



## AlaFile E-Notice

03-CV-2019-900283.00

To: DAVID ALAN LUDDER  
davidaludder@enviro-lawyer.com

---

# NOTICE OF ELECTRONIC FILING

---

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ANTHONY KEITH ET AL V. LANCE R. LEFLEUR, DIR., ADEM ET AL  
03-CV-2019-900283.00

The following complaint was FILED on 2/18/2019 1:07:38 PM

Notice Date: 2/18/2019 1:07:38 PM

GINA J. ISHMAN  
CIRCUIT COURT CLERK  
MONTGOMERY COUNTY, ALABAMA  
251 S. LAWRENCE STREET  
MONTGOMERY, AL, 36104

334-832-1260



State of Alabama  
Unified Judicial System  
Form ARCiv-93 Rev. 9/18

**COVER SHEET**  
**CIRCUIT COURT - CIVIL CASE**  
(Not For Domestic Relations Cases)

Case No: **03**  
Date of Filing: 02/18/2019  
Judge Code:

**GENERAL INFORMATION**

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**  
**ANTHONY KEITH ET AL v. LANCE R. LEFLEUR, DIR., ADEM ET AL**

**First Plaintiff:**  Business  Individual  Government  Other  
**First Defendant:**  Business  Individual  Government  Other

**NATURE OF SUIT:** Select primary cause of action, by checking box (check only one) that best characterizes your action:

**TORTS: PERSONAL INJURY**

- WDEA - Wrongful Death
- TONG - Negligence: General
- TOMV - Negligence: Motor Vehicle
- TOWA - Wantonness
- TOPL - Product Liability/AEMLD
- TOMM - Malpractice-Medical
- TOLM - Malpractice-Legal
- TOOM - Malpractice-Other
- TBFM - Fraud/Bad Faith/Misrepresentation
- TOXX - Other: \_\_\_\_\_

**TORTS: PERSONAL INJURY**

- TOPE - Personal Property
- TORE - Real Property

**OTHER CIVIL FILINGS**

- ABAN - Abandoned Automobile
- ACCT - Account & Nonmortgage
- APAA - Administrative Agency Appeal
- ADPA - Administrative Procedure Act
- ANPS - Adults in Need of Protective Services

**OTHER CIVIL FILINGS (cont'd)**

- MSXX - Birth/Death Certificate Modification/Bond Forfeiture Appeal/ Enforcement of Agency Subpoena/Petition to Preserve
- CVRT - Civil Rights
- COND - Condemnation/Eminent Domain/Right-of-Way
- CTMP - Contempt of Court
- CONT - Contract/Ejectment/Writ of Seizure
- TOCN - Conversion
- EQND - Equity Non-Damages Actions/Declaratory Judgment/ Injunction Election Contest/Quiet Title/Sale For Division
- CVUD - Eviction Appeal/Unlawful Detainer
- FORJ - Foreign Judgment
- FORF - Fruits of Crime Forfeiture
- MSHC - Habeas Corpus/Extraordinary Writ/Mandamus/Prohibition
- PFAB - Protection From Abuse
- EPFA - Elder Protection From Abuse
- FELA - Railroad/Seaman (FELA)
- RPRO - Real Property
- WTEG - Will/Trust/Estate/Guardianship/Conservatorship
- COMP - Workers' Compensation
- CVXX - Miscellaneous Circuit Civil Case

**ORIGIN:** F  **INITIAL FILING**      A  **APPEAL FROM DISTRICT COURT**      O  **OTHER**  
R  **REMANDED**      T  **TRANSFERRED FROM OTHER CIRCUIT COURT**

**HAS JURY TRIAL BEEN DEMANDED?**  YES  NO      **Note:** Checking "Yes" does not constitute a demand for a jury trial. (See Rules 38 and 39, Ala.R.Civ.P, for procedure)

**RELIEF REQUESTED:**  **MONETARY AWARD REQUESTED**  **NO MONETARY AWARD REQUESTED**

**ATTORNEY CODE:**

LUD001

2/18/2019 1:07:35 PM

/s/ DAVID ALAN LUDDER

Date

Signature of Attorney/Party filing this form

**MEDIATION REQUESTED:**  YES  NO  UNDECIDED

**Election to Proceed under the Alabama Rules for Expedited Civil Actions:**  YES  NO

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

**ANTHONY KEITH, RONALD C.  
SMITH, ESTHER CALHOUN,  
WILLIAM T. GIPSON and  
LATONYA GIPSON,**

Plaintiffs,

v.

Civil Action No.

**LANCE R. LeFLEUR**, in his official capacity as Director of the Alabama Department of Environmental Management; and **MARILYN G. ELLIOTT**, in her official capacity as Deputy Director and Nondiscrimination Coordinator of the Alabama Department of Environmental Management,

Defendants.

\_\_\_\_\_/

**COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

**NATURE OF ACTION**

1. This Complaint seeks to declare that "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") developed and adopted by the Director of the Alabama Department of Environmental Management on or about November 5, 2018 are invalid and to enjoin their implementation.

**JURISDICTION AND VENUE**

2. This action arises under Ala. Code 1975 §§ 6-6-223, 6-6-226, and 41-22-10.

3. This Court has jurisdiction under Art. VI, § 142(b), Ala. Const. 1901 (Off. Recomp.) ("The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law"); Ala. Code 1975 §§ 6-6-222 ("Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed"); 6-6-500 ("Injunctions may be granted . . . by the judges of the . . . circuit courts"); 12-11-31 ("The powers and jurisdiction of circuit courts as to equitable matters or proceedings shall extend . . . To all civil actions in which a plain and adequate remedy is not provided in the other judicial tribunals"); 12-11-33 ("Circuit courts, when exercising equitable jurisdiction, must take cognizance of the following cases: (1) When the defendants reside in this state"); and 41-22-10 ("The validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed

by injunctive relief in the circuit court of Montgomery County . . .").

4. The official residence of defendants Lance R. LeFleur and Marilyn G. Elliott is in Montgomery County, Alabama. Venue is appropriate in Montgomery County, Alabama. Ala. Code 1975 §§ 6-23-2, 41-22-10; Little v. State, 44 So. 3d 1070, 1072-73 (Ala. 2010).

#### **PARTIES**

5. Plaintiff Anthony Keith is a resident of Houston County, Alabama. Like most other residents living less than one mile from the City of Dothan Sanitary Landfill, his race is Black/African-American. The City of Dothan Sanitary Landfill is regulated and periodically permitted by the Alabama Department of Environmental Management. The operating conditions approved by the Department for the Landfill allow it to generate offensive odors and disease vectors (e.g., rodents, racoons, buzzards) that invade Mr. Keith's property and/or home and diminish his health, quality of life, enjoyment of property, and property value, thereby having the effect of subjecting him to discrimination because of his race.

6. Plaintiff Ronald C. Smith is a resident of Tallapoosa County, Alabama. Like most other residents living less than one mile from the Stone's Throw Landfill, his race is Black/African-American. The Landfill is regulated and periodically permitted by the Alabama Department of Environmental Management. The operating conditions approved by the Department for the Landfill allow it to generate offensive odors and disease vectors (e.g., vultures). These offensive odors and disease vectors invade his property and/or home, and diminish his quality of life, enjoyment of property, and property value, thereby having the effect of subjecting him to discrimination because of his race.

7. Plaintiff Esther Calhoun is a resident of Perry County, Alabama. Like most other residents living less than one mile from the City of Uniontown Wastewater Treatment Facility and the adjacent Southeastern Cheese, LLC Wastewater Treatment Facility and Sprayfields, her race is Black/African-American. The City of Uniontown Wastewater Treatment Facility is regulated and periodically permitted by the Alabama Department of Environmental Management. The Southeastern Cheese, LLC Wastewater Treatment Facility and

Sprayfields are regulated by the Alabama Department of Environmental Management. The operating conditions approved by the Department for the City of Uniontown Wastewater Treatment Facility and the Southeastern Cheese, LLC Wastewater Treatment Facility and Sprayfields allow them to generate offensive odors and disease vectors (e.g., flies). These offensive odors and disease vectors invade her property and home and diminish her health, quality of life, and enjoyment of property, thereby having the effect of subjecting her to discrimination because of her race.

8. Plaintiffs William T. Gipson and Latonya Gipson are residents of Perry County, Alabama. Like most other residents living within one mile of the Arrowhead Landfill, their race is Black/African-American. The Landfill is regulated and periodically permitted by the Alabama Department of Environmental Management. The operating conditions approved by the Department for the Landfill allow it to generate offensive odors and disease vectors (e.g., buzzards, flies, foxes, opossums, racoons). These offensive odors and disease vectors invade their property and/or home, and diminish their quality of life, enjoyment of property,

and property value, thereby having the effect of subjecting the Gipsons to discrimination because of their race.

9. Defendant Lance R. LeFleur is the Director of the Alabama Department of Environmental Management, duly appointed by the Environmental Management Commission of the Alabama Department of Environmental Management pursuant to Ala. Code 1975 § 22-22A-6(a)(1). Director LeFleur is authorized to perform all powers, duties and functions transferred to the Department by the Alabama Environmental Management Act, except those specifically granted to the Environmental Management Commission of the Alabama Department of Environmental Management, provided that he may delegate the performance of such of his powers, duties and functions, to employees of the Department, wherever it appears desirable and practicable in fulfilling the policies and purposes of the Alabama Environmental Management Act. Ala. Code 1975 § 22-22A-4(b). Director LeFleur developed and adopted the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"). Director LeFleur designated Marilyn G. Elliott as the Nondiscrimination Coordinator for the Alabama Department of Environmental Management.

10. Defendant Marilyn G. Elliott is the Deputy Director and Nondiscrimination Coordinator of the Alabama Department of Environmental Management. Deputy Director Elliott is authorized to assist the Director and shall have charge and general supervision of the Department in the absence or disability of the Director. Ala. Code 1975 § 22-22A-4(c). Defendant Marilyn G. Elliott has been designated as the Nondiscrimination Coordinator for the Alabama Department of Environmental Management and has been charged with implementing portions of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A").

#### **GENERAL ALLEGATIONS OF FACT**

11. The Alabama Department of Environmental Management is an agency within the executive branch of State government and a department of the State. Ala. Code 1975 §§ 22-22A-4(a), 41-22-3(1). The Department administers the Alabama Water Pollution Control Act, Ala. Code 1975 §§ 22-22-1 to 22-22-14; the Alabama Safe Drinking Water Act of 1977, Ala. Code 1975 §§ 22-23-30 to 22-23-53; the Solid Wastes and Recyclable Materials Management Act, Ala. Code 1975 §§ 22-27-1 to 22-27-18; the Alabama Air Pollution Control Act, Ala. Code 1975 §§ 22-28-1 to 22-28-23; the

Hazardous Wastes Management and Minimization Act, Ala. Code 1975 §§ 22-30-1 to 22- 30-24; the Alabama Land Recycling and Economic Redevelopment Act, Ala. Code 1975 §§ 22-30E-1 to 22-30E-13; the regulatory responsibilities of the Alabama Coastal Area Management Program as provided in Ala. Code 1975 §§ 9-7-10 to 9-7-20; and the Alabama Environmental Management Act, Ala. Code 1975 §§ 22-22A-1 to 22-22A-17.

12. The Civil Rights Act of 1964 provides that "no person . . . shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The Act also provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 42 U.S.C. § 2000d-1. Such regulations "may validly proscribe activities that have a disparate impact on racial groups, even though such

activities are [not intentional].” Alexander v. Sandoval, 532 U.S. 275, 281-282, 121 S. Ct. 1511, 1517 (2001).

13. Pursuant to 42 U.S.C. § 2000d-1, the U.S. Environmental Protection Agency promulgated the following regulations:

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

40 C.F.R. § 7.30.

A recipient [of federal financial assistance] shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b).

Each recipient [of federal financial assistance] shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.

40 C.F.R. § 7.90(a).

14. The Alabama Department of Environmental Management is the recipient of federal financial assistance from the U.S. Environmental Protection Agency.

15. Director LeFleur developed and adopted, on or about November 5, 2018, the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") in response to the requirement of 40 C.F.R. § 7.90(a).

16. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") provide procedures for processing complaints by persons alleging discrimination by the Alabama Department of Environmental Management on the basis of race, color, national origin, disability, age, sex, retaliation or intimidation against any individual or group as protected by 40 C.F.R. Parts 5 and 7. These procedures include the following:

- A. Within ten (10) days after the receipt of a complaint by the Department, the Department will provide the complainant or his/her representative with a written acknowledgment of receipt and notice of how the complaint will be investigated ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (4));

B. Within fifteen (15) working days after the receipt of a complaint by the Department, the Nondiscrimination Coordinator will make a determination whether the matters alleged in the complaint are within the jurisdiction of 40 C.F.R. Parts 5 and 7, and whether the complaint has sufficient merit to warrant an investigation ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (5)). If the complaint fails to identify the specific action(s) by the Department that allegedly discriminate or result in discrimination in violation of 40 C.F.R. Parts 5 and 7, fails to identify the specific impact that allegedly has occurred or will occur as the result of such action(s), or fails to identify the parties subjected to, impacted by, or potentially impacted by the alleged discrimination, the Nondiscrimination Coordinator may reject the complaint ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶¶ (3) and (5));

- C. If the Nondiscrimination Coordinator accepts the complaint, s/he will designate an individual to investigate the allegation(s) of the complaint ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (6));
  - D. The investigator will draft a report with findings and recommendations ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (6));
  - E. Within 120 days after acceptance of the complaint by the Nondiscrimination Coordinator, the Office of the Director will approve or disapprove the findings and recommendations made in the investigative report, based upon a preponderance of the evidence, and notify the complainant ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (9));
  - F. The recommendations approved by the Office of the Director will be implemented by the Department ("Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") at ¶ (9)).
17. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") provide Plaintiffs and others with

the opportunity to seek and obtain relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race, color, national origin, disability, age, sex.

18. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") were adopted without prior publication of notice of the proposed adoption thereof in the Alabama Administrative Monthly and without affording all interested persons a reasonable opportunity to submit data, views, or arguments thereon, orally or in writing.

19. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") were adopted without prior public advertisement in the three newspapers of this State with the largest regional circulation of the date, time, and place of a public hearing on the proposed adoption thereof and without providing a public hearing at which persons were afforded a reasonable opportunity to be heard with respect thereto.

20. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") were not developed or adopted by the Environmental Management Commission of the Alabama Department of Environmental Management.

## COUNT I

**The "Nondiscrimination Grievance Investigation Procedures" were adopted without substantial compliance with the notice and comment requirements of the Alabama Administrative Procedure Act.**

21. Plaintiffs incorporate by reference paragraphs 1 through 20.

22. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are statements of general applicability that prescribe policy, or that describe the procedure or practice requirements of the Alabama Department of Environmental Management.

23. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are not "forms."

24. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as defined in Ala. Code 1975 § 41-22-3(9).

25. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") were adopted by Director LeFleur without substantial compliance with the notice and comment requirements of Ala. Code 1975 § 41-22-5(a).

26. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid "rules" because of the

failure by Director LeFleur to substantially comply with the notice and comment requirements of Ala. Code 1975 § 41-22-5(a). See Ala. Code 1975 § 41-22-5(d) ("No rule adopted after October 1, 1982, is valid unless adopted in substantial compliance with this section.").

27. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") may not be invoked by Director LeFleur or Deputy Director/Nondiscrimination Coordinator Elliott or the Alabama Department of Environmental Management for any purpose, including the investigation and resolution of complaints alleging discrimination by the Department on the basis of race, color, national origin, disability, age, or sex, until all notices required by Ala. Code 1975 § 41-22-5(a), including notice in the Alabama Administrative Monthly, have been given. See Ala. Code 1975 § 41-22-4(b) ("No agency rule . . . may . . . be invoked by the agency for any purpose until . . . the agency has given all notices required by Section 41-22-5.").

28. The adoption of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") without substantial compliance with the provisions in Ala. Code 1975 § 41-22-5(a) interferes with or impairs the legal rights of

Plaintiffs to submit data, views, or arguments thereon, orally or in writing - legal rights protected by Ala. Code 1975 § 41-22-5(a). This interference with or impairment of the legal rights of Plaintiffs constitutes an irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is granted. Moreover, the granting of such an injunction will not disserve the public interest.

29. The invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") threatens to interfere with or impair the Plaintiffs' interest in filing complaints alleging that Department actions, including the issuance of permits, have the effect of subjecting them to discrimination on the basis of race, and in obtaining valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race. This threat constitutes a substantial threat of irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is

granted. Moreover, the granting of such an injunction will not disserve the public interest.

30. But for the invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"), Plaintiffs would utilize those procedures to seek and obtain relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

31. If the Court grants the declaratory and injunctive relief sought by Plaintiffs, it is likely that the Alabama Department of Environmental Management, acting through the Environmental Management Commission, will undertake efforts to adopt valid rules prescribing nondiscrimination grievance investigation procedures, after substantial compliance with the notice and comment requirements of Ala. Code 1975 § 41-22-5(a), to ensure compliance with 40 C.F.R. § 7.90(a) and continued receipt of federal financial assistance from the U.S. Environmental Protection Agency. The adoption of such valid rules will enable Plaintiffs to seek and obtain valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

## COUNT II

**The "Nondiscrimination Grievance Investigation Procedures" were adopted without substantial compliance with the notice and hearing requirements of the Alabama Environmental Management Act.**

32. Plaintiffs incorporate by reference paragraphs 1 through 20.

33. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are statements of general applicability that prescribe policy, or that describe the procedure or practice requirements of the Alabama Department of Environmental Management.

34. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as that term is used in Ala. Code 1975 §§ 22-22A-5(2), 22-22A-5(3), 22-22A-6(a)(2), and 22-22A-8.

35. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") were adopted by Director LeFleur without substantial compliance with the notice and comment requirements of Ala. Code 1975 § 22-22A-8.

36. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid "rules" as a result of the failure by Director LeFleur and the Alabama Department

of Environmental Management to substantially comply with the notice and comment requirements of Ala. Code 1975 § 22-22A-8.

37. The adoption of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") without substantial compliance with the notice and comment requirements of Ala. Code 1975 § 22-22A-8 interferes with or impairs the legal rights of Plaintiffs to be heard with respect to the proposed adoption of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") - legal rights protected by Ala. Code 1975 § 22-22A-8. This interference with or impairment of the legal rights of Plaintiffs constitutes an irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is granted. Moreover, the granting of such an injunction will not disserve the public interest.

38. The invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") threatens to interfere with or impair the Plaintiffs' interest in filing complaints alleging that Department actions, including the

issuance of permits, have the effect of subjecting them to discrimination on the basis of race and in obtaining valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race. This threat constitutes a substantial threat of irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is granted. Moreover, the granting of such an injunction will not disserve the public interest.

39. But for the invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"), Plaintiffs would utilize those procedures to seek and obtain relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

40. If the Court grants the declaratory and injunctive relief sought by Plaintiffs, it is likely that the Alabama Department of Environmental Management, acting through the Environmental Management Commission, will undertake efforts to adopt valid rules prescribing nondiscrimination grievance

investigation procedures, after substantial compliance with the notice and comment requirements of Ala. Code 1975 § 22-22A-8, to ensure compliance with 40 C.F.R. § 7.90(a) and continued receipt of federal financial assistance from the U.S. Environmental Protection Agency. The adoption of such valid rules will enable Plaintiffs to seek and obtain valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

### COUNT III

**Director LeFleur exceeded his statutory authority by adopting the "Nondiscrimination Grievance Investigation Procedures."**

41. Plaintiffs incorporate by reference paragraphs 1 through 20.

42. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are statements of general applicability that prescribe policy, or that describe the procedure or practice requirements of the Alabama Department of Environmental Management.

43. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are not "forms."

44. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as defined in Ala. Code 1975 § 41-22-3(9).

45. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as that term is used in Ala. Code 1975 §§ 22-22A-5(2), 22-22A-5(3), 22-22A-6(a)(2), and 22-22A-8.

46. It is the duty of the Environmental Management Commission of the Alabama Department of Environmental Management to establish, adopt, or promulgate any "rules" for the Alabama Department of Environmental Management. Ala. Code 1975 § 22-22A-6(a)(2). All "rules" shall be adopted by and promulgated by the Environmental Management Commission of the Alabama Department of Environmental Management. Ala. Code 1975 § 22-22A-8.

47. The Director of the Alabama Department of Environmental Management is authorized to perform all powers, duties and functions transferred to the Department by the Alabama Environmental Management Act except those specifically granted to the Environmental Management Commission of the Alabama Department of Environmental Management. Ala. Code 1975 § 22-22A-4(b).

48. Director LeFleur, rather than the Environmental Management Commission of the Alabama Department of Environmental Management, adopted the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A").

49. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid "rules" because they were adopted by Director LeFleur in excess of the statutory authority granted to him under Ala. Code 1975 § 22-22A-4(b).

50. The invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") threatens to interfere with or impair the Plaintiffs' interest in filing complaints alleging that Department actions, including the issuance of permits, have the effect of subjecting them to discrimination on the basis of race, and in obtaining valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race. This threat constitutes a substantial threat of irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is

granted. Moreover, the granting of such an injunction will not disserve the public interest.

51. But for the invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"), Plaintiffs would utilize those procedures to seek and obtain relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

52. If the Court grants the declaratory and injunctive relief sought by Plaintiffs, it is likely that the Alabama Department of Environmental Management, acting through the Environmental Management Commission, will undertake efforts to adopt valid rules prescribing nondiscrimination grievance investigation procedures, after substantial compliance with the notice and comment requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8, to ensure compliance with 40 C.F.R. § 7.90(a) and continued receipt of federal financial assistance from the U.S. Environmental Protection Agency. The adoption of such valid rules will enable Plaintiffs to seek and obtain valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

## COUNT IV

**Director LeFleur exceeded his statutory authority by developing the "Nondiscrimination Grievance Investigation Procedures."**

53. Plaintiffs incorporate by reference paragraphs 1 through 20.

54. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are statements that prescribe environmental policies for the State.

55. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "environmental polic[ies]" as that term is used in Ala. Code 1975 §§ 22-22A-5(3) and 22-22A-6(a)(3).

56. It is the duty of the Environmental Management Commission of the Alabama Department of Environmental Management to develop "environmental policy" for the State. Ala. Code 1975 § 22-22A-6(a)(3).

57. The Director of the Alabama Department of Environmental Management is authorized to perform all powers, duties and functions transferred to the Department by the Alabama Environmental Management Act, except those specifically granted to the Environmental Management

Commission of the Alabama Department of Environmental Management. Ala. Code 1975 § 22-22A-4(b).

58. Director LeFleur developed the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A").

59. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid "environmental polic[ies]" because they were developed by Director LeFleur in excess of the statutory authority granted to him under Ala. Code 1975 § 22-22A-4(b).

60. The invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") threatens to interfere with or impair the Plaintiffs' interest in filing complaints alleging that Department actions, including the issuance of permits, have the effect of subjecting them to discrimination on the basis of race, and in obtaining valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race. This threat constitutes a substantial threat of irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is

granted. Moreover, the granting of such an injunction will not disserve the public interest.

61. But for the invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"), Plaintiffs would utilize those procedures to seek and obtain relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

62. If the Court grants the declaratory and injunctive relief sought by Plaintiffs, it is likely that the Alabama Department of Environmental Management, acting through the Environmental Management Commission, will undertake efforts to develop and adopt valid environmental policies prescribing nondiscrimination grievance investigation procedures to ensure compliance with 40 C.F.R. § 7.90(a) and continued receipt of federal financial assistance from the U.S. Environmental Protection Agency. The development and adoption of such valid environmental policies will enable Plaintiffs to seek and obtain valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

## COUNT V

**The "Nondiscrimination Grievance Investigation Procedures" are in excess of the statutory authority granted to the Alabama Department of Environmental Management.**

63. Plaintiffs incorporate by reference paragraphs 1 through 20.

64. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are statements of general applicability that prescribe policy, or that describe the procedure or practice requirements of the Alabama Department of Environmental Management.

65. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are not "forms."

66. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as defined in Ala. Code 1975 § 41-22-3(9).

67. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "rules" as that term is used in Ala. Code 1975 §§ 22-22A-5(2), 22-22A-5(3), 22-22A-6(a)(2), and 22-22A-8.

68. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are "environmental polic[ies]" as

that term is used in Ala. Code 1975 §§ 22-22A-5(3) and 22-22A-6(a)(3).

69. No statute authorizes the Alabama Department of Environmental Management to develop environmental policies or adopt rules prescribing procedures for processing and adjudicating complaints alleging that Department actions have the effect of subjecting persons to discrimination on the basis of race.

70. No statute authorizes the Alabama Department of Environmental Management to deny, modify, or revoke a permit because it is determined that it will have the effect of subjecting persons to discrimination on the basis of race.

71. No statute authorizes the Environmental Management Commission of the Alabama Department of Environmental Management to disapprove or modify a permit because it is determined that it will have the effect of subjecting persons to discrimination on the basis of race. E.g., Holmes v. Ala. Dep't of Env'tl. Mgmt., EMC Docket No. 98-04 (Order adopting Proposed Findings of Fact, Conclusions of Law, and Recommendation to the Commission), 1998 AL ENV LEXIS 1, \*30-31, 1998 WL 75094, \*11 (Ala. Dep't Env'tl. Mgmt. Feb. 17, 1998) ("The governing statutes and regulations do not confer

on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit"); East Central Ala. Alliance for Quality Living v. Ala. Dep't of Env'tl. Mgmt., EMC Docket Nos. 03-01 and 03-02 (Order adopting Recommendation of the Administrative Law Judge), 2003 AL ENV LEXIS 6, \*28, 2003 WL 1957880, \*11 (Ala. Dep't Env'tl. Mgmt. Apr. 22, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit"), aff'd, No. CV-2003-000356.00 (Lee County Cir. Ct. Nov. 20, 2003), aff'd without opinion, 915 So. 2d 1186 (Ala. Civ. App. 2004).

72. No rule authorizes the Alabama Department of Environmental Management to revoke or modify a permit because it is determined that it will have the effect of subjecting persons to discrimination on the basis of race. See e.g., Ala. Admin. Code rs. 335-13-5-.05 (revocation of landfill operation permits restricted to certain circumstances), 335-13-5-.06 (modification of landfill operation permits restricted to certain circumstances), 335-6-6-.17 (revocation and modification of permits for discharges of pollutants to waters restricted to certain

circumstances), 335-3-14-.02(4) (revocation of certain air pollution permits limited to certain circumstances), 335-3-16-.13 (modification and amendment of major source air pollution permits restricted to certain circumstances).

73. The "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid rules or environmental policies because they are in excess of the statutory authority granted to the Alabama Department of Environmental Management. See e.g., Holmes v. Ala. Dep't of Env'tl. Mgmt., EMC Docket No. 98-04 (Order adopting Proposed Findings of Fact, Conclusions of Law, and Recommendation to the Commission), 1998 AL ENV LEXIS 1, \*30-31, 1998 WL 75094, \*11 (Ala. Dep't Env'tl. Mgmt. Feb. 17, 1998) ("The governing statutes and regulations do not confer on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit"); East Central Ala. Alliance for Quality Living v. Ala. Dep't of Env'tl. Mgmt., EMC Docket Nos. 03-01 and 03-02 (Order adopting Recommendation of the Administrative Law Judge), 2003 AL ENV LEXIS 6, \*28, 2003 WL 1957880, \*11 (Ala. Dep't Env'tl. Mgmt. Apr. 22, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial

impact issues where there's an appeal of the granting of a permit"), aff'd, No. CV-2003-000356.00 (Lee County Cir. Ct. Nov. 20, 2003), aff'd without opinion, 915 So. 2d 1186 (Ala. Civ. App. 2004).

74. The invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") threatens to interfere with or impair the Plaintiffs' interest in filing complaints alleging that Department actions, including the issuance of permits, have the effect of subjecting them to discrimination on the basis of race, and in obtaining valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race. This threat constitutes a substantial threat of irreparable injury that does not outweigh the harm to Defendants LeFleur and Elliott if an injunction against implementation of the "Nondiscrimination Grievance Investigation Procedures" is granted. Moreover, the granting of such an injunction will not disserve the public interest.

75. But for the invalidity of the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"), Plaintiffs would utilize those procedures to file complaints

alleging that Department actions, including the issuance of permits, have the effect of subjecting them to discrimination on the basis of race, and to seek relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

76. If the Court grants the declaratory and injunctive relief sought by Plaintiffs, it is likely that the Alabama Department of Environmental Management, acting through the Environmental Management Commission, will undertake efforts to adopt rules or environmental policies prescribing nondiscrimination grievance investigation procedures that are within the statutory authority of the Department to ensure compliance with 40 C.F.R. § 7.90(a) and continued receipt of federal financial assistance from the U.S. Environmental Protection Agency. The adoption of such valid rules or environmental policies will enable Plaintiffs to seek and obtain valid relief from Department actions, including the issuance of permits, that have the effect of subjecting them to discrimination on the basis of race.

**DEMAND FOR RELIEF**

Wherefore Plaintiffs demand the following relief:

A. That the Court enter a judgment pursuant to Ala. Code 1975 §§ 41-22-10, 6-6-222, 6-6-223, and 6-6-226 declaring that the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A") are invalid "rules" or invalid "environmental policies;"

B. That the Court grant a permanent injunction prohibiting the Defendants and their officers, agents, servants, employees, attorneys, successors, assigns, and other persons in active concert or participation with them who receive actual notice of the injunction, from implementing or invoking for any purpose, the "Nondiscrimination Grievance Investigation Procedures" (Exhibit "A"); and

C. That the Court award Plaintiffs such other and additional relief to which they may be entitled.

Respectfully submitted,

*s/ David A. Ludder* \_\_\_\_\_

DAVID A. LUDDER (LUD001)

Attorney for Plaintiffs

ASB-4513-E63D

Law Office of David A. Ludder, PLLC

9150 McDougal Ct.

Tallahassee, Florida 32312-4208

Tel (850) 386-5671

Fax (267) 873-5848

Email [davidaludder@enviro-lawyer.com](mailto:davidaludder@enviro-lawyer.com)

**LANCE R. LEFLEUR**  
DIRECTOR



**KAY IVEY**  
GOVERNOR

**Alabama Department of Environmental Management**  
adem.alabama.gov

1400 Coliseum Blvd. 36110-2400 ■ Post Office Box 301463  
Montgomery, Alabama 36130-1463  
(334) 271-7700 ■ FAX (334) 271-7950



DATE: November 5, 2018

TO: Marilyn Elliot, Deputy Director  
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director *RL*

RE: Nondiscrimination Grievance Investigation Procedures

The Nondiscrimination Coordinator will process complaints alleging discrimination by the Alabama Department of Environmental Management (ADEM) on the basis of race, color, national origin, disability, age, sex, retaliation or intimidation against any individual or group as protected by 40 C.F.R. Parts 5 and 7 (see paragraph (10) below), as follows:

- (1) Complaints alleging discrimination by ADEM will be forwarded to ADEM's Nondiscrimination Coordinator in Montgomery.
- (2) In cases where the complainant is unable or incapable of providing a written statement, a verbal complaint of discrimination will be forwarded to the Nondiscrimination Coordinator at (334) 271-7710. The complainant will be interviewed by an ADEM employee who, if necessary, will assist the person in converting verbal complaints to writing.
- (3) All complaints alleging discrimination by ADEM shall be reviewed for the following information:
  - a. the specific action(s) by ADEM that allegedly discriminate or result in discrimination in violation of 40 C.F.R. Parts 5 and 7.
  - b. the specific impact that allegedly has occurred or will occur as the results of such action(s); and
  - c. the identity of the parties subjected to, impacted by, or potentially impacted by the alleged discrimination.
- (4) Within ten working days of receipt of the complaint, ADEM will provide the complainant or his/her representative with a written acknowledgement of receipt and notice of how the complaint will be investigated. ADEM will also notify complainants that their complaint may also be filed with the U.S. EPA, External Civil Rights Compliance Office, 1200 Pennsylvania Avenue, N.W., Mail Code 1201A, Washington, DC 20460-1000 in accordance with 40 C.F.R. Parts 5 and 7.
- (5) The Nondiscrimination Coordinator, based on the information in the complaint and any additional information provided by the complainant, will determine if the matters alleged are within the jurisdiction of 40 C.F.R. Parts 5 and 7, and whether the complaint has sufficient merit to warrant an investigation. These determinations will be made within fifteen working days after the receipt of the complaint by

**Birmingham Branch**  
110 Vulcan Road  
Birmingham, AL 35209-4702  
(205) 942-6168  
(205) 941-1603 (FAX)

**Decatur Branch**  
2715 Sandlin Road, S.W.  
Decatur, AL 35603-1333  
(256) 353-1713  
(256) 340-9359 (FAX)



**Mobile Branch**  
2204 Perimeter Road  
Mobile, AL 36615-1131  
(251) 450-3400  
(251) 479-2593 (FAX)

**Mobile-Coastal**  
3664 Dauphin Street, Suite B  
Mobile, AL 36608  
(251) 304-1176  
(251) 304-1189 (FAX)

ADEM. A complaint will be regarded as meriting investigation unless:

- a. It clearly appears on its face to be frivolous or trivial;
- b. Within the time allotted for making the determination of jurisdiction and investigative merit, ADEM voluntarily concedes noncompliance and agrees to take appropriate remedial action or reaches an informal resolution with the complainant; or
- c. Within the time allotted for making the determination of jurisdiction and investigative merit, the complainant withdraws the complaint.

(6) If the Nondiscrimination Coordinator accepts the complaint, the Coordinator will designate an individual to investigate the allegation(s). After examining all of the information in light of the requirements of 40 C.F.R. Parts 5 and 7, the investigator will draft a report with findings and recommendations.

(7) In the event that the complainant has not submitted sufficient information to make a determination of jurisdiction or investigative merit, ADEM may request additional information. This request shall be made within fifteen working days of the receipt of the complaint by ADEM. The complainant is under no obligation to provide any requested information.

(8) In the case of complaints involving third party entities; e.g. a sub-recipient, permit applicant or permittee, ADEM will notify the third party entity that the complaint has been received no later than the time of the written notice provided to a complainant that the complaint has been accepted. At such time, ADEM will ask the third party entity to provide information necessary for ADEM to investigate the complaint. ADEM will use the information provided by the third party entity and the complainant in resolving the complaint.

(9) Within 120 days of accepting the complaint, the Office of the Director will respond in writing to the complainant approving or disapproving the findings and recommendations made in the investigative report, based upon a preponderance of the evidence. ADEM will implement the recommendations approved by the Office of the Director.

(10) ADEM employees shall not retaliate, intimidate, threaten, coerce, or discriminate against any individual or group for the purpose of interfering with any right or privilege granted under 40 C.F.R. Parts 5 and 7, or because an individual has filed a complaint or has testified, assisted, or participated in any way in an investigation, or has opposed any practice made unlawful under 40 C.F.R. Parts 5 and 7.

BY AND THROUGH THIS DELEGATION OF RESPONSIBILITIES TO THE ADEM NONDISCRIMINATION COORDINATOR, THE ABOVE PROCEDURES ARE HEREBY ADOPTED TO ASSURE THE PROMPT AND FAIR RESOLUTION OF COMPLAINTS WHICH ALLEGE UNLAWFUL DISCRIMINATION UNDER TITLE VI, AND THE OTHER FEDERAL CIVIL RIGHTS LAWS COVERED UNDER 40 C.F.R. PARTS 5 AND 7.



Lance R. LeFleur, Director