r. 335-6-11-.02(14); Field Operations Division, Alabama Department of Environmental Management, NPDES Individual Permit Rationale at 3 (Oct. 31, 2007) [hereinafter Permit Rationale], attached hereto as Exhibit 12.

90. Pursuant to Alabama's water quality criteria, as found in Alabama regulations, the "Specific Water Quality Criteria" with respect to waters classified for "Fish and Wildlife" use include the following: For "[s]ewage, industrial waste, or other wastes," the criterion is "[n]one which are not effectively treated in accordance with Rule 335-6-10-.08." Ala. Admin. Code r. 335-6-10-.09(5)(e)1.

91. A portion of the waters receiving discharges under Shepherd Bend's permit are designated as Fish and Wildlife. Ala. Admin. Code r. 335-6-11-.02(14); Permit Rationale at 3.

92. With respect to the exempted discharges' impacts in light of the Alabama regulations on the public water supply usage, the exempted discharges clearly are "not effectively treated or controlled," as the permit requires no discharge limitations during the vast majority of precipitation events. Ala. Admin. Code r. 335-6-10-.09(2)(e). The exempted discharges will "render the water unsafe or unsuitable as a source of water supply for drinking...or adversely affect the aesthetic value of waters for any use under [the public water supply] classification." Ala. Admin. Code r. 335-6-10-.09(2)(e)5. *See Comments from Birmingham Water Works Board, December 14, 2007, Exhibit 2.*

93. With respect to the exempted discharges' impacts in light of Alabama regulations on fish and wildlife usage, the exempted discharges clearly are "not effectively treated in accordance with Rule 335-6-10-.08," as the Permit waives the majority of discharge limitations during precipitation events. Ala. Admin. Code r. 335-6-10-.09(5)(e)1. Accordingly, the permit's terms directly violate this water quality criterion specific to the fish and wildlife usage.

94. With respect to the exempted discharges' impacts in light of the "Minimum Conditions Applicable To All State Waters," the exemptions are in violation of the requirement that "[s]tate waters shall be free from substances attributable to sewage, industrial wastes or other wastes 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.” Ala. Admin. Code r. 335-6-10-.06(c).

95. In addition to the impacts from the exempted discharges during precipitation events, the fact that the permit contains no limits on other mining-related pollutants such as TDS, sulfates, chlorides, and aluminum, also results in violations of the water quality criteria cited above.

96. ADEM’s actions in issuing the permit with exemptions to discharge limitations for iron, manganese, and TSS during precipitation events without further controls, and with no limits on mining pollutants such as TDS, sulfates, chlorides, and aluminum, are arbitrary, capricious, and in violation of the Alabama water quality criteria and federal NPDES regulations.

Count Six (As to Defendant Glenn - Declaratory Judgment Act)

97. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-96 as if restated here in full.

98. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated Alabama Code §§ 36-12-2, 36-12-40, 36-12-41, and the terms of ADEM’s “National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Alabama and the United States Environmental Protection Agency, Region IV,” in failing to preserve all documents, files, papers, letters and copies of letters regarding the Shepherd Bend permit, and in failing to allow Riverkeeper to inspect and obtain copies of all such documents.

99. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated the provisions of Ala. Admin. Code rr. 335-2-1-.03 and 335-2-1-.04 by failing to provide Riverkeeper with a Notice of Decision explaining that the final Shepherd Bend NPDES

permit had been granted in accordance with the formal procedures outlined in ADEM's Guide for Citizen Participation.

100. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper seeks a declaration that Director Glenn violated Ala. Administrative Code rr. 335-6-9.03, 335-6-9.05 by failing to require Shepherd Bend to submit a PAP plan, and by failing to make a Determination that the PAP plan is adequate to provide for the protection of water quality before granting a final permit.

101. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper requests a declaration that Director Glenn violated Alabama regulations, water quality criteria, and federal NPDES regulations in issuing the permit with exemptions to certain discharge limitations during precipitation events.

102. Pursuant to Ala. Code § 6-6-220 *et seq.*, Riverkeeper further requests a declaration that, given these substantive violations of Alabama law and regulations regarding the terms of the Shepherd Bend permit, the permit has been illegally granted and is thus void.

Count Seven (As to Defendant Glenn – Claim for Injunctive Relief)

103. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-102 as if restated here in full.

104. Director Glenn's issuance of the final permit to Shepherd Bend was beyond his authority given the aforementioned procedural and substantive errors in the permitting process.

105. Director Glenn's issuance of the final permit to Shepherd Bend was also based on a mistaken interpretation of law given the aforementioned substantive errors.

106. Pursuant to Ala. Code § 6-6-500, Riverkeeper seeks an injunction prohibiting Director Glenn from allowing the commencement of any activities purportedly authorized by the permit, and from taking any other actions relating to ADEM's authorization of the permit. *See*

Drummond Co. v. Alabama Dep't of Transp., 937 So.2d 56, 58 (Ala. 2006) (holding that actions for injunction lie against State officials when they have acted fraudulently, in bad faith, beyond their authority or in a mistaken interpretation of law).

Count Eight (As to Defendant Shepherd Bend – Claim for Injunctive Relief)

107. Riverkeeper incorporates by reference the allegations contained in paragraphs 1-106 as if restated here in full.

108. Pursuant to Ala. Code § 6-6-500, Riverkeeper seeks an injunction prohibiting Shepherd Bend from commencing any activities purportedly authorized by the permit because Shepherd Bend failed to disclose fully all relevant facts and/or misrepresented facts in its permit application in violation of Ala. Admin. Code r. 335-6-6-.17(c)(1)(ii), because Director Glenn acted beyond his authority in issuing the permit to Shepherd Bend given the aforementioned procedural and substantive errors in the permitting process, and because Director Glenn's issuance of the permit was based on mistaken interpretations of law.

DEMAND FOR RELIEF

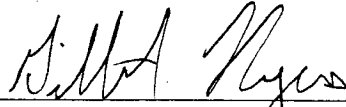
Wherefore, based upon these facts and matters of law, Riverkeeper respectfully requests that the Court grant the following relief:

1. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated the statutory procedures established in Alabama Code §§ 36-12-2, 36-12-40, and 36-12-41 by failing to properly maintain and allow public access to all public records on the Shepherd Bend mine permit, and requiring Defendant Glenn to keep and make available all ADEM public records as required by law;

2. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama Code §41-22-20(k) and the agency's own *Guide to Citizen Participation* by failing to provide Riverkeeper with a Notice of Decision, or other notice, informing Riverkeeper that the final Shepherd Bend mine permit had been granted;
3. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama Code §41-22-20(k) in issuing the final Shepherd Bend mine permit without a PAP plan, and without rendering a determination that the PAP plan was adequate to protect water quality;
4. Issue a declaratory judgment pursuant to Alabama's Administrative Procedure Act and Alabama's Declaratory Judgment Act finding that Defendants ADEM and Glenn violated Alabama regulations, water quality criteria, and federal NPDES regulations in issuing the permit with exemptions to certain discharge limitations during precipitation events, and with no limits on certain mining-related pollutants;
5. Issue a declaratory judgment finding that the permit is illegal, and thus void, given the procedural and substantive errors described herein;
6. Issue an injunction prohibiting Director Glenn from allowing the commencement of any activities purportedly authorized by the permit and from taking any other actions relating to ADEM's authorization of the permit.;
7. Issue an injunction prohibiting Defendant Shepherd Bend from commencing any activities purportedly authorized by the permit;

8. Award plaintiff its costs, expenses, expert witness fees, and reasonable attorneys' fees as provided by law; and
9. Award such additional relief as the Court deems proper.

This 22nd day of December, 2008.



Gilbert Rogers, Al. Bar No. ASB-2085-T66R.
Catherine Wannamaker, Application for Pro Hac Vice
admission forthcoming

Southern Environmental Law Center
127 Peachtree St NE
Suite 605
Atlanta, GA 30303-1840
Phone: (404)521-9900
Fax: (404)521-9909
Email: grogers@selcga.org
ROG037

COUNSEL FOR PLAINTIFF BLACK WARRIOR
RIVERKEEPER

Service Is To Be Conducted By Certified Mail Pursuant To Rule 4(i)(2) Of The Alabama Rules of Civil Procedure:

Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110

Trey Glenn
Director, Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110

Troy King
Attorney General of Alabama
500 Dexter Avenue
Montgomery, AL 36130

Shepherd Bend, LLC
c/o The Corporation Company
2000 Interstate Park Drive, Suite 204
Montgomery, AL 36109


OF COUNSEL



Guide for Citizen Participation

How to make your voice heard on community environmental issues

ADEM

Alabama Department of Environmental Management

Part 4

A General Summary Of The Public Participation Process

What types of opportunities do you have 1) to learn that someone is seeking to engage in an activity that could affect the environment and therefore requires an environmental permit, or other ADEM approval, or 2) to express your concerns or comments to ADEM regarding an environmentally-related decision being made by ADEM?

What types of environmentally-related activities regulated by ADEM include opportunities for you to get involved in the decision making process?

ADEM undertakes several different decision-making processes that require public input.

Those processes include, but are not limited to:

- 1) Issuing an environmental permit for a new facility or source,
- 2) Renewing an existing environmental permit,
- 3) Approving changes to an existing facility or source and its current permit (called a modification),
- 4) Allowing a permit to contain discharge or emissions limits that are less strict than current standards (called a permit variance),
- 5) Evaluating a contaminated site and approving a cleanup process, and
- 6) Making, changing, or eliminating a rule or rules used to carry out environmental laws and requirements,
- 7) Issuing enforcement actions with penalties.

These decision-making activities require ADEM, or the applicant, to provide some kind of notice to the public. Public notice can include notifying next-door-neighbors or providing widespread, general public notice in newspapers or

other media. Public notice also can include holding a comment period, accepting public comments, or providing information about upcoming public meetings or hearings. Various types of ADEM decision-making processes may each have a public notice process. In some cases, no public notice conditions may be required. Thus, the type of public notice process to be employed is determined by the type of decision to be made.

What types of permits does ADEM issue that do not require public notice?

There are some types of permits that do not require public participation; for example, mobile sources such as hazardous waste or medical waste transporters, and gasoline tanker trucks. In other instances, the permitting of small area sources which are "cookie cutter" in nature, such as service stations, have identical sources of emissions and are required to have vapor balance systems for the control of air emissions.

The permitting of drinking water use and construction of new drinking water facilities do not require public notice. However, the establishment of primary and secondary drinking water standards (maximum contaminant levels of pollutants in drinking water) does require public notice per the rulemaking procedures.

public review during a 30 day public comment period. Similarly, the ADEM Land Division places drafts of hazardous waste permits on public notice. However, that public comment period is for 45 days.

- During the public comment period, the public may submit to ADEM its comments and concerns about the proposed permit. Depending on the level of public interest, a public meeting or public hearing also may be held during the public comment period.
- At the conclusion of the public comment period, ADEM permit program staff will consider all comments received during the public comment period, and prepare the final permit (unless the permit request is denied). Staff also will prepare written responses to all comments received during the public comment period and at any public hearings.

STEP 3 - The Permitting Decision

- The decision to issue or deny a permit will be sent to the applicant, and any persons who submitted public comments or otherwise requested that they be notified of the decision.
- If a permit is issued, the applicant will receive a copy of the permit. The different permit programs vary regarding who else may receive a copy of the permit. Anyone may request a copy of the final permitting decision. You can request a copy of the permit (a copying fee may be charged) from the particular media program or the ADEM Public Records Officer. Final permitting decisions will also include ADEM's response to the comments received during the public comment period, and at any public hearing that may have been held. If the permit is denied, ADEM

will have a written decision to explain why the permit was denied.

STEP 4 - Appeals

- Any interested party may appeal ADEM's final decision to issue or deny a permit. Appeals must be filed with the Environmental Management Commission in Montgomery. For additional information on appeals, see pages 34-35 "What if you do not agree with ADEM's final decision? How can you file an appeal?"

How can you learn if a new facility or source that will be engaged in activities that could affect the environment is proposing to locate on the property right next door to you? (or if a facility or source already located right next door to you is proposing to expand?)

In the Land program, applicants for solid waste disposal permits are required to notify their immediate neighbors (adjoining property owners or occupants) that an application for a permit (for a new or expanding facility or source) has been filed.

This requirement applies to nearly all waste disposal permits. If the applicant fails to meet this requirement to notify adjoining property owners and occupants, that failure can be grounds for an appeal of any permit that is issued. (See "What if you do not agree with ADEM's final decision? How can you file an appeal?") However, ADEM ensures that the permit applicant has met all public participation requirements through the application review process. Failure to do so can result in a Notice of Deficiency and the Department will not continue its review process until all requirements have been met.

Who is notified of ADEM's final decision to issue or deny a permit or other approval?

The applicant or permittee, and any person(s) who submitted public comments, are notified when the permitting decision is issued. (See "How do I get on the ADEM mailing lists?") The Notice of Decision describes whether and why the permit or other approval was issued or denied.

The various ADEM program areas (air, water, waste disposal) may differ in the process of notification of its final determination on a permit application. Additional details of the more specific public notice processes of ADEM's various permitting programs may be found in Part 5 of this guide.

What opportunities do you have to participate in the issuance of Administrative Orders?

ADEM has authority to issue administrative orders pursuant to Ala. Code § 22-22A-5(10) (2006 Rplc. Vol.), which provides that ADEM may "issue, modify, suspend or revoke orders, citations, notices of violation, licenses, certifications or permits." Orders may include corrective action requirements only, corrective action requirements and a penalty, or a penalty only (where corrective action has already taken place or none is necessary). Orders may be issued either by consent or may be issued unilaterally.

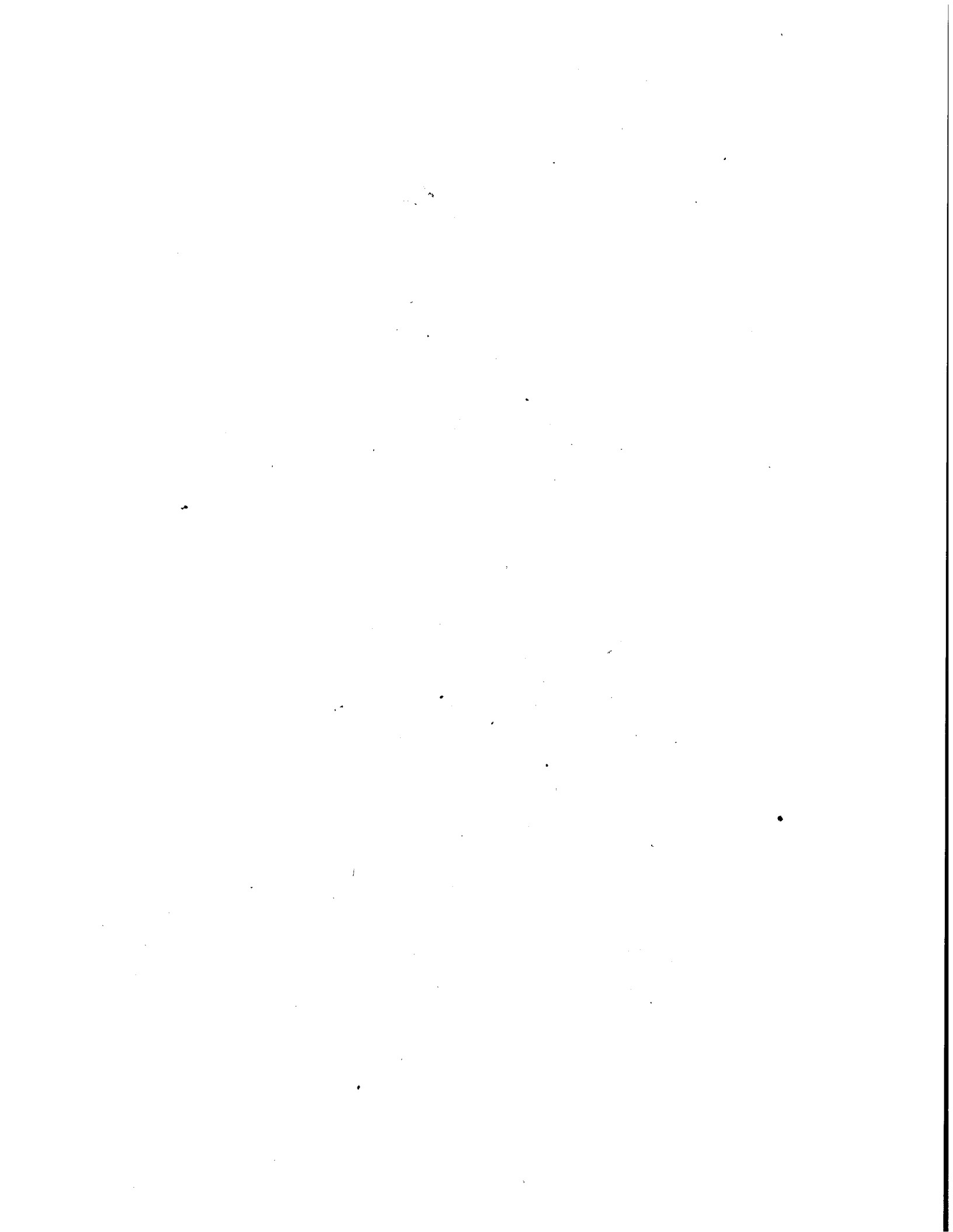
A consent order is usually an order negotiated between the Department and the violator and may or may not contain penalties. While a unilateral order may be issued by the Department without agreement by the violator, input from the violator may be received through a written response to the order which is generally requested, as well as

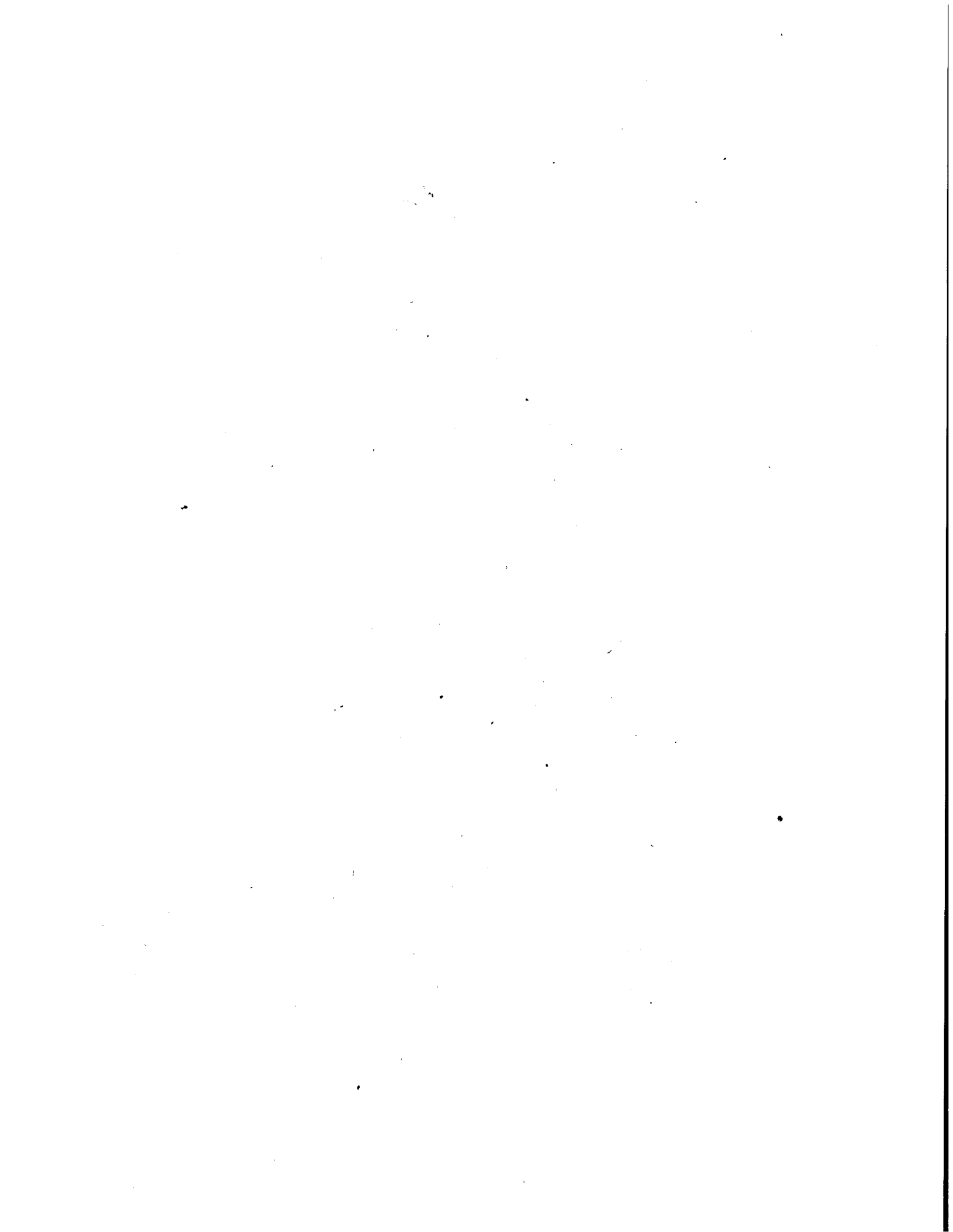
the opportunity for an informal conference prior to the order being issued.

While most of the orders issued by the Department are consent orders, the Department retains the right to issue a unilateral order if a consent order cannot be negotiated or if the Department determines that, based on the violator's history, attempting to negotiate a consent order would be fruitless, or the violation is so conspicuously bad that a compromise penalty is simply unacceptable.

Section 22-22A-5(18), Ala. Code (2006 Rplc. Vol.) governs the issuance of administrative orders. An order may be issued to a "person" who violates: Any provision of the statutes that ADEM administers; The rules the Commission has promulgated; Any order issued by ADEM; or, Any condition of a permit, license, certification or variance issued by the Department. The only exceptions to the Department's authority to issue an order assessing a civil penalty are: If a lawsuit has already been commenced requesting a penalty for the same violation; For any violation at a coal mining facility that is regulated pursuant to Ala. Code §§ 9-16-70 through 9-16-107 (2001 Rplc. Vol.); or If a civil penalty has already been assessed for the violation pursuant to § 22-28-23(b) Ala. Code (2006 Rplc. Vol.).

Prior to issuing the order, statute requires the Department to first notify the violator of the violation and give the violator an opportunity for an informal conference regarding the violation and the proposed order. Before a penalty order is issued, the Department must publish a notice of the order both in a newspaper of general circulation in the area where the violation occurred and on the Department's website. The notice must







THE BIRMINGHAM
WATER WORKS BOARD

December 14, 2007

MR. STEVE JENKINS
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
FIELD OPERATIONS DIVISION
1400 COLISEUM BLVD.
MONTGOMERY, AL 36110

Directors/Officers

Anthony L. Barnes
Chairman/President

The Honorable
Jim H. Lowery
*First Vice Chairman/
First Vice President*

Juanita S. Jones
*Second Vice Chairman/
Second Vice President*

David S. Herring
Secretary-Treasurer

Herschell L. Hamilton
Assistant Secretary-Treasurer

Mac Underwood
General Manager

**Assistant
General Managers**

Darryl R. Jones, P.E.
*Operations and Technical
Services*

T. M. Jones, P.E.
Engineering and Maintenance

Byron J. Taylor,
Finance & Administration

Re: **Shepherd Bend Mine Draft Permit Comments**

Dear Mr. Jenkins:

The Water Works and Sewer Board of the City of Birmingham (Board) would like to provide the following comments regarding the draft permit issued by the Department for the Shepherd Bend Mine (AL0079162) located in Walker County. This facility would discharge to the Mulberry Fork of the Black Warrior River, including discharges immediately upstream of the Board's primary drinking water intake on Mulberry Fork. In general, it can be concluded that the Shepherd Bend operation has the potential to adversely impact the Birmingham area drinking water supply, and that the proposed permit is not protective of designated uses of Mulberry Fork. Our comments for the draft permit are summarized below.

1. The proximity of the mining operation to Board's intake pose a potential hazard to drinking water uses. The Board's drinking water intake is within approximately 800 feet of the mining operation outfalls. Because the intake is so close to the proposed outfalls, the mining discharges may not evenly mix with the full stream flow prior to reaching the intake. The proximity and configuration of the proposed operation could result in a bank-entrained plume of mining-related pollutants traveling directly to the intake and into the Board's treatment facilities.

2. The permit gives no indication that the proximity of the drinking water intake was considered. The proposed permit appears to have been developed primarily from federal effluent guidelines for coal mining operations (40 CFR Part 434). These guidelines were developed for use in permitting typical mining operations across the entire nation, not for the extraordinary circumstance where a surface mining operation would be conjoined with a major municipal water supply intake. A review of these guidelines and their supporting documents reveal that protection of major public water supplies was not explicitly considered. This is not surprising, given that surface mining and major municipal water withdrawals would, in most circumstances, be considered incompatible uses of the same river bend. The proposed permit is therefore not protective of the existing use of Mulberry Fork. Concerns regarding specific pollutants are outlined in more detail in comments below.

3. The iron and manganese limits are not protective of drinking water uses: The proposed NPDES permit limitations include daily average total iron concentrations of 3.0 mg/L (with a daily maximum of 6.0 mg/L), daily average total manganese concentrations of 2.0 mg/L (with a daily maximum of 4.0 mg/L), daily average total suspended solids (TSS) of 35.0 mg/L (with a daily maximum of 70.0 mg/L) and pH ranging from 6.0 to 9.0 (daily minimum and maximum, respectively). The permit also notes that the total manganese limitations are not applicable if pH is 6.0 or higher and total iron is less than 10 mg/l.

The Safe Drinking Water Act includes secondary maximum contaminant levels (MCLs) for total iron concentrations of 0.3 mg/L and total manganese concentrations of 0.050 mg/L. The average concentrations that would be allowed by this NPDES Permit are ten times the secondary MCL for iron and forty times the secondary MCL for manganese. By comparison, the daily average raw water concentrations for iron and manganese for the Western Filtration Plant in 2007 were 0.057 mg/L and 0.079 mg/L, respectively. Iron and manganese can cause significant aesthetic problems in drinking water, including consumers' perceptions of the quality of the drinking water, staining of clothes and basins, and taste of the water.

The proposed NPDES permit specifies discharge limits for total iron and manganese concentrations. However, the speciation of the iron and manganese (i.e., whether Fe and Mn are in reduced or oxidized states) will significantly impact the ability of the existing Board's treatment facilities to remove the iron and manganese. For example, if Fe^{2+} and Mn^{2+} are primarily present in the discharge waters and enter the plant in the reduced oxidation states rather than as particulate iron and manganese, the current treatment process train will not be able to remove them. Speciation of iron and manganese in the discharges is needed to assess whether additional treatment would be required to oxidize the Fe^{2+} and Mn^{2+} and then remove the precipitates. However, even if the iron and manganese is present in particulate form in the discharge waters, opportunities may exist for the particulate iron and manganese to become reduced either in the riverbed sediments or in the treatment plant. Costly operational changes to the treatment plant may be required if iron and manganese precipitation and subsequent reduction occurs in the raw water storage tanks or the sedimentation basins.

The Board's Western Filtration Plant may also be impacted by higher particle loading from TSS, iron, and manganese, which would require additional operations and maintenance (e.g., removing solids from the raw water storage tanks, increasing coagulant dosages to remove the additional turbidity, more frequent backwashing of filters due to reduced filter run times, and generation of more wastewater) and may reduce the overall treatment flow rating of the plant.

4. The proposed permit does not protect the public water supply from pollution by many other mining-related pollutants, including toxic metals: Of significant concern is the potential presence of other contaminants in the discharge waters that may impact the source water. Coal in this region of Alabama has been associated with other elements that may impact water treatment, including arsenic, (described by the USGS as "well above the average for all U.S. coal"), sulfur, salinity, mercury and others.¹ Drainage from coal mines often has elevated concentrations of not just iron and manganese, but many other metals including lead, zinc, copper, and cadmium.

If the permit would allow discharges of iron and manganese concentrations over 10-40 times higher than maximum contaminant levels, it is reasonable to presume that other pollutants associated with coal mine drainage could also greatly exceed levels necessary to protect aquatic life and drinking water. These elements, which are not currently included in the discharge permit, could significantly impact the treatment process needs of the water supply and drastically increase costs of treatment and potentially impact public health. For example, arsenic removal would require additional processes, and demand and require increased chemical dosages. Further, the presence of ammonia would significantly complicate the disinfection strategy employed at the Western Filtration Plant. Additional discharge limitations on the range of elements found in the coal that could impact the Board drinking water source should be established. Further, total dissolved solids (TDS) may be high in the coal beds and should be limited by the discharge permit to avoid exceeding the 500 mg/L TDS secondary MCL; if high TDS levels are observed at the Western Filtration Plant intake, the only (and very costly) option for reducing TDS is reverse osmosis.

¹ Goldhaber, M.H., Bigelow, R.C., Hatch, J.R., and Pasho, J.L. (2000). Distribution of a Suite of Elements Including Arsenic and Mercury in Alabama Coal. <http://pubs.usgs.gov/mf/2000/mf-2333/mf2333so.pdf>

To better evaluate the probable impacts of these discharges on operations at the Board's Western Filtration Plant, additional analysis is needed beyond what is included in the proposed NPDES permit. The impact of the flow rates at the various outfalls should be evaluated on a seasonal basis relative to river flows to estimate the anticipated concentrations of iron, manganese, and TSS at the Mulberry Fork intake. Further study is also required to determine what other elements/compounds may occur in the discharges and additional costs of treatment associated with those discharges.

5. The maximum pH limit is not protective of designated uses: The permit includes a provision that would allow a maximum daily pH of 10.5 standard units. This is well outside the range of water quality criteria deemed protective of aquatic life uses. Additionally, this pH level would exacerbate the toxicity of other constituents. The solubility of many toxic metals (for which the permit includes no limits) would increase. At this pH, even extremely low concentrations of ammonia could be toxic to aquatic life.

6. The permit provides inadequate controls on metals in stormwater runoff from mining operations: The metals limits on stormwater runoff are even less protective than for the non-precipitation-related discharges. No limits are included for any metals except iron for small precipitation events, and these iron limits are over 20 times the MCL. Larger storm events have no metals limits at all. Of special note, runoff of acid or ferruginous drainage from coal refuse disposal piles include no metals limits at all, even for 1-year, 24-hour storm events.

7. The proposed permit could allow large slugs of suspended solids to Mulberry Fork: The permit includes no limits for totals suspended solids in stormwater runoff (only settleable solids), essentially allowing unlimited discharges of fine, non-settleable suspended solids such as clays and fine silts. Given the extreme land disturbance associated with surface mining—and high rate of erosion expected—this could allow large slugs of suspended solids in runoff from even small precipitation events. This in turn could have deleterious effects on aquatic life and greatly increase solids removals costs in the water treatment plant.

Of special concern is the potential for catastrophic movement of solids into the stream during large storm events, either as the result of impoundment failure or precipitation-induced mass wastage of mining materials on high slopes. The permit includes no limits on solids for >10-year storm events, essentially providing no protection from such events. Similarly, the permit includes no hard requirement for the permittee to develop BMP plan to contain solids, and no such plan was available to the reviewers. Catastrophic solids loading events could not only affect the water quality at the intake, it could endanger the intake itself by burial, clogging, or other damage.

8. The permit provides little protection from post-mining impacts: According to section I.A.2 of the draft permit, permit limits would cease to apply upon revegetation of the site and the Phase II bond release. This provides no long-term protection of the drinking water intake from potential post-mining drainage problems such as failure of vegetation, acid mine seepage, or other inadequacies of post-mining reclamation.

9. The Spill Prevention, Control, and Countermeasure (SPCC) plan: Since a spill from the fuel storage area at the Shepherd Bend Mine could shut down the Mulberry Fork intake, the Board contends that it is critical to have an adequate SPCC plan for this facility. The SPCC plan for the Shepherd Bend Mine does not provide adequate detail as required by 40 CFR 112. The following issues were noted with the proposed plan:

- 40 CFR 112.4
 - Facility maps and diagrams were not provided.
 - Failure analysis was not provided.
- 40 CFR 112.7
 - Countermeasures for discharge discovery, response, and cleanup were not provided.

- A prediction of potential discharge's direction, rate of flow, and potential quantity of material that could be discharged was not provided.
- An oil spill contingency plan following 40 CFR 109 was not provided.
- A written commitment of manpower, equipment, and materials was not provided.
- Inspection procedures were not clearly defined in the plan.
- Personnel, Training, and Discharge Prevention procedures were not provided.
- 40 CFR 112.8/112.12
 - Facility drainage was not provided.
 - Procedures for inspection and discharge of rainwater from containment areas were not provided.

10. The draft permit posted on the ADEM website was incomplete. The permit application requires a pollution abatement plan, which was not included in the information posted on the ADEM website. Sections twelve and thirteen of ADEM Form 315 require a topographic map submittal and a detailed facility map submittal, and this information was not posted on the ADEM website.

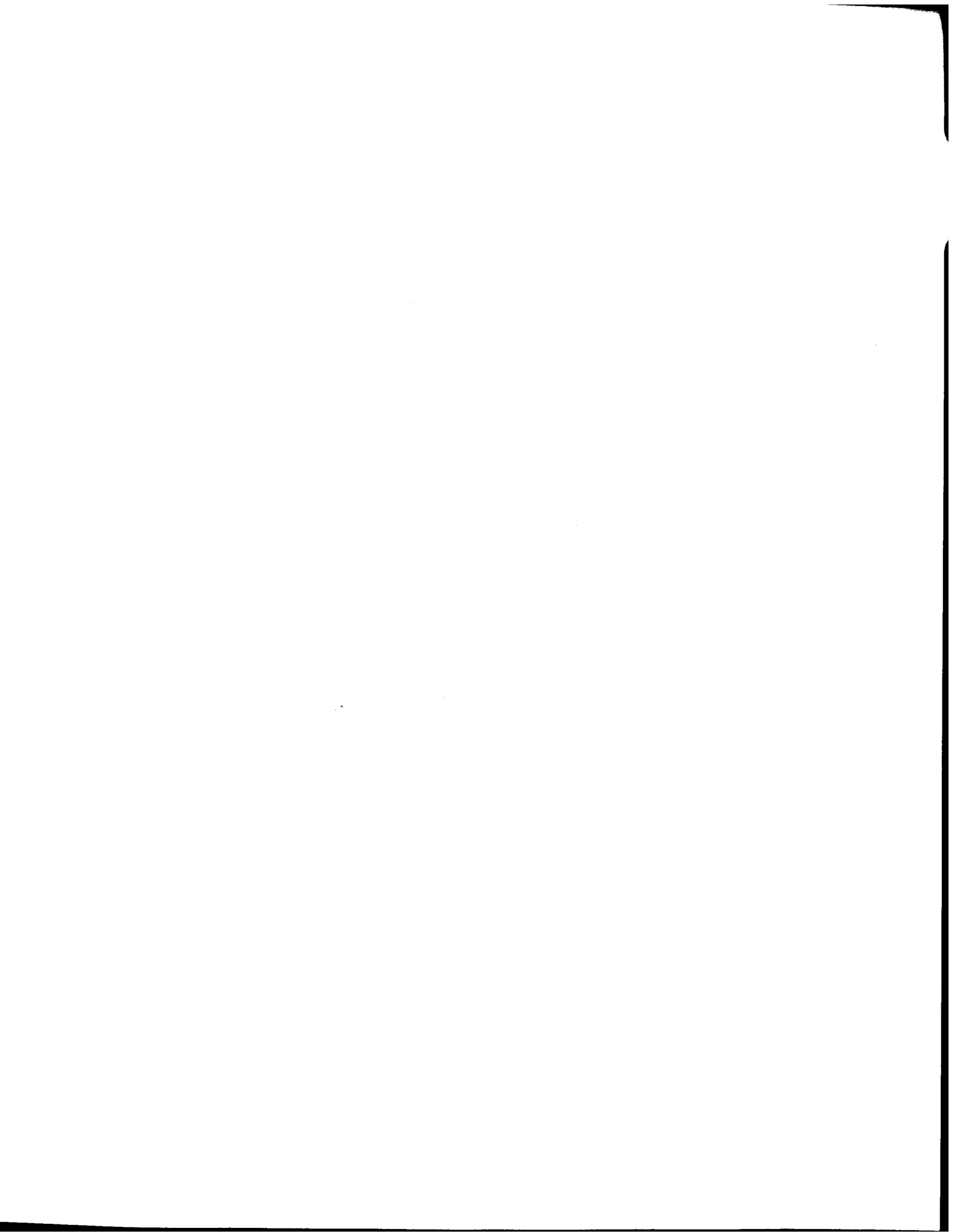
The proximity of the proposed mining operation to such a major municipal water supply intake is unprecedented to our knowledge, and represents an incompatible use. This operation could result in discharge of mining-related pollutants directly to the intake. The draft permit does not appear to have explicitly considered the drinking water use, and is wholly inadequate to protect the Board and its customers from many pollutants commonly associated with mining activities.

In light of the concerns and deficiencies listed above the Board request a forty-five day extension for the comment period for this permit application. The Board also request that a public hearing be held for this permit application.

Please email me at munderwood@bwwsb.com or Darryl Jones at djones@bwwsb.com or call one of us 205-244-4403 you have any questions or comments.

Very Truly Yours,


Mac Underwood
General Manager



Birmingham News (AL){PUBLICATION2}

ADEM mine water decision awaited City system opposes proposed discharge into Mulberry Fork

February 24, 2008

Section: LOCAL NEWS

Page: 15-A

KENT FAULK News staff writer

Birmingham Water Works officials are waiting to find out whether the state's environmental agency will allow a proposed coal strip mine to discharge water into a river near one of the water system's major drinking-water intakes.

Birmingham's drinking water supply could be adversely affected if a permit drafted for the 1,773-acre Shepherd Bend LLC mine in Walker County is approved by the Alabama Department of Environmental Management, Water Works officials have told that agency.

"The proximity of the proposed mining operation to such a major municipal water supply intake is unprecedented to our knowledge, and represents an incompatible use," Mac Underwood, general manager of the Water Works, wrote to ADEM in December.

The drinking water intake is within 800 feet of proposed points upstream where treated water from mining operations would be put into the Mulberry Fork of the Black Warrior River, Underwood's letter states. The Water Works is concerned that water being discharged may not evenly mix into the stream before going into the intake, according to the letter.

The proposed permit would require the mining company to meet federal standards in its discharges into the stream.

But Underwood said the water-quality guidelines being used do not take into account the proximity of the mine to the water-supply intake. The Water Works might have to spend more money at its filter plant to remove silt,

metals such as iron and manganese, and other materials, according to the letter.

The Mulberry Raw Water Pump Station, across the river from the proposed Shepherd's Bend Mine, is one of the biggest sources of drinking water for the Birmingham water system. The station typically pumps approximately 50 million gallons of water a day, with a sustained daily maximum of 65 million gallons, to the system's Western Water Filtration Plant.

Under a permit, mines are required to treat water using things such as holding basins before the water can be released into a river.

In its application, Shepherd Bend said it would spend nearly \$1.9 million to install pollution control systems and \$48,100 a year for operations, maintenance, monitoring, inspections and fees for the pollution control systems.

In a written response to questions from The Birmingham News, Shepherd Bend said it has met with the Birmingham Water Works Board about concerns raised in the board's letter to ADEM. "The meetings were very fruitful in answering the BWWB concerns," the company's letter said.

"We agreed to continue to work with this body on these issues and in the future answer additional concerns that may become evident," the letter said.

A 30-day public comment period on the proposed permit ended Dec. 17.

Public hearing sought

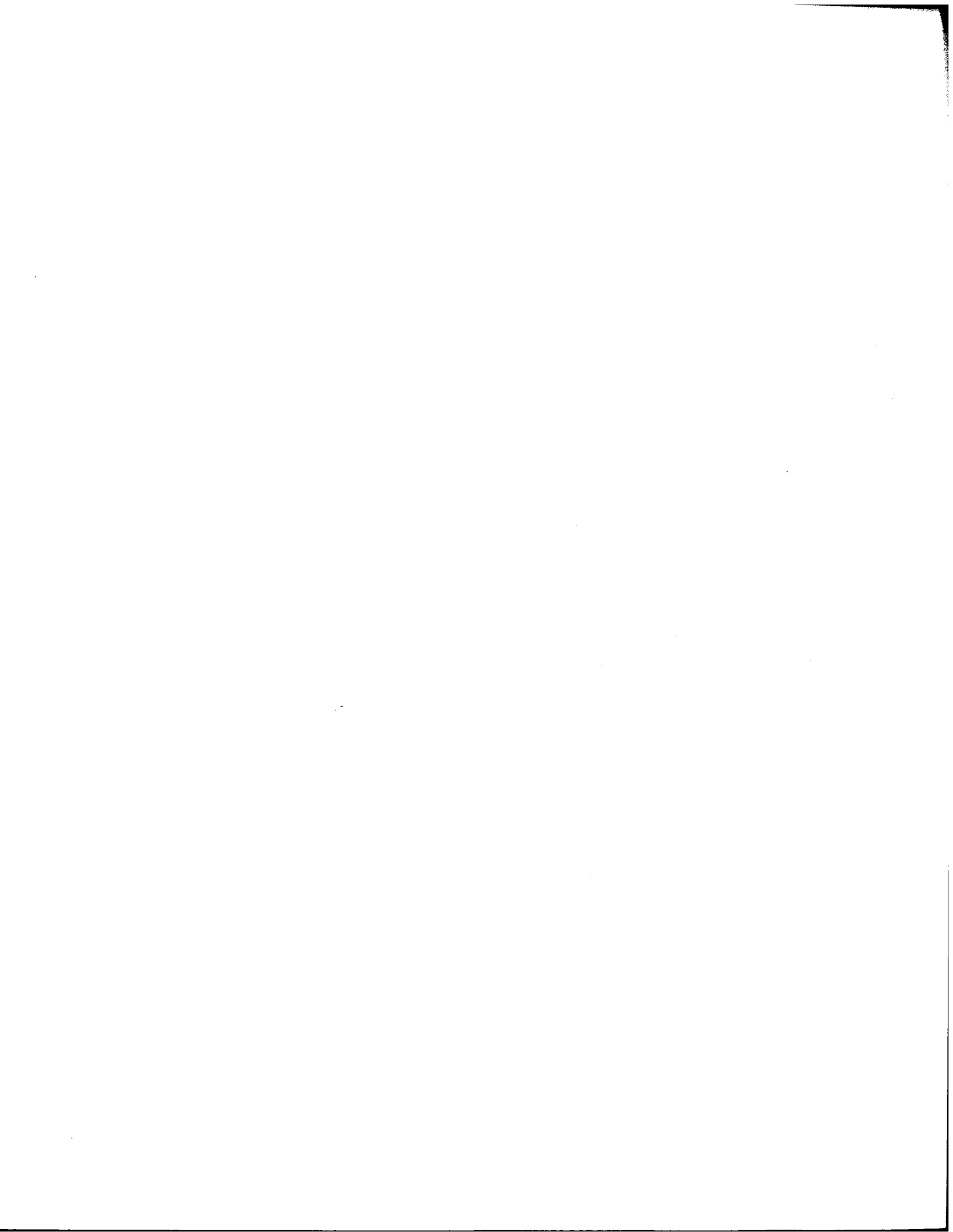
But the Water Works, the environmental group Black Warrior Riverkeeper and 50 local residents asked ADEM hold a public hearing on the proposed permit and grant a 45-day extension for public comments. ADEM spokesman Scott Hughes said the agency's staff is evaluating those requests.

Shepherd Bend said in its permit application that the mine would create 110 skilled jobs with above-average compensation and 60 indirect jobs in related service fields to produce coal for electricity generation. It said the company would pay \$3.4 million a year in local, state and federal taxes and fees.

EMAIL: kfaulk@bhamnews.com

All content © 2008- THE Birmingham News (AL){PUBLICATION2} and may not be republished without permission.

<i>All archives are hosted by NewsBank Media Services, a division of NewsBank, inc.</i>



john kinney

From: Jones, Azure [AJones@adem.state.al.us]
Sent: Wednesday, December 03, 2008 10:53 AM
To: jkinney@blackwarriorriver.org
Subject: RE: Dec. 5th File Review

No problem. I think it's on Public Notice, but I will double check.

Thanks,

Azure D. Jones
Adem
Permits & Services

From: jkinney@blackwarriorriver.org [mailto:jkinney@blackwarriorriver.org]
Sent: Wednesday, December 03, 2008 10:45 AM
To: Jones, Azure
Cc: Marshall, Brian C; Sanderson, Eric; nelson brooke
Subject: Dec. 5th File Review

Hey Azure,

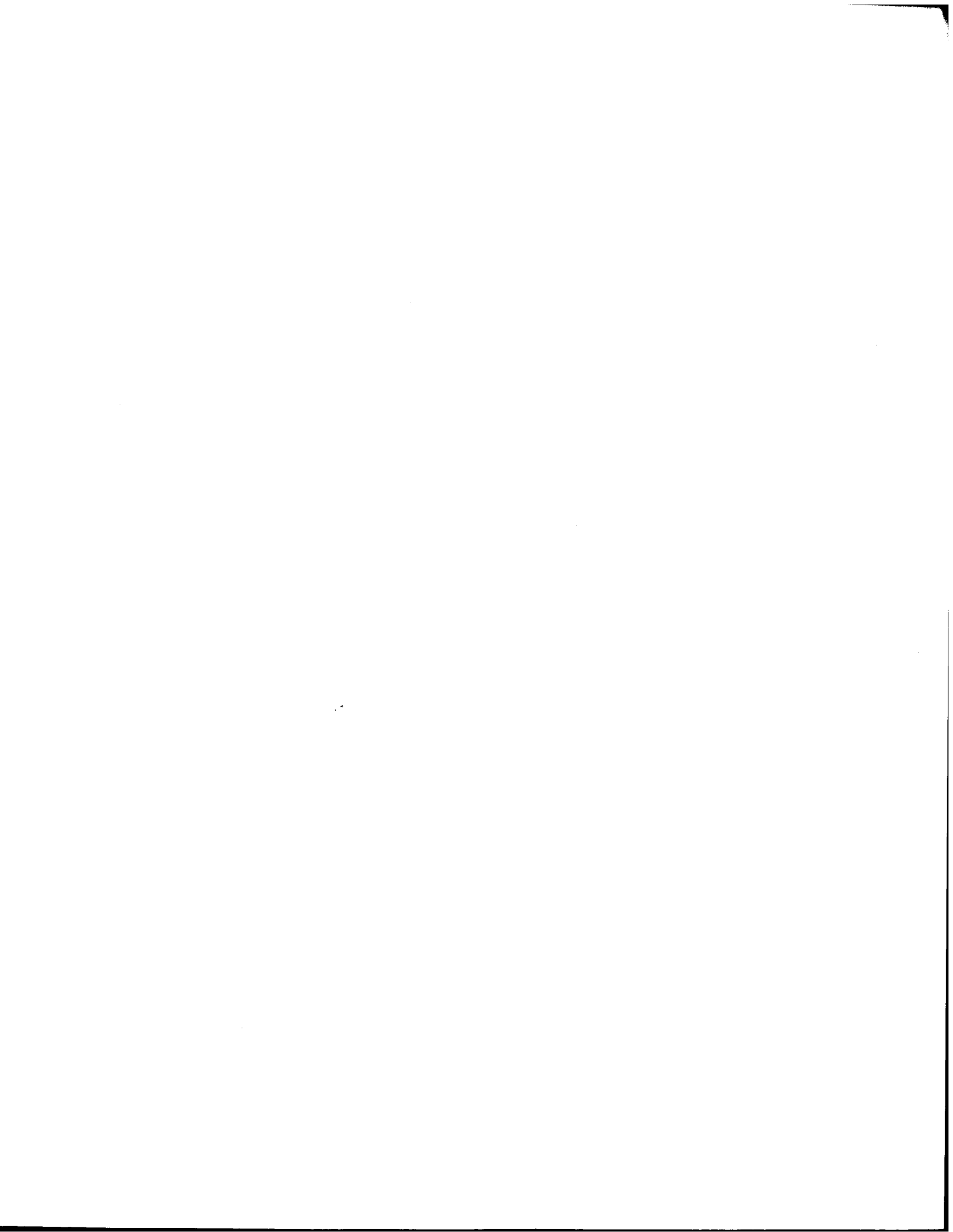
If it's not too late, I wanted to see if we could add the following facility to our file review this Friday:

Shepherd Bend Mine
Shepherd Bend, LLC
Walker County
NPDES Permit Number AL0079162.

We would like to request to see the actual paper file for this facility, including all records of correspondence related to this permit.

Thank you,
John Kinney
Program Director
Black Warrior Riverkeeper
712 37th St South
Birmingham, AL 35222
205-458-0095

No virus found in this incoming message
Checked by AVG - <http://www.avg.com>
Version: 8.0.176 / Virus Database: 270.9.12/1822 - Release Date: 12/3/2008 5:41 PM



Gil Rogers

From: Gil Rogers
Sent: Tuesday, December 09, 2008 11:36 AM
To: 'BMarshall@adem.state.al.us'
Cc: 'Nelson Brooke'; 'John Kinney'
Subject: Shepherd Bend Mine

Brian -

Thank you for responding to my message on Friday. I understand from what you said that the CD you gave us, along with the final NPDES permit that was sent to John Kinney, represents all materials that ADEM has in its file on the Shepherd Bend project. If I am incorrect in this assumption, please let me know when we can pick up any remaining documents from ADEM.

We are still reviewing the materials that ADEM provided to the Black Warrior Riverkeeper. I believe we may be missing the Pollution Abatement/Prevention Plan which is referenced in ADEM's response to comments (e.g. Response 7, p.10). Could you please send me that plan at your earliest convenience?

Black Warrior Riverkeeper continues to have concerns about the lack of notification to those who provided comments of the issuance of the final permit and ADEM's response to comments. What is ADEM's protocol regarding such notice, and why was it not followed in this case?

Thanks again for your help and for responding to me about this permit.

Sincerely,
Gil Rogers

Gilbert B. Rogers
Staff Attorney
Southern Environmental Law Center
127 Peachtree St., Ste. 605
Atlanta, GA 30303
(404) 521-9900
fax (404) 521-9909
www.southernenvironment.org

12/19/2008



Gil Rogers

From: Marshall, Brian C [BMarshall@adem.state.al.us]
Sent: Thursday, December 11, 2008 2:17 PM
To: Gil Rogers
Subject: RE: Shepherd Bend Mine

Mr. Rogers,

I have provided all documentation that I am aware of regarding the above-referenced permit. As a result, any potential discrepancy regarding the contents of what was reviewed by BWRK last week should be discussed with the individual in charge of our files – Ms. Azure Jones.

In addition - there has been no change in policy at the Department with regards to notification to those who have provided comments on a draft NPDES permit.

Sincerely,

Brian Marshall

Industrial/Mining Section
NPDES Permits Branch
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, AL 36110-2059
Phone: (334) 271-7895
Fax: (334) 279-3051
E-Mail: bmarshall@adem.state.al.us

From: Gil Rogers [mailto:grogers@selcga.org]
Sent: Tuesday, December 09, 2008 10:36 AM
To: Marshall, Brian C
Cc: 'Nelson Brooke'; 'John Kinney'
Subject: Shepherd Bend Mine

Brian -

Thank you for responding to my message on Friday. I understand from what you said that the CD you gave us, along with the final NPDES permit that was sent to John Kinney, represents all materials that ADEM has in its file on the Shepherd Bend project. If I am incorrect in this assumption, please let me know when we can pick up any remaining documents from ADEM.

We are still reviewing the materials that ADEM provided to the Black Warrior Riverkeeper. I believe we may be missing the Pollution Abatement/Prevention Plan which is referenced in ADEM's response to comments (e.g. Response 7, p.10). Could you please send me that plan at your earliest convenience?

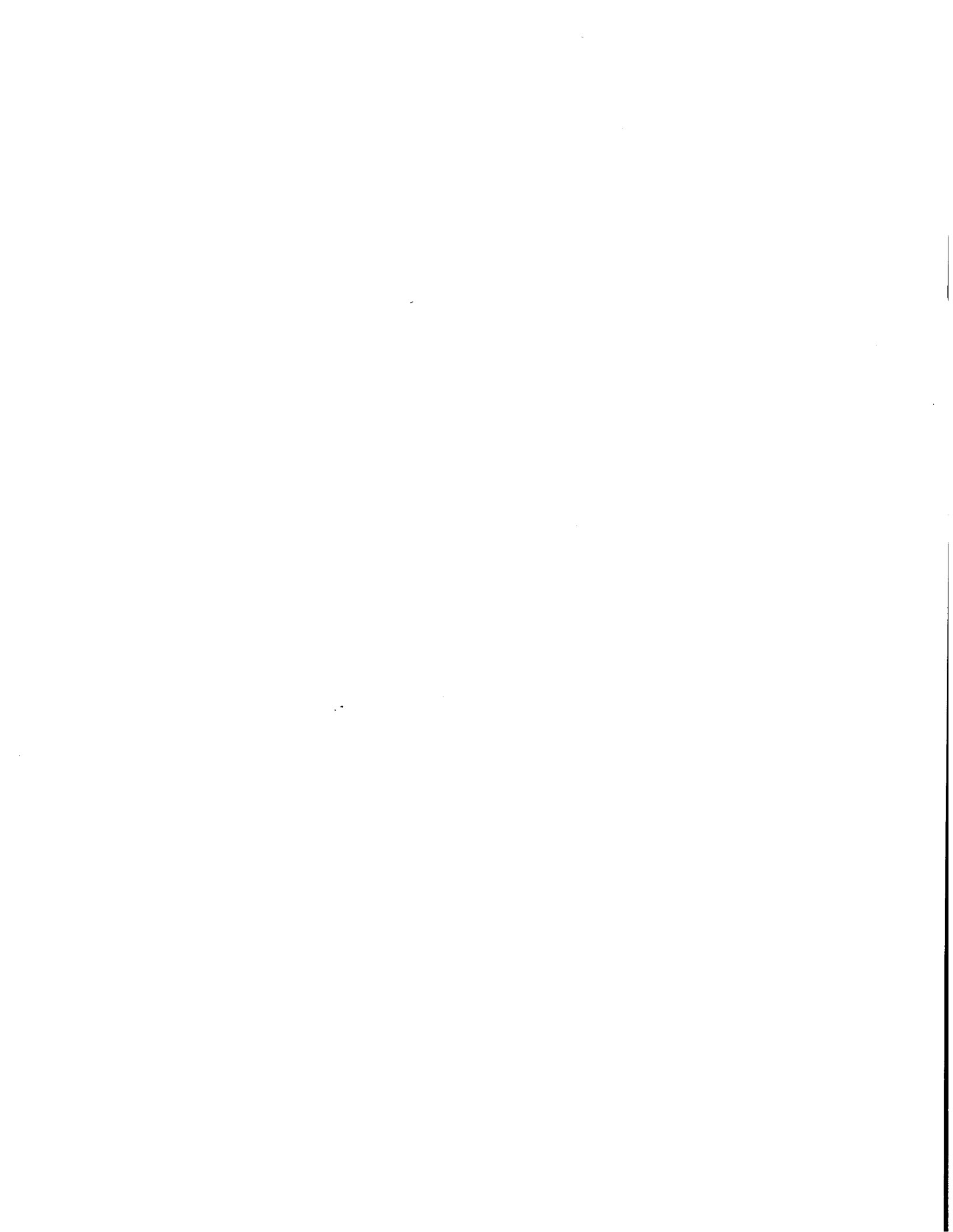
Black Warrior Riverkeeper continues to have concerns about the lack of notification to those who provided comments of the issuance of the final permit and ADEM's response to comments. What is ADEM's protocol regarding such notice, and why was it not followed in this case?

Thanks again for your help and for responding to me about this permit.

Sincerely,
Gil Rogers

12/19/2008

Gilbert B. Rogers
Staff Attorney
Southern Environmental Law Center
127 Peachtree St., Ste. 605
Atlanta, GA 30303
(404) 521-9900
fax (404) 521-9909
www.southernenvironment.org





The Birmingham News

Birmingham Water Works, environmental group surprised permit issued to mine

Water Works opposed ADEM move, wanted hearing

Sunday, December 14, 2008

KENT FAULK

News staff writer

Officials with the Birmingham Water Works and an environmental group said they were recently surprised to learn the state's environmental agency had given a permit to a proposed coal strip mine to discharge water into a river close to a major drinking water intake.

The water system and Black Warrior Riverkeeper officials a year ago protested the Alabama Department of Environmental Management's issuing the proposed permit and asked the agency to hold a public hearing on the issue.

The surprise came when the groups found out that ADEM issued the permit four months ago without telling them.

Binnie Myles, spokeswoman for the Birmingham Water Works, said the system didn't know the permit had been issued until a reporter from The Birmingham News called a few weeks ago. System officials planned to meet to look at their options, she said.

Black Warrior Riverkeeper officials found out at the same time and also are looking at options. "I was definitely shocked," said John Kinney, program director for the group.

ADEM issued the permit to Shepherd Bend LLC on July 26, and it became effective Aug. 1, said Jerome Hand, a spokesman for ADEM.

Shepherd Bend in late 2007 submitted an application for an ADEM permit that would allow water from the proposed 1,773-acre mine to be discharged into the adjacent Mulberry Fork of the Black Warrior River in Walker County. Under the permit, the water would have to be treated before being released into the river.

The Birmingham Water Works, Black Warrior Riverkeeper and area residents protested to ADEM. The drinking water intake is within 800 feet of proposed points upstream where treated water from mining operations would be put into the Mulberry Fork, the Water Works had written ADEM.

"The proximity of the proposed mining operation to such a major municipal water supply intake is unprecedented to our knowledge and represents an incompatible use," Mac Underwood, general manager of the water system, wrote in December 2007.

Asked for hearing:

The Birmingham Water Works and the Riverkeeper asked ADEM to hold a public hearing on the issue. ADEM officials said several times earlier this year the staff was still reviewing comments submitted by the water system and others, and the department had not decided whether to hold a hearing.

Hand said regulations do not require ADEM to notify third parties that a permit has been issued and there was no pending request for notification. He said those protesting the proposed permit had only asked that they be notified of a public hearing, which the agency decided against.

ADEM did formulate responses to comments made by opponents of the permit, Hand said. The agency, however, did not send out notifications that responses were available for review, he said.

"The department did not feel like a public hearing was necessary based on the comments we received," Hand said. "We try to do what's best for the state, and that's what I believe we did in this instance."

The News obtained a copy of ADEM's responses to written comments about Shepherd Bend's proposed permit. Among its responses, ADEM said it analyzed the water quality information it had on the Mulberry and the water system's Western Filter Plant intake. The discharge limits for the mine to follow would be protective of uses for the river, including drinking water supply, according to ADEM.

David Muncher, an official with Shepherd Bend, said ADEM took a careful look at its application, with the process taking longer than normal.

AU a landowner:

The mine is not in operation. Shepherd Bend is still preparing studies that must be done before applying to the Alabama Surface Mining Commission for a mining permit, Muncher said.

Much of the mine would be on University of Alabama-owned land, plus some owned by others. Cathy Andreen, a spokeswoman for the university, and Muncher said the university and mining company had not yet talked about leasing the land.

Landowners were notified that Shepherd Bend applied for an ADEM permit on their property, and Andreen said the university was aware the permit had been issued.

ADEM and state mining officials have said that a mining company would not have to have ownership or lease rights to land before applying for an ADEM permit.

Paul Blalock, a Walker County man whose land in that area is also listed on the permit, said he hadn't been contacted by Shepherd Bend. He said the only contact he had with anyone about that land recently was wildlife conservation officials who wanted to see if there were any special wildlife there that would be affected by mining operations.

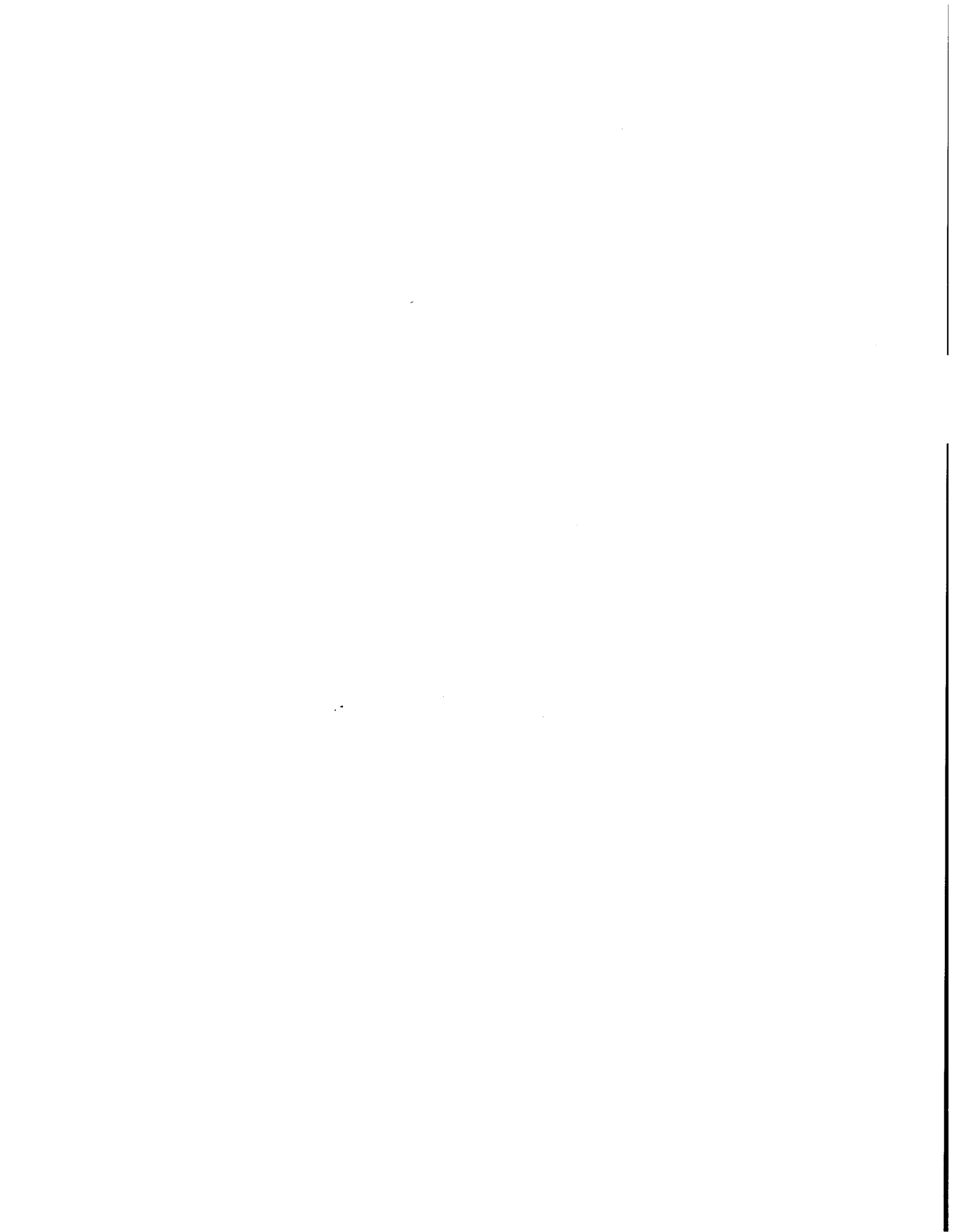
A spokeswoman for Soterra LLC, a land management company that owns some of the land, declined to

comment. Attempts to reach several others listed as landowners at the mine site were unsuccessful.

E-mail: kfaulk@bhamnews.com

©2008 Birmingham

© 2008 al.com All Rights Reserved.



**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT (ADEM)
FIELD OPERATIONS DIVISION NPDES INDIVIDUAL PERMIT APPLICATION**

**SURFACE & UNDERGROUND MINERAL & ORE OR MINERAL PRODUCT MINING QUARRYING, EXCAVATION,
BORROWING, HYDRAULIC MINING, STORAGE, PROCESSING, PREPARATION, RECOVERY, HANDLING,
LOADING, STORING, OR DISPOSING ACTIVITIES AND ASSOCIATED AREAS INCLUDING PRE-MINING SITE
DEVELOPMENT, CONSTRUCTION, EXCAVATION, CLEARING, DISTURBANCE, RECLAMATION, AND
ASSOCIATED AREAS**

PLEASE READ THE ACCOMPANYING INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM. COMPLETE ALL QUESTIONS. RESPOND WITH "N/A" AS APPROPRIATE. INCOMPLETE OR INCORRECT ANSWERS OR MISSING SIGNATURES WILL DELAY PROCESSING. ATTACH ADDITIONAL COMMENTS OR INFORMATION AS NEEDED. IF SPACE IS INSUFFICIENT, CONTINUE ON AN ATTACHED SHEET(S) AS NECESSARY. COMMENCEMENT OF ACTIVITIES APPLIED FOR AS DETAILED IN THIS APPLICATION ARE NOT AUTHORIZED UNTIL PERMIT COVERAGE HAS BEEN ISSUED BY THE DEPARTMENT.

PLEASE TYPE OR PRINT IN INK ONLY.

I. APPLICANT INFORMATION Initial Issuance: Major Modification: Reissuance: NPDES: AL0079166
 Reissuance & Modification: Minor Modification: Transfer: Voluntary Termination:

Company Name <u>Shepherd Bend, LLC.</u>		Facility Name <u>Shepherd Bend Mine</u>	
Responsible Official and Title <u>Donald M. Baxter, Managing Member.</u>		Facility Contact and Title <u>Donald M. Baxter, Managing Member.</u>	
Mailing Address of Applicant <u>P. O. Box 2322</u>		Facility Contact Street Address <u>P. O. Box 2322</u>	
City <u>Jasper</u>	State <u>AL</u>	Zip <u>35502</u>	City <u>Jasper</u>
Business Phone Number <u>(205) 221-7747</u>		Fax Number <u>(205) 221-7865</u>	Facility Contact Phone Number <u>(205) 221-7747</u>
Responsible Official Street/Physical Address & Phone Number <u>Donald M. Baxter 120 North Walston Bridge Road, Building #2, Jasper, AL 35504; (205) 221-7747</u>			Email Address <u>None</u>
Registered Agent Name, Address, & Phone Number <u>Jim G. McLaughlin; 1901 Sixth Ave. North Suite 2400, Birmingham, AL 35203 Phone Number: (205) 254-1058</u>			
Identify the name, title/position, and unless waived in writing by the Department, the residence address of every officer, general partner, LLP partner, LLC member, investor, director, or person performing a function similar to a director, of the applicant, and each person who is the record or beneficial owner of 10 percent or more of any class of voting stock of the applicant, or any other responsible official(s) of the applicant with legal or decision making responsibility or authority for the facility:			
Name	Title/Position	Residence Address (PO Box not acceptable)	
<u>Baxter Company, Inc.</u>	<u>Managing Member</u>	<u>120 North Walston Bridge Road, Jasper, AL, 35501</u>	
<u>Donald M Baxter</u>	<u>CEO of Baxter Company, Inc.</u>	<u>270 Longview Drive, Jasper, AL 35504</u>	

II. OFFICER INFORMATION

Name of each corporation, partnership, association, and single proprietorship (other than applicant) having an Alabama NPDES permit at any time during the sixty (60) month period immediately preceding the date on which this form is signed for which any individual identified in Item I is or was an officer, general partner, LLP partner, LLC member, investor, director, or individual performing a function similar to a director, or principal (10% or more) stockholder:

Name of corporation, partnership, association, or single proprietorship	Name of individual (from Item I)	Title/position in corporation, partnership, association, or single proprietorship
<u>See Sheet 1a of 11</u>		

II. OFFICER INFORMATION – CONTINUED

Name of corporation, partnership, association, or single proprietorship	Name of individual (from Item I)	Title/position in corporation, partnership, association, or single proprietorship
Sloan Mountain Mining, LLC.	Donald M. Baxter	Managing Member
Dorsey Creek Mining, LLC.	Donald M. Baxter	Managing Member
Horse Creek Mining, LLC.	Donald M. Baxter	Managing Member
Quinton Mining, LLC.	Donald M. Baxter	Managing Member

III LEGAL STRUCTURE OF APPLICANT

Corporation
 Association
 Individual
 Single Proprietorship
 Partnership
 LLP
 LLC

Government Agency _____
 Other _____
 Other _____

Yes
 No
 If not an Individual or Single Proprietorship, applicant is properly registered with the Alabama Secretary of State's office. If "No", please explain:

Parent Corporation and Subsidiary Corporations of Applicant, if any: There are none.

Land owner(s): Ala-West LLC, University of Alabama, Dr. Heaton, Soterra, J.L.C, Paul Blalock, Nathaniel Key, Ralph Brasfield, John Hollis, Gail Beard

Mining Sub-contractor(s)/Operator(s), If Known: N/A-None

IV. COMPLIANCE HISTORY

Has the applicant ever had (If the response to any item is yes, attach a letter of explanation.):

	Yes	No		Yes	No
(a) an Alabama NPDES-SID-UIC permit suspended or terminated?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	(b) an Alabama license to mine suspended or revoked?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(c) an Alabama or federal mining permit suspended or terminated?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	(d) a reclamation bond, or similar security deposited in lieu of a bond, or portion thereof, forfeited?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(e) a bond or similar security deposited in lieu of a bond, or portion thereof, the purpose of which was to secure compliance with any requirement of the Alabama Water Improvement Commission or Alabama Department of Environmental Management, forfeited?	<input type="checkbox"/>	<input checked="" type="checkbox"/>		<input type="checkbox"/>	<input checked="" type="checkbox"/>

Identify every Warning Letter, Notice of Violation (NOV), Administrative Action, Directive, or litigation filed by ADEM or EPA during the three year (36 months) period preceding the date on which this form is signed issued to the applicant, parent corporation, subsidiary, general partner, LLP partner, or LLC Member. Indicate the date of issuance, briefly describe alleged violations, list actions (if any) to abate alleged violations, and indicate date of final resolution:

Shepherd Bend, LLC: None. Horse Creek Mining, LLC: Nov's effluent violations 11-14-05 & 3-31-05; Quinton Mining, LLC 8-31-07 consent order Effluent violations & inspection deficiencies, 12-19-06 NOV inspections deficiencies, 5-16-06 WL inspection deficiencies, 4-21-06 WL effluent Violations, 11-14-05 NOV effluent violations, 7-22-05 WL effluent violations

V. PROPOSED SCHEDULE

Anticipated Activity schedule: Commencement date: 7/01/08 Completion date or year: 2013

Proposed Area of the Permitted site: Total area in acres: 1773 Disturbed area in acres: 1773

VI. OTHER PERMITS/AUTHORIZATIONS

1) List any other NPDES or other environmental permits, authorizations, or certifications that have been applied for or issued within the State by ADEM, EPA, Alabama Surface Mining Commission (ASMC), Alabama Department of Industrial Relations (ADIR), or other Agency, to the applicant, parent corporation, subsidiary, or LLC member for this facility whether presently effective, expired, suspended, or revoked (include permit numbers):

ASMC permit to be submitted December 2007

2) List any other NPDES or other ADEM permits, authorizations, or certifications that have been applied for or issued within the State by ADEM, EPA, ASMC, or ADIR, to the applicant, parent corporation, subsidiary, or LLC member for other facilities whether presently effective, expired, suspended, or revoked (include permit numbers):

ADEM-AL0076538, AL0077496, AL0077071, AL0077747, AL0077941, AL0077615, AL0077143, AL0076554

ASMC-P-3960, P-3842, P-3858

VII. ACTIVITY DESCRIPTION & INFORMATION

Township(s), Range(s), Section(s): T15S, R6W, Sec. 34, 35 and T16S, R6W, Sec. 1, 2, 3, 4, 10, 11, 12
 County(s): Walker

Directions To Site: From Birmingham travel north on Al Hwy 269 to Copeland Ferry Bridge continue north approximately 1/2 mile, turn right on the Cordova-Gorgas Road, travel approximately 2 miles, turn right on Underwood Ferry Road, travel approximately 1.5 miles, turn left on Reeds Ferry Road to the mine site.

Yes	No	Is/will this facility:	Yes	No
(a)	<input type="checkbox"/>	<input checked="" type="checkbox"/> an existing facility which currently results in discharges to State waters	(b)	<input checked="" type="checkbox"/> <input type="checkbox"/> be located within any 100-year flood plain?
(c)	<input checked="" type="checkbox"/>	<input type="checkbox"/> a proposed facility which will result in a discharge to State waters?	(d)	<input type="checkbox"/> <input checked="" type="checkbox"/> discharge to Municipal Separate Storm Sewer?
(e)	<input type="checkbox"/>	<input checked="" type="checkbox"/> discharge to waters of or be located in the Coastal Zone?	(f)	<input type="checkbox"/> <input checked="" type="checkbox"/> need/have ADEM UIC permit coverage?
(g)	<input type="checkbox"/>	<input checked="" type="checkbox"/> be located on Indian/ historically significant lands?	(h)	<input type="checkbox"/> <input checked="" type="checkbox"/> need/have ADEM SID permit coverage?
(i)	<input checked="" type="checkbox"/>	<input type="checkbox"/> need/have ASMC permit coverage?	(j)	<input type="checkbox"/> <input checked="" type="checkbox"/> need/have ADIR permit coverage?
(k)	<input type="checkbox"/>	<input checked="" type="checkbox"/> generate, treat, store, or dispose of hazardous or toxic waste? If "yes", attach a detailed explanation.		
(l)	<input checked="" type="checkbox"/>	<input type="checkbox"/> be located in or discharge to a Public Water Supply (PWS) Watershed(s) or be located within 1/2 mile of any PWS well?		

VIII. PROPOSED ACTIVITY TO BE CONDUCTED - Check all that apply.

Type(s) of activity presently conducted at applicant's existing facility or proposed to be conducted at proposed facility (check each one that applies):

Surface mining Underground mining Auger mining Quarrying Hydraulic mining Mineral storing

Within-bank mining Lime production Cement production Synthetic fuel production Alternative fuels operation

Other beneficiation/manufacturing operations Chemicals used in process or wastewater treatment (coagulant, biocide, etc.)

Mineral loading Mineral wet preparation Mineral dry processing (crushing & screening)

Chemical processing or leaching Solution mining Construction related temporary borrow pits/areas

Mineral transportation rail X barge X truck Hydraulic mining, dredging, instream or between stream-bank mining

Preparation plant waste recovery Onsite construction/mining waste/debris/equipment storing/disposing

Excavation Grading, clearing, grubbing, etc. Reclamation of disturbed areas

Pre-mining logging or land clearing Pre-construction ponded water removal Waterbody relocation or other alteration

Adjacent/associated asphalt/concrete plant(s) Low volume sewage treatment package plant Creek/stream crossings

Other (Describe): _____ Other (Describe): _____

Primary SIC Code 1221 Description Bituminous Coal Surface Mining

Secondary SIC Code _____ Description _____

Narrative Description: Activity is for surface mining of bituminous coal; reclamation and maintenance of mine site using mobile equipment.
 of the Activity This activity includes complete reclamation of all disturbed areas in the postmining stages.

IX. MATERIAL TO BE REMOVED, PROCESSED, OR TRANSLOADED - List relative percentages for All that apply

List relative percentages of mineral(s) or mineral products presently mined, quarried, recovered, prepared, processed, handled, transloaded, or disposed at applicant's existing facility or to be mined, quarried, recovered, prepared, processed, handled, transloaded, or disposed at applicant's proposed facility. **If more than one mineral is to be mined, list the relative proportions of each mineral by tonnage for the life of the mine.**

_____ Dirt-Chert	_____ Sand-Gravel	_____ Chalk	_____ Talc	_____ Crushed rock - other
_____ Bentonite	_____ Industrial Sand	_____ Coal product, coke	_____ Marble	_____ Shale & Common Clay
<u>100</u> Coal	_____ Lignite	_____ Fire clay	_____ Iron ore	_____ Coal fines/refuse recovery
_____ Slag, Red Rock	_____ Phosphate rock	_____ Granite	_____ Limestone, crushed limestone and dolomite	
_____ Bauxitic clay	_____ Kaolin	_____ Dimension stone	_____ Gold, other trace minerals (be specific)	
_____ Bauxite ore (for Aluminum production)	_____ Other (be specific)			

X. FUEL · CHEMICAL HANDLING, STORAGE & SPILL PREVENTION CONTROL & COUNTERMEASURES (SPCC) PLAN

Will fuels, chemicals, compounds or liquid waste be used or stored onsite? Yes No If "yes", identify and indicate amount below:

Capacity	Contents	Capacity	Contents	Capacity	Contents
(3) 12,000 gallons	Diesel	(1) 10,000	gallons Gasoline	(3) 1,500 gallons	Oil
(1) 500 gallons	Waste Oil		gallons		

Two containment area locations are shown on the map as Option 1 and 2. Only one of these locations will be utilized.

If "yes", a detailed SPCC Plan with acceptable format/content, including diagrams, must be attached to application according to ADEM Admin. Code R. 335-6-6-.12(r). Unless waived in writing by the Department on a programmatic, categorical, or individual compound/chemical basis, attach Material Safety Data Sheets (MSDS) for chemicals/compounds used or proposed to be used at the facility.

XI. POLLUTION ABATEMENT & PREVENTION (PAP) PLAN

Yes No ADEM 335-6-9 PAP and Appendix A & B Checklists have been completed and are attached as part of this application.

Yes No A detailed PAP Plan with format/content acceptable to ADEM is attached to application according to ADEM Admin. Code R. 335-6-9-.03 and Appendices A & B, or has been submitted to ASMC according to submittal procedures for ASMC regulated facilities (see next response).

No* If a coal facility, detailed mining and engineering design plan(s) are on file with or have been submitted to ASMC.
Date

If response is "No", or if a coal facility and an application has not been filed with ASMC, please explain:

*A permit application, with detailed plans for each proposed outfall, will be submitted to ASMC for their approval December 2007.

XII. TOPOGRAPHIC MAP SUBMITTAL

Attach to this application a 7.5 minute series U.S.G.S. topographic map(s) or equivalent map(s) no larger than, or folded to a size of 8.5 by 11 inches (several pages may be necessary) of the area extending to at least one mile beyond property boundaries. The topographic or equivalent map(s) must include a caption indicating the name of the topographic map, name of the applicant, facility name, county, and township, range, & section(s) where the facility is located. Unless approved in advance by the Department, the topographic or equivalent map(s), at a minimum, must show:

- | | |
|---|--|
| (a) an outline of legal boundary of entire property (property lines and lease boundaries) | (c) all existing and proposed disturbed areas |
| (b) an outline of the facility | (e) proposed and existing discharge points |
| (d) location of discharge areas | (g) lakes, springs, water wells, wetlands |
| (f) perennial, intermittent, and ephemeral streams | (i) all surrounding unimproved/improved roads |
| (h) all known facility dirt/improved access/haul roads | (k) buildings and structures, including fuel/water tanks |
| (j) high-tension power lines and railroad tracks | (m) drainage patterns, swales, washes |
| (l) contour lines, township-range-section lines | (o) Any other pertinent or significant feature |
| (n) all drainage conveyance/treatment structures (ditches, berms, etc.) | |

[symbols identified in Theodore D. Steger, Topographic Maps, U.S. Interior Dept., Geological Survey, 1978 (No. 0--274--961), as updated/revised]

XIII. DETAILED FACILITY MAP SUBMITTAL

Attach to this application a 1:500 scale or better, detailed auto-CAD map(s) or equivalent map(s) no larger than, or folded to a size of 8.5 by 11 inches (several pages may be necessary) of the facility. The facility or equivalent map(s) must include a caption indicating the name of the facility, name of the applicant, facility name, county, and township, range, & section(s) where the facility is located. Unless approved in advance by the Department, the facility or equivalent map(s), at a minimum, must show:

- | | |
|---|--|
| (a) Information listed in Item XII (a) – (o) above | (b) If noncoal, detailed, planned mining progression |
| (c) location of mining or pond cleanout waste storage/disposal areas | (d) If noncoal, location of topsoil storage areas |
| (e) Other information relevant to facility or operation | |
| (f) location of facility sign showing permittee name, facility name, and NPDES Number | |

XIV. PROPOSED NEW OR INCREASED DISCHARGES

Pursuant to ADEM Admin. Code Chapter 335-6-10-.12(9), responses to the following questions must be provided by the applicant requesting NPDES permit coverage for new or expanded discharges of pollutant(s) to Tier 2 waters (except discharges eligible for coverage under general permits). As part of the permit application review process, the Department is required to determine, based on the applicant's demonstration, that the proposed new or increased discharge to Tier 2 waters is necessary for important economic or social development in the area in which the waters are located.

- Yes. New/increased discharges of pollutant(s) or discharge locations to Tier 2 waters are proposed. Complete items 1 – 6 below.
- No. New/increased discharges of pollutants(s) or discharge locations to Tier 2 waters are not proposed.

If "Yes", applicant is requesting issuance, modification, or reissuance & modification of permit coverage for new or expanded discharges of pollutant(s) not previously permitted. Complete this Item, Item XV, and Item XVI as necessary. **Attach additional sheets/documentation and supporting information as needed.**

SEE ATTACHED SHEET 5a of 11 FOR 1) THROUGH 6).

- 1) What environmental or public health problem will the discharge be correcting? _____

- 2) How much will the discharger be increasing employment (at its existing facility or as a result of locating a new facility)?

- 3) How much reduction in employment will the discharger be avoiding? _____

- 4) How much additional state or local taxes will the discharger be paying? _____

- 5) What public service to the community will the discharger be providing? _____

- 6) What economic or social benefit will the discharger be providing to the community? _____

XIV. PROPOSED NEW OR INCREASED DISCHARGES – CONTINUED

1.) **What environmental or public health problem will the discharge be correcting?**

These discharges will not correct any existing environmental or public health problem.

2.) **How much will the discharger be increasing employment (at its existing facility or as a result of locating a new facility)?**

Employment will be increased by approximately 110 new jobs in skilled positions (with above average compensation) and influence indirect employment of approximately 60 new jobs in related service fields.

3.) **How much reduction in employment will the discharger be avoiding?**

None. The facility is a new facility.

4.) **How much additional state or local taxes will the discharger be paying?**

The following is an estimate of the taxes/fees that will be generated for the mine operation from company and employees:

Federal Income	\$ 1,344,000	Walker County	\$34,100
Alabama Income	\$448,000	Property	\$ 8,333
FICA	\$489,600	Alabama Severance	\$80,135
FUTA	\$ 51,200	AML Reclamation	\$ 13,640
SUTA	\$ 76,800	Black Lung Excise	\$187,550
Workman Comp	\$160,000	Fuel (Fed/State/Co)	\$200,000
Alabama Sales	\$316,800		

Estimates as based on annual bases with the potential of 12 years of mining.

5.) **What public service to the community will the discharger be providing?**

This facility will produce a high-grade quality steam coal for Alabama Power Company's electrical generation. This will sustain the community's electrical needs and provide the basis for future economic and social growth. The company may provide equipment and/or personnel to aid the community in times of localized disasters. Community service will depend on specific needs matching available company resources. Charitable donations are made confidentially by the member(s) of Shepherd Bend, LLC.

6.) **What economic or social benefit will the discharger be providing to the community?**

The community will benefit from the mine by supplying labor and materials to meet the needs of the operations. This will increase the local tax revenue, thereby helping to fund governmental services. Increased demand for labor will reduce unemployment levels. These positive attributes will lift community pride and enrich the state by encouraging industrial development that provides economic growth while protecting Alabama's environment.

XV. ALTERNATIVES ANALYSIS ADEM Form 311 3/02

Pursuant to ADEM Admin. Code Chapter 335-6-10, an evaluation of the discharge alternatives identified below has been completed and the following conclusions, as indicated, were reached. All proposed new or expanded discharges of pollutant(s) covered by the Individual NPDES permitting program are subject to the provisions of the antidegradation policy. As part of the permit application review process, the Department is required to determine, based on the applicant's demonstration, that the proposed new or increased discharge to Tier 2 waters is necessary for important economic or social development in the area in which the waters are located. As a part of this demonstration, a registered professional engineer (PE) licensed to practice in the State of Alabama must complete an evaluation of the discharge alternatives, to include calculation of total annualized project costs (Item XVI) for each technically feasible alternative. Technically feasible alternatives with total annualized pollution control project costs that are less than 110% of the preferred alternative total annualized pollution control project costs for the Tier 2 new or increased discharge proposal are considered viable alternatives. **Supporting documentation is attached, referenced, or otherwise handled as appropriate.**

Alternative	Viable	Non-Viable	Reason/Rationale For Indicating Non-Viable
1) Treatment/Discharge Proposed In This Application	X		
2) Land Application		X	See attached sheet 6a of 11 for all Non-Viables.
3) Pretreatment/Discharge to POTW By SID Permit		X	
4) Relocation of Discharge		X	
5) Reuse/Recycle - Pollution Prevention		X	
6) Other Process/Treatment Alternatives		X	
7) Underground Injection By UIC Permit		X	
8) Other Project Specific Alternative(s) Identified By the Applicant Or The ADEM		X	
9) Other Project Specific Alternative(s) Identified By the Applicant Or The ADEM		X	

COMMENTS:

XVI. CALCULATION OF TOTAL ANNUALIZED PROJECT COSTS FOR PRIVATE SECTOR PROJECTS - ADEM Form 313 3/02
(ADEM Form 312 3/02 - Public Sector Project is available upon request)

This item must be completed for each technically feasible alternative evaluated in Item XV. **Copy, complete, and attach additional blocks/sheets and supporting information as needed.**

Capital Costs of pollution control project to be expended or financed by applicant (Supplied by applicant)	\$ <u>1,864,000</u> (1)	* While actual payback schedules may differ across projects and companies, assume equal annual payments over a 10-year period for consistency in comparing projects.
Interest Rate for Financing (Expressed as a decimal)	<u>.10</u> (i)	
Time Period of Financing (Assume 10 years *)	<u>10 years</u> (n)	
Annualization Factor ** = $\frac{i}{(1+i)^{10}-1} + i$ i = Interest Rate	<u>.1627</u> (2)	** Or refer to Appendix B (application information) for calculated annualization factors.
Annualized Capital Cost [Calculate: (1) x (2)]	\$ <u>303,273</u> (3)	
Annual Cost of Operation & Maintenance (including but not limited to monitoring, inspection, permitting fees, waste disposal charges, repair, administration & replacement) ***	\$ <u>48,100</u> (4)	*** For recurring costs that occur less frequently than once a year, prorate the cost over the relevant number of years (e.g., for pumps replaced once every three years, include one-third of the cost in each year).
Total Annual Cost of Pollution Control Project [(3) + (4)]	\$ <u>351,373</u> (5)	

XV. ALTERNATIVES ANALYSIS – CONTINUED

This permitted facility is a surface coal mining operation. It is regulated by several state and federal agencies to prevent any adverse environmental impacts during mining. Also, according to the Alabama Surface Mining Commission's regulation, 880-X-10C-.30 (paraphrased), it is required that mining activities be conducted to extract and conserve all economically recoverable coal so that future mining activities will be minimized. Therefore, based on site specifics, the proposed new discharges are the minimum necessary to control disturbed drainage and make full coal recovery.

Another regulation of the ASMC, 880-X-10C-.13(1)(a) states that "All surface drainage from the disturbed area shall be passed through a sedimentation pond, a series of sedimentation ponds or other treatment facility before (emphasis added) leaving the permit area. Because of this regulation and site specifics of topography and geology, there are no technically feasible alternatives in place of the proposed discharge outfalls at this mine-site including alternatives such as diverting drainage, pumping and underground injection at other mines; none are feasible at this site.

Further description will engage all seven (7) items of ADEM's application form for Item XV as follows:

- 1) Treatment/Discharge Proposed In This Application – The proposed discharge outfalls are the only technically feasible solution to control the disturbed drainage areas. The optimal sites have been selected to control the maximum proposed disturbance areas.
- 2) Land Application – This is not technically feasible since the ASMC requires all disturbed drainage to be passed through a sediment control structure before leaving the permit area. Shepherd Bend, LLC., will construct a sediment control structure (pond) at each proposed outfall. Land Application is considered irrigation by the ASMC and is not allowed according to regulation 880-X-9B-.04(2)(a),(b). Also, Land Application could increase the amount of solids being displaced on a continual basis, especially during a rainfall event, as it is distributed over disturbed areas that may not be fully stabilized by final reclamation and revegetation.
- 3) Pretreatment/Discharge To POTW By SID Permit – This is not technically feasible since the ASMC requires all disturbed drainage to be passed through a sediment control structure. Once disturbance has been treated by the sediment control structure to meet effluent guidelines, there is no longer a need to prevent site discharge. Secondly, there is not a POTW located within proximity to make this feasible even if it would be allowed by the ASMC.
- 4) Relocation Of Discharge – This is not technically feasible for the mine site due to: (1) The proposed mining operations have been planned to maximize recovery. These plans logically call for disturbance in all of the discharge receiving areas at the same time. (2) the topography of the outfall locations (steep slopes) prevents diverting of one discharge area into another and the receiving discharge area sediment control structure could not be designed large enough for both areas to meet effluent limits.
- 5) Reuse/Recycle – This is not technically feasible since there is no use at this operation, such as would occur with a preparation plant, for the discharge. Please note, again, that the ASMC requires all discharges to be passed through a sediment control structure.
- 6) Other Process/Treatment Alternatives – This is not technically feasible since there isn't a process/treatment system designed to meet the needs of coal mining as a point source discharge (regulation 880-X-10C-.13(1)(b)) and compete economically with a sediment control structure (pond).
- 7) Underground Injection By UIC Permit – This is not technically feasible for this permit because of the site geology. To be able to handle the amount of discharge volume would require an abandoned underground mine, and one does not exist within the proximity of this mine. Neither is the permeability of the strata able to handle the volume, especially when groundwater levels are enhanced by the overburden that has been fractured by blasting operations.

In conclusion, there isn't a technically feasible alternative to the proposed discharges that will meet the site requirements and/or meet ASMC regulations.

XVII. RECEIVING WATERS

List the requested permit Action for each outfall (issue, reissue, add, delete, move, etc.), Outfall Designation including noting "E" for existing and "P" for proposed, name of receiving water(s), ADEM water use classification (WUC) for the receiving water, latitude and longitude (to seconds) of location(s) that run-off enters the receiving water, distance of receiving water from outfall in feet, number of disturbed acres, the number of drainage acres which will drain through each treatment system, outfall, or BMP, and if the outfall discharges to an ADEM listed CWA Section 303(d) waterbody segment at the time of application submittal.

Action	Outfall E/P	Receiving Water	ADEM WUC	Latitude	Longitude	Distance to Rec. Water	Disturbed Acres	Drainage Acres	303(d) Segment (Y/N)
		SEE SHEET 7a OF 11							

XVIII. DISCHARGE CHARACTERIZATION

- Yes, pursuant to 40 CFR 122.21, the applicant requests a waiver for completion of EPA forms 2C and/or 2D and certifies that the operating facility will discharge treated stormwater only, unless waived in writing by the Department on a programmatic, categorical, or individual compound/chemical basis that chemical/compound additives are not used, and that there are no process, manufacturing, or other industrial operations or wastewaters, including but not limited to lime or cement production, synfuel operations, etc.
- No, the applicant does not request a waiver and a complete and correct EPA form 2C and/or 2D is attached.

If a completed EPA form 2C and/or 2D is not attached, the applicant is required to supply the following information separately for every P or E outfall. If necessary, attach extra sheets. List expected average daily discharge flow rate in gallons/day and in cfs, frequency of discharge in hours per day and days per month, average summer and winter temperature of discharge(s) in degrees centigrade (C), average daily discharge in pounds per day of Total Iron, Total Manganese, BOD₅, Total Aluminum (if bauxite or bauxitic clay), and Total Suspended Solids:

Outfall E/P	Information Source - # of Samples	Flow cfs	Flow gpd	Frequency hours/day	Frequency days/month	pH s.u.	BOD ₅ lbs/day	Sum/Win Temp, C.	TSS lbs/day	Tot Fe lbs/day	Tot Mn lbs/day	Tot Al lbs/day
	SEE SHEET 7b OF 11											

Please supply the following information separately for every P or E outfall. If necessary, attach extra sheets. Identify and list expected average daily discharge in pounds per day of any other pollutant(s) listed in EPA Form 2C, Item V - Intake And Effluent Characteristics, Parts A, B & C that are not referenced in XVIII above, that you know or there is reason to believe could be present in the discharge(s) at levels of concern. I/we (PE and applicant) certify that I/we have reviewed the list of pollutants referenced in EPA Forms 2C & 2D, and the pollutants listed in EPA Form 2C and/or 2D that are not listed below are believed absent or not present at levels of concern in any proposed or existing discharge(s) from this facility:

Outfall E/P	Reason Believed Present	Information Source - # of Samples									
			lbs/day	lbs/day	Lbs/day	lbs/day	lbs/day	lbs/day	lbs/day	lbs/day	lbs/day
		SEE SHEET 7c OF 11.									

XVII. RECEIVING WATERS - CONTINUED

Action	Outfall E/P	Receiving Water	ADEM WUC	Latitude	Longitude	Distance to Rec. Water	Disturbed Acres	Drainage Acres	303(d) Segment (Y/N)
Issue	001P	UT to Barton Creek	F/W	33°41'31"	87°09'28"	0	111	111	N
Issue	002P	UT to Barton Creek	F/W	33°41'43"	87°09'21"	0	115	115	N
Issue	003P	UT to Barton Creek	F/W	33°41'47"	87°08'58"	0	125	125	N
Issue	004P	Mulberry Fork of Black Warrior River	F/W, PWS	33°41'41"	87°08'34"	0	20	20	N
Issue	005P	Mulberry Fork of Black Warrior River	F/W, PWS	33°41'29"	87°08'25"	150	115	115	N
Issue	006P	Mulberry Fork of Black Warrior River	F/W, PWS	33°41'16"	87°07'58"	150	38	38	N
Issue	007P	Mulberry Fork of Black Warrior River	F/W, PWS	33°41'07"	87°07'55"	550	42	42	N
Issue	008P	UT to Mulberry Fork of Black Warrior River	F/W, PWS	33°40'43"	87°07'43"	200	183	183	N
Issue	009P	Mulberry Fork of Black Warrior River	F/W, PWS	33°40'27"	87°07'36"	500	40	40	N
Issue	010P	Mulberry Fork of Black Warrior River	F/W, PWS	33°40'12"	87°07'31"	600	63	63	N
Issue	011P	Mulberry Fork of Black Warrior River	F/W,S, PWS,	33°40'04"	87°08'13"	650	11	11	N
Issue	012P	Mulberry Fork of Black Warrior River	F/W,S, PWS,	33°40'10"	87°08'12"	250	23	23	N
Issue	013P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°40'17"	87°08'13"	200	56	56	N
Issue	014P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°40'30"	87°08'12"	100	49	49	N
Issue	015P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°40'41"	87°08'19"	400	35	35	N
Issue	016P	UT to Mulberry Fork of Black Warrior River	F/W	33°40'41"	87°08'34"	100	100	100	N
Issue	017P	UT to Mulberry Fork of Black Warrior River	F/W	33°40'39"	87°08'46"	0	89	89	N
Issue	018P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°40'34"	87°08'52"	500	6	6	N
Issue	019P	UT to Mulberry Fork of Black Warrior River	F/W	33°40'31"	87°09'01"	0	37	37	N
Issue	020P	UT to Mulberry Fork of Black Warrior River	F/W	33°40'30"	87°09'05"	0	66	66	N
Issue	021P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°40'12"	87°09'10"	200	21	21	N
Issue	022P	UT to Mulberry Fork of Black Warrior River	F/W	33°40'22"	87°09'26"	0	164	164	N
Issue	023P	Mulberry Fork of Black Warrior River	F/W,S PWS	33°39'58"	87°07'23"	400	34	34	N
Issue	024P	UT to Mulberry Fork of Black Warrior River	F/W	33°39'38"	87°07'35"	0	73	73	N
Issue	025P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°39'36"	87°07'41"	500	25	25	N
Issue	026P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°39'36"	87°07'49"	200	27	27	N
Issue	027P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°39'37"	87°07'54"	600	10	10	N
Issue	028P	UT to Mulberry Fork of Black Warrior River	F/W	33°39'48"	87°08'15"	0	77	77	N
Issue	029P	Mulberry Fork of Black Warrior River	F/W,S, PWS	33°39'56"	87°08'15"	400	18	18	N

XVIII. DISCHARGE CHARACTERIZATION - CONTINUED

Outfall E/P	Information Source - # of Samples	Flow cfs	Flow gpd	Frequency hours/day	Frequency days/month	pH s.u.	BOD ₅ Lbs/day	Sum/Win Temp, C.	TSS lbs/day	Tot Fe lbs/day	Tot Mn lbs/day	Tot Al lbs/day
001P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
002P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
003P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
004P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
005P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
006P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
007P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
008P	BPE	.45	295,000	Precipitation Driven		7.3	.01	31/8	177.00	11.24	4.54	-
009P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
010P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
011P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
012P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
013P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
014P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
015P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
016P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
017P	BPE	.30	179,000	Precipitation Driven		7.3	.01	31/8	100.00	8.90	1.54	-
018P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
019P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
020P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
021P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
022P	BPE	.45	295,000	Precipitation Driven		7.3	.01	31/8	177.00	11.24	4.54	-
023P	BPE	.10	64,000	Precipitation Driven		7.3	.01	31/8	38.40	3.19	2.13	-
024P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
025P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
026P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
027P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-
028P	BPE	.15	101,700	Precipitation Driven		7.3	.01	31/8	61.02	5.08	3.15	-
029P	BPE	.05	16,300	Precipitation Driven		7.3	.01	31/8	9.78	0.81	0.54	-

COAL MINING AND/OR PREPARATION PLANT APPLICATION METALS, CYANIDE, AND TOTAL PHENOLS OUTFALL DATA

NPDES New Application NPDES Permit Standard Based Mining, LLC
 OUTFALL # SAJMS F0 SMC Node 590W DATE SAMPLED 01-28-07
 In-Pond Discharge YES NO SUBSTANTIALLY IDENTICAL OUTFALLS: 001P and 002P
 Facility Shepherd Bend Mine
 Discharge Point Surface Mine Drainage

POLLUTANT AND CAS NO. (if available) / REQUIRED TESTING OUTFALL	BELIEVED PRESENT PROPOSED OUTFALL	BELIEVED ABSENT PROPOSED OUTFALL	MAXIMUM DAILY VALUE			MAXIMUM 30 DAY VALUE (if available)			LONG TERM AVG. VALUE (if available)			# OF ANALYSES	Frequency of Discharge Dry/No Discharge	40 CFR Part 133 EPA Approved Method Analyzed Used	Method Definition Limit (µg/L)	Receiving Water T-10 Flow (CFS)	# of Additional Limitations (Total, SDCO)	Overall Discharge Limit (CFS)	Overall Discharge Limit (µg/L)	Overall Discharge Limit (CFS)
			CONCENTRATION (µg/L)	MASS (lbs)	CONCENTRATION (µg/L)	MASS (lbs)	CONCENTRATION (µg/L)	MASS (lbs)												
1m Ammonia, Total (7240-38-0)	X		9	0.01							1	Precipitation	200.7	2	1.78	18.5				
2M Arsenic, Total (7440-38-2)		X	ND								1	Precipitation	200.7	4	1.78	18.5				
3M Barium, Total (7440-39-7)		X	ND								1	Precipitation	200.7	1	1.78	18.5				
4M Cadmium, Total (7440-41-7)		X	ND								1	Precipitation	200.7	1	1.78	18.5				
5M Chromium, Total (7440-41-5)		X	ND								1	Precipitation	200.7	1	1.78	18.5				
6M Copper, Total (7440-50-9)		X	ND								1	Precipitation	200.7	5	1.78	18.5				
7M Lead, Total (7439-92-1)		X	ND								1	Precipitation	200.7	2	1.78	18.5				
8M Mercury, Total (7439-97-2)		X	ND								1	Precipitation	245.1	0.2	1.78	18.5				
9M Nickel, Total (7440-02-0)	X		3	0.008							1	Precipitation	200.7	1	1.78	18.5				
10M Selenium, Total (7782-48-5)		X	ND								1	Precipitation	200.7	5	1.78	18.5				
11M Silver, Total (7440-22-5)		X	ND								1	Precipitation	200.7	1	1.78	18.5				
2M Titanium, Total (7440-28-0)		X	ND								1	Precipitation	200.7	1	1.78	18.5				
13M Zinc, Total (7440-66-8)	X		3	0.008							1	Precipitation	200.7	1	1.78	18.5				
14M Cyanide, Total (59-11-9)		X	ND								1	Precipitation	335.2	5	1.78	18.5				
15M Phenols, Total		X	ND								1	Precipitation	420.1	10	1.78	18.5				

By submission of this form, I/we (PE and applicant) certify that I/we have read the instructions for completion of EPA Forms 2C & 2D. Attach Additional Information As Needed.

1) For the purpose of demonstration of compliance with these parameters, "Total" and "Total Recoverable" measurements shall be considered equivalent.

2) Instream Hardness (CaCO₃) will be assumed to be 50 mg/L if Instream Hardness data is not submitted.

Rev 6/20/07 Sampling results must be representative of the discharge and test methods used in accordance with 40 CFR Part 136 and 40 CFR 122.21(g)(7)(ii).

Sampled at Horse Creek Mine NPDES AL0076554 Outfall 109E

XIX. DISCHARGE STRUCTURE DESCRIPTION AND POLLUTANT SOURCE

If a completed EPA form 2C and/or 2D is not attached, the applicant is required to detail existing and proposed point source(s) covered by this permit application. Specify outfall number(s) as it appears on the map(s) required by this application [if this application is for a modification to an existing permit do not change the numbering sequence of the permitted outfalls], describe each, e.g. pipe, spillway, channel, tunnel, conduit, well, discrete fissure, or container, and identify the origin of pollutants. The response must be precise for each outfall. If the discharge of pollutants from any outfall is the result of commingling of waste streams from different origins, each origin must be completely described. Please check all responses which describe the discharge origin.

Outfall	Discharge structure Description	Description of Origin Of pollutants	Surface Discharge	Groundwater Discharge	Wet Prep -Other Production Plant	Pumped or Controlled Discharge	Low Volume STP	Other
SEE SHEET 8a OF 11								

Origin of Pollutants - typical examples: (1) Discharge of drainage from the underground workings of an underground coal mine, (2) Discharge of drainage from a coal surface mine, (3) Discharge of drainage from a coal preparation plant and associated areas, (4) Discharge of process wastewater from a gravel-washing plant, (5) Discharge of wastewater from an existing source coal preparation plant, (6) Discharge of drainage from a sand and gravel pit, (7) Pumped discharge from a limestone quarry, (8) Controlled surface mine drainage (pumped or siphoned), (9) Discharge of drainage from mine reclamation, (10) Other:

XX. INFORMATION

Contact the Department prior to submittal with any questions or to request acceptable alternate content/format. Be advised that you are not authorized to commence regulated activity until this application can be processed, publicly noticed, and approval to proceed is received in writing from the Department.

EPA Form(s) 1 and 2F need not be submitted unless specifically required by the Department. EPA Form(s) 2C and/or 2D are required to be submitted unless the applicant is eligible for and the Department grants a waiver (Item XVIII-Discharge Information). Proposed activities described in this application for this facility qualify for coverage under ADEM Admin. Code Chapter 335-6-9 including Appendices A & B, and there are no other potential pollutants, processes, process wastewaters or activities that require permit coverage.

Coverage under the Department's NPDES Construction Stormwater Permit Program allows for short-lived, construction related, limited removal or relocation of offsite fill material, and does not provide coverage for mining activities described in ADEM Admin. Code Chapter 335-6-9 that exceeds or will exceed 5 un-reclaimed acres. Planned/proposed mining sites that are greater than 5 acres, that mine/process coal or metallic mineral/ore, or that have wet or chemical processing must apply for and obtain coverage under and Individual NPDES Permit prior to commencement of any land disturbance.

I understand by submission of this application, that I am advised to contact 1) the Alabama Surface Mining Commission (ASMC) if coal, coal fines, coal refuse, or other coal related materials are mined, transloaded, processed, etc., 2) the Alabama Department of Industrial Relations (ADIR) if conducting non-coal mining operations, 3) the Alabama Historical Commission for requirements related to any potential historic or culturally significant sites, 4) the Alabama Department of Conservation and Natural Resources (ADCNR) for requirements related to potential presence of threatened/endangered species, and 5) the US Army Corps of Engineers, Mobile or Nashville Districts, if this project could cause fill to be placed in federal waters or could interfere with navigation.

An information package, example PAP and SPCC plans, and other information are available upon request.

Complete this form, attach additional information as necessary, enclose appropriate processing fee (including Greenfield fee if applicable) and send to:

Field Operations Division - MNPS
 Alabama Department of Environmental Management
 Phone: (334) 394-4311
 Fax: (334) 394-4326
 Microsoft WORD 97

PO Box 301463
 Montgomery, AL 36130-1463

1400 Coliseum Boulevard
 Montgomery, AL 36110-2059

Email: mmps@adem.state.al.us

Internet Web Page: www.adem.state.al.us

XIX. DISCHARGE CHARACTERIZATION - CONTINUED

Outfall	Discharge structure Description	Description of Origin Of pollutants	Surface Discharge	Groundwater Discharge	Wet Prep - Other Production Plant	Pumped or Controlled Discharge	Low Volume STP	Other
001P	Pipe &/or Channel	(2), (9)	X					
002P	Pipe &/or Channel	(2), (9)	X					
003P	Pipe &/or Channel	(2), (9)	X					
004P	Pipe &/or Channel	(2), (9)	X					
005P	Pipe &/or Channel	(2), (9)	X					
006P	Pipe &/or Channel	(2), (9)	X					
007P	Pipe &/or Channel	(2), (9)	X					
008P	Pipe &/or Channel	(2), (9)	X					
009P	Pipe &/or Channel	(2), (9)	X					
010P	Pipe &/or Channel	(2), (9)	X					
011P	Pipe &/or Channel	(2), (9)	X					
012P	Pipe &/or Channel	(2), (9)	X					
013P	Pipe &/or Channel	(2), (9)	X					
014P	Pipe &/or Channel	(2), (9)	X					
015P	Pipe &/or Channel	(2), (9)	X					
016P	Pipe &/or Channel	(2), (9)	X					
017P	Pipe &/or Channel	(2), (9)	X					
018P	Pipe &/or Channel	(2), (9)	X					
019P	Pipe &/or Channel	(2), (9)	X					
020P	Pipe &/or Channel	(2), (9)	X					
021P	Pipe &/or Channel	(2), (9)	X					
022P	Pipe &/or Channel	(2), (9)	X					
023P	Pipe &/or Channel	(2), (9)	X					
024P	Pipe &/or Channel	(2), (9)	X					
025P	Pipe &/or Channel	(2), (9)	X					
026P	Pipe &/or Channel	(2), (9)	X					
027P	Pipe &/or Channel	(2), (9)	X					
028P	Pipe &/or Channel	(2), (9)	X					
029P	Pipe &/or Channel	(2), (9)	X					

XXI. POLLUTION ABATEMENT PLAN (PAP) - APPENDIX A & B INFORMATION

Outfall(s): 001 thru 029

Y	N	N/A	
X			Runoff from all areas of disturbance is controlled
X			Drainage from pit area, stockpiles, and spoil areas directed to a sedimentation pond
	X		Sedimentation basin at least 0.25 acre/feet for every acre of disturbed drainage
	X		Sedimentation basin cleaned out when sediment accumulation is 60% of design capacity
	X		Trees, boulders, and other obstructions removed from pond during initial construction
	X		Width of top of dam greater than 12'
	X		Side slopes of dam no steeper than 3:1
	X		Cutoff trench at least 8' wide
	X		Side slopes of cutoff trench no less than 1:1
	X		Cutoff trench located along the centerline of the dam
	X		Cutoff trench extends at least 2' into bedrock or impervious soil
	X		Cutoff trench filled with impervious material
	X		Embankments and cutoff trench 95% compaction standard proctor ASTM
	X		Embankment free of roots, tree debris, stones >6" diameter, etc.
	X		Embankment constructed in lifts no greater than 12"
	X		Spillpipe sized to carry peak flow from a one year storm event
	X		Spillpipe will not chemically react with effluent
X			Subsurface withdrawal
	X		Anti-seep collars extend radially at least 2' from each joint in spillpipe
	X		Splashpad at the end of the spillpipe
	X		Emergency Spillway sized for peak flow from 25-yr 24-hr event if discharge not into PWS classified stream
	X		Emergency spillway sized for peak flow from 50-yr 24-hr event if discharge is into PWS classified stream
	X		Emergency overflow at least 20' long
	X		Side slopes of emergency spillway no steeper than 2:1
	X		Emergency spillway lined with riprap or concrete
	X		Minimum of 1.5' of freeboard between normal overflow and emergency overflow
	X		Minimum of 1.5' of freeboard between max. design flow of emergency spillway and top of dam
X			All emergency overflows are sized to handle entire drainage area for ponds in series
X			Dam stabilized with permanent vegetation
	X		Sustained grade of haul road <10%
	X		Maximum grade of haul road <15% for no more than 300'
	X		Outer slopes of haul road no steeper than 2:1
	X		Outer slopes of haul road vegetated or otherwise stabilized
	X		Detail drawings supplied for all stream crossings
	X		Short-Term Stabilization/Grading And Temporary Vegetative Cover Plans
	X		Long-Term Stabilization/Grading And Permanent Reclamation or Water Quality Remediation Plans

Y The applicant has completed the surface water discharge alternatives analysis and has supporting documentation, including annualized costs for each technically feasible alternative available for review upon request

IDENTIFY AND PROVIDE DETAILED EXPLANATION FOR ANY "N" OR "N/A" RESPONSE(S):

All "N" responses are because each structure's designs are site specific and written to comply with the regulations of the Alabama Surface Mining Commission. They are reviewed, inspected and approved under permit by the ASMC prior to construction, which includes all plans, designs, drawings and maps. Once constructed, each structure is monitored and enforced regularly by the ASMC. Because of this regimen, an alternative analysis is not feasible.

XXII. POLLUTION ABATEMENT PLAN (PAP) REVIEW CHECKLIST

Y	N	N/A
X		
X		
X		

PE Seal with License #
 Name and Address of Operator
 Legal Description of Facility

General Information:

X		
	X	
X		
	X	
X		

Name of Company
 Number of Employees
 Products to be Mined
 Hours of Operation
 Water Supply and Disposition

Topographic Map:

X		
	X	
X		
X		
X		

Mine Location
 Location of Prep Plant
 Location of Treatment Basins
 Location of Discharge Points
 Location of Adjacent Streams

1" - 500' or Equivalent Facility Map:

X		
X		
X		
X		

Drainage Patterns
 Mining Details
 All Roads, Structures Detailed
 All Treatment Structures Detailed

Detailed Design Diagrams:

	X	
	X	
	X	

Plan Views
 Cross-section Views
 Method of Diverting Runoff to Treatment Basins

Narrative of Operations:

X		
X		
X		

Raw Materials Defined
 Processes Defined
 Products Defined

Schematic Diagram:

	X	
	X	
	X	

Points of Waste Origin
 Collection System
 Disposal System

Post Treatment Quantity and Quality of Effluent:

X		
X		
X		
X		

Flow
 Suspended Solids
 Iron Concentration
 pH

Description of Waste Treatment Facility:

	X	
	X	
	X	
	X	

Pre-Treatment Measures
 Recovery System
 Expected Life of Treatment Basin
 Schedule of Cleaning and/or abandonment

Other:

	X	
	X	
	X	
	X	
	X	
	X	

Precipitation/Volume Calculations/Diagram Attached
 BMP Plan for Haul Roads
 Measures for Minimizing Impacts to Adjacent Stream i.e., Buffer Strips, Berms, etc.
 Methods for Minimizing Nonpoint Source Discharges
 Facility Closure Plans
 PE Rationale(s) For Alternate Standards, Designs or Plans

IDENTIFY AND PROVIDE DETAILED EXPLANATION FOR ANY "N" OR "N/A" RESPONSE(s):

See Sheet 10a of 11.

XXII. POLLUTION ABATEMENT PLAN (PAP) REVIEW CHECKLIST – CONTINUED

"N" response for Number of Employees and Hours of Operation is because application does not question the amount of each. "N" response for Location of Prep Plant is because one is not located on or adjacent to this facility.
"N" responses for a structure's designs is because its design is site specific and written to comply with the regulations of the Alabama Surface Mining Commission. It is reviewed, inspected and approved under permit by the ASMC prior to construction, which includes all plans, designs, drawings and maps. Once constructed, the structure is monitored and enforced regularly by the ASMC. Because of this regimen, an alternative analysis is not feasible.

XXIII. PROFESSIONAL ENGINEER (PE) CERTIFICATION

A detailed, comprehensive Pollution Abatement/Prevention Plan (PAP) must be prepared, signed, and certified by a professional engineer (PE), registered in the State of Alabama as follows:

"I certify on behalf of the applicant, that I have completed an evaluation of discharge alternatives (Item XV) for any proposed new or increased discharges of pollutant(s) to Tier 2 waters and reached the conclusions indicated. I certify under penalty of law that technical information and data contained in this application, and a comprehensive PAP Plan including any attached SPCC plan, maps, engineering designs, etc. acceptable to ADEM, for the prevention and minimization of all sources of pollution in stormwater and authorized related process wastewater runoff has been prepared under my supervision for this facility utilizing effective, good engineering and pollution control practices and in accordance with the provisions of ADEM Admin. Code Division 335-6, including Chapter 335-6-9 and Appendices A & B. If the PAP plan is properly implemented and maintained by the permittee, discharges of pollutants can reasonably be expected to be effectively minimized to the maximum extent practicable and according to permit discharge limitations and other permit requirements. The applicant has been advised that appropriate pollution abatement/prevention facilities and structural & nonstructural management practices or Department approved equivalent management practices as detailed in the PAP plan must be fully implemented and regularly maintained as needed at the facility in accordance with good sediment, erosion, and other pollution control practices, permit requirements, and other ADEM requirements to ensure protection of groundwater and surface water quality."

Address P. O. Box 2322, Jasper, AL. 35502 PE Registration # 17085
 Name and Title (type or print) David Muncher Phone Number (205) 221-7747
 Signature David Muncher Date Signed 10/10/07

XXIV. RESPONSIBLE OFFICIAL SIGNATURE

This application must be signed by a Responsible Official of the applicant pursuant to ADEM Admin. Code Rule 335-6-6-.09 who has overall responsibility for the operation of the facility.

"I certify under penalty of law that this document, including technical information and data, the PAP plan, including any SPCC plan, maps, engineering designs, and all other attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the PE and other person or persons under my supervision who manage the system or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine or imprisonment for knowing violations.

A comprehensive PAP Plan to prevent and minimize discharges of pollution to the maximum extent practicable has been prepared at my direction by a PE for this facility utilizing effective, good engineering and pollution control practices and in accordance with the provisions of ADEM Admin. Code Division 335-6, including Chapter 335-6-9 and Appendices A & B, and information contained in this application, including any attachments. I understand that regular inspections must be performed by, or under the direct supervision of, a PE and all appropriate pollution abatement/prevention facilities and structural & nonstructural management practices or Department approved equivalent management practices identified by the PE must be fully implemented prior to and concurrent with commencement of regulated activities and regularly maintained as needed at the facility in accordance with good sediment, erosion, and other pollution control practices and ADEM requirements. I understand that the PAP plan must be fully implemented and regularly maintained so that discharges of pollutants can reasonably be expected to be effectively minimized to the maximum extent practicable and according to permit discharge limitations and other requirements to ensure protection of groundwater and surface water quality. I understand that failure to fully implement and regularly maintain required management practices for the protection of groundwater and surface water quality may subject the permittee to appropriate enforcement action.

I certify that this form has not been altered, and if copied or reproduced, is consistent in format and identical in content to the ADEM approved form.

I further certify that the discharges described in this application have been tested or evaluated for the presence of non-stormwater discharges and any non-mining associated beneficiation/process pollutants and wastewaters have been fully identified."

Name (type or print) Donald M. Baxter Official Title Managing Member.
 Signature Donald M Baxter Date Signed 10/10/07





STATE OF ALABAMA
SURFACE MINING COMMISSION

P. O. BOX 2390 — JASPER, ALABAMA 35502-2390
(205) 221-4130

December 16, 2008

CATHERINE WANNAMAKER
SOUTHERN ENVIRONMENTAL LAW CENTER
THE CANDLER BUILDING
127 PEACHTREE STREET SUITE 605
ATLANTA GA 30303-1800

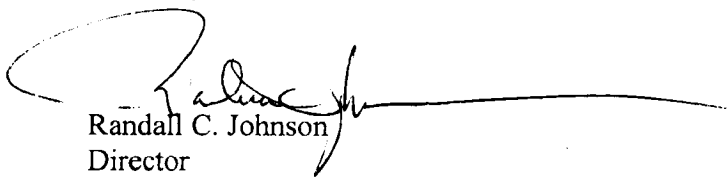
Dear Ms. Wannamaker:

RE: Shepherd Bend Mine, NPDES Permit No. AL0079162

Your letter of December 12, 2008, requested copies of any record regarding a proposed Shepherd Bend Mine that may have been filed with this agency. Be advised that we have not yet received any application for a permit on this proposed mine. We require that all permit applicants acquire an NPDES permit from the Alabama Department of Environmental Management prior to any issuance of a permit from this agency. It is not uncommon that a permittee will obtain an NPDES permit prior to submitting an application to this agency. As a part of our permitting process the applicant must submit a pollution abatement and prevention plan. That plan must be in agreement with any provision of the approved NPDES permit.

I am enclosing a copy of the Memorandum of Understanding between the Alabama Department of Environmental Management and the Alabama Surface Mining Commission that was executed in 1988. This will shed some light on the procedures and agreements between the two agencies regarding coal-mining permits. Should you have any additional questions, please feel free to contact me.

Sincerely,


Randall C. Johnson
Director

/eap
Enclosure

Shepherd Bend Mine Draft Permit Comments

The Birmingham Water Works Board

Comment (1): *The proximity of the mining operation to Board's intake poses a potential hazard to drinking water uses:* The Board's drinking water intake is within approximately 800 feet of the mining operation outfalls. Because the intake is so close to the proposed outfalls, the mining discharges may not evenly mix with the full stream flow prior to reaching the intake. The proximity and configuration of the proposed operation could result in a bank-entrained plume of mining-related pollutants traveling directly to the intake and into the Board's treatment facilities.

Comment (2): *The permit gives no indication that the proximity of the drinking water intake was considered:* The proposed permit appears to have been developed primarily from federal effluent guidelines for coal mining operations (40 CFR Part 434). These guidelines were developed for use in permitting typical mining operations across the entire nation, not for the extraordinary circumstance where a surface mining operation would be conjoined with a major municipal water supply intake. A review of these guidelines and their supporting documents reveal that protection of major public water supplies was not explicitly considered. This is not surprising, given that surface mining and major municipal water withdrawals would, in most circumstances be considered incompatible uses of the same river bend. The proposed permit is therefore not protective of the existing use of Mulberry Fork.

Response to Comments (1) & (2): Using available water quality data for Mulberry Fork and the Western Filter Plant intake, and Shepherd Bend LLC permit conditions, the Department developed mass balance equations to determine expected contaminant levels under critical conditions. This analysis demonstrates that the proposed NPDES limitations will be protective of the water quality standards for the Mulberry Fork designated uses, including the Public Water Supply use. However, as stipulated in Part II.B.4.a of the draft permit the permit does not relieve the permittee from compliance with applicable State water quality standards established in ADEM Admin. Code Chapter 335-6-10, and does not preclude the Department, if deemed necessary in the future, from taking action as appropriate to address the potential for contravention of applicable State water quality standards which could result from discharges of pollutants from the permitted facility.

Comment (3): *The iron and manganese limits are not protective of drinking water uses:* The proposed NPDES permit limitations include daily average total iron concentrations of 3.0 mg/L (with a daily maximum of 6.0 mg/L), daily average total manganese concentrations of 2.0 mg/L (with a daily maximum of 4.0 mg/L), daily average total suspended solids (TSS) of 35.0 mg/L (with a daily maximum of 70.0 mg/L) and pH ranging from 6.0 to 9.0 (daily minimum and maximum, respectively). The permit also notes that the total manganese limitations are not applicable if pH is 6.0 or higher and total iron is less than 10 mg/L. The Safe Drinking Act includes secondary maximum contaminant levels (MCLs) for total iron concentrations of 0.3 mg/L and total manganese

concentrations of 0.050 mg/L. The average concentrations that would be allowed by this NPDES Permit are ten times the secondary MCL for iron and forty times the secondary MCL for manganese.

The Safe Drinking Water Act includes secondary maximum contaminant levels (MCLs) for total iron concentrations of 0.3 mg/L and total manganese concentrations of 0.05 mg/L. The average concentrations that would be allowed by this NPDES Permit are ten times the secondary MCL for iron and forty times the secondary MDL for manganese. By comparison, the daily average raw water concentrations for iron and manganese for the Western Filtration Plant in 2007 were 0.057 mg/L and 0.079 mg/L, respectively. Iron and manganese can cause significant aesthetic problems in drinking water, including consumers' perceptions of the quality of the drinking water, staining of clothes and basins, and taste of the water.

The proposed NPDES permit specifies discharge limits for total iron and manganese concentrations. However, the speciation of the iron and manganese (i.e., whether Fe and Mn are in reduced or oxidized states) will significantly impact the ability of the existing Board's treatment facilities to remove the iron and manganese. For example, if Fe^{2+} and Mn^{2+} are primarily present in the discharge waters and enter the plant in the reduced oxidation states rather than as a particulate iron and manganese, the current treatment process train will not be able to remove them. Speciation of iron and manganese in the discharges is needed to assess whether additional treatment would be required to oxidize the Fe^{2+} and Mn^{2+} and then remove the precipitates. However, even if the iron and manganese is present in particulate form in the discharge waters, opportunities may exist for the particulate iron and manganese to become reduced either in the riverbed sediments or in the treatment plant. Costly operational changes to the treatment plant may be required if iron and manganese precipitation and subsequent reduction occurs in the raw water storage tanks or the sedimentation basins.

The board's Western Filter Plant may also be impacted by higher particle loading from TSS, iron, and manganese, which would require additional operations and maintenance (e.g., removing solids from the raw water storage tanks, increasing coagulant dosages to remove the additional turbidity, more frequent backwashing of filters due to reduced filter run times, and generation of more wastewater) and may reduce the overall treatment flow rating of the plant.

Response (3): Permitted treated discharges from this type facility are limited primarily to discharges associated with wet weather runoff. The treatment basins, which are designed for expected precipitation events to ensure compliance with permit requirements, are not expected to discharge during 7Q10 low flow or zero flow conditions. Experience has shown through evaluating stream hydrographs that a precipitation event resulting in an eventual wet weather discharge from a mining facility will also increase stream flow in the receiving water. The limits in the draft permit for treated discharges from the mining treatment basins are indicative or predictive of the pollutant constituents expected to be potentially present in significant concentrations in wet weather runoff from this type of facility.

EPA's Development Document for Final Effluent Limitations Guidelines New Source Performance Standards, and Pre-Treatment Standards for the Coal Mining Point Source Category, 1982 indicates that toxic metal concentrations from mine discharges are expected to be at or below the detection limit, and concentrations of iron and manganese are expected to be at or below BPT and BAT levels during precipitation events. Therefore, the Department expects the proposed limitations to be protective of water quality during wet weather events. For this reason establishment of specific effluent limitations for iron and manganese have been determined not to be applicable during precipitation events.

However, utilizing available water quality data for Mulberry Fork and the Western Filter Plant intake, and Shepherd Bend LLC permit conditions, the Department developed mass balance equations to determine expected contaminant levels under critical conditions. This analysis demonstrates that the proposed NPDES limitations will be protective of the water quality standards for the Mulberry Fork designated uses, including the Public Water Supply use.

Comment (4): *The proposed permit does not protect the public water supply from pollution by many other mining-related pollutants, including toxic metals:* Of significant concern is the potential presence of other contaminants in the discharge waters that may impact the source water. Coal in this region of Alabama has been associated with other elements that may impact water treatment, including arsenic, (described by the USGS as "well above the average for all U.S. coal"), sulfur, salinity, mercury and others. Drainage from coal mines often has elevated concentrations of not just iron and manganese, but many other metals including lead, zinc, copper, and cadmium.

If the permit would allow discharges of iron and manganese concentrations over 10-40 times higher than maximum contaminant levels, it is reasonable to presume that other pollutants associated with coal mine drainage could also greatly exceed levels necessary to protect aquatic life and drinking water. These elements, which are not currently included in the discharge permit, could significantly impact the treatment process needs of the water supply and drastically increase costs of treatment and potentially impact public health. For example, arsenic removal would require additional processes, and demand and require increased chemical dosages. Further, the presence of ammonia would significantly complicate the disinfection strategy employed at the Western Filter Plant. Additional discharge limitations on the range of elements found in the coal that could impact the Board drinking water source should be established. Further, total dissolved solids (TDS) may be high in the coal beds and should be limited by the discharge permit to avoid exceeding the 500 mg/L TDS secondary MCL; if high TDS levels are observed at the Western Filtration Plant intake, the only (and very costly) option for reducing TDS is reverse osmosis.

To better evaluate the probable impacts of these discharges on operations at the Board's Western Filtration Plant, additional analysis is needed beyond what is included in the proposed NPDES permit. The impact of the flow rates at the various outfalls should be evaluated on a seasonal basis relative to river flows to estimate the anticipated

concentrations of iron, manganese, and TSS at elements/compounds may occur in the discharges and additional costs of treatment associated with those discharges.

Response (4) Utilizing available water quality data for Mulberry Fork and the Western Filter Plant intake, and Shepherd Bend LLC permit conditions, the Department developed mass balance equations to determine expected contaminant levels under critical conditions. This analysis demonstrates that the proposed NPDES limitations will be protective of the water quality standards for the Mulberry Fork designated uses, including the Public Water Supply use.

Furthermore, EPA's Development Document for Final Effluent Limitations Guidelines New Source Performance Standards, and Pre-Treatment Standards for the Coal Mining Point Source Category, 1982 indicates that due to the infrequent occurrence of toxic metals and the low concentrations encountered when detection does occur, toxic metal monitoring associated with coal mines are deemed to be unnecessary.

Comment (5): *The maximum pH limit is not protective of designated uses:* The permit includes a provision that would allow a maximum daily pH of 10.5 standard units. This is well outside the range of water quality criteria deemed protective of aquatic life uses. Additionally, this pH level would exacerbate the toxicity of other constituents. The solubility of many toxic metals (for which the permit includes no limits) would increase. At this pH, even extremely low concentrations of ammonia could be toxic to aquatic life.

Response (5): The US Environmental Protection Agency (EPA) promulgated effluent limitations for the coal mining industry in 40 CFR 434. EPA's rationale for developing the present effluent limitations for the coal mining industry is summarized in EPA's Development Document for Final Effluent Limitations Guidelines New Source Performance Standards, and Pre-Treatment Standards for the Coal Mining Point Source Category, 1982. The limitations in the proposed draft permit are consistent with regulations promulgated by EPA in 40 CFR 434. These limitations have been used for similar discharges and have been found to be protective of applicable State water quality standards. In addition, as stated in Part II.B.4.a. of the draft NPDES permit, the permit does not relieve the permittee from compliance with applicable State water quality standards established in ADEM Admin. Code Chapter 335-6-10.

Comment (6): *The permit provides inadequate controls on metals in stormwater runoff from mining operations:* The metals limits on stormwater runoff are even less protective than for the non-precipitation-related discharges. No limits are included for any metals except iron for small precipitation events, and these iron limits are over 20 times the MCL. Larger storm events have no metals limits at all. Of special note, runoff of acid or ferruginous drainage from coal refuse disposal piles include no metals limits at all, even for 1-year, 24-hour storm events.

Response (6): See response to Comment (4)

Comment (7): *The proposed permit could allow large slugs of suspended solids to Mulberry Fork:* The permit includes no limits for total suspended solids in stormwater runoff (only settleable solids), essentially allowing unlimited discharges of fine, non-settleable suspended solids such as clays and fine silts. Given the extreme land disturbance associated with surface mining—and high rate of erosion expected—this could allow large slugs of suspended solids in runoff from even small precipitation events. This in turn could have deleterious effects on aquatic life and greatly increase solids removals costs in the water treatment plant.

Of special concern is the potential for catastrophic movement of solids into the stream during large storm events, either as the result of impoundment failure or precipitation-induced mass wastage of mining materials on high slopes. The permit includes no limits on solids for >10-year storm events, essentially providing no protection from such events. Similarly, the permit includes no hard requirement for the permittee to develop BMP plan to contain solids, and no such plan was available to the reviewers. Catastrophic solids loading events could not only affect the water quality at the intake, it could endanger the intake itself by burial, clogging, or other damage.

Response (7): Using available water quality data for Mulberry Fork and the Western Filter Plant intake, and Shepherd Bend LLC permit conditions, the Department developed mass balance equations to determine expected contaminant levels under critical conditions. This analysis demonstrates that the proposed NPDES limitations will be protective of the water quality standards for the Mulberry Fork designated uses, including the Public Water Supply use. Based on EPA's *Development Document for Final Effluent Limitations Guidelines New Source Performance Standards, and Pre-Treatment Standards for the Coal Mining Point Source Category*, 1982, it is expected that during wet weather events the control of settleable solids in lieu of total suspended solids is a more effective control strategy.

Furthermore, the Pollution Abatement/Prevention (PAP) plan for this facility has been prepared by a professional engineer (PE) registered in the State of Alabama and is designed to ensure reduction of pollutants in the waste stream to a level that, if operated properly, the treated discharge will not contribute to or cause a violation of applicable State water quality standards. By Memorandum of Understanding with the Alabama Surface Mining Commission (ASMC) the PAP for coal operations is reviewed/approved by ASMC. The proposed permit terms and conditions are predicated on the basis of ensuring reduction of pollutants in the waste stream to a level that the treated discharge will not contribute to or cause a violation of applicable State water quality standards.

Comment (8): *The permit provides little protection from post-mining impacts:* According to section I.A.2 of the draft permit, permit limits would cease to apply upon revegetation of the site and Phase II bond release. This provides no long-term protection of the drinking water intake from potential post-mining drainage problems such as failure of vegetation, acid mine seepage, or other inadequacies of post-mining reclamation.

Response (8): The Alabama Surface Mining Commission (ASMC) regulates reclamation of surface coal mines and places specific requirements on companies

regarding the condition of reclaimed mining sites. An NPDES permit is required during the reclamation process until the ASMC requirements have been satisfied and the mining company has been released from its reclamation obligations.

The Black Warrior River Keeper

Comment (1): Although I'm sure it's not new information, we feel it is absolutely necessary to point out that the location of the proposed Shepherd Bend Mine is directly across from the Birmingham Water Works Board's drinking water intake on the Mulberry Fork. Of the 29 outfalls proposed by the permit, 10 will be located upstream of the intake within 3 miles, and an 11th is located almost directly across the river. Discharges from the mining operations are often high in concentrations of suspended solids and metals such as iron, manganese and aluminum. While the discharge limitations in the permit are intended to be protective of water quality, there is no guarantee that they actually will be protective. (As I have already noted, the applicant has a history of noncompliance at other mines). The potential this mine poses to contaminate the drinking water of over a million people in greater Birmingham Area is completely unacceptable.

Response (1): Please refer to the Department's Response to The Birmingham Water Works Board Comments (1) & (2):

Comment (2): This particular section of the Mulberry Fork has a water use classification of Public Water Supply (PWS) and that some sections are also classified for Swimming and Other Whole Body Contact Sports (S) do not seem to have been considered when ADEM wrote this permit. Although the water use classifications are addressed with boilerplate language in the permit rationale, none of the provisions of the permit are any more restrictive or protective of water quality than the hundreds of permits we have reviewed giving authorization to discharge to streams classified for use as only Limited Warmwater Fisheries (LWF) or Fish and Wildlife (F/W).

Response (2): Water quality criteria associated with the Public Water Supply (PWS) use classification are the same as those for the Fish and Wildlife (F&W) and Swimming and Other Whole Body Water-Contact Sports (S) use classifications with a couple of exceptions. First, the bacteria criteria for the S use classification are applied as a geometric mean concentration of 200 colonies/100 ml on a year round basis. The mining operation is not expected to be a source of bacteria. Secondly, human health water quality criteria for certain toxics are more stringent for the PWS use classification than for other classifications. However, based on information submitted by the applicant, these compounds are not expected to be present in discharges from the mining operation. It should be noted that Part II.B.4.a. of the draft permit states that "On the basis of the permittee's application, plans, or other available information, the Department has determined that compliance with the terms and conditions of this permit will assure compliance with applicable water quality standards. However, this permit does not relieve the permittee from compliance with applicable State water quality standards established in ADEM Admin. Code Chapter 335-6-10, and does not preclude the

Department from taking action as appropriate to address the potential for contravention of applicable State water quality standards which could result from discharges of pollutants from the permitted facility.”

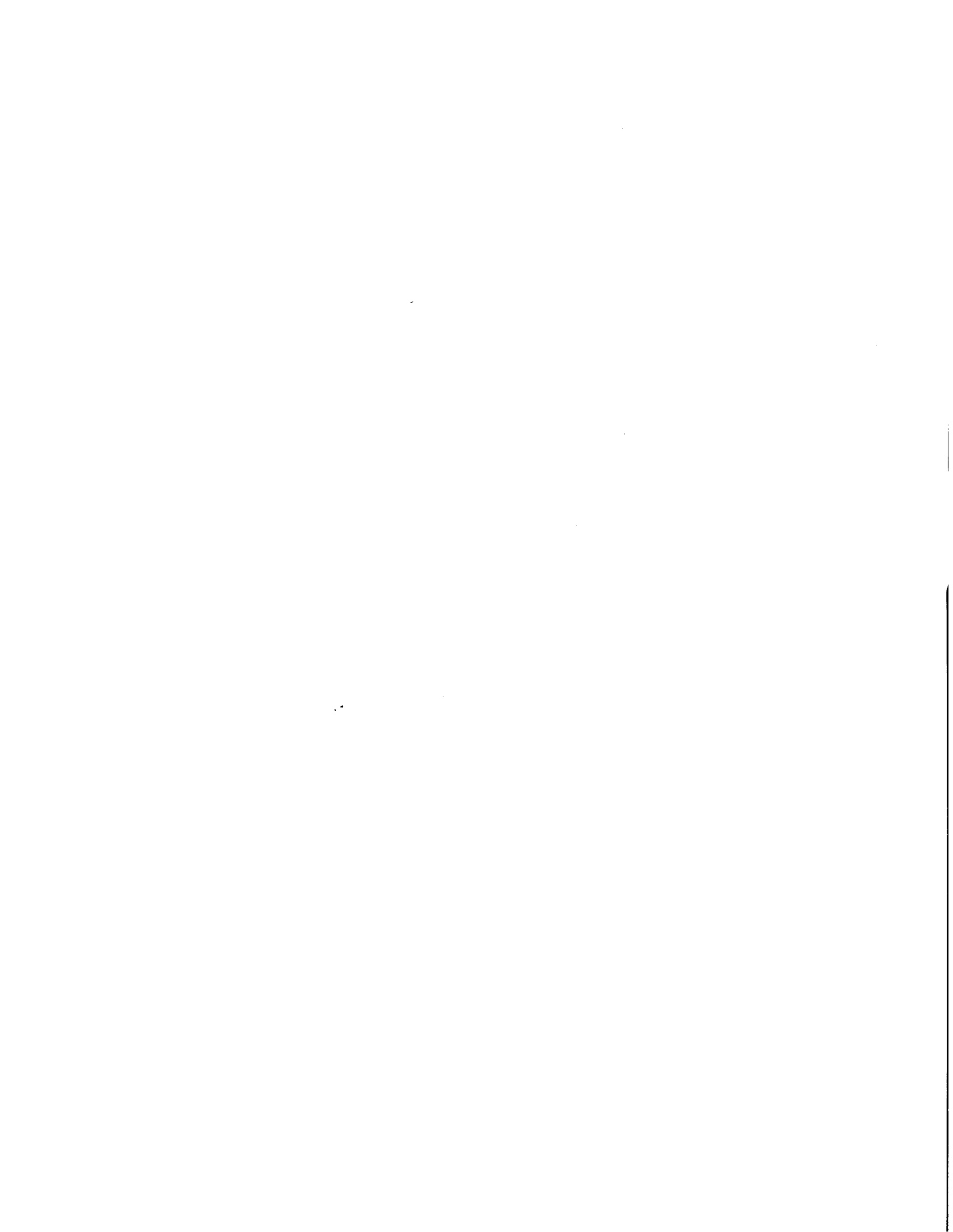
Comment (3): We must take issue with the fact that the proposed permit makes absolutely no reference to aluminum as a potential contaminant, nor does it list any effluent limitations on aluminum. By some estimates, aluminum comprises as much as 7.5 to 8.1% of the earth’s crust, and is often found in close proximity to coal seams. In fact, the whitish/blueish color in coal mine sediment ponds and acid mine drainage is often attributed to the presence of high concentrations of aluminum. Humans and wildlife can be exposed to aluminum through ingestion, inhalation, and skin contact. Some of the health effects of exposure to aluminum include nervous system damage, dementia, and loss of memory. It can also be extremely toxic to fish. If aluminum from this coal mine is allowed to reach the Mulberry Fork, which, once again, is classified for use as a public water supply and for swimming, it could put the health and safety of people using the river and the surrounding fish and wildlife at risk. The permit rationale states, “representative sampling data was submitted as required for proposed and existing discharge points for antimony, arsenic, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thallium, zinc, cyanide, and phenols. The data indicated that none of the analyzed parameters were present at potential levels of concern”. Why was aluminum not included in this list of potential contaminants?

Response (3): The metals of highest concentration in surface coal mine operations are commonly iron (Fe) and manganese (Mn). It is expected that achieving the total iron and manganese allocations provided for in the subject permit will also address aluminum, if present. This approach is considered to be protective of the water quality standards for the Mulberry Fork designated uses, including the Public Water Supply use.

Furthermore, EPA’s *Development Document for Final Effluent Limitations Guidelines New Source Performance Standards, and Pre-Treatment Standards for the Coal Mining Point Source Category*, 1982 indicates that due to the infrequent occurrence of toxic metals and the low concentrations encountered when detection does occur, toxic metal monitoring associated with coal mines are deemed to be unnecessary.

Comment (4): Extremely concerned about the applicant’s history of previous violations.

Response (4): Alabama law and Departmental regulations do not allow the Department to deny an NPDES permit due to past violations unless the applicant is currently in significant noncompliance with the AWPCA or Departmental regulations at facilities within the State of Alabama. To ADEM’s knowledge at this time, the applicant is not in significant noncompliance of either the AWPCA or ADEM regulations. Conditions in the proposed draft issuance permit are designed to ensure compliance with applicable ADEM regulations. A decision relative to an NPDES permit application is not a discretionary action taken by the Department. Section 22-22-9(g) of the AWPCA states that it shall be the duty of ADEM to “receive and examine applications, plans, specifications and other data and to issue permits for the discharge of pollutants, industrial wastes entering directly or through a municipal or private treatment facility and other wastes into the waters of the state, stipulating in each





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET, N.E.
ATLANTA, GEORGIA 30365

OCT 21 1994

4WM-WPEB

Mr. Charles R. Horn, Chief
Water Division
Alabama Department of
Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

Re: Final Memorandum of Agreement
NPDES Program

Dear Mr. Horn:

Please find enclosed the executed copy of the Memorandum of Agreement (MOA) for the NPDES program in Alabama. The effective date of the MOA is the same date as this letter.

We appreciate the cooperative spirit that was displayed during the negotiation process. It is our hope that the new MOA that we have agreed upon will prove to be a practical way to administer State-EPA relations and achieve our common goals in the NPDES program.

If you have any questions about the MOA or if we can be of further assistance in any other matter, please do not hesitate to contact me at (404) 347-2019, ext. 2944.

Sincerely,

James H. Scarbrough, P.E.
Chief
Water Permits & Enforcement Branch
Water Management Division

Enclosure

bcc: Yvonne Martin
Tammy Moore

C:\MOA\LAEXMTE.XMT\FBURNS\10-14-94\

R. BURNS (W) UNIT (W/O) SECTION (W/O) BRANCH (W/O) PERMITS MOA (W) ENFORCEMENT MOA (W)

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF ALABAMA
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

Section I. General

This Memorandum of Agreement (hereinafter, AGREEMENT) establishes policies, responsibilities and procedures pursuant to 40 CFR 123 and defines the manner in which the National Pollutant Discharge Elimination System (NPDES) will be administered by the State of Alabama Department of Environmental Management (hereinafter, the STATE) and reviewed by Region IV of the United States Environmental Protection Agency (hereinafter, EPA). All additional agreements between the STATE and EPA are subject to the review by the Administrator of the U.S. Environmental Protection Agency (hereinafter, the ADMINISTRATOR), and the Director of the Alabama Department of Environmental Management (hereinafter, the STATE DIRECTOR). If the ADMINISTRATOR determines that any provision of any agreement does not conform to the requirements of Section 402(b) of the Federal Clean Water Act, 33 U.S.C. 1251 et. seq., as amended (hereinafter, the CWA), or to the requirements of 40 CFR 122-125, or other applicable Federal regulations the ADMINISTRATOR shall notify the STATE DIRECTOR and the Regional Administrator of EPA (hereinafter, the REGIONAL ADMINISTRATOR) of any proposed revisions or modifications which must be in such agreements.

The STATE DIRECTOR and the REGIONAL ADMINISTRATOR hereby agree to maintain a high level of cooperation and coordination between STATE and EPA staffs in a partnership to assure successful and effective administration of NPDES. In this partnership, EPA will provide to the STATE, on a continuing basis, technical and other assistance on permit matters as requested.

Either the STATE, REGIONAL ADMINISTRATOR or ADMINISTRATOR may initiate action to modify the Agreement at any time. However, before the Agreement may be modified, any proposed revisions must be put in writing, signed by the STATE DIRECTOR and the REGIONAL ADMINISTRATOR.

Section II. Policies

The STATE will administer NPDES in accordance with Section 402 of the CWA, this AGREEMENT, applicable State legal authority, applicable Federal regulations, and the annual State Program Plan. The STATE's program equivalent to NPDES will be the National Pollutant Discharge Elimination System (NPDES). Permit Applications by major dischargers shall normally receive first priority in all NPDES activities, depending on water quality and public health considerations.

A. State Responsibilities

In accordance with the priorities and procedures established in this AGREEMENT and the annual State Program Plan, the STATE will:

1. Create and maintain to the maximum extent possible the legal capability and the resources required to carry out all aspects of the NPDES program.
2. Process in a timely manner and propose to issue, reissue, modify or deny NPDES permits to the following categories of applicants:
 - a. Industrial, commercial, mining and silvicultural dischargers and Federal facilities as outlined in Section III of this AGREEMENT;
 - b. Animal feeding operations, aquatic animal production facilities and aquaculture projects (as defined in 40 CFR 122.54 to 122.56) as outlined in Section 318 of the CWA, 40 CFR 125 Subpart B, and Section III of this AGREEMENT;
 - c. Publicly Owned Treatment Works (POTW's) including those which dispose of sewage sludge as outlined in Section 405 of the CWA, and Section III of this AGREEMENT.
3. Comprehensively evaluate and assess compliance with compliance schedules, effluent limitations and other conditions in these permits as outlined in Section IV of this AGREEMENT.
4. Maintain a vigorous program of taking timely and appropriate enforcement action in accordance with the CWA.
5. Maintain an effective program to carry out the pretreatment responsibilities outlined in Section VI of this AGREEMENT.
6. Maintain an adequate public file at the appropriate district or central office (which must be accessible to EPA for audit purposes) for each permittee. Such files must include at a minimum, copies of:
 - Permit Application
 - Public Notice and Fact Sheet or Statement of Basis (when prepared)
 - Discharge Monitoring Reports
 - All inspection reports
 - All enforcement actions
 - Other pertinent information and correspondence
7. The STATE will submit to the REGIONAL ADMINISTRATOR the information described in Section VII of this AGREEMENT, the State Program Plan and applicable portions of 40 CFR 123.

B. EPA Responsibilities

1. EPA will commit to the maximum extent possible funding to the STATE to support this effort. It is recognized that a majority of NPDES related activities are §106 funded and should a reduction in funds occur, the NPDES support effort may be reduced by a negotiated amount.
2. Where no effective guidelines exist for a discharge, EPA is responsible for transmitting to the STATE technical information to assist in writing permit

- terms and conditions, for example, contractor reports, draft development documents, and available effluent data from similar facilities. Such information will be provided within 30 days of request by the STATE.
3. As outlined in Section VII of this AGREEMENT, EPA will oversee the STATE administration of NPDES on a continuing basis for consistency with the CWA, this AGREEMENT, the State Program Plan, and all applicable Federal regulations. In addition, EPA may consider as a part of its assessment, comments from permittees, the public, and Federal and local agencies concerning the STATE'S administration of NPDES. Any such comments considered by EPA will be brought to the attention of the STATE by written correspondence, if the commenting party has not previously communicated with the STATE.

C. **Jurisdiction over Permits**

Upon the ADMINISTRATOR'S approval of the NPDES program, EPA will only retain jurisdiction over permits as follows. The STATE will assume responsibility for NPDES, including any general permits, the conduct of inspections, and the receipt and review of self-monitoring reports. Issuance of permits under active enforcement by EPA as a result of overfiling under §309 or referral from the STATE will be handled by the STATE unless the STATE's permit is vetoed by EPA. EPA shall handle enforcement on these permits until final resolution on the enforcement or until an EPA Administrative Order has been replaced with an adequate STATE enforcement action. As each EPA enforcement action is finalized, EPA will notify the STATE and transfer jurisdiction of that permit.

Section III. Permit Review and Issuance

The STATE is responsible for drafting, providing public notice, issuing, modifying, reissuing, and termination of permits in accordance with Section II and Section VII, and Paragraphs 1-3.

A. **Receipt of New Permit Applications by the STATE**

Upon receipt of a completed permit application, the State will enter into EPA's National Permit Compliance System, (PCS), all required information. The STATE will enter this information within thirty (30) working days of determination of a completed application.

B. EPA Review of Proposed Permits and Permit Modifications

1. Unless otherwise waived, EPA will review all proposed permits. Thirty calendar days prior to the time of issuance of public notice, the STATE will send the EPA Water Permits and Enforcement Branch one copy of the public notice, the draft permit, and the fact sheet or statement of basis (when prepared) for each facility. Each submittal must be accompanied by a new source/new discharger determination (if applicable). Within thirty calendar days following receipt of the package, the Water Permits and Enforcement Branch will send to the STATE written agreement, comments, or objections to each proposed permit, including a statement of the reasons for the comments or objections and the sections of the CWA or regulations which support them. A copy of all comments will also be sent by EPA to the permit applicant. All EPA comments and objections must be considered by the STATE along with any other public comments received in the preparation of the proposed final permit. If EPA does not respond within thirty calendar days, unless an extension is requested, the STATE may take this non response as concurrence with the draft permit and issue the permit.
2. EPA may request to review any applicant's notice of intent to be covered under a general permit. The EPA/Regional Water Management Division Director will, within ten (10) working days after receipt of the notice of intent, notify the STATE of any formal objections to the applicant's suitability for coverage under the general permit.
3. Following expiration of the period for public comment, a proposed final permit will be drafted. If (a) the proposed final permit is the same as or more stringent than the draft permit defined in the public notice, and (b) EPA has not objected to such draft permit, and (c) valid and significant public comments have not been made, the STATE may issue the permit without further review by EPA. In all other cases, the STATE will send one copy of the proposed final permit and other information to EPA's Water Permits and Enforcement Branch. The EPA/Regional Water Management Division Director will, within fifteen (15) working days after receipt of the proposed final permit, notify the STATE and the permit applicant of any formal objections authorized under 402(d) of the Act. This notification shall set forth in writing the general nature of the objection. Within ninety (90) days following receipt of the proposed final permit to which EPA has objected, the REGIONAL ADMINISTRATOR shall notify the STATE in writing with a detailed statement of the reasons for the objections and the actions that must be taken to eliminate the objections. EPA objections must be based upon one or more of the criteria identified in 40 CFR 123.44(c). STATE requests for a

hearing on the objection and the procedure for resolving the objection shall be governed by 40 CFR 123.44.

C. Waiver of Permit Review by EPA

1. Except as hereafter expressly provided, EPA waives the right to comment on or object to the sufficiency of permit applications, draft permits, proposed final permits, and finally adopted permits for any existing discharges or proposed discharges with the exception of the following:
 - a. discharges which may adversely affect the waters of a state other than the one in which the discharge originates;
 - b. proposed general permits (see 40 CFR 122.28);
 - c. discharges from publicly owned treatment works with a daily average discharge exceeding 1.0 million gallons per day;
 - d. discharges from any major discharger or a discharger within any of the industrial categories listed in Appendix A to 40 CFR 122;
 - e. discharges from other sources with a average discharge exceeding 0.5 million gallons per day;
 - f. Federal facilities with a daily average discharge exceeding 0.05 million gallons per day.

The foregoing does not include waiver of receipt of complete copies of applications, public notices of proposed permit issuances or denials, notices of public hearings, copies of all final permits issued, or any notices required under Section VII of this AGREEMENT.

2. With respect to modifications of permits, EPA waives the right to review the following:
 - a. A modification to any permit for which the right to review the original permit was waived (unless the modification would put the permit in one of the categories in Section III.C.1.)
 - b. A modification to any permit which grants an extension of a schedule of compliance for 120 days or less for good and valid cause. However, only one

such extension is waived. Any second extension for any permit must be submitted for review.

- c. A modification to any permit which makes minor changes to the monitoring requirements.
- d. Change of ownership or control of a source.
3. EPA reserves the right to terminate the waivers in paragraphs 1 and 2 above (in whole or in part) with respect to any specific discharger, at any time. Any such determination shall be accomplished by the EPA Regional Water Management Division Director in writing, and a copy of such written termination shall be delivered to the STATE and the permit applicant.
4. The foregoing waiver shall not be construed to authorize the issuance of permits which do not comply with applicable provisions of Federal or State laws, rules, regulations, or effluent guidelines, nor to relinquish the right of EPA, to petition the STATE for review of any action or inaction because of violation of Federal or State laws, rules, regulations, or effluent guidelines.

D. Public Participation

1. Draft permits, public notices, fact sheets (in accordance with 40 CFR 123.8), and statements of basis (when prepared) will be made available to any party upon request, upon payment of applicable state duplicating fees.
2. Unless otherwise waived by the specific organization, the STATE will provide to the following organizations, copies of all public notices and fact sheets when prepared in accordance with 40 CFR 124.8 and 124.10:

- U.S. Army Corps of Engineers
- U.S. Fish and Wildlife Service
- National Marine Fisheries Service
- Other appropriate State and Federal Agencies
- Adjacent States (only for permits which affect them)
- Major commands of the Department of Defense (DOD) (only for DOD permits)
- The State Historic Preservation Officer

E. Issuance of Permits or Notice of Intent to Deny

1. If the final determination is to issue the permit, the final permit will be forwarded to the permit applicant, along with a transmittal letter notifying the applicant that the permit is being issued. Copies of issued permits will be forwarded to EPA in accordance with the schedule contained in Section VII of this AGREEMENT.
2. If the final determination is to deny the permit, notice of intent to deny shall be given to the Water Permits and Enforcement Branch and to the applicant in accordance with applicable NPDES regulations.

F. Suspension or Revocation of Permits

When the STATE makes a determination to suspend or revoke a permit, in whole or in part for cause, EPA will be notified.

G. Major Discharger List

There shall be included as a part of the annual State Program Plan a "major dischargers" list, which shall include those dischargers mutually defined by the STATE and EPA as major dischargers based on a point rating worksheet or applicable definitions plus any additional dischargers that, in the opinion of the STATE or EPA, have a high potential for violation of water quality standards. The major discharger list for Federal facilities shall be jointly determined by EPA and the STATE.

Section IV. Compliance Monitoring

The STATE will operate a timely and effective compliance monitoring system via the Permit Compliance System (PCS) to track compliance of permittees with permit conditions. For purposes of this AGREEMENT, the term "compliance monitoring" shall refer to all efforts associated with assuring full compliance with permit conditions. Compliance monitoring shall normally focus first on major dischargers in accordance with the priorities and time frames for compliance tracking as established in this AGREEMENT and as further delineated in the annual State Program Plan. All compliance monitoring activities shall be undertaken in such a manner that if the situation requires, they will lead to timely appropriate and effective enforcement actions as outlined in Section V.

A. Schedule Dates

The STATE will track the submittal of all reports on date-related permit condition or other schedules in effect pursuant to the to the permit (i.e., Administrative Orders, Enforcement Compliance Schedule Letters, or court orders, etc.). In order to determine the permittee's compliance status, the STATE will conduct a timely and substantive review of all date-related permit conditions and reports and consider possible enforcement actions for failure to submit required reports.

B. Review of Self-Monitoring Reports

1. The STATE will operate a tracking system capable of determining if:
 - a. the required self-monitoring reports are submitted on time;
 - b. the submitted reports are complete; and
 - c. the permit conditions are met.
2. The STATE will conduct a timely and substantive review of all self-monitoring reports received, and will evaluate the permittee's compliance status. This evaluation will be uniform and consistent and will take into account frequency, severity, and analytical error in determining where limitations have been exceeded.
3. The STATE will ensure that monitoring data are entered into PCS with the necessary quality assurance to achieve a 95 percent entry accuracy rate.
4. EPA may object in writing to deficiencies in reporting forms used by permittees or the STATE. The STATE will ensure that deficiencies identified by the REGIONAL ADMINISTRATOR are adequately addressed.
5. The STATE must utilize pre-printed Discharge Monitoring Reports for all majors, including Federal Facilities.
6. The STATE will submit an automated Quarterly Noncompliance Report (QNCR) with annotations on a quarterly basis. The QNCR will be due at EPA on the 28th day of the second month following the close of the quarter being reported on. This shall include as an attachment a Pretreatment QNCR, based on Agency guidance.
7. EPA will review a random sample of Discharge Monitoring Reports and PCS entries during periodic audits of the STATE'S NPDES program. EPA will verify the accuracy of the QNCR's and PCS during periodic audits.

C. Facility Inspections

1. Types
The different types of compliance inspections are described in the Foreword of EPA's NPDES Compliance Inspection Manual (May 1988).
2. General Procedures
The STATE and EPA will develop as part of the annual State Program Plan an annual list of permittees to be the subject of compliance audits and inspections.

EPA will be given adequate notice and opportunity to participate with the State in an inspection at any time for overview purposes. EPA or the State may determine that additional inspections are necessary to monitor compliance with issued permits. If EPA makes a determination that additional inspections are necessary or appropriate, it shall notify that STATE of such determination and may perform the inspection alone or jointly with the STATE or may request the STATE to conduct those inspections. EPA will keep the STATE fully informed of plans and results. EPA shall provide to the STATE at least thirty (30) days notice before a joint or independent inspection. EPA will participate in up to 20 percent joint inspections and will conduct some independent inspections to evaluate the effectiveness of the STATE'S program activities. EPA may choose to reduce its overview activities in order to give emphasis to special needs.

3. Federal Facility Procedures

Because of its responsibilities toward Federal facilities and the need for continued and periodic coordination with the Office of Management and Budget, EPA reserves the right to inspect Federal facilities at any time. EPA will notify the STATE of planned Federal facilities inspections.

4. Reporting Schedule

All reports of audits and inspections at NPDES major facilities conducted by the STATE will be forwarded to EPA within thirty (30) days of the date of the inspection or within thirty (30) days of receipt of sampling results, when compliance samples are taken. Where an audit or inspection is conducted solely by EPA, a copy will be forwarded to the STATE within sixty (60) days after the inspection. Each report will be thoroughly reviewed by the STATE to determine what, if any, enforcement action (as outlined in Section V of the AGREEMENT) shall be initiated.

5. The STATE will conduct Compliance Biomonitoring Inspections for at least 10 percent of the permitted facilities with Whole Effluent Toxicity limits.

D. Miscellaneous Compliance Activities

1. Independent Inspections Capability

The STATE shall have inspections and surveillance procedures to identify compliance or noncompliance independent of permittee supplied information.

2. Information Requests

Whenever either EPA or the STATE requests information concerning a specific discharger for a specific reason and the requested information is not available from the files, the agency making the request shall be promptly notified of the unavailability. If the requested information is available, then

the information will be provided to the requesting agency within a reasonable time.

3. Laboratory Quality Assurance

- a. The STATE will plan, initiate, and maintain a program for the inspection of contract laboratories serving the wastewater treatment facilities in the state or arrange for EPA personnel to inspect them as their resources allow.
- b. EPA will take the lead in enforcing DMR-QA on nonresponders. The STATE is responsible for following up on DMR-QA study results.

4. Emergency Pollution Incidents

Upon receipt of any information of actual or threatened pollution incidents that may result in endangerment to human health, the party in receipt of such information shall immediately notify by telephone the other party to this AGREEMENT of the incident. The STATE may be notified by contacting the STATE's Environmental Response Coordinator at (800)843-0699. EPA may be notified by telephone at (404)347-4062 (Emergency Response Section/Waste Management Division).

5. Integration of Pretreatment Compliance Monitoring Responsibilities into the NPDES Program

- a. The STATE will establish procedures and time frames for effective monitoring of local pretreatment programs consistent with the Pretreatment Compliance Monitoring and Enforcement Guidance. Included should be procedures and time frames for reviewing monitoring reports, including reports submitted by POTWs and semi-annual reports submitted by categorical and significant industrial users (IU's) in areas without local programs; establishing and maintaining a complete inventory of POTWs with pretreatment programs; and conducting, as part of regular NPDES inspections, annual audits or inspections or equivalent review of program elements of POTWs with approved programs, including a sample of IU's in the POTW, consistent with work plan commitments.
- b. The STATE should also have a plan for completing an inventory of all categorical users and significant industrial users. The STATE is responsible for monitoring local pretreatment programs consistent with the established procedures and time frames in the Pretreatment Compliance Monitoring and Enforcement Guidance.

Section V. Enforcement

A. Timely Enforcement Responsibility

- I. The STATE is responsible for taking timely and appropriate enforcement action (as defined in paragraph 2 of this section) against permittees in violation of compliance schedules, effluent limitations, pretreatment standards and requirements, and all other permit conditions. This responsibility encompasses

- violations whether detected by STATE or Federal surveys. Prior to initiating enforcement action against a Federal Facility, EPA shall be notified.
2. The STATE will continue to use, in a STATE Enforcement Management System (EMS), current pre-enforcement procedures that are consistent with the principles in EPA's EMS including the Technical Review Criteria (TRC) and the Enforcement Response Guide (ERG). The procedures should include application of the TRC for screening DMR's to determine significance of violations; procedures and time frames for applying appropriate initial response options to identified violations; and procedures for maintaining a chronological summary of all violations. The STATE will screen all DMR's from permittees to determine the level and frequency of all violations and will evaluate instances of noncompliance by all major permittees and Public Law (P.L.) 92-500 minor permittees within 30 days of the identification of a violation; determine the appropriate initial response, consistent with the EMS, and document any action taken/not taken, documenting the technical reason. The date of identification of the violation is the point at which the STATE enforcement staff learn of the violation.
 3. Timely enforcement action begins with a written notice of violation to a major discharger within thirty (30) days of becoming aware that the following violations have occurred (actions against minor dischargers should be given lower priority but should be taken as quickly as possible):
 - a. failure to submit a data related report;
 - b. failure to submit a self-monitoring report;
 - c. failure to meet an effluent limitation (if the failure is detected as the result of a CEI or a CSI, notice of violation must be issued within thirty (30) days of the date of receipt of the inspection report).
 4. If a notice of violation is not applicable or effective, timely enforcement action also includes follow-up with other enforcement mechanisms to ensure permit and program compliance.
 5. For serious violations which present an imminent danger to the health or welfare to the people of the State, the Director will order, without prior hearing, the immediate discontinuance of any such activity, pursuant to applicable state law. Such orders shall be issued as soon as feasible and possible, but in no case to exceed ten (10) days from initial notification to the Alabama Department of Environmental Management of the condition or activity.
 6. The STATE shall keep records that demonstrate that its enforcement procedures result in appropriate initial and follow-up enforcement actions that are applied in a uniform, consistent, and timely manner; formal enforcement actions that clearly define what the permittee is expected to do by a reasonable date certain; the assessment of a civil penalty, when appropriate, based on

consideration of established factors¹ (or equivalent sanctions) as part of all civil judicial referrals and an amount appropriate to the violation; and compilation of complete and accurate permanent records that can be used in future formal enforcement actions².

7. The STATE shall keep records on penalty assessments in accordance with the State law for enforcement actions where a civil or administrative penalty is assessed.
8. In the case of major permittees, by the time a major permittee appears on the QNCR and is determined to be in noncompliance, the STATE is expected to have already initiated enforcement actions to achieve compliance. Prior to a permittee appearing on the subsequent QNCR for the same instance of noncompliance, the permittee should either be in compliance or the STATE should have taken formal enforcement action (generally within 60 days of the first QNCR) to achieve final compliance. For the State of Alabama, these formal actions are defined as Administrative Orders and Consent Orders (Code of Alabama, 22-22A1 to 15; and Alabama Water Pollution Control Act 22-22-1 to 14).
9. The following table specifies when EPA will send a Section 309 Notice Of Violation (NOV) to the STATE:

For unresolved violations in:	EPA will send a §309 NOV by:
July-December	March 31
October-March	June 30
January-June	September 30
April-September	December 31

Following the 30 day §309 NOV period, EPA will proceed with appropriate direct action absent clear indication of acceptable STATE action.

¹ The determination of a penalty amount (or equivalent sanction) should be based on factors such as the seriousness of the violation(s), any history of noncompliance, any good faith effort to comply with applicable requirements, the amount of economic benefit resulting from the violation, the economic impact of the penalty on the violator, and such other factors as justice may require; the seriousness of a set of violations includes consideration of the harm or risk of harm posed to health or the environment by the violations, the amount by which effluent limits were exceeded, the violator's efforts to correct the problem, and the duration of the violations. Regions are expected to follow the CWA Penalty Policy in calculating penalties for EPA cases.

² A formal enforcement action is defined as one that requires actions to achieve compliance, specifies a timetable, contours consequences for noncompliance that are independently enforceable without having to prove the original violation, and subject the person to adverse legal consequences for noncompliance (see Policy Framework for details).

10. The STATE will submit to EPA (NPDES Enforcement Section) on January 10, April 10, July 10, and October 10 a statistical summary of the civil referral activity involving NPDES violations during the preceding quarter. In addition, on April 10 and October 10 an annotated listing of the actions in the above summary will be submitted. Forms for these reports will be furnished to the STATE.
 11. EPA will verify the timeliness and appropriateness of the STATE's enforcement actions and will use the criteria of more than 95 percent of SNC facilities timely and appropriate and less than 1 percent of all major facilities should appear on the Exceptions List as goals for the region. Shortfalls will lead to joint actions to identify opportunities to improve the management of cases.
- B. EPA Actions on Improper Enforcement Claims**
1. Failure of the STATE to take appropriate enforcement actions is defined as any of the following.
 - a. Failure to seek or impose, where appropriate, penalties consistent with 40 CFR 123.27.
 - b. Failure to finally resolve missing or late self-monitoring or other reports.
 2. Failure by the STATE to initiate appropriate enforcement action against a major discharger within thirty (30) days of the date either a schedule-date-related report or a discharge monitoring report is due from the discharger to the STATE may be the basis for EPA determination that the STATE has failed to take timely enforcement action. In instances where EPA determines that the STATE has not initiated timely and appropriate enforcement actions for permit-violations, EPA may proceed with any or all enforcement options available under the CWA.
 3. Except for violations which affect the national interest, or violations on which the STATE has not initiated enforcement action, the REGIONAL ADMINISTRATOR will generally not proceed with Federal civil enforcement until the STATE has been given at least thirty (30) days to seek enforcement. The REGIONAL ADMINISTRATOR shall base his request for enforcement on a determination of one or more of the following reasons:
 - a. any person is in violation of Sections 301, 302, 306, 307, 308, 318, 402, or 405 of the Act, or
 - b. any person is in violation of any permit condition or limitation implementing those sections in a permit issued by the STATE, or
 - c. the STATE has not taken timely action or appropriate enforcement action, or
 - d. widespread permit violations exist.

The REGIONAL ADMINISTRATOR shall notify the STATE of the findings and give the STATE thirty (30) days in which to seek compliance, issue an order, assess a civil penalty, and/or file civil or criminal action.

4. As final steps prior to proceeding with Federal civil enforcement action (and for the purpose of providing notice only), EPA shall inform the STATE that Federal enforcement action is to be initiated forthwith. This notification may be in the form of a telephone communication from the REGIONAL ADMINISTRATOR, with written documentation by EPA to the STATE; and, except in the exercise by EPA of its emergency power under Section 504 of the CWA, such notification shall be provided in all cases of Federal civil enforcement action regardless of the existence or extent of previous communications between EPA and the STATE on the matter. In the usual case, it is expected that preliminary staff discussions will take place between EPA and the STATE before institution of Federal civil enforcement action.
5. The STATE agrees to implement NPDES compliance procedures described in the Program Description of this application. These procedures will also be contained in an Enforcement Management System (EMS) which will be developed by the STATE and EPA. The STATE agrees to submit any changes to the EMS to the REGIONAL ADMINISTRATOR for approval. EPA will return the proposed changes to the STATE with either comments or approval within 45 days of submittal.
- C. **Appropriate involvement of State Attorneys General (or other appropriate STATE legal staff) to ensure legal support for national enforcement priorities**

The STATE will establish procedures for routine coordination and notification of proposed enforcement actions, as well as general time frames from case referral to filing and is responsible for ensuring that the Attorney General (AG) is consulted on the annual judicial enforcement commitments the administering agency is making. As a part of the procedures, the STATE will consider using PCS-type enforcement coordination reports to ensure that all actions are tracked and coordinated. The STATE is also responsible for establishing workable internal procedures for notifying and consulting with the AG on individual cases arising throughout the year and providing these procedures as well as those identified above to EPA. The STATE should demonstrate that its internal coordination procedures with the AG (or other appropriate STATE legal staff) result in: timely review of initial referral packages; satisfactory settlement of cases, as appropriate; timely filing and prosecution of well-prepared referral cases; and prompt action where dischargers violate consent decrees. As a general goal, the STATE's cases should proceed from referral to filing in 60 to 90 days.

- D. **Sharing of Information on the Status of the Program and Improvement of Compliance Rates**
1. The STATE will prepare and submit to EPA information on the operation of the NPDES program in the manner prescribed by national guidance. The STATE will seek to reduce the percentage of facilities in Significant Noncompliance (SNC) by 5 percent each year.
 2. EPA will consolidate STATE reports and make available comparative information from other states.
 3. The STATE will share with EPA any enforcement actions taken to protect water, including wetlands, from unpermitted discharges of solid waste.
- E. Nothing in this agreement should be construed to constitute or create a valid defense to regulated parties in violation of environmental statutes, regulations, or permits.

Section VI. Pretreatment

This section is intended to define STATE and EPA responsibilities in carrying out the establishment and enforcement of National Pretreatment Standards (NPS) for new and existing sources under Section 307(b) and (c) of the CWA.

- A. **Basic Program**
1. The STATE has primary responsibility for ensuring:
 - a. enforcement against sources introducing pollutants prohibited by 40 CFR 403.5;
 - b. application and enforcement of any NPS established by the ADMINISTRATOR in accordance with Section 307(b) and (c) of the CWA.
 2. The STATE shall carry out independent inspection, surveillance, and monitoring procedures which will determine compliance or noncompliance with pretreatment conditions incorporated into Industrial User (IU) permits.
 3. The STATE will issue, reissue, or modify permits for IU's, including but not limited to, all Categorical Industrial Users (CIU's) and other Significant Industrial Users (SIU's) covered by pretreatment requirements.
 4. EPA will overview STATE pretreatment operations consistent with 40 CFR 403 pretreatment requirements.
- B. **Section 403.6 NPS Categorical Standards**
- The STATE shall review requests from IU's for industrial subcategory determinations received within thirty (30) days after the effective date of an NPS for a subcategory under which an IU believes itself to be included and prepare a written determination and justification as to whether the IU does or does not fall within that particular subcategory. The STATE shall forward its

findings together with a copy of the request and necessary supporting information to EPA, Water Permits and Enforcement Branch. If EPA does not object to the STATE's decision within thirty (30) days after receipt thereof, the STATE's finding is final.

C. Section 403.7 Removal Credits

The STATE shall review POTW applications for removal credits for users who are or may be subject in the future to categorical NPS. The STATE's findings together with application and supporting information shall be submitted to EPA, Water Permits and Enforcement Branch, for review. No removal credits request shall be approved by the STATE, if during the thirty (30) day (or extended) evaluation period provided for in 40 CFR 403.11 (b)(1)(ii), the EPA Regional Water Management Division Director objects in writing to the approval of such a submission.

D. Section 403.13 Variances From Categorical NPS for Fundamentally Different Factors (FDF)

The STATE will make an initial finding on all requests from IUs for variances from categorical NPS for FDF, and in cases where the STATE supports the variance, submit its findings together with the request and supporting information to EPA, Water Permits and Enforcement Branch, for a final review. The STATE will not grant a FDF request until written concurrence has been received from EPA. Concurrence/nonconcurrence by EPA will be forwarded within thirty (30) days. The STATE can deny requests for FDF without EPA review.

E. Effective Integration of Pretreatment Enforcement Activities into the NPDES Program

1. The STATE should have enforcement response procedures and timeframes consistent with the Pretreatment Compliance Monitoring and Enforcement Guidance. The STATE is responsible for having procedures in place for categorical and non-categorical industrial users. These procedures will be reviewed annually and any changes submitted as part of the EMS update.
2. The STATE is expected to initiate enforcement action against IUs that are in significant noncompliance, which applies to: failure to meet milestones in enforceable schedules; for violations of effluent limits; and delinquent pretreatment reports. The STATE should ensure, at least annually, public notification of significant violations in the largest daily newspaper published in the municipality in which the IU is located.

F. Miscellaneous

Nothing in this AGREEMENT is intended to affect any Pretreatment requirement, including any standards or prohibitions, established by State or local law. EPA may take actions authorized by Federal law if State or local requirements are less stringent than:

1. any set forth in the NPS, or
2. other requirements or prohibitions established under the CWA or applicable applications.

Section VII. Reporting and Transmittal of Information

A. STATE to EPA		
	DESCRIPTION	FREQUENCY OF SUBMISSION
1.	A copy of all public notices, draft permits and fact sheets or statements of basis except for draft permits where EPA waives review.	At the time of public notice
2.	A copy of all proposed final permits (including general permits) with a copy of the complete permit applications received by the state except those for which permit review is waived by EPA.	When drafted
3.	One copy of all issued permits and documentation which is related to or affects authorization of the permit.	As issued
4.	Copies of all CEI and CSI reports and copies of letters transmitting them to permittees.	Within 30 days of survey or for CSI, 30 days after the sampling results are received
5.	For all major dischargers and Federal facilities, a permit noncompliance report (the "Quarterly Noncompliance Report") including information defined in 40 CFR 123.45 -Facility name, location, and permit number -Description and date history of each noncompliance -Description of actions and dates of actions by the STATE to obtain compliance -Current compliance status (include date of resolution or return to compliance if it has occurred) -Mitigating circumstances	Quarterly reports due within 60 days of each quarter

6.	<p>For all non major NPDES permittees a statistical summary of all permits for which limits are in PCS shall be prepared (as described in 40 CFR 123.45) indicating number of noncompliances, number of enforcement actions, and number of extensions of compliance deadlines. The summary shall list noncompliances according to the following categories:</p> <ul style="list-style-type: none"> -Failure to complete construction -Failure to submit scheduled reports -Noncompliance with effluent limitations -Failure to report effluent data -Deficient reports <p>A separate list by name and permit number of all major discharger permittees, one year or more behind on their construction schedule, shall also be submitted.</p>	<p>Annually within 60 days following the end of the Federal fiscal year (September 30)</p>
7.	<p>Copies of all of the following enforcement actions against major discharger violators of permit conditions and pretreatment requirements:</p> <ul style="list-style-type: none"> -Administrative Orders -Initial determinations -Processing for Judicial Action -Consent Decrees -Assessment of Penalties -Federal Facilities Compliance Agreements 	<p>Copies - as issued</p>
8.	<p>Copies of the following correspondence, required by Section VI of this AGREEMENT to carry out the Pretreatment Program:</p> <ul style="list-style-type: none"> -Categorical pretreatment determinations made under Section VI.B. -Removal credit determinations under Section VI.C. -Initial determinations on pretreatment FDF under Section VI.D. 	<p>As issued or received</p>
9.	<p>Copies of significant comments presented pursuant to on the draft permits, unless permit review has been waived under Section III.C.2.</p>	<p>As required pursuant to 40 CFR 123.74(c)(2)</p>

B. EPA to STATE		
	DESCRIPTION	FREQUENCY OF SUBMISSION
1.	Revisions to the schedule of CSIs and CEIs.	As needed
2.	Copies of all EPA completed CSI and CEI reports and data.	Within 60 days of survey
3.	Notification of citizen complaints where a citizen does not agree to contact the STATE directly.	Within 10 days of complaint receipt
4.	Notification to the STATE of observed violations resulting from EPA oversight inspections which do not qualify as CSI or CEI reports.	Within 30 days of inspection
5.	Notification of the commencement of Federal enforcement and the actions being taken.	As initiated
6.	An analysis of the NPDES program operation based on STATE reports, meetings with STATE officials, and file audits.	Quarterly
7.	Assistance in obtaining PCS retrievals and prompt notice of changes in PCS procedures.	As needed and as available
8.	Copies of court decisions/actions affecting the permit issuance, compliance and enforcement process, regulatory changes and proposed changes, and policy or guidance memorandum.	Within 15 days of action
9.	A list of major dischargers located in the state who have multi-state interests and noncompliance/violations in other eastern States and identification of the type of noncompliances.	Quarterly

Section VIII. Program Review

EPA is responsible for assuring that NPDES is consistent with all requirements of this AGREEMENT, the State Program Plan, and applicable sections of 40 CFR 122-125 and 40 CFR 140. To fulfill this responsibility, EPA shall:

1. Review the information transmitted from the STATE to assure that all the requirements of Section VII of this AGREEMENT are met.
2. Meet with State officials at least annually to observe the data handling, permit processing, compliance monitoring, and enforcement procedures, including both manual and automated data processing.
3. Examine in detail the STATE files and documentation of selected facilities to determine whether:
 - a. Permits are processed and issued consistently with Federal requirements;
 - b. Easy capability exists to discover permit violations when they occur;
 - c. Compliance reviews are timely;
 - d. Selection of enforcement actions is appropriate;
 - e. Enforcement actions are both timely and effective.

These detailed file audits shall be conducted by EPA in the appropriate STATE office at least annually. The STATE shall be notified fifteen days in advance of the audit so that appropriate STATE officials may be available to discuss individual circumstances and problems with EPA. A copy of the audit report shall be transmitted to the STATE when available.

4. Determine the need for (and to hold) public hearings on NPDES.
5. Review that STATE'S public participation policies, practices, and procedures. In the event EPA determines that elements of NPDES are in any way deficient or inconsistent with this AGREEMENT, the State Program Plan, applicable regulations, and statutes, EPA shall notify the STATE in writing of these inconsistencies or other deficiencies. The STATE shall respond in writing within thirty (30) days. EPA shall inform the STATE in writing, within thirty (30) days of its determination, whether noted inconsistencies or deficiencies have been rectified. If they have not been corrected, EPA may proceed in accordance with Sections 309 and 402(c)(3) of the Act.

The STATE shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, its NPDES forms and NPDES program procedures. When the STATE proposes to revise its internal memorandum prohibiting conflicts of interest it will submit proposed changes to EPA for review. EPA will

provide comments within thirty (30) days of receipt. The STATE agrees that EPA concurrence will be obtained before any changes become effective.

Nothing in this AGREEMENT shall be construed to limit EPA authority to take action under Sections 308, 309, 311, 402, 504, or other sections of the Act.

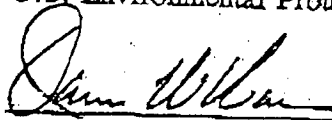
Nothing in this AGREEMENT shall be construed to require the STATE to take any action which is not authorized by STATE law.

Section IX. Approval and Effective Date of Revised Agreement

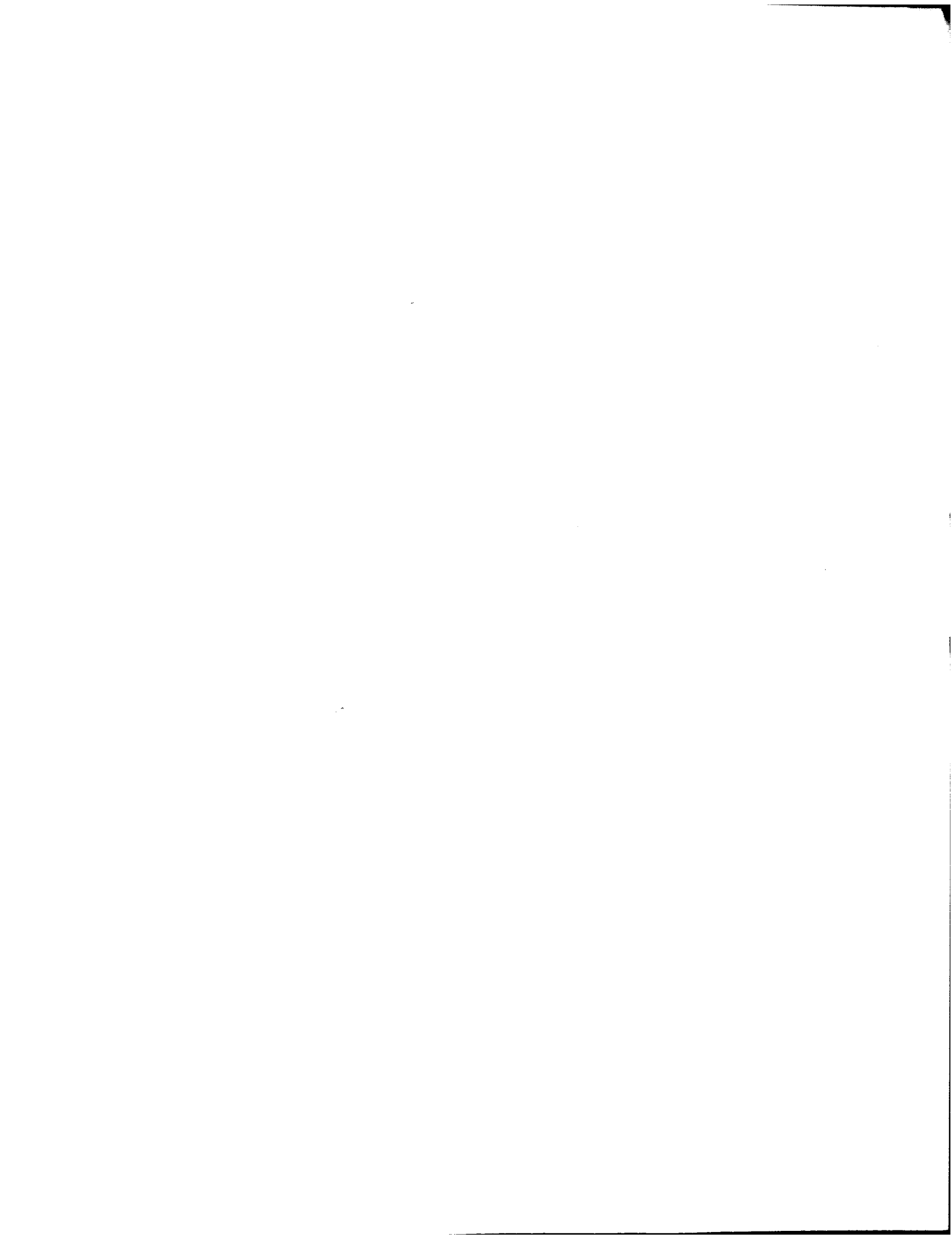
This Memorandum of Agreement shall take effect upon approval of the Regional Administrator, U.S. Environmental Protection Agency, Region IV.



for JOHN H. HANKINSON, JR.
Regional Administrator, Region IV
U.S. Environmental Protection Agency



JAMES W. WARR, Director
Department of Environmental Management
State of Alabama



**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
FIELD OPERATIONS DIVISION**

NPDES INDIVIDUAL PERMIT RATIONALE

Company Name: Shepherd Bend, LLC
Facility Name: Shepherd Bend Mine
County: Walker
Permit Number: AL0079162
Prepared by: Darby Clark
Date: October 31, 2007
Receiving Waters: Surface Waters
Permit Coverage: (1) - New Source Coal Mine And Associated Areas
Industrial Class: Primary
SIC Codes: 1221 and 1222

The Department has made a tentative determination that the available information is adequate to support issuance of this permit.

The draft permit requirements have been developed to assure that permitted treated discharges should not cause or contribute to a violation of applicable instream State water quality standards for the receiving water(s). Full compliance with the draft permit terms and conditions is expected to be protective of instream water quality and ensure consistency with applicable instream State water quality standards for the receiving stream(s).

This permit covers a new source coal mine facility and associated areas. Effluent limitations are similar to those promulgated by EPA in the October 9, 1985 Federal Register (40 CFR Part 434). Precipitation event discharge limitations and post-mining discharge limitations are included in addition to the generally applicable discharge limitations. This permit is more restrictive than the BAT Guidelines in that the permittee, in order to qualify for the post-mining discharge limitations, must have received a Phase II Bond Release from the Alabama Surface Mining Commission for all areas mined in the drainage basin(s) associated with the discharge.

The reason Phase II Bond Release is required for post-mining limitations rather than Phase I is that topsoil replacement and the commencement of revegetation are frequently important factors in controlling the effluent quality from a coal mine. The staff determined (and industry concurred) that tying the post-mining discharge limitations to the Phase II Bond Release will effectively protect water quality in Alabama as it relates to coal mining. The permit allows the daily maximum discharge limitations for pH to be 10.5 s.u. when the application of neutralization and sedimentation treatment technology results in the permittee's inability to comply with applicable total manganese discharge limitations.

Representative sampling data was submitted as required for proposed and existing discharge points for antimony, arsenic, beryllium, cadmium, chromium, copper, lead, mercury, nickel, selenium, silver, thallium, zinc, cyanide, and phenols. The data indicated that none of the analyzed parameters were present at potential levels of concern.

The Pollution Abatement/Prevention (PAP) plan for this facility has been prepared by a professional engineer (PE) registered in the State of Alabama and is designed to ensure reduction of pollutants in the waste stream to a level that, if operated properly, the treated discharge will not contribute to or cause a violation of applicable State water quality standards. By Memorandum of Understanding with the Alabama Surface Mining Commission (ASMC) the PAP for coal operations is reviewed/approved by ASMC. The proposed permit terms and conditions are predicated on the basis of ensuring reduction of pollutants in the waste stream to a level that the treated discharge will not contribute to or cause a violation of applicable State water quality standards.

In accordance with ADEM Admin. Code R. 335-6-3-.07 the design professional engineer, as evidenced by their seal and/or signature on the application, has accepted full responsibility for the effectiveness of the waste treatment facility to treat the permittee's effluent to meet NPDES permit limitations and requirements, and to fully comply with Alabama's water quality standards, when such treatment facilities are properly operated.

If there is a reasonable potential that a pollutant present in treated discharges from a facility could cause or contribute to a contravention of applicable State water quality standards above numeric or narrative criteria, 40 CFR § 122 requires the Department to establish effluent limits using a calculated water quality criterion; establish effluent limits on a case-by-case basis using criteria established by EPA; or establish effluent limits based on an indicator parameter. Based on available information, potential pollutants discharged from this facility, if discharged within the concentrations allowed by this permit, would not have reasonable potential to cause or contribute to a contravention of applicable State water quality standards.

Permitted treated discharges from this type facility are limited primarily to wet weather stormwater runoff. If the receiving stream experiences 7Q10 low flow or zero flow conditions, surface treatment basins are not predicted to discharge. Experience has shown, through evaluating stream hydrographs, that a precipitation event that will result in an eventual wet weather stormwater discharge from a mining facility will also increase stream flow in the receiving water. During drought conditions (7Q10) a facility will not experience stormwater discharges. The limits in the draft permit for treated stormwater discharges from the mining treatment basins are indicative or predictive of the pollutant constituents expected to be potentially present in significant concentrations in wet weather stormwater runoff from this type of mine.

If necessary, pursuant to Part II, B. of the permit, the Department can initiate modification of the permit and take further action as appropriate to require more restrictive discharge limitations necessary to ensure there is not a contravention of water quality standards.

Pursuant to ADEM Admin. Code R. 335-6-6-.12(r) this permit requires the permittee to design and implement a Spill Prevention Control and Countermeasures (SPCC) plan for all stored chemicals, fuels and/or stored pollutants that have the potential to discharge to a water of the State. This plan must meet the minimum engineering requirements as defined in 40 CFR Part 112 and must provide for secondary containment adequate to control a potential spill.

The applicant has, in accordance with 40 CFR Part 122.21 and their NPDES permit application, submitted data relative to metals, cyanide, and total phenols as part of the application. The Department has granted a waiver from testing for other Group A, B and C pollutants listed in the EPA Form 2C and 2D that are not

addressed in their application. The applicant has certified that due to the processes involved in their mining activity these pollutants are believed to be not present in the waste stream.

This proposed permit authorizes treated discharges into a stream segment(s), other State water(s), or local watershed(s) that currently has a water quality classification of Public Water Supply (PWS) (ADEM Admin. Code R. 335-6-10-.09). If the requirements of the proposed permit are fully implemented, the facility will not discharge pollutants at levels that will cause or contribute to a violation of the PWS classification.

This proposed permit authorizes treated discharges into a stream segment(s), other State water(s), or local watershed(s) that currently has a water quality classification of Swimming and Other Whole Body Water-Contact Sports (S) (ADEM Admin. Code R. 335-6-10-.09). If the requirements of the proposed permit are fully implemented, the facility will not discharge pollutants at levels that will cause or contribute to a violation of the S classification.

This proposed permit authorizes treated discharges into stream segment(s), other State water(s), or local watershed(s) that currently has a water quality classification of Fish & Wildlife (F&W) (ADEM Admin. Code R. 335-6-10-.09). If the requirements of the proposed permit are fully implemented, the facility will not discharge pollutants at levels that will cause or contribute to a violation of the F&W classification.

The applicant is not proposing discharges of pollutant(s) to a water with an approved Total Maximum Daily Load (TMDL).

The applicant is not proposing discharges into a stream segment or other State water that is included on Alabama's current CWA §303(d) list.

The applicant is not proposing discharges of pollutant(s) to an ADEM identified Tier 1 water.

The proposed permit action authorizes new or increased discharges of pollutant(s) to receiving waters determined by the Department to be waters where the quality exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water (Tier 2). Pursuant to ADEM Admin. Code Ch. 335-6-10 [Antidegradation Policy and Implementation of the Antidegradation Policy], the applicant has submitted and the Department has reviewed/considered information regarding (1) Demonstration of Necessity/Importance, (2) Alternatives Analysis, and (3) if required, Calculation of Total annualized Costs for technically feasible treatment alternatives regarding the proposed new or increased discharges to Tier 2 waters. The Department has determined, based on the applicant's demonstration, that the proposed new or increased discharges to Tier 2 waters are necessary for important economic or social development in the area in which the waters are located.

ADEM authority regarding mining operations is limited to water quality issues. ADEM regulates the discharge of treated drainage to surface waters and any potential impacts to instream water quality from mining operations. The Department does not have the authority to issue permits for the disturbance or mining activity itself. Permits for mining activities, if required, are issued by the Alabama Surface Mining Commission (ASMC) or the Alabama Department of Industrial Relations (ADIR). The NPDES permitting decision which encompasses engineering and technical considerations, best management information, and formal administrative procedures is predicated on compliance with Departmental regulations and applicable Alabama law. The comprehensive NPDES mining permits comply with applicable state and federal requirements and past experience has demonstrated that compliance with the permit terms and conditions are protective of water quality. Issues such as habitat alteration, recreation, over development, tree removal, loss of productive farmland, highway access, increased equipment/traffic pressures, noise, aesthetics, and decreased property values are all legitimate public policy concerns. However, these issues are beyond the scope of the Department's statutory authority. An NPDES permitting decision is based on compliance with

the requirements of the Alabama Water Pollution Control Act (AWPCA) and the NPDES permit program, which are designed to protect instream water quality. An NPDES permit, if issued, would neither preclude nor negate the company's responsibility or liability to apply for, obtain, or comply with other ADEM, federal, state, or local government permits, certifications, licenses, or other approvals.

The U.S. Fish & Wildlife Service is the federal agency, and the Alabama Department of Conservation & Natural Resources (ADCNR) is the State agency with primacy and statutory authority to address any concerns regarding potential impacts to endangered or threatened species. An NPDES applicant is not required by ADEM to conduct a survey for endangered species when applying for an NPDES permit. ADEM is not charged with, nor funded to conduct this type of survey. If the proposed activities have the potential to result in an impact to or taking of endangered or threatened species through habitat destruction or other actions outside of the scope of the NPDES program, that potential impact can be appropriately addressed through the Endangered Species Act that is implemented and enforced by the U.S. Fish & Wildlife Service. A copy of the application and proposed draft permit which contains detailed information relative to the operation of the facility will be provided to the U.S. Fish & Wildlife Service to evaluate the facility, conduct any necessary surveys, cooperate with other entities as appropriate to have surveys performed, communicate directly with the applicant/permittee to require the applicant/permittee to conduct surveys as appropriate, and take actions as appropriate to ensure full compliance with the Endangered Species Act.

The Alabama Historical Commission is the State agency with primacy and statutory authority to address any concerns regarding potential preservation or potential impacts to surrounding or onsite historical, archaeological, and burial sites. The Department does not have the statutory authority to require NPDES applicants or permittees to conduct archeological reviews or cultural resource assessments. ADEM is not funded nor authorized to conduct this type of survey. If the proposed activities have the potential to result in an impact to historical, archaeological, or burial sites, that potential impact can be appropriately addressed by the Alabama Historical Commission. A copy of the application and proposed draft permit which contains detailed information relative to the operation of the facility will be provided to the Alabama Historical Commission to evaluate the facility, conduct any necessary surveys, cooperate with other entities as appropriate to have surveys performed, communicate directly with the applicant/permittee to require the applicant/permittee to conduct surveys as appropriate, and take enforcement action as appropriate to ensure full compliance with applicable requirements to protect historical, archaeological, and burial sites.

The U.S. Army Corps of Engineers is the federal agency with primacy and statutory authority to address any concerns regarding potential impacts to inherent or ecological values of wetland areas. The Alabama Department of Economic and Community Affairs (ADECA) is the State agency with primacy and statutory authority to address any concerns regarding potential water quantity or redirected flow issues. The State Fire Marshall and the Alabama Department of Industrial Relations (ADIR) are the State agencies with primacy and statutory authority to address any concerns regarding potential safety considerations regarding blasting.