



## AlaFile E-Notice

03-CV-2020-900877.00

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

BOBBY LEWIS ET AL V. ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT ET  
03-CV-2020-900877.00

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Civil Action No. 03-CV-2020-900877.00

IN THE MONTGOMERY COUNTY CIRCUIT COURT

**BOBBY LEWIS; MICHAEL DEL VECCHIO; DAVID DEL VECCHIO;  
PEGGY R. DEL VECCHIO; WILLIAM P. NOVACK; and TARA NOVACK,**

Plaintiffs-Petitioners,

v.

**ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT;  
LANCE R. LEFLEUR, in his official capacity as Director of the Alabama  
Department of Environmental Management; ENVIRONMENTAL  
MANAGEMENT COMMISSION OF THE ALABAMA DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT; SAMUEL L. MILLER, KEVIN  
MCKINSTRY, THOMAS P. WALTERS, RUBY L. PERRY, MARY J.  
MERRITT, and JOHN H. MASINGILL, III, in their official capacities as  
members of the Environmental Management Commission of the Alabama  
Department of Environmental Management; and CITY OF DOTHAN, ALABAMA,**

Defendants-Petitioners.

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On Appeal from the Final Action of the Alabama Department of  
Environmental Management and Order of the Environmental Management  
Commission of the Alabama Department of Environmental Management in  
Bobby Lewis, et al. v. Ala. Dep't of Env'tl. Mgmt.,  
EMC Docket No. 19-03

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**PETITION FOR REVIEW**

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**STATEMENT REGARDING ORAL ARGUMENT**

Plaintiffs-Petitioners believe that oral argument may assist the Court in understanding the facts and law of this case.

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**STATEMENT OF JURISDICTION AND VENUE**

Ala. Code 1975 § 22-22A-7(c)(6) provides:

Any order of the Environmental Management Commission made pursuant to the above procedure, modifying, approving or disapproving the department's administrative action, constitutes a final action of the department and is appealable to the Montgomery County Circuit Court or the circuit court in which the applicant does business or resides for judicial review on the administrative record provided that such appeal is filed within 30 days after issuance of such order.

In *Plumbers and Steamfitters, Local 52 v. Alabama Department of Environmental Management*, 622 So. 2d 347 (Ala. 1993), the Court described how an appeal under Ala. Code 1975 § 22-22A-7(c)(6) is perfected:

The AEMA has simple and straightforward requirements at § 22-22A-7(c)(6) for perfecting an appeal from an order of the EMC. The AEMA does not require a petition for review, nor any bond. Rather, under § 22-22A-7(c)(6), it is sufficient that a notice of appeal is filed with the appropriate circuit court. Under § 22-22A-7(c)(6), the notice of appeal must be filed with the appropriate circuit court “within” 30 days after an order of the EMC is issued. Venue is prescribed as appropriate in Montgomery County and in the county where the appellant does business or resides.

*Id.* at 348-349.

On June 12, 2020, the Environmental Management Commission (AEMC) of the Alabama Department of Environmental Management (ADEM) entered an order approving ADEM’s renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. *Lewis v. Ala. Dep’t of Env’tl. Mgmt.*, AEMC Dkt. No. 19-06, 2020 AL ENV LEXIS 6 (June 12, 2020), Admin. Rec. Doc. 139 (AEMC Order). By operation of law, that order became the final action of ADEM. Ala.

Code 1975 § 22-22A-7(c)(6). Plaintiffs-Petitioners filed a timely notice of appeal in the Montgomery County Circuit Court on July 10, 2020 with the AEMC Order attached.

Doc. 8. Venue is appropriate in the Montgomery County Circuit Court. Ala. Code 1975 § 22-22A-7(c)(6).

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## STATEMENT OF THE CASE

On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petrs' Hr'g Ex. P-17. On June 4, 2019, Plaintiffs-Petitioners filed a timely request for hearing with the AEMC pursuant to Ala. Code 1975 § 22-22A-7(c) to contest the renewal and modification of the permit. Admin. Rec. Doc. 1 (Request for Hearing).

On June 13, 2019, the AEMC designated James F. Hampton as Hearing Officer to conduct the hearing on Plaintiffs'-Petitioners' request for hearing. Admin. Rec. Doc. 4 (Letter from Debra S. Thomas to James F. Hampton). On July 10, 2019, the City of Dothan filed a motion for leave to intervene. Admin. Rec. Doc. 16 (Motion for Leave to Intervene). Subsequently, the City of Dothan was admitted as a party. Admin. Rec. Doc. 48 (Order).

After hearing eight days of testimony (2,044 transcript pages) and admitting one-hundred twenty-three documentary exhibits into the record, on May 20, 2020, the Hearing Officer submitted a report containing findings of fact, conclusions of law, and recommendations to the AEMC. Admin. Rec. Doc. 105 (Report of Hearing Officer). The Hearing Officer concluded that Plaintiffs-Petitioners met their burden of proof on two issues – (1) the City's failure to demonstrate in its 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) compliance with the requirements of Ala. Admin. Coder. 335-13-5-.02 and Ala. Code 1975 § 22-27-48(b) for

local governing body (host government) approval of the 2018 application; and (2) the City's failure to demonstrate in its 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) compliance with the methodology prescribed by Ala. Admin. Code r. 335-13-4-.11 for ensuring that there is a minimum of five feet of separation between the bottom of the liner system and highest measured (seasonal) groundwater level. Admin. Rec. Doc. 105 (Report of Hearing Officer). Accordingly, the Hearing Officer recommended to the AEMC that it disapprove the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). Id.

After receiving objections from the parties to the Report of Hearing Officer, Admin. Rec. Docs. 116 (Department's Objections to the Hearing Officer's Report), 120 (Petitioners' Objections to Hearing Officer's Report and Brief in Support Thereof), and 124 (Intervenor City of Dothan's Objections to Hearing Officer's Report), and proposed alternative findings of fact, conclusions of law, and recommendations, Admin. Rec. Docs. 116 (Department's Proposed Order), 121 (Petitioners' Proposed Order), 126 (City of Dothan's Proposed Alternative Findings of Fact and Conclusions), and hearing limited oral arguments from the attorneys for all parties, Admin. Rec. Doc. 141 (AEMC Meeting Transcript), on June 12, 2020, the AEMC issued a final order "modifying" the Report of Hearing Officer "by adopting the Department's Proposed Order which in turn adopts the alternate Findings of Fact and Conclusions of Law that the City of Dothan proposed" and

approving Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). Admin. Rec. Doc. 139 (AEMC Order).

Plaintiffs-Petitioners filed a timely notice of appeal in the Montgomery County Circuit Court on July 10, 2020.

### **STATEMENT OF THE ISSUES**

#### **I. THRESHOLD MATTERS**

- A. Whether Plaintiffs-Petitioners demonstrated administrative standing? *See infra* pp. 96-103.
- B. Whether Plaintiffs-Petitioners have statutory standing? *See infra* pp. 104-107.
- C. Whether Plaintiffs-Petitioners have judicial standing? *See infra* pp. 107-112.
- D. Whether the substantial rights of the Plaintiffs-Petitioners have been prejudiced by the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013)? *See infra* pp. 112-114.

#### **II. THE MERITS**

- A. **Prohibition Against Application Processing without Prior Approval of Application by Affected Local Governing Body**
  - 1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No.

- 35-06 (Oct. 21, 2013) is affected by an erroneous interpretation of Ala. Code 1975 § 22-27-48(b)? *See infra* pp. 115-129.
2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in excess of the statutory authority of the AEMC under Ala. Code 1975 § 22-27-48(b)? *See infra* pp. 129-131.
  3. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-5-.02? *See infra* pp. 131-134.
  4. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3)? *See infra* pp. 134-137.
  5. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3)? *See infra* pp. 137-139.

**B. Seasonal High Groundwater Elevation Measurements, Bottom Elevation of Lowermost Liner, and Separation Distance Between Bottom Elevation of Lowermost Liner and Seasonal High Groundwater Elevation**

1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan's application does not demonstrate that seasonal high groundwater elevation measurements were obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a)? *See infra* pp. 140-149.
2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is characterized by an abuse of discretion or clearly unwarranted exercise of discretion in the application of Ala. Admin. Code rs. 335-13-4-.11(1)? *See infra* pp. 150-159.
3. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan's application does not accurately demonstrate the bottom elevation of the lowermost liner or the separation distance between the bottom

elevation of the lowermost liner and highest seasonal measured groundwater elevation in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a)? *See infra* pp. 159-163.

**C. Demonstration of Alternate Liner System Design Effectiveness**

1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan's application does not demonstrate that the alternate liner system design complies with Ala. Admin. Code r. 335-13-4-.18(3)(h)1.? *See infra* pp. 163-167.
2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-4-.18(3)(h)1.? *See infra* pp. 168-172.
3. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record with respect

to the City of Dothan's demonstration of compliance with Ala.

Admin. Code r. 335-13-4-.18(3)(h)1.? *See infra* pp. 173-178.

**D. Prohibition Against the Discharge of Unpleasant and Harmful Odors**

1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City's of Dothan's application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a)? *See infra* pp. 178-186.
2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a)? *See infra* pp. 187-193.

**E. Prohibition Against the Discharge of Visible Fugitive Dust Emissions**

1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City's of Dothan's application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a)? *See infra* pp. 193-200.
2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(3)(a)? *See infra* pp. 200-206.

**F. Prevention of Disease Vectors**

1. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in

violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(2)(d)? *See infra* pp. 206-215.

2. Whether the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(2)(d)? *See infra* pp. 213-216.

### **STATEMENT OF THE FACTS**

#### **A. Prohibition Against Application Processing without Prior Approval of Application by Affected Local Governing Body**

1. On October 21, 2013, ADEM issued a renewal of Solid Waste Disposal Facility Permit No. 35-06. The size of the permitted facility was 78 acres and the size of the permitted municipal solid waste landfill unit was 55 acres. Admin. Rec. Doc. 139 (AEMC Order), at 5; Petnrs' Hr'g Ex. P-3; Hr'g Tr. at 3:850 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).

2. On April 1, 2014, the City engaged CDG Engineers and Associates, Inc. to perform professional services for the design and permitting of an expansion to the City of Dothan Sanitary Landfill. Admin. Rec. Doc. 139 (AEMC Order), at 5; Petnrs' Hr'g Ex. P-18; Petnrs' Hr'g Ex. P-19; Hr'g Tr. at 1:290-292 (Test. Mike Schmitz, Mayor of Dothan 2009-2017). *See* Hr'g Tr. at 6:1407-1409 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works) (preliminary work on ADEM permit application may have begun but final permit application not likely to have been completed).
3. On August 2, 2014, the City published in the Dothan Eagle a "Notice of Public Hearing to Accept Comment Concerning Approval of a Modification to the City of Dothan Landfill." The notice stated that "[p]ublic comment is being accepted in relation to the facility's request for local approval to expand the facility boundary." Admin. Rec. Doc. 139 (AEMC Order), at 5; ADEM Hr'g Ex. 2, at Bates-stamp 00014; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00014. The notice does not identify or describe: (a) any proposed expansion of the existing municipal solid waste landfill; (b) any proposed new construction/demolition landfill; (c) the size or location of any proposed municipal solid waste landfill expansion; (d) the size or location of any proposed construction/demolition landfill; or (e) the location of the proposed expanded facility boundary. ADEM Hr'g Ex. 2, at Bates-stamp 00014; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00014.

4. On September 2, 2014, the City held a public hearing “to discuss the City of Dothan’s Landfill Expansion.” During the hearing, Daniel Wells of CDG Engineers and Associates, Inc. stated that the permitting plans should be completed by the end of 2014. Ernie Stokes, Senior Civil Engineer for the City of Dothan, estimated the plans would be submitted to ADEM in January, 2015. Admin. Rec. Doc. 139 (AEMC Order), at 6; ADEM Hr’g Ex. 2, at Bates-stamp 00015; Petnrs’ Hr’g Ex. P-11A, at Bates-stamp 00015.
5. On September 16, 2014, the Board of Commissioners of the City of Dothan adopted Resolution No. 2014-246 approving “the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres.” Admin. Rec. Doc. 139 (AEMC Order), at 6; ADEM Hr’g Ex. 2, at Bates-stamp 00017; Petnrs’ Hr’g Ex. P-11A, at Bates-stamp 00017; Hr’g Tr. at 3:866 ( Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 1:294 (Test. Mike Schmitz, Mayor of Dothan 2009-2017); Hr’g Tr. at 6:1390-1391 (Test. Jerry Corbin, Dir. of Dothan Public Works 1995-2018).
6. Resolution No. 2014-246 does not identify, describe, or approve: (a) any proposed expansion of the existing municipal solid waste landfill; (b) any proposed new construction/demolition landfill; (c) the size or location of any proposed municipal solid waste landfill expansion; (d) the size or location of any proposed

- construction/demolition landfill; or (e) the location of the proposed expanded facility boundary. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:540, 8:1791 (Test Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:866 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
7. Resolution No. 2014-246 did not approve expansion of the 20.6-acre municipal solid waste landfill. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 3:866-867 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
  8. Resolution No. 2014-246 did not approve an application for a modified permit to be submitted to ADEM for consideration. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 6:1391 (Test. Jerry Corbin, Dir. of Dothan Public Works 1995-2018); Hr'g Tr. at 6:1410-1411 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works).
  9. On September 16, 2014, there was no application for modification of Solid Waste Disposal Facility Permit No. 35-06 pending before ADEM. Hr'g Tr. at 2:536-537 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:865 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
  10. On September 16, 2014, Public Works Director Jerry Corbin reported to the Board of Commissioners of the City of Dothan that the proposed Landfill expansion is in

the design phase. On September 16, 2014, the proposed expansion of the City of Dothan Sanitary Landfill was still in the preliminary design phase. Admin. Rec. Doc. 139 (AEMC Order), at 6; Petnrs' Hr'g Ex. P-23. *See* Hr'g Tr. at 6:1392-1393 (Test. Jerry Corbin, Dir. of Dothan Public Works 1995-2018) (same).

11. On September 16, 2014, City Manager Michael West advised the Board of Commissioners of the City of Dothan that the final design of the proposed expansion of the City of Dothan Sanitary Landfill would be voted on at a later date. Petnrs' Hr'g Ex. P-23.
12. As of September 16, 2014, CDG Engineers and Associates, Inc. had not presented to the City of Dothan a proposed application to be submitted to ADEM for expansion of the City of Dothan Sanitary Landfill. Admin. Rec. Doc. 139 (AEMC Order), at 6; Hr'g Tr. at 1:295-296 (Test. Mike Schmitz, Mayor of Dothan 2009-2017); Hr'g Tr. at 6:1392-1393 (Test. Jerry Corbin, Dir. of Dothan Public Works 1995-2018).
13. On January 26, 2015, the City of Dothan submitted to ADEM an application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 534 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 75.6 acres, and to add a new permitted 13.6-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 6; Petnrs' Hr'g Ex. P-26;

- Hr'g Tr. at 2:511-513 (Test. Eric , ADEM Chief of Solid Waste Branch). *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).
14. Resolution No. 2014-246 was included in the January 26, 2015 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) submitted to ADEM on January 26, 2015. Admin. Rec. Doc. 139 (AEMC Order), at 6; Petnrs' Hr'g Ex. P-27D; Hr'g Tr. 3:861-862 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 4:1053-1054 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section).
  15. Resolution No. 2014-246 did not approve the January 26, 2015 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) submitted to ADEM. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 4:1054 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section).
  16. On January 8, 2016, ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 534 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 75.6 acres, and to add a new permitted 13.6-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 7; Petnrs' Hr'g Ex. P-5; Hr'g Tr. at 2:514-515, 2:520 (Test. Eric

- Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:851 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 1:304 (Test. Mike Schmitz, Mayor of Dothan 2009-2017).
17. On June 10, 2016, ADEM rescinded the January 8, 2016 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order), at 7; Petnrs’ Hr’g Ex. P-6; Hr’g Tr. at 2:515 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:851 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 1:305-306 (Test. Mike Schmitz, Mayor of Dothan 2009-2017).
  18. On November 16, 2016, the City of Dothan submitted to ADEM a revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 71.1 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Admin Rec. Doc. 139 (AEMC Order), at 7; Petnrs’ Hr’g Ex. P-29A. *See* Petnrs’ Hr’g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).
  19. The November 16, 2016 application for modification of Solid Waste Disposal Facility Permit No. 35.06 (Oct. 21, 2013) included the same “local approval for the property expansion on September 16, 2014.” Admin. Rec. Doc 139, at 7; Petnrs’

- Hr'g Ex. P-29E; Hr'g Tr. at 3:864 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
20. On or about March 1, 2017, the City of Dothan submitted to ADEM a revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 7; Petnrs' Hr'g Ex. P-32; Petnrs' Hr'g Ex. P-33A; Hr'g Tr. at 2:516-517 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).
21. On November 1, 2017, ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 7-8; Petnrs' Hr'g Ex. P-7; Hr'g Tr. at 2:519-520 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:852 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). *See* Petnrs' Hr'g Ex.

- P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).
22. On April 18, 2018, the City submitted an application (ADEM Form 439) to ADEM to renew Solid Waste Disposal Facility Permit No. 3506 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order), at 8; ADEM Hr'g Ex. 1; Hr'g Tr. at 7:1730-1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
  23. On April 24, 2018, ADEM rescinded the November 1, 2017 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order), at 8; Petrs' Hr'g Ex. P-8; Hr'g Tr. at 2:522 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:853 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
  24. During the Spring and Summer of 2018, the City of Dothan submitted to ADEM a four-part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. Part two was ADEM Form 439 submitted to ADEM on May 5, 2018. Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. Part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of

the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 8; ADEM Hr'g Ex. 1; Petnrs' Hr'g Ex. P-9; ADEM Hr'g Ex. 2; Petnrs' Hr'g Ex. P-12; Hr'g Tr. at 2:493-494, 2:504-505, 7:1730-1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

25. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity at the municipal solid waste landfill unit, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years. ADEM Hr'g Ex. 3A, at Bates-stamp 0036.
26. The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that "a copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM." ADEM Hr'g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017. *See* Hr'g

- Tr. at 2:508 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. 3:860 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
27. Resolution No. 2014-246 does not approve the City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:869 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works).
28. The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include documentation demonstrating that the Board of Commissions of the City of Dothan approved the 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) in accordance with the procedures of Ala. Code 1975 § 22-27-48. ADEM Hr'g Ex. 2.
29. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the existing permitted municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Petnrs'

Hr'g Ex. P-17; Hr'g Tr. at 2:508 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

30. ADEM officials and the AEMC do not interpret Ala. Code 1975 § 22-27-48(b) as prohibiting ADEM's consideration of an application for modification of a solid waste disposal facility permit if the affected local governing body has not approved the application for modification of the ADEM permit. Rather, ADEM officials and the AEMC interpret Ala. Code 1975 § 22-27-48(b) as prohibiting ADEM consideration of an application for modification of a solid waste disposal facility permit if the affected local governing body has not approved a separate application to the local governing body addressing the factors in Ala. Code 1975 § 22-27-48(c). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15-17 (¶¶ 5-7); Hr'g Tr. at 2:534-536, 7:1743-1745, 8:1786-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). *Contra*, Hr'g Tr. at 4:1057 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (§ 22-27-48(b) prohibits ADEM consideration of an application unless the local governing body has first approved that application).
31. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petnr's Hr'g Ex. P-17.

32. On June 12, 2020, the AEMC issued an order approving ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

**B. Seasonal High Groundwater Elevation Measurements, Bottom Elevation of Lowermost Liner, and Separation Distance Between Bottom Elevation of Lowermost Liner and Seasonal High Groundwater Elevation**

33. During the Spring and Summer of 2018, the City of Dothan submitted to ADEM a four-part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. Part two was ADEM Form 439 submitted to ADEM on May 5, 2018. Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. Part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Admin. Rec. Doc. 139 (AEMC Order), at 8; ADEM Hr'g Ex. 1; Petnrs' Hr'g Ex. P-9; ADEM Hr'g Ex. 2; Petnrs' Hr'g Ex. P-12; Hr'g Tr. at 2:493-494, 2:504-505, 7:1730-1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. Stephen Scott Story, Chief of ADEM Solid

Waste Eng'g Section). *See* Petnr's Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

34. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity at the municipal solid waste landfill unit, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years.  
ADEM Hr'g Ex. 3A, at Bates-stamp 0036.
35. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the residuum beneath the City's proposed municipal solid waste landfill expansion is relatively impermeable, with the exception of the weathered chert which has been encountered in permeable, saturated layers in some areas. ADEM Hr'g Ex. 2, at Bates-stamp 00258, 00263.
36. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the residuum deposits beneath the City's proposed municipal solid waste landfill expansion range in thickness from 10 to 35 feet. ADEM Hr'g Ex. 2, at Bates-stamp 00258, 00263.
37. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the residuum

is underlain by a saturated sand unit considered to represent the Lisbon Formation.

ADEM Hr'g Ex. 2, at Bates-stamp 00258.

38. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the Lisbon Formation contains the Lisbon Aquifer. ADEM Hr'g Ex. 2, at Bates-stamp 00265.
39. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the Lisbon Aquifer is considered to be the uppermost saturated zone. ADEM Hr'g Ex. 2, Bates-stamp at 00258. *See* Hr'g Tr. at 7:1615 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch) (same); Hr'g Tr. at 5:1220-1212, 5:1237 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).
40. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the relatively low permeability of the residuum serves as a confining unit for much of the Lisbon Formation in this area. ADEM Hr'g Ex. 2, Bates-stamp at 00258. *See* Hr'g Tr. at 5:1221 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).
41. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that the Lisbon Aquifer appears to be under artesian conditions in the area of the City's proposed

- municipal solid waste landfill expansion. ADEM Hr'g Ex. 2, Bates-stamp at 00265. *See* Hr'g Tr. at 5:1221 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).
42. Ala. Admin. Code r. 335-13-4-.11(2)(a) specifies that groundwater elevation measurements shall be made during the months of February, March and April because those months would typically be the time when groundwater would be at its highest elevation. Hr'g Tr. at 3:680 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:882 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 4:1066-1067 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section); Hr'g Tr. at 7:1616 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch); Hr'g Tr. at 5:1171, 5:1242 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
43. A piezometer is a hole that's drilled into the ground to the water level and just beyond. And then it's screened with casing that has slots to allow the water to come into the well. It typically has a – sand packed around the well screen, and then solid casing from the top of the screen to the land surface. And that is generally sealed with a cement bentonite grout all the way to the land surface. So it is a structure that's used to measure water levels. Hr'g Tr. 5:1162-1163 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.). *See* Hr'g Tr. at 4:1068

(Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (a piezometer is a well or tube placed into the ground to measure groundwater elevation).

44. To establish the uppermost elevation of the first zone of saturation and the elevation of groundwater, a hole is drilled until water is encountered. Hr'g Tr. at 5:1237-1238, 5:1167-1169 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
45. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the piezometers identified in the City's 2018 application as PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 are in the area of the proposed cell or liner system of the proposed municipal solid waste landfill expansion. ADEM Hr'g Ex. 2, at Bates-stamp 00278; Petnrs' Hr'g Ex. P-11L. *See* Hr'g Tr. at 2:589-594, 3:717-718 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Hr'g Tr. at 3:885-886 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section) (same); Hr'g Tr. at 4:1068-1070 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (same); Hr'g Tr. at 5:1175, 5:1184 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Admin. Rec. Doc. 139 (AEMC Order), at 9-10 (identifying piezometers PZ-20, PZ-21, PZ-27, PZ-28, and PZ-29 as being in the area of the proposed cell or liner system).

46. To obtain the groundwater elevation, you survey the top elevation of the well casing and subtract the measured depth to groundwater from that elevation. Hr'g Tr. at 5:1168 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
47. The elevation of the top of the casing at piezometers PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 has been surveyed and reported in the second column of Table 2 - Summary of Groundwater Elevations: September 2013 through March 2018. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K; Hr'g Tr. at 5:1245 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
48. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-20 was constructed on January 23-24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00302; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O at Bates-stamp 00302. *See* Admin. Rec. Doc. 139 (AEMC Order), at 9 (same). *See* Hr'g Tr. at 3:704-706, 3:715 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
49. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows the depth to saturated soils (groundwater) at piezometer PZ-20 was measured on January 23-24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M. *See*

Hr'g Tr. at 3:715-717 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).

50. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-21 was constructed in May 12, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00303; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O at Bates-stamp 00303. *See* Hr'g Tr. at 3:705 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
51. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows the depth to saturated soils (groundwater) at piezometer PZ-21 was measured on May 12, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M.
52. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-22 was constructed on May 13, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00304; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O at Bates-stamp 00304. *See* Hr'g Tr. at 3:705 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
53. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the depth to

- saturated soils (groundwater) at PZ-22 was measured on May 13, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M.
54. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-27 was constructed on January 23-24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00306; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O, at Bates-stamp 00306. *See* Admin. Rec. Doc. 139 (AEMC Order), at 9 (same). Hr'g Tr. at 3:704-706, 715 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
55. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the depth to saturated soils (groundwater) at piezometer PZ-27 was measured on January 23, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M. *See* Hr'g Tr. at 3:715-717 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
56. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-28 was constructed on January 23-24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00307; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O, at Bates-stamp 00307. *See* Admin. Rec. Doc. 139 (AEMC Order), at 9

- (same); Hr'g Tr. at 3:704-706, 715 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
57. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the depth to saturated soils (groundwater) at piezometer PZ-28 was measured on January 23, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M. *See* Hr'g Tr. at 3:715-717 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).
58. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometer PZ-29 was constructed on January 24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00270, 00272, 00308; Petnrs' Hr'g Ex. P-11M; Petnrs' Hr'g Ex. P-11O, at Bates-stamp 00308. *See* Hr'g Tr. at 3:704-706 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Admin. Rec. Doc. 139 (AEMC Order), at 9 (same).
59. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the depth to saturated soils (groundwater) at piezometer PZ-29 was measured on January 24, 2012. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M. *See* Hr'g Tr. at 3:715-717 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same).

60. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) includes no groundwater elevation measurements in the saturated zone taken during the months of February, March and April at piezometers PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, or PZ-29.
61. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements were taken at piezometers PZ-20, PZ-27, PZ-28, and PZ-29 during the period of February through April of 2014 as indicated in the following calendars (circled dates are dates of measurements):

#### Water Elevation Measurement Dates at PZ-20

February 2014							March 2014							April 2014						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
						1							1			1	2	3	4	5
2	3	4	5	6	7	8	2	3	4	5	6	7	8	6	7	8	9	10	11	12
9	10	11	12	13	14	15	9	10	11	12	13	14	15	13	14	15	16	17	18	19
16	17	18	19	20	21	22	16	17	18	19	20	21	22	20	21	22	23	24	25	26
23	24	25	26	27	28		23	24	25	26	27	28	29	27	28	29	30			
							30	31												

#### Water Elevation Measurement Dates at PZ-27

February 2014							March 2014							April 2014						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
						1							1			1	2	3	4	5
2	3	4	5	6	7	8	2	3	4	5	6	7	8	6	7	8	9	10	11	12
9	10	11	12	13	14	15	9	10	11	12	13	14	15	13	14	15	16	17	18	19
16	17	18	19	20	21	22	16	17	18	19	20	21	22	20	21	22	23	24	25	26
23	24	25	26	27	28		23	24	25	26	27	28	29	27	28	29	30			
							30	31												

**Water Elevation Measurement Dates at PZ-28**

February 2014							March 2014							April 2014						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
						1							1			1	2	3	4	5
2	3	4	5	6	7	8	2	3	4	5	6	7	8	6	7	8	9	10	11	12
9	10	11	12	13	14	15	9	10	11	12	13	14	15	13	14	15	16	17	18	19
16	17	18	19	20	21	22	16	17	18	19	20	21	22	20	21	22	23	24	25	26
23	24	25	26	27	28		23	24	25	26	27	28	29	27	28	29	30			
							30	31												

**Water Elevation Measurement Dates at PZ-29**

February 2014							March 2014							April 2014						
S	M	T	W	T	F	S	S	M	T	W	T	F	S	S	M	T	W	T	F	S
						1							1			1	2	3	4	5
2	3	4	5	6	7	8	2	3	4	5	6	7	8	6	7	8	9	10	11	12
9	10	11	12	13	14	15	9	10	11	12	13	14	15	13	14	15	16	17	18	19
16	17	18	19	20	21	22	16	17	18	19	20	21	22	20	21	22	23	24	25	26
23	24	25	26	27	28		23	24	25	26	27	28	29	27	28	29	30			
							30	31												

ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K.

62. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements taken at piezometers PZ-20, PZ-27, PZ-28, and PZ-29 in February 2014 included only one measurement (February 20, 2014) at each piezometer. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. See Hr'g Tr. at 2:616, 2:620, 3:690, 3:693-694, 7:1792-1793 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Hr'g Tr. at 5:1185, 5:1191, 5:1193, 5:1198, 5:1202, 5:1204, 5:1233 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Hr'g Tr. at 7:1616-1617 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater

Branch) (same); Hr'g Tr. at 4:1071-1072, 4:1075 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (discussing PZ-20 & PZ-27).

63. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements taken at piezometers PZ-20, PZ-27 and PZ-28 in April 2014 included two measurements (April 16 and 28, 2014) taken within a twelve-day period at each piezometer. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Hr'g Tr. at 5:1185, 5:1191; 5:1194 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).
64. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that no water elevation measurements were taken at piezometer PZ-29 in March 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Hr'g Tr. at 5:1202 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).
65. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that only one water elevation measurement was taken at piezometer PZ-29 in April 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Hr'g Tr. at 5:1202-1203 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same).

66. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements taken at Piezometers PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 during 2015, 2016, 2017, and 2018 did not include any measurements in February and April. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Hr'g Tr. at 3:689-695 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Hr'g Tr. at 5:1187-1188, 5:1194-1198, 5:1200-1205 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Hr'g Tr. at 4:1071-1075 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (discussing PZ-20, PZ-21, PZ-22, and PZ-27).
67. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements taken at piezometers PZ-20, PZ-22, PZ-27, and PZ-29 during 2015, 2016, 2017, and 2018 included only one measurement in March. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P11-K. *See* Hr'g Tr. at 5:1187-1188, 5:1194-1195, 5:1197-1198, 5:1200-1205 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Hr'g Tr. at 3:689-695 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (discussing PZ-20, PZ-22, PZ-27, PZ-29); Hr'g Tr. at 4:1072-1073, 4:1075-1076 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (discussing PZ-20, PZ-22, and PZ-27).

68. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements at piezometer PZ-21 during 2015, 2016, and 2017 included only one measurement in March. No water elevation measurements were taken at piezometer PZ-21 during March of 2018. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P11-K. *See* Hr'g Tr. at 5:1196-1198 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Hr'g Tr. at 4:1073-1074 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (discussing PZ-21); Hr'g Tr. at 3:691-692 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (discussing PZ-21).
69. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that water elevation measurements at piezometer PZ-28 during 2015, 2016, and 2018 included only one measurement in March. No water elevation measurements were taken at piezometer PZ-28 during March of 2017. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P11-K. *See* Hr'g Tr. at 5:1194-1196 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.); Hr'g Tr. at 3:690-691 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (discussing PZ-28).
70. James Mark Tanner identified the highest measured water elevation recorded at each piezometer for the period September 2013 to March 2018, regardless of the

month and date measured, and selected that value to represent the seasonal high groundwater elevation at that piezometer location. Hr'g Tr. at 5:1161, 5:1172, 5:1189 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.). *See* ADEM Hr'g Ex. 2, at Bates-stamp 00271 (highlighted values); Petnrs' Hr'g Ex. P-11K (same).

71. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-20 based on a single measurement taken on March 21, 2016 without taking a second measurement in March 2016 and without taking any measurements in February and April of 2016. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 10 (Report of Hearing Officer).
72. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-21 based on a single measurement taken on March 16, 2017 without taking a second measurement in March 2017 and without taking any measurements in February and April 2017. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 10 (Report of Hearing Officer).

73. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-22 based on a single measurement taken on September 29, 2015 without taking a second measurement in March 2015 and without taking any measurements in February and April 2015. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 11 (Report of Hearing Officer).
74. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-27 based on a single measurement taken on April 28, 2014 without taking two measurements in February 2014 and without taking two measurements more than 12 days apart in April 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 11 (Report of Hearing Officer).
75. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-28 based on a single measurement taken on March 21, 2016 without taking a second measurement in March 2016 and without taking any measurements in February

- and April of 2016. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 11-12 (Report of Hearing Officer).
76. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the City determined the highest measured water elevation at piezometer PZ-29 based on a single measurement taken on March 21, 2016 without taking a second measurement in March 2016 and without taking any measurements in February and April of 2016. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. *See* Admin. Rec. Doc. 105, at 12 (Report of Hearing Officer).
77. ADEM officials admit that the groundwater elevation measurements included in the City's application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) do not include two measurements taken in the area of the proposed cell or liner system of the proposed municipal solid waste landfill expansion during each of the consecutive months of February, March, and April of any year. Hr'g Tr. at 2:620, 3:695-696 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:890-891 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
78. ADEM officials admit that the groundwater elevation measurements included in the City's application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) do not meet the requirements of Ala.

Admin. Code r. 335-13-4-.11(2)(a). Hr'g Tr. at 3:688, 3:727 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:880-883 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).

79. James Mark Tanner, who supervised the collection of water elevation measurements, testified that after 2014, he measured groundwater levels in the piezometers on a semi-annual basis in March and September of every year as required by the landfill permit. Hr'g Tr. at 5:1251 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.). He testified further:

Q. Okay. So your choice of time when to measure was based on a semiannual groundwater monitoring event?

A. That's when the water levels were collected.

Q. All right. Can you explain to me why you didn't collect more samples to assure that you had two samples in February, two samples in March, and two samples in April during any one year from 2014 to 2018?

A. No, sir.

Hr'g Tr. 5:1190 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).

80. Charles Chelsey Whittlesey Slagle, Chief of ADEM's Hydrogeology Section, Groundwater Branch, testified that ADEM regulations require two groundwater elevation measurements per month during February, March, and April not to be closer together than two weeks, so a total of six readings over that three-month period of time. Hr'g Tr. at 7:1616 (Test. Charles Chelsey Whittlesey Slagle, Chief

of ADEM Hydrogeology Section, Groundwater Branch). Slagle testified that he knew of no reason why the City of Dothan couldn't have collected more groundwater elevation data. Hr'g Tr. 7:1606 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch).

81. Stephen Scott Story, Chief of ADEM's Solid Waste Engineering Section testified that since 2014, there would have been time for the City to have collected more groundwater elevation data during the high water time period. Hr'g Tr. at 3:916-917 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
82. ADEM officials testified that ADEM could have asked the City to do additional sampling during the months of February, March and April. Hr'g Tr. at 3:698, 7:1794 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:893 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). *See* Hr'g Tr. at 3:697 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) ("if the -- our professionals deemed that the data that was submitted was appropriate, I see no reason to go back and ask for more.").
83. Eric Sanderson testified that Ala. Admin. Code r. 335-13-4-.11(1) "afford[s] the Department [the discretion] to use different months to determine the high-water mark, if deemed necessary." Hr'g Tr. at 3:681 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). *See* Hr'g Tr. at 3:697 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) ("We have that ability or that discretion in our

regulations.”). He testified, “We have the ability to, in that sense, waive that requirement [of r. 335-13-4-.11(2)(a)] if we feel we can get the better data elsewhere in other months.” Hr’g Tr. at 3:686 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). However, Sanderson testified that looking at groundwater elevation measurements outside the period of February, March, and April was not “necessary.” Hr’g Tr. at 3:698 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

84. Charles Chelsey Whittlesey Slagle, Chief of ADEM’s Hydrogeology Section, testified that it was “necessary” to deviate from the groundwater elevation measurement requirements in r. 335-13-4-.11(2)(a) “because we have additional data which gives us information to believe the standards are being met.” Hr’g Tr. at 7:1634-1635 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch).
85. Stephen Scott Story, Chief of ADEM’s Solid Waste Engineering Section, testified that r. 335-13-4-.11(1) says that rule requirements can be either enhanced or reduced by ADEM as deemed necessary. Hr’g Tr. at 3:881 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section). He testified, “In this case, we had a lot more data than -- than just those six samples that we used to make a decision.” Hr’g Tr. at 3:882 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section). However, Story testified that “I’m not going to say it’s

necessary” to reduce the requirements of r. 335-13-4-.11(2)(a). “If we had those six [measurements required by r. 335-13-4-.11(2)(a)], we could have just used those six, but in this case, we had more than that . . .” Hr’g Tr. at 3:893 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section). *See* Hr’g Tr. at 3:882 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (“No, I mean, it’s not necessary” to collect measurements outside of February, March and April).

86. James Mark Tanner used the highest water elevation measurements taken at PZ-20 (March 21, 2016), PZ-21 (March 16, 2017), PZ-22 (September 29, 2015), PZ-27 (April 28, 2014), PZ-28 (March 21, 2016), PZ-29 (March 21, 2016), as well as other measurements at other locations identified in ADEM Hr’g Ex. 2, at Bates-stamp 00271 (Petnrs’ Hr’g Ex. P-11K), to develop a potentiometric surface map characterized as representative of “seasonal high groundwater.” ADEM Hr’g Ex. 2, at Bates-stamp 00258, 00262, 00278; Petnrs’ Hr’g Ex. P-11L. *See* Hr’g Tr. at 7:1581 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch) (describing Tanner’s methodology); Hr’g Tr. at 1692-1693 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng’rs & Assoc.) (same).

87. A “potentiometric surface” is the pressure head that groundwater rises in an artesian aquifer. Hr’g Tr. at 5:1217 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
88. A “potentionmetric surface” is a planar surface which illustrates the top of a water table or hydrostatic surface that occurs across an area. Hr’g Tr. at 7:1575 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch).
89. James Mark Tanner explained how he typically generates contour maps of seasonal high groundwater:

The way I generate a seasonal high groundwater contour map is I take the water levels that are measured in the wells or the piezometers, and then typically it’s February, March, and April. And then I take whatever the highest water level in each well happens to be during that time period, and those are the water levels that I use to generate the contour map.

- Hr’g Tr. at 5:1161 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).
90. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states:

#### ***4.6 INITIAL AND FINAL CONTOURS***

The Permit Plans for this facility include the existing contours of the entire site. The Permit Plans show *the top of the clay liner elevations for cell base grades in relation to existing contours and seasonal high groundwater*. The expansion design meets the minimum separation of 5 ft between liner and seasonal high groundwater. The Final Grading Plan shows elevations of the top liner. Excavation and construction elevations for the development of all cells, and all final

contours are provided in the Permit Plans as required by ADEM Administrative Code R. 335-13-4-.12(2)(d).

ADEM Hr'g Ex. 2, at Bates-stamp 00431 (emphasis added). *See* Petnr's Hr'g Ex. 12, at Sheet 3 ("Base Grading Plan").

91. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states:

**4.4 LANDFILL CROSS SECTIONS**

The Permit Plans, Sheet 6 [sic: Sheet 7], for this facility include cross sections of the proposed landfill as required by ADEM Administrative Code R. 335-13-4-.12(2)(b). Each cross-section shows *potentiometric surface (groundwater elevations), the existing ground elevations, cell construction elevations indicating **top of liner***, and final closure elevations.

ADEM Hr'g Ex. 2, at Bates-stamp 00431 (emphasis added). *See* Petnr's Hr'g Ex. P-12, at Sheet 7 ("Cross Sections");<sup>1</sup> Petnr's Hr'g Ex. P-12C (Cross Section A - A'); Petnr's Hr'g Ex. P-12D (Cross Section B - B'); Petnr's Hr'g Ex. P-12E (Cross Section C - C').

92. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows the top of the 12

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<sup>1</sup> The AEMC's index of electronic files in the administrative record shows two of Plaintiffs'-Petitioners' exhibits identified as "Exhibit 12A" and no exhibit identified as "Exhibit 12." Plaintiffs'-Petitioners refer herein to Petnr's Hr'g Ex. P-12 as that exhibit which is entitled "Major Modification Plans for the Dothan Landfill for the City of Dothan" and consists of fourteen pages. Plaintiffs'-Petitioners refer herein to Petnr's Hr'g Ex. P-12A as that exhibit which is entitled "Facility Sketch" and consists of one page.

inch thick Compact Clay liner as the “Ref. Elevation.” Petnr’s Ex. P-12, at Sheet 3 (“Base Grading Plan”). The “Ref. Elevation” refers to the “Proposed Base Grade.” Hr’g Tr. at 3:736-737 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:901-903 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 6:1469-1470 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).

93. The three cross sections included in Petnr’s Hr’g Ex. P-12, at Sheet 7 (“Cross Sections”) depict the elevation of the “Potentiometric Surface” and elevation of the “Proposed Base Grade” along the length of each cross section and identify the minimum separation distance between the “Potentiometric Surface” and “Proposed Base Grade” along each cross section. ADEM Hr’g Ex. 2, at Bates-stamp 00431; Petnr’s Hr’g Ex. 12, at Sheet 7; Petnr’s Hr’g Ex. P-12C; Petnr’s Hr’g Ex. P-12D; Petnr’s Hr’g Ex. P-12E.
94. The “Potentiometric Surface” elevations depicted in the three cross sections included in Petnr’s Hr’g Ex. P-12, at Sheet 7 (“Cross Sections”) are derived from the highest water elevation measurements reported in Table 2, ADEM Hr’g Ex. 2, at Bates-stamp 00271 and Petnr’s Hr’g Ex. P-11K, and shown in Figure 5, ADEM Hr’g Ex. 2, at Bates-stamp 00278 and Petnr’s Hr’g Ex. P-11L. Hr’g Tr. at 7:1693 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng’rs & Assoc.). *See* ADEM Hr’g Ex. 2, at Bates-stamp 00431 (cross sections show “potentiometric surface

(groundwater elevations”); Hr’g Tr. at 3:727 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (potentiometric surface line is derived from data in Petnr’s Hr’g Ex. P-11K “as far as I know”). The “Potentiometric Surface” elevations depicted in the three cross sections included in Petnr’s Hr’g Ex. P-12, at Sheet 7 (“Cross Sections”) are not derived from the highest water elevation measurements taken from among two measurements during each of the consecutive months of February, March, and April in any one year. Hr’g Tr. at 3:727 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

95. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) describes the “Proposed Base Grade” as the top of the 12- inch thick compacted clay liner. ADEM Hr’g Ex. 2, at Bates-stamp 00431; Petnr’s Hr’g Ex. P-12, at Sheet 3. *See* Hr’g Tr. at 3:722-727, 3:740 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Hr’g Tr. at 902-903 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (same); Hr’g Tr. at 6:1467-1470, Hr’g Tr. at 1479 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.) (same).
96. The “Proposed Base Grade” elevations depicted in the three cross sections included in Petnr’s Hr’g Ex. P-12, at Sheet 7 (“Cross Sections”) represent the top of the 12-inch thick compacted clay liner. Hr’g Tr. at 6:1479 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).

97. The elevation of the bottom of the compacted clay liner is twelve inches lower than the elevation of the “Proposed Base Grade.” Tr. at 2:622, 3:722-723, 3:726-733, 3:736-737, 3:739-741 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:901-903, 3:912-913 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Tr, at 6:1465-1470, 6:1479, 6:1490 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).
98. The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the minimum separation distance between the “Proposed Base Grade” and the “Potentiometric Surface” along Cross Section A - A’ of the landfill expansion is 8.0 feet. ADEM Hr’g Ex. 12, at Sheet 7; Petnrs’ Hr’g Ex. P-12C. *See* Hr’g Tr. at 6:1490 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.) (same). The “Proposed Base Grade” is the top of the 12-inch thick compacted clay liner. Hr’g Tr. at 6:1479 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.). Thus, the minimum separation distance between the bottom of the compacted clay liner and the “Potentiometric Surface” shown on Cross Section A - A’ is 7.0 feet. Hr’g Tr. at 6:1490 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).
99. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the minimum separation distance between the “Proposed Base Grade” and the “Potentiometric

Surface” along Cross Section B - B’ of the landfill expansion is 6.25 feet. ADEM Hr’g Ex. 2, at Sheet 7; Petnr’s Hr’g Ex. P-12D. *See* Hr’g Tr. at 6:1494 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.) (same). The “Proposed Base Grade” is the top of the 12-inch thick compacted clay liner. Hr’g Tr. at 6:1479 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.). Thus, the minimum separation distance between the bottom of the compacted clay liner and the “Potentiometric Surface” shown on Cross Section B - B’ is 5.25 feet. Hr’g Tr. at 6:1494 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).

100. The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the minimum separation distance between the line representing the “Proposed Base Grade” and the line representing the “Potentiometric Surface” shown on Cross Section C - C’ of the landfill expansion is 5.25 feet. ADEM Hr’g Ex. 2, at Sheet 7; Petnr’s Hr’g Ex. P-12E. *See* Hr’g Tr. at 6:1496 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.). The “Proposed Base Grade” is the top of the 12-inch thick compacted clay liner. Hr’g Tr. at 6:1479 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.). Thus, the minimum separation distance between the bottom of the compacted clay liner and the “Potentiometric Surface” shown on Cross Section C - C’ is 4.25 feet. Hr’g Tr. at 6:1499-1500 (Test. Sarah Sightler, Project Eng’r, CDG Eng’rs & Assoc.).

101. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petnrs' Hr'g Ex. P-17.
102. On June 12, 2020, the AEMC issued an order approving ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

**C. Demonstration of Alternate Liner System Design Effectiveness**

103. In 2018, the City of Dothan submitted to ADEM a four part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. ADEM Hr'g Ex. 1; Hr'g Tr. at 7:1730-1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). Part two was ADEM Form 439 submitted to ADEM on May 15, 2018. Petnrs' Hr'g Ex. P-9; Hr'g Tr. at 2:493-494, 7:1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. ADEM Hr'g Ex. 2; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). And part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. Petnrs' Hr'g Ex. P-12; Hr'g Tr. at 2:504-505 (Test. Eric

Sanderson, Chief of ADEM Solid Waste Branch). The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Petnrs' Hr'g Ex. P-9. *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

104. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity at the municipal solid waste management unit, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years. ADEM Hr'g Ex. 3A, at Bates-stamp 0036.
105. The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that an alternate liner system design is proposed to be used at the expansion of the municipal solid waste landfill unit. ADEM Hr'g Ex. 2, at Bates-stamp 00433-00435; Petnrs' Hr'g Ex. P-12, at Sheet 3 (Detail for Liner System Construction). *See* Hr'g Tr. at 7:1677-1681 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.) (same).
106. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) specifies that the alternate liner system will include a 60 mil thick High Density Polyethylene

- (HDPE) flexible membrane liner (FML). Petnr's Hr'g Ex. P-12, at Sheet 3; ADEM Hr'g Ex. 2, at Bates-stamp 00433-00434. *See* Hr'g Tr. at 7:1681 (Test. of Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.) (same).
107. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) includes the results of the Hydrological Evaluation of Landfill Performance (HELP) model. ADEM Hr'g Ex. 2, at Bates-stamp 00442-00462. *See* Hr'g Tr. at 7:1681 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.).
108. ADEM officials relied on the results of the HELP model presented in the City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to demonstrate that the City's proposed alternate liner system design will ensure that the concentration values listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18 will not be exceeded in the first saturated zone as required by Ala. Admin. Code r. 335-13-4-.18(3)(h). Hr'g Tr. at 3:792-793 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 4:1123-1129 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section).
109. The HELP model is designed to calculate the amount of leachate generation and the maximum anticipated depth of leachate head over a particular liner system given certain inputs into the model for the liner system design and other factors (including localized temperature, precipitation, evapotranspiration, and runoff).

- ADEM Hr'g Ex. 2, at Bates-stamp 00432, 00444-00447; Hr'g Tr. at 7:1668 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.).
110. The HELP model is only capable of calculating the predicted *volume* of liquid leachate that passes through the liner system. Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.); Hr'g Tr. at 6:1517 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 4:1125-1126 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section).
111. The HELP model is not capable of calculating the predicted concentrations of contaminants that pass through the liner system and migrate into the first saturated zone. Hr'g Tr. at 3:794 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 4:1128-1129 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section); Hr'g Tr. at 6:1517-1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.).
112. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the value used in the HELP model for the thickness of the High Density Polyethylene (HDPE) flexible membrane liner (FML) was 0.04 inches – the equivalent of 40 mil. ADEM Hr'g Ex. 2, at Bates-stamp 00443, 00450, 00456, 00457.

113. A model exists that is capable of predicting the contaminant concentrations that pass through a liner system and migrate into the first saturation zone. The City's consulting engineers did not use that model. Hr'g Tr. at 7:1711-1712 ( Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.).
114. The City's consulting engineers did nothing to demonstrate that the contaminant concentrations that may leak through the bottom liner system and migrate into the first saturated zone will not exceed the concentration values listed in Rule 335-13-4-.18, Table 1. Hr'g Tr. at 6:1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.).
115. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a demonstration that the alternate liner system design proposed by the City for the municipal solid waste landfill unit expansion ensures that the contaminant concentration values listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18 will not be exceeded in the first saturated zone. ADEM Hr'g Ex. 2.
116. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a HELP Model calculation of the volume of leachate that would pass through the default "composite liner" system design specified in Ala. Admin. Code r. 335-13-

4-.03(26) if it was used at the City's municipal solid waste landfill unit expansion.

ADEM Hr'g Ex. 2.

117. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a demonstration that utilization of the default "composite liner" system design specified in Ala. Admin. Code r. 335-13-4-.03(26) at the City's municipal solid waste landfill unit expansion would ensure that the contaminant concentration values listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18 will not be exceeded in the first saturated zone. ADEM Hr'g Ex. 2.
118. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petnr's Hr'g Ex. P-17.
119. On June 12, 2020, the AEMC issued an order approving ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

**D. Prohibition Against the Discharge of Unpleasant and Harmful Odors**

120. In 2018, the City of Dothan submitted to ADEM a four part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. ADEM Hr'g Ex. 1; Hr'g Tr. at 7:1730-1731 (Test. Eric Sanderson, Chief of

ADEM Solid Waste Branch). Part two was ADEM Form 439 submitted to ADEM on May 15, 2018. Petrs' Hr'g Ex. P-9; Hr'g Tr. at 2:493-494, 7:1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. ADEM Hr'g Ex. 2; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). And part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. Petrs' Hr'g Ex. P-12; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Petrs' Hr'g Ex. P-9. *See* Petrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

121. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity at the municipal solid waste management unit, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years. ADEM Hr'g Ex. 3A, at Bates-stamp 0036.

122. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes the following reference to cover material:

**7.2 COVER MATERIAL**

At the conclusion of each working day, the Landfill Operator shall cover the general working face of the landfill with a minimum of 6-inches of compacted earth cover or an approved alternate daily cover material.

\* \* \* The earthen cover material will be placed and compacted to a minimum depth of 6-inches to control disease, vectors, fire, odors, blowing litter, and scavenging.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00495; Petnrs' Hr'g Ex. P-11T.

123. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that six inches of daily cover with compacted earth is adequate to prevent the presence in the outdoor atmosphere of odors that are unpleasant to persons and interfere with the enjoyment of life or property. ADEM Hr'g Ex. 2.
124. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes the following reference to buffer zones:

**4.7 BUFFER ZONES**

A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM

Administrative Code R. 335-13-4-.12(2)(f). No disposal will occur within the buffer area. Additionally, the facility will maintain a 100-ft buffer from the stream in the C/D Disposal Area.

ADEM Hr'g Ex. 2, at Bates-stamp 00431; Petnrs' Hr'g Ex. P-11H.

125. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that a 100-foot buffer zone is adequate to prevent the presence in the outdoor atmosphere of odors that are unpleasant to persons and interfere with the enjoyment of life or property. ADEM Hr'g Ex. 2.
126. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that the combination of six inches of daily cover with compacted earth and a 100-foot buffer zone are adequate to prevent the presence in the outdoor atmosphere of odors that are unpleasant to persons and interfere with the enjoyment of life or property. ADEM Hr'g Ex. 2.
127. Requirements for the provision of daily cover of solid waste with six inches of compacted earth and a 100-foot buffer zone have been applicable to the City's existing municipal solid waste landfill since at least October 21, 2013. Petnrs' Hr'g Ex. P-3, at 6 (permit requirement that operation and maintenance must be consistent with requirements of Ala. Admin. Code div. 335-13, the permit, and the application); Petnrs' Hr'g Ex. P-3, at 8 (permit requirement for daily cover); Ala.

Admin. Code r. 335-13-4-.22(1)(a)1. (rule requirement for daily cover); Ala.

Admin. Code r. 335-13-4-.12(2)(f) (rule requirement for buffer zone); Hr'g Tr. at 3:930 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 7:1712 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.).

128. Unpleasant odors from the operation of the City's existing municipal solid waste landfill have repeatedly migrated beyond the landfill property boundary and interfered with the enjoyment of life and property of persons. Hr'g Tr. at 1:118-119, 1:117-118, 1:127, 1:134 (Test. David F. Del Vecchio); Hr'g Tr. at 1:318-321 (Test. Peggy Del Vecchio); Hr'g Tr. at 1:192-195, 1:205, 1:219-220 (Test. Tara Novack); Hr'g Tr. at 1:346-349 (Test. William Novack); Hr'g Tr. at 1:228-232 (Test. Michael Del Vecchio); and Hr'g Tr. at 2:386-389, 2:395, 2:401, 2:404 (Test. Bobby Lewis); Hr'g Tr. at 1:14-18, 1:23-24, 1:28, 1:38-39, 1:74-75 (Test. Anthony Keith).
129. ADEM has received many complaints of unpleasant odors emanating from the City of Dothan Sanitary Landfill. Petnrs' Hr'g Ex. P-65 (Oct. 21, 2013 ADEM Response to Comments at Comment #3); Petnrs' Hr'g Ex. P-108 (Nov. 3, 2015 letter from Anthony J. Keith); Petnrs' Hr'g Ex. P-111 (Nov. 3, 2015 letter from Bobby Lewis); Petnrs' Hr'g Ex. P-55 (Nov. 1, 2017 ADEM Response to Comments, at 1); Petnrs' Hr'g Ex. P-14 (Dec. 28, 2018 Letter from David A.

Ludder, at 4-5); Petnrs' Hr'g Ex. P-110 (Dec. 28, 2018 letter from Bobby Lewis); Petnrs' Hr'g Ex. P-15 (Feb. 28, 2019 Public Hearing, at 13-15, 21, 27-29, 33, 50, 54, 65); Petnrs' Hr'g Ex. P-16 (May 6, 2019 ADEM Response to Comments, at 1-2).

130. ADEM officials consider that the application of daily cover of solid waste with six inches of compacted earth and the provision of a 100-foot buffer zone are sufficient to "minimize" or "control" odors, Hr'g Tr. at 5:1270-1271, 5:1273 (Test. Ronald W. Gore, Chief of ADEM Air Division); Hr'g Tr. at 2:634-635 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch), but may not be sufficient to eliminate odors. Hr'g Tr. at 5:1270-1271 (Test. Ronald W. Gore, Chief of ADEM Air Division); Hr'g Tr. at 2:634-635 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
131. Additional measures that may lessen odors around a landfill could include daily cover of solid waste with more than six inches of compacted earth, Hr'g Tr. at 3:927 (Test. Steven Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 5:1283-1284 (Test. Ronald W. Gore, Chief of ADEM Air Division), more frequent application of earth cover of solid waste, Hr'g Tr. at 3:744-745 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); operating a smaller working face, Hr'g Tr. at 3:747 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch), and providing a larger buffer zone. Hr'g Tr. at 5:1283, 5:1288 (Test.

- Ronald W. Gore, Chief of ADEM Air Division). In addition, a spray foam that hardens might be used to cover solid waste and control odors. Hr’g Tr. at 3:742-743 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
132. Ala. Admin. Code r. 335-3-1-.02 includes definitions of the terms “air contaminant,” “odor,” and “air pollution.” Hr’g Tr. at 5:1261 (Test. Ronald W. Gore, Chief of ADEM Air Division).
133. Ala. Admin. Code r. 335-3-1-.08 prohibits the discharge of an air contaminant for which no ambient air quality standard has been set if it would interfere with the enjoyment of life or property. Hr’g Tr. at 5:1262-1263 (Test. Ronald W. Gore, Chief of ADEM Air Division).
134. The definition of “air contaminant” includes “odor.” Hr’g Tr. at 5:1261 (Test. Ronald W. Gore, Chief of ADEM Air Division).
135. There are no ambient air quality standards for odor. Hr’g Tr. at 5:1263 (Test. Ronald W. Gore, Chief of ADEM Air Division).
136. An “odor” includes a smell that is unpleasant to persons. Hr’g Tr. at 5:1262 Test. Ronald W. Gore, Chief of ADEM Air Division).
137. A State Implementation Plan is a set of procedures and rules that a state submits to EPA that shows that air quality standards for the six criteria pollutants will be met and maintained in the State. Hr’g Tr. at 5:1264 (Test. Ronald W. Gore, Chief of ADEM Air Division).

138. Once a State Implementation Plan is approved by the U.S. Environmental Protection Agency, the rules in the approved plan take on the characteristic of federal rules. Hr’g Tr. at 5:1264 (Test. Ronald W. Gore, Chief of ADEM Air Division).
139. The prohibition of “air pollution” in Ala. Admin. Code r. 335-3-1-.08 is included in the State Implementation Plan approved by the U.S. Environmental Protection Agency, as are the definitions of “air contaminant,” “odor,” and “air pollution” in Ala. Admin. Code r. 335-3-1-.02. Hr’g Tr. at 5:1265-1268 (Test. Ronald W. Gore, Chief of ADEM Air Division); Petrs’ Hr’g Ex. P-56.
140. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petrs’ Hr’g Ex. P-17.
141. On June 12, 2020, the AEMC issued an order approving ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

**E. Prohibition Against the Discharge of Visible Fugitive Dust Emissions**

142. In 2018, the City of Dothan submitted to ADEM a four part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. ADEM Hr’g Ex. 1; Hr’g Tr. at 7:1730-1731 (Test. Eric Sanderson, Chief of

ADEM Solid Waste Branch). Part two was ADEM Form 439 submitted to ADEM on May 15, 2018. Petnrs' Hr'g Ex. P-9; Hr'g Tr. at 2:493-494, 7:1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. of Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. ADEM Hr'g Ex. 2; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). And part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. Petnrs' Hr'g Ex. P-12; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Petnrs' Hr'g Ex. P-9. *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

143. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years. ADEM Hr'g Ex. 3A, at Bates-stamp 0036.

144. A State Implementation Plan is a set of procedures and rules that a state submits to EPA that shows that air quality standards for the six criteria pollutants will be met and maintained in the State. Hr’g Tr. at 5:1264 (Test. Ronald W. Gore, Chief of ADEM Air Division).
145. Once a State Implementation Plan is approved by the U.S. Environmental Protection Agency, the rules in the approved plan take on the characteristic of federal rules. Hr’g Tr. at 5:1264 (Test. Ronald W. Gore, Chief of ADEM Air Division).
146. ADEM Admin. Code r. 335-3-4-.02 regarding “Fugitive Dust and Fugitive Emissions” is part of the State Implementation Plan for Alabama approved by the U.S. Environmental Protection Agency. Hr’g Tr. at 5:1268 (Test. Ronald W. Gore, Chief of ADEM Air Division); Petnrs’ Hr’g Ex. P-56.
147. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes the following reference to a water truck:

***6.9 FIRE CONTROL***

The Landfill Operator shall implement fire control measures in the active disposal areas. These measures shall include, but are not limited to, the following:

1. Access to a vehicle equipped with a water tank of sufficient capacity *to extinguish small fires* that could occur at the working face.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00491 (emphasis added).

148. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that access to a water truck intended to extinguish fires at the working face will prevent the migration of visible fugitive dust emissions beyond the landfill property boundary. ADEM Hr'g Ex. 2; Hr'g Tr. at 3:934 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
149. There is no requirement in Ala. Admin. Code div. 335-13 to use a water truck for dust suppression at landfills. Hr'g Tr. at 3:934 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
150. There was no requirement in Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to use a water truck for dust suppression. Petnrs' Hr'g Ex. P-3.
151. There is no requirement in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) to use a water truck for dust suppression. Hr'g Tr. at 3:934, 4:941 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Petnrs' Hr'g Ex. P-17.
152. The use of a water truck for dust suppression on roads would "minimize" the generation of fugitive dust. Hr'g Tr. at 3:749-751, 7:1753 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). However, it may not prevent the migration

of visible fugitive dust emissions across property lines. Hr’g Tr. at 3:750-751 (Test. Eric Sanderson, the combination of access to a water truck to extinguish fires at the working face, provision of an all-weather access road to the working face, and provision of a 100-foot buffer zone will prevent the migration of visible fugitive dust emissions beyond the landfill property boundary.

153. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes the following reference to an all-weather access road to the working face of the landfill.

***6.11 ADVERSE WEATHER OPERATIONS***

During the winter months, adverse weather conditions could hinder the operations at the landfill. An all-weather access road shall be provided to the working face of the landfill *to permit vehicular access*. The access road shall be wide enough for collections vehicles to easily pass each other.

ADEM Hr’g Ex. 2, at Bates-stamp 00491 (emphasis added).

154. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that an all-weather access road intended to permit vehicular access to the working face will prevent the migration of visible fugitive dust emissions beyond the landfill property boundary. ADEM Hr’g Ex. 2.
155. An all-weather access road would “minimize” the generation of dust. Hr’g Tr. at 7:1804 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

156. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes the following reference to buffer zones:

***4.7 BUFFER ZONES***

A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM Administrative Code R. 335-13-4-.12(2)(f). No disposal will occur within the buffer area. Additionally, the facility will maintain a 100-ft buffer from the stream in the C/D Disposal Area.

ADEM Hr'g Ex. 2, at Bates-stamp 00431.

157. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that a 100-foot buffer zone will prevent the migration of visible fugitive dust emissions beyond the landfill property boundary. ADEM Hr'g Ex. 2.
158. A buffer zone may serve as a control measure for fugitive dust. Hr'g Tr. 3:942, 4:1014-1015 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
159. A larger buffer zone would reduce the migration of visible fugitive emissions across property lines. Hr'g Tr. at 5:1279 (Test. Ronald W. Gore, Chief of ADEM Air Division).
160. The City of Dothan's application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that

the combination of access to a water truck to extinguish fires at the working face, provision of an all-weather access road to the working face, and provision of a 100-foot buffer zone will prevent the migration of visible fugitive dust emissions beyond the landfill property boundary. ADEM Hr'g Ex. 2.

161. ADEM officials acknowledge that the availability of a water truck, the provision of an all-weather access road, and provision of a 100-foot buffer zone may only control or minimize the migration of visible fugitive dust emissions beyond the landfill property boundary. Hr'g Tr. at 3:749-751, 7:1753, 7:1804 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. 3:942, 4:1014-1015 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).
162. The combination of access to a water truck to extinguish fires at the working face, provision of an all-weather access road to the working face, and provision of a 100-foot buffer zone may not ensure that the migration of visible fugitive dust emissions beyond the landfill property boundary is prevented. Hr'g Tr. at 7:1806 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
163. Requirements for the provision of fire control measures, an all-weather access road to the working face, and a 100-foot buffer zone have been applicable to the City of Dothan's existing municipal solid waste landfill since at least October 21, 2013. Petrs' Hr'g Ex. P-3, at 6 (Operation of Facility); Petrs' Hr'g Ex. P-3, at 9 (Fire Control); Petrs' Hr'g Ex. P-3, at 8 (All Weather Access Roads); Ala. Admin.

- Code r. 335-13-4-.22(2)(c) (all-weather access road); Ala. Admin. Code r. 335-13-4-.23(2)(d) (all weather access road); and Ala. Admin. Code r. 335-13-4-.12(2)(f) (buffer zone); Hr’g Tr. at 7:1712-1714 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng’rs & Assoc.).
164. Visible fugitive dust emissions from operation of the City of Dothan’s existing municipal solid waste landfill have repeatedly migrated beyond the landfill property boundary onto the Petitioners’ property. Hr’g Tr. at 1:106-107, 1:119-120 (Test. David F. Del Vecchio); Hr’g Tr. at 1:323-324 (Test. Peggy Del Vecchio); Hr’g Tr. at 1:198-199, 1:220 (Test. Tara Novack); Hr’g Tr. at 1:349-350 (Test. William Novack); Hr’g Tr. at 1:233-234, 1:255 (Test. Michael Del Vecchio); and Hr’g Tr. at 2:399-400 (Test. Bobby Lewis). *See* Hr’g Tr. at 1:28-32 (Test. Anthony Keith).
165. ADEM has received complaints of visible fugitive dust emissions from the City of Dothan Sanitary Landfill. Petnrs’ Hr’g Ex. P-55 (Nov. 1, 2017 ADEM Response to Comments, at 5); Petnrs’ Hr’g Ex. P-15 (Feb. 28, 2019 Public Hearing, at 50, 54).
166. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petnrs’ Hr’g Ex. P-17.

167. On June 12, 2020, the AEMC issued an order approving ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

**F. Prevention of Disease Vectors**

168. In 2018, the City of Dothan submitted to ADEM a four part application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Part one was ADEM Form 439 submitted to ADEM on April 18, 2018. ADEM Hr'g Ex. 1; Hr'g Tr. at 7:1730-1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). Part two was ADEM Form 439 submitted to ADEM on May 15, 2018. Petnrs' Hr'g Ex. P-9; Hr'g Tr. at 2:493-494, 7:1731 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:856 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section). Part three was an "Operations Manual for Dothan Landfill" (revised July 2018) submitted to ADEM on or about July 18, 2018. ADEM Hr'g Ex. 2; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). And part four was "Major Modification Plans for the Dothan Landfill" (July 2018) submitted to ADEM on July 18, 2018. Petnrs' Hr'g Ex. P-12; Hr'g Tr. at 2:504-505 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch). The modification sought was to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the permitted existing municipal solid waste landfill unit from 55 acres

to 69.9 acres, and to add a new permitted 15.0-acre construction and demolition landfill unit. Petnrs' Hr'g Ex. P-9. *See* Petnrs' Hr'g Ex. P-3 (identifying previous permitted facility acreage and previous municipal solid waste landfill unit acreage).

169. The proposed expansion will provide approximately 2,650,000 cubic yards of additional disposal capacity, extending the life of the City of Dothan Sanitary Landfill for approximately 20 years. ADEM Hr'g Ex. 3A, at Bates-stamp 0036.
170. A disease vector is any insect, bird, or animal that has contact with the landfill and then has the potential to migrate outside the landfill and produce disease. Hr'g Tr. at 3:752-753 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
171. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) contains the following references to disease vectors:

#### ***6.10 VECTOR CONTROL***

Vector control at the landfill shall be the responsibility of the Landfill Operator. Daily cover shall be used in the municipal solid waste disposal area to prevent the transmission of disease by vectors. Six inches of earthen cover will be used to cover the open face daily. Wastes that could encourage vector breeding shall not be left uncovered at the site. Areas where stagnate water accumulates will be regraded to encourage runoff.

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

## **7.2 COVER MATERIAL**

At the conclusion of each working day, the Landfill Operator shall cover the general working face of the landfill with a minimum of 6-inches of compacted earth cover or an approved alternate daily cover material.

\* \* \* The earthen cover material will be placed and compacted to a minimum depth of 6-inches to control disease, vectors, fire, odors, blowing litter, and scavenging.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00495.

## **8.2 ROUTINE MAINTENANCE**

\* \* \*

7. Measures shall be taken to prevent the breeding or accumulation of disease vectors. If determined necessary by the Department or the State Health Department, additional disease vector control measures shall be conducted.

ADEM Hr'g Ex. 2, at Bates-stamp 00506.

172. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that daily cover of municipal solid waste with six inches of compacted earth is adequate to prevent the accumulation or breeding of disease vectors at the City of Dothan Sanitary Landfill. ADEM Hr'g Ex. 2.
173. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no

demonstration that a 100-foot buffer zone is adequate to prevent the accumulation or breeding of disease vectors at the City of Dothan Sanitary Landfill. ADEM Hr'g Ex. 2.

174. The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-05 (Oct. 21, 2013) includes no demonstration that the combination of daily cover of municipal solid waste with six inches of compacted earth and a 100-foot buffer zone is adequate to prevent the accumulation or breeding of disease vectors at the City of Dothan Sanitary Landfill. ADEM Hr'g Ex. 2.
175. Daily cover of municipal solid waste serves to "control" or "minimize" disease vectors, not to "prevent" disease vectors. Hr'g Tr. at 2:652, 7:1755, 8:1808 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
176. A 100-foot buffer zone serves to "minimize" disease vectors, not to "prevent" disease vectors. Hr'g Tr. at 8:1808 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
177. Daily cover of municipal solid waste and provision of a 100-foot buffer zone are considered by ADEM officials to be the primary measures used to "control" or "minimize" the accumulation and breeding of disease vectors at the City of Dothan Sanitary Landfill. Hr'g Tr. at 2:652, 8:1807 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

178. ADEM officials are of the opinion that Ala. Admin. Code r. 335-13-4-.22 requires that landfill operators must “control” the accumulation and breeding of disease vectors, not “prevent” the accumulation and breeding of disease vectors. Hr’g Tr. at 2:652-654 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
179. Additional measures to control the accumulation and breeding of disease vectors might include deeper cover (more than six inches), more frequent cover (more often than at the conclusion of daily operations), working face size reduction, the use of repellents, insecticides, rodenticides, and the use of predatory and reproductive controls. None of these measures have been required at the City of Dothan Sanitary Landfill. Hr’g Tr. 3:753 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).
180. Requirements for daily cover of municipal solid waste with a minimum of six inches of compacted earth and the provision of a 100-foot buffer zone have been applicable to the City of Dothan’s existing municipal solid waste landfill since at least October 21, 2013. Petnrs’ Hr’g Ex. P-3, at 6 (permit requirement that operation and maintenance must be consistent with requirements of Ala. Admin. Code div. 335-13, the permit, and the application); Petnrs’ Hr’g Ex. P-3, at 8 (permit requirement for daily cover); Ala. Admin. Code r. 335-13-4-.22(1)(a)1. (rule requirement for daily cover); and Ala. Admin. Code r. 335-13-4-.12(2)(f)

- (rule requirement for buffer zone); Hr’g Tr. at 7:1712 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng’rs & Assoc.).
181. Persons living near the City of Dothan’s existing municipal solid waste landfill, including Petitioners, have repeatedly observed the accumulation of disease vectors, particularly buzzards and flies, at and around the City’s existing municipal solid waste landfill that have migrated to their properties. Hr’g Tr. at 1:18-19, 1:40, 1:42, 1:75 (Test. Anthony Keith); Hr’g Tr. at 1:106-107, 1:111-112, 1:120, 1:142-143 (Test. David F. Del Vecchio); Hr’g Tr. at 1:321-322, 1:325 (Test. Peggy Del Vecchio); Hr’g Tr. at 1:350, 1:357 (Test. William Novack); Hr’g Tr. at 1:236-241, 1:253-254, 1:282, 1:284 (Test. Michael Del Vecchio); and Hr’g Tr. at 2:395-399, 2:476-477, 2:400-401 (Test. Bobby Lewis).
182. ADEM has received many complaints of disease vectors accumulating at the City of Dothan Sanitary Landfill. Petnrs’ Hr’g Ex. P-65 (Oct. 21, 2013 ADEM Response to Comments at Comment #3); Petnrs’ Hr’g Ex. P-108 (Nov. 3, 2015 letter from Anthony J. Keith); Petnrs’ Hr’g Ex. P-111 (Nov. 3, 2015 letter from Bobby Lewis); Petnrs’ Hr’g Ex. P-55 (Nov. 1, 2017 ADEM Response to Comments, at 1); Petnrs’ Hr’g Ex. P-14 (Dec. 28, 2018 Letter from David A. Ludder, at 5); Petnrs’ Hr’g Ex. P-110 (Dec. 28, 2018 letter from Bobby Lewis); Petnrs’ Hr’g Ex. P-15 (Feb. 28, 2019 Public Hearing, at 26, 30, 50, 54, and 61); Petnrs’ Hr’g Ex. P-16 (May 6, 2019 ADEM Response to Comments, at 1).

183. On May 6, 2019, ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to the City of Dothan. Petrs' Hr'g Ex. P-17.
184. On June 12, 2020, the AEMC issued an order approving ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 139 (AEMC Order).

### **STANDARD OF REVIEW**

Ala. Code 1975 § 41-22-27(f) provides:

Except as provided in subdivision (6) of subsection (c) of Section 22-22A-7, judicial review of any order of the Environmental Management Commission modifying, approving or disapproving an administrative action of the Alabama Department of Environmental Management shall be in accordance with the provisions for review of final agency decisions of contested cases in Sections 41-22-20 and 41-22-21.

In *Plumbers and Steamfitters, Local 52 v. Alabama Department of Environmental Management*, 622 So. 2d at 794-795, the Court confirmed that Ala. Code 1975 § 41-22-27(f) requires that judicial review of any order of the AEMC modifying, approving or disapproving an administrative action of ADEM be in accordance with Ala. Code 1975 § 41-22-20 which provides:

Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the

agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) In violation of any pertinent agency rule;
- (4) Made upon unlawful procedure;
- (5) Affected by other error of law;
- (6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

*See also Gipson v. Ala. Dep't of Env'tl. Mgmt.*, 297 So. 3d 448, 457-458 (Ala. Civ. App. 2019).

There is no presumption of correctness afforded to the AEMC's legal conclusions or its application of the law to the facts. *Ala. Dep't of Env'tl. Mgmt. v. Legal Env'tl. Assistance Found., Inc.*, 973 So. 2d 369, 376 (Ala. Civ. App. 2007). *Accord, Bice v. Taylor*, 157 So. 3d 161, 167 (Ala. Civ. App. 2014). *See May v. Azar*, Nos. 2180004, 2180033, 2019 Ala. Civ. App. LEXIS 101, \*32 (Ala. Civ. App. Aug. 2, 2019) (judicial review of an agency's conclusions of law and its application of the law to the facts are *de novo*).

A finding of fact is clearly erroneous if it is not supported by any reliable and probative evidence that a reasonable man might accept as adequate to support a conclusion. Ala. Code 1975 § 41-22-20(k)(6); *State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d 54, 63 (Ala. Civ. App. 1989), *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d 63 (Ala. 1990).

An agency decision that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. *See State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63.

The Court may affirm the decision of the AEMC only if the administrative action and the stated basis for the action are correct. *Ala. Dep't of Env'tl. Mgmt. v. Ala. Rivers Alliance, Inc.*, 14 So. 3d 853 (Ala. Civ. App. 2007) (citing *Ex parte Beverly Enters.-Ala., Inc.*, 812 So. 2d 1189, 1195 (Ala. 2001)). *Accord, Glass v. City of Dothan Pers. Bd.*, 910 So. 2d 128, 130 (Ala. Civ. App. 2004).

## SUMMARY OF THE ARGUMENT

### **I. THRESHOLD MATTERS**

Plaintiffs-Petitioners are adversely affected by ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Accordingly, they are persons "aggrieved" by an administrative action of ADEM and have administrative standing to pursue a hearing before the AEMC to contest the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06. Ala. Code 1975 § 22-22A-7(c); Ala. Admin. Code rs. 335-2-1-.03 and 335-2-1-.02(b). *See infra* pp. 96-103.

Plaintiffs-Petitioners were parties in the proceeding before the AEMC to contest the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06. The AEMC rendered a decision adverse to Plaintiffs-Petitioners. Plaintiffs-Petitioners are "aggrieved" by the adverse decision of the AEMC because they have suffered and will suffer injuries that are fairly traceable to the adverse decision by the AEMC and the relief sought from the Court is likely to redress those injuries. Accordingly, Plaintiffs-Petitioners have statutory standing to seek judicial relief under Ala. Code 1975 § 41-22-20(a). *See infra* pp. 104-107.

Plaintiffs-Petitioners have suffered actual and threatened injuries that are fairly traceable to the adverse decision by the AEMC and the relief sought from the Court is likely to redress those injuries. Accordingly, Plaintiffs-Petitioners have standing to seek judicial relief under the Alabama Constitution. *See infra* pp. 107-112.

The AEMC's Order approving ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of applicable statutory provisions, in excess of applicable statutory authority, in violation of pertinent agency rule(s), affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary, and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion and should be reversed. Reversal of the AEMC's Order will eliminate or mitigate Plaintiffs'-Petitioners' injuries. Accordingly, Plaintiffs-Petitioners substantial rights have been prejudiced by the AEMC's Order. *See infra* pp. 112-114.

## II. THE MERITS

### A. Prohibition Against Application Processing without Prior Approval of Application by Affected Local Governing Body

Ala. Admin. Code r. 335-13-5-.02 requires that an application include “[d]ocumentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 . . .” Section 22-27-48(b) provides that “[t]he department may not consider an application for a modified permit for a facility unless *such application* has received approval pursuant to this section by the affected local governing body.” (Emphasis added). “Such application” plainly refers to the antecedent phrase “an application for a modified permit” submitted to ADEM. The AEMC erroneously interprets § 22-27-48(b) as prohibiting ADEM consideration of an application for a modified permit for a facility unless the local governing body has first approved an

*application to that body* for approval of the proposed facility based on the criteria included in Ala. Code 1975 § 22-27-48(c). Thus, the AEMC contends that local governing body approval of the City's *application to ADEM* for a modified permit is not required. The local governing body (*i.e.*, the Board of Commissioners of the City of Dothan) did not approve the City of Dothan's 2018 application to ADEM. Nevertheless, on May 6, 2019 ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). Thus, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an error of law, *i.e.*, it is based on an erroneous interpretation of Ala. Code 1975 § 22-27-48(b). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 115-129.

Ala. Code 1975 § 22-27-48(b) provides that “[t]he department may not consider an application for a modified permit for a facility unless *such application* has received approval pursuant to this section by the affected local governing body.” (Emphasis added). Under this provision, ADEM does not have the authority to consider an application for a modified permit if the affected local governing body has not approved *such application*. The City of Dothan's 2018 application to ADEM did not receive approval by the affected local governing body pursuant to Ala. Code 1975 § 22-27-48(b).

Acting in excess of its authority under § 22-27-48(b), ADEM considered the City's 2018 application and on May 6, 2019 modified Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). On *de novo* review, the AEMC approved ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013), and in so doing, exceeded its authority under Ala. Code 1975 § 22-27-48(b). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 129-131.

Ala. Admin. Code r. 335-13-5-.02 requires that an application include “[d]ocumentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 . . .” Compliance with Ala. Admin. Code r. 335-13-5-.02 requires that a permit application to ADEM for modification of a permit include documentation demonstrating that the local governing body has approved the application submitted to ADEM as provided in Ala. Code 1975 § 22-27-48(b). The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include the documentation required by Ala. Admin. Code r. 335-13-5-.02, *i.e.*, it does not include documentation that the Board of City Commissioners approved the City's 2018 application to ADEM for a modified permit. Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal

Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-5-.02. *See infra* pp. 131-134.

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-.02. Ala. Admin. Code r. 335-13-5-.02 requires that an application include “[d]ocumentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 . . . .” The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include the documentation required by Ala. Admin. Code r. 335-13-5-.02, *i.e.*, it does not include documentation that the Board of City Commissioners approved the City’s 2018 application to ADEM for a modified permit. Notwithstanding that the City’s 2018 application fails to demonstrate compliance with Ala. Admin. Code r. 335-13-5-.02, on May 6, 2019 ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM’s action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC’s June 12, 2020 approval thereof is affected by an erroneous application of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC’s June 12, 2020 Order approving ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp.134-137. \_\_

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-.02. Ala. Admin. Code r. 335-13-5-.02 requires that an application include “[d]ocumentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 . . .” The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include the documentation required by Ala. Admin. Code r. 335-13-5-.02, *i.e.*, it does not include documentation that the Board of City Commissioners approved the City’s 2018 application to ADEM for a modified permit. On May 6, 2019 ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM’s action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC’s June 12, 2020 approval thereof is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC’s June 12, 2020 Order approving ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 137-139.

**B. Seasonal High Groundwater Elevation Measurements, Bottom Elevation of Lowermost Liner, and Separation Distance Between Bottom Elevation of Lowermost Liner and Seasonal High Groundwater Elevation**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11. Ala. Admin. Code r. 335-13-4-.11(2)(a) requires that seasonal high groundwater elevation be determined by obtaining “a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period.” The City of Dothan’s 2018 application does not demonstrate that groundwater elevation measurements were obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a). No measurements of “groundwater” elevations were taken during the months of February, March and April. Furthermore, measurements of “water” elevations did not comply with the requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a). Notwithstanding that the City’s 2018 application fails to determine seasonal high groundwater elevation as required by Ala. Admin. Code r. Rule 335-13-4-.11(2)(a), on May 6, 2019 ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM’s action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC’s June 12, 2020 approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and

335-13-5-.04(3). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 140-149.

Ala. Admin. Code rs. 335-13-4-.11(1) grants ADEM the discretion to reduce the requirements of Ala. Admin. Code r. Rule 335-13-4-.11(2)(a) "as deemed necessary to comply with the" Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. Reducing the groundwater elevation measurement requirements of r. Rule 335-13-4-.11(2)(a) was not "necessary" (*i.e.*, indispensable) for the City of Dothan to comply with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. The City had several years during which to obtain the required groundwater elevation measurements and offered no excuse for failing to do so. ADEM had the authority to demand additional groundwater elevation measurements and it failed to do so. Rule 335-13-4-.11(1) does not authorize a reduction in the groundwater elevation measurement requirements of r. 335-13-4-.11(2)(a) merely for the convenience of an applicant or because ADEM considers the reduction inconsequential. The AEMC's exercise of discretion under Ala. Admin. Code r. 335-13-4-.11(1) to reduce the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is an abuse of discretion or a clearly unwarranted exercise of discretion because it was not "necessary" to ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. Accordingly,

the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 150-159.

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11. Ala. Admin. Code r. 335-13-4-.11(a)(2) requires that the application demonstrate that the bottom elevation of the lowermost liner shall be a minimum of five feet above the highest measured groundwater level. The City of Dothan's application failed to identify the bottom elevation of the lowermost liner and failed to demonstrate that the bottom of the lowermost liner is a minimum of five feet above the highest groundwater level. Notwithstanding that the City's 2018 application failed to identify the bottom elevation of the lowermost liner and failed to demonstrate that the bottom of the lowermost liner is a minimum of five feet above the highest groundwater level as required by Ala. Admin. Code r. 335-13-4-.11(a)(2), on May 6, 2019 ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC's June 12, 2020 approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC's June 12, 2020 Order

approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 159-163.

**C. Demonstration of Alternate Liner System Design Effectiveness**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.18. Rule 335-13-4-.18(3)(h)1. requires that a permit applicant who proposes to use an alternate liner system design must “demonstrate[] that the alternate design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone . . .” The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) proposes an alternate liner system design but does not demonstrate that the design ensures the contaminant concentrations listed in Table 1 will not be exceeded in the first saturated zone. Notwithstanding that the City's 2018 application fails to demonstrate that the alternate liner system design ensures the contaminant concentrations listed in Table 1 will not be exceeded in the first saturated zone as required by Ala. Admin. Code r. Rule 335-13-4-.18(3)(h)1., on May 6, 2019 ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC's June 12, 2020

approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 163-167.

The City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) includes a demonstration of the leachate leakage rate of the alternate liner system design proposed by the City. The AEMC made findings of fact that the HELP Model demonstrates that "the leakage rate for the alternate liner design was less than that for the regulation design" and that "a lower leakage rate would demonstrate that the proposed alternate design would be at least as protective as the [default liner system design] regarding the concentration values in Table 1 of ADEM 335-13-4-.18." Thus, the AEMC concluded that "[t]he Petitioners failed to prove that the alternate liner design violates the Department's regulations." The AEMC applied Ala. Admin. Code r. 335-13-4-.18(3)(h)1. as if it requires a demonstration that the leachate leakage rate of the alternate liner system design is less than the leachate leakage rate of the default liner system design, rather than a demonstration that the alternate design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone. This misapplication of the plain language of rule 335-13-4-.18(3)(h)1. is erroneous. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21,

2013) is affected by an erroneous application of Ala. Admin. Code r.

335-13-4-.18(3)(h)1. Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 168-172.

The AEMC's findings that "[t]he HELP Model, demonstrates that the leakage rate for the alternate liner design was *less than* that for the regulation design" and that "a *lower* leakage rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18" (emphasis added) are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. There is no evidence in the record to support the AEMC's findings that the leakage rate of the alternate liner system design is less than the leachate leakage rate of the default liner system design.

Furthermore, the HELP Model used an incorrect value for the thickness of the HDPE flexible liner in the alternate liner system design that invalidates the model results.

Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 173-178.

**D. Prohibition Against the Discharge of Unpleasant and Harmful Odors**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala.

Admin. Code div. 335-13, including Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a). Rule 335-13-4-.01(3) provides that “Solid Waste Disposal Facilities must comply with any other applicable State . . . rules, . . . regulations or other requirements,” which include Ala. Admin. Code r. 335-3-1-.08 (prohibition of “air pollution”) and 335-3-1-.02 (definitions of “air pollution,” “air contaminant,” and “odor”). Rule 335-13-4-.22(3)(a) provides that “[o]wners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.” The approved State Implementation Plan for Alabama includes Ala. Admin. Code r. 335-3-1-.08 (prohibition of “air pollution”) and 335-3-1-.02 (definitions of “air pollution,” “air contaminant,” and “odor”). These provisions *prohibit* landfills from causing or permitting the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property. The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) describes two work practices that ADEM claims will *control* or *minimize* the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the

upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property, *i.e.*, periodic cover of solid waste and the establishment of a 100-foot buffer zone in which no disposal of waste will occur. These work practices have been used by the City since at least 2013 and they have failed to *prevent* the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property. Notwithstanding that the City's 2018 application fails to demonstrate that operation of the landfill will not result in the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property as required by Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a), on May 6, 2019 ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC's June 12, 2020 approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the

AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 178-186.

On June 12, 2020, the AEMC approved ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC concluded that "[t]he permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama's regulations and the Alabama State implementation Plan as it concerns odor . . . ." However, the AEMC made no findings of fact that support the conclusion that these work practices and technology-based standards will prevent the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property. The AEMC's conclusion was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed and remanded. *See infra* pp. 187-193.

### **E. Prohibition Against the Discharge of Visible Fugitive Dust Emissions**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(3)(a). Rule 335-13-4-.22(3)(a) provides that “[o]wners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.” The approved State Implementation Plan for Alabama provides that “[n]o person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.” 40 C.F.R. § 52.50 (incorporating Ala. Admin. Code r. 335-3-4-.02). The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) describes three measures that ADEM claims will *minimize* the generation of fugitive dust emissions, *i.e.*, the establishment of a 100-foot buffer zone in which no disposal of waste will occur; “[a]ccess to a vehicle equipped with a water tank of sufficient capacity to extinguish small fires that could occur at the working face;” and the construction of “an all-weather access road to the dumping face that is wide enough to allow passage of collection vehicles.” These measures have been used by the City since at least 2013 and they have failed to *prevent* the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

Notwithstanding that the City's 2018 application fails to demonstrate that operation of the landfill will not result in the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate as required by Ala. Admin. Code r. 335-13-4-.22(3)(a), on May 6, 2019 ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. Admin. Rec. Doc. 139 (AEMC Order). ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC's June 12, 2020 approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 193-200.

On June 12, 2020, the AEMC approved ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC concluded that "[t]he permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama's regulations and the Alabama State implementation Plan as it concerns . . . fugitive dust." However, the AEMC made no findings of fact that support the conclusion that these work practices and technology-based standards will prevent the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate. The AEMC's conclusion was made upon unlawful procedure because the AEMC did not make the

necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(3)(a) and 40 C.F.R. § 52.50. Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed and remanded. *See infra* pp. 200-206.

#### **F. Prevention of Disease Vectors**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(2)(d). Rule 335-13-4-.22(2)(d) provides that “[m]easures shall be taken to *prevent* the breeding or accumulation of disease vectors.” “Prevent” means “to keep from happening,” not *minimize* or *control*. The City of Dothan's application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) describes two measures to *control* or *minimize* the breeding or accumulation of disease vectors, *i.e.*, daily cover of solid waste and regrading of areas where stagnant water accumulates. These measures have been used by the City since at least 2013 and they have failed to *prevent* the breeding or accumulation of disease vectors, *e.g.*, buzzards, flies, and coyotes. Notwithstanding that the City's application fails to demonstrate that measures will be taken to *prevent* the breeding and accumulation of disease vectors as required by Ala. Admin. Code r. 335-13-4-.22(2)(d), on May 6, 2019 ADEM issued a renewal and

modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC approved ADEM's action on June 12, 2020. ADEM's renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) and the AEMC's approval thereof are in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3). Accordingly, the AEMC's June 12, 2020 Order approving ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed. *See infra* pp. 206-215.

On May 6, 2019 ADEM issued a renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). That renewal and modification requires the City to take two measures to control or minimize the breeding or accumulation of disease vectors, *i.e.*, daily cover of solid waste and regrading of areas where stagnant water accumulates. These measures do not *prevent* the breeding or accumulation of disease vectors as required by Ala. Admin. Code r. 335-13-4-.22(2)(d). On June 12, 2020, the AEMC approved ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). The AEMC concluded that "[t]he Permit contains measures to prevent the breeding and accumulation of disease vectors as required by ADEM Admin. Code r. 335-13-4-.22(2)(d)." However, the AEMC made no findings of fact that support the conclusion that these measures will *prevent* the breeding or accumulation of disease vectors. The AEMC's conclusion was made upon unlawful procedure because the AEMC did not make the necessary findings

of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(2)(d). Accordingly, the AEMC’s June 12, 2020 Order approving ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit (Oct. 21, 2013) is due to be reversed and remanded. *See infra* pp. 213-216.

## ARGUMENT

### I. THRESHOLD MATTERS

#### A. Plaintiffs-Petitioners demonstrated administrative standing.

Ala. Code 1975 § 22-22A-7(c)(6) authorizes an appeal of an AEMC order to circuit court. “[T]he judicial appeal authorized by § 22-22A-7(c)(6) contemplates appeals in which the complainant before the AEMC was aggrieved.” *Ala. Dep’t of Env’tl Mgmt. v. Legal Env’tl Assistance Found., Inc.*, 973 So. 2d at 378.

A person is entitled to a hearing before the AEMC to contest an administrative action of ADEM under Ala. Code 1975 § 22-22A-7(c) if he is “aggrieved.” A person is “aggrieved” if he has suffered a threatened or actual injury in fact, *i.e.*, he is somehow adversely affected by the contested administrative action. Ala. Admin. Code r. 335-2-1-.02(b); *Ala. Dep’t of Env’tl Mgmt. v. Legal Env’tl Assistance Found., Inc.*, 973 So. 2d at 378.<sup>2</sup>

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<sup>2</sup> The “case or controversy” and prudential standing requirements applicable in judicial proceedings are not applicable in administrative proceedings under Ala. Code 1975 § 22-22A-7(c). *See ABC Coke v. GASP*, 233 So. 3d 999, 1004-06 (Ala. Civ. App. 2016) (The “case or controversy” and prudential standing requirements applicable in  
(continued...)

The administrative action contested before the AEMC is ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) granted to the City of Dothan for the continued operation of an existing landfill and for the construction and operation of a new landfill expansion. Admin. Rec. Doc. 1 (Request for Hearing), at 2.

David F. Del Vecchio is a minister at the Christ Church International in Dothan, Alabama. Hr'g Tr. at 1:100. He resides only 238 feet from the proposed landfill expansion. Hr'g Tr. at 1:100-101. His property abuts the landfill facility property. Hr'g Tr. at 1:101-104. Petnr's Ex. P-86; Petnr's Ex. P-12A; ADEM Ex. 2, at Bates-stamp 00441. He has lived there for 34 years. Hr'g Tr. at 1:104. Mr. Del Vecchio described odors coming onto his property from the landfill as smelling like "garbage," Hr'g Tr. at 1:118, and being "obnoxious, unpleasant, inconvenient, disgusting." Hr'g Tr. at 1:119. The odors have caused him to keep his house windows closed. Hr'g Tr. at 1:118. Sometimes the odors force him to go inside his house. Hr'g Tr. at 1:118. He does not cook outdoors because of the odors. Hr'g Tr. at 1:118-119. He has observed visible dust blowing from the landfill toward his house. Hr'g Tr. at 1:120. The deposition of dust particles has required constant cleaning of his back porch. Hr'g Tr. at 1:123. The dust particles get on the car, like a film. Hr'g Tr. at 1:120. He has suffered a consistent and

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<sup>2</sup>(...continued)

judicial proceedings are not applicable to requests for hearings filed by persons aggrieved by administrative actions of the Jefferson County Department of Health).

excessive problem with biting flies when the landfill was operating. Hr'g Tr. at 1:120. Twenty to thirty buzzards at a time would invade his property from the landfill and defecate on his fence requiring repainting. Hr'g Tr. 1:111-112. The buzzards attacked a young calf. Hr'g Tr. at 1:112. Coyotes have also invaded his property from the landfill. Hr'g Tr. at 1:107. They killed one of his young calves. Hr'g Tr. at 1:106. Mr. Del Vecchio is of the opinion that his property value is considerably less because of its proximity to the City of Dothan Sanitary Landfill. Hr'g Tr. at 1:129-130.

Peggy Del Vecchio resides with her husband, David F. Del Vecchio, at the same location he does. She has lived there since 1985. Hr'g Tr. 1:317-318; Petnrs' Ex. P-86. Ms. Del Vecchio says the odor that invades her property from the landfill smells like rotten food, rotten meat and stuff. Hr'g Tr. at 1:318-319. She testified that the odors have "given me headaches; they've burned my eyes. Sometimes, depending on the smell, it will make you nauseated." Hr'g Tr. at 1:319. She operated a day care at her house and "could not let the children out on the back porch because it was so wretched out there, the smells were so bad." Hr'g Tr. 1:319-320. "But sometimes [the odors] were so strong that it really bothered the little kids, so a lot of times [she] had to keep them inside." Hr'g Tr. at 1:320. She couldn't sit out on her back porch in the evening because it would smell. Hr'g Tr. at 1:320. She has seen buzzards flying over the landfill and landing on the landfill. Hr'g Tr. at 322. She has seen 20 to 25 buzzards sitting on her fence. Hr'g Tr. at

1:321-322. Ms. Del Vecchio has observed airborne dust stirred up at the landfill and leaving the landfill property. Hr’g Tr. at 323-324.

Tara Novack has lived near the City of Dothan Sanitary Landfill since 1985. Hr’g Tr. at 1:202. She purchased her grandfather’s house in 2007. Hr’g Tr. at 1:188. Her house is approximately 732 feet from the landfill facility boundary and 900 feet from the municipal solid waste landfill. Hr’g Tr. at 1:189-191. Ms. Novack testified that odors from the landfill “stunk really bad.” Hr’g Tr. at 1:192. She characterized the odors as unpleasant, rancid, putrid, and nasty. Hr’g Tr. at 1:195. The odors occurred many times each week. Hr’g Tr. at 1:193. When the odors are present, she cannot be outdoors. Hr’g Tr. at 1:192-193. The odors give her headaches. Hr’g Tr. at 1:192. She does not engage in outdoor barbecues. Hr’g Tr. at 1:194. Ms. Novack has seen airborne dust being generated at the landfill and traveling to her property. Hr’g Tr. at 1:198-199. Dust particles were deposited on vehicles, the grill, on the house, and on the porch. Hr’g Tr. at 1:199. She has been disturbed by loud and annoying noise caused by large machinery and trucks operating at the landfill. Hr’g Tr. at 1:199. Ms. Novack opined that the value of her property is less because of its location near the landfill. Hr’g Tr. at 1:201.

William P. Novack is an inspector on UH-60 Black Hawks. Hr’g Tr. at 2:347. He lives with his wife, Tara Novack. Hr’g Tr. at 1:345-346. He has lived there since 2014. Hr’g Tr. at 1:346. He says the existing landfill is some 900 feet from his home and the

new landfill expansion is some 700 feet from his home. Hr’g Tr. at 1:346. When the landfill was in operation, it had “a really rotten, nasty smell.” Hr’g Tr. at 1:347. He testified that he enjoys working on cars outdoors, but when the landfill is smelling really obnoxious, he goes inside. Hr’g Tr. at 1:348, 1:355, 1:364-365. Because of the smell from the landfill, he and his wife do not barbecue and do not have parties. Hr’g Tr. at 1:348. He could see airborne dust coming from the general direction of the landfill when the landfill was operating. Hr’g Tr. at 1:349, 1:356. He could see the airborne dust cross the landfill property line. Hr’g Tr. at 1:350. He has observed buzzards flying over the landfill and occasionally land on the landfill. Hr’g Tr. at 1:350. He has observed buzzards on power lines and in trees on his property. Hr’g Tr. at 1:350, 1:357. He has seen buzzard droppings on fences, cars and his truck. Hr’g Tr. at 1:351-352. Mr. Novack works third shift so he has to sleep in the daytime. The noise from backup alarms and banging tailgates on trucks disturb his sleep. Hr’g Tr. at 1:351, 1:358, 1:365.

Michael Del Vecchio is employed by United Parcel Service. Hr’g Tr. at 1:245. He purchased his property in 2002 and built his house in 2006. Hr’g Tr. at 1:227. He lives there with his wife and four children. Hr’g Tr. at 1:228. His property is just south of the existing and future expansion of the landfill. Hr’g Tr. at 1:226-227; Petrs’ Ex. P-87; ADEM Ex. 2, at Bates-stamp 00441. Odors from the landfill have invaded his property almost every day. Hr’g Tr. at 1:229. He characterizes the odors as “unpleasant” and like “rotting garbage.” Hr’g Tr. at 1:229. His girls could not play outdoors because, as they

said, “we can’t stand the smell.” Hr’g Tr. at 1:230. He would not have cookouts with friends because the smell was an embarrassment. Hr’g Tr. at 1:231. He has not been able to open his house windows during landfill operation. Hr’g Tr. at 1:232. He has frequently seen dust stirred up into the atmosphere at the landfill by dump trucks and tractors. Hr’g Tr. at 1:233-234. This dust would come onto his property when the winds are from the north and be deposited onto cars and porches. Hr’g Tr. at 1:233. He has often heard coyotes at night from the direction of the landfill. Hr’g Tr. at 1:238. He shot several coyotes. Hr’g Tr. at 1:239. He lost a newborn calf and another calf to the coyotes. Hr’g Tr. at 1:237. His property has been invaded by buzzards, sometimes 20 to 30 of them, that frequent the landfill. Hr’g Tr. at 1:239. “And then they would come further in and they were in our trees over our house and on our fences and they defecate on our fences.” Hr’g Tr. at 1:240. “And you can actually see the buzzards land on the landfill . . .” Hr’g Tr. at 1:241. Mr. Del Vecchio opined that his house and land are worth less because of their location near the landfill. Hr’g Tr. at 1:243-244.

Bobby Lewis is a farmer, real estate broker, and auctioneer. Hr’g Tr. at 2:388, 2:395, 2:402. He lives 60 feet from the landfill boundary, directly across the road from the closed landfill. Hr’g Tr. at 2:379-380, 2:385; Petnrs’ Ex. 12A; ADEM Ex. 2, at Bates-stamp 00441. Mr. Lewis’s house is one-half to three quarters of a mile from the existing landfill. Hr’g Tr. at 2:382. Mr. Lewis’s house is about three-quarters to eight- or nine-tenths of a mile from the new landfill expansion. Hr’g Tr. at 2:384. He has lived

there since 1955. Mr. Lewis described odors entering his property from the City of Dothan Sanitary Landfill as “rancid, putrid, raw vomit kind of smell.” Hr’g Tr. at 2:387. The odors have caused him decreased appetite, Hr’g Tr. at 2:388, sinus issues (drainage and headaches), Hr’g Tr. at 2:388, and to vomit. Hr’g Tr. at 2:387. He no longer has cookouts at his home, Hr’g Tr. at 2:387, or family reunions at his home, Hr’g Tr. at 2:395, and often leaves his home to escape the odors. Hr’g Tr. at 2:388. Mr. Lewis has observed clouds of fugitive dust blowing from the landfill to his property where dust particles have settled on his vehicles and house. Hr’g Tr. at 2:399-400. Mr. Lewis has suffered an invasion of buzzards from the landfill onto his property on a daily basis during landfill operations. Hr’g Tr. at 2:397. These buzzards have left droppings and vomit on his property. Hr’g Tr. at 2:399. Mr. Lewis has also suffered from disturbing noises from truck and equipment backup alarms and slamming truck tailgates. Hr’g Tr. at 2:408-410. Mr. Lewis no longer farms the property where his home is located with vegetables because of concern for his health and consumers of the vegetables. Hr’g Tr. at 2:395. He continues to farm on his other property three and one-half miles away from his home. Hr’g Tr. at 2:388. Mr. Lewis testified that his property has been substantially reduced in value because of its proximity to the City of Dothan Sanitary Landfill. Hr’g Tr. at 2:401-404.

Petitioners below established that they have suffered (a) frequent exposures to unpleasant odors from the operation of the City of Dothan Sanitary Landfill that interfere

with their enjoyment of life and property; (b) frequent particulate matter deposition on their property from visible fugitive dust emissions from the operation of the City of Dothan Sanitary Landfill; (c) frequent exposures to disease vectors (including buzzards, flies, and coyotes) that breed or accumulate at the City of Dothan Sanitary Landfill; (d) frequent exposures to disturbing and annoying noises from the operation of vehicles and machinery at the City of Dothan Sanitary Landfill; and (e) depressed or reduced property values because of the proximity of their properties to the City of Dothan Sanitary Landfill. The evidence establishes that these adverse effects occur during the operation of the existing municipal solid waste landfill and are threatened to continue to occur during the operation of the expanded municipal solid waste landfill authorized by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). The AEMC concluded:

Petitioners have established that they suffered or are likely to suffer adverse effects from operation of the City of Dothan Sanitary Landfill authorized by the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). Accordingly, Petitioners are considered aggrieved persons and are entitled to a hearing before the Environmental Management Commission to contest the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019).

Admin. Rec. Doc. 139 (AEMC Order), at 15. Accordingly, Petitioners below are “aggrieved” persons entitled to a hearing before the AEMC to contest ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**B. Plaintiffs-Petitioners have statutory standing.**

A person seeking to invoke the jurisdiction of the court must be a party or an aggrieved person entitled to judicial review under Ala. Code 1975 § 41-22-20(a). *See* Ala. Code 1975 § 41-22-27(f) (§ 41-22-20 applies to judicial review of any order of the AEMC approving, modifying or disapproving an administrative action of ADEM); *Ala. Dep't of Env'tl. Mgmt. v. Friends of Hurricane Creek*, 71 So. 3d 673, 677-678 (Ala. Civ. App. 2011) (remanding circuit court judgment for determination whether FOHC had standing to invoke jurisdiction of court under Ala. Code 1975 § 41-22-20(a)); *Ala. Dep't of Env't'l Mgmt. v. Legal Env't'l Assistance Found., Inc.*, 973 So. 2d at 380 (concurring opinion of Pittman, J., joined by Thomas, J. ) (§ 41-22-20(a) applies to judicial review of administrative decisions of the AEMC).

“[T]o obtain standing under the AAPA a person must meet three requirements. First, he must exhaust all administrative remedies; second, he must be involved in a ‘contested case’; and third, he must be aggrieved by a final decision of an administrative agency. § 41-22-20(a), Code 1975 (1988 Cum. Supp.).” *Springhill Hospitals, Inc. v. Ala. State Health Planning Agency & Mobile Infirmary*, 549 So. 2d 1348, 1350 (Ala. Civ. App. 1989) (quoting *State Health Planning and Dev. Agency v. AMI Brookwood Med. Ctr.*, 564 So. 2d at 57, *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63). *See also State Pers. Bd. v. State Dep't of Mental Health & Mental*

*Retardation*, 694 So. 2d 1367, 1372-74 (Ala. Civ. App. 1996) (“one who is a party to an administrative hearing, is entitled to appeal an adverse decision” under § 41-22-20(a)).

Neither the Alabama Administrative Procedures Act nor Ala. Admin. Code chap. 335-2 provide an administrative remedy for further review of an AEMC decision prior to appeal to the circuit court. Thus, there are no administrative remedies requiring exhaustion.

A “contested case” is “[a] proceeding, including . . . 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 1975 § 41-22-3(3). The hearing conducted by the AEMC on ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is a licensing proceeding in which the legal rights and duties of the City of Dothan and Plaintiffs-Petitioners are required by Ala. Code 1975 § 22-22A-7(c) to be determined after a hearing. Accordingly, the proceeding before the AEMC is a “contested case.”

The Petitioners below were parties in the contested case proceeding before the AEMC. The AEMC issued an Order adverse to the Petitioners. Admin. Rec. Doc. 139 (AEMC Order).

A person is “aggrieved” under Ala. Code 1975 § 41-22-20(a) if that person demonstrates (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. *Tuscaloosa Res., Inc. v. Ala. Dep't of Env'tl. Mgmt.*, 165 So. 3d 591, 592-593 (Ala. Civ. App. 2013), *rev'd on other grounds sub nom., Ex parte Ala. Rivers Alliance*, 165 So. 3d 597, 600 (Ala. 2014); *Ala. Dep't of Env'tl. Mgmt. v. Friends of Hurricane Creek*, 114 So. 3d 47, 51 (Ala. Civ. App. 2012). Thus, satisfaction of the constitutional elements of judicial standing as described below satisfies the requirement of Ala. Code 1975 § 41-22-20(a) that Petitioners be persons who are “aggrieved” by the AEMC decision to approve ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**C. Plaintiffs-Petitioners have judicial standing.**

Standing to invoke the jurisdiction of the court requires the existence of (1) an actual concrete and particularized “injury in fact” suffered by the plaintiff – an invasion of a legally protected interest belonging to the plaintiff; (2) a causal connection between the injury suffered by the plaintiff and the conduct of defendant complained of; and (3) a likelihood that plaintiff’s injury will be redressed by a favorable decision by the court. *Smith v. LeFleur*, No. 2180375, 2019 Ala. Civ. App. LEXIS 141, at \*13 (Ala. Civ. App. Oct. 11, 2019) (citing *Keith v. LeFleur*, 256 So. 3d 1206, 1210-11 (Ala. Civ. App. 2018)), *cert. granted sub nom. Ex parte LeFleur*, No. 1190191 (Ala. May 22, 2020). *Accord, Ex parte Merrill*, 264 So. 3d 855, 862-863 (Ala. 2018) (citing *Ala. Alcoholic Beverage*

*Control Bd. v. Henri-Duval Winery, L.L.C.*, 890 So. 2d 70, 74 (Ala. 2003), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)).

**1. Plaintiffs-Petitioners have suffered actual and threatened injuries in fact.**

An “injury in fact” is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. *Salter v. State*, 971 So. 2d 31, 35-36 (Ala. Civ. App. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S. Ct. at 2137). A “legally protected interest” does not require a wrong which directly results in the violation of a legal right (*e.g.*, one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege). *E.g.*, *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970). Rather, it requires an invasion of some interest, economic or otherwise, that is a judicially cognizable interest. *See Sierra Club v. Morton*, 405 U.S. 727, 734-735, 92 S. Ct. 1361, 1366 (1972) (harm to aesthetic, environmental, or economic interests may constitute an injury in fact); *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (toc), Inc.*, 528 U.S. 167, 183, 120 S. Ct. 693, 705 (2000) (harm to aesthetic, recreational, or economic interests may constitute injury in fact). Thus, in *Lujan v. Defenders of Wildlife*, the court concluded that a person’s desire to use or observe an animal species, even for purely aesthetic purposes, “is undeniably a cognizable interest” for purposes of standing to challenge a rule promulgated under the Endangered Species Act. *See e.g.*, *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997) (the

interest of irrigation districts and ranchers in preserving the continued availability of water is a “judicially cognizable interest” for purposes of standing to challenge a biological opinion issued by the Fish and Wildlife Service under the Endangered Species Act); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 n.4, 106 S. Ct. 2860, 2866 n.4 (1986) (whale watching and studying interests harmed by whaling activities is an injury in fact); *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 73-74, 98 S. Ct. 2620, 2630 (1978) (environmental and aesthetic interests harmed by the thermal water pollution is an injury in fact); *Smith v. LeFleur*, 2019 Ala. Civ. App. LEXIS 141, at \*14-16 (plaintiffs use and enjoyment of property is a protected interest adversely affected by offensive odors, vultures and flies from a nearby landfill regulated by ADEM), *cert. granted sub nom. Ex parte LeFleur*, No. 1190191 (Ala. May 22, 2020). A judicially “cognizable interest” is simply the sort of interest that courts think to be of sufficient moment to justify judicial intervention. *Wilderness Soc’y v. Kane County, Utah*, 581 F.3d 581 F.3d 1198, 1211-12 (10th Cir. 2009).

An injury to a judicially cognizable interest is “concrete” if it is real, and not abstract. *Spokeo, Inc. v. Robins*, – U.S. –, –, 136 S. Ct. 1540, 1548 (2016). The injury must be “distinct and palpable,” as opposed to merely “[a]bstract,” and the harm must be actual or imminent, not “conjectural” or “hypothetical.” *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1260 (Ala. 2004) (See, J., concurring specially)

(citing *Whitmore v. Arkansas*, 495 U.S. 149, 156, 110 S. Ct. 1717, 1723 (1990) and *Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210 (1975)).

An injury is “particularized” if it affects the plaintiff in a personal and individual way. *Ex parte Merrill*, 264 So. 3d at 863-864. *See Spokeo, Inc. v. Robins*, 136 S. Ct. at 1548 (“For an injury to be ‘particularized,’ it ‘must affect the plaintiff in a personal and individual way.’”) (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. at 560 n.1, 112 S. Ct. at 2136 n.1. (“By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.”)).

In the case *sub judice*, Plaintiffs-Petitioners have judicially cognizable interests in their use and enjoyment of property, in their property values, and in their health and well-being that have been and threaten to be adversely affected by the discharge of unpleasant odors into the air, the breeding or accumulation of buzzards, flies, and coyotes, the emission of visible fugitive dust, and the creation of disturbing noises from the operation of the existing and the new landfill expansion authorized by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019). The injuries to Plaintiffs’-Petitioners’ judicially cognizable interests are distinct and palpable, actual and imminent, and particularized to them. *See supra* at pp. 97-103. Accordingly, Plaintiffs-Petitioners have suffered an actual and threatened injury in fact for purposes of standing.

**2. Plaintiffs'-Petitioners' injuries are "fairly traceable" to the AEMC's unlawful approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).**

A plaintiff must allege a causal connection between the injury and the conduct complained of, *i.e.*, the injury has to be "fairly traceable" to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *E. Cent. Baldwin County Water, Sewer and Fire Prot. Auth. v. Town of Summerdale*, 252 So. 3d 98, 107 (Ala. Civ. App. 2015) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S. Ct. at 2136), *rev'd on other grounds*, *Ex parte Town of Summerdale*, 252 So. 3d 111 (Ala. 2016). *See Town of Cedar Bluff*, 904 So. 2d at 1261 (A plaintiff must allege a palpable harm that "'fairly can be traced back to the challenged action.'") (quoting *Whitmore*, 495 U.S. at 155, 110 S. Ct. at 1723)). The challenged government action need not be the proximate cause (*i.e.*, direct and immediate cause) of a plaintiff's injury; rather, plaintiff's injury need only be "fairly traceable" to the challenged government action. *Bennett v. Spear*, 520 U.S. at 168-169, 117 S. Ct. at 1164.

But for the AEMC's approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013), the City of Dothan would not be authorized to continue operation of the existing landfill and would not be authorized to construct and operate the landfill expansion and Plaintiffs-Petitioners would not suffer, or would suffer substantially less, from the discharge of unpleasant odors, the breeding or accumulation of buzzards, flies, and coyotes, the emission of visible fugitive

dust, and the creation of disturbing noises that harm and threaten to harm their use and enjoyment of property, their property values, and their health and well-being.

Accordingly, Plaintiffs'-Petitioners' injuries are "fairly traceable" to the AEMC's approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**3. It is likely that a favorable decision by the Court will redress Plaintiffs'-Petitioners' injuries.**

The relief requested by a plaintiff must be likely to redress the plaintiff's injury in fact. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019 (1998). "[R]elief that does not remedy the injury' does not satisfy the redressability element of standing." *Ala. Dep't of Env'tl. Mgmt. v. Friends of Hurricane Creek*, 114 So. 3d at 54 (quoting *Steel Co.* 523 U.S. at 107, 118 S. Ct. at 1019. *Accord, Ex parte Aull*, 149 So. 3d 582, 594 (Ala. 2014); *Ex parte Ala. Educ. Television Comm'n*, 151 So. 3d 283, 288-289 (Ala. 2013). It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to unlawful conduct, relief that effectively abates that conduct and prevents its recurrence provides a form of redress. *Friends of the Earth, Inc.*, 528 U.S. at 185-186, 120 S. Ct. at 706.

Ala. Code 1975 § 41-22-20(k) authorizes the Court to "reverse or modify the [AEMC] decision or grant other appropriate relief from the [AEMC] action, equitable or legal, including declaratory relief, if the court finds that the [AEMC] action is due to be set aside or modified. In this brief, Plaintiffs'-Petitioners request that the Court grant

declaratory relief and reverse without remand or reverse with remand the AEMC's approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). This relief, if granted, will likely result in the cessation of landfill operations pending the submission of a new application by the City that complies with all the requirements of Ala. Admin. Code div. 335-13 and ADEM action thereon, which in turn is likely to result in Plaintiffs-Petitioners not suffering, or suffering substantially less, from the discharge of unpleasant odors, the breeding or accumulation of buzzards, flies, and coyotes, the emission of visible fugitive dust, and the creation of disturbing noises that harm and threaten to harm their use and enjoyment of property, their property values, and their health and well-being. Accordingly, the relief requested by Plaintiffs-Petitioners is likely to redress their injuries.

**D. The substantial rights of the Plaintiffs-Petitioners have been prejudiced by the AEMC's approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).**

Ala. Code 1975 § 41-22-20(k) authorizes the Court to reverse or modify an agency decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, "if substantial rights of the petitioner have been prejudiced" because the agency action is determined to meet one or more of the criteria in § 41-22-20(k)(1)-(7).

Plaintiffs-Petitioners ask the Court to grant declaratory relief, to reverse without remand, and to reverse with remand, the AEMC's June 12, 2020 Order approving

ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) authorizing the continued operation an existing municipal solid waste landfill and the construction and operation of a new expansion of the municipal solid waste landfill because the AEMC’s Order is in violation of statutory provisions, in excess of the statutory authority, in violation of pertinent agency rule(s), affected by other error of law, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, arbitrary, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion and is prejudicial to Plaintiffs’-Petitioners’ “substantial rights.”

The “substantial rights” language in Ala. Code 1975 § 41-22-20(k) was adopted by the Alabama Legislature in 1981. Ala. Acts 1981, Act No. 81-855, § 20(11), p. 1552. It is a “direct adoption [from] Iowa Code § 17A.19(8) (1976 Cum. Supp.) . . .”

Commentary to Act No. 81-855. “[W]hen the Legislature enacts a statute borrowed from another jurisdiction it also enacts the authoritative interpretation of the statute” by that jurisdiction. *Ex parte Huguley Water System*, 282 Ala. 633, 638, 213 So. 2d 799, 804 (1968). “Indeed, it is the well-settled rule that when a statute is adopted from another state or country, the judicial construction already placed on such statute by the highest courts of the jurisdiction from which it is taken is treated as incorporated therein so as to govern its interpretation.” 73 Am. Jur. 2d *Statutes* § 222 (2020).

In *Des Moines v. Public Employment Relations Board*, 275 N.W.2d 753 (Iowa 1979), the Iowa Supreme Court interpreted the meaning of “substantial rights” in Iowa Code § 17A.19(8). The Court explained:

[T]he ‘substantial rights’ language of [Iowa Code] § 17A.19(8) has no bearing on a person or party’s standing to obtain judicial review. It is, instead, merely a provision analogous to a harmless error rule. It is a direction to the court that an agency’s action should not be tampered with unless the complaining party has in fact been harmed” by the agency’s action.

*Id.* at 759.

The AEMC’s approval of ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) authorizes continued operation an existing municipal solid waste landfill and the construction and operation of a new expansion of the municipal solid waste landfill. That operation harms the Plaintiffs’-Petitioners’ use and enjoyment of their property, harms their property values, and harms their health and well-being. Accordingly, the AEMC’s approval of ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is prejudicial to the substantial rights of the Plaintiffs-Petitioners.

## II. THE MERITS

### A. Prohibition Against Application Processing without Prior Approval of Application by Affected Local Governing Body

1. **The AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous interpretation of Ala. Code 1975 § 22-27-48(b).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13. *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>3</sup>

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<sup>3</sup> The AEMC’s scope of review of an “administrative action” is *de novo*. *Bates Motel, Inc. v. Env’tl. Mgmt. Comm’n*, 596 So. 2d 924, 927 (Ala. Civ. App. 1991). An “administrative action” is defined as “[t]he *issuance, modification*, repeal or denial of any permit . . . by the department.” Ala. Code 1975 § 22-22A-3(8) (emphasis added). Any order of the AEMC modifying, approving, or disapproving an ADEM administrative action, constitutes the final action of ADEM. Ala. Code 1975 § 22-22A-7(c)(6).

(continued...)

Ala. Admin. Code r. 335-13-5-.02 provides *inter alia*:

**Permit Application.** Existing and proposed landfill units shall obtain permits to construct and/or operate in accordance with the following:

(1) **Application Requirements.** Landfill units proposed after the effective date of this Division shall submit the following in order to request a permit:

\* \* \*

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<sup>3</sup>(...continued)

“Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.” *IMED Corp. v. Sys. Eng’g Assoc. Corp.*, 602 So. 2d 344, 346 (Ala. 1992). The courts regularly look to dictionary definitions to ascertain the plain meaning of words used in a statute. *State v. City of Birmingham*, No. 1180342, 2019 Ala. LEXIS 132, at \*11 (Ala. Nov. 27, 2019). “Issuance” means “[t]he act of issuing,” *American Heritage Dictionary of the English Language*, Fifth Edition (2020), <https://ahdictionary.com> (accessed Jan. 23, 2020); “[t]he action of issuing or granting something.” *OED Online* (Dec. 2019), Oxford University Press., <https://www.oed-com> (accessed January 23, 2020). “Modification” means “[t]he act or process of modifying or the condition of being modified,” *American Heritage Dictionary of the English Language*, Fifth Edition (2020) (accessed Jan. 23, 2020); “[t]he action or an act of making changes to something without altering its essential nature or character; . . .” *OED Online* (Dec. 2019), Oxford University Press., <https://www.oed.com> (accessed January 23, 2020). Accordingly, the AEMC is authorized to review ADEM’s *act of issuing* and *act of modifying* Solid Waste Disposal Facility Permit No. 35-06, not merely the permit itself.

Ala. Admin. Code rs. 335-13-5-.03(2)(b) and 335-13-5-.04(3)(b) provide that ADEM shall “[i]ssue the permit if the application complies with this Division; . . .” Thus, an application’s compliance with Ala. Admin. Code div. 335-13 is a condition precedent to issuance of a permit renewal or modification. Alternatively, these rules provide that ADEM shall “[d]eny the permit, stating in writing the reasons for denial and inform the person requesting the permit of appeal procedures in 335-13-1-.07” or shall “[r]equire additional information, elements of design for the facility, and specify procedures for inclusion into the permit prior to issuance of the permit.” Ala. Admin. Code rs. 335-13-5-.03(2)(a) & -.03(2)(c) and 335-13-5-.04(3)(a) & -.04(3)(c).

(b) Documentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 and 48.1;

\* \* \*

Ala. Code 1975 § 22-27-48(b) states:

\* \* \* The department may not consider an application for a modified permit for a facility unless *such application* has received approval pursuant to this section by the affected local governing body.

(Emphasis added).

The City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that "[o]n September 16, 2014, the City of Dothan granted local approval to increase the permitted facility boundary to 522 acres. \* \* \* A copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM." ADEM Hr'g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017.

Resolution No. 2014-246 approves "the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres." ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp

00017.<sup>4</sup> Resolution No. 2014-246 does *not* approve the City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).<sup>5</sup> ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:869 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works).

On May 6, 2019, ADEM issued a modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) to expand the size of the permitted facility from 78 acres to 522.19 acres, to expand the size of the existing permitted municipal solid waste landfill unit from 55 acres to 69.9 acres, and to add a new permitted 15.0-acre

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<sup>4</sup> Resolution No. 2014-246 does not identify, describe, or approve: (a) any proposed expansion of the existing municipal solid waste landfill; (b) any proposed new construction/demolition landfill; (c) the size or location of any proposed municipal solid waste landfill expansion; (d) the size or location of any proposed construction/demolition landfill; or (e) the location of the proposed expanded facility boundary. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:540, 8:1791 (Test Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:866 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section).

<sup>5</sup> Resolution No. 2014-246 does not approve any earlier application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017. *See* Hr'g Tr. at 6:1390-1391 (Test. Jerry Corbin, Dir. of Dothan Public Works 1995-2018) (Resolution No. 2014-246 did not approve an application to ADEM); Hr'g Tr. at 6:1410-1411 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works) (same); Hr'g Tr. at 4:1054 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section) (Resolution No. 2014-246 did not approve the City's application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) submitted to ADEM on January 26, 2015).

construction and demolition landfill unit. *Compare* Petnr's Hr'g Ex. P-3 *with* Petnr's Hr'g Ex. P-17.

Plaintiffs-Petitioners contested ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) contending that the City of Dothan's 2018 application therefor did not receive approval by the Board of Commissioners of the City of Dothan in accordance with the requirements of Ala. Admin. Code r. 335-13-5-.02(1)(b) and Ala. Code 1975 § 22-27-48(b). Admin. Rec. Doc. 1 (Request for Hearing), at 9 (¶ B); Admin. Rec. Doc. 50 (Prehearing Order), at 5-7 (¶ B). Accordingly, Plaintiffs-Petitioners contended that the City's 2018 application does not demonstrate compliance with the requirements of Ala. Admin. Code r. 335-13-5-.02(1)(b) and Ala. Code 1975 § 22-27-48(b).

The Hearing Officer concluded that "Ala. Code 1975 § 22-27-48(b) provides that ADEM may not consider an application for a modified permit unless the local governing body has approved that application for a modified permit after following the procedural requirements of Ala. Code 1975 § 22-27-48(c) through (f);" that "ADEM's interpretation of Ala. Code 1975 § 22-27-48(b) is erroneous;" that "[t]he City's application to ADEM to modify Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include documentation of host government approval of that application as required by Ala. Code 1975 § 22-27-48(b);" and that "[t]he City's application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 does not demonstrate compliance with . .

. Ala. Code 1975 § 22-27-48(b).” Admin. Rec. Doc. 105 (Report of Hearing Officer), at 20-21 (¶¶ 8 and 12). Accordingly, the Hearing Officer recommended that the AEMC disapprove ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Admin. Rec. Doc. 105 (Report of Hearing Officer), at 27.

The AEMC modified the Hearing Officer’s conclusions of law by adopting the conclusions of law recommended by the City of Dothan. Admin. Rec. Doc. 139 (AEMC Order). The AEMC’s conclusions include the following:

5. While Ala. Code 1975 § 22-27-48 requires host government approval before the Department can consider an application for a modified permit, it does not require that an applicant submit to the local governing body the technical information that is required by the Department. Rather, § 22-27-48(b) provides that the local governing body must provide approval “pursuant to this section.”

6. Indeed, the engineering and operational materials considered by the Department are not relevant to the criteria prescribed by § 22-27-48 for consideration by the local governing body “[i]n determining whether to recommend approval of the proposed . . . modification of a new or existing solid waste management site,” which are as follows:

(1) The consistency of the proposal with the jurisdiction’s solid waste management need as identified in its plan.

(2) The relationship of the proposal to local planned or existing development or the absence thereof, to major transportation arteries and to existing state primary and secondary roads.

(3) The location of a proposed facility in relationship to existing industries in the state that generate large volumes of solid waste, or the relationship to the areas

projected for development of industries that will generate solid waste.

(4) Costs and availability of public services, facilities and improvements required to support a proposed facility and protect public health, safety, and the environment.

(5) The impact of a proposed facility on public safety and provisions made to minimize the impact on public health and safety.

(6) The social and economic impacts of a proposed facility on the affected community, including changes in property values, and social or community perception.

§ 22-27-48(c)(1)-(c)(6).

7. This division of responsibilities is considered one of the advantages of Alabama’s solid waste landfill permitting process. (Final Report, Administrative & Technical Support in Evaluating Public Input on Potential Enhancements to the State Solid Waste Program, available at <http://www.adem.state.al.us/programs/land/swreport/PhaseIFinalReport.pdf>) (“Another advantage of Alabama’s current landfill permitting process is the separation of authorities and responsibilities between the [Host Government Authority] and [Regional Planning Commission], and the state’s environmental regulator ADEM. . . . This “firewall” separates issues and decisions predominantly in the political domain from issues and decisions related to the technical design and operation of the proposed landfill.”).

8. The City’s application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 and the September 16, 2014 host government approval satisfied the requirements of Ala. Admin. Code r. 335-13-5-.02 and Ala. Code 1975 § 22-27-48(b). Accordingly, the modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 was issued in compliance with Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Admin. Rec. Doc. 139 (AEMC Order), at 15-17 (¶¶ 5-8).

There is no presumption of correctness afforded to the AEMC’s legal conclusions or its application of the law to the facts. *Ala. Dep’t of Env’tl. Mgmt. v. Legal Env’tl. Assistance Found., Inc.*, 973 So. 2d at 376. *Accord, Bice v. Taylor*, 157 So. 3d at 167. *See May v. Azar*, 2019 Ala. Civ. App. LEXIS 101, \*32 (judicial review of an agency’s conclusions of law and its application of the law to the facts are *de novo*). Thus, it is for the Court to decide the meaning of the words used in Ala. Code 1975 § 22-27-48(b).

““In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature.” *DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 275 (Ala. 1998).

“““Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.””

““*Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen*, 714 So. 2d 293, 296 (Ala. 1998) (quoting *IMED Corp. v. Systems Eng’g Assocs. Corp.*, 602 So. 2d 344, 346 (Ala. 1992)).’

“*City of Prattville v. Corley*, 892 So. 2d [845,] 848 [(Ala. 2003)].

“In *Archer v. Estate of Archer*, 45 So. 3d 1259, 1263 (Ala. 2010), this Court described its responsibilities when construing a statute:

““““[I]t is this Court’s responsibility in a case involving statutory construction to give

effect to the legislature’s intent in enacting a statute when that intent is manifested in the wording of the statute . . . .””” [I]f the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.””” . . . In determining the intent of the legislature, we must examine the statute as a whole and, if possible, give effect to each section.”

“““*Ex parte Exxon Mobil Corp.*, 926 So. 2d 303, 309 (Ala. 2005). Further,

““““when determining legislative intent from the language used in a statute, a court may explain the language, but it may not detract from or add to the statute.... When the language is clear, there is no room for judicial construction . . . .”

“““*Water Works & Sewer Bd. of Selma v. Randolph*, 833 So. 2d 604, 607 (Ala. 2002).””

“(Quoting *Ex parte Birmingham Bd. of Educ.*, 45 So. 3d 764, 767 (Ala. 2009).) Similarly, in *Lambert v. Wilcox County Commission*, 623 So. 2d 727, 729 (Ala. 1993), the Court stated:

“““The fundamental rule of statutory construction is that this Court is to ascertain and effectuate the legislative intent as expressed in the statute . . . . In this ascertainment, we must look to the entire Act instead of isolated phrases

or clauses . . . and words are given their plain and usual meaning . . . . Moreover, just as statutes dealing with the same subject are in pari materia and should be construed together, . . . parts of the same statute are in pari materia and each part is entitled to equal weight.”

“(Quoting *Darks Dairy, Inc. v. Alabama Dairy Comm’n*, 367 So. 2d 1378, 1380–81 (Ala. 1979).)”

“*First Union Nat’l Bank of Florida v. Lee Cty. Comm’n*, 75 So. 3d 105, 111–12 (Ala. 2011).”

*Craft v. McCoy*, No. 1180820, 2020 Ala. LEXIS 86, at \*9-10 (Ala. June 5, 2020) (quoting *Cockrell v. Pruitt*, 214 So. 3d 324, 331-332 (Ala. 2016)).

In *City of Brundidge v. Alabama Department of Environmental Management*, 218 So. 3d 798 (Ala. Civ. App. 2016), the Alabama Court of Civil Appeals was called upon to interpret the phrase “[s]uch approval or disapproval of services or activities” in Ala. Code 1975 § 22-27-48(a). The Court explained that “Such is properly used as an adjective when reference has previously been made to a category of persons or things . . . . [S]uch is a DEICTIC TERM that must refer to a clear antecedent. Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 859 (3d ed. 2011).” *Id.* at 812. The Alabama Supreme Court similarly said in *Gafford v. Kirby*, 512 So. 2d 1356 (Ala. 1987), that “[the word “such”] is descriptive and limiting, referring always to a class just before pointed out.” *Id.* at 1361 (quoting *United States v. Pittman*, 151 F.2d 851, 852 (5th Cir. 1945)). The *Gafford* court also quoted from another source as follows:

In its natural and ordinary sense, and by grammatical usage, the word “such” refers to an antecedent, some antecedent word or phrase, and, more specifically, to the last precedent antecedent, unless the meaning would thereby be impaired. Thus the word “such” refers back to and identifies something previously spoken of, something that has gone before, something that has been specified. It always refers to a class just before pointed out, and should be construed as referring back to a common subject matter. It may be used as representing the object as already particularized in terms which are not mentioned, and it may indicate or suggest a person or thing originally specified by a name or designation.

83 C.J.S. *Such* (1953).

*Id.*

The words “such application” in Ala. Code 1975 § 22-27-48(b) plainly and unambiguously refer to the antecedent phrase “application for a modified permit” that may be submitted to ADEM for consideration. *See Fitzjarrald v. Huntsville*, 597 So. 2d 1378, 1379 (Ala. Civ. App. 1992) (“ADEM may not even consider a permit application unless it has already been approved by the local government unit.”). Thus, with limited exceptions specified the statute,<sup>6</sup> ADEM may not consider an application for modification of a solid waste disposal facility permit unless that application has received prior approval by the affected local governing body pursuant to Ala. Code 1975 § 22-27-48(c) through - 27-48(f). Given the plain and unambiguous language of the statute, there is no room for

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<sup>6</sup> Ala. Code 1975 § 22-27-48(d) provides that local approval is not required for “permit modifications for the limited purposes of changing liner and leachate collection design, changes in waste streams from within the facility's designated service area, changes in sequence of fill, changes to incorporate new technology, and changes intended to bring a facility into compliance with statutes and regulations.”

judicial construction, and thus no need to consider the interpretation by the AEMC or ADEM. *See Ala. Bd. of Exam'rs of Landscape Architects v. Bostick*, 211 So. 3d 825, 834 (Ala. 2016) (“[W]here the language of the statute or ordinance is plain, this Court will not blindly follow an administrative agency’s interpretation, but will interpret the statute to mean exactly what it says.”).

The AEMC incorrectly interprets the words “such application” in Ala. Code 1975 § 22-27-48(b) as referring to an application submitted to a local governing body for approval of a proposed facility pursuant to Ala. Code 1975 § 22-27-48(c). While the statute does contemplate an application being made to a local governing body (*e.g.*, Ala. Code 1975 § 22-27-48(d) (“The application of the plan for local approval shall be accompanied by an application fee payable to the local governing body; . . .” \* \* \* “A renewed application for local approval submitted within 18 months of an application being denied or rejected by the local governing body shall be accompanied by an application fee payable to the local governing body . . .”), the statute plainly requires that a local governing body approve or disapprove the application for permit modification to be submitted to ADEM. The statutory requirement that a local governing body approve or disapprove the ADEM application does not authorize the local governing body to consider whether the ADEM application complies with the provisions of Ala. Admin. Code div. 335-13. Rather, Ala. Code 1975 § 22-27-48(c) constrains the local governing body to consideration of the criteria identified therein. If the local governing body has

evaluated the proposed facility under the criteria identified in § 22-27-48(c)(1) to -27-48(c)(6) and determined that the proposed facility is acceptable, the local governing body may grant its approval of the ADEM application whereupon ADEM may proceed to consider the application. This construction harmonizes and gives effect to all the provisions of Ala. Code 1975 § 22-27-48, particularly subsection (c), whereas the AEMC’s interpretation does not give effect to the plain and unambiguous meaning of “such application” in Ala. Code 1975 § 22-27-48(b).

Finally, any administrative burden that might befall a permit applicant who is required by ADEM to revise a permit application to comply with the requirements of Ala. Admin. Code div. 335-13 and who may have to obtain a new approval of the revised application from the local governing body cannot justify disregard of the plain language of Ala. Code 1975 § 22-27-48(b). Where statutory language is plain and unambiguous, it is the duty of the Court to give that language effect. The separation of powers doctrine requires that the judiciary abstain from construing plain statutory language to achieve a judicial notion of propriety, wisdom, necessity, utility or expediency. *See Westphal v. Northcutt*, 187 So. 3d 684, 695 (Ala. 2015) (“[A]ll questions of propriety, wisdom, necessity, utility and expediency in the enactment of laws are exclusively for the legislature, and are matters with which the courts have no concern.”) quoting *Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 983 (Ala. Civ. App. 2008), in turn quoting *Jansen v. State ex rel. Downing*, 273 Ala. 166, 168, 137 So. 2d 47, 48 (1962)). Accordingly, any

burden or hardship that might befall an applicant because of the plain language of Ala. Code 1975 § 22-27-48(b) is of no concern to the courts.

Ala. Code 1975 § 22-27-48(b) precludes the AEMC and ADEM from considering the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) without prior approval of that permit application by the Board of Commissioners of the City of Dothan pursuant to the requirements of Ala. Code 1975 § 22-27-48. There is no dispute that Resolution No. 2014-246 does not approve the City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Thus, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an error of law, *i.e.*, it is based on an erroneous interpretation of Ala. Code 1975 § 22-27-48(b).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Code 1975 § 22-27-48(b) precludes the AEMC (and ADEM) from considering an application for a modified solid waste disposal facility permit unless that application has received approval by the local governing body pursuant to Ala. Code 1975 § 22-27-48; (2) declare that the Board of Commissioners of the City of Dothan did not approve the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) pursuant to Ala. Code 1975 § 22-27-48; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit

No. 35-06 (Oct. 21, 2013) was affected by an erroneous interpretation of Ala. Code 1975 § 22-27-48; and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**2. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in excess of the statutory authority of the AEMC under Ala. Code 1975 § 22-27-48(b).**

Ala. Code 1975 § 22-27-48(b) states:

\* \* \* The department may not consider an application for a modified permit for a facility unless *such application* has received approval pursuant to this section by the affected local governing body.

(Emphasis added).

The City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that "[o]n September 16, 2014, the City of Dothan granted local approval to increase the permitted facility boundary to 522 acres. \* \* \* A copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM." ADEM Hr'g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnrs' Hr'g Ex. P-11A, at Bates-stamp 00017.

Resolution No. 2014-246 approves "the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536

acres.” ADEM Hr’g Ex.2, at Bates-stamp 00017; Petnr’s Hr’g Ex. P-11A, at Bates-stamp 00017.<sup>7</sup> Resolution No. 2014-246 does *not* approve the City of Dothan’s 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).<sup>8</sup> ADEM Hr’g Ex.2, at Bates-stamp 00017; Petnr’s Hr’g Ex. P-11A, at Bates-stamp 00017; Hr’g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:869 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng’r for Dothan Public Works).

As discussed in Part II. A. 1. (pp. 115-129) above, Ala. Code 1975 § 22-27-48(b) precludes the AEMC (and ADEM) from considering the City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) without prior approval of that permit application by the Board of Commissioners of the City of Dothan pursuant to the requirements of Ala. Code 1975 § 22-27-48. There is no dispute that Resolution No. 2014-246 does not approve the City of Dothan’s 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). Thus, the AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct.21, 2013) is in excess of the AEMC’s statutory authority under Ala. Code 1975 § 22-27-48(b).

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<sup>7</sup> *See supra* note 4.

<sup>8</sup> *See supra* note 5.

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Code 1975 § 22-27-48(b) precludes the AEMC (and ADEM) from considering an application for a modified solid waste disposal facility permit unless that application has received approval by the local governing body pursuant to Ala. Code 1975 § 22-27-48; (2) declare that the Board of Commissioners of the City of Dothan did not approve the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) pursuant to Ala. Code 1975 § 22-27-48; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in excess of the AEMC's statutory authority; and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**3. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-5-.02.**

Ala. Admin. Code r. 335-13-5-.02 provides *inter alia*:

**Permit Application.** Existing and proposed landfill units shall obtain permits to construct and/or operate in accordance with the following:

(1) **Application Requirements.** Landfill units proposed after the effective date of this Division shall submit the following in order to request a permit:

\* \* \*

(b) Documentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 and 48.1;

\* \* \*

The City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that "[o]n September 16, 2014, the City of Dothan granted local approval to increase the permitted facility boundary to 522 acres. \* \* \* A copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM." ADEM Hr'g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017.

Resolution No. 2014-246 approves "the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres." ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017.<sup>9</sup> Resolution No. 2014-246 does *not* approve the City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).<sup>10</sup> ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:869 (Test. Stephen Scott Story, Chief of

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<sup>9</sup> *See supra* note 4.

<sup>10</sup> *See supra* note 5.

ADEM Solid Waste Eng'g Section); Hr'g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works).

The Hearing Officer concluded that “[t]he City’s application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 does not demonstrate compliance with Ala. Admin. Coder. 335-13-5-.02.” Admin. Rec. Doc. 105 (Report of Hearing Officer), at 21 (¶ 12). The AEMC modified the Hearing Officer’s conclusion holding that “[t]he City’s application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 and the September 16, 2014 host government approval satisfied the requirements of Ala. Admin. Code r. 335-13-5-.02 . . .” Admin. Rec. Doc. 139 (AEMC Order), at 17 (¶ 8).

As discussed in Part II. A. 1. (pp. 115-129) above, Ala. Code 1975 § 22-27-48(b) requires that the local governing body (host government) approve the application for permit modification submitted to ADEM before ADEM may consider the application. Compliance with Ala. Admin. Code r. 335-13-5-.02 requires that a permit application include documentation demonstrating that the local governing body has approved the application submitted to ADEM as provided in Ala. Code 1975 § 22-27-48. The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include that documentation. Accordingly, the AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal

Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-5-.02.

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code r. 335-13-5-.02 requires that an application for modification of a solid waste disposal facility permit is required to include documentation that the application received approval by the local govern body (host government); (2) declare that the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include documentation that the application received approval by the local govern body (host government) as required by Ala. Admin. Code r. 335-13-5-.02; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-5-.02; and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**4. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-

.02. *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>11</sup> Although the AEMC correctly interpreted Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3), the AEMC applied these rules incorrectly. The AEMC held:

8. The City’s application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 and the September 16, 2014 host government approval satisfied the requirements of Ala. Admin. Code r. 335-13-5-.02 . . . . Accordingly, the modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 was issued in compliance with Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Admin. Rec. Doc. 139 (AEMC Order), at 17 (¶ 8).

The City of Dothan’s 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that “[o]n September 16, 2014, the City of Dothan granted local approval to increase the permitted facility boundary to 522 acres. \* \* \* A copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM.” ADEM Hr’g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr’g Ex. 2, at Bates-stamp 00017; Petnrs’ Hr’g Ex. P-11A, at Bates-stamp 00017.

Resolution No. 2014-246 approves “the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536

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<sup>11</sup> *See supra* note 3.

acres.” ADEM Hr’g Ex.2, at Bates-stamp 00017; Petnr’s Hr’g Ex. P-11A, at Bates-stamp 00017.<sup>12</sup> Resolution No. 2014-246 does *not* approve the City of Dothan’s 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).<sup>13</sup> ADEM Hr’g Ex.2, at Bates-stamp 00017; Petnr’s Hr’g Ex. P-11A, at Bates-stamp 00017; Hr’g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:869 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section); Hr’g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng’r for Dothan Public Works).

As discussed in Part II. A. 3. (pp. 131-134) above, Resolution No. 2014-246 does not demonstrate compliance with Ala. Admin. Code r. 335-13-5-.02. Accordingly, the AEMC’s June 12, 2020 conclusion that “the modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 was issued in compliance with Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3)” is affected by an erroneous application of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-.02; (2) declare that the City of Dothan’s 2018

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<sup>12</sup> *See supra* note 4.

<sup>13</sup> *See supra* note 5.

application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate compliance with Ala. Admin. Code r. 335-13-5-.02; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**5. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-.02. *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>14</sup>

Ala. Admin. Code r. 335-13-5-.02 provides *inter alia*:

**Permit Application.** Existing and proposed landfill units shall obtain permits to construct and/or operate in accordance with the following:

(1) **Application Requirements.** Landfill units proposed after the effective date of this Division shall submit the following in order to request a permit:

\* \* \*

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<sup>14</sup> *See supra* note 3.

(b) Documentation of host government approval, as provided in the Code of Alabama 1975, § 22-27-48 and 48.1;

\* \* \*

The City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states that "[o]n September 16, 2014, the City of Dothan granted local approval to increase the permitted facility boundary to 522 acres. \* \* \* A copy of the local approval resolution and correspondence related to the Statement of Consistency are included in Appendix 1.1. Original Local Approval Documentation is on file at ADEM." ADEM Hr'g Ex. 2, at Bates-stamp 00010. Included at Appendix 1.1 of the Operations Manual is Resolution No. 2014-246 adopted by the Board of Commissioners of the City of Dothan on September 16, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017.

Resolution No. 2014-246 approves "the proposed expansion of the facility boundary of the Dothan Landfill located at 1290 Burkett Road to approximately 536 acres." ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017.<sup>15</sup> Resolution No. 2014-246 does *not* approve the City of Dothan's 2018 application to ADEM for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).<sup>16</sup> ADEM Hr'g Ex.2, at Bates-stamp 00017; Petnr's Hr'g Ex. P-11A, at Bates-stamp 00017; Hr'g Tr. at 2:539, 8:1787-1789 (Test. Eric Sanderson, Chief of

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<sup>15</sup> See *supra* note 4.

<sup>16</sup> See *supra* note 5.

ADEM Solid Waste Branch); Hr'g Tr. at 3:869 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 6:1414-1415 (Test. Ernest Stokes, Sr. Civil Eng'r for Dothan Public Works).

As discussed in Part II. A. 4. (pp. 134-137) above, Resolution No. 2014-246 does not demonstrate compliance with Ala. Admin. Code r. 335-13-5-.02. Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-5-.02; (2) declare that the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate compliance with Ala. Admin. Code r. 335-13-5-.02; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**B. Seasonal High Groundwater Elevation Measurements, Bottom of Lowermost Liner Elevation, and Separation Distance Between Bottom Elevation of Lowermost Liner and Seasonal High Groundwater Elevation**

- 1. The AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan’s application does not demonstrate that seasonal high groundwater elevation measurements were obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11(2)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>17</sup> Plaintiffs-Petitioners contested the May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) by ADEM contending that the City of Dothan’s permit application does not demonstrate compliance with the groundwater elevation measurement requirements in Ala. Admin. Code rs. 335-13-4-.11(2)(a). Admin. Rec. Doc. 1 (Request for Hearing), at 10-11 (¶ E); Admin. Rec. Doc. 50 (Prehearing Order), at 12-14 (¶ E).

Ala. Admin. Code r. 335-13-4-.11(2)(a) prescribes the methodology that permit applicants must use to demonstrate that there is a minimum of five feet of separation between the bottom of the liner system and highest measured “seasonal” (February to

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<sup>17</sup> *See supra* note 3.

April) groundwater elevation. *See* Admin. Rec. Doc. 139 (AEMC Order), at 18 (¶ 12).

Ala. Admin. Code r. 335-13-4-.11(2)(a) provides:

For purposes of designing the bottom elevation of the liner system, ***the applicant shall measure the groundwater elevation*** at the location of the proposed cell or liner system. Such determinations shall be based on groundwater measurements taken in the area of the proposed cell or liner system as approved by the Department. ***At each measuring location, the applicant shall obtain a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period.*** Having obtained the measurements, the applicant shall design the facility so that the bottom elevation of the liner shall be a minimum of five feet above the highest measured groundwater level. The applicant shall submit to the Department all data known to exist concerning groundwater elevations at the landfill site and shall submit to the Department a location map showing all monitoring wells or piezometers and drilling logs for all monitoring wells or piezometers used to obtain any groundwater elevation data that is submitted. Nothing herein shall prevent the Department from requiring additional groundwater measurements or from requiring an additional buffer as it may deem appropriate with respect to a particular site.

(Emphasis added). *See* Admin. Rec. Doc 139 (AEMC Order), at 18 (¶ 15).

The Hearing Officer made multiple findings of fact regarding groundwater elevation measurements obtained in the area of the proposed municipal solid waste landfill expansion. Admin. Rec. Doc. 105 (Report of Hearing Officer), at 10-12. Among these was the following:

The City's application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that groundwater elevations measured in the first saturated zone (confined Lisbon aquifer) at piezometers PZ-20, PZ-21, PZ-22A, PZ-27, PZ-28, or PZ-29 included "a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period."

Admin. Rec. Doc. 105 (Report of Hearing Officer), at 12.

The Hearing Officer made the following conclusions:

22. The City's application for modification of Solid Waste Disposal Facility Permit No. 35-06 does not demonstrate that the City obtained groundwater elevation measurements in accordance with the methodology prescribed in Ala. Admin. Code r. 335-13-4-.11(a)(2).

Admin. Rec. Doc. 105 (Report of Hearing Officer), at 23 (¶ 22).

28. The City's application to renew and modify Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate compliance with Ala. Admin. Code r. 335-13-4-.11. Accordingly, the renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 on May 6, 2019 was issued in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Admin. Rec. Doc. 105 (Report of Hearing Officer), at 25 (¶ 28).

The AEMC modified the Hearing Officer's findings and conclusions. Admin. Rec. Doc. 139 (AEMC Order). The AEMC made no findings of fact regarding the dates of groundwater elevation measurements at PZ-20, PZ-21, PZ-22A, PZ-27, PZ-28, or PZ-29. Admin. Rec. Doc. 139 (AEMC Order), at 8-10.<sup>18</sup> Nevertheless, the AEMC

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<sup>18</sup> Ala. Admin. Code r. 335-2-1-.17(3) requires that "[a]ny order of the Commission modifying, approving, or disapproving the Department's administrative action shall be in writing and shall include findings of fact and conclusions of law separately stated." Notwithstanding this requirement, the AEMC made no findings of fact regarding the dates that groundwater elevation measurements were obtained at piezometers PZ-20, PZ-21, PZ-22A, PZ-27, PZ-28, or PZ-29.

(continued...)

concluded as follows:

18. The City’s application for modification of Solid Waste Disposal Facility Permit No. 35-06 demonstrates that the City obtained groundwater elevation measurements in substantial compliance with the methodology prescribed in Ala. Admin. Code r. 335-13-4-11(a)(2) [sic: 335-13-4-.11(2)(a)].

19. The City’s application to renew Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code r. 335-13-4-.11.

20. The City’s application to modify Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code R. 335-13-4-.11.

Admin. Rec. Doc. 139 (AEMC Order), at 19 (¶¶ 18-20).

The term “groundwater” is defined as “water below the land surface in the zone of saturation.” Ala. Admin. Code r. 335-13-1-.03(58). The term “saturated zone” is defined as “that part of the earth’s crust in which all voids are filled with water.” Ala. Admin. Code r. 335-13-1-.03(122). *See* Admin. Rec. Doc. 139 (AEMC Order), at 17-18 (¶ 11). Rule 335-13-4-.11(2)(a) requires groundwater elevation measurements of the top of the saturated zone. Hr’g Tr. 3:680-681 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch).

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<sup>18</sup>(...continued)

An AEMC order that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. *See State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev’d on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63.

The groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) apply to all landfill units regardless of where they are located and regardless of whether the aquifer underlying the landfill is confined or unconfined. *See* Ala. Admin. Code r. 335-13-5-.02 (applications for proposed landfill units shall include technical data and reports to comply with r. 335-13-4-.11); Admin. Rec. Doc. 105 (Report of Hearing Officer), at 22 (§ 19) (“Ala. Admin. Code r. 335-13-4-.11(a)(2) [sic: 335-13-4-.11(2)(a)] does not prescribe different methodologies for taking groundwater elevation measurements in confined aquifers and unconfined aquifers”).

Ala. Admin. Code r. 335-13-4-.11(2)(a) requires that groundwater elevation measurements shall be obtained in the area of the proposed cell or liner system as approved by ADEM. *See* Admin. Rec. Doc. 139 (AEMC Order), at 18 (§ 14). The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometers PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 are located in the area of the proposed cell or liner system of the municipal solid waste landfill expansion. ADEM Hr’g Ex. 2, at Bates-stamp 00278; Petnrs’ Hr’g Ex. P-11L. *See* Hr’g Tr. at 2:589-594, 3:717-718 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (same); Hr’g Tr. at 3:885-886 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (same); Hr’g Tr. at 4:1068-1070 (Test. Jared Kelly, Permit Eng’r in ADEM Solid Waste Section) (same); Hr’g Tr. at 5:1175, 5:1184 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.) (same); Admin. Rec. Doc. 139

(AEMC Order), at 9-10 (identifying piezometers PZ-20, PZ-21, PZ-27, PZ-28, and PZ-29 as being in the area of the proposed cell or liner system).

Ala. Admin. Code r. 335-13-4-.11(2)(a) schedules groundwater elevation measurements to be obtained during February, March, and April because these months are normally the wettest months of the year. *See* Admin. Rec. Doc. 139 (AEMC Order), at 9; Hr'g Tr. at 3:680 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:882 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 4:1066-1067 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section); Hr'g Tr. at 7:1616 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch); Hr'g Tr. at 5:1171, 5:1242 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that piezometers PZ-20, PZ-27, and PZ-28 were constructed on January 23-24, 2012; piezometer PZ-29 was constructed on January 24, 2012; piezometer PZ-21 was constructed on May 12, 2014; and piezometer PZ-22 was constructed on May 13, 2014. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnr's Hr'g Ex. P-11M.

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that the depth to saturated soils (groundwater) below land surface was measured on the date(s) these piezometers were

constructed. ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnr's Hr'g Ex. P-11M.<sup>19</sup> The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include any measurements of depth to groundwater or groundwater elevations in the saturated zone obtained during the consecutive months of February, March, or April. ADEM Hr'g Ex. 2. *See* Hr'g Tr. at 3:686 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (the City did not provide groundwater elevations in the saturated zone during three consecutive months of February, March and April). Accordingly, the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include groundwater elevation measurements obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a).

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that "water" elevation measurements were obtained at piezometers PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 subsequent to the dates when the piezometers were constructed. ADEM Hr'g Ex. 2, at Bates-stamp

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<sup>19</sup> A measured depth to groundwater below land surface can be converted to groundwater elevation by subtracting the depth to groundwater measurement from the elevation measurement of the top of the piezometer casing. Hr'g Tr. at 5:1168 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.). Measured depths to groundwater (saturated soils) at PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 are shown in ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnr's Hr'g Ex. P-11M. Measured elevations of the top of the piezometer casings of PZ-20, PZ-21, PZ-22, PZ-27, PZ-28, and PZ-29 are shown in ADEM Hr'g Ex. 2, at Bates-stamp 00271 and Petnr's Hr'g Ex. P-11K.

00262; ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. These water elevation measurements do not reflect "groundwater" elevations in the "saturated zone" because they are affected by artesian rise. ADEM Hr'g Ex. 2, at Bates-stamp 00265; ADEM Hr'g Ex. 2, at Bates-stamp 00272; Petnrs' Hr'g Ex. P-11M. *See* Ala. Admin. Code r. 335-13-1-.03(58) and -.03 (122) (definitions of "groundwater" and "saturated zone").

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows that in 2014, the City of Dothan obtained one water elevation measurement at piezometers PZ-20, PZ-27, PZ-28 and PZ-29 on January 28; one water elevation measurement at piezometers PZ-20, PZ-27, PZ-28 and PZ-29 in February (February 20); two water elevation measurements at piezometers PZ-20, PZ-27, PZ-28, and PZ-29 in March (March 18 and 31) (not within a twelve day period); two water elevation measurements at piezometers PZ-20, PZ-27, and PZ-28 in April (April 16 and 28) (within a twelve days period); and one water elevation measurement at piezometer PZ-29 on April 28. ADEM Hr'g Ex. 2, at Bates-stamp 00271; Petnrs' Hr'g Ex. P-11K. The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include at least two "water" elevation measurements at these piezometers during each of the three consecutive months of February, March and April with no two measurements taken

within any twelve-day period during 2013 to 2018.<sup>20</sup> ADEM Hr’g Ex. 2, at Bates-stamp 00271; Petnrs’ Hr’g Ex. P-11K. Accordingly, the City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include water elevation measurements obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a).

“[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them. . . . [A]nd so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required . . . the agency must be held to its own standard.” *Ala. Dep’t of Revenue v. Downing*, 272 So. 3d 184, 189 (Ala. Civ. App. 2018) (quoting *ABC Coke v. GASP*, 233 So. 3d at 1008 (in turn quoting *Hand v. State Dep’t of Human Res.*, 548 So. 2d 171, 173 (Ala. Civ. App. 1988), *aff’d sub nom.*, *Ex parte State Dep’t of Human Res.*, 548 So. 2d 176 (Ala. 1988)). *Accord*, *Health Care Auth. v. Statewide Health Coordinating Council*, 988 So. 2d 574, 582 (Ala. Civ. App. 2008); *Ex parte Wilbanks Health Care Servs.*, 986 So. 2d 422, 424-425 (Ala. 2007).

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<sup>20</sup> Most “water” elevation measurements were obtained in March and September. ADEM Hr’g Ex. 2, at Bates-stamp 00271; Petnrs’ Ex. P-11K. These measurements coincided with semiannual groundwater monitoring events required by Ala. Admin. Code r. 335-13-4-.27(3)(b)1. and Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013), Petnrs’ Hr’g Ex. P-3, at 10.

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that groundwater elevation measurements were obtained in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a).<sup>21</sup> Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11(2)(a); (2) declare that the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate compliance with the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a); (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

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<sup>21</sup> The applicability of Ala. Admin. Code r. 335-13-4-.11(1) is discussed in Part II. B. 2. (pp. 150-159), *infra*.

2. **The AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is characterized by an abuse of discretion or clearly unwarranted exercise of discretion in the application of Ala. Admin. Code rs. 335-13-4-.11(1).**

Ala. Admin. Code r. 335-13-4-.11(1) provides:

General Standards. 335-13-4-.12 through 335-13-4-.20 provides standards for establishing a landfill unit providing that the siting standards of 335-13-4-.01 have been fully complied with to the satisfaction of the Department. Certain requirements contained in 335-13-4-.01 through 335-13-4-.20 *may be enhanced or reduced by the Department as deemed necessary to comply with the Act and this Division.* The applicant shall submit to the Department all data known to exist concerning groundwater elevations at the landfill site and shall submit to the Department a location map showing all monitoring wells or piezometers and drilling logs for all monitoring wells or piezometers used to obtain any groundwater elevation data that is submitted. Nothing herein shall prevent the Department from requiring additional groundwater measurements or from requiring an additional buffer as it may deem appropriate with respect to a particular site.

(Emphasis added).

The Hearing Officer made the following finding of fact:

The City had ample opportunity to take “a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period” of groundwater elevations in the area of the proposed cell or liner system of the expansion of the municipal solid waste landfill unit.

Admin. Rec. Doc. 105 (Report of Hearing Officer), at 13.

The Hearing Officer made the following conclusion of law:

26. A reduction in the minimum groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(a)(2) [sic: 335-13-4-.11(2)(a)] was not “absolutely needed” because the City had

ample opportunity to make the required groundwater measurements during the three consecutive months of February, March and April in 2014, 2015, 2016, 2017, and 2018. Moreover, ADEM offered no evidence or explanation as to why a reduction or enhancement in the requirements of Ala. Admin. Code r. 335-13-4-.11(a)(2) [sic: 335-13-4-.11(2)(a)] was deemed necessary to comply with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. If an application is found to be lacking required information, ADEM has authority to require that an applicant provide additional information. Ala. Admin. Code rs. 335-13-5-.03(2)(c) & 335-13-5-.04(3)(c).

Admin. Rec. Doc. 105 (Report of Hearing Officer), at 24 (¶ 26).

The AEMC modified the Report of the Hearing Officer. Admin. Rec. Doc. 139 (AEMC Order).<sup>22</sup> It made the following conclusions of law:

17. The Department had discretion to consider the January 28 measurement along with all of the other measurements of groundwater in satisfaction of the requirements. See Ala. Admin. Code r. 335-13-4-.11(a)(1) [sic: 335-13-4-.11(1)] (“Certain requirements contained in 335-13-.01 through 335-13-4-.20 may be enhanced or reduced by the Department as deemed necessary to comply with the Act and this Division”); of ADEM Admin. Code r. 335-13-14-.07 (“As determined by the Director, substantial non-compliance with Department regulations will be grounds for denial of application”).

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<sup>22</sup> Ala. Admin. Code r. 335-2-1-.17(3) requires that “[a]ny order of the Commission modifying, approving, or disapproving the Department’s administrative action shall be in writing and shall include findings of fact and conclusions of law separately stated.” Notwithstanding this requirement, the AEMC made no finding(s) of fact that a reduction in the groundwater elevation measurement requirements in Ala. Admin. Code r. 335-13-4-.11(2)(a) is “necessary” to ensure compliance with the Solid Wastes and Recyclable Materials Management Act or Ala. Admin. Code div. 335-13. An AEMC order that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. See *State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev’d on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63.

18. The City’s application for modification of Solid Waste Disposal Facility Permit No. 35-06 demonstrates that the City obtained groundwater elevation measurements in substantial compliance with the methodology prescribed in Ala. Admin. Code r. 335-13-4-11(a)(2) [sic: 335-13-4-.11(2)(a)].

19. The City’s application to renew Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code r. 335-13-4-.11.

20. The City’s application to modify Solid Waste Disposal Facility Permit No. 35-06 demonstrated compliance with Ala. Admin. Code R. 335-13-4-.11.

Admin. Rec. Doc. 139 (AEMC Order), at 18 (¶ 17-20).

While the language of Ala. Admin. Code r. 335-13-4-.11(1) grants ADEM the discretion to reduce certain requirements of Ala. Admin. Code div. 335-13, the exercise of that discretion is constrained to those occasions where it is deemed “necessary to comply with the Act and this Division.” *Cf. Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 532-533, 127 S. Ct. 1438, 1462 (2007) (the exercise of discretion may be constrained by limiting statutory language).

“[L]anguage used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.” *Fraternal Order of Police, Lodge No. 64 v. Pers. Bd. of Jefferson Cnty.*, 103 So. 3d 17, 25 (Ala. 2012) (quoting *Ex parte Wilbanks Health Care Servs., Inc.*, 986 So. 2d at 427, in turn quoting *Ala. Medicaid Agency v. Beverly Enters.*, 521 So. 2d 1329, 1332 (Ala. Civ. App. 1987)). *Accord, Hamilton v. Ala. Dep’t of Postsecondary Educ.*, 50 So. 3d 439, 445

(Ala. Civ. App. 2009) (quoting *State Pers. Bd. v. Wallace*, 682 So. 2d 1357, 1359 (Ala. Civ. App. 1996)); *Brookwood Health Servs., Inc. v. State Health Planning & Dev. Agency*, 202 So. 3d 345, 351 (Ala. Civ. App. 2016).

The courts regularly look to dictionary definitions to ascertain the plain meaning of words. The natural, plain, ordinary, and commonly understood meaning of the word “necessary” is “an indispensable item.” *Merriam-Webster.com Dictionary*, Merriam-Webster Inc., <https://www.merriam-webster.com>, (last visited Aug. 18, 2020); “That which is indispensable; a necessary thing; an essential or requisite,” *OED Online*, <https://www-oed-com> (last visited Aug. 18, 2020); “Something indispensable,” *The American Heritage Dictionary of the English Language*, Fifth Edition (2020), <https://ahdictionary.com> (last visited Aug. 18, 2020). Thus, Ala. Admin. Code r. 335-13-4-.11(1) permits a reduction in the groundwater elevation measurement requirements of r. 335-13-4-.11(2)(a) only if the reduction is “indispensable” to ensuring compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13.

The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that a reduction in the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is “necessary” or indispensable to ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. Moreover,

the evidence received at the hearing does not demonstrate that a reduction in the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is “necessary” or indispensable to ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13.

Indeed, ADEM’s Stephen Scott Story testified that since 2014, there would have been time for the City to have collected more groundwater elevation data during the high water time period (February through April). Hr’g Tr. at 3:916-917 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section). Similarly, ADEM’s Charles Chelsey Whittlesey Slagle testified that he knew of no reason why the City of Dothan couldn’t have collected more groundwater elevation data. Hr’g Tr. 7:1606 (Test. Charles Chelsey Whittlesey Slagle, Chief of ADEM Hydrogeology Section, Groundwater Branch). James Mark Tanner, who supervised the collection of water elevation measurements, testified that after 2014, he measured water elevations in the wells on a semi-annual basis in March and September of every year as required by the landfill permit.<sup>23</sup> Hr’g Tr. at 5:1251 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.). He testified further:

- Q. Okay. So your choice of time when to measure was based on a semiannual groundwater monitoring event?
- A. That’s when the water levels were collected.
- Q. All right. Can you explain to me why you didn’t collect more samples to assure that you had two samples in February, two samples

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<sup>23</sup> See *supra* note 20.

in March, and two samples in April during any one year from 2014 to 2018?

A. No, sir.

*Id.*, at Hr’g Tr. 5:1190 (Test. James Mark Tanner, Sr. Project Geologist, TTL, Inc.).

Thus, for no known reason, it is apparent that the City chose not to adhere to the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) and not to demonstrate that a reduction in the groundwater elevation measurement requirements is “necessary” to ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. And even though ADEM was authorized to demand that the City submit additional groundwater elevation measurements obtained during the months of February, March and April, *see* Ala. Admin. Code r. 335-13-4-.11(2)(a) (“Nothing herein shall prevent the Department from requiring additional groundwater measurements or from requiring an additional buffer as it may deem appropriate with respect to a particular site”), Ala. Admin. Code rs. 335-13-5-.03(2)(c) (ADEM may “require additional information”) and 335-13-5-.04(3)(c) (same), ADEM did not do so. Hr’g Tr. at 3:698, 7:1794 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr’g Tr. at 3:893 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section).

Reducing the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) for the City of Dothan may have been convenient for the City and considered inconsequential by ADEM, but it was not “necessary” or indispensable to

ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13. Hr’g Tr. at 3:698 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (looking at groundwater elevation measurements outside the period of February, March, and April was not “necessary”); Hr’g Tr. at 3:882 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (“No, I mean, it’s not necessary” to collect measurements outside of February, March and April); Hr’g Tr. at 3:893 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (“I’m not going to say it’s necessary” to reduce the requirements of r. 335-13-4-.11(2)(a). “If we had those six [measurements required by r. 335-13-4-.11(2)(a)], we could have just used those six . . .”). Accordingly, the AEMC’s exercise of discretion under Ala. Admin. Code r. 335-13-4-.11(1) to reduce the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is an abuse of discretion or a clearly unwarranted exercise of discretion because it was not “necessary” to ensure compliance with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13.

In its Order approving ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013), the AEMC also cites Ala. Admin. Code r. 335-13-14-.07 with the preceding signal of “*cf.*” Admin. Rec. Doc 139, at 18 (¶ 17). “*Cf.*” is used when the cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. The parenthetical explanation

indicates that a permit may be denied if there is substantial non-compliance with ADEM regulations. Apparently, the AEMC is suggesting that *substantial compliance* with Ala. Admin. Code r. 335-13-4-.11(2)(a) is all that is required of an applicant seeking a new or modified landfill permit.

Ala. Admin. Code r. 335-13-14-.07(4)(a) provides:

#### Permit Application Denial

As determined by the Director, substantial non-compliance with Department regulations or permits at any facility in the State of Alabama owned or operated by the applicant, including any facility for which the pending permit application is requested, will be grounds for denial of the application, or alternatively, for suspension of further consideration of the application until such noncompliance is corrected.

Ala. Admin. Code chap. 335-13-14, however, applies to the operation and maintenance of composting facilities, not municipal solid waste landfills. *See* Ala. Admin. Code r. 335-13-14-.03. Accordingly, the AEMC's reliance on Ala. Admin. Code r. 335-13-14-.07 as support for the AEMC's authority to permit substantial compliance with the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is completely misplaced.

Moreover, the AEMC may not construe Ala. Admin. Code r. 335-13-4-.11(2)(a) as requiring only substantial compliance. “[R]egulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them. . . . [A]nd so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required . . . the agency must be

held to its own standard.” *Ala. Dep’t of Revenue v. Downing*, 272 So. 3d at 189 (quoting *ABC Coke v. GASP*, 233 So. 3d at 1008 (in turn quoting *Hand v. State Dep’t of Human Res.*, 548 So. 2d at 173, *aff’d sub nom.*, *Ex parte State Dep’t of Human Res.*, 548 So. 2d at 176).

Accordingly, Ala. Admin. Code r. 335-13-14-.07 does not provide support for the AEMC’s conclusion that substantial compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a) is sufficient.

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code r. 335-13-4-.11(1) grants ADEM the discretion to reduce certain requirements of Ala. Admin. Code rs. 335-13-4-.12 through 335-13-4-.20 only if deemed necessary (*i.e.*, indispensable) to comply with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13; (2) declare that the City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that a reduction in the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is necessary (*i.e.*, indispensable) to comply with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div. 335-13; (3) declare that there is no evidence in the record demonstrating that a reduction in the groundwater elevation measurement requirements of Ala. Admin. Code r. 335-13-4-.11(2)(a) is necessary (*i.e.*, indispensable) to comply with the Solid Wastes and Recyclable Materials Management Act and Ala. Admin. Code div.

335-13; (4) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was based on an abuse of discretion or clearly unwarranted exercise of discretion in the application of Ala. Admin. Code r. 335-13-4-.11(1); and (5) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

3. **The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan's application does not accurately demonstrate the bottom elevation of the lowermost liner or the separation distance between the bottom elevation of the lowermost liner and highest seasonal measured groundwater elevation in compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11(2)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>24</sup> Plaintiffs-Petitioners contested the May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) by ADEM contending that the City of Dothan's permit application does not demonstrate that the bottom elevation of the liner system is a minimum of five feet above the highest measured groundwater elevation level in violation of Ala. Admin.

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<sup>24</sup> *See supra* note 3.

Code r. 335-13-4-.11(2)(a). Admin. Rec. Doc. 1 (Request for Hearing), at 10-11 (¶ E); Admin. Rec. Doc. 50 (Prehearing Order), at 12-14 (¶ E).

Ala. Admin. Code r. 335-13-4-.11(2)(a) prescribes the methodology that permit applicants must use to demonstrate that there is a minimum of five feet of separation between the bottom of the liner system and highest measured “seasonal” (February to April) groundwater elevation. *See* Admin. Rec. Doc. 139 (AEMC Order), at 18 (¶ 12).

Ala. Admin. Code r. 335-13-4-.11(2)(a) provides:

For purposes of designing the bottom elevation of the liner system, the applicant shall measure the groundwater elevation at the location of the proposed cell or liner system. Such determinations shall be based on groundwater measurements taken in the area of the proposed cell or liner system as approved by the Department. At each measuring location, the applicant shall obtain a minimum of two measurements taken during each of the three consecutive months of February, March and April with no two measurements taken within any twelve-day period. Having obtained the measurements, the applicant shall design the facility so that the ***bottom elevation of the liner shall be a minimum of five feet above the highest measured groundwater level.*** The applicant shall submit to the Department all data known to exist concerning groundwater elevations at the landfill site and shall submit to the Department a location map showing all monitoring wells or piezometers and drilling logs for all monitoring wells or piezometers used to obtain any groundwater elevation data that is submitted. Nothing herein shall prevent the Department from requiring additional groundwater measurements or from requiring an additional buffer as it may deem appropriate with respect to a particular site.

(Emphasis added). *See* Admin. Rec. Doc 139 (AEMC Order), at 18 (¶ 12-13).

The City of Dothan’s 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) states:

#### ***Section 4.4***

The Permit Plans, Sheet 6 [sic: Sheet 7], for this facility include cross sections of the proposed landfill as required by ADEM Administrative Code R. 335-13-4-.12(2)(b). ***Each cross-section shows potentiometric surface (groundwater elevations), the existing ground elevations, cell construction elevations indicating top of the liner,*** and final closure elevations.

ADEM Hr'g Ex. 2, at Bates-stamp 00431 (emphasis added). *See* Petnrs' Hr'g Ex. 12, at Sheet 7; Petnrs' Hr'g Ex. P-12C, P-12D, and P-12E (showing cross sections). The application also states:

#### ***Section 4.6***

The Permit Plans for this facility include the existing contours of the entire site. The Permit Plans show ***the top of the clay liner elevations for the cell base grades in relation to existing contours and seasonal high groundwater.*** The expansion design meets the minimum separation of 5 ft between liner and seasonal high groundwater. The Final Grading Plan shows the elevation of the top liner. Excavation and construction elevations for the development of all cells, and all final contours are provided in the Permit Plans as required by ADEM Administrative Code R. 335-13-4-.12(2)(d).

ADEM Hr'g Ex. 2, at Bates-stamp 00431 (emphasis added). *See* Petnrs' Hr'g Ex. P-12, at Sheet 3 (showing (Detail for Liner System Construction)).

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) shows the *top* elevation of the lowermost liner, rather than *bottom* elevation of the lowermost liner as required by Ala. Admin. Code r. 335-13-4-.11(2)(a). Hr'g Tr. at 3:722-727, 3:740 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 902-903 (Test. Stephen Scott Story, Chief of ADEM

Solid Waste Eng'g Section); Hr'g Tr. at 6:1467-1470, 6:1479 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.). Thus, the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not accurately identify the bottom elevation of the lowermost liner, does not accurately determine the separation distance between the bottom of the lowermost liner and the highest measured seasonal groundwater elevation,<sup>25</sup> and does not demonstrate compliance with Ala. Admin. Code r. 335-13-4-.11(2)(a). Accordingly, the AEMC's June 12, 2020 approval of ADEM's April 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

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<sup>25</sup> Three cross section diagrams of the proposed municipal solid waste landfill expansion included in the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) show the elevation of the "proposed base grade" (top of the compacted clay liner) and elevation of the "potentiometric surface." Petnr's Hr'g Ex. 12, at Sheet 7; Petnr's Hr'g Ex. P-12C, P-12D, and P-12E. Each of these cross-sections identify the minimum separation distance between the "proposed base grade" (top of the compacted clay liner) and the "potentiometric surface." Cross-section C - C' shows a minimum separation of 5.25 feet. Petnr's Hr'g Ex. P-12E. The compacted clay liner is to be 12" thick. Petnr's Hr'g Ex. 12, at Sheet 3 (Detail for Liner System Construction). Thus, the bottom elevation of the compacted clay liner is 12" lower than the "proposed base grade" shown in cross-section C - C'. Tr. at 2:622, 3:722-723, 3:726-733, 3:736-737, 3:739-741 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 3:901-903, 3:912-913 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Tr, at 6:1465-1470, 6:1479, 6:1490 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.). Therefore, the actual minimum separation distance along cross-section C - C' is 4.25 feet. Hr'g Tr. at 6:1479, 1496-1497 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.11(2)(a); (2) declare that the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not accurately demonstrate the bottom elevation of the lowermost liner or the separation distance between the bottom elevation of the lowermost liner and the highest measured seasonal groundwater elevation as required by Ala. Admin. Code r. 335-13-4-.11(2)(a); (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**C. Demonstration of Alternate Liner System Design Effectiveness**

- 1. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City of Dothan's application does not demonstrate that the alternate liner system design complies with Ala. Admin. Code r. 335-13-4-.18(3)(h)1.**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r.

335-13-4-.18(3)(h)1. *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>26</sup> Plaintiffs-Petitioners contested the May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) by ADEM contending that the City of Dothan's permit application does not demonstrate that the alternate liner system design complies with Ala. Admin. Code r. 335-13-4-.18(3)(h)1. Admin. Rec. Doc. 1 (Request for Hearing), at 19-20 (¶ Q); Admin. Rec. Doc. 50 (Prehearing Order), at 27 (¶ Q).

Ala. Admin. Code r. 335-13-4-.18(1) provides that a new or lateral expansion of a municipal solid waste landfill shall be constructed with a composite liner system described in Ala. Admin. Code r. 335-13-1-.03(26) or an alternate design as specified in r. 335-13-4-.18(3)(h)1.

Ala. Admin. Code r. 335-13-4-.18(3)(h)1. prescribes the demonstration that must be made when a permit applicant proposes to use an alternate liner system design. It provides:

An alternate liner design may be approved by the Department provided that:

1. The owner or operator ***demonstrates that the alternate design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone*** at the relevant point of compliance, as specified by the Department under 335-13-4-.27(2)(a)3.

2. When approving a design that complies with subparagraph (a) of this paragraph, the Department shall consider at least the following factors:

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<sup>26</sup> *See supra* note 3.

- (I) The hydrogeologic characteristics of the facility and surrounding land;
- (ii) The climatic factors of the area; and
- (iii) The volume and physical and *chemical characteristics of the leachate*.

(Emphasis added). Table 1 contains concentration values for twenty-four chemicals that may not be exceeded in the first saturated zone.

The City's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) proposed an alternate liner system design. ADEM Hr'g Ex. 2, at Bates-stamp 00433, 00435, 00535-00538; Petnr's Hr'g Ex. P-12, at Sheet 3 (Detail for Liner System Construction); Admin. Rec. Doc. 139 (AEMC Order), at 11. The City's 2018 application includes the results of the Hydrologic Evaluation of Landfill Performance (HELP) model developed by the U.S. Army Corps of Engineers Waterways Experiment Station for the U.S. EPA. ADEM Hr'g Ex. 2, at Bates-stamp 00442-00462. The HELP model "is used to estimate the amount of runoff and leachate generated for a particular [liner system] design. The model is also used to determine the maximum anticipated depth of leachate head over the liner system." ADEM Hr'g Ex. 2, at Bates-stamp 00432. The HELP model is only capable of calculating the predicted *volume* of liquid (leachate) that passes through the liner system. Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.); Hr'g Tr. at 6:1517 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 4:1125-1126 (Test. Jared

Kelly, Permit Eng'r in ADEM Solid Waste Section). The HELP model is not capable of calculating the predicted *concentrations of contaminants* that pass through the liner system or that migrate into the first saturated zone. Hr'g Tr. at 3:794 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 4:1128-1129 (Test. Jarred Kelly, Permit Eng'r in ADEM Solid Waste Section); Hr'g Tr. at 6:1517-1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.). Accordingly, the HELP model does not demonstrate that the City's proposed alternate liner design ensures that the chemical contaminant concentration values listed in Table 1 will not be exceeded in the first saturated zone.

Although a model exists that is capable of predicting the contaminant concentrations that migrate into the first saturation zone, Hr'g Tr. at 7:1711-1712 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.), the City's consulting engineers did nothing to demonstrate that the contaminant concentrations that leak through the bottom liner and migrate into the first saturated zone will not exceed the concentration values listed in Rule 335-13-4-.18, Table 1. Hr'g Tr. at 6:1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.).

The City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that the City's proposed alternate liner system design ensures that the chemical contaminant concentration values

listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18 will not be exceeded in the first saturated zone as required by Ala. Admin. Code r. 335-13-4-.18(3)(h)1. Accordingly, the AEMC's June 12, 2020 approval of ADEM's modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.18(3)(h)1.; (2) declare that the City of Dothan's 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that the proposed alternate liner system design ensures that the chemical contaminant concentration values listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18 will not be exceeded in the first saturated zone as required by Ala. Admin. Code r. 335-13-4-.18(3)(h)1.; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

2. **The AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-4-.18(3)(h)1.**

Ala. Admin. Code r. 335-13-4-.18(3)(h) provides:

An alternate liner design may be approved by the Department provided that:

1. The owner or operator *demonstrates that the alternate design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone* at the relevant point of compliance, as specified by the Department under 335-13-4-.27(2)(a)3.

2. When approving a design that complies with subparagraph (a) of this paragraph, the Department shall consider at least the following factors:

(I) The hydrogeologic characteristics of the facility and surrounding land;

(ii) The climatic factors of the area; and

(iii) The volume and physical and *chemical characteristics of the leachate*.

(Emphasis added).

The AEMC made the following findings of fact respecting the demonstration required by Ala. Admin. Code r. 335-13-4-.18(3)(h)1.:

The City submitted a copy of the results of the Hydrological Evaluation of Landfill Performance (HELP) model, developed by the US Army Engineer Waterways Experiment Station for the US EPA. The HELP model, demonstrates that the leakage rate for the alternate liner design was less than that for the regulation design.

The liner design described in the regulations would meet the standards for groundwater protection in the rules. Thus, a lower leakage

rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18.

Admin. Rec. Doc. 139 (AEMC Order), at 11.

The AEMC made the following conclusion of law:

27. The Petitioners failed to prove that the alternate liner design violates the Department's regulations.

Admin. Rec. Doc. 139 (AEMC Order), at 20 (¶ 27).<sup>27</sup>

From the forgoing findings of fact and conclusion of law, it is apparent that the AEMC applied Ala. Admin. Code r. 335-13-4-.18(3)(h)1. as requiring a demonstration that the alternate liner system design ensures that the leachate leakage rate (volume) is

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<sup>27</sup> This AEMC conclusion presumes that Plaintiffs-Petitioners have the burden of demonstrating that the alternate liner system design will result in concentration values listed in Table 1 of rule 335-13-4-.18 being exceeded in the first saturated zone. Plaintiffs-Petitioners claim is that the City of Dothan's 2018 application does not demonstrate that the alternate liner system design complies with Ala. Admin. Code r. 335-13-4-.18(3)(h)1. *See* Admin. Rec. Doc. 1 (Request for Hearing), at 19-20 (¶ Q) and Admin. Rec. Doc. 50 (Prehearing Order), at 27 (¶ Q. 1.). The AEMC agreed that "Ala. Admin. Code rs. 335-13-5-.03(2)(b) and 335-13-5-.04(3)(b) provide that a permit may be issued only if the application demonstrates compliance with Ala. Admin. Code div. 335-13." Admin. Rec. Doc. 139 (Order), at 15 (¶ 3). Absent the City's demonstration that the alternate liner system design will not result in an exceedance of the contaminant concentration values listed in Table 1 of rule 335-13-4-.18, ADEM is prohibited by Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) from issuing the modification of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) and the AEMC is prohibited from approving ADEM's modification of the permit.

less than or equal to the leachate leakage rate (volume) produced by the default liner system design.

“[L]anguage used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.”

*Fraternal Order of Police, Lodge No. 64 v. Pers. Bd. of Jefferson Cnty.*, 103 So. 3d at 25 (quoting *Ex parte Wilbanks Health Care Servs., Inc.*, 986 So. 2d at 427, in turn quoting *Ala. Medicaid Agency v. Beverly Enters.*, 521 So. 2d at 1332). *Accord*, *Hamilton v. Ala. Dep’t of Postsecondary Educ.*, 50 So. 3d at 445; *State Pers. Bd. v. Wallace*, 682 So. 2d at 1359.

A court will not defer to an agency’s interpretation of its own regulations if that interpretation is plainly erroneous or inconsistent with the regulation. *Fraternal Order of Police, Lodge No. 64 v. Pers. Bd. of Jefferson Cnty.*, 103 So. 3d at 25 (citing *Brunson Constr. & Envtl. Servs., Inc. v. City of Prichard*, 664 So. 2d 885, 890 (Ala. 1995), *United States v. Larionoff*, 431 U.S. 864, 872, 97 S. Ct. 2150, 2155 (1977), and *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217 (1945)). *See Kisor v. Wilkie*, 588 U.S.—, —, 139 S. Ct. 2400, 2015-16 (2019) (a court may consider an agency’s interpretation of a regulation only if it is genuinely ambiguous).

The plain and unambiguous language of Ala. Admin. Code r. 335-13-4-.18(3)(h)1. requires a permit applicant to demonstrate that use of an alternate liner system design will not result in an exceedance of the contaminant concentration values listed in Table 1 in

the first saturated zone. It does not suggest that a permit applicant is required to demonstrate that the alternate liner system design ensures that the leachate leakage rate (volume) is less than or equal to the leachate leakage rate (volume) produced by the default liner system design. Thus, the AEMC's application of Ala. Admin. Code r. 335-13-4-.18(3)(h)1. conflicts with and is inconsistent with the plain language of Ala. Admin. Code r. 335-13-4-.18(3)(h)1.

Moreover, the HELP model relied upon by ADEM and the AEMC does not demonstrate that the alternate liner system design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone. The HELP model is only capable of calculating the predicted *volume* of liquid (leachate) that passes through the liner system. Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.); Hr'g Tr. at 6:1517 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 4:1125-1126 (Test. Jared Kelly, Permit Eng'r in ADEM Solid Waste Section). The HELP model is not capable of calculating the predicted contaminant concentrations that pass through the liner system or that migrate into the first saturated zone. Hr'g Tr. at 3:794 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch); Hr'g Tr. at 4:1128-1129 (Test. Jarred Kelly, Permit Eng'r in ADEM Solid Waste Section); Hr'g Tr. at 6:1517-1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.); Hr'g Tr. at 7:1709 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.). The City's consulting engineers did nothing to demonstrate that the contaminant

concentrations that leak through the bottom liner and migrate into the first saturated zone will not exceed the concentration values listed in Rule 335-13-4-.18, Table 1. Hr'g Tr. at 6:1518 (Test. Sarah Sightler, Project Eng'r, CDG Eng'rs & Assoc.).

Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is affected by an erroneous application of Ala. Admin. Code r. 335-13-4-.18(3)(h)1.

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code r. 335-13-4-.18(3)(h)1. requires a demonstration that an alternate liner system design ensures that the concentration values listed in Table 1 of rule 335-13-4-.18 will not be exceeded in the first saturated zone; (2) declare that modeling the predicted volume of liquid (leachate) that passes through a liner system does not demonstrate the predicted contaminant concentrations that pass through the liner system or that migrate into the first saturated zone; (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was based on an erroneous application of Ala. Admin. Code r. 335-13-4-.18(3)(h)1.; (4) declare that there is no evidence in the record demonstrating that the alternate liner system design proposed by the City of Dothan ensures that the contaminant concentration values listed in Table 1 of rule 335-13-4-.18 will not be exceeded in the first saturated zone; and (5) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

3. **The AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record with respect to the City of Dothan’s demonstration of compliance with Ala. Admin. Code r. 335-13-4-.18(3)(h)1.**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.18(3)(h)1. *See* Admin. Rec. Doc. 139 (AEMC Order), at 15.<sup>28</sup> Ala. Admin. Code r. 335-13-4-.18(1) provides that “[n]ew MSWLF units and lateral expansions, at a minimum, shall be constructed with a composite liner, as defined in 335-13-1-.03, or an alternate design as specified in 335-13-4-.18(3)(h).”

Ala. Admin. Code r. 335-13-4-.18(3)(h) provides:

An alternate liner design may be approved by the Department provided that:

1. The owner or operator *demonstrates that the alternate design ensures the concentration values listed in Table 1 of this rule will not be exceeded in the first saturated zone* at the relevant point of compliance, as specified by the Department under 335-13-4-.27(2)(a)3.

2. When approving a design that complies with subparagraph (a) of this paragraph, the Department shall consider at least the following factors:

(I) The hydrogeologic characteristics of the facility and surrounding land;

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<sup>28</sup> *See supra* note 3.

(ii) The climatic factors of the area; and

(iii) The volume and physical and chemical characteristics of the leachate.

(Emphasis added). Table 1 contains concentration values for twenty-four chemical contaminants that may not be exceeded in the first saturated zone.

The AEMC made the following findings of fact concerning the City's proposed alternate liner design:

The City submitted a copy of the results of the Hydrological Evaluation of Landfill Performance (HELP) model, developed by the US Army Engineer Waterways Experiment Station for the US EPA. The HELP model, demonstrates that the leakage rate for the alternate liner design was less than that for the regulation design.

The liner design described in the regulations would meet the standards for groundwater protection in the rules. Thus, a lower leakage rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18.

Admin. Rec. Doc. 139 (AEMC Order), at 11.

The AEMC's findings that "[t]he HELP model, demonstrates that the leakage rate for the alternate liner design was *less than* that for the regulation design" and that "a *lower* leakage rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18" (emphasis added) are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Both findings require a comparison of the leachate leakage rate of the alternate liner system design with the

leachate leakage rate of default liner system design. The City's application, however, includes no evidence of the leachate leakage rate that would result from using the default liner system design at the City's proposed landfill expansion (*i.e.*, the application includes no HELP model results for the default liner system design)<sup>29</sup> which might be compared to the leachate leakage rate predicted by the HELP model for the City's proposed alternative liner system design. ADEM Hr'g Ex. 2. Hence, the AEMC's conclusion that the City's alternate liner system design results in a leakage rate that is "less than" or "lower" than the default liner system design is unsupported in the record.

The AEMC's conclusion that the HELP model results demonstrate that the alternate liner system design ensures the concentration values listed in Table 1 of r. 335-13-4-.18 will not be exceeded in the first saturated zone, *see* Admin. Rec. Doc. 139 (AEMC Order), at 20 (¶ 27) ("The Petitioners failed to prove that the alternate liner

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<sup>29</sup> The HELP Model requires input values representing localized conditions specific to the area of the landfill expansion, such as evaporative zone depth, initial water in evaporative zone, upper limit of water storage in evaporative zone, maximum leaf area index, start of the growing season, end of the growing season, average annual wind speed, quarterly relative humidity, normal mean monthly precipitation, and normal mean monthly temperature. ADEM Ex. 2, at Bates-stamp 00458-00459. The City's 2018 application does not include HELP Model results for the default liner system design using these input values representing localized conditions specific to the area of the landfill expansion. Absent application of the HELP Model to the default liner system design using input values representing localized conditions specific to the area of the landfill expansion, it is impossible to predict the leachate leakage rate of the default liner system or to conclude that the leachate leakage rate of the alternative liner system design would be "less than" or "lower" than the leachate leakage rate of the default liner system design.

design violates the Department's regulations"), is based on two unsupported factual assumptions: (1) the default liner system design ensures that leachate leakage will not result in chemical contaminant concentrations in the first saturated zone below the City's proposed landfill expansion that exceed the values listed in Table 1 of Ala. Admin. Code r. 335-13-4-.18; and (2) the City's proposed alternate liner system design results in less or lower chemical contaminant concentrations in the leachate leakage than the default liner system design. Neither of these assumptions are supported by *any* evidence provided by the City in its 2018 application for modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013). ADEM Hr'g Ex. 2. Furthermore, the City's 2018 application includes no evidence of the predicted chemical characteristics of the leachate that will be generated by the City's proposed landfill expansion (*i.e.*, there is no identification of the chemical contaminants or their concentrations in the leachate) and no evidence of the predicted chemical contaminant concentrations in the first saturated zone after migration through native soils below the lowest liner. ADEM Hr'g Ex. 2.

Finally, the City's HELP Model predicted a leachate leakage rate for the proposed alternate liner system design that is inaccurate because the City used an incorrect input assumption for the alternate liner system design. The City's 2018 application proposed a 60 mil thick HDPE liner as part of its alternate liner system design. ADEM Hr'g Ex. 2, at Bates-stamp 00433 (Layer 5: textured 60 mil HDPE flexible geosynthetic liner); ADEM Hr'g Ex. 2, at Bates-stamp 00434 (Layer 9: textured 60 mil HDPE flexible geosynthetic

liner); Petnr's Hr'g Ex. P-12, at Sheet 3 (HDPE 60 mil Textured Liner). However, the HELP model was run assuming a 40 mil (0.04 inch) thick High Density Polyethylene (HDPE) flexible membrane liner. ADEM Hr'g Ex. 2, at Bates-stamp 00443 (Layer 5: 0.04 inch flexible membrane liner); ADEM Hr'g Ex. 2, at Bates-stamp 00450 (Layer 5: 0.04 inch flexible membrane liner); ADEM Hr'g Ex. 2, at Bates-stamp 00457 (Layer 9: 0.04 inch flexible membrane liner). This singular erroneous input value in the HELP Model invalidates the predicted leachate leakage rate for the City's proposed alternate liner system design. Thus, there is no valid predicted leachate leakage rate for the City's alternate liner system design *and* no predicted leachate leakage rate for the default liner system design with which to compare.

Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is premised on findings of fact which are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code r. 335-13-4-.18(3)(h)1. requires a demonstration that an alternate liner system design ensures that the concentration values listed in Table 1 of rule 335-13-4-.18 will not be exceeded in the first saturated zone; (2) declare that the AEMC's finding that "[t]he HELP model, demonstrates that the leakage rate for the alternate liner design was less than that for the regulation design" is clearly erroneous in view of the reliable, probative,

and substantial evidence on the whole record; (3) declare that the AEMC's finding that "a lower leakage rate would demonstrate that the proposed alternate design would be at least as protective as the described design regarding the concentration values in Table 1 of ADEM 335-13-4-.18" is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (4) declare that the input value for the thickness of the HDPE flexible geosynthetic liner used by the City in the HELP model is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; (5) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record with respect to the City of Dothan's demonstration of compliance with Ala. Admin. Code r. 335-13-4-.18(3)(h)1.; and (6) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

- D. Prohibition Against the Discharge of Unpleasant and Harmful Odors**
- 1. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2103) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City's of Dothan's application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a renewal or modification of a permit is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>30</sup> Plaintiffs-Petitioners contested the May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) by ADEM contending that the City’s 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 11-12 (¶¶ F & G), Admin. Rec. Doc. 50 (Prehearing Order), at 14-15 (¶ F.1.) and 16-17 (¶ G.1.).

Ala. Admin. Code r. 335-13-4-.01(3) provides:

Other Requirements. Solid Waste Disposal Facilities must comply with any other applicable State or Federal rules, laws, regulations or other requirements.

Among the “other applicable State . . . rules” that municipal solid waste landfill units and construction/demolition landfill units must comply with is Ala. Admin. Code r. 335-3-1-.08 which provides:

Prohibition of Air Pollution. No person shall permit or cause *air pollution*, as defined in rule 335-3-1-.02(1)(e) of this chapter by the discharge of any

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<sup>30</sup> *See supra* note 3.

air contaminant for which no ambient air quality standards have been set under rule 335-3-1-.03(1).

(Emphasis added).<sup>31</sup>

“Air Pollution” is defined as follows:

[T]he 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 State and in such territories of the State as shall be affected thereby.

Ala. Admin. Code r. 335-3-1-.02(1)(e) (emphasis added).

An “air contaminant” is defined as follows:

any solid, liquid, or gaseous matter, any *odor*, or any combination thereof, from whatever source.

Ala. Admin. Code r. 335-3-1-.02(1)(d) (emphasis added).

An “odor” is defined as follows:

smells or aromas which are *unpleasant to persons* or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, or which by their inherent chemical or physical nature or method or processing are, or may be, detrimental or dangerous to health. Odor and smell are used interchangeably herein.

Ala. Admin. Code r. 335-3-1-.02(1)(ss) (emphasis added).

Municipal solid waste landfill units must also comply with Ala. Admin. Code r. 335-13-4-.22(3)(a) which provides:

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<sup>31</sup> No ambient air quality standards have been set for odor under r. 335-3-1-.03(1). Hr’g Tr. at 5:1263 (Test. Ronald W. Gore, Chief of ADEM Air Division).

Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

The Administrator of the U.S. Environmental Protection Agency approved a State Implementation Plan (SIP) for Alabama pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, as amended. *See* 40 C.F.R. § 52.50. That approved SIP incorporates Ala. Admin. Code rs. 335-3-1-.08 (prohibition of “air pollution”) and 335-3-1-.02 (definitions of “air pollution,” “air contaminant,” and “odor”).

Thus, Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a) *prohibit* landfills from causing or permitting the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property.

The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct 21, 2013) includes the following provisions:

## **7.2 COVER MATERIAL**

At the conclusion of each working day, the Landfill Operator shall cover the general working face of the landfill with a minimum of 6-inches of compacted earth cover or an approved alternate daily cover material.

The earth cover shall be excavated from on-site and shall have a sufficient clay content to provide a seal over the waste when compacted. The earthen cover material will be placed and compacted to a minimum depth of 6-inches to control disease, vectors, fire, odors, blowing litter, and scavenging.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00495.

#### **4.7 BUFFER ZONES**

A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM Administrative Code R. 335-13-4-.12(2)(f). No disposal will occur within the buffer area. Additionally, the facility will maintain a 100-ft buffer from the stream in the C/D Disposal Area.

ADEM Hr'g Ex. 2, at Bates-stamp 00431.

Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) includes the following condition:

Operation of Facility. The Permittee shall operate and maintain the disposal facility consistent with the Application, this permit, and 335-13.

Petrns' Hr'g Ex. P-17, at 6 (¶ A). This condition incorporates by reference Ala. Admin. Code rs. 335-13-4-.12(2)(f) (buffer zones), 335-13-4-.22(1)(a)1. (daily cover of municipal solid waste), 335-13-4-.23(1)(a)1. (weekly cover of construction/demolition solid waste), as well as Sections 4.7 (buffer zones) and 7.2 (cover of solid waste) of the City's 2018 application.

Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) includes the following condition:

Cover Requirements. The Permittee shall cover all wastes as required by 335-13. The municipal solid waste disposal area shall be covered at the conclusion of each day's activities. The construction and demolition waste disposal area shall be covered at the conclusion of each week's activities.

Petrns' Hr'g Ex. P-19, at 8 (¶ H). This condition incorporates by reference Ala. Admin. Code rs. 335-13-4-.22(1)(a)1. (daily cover of municipal solid waste) and 335-13-4-.23(1)(a)1. (weekly cover of construction/demolition solid waste).

The City's 2018 application does not *demonstrate* that implementation of a buffer zone and application of cover of solid waste as required by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will prevent the landfill from discharging smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property. In fact, the application says nothing about demonstrating compliance with the requirements of Ala. Admin. Code r. 335-3-1-.08 and 40 C.F.R. § 52.50.

Moreover, ADEM officials testified that the application of six inches of earthen cover and the implementation of a 100-foot buffer zone will "minimize" or "control" odors, Hr'g Tr. at 5:1270-1271, 5:1273 (Test. Ronald W. Gore, Chief of ADEM Air Division); Hr'g Tr. at 2:634-635 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch), but may not be sufficient to eliminate odors. Hr'g Tr. at 5:1270-1271 (Test. Ronald W. Gore, Chief of ADEM Air Division); Hr'g Tr. at 2:634-635 (Test. Eric

Sanderson, Chief of ADEM Solid Waste Branch). Thus, application of six inches of earthen cover and the implementation of a 100-foot buffer zone do not ensure that a landfill will not cause or permit the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property.

Furthermore, requirements for the application of earthen cover of solid waste and implementation of a 100-foot buffer zone were applicable to the City's existing landfill since at least October 21, 2013. *See* Petnr's Hr'g Ex. P-3, at 8 (¶ H) (2013 permit requirements for cover); Ala. Admin. Code rs. 335-13-4-.22(1)(a)1. and 335-13-4-.23(1)(a)1. (rule requirements for cover);<sup>32</sup> Petnr's Hr'g Ex. P-3, at 6 (¶ A) (2013 permit requirement that operation and maintenance must be consistent with requirements of Ala. Admin. Code div. 335-13, the permit, and the application); Ala. Admin. Code r. 335-13-4-.12(2)(f) (rule requirement for buffer zone);<sup>33</sup> Hr'g Tr. at 3:930 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng'g Section); Hr'g Tr. at 7:1712 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.). During the seven year period

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<sup>32</sup> The requirements of Ala. Admin. Code rs. 335-13-4-.22(1)(a)1. and 335-13-4-.23(1)(a)1. have remained unchanged since 2013.

<sup>33</sup> The requirements of Ala. Admin. Code r. 335-13-4-.12(2)(f) have remained unchanged since 2013.

following issuance of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013), operation of the City's existing landfill have repeatedly caused unpleasant smells and aromas (odors) that migrated beyond the landfill property boundary and interfered with the enjoyment of life and property of the Petitioners and others. Hr'g Tr. at 1:118-119, 1:117-118, 1:127, 1:134 (Test. David F. Del Vecchio); Hr'g Tr. at 1:318-321 (Test. Peggy Del Vecchio); Hr'g Tr. at 1:192-195, 1:205, 1:219-220 (Test. Tara Novack); Hr'g Tr. at 1:346-349 (Test. William Novack); Hr'g Tr. at 1:228-232 (Test. Michael Del Vecchio); and Hr'g Tr. at 2:386-389, 2:395, 2:401, 2:404 (Test. Bobby Lewis); Hr'g Tr. at 1:14-18, 1:23-24, 1:28, 1:38-39, 1:74-75 (Test. Anthony Keith). Moreover, ADEM has received many complaints of unpleasant odors emanating from the City's existing landfill. Petnr's Hr'g Ex. P-65 (Oct. 21, 2013 ADEM Response to Comments at Comment #3); Petnr's Hr'g Ex. P-108 (Nov. 3, 2015 letter from Anthony J. Keith); Petnr's Hr'g Ex. P-111 (Nov. 3, 2015 letter from Bobby Lewis); Petnr's Hr'g Ex. P-55 (Nov. 1, 2017 ADEM Response to Comments, at 1); Petnr's Hr'g Ex. P-14 (Dec. 28, 2018 Letter from David A. Ludder, at 4-5); Petnr's Hr'g Ex. P-110 (Dec. 28, 2018 letter from Bobby Lewis); Petnr's Hr'g Ex. P-15 (Feb. 28, 2019 Public Hearing, at 13-15, 21, 27-29, 33, 50, 54, 65); Petnr's Hr'g Ex. P-16 (May 6, 2019 ADEM Response to Comments, at 1-2).

Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3)

because the City's of Dothan's application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit renewal and modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a); (2) declare that the City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a); (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

- 2. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit renewal or modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>34</sup> Plaintiffs-Petitioners contested ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) contending that the City's 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3), 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 12-13 (¶ H); Admin. Rec. Doc. 50 (Prehearing Order), at 17-18 (¶ H).

Ala. Admin. Code r. 335-13-4-.01(3) provides:

Other Requirements. Solid Waste Disposal Facilities must comply with any other applicable State or Federal rules, laws, regulations or other requirements.

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<sup>34</sup> *See supra* note 3.

Among the “other applicable State . . . rules” that municipal solid waste landfill units and construction/demolition landfill units must comply with is Ala. Admin. Code r. 335-3-1-.08 which provides:

Prohibition of Air Pollution. No person shall permit or cause *air pollution*, as defined in rule 335-3-1-.02(1)(e) of this chapter by the discharge of any air contaminant for which no ambient air quality standards have been set under rule 335-3-1-.03(1).

(Emphasis added).<sup>35</sup>

“Air Pollution” is defined as follows:

[T]he 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 State and in such territories of the State as shall be affected thereby.

Ala. Admin. Code r. 335-3-1-.02(1)(e) (emphasis added).

An “air contaminant” is defined as follows:

any solid, liquid, or gaseous matter, any *odor*, or any combination thereof, from whatever source.

Ala. Admin. Code r. 335-3-1-.02(1)(d) (emphasis added).

An “odor” is defined as follows:

smells or aromas which are *unpleasant to persons* or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, or which by their inherent chemical or physical nature or method or processing

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<sup>35</sup> No ambient air quality standards have been set for odor under r. 335-3-1-.03(1). Hr’g Tr. at 5:1263 (Test. Ronald W. Gore, Chief of ADEM Air Division).

are, or may be, detrimental or dangerous to health. Odor and smell are used interchangeably herein.

Ala. Admin. Code r. 335-3-1-.02(1)(ss) (emphasis added).

Municipal solid waste landfill units must also comply with Ala. Admin. Code r. 335-13-4-.22(3)(a) which provides:

Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

The Administrator of the U.S. Environmental Protection Agency approved a State Implementation Plan (SIP) for Alabama pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, as amended. *See* 40 C.F.R. § 52.50. That approved SIP incorporates the requirements of Ala. Admin. Code rs. 335-3-1-.08 (prohibition of “air pollution”) and 335-3-1-.02 (definitions of “air pollution,” “air contaminant,” and “odor”).

Thus, Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a) *prohibit* landfills from causing or permitting the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property.

The AEMC made the following findings of fact:

The Department requires work practices to minimize odors at landfills. These work practices include cover requirements and buffer zones.

Admin. Rec. Doc. 139 (AEMC Order), at 12.

The permit requires six inches of compacted earth cover at the conclusion of each working day for the municipal waste. The permit requires the same cover material for the construction/demolition but at the conclusion of each week.

Admin. Rec. Doc. 139 (AEMC Order), at 12. *See* Petnr's Hr'g Ex. P-17, at 8 (¶ H); Ala.

Admin. Code rs. 335-13-4-.22(1)(a)1. and 335-13-4-.23(1)(a)1.

The permit also requires a 100-foot buffer zone around the disposal area. \* \* \*

Admin. Rec. Doc. 139 (AEMC Order), at 12. *See* Petnr's Hr'g Ex. P-17, at 6 (¶ A) (incorporating by reference Ala. Admin. Code r. 335-13-4-.12(2)(f) and ADEM Hr'g Ex. 2, at Bates-stamp 00431 (Section 4.7 of application).

The AEMC made no findings of fact on the issue of whether periodic cover of solid waste and a 100 foot buffer zone will prevent the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property. Nevertheless, the AEMC made the following conclusion of law:

The permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama's regulations

and the Alabama State implementation Plan as it concerns includes [sic] odor . . .

Admin. Rec. Doc. 139 (AEMC Order), at 19 (¶ 22). This conclusion is not supported by any findings of fact.<sup>36</sup>

An AEMC order that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. *See State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63. *See* Ala. Admin. Code r. 335-2-1-.17(3) (“Any order of the Commission modifying, approving, or disapproving the Department’s administrative action 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 and on matters officially noticed in the record. Findings of fact, if set forth in a manner which is no more than mere tracking of statutory language, shall be accompanied by a concise and explicit

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<sup>36</sup> To the contrary, the record shows that periodic cover of solid waste and a 100 foot buffer zone as required by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) do not prevent the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property and do not ensure compliance with Ala. Admin. Code rs. 335-13-4-.01(3), 335-13-4-.22(3)(a), 335-3-1-.08 and 40 C.F.R. § 52.50. *See supra* pp. 97-103.

statement of the underlying facts of record which support the findings.”). Accordingly, the AEMC’s approval of Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) must be reversed and remanded to the AEMC for reconsideration and the adoption of findings of fact based on the evidence in the record.

Plaintiffs-Petitioners request that the Court (1) declare that the AEMC’s June 12, 2020 Order approving ADEM’s April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a findings of fact supporting the conclusion that “[t]he permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama’s regulations and the Alabama State implementation Plan as it concerns . . . odor;” (2) declare that the AEMC’s June 12, 2020 Order approving ADEM’s April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a finding of fact supporting a conclusion that periodic cover of solid waste and a 100 foot buffer zone will prevent the discharge of smells or aromas into the outdoor atmosphere that are unpleasant to persons or that tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, in such quantities and duration as would interfere with the enjoyment of life or property; (3) declare that the City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste

Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a); and (4) reverse and remand the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**E. Prohibition Against the Discharge of Visible Fugitive Dust Emissions**

- 1. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City's of Dothan's application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit renewal and modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>37</sup> Plaintiffs-Petitioners contested the May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) by ADEM contending that the City's 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will

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<sup>37</sup> *See supra* note 3.

comply Ala. Admin. Code r. 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 12-13 (¶ H), Admin. Rec. Doc. 50 (Prehearing Order), at 17-18 (¶ H).

Ala. Admin. Code r. 335-13-4-.22(3)(a) provides:

Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

The Administrator of the U.S. Environmental Protection Agency approved a SIP for Alabama pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, as amended. *See* 40 C.F.R. § 52.50. That approved SIP for Alabama provides that “[n]o person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.” 40 C.F.R. § 52.50 (citing Ala. Admin. Code Section [sic: r.] 335-3-4-.02).

Despite that Ala. Admin. Code r. 335-3-4-.02(2) was declared to be unconstitutional by the Alabama Supreme Court in *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So. 2d 82 (Ala. 1983), the EPA-approved SIP for Alabama continues in force and effect. 40 C.F.R. § 52.50. A SIP may not be revised without approval by the U.S. Environmental Protection Agency. *See* 40 C.F.R. § 51.105 (“Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.”); *United States v. Ford Motor Co.*, 814 F.2d 1099, 1103 (6th Cir. 1987) (“State courts thus lack the authority to invalidate EPA-approved SIPs on

infeasibility grounds” and “invalidation of a SIP on technical grounds by a state court . . . cannot be given effect, because . . . revisions and variances of properly promulgated SIPs require EPA approval”); *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1166 n.2 (9th Cir. 1979) (State law changes do not revise SIP without EPA approval); *Sierra Club v. TVA*, 430 F.3d 1337, 1346 (11th Cir. 2005) (ADEM interpretation of rule and adoption of rule revision does not revise SIP without EPA approval); *Safe Air for Everyone v. United States EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (“the SIP became federal law, not state law, once EPA approved it, and could not be changed unless and until EPA approved any change”); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 92, 95 S. Ct. 1470, 1488 (1975) (“[A] polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency”); *Gen. Motors Corp. v. United States*, 496 U.S. 530, 540, 110 S. Ct. 2528, 2533 (1990) (“There can be little or no doubt that the existing SIP remains the ‘applicable implementation plan’ even after the State has submitted a proposed revision”). Thus, the approved SIP for Alabama continues to prohibit “the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate” despite the Court’s decision in *Ross Neely Express, Inc.*

The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Permit No. 35-06 (Oct 21, 2013) includes the following provisions:

#### **4.7 BUFFER ZONES**

A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM Administrative Code R. 335-13-4-.12(2)(f). No disposal will occur within the buffer area. Additionally, the facility will maintain a 100-ft buffer from the stream in the C/D Disposal Area.

ADEM Hr'g Ex. 2, at Bates-stamp 00431.

#### **6.9 FIRE CONTROL**

The Landfill Operator shall implement fire control measures in the active disposal areas. These measures shall include, but are not limited to, the following:

1. Access to a vehicle equipped with a water tank of sufficient capacity to extinguish small fires that could occur at the working face.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

#### **6.11 ADVERSE WEATHER OPERATIONS**

During the winter months, adverse weather conditions could hinder the operations at the landfill. An all-weather access road shall be provided to the working face of the landfill to permit vehicular access. The access road shall be wide enough for collections vehicles to easily pass each other.

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) includes the following provisions:

Operation of Facility. The Permittee shall operate and maintain the disposal facility consistent with the Application, this permit, and 335-13.

Petrns' Hr'g Ex. P-17, at 6 (¶ A). This provision incorporates by reference Ala. Admin. Code rs. 335-13-4-.12(2)(f) (minimum 100-foot buffer zone) and 335-13-4-.22(2)(c) (all-weather access road to the dumping face), as well as Sections 4.7 (minimum 100-foot buffer zone), 6.9 (vehicle equipped with a water tank of sufficient capacity to extinguish small fires that could occur at the working face) and 6.11 (all-weather access road to working face) of the City's 2018 application.

Fire Control. The Permittee shall provide fire control measures.

Petrns' Hr'g Ex. P-17, at 9 (¶ Y).

All Weather Access Roads. The Permittee shall provide an all-weather access road to the dumping face that is wide enough to allow passage of collection vehicles.

Petrns' Hr'g Ex. P-17, at 9 (¶ L).

The City's 2018 application does not *demonstrate* that implementation of a 100-foot buffer zone, access to a vehicle equipped with a water tank to extinguish fires at the working face, or construction of an all-weather access road to the working face as required by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will prevent "the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate" as is required by Ala. Admin. Code r. 335-13-4-.22(3)(a). In fact, the application says nothing about demonstrating compliance with the requirements of the SIP for Alabama or 40 C.F.R. § 52.50.

Moreover, all witnesses testified that a 100-foot buffer zone, use of a water truck for dust suppression, and construction of an all-weather access road to the working face would only reduce or minimize fugitive dust emissions and would not prevent visible fugitive dust emissions from crossing property lines. *See* Hr’g Tr. at 3:749-751 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (use of a water truck for dust suppression would “minimize” fugitive dust emissions, not prevent visible fugitive dust emissions from crossing property lines); Hr’g Tr. at 7:1753 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (water truck and all-weather access road would “minimize” dust); Hr’g Tr. at 1799-1800 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (all-weather access road would result in “less” dust); Hr’g Tr. at 7:1804-1805 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (all-weather access road would “minimize” dust); Hr’g Tr. at 7:1806-1807 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (don’t know if all-weather access road, water truck and whatever else will achieve no visible dust emissions beyond the lot line); Hr’g Tr. 4:1014-1015 (Test. Stephen Scott Story, Chief of ADEM Solid Waste Eng’g Section) (buffer zone allows some area for dust to settle out - hopefully it settles before it gets to the property line); Hr’g Tr. at 5:1279 (Test. Ronald W. Gore, Chief of ADEM Air Division) (buffer zone will lessen dust); Hr’g Tr. at 7:1705-1706 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng’rs & Assoc.) (all-weather access roads “reduce” dust; water trucks are used to condition fill “so windblown dust will not be a problem”). *See*

*also* Hr’g Tr. at 1:106-107, 1:119-120 (Test. David F. Del Vecchio) (visible fugitive dust emissions from operation of the City of Dothan’s existing municipal solid waste landfill have repeatedly migrated beyond the landfill property boundary); Hr’g Tr. at 1:323-324 (Test. Peggy Del Vecchio) (same); Hr’g Tr. at 1:198-199, 1:220 (Test. Tara Novack) (same); Hr’g Tr. at 1:349-350 (Test. William Novack) (same); Hr’g Tr. at 1:233-234, 1:255 (Test. Michael Del Vecchio) (same); Hr’g Tr. at 2:399-400 (Test. Bobby Lewis) (same); Hr’g Tr. at 1:28-32 (Test. Anthony Keith) (same).

Accordingly, the AEMC’s June 12, 2020 approval of ADEM’s renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the City’s of Dothan’s application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit renewal and modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(3)(a); (2) declare that the City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06

(May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a); (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

2. **The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(3)(a).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that the issuance of a permit renewal or modification is permissible only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>38</sup> Plaintiffs-Petitioners contested ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) contending that the City's 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will

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<sup>38</sup> *See supra* note 3.

comply with Ala. Admin. Code r. 335-13-4-.22(3)(a). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 12-13 (¶ H); Admin. Rec. Doc. 50 (Prehearing Order), at 17-18 (¶ H).

Ala. Admin. Code r. 335-13-4-.22(3)(a):

Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

The Administrator of the U.S. Environmental Protection Agency approved a SIP for Alabama pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410, as amended. *See* 40 C.F.R. § 52.50. That approved SIP for Alabama provides that “[n]o person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.” 40 C.F.R. § 52.50 (citing Ala. Admin. Code Section [sic: r.] 335-3-4-.02).

The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Permit No. 35-06 (Oct 21, 2013) includes the following provisions:

#### **4.7 BUFFER ZONES**

A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM Administrative Code R. 335-13-4-.12(2)(f). No disposal will occur within the buffer area. Additionally, the facility will maintain a 100-ft buffer from the stream in the C/D Disposal Area.

ADEM Hr’g Ex. 2, at Bates-stamp 00431.

## **6.9 FIRE CONTROL**

The Landfill Operator shall implement fire control measures in the active disposal areas. These measures shall include, but are not limited to, the following:

1. Access to a vehicle equipped with a water tank of sufficient capacity to extinguish small fires that could occur at the working face.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

## **6.11 ADVERSE WEATHER OPERATIONS**

During the winter months, adverse weather conditions could hinder the operations at the landfill. An all-weather access road shall be provided to the working face of the landfill to permit vehicular access. The access road shall be wide enough for collections vehicles to easily pass each other.

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) includes the following provisions:

Operation of Facility. The Permittee shall operate and maintain the disposal facility consistent with the Application, this permit, and 335-13.

Petrns' Hr'g Ex. P-17, at 6 (¶ A). This provision incorporates by reference Ala. Admin. Code rs. 335-13-4-.12(2)(f) (minimum 100-foot buffer zone) and 335-13-4-.22(2)(c) (all-weather access road to the dumping face), as well as Sections 4.7 (minimum 100-foot buffer zone), 6.9 (vehicle equipped with a water tank of sufficient capacity to extinguish small fires that could occur at the working face) and 6.11 (all-weather access road to working face) of the City's 2018 application.

Fire Control. The Permittee shall provide fire control measures.

Petrs' Hr'g Ex. P-17, at 9 (¶ Y).

All Weather Access Roads. The Permittee shall provide an all-weather access road to the dumping face that is wide enough to allow passage of collection vehicles.

Petrs' Hr'g Ex. P-17, at 9 (¶ L).

The AEMC made the following findings of fact:

The Operating Plan incorporated in the Permit specifies the use of all-weather haul roads at the Landfill. This type of road reduces the amount of dust generated.

The Operating Plan also specifies a water truck for firefighting.

A Department staff member has observed the City using a water truck for dust suppression.

The buffer zone also functions as an area for dust to settle out of the air.

Admin. Rec. Doc. 139 (AEMC Order), at 13.

The AEMC made no findings of fact that use of an all-weather access road to the working face, the presence of a water truck to extinguish small fires at the working face, and the presence of a minimum 100-foot buffer zone will prevent the “discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.” Nevertheless, the AEMC made the following conclusion of law:

The permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama’s regulations and the Alabama State implementation Plan as it concerns . . . fugitive dust.

Admin. Rec. Doc. 139 (AEMC Order), at 19 (¶ 22). This conclusion is not supported by any findings of fact.<sup>39</sup>

An AEMC order that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. *See State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63. *See* Ala. Admin. Code r. 335-2-1-.17(3) (“Any order of the Commission modifying, approving, or disapproving the Department’s administrative action 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 and on matters officially noticed in the record. Findings of fact, if set forth in a manner which is no more than mere tracking of statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.”). Accordingly, the AEMC’s June 12, 2020 approval of Solid Waste Disposal Facility Permit No. 35-06

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<sup>39</sup> To the contrary, the record shows that a buffer zone, access to a vehicle equipped with a water tank to extinguish small fires at the working face, and the construction of an all-weather access road to the working face as required by Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) do not prevent the discharge of the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate and do not ensure compliance with Ala. Admin. Code r. 335-13-4-.22(3)(a). *See supra* pp. 97-103.

(May 6, 2019) must be reversed and remanded to the AEMC for reconsideration based on the evidence in the record.

Plaintiffs-Petitioners request that the Court (1) declare that the AEMC's June 12, 2020 Order approving ADEM's April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a findings of fact supporting the conclusion that "[t]he permit conditions, specifically its work practices and technology-based standards, comply with applicable Alabama's regulations and the Alabama State implementation Plan as it concerns . . . fugitive dust;" (2) declare that the AEMC's June 12, 2020 Order approving ADEM's April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include findings of fact supporting a conclusion that use of an all-weather access road to the working face, the presence of a water truck to extinguish small fires at working face, and the presence of a minimum 100-foot buffer zone will prevent the "discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate;" (3) declare that the City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(3)(a); and (4) reverse and remand the AEMC's June 12, 2020 approval of

ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

**F. Prevention of Disease Vectors**

- 1. The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) because the application does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(2)(d).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(2)(d). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>40</sup> Plaintiffs-Petitioners contested ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) contending that the City's 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply Ala. Admin. Code r. 335-13-4-.22(2)(d). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 13-14 (¶ I); Admin. Rec. Doc. 50 (Prehearing Order), at 19-20 (¶ I).

Ala. Admin. Code r. 335-13-4-.22(2)(d) provides:

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<sup>40</sup> *See supra* note 3.

Measures shall be taken to *prevent* the breeding or accumulation of disease vectors. If determined necessary by the Department or the State Health Department, additional disease vector control measures shall be conducted.

(Emphasis added).<sup>41</sup>

“The language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute.”

*Hamilton v. Ala. Dep’t of Postsecondary Educ.*, 50 So. 3d at 445, quoting *State Pers. Bd. v. Wallace*, 682 So. 2d at 1359 (quoting *Alabama Medicaid Agency v. Beverly Enters.*, 521 So. 2d at 1332). *Accord*, *Fraternal Order of Police, Lodge No. 64 v. Pers. Bd. of Jefferson County*, 103 So. 2d 17, 25 (Ala. 2012) (quoting *Ex parte Wilbanks Health Care Servs., Inc.*, 986 So. 2d at 427. The courts regularly look to dictionary definitions to ascertain the plain meaning of words. In the context of Rule 335-13-4-.22(2)(d), the word “prevent” is a transitive verb meaning “to keep from happening or existing,”

*Merriam-Webster.com Dictionary*, Merriam-Webster Inc., <https://www.merriam-webster.com> (accessed Jan. 23, 2020); “[t]o keep from happening; avert,” *American Heritage Dictionary of the English Language*, Fifth Edition, <https://ahdictionary.com> (accessed Jan. 23, 2020). *E.g.*, *Fowler v. United States*, 563 U.S. 668, 675 (2011) (“the dictionary defines ‘prevent’ as ‘to render (an intended, possible, or

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<sup>41</sup> “Disease vectors” are defined as “organism[s] that [are] capable of transmitting a disease from one host to another.” Ala. Admin. Code r. 335-13-1-.03(38). *See* 40 C.F.R. § 258.22(b) (“disease vectors means any rodents, flies, mosquitoes, or other animals, including insects, capable of transmitting disease to humans”).

likely action or event) impractical or impossible by anticipatory action”) (citing *OED Online* (Mar. 2011), <http://www.oed.com> (accessed May 23, 2011)); *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 279 (4th Cir. 2002) (“As previously pointed out, the primary and most common meaning of ‘prevent’ is ‘to keep from happening.’ *American Heritage College Dictionary* 1085 (3d ed. 1997)”); *Modine Mfg. Co. v. Borg-Warner, Inc.*, No. 12-CV-815-JPS, 2013 U.S. Dist. LEXIS 148269, at \*27, 2013 WL 5651381, at \* \_\_\_ (E.D. Wis. Oct. 15, 2013) (“‘Prevent’ is commonly understood to mean to foreclose the occurrence of something. \* \* \* The dictionary definition of the term is in keeping with that understanding: it provides that ‘prevent’ means: ‘1. [t]o keep from happening; avert; 2. [t]o keep (a person or thing) from doing something; impede.’ *American Heritage Dictionary*. Thus, the Court finds that the word ‘prevent’ means to entirely foreclose . . . .”); *API v. Cooper*, 681 F. Supp. 2d 635, 650 (E.D. N.C. 2010) (“To ‘prevent’ unmistakably means ‘to deprive of power . . . of acting’ or ‘to keep from happening.’ *See Webster’s Third New International Dictionary* 1798 (2002)”); *Garmin Ltd. v. TomTom, Inc.*, 468 F. Supp. 2d 988, 1017 (W.D. Wis. 2006) (“‘Prevent’ means ‘to keep from happening.’ *American Heritage Dictionary* 1139 (4th ed. 2000); *Random House Webster’s College Dictionary* 1046 (1999); *Merriam-Webster online*; *Merriam-Webster’s Collegiate Dictionary* 924 (10th ed. 1997). These definitions do not suggest exceptions. (TomTom comes up with one definition in *American Heritage* that ‘prevent’ means ‘[t]o

present an obstacle,’ but it overlooks the dictionary’s definition of this use as ‘archaic,’ not a current understanding of the term.”).

Thus, Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) command that a permit may not be issued to the City of Dothan if the application does not demonstrate that measures will be taken to *prevent* (*i.e.*, keep from happening) the breeding and accumulation of disease vectors at the landfill.

“[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them. . . . [A]nd so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required . . . the agency must be held to its own standard.” *Ala. Dep’t of Revenue v. Downing*, 272 So. 3d at 189 (quoting *ABC Coke v. GASP*, 233 So. 3d at 1008 (in turn quoting *Hand v. State Dep’t of Human Res.*, 548 So. 2d 171, *aff’d sub nom.*, *Ex parte State Dep’t of Human Res.*, 548 So. 2d at 176). *Accord*, *Health Care Auth. v. Statewide Health Coordinating Council*, 988 So. 2d at 582; *Ex parte Wilbanks Health Care Servs.*, 986 So. 2d at 424-425.

The City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct 21, 2013) provides:

### **6.10 VECTOR CONTROL**

Vector control at the landfill shall be the responsibility of the Landfill Operator. Daily cover shall be used in the municipal solid waste disposal area to prevent the transmission of disease by vectors. Six inches of earthen cover will be used to cover the open face daily. Wastes that could encourage vector breeding shall not be left uncovered at the site. Areas where stagnate water accumulates will be regraded to encourage runoff.

ADEM Hr'g Ex. 2, at Bates-stamp 00491.

### **7.2 COVER MATERIAL**

At the conclusion of each working day, the Landfill Operator shall cover the general working face of the landfill with a minimum of 6-inches of compacted earth cover or an approved alternate daily cover material.

\* \* \* The earthen cover material will be placed and compacted to a minimum depth of 6-inches to control disease, vectors, fire, odors, blowing litter, and scavenging.

\* \* \*

ADEM Hr'g Ex. 2, at Bates-stamp 00495.

### **8.2 ROUTINE MAINTENANCE**

\* \* \*

7. Measures shall be taken to prevent the breeding or accumulation of disease vectors. If determined necessary by the Department or the State Health Department, additional disease vector control measures shall be conducted.

ADEM Hr'g Ex. 2, at Bates-stamp 00506.

Thus, the City's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) identifies two specific measures that

address disease vectors: daily cover of solid waste and regrading of areas where stagnant water accumulates.

Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) identifies the same two measures that address disease vectors. *See* Petnrs' Hr'g Ex. P-17, at 8 (¶ H) (requiring daily cover of solid wastes); Petnrs' Hr'g Ex. P-17, at 6 (¶ A) (requiring operation consistent with ADEM Hr'g Ex. 2, at Bates-stamp 00491 – Section 6.10 of the application); Admin. Rec. Doc. 139 (AEMC Order), at 14 (“The permit contains conditions that address disease vectors: cover requirements, requirements that wastes that could encourage vector breeding shall not be left uncovered at the site, and requirements to regrade areas where stagnant water accumulates”).

However, the City's 2018 application does not *demonstrate* that these measures will *prevent* the breeding or accumulation of disease vectors at the City of Dothan's landfill. *See* Hr'g Tr. at 2:654, 7:1755, 8:1807-1808 (Test. Eric Sanderson, Chief of ADEM Solid Waste Branch) (daily cover of solid waste serves to “control” or “minimize” disease vectors, not to “prevent” disease vectors); Hr'g Tr. at 7:1755 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.) (daily cover of solid waste “minimizes” the opportunity for disease vectors); Hr'g Tr. at 7:1712 (Test. Ralph Daniel Wells, Sr. Project Mgr., CDG Eng'rs & Assoc.) (measures for the control of disease vectors are the same as were applied to the existing landfill in past years); Petnrs' Hr'g Ex. P-3, at 8 (daily cover of solid waste was a requirement of the 2013 permit); Ala. Admin. Code r.

335-13-4-.22(1)(a)1. (rule requirement for daily cover of solid waste has existed since at least 2013); Hr'g Tr. at 1:18-19, 1:40, 1:42, 1:75 (Test. Anthony Keith) (repeated observations of the accumulation of disease vectors at and around the City's existing municipal solid waste landfill that have migrated to his property); Hr'g Tr. at 1:106-107, 1:111-112, 1:120, 1:142-143 (Test. David F. Del Vecchio) (same); Hr'g Tr. at 1:321-322, 1:325 (Test. Peggy Del Vecchio) (same); Hr'g Tr. at 1:350, 1:357 (Test. William Novack) (same); Hr'g Tr. at 1:236-241, 1:253-254, 1:282, 1:284 (Test. Michael Del Vecchio) (same); and Hr'g Tr. at 2:395-399, 2:476-477, 2:400-401 (Test. Bobby Lewis) (same).

Accordingly, the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3).

Plaintiffs-Petitioners request that the Court (1) declare that Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit renewal and modification is permissible only if the application therefor demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(2)(d) ; (2) declare that the City of Dothan's 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(2)(d); (3) declare that the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification

of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 1, 2013) is in violation of Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3); and (4) reverse the AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

2. **The AEMC's June 12, 2020 approval of ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 12, 2013) was made upon unlawful procedure because the AEMC did not make the necessary findings of fact to support its conclusion that the permit ensures compliance with Ala. Admin. Code r. 335-13-4-.22(2)(d).**

Ala. Admin. Code rs. 335-13-5-.03(2) and 335-13-5-.04(3) provide that a permit may be issued by ADEM only if the application demonstrates compliance with Ala. Admin. Code div. 335-13, including Ala. Admin. Code r. 335-13-4-.22(2)(d). *See* Admin. Rec. Doc. 139 (AEMC Order), at 15 (¶ 3).<sup>42</sup> Plaintiffs-Petitioners contested ADEM's May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) contending that the City's 2018 application therefor does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply Ala. Admin. Code r. 335-13-4-.22(2)(d). *See* Admin. Rec. Doc. 1 (Request for Hearing), at 13-14 (¶ I); Admin. Rec. Doc. 50 (Prehearing Order), at 19-20 (¶ I).

Ala. Admin. Code r. 335-13-4-.22(2)(d) provides:

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<sup>42</sup> *See supra* note 3.

Measures shall be taken to *prevent* the breeding or accumulation of disease vectors. If determined necessary by the Department or the State Health Department, additional disease vector control measures shall be conducted.

The City's 2018 application and Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) identify two measures that address disease vectors: daily cover of solid waste and regrading of areas where stagnant water accumulates. ADEM Hr'g Ex. 2, at Bates-stamp 00491; Petnrs' Hr'g Ex. P-17, at 8 (¶ H) (requiring daily cover of solid wastes); Petnrs' Hr'g Ex. P-17, at 6 (¶ A) (requiring operation consistent with application, including Section 6.10 of the application described above).

The AEMC found that these measures “address” disease vectors. *See* Admin. Rec. Doc. 139 (AEMC Order), at 14 (“The permit contains conditions that address disease vectors: cover requirements, requirements that wastes that could encourage vector breeding shall not be left uncovered at the site, and requirements to regrade areas where stagnant water accumulates”). However, the AEMC made no findings of fact on the issue of whether these measures will *prevent* the breeding and accumulation of disease vectors as required by Ala. Admin. Code r. 335-13-4-.22(2)(d). Nevertheless, the AEMC made the following conclusion of law: “The Permit contains measures to prevent the breeding and accumulation of disease vectors as required by ADEM Admin. Code r. 335-13-4-.22(2)(d).” Admin. Rec. Doc. 139 (AEMC Order), at 20 (¶ 24) (emphasis added). This conclusion is not supported by any findings of fact and is contrary to the evidence in the record.

An AEMC order that does not include findings of fact to support its decision is made upon unlawful procedure and must be remanded. *See State Health Planning & Dev. Agency v. AMI Brookwood Med. Ctr., Div. of Brookwood Health Servs., Inc.*, 564 So. 2d at 58-59 (failure to make necessary findings of fact is a procedural defect that requires remand), *rev'd on other grounds sub nom., Ex parte Shelby Med. Ctr., Inc.*, 564 So. 2d at 63. *See Ala. Admin. Code r. 335-2-1-.17(3)* (“Any order of the Commission modifying, approving, or disapproving the Department’s administrative action 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 and on matters officially noticed in the record. Findings of fact, if set forth in a manner which is no more than mere tracking of statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.”). Accordingly, the AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) must be set aside and remanded to the AEMC for reconsideration based on the evidence in the record.

Plaintiffs-Petitioners request that the Court (1) declare that the AEMC’s June 12, 2020 Order approving ADEM’s April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include a findings of fact supporting the conclusion that “[t]he Permit contains measures to prevent the breeding and accumulation of disease vectors as required by ADEM Admin. Code r. 335-13-4-

.22(2)(d);” (2) declare that the AEMC’s June 12, 2020 Order approving ADEM’s April 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not include findings of fact supporting a conclusion that daily cover of solid waste and regrading of areas where stagnant water accumulates will prevent the breeding and accumulation of disease vectors; (3) declare that the City of Dothan’s 2018 application for renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013) does not demonstrate that operation of the landfill under the conditions included in Solid Waste Disposal Facility Permit No. 35-06 (May 6, 2019) will comply with Ala. Admin. Code r. 335-13-4-.22(2)(d); and (4) reverse and remand the AEMC’s June 12, 2020 approval of ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

### **CONCLUSION**

For all of the foregoing reasons, Plaintiffs-Petitioners request that the Court grant the relief requested hereinabove at pages 128-129, 131, 134, 136-137, 139, 149, 158-159, 163, 167, 172, 177-178, 186, 192-193, 199-200, 205-206, 212-213, and 215-216, including declaratory relief, and reverse, or reverse and remand, the AEMC’s approval of ADEM’s May 6, 2019 renewal and modification of Solid Waste Disposal Facility Permit No. 35-06 (Oct. 21, 2013).

Respectfully submitted,

*s/ David A. Ludder*

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petition for Review was electronically filed with the Clerk of Court using the AlaFile system which will send notification of such filing to the following persons:

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Done this 19th day of October, 2020.

/s/ David A. Ludder  
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