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03-CV-2019-900283.00

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

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

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IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
Civil Action No. 03-CV-2019-900283.00

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

Plaintiffs,

v.

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

Defendants.

**PLAINTIFFS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

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I. History of this litigation.

On or about October 18, 2004, the Director of the Alabama Department of Environmental Management (ADEM) issued Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints to “provide guidance to anyone who has reason to believe that they have been discriminated against by the Alabama Department of Environmental Management (ADEM) on the basis of” race, color, national origin, disability, age or sex.¹

On July 13, 2016, Plaintiffs filed an action against Lance R. LeFleur in his official capacity as Director of ADEM, and against ADEM, seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.² On August 15, 2016, ADEM Director LeFleur filed a motion to dismiss under Ala. R. Civ. P. 12(b)(1).³ On November 16, 2016, the Circuit Court of Montgomery County entered a final order dismissing Plaintiffs’ complaint.⁴

¹ Pls.’ Second Req. for Admis., ¶ 1 [Ex. F]; Def. LeFleur’s Resp. to Pls.’ Second Req. for Admis. [Doc. 72], ¶ 1 [Ex. G].

² Compl. for Declaratory J., Keith v. LeFleur, CV-2016-900939 (Montgomery Cnty. Cir. Ct., filed July 13, 2016) [Ex. S].

³ Mtn. to Dismiss, Keith v. LeFleur, CV-2016-900939 (Montgomery Cnty. Cir. Ct., filed Aug. 15, 2016) [Ex. T].

⁴ Order, Keith v. LeFleur, CV-2016-900939 (Montgomery Cnty. Cir. Ct., filed Nov. 16, 2016) [Ex. U].

On January 9, 2017, Plaintiffs filed a new complaint against Lance R. LeFleur in his official capacity as Director of ADEM, and against ADEM, seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.⁵ After the Circuit Court of Montgomery County entered a final order dismissing Plaintiffs' complaint, an appeal to the Alabama Court of Civil Appeals was taken. Keith v. LeFleur, 256 So. 3d 1206, 1210 (Ala. Civ. App. 2018). That Court affirmed the dismissal of ADEM and reversed and remanded the dismissal of ADEM Director LeFleur. Id.

After remand of the case to the Circuit Court, ADEM Director LeFleur rescinded Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.⁶ Contemporaneously, Defendant LeFleur filed a "Suggestion of Mootness" with the Circuit Court.⁷ On August 22, 2018, the Circuit Court entered a final order dismissing Plaintiffs' claims with regard to the invalidity of

⁵ Compl. for Declaratory and Injunctive Relief, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed Jan. 9, 2017) [Ex. V].

⁶ Pls.' Second Req. for Admis. to Defs., ¶ 2 [Ex. F]; Defs' Resp. to Pls.' Second Req. for Admis., ¶ 2 [Ex. G].

⁷ Suggestion of Mootness, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed June 5, 2018) [Ex. W].

Memorandum 108: Procedure for Title VI or Environmental Justice Filing of
Discrimination Complaints as moot.⁸

On November 5, 2018, ADEM Director Lance R. LeFleur developed,⁹ approved,¹⁰
signed¹¹ and adopted¹² the Nondiscrimination Grievance Investigation Procedures.¹³

⁸ Order, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed Aug. 22, 2018) [Ex. X].

⁹ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 15 & 58; Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶¶ 15 & 58; Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 5, 9 & 31; Pls.’ First Req. for Admis. to Def. Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 5, 9 & 31.

¹⁰ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 15 & 58; Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶¶ 15 & 58.

¹¹ Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 7 & 31; Pls.’ First Req. for Admis. to Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 7 & 31.

¹² Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 7, 9, 17, 19 & 31; Pls.’ First Req. for Admis. to Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 7, 9, 17, 19 & 31. See Nondiscrimination Grievance Investigation Procedures at 2 (“ . . . THE ABOVE PROCEDURES ARE HEREBY ADOPTED . . .”).

¹³ For the convenience of the Court, the Nondiscrimination Grievance Investigation Procedures established on November 5, 2018 are appended to this brief in the appendix.

Plaintiffs filed this action on February 18, 2019 seeking to declare the Nondiscrimination Grievance Investigation Procedures invalid on multiple grounds.¹⁴

Plaintiffs' Complaint asserts five claims. Count I alleges that the Nondiscrimination Grievance Investigation Procedures are invalid "rules" because they were adopted without substantial compliance with the notice and comment requirements of the Alabama Administrative Procedure Act, Ala. Code 1975 § 41-22-5(a).¹⁵ Count II alleges that the Nondiscrimination Grievance Investigation Procedures are invalid "rules" because they were adopted without substantial compliance with the notice and hearing requirements of the Alabama Environmental Management Act, Ala. Code 1975 § 22-22A-8.¹⁶ Count III alleges that the Nondiscrimination Grievance Investigation Procedures are invalid "rules" because ADEM Director LeFleur lacks statutory authority to adopt rules.¹⁷ Count IV alleges that the Nondiscrimination Grievance Investigation Procedures are invalid "environmental policies" because ADEM Director LeFleur lacks statutory authority to develop "environmental policies."¹⁸ And Count V alleges that the Nondiscrimination Grievance Investigation Procedures are invalid "rules" or

¹⁴ Compl. for Declaratory and Injunctive Relief [Doc. 2].

¹⁵ Id. at ¶¶ 21-31.

¹⁶ Id. at ¶¶ 32-40.

¹⁷ Id. at ¶¶ 41-52.

¹⁸ Id. at ¶¶ 53-62.

“environmental policies” because they are in excess of the statutory authority granted to ADEM by the Legislature.¹⁹

II. Narrative Summary of Undisputed Material Facts

A Narrative Statement of Undisputed Material Facts is attached to Plaintiffs’ Motion for Summary Judgment as Exhibit A.

III. Standard of review

A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present “substantial evidence” creating a genuine issue of material fact -- “evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.”

Somnus Mattress Corp. v. Hilson, 280 So. 3d 373, 377-378 (Ala. 2018) (quoting Pritchett v. ICN Med. Alliance, Inc., 938 So. 2d 933, 935 (Ala. 2006), quoting in turn Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994)).

Like any other fact essential to recovery, the plaintiff has the burden of proving standing. At the summary-judgment stage, a plaintiff asserting standing must prove standing through specific facts set forth by affidavit or other evidence. Boys & Girls

¹⁹ Id. at ¶¶ 63-76.

Clubs of S. Ala., Inc. v. Fairhope-Point Clear Rotary Youth Programs, Inc., 114 So. 3d 817, 820 (Ala. 2012); Byrd v. MorEquity, Inc., 94 So. 3d 378, 379 (Ala. Civ. App. 2012). Accord, Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, S. Ct. 112 S. Ct. 2130, 2136 (1992). Although standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the claim. ASARCO, Inc. v. Kadish, 490 U.S. 605, 624, 109 S. Ct. 2037, 2049 (1989); Warth v. Seldin, 422 U.S. 490, 500 (1975). Thus, when analyzing standing, the court should assume that the plaintiff's claim has merit. See Ex parte Boys & Girls Clubs of S. Ala., Inc., 163 So. 3d 1007, 1012-1013 (Ala. 2014); Wyeth, Inc. v. Blue Cross & Blue Shield of Ala., 42 So. 3d 1216, 1219-1221 (Ala. 2010).

IV. Plaintiffs have demonstrated standing.

Standing to invoke the jurisdiction of the court traditionally requires the existence of (1) an actual or threatened 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. Keith v. LeFleur, 256 So. 3d 1206, 1210-11 (Ala. Civ. App. 2018). 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, 504 U.S. at 560-61, 112 S. Ct. at 2136).

The standing analysis differs somewhat for procedural injuries. A plaintiff suffers a procedural injury in fact when the defendant's action omitted a procedural requirement that threatens some concrete interest of the plaintiff's that the procedure was designed to protect (e.g., the procedural requirement for a hearing prior to denial of a license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed). Lujan, 504 U.S. at 572 & 573 n.8, 112 S. Ct. at 2142 & 2143 n.8. See Summers v. Earth Island Inst., 555 U.S. 488, 496-497, 129 S. Ct. 1142, 1151 (2009) (a person can enforce a procedural right so long as deprivation of that right affects his concrete interest); Keith v. LeFleur, 256 So. 3d 1206, 1211-1212 (Ala. Civ. App. 2018) (recognizing that a procedural injury that threatens a concrete interest is an injury in fact); Sierra Club v. Johnson, 436 F.3d 1269, 1278 (11th Cir. 2006) (a plaintiff has established procedural injury standing if he has established that the claimed violation of the procedural right caused a concrete injury in fact to an interest of the plaintiff that the statute was designed to protect). In Sierra Club, a Club member established procedural injury standing where the State agency failed to provide public notice to a mailing list soliciting public comment (as required by federal regulation) on a proposed permit allowing pollutant emissions into the air that reduced the member's aesthetic and recreational values in the area surrounding the source. 436 F.3d at 1279. When a defendant's action omitted a procedural requirement that threatens some concrete interest

of the plaintiff's, the plaintiff need not meet all the normal standards of redressability and immediacy. Lujan, 504 U.S. at 572 n.7, 112 S. Ct. at 2142 n.7

The Legislature also “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” Lujan, 504 U.S. at 50, 112 S. Ct. at 2146. Accord, Massachusetts v. EPA, 549 U.S. 497, 516, 127 S. Ct. 1438, 1453 (2007). “In exercising this power, however, [the Legislature] must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” Id. Thus, in Massachusetts, the Court concluded that Congress accorded Massachusetts a procedural right under 42 U.S.C. § 7607(b)(1) to challenge EPA’s failure to regulate greenhouse gas emissions which would have protected the concrete interests of the Commonwealth in preserving its coastal property. “[T]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” “When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” Massachusetts, 549 U.S. at 518, 127 S. Ct. at 1453. Accord, Keith v. LeFleur, 256 So. 3d at 1212.

A. Plaintiffs have suffered actual and threatened injuries in fact.

Plaintiffs assert five claims alleging that the Nondiscrimination Grievance Investigation Procedures are invalid. In Count I, Plaintiffs allege that the

Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they were adopted without substantial compliance with the notice and comment requirements of the Alabama Administrative Procedure Act, Ala. Code 1975 § 41-22-5(a). In Count II Plaintiffs allege that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they were adopted without substantial compliance with the notice and hearing requirements of the Alabama Environmental Management Act, Ala. Code 1975 § 22-22A-8. In Count III, Plaintiffs allege that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” because ADEM Director LeFleur lacks statutory authority to adopt rules. In Count IV, Plaintiffs allege that the Nondiscrimination Grievance Investigation Procedures are invalid “environmental policies” because ADEM Director LeFleur lacks statutory authority to develop “environmental policies.” And in Count V, Plaintiffs allege that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” or “environmental policies” because they are in excess of the statutory authority granted to ADEM by the Legislature. These assertions go to the merits of Plaintiffs’ claims, not standing. Although standing often turns on the nature and source of the claim asserted, it in no way depends on the merits of the claim. ASARCO, Inc. v. Kadish, 490 U.S. 605, 624, 109 S. Ct. 2037, 2049 (1989); Warth v. Seldin, 422 U.S. 490, 500 (1975). Thus, when analyzing standing, the court should assume that the plaintiff’s claim has merit. See Ex parte Boys & Girls Clubs

of S. Ala., Inc., 163 So. 3d 1007, 1012-1013 (Ala. 2014); Wyeth, Inc. v. Blue Cross & Blue Shield of Ala., 42 So. 3d 1216, 1219-1221 (Ala. 2010).

“Plaintiffs have a private right of action to enforce public-notice requirements in the AAPA and AEMA.” Keith v. LeFleur, 256 So. 3d at 1213 (citing Ex parte Legal Envtl. Assistance Found., Inc.). Plaintiffs allege in Counts I and II that the Nondiscrimination Grievance Investigation Procedures are “rules” and that ADEM Director LeFleur omitted compliance with the notice and comment requirements in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8 when he adopted the Procedures. As a result, Plaintiffs have suffered the deprivation of their statutory right to notice and opportunity to comment on the proposed Nondiscrimination Grievance Investigation Procedures prior to adoption. Accordingly, Plaintiffs have suffered an injury in fact.

A plaintiff suffers a procedural injury in fact when the defendant’s action omitted a procedural requirement that threatens some concrete interest of the plaintiff’s that the procedure was designed to protect. Lujan, 504 U.S. at 572 & 573 n.8, 112 S. Ct. at 2142 & 2143 n.8. See Keith v. LeFleur, 56 So. 3d at 1212 (recognizing as a procedural injury “the director and ADEM’s alleged promulgation of rules that do not comply with statutory directives” which threatens Plaintiffs’ ability to file valid discrimination complaints and to receive valid resolutions of the discrimination complaints). Plaintiffs allege in Counts I and II that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” because ADEM Director LeFleur omitted compliance with the notice

and comment requirements in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8. This omission threatens Plaintiffs' concrete interest in curbing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures to curb such exposures. Accordingly, Plaintiffs have suffered a procedural injury in fact.

The Legislature may also accord a procedural right to litigants to challenge the validity of rules to protect their concrete interests. Massachusetts v. EPA, 549 U.S. at 516, 127 S. Ct. at 1453 (citing Lujan, 504 U.S., at 580, 112 S. Ct. at 2146-47 (Kennedy, J., concurring in part and concurring in judgment)). In Ala. Code 1975 § 41-22-10, the Alabama Legislature has accorded a procedural right to litigants to challenge the validity of "rules" on the grounds that they were adopted without substantial compliance with the notice and comment procedures in Ala. Code 1975 § 41-22-5(a) or that they exceed the statutory authority of the agency. Plaintiffs must demonstrate that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, their legal rights or privileges. See Medical Ass'n of State of Ala., 656 So. 2d 863, 866 (Ala. Civ. App. 1995) ("the phrase 'interferes with or impairs, or threatens to interfere with or impair, [the plaintiff's] legal rights or privileges' is liberally construed to confer

standing on a broad class of plaintiffs who seek to challenge administrative regulations”); Health Care Auth. of Athens and Limestone County v. Statewide Health Coordinating Council, 988 So. 2d 574, 579-580 (Ala. Civ. App. 2008) (same). The Alabama Supreme Court has twice entertained actions under Ala. Code § 41-22-10 where the plaintiffs were not the subject of challenged “rules” and the impairment was to their non-economic interests. Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d 61 (Ala. 2002); Ala. Dep’t of Envtl. Mgmt. v. Coosa River Basin Initiative, Inc., 826 So. 2d 111 (Ala. 2002).

In addition, in Ala. Code 1975 § 6-6-222 the Legislature has accorded a procedural right to litigants to challenge the validity of “rules” on the grounds that they were adopted without compliance with the notice and comment procedures in Ala. Code 1975 § 41-22-5 and 22-22A-8 or were adopted in excess of the statutory authority of the official or agency adopting them. See e.g., Ala. Dep’t of Envtl. Mgmt. v. Coosa River Basin Initiative, 826 So. 2d 111, 118 (Ala. 2002) (court has jurisdiction under Ala. Code 1975 §§ 41-22-10 and 6-6-222 to hear a claim that agency “rule” is invalid); Alabama Cellular Serv. v. Sizemore, 565 So. 2d 199, 204 (Ala. 1990) (“It is clear that the Legislature, in adopting the APA, did not intend to limit declaratory judgment actions in any way. By the inclusion of § 41-22-10 in the APA, the drafters of this legislation ensured that the validity and applicability of a state agency rule or regulation could be the basis of a ‘justiciable controversy’ as that term is used in our Uniform Declaratory Judgments Act.”). Plaintiffs must demonstrate that their rights, status, or other legal relations are

affected by a statute and that they may suffer an imminent invasion of a legally protected interest.

Plaintiffs allege in Counts I, II, and III that the Nondiscrimination Grievance Investigation Procedures are “rules.” Plaintiffs allege in Counts I and II that ADEM Director LeFleur omitted compliance with the notice and comment requirements in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8 when he adopted the Procedures, thus making them invalid. Plaintiffs allege in Count III that the Nondiscrimination Grievance Investigation Procedures were adopted by ADEM Director LeFleur in excess of his statutory authority, thus making them invalid. These defects in the adoption of the Nondiscrimination Grievance Investigation Procedures interfere with, impair, and invade Plaintiffs’ legally protected and concrete interests in curbing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures to curb such exposures. Accordingly, Plaintiffs have suffered an injury in fact.

Similarly, Ala. Code 1975 § 6-6-222 accords a procedural right to Plaintiffs to challenge the validity of the Nondiscrimination Grievance Investigation Procedures which they allege are “environmental policies” adopted by ADEM Director LeFleur in excess of

his statutory authority. Once again, Plaintiffs injury is the invasion of their legally protected and concrete interests in curbing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures to curb such exposures.

Finally, Ala. Code 1975 §§ 41-22-10 and 6-6-222 accords a procedural right to Plaintiffs to challenge the validity of the Nondiscrimination Grievance Investigation Procedures which they allege are “rules” or “environmental policies that are in excess of ADEM’s statutory authority to adopt. Once again, Plaintiffs injury is the invasion of their legally protected and concrete interests in curbing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures to curb such exposures.

Each of the Plaintiffs provided sworn answers to interrogatories detailing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property,

and their health and well-being.²⁰ The testimony of Tonya Gipson is illustrative. She states that the past and future operation of the Arrowhead Landfill as authorized by ADEM's July 6, 2006 issuance, September 27, 2011 renewal, February 3, 2012 modification, and February 10, 2017 renewal and modification of Solid Waste Disposal Facility Permit No. 53-03 have caused, and will cause, her the following actual and threatened injuries:

(a) interference with the enjoyment of life and interference with the use and enjoyment of property because unpleasant odors are discharged into the air at the Arrowhead Landfill and migrate therefrom to the property where she resides, causing her to refrain from engaging in outdoor activities.²¹ She further describes these injuries as follows:

The Arrowhead Landfill generates offensive odors that migrate to my property on an almost daily basis. The odors from the Landfill smell like rotten eggs and are distinctive to the Landfill. The odors from the Landfill are particularly bad in the morning and at night. The odors often cause me headaches and nausea. In addition, since the Landfill commenced operation, I have suffered nasal swelling and redness and dryness of my nasal passages. As a result of the offensive odors I rarely take walks along County Roads 1 and 21, I no longer sit outside my home, I rarely have visitors over, and rarely have cook-outs. The odors from the Landfill require me to keep the door and windows of my home closed and to replace or clean air conditioning filters more frequently. The offensive odors

²⁰ Pl. Anthony Keith's Answers to Interrog. [Ex. M] at ¶¶ 1 & 4; Pl. Ronald C. Smith's Answers to Interrog. [Ex. N] at ¶¶ 1 & 4; Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶¶ 1 & 4; Pl. William T. Gipson's Answers to Interrog. [Ex. P] at ¶¶ 1 & 4; Pl. Esther Calhoun's Answers to Interrog. [Ex. Q] at ¶¶ 1 & 4.

²¹ Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 1.

originating from the Arrowhead Landfill have diminished my use and enjoyment of my property.²²

(b) exposure to disease vectors (buzzards, flies, raccoons, rodents, etc.) that breed or accumulate at the Arrowhead Landfill, migrate therefrom to the property where she resides, deposit feces on the property, and cause her grave concern about my exposure to bacterial and viral contaminants from the landfill.²³ She further describes these injuries as follows:

Buzzards, flies, and other vermin scavenge, harbor and breed at or near the Arrowhead Landfill. I have observed buzzards circling over the Arrowhead Landfill on many occasions. Attached hereto as Exhibits B-1, B-2, and B-3 are photographs of buzzards circling over the Arrowhead Landfill which I took on December 29, 2019, December 29, 2019, and December 20, 2019, respectively. These photographs accurately depict the scenes as they were at the time the photographs were taken. I have observed buzzards flying onto my property where they roost in trees, on the roof of my home, and on watering and feeding troughs used by my cattle. Attached hereto as Exhibits C-1, C-2, and C-3 are photographs of buzzards that have landed on my property which I took on December 25, 2019, December 20, 2019, and January 1, 2020, respectively. These photographs accurately depict the scenes as they were at the time the photographs were taken. The buzzards drop their feces on the house, in the trees, in the troughs, and on our cars. Flies have become a significant problem outdoors since the Arrowhead Landfill commenced operation. We are careful to keep the door and windows closed to prevent flies from entering our house but are not always successful. The flies land on food and persons and are generally annoying pests. We have had to purchase and use insecticides regularly to combat the indoor fly population. Other disease vectors that I have seen entering and leaving the Landfill and on my property include opossums and racoons. The rat population around my home has also increased since the Arrowhead Landfill commenced operation. The invasion of these disease vectors onto

²² Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 4(a).

²³ Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 1.

my property causes me grave concern for my health and the health of my daughter because these disease vectors deposit feces and may carry bacterial and viral contaminants from the Landfill. The migration of these disease vectors from the Arrowhead Landfill to my property diminishes my use and enjoyment of my property.²⁴

(c) interference with her use and enjoyment of property because visible fugitive dust emissions are discharged into the air at the Arrowhead Landfill and migrate therefrom to the property where she resides, causing deposition of particulate matter on the property.²⁵ She further describes these injuries as follows:

On at least two occasions during the last year, I have observed visible fugitive dust emissions leaving the Landfill property and entering upon my property. Since the operation of the Landfill began in 2006, I have observed increased deposits of “dust” (particulate matter) on my outdoor furniture requiring frequent cleaning. Since the operation of the Landfill began in 2006, I have observed increased deposits of “dust” (particulate matter) on my car requiring cleaning during dry weather. Since the operation of the Landfill began in 2006, I have experienced increased “dust” (particulate matter) in my home requiring frequent cleaning. The migration of visible fugitive dust emissions from the Arrowhead Landfill to my property diminishes my use and enjoyment of my property.²⁶

(d) a reduction in the value of her property because of the continuing unpleasant odors, disease vectors, and fugitive dust emissions that originate at the Arrowhead

²⁴ Pl. Latonya Gipson’s Answers to Interrog. [Ex. O] at ¶ 4(b).

²⁵ Pl. Latonya Gipson’s Answers to Interrog. [Ex. O] at ¶ 1.

²⁶ Pl. Latonya Gipson’s Answers to Interrog. [Ex. O] at ¶ 4(c).

Landfill and migrate therefrom to her property.²⁷ She further describes these injuries as follows:

In 2005, no landfill existed where the Arrowhead Landfill is located today. Since 2006, the solid waste disposal area permitted by the Department at the Arrowhead Landfill has increased from 256 acres to 425.33 acres. I have experienced frequent offensive odors, disease vectors (buzzards, flies, etc.), and occasional visible fugitive dust emissions from the Arrowhead Landfill on my property during the last 13 years. The offensive odors, disease vectors, and visible fugitive dust emissions from the Arrowhead Landfill that invade my property has reduced my use and enjoyment of my property. Based on my extensive first-hand knowledge of my property acquired over 14 years of residence thereon and my extensive opportunities to observe the condition of my property during 14 years of residence thereon, I have had an opportunity to form an opinion as to the value of the property during the time of my residence thereon. In my opinion, the fair market value of my property has been substantially lessened because of the offensive odors, disease vectors, and visible fugitive dust emissions from the Arrowhead Landfill that invade my property.²⁸

Each of the Plaintiffs express a desire to curb these exposures by filing discrimination complaints with ADEM under the Nondiscrimination Grievance Investigation Procedures but for the fact that the Procedures are, in their opinion, invalid and cannot provide valid and effective relief from their exposures.

Each of the Plaintiffs also allege threats to their concrete interests that are legally protected by federal statutes, state statutes, federal rules, state rules, and common law.²⁹

²⁷ Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 1.

²⁸ Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 4(d).

²⁹ Pl. Anthony Keith's Answers to Interrog. [Ex. M] at ¶ 10; Pl. Ronald C. Smith's Answers to Interrog. [Ex. N] at ¶ 10; Pl. Latonya Gipson's Answers to Interrog. [Ex. O] at ¶ 10; Pl. William T. Gipson's Answers to Interrog. [Ex. P] at ¶ 10; Pl. Esther Calhoun's

Accordingly, Plaintiffs have established an actual and threatened injury in fact sufficient for standing.

B. Plaintiffs’ injuries are “fairly traceable” to the LeFleur’s unlawful adoption of the Nondiscrimination Grievance Investigation Procedures.

A plaintiff must demonstrate a causal connection between his 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 v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 1723 (1990)). 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. 154, 168-169, 117 S. Ct. 1154, 1164 (1997).

Plaintiffs’ injuries are (1) deprivation of their right to notice and opportunity to comment on the proposed Nondiscrimination Grievance Investigation Procedures prior to

Answers to Interrog. [Ex. Q] at ¶ 10.

adoption; and (2) actual and threatened interference with and impairment of their concrete interests in curbing their existing and threatened exposures to unpleasant odors, fugitive dust, and disease vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures to curb such exposures.

The deprivation of Plaintiffs' right to notice and opportunity to comment on the proposed Nondiscrimination Grievance Investigation Procedures prior to adoption is obviously "fairly traceable" to ADEM Director LeFleur's failure to comply with the notice and comment procedural requirements in Ala. Code 1975 §§ 41-22-5 and 22-22A-8 prior to adoption of the Nondiscrimination Grievance Investigation Procedures.

The Nondiscrimination Grievance Investigation Procedures are alleged to be invalid because ADEM Director LeFleur adopted the Procedures (1) without compliance with the notice and comment procedural requirements of Ala. Code 1975 § 41-22-5; (2) without compliance with the notice and comment procedural requirements of Ala. Code 1975 § 22-22A-8; (3) without statutory authority to adopt "rules" for ADEM; (4) without statutory authority to develop "environmental policies" for ADEM; and (5) without statutory authority to adopt any nondiscrimination grievance investigation procedures for ADEM. The actual and threatened interference with and impairment of Plaintiffs' concrete interests in curbing their exposure to unpleasant odors, fugitive dust, and disease

vectors as a result of their race that interfere with or impair their use and enjoyment of property, and their health and well-being and in seeking and receiving valid resolutions of their discrimination complaints from ADEM pursuant to the Nondiscrimination Grievance Investigation Procedures is “fairly traceable” to ADEM Director LeFleur’s adoption of the Nondiscrimination Grievance Investigation Procedures without compliance with applicable notice and comment procedures and without statutory authority.

In Keith v. LeFleur, the Court rejected ADEM and the Director’s arguments that plaintiffs’ injuries are not fairly traceable to “Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.” The Court explained:

ADEM and the director argue in their brief on appeal, as they did in their motion to dismiss before the trial court, that the plaintiffs’ injuries are not fairly traceable to the documents. Specifically, they assert that the plaintiffs fail to allege a connection between their asserted exposure to offensive odors and disease vectors resulting from their race and the documents. The plaintiffs appear to define their injury, however, as an inability to file complaints and receive a valid resolution thereon because, they argue, the documents are invalid. In that regard, the invalid adoption of the documents is directly related to the plaintiffs’ inability to file a valid complaint.

* * *

In the present case, . . . , the deprivation of the plaintiffs’ ability to file a valid complaint is related to their concrete interest in curbing their exposure to offensive odors and disease vectors as a result of their race and in receiving a valid resolution of their complaint. The threat is actual or imminent, as required by Lujan, because the plaintiffs’ ultimate injury is current and ripe to be addressed. Thus, the plaintiffs have met their burden of showing a connection between their injury, i.e., their inability to file a

valid complaint and to receive a valid resolution of the complaint, and the conduct complained of, i.e., the director and ADEM's alleged promulgation of rules that do not comply with statutory directives.

256 So. 3d at 1211-1212.

Accordingly, Plaintiffs have demonstrated that their injuries are "fairly traceable" to the actions of ADEM Director LeFleur in adopting without compliance with applicable notice and comment procedures and without statutory authority.

C. It is likely that a favorable decision by the Court will redress Plaintiffs' 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.

When a plaintiff has been accorded a procedural right to protect his concrete interests, he can assert that right without meeting all the normal standards for redressability and immediacy. Lujan v. Defenders of Wildlife, 504 U.S. at 572 n.7, 112

S. Ct. at 2142 n.7; Massachusetts v. EPA, 549 U.S. at 517-518, 126 S. Ct. at 1453.

“When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” Id. (underscoring added). In Keith v. LeFleur, the Court observed:

In the present case, the plaintiffs assert that, if the trial court were to invalidate the documents promulgated by the director and ADEM, those parties would likely promulgate additional rules to comply with federal regulations that require the adoption of grievance procedures for agencies like ADEM that receive federal funding. We agree with the plaintiffs that, if the trial court were to invalidate the documents at issue in the present case, it is likely that the director and ADEM would issue rules in compliance with the requirements related to the agency’s federal funding. Although there is no guarantee that the promulgation of rules adopting appropriate grievance procedures will be performed in compliance with all relevant statutes, we conclude, in light of Massachusetts v. Environmental Protection Agency, that “there is some possibility that the requested relief will prompt” the director and ADEM to reconsider the manner in which such rules are enacted. * * *.

256 So. 3d at 1212.

If this Court invalidates the Nondiscrimination Grievance Investigation Procedures at issue in the present case, it is likely that ADEM, acting through the Environmental Management Commission, will adopt “rules” or develop “environmental policies” respecting nondiscrimination grievance investigation procedures to comply with the requirements of 40 C.F.R. § 7.90 and ensure ADEM’s continued receipt of financial assistance from EPA. Plaintiffs each testified that if valid and lawful nondiscrimination grievance investigation procedures are adopted, they will submit discrimination

complaints to ADEM that seek determinations that ADEM’s actions (or inactions) have the effect of subjecting them to discrimination on the basis of race and seek relief from the adverse effects of such actions (or inactions).³⁰ While there is no guarantee that ADEM will adopt valid and lawful nondiscrimination grievance investigation procedures or grant Plaintiffs relief from racially disparate exposures to unpleasant odors, fugitive dust, and disease vectors, there is “some possibility” that the Court’s invalidation of the existing Nondiscrimination Grievance Investigation Procedures will cause ADEM to do both.

Accordingly, Plaintiffs have satisfied the redressability prong of the standing analysis.

VI. Counts I and II: The Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they were adopted without observance of required notice and comment procedures.

Counts I and II of Plaintiffs’ Complaint allege that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they were adopted without substantial compliance with the notice and comment requirements of Ala. Code 1975 §§ 41-22-5³¹ and 22-22A-8.³²

³⁰ Pl. Anthony Keith’s Answers to Interrog. [Ex. M] at ¶ 6; Pl. Ronald C. Smith’s Answers to Interrog. [Ex. N] at ¶ 6; Pl. Latonya Gipson’s Answers to Interrog. [Ex. O] at ¶ 6; Pl. William T. Gipson’s Answers to Interrog. [Ex. P] at ¶ 6; Pl. Esther Calhoun’s Answers to Interrog. [Ex. Q] at ¶ 7.

³¹ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 21-31.

³² Id. at ¶¶ 32-40.

A. The Nondiscrimination Grievance Investigation Procedures set forth the nature and requirements of formal or informal procedures available and must be adopted as rules of practice after notice and opportunity for comment.

Ala. Code 1975 § 41-22-4(a)(2) imposes on ADEM the affirmative duty to “[a]dopt rules of practice setting forth the nature and requirements of all formal and informal procedures available . . .” Section 41-22-4(a)(2) was taken directly from the Revised Model State Administrative Procedure Act § 2(a)(2) (1961). See Commentary to Ala. Code 1975 § 41-22-4. As discussed by Harold S. Bloomenthal in *The Revised Model State Administrative Procedure Act – Reform or Retrogression?*, 1963 Duke L.J. 593 (1963):

The first requirement for administrative adjudication is that the agency have established procedures for conducting such adjudication, embodied in the form of rules of practice that are available to all persons affected by such adjudication. The Model Act in itself supplies a skeleton set of rules; the detail relating to implementation, however, is quite properly left to the individual agencies. The Model Act also affirmatively requires that each agency adopt rules of practice.

Id. at 603-604 (citing Revised Model State Administrative Procedure Act § 2(a)(2)). As discussed by Frank E. Cooper in *State Administrative Law* (1965):

The fourth requirement of the Revised Model State Act imposes on agencies a duty to adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available. Experience has shown this requirement to be an important one, particularly with respect to the mandate to advise the public of the informal procedures that may be utilized. In many types of administrative adjudication, formal proceedings are utilized only to impose sanctions for violations of applicable legal requirements. In order to work out mutually acceptable understandings as to methods of operation that will not be officially challenged, it is necessary

to resort to informal procedures. Too often, these have not been published, and are known only to the handful of specialists devoting a major part of their time and effort to the representation of clients before a particular agency. The purpose of the Revised Model State Act is to make sure that all procedural devices will be officially described and made known to the public. This purpose has recommended itself to the legislatures of many states.

Id. at 167 (footnote omitted). Thus, “[a]gencies will be required to educate the public as to the nature of their rights and how to exercise them.” Commentary to Ala. Code 1975 § 41-22-4.

Pursuant to Ala. Code 1975 § 41-22-4(a)(2), ADEM is required to adopt rules of practice setting forth the nature and requirements of any formal and informal procedures it has regarding the submission, consideration and disposition of complaints alleging discrimination by ADEM on the basis of race, color, national origin, disability, age, or sex. The Nondiscrimination Grievance Investigation Procedures set forth procedures available to persons “alleging discrimination by ADEM on the basis of race, color, national origin, disability, age, sex, retaliation or intimidation against any individual or group as protected by 40 C.F.R. Parts 5 and 7”³³ and seeking “the prompt and fair resolution of complaints which allege unlawful discrimination under Title VI, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7.”³⁴ Ala. Code 1975 § 41-22-4(a)(2) requires that these Procedures be adopted as rules after notice of the

³³ Nondiscrimination Grievance Investigation Procedures [App] at 1.

³⁴ Id. at 2.

terms or substance of the proposed rules is published in the Alabama Administrative Monthly, Ala. Code 1975 § 41-22-5(a)(1), and after opportunity for all interested persons to submit data, views, or arguments, orally or in writing on the proposed rules is provided. Ala. Code 1975 § 41-22-5(a)(2). See Brunson Constr. & Envtl. Servs. v. City of Prichard, 664 So. 2d at 893 (“The provisions of the Administrative Procedure Act impose upon administrative agencies the duty -- preliminary to the ‘adoption, amendment, or repeal,’ § 41-22-5(a)(1), of ‘rules of practice,’ § 41-22-4(a)(2) -- to publish the ‘terms or substance’ of such rules, § 41-22-5(a)(1), and, among other things, to ‘afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing.’ Section 41-22-5(a)(2).”); Stiff v. Ala. Alcoholic Bev. Control Bd., 878 So. 2d 1138, 1146 (Ala. 2003) (same). ADEM Director LeFleur did not publish the terms or substance of the Nondiscrimination Grievance Investigation Procedures in the Alabama Administrative Monthly, did not provide a reasonable opportunity for all interested persons to submit data, views, or arguments, orally or in writing, on the Nondiscrimination Grievance Investigation Procedures,³⁵ and did not adopt the Procedures as rules. Absent substantial compliance with the notice and comment requirements of Ala. Code 1975 § 41-22-5(a), the Nondiscrimination Grievance Investigation Procedures are invalid. See Ala. Code

³⁵ Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶ 17; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 17. See Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 18 (“the NGIP was not published in the Alabama Administrative Monthly”).

1975 § 41-22-5(d) (“No rule adopted after October 1, 1982, is valid unless adopted in substantial compliance with this section”). Moreover, “[n]o agency rule, order, or decision . . . may it be invoked by the agency for any purpose until . . . the agency has given all notices required by Section 41-22-5.” Ala. Code 1975 § 41-22-4(b). See Brunson Constr. & Env'tl. Servs. v. City of Prichard, 664 So. 2d at 893 (“Noncompliance with these provisions voids every ‘agency rule, order, or decision’ taken in any case in which the provisions are applicable.”); Stiff v. Ala. Alcoholic Bev. Control Bd., 878 So. 2d at 1146 (same).

Accordingly, the Nondiscrimination Grievance Investigation Procedures adopted by ADEM Director LeFleur were required to be adopted as “as rules of practice” after notice and opportunity for comment. They were not adopted in that manner³⁶ and are thus invalid and void.

B. The Nondiscrimination Grievance Investigation Procedures are statements of general applicability that describe ADEM procedures or implement law or policy which must be adopted as “rules” after notice and opportunity for comment.

1. The Nondiscrimination Grievance Investigation Procedures are statements of general applicability.

Ala. Code 1975 § 41-22-3(9) defines a “rule” as “[e]ach agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of

³⁶ Id.

any agency . . .” An agency statement has “general applicability” if it is directed at a class of persons by description.

In the context of state administrative law, the term “general applicability” includes

“[e]very statement implementing, interpreting, or prescribing law or policy that is directed at a class by description, that is, directed at all persons similarly situated, rather than at named individuals . . . Statements of general applicability are to be distinguished from statements of particular applicability, which are addressed to specified individuals rather than to all individuals who are similarly situated.”

Arthur Earl Bonfield, *State Administrative Rule Making* § 3.3.1 (1986) (emphasis omitted). Moreover,

“to be of general application a rule need not apply to all persons within the state. Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class.”

Id. at 3.3.2(b) (quoting Citizens for Sensible Zoning, Inc. v. Department of Natural Res., Columbia County, 90 Wis.2d 804, 815-16, 280 N.W.2d 702, 707-08 (1978)).

Health Care Auth. of Athens v. Statewide Health Coordinating Council, 988 So. 2d 574, 584 (Ala. Civ. App. 2008) (Bryan, J., concurring specially).

In Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179 (Ala. 1988), the Alabama Statewide Coordinating Council adopted an amendment to the State Health Plan allowing licensed hospitals that meet established criteria to be granted a certificate of need (“CON”) to designate certain acute care beds as “swing” beds, so that the hospital

can treat skilled nursing home patients (as opposed to hospital patients) in the hospital facility. The Court explained that an “aspect of the definition of a rule is that it must be a statement of ‘general applicability’ rather than a determination, decision, order, statement of policy, or interpretation in a contested case. See § 41-22-3(9). It is clear from reading the swing bed amendment that it is not a standard or rule for a specific contested case; rather, it is a rule of general applicability setting forth the standard by which a swing bed CON is granted.” Id. at 1184.

In Brunson Constr. & Envtl. Servs. v. City of Prichard, 664 So. 2d 885 (Ala. 1995), the Court held that an unwritten, informal method used by ADEM to calculate the maximum permitted volume of solid waste that may be disposed at any landfill had and will continue to have general applicability. Id. at 893. The Court concluded “that ADEM must -- pursuant to §§ 41-22-4 through -7 -- formally promulgate a rule or regulation articulating the factors or criteria that are to be considered in establishing permitted volumes for Alabama waste facilities . . .” Id. at 894. See also Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d at 66 (ADEM’s Antidegradation Implementation Procedures for Tier 2 Waters which establish the criteria to be met, and the procedures to be followed to demonstrate that those criteria have been met, by applicants for permits to discharge pollutants into Alabama waterways, constitute a statement of general applicability).

The Nondiscrimination Grievance Investigation Procedures do not have particular applicability to named individuals who submit complaints alleging discrimination by ADEM, but rather have general applicability to an entire class of unnamed individuals who submit complaints alleging unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7. See, e.g., Nondiscrimination Grievance Investigation Procedures, at 1 (“The Nondiscrimination Coordinator will process complaints . . . as follows: . . .”); id., at ¶ 3 (“All complaints alleging discrimination by ADEM shall be reviewed for the following information: . . .”); id., at 2 (“THE ABOVE PROCEDURES ARE HEREBY ADOPTED TO ASSURE THE PROMPT AND FAIR RESOLUTION OF COMPLAINTS WHICH ALLEGE UNLAWFUL DISCRIMINATION . . .”).

Accordingly, the Nondiscrimination Grievance Investigation Procedures are statements of general applicability.

2. The Nondiscrimination Grievance Investigation Procedures describe the procedures of ADEM.

Ala. Code 1975 § 41-22-3(9) defines a “rule” as “[e]ach . . . statement of general applicability . . . that describes the . . . procedure . . . of any agency . . .”

In response to the requirements of 40 C.F.R. § 7.90(a), ADEM Director LeFleur adopted the Nondiscrimination Grievance Investigation Procedures.³⁷ These Procedures

³⁷ Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 7, 9, 17, 19 & 31; Pls.’

describe the process (procedures) that ADEM will follow to assure the prompt and fair resolution of complaints which allege discrimination by ADEM on the basis of race, color, national origin, disability, age, or sex.³⁸

In Ex parte Legal Environmental Assistance Foundation, Inc., ADEM adopted Implementation Procedures for Tier 2 of the Antidegradation Policy in accordance with the requirements of 40 C.F.R. § 131.12(b). The Legal Environmental Assistance Foundation challenged the Implementation Procedures for Tier 2 of the Antidegradation Policy as being unlawful “rules” because ADEM adopted them without complying with the notice and comment requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8. The Alabama Supreme Court held that the Implementation Procedures are statements of general applicability that describe ADEM procedures and practice requirements for applications for discharge permits. 832 So. 2d at 66. Accordingly, the Court concluded that the Implementation Procedures are “rules” as defined in Ala. Code 1975 § 41-22-3(9) that may be adopted only after notice and opportunity for comment as provided in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8.

Like the Implementation Procedures for Tier 2 of the Antidegradation Policy successfully challenged in Ex parte Legal Environmental Assistance Foundation, Inc., the

First Req. for Admis. to Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 7, 9, 17, 19 & 31. See Nondiscrimination Grievance Investigation Procedures at 2 (“ . . . THE ABOVE PROCEDURES ARE HEREBY ADOPTED . . .”).

³⁸ Defs.’ Resp. to Pls.’ Second Req. for Admis. [Ex. G] at ¶ 10.

Nondiscrimination Grievance Investigation Procedures are “rules” because they are a statement of general applicability that describes ADEM procedures.

3. The Nondiscrimination Grievance Investigation Procedures implement law or policy.

Ala. Code 1975 § 41-22-3(9) defines a “rule” as “[e]ach agency . . . statement of general applicability that implements . . . law or policy”

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. 42 U.S.C. § 2000d-1 provides that “[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.” Such regulations may, and often do, proscribe activities that have a disparate impact on racial groups. See, e.g., Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 591-593, 103 S. Ct. 3221, 3226-3227 (1983); Lau v. Nichols, 414 U.S. 563, 568, 94 S. Ct. 786, 789 (1974); 42 C.F.R. § 104(b)(2) (Department of Justice regulation prohibiting financial assistance recipients utilizing

criteria or methods of administration of programs which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin).

EPA has promulgated 40 C.F.R. §§ 7.30 and 7.35 which prohibit EPA financial assistance recipients, such as ADEM,³⁹ from engaging in activities that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex. EPA has also promulgated 40 C.F.R. § 7.90(a) which provides that “[e]ach recipient [of EPA financial assistance] shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.” These federal regulations were adopted pursuant to 42 U.S.C. § 2000d-1 to implement Title VI of the Civil Rights Act of 1964. 40 C.F.R. § 7.10.

In response to the requirement of 40 C.F.R. § 7.90(a), ADEM Director LeFleur adopted the Nondiscrimination Grievance Investigation Procedures on or about

³⁹ Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 14; Def. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶ 2; Def. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 2.

November 5, 2018.⁴⁰ The Nondiscrimination Grievance Investigation Procedures provide:

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

ADEM admits that the Nondiscrimination Grievance Investigation Procedures are a means of ensuring compliance with the requirements of 40 C.F.R. Part 7.⁴¹ Thus, the Nondiscrimination Grievance Investigation Procedures are “rules” because they are a statement of general applicability that implement law, i.e., Title VI of the Civil Rights Act of 1964 and 40 C.F.R. Part 7 (including §§ 7.30, 7.35, and 7.90(a)).

The Nondiscrimination Grievance Investigation Procedures also prescribe ADEM policy with respect to the submission, consideration and disposition of complaints alleging discrimination by ADEM on the basis of race, color, national origin, disability, age, or sex. In Stiff v. Ala. Alcoholic Bev. Control Bd., the ABC Board used a procedure by which the price of table wine is marked up and set for sale to wholesale and retail customers. The Court held that the procedure “is a ‘rule’ as defined by § 41-22-3(9), Ala.

⁴⁰ Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 7, 9, 17, 19 & 31; Pls.’ First Req. for Admis. to Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 7, 9, 17, 19 & 31. See Nondiscrimination Grievance Investigation Procedures at 2 (“ . . . THE ABOVE PROCEDURES ARE HEREBY ADOPTED . . .”).

⁴¹ Defs.’ Resp. to Pls.’ Third Req. for Admis. [Ex. I] at ¶ 16.

Code 1975, because it implements or prescribes a pricing policy.” *Id.*, 878 So. 2d at 1145. Similarly, in Ex parte Legal Environmental Assistance Foundation, Inc., the Court held that ADEM’s Implementation Procedures for Tier 2 of the Antidegradation Policy was a “rule” as defined in § 41-22-3(9) because it prescribes pollution policy. *Id.*, 832 So. 2d at 66. The Nondiscrimination Grievance Investigation Procedures are statements of general applicability that prescribe ADEM policy with respect to the submission, consideration and disposition of complaints alleging discrimination by ADEM on the basis of race, color, national origin, disability, age, or sex. Accordingly, the Procedures are “rules.”

In addition, EPA promulgated 40 C.F.R. § 7.95(a) which provides that “[a] recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, [or] national origin . . . in a program or activity receiving EPA assistance . . .” This regulation was also adopted pursuant to 42 U.S.C. § 2000d-1 to implement Title VI of the Civil Rights Act of 1964. 40 C.F.R. § 7.10. In compliance with 40 C.F.R. § 7.95(a),⁴² ADEM published a statement declaring that ADEM does not discriminate. This declaratory statement provides:

Nondiscrimination Statement

The Alabama Department of Environmental Management does not discriminate on the basis of race, color, [or] national origin . . . in the

⁴² Defs’ Resp. to Plfs’ Third Req. for Admis. [Ex. I] at ¶ 14.

administration of its programs or activities, in accordance with applicable laws and regulations.

The Department has designated responsibility for coordination of compliance efforts and receipt of inquiries concerning nondiscrimination requirements, including grievances and discrimination complaints, as implemented by 40 C.F.R. Parts 5 and 7 to:

Nondiscrimination Coordinator
 Marilyn G. Elliott
 Alabama Department of Environmental Management
 P.O. Box 301463
 Montgomery, Alabama 36130-1463
 (334) 271-7710
 civilrightsassistance@adem.alabama.gov

(Underscoring added).⁴³

“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). A “policy” is defined as “[a] principle or course of action adopted or proposed as desirable, advantageous, or expedient; esp. one formally advocated by a government, political party, etc.” OED Online, Oxford University Press, December 2019,

⁴³ Pls.’ Third Req. for Admis. [Ex. H] at ¶ 12; Defs’ Resp. to Plfs’ Third Req. for Admis. [Ex. I] at ¶ 12.

www.oed.com/view/Entry/146842, accessed February 26, 2020; “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” Merriam – Webster.com Dictionary, <https://www.merriam—webster.com/dictionary/policy>, accessed February 26, 2020.

ADEM’s Nondiscrimination Statement is a statement of “policy” as that term is used in Ala. Code 1975 § 41-22-3(9) and commonly understood. Just as the ABC Board’s procedure for marking up and setting the price of table wine was held to be a “rule” because it implements a pricing policy, Stiff v. Ala. Alcoholic Bev. Control Bd., 878 So. 2d at 1145, ADEM’s Nondiscrimination Grievance Investigation Procedures is also a “rule” because it implements ADEM’s policy of nondiscrimination.

C. The Nondiscrimination Grievance Investigation Procedures are not excluded from the definition of “rule.”

The Nondiscrimination Grievance Investigation Procedures are statements of general applicability that describe procedures of ADEM, and implement law and policy. Accordingly, they are presumptively “rules” as defined in Ala. Code 1975 § 41-22-3(9). The agency carries the burden of justifying its avoidance of rulemaking notice and comment procedures by showing that an exclusion in § 41-22-3(9)a. through -3(9)h applies. Byrne v. Galliher, 39 So. 3d 1049, 1056 (Ala. 2009) (quoting Wood v. State Pers. Bd., 705 So. 2d 413, 416 (Ala. Civ. App. 1997), in turn quoting J. O’Reilly, Administrative Rulemaking § 3.06 at 47-48 (1983); Hartford Healthcare, Inc. v. Williams, 751 So. 2d 16, 21 (Ala. 1999) (same).

ADEM Director LeFleur contends that the Nondiscrimination Grievance Investigation Procedures are not “rules” because they are excluded from the definition of “rule” under Ala. Code 1975 §§ 41-22-3(9)a.⁴⁴ and 41-22-3(9)c.⁴⁵ Ala. Code 1975 § 41-22-3(9)a. excludes from the definition of “rule” those “[s]tatements concerning only the internal management of an agency and not affecting private rights or procedures available to the public.”⁴⁶ Ala. Code 1975 § 41-22-3(9)c. excludes from the definition of “rule” intra-agency memoranda or directives provided they do not “substantially affect the legal rights of, or procedures available to, the public or any segment thereof.”⁴⁷ ADEM has the

⁴⁴ Def. Lance R. LeFleur’s Resp. to Pls.’ Second Set of Interrogs. [Ex. L] at ¶ 3.

⁴⁵ Def. Lance R. LeFleur’s Resp. to Pls.’ Second Set of Interrog. [Ex. L] at ¶ 4. See Def. Lance R. LeFleur’s Resp. to Pls.’ First Set of Interrogs. [Ex. J] at ¶ 2 (“The NGIP is an internal directive to the Department’s Nondiscrimination Coordinator for conducting investigations of Title VI discrimination complaints.”); Def. Marilyn G. Elliott’s Resp. to Pls.’ First Set of Interrogs. [Ex. K] at ¶ 2 (same); Def. Lance R. LeFleur’s Resp. to Pls.’ Second Set of Interrogs. [Ex. L] at ¶ 1 (“The provisions of the Nondiscrimination Grievance Investigation Procedures (NGIP) demonstrate that it is an internal directive from the Director to the Nondiscrimination Coordinator”).

⁴⁶ Exclusion clause a. is adopted from the Revised Model State Administrative Procedure Act. Commentary to Ala. Code 1975 § 41-22-3. The Model Act, promulgated by the National Conference of Commissioners on Uniform State Laws (1961) excluded from the definition of “rule” those “statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public.” MSAPA § 1(7)(A) (1961).

⁴⁷ Exclusion clause c. is adopted from Iowa Code § 17A.2(7)(c) (1976 Cum. Supp.). Commentary to Ala. Code 1975 § 41-22-3. Iowa Code § 17A.2(7)(c) (1976 Cum. Supp.) excluded from the definition of “rule” “[a]n intergovernmental, interagency, or intra-agency memorandum, directive, manual or other communication which does not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.”

burden of showing that either of these exclusions apply to the Nondiscrimination Grievance Investigation Procedures.

Section 41-22-3(9)a. includes two criteria that must be satisfied to achieve exclusion from the definition of “rule.” Those are that the agency statement (here, the Nondiscrimination Grievance Investigation Procedures) (1) concerns only the internal management of an agency; and (2) does not affect private rights or procedures available to the public. See Green Party of Haw. v. Nago, 378 P.3d 944, 954-955 (Haw. 2016) (“[E]ven if it is determined that a regulation concerns only internal management of an agency, the exception will apply only if it is also determined that the regulation does not affect private rights or procedures available to the public.”). Section 41-22-3(9)c. includes only one criterion that must be satisfied to achieve exclusion of an intra-agency directive from the definition of “rule.” That criterion is that the intra-agency directive (here, the Nondiscrimination Grievance Investigation Procedures) not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

Professor Bonfield, recognized by the Alabama Supreme Court as an authority on state administrative law in Ex parte Traylor Nursing Home, 543 So. 2d at 1183, said:

[P]aragraph (c) of [Iowa Code] section [17A.] 2(7) is concerned with excluding internal agency materials from the definition of “rule”. But section 2(7)(c) is different from the Revised Model Act and many of the statutes based upon it which simply exclude from the definition of “rule” all “intra-agency memoranda” without qualification. Professor Davis has rightfully criticized this provision, saying that it

may look innocuous but it still may cause serious harm. Agencies often have a tendency to maintain systems of secret law. They administer vague statutory provisions which drastically affect private parties but they refuse to clarify through promulgating rules. Instead, they clarify through instructions to their staffs, and then they keep the instructions confidential, even though the instructions are in truth the substantive law of the subject.^[48]

* * * This provision also strikes a proper balance between the agencies' need to conduct their own internal affairs without being excessively burdened by rulemaking requirements, and the public's need to assure an adequate opportunity for public participation in agency lawmaking. Consequently, under this exclusion agencies can produce and adopt, without rulemaking proceedings, internal memoranda, directives, or manuals on any subject which does not significantly affect the public. Agency members can also communicate with each other to an unlimited degree about proposed policies affecting the public without concerning themselves about the procedures for rulemaking. The only caveat is that any final product they adopt which will substantially affect the public or any segment thereof, must be promulgated with all the procedural niceties required for rules. This is so whether that final product defining law or policy of general applicability is denominated a "memorandum, directive, manual or [any] other communication." * * *

A. Bonfield, The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process, 60 Iowa L. Rev. 731, 834-835 (1975).

The Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity

⁴⁸ Citing 1 K. Davis, Administrative Law Treatise § 1.04-06, at 16 (Supp. 1970).

receiving Federal financial assistance. 42 U.S.C. § 2000d. The Act also directed federal agencies extending federal financial assistance to any program or activity to adopt rules to effectuate this prohibition against discrimination. 42 U.S.C. § 2000d-1. See Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 591-593, 103 S. Ct. 3221, 3226-3227 (1983); Lau v. Nichols, 414 U.S. 563, 568, 94 S. Ct. 786, 789 (1974). EPA has adopted rules to effectuate the prohibition against discrimination. E.g., 40 C.F.R. Part 7. These rules prohibit financial assistance recipients from subjecting any person to discrimination, 40 C.F.R. § 7.30, and from using criteria or methods of administering any program or activity which have the effect of subjecting individuals to discrimination, 40 C.F.R. § 7.35(b). To effectuate these prohibitions, EPA has adopted its own grievance investigation procedures at 40 C.F.R. § 7.120 and required financial assistance recipients to do the same. 40 C.F.R. § 7.90(a). ADEM adopted the Nondiscrimination Grievance Investigation Procedures in response to, and to ensure compliance with, the requirements of 40 C.F.R. § 7.90(a).⁴⁹ Thus, the Nondiscrimination Grievance Investigation Procedures concern not only the internal management of ADEM; they also concern the protection of persons from discrimination. Thus, the Procedures are not excluded from the definition of “rule” by Ala. Code 1975 § 41-22-3(9)a.

⁴⁹ Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶ 9; Pls.’ Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 9; Def. Lance R. LeFleur’s Resp. to Pls.’ Third Req. for Admis. [Ex. I] at ¶ 16.

Under Ala. Code 1975 § 41-22-3(9)a. a statement concerning the internal management of an agency is not excluded from the definition of “rule” if it “affect[s] private rights or procedures available to the public.” Under Ala. Code 1975 § 41-22-3(9)c., an intra-agency directive is not excluded from the definition of “rule” if it “substantially affect[s] the legal rights of, or procedures available to, the public or any segment thereof.” Because these criteria are similar, they are addressed together below.

As discussed above, Plaintiffs have a right not to be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. § 2000d. This right also extends to the public and those classes of persons within the public that are identified in 42 U.S.C. § 2000d (i.e., race, color, or national origin). A private right of action exists to seek relief from intentional discrimination, but does not exist to seek relief from violation of federal agency regulations proscribing activities of financial assistance recipients that have a disparate impact on protected classes. Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511 (2001). Enforcement of federal agency regulations proscribing activities of financial assistance recipients that have a disparate impact on protected classes is left to the federal agencies themselves pursuant to the provisions of 42 U.S.C. § 2000d-1 and agency regulations. E.g., 40 C.F.R. § 7.130 and 28 C.F.R. § 50.3. Nevertheless, the absence of a private right of action to enforce federal agency regulations proscribing activities of financial assistance recipients that have a disparate impact on protected classes does not negate the existence of a private right not to be

subjected to discrimination under any program or activity receiving Federal financial assistance. Notwithstanding the absence of a private right of action to enforce federal agency regulations proscribing activities of financial assistance recipients that have a disparate impact on protected classes, 40 C.F.R. § 7.120 authorizes persons who believe they have suffered discrimination in violation of 40 C.F.R. Part 7 to file a complaint with EPA seeking EPA enforcement action against a financial assistance recipient.

As discussed above, EPA requires that financial assistance recipients like ADEM “adopt discrimination grievance procedures that assure the prompt and fair resolution of complaints which allege violation of [40 C.F.R. Part 7].” 40 C.F.R. § 7.90(a). This requirement is obviously intended to provide a means for persons alleging discrimination by an EPA financial assistance recipient (such as ADEM) to seek a remedy directly from the recipient rather than seek enforcement by EPA. ADEM has adopted the Nondiscrimination Grievance Investigation Procedures to fulfill the requirement of 40 C.F.R. § 7.90(a). Thus, the Procedures are an integral part of the federal scheme to enforce compliance with 40 C.F.R. §§ 7.30 and 7.35 and ensure that “[n]o person . . . shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. Accordingly, the Procedures substantially affect the rights of persons⁵⁰ and the public not

⁵⁰ The Nondiscrimination Grievance Investigation Procedures appear to recognize that private rights may be affected by their implementation. The Procedures provide that ADEM shall provide notice to the complainant of ADEM’s receipt of the complaint; that

to be subjected to discrimination by actions of ADEM (e.g., permitting of polluting facilities) and are not excluded from the definition of “rule” by Ala. Code § 41-22-3(9) a. or -3(9)c.

The Nondiscrimination Grievance Investigation Procedures also substantially affect procedures available to the public. They effectively prescribe the form and substantive content of discrimination complaints necessary to secure an investigation and ultimately to obtain redress. For example, the Procedures effectively require that complaints be in writing or be converted to writing;⁵¹ that complaints identify the specific ADEM actions that discriminate or result in discrimination;⁵² that complaints identify the specific impacts that have occurred or will occur as a result of ADEM’s actions;⁵³ that complaints identify the parties impacted by the alleged discrimination;⁵⁴ that complaints allege matters that are within the jurisdiction of 40 C.F.R. Part 5 or 7;⁵⁵ and that

ADEM may request additional information from the complainant; and that the Office of the Director will respond in writing to the complainant approving or disapproving the findings and recommendations in the investigative report, thereby granting or denying the complainant relief from discrimination.

⁵¹ Nondiscrimination Grievance Investigation Procedures [App] at ¶ 2.

⁵² Id. at ¶ 3.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id. at ¶ 5.

complaints include allegations of sufficient merit to warrant investigation.⁵⁶ Absent the inclusion of any of these elements, a complaint may not be “accepted” for investigation⁵⁷ and relief from discrimination may not be forthcoming.

Moreover, the Nondiscrimination Grievance Investigation Procedures adopted on November 5, 2018 substantially affect procedures previously available to the public to redress discrimination by ADEM. These previous procedures include:

Memorandum #108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints dated October 18, 2004 and rescinded June 5, 2018 during litigation contesting its validity.⁵⁸

ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process published on ADEM’s website in April 2016.⁵⁹

ADEM’s Guide for Citizen Participation (Revised March 2014), App. III – ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process.⁶⁰

⁵⁶ Id.

⁵⁷ Id. at ¶ 6.

⁵⁸ Pls.’ Second Req. for Admis. [Ex. F] at ¶¶ 1 & 2; Dfs.’ Resp. to Pls.’ Second Req. for Admis. [Ex. G] at ¶¶ 1 & 2; Complaint for Declaratory and Injunctive Relief, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed Jan. 9, 2017) [Ex. V]; Suggestion of Mootness, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed June 5, 2018) [Ex. W]; Order, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed Aug. 22, 2018) [Ex. W].

⁵⁹ Complaint for Declaratory and Injunctive Relief, Keith v. LeFleur, CV-2017-900021 (Montgomery Cnty. Cir. Ct., filed Jan. 9, 2017) [Ex. V] at Exhibit B; Dfs.’ Response to Pls.’ Third Req. for Admis. [Ex. I] at ¶ 9.

⁶⁰ Pls.’ Third Req. for Admis. [Ex. H] at ¶ 2; Dfs.’ Response to Pls.’ Third Req. for Admis. [Ex. I] at ¶ 2.

ADEM Director LeFleur's instructions to Marilyn G. Elliott on or about June 5, 2018 regarding the processing of complaints alleging discrimination by ADEM on the basis of race, color, national origin, disability, age or sex on an interim basis.⁶¹

Interim Title VI Grievance Investigation Procedures dated August 10, 2018.⁶²

Thus, the Procedures substantially affect procedures available to the public and are not excluded from the definition of "rule" by Ala. Code § 41-22-3(9) a. or -3(9)c.

D. Failure to comply with notice and comment procedures required by Ala. Code 1975 §§ 41-22-5 and 22-22A-8.

Ala. Code 1975 § 41-22-5 provides inter alia:

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) Give at least 35 days' notice of its intended action. Date of publication in the Alabama Administrative Monthly shall constitute the date of notice. * * * The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, shall specify a notice period ending not less than 35 days or more than 90 days from the date of the notice, during which period interested persons may present their views, and shall specify the place where, and the manner in which, interested persons may present their views. * * *

(2) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if conflicting views are submitted on the proposed rule, shall issue a concise statement of the principal reasons for

⁶¹ Dfs.' Response to Pls.' Third Req. for Admis. [Ex. I] at [Ex. I] at ¶ 5.

⁶² Pls.' Third Req. for Admis. [Ex. H] at ¶ 3; Dfs.' Response to Pls.' Third Req. for Admis. [Ex. I] at ¶ 3.

and against its adoption, incorporating therein its reasons for overruling any considerations urged against its adoption.

Ala. Code 1975 § 41-22-5(d) provides that “[n]o rule adopted after October 1, 1982, is valid unless adopted in substantial compliance with this section. * * *” In addition, Ala. Code 1975 § 41-22-4(b) provides that “[n]o agency rule . . . shall be valid or effective against any person or party nor may it be invoked by the agency for any purpose until . . . the agency has given all notices required by Section 41-22-5.”

In Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179 (Ala. 1988), the Alabama Statewide Coordinating Council adopted an amendment to the State Health Plan allowing licensed hospitals that meet established criteria to be granted a certificate of need (“CON”) to designate certain acute care beds as “swing” beds, so that the hospital can treat skilled nursing home patients (as opposed to hospital patients) in the hospital facility. After concluding that the swing bed amendment was a “rule” because it “either prescribes or describes procedures or ‘requirements’ for health care providers,” id. at 1183-84, the Court concluded that Council “failed to substantially comply with the AAPA” requirements for notice and opportunity to comment in Ala. Code 1975 § 41-22-5(a). Id. at 1187. “By requiring state agencies to follow procedures regarding notification of their intent to adopt rules, regulations, or policies, the public has an opportunity to participate in the decision making process on issues affecting its rights.” Id. at 1181. The Court concluded that “the swing bed amendment is invalid, because the health council failed to substantially comply with the AAPA.” Id. at 1182.

Ala. Code 1975 § 22-22A-8 provides inter alia:

(a) All rules, regulations or standards shall be adopted by and promulgated by the Environmental Management Commission. With the exception of editorial changes, no rule, regulation or standard shall be adopted, amended or repealed unless such rule, regulation or standard has been reviewed by the director and until after a public hearing has been held. Unless different notice provisions are specifically required elsewhere by law, at least 45 days prior to the scheduled date of the hearing the department shall give notice of such hearing by public advertisement in the three newspapers of this state with the largest regional circulation of the date, time, place and purpose of such hearing; and make available to any person upon request copies of the proposed rules, regulations or standards, together with summaries of the reasons supporting their adoption, amendment or repeal.

(b) Any public hearing relating to the adoption, amendment or repeal of department rules, regulations or standards under this section shall be held before a department representative, who shall be designated by the Environmental Management Commission. All such hearings shall be open to the public, and reasonable opportunity to be heard with respect to the subject of the hearing shall be afforded to any person. All testimony taken before the department representative shall be recorded and transcribed. The transcript, any exhibits or any written submissions to the department in relation to such hearings shall be open to public inspection.

(c) After such hearing, the department may revise the proposed rules, regulations or standards, before adoption in response to testimony, written submissions or exhibits introduced at the hearing, without conducting a further hearing on the revisions.

* * *

In Ex parte Legal Environmental Assiancxe Foundation, Inc., 832 So. 2d 61 (Ala. 2002), ADEM adopted Implementation Procedures for Tier 2 of the Antidegradation Policy in accordance with the requirements of 40 C.F.R. § 131.12(b). The Legal Environmental Assistance Foundation challenged the Implementation Procedures for Tier

2 of the Antidegradation Policy as being unlawful “rules” because ADEM adopted them without complying with the notice and comment requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8. The Alabama Supreme Court held that the Implementation Procedures are statements of general applicability that describe ADEM procedures and practice requirements for applications for discharge permits. Id. at 66. Thus, the Court concluded that the Implementation Procedures are “rules” as defined in Ala. Code 1975 § 41-22-3(9) that may be adopted only after notice and opportunity for comment as provided in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8. Id. at 67. The Court concluded that “ADEM did not afford the public notice or opportunity to be heard or otherwise follow the requirements of the AAPA or the AEMA for the promulgation of ‘rules.’” Id. at 64. Accordingly, the Court held that the trial court’s grant of summary judgment grounded on the mistaken premise that the Implementation Procedures are not “rules” is invalid and reversed the judgment of the Court of Civil Appeals affirming the trial court’s summary judgment. Id. at 67.

In the present case, ADEM admits that it did not provide notice and opportunity to comment prior to adoption of the Nondiscrimination Grievance Investigation Procedures

as provided in Ala. Code 1975 §§ 41-22-5(a)⁶³ or 22-22A-8.⁶⁴ Thus, if the Procedures are “rules” as asserted above, the Procedures are invalid.

VII. Count III: The Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they exceed ADEM Director LeFleur’s statutory authority.

Count III of Plaintiffs’ Complaint alleges that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” because they were adopted by ADEM Director LeFleur who lacks statutory authority to adopt rules.⁶⁵

Ala. Code 1975 § 22-22A-4(b) provides inter alia:

All powers, duties and functions transferred to the department by this chapter, except those specifically granted to the Environmental Management Commission, shall be performed by the director; provided that the director may delegate the performance of such of his powers, duties and functions, to employees of the department, wherever it appears desirable and practicable in fulfilling the policies and purposes of this chapter.

(Underscoring added). Thus, Ala. Code 1975 § 22-22A-4(b) deprives the Director of any powers specifically granted to the Commission.

Ala. Code 1975 § 22-22A-8(a) provides that “[a]ll rules, regulations or standards shall be adopted by and promulgated by the Environmental Management Commission.”

⁶³ Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 18; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. B] at ¶ 17; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 17.

⁶⁴ Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 19; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. B] at ¶ 19; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 19.

⁶⁵ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 41-52.

See also Ala. Code 1975 § 22-22A-6(a) (the Commission shall have the duty to establish, adopt, promulgate, modify, repeal, and suspend any rules, regulations, or environmental standards for ADEM); Ala. Code 1975 § 22-22A-5(2) (“[a]cting through the Environmental Management Commission,” ADEM is authorized to promulgate rules, regulations, and standards).⁶⁶ Thus, if the Nondiscrimination Grievance Investigation Procedures are determined to be “rules” under Ala. Code 1975 §§ 41-22-3(9) or 22-22A-6(a)(2) and 22-22A-8(a), ADEM Director LeFleur exceeded his statutory authority by adopting the Procedures. Accordingly, such rules are invalid and a nullity.

VIII. Count IV: The Nondiscrimination Grievance Investigation Procedures are invalid “environmental policies” exceed ADEM Director LeFleur’s statutory authority.

Count IV of Plaintiffs’ Complaint alleges that the Nondiscrimination Grievance Investigation Procedures are invalid “environmental policies” (as that term is used in Ala. Code 1975 § 22-22A-6(a)(3)) because they were developed by ADEM Director LeFleur in excess of his statutory authority.⁶⁷

⁶⁶ See also Ala. Admin. Code r. 335-1-1-.03(1)(b) (the duties of the Commission include “[t]o establish, adopt, promulgate, modify, repeal and suspend any rules, regulations, or environmental standards for the Department”). The Nondiscrimination Grievance Investigation Procedures were not adopted by the Environmental Management Commission of the Alabama Department of Environmental Management. Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 20; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶ 8; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 8.

⁶⁷ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 53-62.

“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). A “policy” is defined as “[a] principle or course of action adopted or proposed as desirable, advantageous, or expedient; esp. one formally advocated by a government, political party, etc.” OED Online, Oxford University Press, December 2019, www.oed.com/view/Entry/146842, accessed February 26, 2020; “a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions.” Merriam – Webster.com Dictionary, <https://www.merriam—webster.com/dictionary/policy>, accessed February 26, 2020.

The Nondiscrimination Grievance Investigation Procedures establish a definite course of action that ADEM will follow to investigate and resolve complaints alleging that ADEM actions, including the issuance, renewal and modification of permits, result in discrimination on the basis of race, color, national origin, disability, age, or sex in violation of protections conferred by 40 C.F.R. Parts 5 and 7. Thus, the Procedures establish policies for the investigation and resolution of complaints regarding the

discriminatory impacts of ADEM actions. As such, the Procedures may be characterized as “environmental policy.”

Ala. Code 1975 § 22-22A-4(b) provides inter alia:

All powers, duties and functions transferred to the department by this chapter, except those specifically granted to the Environmental Management Commission, shall be performed by the director; provided that the director may delegate the performance of such of his powers, duties and functions, to employees of the department, wherever it appears desirable and practicable in fulfilling the policies and purposes of this chapter.

(Underscoring added). Thus, Ala. Code 1975 § 22-22A-4(b) deprives the Director of any powers specifically granted to the Commission.

Ala. Code 1975 § 22-22A-6(a)(3) specifically grants the power to develop “environmental policy” to the Environmental Management Commission.⁶⁸ Ala. Code 1975 § 22-22A-4(b) deprives the ADEM Director of any power to develop environmental policy. ADEM Director LeFleur developed the Procedures.⁶⁹ Thus,

⁶⁸ See also Ala. Admin. Code r. 335-1-1-.03(1)(c) (the duties of the Commission include “[t]o develop environmental policy for the state). The Nondiscrimination Grievance Investigation Procedures were not developed by the Environmental Management Commission of the Alabama Department of Environmental Management. Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶ 20; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶ 6; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶ 6.

⁶⁹ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 15 & 58; Defs.’ Answer to Pls.’ Compl. [Doc. 13] at ¶¶ 15 & 58; Pls.’ First Req. for Admis. to Def. Lance R. LeFleur [Ex. B] at ¶ 31; Def. Lance R. LeFleur’s Resp. to Pls.’ First Req. for Admis. [Ex. C] at ¶¶ 5, 9 & 31; Pls.’ First Req. for Admis. to Def. Marilyn G. Elliott [Ex. D] at ¶ 31; Def. Marilyn G. Elliott’s Resp. to Pls.’ First Req. for Admis. [Ex. E] at ¶¶ 5, 9 & 31.

ADEM Director LeFleur exceeded his authority by developing the Procedures.

Accordingly, the Procedures are invalid and a nullity.

IX. Count V: The Nondiscrimination Grievance Investigation Procedures are invalid because they exceed ADEM’s statutory authority.

Count V of Plaintiffs’ Complaint alleges that the Nondiscrimination Grievance Investigation Procedures are invalid “rules” or “environmental policies” because they exceed the statutory authority granted to ADEM by the Legislature.⁷⁰

“It is settled law in Alabama that an administrative agency is purely a creature of the legislature and has only those powers conferred upon it by the legislature.” Jefferson Cnty. v. Ala. Criminal Justice Info. Ctr. Comm’n, 620 So. 2d 651, 658 (Ala. 1993). An administrative agency cannot claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation. Id. An administrative agency cannot usurp the power of the legislative branch to make law. Ex parte Jones Mfg. Co., Inc., 589 So. 2d 208, 210 (Ala. 1991).

The Legislature has not expressly granted ADEM the power to adopt “rules” or “environmental policies” that permit ADEM to investigate complaints which allege unlawful discrimination under Title VI, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7 or to “resolve” those complaints by any means, including the revocation or modification of permits issued to owners or operators of ADEM-

⁷⁰ Compl. for Declaratory and Injunctive Relief [Doc. 2] at ¶¶ 63-76.

regulated facilities. See Ala. Code 1975 §§ 22-22A-5 (delineating powers of ADEM) and 22-22A-6 (delineating powers of the Environmental Management Commission). Indeed, the Environmental Management Commission has twice held that ADEM does not have the power to consider racial impacts in its permit decisions. See Holmes v. Ala. Dep't of Env'tl. Mgmt., EMC Dkt. No. 98-04,⁷¹ 1998 WL 75094, 1998 AL ENV LEXIS 1 (AEMC Feb. 17, 1998) (“The governing statutes and regulations do not confer on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit”); E. Cent. Ala. Alliance for Quality Living v. Ala. Dep't of Env'tl. Mgmt., EMC Dkt. No. 03-01 & 03-02,⁷² 2003 WL 1957880, 2003 AL ENV LEXIS 6 (AEMC Apr. 22, 2003) (“it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issue where there’s an appeal of the granting of a permit”), aff'd, No. CV-2003-000356.00 (Lee Cnty. Cir. Ct. Nov. 20, 2003), aff'd, 915 So. 2d 1186 (Ala. Civ. App. 2004). See also Memorandum from James W. Warr, Director of ADEM, to Dr. William M. Sanders, Chairman, Environmental Management Commission (Oct. 19, 2004) (“The Department is not aware of any basis in the Environmental Management Act, or any of the individual state environmental laws

⁷¹ Certified copy of slip opinion at Ex. R, Bates 042-057.

⁷² Certified copy of slip opinion at Ex. R, Bates 003-040.

administered by the Department, for consideration of [racial or other] demographics in permitting decisions.”).⁷³

Defendants LeFleur and Elliott contend that Ala. Code 1975 §§ 22-22A-2(2), 22-22A-4(a), 22-22A-4(n), 22-22A-5(8), and 22-22A-5(14) authorize ADEM to adopt the Nondiscrimination Grievance Investigation Procedures and to investigate and resolve complaints by persons alleging that they have been discriminated against by ADEM on the basis of race, color, national origin, disability, age or sex.⁷⁴ Plaintiffs disagree.

Ala. Code 1975 § 22-22A-2(2) provides:

It is also declared to be the intent of the Legislature to retain for the state, within the constraints of appropriate federal law, the control over its air, land and water resources and to secure cooperation between agencies of the state, agencies of other states, interstate agencies and the federal government in carrying out these objectives.

Unlike, Ala. Code 1975 §§ 22-22A-5 and 22-2A-6 which define the express powers of ADEM and the Commission, respectively, this declaration of intent is not a declaration of ADEM’s authority. It merely provides a rule of construction that may sometimes aid in determining the intent of other provisions of the Alabama Environmental Management Act. See Williams v. Standard Oil Co., 278 U.S. 235, 241, 49 S. Ct. 115, 117 (1928) ([A] legislative declaration of intent provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command). Thus, by

⁷³ Certified copy of memorandum at Ex. R, Bates 059-064.

⁷⁴ Def. Lance R. LeFleur’s Answers to Pls.’ First Set Interrogs. [Ex. J] at ¶¶ 17 & 18; Def. Marilyn G. Elliott’s Answers to Pls.’ First Set Interrogs. [Ex. K] at ¶¶ 17 & 18.

itself, the declaration of intent in Ala. Code 1975 § 22-22A-2(2) does not confer any authority on ADEM to investigate or resolve discrimination complaints.

Even if Ala. Code 1975 §§ 22-22A-2(2) is construed to grant ADEM some kind of authority, that authority is limited to that which is necessary to (1) retain State control over the State's air, land and water resources, and (2) secure cooperation between the State, other states, interstate agencies, and the federal government in carrying out the objectives identified in § 22-22A-2. The lack of valid nondiscrimination grievance investigation procedures to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7 does not prevent the State from retaining control over the State's air, land, and water resources. ADEM can retain State control over the State's air, land, and water resources – to the exclusion of EPA – by obtaining EPA approval of its environmental regulatory programs. See, e.g., Clean Water Act, 33 U.S.C. § 1342(b) (minimum requirements for State NPDES permit programs) and 40 C.F.R. Part 123, Subpart B (same); Clean Air Act, 42 U.S.C. § 7410(a)(2) (minimum requirements for State air quality implementation plans) and 40 C.F.R. Part 51, App. V (same); Clean Air Act § 7661a(b) (minimum requirements for State permit programs) and 40 C.F.R. § 70.4 (same); Solid Waste Disposal Act, 42 U.S.C. § 6943(a) (minimum requirements for State solid waste management plans) and 40 C.F.R. Part 256, Subpart C (same); Solid Waste Disposal Act, 42 U.S.C. § 6945(c)(1) (minimum

requirements for State municipal solid waste permit programs) and 40 C.F.R. § 239.10 (same); Solid Waste Disposal Act, 42 U.S.C. § 6926(b) (minimum requirements for State hazardous waste programs) and 40 C.F.R. Part 271, Subpart A (same). These minimum federal program requirements do not demand that States have legal authority to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7. EPA is not authorized to expand upon these minimum federal program requirements and demand compliance with federal discrimination laws or rules as a condition of granting approval of State programs. See e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 671, 127 S. Ct. 2518, 2537 (2007) (EPA must approve State programs that meet the criteria of Clean Water Act, 33 U.S.C. § 1342(b), and is not authorized to add another entirely separate criterion derived from another statute). Furthermore, EPA is not authorized to withdraw, revoke, or terminate approval of State programs based on a State's failure to comply with federal discrimination laws or rules. See, e.g., Clean Water Act, 33 U.S.C. § 1342(c) (criteria for withdrawal of State NPDES permit programs) and 40 C.F.R. § 123.63 (same); Clean Air Act, 40 C.F.R. § 70.10(c) (criteria for withdrawal of State permit program approval); Solid Waste Disposal Act, 42 U.S.C. § 6947(a) (criteria for withdrawal of State solid waste management plan approval) and 40 C.F.R. § 256.04(b) (same); Solid Waste Disposal Act, 42 U.S.C. § 6945(c)(2)(A) (criteria for withdrawal of

State municipal solid waste permit program approval) and 40 C.F.R. § 239.13 (same); Solid Waste Disposal Act, 42 U.S.C. § 6926(e) (criteria for State hazardous waste program withdrawal) and 40 C.F.R. § 271.22 (same). Thus, ADEM's lack of valid nondiscrimination grievance investigation procedures to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7 will not result in the State's surrender of control over its air, land and water resources. At most, ADEM's lack of valid nondiscrimination grievance investigation procedures to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7 will result in the denial, annulment, termination or suspension of financial assistance to ADEM by EPA. 40 C.F.R. § 7.130.

Moreover, the lack of valid nondiscrimination grievance investigation procedures to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7 will not impair ADEM's ability to cooperate with other State agencies, agencies of other states, interstate agencies, and the federal government in carrying out the objectives identified in Ala. Code 1975 § 22-22A-2. Such cooperation is not dependent on ADEM having valid nondiscrimination grievance

investigation procedures to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7.

Ala. Code 1975 § 22-22A-4(a) provides:

There is hereby created and established the Alabama Department of Environmental Management to carry out the purposes of this chapter and to administer and enforce the provisions of this chapter and all functions transferred to the department by this chapter. The department shall maintain its principal office in the City of Montgomery, Montgomery County, Alabama.

This subsection merely explains why ADEM was established. It does not confer any specific authorities on ADEM. At most, it merely suggests that ADEM is to carry out the purposes of Ala. Code 1975, Chapter 22-22A, and to administer and enforce the provisions of Ala. Code 1975, Chapter 22-22A and functions transferred to ADEM by Ala. Code 1975, Chapter 22-22A. Nothing in the language of § 22-22A-4(a) suggests that ADEM is authorized to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7.

Ala. Code 1975 § 22-22A-4(n) provides:

Beginning October 1, 1982, the department is hereby designated as the State Environmental Control Agency for the purposes of federal environmental law. Specifically, the department is designated as the State Air Pollution Control Agency for the purposes of the Federal Clean Air Act, 42 U.S.C. §7401 et seq., as amended; as the State Water Pollution Control Agency for the purposes of the Federal Clean Water Act, 33 U.S.C. §1251 et seq., as amended; the state agency responsible for the promulgation and

enforcement of drinking water regulations in accordance with the Federal Safe Drinking Water Act, 42 U.S.C. §201 et seq., as amended; the state agency responsible for the promulgation and enforcement of solid and hazardous waste regulations in accordance with the Solid Waste Disposal Act, 42 U.S.C. §3251 et seq., as amended, including 42 U.S.C. §6901 et seq., as amended; and is hereby authorized to take all actions necessary and appropriate to secure to this state the benefits of federal environmental laws.

The last clause in this subsection cannot be interpreted to authorize ADEM to take actions to implement the Civil Rights Act of 1964 or 40 C.F.R. Part 7 even if EPA's demands that it do so in a grant agreement. ADEM has not been authorized by the Legislature to take such actions and this clause does not do so. By executing grant agreements with EPA cannot enlarge upon its statutory authority. Such would contravene Article III, § 43, Constitution of Alabama 1901.

Moreover, the Legislature may delegate "the power to execute and administer the laws," so long as in doing so it provides "reasonable clear standards governing the execution and administration of the statute." Kirby v. State, 899 So. 2d 968, 974 (Ala. 2004) (citing Folsom v. Wynn, 631 So. 2d 890, 894 (Ala. 1993)). The last clause in this subsection provides no standards at all. Read as ADEM does, it authorizes ADEM to assume any power and take any action if EPA demands it grant agreement. The Legislature cannot have intended such a result.

Ala. Code 1975 § 22-22A-5(8) empowers ADEM to:

Enter into agreements and contracts, where appropriate, with other state agencies, the federal government or private individuals, in order to accomplish the purposes of this chapter.

Similarly, Ala. Code 1975 § 22-22A-5(14) empowers ADEM to:

Apply for, where appropriate, accept, receive, and administer grants or other funds or gifts from public and private agencies, including the federal government, for the purpose of carrying out any of the functions, purposes, or provisions of this chapter or any of the functions or provisions transferred to the department by this chapter.

Ala. Code 1975 §§ 22-22A-5(8) and 22-22A-5(14) indicate a legislative intent to authorize ADEM to enter into agreements with the federal government and to apply for and receive grants from the federal government to carry out the purposes, functions and provisions of Ala. Code 1975, Chapter 22-22A and any functions or provisions transferred to ADEM by Chapter 22-22A. Neither Chapter 22-22A, nor any of the statutes which ADEM administers, authorize ADEM to investigate and resolve complaints which allege unlawful discrimination under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7. ADEM cannot enlarge upon its statutory authority simply by entering into a grant agreement with EPA which commits ADEM to exercising powers that the Legislature has not granted to ADEM. Nor can EPA enlarge upon ADEM's statutory authority by including conditions in grant agreements requiring ADEM to investigate and resolve complaints which allege unlawful discrimination under Title VI, and the other federal civil rights laws covered under 40 C.F.R. Parts 5 and 7.

ADEM's development and adoption of the Nondiscrimination Grievance Investigation Procedures without statutory authority is an usurpation of the power

conferred exclusively on the Legislature – an usurpation which is prohibited by Article III, § 43, Constitution of Alabama 1901. Accordingly, the Nondiscrimination Grievance Investigation Procedures are invalid and a nullity because they are in excess of ADEM’s statutory authority.

X. Conclusion

For all the foregoing reasons, the Nondiscrimination Grievance Investigation Procedures are invalid and a nullity.

Respectfully submitted,

s/ David A. Ludder

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APPENDIX

**NONDISCRIMINATION GRIEVANCE INVESTIGATION PROCEDURES
(November 5, 2018)**

LANCE R. LEFLEUR
DIRECTOR



KAY IVEY
GOVERNOR

Alabama Department of Environmental Management
adem.alabama.gov

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

DATE: November 5, 2018

TO: Marilyn Elliot, Deputy Director
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director 

RE: Nondiscrimination Grievance Investigation Procedures

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Lance R. LeFleur, Director

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Brief in Support of Motion for Summary Judgment 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 6th day of January, 2021.

s/ David A. Ludder
David A. Ludder