

**BEFORE THE  
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION**

IN THE MATTER OF:

PETITION TO AMEND ALA. (ADEM)  
ADMIN. CODE R. 335-2-1-.12

ENVIRONMENTAL DEFENSE ALLIANCE,

Petitioner.

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**PETITION TO AMEND ALA. (ADEM) ADMIN. CODE R. 335-2-1-.12**

**I. INTRODUCTION**

1. This petition proposes the adoption of an amendment to Ala. (ADEM) Admin. Code r. 335-2-1-.12(3) to make it consistent with Ala. Code 1975 § 22-22A-7(a)(2).

**II. PETITIONER**

2. The Petitioner is as follows:

Environmental Defense Alliance  
1116 20th Street South #526  
Birmingham, AL 35205-2612  
(205) 718-7336

**III. STATEMENT OF INTERESTS**

3. The Environmental Defense Alliance is a non-profit corporation that strategically uses law and policy to protect human health and the environment on behalf of the public and its members. The Alliance administers a program to ensure that government actions affecting human health and the environment are lawful. Members of the Alliance have contested administrative actions of the

Alabama Department of Environmental Management in the past and expect to do so again in the future.

**IV. PROPOSED AMENDMENT TO ALA. (ADEM) ADMIN. CODE R. 335-2-1-.12**

4. Petitioners request that the Commission amend Ala. (ADEM) Admin. Code r. 335-2-1-.12 as indicated below (stricken language to be deleted and underscored language to be added):

**335-2-1-.12 Subpoenas.**

(1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Chair of the Commission or the Hearing Officer may grant a request for a subpoena upon a showing of (a) the grounds and necessity therefor, and (b) the materiality and relevance of the evidence to be adduced. Request for the production of documents shall describe the evidence sought as specifically as practicable. A subpoena may be issued by the Chair of the Commission, the Hearing Officer, or a designee.

(2) Subpoenas shall be served in accordance with the Alabama Rules of Civil Procedure.

(3) Witnesses summoned before the Hearing Officer shall be paid the same fees for attendance and mileage travel that are paid witnesses in the courts of Alabama. Fees shall be paid ~~by the party at whose instance the witness appears.~~ ~~Where a witness appears pursuant to a request initiated by the Commission or Hearing Officer, fees shall be paid by~~ from funds of the Department.

**V. EVIDENCE, DATA, AND INFORMATION SUPPORTING PROPOSED AMENDMENT**

5. In 1982, the Alabama Legislature enacted the Alabama Environmental Management Act. Ala. Code 1975 § 22-22A-7(a) provides:

(a) Beginning October 1, 1982, the Environmental Management Commission, in addition to any other authority which may be conferred upon it by law, shall have the power to:

(1) Develop and prescribe its own hearing procedures, unless otherwise specified by law; and

(2) Administer oaths, certify to official acts, take and cause to be taken depositions of witnesses, issue subpoenas, and compel the attendance of witnesses and the production of papers, books, accounts, payrolls, documents and records. In the event of failure of any person to comply with any subpoena lawfully issued, or on the refusal of any witness to produce evidence or to testify as to any matter regarding which he may be lawfully interrogated, it shall be the duty of any court of competent jurisdiction or of the judge thereof, upon the application of the Environmental Management Commission or its designee, to compel obedience by contempt proceedings, as in the case of disobedience of the requirements of a subpoena issued by such court or a refusal to testify therein. ***The fees of witnesses for attendance and travel shall be the same as fees of witnesses before courts of record and shall be paid from the funds of the department.***

(Emphasis added).

6. In 1994, the Alabama Department of Environmental Management proposed amendments to Ala. (ADEM) Admin. Code chap. 335-2-1 which sought to impose liability for the payment of attorney fees on losing parties in proceedings to contest administrative actions of the Department and to impose liability for the payment of witness fees on parties requesting subpoenas in proceedings to contest administrative actions of the Department. The proposal to impose liability for the payment of attorney fees on losing parties was not adopted after public comments were submitted suggesting that the Department does not have statutory authority to adopt such a proposal. No public comments were submitted to the Department regarding the proposal to impose liability for the payment of witness fees on parties that request subpoenas. The Environmental Management Commission adopted the Department's proposal to impose liability for the payment of witness fees in proceedings to contest administrative actions of the Department on parties that request subpoenas. Rule 335-2-1-.12 became effective on November 1, 1994.

7. It is axiomatic that an administrative agency such as the Department is a creature of the legislature, and has only those powers conferred upon it by its legislature. Ex parte City of

Florence, 417 So. 2d 191, 194 (Ala. 1982) (citing Woodruff v. Beeland, 220 Ala. 652, 127 So. 235 (1930)). Ala. Code 1975 § 22-22A-7(a)(2) requires that witness fees be paid from Department funds. It does not confer on the Department the power to adopt rules that are in conflict with § 22-22A-7(a)(2).

8. It is also axiomatic that administrative regulations must be consistent with the statutory authority by which their promulgation was authorized. Ex parte City of Florence, 417 So. 2d 191, 193 (Ala. 1982). Accord, Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991). See Jefferson County v. Alabama Criminal Justice Info. Ctr. Comm'n, 620 So. 2d 651, 658 (Ala. 1993) (per curiam) (“[an agency] cannot claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation”). Ala. (ADEM) Admin. Code r. 335-2-1-.12(3) is not consistent with Ala. Code 1975 § 22-22A-7(a)(2).

9. The provisions of a statute will prevail in any case of a conflict between a statute and an agency regulation. Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991) (citing Ex parte State Dep’t of Human Res., 548 So. 2d 176 (Ala. 1988). “[W]hen the Department’s interpretation conflicts with the applicable statute, the Department’s regulation cannot stand.” Ala. Dep’t of Rev. v. Jim Beam Brands Co., Inc., 11 So. 3d 858, 866 (Ala. Civ. App. 2008). A regulation that conflicts with a statute is a nullity. Smith v. LeFleur, No. 2180375, 2019 Ala. Civ. App. LEXIS 141, at \*20, 2019 WL 5091863, at \*\_\_ (Ala. Civ. App. Oct. 11, 2019), cert. granted, Ex parte LeFleur, No. 1190191 (Ala. May 22, 2020); Ex parte City of Florence, 417 So. 2d 191, 195 (Ala. 1982). Because Ala. (ADEM) Admin. Code r. 335-2-1-.12(3) conflicts with Ala. Code 1975 § 22-22A-7(a)(2), r. 335-2-1-.12(3) is a nullity.

10. In Bobby Lewis, et al. v. Alabama Department of Environmental Management, EMC Dkt. No. 19-06 (filed June 4, 2019), the Hearing Officer, at the request of Petitioners, issued several subpoenas for witnesses to appear and give testimony at the evidentiary hearing in said matter. (Doc. 28). Petitioners served the subpoenas on the witnesses without payment of witness fees. Intervenor notified Petitioners that payment of witness fees is required by Ala. (ADEM) Admin. Code r. 335-2-1-.12(3)(c) and that witnesses served with subpoenas may not appear and give testimony at the evidentiary hearing. Electronic mail message from F. Lenton White to David A. Ludder dated August 8, 2019. Petitioners then filed a motion with the Hearing Officer seeking to clarify responsibility for payment of witness fees. Petrs' Mot. in Limine to Clarify Responsibility for Payment of Witness Fees for Attendance at and Travel to Hearing (Doc. 44). Intervenor then moved to quash several of the subpoenas because the Petitioners did not include with the subpoenas payment of witness fees for attendance and travel to the evidentiary hearing in accordance with the requirements of Ala. (ADEM) Admin. Code r. 335-2-1-.12(3). Intervenor City of Dothan's Resp. to Petrs' Mot. for Exemption from Payment of Witness Fees and Mot. to Quash Subpoenas (Doc. 46). Petitioners responded that the provisions of Ala. (ADEM) Admin. Code r. 335-2-1-.12(3) that require that parties seeking subpoenas pay witness attendance and travel fees is in conflict with the provisions of Ala. Code 1975 § 22-22A-7(a)(3) which require that witness fees be paid from funds of the Department. Petrs' Resp. to Mot. to Quash Subpoenas (Doc. 43). The Hearing Officer ruled that "all witnesses who have been 'properly served with a subpoena to appear....in the above-entitled matter.....on August 19, 2019 are required to attend as directed without payment of witness fees. The Department is ORDERED to pay fees due such witnesses upon compliance with the subpoena received and upon appropriate application to the Department for such fees due." Order (Doc. 47).

## **VI. OTHER FACTORS FOR CONSIDERATION**

11. The proposed rule amendment is a constitutional exercise of the Department's authority to adopt rules implementing the Alabama Environmental Management Act. "There is no constitutional impediment to the adoption of the proposed amendment. The Department is authorized to adopt the proposed amendment by the following statutory provisions: Ala. Code 1975 §§ 22-22A-7(a)(1), 22-22A-7(a)(2), and 22-22A-8(a).

12. The proposed amendment will promote the express legislative intent and purpose of the Alabama Environmental Management Act. See Ala. Code 1975 §§ 22-22A-2 and 22-22A-7(c)(1).

13. The evidence, data, and information submitted herein is substantive, credible and relevant and reasonably supports the adoption of the proposed amendment.

14. The Petitioner has not had a prior opportunity to present relevant evidence, data and information on the subject matter of the proposed amendment. The Environmental Defense Alliance did not exist when Ala. (ADEM) Admin. Code r. 335-2-1-.12 (3) was adopted in 1994. Ala. (ADEM) Admin. Code r. 335-2-1-.12 has not been the subject of proposed amendments subsequent to adoption in 1994.

15. Alternative means of obtaining the same or similar relief are not presently available and have not in the recent past been made available to the petitioner.

16. The proposed amendment will implement the express requirements of Ala. Code 1975 § 22-22A-7(a)(2).

## **VII. DISPOSITION OF PETITION**

17. Ala. (ADEM) Admin Code R. 335-2-2-.06 provides:

Disposition of Petition. Within sixty days after a petition is filed with the Commission in accordance with Rule 335-2-2-.04, the Commission shall do one of the following, provided however, that upon written notice to the petitioner, such sixty day period may be extended for not more than thirty days if the Commission's next regularly scheduled meeting is not within said sixty day period:

(a) initiate rule-making proceedings in accordance with *Code of Alabama* 1975, §§ 22-22A-8 and 41-22-5, as amended; or

(b) deny the petition in writing on the merits stating the reasons therefor.

Respectfully submitted,



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David A. Ludder  
Attorney for Petitioner  
Environmental Defense Alliance

Address and Phone:  
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Tallahassee, FL 32313-4208  
(850) 386-5671

**CERTIFICATE OF SERVICE**

I certify that the original of the foregoing Petition was delivered by U.S. Mail as certified, return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered, to:

Chairman  
Alabama Environmental Management Commission  
c/o Alabama Department of Environmental Management  
P.O. Box 301463  
Montgomery, Alabama 36130-1463

Done this 2nd day of July, 2020.



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David A. Ludder