

Embattled ADEM director: Handling of north Birmingham Superfund site was 'by the book'

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ADEM Director Lance LeFleur speaks during a meeting of the Alabama Environmental Management Commission on August 17, 2018. (Dennis Pillion | dpillion@al.com)

The Alabama Department of Environmental Management has come under considerable criticism since cleanup of a polluted Birmingham neighborhood became the focus of a federal corruption trial this summer, but ADEM Director Lance LeFleur said the

state environmental department acted appropriately in its actions involving the north Birmingham 35th Avenue Superfund site.

"The department went by the book on everything that it did," LeFleur said in an interview with AL.com. "When you go by the book, there's nothing to look back on and say, 'I did this wrong' or 'I didn't do that.'"

The controversy surrounds the state's role in efforts to oppose the addition of the site to the U.S. Environmental Protection Agency's National Priorities List and expand the site into the neighboring city of Tarrant.

Exhibits and testimony in the U.S. v. Gilbert trial -- in which Drummond Company executive David Roberson and Balch and Bingham attorney Joel Gilbert were convicted of conspiracy, bribery, wire fraud and other charges relating to their efforts to oppose the listing -- revealed that the defendants spent considerable time and money trying to strong-arm ADEM into not concurring with the EPA's proposal to list the site on the NPL.

The addition of the site to the NPL would allow the EPA to use additional funding sources for the cleanup, which is still ongoing. Drummond, identified as one of five potentially responsible parties for the contaminated soil discovered in residential neighborhoods, could have been forced to pay for portions of the cleanup.

Efforts to oppose the listing included hiring a consulting company that employed Scott Phillips, who was also a member of the Alabama Environmental Management Commission, the civilian board that oversees ADEM.

Phillips, as a commissioner, voted on proposed ADEM rules and regulations and on the hiring and compensation of LeFleur as the department's director.

At the same time, he was being paid to help Gilbert, Roberson and Drummond keep a polluted site from being expanded and added to a list for priority cleanup.

LeFleur maintains the department's decision not to concur with the EPA's proposed NPL listing for the site was because the site did not pose a health hazard to people living there, not because of political pressure from Phillips or then-Gov. Robert Bentley.

"I'm confident that everybody in the department did their job the way they're supposed to do their job," LeFleur said.

Not everyone agrees. Eleven Alabama environmental groups co-signed a letter demanding LeFleur's resignation or termination after revelations in the trial, and many of those same groups are asking Gov. Kay Ivey to further investigate the commission's role in opposing the listing.

Phillips resigned from the Commission in 2017, but LeFleur said Phillips never exerted influence over ADEM's decision not to concur with the listing.

"Scott Phillips, to my knowledge, never approached anybody at ADEM to try to influence our decision on whether to concur with the listing or not," LeFleur said.

Emails introduced as evidence in court showed that Phillips said he would have to be careful to maintain compliance with state ethics laws.

Court documents also showed Phillips was in regular communication with Gilbert regarding north Birmingham matters while Gilbert met numerous times in person or on conference calls with ADEM employees, including LeFleur. Those meetings did not always go

smoothly, as a witness testified LeFleur 'yelled' at Gilbert and Roberson 'for some time' during a meeting discussing ADEM's position on the site.

Phillips suggested tactics the defendants could use to fight the clean-up and met with the defendants and then-State Rep. Oliver Robinson to help Robinson prepare for his presentation to the AEMC, of which he was a member. Gilbert and Roberson were convicted of bribing Robinson to oppose the cleanup, and Robinson pleaded guilty to accepting those bribes, as well as fraud and tax evasion.

Phillips also provided Gilbert with advance copies of a presentation made by environmental group Gasp supporting the listing at an AEMC meeting. Gilbert then prepared talking points that he sent to the commissioners rebutting Gasp's arguments before the group made its formal presentation.

Environmental groups critical of the department point to this interaction as an example of ways in which the deck is stacked in favor of industry concerns over environmental ones. LeFleur demurred on whether it was proper for Phillips to distribute advance copies of the presentation outside of the commission.

"It appears that [Phillips] made a copy of a document, that is technically a public document, available to his employer," LeFleur said. "That, in some people's minds, has an appearance of favoritism. I leave that up to other folks to make that call."

LeFleur also declined to comment on whether Phillips' dual roles as commissioner and consultant presented a conflict of interest, but said that commissioners serve on a volunteer basis and see their duties as an act of public service.

"They all have business interests outside of the commission and as long as those business interests don't interfere with the performance of their duties as commissioners, then I believe that ethics laws recognize that and allow it," LeFleur said.

Did ADEM change its tune on site?

LeFleur maintains that the department's position has been consistent that the site should not have been added to the NPL. But even a former ADEM lawyer testified that the department's initial response left many people confused about where ADEM stood.

According to public documents from EPA and ADEM, ADEM was approached by EPA in April 2014 and asked to state its position on a potential listing of the 35th Avenue Site on the NPL.

In response, LeFleur sent a letter to the agency dated June 11 saying the department would not object to the listing, if certain conditions were met.

"ADEM does not object to EPA's proposal to list the Site on the NPL, provided EPA is able to reach an agreement with potentially responsible parties to provide adequate funding for the cleanup efforts," LeFleur wrote.

He also stated that if the EPA could not reach an agreement with the potentially responsible parties to fund the cleanup, the state would not be able to provide the 10 percent share of the cleanup as described in the Superfund statute.

"ADEM's support for such a listing would be contingent on having funding available to cover the State's share of the cleanup costs," LeFleur wrote. "Currently, no such funding source exists."

LeFleur told AL.com that if he had concurred with the listing he would have committed the state to paying for 10 percent of the cleanup and ADEM did not have the authority to commit the state to paying those costs. He hoped by not objecting or concurring with the listing, he would leave open a pathway for EPA and the responsible industries to reach an agreement to fund the cleanup without the state having to foot the bill.

During that time, ADEM was in the midst of a series of budget cuts from the Alabama Legislature that would eventually whittle the department's total state funding to less than \$300,000 in 2016.

In August 2014, LeFleur received a letter from Bentley requesting updates on the situation and urging the department to more forcefully state its position opposing the NPL listing. LeFleur also met with Gilbert and Roberson to discuss the department's position, in which LeFleur was described as being "very angry" at Gilbert and Roberson.

When the EPA formally proposed the NPL listing in September 2014, LeFleur sent then-EPA Administrator Gina McCarthy a scathing email dated Sept. 16, stating the department did not concur with the proposed listing in stronger language than the June response. LeFleur also forwarded a copy of that email to Bentley's office.

In that letter, LeFleur stated that the department saw "no scientific basis," to list the site on the NPL and that the state "does not concur in the proposed listing." Concerns over the scientific merit of the listing had not been raised in the June letter to EPA.

In the September email, LeFleur called the EPA's decision to move forward with the proposed listing of the site without the state's concurrence a "most egregious breach of protocol."

"In the strongest terms possible I wish to voice my disappointment in this action by EPA," LeFleur said in the email.

On January 13, 2015, LeFleur sent a formal letter to the EPA, again voicing the department's disagreement with the proposed NPL listing, and invoking the EPA's issues resolution process, created for instances in which the state and EPA disagree about a proposed listing.

LeFleur said he sent that letter as "an accommodation to the governor," and that the governor's office had been "pretty insistent" that he send it, but that the department had already decided months previously to oppose the NPL listing. It was later revealed that Gilbert had written the letter.

"Based on EPA's decision to propose the listing and subsequent communications between EPA and ADEM, it is clear that EPA erroneously interpreted ADEM's response as a type of 'conditional concurrence,'" the letter said. "This was not the Department's intention."

The letter cites studies showing limited health consequences for conditions at the site, and highlights contaminated sites in other parts of the country that were successfully remediated without being placed on the NPL.

"ADEM concludes it is necessary that the option for withdrawal of the proposed NPL listing referenced in Assistant Administrator Stanislaus' December 4, 2014 letter to Alabama Attorney General Luther Strange must be exercised, and that no further action should be taken on this matter until the issues raised by the State can be properly resolved," the letter states.

LeFleur said that letter was consistent with the department's position all along, and that it would be better to try to reach agreements between EPA and the

potentially responsible parties without going through the NPL listing process.

"Our position was established in September 2014," LeFleur said. "And by the time January of 2015 got around, it was simply a process question. We said it's not going to hurt anything to retain whatever rights might be available under that dispute resolution process."

As for the input of Bentley, Strange and others, LeFleur said it is entirely appropriate and necessary for the department to receive input from all interested parties, from the governor and legislators to environmental groups and industries.

"We received input from a lot of parties, EPA, Gasp, Balch and Bingham, on behalf of Drummond, lots and lots of different parties," LeFleur said. "It is our obligation and it helps us do our job to receive input from all interested parties."

"Anybody who wants to give us input, we receive it. We do not tell people 'don't provide us input.' We receive it, and we weigh it appropriately."

The data issue

In his email to McCarthy and formal letter to LeFleur cited an assessment performed by the Agency for Toxic Substances and Disease Registry, an arm of the U.S. Centers for Disease Control, stating that the levels of lead, arsenic, and hydrocarbons in the soil at most properties tested were not at levels for which casual contact would be expected to cause health problems, and advising children in the area to not eat dirt and to wash their hands after playing in dirt to avoid contamination.

The ATSDR report also said that about 15 percent of properties tested from 2012 showed levels of known carcinogens such as benzo(a)pyrene in the soil that could lead to an elevated risk of cancer, although the agency "considers long-term PAH soil exposures at most residential properties to represent a low cancer risk."

LeFleur also cited data from the Jefferson County Department of Health that did not show an elevated cancer rate among residents of the site. He said ADEM's contention is that the site is a Brownfield site, a less serious category of polluted industrial sites.

"We don't believe that it meets the requirements for listing on the NPL as a Superfund site and we set that out in our response to EPA that there's no human health hazard," LeFleur said.

'Glad' for continued cleanup

LeFleur said that while the department did not concur with listing the site on the NPL, he's glad the EPA reaffirmed its commitment to finish cleaning up the north Birmingham site.

"I'm glad the site is being cleaned up," LeFleur said. "We are in favor of cleaning up contamination, whether it's through NPL or not."

"If it cleans up the environment, we're for it. But you have to go by rule of law and process. You can't circumvent the law to do it."

And ultimately, LeFleur said, the cleanup was a federal matter. ADEM could concur or not concur with the agency's decision, but in the end, the decision-making power rested outside of Montgomery.

"The department had no role except to concur or not concur," LeFleur said. "The commission had even less role."

LeFleur said he is disappointed that the commissioners have faced the amount of criticism they have since the trial, in which he, Phillips and current Commission Chairman Lanier Brown, testified about efforts by Gilbert and Roberson to influence ADEM.

"The commission did not take any action, could not take any action related to north Birmingham," he said. "The only thing they could do would be to pass along whatever information they had gotten to the department so that the department could make a fully informed analysis on whether to concur or not to concur."

"[The commissioners] were non-players in the game and we were only peripherally players in the game."

Three commissioners are set to see their terms expire this year, and Phillips' old position is still vacant. LeFleur said he worries that the criticism over north Birmingham will hurt the state's ability to recruit future commissioners who essentially work as volunteers, earning a per diem for each bi-monthly commission meeting that is typically less than they would earn in a day at their regular jobs, not to mention hours of reading, research and correspondence in between.

"I feel bad that the commission is being painted with this brush of corruption when in fact these are people, they don't get paid anything," LeFleur said. "They are tops in their fields, they're highly respected and they get treated like trash."

"To have the commission be perceived as something other than totally objective is wrong. It undermines public confidence in the good work that they do."