



STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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October 23, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA E-MAIL (MCTEERTONEY.HEATHER@EPA.GOV)

Ms. Heather McTeer Toney
Regional Administrator--Region 4
United States Environmental Protection Agency
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Re: Non-compliance with July 25, 1997 Fields Memorandum Regarding 35th Avenue Site Proposed NPL Listing

Dear Administrator Toney:

I am writing on behalf of the State of Alabama regarding EPA's proposed listing of the "35th Avenue" Superfund Site¹ on the National Priorities List ("NPL").² For the reasons outlined below, EPA's proposed listing is both premature based on EPA's own policies and procedures, and is futile based on the statutory and regulatory mandates regarding EPA's use of superfund money for fund-financed remedial action. Accordingly, the State requests that EPA revise Proposed Rule No. 61 to remove the 35th Avenue Superfund Site from the list of proposed additions to the General Superfund section of the NPL.

As you are aware, your office contacted the Alabama Department of Environmental Management ("ADEM") on April 2, 2014, regarding the State's position on potentially listing the 35th Avenue Superfund Site on the NPL. On June 11, 2014, ADEM advised your office that it did not concur in EPA's proposed listing and specifically advised your office that the State of Alabama would not provide any funding "to cover the State's share of cleanup costs."³ On September 16, 2014, ADEM sent your office a follow-up email making it abundantly clear that "[t]he State **DOES NOT CONCUR** in the proposed listing for numerous reasons."⁴ Undeterred by the State's unambiguous

¹ Docket ID No. EPA-HQ-SFUND-2014-0623.

² See National Priorities List, Proposed Rule No. 61, 79 Fed. Reg. 56538 (Sept. 22, 2014).

³ A copy of ADEM's June 11, 2014 letter is attached for your reference.

⁴ A copy of ADEM's September 16, 2014 email is attached for your reference.

statement that it did not concur with EPA's proposed listing, and despite its unqualified refusal to allocate any State funds to assist in clean-up of the 35th Avenue Superfund Site, EPA nevertheless decided to move forward with its proposed NPL listing without any further involvement from the State.

As noted above, EPA's proposed rule listing the 35th Avenue Superfund Site on the NPL is premature. EPA failed to follow its own internal procedures, which it says "will be employed in cases where a Regional Office . . . recommends proposing or placing a site on the [NPL], but the State . . . opposes listing the site." That process is clearly laid out in the July 25, 1997 memorandum—titled "Coordinating with the States on National Priorities List Decisions—Issue Resolution Process"—from Timothy Fields, Jr., Acting Assistant Administrator for the Office of Solid Waste and Emergency Response, to EPA's regional administrators.⁵ According to that memorandum, in situations where a State does not agree that listing a site on the NPL is appropriate, the relevant EPA regional office "should work closely with the State to try to resolve the issue before raising it to EPA Headquarters." In doing so, "[t]he Region should take into account past, ongoing and planned response actions by the State. If the Region determines that the issue cannot be resolved at the Regional level, the Regional Superfund Division Director should inform the Director of the State, Tribal and Site Identification Center (ST/SI) of the Office of Emergency and Remedial Response (OERR) and/or the appropriate ST/SI Regional Coordinator." OERR would then brief the Assistant Administrator for Solid Waste and Emergency Response. And EPA's own memorandum regarding this "Issue Resolution Process" makes very clear that if the matter is escalated to the Assistant Administrator for Solid Waste and Emergency Response, "[t]he State should have the opportunity to present its position in writing."

EPA failed to follow this procedure and Alabama has not been afforded an opportunity to present its position in writing. Instead, after being informed that the State of Alabama did not concur with the proposed NPL listing and that no State funds would be allocated to assist in any clean-up effort at the 35th Avenue Superfund Site, EPA moved forward with its proposed NPL listing without any further involvement from the State of Alabama. Such a blatant disregard of EPA's own policies and procedures is textbook arbitrary and capricious decision-making. *See, e.g., Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . ."). Because the decision to propose the listing has not been elevated for review and because the State was not given the "opportunity to present its position in writing," as the Fields memo mandates, EPA's proposed rule listing the 35th Avenue Superfund Site as an addition to the General Superfund section of the NPL is premature.

Moreover, EPA's decision to move forward with its proposed NPL listing is perplexing, still, given the State's clear statement that it will not allocate **any** funds to assist in any clean-up effort at the 35th Avenue Superfund Site. The very purpose of listing a site on the NPL is to make the site eligible for superfund monies. Indeed, as the regulations make clear, "[o]nly those releases included on the NPL shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1). But

⁵ A copy of the July 25, 1997 Fields memo is attached for your reference.

Ms. Heather McTeer Toney

<October 23, 2014>

Page 3

even if a site is listed on the NPL, “[a] Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) **cannot proceed** unless a state provides its applicable required assurances,” 40 C.F.R. § 300.510(a) (emphasis added), including that “the State will pay or assure payment of . . . 10 per centum of the costs of the remedial action, including all future maintenance” 42 U.S.C. §9604(c)(3).

The State of Alabama has been unmistakably clear that no State money will be expended to assist in any clean-up effort at the 35th Avenue Superfund Site. Although your October 1, 2014 email to ADEM Director Lance LeFleur indicates that EPA believes it has “flexibilities in how the state cost share is paid,”⁶ I see no statutory or regulatory basis for such flexibility. In fact, the regulations are quite clear that, in the absence of the State’s agreement to shoulder 10% of the cost of EPA’s remedial action, “[a] Fund-financed remedial action . . . cannot proceed.” 40 C.F.R. § 300.510(a). Because Alabama will not provide any State funds to assist in any clean-up effort at the 35th Avenue Superfund Site, I must question why EPA would propose the site for listing at great expense to all concerned parties when listing the site will be futile and have no practical effect.

I would very much appreciate an explanation of EPA’s position as it relates to these issues, which are so critical to the relationship between the State of Alabama and the federal government on environmental matters. For the reasons stated above, the State of Alabama also requests that EPA revise Proposed Rule No. 61 to remove the 35th Avenue Superfund Site from the list of proposed additions to the General Superfund section of the NPL. Should EPA persist in moving forward with listing the 35th Avenue Superfund Site in contravention of its own policies and procedures, the State of Alabama is prepared to file comments in opposition to this proposed rule.

Respectfully,



Luther Strange
Attorney General

Attachments

cc: Governor Robert Bentley
Administrator Gina McCarthy
Ms. Gwendolyn Keyes Fleming
Mr. Lance R. LeFleur
Mayor William A. Bell, Sr.

⁶ A copy of your October 1, 2014 email is attached for your reference.

LANCE R. LEFLEUR
DIRECTOR



ROBERT J. BENTLEY
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
June 11, 2014

Ms. Heather McTeer Toney
Regional Administrator, US EPA Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303-3104

RE: Proposed NPL Listing
35th Avenue Site, Birmingham (Jefferson County), AL

Dear Ms. Toney:

As indicated in the attached letter, the Alabama Department of Environmental Management (ADEM) has been designated by Governor Robert Bentley to represent the State of Alabama in issues concerning the potential listing of the 35th Avenue Site (Site) in Birmingham on the National Priorities List (NPL). ADEM does not object to EPA's proposal to list the Site on the NPL provided EPA is able to reach an agreement with the potentially responsible parties (PRPs) to provide adequate funding for the cleanup efforts. However, should EPA be unable to reach an agreement or prevail in an enforcement action to compel a responsible party for the funding of the remediation, thus resulting in the Agency proceeding with a "fund-lead" cleanup under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), ADEM's support for such a listing would be contingent on having funding available to cover the State's share of the cleanup costs. Currently, no such funding source exists.

As the listing process progresses, please feel free to coordinate with Mr. Chip Crockett of the ADEM Land Division at 334-270-5627 or via e-mail at vhc@adem.state.al.us.

Sincerely,

Lance R. LeFleur
Director

LRL/VHC/ghc

Attachment

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
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(251) 479-2593 (FAX)

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OFFICE OF THE GOVERNOR



STATE CAPITOL
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ROBERT BENTLEY
GOVERNOR

(334) 242-7100
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STATE OF ALABAMA

May 30, 2014

Heather McTeer Toney
Regional Administrator
U.S. Environmental Protection Agency, Region 4
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303-3104



Dear Ms. Toney:

By letter of April 2, 2014, your office contacted the Alabama Department of Environmental Management ("ADEM") concerning potential listing of the 35th Avenue Site located in Northern Birmingham, Alabama, on the National Priorities List and solicited the State's position on the proposed listing. EPA's letter asked for a response from the Governor or a delegated representative. ADEM has worked closely with EPA in the evaluation of the Site throughout the assessment process. Accordingly, I am delegating authority to ADEM to provide comments to EPA on behalf of the State concerning the proposed listing. The Department will be providing a response to you regarding this matter in the near future.

Sincerely,

A handwritten signature in cursive script that reads "Robert Bentley".

Robert Bentley
Governor

cc: Lance R. LeFleur, Director, Alabama Department of Environmental Management
Franklin E. Hall, Director, Superfund Division
Phillip Davis, Director, Land Management Division

From: LeFleur, Lance R
Sent: Tuesday, September 16, 2014 12:43 PM
To: 'McCarthy.Gina@EPA.gov'; 'McTeertoney.heather@Epa.gov'; Gwendolyn KeyesFleming (KeyesFleming.Gwendolyn@epamail.epa.gov)
Subject: 35th Avenue Birmingham NPL listing

Administrator McCarthy

It came to the attention of the Alabama Department of Environmental Management (ADEM) this morning that EPA will announce today at 1:00 p.m. CDT, and it will be published in the Federal Register on Thursday, September 18, 2014, that EPA is proposing a listing on the National Priorities List for the 35th Avenue, Birmingham, Alabama site. EPA did not consult with or notify ADEM of this intended action until just hours before announcing it to the public. This is a most egregious breach of protocol in the long established working arrangement between ADEM and EPA.

In a letter dated April 2, 2014 EPA requested the State of Alabama concur in a listing on the NPL. In my June 11, 2014 response directed to Regional Administrator McTeer-Toney, EPA was informed the State **DID NOT CONCUR** in the proposed listing. The State **DOES NOT CONCUR** in the proposed listing for numerous reasons including:

1. ADEM has not been provided the Hazard Ranking System documentation that was requested by the Department, so there is no scientific basis on which the Department can make a determination on whether to concur in a listing.
2. The air and land studies performed by the U. S. Agency for Toxic Substances and Disease Registry (ATSDR) within the Centers for Disease Control determined there is no public health hazard at the 35th Avenue site and therefore the studies do not support listing on the NPL.
3. A recently completed study by the Jefferson County Department of Health determined there is no increased incidence of cancers in the 35th Avenue area and therefore it does not support listing on NPL.
4. ADEM is aware of no scientific or epidemiological data related to contamination at the 35th Avenue site that is consistent with listing on NPL due to a significant threat to public health.
5. EPA has not prevailed in any enforcement action against any Responsible Party and no Potentially Responsible Party has volunteered to cleanup such contamination as may exist on the site, therefore, there is no clear path to removing any contamination.

In the strongest terms possible I wish to voice my disappointment in this action by EPA.

Lance R. LeFleur

Director

Cc: Governor Robert Bentley



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 25 1997

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Coordinating with the States on National
Priorities List Decisions -- Issue Resolution
Process

FROM: Timothy Fields, Jr., *Timothy Fields, Jr.* Acting Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators
Regions I - X

PURPOSE

The purpose of this memorandum is to describe the process that will be employed in cases where a Regional Office of the U.S. Environmental Protection Agency (EPA) recommends proposing or placing a site on the National Priorities List (NPL), but the State or Tribe (hereafter referred to as "State") opposes listing the site.

BACKGROUND

The Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 1996, included a requirement that EPA must receive a written request from the Governor of the State in order for the Agency to propose to place a site on the NPL, or to place a site on the NPL. However, the Department of Veterans Affairs and

Housing and Urban Development, and Independent Agencies Appropriations Act, Fiscal Year 1997, Public Law 104-204, did not contain such a requirement. On November 14, 1996, the Office of Solid Waste and Emergency Response (OSWER) issued a memorandum entitled, "Coordinating with the States on National Priorities List Decisions". According to that memorandum, an EPA Regional Office requests the position of the State on a site that the Region is considering for NPL listing. The Regional Administrator directs a written inquiry to the governor, with a copy to the State commissioner. For some sites, a State may not agree that EPA should proceed with NPL listing. The purpose of this memorandum is to outline the process that will be employed when the State does not agree that a site should be listed, but the Region believes it has sufficient reasons to proceed with the NPL listing process.

IMPLEMENTATION

EPA Regional Offices have been seeking the position of the States on sites that the Region is considering for NPL listing. In some cases, the State may not agree that EPA should pursue NPL listing, but the Region believes it has sufficient reasons to proceed.

In these cases, the Region should work closely with the State to try to resolve the issue before raising it to EPA Headquarters. The Region should take into account past, ongoing and planned response actions by the State.

If the Region determines that the issue cannot be resolved at the Regional level, the Regional Superfund Division Director should inform the Director of the State, Tribal and Site Identification Center (ST/SI) of the Office of Emergency and Remedial Response (OERR) and/or the appropriate ST/SI Regional Coordinator. OERR should then brief the Assistant Administrator (AA) for Solid Waste and Emergency Response. The State should have the opportunity to present its position in writing. The OSWER AA will then decide whether to pursue NPL listing. A case could arise where the Region notifies the State in writing of its desire to proceed with listing a site and provides an appropriate deadline for a response, but the State does not respond. In such a case, EPA may proceed with the NPL listing process.

CONCLUSION

The EPA Regional Offices have been working closely with the States to ensure that sites are evaluated and that response actions, if warranted, are taken as quickly as possible. EPA will continue to work with the States to assess sites and to prepare and submit HRS packages for those sites that are the highest priority for listing on the NPL. The Agency also will coordinate with the ATSDR and the Natural Resource Trustees in gathering information for the process.

If you or your staff have any questions, you may contact me at (202) 260-4610, or Dave Evans, Director of the ST/SI Center, at (703) 603-8885.

cc: Steve Herman, OECA
Steve Luftig, OERR
Lisa Friedman, OGC
Jim Woolford, FFRRO
All OERR Center Directors
Site Assessment Contacts, Regions I-X
Superfund Regional Division Directors
Regional Counsels, Regions I-X

LeFleur, Lance R

From: LeFleur, Lance R
Sent: Wednesday, October 01, 2014 4:27 PM
To: 'McTeerToney, Heather'
Subject: RE: 35th Ave. NPL Listing

Heather

Thank you for your follow up on our conversation earlier today. I want to make it clear that EPA misconstrued our letter of June 11, 2014. As I previously stated, a careful reading of the letter will confirm ADEM did not and does not conditionally, or otherwise, concur in the proposed listing of the 35th Avenue site on the NPL.

Lance

From: McTeerToney, Heather [mailto:McTeerToney.Heather@epa.gov]
Sent: Wednesday, October 01, 2014 11:45 AM
To: LeFleur, Lance R
Subject: FW: 35th Ave. NPL Listing

Please see below. The previous email was incorrect.

All the best,
Heather

From: McTeerToney, Heather
Sent: Wednesday, October 01, 2014 12:43 PM
To: 'LLfleur@ADEM.state.AL.US'
Cc: Stanislaus, Mathy; Heard, Anne; Jenkins, Brandi; Feldt, Lisa; HicksWhite, Javoyne; KeyesFleming, Gwendolyn; Hill, Franklin; Chaffins, Randall
Subject: 35th Ave. NPL Listing

Dear Lance,

It was a pleasure speaking with you today. On behalf of Administrator McCarthy, I am responding to your September 16, 2014, email regarding EPA's action to propose the 35th Avenue Site to the National Priorities List (NPL). EPA highly values the relationships we maintain with our state partners and recognizes that without these partnerships, success in the work we accomplish to protect human health and the environment is impossible. To that point, I want to clarify that our actions on the 35th Avenue Site are to protect and improve the quality of life for Alabama residents. Moving forward, I would like to reaffirm that we must improve the quantity and quality of our communications to ensure that our words and actions are well coordinated.

In this specific case, EPA strongly believes the 35th Avenue Site warrants inclusion on the NPL based on a large quantity of environmental data sampled and analyzed by EPA contractors which shows widespread contamination of residential yards with hazardous substances. We have conducted a rigorous evaluation of the risks to human health posed by this contamination and have determined that cleanup is warranted for several hundred residential properties. These decisions are consistent with decisions EPA has made on other sites in Region 4 and throughout the nation. EPA is committed to our Enforcement First principle where Potentially Responsible Parties (PRPs) conduct clean-ups. Listing the site on the NPL puts us in the best possible position to achieve a PRP-led investigation and cleanup of the site.

On June 11, 2014, I received a response from you to Region 4's request for concurrence to list the Site on the NPL. EPA understood your letter to mean that ADEM concurred on the listing, but conditioned that concurrence with the understanding that the State does not have funds available to pay the 10% cost share required for "fund-lead" remedial actions under Superfund. Region 4 has received similar "conditional concurrence" from other states in Region 4 and has always proceeded with the listing. Your conditional concurrence also references the Agency's ability to identify PRPs which the Region is proceeding on a dual track to accomplish. I certainly understand your funding concerns and you have my commitment that EPA will work closely with the State as we engage PRPs to take full responsibility for the cleanup via an enforceable agreement. Should our enforcement efforts fail and we find it necessary to request a 10% cost share from the state, we will use our flexibilities in how the state cost share is paid to the maximum extent possible.

Our efforts in this community have been discussed with members of the community, the State, congressional representatives, the Mayor and other local government representatives. We are currently responding to a community in need which has suffered disproportionately as the result of a legacy of industrial releases of hazardous constituents that have been documented as a result of our sampling in the Fairmont, Collegeville and Harriman Park communities. We strongly believe our top priority should continue to be bringing as many resources to bear as we can to improve this situation. Adding the site to the NPL sends a strong signal to the community AND to the PRPs that EPA and ADEM are willing to take the necessary steps to address the needs of the community.

I look forward to continuing to work with ADEM to improve our communications and in this effort to protect these communities.

Heather McTeer Toney
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Regional Administrator, Region 4
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