

**BEFORE THE JEFFERSON COUNTY BOARD OF HEATH**

GASP, )  
 )  
 Petitioner. )  
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**PETITION FOR DECLARATORY RULING**

**I. Nature of Petition**

1. This is a Petition for Declaratory Ruling seeking an administrative determination that certain rules repealed and adopted in Jefferson County Air Pollution Control Rules and Regulations (hereinafter, “JCAPC R. & Regs.”) Ch. 12 – Rules of Administrative Procedure, are invalid. This Petition is submitted to the Jefferson County Board of Health pursuant to Ala. Code § 41-22-11(a).

**II. Authority and Responsibility of Board**

2. The Jefferson County Board of Health is an “agency” within the meaning of Ala. Code § 41-22-3(1). Smith v. Smith, 778 So. 2d 189, 191 (Ala. Civ. App. 1999). *Accord*, ABC Coke v. GASP, Inc., Nos. 2150490 & 2150489 (Ala. Civ. App. Dec. 16, 2016); Opinion to Hon. David S. Maxey, Attorney, Jefferson County Board of Health, dated May 1, 2007, A.G. No. 2007-087. *See also* Williams v. Madison County Bd. of Health, 523 So. 2d 453, 455 (Ala. Civ. App. 1988) (Madison County Board of Health “is a local agency of the State of Alabama”). As an “agency,” the Jefferson County Board of Health is subject to the Alabama Administrative Procedure Act, including Ala. Code § 41-22-11.

3. Upon receiving a petition for declaratory ruling, an agency may issue a declaratory ruling with respect to the validity of a rule. Ala. Code § 41-22-11(a). Failure of the agency to issue a declaratory ruling on the merits within 45 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request. Ala. Code § 41-22-11(b).

4. Although the Jefferson County Board of Health has not prescribed by rule the form of petitions for declaratory ruling or the procedure for their submission, consideration and disposition, and not prescribed by rule the circumstances in which rulings shall or shall not be issued as required by Ala. Code § 41-22-11(a), the absence of such a rule does not relieve the Board of its statutory duty to receive and consider a petition for declaratory ruling.

### **III. GASP is “Substantially Affected”**

5. Pursuant to Ala. Code § 41-22-11(a), any person “substantially affected” by an agency rule may petition the agency for a declaratory ruling seeking an administrative determination of the validity of the rule. “The petition seeking an administrative determination under this section shall be in writing and shall state with particularity facts sufficient to show the person seeking relief is substantially affected by the rule.” *Id.*

6. No reported Alabama appellate court decision has addressed the meaning of “substantially affected” in Ala. Code § 41-22-11(a). *See Auburn Med. Ctr., Inc. v. Ala. State Health Planning & Dev. Agency*, 848 So. 2d 269 (Ala. Civ. App. 2002) (AMC was

not “substantially affected” because its CON had previously expired); Alabama Dept. of Public Safety v. Clark, 865 So. 2d 1199 (Ala. Civ. App. 2003) (Clark’s assertion that he was “substantially affected” was not disputed); Ex parte Ala. Dep’t of Public Health, 142 So. 3d 650 (Ala. Civ. App. 2013), *rev’d sub nom. Ex parte Torbert*, No. 1150774, 2016 Ala. LEXIS 119 (Ala. Sept. 30, 2016) (“substantially affected” not discussed); HealthSouth of Ala., LLC v. Shelby Ridge Acquisition Corp., 207 So. 3d 14 (Ala. Civ. App. 2015) (“substantially affected” not discussed), *rev’d on other grounds*, Ex parte HealthSouth of Ala., LLC, 207 So. 3d 39 (Ala. 2016); Ala. State Personnel Bd. v. Brashears, 575 So. 2d 1149 (Ala. Civ. App. 1991) (“substantially affected” not discussed).

7. “[T]he language ‘any person substantially affected by a rule’ is taken from Fla. Stat. § 120.56(1) (1977).” Commentary, Ala. Code § 41-22-11. The Florida statute provided then and provides now:

Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

Fla. Stat. § 120.56(1) (1977) (now codified at Fla. Stat. § 120.56(1)(a)).

8. In Office of Insurance Regulation and Financial Services Commission v. Secure Enterprises, LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013), the Court stated:

To establish standing under the “substantially affected” test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360

(Fla. 1st DCA 2005).<sup>1</sup> To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. Lanoué v. Fla. Dept. of Law Enforcement, 751 So. 2d 94, 97 (Fla. 1st DCA 1999).<sup>2</sup>

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<sup>1</sup> Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005), stated:

To demonstrate that one is or will be “substantially affected by a rule or a proposed rule,” one must establish both that application of the rule will result in “a real and sufficiently immediate injury in fact” and that “the alleged interest is arguably within the zone of interest to be protected or regulated.” *See, e.g.*, Lanoué v. Fla. Dep’t of Law Enforcement, 751 So. 2d 94, 96 (Fla. 1st DCA 1999); Ward v. Bd. of Trs. of Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); All Risk Corp. of Fla. v. State Dep’t of Labor & Employment Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); Fla. Dep’t of Offender Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978).

<sup>2</sup> Lanoué v. Fla. Dep’t of Law Enforcement, 751 So. 2d 94, 97 (Fla. 1st DCA 1999), stated:

“In order to meet the substantially affected test . . . , the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) ‘that the alleged interest is arguably within the zone of interest to be protected or regulated.’” Ward v. Board of Trustees of the Internal Improvement Trust Fund, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (quoting All Risk Corp. of Fla. v. State, Dep’t of Labor & Employment Sec., 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982)); *see* Cole Vision Corp. v. Department of Bus. & Prof. Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997) (“A petitioner who establishes a substantial injury in fact that is within the ‘zone of interest to be protected or regulated’ by the promulgating statute or other related statutes meets the standing requirement.”); Televisual Communications, Inc. v. State, Dep’t of Labor & Employ. Sec., 667 So. 2d 372, 374 (Fla. 1st DCA 1995) (“The hearing officer correctly noted that to demonstrate that it is substantially affected by a proposed rule, a party must establish that, as a consequence of the proposed rule, it will suffer injury in fact and that the injury is within the zone of interest to be regulated or protected.”).

9. GASP is an Alabama non-profit, membership corporation and “person” as defined in Ala. Code § 41-22-3(7). GASP’s purpose is to further the conservation, preservation, protection, maintenance, improvement, and enhancement of human health and the environment on behalf of its members and in the public interest. Members of GASP live, work, and recreate in Jefferson County. Members of GASP breathe the air in Jefferson County into which industrial and commercial facilities emit air pollutants/contaminants as permitted by the Jefferson County Department of Health, Air Pollution Control Program, pursuant to rules adopted by the Jefferson County Board of Health.

10. On May 15, 2013, ABC Coke, A Division of Drummond Co., Inc., applied to the Jefferson County Department of Health, Air Pollution Control Program, for reissuance of Major Source Operating Permit No. 4-07-0001-03. On August 11, 2014, the Jefferson County Department of Health, Air Pollution Control Program, reissued Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Co., Inc.

11. Pursuant to JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.03 (adopted April 19, 2017), upon the filing of a timely and proper request, any person aggrieved by an administrative action of the Jefferson County Department of Health, Air Pollution Control Program shall be entitled to a hearing before the Jefferson County Board of Health or its designated Hearing Officer. *Cf.* JCAPC R. &

Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.3 (repealed April 19, 2017).

An “administrative action” includes the issuance of a permit. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.02(a) (adopted April 19, 2017). *Cf.* JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.2.1 (repealed April 19, 2017). After the conclusion of the hearing, the Board shall issue an appropriate order modifying, approving, or disapproving the Department’s administrative action. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.17(1) (adopted April 19, 2017). *Cf.* JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.14.1 (repealed April 19, 2017). Thus, upon the filing of a timely and proper request, any person aggrieved by the issuance of a permit by the Jefferson County Department of Health, Air Pollution Control Program is entitled to become a “party” in a “contested case” concerning the issuance of the permit. *See* Ala. Code §§ 41-22-3(6) (a “party” includes any person “properly seeking and entitled as a matter of right, whether established by constitution, statute, or agency regulation or otherwise, to be admitted as a party”); 41-22-3(3) (a “contested case” is proceeding, including but not restricted to . . . licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing”).

12. Pursuant to JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Part 12.4 (repealed April 19, 2017), GASP filed a timely Request for Hearing with the Jefferson County Board of Health to contest the reissuance of Major Source

Operating Permit No. 4-07-0001-03 by the Jefferson County Department of Health, Air Pollution Control Program, to ABC Coke, A Division of Drummond Company, Inc., on August 26, 2014. GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003 (filed Aug. 26, 2014). **Exhibit A.** Pursuant to JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.23.1 (repealed April 19, 2017), the Jefferson County Board of Health appointed a hearing officer to conduct the hearing requested by GASP. ABC Coke, A Division of Drummond Company, Inc., was granted intervention by the hearing officer.

13. The Jefferson County Department of Health, Air Pollution Control Program, and ABC Coke, A Division of Drummond Company, Inc., moved to dismiss GASP's Request for Hearing for failure to sufficiently allege that GASP was aggrieved by the issuance of Major Source Operating Permit No. 4-07-0001-03 and failure to comply with the pleading requirements of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017). In essence, the Jefferson County Department of Health, Air Pollution Control Program, and ABC Coke, A Division of Drummond Company, Inc. asserted that GASP was not entitled to be "party" in a contested case proceeding concerning the reissuance of Major Source Operating Permit No. 4-07-0001-03.

14. The hearing officer recommended to the Jefferson County Board of Health that GASP's Request for Hearing be dismissed for failing to provide sufficient allegations

that GASP was aggrieved by the issuance of Major Source Operating Permit No. 4-07-0001-03 and for failing to fully comply with the pleading requirements in JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017). On April 8, 2015, the Jefferson County Board of Health adopted the hearing officer’s recommendation and dismissed GASP’s Request for Hearing. **Exhibit B.**

15. Pursuant to Ala. Code § 41-22-20, GASP filed a notice of appeal with the Board and a petition for review with the Jefferson County Circuit Court.<sup>3</sup> On January 14, 2016, the Jefferson County Circuit Court reversed and remanded the Jefferson County Board of Health’s dismissal of GASP’s Request for Hearing. GASP v. Jefferson County Bd. of Health, No. CV 2015-902278 (Jefferson County Cir. Ct. Jan. 14, 2016). Subsequently, the Alabama Court of Civil Appeals affirmed the decision of the Circuit Court. ABC Coke, A Div. of Drummond Co., Inc. v. GASP, Nos. 2150489, 2150490, 2016 Ala. Civ. App. LEXIS 299 (Ala. Civ. App. Dec. 16, 2016). The courts held that GASP’s Request for Hearing sufficiently alleged that GASP was a person aggrieved by the reissuance of Major Source Operating Permit No. 4-07-0001-03, that GASP fully complied with the pleading requirements in JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017), and that GASP was entitled

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<sup>3</sup> In its Response to GASP’s Petition for Review, the Board admitted that Ala. Code § 41-22-20 provided GASP the right to appeal of the Board’s decision. The Board never contested that it was an “agency” subject to the Alabama Administrative Procedure Act.

to a hearing before the Jefferson County Board of Health or its designated hearing officer. In essence, the courts determined that GASP was entitled to be admitted as a “party” in the contested case proceeding concerning the reissuance of Major Source Operating Permit No. 4-07-0001-03.

16. Pursuant to JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017), on or about July 14, 2017, the Jefferson County Board of Health appointed another hearing officer to resume the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003. **Exhibit C.** The merits of GASP’s contest of the reissuance of Major Source Operating Permit No. 4-07-0001-03 have not yet been presented to or adjudicated by the Board or its appointed hearing officer.

17. On April 19, 2017, the Jefferson County Board of Health repealed JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure (revised May 8, 1991). **Exhibit D.**

18. On April 19, 2017, the Jefferson County Board of Health adopted by reference as JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, the “Rules of Procedure for Hearing Appeals of Administrative Actions of the Alabama Department of Environmental Management,” contained in Chapter 335-2-1 of the Alabama Administrative Code, with with the following exceptions: (1) wherever the Rules of Procedure refer to the “Commission” (i.e., the Environmental Management Commission

of the Alabama Department of Environmental Management), insert the Jefferson County Board of Health; (2) wherever the Rules of Procedure refer to the “Department” (i.e., the Alabama Department of Environmental Management), insert the Jefferson County Department of Health Air Pollution Control Program; (3) any hearing held pursuant to this Chapter shall be held in Birmingham, Alabama, unless the parties agree otherwise and the Hearing Officer approves; and (4) filing may be accomplished by personal, private-service, or mail delivery addressed to:

Health Officer  
Jefferson County Board of Health  
1400 Sixth Avenue South  
Birmingham, Alabama 35233

**Exhibits D and E.**

**A. Rule 335-2-1-.27 Hearing Officers (adopted April 19, 2017)**

19. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017) provides:

(1) The Jefferson County Board of Health may hire or employ one or more Hearing Officers to conduct hearings of contested administrative actions of the Jefferson County Department of Health Air Pollution Control Program, other than requests for a stay of an administrative action of the Jefferson County Department of Health Air Pollution Control Program or hearings to contest the issuance of emergency orders. Such Hearing Officers shall be attorneys licensed to practice law in the State of Alabama and shall be paid an amount prescribed by the Commission from Jefferson County Department of Health Air Pollution Control Program funds but shall not be subject to the authority, direction, or discretion of the Director of the Jefferson County Department of Health Air Pollution Control Program or any other person subject to the authority, direction, or discretion of the

Director of the Jefferson County Department of Health Air Pollution Control Program.

(2) The Jefferson County Board of Health may delegate to a Hearing Officer the power to conduct hearings of contested administrative actions of the Jefferson County Department of Health Air Pollution Control Program, other than hearings to contest the issuance of an emergency order or to request a stay of the administrative action, and all proceedings related thereto, in the same manner as provided in this Chapter for the conduct of such hearings and proceedings before the Jefferson County Board of Health. Except as otherwise provided by these rules, the power to conduct hearings of contested administrative actions of the Jefferson County Department of Health Air Pollution Control Program shall include the power to do all things which the Jefferson County Board of Health might do under this Chapter, except issue an order modifying, approving, or disapproving an administrative action of the Jefferson County Department of Health Air Pollution Control Program, issue an order dismissing an appeal pursuant to Rule 335-2-1-.15 or Rule 335-2-1-.21, or issue an order granting or denying an application for a stay of the operation of the contested administrative action of the Jefferson County Department of Health Air Pollution Control Program pending issuance of a Jefferson County Board of Health order modifying, approving, or disapproving such administrative action.

(3) The Hearing Officer shall prepare and submit to the Jefferson County Board of Health within ten days after the close of the record of any hearing to contest an administrative action of the Jefferson County Department of Health Air Pollution Control Program, or such other time as the parties agree, a report containing findings of fact, conclusions of law, recommendations, and the record, including a transcript of all testimony or comments given in such hearing, for the consideration of the Commission. The report of the Hearing Officer shall also state the date on which the hearing was concluded.

(4) The Hearing Officer is specifically authorized to:

(a) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders other than those specifically reserved to the Jefferson County Board of Health under this chapter;

(b) Administer oaths and affirmations and take affidavits;

- (c) Examine witnesses and receive documentary or other evidence;
- (d) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other non privileged evidence, and failing the production thereof without good cause shown, draw adverse inferences against the party;
- (e) Limit or strike issues not properly before the Jefferson County Board of Health;
- (f) Admit or exclude evidence;
- (g) Hear and make recommendations on questions of facts, law or discretion;
- (h) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;
- (i) Issue subpoenas;
- (j) Make recommendations to the Jefferson County Board of Health concerning the final disposition of the proceedings;
- (k) Establish guidelines and limitations on the scope and length of any hearings and briefs presented consistent with the principles of administrative law and the intent of the Environmental Management Act; and
- (l) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(5) In preparing the recommendation to the Jefferson County Board of Health, the Hearing Officer shall determine each matter of controversy upon a preponderance of the evidence. The burden shall rest with the petitioner to show by a preponderance of the evidence that the Jefferson County Department of Health Air Pollution Control Program's action should be modified or disapproved.

20. The Alabama Administrative Procedure Act does not expressly authorize agencies to appoint hearing officers to conduct hearings in contested cases. Nor does the Act grant agencies the authority to promulgate rules permitting the appointment of hearing officers. *See* Ala. Code § 41-22-2(d) (“Nothing in this chapter shall be construed as granting to any agency the authority to adopt or promulgate rules and regulations.”).

21. Ala. Code Ala. Code § 22-28-23 does not expressly authorize the Jefferson County Board of Health to appoint hearing officers to conduct hearings of contested administrative actions of the Jefferson County Department of Health, Air Pollution Control Program. It does, however, authorize the Board to adopt certain regulations. *See* Ala. Code §§ 22-28-23(b)(1) and 22-28-23(d). An agency’s authority to appoint a hearing officer may derive from a general legislative grant of authority to promulgate rules to implement a statute. Personnel Bd. of Ala. v. King, 456 So. 2d 80, 81 (Ala. Civ. App. 1984). *See* Earl v. State Personnel Bd., 948 So. 2d 549, 555-556 n. 9 (Ala. Civ. App. 2006) (“Earl argues that Ala. Code 1975, § 36-26-27(a), does not authorize the use of a hearing officer. However, in King, we concluded that the use of a hearing officer was within the authority of the Personnel Board based on applicable regulations adopted pursuant to the Board’s regulatory authority. *See* Ala. Code 1975, § 36-26-9; Ala. Admin. Code (State Pers. Bd.), Rule 670-X-5-.08.”).<sup>4</sup> However, those rules must be “valid,” *i.e.*, adopted in substantial compliance with Ala. Code § 41-22-5(a).

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<sup>4</sup> The doctrine of separation of powers does not prohibit the Legislature from delegating the power to execute and administer the laws, so long as the delegation carries reasonably clear standards governing the execution and administration. Monroe v. Harco, 762 So. 2d 828, 831 (Ala. 2000). Whether the statutory grant of authority to adopt rules in Ala. Code § 22-28-23 is sufficient to include the adoption of rules authorizing the appointment of hearing officers is not before the Board in this Petition for Declaratory Ruling. The only question before the Board is the validity *vel non* of rules adopted without substantial compliance with Ala. Code § 41-22-5.

22. If JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017) is invalid because the Jefferson County Board of Health failed to substantially comply with Ala. Code § 41-22-5(a) as asserted below, the Board has no authority to appoint a hearing officer to conduct the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, or to delegate or prescribe the powers of an appointed hearing officer.

23. If the Jefferson County Board of Health failed to give all notices required by Ala. Code § 41-22-5 as asserted below, the Board may not invoke Rule 335-2-1-.27 (adopted April 19, 2017) as authority to appoint a hearing officer to conduct the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003. *See* Ala. Code § 41-22-4(b) (“No agency rule . . . may it be invoked by the agency for any purpose until . . . the agency has given all notices required by Section 41-22-5.”)

24. If the Jefferson County Board of Health failed to give all notices required by Ala. Code § 41-22-5 as asserted below, the Board’s appointment of a hearing officer to conduct the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, is void. *See* Stiff v. Ala. Alcoholic Beverage Control Bd., 878 So. 2d 1138, 1146 (Ala. 2003) (Ala. Code § 41-22-4(b) voids ABC Board’s wine pricing rule and ABC Board may not sell wine without prior publication of notice of the rule in the Alabama Administrative Monthly as required by Ala. Code § 41-22-5(a));

Brunson Constr. & Envtl Servs., Inc. v. City of Prichard, 664 So. 2d 885 (Ala. 1995) (Ala. Code § 41-22-4(b) voids ADEM permit condition based on rule adopted without prior publication of notice of the rule in the Alabama Administrative Monthly as required by Ala. Code § 41-22-5(a)). In addition, any orders, rulings, findings of fact, conclusions of law, and recommendations made by the hearing officer would be void.

25. If JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017) is invalid because the Jefferson County Board of Health failed to substantially comply with Ala. Code § 41-22-5(a) as asserted below, and the appointment of a hearing officer is void, GASP is entitled to a hearing conducted by the Jefferson County Board of Health. *See* JCBH R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.03 (adopted April 19, 2017) (“Upon a proper request made and filed in accordance with Rule 335-2-1-.04, any person aggrieved by an administrative action of the Department shall be entitled to a hearing before the Jefferson County Board of Health or its designated Hearing Officer.”).

26. The application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017) to the contested case proceeding in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, will inflict a real and immediate injury in fact on GASP because the appointment of a hearing officer is void, any orders, rulings, findings of fact, conclusions of law, and recommendations made by the appointed hearing officer will be void, and

GASP will be denied a hearing conducted by the Jefferson County Board of Health. Accordingly, GASP has an interest in ensuring that the hearing in the contested case proceeding of GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, is conducted by the Jefferson County Board of Health or a lawfully designated hearing officer and that any orders, rulings, findings of fact, conclusions of law, and recommendations made by the hearing officer are not void.

27. GASP's interest in ensuring that the hearing in the contested case proceeding of GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, is conducted by the Jefferson County Board of Health or a lawfully designated hearing officer and that any orders, rulings, findings of fact, conclusions of law, and recommendations made by the hearing officer are not void, is within the zone of interests to be protected by Ala. Code §§ 41-22-12 (in a contested case, all parties shall be afforded an opportunity for hearing; on motion of a party, the presiding officer conducting the hearing may issue subpoenas, discovery orders related to relevant matters, and protective orders in accordance with the rules of civil procedure; opportunity shall be afforded all parties to respond and present evidence and argument on all material issues involved; the record in a contested case shall include all intermediate rulings, statements of all matters officially noticed, evidentiary objections and rulings thereon, proposed findings and exceptions, and the report by a hearing officer) and 22-28-23 (a county board of health may establish and administer a local air pollution control program that provides

for administrative organization, staff, financial, and other resources necessary to effectively and efficiently carry out its program).

28. Accordingly, GASP is “substantially affected” by the application of the alleged invalid JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 (adopted April 19, 2017) in the contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003.

**B. Sections 12.4.1 and 12.4.4 Request for Hearing (repealed April 19, 2017); Rule 335-2-1-.04 Request for Hearing (adopted April 19, 2017)**

29. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017) provided:

**12.4 Request for Hearing.**

**12.4.1** Any Person aggrieved by an administrative action of the Program, other than the issuance of any rule or regulation or emergency order, may file with the Board a request for a hearing to contest such action within fifteen days after notice to the aggrieved person by the Program of such action, or if no notice to the aggrieved person is given or required by the Alabama Environmental Management Act, Code of Alabama 1975, SS 22-22A-1 to 22-22A-13, within thirty days of such action.

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**12.4.4** A request for a hearing to contest an administrative action of the Program shall be made in writing and shall contain:

(a) the name, mailing address, and telephone number of the person making the request;

(b) a short and plain statement identifying the administrative action of the Program being contested;

(c) a short and plain statement of the threatened or actual injury suffered by the requester as a result of the administrative action of the Program;

(d) a short statement of the terms and conditions which the requester proposes that the Board should include in an order modifying or disapproving the Program's administrative action; and

(e) the name, mailing address, and telephone number of the requester's attorney, if represented by an attorney.

30. The courts of Alabama have affirmed that GASP's Request for Hearing filed in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, sufficiently alleged that GASP is a person aggrieved by the issuance of Major Source Operating Permit No. 4-07-0001-03 and satisfied the pleading requirements of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017). GASP v. Jefferson County Bd. of Health, No. CV 2015-902278 (Jefferson County Cir. Ct. Jan. 14, 2016), *aff'd sub nom*, ABC Coke, A Div. of Drummond Co., Inc. v. GASP, Nos. 2150489, 2150490, 2016 Ala. Civ. App. LEXIS 299 (Ala. Civ. App. Dec. 16, 2016). Specifically, the Court of Civil Appeals said that “[a]lleging a specific error and/or asserting a legal theory for relief may be requirements for establishing a case or controversy and invoking the judicial process, but they are not requirements contained in JCBH's rules of administrative procedure.” Id., 2016 Ala. Civ. App. LEXIS 299, \*18 (citing JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017)). Accordingly, the Jefferson County Board

of Health's dismissal of GASP's Request for Hearing on January 14, 2016 was reversed and remanded to the Board, thus requiring that the hearing in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, be resumed.

31. The Jefferson County Board of Health adopted JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017) which provides:

**335-2-1-.04 Request for Hearing.**

(1) Any person aggrieved by an administrative action of the Jefferson County Department of Health Air Pollution Control Program, other than the issuance of any rule or regulation or emergency order, may file with the Jefferson County Board of Health a request for a hearing to contest such action within thirty days of such action.

(2) To obtain a hearing on any order assessing a civil penalty issued by the Jefferson County Department of Health Air Pollution Control Program, an aggrieved person must either be subject to the order or have submitted timely written comments on the proposed order in accordance with Code of Alabama 1975, § 22-22A-5(18).

(3) Any person aggrieved by the issuance, modification or repeal of any rule or regulation by the Jefferson County Department of Health Air Pollution Control Program may file with the Jefferson County Board of Health a request for a hearing to contest such administrative action within forty-five days of the adoption of the rule or regulation by the Jefferson County Board of Health.

(4) Any person aggrieved by the issuance of any emergency order by the Jefferson County Department of Health Air Pollution Control Program may file with the Jefferson County Board of Health a request for an expedited hearing to contest such administrative action. The request shall be filed within the time provided in paragraph (1), above.

(5) A request for a hearing to contest an administrative action of the Jefferson County Department of Health Air Pollution Control Program shall be made in writing and shall contain:

(a) the name, mailing address, and telephone number of the person making the request;

(b) a short and plain statement identifying the administrative action of the Jefferson County Department of Health Air Pollution Control Program being contested;

(c) a short and plain statement of the threatened or actual injury suffered by the person making the request as a result of the administrative action of the Jefferson County Department of Health Air Pollution Control Program;

(d) *a short and plain statement of the alleged error(s) made by the Jefferson County Department of Health Air Pollution Control Program in the administrative action;*

(e) a short statement of the terms and conditions which the person making the request proposes that the Jefferson County Board of Health should include in an order modifying or disapproving the Jefferson County Department of Health Air Pollution Control Program's administrative action; and

(f) the name, mailing address, and telephone number of the attorney for the person making the request, if represented by an attorney.

(g) an original signature of the person making the request or such person's attorney.

(6) A request for a hearing to contest an administrative action of the Jefferson County Department of Health Air Pollution Control Program shall be filed with the Jefferson County Board of Health. Filing may be accomplished by personal, private-service or mail delivery addressed to:

Health Officer  
Jefferson County Board of Health  
1400 Sixth Avenue South  
Birmingham, Alabama 35233

Filing shall not be timely unless the papers are received by the Jefferson County Board of Health within the time fixed for filing, except that papers shall be deemed filed on the day of mailing if mailed by certified, registered or express mail of the United States Postal Service or a similar private express-delivery service, and the date of the official post-mark is on or

before the time fixed for filing. A request for a hearing may not be filed by facsimile (telefax).

(7) Within five (5) days of receipt by the Jefferson County Department of Health Air Pollution Control Program of a timely request for a hearing, the Department shall file with the Jefferson County Board of Health, if appropriate, a notice alleging any pleading defects in the request for a hearing and identifying the omissions of information required by paragraph (5), above. A copy of the notice shall be served on the petitioner. Thereupon, the petitioner shall correct the identified defects within ten (10) days of receipt of the notice. Failure by the petitioner to cure all identified defects within the time provided shall deem the original filing an improper request and will not preserve that person's right to a hearing.

(Emphasis added). JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017) includes a new pleading requirement, *i.e.*, “a short and plain statement of the alleged error(s) made by the [Jefferson County Department of Health Air Pollution Control Program] in the administrative action; . . .”

32. The repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017) and the application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017) to the hearing in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, are likely to result in a renewed motion to dismiss GASP's Request for Hearing for failure to comply with the new pleading requirement in JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017).

33. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21(4) (adopted April 19, 2017) authorizes the Jefferson County Board of Health to dismiss a request for hearing, on motion filed by any party, alleging that the Request for Hearing does not comply with the pleading requirements of Rule 335-2-1-.04 (adopted April 19, 2017). Such a dismissal, based on the alleged invalid repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017) and alleged invalid adoption of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017), would inflict a real and immediate injury in fact on GASP by depriving GASP of a hearing on the issuance of Major Source Operating Permit No. 4-07-0001-03. GASP has an interest in ensuring that its Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 is not dismissed based on the alleged invalid repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017) and alleged invalid adoption of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017).

34. GASP's interest in ensuring that its Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 is not dismissed based on the alleged invalid repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017) and alleged invalid adoption of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04

(adopted April 19, 2017) is within the zone of interests to be protected by Ala. Code § 41-22-12(a) (“all parties shall be afforded an opportunity for hearing”).

35. Accordingly, GASP is “substantially affected” by the application of the alleged invalid repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 (repealed April 19, 2017), and by the application of the alleged invalid adoption of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 (adopted April 19, 2017) in the contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003.

**C. Rule 335-2-1-.11 Discovery (adopted April 19, 2017)**

36. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.11 (adopted April 19, 2017) restricts discovery methods in contested cases before the Jefferson County Board of Health or its designated hearing officer to depositions upon oral examination and production of documents and things. It does not authorize the use of other discovery methods, *e.g.*, requests for admissions or interrogatories as provided in the Alabama Rules of Civil Procedure. Rule 335-2-1-.11 (adopted April 19, 2017) provides:

- (1) Except as provided by Rule 335-2-1-.10, discovery shall be permitted only upon determination by the Hearing Officer:
  - (a) That such discovery will not unreasonably delay the proceeding;
  - (b) That the information to be obtained is not otherwise obtainable;
  - (c) That such information has significant probative value; and
  - (d) That such information is not confidential financial, commercial or trade-secret information, or privileged. The Jefferson County Board of

Health shall give effect to the rules of privilege recognized and protected by law.

(2) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:

(a) The nature of the information expected to be discovered; and

(b) The proposed time and place where it will be taken. If the Jefferson County Board of Health or Hearing Officer determines that the motion should be granted, the Jefferson County Board of Health or Hearing Officer shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(3) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (a) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (b) the issuance of a dismissal order under Rule 335-2-1-.21.

(4) *Parties may obtain discovery by one or more of the following methods: depositions upon oral examinations and production of documents or things.*

(5) With the exception of petitioner's witnesses in an appeal of an enforcement action, depositions of all parties, their family members, employees, agents, and other persons under their control will be conducted at the Jefferson County Department of Health Air Pollution Control Program's offices in Montgomery, Alabama, unless all parties agree otherwise. Depositions of petitioner's witnesses in appeals of enforcement actions may be scheduled in the county of the witness's residence or the county where the violation occurred, or any other place to which all parties agree. The depositions of other persons who are not subject to the control of a party to the proceeding may be taken in Montgomery County, the county where the person resides, or any other place to which all parties agree.

(6) Court reporter's fees and reasonable copying costs shall be borne by the party requesting the discovery.

(Emphasis added).

37. Ala. Code § 41-22-12(c) provides:

In a contested case, on motion of a party, the presiding officer conducting the hearing may issue subpoenas, discovery orders related to relevant matters, and protective orders in accordance with the rules of civil procedure. The agency may set a reasonable fee by rule for the issuance of a subpoena to be paid by the moving party. Process issued pursuant to this subsection shall be enforced by a court in the same manner as process issued by the court. \* \* \*

Thus, Ala. Code § 41-22-12(c) authorizes presiding officers in contested case proceedings to issue discovery orders allowing the use of any discovery methods provided in the Alabama Rules of Civil Procedure. These include requests for admissions and interrogatories. Rules 36 and 33, Ala. R. Civ. P.

38. The application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.11 (adopted April 19, 2017) in the pending contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, will inflict a real and immediate injury in fact on GASP by precluding GASP from seeking discovery through methods authorized by the Alabama Rules of Civil Procedure but not authorized by JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.11 (adopted April 19, 2017). Thus, GASP has an interest in seeking discovery by the methods provided in the Alabama Rules of Civil Procedure in the pending contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003.

39. GASP's interest in seeking discovery by the methods provided in the Alabama Rules of Civil Procedure in the pending contested case proceeding of GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, is within the zone of interests to be protected by Ala. Code § 41-22-12(c) ("the presiding officer conducting the hearing may issue subpoenas, discovery orders related to relevant matters, and protective orders in accordance with the rules of civil procedure").

40. Accordingly, GASP is "substantially affected" by the application of the alleged invalid JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.11 (adopted April 19, 2017) in the contested case proceeding of GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003.

**D. Rule 335-2-1-.21 Disposition Without Hearing  
(adopted April 19, 2017)**

41. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 (adopted April 19, 2017) provides:

**335-2-1-.21 Disposition Without Hearing.**

(1) Any party who made and filed with the Jefferson County Board of Health a request for a hearing to contest an administrative action of the Jefferson County Department of Health Air Pollution Control Program in accordance with Rule 335-2-1-.04, may at any time before the commencement of a hearing withdraw the request by filing a notice thereof with the Jefferson County Board of Health and serving a copy upon the Hearing Officer and all parties in accordance with Rule 335-2-1-.24.

(2) Any party who made and filed with the Jefferson County Board of Health a request for a hearing to contest an administrative action of the Jefferson County Department of Health Air Pollution Control Program in

accordance with Rule 335-2-1-.04, may at any time after the commencement of a hearing file a motion for voluntary dismissal of the contest with the Jefferson County Board of Health. A copy of said notice shall be served upon all parties and the Hearing Officer in accordance with Rule 335-2-1-.24.

(3) The parties to any hearing to contest an administrative action of the Jefferson County Department of Heath Air Pollution Control Program may at any time after the filing of the request for a hearing to contest an administrative action of the Jefferson County Department of Heath Air Pollution Control Program file with the Jefferson County Board of Health a proposed consent order modifying, approving, or disapproving the administrative action of the Jefferson County Department of Heath Air Pollution Control Program with a joint motion that the Jefferson County Board of Health issue an order in accordance therewith. A copy of said consent order shall be served upon the Hearing Officer as provided by Rule 335-2-1-.24.

(4) Motion to Dismiss.

(a) *Upon motion of the Jefferson County Department of Heath Air Pollution Control Program, the Jefferson County Board of Health may dismiss an action for failure of the petitioner to comply with any of the following:*

1. The time requirements for filing a request for hearing set forth at Rule 335-2-1-.04;
2. *The pleading requirements of Rule 335-2-1-.04;*
3. An order of the Jefferson County Board of Health or Hearing Officer; or,
4. A requirement to appear and proceed at a pre-hearing conference or at the hearing.

(b) Before any action is taken on a motion to dismiss filed in accordance with this rule, all parties shall be given a reasonable opportunity to oppose such motion.

(Emphasis added). Thus, JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 (adopted April 19, 2017) authorizes the dismissal of a request for hearing on motion of the Jefferson County Department of Heath Air Pollution

Control Program for failure to comply with the requirement to allege errors in Rule 335-2-1-.04 (adopted April 19, 2017).

42. The courts of Alabama previously affirmed that GASP's Request for Hearing filed in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, sufficiently alleged that GASP is a person aggrieved by the issuance of Major Source Operating Permit No. 4-07-0001-03 and that GASP's Request for Hearing satisfied the pleading requirements of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017). GASP v. Jefferson County Bd. of Health, No. CV 2015-902278 (Jefferson County Cir. Ct. Jan. 14, 2016), *aff'd sub nom*, ABC Coke, A Div. of Drummond Co., Inc. v. GASP, Nos. 2150489, 2150490, 2016 Ala. Civ. App. LEXIS 299 (Ala. Civ. App. Dec. 16, 2016). Specifically, the Court of Civil Appeals held that “[a]lleging a specific error and/or asserting a legal theory for relief may be requirements for establishing a case or controversy and invoking the judicial process, but they are not requirements contained in JCBH's rules of administrative procedure.” ABC Coke, A Div. of Drummond Co., Inc. v. GASP, 2016 Ala. Civ. App. LEXIS 299, at \*18 (citing JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, § 12.4.4 (repealed April 19, 2017)).

43. The application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 (adopted April 19, 2017) to the hearing in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, is

likely to result in a renewed motion to dismiss for failure to comply with new pleading requirements in JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 (adopted April 19, 2017). Upon the filing of such a motion, JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 (adopted April 19, 2017) authorizes the Jefferson County Board of Health to dismiss GASP’s Request for Hearing. Such a dismissal would inflict a real and immediate injury in fact on GASP by depriving GASP of a hearing on the reissuance of Major Source Operating Permit No. 4-07-0001-03. GASP has an interest in avoiding the dismissal of GASP as a party and the dismissal of the contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003.

44. GASP’s interest in avoiding the dismissal of GASP as a party and dismissal of the contested case proceeding of GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, is within the zone of interests to be protected by Ala. Code § 41-22-3(6) (a “party” includes any person “properly seeking and entitled as a matter of right, whether established by constitution, statute, or agency regulation or otherwise, to be admitted as a party”) and Ala. Code § 41-22-12(a) (“[i]n a contested case, all parties shall be afforded an opportunity for hearing”).

45. Accordingly, GASP is “substantially affected” by the application of the alleged invalid JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule

335-2-1-.21 (adopted April 19, 2017) in the contested case proceeding of GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003.

**F. Rule 335-2-1-.22 Summary Judgment (adopted April 19, 2017)**

46. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 (adopted April 19, 2017) provides:

**335-2-1-.22 Summary Judgment.**

(a) The Jefferson County Board of Health or Hearing Officer, upon motion of any party or sua sponte, may at any time render an accelerated recommendation in favor of the petitioner or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as the Jefferson County Board of Health or Hearing Officer may require, if no genuine issue of material fact exists and a party is entitled to decision as a matter of law, as to all or any part of the proceeding.

(b) Before any motion is granted in accordance with this rule, all parties shall be given a reasonable opportunity to oppose such motion.

Thus, under JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 (adopted April 19, 2017), a motion for summary judgment may be granted on the basis of affidavits without any determination that the interests of the parties will not be prejudiced substantially by allowing the presentment of testimony by affidavits. In addition, under JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 (adopted April 19, 2017), a motion for summary judgment may be granted without allowing the adversary party to cross-examine witnesses who present testimony by affidavits. Finally, JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure,

Rule 335-2-1-.22 (adopted April 19, 2017) permits a final order on the merits to be entered without conducting a hearing at which a party is afforded the opportunity to present and respond to evidence and argument on all material issues.

47. The Alabama Administrative Procedure Act “is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public” and “[t]o increase the fairness of agencies in their conduct of contested case proceedings. Ala. Code § 41-22-2.

48. The Alabama Administrative Procedure Act provides that when the hearing in a contested case proceeding will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received or may be required to be submitted in verified form. Ala. Code § 41-22-13(1). Thus, a motion to submit evidence in verified form, such as a motion for summary judgment supported by affidavits, may not be granted except upon a determination that “the interests of the parties will not be prejudiced substantially” by the submission of evidence in verified form.

49. The Alabama Administrative Procedure Act provides that when any part of the evidence is received or required to be submitted in verified form in a contested case proceeding, such as by affidavits, “the adversary party shall not be denied the right of cross-examination of the witness.” Ala. Code § 41-22-13(1).

50. The Alabama Administrative Procedure Act provides that a party shall be afforded the opportunity to present and respond to evidence and argument on all material issues in a hearing. Ala. Code § 41-22-12(a) and (e).

51. The application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 (adopted April 19, 2017) to the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003, will inflict a real and immediate injury in fact on GASP by permitting a motion for summary judgment to be granted without a determination that the submission of testimony in verified form will not substantially prejudice a party, without opportunity to cross-examine witnesses who submit testimony in verified form, and without conducting a hearing at which all parties are afforded the opportunity to present and respond to evidence and argument on all material issues. GASP has an interest in ensuring that the submission of testimony in verified form will not substantially prejudice GASP, that GASP is permitted to in cross-examine witnesses who submit testimony in verified form, and that GASP is afforded the opportunity to present and respond to evidence and argument on all material issues in a hearing.

52. GASP’s interest in ensuring that the submission of testimony in verified form will not substantially prejudice GASP, that GASP is permitted to cross-examine witnesses who submit testimony in verified form, and that GASP is afforded the opportunity to present and respond to evidence and argument on all material issues in a

hearing, are within the zone of interests to be protected by Ala. Code §§ 41-22-13(1) (the submission of testimony in verified form must not substantially prejudice a party; parties are entitled to cross-examine witnesses who submit testimony in verified form) and 41-22-12 (a party shall be afforded the opportunity to present and respond to evidence and argument on all material issues in a hearing).

53. Accordingly, GASP is “substantially affected” by the application of the alleged invalid JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 (adopted April 19, 2017) in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003.

**G. Rule 335-2-1-.17 Order (adopted April 19, 2017)**

54. JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.17 (adopted April 19, 2017) provides:

(1) Within thirty days after the conclusion of a hearing contesting an administrative action of the Jefferson County Department of Health Air Pollution Control Program, other than the issuance of an emergency order, the Jefferson County Board of Health shall issue an appropriate order modifying, approving, or disapproving the Jefferson County Department of Health Air Pollution Control Program’s action unless all the parties agree to some other period of time.

(2) Within such time as may be reasonable under the circumstances but not later than thirty days after the conclusion of a hearing contesting the issuance of an emergency order, unless all the parties agree to some other period of time, the Jefferson County Board of Health shall issue an appropriate order modifying, approving, or disapproving the Jefferson County Department of Health Air Pollution Control Program’s action.

(3) Any order of the Jefferson County Board of Health modifying, approving, or disapproving the Jefferson County Department of Health Air Pollution Control Program's administrative action shall be in writing and shall include findings of fact and conclusions of law separately stated. Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record. Findings of fact, if set forth in a manner which is no more than mere tracking of statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(4) The Hearing Officer's recommendation shall be given due weight but is not binding on the Jefferson County Board of Health.

(5) A copy of the order of the Jefferson County Board of Health shall be served upon each of the parties either personally, by registered mail, or by certified mail return receipt requested.

(6) In the case of the imposition of civil penalties in an administrative order, the Jefferson County Board of Health may increase or decrease the penalty assessed based upon the evidence presented as applied to the six penalty factors found at Code of Alabama 1975, §22-22A-5(18).

JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.17

(adopted April 19, 2017) does not provide for filing, consideration or disposition of an application for rehearing of a final order of the Jefferson County Board of Health.

55. The Alabama Administrative Procedure Act “is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public” and “[t]o increase the fairness of agencies in their conduct of contested case proceedings.” Ala. Code § 41-22-2.

56. Ala. Code § 41-22-17 provides as follows:

(a) Any party to a contested case who deems himself aggrieved by a final order and who desires to have the same modified or set aside may,

within 15 days after entry of said order, file an application for rehearing, which shall specify in detail the grounds for the relief sought therein and authorities in support thereof.

(b) The filing of such an application for rehearing shall not extend, modify, suspend or delay the effective date of the order, and said order shall take effect on the date fixed by the agency and shall continue in effect unless and until said application shall be granted or until said order shall be superseded, modified, or set aside in a manner provided by law.

(c) Such application for rehearing will lie only if the final order is:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) In violation of an agency rule;

(4) Made upon unlawful procedure;

(5) Affected by other error of law;

(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(7) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

(d) Copies of such application for rehearing shall be served on all parties of record, who may file replies thereto.

(e) Within 30 days from the filing of an application the agency may in its discretion enter an order:

(1) Setting a hearing on the application for a rehearing which shall be heard as soon as practicable; or

(2) With reference to the application without a hearing; or

(3) Granting or denying the application.

If the agency enters no order whatsoever regarding the application within the 30-day period, the application shall be deemed to have been denied as of the expiration of the 30-day period.

57. The application of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.17 (adopted April 19, 2017) to the hearing in GASP v. Jefferson County Dep’t of Health Air Pollution Control Program, Case No. 2014-003,

will inflict a real and immediate injury in fact on GASP by precluding GASP from seeking and obtaining a rehearing on the final order of the Jefferson County Board of Health in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003. GASP has an interest in seeking and obtaining a rehearing on any final order issued by the Jefferson County Board of Health in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003.

58. Accordingly, GASP is “substantially affected” by the application of the alleged invalid JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.17 (adopted April 19, 2017) in GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003.

#### **IV. Invalidity of rules**

59. On February 19, 2017, the Jefferson County Board of Health published notice of proposed revisions to JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure in the Birmingham News. The notice announced a public hearing to be held on March 21, 2017 and a public comment period to end at the close of business on March 21, 2017. **Exhibit F.**

60. The Jefferson County Board of Health did not provide notice of the proposed amendment to Chapter 12 – Rules of Administrative Procedure to GASP, despite the fact that GASP v. Jefferson County Dep't of Health Air Pollution Control Program, Case No. 2014-003, a contested case proceeding subject to Chapter 12 – Rules

of Administrative Procedure, has been pending before the Board since August 26, 2014. GASP did not receive notice of the proposed amendment to Chapter 12 – Rules of Administrative Procedure from any other source. GASP was first informed of the adoption of the amendment to Chapter 12 – Rules of Administrative Procedure on May 19, 2017. **Exhibit G.**

61. The Jefferson County Board of Health’s compliance with the notice requirements in Ala. Code § 22-28-15(a) alone is not sufficient. Those requirements are made applicable to Jefferson County Board of Health rulemaking by Ala. Code § 22-28-23(b)(2) and demand publication of a notice of hearing in a newspaper of general circulation in the area of the state concerned at least 20 days before the hearing. However, the Alabama Administrative Procedure Act provides that “[e]very state agency having express statutory authority to promulgate rules and regulations shall be governed by the provisions of this chapter . . .” Ala. Code § 41-22-2(d). In addition, Ala. Code § 41-22-5(c) provides that “[i]t is the intent of this section to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules” and “the provisions of this section are applicable to the exercise of any rulemaking authority conferred by any statute . . .” Moreover, the Act provides:

Except as expressly provided otherwise by this chapter or by another statute referring to this chapter by name, the rights created and the requirements imposed by this chapter shall be in addition to those created or imposed by every other statute in existence on the date of the passage of this chapter or thereafter enacted. If any other statute in existence on the date of the passage of this chapter or thereafter enacted diminishes any right conferred

upon a person by this chapter or diminishes any requirement imposed upon an agency by this chapter, this chapter shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of this named chapter.

Ala. Code 41-22-25. *See also* 41-22-2(a) (“This chapter is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.”); Oliver v. Williams, 567 So. 2d 304, 308 (Ala. Civ. App. 1989) (minimum procedures in Alabama Administrative Procedure Act supercede less restrictive procedures in Merit System Act); Ex parte Affinity Hosp., LLC, 85 So. 3d 1033, 1041-42 (Ala. Civ. 2011) (per curiam) (in the absence of express provisions stating otherwise, requirements created by other statutes cannot diminish the requirements established by the AAPA).

62. Since October 1, 1982, the Alabama Administrative Procedure Act has provided that agencies *shall* publish notice of intent to adopt, amend, or repeal a rule in the Alabama Administrative Monthly at least 35 days prior to any action thereon and has declared that “no rule is valid unless adopted in substantial compliance with” this requirement. Ala. Act No. 81-855, § 5 (approved May 27, 1981); Ala. Act No. 93-627, § 1 (approved May 13, 1993); Ala. Code § 41-22-5. The use of the word “shall” indicates that the agency has no discretion about what notice must be provided. *Cf.* Ex parte Forest Manor, Inc., 739 So. 2d 20, 23 (Ala. 1998) (requirement in Ala. Code § 41-22-12(b) that all parties in a contested case “shall” be afforded an opportunity for a hearing and that

notice regarding the hearing “shall” include four specific types of information indicates that the agency has no discretion).

63. “The purpose of the AAPA, at least in part, is to protect public interest and participation, as well as to increase governmental accountability by establishing specific notification procedures that must be followed in order for a state agency to implement rules and regulations that affect the public.” Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1181 (Ala. 1988). “By requiring state agencies to follow procedures regarding notification of their intent to adopt rules, regulations, or policies, the public has an opportunity to participate in the decision making process on issues affecting its rights.” Id. “The AAPA provides a mechanism for both business people and the general public to participate in the development and adoption of rules, regulations, standards, or procedures that affect the public or a specific industry.” Id. at 1186.

64. Publication of notice of a proposed rule in newspapers, without publication in the Alabama Administrative Monthly, is not “substantial compliance” with Ala. Code § 41-22-5(a). Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1187 (Ala. 1988).

65. On April 19, 2017, the Jefferson County Board of Health repealed JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure (revised May 8, 1991), including §§ 12.4.1 and 12.4.4 Request for Hearing. **Exhibit D.**

66. The Jefferson County Board of Health did not publish notice of its intent to repeal JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure (revised May 8,

1991), including §§ 12.4.1 and 12.4.4 Request for Hearing, in the Alabama Administrative Monthly at least 35 days prior to the adoption of same on April 19, 2017.

**Exhibit H.**

67. On April 19, 2017, the Jefferson County Board of Health adopted JCAPC R. & Reg., Ch. 12 - Rules of Administrative Procedure (adopting by reference Ala. Admin. Code ch. 335-2-1), including Rules 335-2-1-.27 Hearing Officers, 335-2-1-.04 Request for Hearing, 335-2-1-.11 Discovery, 335-2-1-.21 Disposition Without Hearing, 335-2-1-.22 Summary Judgment, and 335-2-1-.17 Order. **Exhibits D and E .**

68. The Jefferson County Board of Health did not publish notice of its intent to adopt JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure (adopting by reference Ala. Admin. Code ch. 335-2-1), including Rules 335-2-1-.27 Hearing Officers, 335-2-1-.04 Request for Hearing, 335-2-1-.11 Discovery, 335-2-1-.21 Disposition Without Hearing, 335-2-1-.22 Summary Judgment, and 335-2-1-.17 Order, in the Alabama Administrative Monthly at least 35 days prior to the adoption of same on April 19, 2017. **Exhibit H.**

**V. Request for Declaratory Ruling**

69. GASP requests that the Jefferson County Board of Health declare as follows:

(A) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 Hearing Officers (adopted April 19, 2017) is invalid;

(B) that the repeal of JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, §§ 12.4.1 and 12.4.4 Request for Hearing (repealed April 19, 2017) is invalid;

(C) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.04 Request for Hearing (adopted April 19, 2017) is invalid;

(D) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.11 Discovery (adopted April 19, 2017) is invalid;

(E) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.21 Disposition Without Hearing (adopted April 19, 2017) is invalid;

(F) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.22 Summary Judgment (adopted April 19, 2017) is invalid; and

(G) that JCAPC R. & Regs., Ch. 12 – Rules of Administrative Procedure, Rule 335-2-1-.27 Order (adopted April 19, 2017) is invalid.

Dated: July 26, 2017.

Respectfully submitted,



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**CERTIFICATE OF FILING**

I, David A. Ludder, hereby certify that I have filed the foregoing Petition for Declaratory Ruling on the Jefferson County Board of Health by placing the same with a courier for overnight delivery, addressed as follows:

Jefferson County Board of Health  
Attn.: Max Michael, III, MD, Chair  
1400 Sixth Avenue South  
Birmingham, AL 35233

Done this 26th day of July, 2017.

  
David A. Ludder

**CERTIFICATE OF SERVICE**

I, David A. Ludder, hereby certify that I have served the foregoing Petition for Declaratory Ruling on the following persons by electronic mail as follows:

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Done this 27th day of July, 2017.

  
David A. Ludder