



AlaFile E-Notice

01-CV-2015-902278.00

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

GASP V. JEFFERSON COUNTY BOARD OF HEALTH ET AL
01-CV-2015-902278.00

The following complaint was FILED on 6/5/2015 8:30:54 PM

Notice Date: 6/5/2015 8:30:54 PM

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**COVER SHEET
CIRCUIT COURT - CIVIL CASE**

(Not For Domestic Relations Cases)

Case Number:
01-CV-201

Date of Filing:
06/05/2015



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01-CV-2015-902278.00
CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
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GENERAL INFORMATION

**IN THE CIRCUIT OF JEFFERSON COUNTY, ALABAMA
GASP v. JEFFERSON COUNTY BOARD OF HEALTH ET AL**

First Plaintiff: Business Individual
 Government Other

First Defendant: Business Individual
 Government Other

NATURE OF SUIT:

TORTS: PERSONAL INJURY

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

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
- FELA-Railroad/Seaman (FELA)
- RPRO-Real Property
- WTEG-Will/Trust/Estate/Guardianship/Conservatorship
- COMP-Workers' Compensation
- CVXX-Miscellaneous Circuit Civil Case

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

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

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

ATTORNEY CODE: LUD001

6/5/2015 8:30:26 PM

/s/ DAVID ALAN LUDDER

MEDIATION REQUESTED: Yes No Undecided



No. _____

IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, ALABAMA

GASP,

Plaintiff/Petitioner,

vs.

**JEFFERSON COUNTY BOARD OF HEALTH;
JENNIFER R. DOLLAR, NICOLE REDMOND,
JOSHUA MILLER, STEVEN KULBACK, and
MAX MICHAEL, III**, each in their official capacities
as members of the Jefferson County Board of Health; and
**DRUMMOND COMPANY, INC., d/b/a ABC COKE, A
DIVISION OF DRUMMOND COMPANY, INC. and d/b/a ABC COKE,**

Defendants/Respondents.

**PETITION FOR REVIEW UNDER ALA CODE § 41-22-20
ALTERNATIVE PETITION FOR COMMON LAW WRIT OF CERTIORARI
CLAIM FOR PROCEDURAL DUE PROCESS VIOLATIONS**

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I. Parties

1. GASP is an Alabama not-for-profit and membership corporation. The purpose of GASP 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. GASP's current mission is to reduce air pollution, educate the public about the health risks of poor air quality, and encourage community leaders to serve as role models for clean air and clean energy. GASP filed a Request for Hearing with the Jefferson County Board of Health to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. *GASP v. Jefferson Cnty. Dep't of Health Air Pollution Control Program*, No. 2014-003 (Jefferson Cnty. Bd. of Health, filed Aug. 26, 2014).

2. The Jefferson County Board of Health is a county board of health established in accordance with Ala. Code § 22-3-1. The Jefferson County Board of Health is a local agency of the State of Alabama. *See Williams v. Madison Cnty. 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”); *Smith v. Smith*, 778 So.2d 189, 191 (Ala. Civ. App. 1999) (Jefferson County Board of Health “is a state agency . . .”); *Opinion to Hon. David S. Maxey, Attorney, Jefferson County Board of Health*, dated May 1, 2007, A.G. No. 2007-087 (“Jefferson County Board of Health is a state agency . . .”). The Jefferson County Board of Health has established and administers a local air pollution control

program pursuant to Ala. Code § 22-28-23. Pursuant to such program, the Board is authorized to hear and determine appeals of administrative actions of the Jefferson County Air Pollution Control Program. Jefferson County Air Pollution Control R. & Regs., Part 12.1. The Board is authorized to delegate the power to conduct hearings on appeals of administrative actions to a Hearing Officer who is required to make and submit proposed findings of fact, conclusions of law and a recommendation to the Board.

Jefferson County Air Pollution Control R. & Regs., Part 12.23. The Jefferson County Board of Health itself, or through its designated Hearing Officer, entered several intermediate rulings adverse to GASP and a final decision dismissing GASP's Request for Hearing to contest the reissuance of Major Source Operating Permit No.

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3. Jennifer R. Dollar, Nicole Redmond, Joshua Miller, and Steven Kulback, and Max Michael, III, are each individual members of the Jefferson County Board of Health and are sued in their official capacities as members of the Jefferson County Board of Health. Hereinafter, all references to the "Jefferson County Board of Health" shall

mean each of the individual members of the Board in their official capacities, as well as the Board as a body or agency.

4. Drummond Company, Inc., d/b/a ABC Coke, A Division of Drummond Company, Inc. and d/b/a ABC Coke, is the recipient of Major Source Operating Permit No. 4-07-0001-03 and was admitted as an intervenor in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 2014-003 (Jefferson Cnty. Bd. of Health, Order filed Oct. 27, 2014). Drummond Company, Inc., d/b/a ABC Coke, A Division of Drummond Company, Inc. and d/b/a ABC Coke, is joined as a party pursuant to Ala. R. Civ. P. 19.

II. PETITION FOR REVIEW UNDER ALA. CODE § 41-22-20

A. Nature of Agency Actions

5. This is an action seeking judicial review of a final decision of the Jefferson County Board of Health dismissing GASP's Request for Hearing 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. In addition, review is sought of several adverse intermediate rulings of the Jefferson County Board of Health and the Board's Hearing Officer.

B. Particular Agency Actions

6. The particular agency actions for which judicial review is sought are the following:

- On April 8, 2015, the Jefferson County Board of Health entered a final decision dismissing GASP's Request for Hearing 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. Order (filed April 8, 2015) (Doc. 50); Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 14, 2015) at 4 (Doc. 39). *See* ¶¶ 30-94 *infra*.
- On April 8, 2015, the Jefferson County Board of Health issued an Order summarily denying GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation. Order (filed Apr. 8, 2015) (Doc. 48). *See* ¶¶ 95-118 *infra*.
- On October 27, 2014, the Jefferson County Board of Health's Hearing Officer summarily denied GASP's Motion for Disclosure. Order (filed Oct. 27, 2014) (Doc. 11). *See* ¶¶ 119-132 *infra*.
- On October 27, 2014, the Jefferson County Board of Health's Hearing Officer summarily granted ABC Coke's Motion to Intervene. Order on Motions (Oct. 27, 2014) (Doc. 11). *See* ¶¶ 133-147 *infra*.

C. Facts and Law on Jurisdiction and Venue

7. Ala. Code § 41-22-20(a) provides that “[a] *person* who has exhausted all administrative remedies available within the *agency*, . . . and who is *aggrieved* by a final decision in a *contested case* is entitled to judicial review . . . (Emphasis added). *Medical Ass’n of State of Alabama v. Shoemake*, 656 So.2d 863, 867 (Ala. Civ. App. 1995). In addition, a “party” in a contested case is entitled to judicial review. *State Personnel Bd. v. State Dep’t of Mental Health & Mental Retardation*, 694 So.2d 1367, 1372-73 (Ala. Civ. App. 1996). See Ala. Code § 41-22-3(6) (“party” means “[e]ach person or agency named or admitted as a party” in a contested case). Cf. *Ala. Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found.*, 973 So.2d 369, 378-380 (Ala. Civ. App. 2007) (Pittman, J., concurring) (person who was admittedly neither injured nor threatened with injury by ADEM administrative action “was not a *party* or an *aggrieved person* entitled to judicial review” of AEMC decision under the Alabama Administrative Procedure Act). Ala. Code § 41-22-20(b) provides that such review shall be in the circuit court.

8. An “agency” includes “[e]very board . . . or other administrative office or unit of the state . . .” Ala. Code § 41-22-3(1). The Jefferson County Board of Health is a local agency of the State of Alabama. See *Williams v. Madison Cnty. 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”); *Smith v. Smith*, 778 So.2d 189, 191 (Ala. Civ. App. 1999) (Jefferson County Board of Health “is a state agency . . .”); *Opinion to Hon. David*

S. Maxey, Attorney, Jefferson County Board of Health, dated May 1, 2007, A.G. No. 2007-087 (“Jefferson County Board of Health is a state agency . . .”). Accordingly, the Jefferson County Board of Health is an “agency” within the meaning of Ala. Code § 41-22-3(1).

9. A “license” includes “[t]he whole or part of any agency . . . permit . . .” Ala. Code § 41-22-3(4). Major Source Operating Permit No. 4-07-0001-03 is a “license” withing the meaning of Ala. Code § 41-22-3(4).

10. A “contested case” includes “[a] 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.” Ala. Code § 41-22-3(3). Jefferson County Air Pollution Control R. & Regs., Chapter 12, “prescribes the procedures for the hearing and determination of appeals of administrative actions of the Jefferson County Department of Health Air Pollution Control Program by the Jefferson County Board of Health.” *Id.* at Part 12.1. Such procedures authorize the Jefferson County Board of Health to modify, approve, or disapprove a permit issued or reissued by the Jefferson County Department of Health Air Pollution Control Program. Jefferson County Air Pollution Control R. & Regs., Part 12.14. “Any order of the Board modifying, approving, or disapproving the Program’s [permit] 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 [of a hearing to contest the permit] and

on matters officially noticed in the record.” Jefferson County Air Pollution Control R. & Regs., Section 12.14.3 and Part 12.13. Accordingly, a hearing before the Jefferson County Board of Health pursuant to Jefferson County Air Pollution Control R. & Regs., Chap. 12, 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 is a “contested case” within the meaning of Ala. Code § 41-22-3(3).

11. A “person” includes a corporation. Ala. Code § 41-22-3(7). GASP is an Alabama not-for-profit corporation and a “person” within the meaning of Ala. Code § 41-22-3(7).

12. A person is “aggrieved” for purposes of Ala. Code § 41-22-20 if he can show (1) an actual concrete and particularized injury in fact – an invasion of a legally protected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *Ex parte Alabama Rivers Alliance*, No. 1130393, 2014 Ala. LEXIS 153, *5 (Ala. Sept. 26, 2014) (citing *Tuscaloosa Res., Inc. v. Alabama Dep’t of Env’tl. Mgmt.*, No. 21204822013, 2013 Ala. Civ. App. LEXIS 219, *4-5 (Ala. Civ. App. Oct. 4, 2013) and *Ala. Dep’t of Env’tl. Mgmt. v. Friends of Hurricane Creek*, 114 So. 3d 47, 51 (Ala. Civ. App. 2012)).

13. “When the plaintiff complains of an injury in fact that is procedural in nature, the plaintiff must demonstrate that ‘the procedures in question are designed to protect some threatened concrete interest of his.’” *Sierra Club v. Johnson*, 436 F.3d

1269, 1276-77 (11th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n. 8, 112 S. Ct. 2130, 2158 n. 8 (1992)). See *Ex parte Alabama Educ. Television Comm'n*, 151 So.3d 283, 292 n. 9 (Ala. 2013) (Murdock, J., concurring) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 573 n. 7, 112 S. Ct. at 2142 n. 7). The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. *Sierra Club v. Johnson*, 436 F.3d at 1276-77. “When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 127 S. Ct. 1438, 1453 (2007).

14. Jefferson County Air Pollution Control R. & Regs., Part 12.3 creates a procedural right to a hearing to seek modification or disapproval of an administrative action by the Jefferson County Air Pollution Control Program in favor of any person who is “aggrieved” by the administrative action and who makes and files a proper request for hearing in accordance with Jefferson County Air Pollution Control R. & Regs., Part 12.4. An “administrative action” includes “the issuance of . . . any permit.” Jefferson County Air Pollution Control R. & Regs., Section 12.2.1. A person is “aggrieved” for purposes of Jefferson County Air Pollution Control R. & Regs., Part 12.3 if he has suffered a threatened or actual injury, *i.e.*, he is somehow adversely affected by the administrative action of which he complained. Jefferson County Air Pollution Control R. & Regs.,

Section 12.2.2. *Cf. Alabama Dep't of Env'tl. Mgmt. v. Friends of Hurricane Creek*, 973 So.2d 369, 378 (Ala. Civ. App. 2007) (“By its plain language, therefore, § 22-22A-7 limits the right to a hearing to those persons ‘aggrieved’ by an ADEM action.” “[A] ‘person aggrieved’ under § 22-22A-7 is one who has suffered a threatened or actual injury, *i.e.*, one who is somehow adversely affected by the ADEM action of which it complained.”).

15. An organizational “person” can seek judicial relief on behalf of its members when its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization’s purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding. *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783 So.2d 792, 795 (Ala. 2000). *Accord, City of Bessemer v. McClain*, 957 So.2d 1061, 1077 (Ala. 2006) (per curiam). *See Medical Ass’n of State of Alabama v. Shoemaker*, 656 So.2d 863, 868 (Ala. Civ. App. 1995) (association has standing to seek declaratory judgment under Ala. Code § 41-22-10); *State Personnel Board v. Cook*, 600 So.2d 1027, 1028 (Ala. Civ. App. 1992) (same); *Fort Morgan Civic Ass’n, Inc. v. Baldwin Cnty. Comm’n*, 890 So.2d 139, 144-145 (Ala. Civ. App. 2003) (association has standing to challenge county commission decisions where it presented substantial evidence that the county commission’s decision “could have” an adverse effect upon its members’ use and enjoyment of their property or on the value of its members’ property).

16. 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 Company, Inc. Respondent's Motion to Dismiss (filed Nov. 4, 2014) at Exhibit A (Doc. 12). The reissuance of Major Source Operating Permit No. 4-07-0001-03 authorizes ABC Coke, A Division of Drummond Company, Inc., to operate sources that emit or may emit air contaminants into the atmosphere, including particulate matter, smells and odors, and carcinogens. Respondent's Motion to Dismiss (filed Nov. 4, 2014) at Exhibit A (Doc. 12); Summary of GASP's Position on Its Entitlement to a Hearing (filed Jan. 30, 2015) at Exhibit A (Doc. 31).

17. On August 26, 2014, 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 to ABC Coke, A Division of Drummond Company, Inc. Request for Hearing (filed Aug. 26, 2014) (Doc. 1). GASP's Request for Hearing alleged:

4. The threatened or actual injuries suffered by GASP as a result of the issuance of Major Source Operating Permit No. 4-07-0001-03 by the Jefferson County Department of Health Air Pollution Control Program, and the emissions authorized thereby, are described as follows:

A. GASP is an Alabama non-profit, membership corporation. An organization can seek relief on behalf of its members when its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization's purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding. *See e.g., Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 05-01, 2006 AL ENV

LEXIS 2, *12-15 (Feb. 24, 2006) (an organization has standing to contest an ADEM administrative action under Ala. Code § 22-22A-7(c) if its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization's purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding); *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 08-07, 2010 AL ENV LEXIS 1, *47-52 (Apr. 16, 2010) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Code § 22-22A-7(c)), *aff'd sub nom. Alabama Rivers Alliance, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, 14 So.3d 853 (Ala. Civ. App. 2007); *Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 09-04, 2011 AL ENV LEXIS 3, *10-12 (Aug. 19, 2011) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Admin. Code R. 335-2-1-.02(b)); *Ex parte Fowl River Protective Ass'n, Inc.* 572 So.2d 446, 456 n. 2 (Ala. 1990) (organizations "that appealed this ADEM decision clearly qualify" as persons "aggrieved" under Ala. Code § 22-22A-7(c); "a citizen's statutory right to appeal an ADEM decision should be interpreted broadly").

B. The purpose of GASP 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. GASP's current mission is to reduce air pollution, educate the public about the health risks of poor air quality, and encourage community leaders to serve as role models for clean air and clean energy.

C. Members of GASP reside, work, and/or recreate in close proximity to the ABC Coke facility which was granted Major Source Operating Permit No. 4-07-0001-03. These members are "aggrieved" because they have suffered the following threatened and actual injuries in fact as a result of the operations authorized by Major Source Operating Permit No. 4-07-0001-03: soot (particulate) deposits that are injurious to their homes and interfere with the enjoyment of their homes; smells that are unpleasant in and around their homes; exposures to airborne carcinogens in concentrations that tend to be injurious to human health and welfare; and exposures to airborne carcinogens in concentrations that create an incremental increase in the risk of cancer that is greater than 1 in 100,000. *See* Jefferson County Air Pollution Control R. & Regs., Section 12.2.2

(“‘Aggrieved’ means having suffered a threatened or actual injury in fact”); *Alabama Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found., Inc.*, 973 So.2d 369, 378 (Ala. Civ. App. 2007) (“a ‘person aggrieved’ under § 22-22A-7 is one who has suffered a threatened or actual injury, *i.e.*, one who is somehow adversely affected by the ADEM action of which it complained”).

D. Neither the claims asserted nor the relief requested by GASP require that individual members of GASP be made parties in this proceeding.

5. GASP proposes that the Jefferson County Board of Health issue an order disapproving the issuance of Major Source Operating Permit No. 4-07-0001-03 in its entirety.

Request for Hearing (filed Aug. 26, 2014) (Doc. 1).

18. On April 8, 2015, the Jefferson County Board of Health entered a final decision dismissing GASP’s Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., by the Jefferson County Department of Health Air Pollution Control Program. Order (filed April 8, 2015) (Doc. 50). The dismissal of GASP’s Request for Hearing constitutes a *de facto* approval of the reissuance of Major Source Operating Permit No. 4-07-0001-03. *See Ex parte Marshall Durbin & Co. of Jasper, Inc.*, 537 So.2d 496, 498 (Ala. 1988) (agency dismissal of permit challenge is *de facto* approval of permit). The reissuance of Major Source Operating Permit No. 4-07-0001-03 authorizes ABC Coke, A Division of Drummond Company, Inc., to operate sources that emit or may emit air contaminants into the atmosphere, including particulate matter, smells and odors, and carcinogens. Respondent’s Motion to Dismiss (filed Nov. 4, 2014) at Exhibit A

(Doc. 12); Summary of GASP's Position on Its Entitlement to a Hearing (filed Jan. 30, 2015) at Exhibit A (Doc. 31).

19. As a result of the Jefferson County Board of Health's dismissal of GASP's Request for Hearing and *de facto* approval of the reissuance of Major Source Operating Permit No. 4-07-0001-03, members of GASP will suffer soot (particulate) deposits that are injurious to their homes and interfere with the enjoyment of their homes; smells that are unpleasant in and around their homes; exposures to airborne carcinogens in concentrations that tend to be injurious to human health and welfare; and exposures to airborne carcinogens in concentrations that create an incremental increase in the risk of cancer that is greater than 1 in 100,000. Specifically, GASP alleges that the reissuance of Major Source Operating Permit No. 4-07-0001-03 has caused and threatens to cause GASP member Emory E. Harris to suffer soot (particulate) deposits on her window sills and patio furniture that require frequent cleaning and unpleasant smells causing her nausea, loss of appetite, loss of sleep and limiting his outdoor activity; has caused and threatens to cause GASP member Cynthia Rosgen to suffer soot (particulate) deposits on her window sills, vents and floors that require frequent cleaning, unpleasant smells causing her nausea and causing her to close her windows and use air fresheners, and exposure to air contaminants, including carcinogens, causing her respiratory problems; has caused and threatens to cause GASP member John B. Crumpton to suffer soot (particulate) deposits that are injurious to his home and interfere with the enjoyment of

his home; has caused and threatens to cause GASP member Barbara Johnson to suffer soot (particulate) deposits on her windows and vents that require frequent cleaning and unpleasant smells in and around her home causing her nausea, loss of appetite and loss of sleep and requiring the use of air fresheners; and has caused and threatens to cause GASP member Wallace Williams, Jr. to suffer soot (particulate) deposits that are injurious to his home and interfere with the enjoyment of his home, unpleasant smells in and around his home causing him nausea, loss of appetite and loss of sleep and requiring the use of air fresheners, and exposure to air contaminants, including carcinogens, causing him respiratory problems.

20. Through this Petition for Review of the Jefferson County Board of Health's dismissal of GASP's Request for Hearing and *de facto* approval of the reissuance of Major Source Operating Permit No. 4-07-0001-03, GASP seeks to reverse the Board's dismissal of GASP's Request for Hearing and, after a *de novo* hearing on the merits before the Jefferson County Board of Health (or its designated hearing officer), to obtain an order disapproving Major Source Operating Permit No. 4-07-0001-03 in its entirety, thereby terminating the authority of ABC Coke, A Division of Drummond Company, Inc., to operate sources that emit or may emit air contaminants into the atmosphere that cause GASP's members to suffer injuries. *See e.g.*, Jefferson County Air Pollution Control R. & Regs., Section 18.2.1 ("Any Major Source operating without an Air Permit, an Operating Permit or a Synthetic Minor Operating Permit (as defined in Chapters 2, 17

and 18 of these regulations) may continue to operate (or may restart) only if its owner or operator obtains an Operating Permit or a Synthetic Minor Operating Permit prior to a date to be set by the Health Officer (or prior to restarting).”); Ala. Code § 22-28-16(d) (“No person shall construct, install, modify or use any equipment, device or other article designated by regulations capable of causing, or contributing to, air pollution or designated to prevent air pollution without a permit from the director or in violation of any conditions imposed by such permits.”).

21. The interests GASP seeks to protect by pursuing this Petition for Review are germane to GASP’s organizational purpose, *i.e.*, 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; and to reduce air pollution.

22. When an organization seeks prospective or injunctive relief for its members rather than individualized relief, individual participation in the proceeding is not normally necessary. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546, 116 S. Ct. 1529, 1531 (1996). GASP’s pursuit of this Petition for Review seeking to reverse the Jefferson County Board of Health’s dismissal of GASP’s Request for Hearing and *de facto* approval of the reissuance of Major Source Operating Permit No. 4-07-0001-03 does not require that individual members of GASP be made parties in this action.

23. If the Court reverses the Jefferson County Board of Health's dismissal of GASP's Request for Hearing, the Board will be required to grant GASP's Request for Hearing. Doing so will require that the Board consider the evidence supporting disapproval of Major Source Operating Permit No. 4-07-0001-03.

24. GASP anticipates that the evidence will show the following:

First Allegation of Error

Part 1.13, Jefferson County Air Pollution Control R. & Regs., prohibits any person from permitting or causing "air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1." "Air Pollution" is defined as "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Part 1.3, Jefferson County Air Pollution Control R. & Regs.. An "air contaminant" is defined as "any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source." Id.

The discharge of Total Suspended Particulate Matter (including particulate matter larger than 10 microns) for which no ambient air quality standards have been set under Section 1.7.1 from the ABC Coke facility causes the presence in the outdoor atmosphere of particulate matter in such quantities and duration as are injurious to the property of GASP's members and interferes with the enjoyment of property by GASP's members (e.g., deposits particulate matter on houses, in yards and gardens, and more).

The Health Officer is required to "deny an Operating Permit if the applicant does not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations," including Part 1.13. Paragraph 18.2.8(a), Jefferson County Air Pollution

Control R. & Regs. ABC Coke did not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted Total Suspended Particulate Matter (including particulate matter larger than 10 microns) in violation of Part 1.13. The Health Officer failed to deny the Operating Permit as required by Paragraph 18.2.8(a). The Board of Health should disapprove the issuance of Major Source Operating Permit No. 4-07-0001-03.

Second Allegation of Error

Part 1.13, Jefferson County Air Pollution Control R. & Regs., prohibits any person from permitting or causing “air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.” “Air Pollution” is defined as “the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby.” Part 1.3, Jefferson County Air Pollution Control R. & Regs.. An “air contaminant” is defined as “any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source.” *Id.*

The discharge of odor for which no ambient air quality standards have been set under Section 1.7.1 from the ABC Coke facility causes the presence in the outdoor atmosphere of odor in such quantities and duration as tend to be injurious to the health or welfare of GASP’s members (e.g., unpleasant, lessen food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea) or interfere with the enjoyment of life or property of GASP’s members (e.g., diminishes enjoyment of indoors and outdoors).

The Health Officer is required to “deny an Operating Permit if the applicant does not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations,”

including Part 1.13. Paragraph 18.2.8(a), Jefferson County Air Pollution Control R. & Regs.. ABC Coke did not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted odor in violation of Part 1.13. The Health Officer failed to deny the Operating Permit as required by Paragraph 18.2.8(a). The Board of Health should disapprove the issuance of Major Source Operating Permit No. 4-07-0001-03.

Third Allegation of Error

Part 1.13, Jefferson County Air Pollution Control R. & Regs., prohibits any person from permitting or causing “air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.” “Air Pollution” is defined as “the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby.” Part 1.3, Jefferson County Air Pollution Control R. & Regs.. An “air contaminant” is defined as “any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source.” Id.

The discharge of Benzene, Naphthalene and Arsenic for which no ambient air quality standards have been set under Section 1.7.1 from the ABC Coke facility causes the presence in the outdoor atmosphere of Benzene, Naphthalene and Arsenic in such quantities and duration as tend to be injurious to the health of GASP’s members (*i.e.*, each contaminant creates a cancer risk greater than 1×10^{-5} (1 in 100,000)).

The Health Officer is required to “deny an Operating Permit if the applicant does not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations,” including Part 1.13. Paragraph 18.2.8(a), Jefferson County Air Pollution Control R. & Regs.. ABC Coke did not show that every article, machine,

equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted Benzene, Naphthalene and Arsenic in violation of Part 1.13. The Health Officer failed to deny the Operating Permit as required by Paragraph 18.2.8(a). The Board of Health should disapprove the issuance of Major Source Operating Permit No. 4-07-0001-03.

Fourth Allegation of Error

Part 1.13, Jefferson County Air Pollution Control R. & Regs., prohibits any person from permitting or causing “air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.” “Air Pollution” is defined as “the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby.” Part 1.3, Jefferson County Air Pollution Control R. & Regs.. An “air contaminant” is defined as “any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source.” Id.

The discharge of many carcinogenic contaminants for which no ambient air quality standards have been set under Section 1.7.1 from the ABC Coke facility causes the presence in the outdoor atmosphere of carcinogenic contaminants in such quantities and duration as tend to be injurious to the health of GASP’s members (*i.e.*, creates an unacceptable cancer risk).

The Health Officer is required to “deny an Operating Permit if the applicant does not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted air contaminants in violation of these rules and regulations.” Paragraph 18.2.8(a), Jefferson County Air Pollution Control R. & Regs.. ABC Coke did not show that every article, machine, equipment, or other contrivance, the use of which may cause the issuance of air contaminants, is

so designed, controlled, or equipped with such air pollution control equipment, that it is expected to operate without emitting or without causing to be emitted carcinogens in violation of Part 1.13. The Health Officer failed to deny the Operating Permit as required by Paragraph 18.2.8(a). The Board of Health should disapprove the issuance of Major Source Operating Permit No. 4-07-0001-03.

Fifth Allegation of Error

Conditions in Major Source Operating Permit No. 4-07-0001-03 based on Part 6.2, Jefferson County Air Pollution Control R. & Regs. (“Fugitive Dust”) which require that ABC Coke take “reasonable” precautions to prevent particulate matter from becoming airborne or which require that Walter Coke, Inc. not cause the discharge of visible fugitive dust emissions beyond the lot line are unconstitutional and in excess of the authority of Jefferson County Air Pollution Control Program to impose. In *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So.2d 82 (Ala. 1983), the Alabama Supreme Court struck down a nearly identical State rule governing fugitive dust. The Court held that the requirement to take “reasonable” precautions to prevent particulate matter from becoming airborne was unconstitutionally vague and the prohibition against causing the discharge of visible fugitive dust emissions beyond the lot line was unreasonably and unconstitutionally restrictive. The Jefferson County Health Department committed error by including provisions in the permit that are in excess of its authority. The Board of Health should modify the issuance of Major Source Operating Permit No. 4-07-0001-03 by striking all requirements that ABC Coke take “reasonable” precautions to prevent particulate matter from becoming airborne and that ABC Coke not cause the discharge of visible fugitive dust emissions beyond the lot line.

Sixth Allegation of Error

General Permit Condition 45 (“Abatement of Obnoxious Odors”) imposes limitations on the authority of the Jefferson County Department of Health that are not authorized by Section 6.2.3, Jefferson County Air Pollution Control R. & Regs.. General Permit Condition 45 impermissibly requires that odors be “obnoxious” and be verified by a Department inspector before the Health Officer may order abatement of the odors. In addition, General Permit Condition 45 impermissibly requires that the

Department determine that odor abatement measures be “technically and economically feasible” before they are required to be implemented.

The Jefferson County Health Department committed error by including provisions in the permit that are in excess of its authority. The Board of Health should modify the issuance of Major Source Operating Permit No. 4-07-0001-03 by striking those provisions in General Permit Condition 45 that require that odors be “obnoxious” and be verified by a Department inspector before the Health Officer may order abatement of the odors; and by striking those provisions of General Permit Condition 45 that require that the Department determine that odor abatement measures be “technically and economically feasible” before they are required to be implemented.

Seventh Allegation of Error

Section 18.4.8, Jefferson County Air Pollution Control R. & Regs., requires that a permit application include “[e]missions rates of all pollutants in tons per year (tpy) and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method, or alternative method approved by the Health Officer; . . .” In response to this requirement, ABC Coke submitted an application containing an emission inventory almost entirely based on calculated estimates, not measurements. Paragraph 18.2.8(c), Jefferson County Air Pollution Control R. & Regs., provides that “[b]efore an Operating Permit is granted, the Health Officer may require the applicant to provide and maintain such facilities as are necessary for sampling and testing purposes in order to secure information that will disclose the nature, extent, quantity or degree of air contaminants discharged into the atmosphere from the article, machine, equipment, or other contrivance described in the Operating Permit.” GASP suggested in comments on the draft permit that estimates of emissions by ABC Coke are likely to be under-estimated and that the Health Officer should order ABC Coke to employ differential absorption Light Detection and Ranging (DIAL) technology to accurately measure its emissions prior to issuance of the permit. The Jefferson County Air Pollution Control Program did not respond to GASP’s suggestion. The Board of Health should disapprove the issuance of Major Source Operating Permit No. 4-07-0001-03 and advise the Health Officer to order ABC Coke to perform DIAL testing of its emissions.

25. As these allegations demonstrate, there is “some possibility” that the relief requested in this Petition for Review, *e.g.*, reversal of the Jefferson County Board of Health’s dismissal of GASP’s Request for Hearing, will prompt the Board to reconsider its approval of Major Source Operating Permit No. 4–07–0001–03.

26. GASP has exhausted all available administrative remedies.

27. “All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency . . .” “within 30 days after the receipt of the notice of or other service of the final decision of the agency upon the petitioner . . .” Ala. Code § 41-22-20(b) & (d). The Jefferson County Board of Health’s final decision dismissing GASP’s Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., by the Jefferson County Department of Health Air Pollution Control Program was entered on April 8, 2015. Order (filed April 8, 2015) (Doc. 50). GASP filed a notice of appeal and cost bond with the Jefferson County Board of Health on May 8, 2015.

28. “The petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review.” Ala. Code § 41-22-20(d). GASP filed a notice of appeal and cost bond with the Jefferson County Board of Health on May 8, 2015. This petition for review was filed on June 5, 2015.

29. Venue of a petition for judicial review of a final decision in a contested case is appropriate in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters. Ala. Code § 41-22-20(b). The Jefferson County Board of Health maintains its headquarters in Jefferson County. Suits involving public officials are properly maintained in the county of their official residence. *Tri-State Corp. v. State ex rel. Gallion*, 128 So.2d 505, 509 (Ala. 1961). Jennifer R. Dollar, Nicole Redmond, Joshua Miller, Steven Kulback, and Max Michael, III, each maintain their official residence as members of the Jefferson County Board of Health in Jefferson County. Accordingly, venue is appropriate in the Circuit Court for Jefferson County.

D. Grounds for Relief

1. The Jefferson County Board of Health's dismissal of GASP's Request for Hearing is in violation of Jefferson County Air Pollution Control Rules and Regulations or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control Rules and Regulations.

30. On August 11, 2014, the Jefferson County Department of Health Air Pollution Control Program, with the approval of the Health Officer, reissued Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. This permit authorizes the operation of sources that emit or may emit air contaminants into the atmosphere, including particulate matter, smells and odors, and carcinogens. Respondent's Motion to Dismiss (filed Nov. 4, 2014) at Exhibit A (Doc.

12); Summary of GASP's Position on Its Entitlement to a Hearing (filed Jan. 30, 2015) at Exhibit A (Doc. 31).

31. On August 26, 2014, 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 to ABC Coke, A Division of Drummond Company, Inc. Request for Hearing (filed Aug. 26, 2014) (Doc. 1). The Request for Hearing was docketed with the Jefferson County Board of Health as *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

32. On November 4, 2014, the Jefferson County Department of Health Air Pollution Control Program and ABC Coke filed motions to dismiss GASP's Request for Hearing. Respondent's Motion to Dismiss (filed Nov. 4, 2014) (Doc. 12); ABC Coke's Motion to Dismiss (filed Nov. 4, 2014) (Doc. 13).

33. Additional filings related to the Motions to Dismiss include: GASP's Response to Respondent's and Intervenor's Motions to Dismiss (filed Nov. 12, 2014) (Doc. 14); Reply in Support of Respondent's Motion to Dismiss (filed Nov. 13, 2014) (Doc. 15); ABC Coke's Reply in Support of its Motion to Dismiss (filed Nov. 11, 2014) (Doc. 16); GASP's Supplemental Response to Respondent's and Intervenor's Motions to Dismiss (filed Nov. 24, 2014) (Doc. 18); ABC Coke's Supplemental Reply in Support of its Motion to Dismiss (filed Nov. 20, 2014) (Doc. 17); Response to the Hearing Officer's Order (Jan. 30, 2015) (Doc. 29); Summary of GASP's Position on Its Entitlement to a

Hearing (filed Jan. 30, 2015) (Doc. 31); ABC Coke's Summary Regarding GASP's Standing (filed Jan. 30, 2015) (Doc. 33); Order (filed Feb. 9, 2015) (Doc. 34); ABC Coke's Notice of Filing Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 35); GASP's Proposed Order on Motions to Dismiss (filed Mar. 6, 2015) (Doc. 36); Respondent's Notice of Filing Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 37); Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 38).

34. On March 19, 2015, the Jefferson County Board of Health's Hearing Officer entered the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation. Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) (Doc. 39). The Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation are nearly identical to Proposed Findings of Fact, Conclusions of Law, and Recommendation submitted to the Hearing Officer by ABC Coke on March 6, 2015. ABC Coke's Notice of Filing Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 35).

35. On March 31, 2015, GASP filed with the Jefferson County Board of Health a Motion to Reject Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation and to Enter Alternative Order (filed Mar. 31, 2015) (Doc. 40).

36. On April 8, 2015, the Jefferson County Board of Health entered an Order (filed Apr. 8, 2015) (Doc. 49) denying GASP's Motion to Reject Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation and to Enter Alternative Order (filed Mar. 31, 2015) (Doc. 40).

37. On April 8, 2015, the Jefferson County Board of Health granted the Jefferson County Department of Health Air Pollution Control Program's and ABC Coke's motions to dismiss and adopted the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation "in its entirety as the Board's Final Order." Order (filed April 8, 2015) (Doc. 50).

- a. **The Jefferson County Board of Health incorrectly applied or interpreted Jefferson County Air Pollution Control R. & Regs., Part 12.3 to require that GASP must include in its Request for Hearing a statement of the alleged errors made by the Jefferson County Department of Health Air Pollution Control Program in the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc.**

38. Jefferson County Air Pollution Control R. & Regs., Part 12.3 provides:

Upon a *proper request* made and filed in accordance with Part 12.4, *any person aggrieved* by an administrative action of the Program shall be entitled to a hearing before the Board or its designated Hearing Officer.

(Emphasis added).

39. A request for hearing is "proper" if it contains the information required by Section 12.4.4, including the following:

- (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; and modifying or disapproving the Program's administrative action;

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

40. The Jefferson County Board of Health made the following findings of fact:

* * * The Request for Hearing also does not allege any error that the Program committed in issuing the Permit, nor does it claim that any aspect of the Permit is contrary to any law.

Taking the contents of the Request for Hearing as true, it identifies no alleged error that the Program committed in renewing ABC Coke's Permit—no fact or legal theory which, if proved true or accepted, would support that result. * * *

Order (filed April 8, 2015) (Doc. 50); Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) at 3-4 (Doc. 39).

41. The Jefferson County Board of Health made the following conclusion of law: To demonstrate that GASP is "aggrieved," GASP's Request for Hearing must include a statement of the alleged errors that the Jefferson County Department of Health Air Pollution Control Program made in the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. *See* Order

(filed April 8, 2015) (Doc. 50); Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) at 6-7 (Doc. 39).

42. A citizen’s right to an administrative appeal of an air pollution permit issued by the Jefferson County Department of Health Air Pollution Control Program should be interpreted broadly. *See Ex parte Fowl River Protective Ass’n, Inc.* 572 So.2d 446, 456 n. 2 (Ala. 1990) (“[M]atters of environmental protection and regulation are of great significance to the citizens of Alabama, and . . . a citizen’s statutory right to appeal an ADEM decision should be interpreted broadly.”).

43. “Standing” to seek administrative review of the reissuance of Major Source Operating Permit No. 4-07-0001-03 is governed by the language of Jefferson County Air Pollution Control R. & Regs., Part 12.3, not judicial standing principles. *See e.g., Alabama Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found., Inc.*, 973 So.2d 369, 372 (Ala. Civ. App. 2007) (entitlement to an administrative hearing before the Alabama Environmental Management Commission is dependent on statutory language in Ala. Code § 22-22A-7; standing to seek judicial review of Commission’s decision is dependent on the constitutional limits of judicial power).

44. The plain language of Jefferson County Air Pollution Control R. & Regs., Part 12.3 makes clear that “any person aggrieved by an administrative action” of the Jefferson County Air Pollution Control Program is entitled to a hearing before the Jefferson County Board of Health. *See Alabama Dep’t of Env’tl. Mgmt. v. Legal Env’tl.*

Assistance Found., Inc., 973 So.2d at 377 (“In creating the right to a hearing, this language defines those entitled to be heard as ‘any person aggrieved’ by an administrative action of ADEM. By its plain language, therefore, § 22-22A-7 limits the right to a hearing to those persons “aggrieved” by an ADEM action.”).

45. A person is “aggrieved” if that person has suffered a threatened or actual injury in fact by the administrative action of the Jefferson County Air Pollution Control Program. Jefferson County Air Pollution Control R. & Regs., Section 12.2.2 (“[a]ggrieved’ means having suffered a threatened or actual injury in fact.”). *See Alabama Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found., Inc.*, 973 So.2d at 378 (“By its plain language, therefore, a ‘person aggrieved’ under § 22-22A-7 is one who has suffered a threatened or actual injury, *i.e.*, one who is somehow adversely affected by the ADEM action of which it complained.”).

46. Nothing in the plain language of Jefferson County Air Pollution Control R. & Regs., Part 12.3 (or Section 12.4.4) requires that a request for hearing include a statement of the alleged errors made by the Jefferson County Department of Health Air Pollution Control Program in an administrative action. For example, Section 12.4.4 of Jefferson County Air Pollution Control R. & Regs. does not require that a request for hearing contain “a short and plain statement of the alleged errors made by the Program in the administrative action.” *But cf.* Ala. Admin. Code r. 335-2-1-.04(5)(d) (adopted Nov. 1, 1994) (a request for hearing before the Alabama Environmental Management

Commission shall contain “a short and plain statement of the alleged error(s) made by the Department in the administrative action”).

47. Jefferson County Air Pollution Control R. & Regs., Chap. 12 (revised May 8, 1991) is nearly identical to Ala. Admin. Code chap. 335-2-1 (amended Oct. 10, 1984). Summary of GASP’s Position on It’s Entitlement to a Hearing (filed Jan. 30, 2015) at Exhibit B (Doc. 31). Ala. Admin Code r. 335-2-1-.04(4) (amended Oct. 10, 1984) did not require that a request for hearing contain a statement of the alleged errors made by ADEM in the contested administrative action. On November 1, 1994, the Alabama Environmental Management Commission adopted Ala. Admin. Code r. 335-2-1-.04(5)(d) which required that a request for hearing before the Alabama Environmental Management Commission shall contain “a short and plain statement of the alleged error(s) made by the Department in the administrative action.” Summary of GASP’s Position on It’s Entitlement to a Hearing (filed Jan. 30, 2015) at 20 n.7 & Exhibit B (Doc. 31). The Jefferson County Board of Health has not made a similar revision to Jefferson County Air Pollution Control R. & Regs., Section 12.4.4.

48. Where an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements. *Hand v. State Dep’t of Human Res.*, 548 So.2d 171, 173 (Ala. Civ. App. 1988), *aff’d*, 548 So.2d 176 (Ala. 1988). *Accord, Ex parte Wilbanks Health Care Serv., Inc.*, 986 So.2d 422, 425-426 (Ala. 2007). This principle prevents agencies from skirting

their own regulations by the use of crabbed, *ad hoc* definitions of regulation terms. *Id.* at 427.

49. Jefferson County Air Pollution Control R. & Regs., Part 12.3 must be applied as it is written, not as the Jefferson County Board of Health wishes it had been written.

50. The language used in Jefferson County Air Pollution Control R. & Regs., Part 12.3 cannot be “interpreted” more expansively or restrictively than its plain language allows.

51. An interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.3 that requires that a request for hearing must contain a statement of the alleged errors made by the Jefferson County Department of Health Air Pollution Control Program in the issuance of a permit is inconsistent with the plain language of those provisions and is an invalid interpretation. *See Brunson Constr. & Envtl. Servs., Inc. v. City of Prichard*, 664 So.2d 885, 890 (Ala. 1995) (agency interpretation that is plainly erroneous or inconsistent with the regulation is not controlling); *Fraternal Order of Police, Lodge No. 64 v. Personnel Bd. of Jefferson Cnty.*, 103 So.3d 17, 25 (Ala. 2012) (same).

52. The Jefferson County Board of Health can adopt a prospective amendment to Jefferson County Air Pollution Control R. & Regs., Chap. 12 at any time to require that a request for hearing must contain “a short and plain statement of the alleged errors made by the Program in the administrative action.” *See e.g.*, Ala. Admin. Code r. 335-2-1-

.04(5) (adopted Nov. 1, 1994) (requiring that a request for hearing before the Alabama Environmental Management Commission contain “a short and plain statement of the alleged error(s) made by the Department in the administrative action”).

53. The Jefferson County Board of Health cited *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 342, 126 S. Ct. 1854, ___ (2006), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, ___ (1992), and *Warth v. Seldin*, 422 U.S. 490, 499–500, 95 S. Ct. 2197, ___ (1975), in support of its conclusion that GASP’s Request for Hearing is defective because it does not contain a statement of the alleged errors made by the Jefferson County Department of Health Air Pollution Control Program in the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke. These cases address the constitutional limits on the exercise of judicial power, not the statutory or regulatory limits of administrative jurisdiction. *See e.g., Alabama Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found., Inc.*, 973 So.2d 369, 372 (Ala. Civ. App. 2007) (entitlement to an administrative hearing before the Alabama Environmental Management Commission is dependent on statutory language in Ala. Code § 22-22A-7; standing to seek judicial review of Commission’s decision is dependent on the constitutional limits of judicial power).

54. GASP’s Request for Hearing is not defective because it does not contain a statement of the alleged errors made by the Jefferson County Department of Health Air

Pollution Control Program in the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc.

55. The Jefferson County Board of Health's dismissal of GASP's Request for Hearing because it did not contain a statement of the alleged errors made by the Jefferson County Department of Health Air Pollution Control Program in the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.3 and Section 12.4.4 or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.3 and Section 12.4.4.

56. GASP's right to a hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. has been prejudiced by the Jefferson County Board of Health's dismissal of GASP's Request for Hearing based on its incorrect legal conclusion that Jefferson County Air Pollution Control R. & Regs., Part 12.3 requires that GASP demonstrate that it is "aggrieved" by including in its Request for Hearing a statement of the alleged errors that the Jefferson County Department of Health Air Pollution Control Program made in the reissuance of the permit.

- b. **The Jefferson County Board of Health incorrectly applied or interpreted Jefferson County Air Pollution Control R. & Regs., Part 12.3 to require that GASP identify in its Request for Hearing an individual GASP member who has suffered a specific and particularized injury by the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc.**

57. Jefferson County Air Pollution Control R. & Regs., Part 12.3 provides:

Upon a *proper request* made and filed in accordance with Part 12.4, *any person aggrieved* by an administrative action of the Program shall be entitled to a hearing before the Board or its designated Hearing Officer.

(Emphasis added).

58. A request for hearing is “proper” if it contains the information required by

Section 12.4.4, including the following:

(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; and modifying or disapproving the Program’s administrative action;

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

(Emphasis added).

59. GASP's Request for Hearing addressed its status as a person "aggrieved" and addressed the requirement of paragraph (c) of Section 12.4.4 with the following statement:

4. The threatened or actual injuries suffered by GASP as a result of the issuance of Major Source Operating Permit No. 4-07-0001-03 by the Jefferson County Department of Health Air Pollution Control Program, and the emissions authorized thereby, are described as follows:

A. GASP is an Alabama non-profit, membership corporation. An organization can seek relief on behalf of its members when its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization's purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding. *See e.g., Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 05-01, 2006 AL ENV LEXIS 2, *12-15 (Feb. 24, 2006) (an organization has standing to contest an ADEM administrative action under Ala. Code § 22-22A-7(c) if its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization's purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding); *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 08-07, 2010 AL ENV LEXIS 1, *47-52 (Apr. 16, 2010) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Code § 22-22A-7(c)), *aff'd sub nom. Alabama Rivers Alliance, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, 14 So.3d 853 (Ala. Civ. App. 2007); *Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 09-04, 2011 AL ENV LEXIS 3, *10-12 (Aug. 19, 2011) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Admin. Code R. 335-2-1-.02(b)); *Ex parte Fowl River Protective Ass'n, Inc.* 572 So.2d 446, 456 n. 2 (Ala. 1990) (organizations "that appealed this ADEM decision clearly qualify" as persons "aggrieved" under Ala. Code § 22-22A-7(c); "a citizen's statutory right to appeal an ADEM decision should be interpreted broadly").

B. The purpose of GASP 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. GASP's current mission is to reduce air pollution, educate the public about the health risks of poor air quality, and encourage community leaders to serve as role models for clean air and clean energy.

C. Members of GASP reside, work, and/or recreate in close proximity to the ABC Coke facility which was granted Major Source Operating Permit No. 4-07-0001-03. These members are "aggrieved" because they have suffered the following threatened and actual injuries in fact as a result of the operations authorized by Major Source Operating Permit No. 4-07-0001-03: soot (particulate) deposits that are injurious to their homes and interfere with the enjoyment of their homes; smells that are unpleasant in and around their homes; exposures to airborne carcinogens in concentrations that tend to be injurious to human health and welfare; and exposures to airborne carcinogens in concentrations that create an incremental increase in the risk of cancer that is greater than 1 in 100,000. *See* Jefferson County Air Pollution Control R. & Regs., Section 12.2.2 ("Aggrieved" means having suffered a threatened or actual injury in fact"); *Alabama Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So.2d 369, 378 (Ala. Civ. App. 2007) ("a 'person aggrieved' under § 22-22A-7 is one who has suffered a threatened or actual injury, *i.e.*, one who is somehow adversely affected by the ADEM action of which it complained").

D. Neither the claims asserted nor the relief requested by GASP require that individual members of GASP be made parties in this proceeding.

Request for Hearing (filed Aug. 26, 2014) at 2-5 (Doc. 1).

60. The Jefferson County Board of Health made the following findings of fact:

GASP filed its Request for Hearing, which states that unidentified members of GASP have suffered the following threatened and actual injuries as a result of the operations authorized by ABC Coke's Permit: soot deposits on their home; unpleasant smells; and exposure to airborne carcinogens in concentrations (1) that tend to be injurious to human health

and welfare and (2) create an incremental increase in the risk of cancer that is greater than 1 in 100,000. * * *

* * * The Request for Hearing does not identify any individual GASP member who suffers the claimed threatened or actual injuries, much less one who would be harmed by the issuance of the Permit.

Order (filed April 8, 2015) (Doc. 50); Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) at 3-4 (Doc. 39).

61. The Jefferson County Board of Health made the following conclusion of law: To demonstrate that it is "aggrieved," GASP's Request for Hearing must identify some individual member who has suffered a specific and particularized injury. *See* Order (filed April 8, 2015) (Doc. 50); Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 14, 2015) at 7-8 (Doc. 39).

62. "Standing" to seek administrative review of the reissuance of Major Source Operating Permit No. 4-07-0001-03 is governed by the language of Jefferson County Air Pollution Control R. & Regs., Part 12.3, not judicial standing principles. *See e.g., Alabama Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So.2d 369, 372 (Ala. Civ. App. 2007) (entitlement to an administrative hearing before the Alabama Environmental Management Commission is dependent on statutory language in Ala. Code § 22-22A-7; standing to seek judicial review of Commission's decision is dependent on the constitutional limits of judicial power).

63. The plain language of Jefferson County Air Pollution Control R. & Regs., Part 12.3 makes clear that "any person aggrieved by an administrative action" of the

Program is entitled to a hearing. *See Alabama Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So.2d at 377 (“In creating the right to a hearing, this language defines those entitled to be heard as ‘any person aggrieved’ by an administrative action of ADEM. By its plain language, therefore, § 22-22A-7 limits the right to a hearing to those persons “aggrieved” by an ADEM action.”).

64. A person is “aggrieved” if that person has suffered a threatened or actual injury in fact by the administrative action of the Jefferson County Air Pollution Control Program. Jefferson County Air Pollution Control R. & Regs., Section 12.2.2 (“[a]ggrieved’ means having suffered a threatened or actual injury in fact.”). *See Alabama Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So.2d at 378 (“By its plain language, therefore, a ‘person aggrieved’ under § 22-22A-7 is one who has suffered a threatened or actual injury, *i.e.*, one who is somehow adversely affected by the ADEM action of which it complained.”).

65. The Alabama Environmental Management Commission, which has rules similar to Jefferson County Air Pollution Control R. & Regs., Chap. 12 (Ala. Admin. Code chap. 335-2-1), has held that organizations may assert associational standing as recognized by *Bama Budweiser of Montgomery, Inc. v. Anheuser-Busch, Inc.*, 783 So.2d 792, 795 (Ala. 2000). *See e.g., Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 05-01, 2006 AL ENV LEXIS 2, *12-15 (Ala. Env'tl. Mgmt. Comm'n, Feb. 24, 2006) (an organization has standing to contest an ADEM

administrative action under Ala. Code § 22-22A-7(c) if its members would otherwise have standing to pursue such relief; the interests it seeks to protect are germane to the organization's purpose; and neither the claims asserted nor the relief requested require that individual members be made parties in the proceeding); *Friends of Hurricane Creek v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 08-07, 2010 AL ENV LEXIS 1, *47-52 (Ala. Env'tl. Mgmt. Comm'n, Apr. 16, 2010) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Code § 22-22A-7(c)), *aff'd sub nom. Alabama Rivers Alliance, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, 14 So.3d 853 (Ala. Civ. App. 2007); *Black Warrior Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket No. 09-04, 2011 AL ENV LEXIS 3, *10-12 (Ala. Env'tl. Mgmt. Comm'n, Aug. 19, 2011) (organization who's members use and enjoyment of water is threatened by discharges authorized by ADEM permit is "aggrieved" under Ala. Admin. Code R. 335-2-1-.02(b)). *See also Ex parte Fowl River Protective Ass'n, Inc.* 572 So.2d 446, 456 n. 2 (Ala. 1990) (organizations "that appealed this ADEM decision clearly qualify" as persons "aggrieved" under Ala. Code § 22-22A-7(c)).

66. The Alabama Environmental Management Commission, which has rules similar to Jefferson County Air Pollution Control R. & Regs., Chap. 12 (Ala. Admin. Code chap. 335-2-1), has granted hearings to organizations whose unnamed members were alleged to have been injured by an administrative action. *E.g., Black Warrior*

Riverkeeper, Inc. v. Alabama Dep't of Env'tl. Mgmt., EMC Dkt. No. 09-04, 2011 AL ENV LEXIS 3 (Ala. Env'tl. Mgmt. Comm'n, Aug. 19, 2011); *Wild Alabama v. Alabama Dep't of Env'tl. Mgmt.*, EMC Dkt. No. 99-23, 2000 AL ENV LEXIS 7 (Ala. Env'tl. Mgmt. Comm'n, June 20, 2000).

67. At least four U.S. Circuit Courts of Appeal that have considered whether an organization's members must be identified at the pleading stage of litigation have expressly rejected the position advanced by the Jefferson County Board of Health here. The Eleventh Circuit did so in *Doe v. Stincer*, 175 F.3d 879, 882 (11th Cir. 1999); the Fifth Circuit did so in *Hancock County Board of Supervisors v. Ruhr*, 487 Fed. Appx. 189, 198-199 (5th Cir. 2012); the Second Circuit did so in *Building and Construction Trades Council of Buffalo, New York and Vicinity v. Downtown Development, Inc.*, 448 F.3d 138, 144-145 (2d Cir. 2006); and the Seventh Circuit did so in *Disability Rights Wisconsin, Inc. v. Walworth County Board of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008).

68. The Jefferson County Board of Health cited *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237, 242 (5th Cir. 1994), for the proposition that an association must identify at least one individual member who has or could be injured. Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation at 8 (Doc. 39). The stage of the litigation in that case however, was summary judgment where the plaintiff may not rest on the general allegations of a

complaint, but must come forward with specific facts to support standing. The Fifth Circuit subsequently held that at the pleading stage, association plaintiffs do not need to identify their injured members. *Hancock Cnty. Bd. of Supervisors*, 487 Fed. Appx. at 198-199.

69. The Jefferson County Board of Health cited *National Coalition for Students with Disabilities v. Miller*, 298 F. Supp. 2d 16, 20 (D. D.C. 2002) for the proposition that “[P]laintiff must at least allege in its complaint that a *specific member* has suffered an injury.” (Emphasis added). Hearing Officer’s Proposed Findings of Fact, Conclusions of Law and Recommendation at 8 (Doc. 39). In that case, the Court explained that “[h]ere, however, the NCSD has not satisfied the first prong of the [associational standing] test because it has failed to allege, let alone demonstrate, that there is *any* D.C. resident in its organization who is both an eligible voter and has been deprived of the opportunity to register to vote due to defendant Alice Miller’s alleged NVRA violations.” 298 F. Supp. 2d at 20 . (emphasis added). Accordingly, the Court said that “to survive a motion to dismiss based on lack of associational standing, the plaintiff must at least allege in its complaint that a specific member has suffered an injury.” The Court did not say that the member must be identified. More recently, the same District Court held that injured members do not need to be named in the complaint. *Fraternal Order of Police Library of Congress Labor Comm. v. Library of Congress*, 692 F. Supp. 2d 9, 14 (D. D.C. 2010). There, plaintiff alleged that a number of its unnamed members had suffered injuries.

Defendant argued on a motion to dismiss that plaintiff's amended complaint failed to satisfy the injury-in-fact requirement of art. III because "the amended complaint does not identify a single member who suffered [the] alleged injuries . . ." The Court rejected this argument saying that the complaint was sufficient without naming the injured members. *See also W. Va. Highlands Conservancy v. Johnson*, 540 F. Supp. 2d 125, 143 n.12 (D. D.C. 2008) ("plaintiffs have adequately alleged associational standing in a representative capacity" when they have made general allegations that their unnamed members suffered specific injuries).

70. GASP's allegations in paragraph 4 of its Request for Hearing are sufficient as a matter of law to demonstrate that its members have suffered specific threatened or actual injuries, *i.e.*, they are somehow adversely affected by the reissuance of Major Source Operating Permit No. 4-07-0001-03. Accordingly, GASP is a person "aggrieved" by the reissuance of Major Source Operating Permit No. 4-07-0001-03 as a matter of law.

71. GASP's allegations in paragraph 4 of its Request for Hearing are sufficient as a matter of law to satisfy the requirement of paragraph (c) of Section 12.4.4 of Jefferson County Air Pollution Control R. & Regs., that the Request for Hearing specify the threatened or actual injury in fact suffered by the requester as a result of the contested administrative action. *See e.g., Martin v. Alabama Dep't of Env'tl. Mgmt.*, EMC Dkt. Nos. 95-17, 95-18, 96-01, 1996 AL ENV LEXIS 4, *100-101 (Ala. Env'tl. Mgmt. Comm'n,

Nov. 28, 1995) (“Petitioner has made sufficient allegations of either real or threatened harm to overcome the Respondent’s Motion to Dismiss”).

72. GASP is not required by Jefferson County Air Pollution Control R. & Regs., Part 12.3 (or Section 12.4.4) to identify, at the pleading stage, the individual members of GASP who have suffered a threatened or actual injury in fact to establish associational standing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03.

73. GASP has, as a matter of law, sufficiently alleged that it is a “person aggrieved” and provided a sufficient statement of the threatened or actual injuries it has suffered as a result of the reissuance of Major Source Operating Permit No. 4-07-0001-03.

74. The Jefferson County Board of Health’s dismissal of GASP’s Request for Hearing because it did not identify some individual member who has suffered a specific and particularized injury its Request for Hearing is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.3, or an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.3.

75. GASP’s right to a hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. has been prejudiced by the Jefferson County Board of Health’s dismissal of GASP’s Request for Hearing based on its incorrect legal conclusion that Jefferson County Air

Pollution Control R. & Regs., Part 12.3 requires that GASP demonstrate that it is “aggrieved” by identifying in its Request for Hearing some individual member that has suffered a specific and particularized injury.

- c. **The Jefferson County Board of Health incorrectly applied or interpreted Jefferson County Air Pollution Control R. & Regs., paragraph (d) of Section 12.4.4, to require that GASP state in its Request for Hearing the legal basis for the relief it seeks from the Jefferson County Board of Health.**

76. Paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. requires that a request for hearing include the following:

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;

77. GASP’s Request for Hearing addressed paragraph (d) of Section 12.4.4 with the following statement:

5. GASP proposes that the Jefferson County Board of Health issue an order disapproving the issuance of Major Source Operating Permit No. 4-07-0001-03 in its entirety.

Request for Hearing (filed Aug. 26, 2014) at 5 (Doc. 1).

78. The Jefferson County Board of Health made the following findings of fact:

The Request for Hearing proposes that the Board “issue an order disapproving the issuance of [the Permit] in its entirety” without alleging any basis or rationale for such an order.

* * * Taken as true, the Request for Hearing does not contain any suggested revision to the Permit which would redress any claimed injury or unspecified error, in the form of a statement of proposed terms and conditions pursuant to JCBH RR section 12.4.4(d) or otherwise.

Order (filed April 8, 2015) (Doc. 50); Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 14, 2015) at 4 (Doc. 39).

79. The Jefferson County Board of Health made the following conclusion of law: To satisfy the requirement of paragraph (d) of Section 12.4.4, GASP must state the legal basis for the relief it seeks from the Jefferson County Board of Health. *See* Order (filed April 8, 2015) (Doc. 50); Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 14, 2015) at 9 (Doc. 39).

80. “[L]anguage used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.” *Ex parte Wilbanks Health Care Servs., Inc.*, 986 So. 2d 422, 427 (Ala. 2007) (quoting *Alabama Medicaid Agency v. Beverly Enters.*, 521 So. 2d 1329, 1332 (Ala. Civ. App. 1987)).

81. Where an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements. *Hand v. State Dep’t of Human Res.*, 548 So.2d 171, 173 (Ala. Civ. App. 1988), *aff’d*, 548 So.2d 176 (Ala. 1988). *Accord*, *Ex parte Wilbanks Health Care Serv., Inc.*, 986 So.2d 422, 425-426 (Ala. 2007). This principle prevents agencies from skirting their own regulations by the use of crabbed, *ad hoc* definitions of regulation terms. *Id.* at 427.

82. Nothing in the plain language of paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. requires that a requester provide *any* reasons for why it seeks the terms and conditions it proposes. Specifically, the plain language of paragraph (d) does not require that a requester state the legal basis for the relief it seeks.

83. An interpretation of Jefferson County Air Pollution Control R. & Regs., Section 12.4.4(d) that requires that a requester state the legal basis for the relief it seeks from the Jefferson County Board of Health is inconsistent with the plain language of that provision and is an invalid interpretation. *See Brunson Constr. & Envtl. Servs., Inc. v. City of Prichard*, 664 So.2d 885, 890 (Ala. 1995) (agency interpretation that is plainly erroneous or inconsistent with the regulation is not controlling); *Fraternal Order of Police, Lodge No. 64 v. Personnel Bd. of Jefferson Cnty.*, 103 So.3d 17, 25 (Ala. 2012) (same).

84. The Jefferson County Board of Health's interpretation of paragraph (d) of Section 12.4.4, Jefferson County Air Pollution Control R. & Regs., requires that additional words be engrafted on the existing language:

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, *including the legal basis therefor*;

Such a significant modification of the existing language of paragraph (d) of Section 12.4.4 under the guise of "interpretation" is impermissible. *Cf. Gulf Stevedore Corp. v.*

Rabren, 242 So.2d 386, 388 (Ala. 1970) (statutory language cannot be rewritten under guise of construction).

85. Ala. Code § 41-22-4(a)(2) provides that all agencies shall “[a]dopt rules of practice setting forth the . . . requirements of all formal and informal procedures available . . .” “Adoption of rules describing . . . the actual procedures and policies of a state agency will enable the public to hold agencies to the standards to which it is intended they be held.” Commentary to § 41-22-4. Permitting administrative agencies to *alter* their regulations at will through the guise of “interpretation” would render the AAPA rulemaking procedures superfluous. *See Hartford Healthcare, Inc. v. Williams*, 751 So.2d 16, 22 (Ala. Civ. App. 1999) (“To condone Medicaid’s reversal of its former interpretation of Rule 560-X-22.15(3) would render the AAPA formal rulemaking procedures basically superfluous by permitting administrative agencies to alter their regulations at will through the guise of ‘correcting a mistake.’”).

86. The plain language of paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. does not require that a request for hearing contain proposed findings of fact and conclusions of law. Had the Jefferson County Board of Health meant to say in paragraph (d) that a request for hearing shall contain those “findings of fact and conclusions of law” that the requester proposes that the Board should include in an Order modifying or disapproving the Program’s administrative action, the Board certainly knew how to do so. *See e.g.*, Jefferson County Air Pollution

Control R. & Regs., Sections 12.14.3 and 12.23.3 (discussing “findings of fact and conclusions of law”). Moreover, suggesting proposed findings of fact and conclusions of law that the Board should include in its order before any evidence is taken would contradict Jefferson County Air Pollution Control R. & Regs., Section 12.14.3 (findings of fact “shall be based *solely on the evidence in the record* and matters officially noticed.”) (emphasis added).

87. The plain language of paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. leaves it to the discretion of the requester to propose those terms and conditions it desires that the Board include in an order modifying or disapproving the administrative action of the Jefferson County Department of Health Air Pollution Control Program.

88. The disapproval of Major Source Operating Permit No. 4-07-0001-03 in its entirety is within the authority of the Jefferson County Board of Health to grant. *See* Jefferson County Air Pollution Control R. & Regs., Section 12.14.1. Accordingly, the terms and conditions which GASP proposed that the Board should include in its order are not in excess of the Board’s authority. Nevertheless, the plain language of paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. does not require that a request for hearing demonstrate that the terms and conditions which the requester proposes that the Board should include in its order be within the Board’s authority to grant.

89. The disapproval of Major Source Operating Permit No. 4-07-0001-03 in its entirety would leave ABC Coke, A Division of Drummond Company, Inc., without authority to operate sources that emit or may emit air contaminants into the atmosphere. *See* Jefferson County Air Pollution Control R. & Regs., Section 18.2.1 (“Any Major Source operating without an Air Permit, an Operating Permit or a Synthetic Minor Operating Permit (as defined in Chapters 2, 17 and 18 of these regulations) may continue to operate (or may restart) only if its owner or operator obtains an Operating Permit or a Synthetic Minor Operating Permit prior to a date to be set by the Health Officer (or prior to restarting).”; Ala. Code § 22-28-16(d) (“No person shall construct, install, modify or use any equipment, device or other article designated by regulations capable of causing, or contributing to, air pollution or designated to prevent air pollution without a permit from the director or in violation of any conditions imposed by such permits.”)). Accordingly, the terms and conditions which GASP proposed that the Board should include in its order would redress GASP’s alleged injuries. Nevertheless, the plain language of paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control R. & Regs. does not require that a request for hearing demonstrate that the terms and conditions which the requester proposes that the Board should include in its order would redress the requester’s alleged injuries.

90. After the presentation of evidence at a hearing, the Jefferson County Board of Health is authorized to issue an Order including terms and conditions different from those proposed by GASP.

91. GASP's Request for Hearing is not required by paragraph (d) of Section 12.4.4 of the Jefferson County Air Pollution Control Rules and Regulations to state the legal basis for the relief it seeks from the Jefferson County Board of Health.

92. GASP's statement that it "proposes that the Jefferson County Board of Health issue an order disapproving the issuance of Major Source Operating Permit No. 4-07-0001-03 in its entirety" complies with the plain language of paragraph (d) of Section 12.4.4, Jefferson County Air Pollution Control R. & Regs.

93. The Jefferson County Board of Health's dismissal of GASP's Request for Hearing because it did not state the legal basis for the relief it seeks from the Jefferson County Board of Health is in violation of paragraph (d) of Section 12.4.4, Jefferson County Air Pollution Control R. & Regs., or affected by an erroneous application or interpretation of paragraph (d) of Section 12.4.4, Jefferson County Air Pollution Control R. & Regs.

94. GASP's right to a hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., has been prejudiced by the Jefferson County Board of Health's dismissal of GASP's Request for Hearing based on its incorrect legal conclusion that paragraph (d) of Section

12.4.4, Jefferson County Air Pollution Control R. & Regs., requires that GASP state the legal basis for the relief it seeks from the Jefferson County Board of Health.

2. **The Jefferson County Board of Health's denial of GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a) or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a).**

95. On December 5, 2014, GASP filed a Motion to Disqualify Hearing Officer James H. Hard on the grounds that (1) he was not hired or employed by the Jefferson County Board of Health to conduct a hearing on GASP's Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 as required by Jefferson County Air Pollution Control R. & Regs., Section 12.23.1; and (2) he was subject to the authority, direction or discretion of the Health Officer who both approved Major Source Operating Permit No. 4-07-0001-03 and appointed him to serve as hearing officer in GASP's contest of the reissuance of Major Source Operating Permit No. 4-07-0001-03 in violation of Ala. Code § 41-22-18(a). GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) (Doc. 19).

96. On December 23, 2014, GASP filed an affidavit in support of its contention that Ala. Code § 41-22-18(a) prohibits James H. Hard from serving as Hearing Officer because he is subject to the authority of the Health Officer, a person who advocated in connection with the reissuance of Major Source Operating Permit No. 4-07-0001-03.

Affidavit of Stacie M. Propst in Support of GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 24).

97. Additional filings related to GASP's Motion to Disqualify Hearing Officer James H. Hard include: ABC Coke's Response to GASP's Motion to Disqualify Hearing Officer (filed Dec. 10, 2014) (Doc. 20); Respondent's Opposition to Petitioner's Motion to Disqualify Hearing Officer (filed Dec. 10, 2014) (Doc. 21); GASP's Reply to ABC Coke's and JCDH's Responses to Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 23); Respondent's Motion to Strike the Affidavit of Stacie M. Propst in Support of GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 25); ABC Coke's Motion to Strike Affidavit of Stacie M. Propst (filed Dec. 23, 2014) (Doc. 26); GASP's Response to Respondent's and Intervenor's Motions to Strike Affidavit of Stacie M. Propst (Jan. 5, 2015) (Doc. 27); Respondent's Reply in Support of its Motion to Strike Affidavit of Stacie M. Propst (Jan. 30, 2015) (Doc. 30); and ABC Coke's Reply in Support of its Motion to Strike Affidavit of Stacie M. Propst (Jan. 30, 2015) (Doc. 32).

98. The Hearing Officer never ruled upon GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) (Doc. 19).

99. On March 19, 2015, Hearing Officer James H. Hard entered the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation.

Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) (Doc. 39).

100. On April 3, 2015, GASP filed a Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation on the grounds that (1) James H. Hard was not hired or employed by the Jefferson County Board of Health to conduct a hearing on GASP's Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 as required by Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 and therefore lacked authority to make and submit the Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation to the Board; and (2) James H. Hard was subject to the authority, direction or discretion of the Health Officer who both approved the reissuance of Major Source Operating Permit No. 4-07-0001-03 and appointed him to serve as Hearing Officer in GASP's contest of the reissuance of Major Source Operating Permit No. 4-07-0001-03 in violation of Ala. Code § 41-22-18(a). Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation (filed Apr. 3, 2015) (Doc. 41).

101. On April 8, 2015, the Jefferson County Board of Health issued an Order summarily denying GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation. Order (filed Apr. 8, 2015) (Doc. 48).

102. On April 8, 2015, the Jefferson County Board of Health adopted the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation "in its entirety as the Board's Final Order" and granted the Jefferson County Department of Health Air Pollution Control Program's and ABC Coke's motions to dismiss. Order (filed April 8, 2015) (Doc. 50).

103. Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 provides:

The Board may hire or employ one or more Hearing Officers to conduct hearings of contested administrative actions of the Program . . . Such Hearing Officers shall be attorneys licensed to practice law in the State of Alabama and shall be paid an amount prescribed by the Board from Program funds but shall not be subject to the authority, direction, or discretion of the Director of the Program or any other person subject to the authority, direction, or discretion of the Director of the Program.

(Emphasis added).

104. Jefferson County Air Pollution Control R. & Regs., Section 12.23.2 provides:

The Board may delegate to a hearing Officer, the power to conduct hearings of contested administrative actions of the Program, other than hearings to contest the issuance of an emergency order, and all proceedings related thereto, in the same manner as provided in this Chapter for the conduct of such hearings and proceedings before the Board. The power to conduct hearings of contested administrative actions of the Program shall include the power to do all things which the Board might do under this Chapter, except issue an order modifying, approving, or disapproving an administrative action of the Program or issue an order granting or denying an application for a stay of the operation of the contested administrative action of the Program pending issuance of a Board order modifying, approving, or disapproving such administrative action.

(Emphasis added).

105. Ala. Code § 41-22-18(a) provides:

No individual who participates in the making of any proposed order or final decision in a contested case shall have prosecuted or represented a party in connection with that case, the specific controversy underlying that case, or another pending factually related contested case, or pending factually related controversy that may culminate in a contested case involving the same parties. *Nor shall any such individual be subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with that contested case, the specific controversy underlying that contested case, or a pending factually related contested case or controversy, involving the same parties.*

(Emphasis added).

106. Ala. Code § 41-22-18(b) provides:

A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection (a) or asserting personal bias of an individual participating in the making of any proposed order or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

(Emphasis added).

107. On August 12, 2009, the Jefferson County Board of Health approved a list of seven persons, including James H. Hard, as eligible “to serve as Hearing Officers for the Jefferson County Board of Health.” GASP’s Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) at Exhibit A (Doc. 19); Motion to Board of Health to

Disregard Hearing Officer's Proposed Findings of Fact, Conclusion of Law, and Recommendation (filed Apr. 3, 2015) at Exhibit A (Doc. 41).

108. The Jefferson County Board of Health's approval of this list did not effect the hiring or employment of James H. Hard to serve as a Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003. Moreover, this approval did not prescribe any terms of employment, such as an amount to be paid to James H. Hard for his services as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003. Finally, this approval did not delegate to James H. Hard the power to conduct a hearing in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

109. The Jefferson County Board of Health did not hire or employ James H. Hard to serve as a Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003; did not prescribe any terms of employment for James H. Hard's service as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003, such as an amount to be paid him; and did not delegate to James H. Hard the power to conduct a hearing in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

110. On September 2, 2014, Mark E. Wilson, Health Officer of the Jefferson County Department of Health, notified James H. Hard that the GASP Request for Hearing is "assigned to you as Hearing Officer." GASP's Motion to Disqualify Hearing Officer

James H. Hard (filed Dec. 5, 2014) at Exhibit B (Doc. 19); Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusion of Law, and Recommendation (filed Apr. 3, 2015) at Exhibit B (Doc. 41). On September 3, 2014, counsel for GASP was notified by James H. Hard that he had been appointed as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 by the "appointing authority." GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) at 3 (Doc. 19).

111. Jefferson County Air Pollution Control R. & Regs. Chap. 12 does not delegate the powers of the Jefferson County Board of Health under Jefferson County Air Pollution Control R. & Regs., Part 12.23 to the Health Officer of the Jefferson County Department of Health. Accordingly, the Health Officer was without authority to appoint James H. Hard as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

112. 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 Company, Inc. Major Source Operating Permit No. 4-07-0001-03 includes the following inscription: "Approved: Mark E. Wilson, M.D., Health Officer." Respondent's Motion to Dismiss (filed Nov. 4, 2014) at Exhibit A (Doc. 12); GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) at Exhibit C (Doc. 19). Thus, Mark E. Wilson, Health Officer of the Jefferson County

Department of Health, advocated in connection with the specific controversy underlying this contested case, *i.e.*, the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc.

113. James H. Hard's power to serve as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 and terms of employment, including compensation, are subject to the authority of Mark E. Wilson, Health Officer, who advocated in connection with the reissuance of Major Source Operating Permit No. 4-07-0001-03.

114. James H. Hard was not hired or employed by the Jefferson County Board of Health to serve as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 as required by Jefferson County Air Pollution Control R. & Regs., Section 12.23.1. Accordingly, he lacked the authority to act as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

115. James H. Hard was not delegated the power to conduct a hearing in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 by the Jefferson County Board of Health as required by Jefferson County Air Pollution Control R. & Regs., Section 12.23.2. Accordingly, he lacked the authority to act as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

116. James H. Hard was prohibited by Ala. Code § 41-22-18(a) from participating in the making of Proposed Findings of Fact, Conclusions of Law, and Recommendation in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003, because he is subject to the authority, direction, or discretion of Mark E. Wilson, a person who has advocated in connection the reissuance of Major Source Operating Permit No. 4-07-0001-03.

117. The Jefferson County Board of Health's April 8, 2015 Order summarily denying GASP's April 3, 2015 Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a) or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a).

118. GASP's right to a hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., has been prejudiced by the Jefferson County Board of Health's denial of GASP's April 3, 2015 Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law and Recommendation and subsequent adoption of the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation "in its entirety as the Board's Final Order" dismissing GASP's Request for Hearing.

3. The Hearing Officer's denial of GASP's Motion for Disclosure is an abuse of discretion.

119. On September 9, 2014, GASP filed a Motion for Disclosure seeking the following:

- A resolution adopted by the Board of Health authorizing James H. Hard to act as Hearing Officer for the Board;
- Minutes of the meeting of the Board of Health where James H. Hard was authorized to act as Hearing Officer for the Board;
- All documents, correspondence, and communications authorizing James H. Hard to act as Hearing Officer for the Board;
- The name and official title of the person or persons who appointed James H. Hard as Hearing Officer;
- The relationship of such official to other officials in the Jefferson County Department of Health;
- A copy of the contract or agreement under which James H. Hard will provide services and be paid;
- A description of the method by which James H. Hard was selected as Hearing Officer;
- All services provided by James H. Hard to the Jefferson County Board of Health or Jefferson County Department of Health prior to August 27, 2014; and
- Whether James H. Hard may provide future services to the Board of Health or Jefferson County Department of Health, including appointment as Hearing Officer for the Board of Health on any matter, including a request for hearing on the issuance of a Major Source Operating Permit to Walter Coke, Inc.

GASP's Motion for Disclosure (filed Sep. 9, 2014) (Doc. 3).

120. The grounds offered by GASP for disclosure of the foregoing was that it was necessary for GASP “[t]o evaluate whether James H. Hard’s appointment as Hearing Officer is valid and lawful and whether James H. Hand is duly authorized to act as Hearing Officer for the Board;” [t]o evaluate whether James H. Hard’s appointment as Hearing Officer is contrary to Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 or Ala. Code § 41-22-18(a), or would preclude the Hearing Officer from making a proposed order;” and “[t]o evaluate whether the appointment of James H. Hard as Hearing Officer violates Petitioner’s due process right to a hearing before a fair and impartial hearing officer.” GASP’s Motion for Disclosure (filed Sep. 9, 2014) (Doc. 3).

121. Additional filings related to GASP’s Motion for Disclosure include: Respondent’s Opposition to Petitioner’s Motion for Disclosure (filed Sep. 12, 2014) (Doc. 4); and GASP’s Reply to JCDH’s Opposition to GASP’s Motion for Disclosure (filed Sep. 30, 2014) (Doc. 6).

122. On October 27, 2014, the Hearing Officer summarily denied GASP’s Motion for Disclosure. Order (filed Oct. 27, 2014) (Doc. 11).

123. The issue of whether James H. Hard’s appointment as Hearing Officer is valid and lawful and whether James H. Hard is duly authorized to act as Hearing Officer for the Board of Health is an appropriate matter for inquiry. GASP is entitled to a hearing before the Jefferson County Board of Health or its designated Hearing Officer. Jefferson County Air Pollution Control R. & Regs., Part 12.3. Any such Hearing Officer must be

“hire[d] or employ[ed]” by the Board of Health and must be “delegate[d] . . . the power to conduct hearings of contested administrative actions of the Program” by the Board of Health. *Id.* at Sections 12.3.1 & 12.3.2.

124. Several of the documents sought in GASP’s Motion for Disclosure are relevant to the issue of whether James H. Hard’s appointment as Hearing Officer is valid and lawful and whether James H. Hard is duly authorized to act as Hearing Officer for the Board of Health in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003.

125. While GASP contends that the Jefferson County Board of Health did not hire or employ James H. Hard to serve as a Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 and did not delegate to James H. Hard the power to conduct a hearing in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003, such contentions are based on the limited evidence available to GASP. *See* GASP’s Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) (Doc. 19); GASP’s Reply to ABC Coke’s and JCDH’s Responses to Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 23); Affidavit of Stacie M. Propst in Support of GASP’s Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 24). GASP has been denied access to all evidence relevant to whether James H. Hard has the

appropriate authority to serve as Hearing Officer in *GASP v. Jefferson County*

Department of Health Air Pollution Control Program, No. 2014-003.

126. The issue of whether James H. Hard's appointment as Hearing Officer is contrary to Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 or Ala. Code § 41-22-18(a), or would preclude the Hearing Officer from making a proposed order is an appropriate matter for inquiry. GASP is entitled to a hearing before the Jefferson County Board of Health or its designated Hearing Officer. Jefferson County Air Pollution Control R. & Regs., Part 12.3. Any such Hearing Officer must be in compliance with Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 and Ala. Code § 41-22-18(a).

127. Several of the documents sought in GASP's Motion for Disclosure are relevant to the issue of whether James H. Hard is "subject to the authority, direction or discretion of the Director of the Program or any other person subject to the authority, direction, or discretion of the Director of the Program" as prohibited by Jefferson County Air Pollution Control R. & Regs., 12.23.1, or is "subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with . . . the specific controversy underlying that contested case" as prohibited by Ala. Code § 41-22-18(a).

128. While GASP contends that James H. Hard is subject to the authority, direction or discretion of the Health Officer who both approved the reissuance of Major

Source Operating Permit No. 4-07-0001-03 and appointed him to serve as hearing officer in GASP's contest of the reissuance of Major Source Operating Permit No. 4-07-0001-03 in violation of Ala. Code § 41-22-18(a), such contentions are based on the limited evidence available to GASP. *See* GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) (Doc. 19); GASP's Reply to ABC Coke's and JCDH's Responses to Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 23); Affidavit of Stacie M. Propst in Support of GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 24). GASP has been denied access to all evidence relevant to whether James H. Hard is "subject to the authority, direction or discretion of the Director of the Program or any other person subject to the authority, direction, or discretion of the Director of the Program" as prohibited by Jefferson County Air Pollution Control R. & Regs., 12.23.1, or is "subject to the authority, direction or discretion of any person who has prosecuted or advocated in connection with . . . the specific controversy underlying that contested case" as prohibited by Ala. Code § 41-22-18(a).

129. The issue of whether the appointment of James H. Hard as Hearing Officer violates GASP's due process right to a hearing before a fair and impartial hearing officer is an appropriate matter for inquiry. GASP is entitled to a fair and impartial hearing officer under Ala. Const. 1901, art. I, § 13 and U.S. Const., amend XIV, § 1.

130. Several of the documents sought in GASP's Motion for Disclosure are relevant to the issue of whether the appointment of James H. Hard as Hearing Officer violates GASP's due process right to a hearing before a fair and impartial hearing officer based on *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 147 (1st Cir. 2008). There, the Court held that the method by which hearing examiners were selected (at discretion of agency) and paid (hourly rate) made the examiner vulnerable to the temptation to make recommendations favorable to the agency. The Court concluded that this practice introduced such a high risk of bias that it was unconstitutional. *See* Motion for Disclosure (filed Sep. 9, 2014) at 6-7 (Doc. 3). *See also* GASP's Response to Respondent's and Intervenor's Motions to Strike Affidavit of Stacie M. Propst (filed Jan. 5, 2015) at 4-5 (Doc. 27).

131. GASP has been denied access to all evidence relevant to whether the appointment of James H. Hard as Hearing Officer violates GASP's due process right to a hearing before a fair and impartial hearing officer.

132. GASP's right to ensure that the hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., is before a hearing officer with lawful authority has been prejudiced by the Hearing Officer's abuse of discretion in his denial of GASP's Motion for Disclosure. Order (filed Oct. 27, 2014) (Doc. 11). GASP's right to ensure that the hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A

Division of Drummond Company, Inc., is before a hearing officer who is free from the conflicts prohibited by Jefferson County Air Pollution Control R. & Regs., Section 12.23.1 and Ala. Code § 41-22-18(a) has been prejudiced by the Hearing Officer's abuse of discretion in his denial of GASP's Motion for Disclosure. Order (filed Oct. 27, 2014) (Doc. 11). GASP's right to ensure that the hearing to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc., is before a hearing officer who is free from the unconstitutional temptation to make recommendations favorable to the agency has been prejudiced by the Hearing Officer's abuse of discretion in his denial of GASP's Motion for Disclosure. Order (filed Oct. 27, 2014) (Doc. 11).

4. The Hearing Officer's grant of ABC Coke's Motion to Intervene is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.7 or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.7.

133. Jefferson County Air Pollution Control R. & Regs., Section 12.7.1 provides the conditions that must be met for intervention:

Upon timely application filed with the Board, any person shall be permitted to intervene in any hearing to contest an administrative action of the Program when a statute confers an unconditional right to intervene, or when the applicant has an individual interest in the outcome of the hearing as distinguished from a public interest and *the representation of the interest of the applicant by persons already made parties is inadequate.*

See Ala. Code § 41-22-14 (same conditions for intervention in contested cases under the Alabama Administrative Procedure Act). An application to intervene shall contain “a

statement of why the representation of the interest of the applicant by persons already parties in the hearing is inadequate.” Jefferson County Air Pollution Control R. & Regs., Section 12.7.2.

134. On September 11, 2014, “ABC Coke” filed ABC Coke’s Motion to Intervene. ABC Coke’s Motion to Intervene (filed Sep. 1, 2014) (Doc. 2). The Motion to Intervene alleges that “[a]s the Permittee, ABC Coke has significant and unique contractual and property interests in the subject matter of this action, which neither GASP nor the Program can adequately represent.” *Id.* at 1.

135. On September 23, 2014, GASP filed its Opposition to ABC Coke’s Motion to Intervene in which GASP alleged that ABC Coke’s interest in having Major Source Operating Permit No. 4-07-0001-03 approved by the Jefferson County Board of Health without change is adequately represented by an existing party – the Jefferson County Department of Health Air Pollution Control Program. GASP’s Opposition to ABC Coke’s Motion to Intervene (filed Sep. 23, 2014) (Doc. 5).

136. Additional filings related to ABC Coke’s Motion to Intervene include: ABC Coke’s Reply in Support of its Motion to Intervene (filed Oct. 3, 2014) (Doc. 7); GASP’s Sur-Reply in Opposition to ABC Coke’s Motion to Intervene (filed Oct. 15, 2014) (Doc. 9); ABC Coke’s Motion to Strike Sur-Reply (filed Oct. 13, 2014) (Doc. 8); and GASP’s Opposition to ABC Coke’s Motion to Strike (filed Oct. 17, 2014) (Doc. 10).

137. On October 27, 2014, Hearing Officer James H. Hard summarily granted ABC Coke's Motion to Intervene. Order on Motions (Oct. 27, 2014) (Doc. 11).

138. Intervention by a permittee in a proceeding contesting the issuance or reissuance of a permit by the Jefferson County Department of Health Air Pollution Control Program is not an unconditional right conferred by statute. Accordingly, ABC Coke does not have an unconditional right to intervene simply because it is a permittee.

139. "Permissive" intervention, like that authorized by Ala. R. Civ. P. R. 24(b), is not authorized under Jefferson County Air Pollution Control R. & Regs. Section 12.7.1.

140. Every applicant for intervention in a proceeding contesting the issuance or reissuance of a permit by the Jefferson County Department of Health Air Pollution Control Program must demonstrate that the representation of its interest by persons already made parties is inadequate.

141. Where the objectives of an existing party and proposed intervenor are nearly identical, intervention should be denied, *United States v. City of Miami*, 278 F.3d 1174, 1178-79 (11th Cir. 2002); *Meek v. Metro Dade County, Fla.*, 985 F.2d 1471, 1477 (11th Cir. 1993), *abrogated on other grounds by Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 2007); *Root v. City of Mobile*, 592 So.2d 1051, 1053 (Ala. 1992); *Athens Lumber Co., Inc.*, 690 F.2d 1364, 1366-67 (11th Cir. 1982), absent proof of collusion between the representative and an opposing party, adversity of interests between the representative and the proposed intervenor, or failure by the representative to fulfill a

duty. *FSLIC v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 215 (11th Cir. 1993). When an existing party seeks the same objectives as the would-be interveners, adequate representation is presumed. *Sierra Club, Inc. v. Leavitt*, 488 F.3d 904, 910 (11th Cir. 2007); *Associated Indus. of Alabama, Inc. v. Train*, 543 F.2d 1159, 1161 n.7 (5th Cir. 1976). *Cf. Kids Klub II, Inc. v. Dep't of Human Res.*, 763 So.2d 259, 261 (Ala. Civ. App. 2000) (license applicant was entitled to intervene in agency's appeal of ALJ's decision reversing agency's denial of license when the only party participating in the appeal was the agency that denied the license – *i.e.*, there was no representation of the licensee's interest in maintaining the favorable decision of the ALJ).

142. The Jefferson County Department of Health Air Pollution Control Program and ABC Coke share the identical objective – assuring that the Jefferson County Board of Health approves Major Source Operating Permit No. 4-07-0001-03 without change. *See Kids Klub II, Inc. v. Dep't of Human Res.*, 763 So.2d 259, 261 (Ala. Civ. App. 2000) (“KKII’s ‘interest’ in the appeal to the circuit court is simply its interest in maintaining the judgment in which the administrative law judge ordered that KKII be awarded a nighttime-care license.”).

143. In a belated effort to differentiate its interest from the interest of the Jefferson County Air Pollution Control Program, ABC Coke characterized its interests as follows: “[1] to operate pursuant to the terms of the Permit without alteration; [2] to protect its business interests in such operation, which are significant; and [3] to have an

opportunity to refute mischaracterizations of its operations, the Permit, and other subjects of this proceeding.” ABC Coke’s Reply in Support of Its Motion to Intervene at 7 (filed Oct. 3, 2014) (Doc. 7). As stated in GASP’s Sur-Reply in Opposition to ABC Coke’s Motion to Intervene (filed Oct. 15, 2014) at 12 (Doc. 9), this revised statement of ABC Coke’s interests is not included in ABC Coke’s Motion to Intervene as is required by Jefferson County Air Pollution Control R. & Regs. Section 12.7.2(c). Furthermore,

[W]hat ABC Coke has described as “interests” [1] and [2] are really motivations for pursuing its real interest – approval of Major Source Operating Permit No. 4-07-0001-03 by the Board of Health without change. If the permit is approved, ABC Coke’s “interests” [1] and [2] will be fully protected. What ABC Coke has described as “interest” [3] is merely the expression of ABC Coke’s desire to participate in the hearing so that it might take a different litigation strategy than the Program might. “A mere difference of opinion concerning the tactics with which the litigation should be handled does not make inadequate the representation of those whose interests are identical with that of an existing party . . .” *Jones v. Prince George’s Cnty.*, 348 F.3d 1014, 1020 (D.C. Cir. 2003) (quoting 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1909, at 344 (2d ed. 1986)). *Accord, Little Rock Sch. Dist. v. North Little Rock Sch. Dist.*, 378 F.3d 774, 780 (8th Cir. 2004) (“It is not sufficient that the party seeking intervention merely disagrees with the litigation strategy or objectives of the party representing its interests.”). That ABC Coke might assert its interest with arguably greater fervor than the Program and might make different procedural choices, does not make its interest distinct. *See id.* at 781.

GASP’s Sur-Reply in Opposition to ABC Coke’s Motion to Intervene (filed Oct. 15, 2014) at 12-13 (Doc. 9).

144. ABC Coke presented no proof of collusion between the Jefferson County Department of Health Air Pollution Control Program and GASP; no proof of adversity of

interests between the Jefferson County Department of Health Air Pollution Control Program and ABC Coke; and no proof of failure by the Jefferson County Department of Health Air Pollution Control Program to fulfill any duty. In fact, the Jefferson County Department of Health Air Pollution Control Program has defended Major Source Operating Permit No. 4-07-0001-03 as vigorously as, and in “lock step” with, ABC Coke. *Compare* Respondent’s Motion to Dismiss (filed Nov. 4, 2014) (Doc. 12) *with* ABC Coke’s Motion to Dismiss (filed Nov. 4, 2014) (Doc. 13); *compare* Respondent’s Opposition to Petitioner’s Motion to Disqualify the Hearing Officer (filed Dec. 10, 2014) (Doc. 21) *with* ABC Coke’s Response to GASP’s Motion to Disqualify Hearing Officer (filed Dec. 10, 2014) (Doc. 20); *compare* Respondent’s Motion to Strike Affidavit of Stacie M. Propst (filed Dec. 23, 2014) (Doc. 25) *with* ABC Coke’s Motion to Strike Affidavit of Stacie M. Propst (filed Dec. 23, 2014) (Doc. 26); Respondent’s and Intervenor’s Joint Response in Opposition to GASP’s Motion for Oral Argument (filed Apr. 7, 2015) (Doc. 43); Respondent’s and Intervenor’s Joint Opposition to Petitioner’s Motion to Board of Health to Disregard Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Apr. 7, 2015) (Doc. 44); Respondent’s and Intervenor’s Joint Response in Opposition to GASP’s Motion to Reject Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation and to Enter Alternative Order (filed Apr. 7, 2015) (Doc. 45).

145. The Jefferson County Department of Health Air Pollution Control Program adequately represents ABC Coke's interest in assuring that the Jefferson County Board of Health approves Major Source Operating Permit No. 4-07-0001-03 without change.

146. The Hearing Officer granted ABC Coke's Motion to Intervene in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.7 or based on an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.7.

147. Jefferson County Air Pollution Control R. & Regs., Part 12.7 confers on GASP the right to litigate only with the Jefferson County Department of Health Air Pollution Control Program and other parties who have been properly allowed to intervene because they are not adequately represented by existing parties. That right has been prejudiced by the Hearing Officer's grant of ABC Coke's Motion to Intervene. As a consequence, GASP has had to respond to filings by ABC Coke which it should not have had to, thereby expending time and expense to the detriment of its efforts to defend its right to contest Major Source Operating Permit No. 4-07-0001-03. Moreover, ABC Coke's intervention has significantly affected the outcome of the administrative appeal – The Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 19, 2015) (Doc. 39) are nearly identical to ABC Coke's Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6,

2015) (Doc. 35). GASP will suffer the same consequences to a much greater degree if the Jefferson County Board of Health is required to grant GASP a hearing.

E. Relief Sought

148. GASP prays that the Court will reverse the decision of the Jefferson County Board of Health dismissing GASP's Request for Hearing and remand the matter to the Board with directions to grant GASP a hearing on the reissuance of Major Source Operating Permit No. 4-07-0001-03. In addition, GASP prays that the Court will reverse the ruling of the Jefferson County Board of Health denying GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation; reverse the ruling of the Hearing Officer denying GASP's Motion for Disclosure; and reverse the ruling of the Hearing Officer granting ABC Coke's Motion to Intervene. GASP also prays that the Court grant such further or different relief to which it is entitled.

III. ALTERNATIVE PETITION FOR COMMON LAW WRIT OF CERTIORARI

149. If the Court determines that review of those agency actions identified in paragraph 6 *supra* is not available under Ala. Code § 41-22-20, GASP asserts that it is entitled, in the alternative, to petition for a common law writ of certiorari to review the decisions of the Jefferson County Board of Health and its Hearing Officer. *See e.g., Fox v. City of Huntsville*, 9 So.3d 1229, 1232 (Ala. 2008) (In the absence of a statute providing a right of appeal, administrative rulings may be reviewed under a common law

writ of certiorari); *Ex parte Boykins*, 862 So.2d 587, 593 (Ala. 2002) (same). A Court may convert an appeal to a petition for writ of certiorari. *See Robinson v. State*, 12 So.3d 58, 59 (Ala. 2008) (Circuit Court properly converted complaint for declaratory judgment to petition for common law writ of certiorari); *Heatherly v. Kemsel*, 504 So.2d 285, 286 (Ala. Civ. App. 1986) (“we are convinced that, here, substance governs rather than form and that the employee’s ‘appeal’ should be construed so as to do substantial justice under Rule 8(f), Alabama Rules of Civil Procedure, by treating that pleading as if it were certiorari proceedings.”); *Phillips v. City of Citronelle*, 961 So.2d 827, 830 n. 1 (Ala. Civ. App. 2007) (per curiam) (circuit court acted properly in treating complaint as petition for common-law writ of certiorari).

150. GASP incorporates by reference paragraphs 1 through 4 hereof.

A. Nature of Agency Actions

151. GASP incorporates by reference paragraph 5 hereof.

B. Particular Agency Actions

152. GASP incorporates by reference paragraph 6 hereof.

C. Facts and Law on Jurisdiction and Venue

153. GASP incorporates by reference paragraphs 16 through 26 and 30 through 147 hereof.

154. This alternative petition arises under the common law of England as adopted by Ala. Code § 1-3-1 and modified by decisions of the Alabama courts.

155. This Court has jurisdiction over this petition for common law writ of certiorari pursuant to Ala. Const. 1901 Amend. No. 328, Art. VI § 6.04(b) (“The circuit court shall exercise general jurisdiction in all cases except as may otherwise be provided by law”); and Ala. Code § 12-17-26 (“Circuit judges have the following authority and duties: (1) To grant . . . writs of certiorari . . .;”).

156. Venue of a petition for common law writ of certiorari to review an agency decision is appropriate in the circuit court of the county encompassing the situs of the governmental entity unless a specific provision to the contrary applies. *Ex parte Woods*, 941 So. 2d 259, 262 (Ala. 2006); *Boykins v. State*, 862 So. 2d 594, 595 (Ala. Crim. App. 2003), *overruled on other grounds*, *Collins v. Ala. Dep’t of Corrections*, 982 So. 2d 1078 (Ala. 2007); *Ex parte City of Birmingham*, 507 So.2d 471, 474 (Ala. 1987). The Jefferson County Board of Health maintains its headquarters in Jefferson County. Suits involving public officials are properly maintained in the county of their official residence. *Tri-State Corp. v. State ex rel. Gallion*, 128 So.2d 505, 509 (Ala. 1961). Jennifer R. Dollar, Nicole Redmond, Joshua Miller, Steven Kulback, and Max Michael, III, each maintain their official residence as members of the Jefferson County Board of Health in Jefferson County. Accordingly, venue is appropriate in the Circuit Court for Jefferson County.

D. Grounds for Relief

157. On common-law certiorari review, the circuit court's scope of review is limited to determining if the subordinate tribunal's decision is supported by legal evidence and if the law was correctly applied to the facts. In addition, the court is responsible for reviewing the record to ensure that the fundamental rights of the parties, including the right to due process, has not been violated. *Franks v. Jordan*, 55 So.3d 1218, 1220-21 (Ala. Civ. App. 2010). *Accord, Fox v. City of Huntsville*, 9 So.3d 1229, 1232 (Ala. 2008).

158. GASP asserts that the Jefferson County Board of Health's dismissal of GASP's Request for Hearing is in violation of Jefferson County Air Pollution Control Rules and Regulations or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control Rules and Regulations. In support thereof, GASP incorporates by reference paragraphs 30 to 94 hereof.

159. GASP asserts that the Jefferson County Board of Health's denial of GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a) or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.23 and Ala. Code § 41-22-18(a). In support thereof, GASP incorporates by reference paragraphs 95 to 118 hereof.

160. GASP asserts that the Hearing Officer's denial of GASP's Motion for Disclosure is an abuse of discretion. In support thereof, GASP incorporates by reference paragraphs 119 to 132 hereof.

161. GASP asserts that the Hearing Officer's grant of ABC Coke's Motion to Intervene is in violation of Jefferson County Air Pollution Control R. & Regs., Part 12.7 or affected by an erroneous application or interpretation of Jefferson County Air Pollution Control R. & Regs., Part 12.7. In support thereof, GASP incorporates by reference paragraphs 133-147.

E. Relief Sought

162. GASP prays that the Court will set aside the decision of the Jefferson County Board of Health dismissing GASP's Request for Hearing and remand the matter to the Board with directions to grant GASP's Request for Hearing on the reissuance of Major Source Operating Permit No. 4-07-0001-03. In addition, GASP prays that the Court will set aside the ruling of the Jefferson County Board of Health denying GASP's Motion to Board of Health to Disregard Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation, set aside the ruling of the Hearing Officer denying GASP's Motion for Disclosure, and set aside the ruling of the Hearing Officer granting ABC Coke's Motion to Intervene with directions to enter new rulings consistent with the Court's judgment. GASP also prays that the Court grant such further or different relief to which it is entitled.

IV. CLAIM FOR PROCEDURAL DUE PROCESS VIOLATIONS

163. GASP incorporates by reference paragraphs 1 through 4, 16 through 26, and 30 through 147 hereof.

164. “It is well settled law that due process must be observed by all boards . . .” *Ex parte Case*, 925 So.2d 956, 960 (Ala. 2005). *Accord, Withrow v. Larkin*, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464 (1975). Procedural due process requires more than a hearing. “An unbiased and impartial decision-maker is one of the most, if not the most, fundamental of requirements of fairness and due process.” *State Tenure Comm'n v. Page*, 777 So.2d 126, 131 (Ala. Civ. App. 2000) (quoting *Stallworth v. City of Evergreen*, 680 So.2d 229, 233-234 (Ala. 1996)). “Not only is a biased decisionmaker constitutionally unacceptable, but ‘our system of law has always endeavored to prevent even the probability of unfairness.’” *Withrow v. Larkin*, 421 U.S. at 47, 95 S. Ct. at 1464 (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955)). “Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof . . . , or which might lead him not to hold the balance nice, clear and true between the State and [an opposing party], denies the latter due process of law.” *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S. Ct. 437, 444 (1927).

165. “In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in

which the adjudicator has a pecuniary interest in the outcome,” *Withrow v. Larkin*, 421 U.S. at 46-47, 95 S. Ct. at 1464 (citations omitted). *Accord, Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009).

166. The United States Supreme Court has held that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable when the decision will financially benefit the decisionmaker or the public fisc over which the decisionmaker also has responsibility. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S. Ct. 80 (1972) (Petitioner was denied a trial before a disinterested and impartial judicial officer as guaranteed by the Due Process Clause of the Fourteenth Amendment where he was compelled to stand trial for traffic offenses before the mayor, who was responsible for village finances and whose court, through fines, forfeitures, costs, and fees, provided a substantial portion of village funds); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S. Ct. 2252 (2009) (the objective standards implementing the Due Process Clause do not require proof of actual bias; rather, the question is whether, “under a realistic appraisal of psychological tendencies and human weakness,” a judge’s financial interest “poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-825, 106 S.Ct. 1580, 1586-1587 (1986) (justice who was a judge in one case and party in another case had a direct, personal, substantial, and pecuniary interest in deciding issues in the first case that would inure to his benefit in the

second case); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S. Ct. 1689, 1698 (1973) (an administrative board composed of optometrists had a pecuniary interest of “sufficient substance” so that it could not preside over a hearing against competing optometrists).

167. In *Tumey v. Ohio*, Tumey was arrested and charged with unlawfully possessing intoxicating liquor. He was brought before the Mayor of the Village of North College Hill sitting as the “Liquor Court.” Tumey was convicted and fined \$100, \$12 of which was received and retained by the Mayor for his fees and costs. A portion of the fine was also retained by the Village for its general use. On review, the United States Supreme Court held that Tumey was entitled to have been tried before an impartial judge and that the Mayor was disqualified “both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village.” 273 U.S. at 535, 47 S. Ct. at 445. The Court explained:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.

But the pecuniary interest of the Mayor in the result of his judgment is not the only reason for holding that due process of law is denied to the defendant here. The statutes were drawn to stimulate small municipalities in the country part of counties in which there are large cities, to organize and maintain courts to try persons accused of violations of the Prohibition Act everywhere in the county. The inducement is offered of dividing

between the State and the village the large fines provided by the law for its violations. The trial is to be had before a mayor without a jury, without opportunity for retrial, and with a review confined to questions of law presented by a bill of exceptions, with no opportunity by the reviewing court to set aside the judgment on the weighing of evidence unless it should appear to be so manifestly against the evidence as to indicate mistake, bias or willful disregard of duty by the trial court. The statute specifically authorizes the village to employ detectives, deputy marshals, and other assistants to detect crime of this kind all over the county, and to bring offenders before the Mayor's court, and it offers to the village council and its officers a means of substantially adding to the income of the village to relieve it from further taxation. The mayor is the chief executive of the village. He supervises all the other executive officers. He is charged with the business of looking after the finances of the village. It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it, in the pecuniarily successful conduct of such a court. The mayor represents the village, and cannot escape his representative capacity. On the other hand, he is given the judicial duty, first, of determining whether the defendant is guilty at all, and second, having found his guilt, to measure his punishment between \$100 as a minimum and \$1,000 as a maximum for first offenses, and \$300 as a minimum and \$2,000 as a maximum for second offenses. With his interest as mayor in the financial condition of the village, and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial or a fair sentence from one who would have so strong a motive to help his village by conviction and a heavy fine?

Id. at 532-533, 47 S. Ct. at 444-445.

168. Later, in *Ward v. Village of Monroeville*, Ward was compelled to stand trial for two traffic offenses before the Mayor's Court of Monroeville. He was convicted and fined \$50 for each offense. The Mayor received no portion of the fine. Instead, the fines were remitted to the municipal treasury. A major part of village income was derived from the fines, forfeitures, costs, and fees imposed by the Mayor in his court. In 1964, this

income contributed \$23,589.50 of total village revenues of \$46,355.38; in 1965, it was 18,508.95 of \$46,752.60; in 1966, it was \$16,085 of \$43,585.13; in 1967, it was \$20,060.65 of \$53,931.43; and in 1968, it was \$23,439.42 of \$52,995.95. The Mayor had wide executive powers, was president of the village council, votes in case of a tie, accounts annually to the council respecting village finances, fills vacancies in village offices, and has general overall supervision of village affairs. The Court held that, on these facts, Ward was denied “a neutral and detached judge . . .” 409 U.S. at 61-62, 93 S. Ct. at 84. The Court explained:

[T]he test is whether the mayor’s situation is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused. Plainly that “possible temptation” may also exist when the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court. This, too, is a situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Id. at 60, 93 S. Ct. at 83 (citations and internal quotation marks omitted).

169. More recently, the United States Court of Appeals for the First Circuit was confronted with case where an administrative board sought to impose an administrative fine that would financially benefit the board. In *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3rd 136 (1st Cir. 2008), Esso obtained a summary judgment and permanent injunction against several members and officials of the Puerto Rico Environmental

Quality Board (“EQB”) who had proposed to levy a \$76 million fine on Esso after conducting hearings that were held not to have been impartial. The defendants appealed. On review, the Court of Appeals affirmed explaining that the EQB is tasked with the responsibility of adopting and enforcing Puerto Rico’s environmental statutes and regulations; the EQB is empowered to impose sanctions and administrative fines on violators; those administrative fines – “the crux of this case” – are then deposited into the “Special Account of the Board on Environmental Quality;” and that money is then placed at the disposal of the EQB through payment orders authorized or signed by the Chairperson of the EQB. On these facts, the Court wrote:

Esso asserts that it was denied a fair hearing because of the EQB’s structural bias. Specifically, Esso contends that the EQB has an institutional interest in imposing hefty fines because the collected monies are deposited into an EQB Special Account over which the EQB has limitless discretion. Moreover, in this case, the proposed fine – \$76 million – is more than double the EQB’s annual budget. In response, the defendants attempt to focus the inquiry on the individual members of the EQB, rather than the agency as a whole; the EQB Governing Board members are salaried and thus have no personal pecuniary interest in the fines imposed and collected by the agency.

Not only is the defendants’ argument utterly unsupported by the law, but we have already rejected it. *See Esso I*, 389 F.3d at 219. On last appeal, we expressly stated,

[T]he adjudicative body stands to benefit financially from the proceeding because any fine imposed will flow directly to the EQB’s budget. Although members of the EQB Governing Board may not stand to gain personally . . . a pecuniary interest need not be personal to compromise an adjudicator’s neutrality.

Id. at 218-19. * * *

Last time, we properly concluded that the bias stems from the potential financial benefit to the EQB’s budget as a result of an imposed fine. *Esso I*, 389 F.3d at 219; *cf. Ward v. Vill. of Monroeville*, 409 U.S. 57, 59-60, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (invalidating the mayor’s court because a substantial portion of the village funds were comprised of the fines he imposed for traffic violations). In *Ward*, the Supreme Court expressed concerns that the funding structure would “offer a possible temptation to the average man” to the extent that there is a “situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial [and] necessarily involves a lack of due process of law.” *Ward*, 409 U.S. at 60, 93 S.Ct. 80 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 534, 47 S.Ct. 437, 71 L.Ed. 749 (1927)). This is not a situation in which the EQB Governing Board is so removed from the financial policy of the Special Account that such a presumption of bias is inapplicable. *Cf. Dugan v. Ohio*, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed. 784 (1928). Rather, this is a case in which the EQB has complete discretion over the usage of those funds which are supplied, at least in part, by fines which it imposes. In this particular case, the possibility of temptation is undeniable and evident in the fact that the size of the proposed fine in this case is so unprecedented and extraordinarily large. The \$76 million proposed fine – a sum twice the EQB’s annual operating budget and 5,000 times greater than the largest fine ever imposed by the EQB – only intensifies the appearance of bias infecting the proceedings.

Id. at 146-147.

170. The due process guaranteed under the Alabama Constitution is interpreted to be coextensive with the due process guaranteed under the United States Constitution. *See Ex parte Dragomir*, 65 So.3d at 390 (“This Court has interpreted the due process guaranteed under the Alabama Constitution to be coextensive with the due process guaranteed under the United States Constitution”) (quoting *Ex parte Excelsior Fin., Inc.*,

42 So.3d 96, 101 (Ala. 2010), in turn quoting *Elliott v. Van Kleeef*, 830 So.2d 726, 730 (Ala. 2002)).

171. Subsequent “neutral judicial review” does not cure due process violations. *Ward v. Village of Monroeville*, 409 U.S. at 61-62, 93 S. Ct. at 83-84; *Concrete Pipe and Prod. of Calif., Inc. v. Constr. Laborers Pension Trust for S. Calif.*, 508 U.S. 602, 618, 113 S. Ct. 2264, 2277 (1993) (“Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator”).

A. GASP has been denied procedural due process because the pay of Hearing Officer James H. Hard is entirely dependent upon the discretionary assignment of appeals of administrative actions by the Health Officer making him vulnerable to the temptation to make recommendations favorable to the Jefferson County Department of Health.

172. James H. Hard was assigned as the Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 (filed Aug. 26, 2014) by and at the discretion of Mark E. Wilson, Health Officer. See GASP’s Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 5, 2014) at Exhibit B (Doc. 19). James H. Hard’s compensation for his services as Hearing Officer for the Jefferson County Board of Health is entirely dependent upon the discretionary assignment of cases by the Health Officer (or the Board of Health).

173. In *Esso Standard Oil Co. v. Lopez-Frevtes*, the Court held that because a Hearing Examiner's pay is entirely dependent upon the discretionary assignment of cases

from the Environmental Quality Board (EQB), the examiner is vulnerable to the temptation to make recommendations favorable to the Board. The Court explained:

Hearing Examiners are independent contractors who sign a one-year contract for employment with the EQB and are paid a fixed hourly rate. They preside over the administrative hearing and make recommendations to the Governing Board of the EQB as to whether a fine should be levied. They are assigned cases pursuant to the discretion of the EQB; those cases include administrative investigative proceedings, quasi-judicial proceedings, and legislative proceedings.

The district court concluded that the contractual relationship between the EQB and the Hearing Examiners exhibited structural bias on account of both the method by which the Hearing Examiners receive assignments and because of the particularities within the pay structure. We agree. Hearing Examiners are not protected from the pressures of political appointments and their employment is entirely dependent on the EQB's willingness to assign cases to them. Furthermore, the evidence on the record indicates that the Hearing Examiner's contract in this case provides an hourly salary rate with a set maximum number of hours for work. Notably, there is no provision for a minimum number of hours. Given that a Hearing Examiner's pay is entirely dependent upon the discretionary assignment of cases from the EQB, the examiner is vulnerable to the temptation to make recommendations favorable to the EQB.

Id. at 147.

174. The average man sitting as a Hearing Officer for the Jefferson County Board of Health would be vulnerable to the “possible temptation” to make recommendations favorable to the Health Officer (or Board of Health) to enhance the probability that he will receive additional assignments of cases and additional compensation for his services in the future. This “possible temptation” to the average man “is too high to be constitutionally tolerable.”

175. Accordingly, the assignment of James H. Hard as Hearing Officer in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 denied GASP due process under Ala. Const. 1901, art. I, § 13 and U.S. Const., amend. XIV, § 1.

176. GASP prays that the Court set aside the decision of the Jefferson County Board of Health dismissing GASP's Request for Hearing, set aside all intermediate rulings of the Hearing Officer James H. Hard, and remand the matter to the Board with directions to make an assignment of another Hearing Officer in a manner that does not violate GASP's due process rights. GASP also prays that the Court grant such further or different relief to which it is entitled.

B. GASP has been denied procedural due process because Hearing Officer James H. Hard's compensation is dependent on the collection of permit fees from major sources of air pollution like ABC Coke, A Division of Drummond Company, Inc.

177. Jefferson County Air Pollution Control R. & Regs., Parts 16.4 and 16.5 impose operating permit fees on major sources of air pollution that must be paid to the Jefferson County Department of Health. *See also* Section 18.5.11 ("Permits shall contain a provision that states that the source (permittee) must have paid all fees required by these regulations or the permit is not valid.").

178. Jefferson County Air Pollution Control R. & Regs., Section 16.5.5 provides that "[a]ll fees generated by this program will be used to directly and indirectly support the Air Program."

179. Jefferson County Air Pollution Control R. & Regs., Section 12.23.1

provides that “Hearing Officers . . . shall be paid an amount prescribed by the Board from Program funds . . .”

180. General Permit Condition No. 24 of Major Source Operating Permit No. 4-07-0001-3 reissued to ABC Coke, A Division of Drummond Company, Inc. on August 11, 2014 provides as follows:

Payment of Fees

The permittee must have paid all fees required by the Rules and Regulations or this Operating Permit is not valid. Payment of Operating Permit fees required under Part 16.4 of the Rules and Regulations shall be made on or before the date specified under Section 16.5.1 of the Rules and Regulations of each year. Failure to make payment of fees within 30 days of the specified date shall cause the assessment of a late fee of 3 percent (3% of the original fee) per month or fraction thereof.

181. Jefferson County Air Pollution Control R. & Regs., Section 16.5.3 provides that “[f]ailure to submit payment as required in this Chapter shall be cause for revocation of air and or operating permit(s).”

182. In Fiscal Year 2013 (Oct. 1, 2012 to Sep. 30, 2013), the Jefferson County Department of Health collected \$950,346 in operating permit fees from all major sources of air pollution. In Fiscal Year 2014 (Oct. 1, 2013 to Sep. 30, 2014), the Jefferson County Department of Health collected \$911,769 in operating permit fees from all major sources of air pollution.

183. In Fiscal Year 2013 (Oct. 1, 2012 to Sep. 30, 2013), the Jefferson County Department of Health expended \$679,288 on its Air Pollution Control Program for major

sources of air pollution. In Fiscal Year 2014 (Oct. 1, 2013 to Sep. 30, 2014), the Jefferson County Department of Health expended \$514,280 on its Air Pollution Control Program for major sources of air pollution.

184. In Fiscal Year 2013 (Oct. 1, 2012 to Sep. 30, 2013), ABC Coke, A Division of Drummond Company, Inc., paid to the Jefferson County Department of Health \$142,482 in operating permit fees. In Fiscal Year 2014 (Oct. 1, 2013 to Sep. 30, 2014), ABC Coke, A Division of Drummond Company, Inc., paid to the Jefferson County Department of Health \$140,966 in operating permit fees.

185. The operating permit fees paid by ABC Coke, A Division of Drummond Company, Inc., in Fiscal Year 2013 account for 15% of all operating permit fees collected by the Jefferson County Department of Health during that year. The operating permit fees paid by ABC Coke, A Division of Drummond Company, Inc., in Fiscal Year 2014 account for 15% of all operating permit fees collected by the Jefferson County Department of Health during that year.

186. The operating permit fees paid by ABC Coke, A Division of Drummond Company, Inc., in Fiscal Year 2013 amount to 21% of the expenditures by the Jefferson County Department of Health on its Air Pollution Control Program for major sources of pollution during that year. The operating permit fees paid by ABC Coke, A Division of Drummond Company, Inc., in Fiscal Year 2014 amount to 27% of the expenditures by the

Jefferson County Department of Health on its Air Pollution Control Program for major sources of pollution during that year.

187. August 28, 2014, GASP filed a Request for Hearing with the Jefferson County Board of Health to contest the reissuance of Major Source Operating Permit No. 4-07-0001-03 to ABC Coke, A Division of Drummond Company, Inc. GASP sought the disapproval of Major Source Operating Permit No. 4-07-0001-03 in its entirety.

188. If successful in obtaining disapproval of Major Source Operating Permit No. 4-07-0001-3, ABC Coke, A Division of Drummond Company, Inc., will not be permitted to operate and will not be required to pay fees to the Jefferson County Department of Health to support the Air Pollution Control Program, including the payment of compensation to Hearing Officer James H. Hard. If unsuccessful in obtaining disapproval of Major Source Operating Permit No. 4-07-0001-3, ABC Coke, A Division of Drummond Company, Inc., will be permitted to operate and will be required to pay fees to the Jefferson County Department of Health to support the Air Pollution Control Program, including the payment of compensation to Hearing Officer James H. Hard.

189. James H. Hard's pay for his services as Hearing Officer is substantially dependent upon the fees collected annually from permitted major sources of air pollution, including ABC Coke, A Division of Drummond Company, Inc. He is vulnerable, as the average man sitting as a Hearing Officer would be, to the "possible temptation" to make recommendations against disapproval of any operating permit, including Major Source

Operating Permit No. 4-07-0001-3, to enhance the coffers of the Air Pollution Control Program and ensure that the Program has funds available to pay for his services in the future. This possible temptation “is too high to be constitutionally tolerable” and violates due process under Ala. Const. 1901, art. I, § 13 and U.S. Const., amend. XIV, § 1, regardless of the honor, integrity and self-sacrifice of Hearing Officer James H. Hard.

190. GASP prays that the Court set aside the decision of the Jefferson County Board of Health dismissing GASP’s Request for Hearing, set aside all intermediate rulings of Hearing Officer James H. Hard, and remand the matter to the Board with directions to assign another Hearing Officer and make arrangements for the compensation of that Hearing Officer in a manner that does not violate GASP’s due process rights.

GASP also prays that the Court grant such further or different relief to which it is entitled.

C. GASP has been denied procedural due process because the attorneys for the Jefferson County Board of Health are also the attorneys for the Jefferson County Air Pollution Control Program.

191. The Spain & Gillon, LLC law firm has repeatedly entered annual contracts to represent the Jefferson County Board of Health, including a contract with a term of March 1, 2014 to February 28, 2015 and a contract with a term of March 1, 2015 to February 29, 2016.

192. David S. Maxey and Wade C. Merritt are attorneys in the Spain & Gillon, LLC law firm.

193. David S. Maxey has represented the Jefferson County Board of Health since 1993.

194. David S. Maxey and Wade C. Merritt represented the Jefferson County Air Pollution Control Program as the Respondent in opposition to Petitioner GASP in its Request for Hearing to contest the reissuance of Major Source Operating Permit No. 4-07-00001-03 before the Jefferson County Board of Health in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003. During such representation, they filed the following:

- Respondent's Opposition to Petitioner's Motion for Disclosure (filed Sep. 12, 2014) (Doc. 4) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent's Motion to Dismiss (filed Nov. 4, 2014) (Doc. 12) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Reply in Support of Respondent's Motion to Dismiss (filed Nov. 13, 2014) (Doc. 15) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent's Opposition to Petitioner's Motion to Disqualify the Hearing Officer (filed Dec. 10, 2014) (Doc. 21) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent's Motion to the Strike Affidavit of Stacie M. Propst in Support of GASP's Motion to Disqualify Hearing Officer James H. Hard (filed Dec. 23, 2014) (Doc. 25) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Response to the Hearing Officer's Order (filed Jan. 30, 2015) (Doc. 29) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);

- Respondent’s Reply in Support of Its Motion to Strike the Affidavit of Stacie M. Propst (filed Jan. 30, 2015) (Doc. 30) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent’s Notice of Filing Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 38) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Hearing Officer’s Findings of Fact, Conclusions of Law, and Recommendation (filed Mar. 6, 2015) (Doc. 39);
- Respondent’s and Intervenor’s Joint Response in Opposition to GASP’s Motion for Oral Argument (filed Apr. 7, 2015) (Doc. 43) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent’s and Intervenor’s Joint Opposition to Petitioner’s Motion to Board of Health to Disregard Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation (filed Apr. 7, 2015) (Doc. 44) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent);
- Respondent’s and Intervenor’s Joint Opposition to Petitioner’s Motion to Reject Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Recommendation and to Enter Alternative Order (filed Apr. 7, 2015) (Doc. 45) (signed by Wade C. Merritt on behalf of Wade C. Merritt and David S. Maxey, Attorneys for Respondent).

195. On April 8, 2015, the Jefferson County Board of Health approved “a contract with Olivia Rowell, Esq. (payee) to provide legal counsel for the Jefferson County Board of Health . . . from March 27, 2015 through March 26, 2016.” Attorney Rowell advised the Board Chair on the matter of *GASP v. Jefferson County Department*

of Health Air Pollution Control Program, No. 2014-003 in preparation for the Board's consideration of such matter at its meeting on April 8, 2015.

196. In *Continental Telephone Co. v. Alabama Public Service Commission*, 479 So.2d 1195 (Ala. 1985) (per curiam), the Public Service Commission allowed Governor George C. Wallace, by and through the Public Staff for Utility Consumer Protection ("Public Staff"), to participate as an intervenor in a ratemaking proceeding. The Public Staff was, in fact, the *former* Trial Staff of the Commission "on loan" to the Governor. Members of the Public Staff continued to be employees of the Commission and the Commission committed to fund the Public Staff. *Id.* at 1199. The Court said:

It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases, but our system has always endeavored to prevent even the probability of unfairness.

Id. at 1200. The Court then found that "Continental's 'due process' rights were violated" because of the Public Staff's participation in the proceeding on behalf of the Governor.

Id. On the Governor's application for rehearing, the Court extended its opinion and reaffirmed its decision saying that "Continental adequately demonstrated that it was not accorded 'fundamental fairness' in the rate hearing; therefore, we are of the opinion that the Governor's application for rehearing on the 'due process' issue is due to be denied."

Id. at 1222. In a subsequent case, the Alabama Court of Civil Appeals Court explained that "Continental's due process rights were violated because the Public Staff was nothing more than an integral part of the Commission's trial staff under a different label. Thus,

the potential for prejudice which existed created a due process violation in and of itself.”
Evers v. Bd. of Medical Exam’rs, 516 So.2d 650, 652 (Ala. Civ. App. 1987) (emphasis added).

197. The potential for prejudice which existed because David S. Maxey and Wade C. Merritt represented the Jefferson County Board of Health during the same time that they represented the Jefferson County Air Pollution Control Program before the Jefferson County Board of Health in *GASP v. Jefferson County Department of Health Air Pollution Control Program*, No. 2014-003 (Jefferson Cnty. Bd. of Health, filed Aug. 26, 2014) denies GASP fundamental fairness and creates a due process violation in an of itself.

198. GASP prays that the Court set aside the decision of the Jefferson County Board of Health dismissing GASP’s Request for Hearing and remand the matter to the Board with directions to conduct a new hearing on GASP’s Request for Hearing in a manner that does not violate GASP’s due process rights. GASP also prays that the Court grant such further or different relief to which it is entitled.

Respectfully submitted,

s/ David A. Ludder

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CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that I have served the foregoing on the following persons by U.S. Mail addressed as follows:

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Done this 6th day of June, 2015.

s/ David A. Ludder
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