Case No. 2200821

IN THE ALABAMA COURT OF CIVIL APPEALS

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

v.

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

Appellees.

ON APPEAL FROM THE
MONTGOMERY COUNTY CIRCUIT COURT
CIVIL ACTION NO. 2019-900283

PRINCIPAL BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. This appeal involves significant questions regarding the proper application of the doctrine of standing in procedural rights cases and novel questions regarding the proper construction and application of the rulemaking provisions of the Alabama Administrative Procedure Act. Therefore, Appellants suggest that the decisional process of this Court is likely to be aided by oral argument.

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STATEMENT OF JURISDICTION

This is an appeal of the June 11, 2021 final judgment of the Montgomery County Circuit Court dismissing the case on the grounds that Plaintiffs failed to establish their standing to challenge the Director's development and adoption of invalid Nondiscrimination Grievance Investigation Procedures.[1] C. 1832-35. On July 20, 2021, the Plaintiffs filed a timely notice of appeal with the Circuit Court. C. 1836-37; Ala. R. App. P. 4(a)(1).

The subject matter jurisdiction of this Court is invoked under Art. VI, § 141(b), Ala. Const. 1901(Off. Recomp.) and Ala. Code 1975 § 12-3-10. See, e.g., Smith v. LeFleur, No. 2180375, 2019 Ala. Civ. App. LEXIS 141, at *3 n.5 (Ala. Civ. App. Oct. 11, 2019) ("this court has exclusive jurisdiction of all appeals involving the enforcement of, or challenging, the rules, regulations, orders, actions, or decisions of administrative agencies, even when the appeal is, in form, an appeal from a circuit court") (quotation marks and citations omitted), rev'd on other grounds sub nom. Ex parte LeFleur, No. 1190191, 2020 Ala. LEXIS 160 (Ala. Nov. 6, 2020).

[1] The Nondiscrimination Grievance Investigation Procedures are hereinafter referred to as "NGIPs."

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STATEMENT OF THE CASE

A. Nature of the case

Plaintiffs' Complaint in the Circuit Court asserts five claims. Count I alleges that the NGIPs are "rules" that are invalid 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).[2] Count II alleges that the NGIPs are "rules" that are invalid 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(a) and -8(b).[3] Count III alleges that the NGIPs are "rules" that are invalid because Lance R. LeFleur, Director of the Alabama Department of Environmental Management,[4] lacks statutory authority to adopt rules.[5] Count IV alleges that the NGIPs are "environmental policies" that are invalid because the

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[2] C. 57-60.

[3] C. 61-64.

[4] Lance R. LeFleur is hereinafter referred to as "the Director." The Alabama Department of Environmental Management is hereinafter referred to as "ADEM."

[5] C. 64-67.

Director lacks statutory authority to develop "environmental policies."[6] And Count V alleges that the NGIPs are invalid because they are in excess of the statutory authority granted to ADEM by the Legislature.[7]

B. Course of proceedings

In 2004, the then Director of 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.[8]

On July 13, 2016, Plaintiffs commenced an action against the Director and ADEM seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.[9] On August 15, 2016, the Director filed a motion to dismiss under Ala. R. Civ. P. 12(b)(1).[10] On November 16, 2016,

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[6] C. 68-70.

[7] C. 71-76.

[8] C. 365; C. 474.

[9] C. 1496-1523.

[10] C. 1525-31.

the Circuit Court of Montgomery County entered a final order dismissing Plaintiffs' complaint.[11]

On January 9, 2017, Plaintiffs commenced a new action against the Director and ADEM seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.[12] 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 reversed and remanded the dismissal of the Director and affirmed the dismissal of ADEM. Id.

After remand of the case to the Circuit Court, the Director rescinded Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.[13] Contemporaneously, the Director filed a "Suggestion of Mootness" with the Circuit Court.[14] On August 22, 2018,

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[11] C. 1533.

[12] C. 1535-86.

[13] C. 365 & 402; C. 881; C. 1051; C. 1588-91.

[14] C. 1588-91.

the Circuit Court entered a final order dismissing Plaintiffs' claims with regard to the validity of Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints as moot because Memorandum 108 had been rescinded.[15]

On or about November 5, 2018, the Director developed, approved, signed and adopted[16] the NGIPs for ADEM.[17] Plaintiffs commenced this action against the Director and Deputy Director/Nondiscrimination Coordinator Marilyn G. Elliott on February 18, 2019 seeking to declare the NGIPs invalid.[18]

Cross-motions for summary judgment were filed by the parties.

C. Disposition in the court below

The Circuit Court granted Defendants' motion for summary judgment and dismissed the action on the grounds that Plaintiffs failed to

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[15] C. 1593.

[16] C. 83 & 86; C. 330 & 334; C. 337 & 342; C. 346 & 357; C. 357.

[17] C. 342; C. 330-31; C. 333-34. For the convenience of the Court, the NGIPs are included as Addendum A to this brief.

[18] C. 44-80.

demonstrate that their injuries are causally connected to the Defendants' development and adoption of the invalid NGIPs.[19]

STATEMENT OF THE ISSUES

I. Whether the trial court erred in dismissing the case on the ground that Plaintiffs failed to demonstrate that their injuries are causally related to the Director's development and adoption of the NGIPs?

II. Whether the Director's adoption of the NGIPs was in violation of the notice and comment and hearing requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b)?

III. Whether the Director's development and adoption of the NGIPs exceed his and ADEM's statutory authority?

STATEMENT OF THE FACTS

Plaintiff Anthony Keith is a Black/African-American[20] who resides about one-half mile southwest of the City of Dothan Sanitary Landfill[21] in Houston County.[22] He has resided on his property since 2013.[23] The

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[19] C. 1132-35.

[20] C. 46; C. 82; C. 788.

[21] C. 790.

[22] C. 46 & C. 82.

[23] C. 791.

number of persons who live within 1.0 mile of the City of Dothan Sanitary Landfill is approximately 547, 89 percent of whom are Black.[24] The operation of the City of Dothan Sanitary Landfill is regulated and periodically permitted by ADEM.[25] Anthony Keith claims that ADEM permitting actions with regard to the Landfill have the effect of subjecting him and other Blacks to discrimination on the basis of race.[26]

Plaintiff Ronald C. Smith is a Black/African-American[27] who resides less than 2,500 feet from the Stone's Throw Landfill[28] in Tallapoosa County.[29] He has resided on his property since 2004.[30] The number of persons who live within 1.0 mile of the Stones Throw Landfill is approximately 93, 56 percent of whom are Black.[31] The operation of the

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[24] C. 788. See C. 340 & 360 (race of population within 1.0 mile of the landfill is predominantly Black).

[25] C. 82; C. 340; C. 360. See C. 787 (identifies specific ADEM permitting actions).

[26] C. 789.

[27] C. 47; C. 82; C. 954.

[28] C. 955.

[29] C. 47 & C. 82.

[30] C. 957.

[31] C. 954. See C. 341; C. 361 (race of population within 1.0 mile of the landfill is predominantly Black).

Stone's Throw Landfill is regulated and periodically permitted by ADEM.[32] Ronald C. Smith claims that ADEM permitting actions with regard to the Landfill have the effect of subjecting him and other Blacks to discrimination on the basis of race.[33]

Plaintiffs Latonya Gipson and William T. Gipson are Black/African-Americans[34] who reside less than 120 feet from the Arrowhead Landfill[35] in Perry County.[36] Latonya Gipson has resided on the property since 2005.[37] The number of persons who live within 1.0 mile of the Arrowhead Landfill is approximately 30, 86 percent of whom are Black.[38] The operation of the Arrowhead Landfill is regulated and periodically permitted by ADEM.[39] The Gipsons claim that ADEM

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[32] C. 82; C. 341; C. 361. See C. 953 (identifies specific ADEM permitting actions).

[33] C. 954.

[34] C. 48; C. 82; C. 1065-66; C. 1197.

[35] C. 1068; C.1199.

[36] C. 48 & C. 82.

[37] C. 1070.

[38] C. 1066; C. 1197. See C. 342; C. 362 (race of population within 1.0 mile of the landfill is predominantly Black).

[39] C. 82; C.341; C. 360. See C. 1065-1066; C. 1196 (identifying specific ADEM permitting actions).

permitting actions with regard to the Landfill have the effect of subjecting them and other Blacks to discrimination on the basis of race.[40]

The Plaintiffs aver that operation of the landfills authorized by ADEM permits cause them suffer exposures to (1) unpleasant or offensive odors that cause them to limit outdoor activities,[41] to suffer ill-effects such as headaches,[42] irritation of nasal passages,[43] sinus drainage,[44] lung congestion,[45] difficulty breathing,[46] and nausea;[47] (2) disease vectors such as buzzards (or vultures) that drop feces on their property[48] and flies,[49] both of which pose a risk of bacterial and viral contamination; and (3) fugitive dust emissions that cause particulate deposits on outdoor

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[40] C. 1067; C. 1197.

[41] C. 788 & C. 790; C. 953-56; C. 1066 & C. 1068; C. 1197-99.

[42] C. 955-56; C. 1068.

[43] C. 1068.

[44] C. 1199.

[45] C. 1199.

[46] C. 1199.

[47] C. 1068; C. 1199.

[48] C. 788 & C. 790-91; C. 953-54 & C. 956-57; C. 1066 & C. 1068-69; C. 1196-97 & C. 1199-1200.

[49] C. 790-91; C. 1068-69; C. 1199-1200.

furniture, cars, and trucks.[50] Plaintiffs also aver that their use and enjoyment of property has diminished[51] and their property values have declined[52] because of the unpleasant odors, disease vectors and fugitive dust emissions.

The Plaintiffs aver that the invalid and unlawful NGIPs threaten to interfere with and impair their interests in filing valid complaints of discrimination with ADEM that are capable of yielding any valid and effective relief that may curb their exposures to unpleasant and offensive odors, disease vectors, and fugitive dust emissions.[53]

The Plaintiffs aver that they have not previously filed discrimination complaints with ADEM because they believe that the NGIPs are invalid and unlawful and that any relief granted pursuant to those invalid and unlawful procedures will be invalid and ineffective. If

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[50] C. 788 & C. 791; C. 1066 & C. 1070; C. 1196-97 & C. 1200.

[51] C. 788 & C. 790-92; C. 953-57; C. 1066 & C. 1068-71; C. 1196-1200.

[52] C. 788 & C. 791-92; C. 953-54 & C. 957; C. 1066 & C. 1070-71.

[53] C. 789; C. 954-55; C. 1067; C. 1198.

valid and lawful procedures are adopted, they plan to file discrimination complaints with ADEM.[54]

The Plaintiffs aver that they would like ADEM to investigate their complaints of discrimination regarding the permitting of the landfills but to use valid and lawful investigation procedures. They would like ADEM to revise the landfills' permit operating conditions so that they are not subjected to the effects of discrimination on the basis of race and so that their injuries from the activities permitted by ADEM are abated.[55]

ADEM is an agency within the executive branch of State government and a department of the State.[56] ADEM is the recipient of federal financial assistance from the U.S. Environmental Protection Agency.[57] ADEM receives $10 million to $20 million from EPA annually.[58] Defendant Lance R. LeFleur is the Director of ADEM.[59] Defendant

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[54] C. 793; C. 958-59; C. 1071; C. 1201.

[55] C. 793; C. 959; C. 1072; C. 1201.

[56] C. 336; C. 356.

[57] C. 83; C. 336; C. 356. The U.S. Environmental Protection Agency is hereinafter referred to as "EPA."

[58] C. 1711.

[59] C. 82; C. 337; C. 357.

Marilyn G. Elliott is the Deputy Director of ADEM and designated Nondiscrimination Coordinator for ADEM.[60]

40 C.F.R. Part 7 applies to recipients of financial assistance from the EPA. 40 C.F.R. § 7.15. 40 C.F.R. § 7.30 provides:

> A recipient [of EPA financial assistance] shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.[61]

40 C.F.R. § 7.35(b) provides:

> A recipient [of EPA financial assistance] shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.[62]

40 C.F.R. § 7.95(a) provides:

> A recipient [of EPA financial assistance] shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, age, or handicap in a program or activity receiving EPA assistance or, in programs or activities

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[60] C. 83; C. 337; C. 357.

[61] C. 52; C. 83.

[62] C. 52; C. 83.

> covered by section 13, on the basis of sex. * * * The notice must identify the responsible employee designated in accordance with §7.85.

In compliance with the requirements of 40 C.F.R. § 7.95(a), ADEM published a Nondiscrimination Statement declaring as follows:

> **Nondiscrimination Statement**
>
> The Alabama Department of Environmental Management does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in the 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[63]

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[63] C. 752. See C. 756 (admitting genuineness of ADEM's Nondiscrimination Statement); C. 217 (earlier version entitled "Nondiscrimination Policy").

This statement was published on ADEM's website[64] and in ADEM's Guide for Citizen Participation (revised Nov. 2018).[65]

40 C.F.R. § 7.90(a) provides:

> Each recipient [of EPA financial assistance] shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.[66]

On or about October 18, 2004, the then Director of 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.[67] The substance of Memorandum 108 was published on ADEM's internet website[68] and in ADEM's Guide for Citizen Participation (revised March 2014).[69]

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[64] C. 752.

[65] C. 628. See C. 756 (admitting genuiness of ADEM's Guide for Citizen Participation (revised Nov. 2018)).

[66] C. 52; C. 83.

[67] C. 365; C. 474; C. 754.

[68] C. 756; C. 1718-19.

[69] C. 615-17; C. 754; C. 1720.

EPA commenced an investigation of ADEM's compliance with 40 C.F.R. § 7.90(a) in February 2016.[70]

On July 13, 2016, Plaintiffs commenced an action against the Director and ADEM seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.[71] On August 15, 2016, the Director filed a motion to dismiss under Ala. R. Civ. P. 12(b)(1).[72] On November 16, 2016, the Circuit Court of Montgomery County entered a final order dismissing Plaintiffs' complaint.[73]

On January 9, 2017, Plaintiffs filed a new complaint against the Director and ADEM seeking to declare Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints invalid on multiple grounds.[74] After the Circuit Court of Montgomery County entered a final order dismissing Plaintiffs' complaint, an appeal

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[70] C. 865-869. On March 1, 2018, EPA concluded that ADEM's grievance procedures complied with 40 C.F.R. § 7.90(a). C. 889; C. 1059.

[71] C. 1496-1523.

[72] C. 1525-31.

[73] C. 1533.

[74] C. 1535-86.

to the Alabama Court of Civil Appeals was taken. Keith v. LeFleur, 256 So. 3d at 1210. That Court reversed and remanded the dismissal of the Director and affirmed the dismissal of ADEM. Id.

After remand of the case to the Circuit Court, the Director rescinded Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.[75] Contemporaneously, the Director filed a "Suggestion of Mootness" with the Circuit Court.[76] On August 22, 2018, the Circuit Court entered a final order dismissing Plaintiffs' claims with regard to the validity of Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints as moot because Memorandum 108 had been rescinded.[77]

On June 13, 2018, Plaintiffs Keith and Smith filed a discrimination complaint with EPA alleging that ADEM was in violation of 40 C.F.R. § 7.90(a) because it had no discrimination grievance procedures.[78] EPA accepted the complaint for investigation on July 2, 2018.[79]

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[75] C. 365 & 402; C. 474-75; C. 1722.

[76] C. 876-81; C. 1046-51; C. 1587-91; C. 1722-23.

[77] C. 1593; C. 1723.

[78] C. 794; C. 870-82; C. 960; C. 1040-52.

[79] C. 795; C. 885-87; C. 961; C. 1055-57.

In response to the requirement of 40 C.F.R. § 7.90(a), on or about November 5, 2018 the Director developed, approved, signed, and adopted the NGIPs.[80] The NGIPs were not developed or adopted by the Environmental Management Commission of ADEM.[81]

The NGIPs were adopted without prior publication of notice of the proposed adoption thereof in the Alabama Administrative Monthly and without affording all interested persons a reasonable opportunity to submit data, views, or arguments thereon, orally or in writing.[82] The NGIPs were adopted without prior public advertisement in the three newspapers of this State with the largest regional circulation of the date, time, and place of a public hearing on the proposed adoption thereof and without providing a public hearing at which persons were afforded a reasonable opportunity to be heard with respect thereto.[83]

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[80] C. 83 & 86; C. 330-31 & 333-34; C. 337 & 342; C. 346 & 357.

[81] C. 84; C. 337; C. 357.

[82] C. 84; C. 339-40; C. 359-60; C. 1742-43.

[83] C. 84; C. 340; C. 360; C. 1742-43.

On November 5, 2018, ADEM posted the NGIPs on its internet website.[84] ADEM also published the NGIPs in ADEM's Guide for Citizen Participation (revised Nov. 2018).[85]

On December 3, 2018, EPA notified Plaintiffs Keith and Smith that it had resolved and closed the complaint they filed with EPA on June 13, 2018 alleging discrimination by ADEM.[86] The EPA letter states that "[d]uring the course of this investigation, EPA provided technical assistance to ADEM and in response ADEM updated and posted on its website . . . grievance procedures that meet the regulatory nondiscrimination requirements. Accordingly, [EPA] finds insufficient evidence of current noncompliance with Title VI and EPA's implementing regulations at 40 C.F.R. Parts 5 and 7."[87]

A person may file a complaint with ADEM alleging discrimination by ADEM on the basis of race, color, national origin, disability, age, sex, retaliation or intimidation against any person or group as protected by 40

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[84] C. 333-34 & 342; C. 471 & C. 475.

[85] C. 749-50. See C. 756 (admitting genuiness of ADEM's Guide for Citizen Participation (revised Nov. 2018)).

[86] C. 795 & C. 888-891; C. 961 & C. 1058-61.

[87] C. 890-91; C. 1060-61.

C.F.R. Parts 5 and 7.[88] Plaintiffs claim a right under Art. I, § 25, Ala. Const. 1901 (Off. Recomp.) to file such a complaint with ADEM.[89]

The NGIPs describe the process that ADEM will follow to assure the prompt and fair resolution of all complaints which allege 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.[90]

The NGIPs provide that "[c]omplaints alleging discrimination by ADEM will be forwarded to ADEM's Nondiscrimination Coordinator in Montgomery."[91] If the complainant is unable or incapable of preparing a written complaint, the NGIPs provide that ADEM will interview and assist the complainant in converting a verbal complaint into a written complaint.[92] The NGIPs provide that ADEM will provide the complainant

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[88] C. 475.

[89] C. 796; C. 961; C. 1073-74; C. 1202-03.

[90] C. 476.

[91] C. 330-31; C. 333 (¶ (1)); C. 342.

[92] C. 330-31; C. 333 (¶(2)); C. 342.

with a written acknowledgment of receipt of the complaint and notice of how the complaint will be investigated.[93]

The NGIPs then require that "[a]ll 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."[94]

The NGIPs then provide that "[t]he Nondiscrimination Coordinator, based on the information in the complaint and any other 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

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[93] C. 330-31; C. 333 (¶ (4)); C. 342.

[94] C. 330-31; C. 333 (¶ 3); C. 342.

of the complaint by ADEM."[95] The NGIPs provide that if ADEM determines that "the complainant has not submitted sufficient information to allow ADEM to make a determination of jurisdiction or investigative merit, ADEM may request additional information from the complainant."[96]

The NGIPs provide that "[i]f the Nondiscrimination Coordinator accepts the complaint, the Coordinator will designate an individual to investigate the allegation(s)." (Underscoring added).[97] "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

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[95] C. 330-31; C. 333-34 (¶ (5)); C. 342.

[96] C. 330-31; C. 333-34 (¶ (7)); C. 342.

[97] C. 330-31; C. 334 (¶ (6)); C. 342. The Nondiscrimination Coordinator can recommend to the Director that a complaint be "rejected." C. 1757.

information provided by the third party entity and the complainant in resolving the complaint." (Underscoring added).[98]

The NGIPs provide that "[a]fter 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."[99] "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." (Underscoring added).[100] Recommendations may include permit modifications "[t]o the degree that we are allowed to, by our regulation, to put conditions in a permit that we remediate the situation . . .."[101] "To the degree that we may be allowed discretion in our rules, in our permitting programs, we would exercise our discretion if we were found to be discriminating in

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[98] C. 330-31; C. 334 (¶ (8)); C. 342.

[99] C. 330-31; C. 334 (¶ (6)); C. 342.

[100] C. 330-31; C. 334 (¶ 9); C. 342.

[101] C. 1758.

some action that we took, and if that exercise of discrimination would be the appropriate remedial action to correct that discrimination."[102] However, ADEM "wouldn't make adjustments in the permit merely because of disproportionate impact" on a particular race.[103]

ADEM is not authorized by Ala. Admin. Code r. 335-6-6-.17 to unilaterally modify or revoke a NPDES permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[104] No rule in Ala. Admin. Code chap. 335-6-6 authorizes ADEM to unilaterally modify, deny, suspend or revoke a NPDES permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[105]

ADEM is not authorized by Ala. Admin. Code r. 335-13-5-.06 to unilaterally modify a solid waste disposal facility permit solely on the basis of a finding that the activity authorized by the permit results in

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[102] C. 1759.

[103] C. 1761.

[104] C. 482.

[105] C. 482-83.

discrimination in violation of 40 C.F.R., Parts 5 and 7.[106] ADEM is not authorized by Ala. Admin. Code r. 335-13-5-.05 to unilaterally deny, suspend or revoke a solid waste disposal facility permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[107] No rule in Ala. Admin. Code div. 335-13 authorizes ADEM to unilaterally modify, deny, suspend or revoke a solid waste disposal facility permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[108]

ADEM is not authorized by Ala. Admin. Code r. 335-3-16-.13 to unilaterally modify a major source operating permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[109] No rule in Ala. Admin. Code div. 335-3 authorizes ADEM to unilaterally modify, deny, suspend, or revoke a major source operating permit solely on the basis of

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[106] C. 483.

[107] C. 483.

[108] C. 483.

[109] C. 483.

a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R., Parts 5 and 7.[110]

The NGIPs are not a "form" and do not include a "form."[111] The NGIPs do not impose any requirement or solicit any information specifically required by federal statute or by federal rule or regulation.[112] EPA has not required that ADEM adopt the specific procedures described in the NGIPs.[113]

STANDARD OF REVIEW

> """In reviewing the disposition of a motion for summary judgment, we utilize the same standard as that of the trial court in determining whether the evidence before the court made out a genuine issue of material fact' and whether the movant was entitled to a judgment as a matter of law. Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to present substantial

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[110] C. 483-84.

[111] C. 84-86; C. 339; C. 359.

[112] C. 339; C. 359.

[113] C. 339; C. 359.

> evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala.1989). Evidence is 'substantial' if it is 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.' West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala.1989)."

> "'Ex parte General Motors Corp., 769 So. 2d 903, 906 (Ala. 1999). When the basis of a summary-judgment motion is a failure of the nonmovant's evidence, the movant's burden, however, is limited to informing the court of the basis of its motion -- that is, the moving party must indicate where the nonmoving party's case suffers an evidentiary failure. See General Motors, 769 So. 2d at 909 (adopting Justice Houston's special concurrence in Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989), in which he discussed the burden shift attendant to summary-judgment motions); and Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (stating that "a party seeking summary judgment always bears the initial responsibility of informing the [trial] court of the basis of its motion"). The moving party must support its motion with sufficient evidence only if that party has the burden of proof at trial. General Motors, 769 So. 2d at 909.'

"Rector v. Better Houses, Inc., 820 So. 2d 75, 79-80 (Ala. 2001). Additionally, we 'accept the tendencies of the evidence most favorable to the nonmoving party and must resolve all

> reasonable doubts in favor of the nonmoving party.' Bruce v. Cole, 854 So. 2d 47, 54 (Ala. 2003)."

Ex parte LeFleur, No. 1190191, 2020 Ala. LEXIS 160, at *15-16 (Ala. Nov. 6, 2020) (quoting Farr v. Gulf Agency, 74 So. 3d 393, 397-98 (Ala. 2011)).

> "The burden is on one moving for summary judgment to demonstrate that no genuine issue of material fact is left for consideration by the jury. The burden does not shift to the opposing party to establish a genuine issue of material fact until the moving party has made a prima facie showing that there is no such issue of material fact."

Rosser v. Fannie Mae, No. 2180917, 2020 Ala. Civ. App. LEXIS 134, at *9-10 (Ala. Civ. App. Oct. 30, 2020) (quoting Schoen v. Gulledge, 481 So. 2d 1094, 1096 (Ala. 1985)). See Hon v. Hon, No. 1190682, 2021 Ala. LEXIS 48, at *19 (Ala. May 1, 2021) (discussing movant's and nonmovant's respective burdens of proof according to which has the burden of proof at trial).

" 'Where cross-motions for a summary judgment are filed in the trial court, the party whose motion was not granted is entitled to have that motion reviewed on appeal from the grant of the opponent's motion.'" Lynd v. Marshall Cty. Pediatrics, P.C., 263 So. 3d 1041, 1052 (Ala. 2018) (quoting Mountain Lakes Dist., N. Alabama Conference, United Methodist Church, Inc. v. Oak Grove Methodist Church, 126 So. 3d 172, 180 (Ala.

Civ. App. 2013)). Accord, Smith v. Lefleur, 2019 Ala. Civ. App. LEXIS 141, at *12,rev'd on other grounds sub nom., Ex parte LeFleur, 2020 Ala. LEXIS 160.

SUMMARY OF THE ARGUMENT

Plaintiffs have established that they have suffered injury to their judicially cognizable interests, i.e., the impairment of their right to file valid complaints of discrimination with ADEM and to obtain valid resolutions of such complaints so as to curb their exposures to offensive and unpleasant odors, disease vectors, and fugitive dust emissions, and to restore their use and enjoyment of property and property values. Accordingly, Plaintiffs have satisfied the injury in fact prong of the standing analysis. See infra pp. 32-38.

Plaintiffs assert that, because the NGIPs are invalid "rules," any relief that might be granted by ADEM under those "rules" is invalid and ineffective. Thus, Plaintiffs have established that the injury to their judicially cognizable interests is "fairly traceable" to the development and adoption of invalid NGIPs by the Director. Accordingly, Plaintiffs have satisfied the causal connection prong of the standing analysis. See infra pp. 38-41.

Plaintiffs have established that a declaration that the NGIPs are invalid will likely or possibly cause the Director and ADEM to adopt new procedures that are valid. The adoption of valid procedures will permit Plaintiffs to file complaints of discrimination with ADEM and to obtain valid resolutions of those complaints that may curb their exposure to offensive and unpleasant odors, disease vectors, and fugitive dust emissions, and restore their use and enjoyment of property and property values. Accordingly, Plaintiffs have satisfied the redressability prong of the standing analysis. See infra pp. 41-43.

The NGIPs establish the process that ADEM will follow to assure the prompt and fair resolution of all complaints which allege 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. The NGIPs are statements of general applicability that implement or prescribe law or policy, or describe the procedure of ADEM. Accordingly, the NGIPs are "rules" within the meaning of that term in Ala. Code 1975 §§ 41-22-3(9) and 22-22A-8. See infra pp. 43-49.

The NGIPs do not concern only the internal management of ADEM. They also concern persons who allege discrimination by ADEM and "third party entities (e.g. permit applicants and permittees). Moreover, the NGIPs affect the private rights or procedures available to the public to redress discrimination by ADEM. Accordingly, the NGIPs are not excepted from the definition of "rule" by Ala. Code 1975 § 41-22-3(9)a. The NGIPs substantially affect the legal rights of, or procedures available to, the public or a segment thereof to redress discrimination by ADEM. Accordingly, the NGIPs are not excepted from the definition of "rule" by Ala. Code 1975 § 41-22-3(9)c. See infra pp. 49-57.

The NGIPs were adopted without any prior public notice or opportunity for public comment or hearing as provided in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b). Absent substantial compliance with these requirements, the NGIPs are invalid rules. See infra at 57-59.

The NGIPs were adopted by the Director who lacks statutory authority to adopt rules. That authority resides exclusively with the Environmental Management Commission of ADEM which did not adopt the NGIPs. Accordingly, the NGIPs are invalid rules. See infra pp. 59-60.

The NGIPs establish a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine ADEM decisions to investigate and resolve complaints of discrimination by ADEM. Accordingly, the NGIPs reflect ADEM "policy." Because the policy relates to the environment, the NGIPs establish "environmental policy." See infra p. 60.

The NGIPs were developed by the Director who lacks statutory authority to develop "environmental policy." That authority resides exclusively with the Environmental Management Commission of ADEM which did not develop the NGIPs. Accordingly, the NGIPs are invalid "environmental policy." See infra pp. 60-61.

The NGIPs are procedural "rules" or "policy" that govern ADEM's investigation and resolution of complaints alleging discrimination by ADEM. ADEM has no statutory authority to adopt "rules" or "policy" respecting discrimination. Accordingly, the NGIPs are invalid. See infra pp. 61-69.

ARGUMENT

I. The trial court erred in dismissing the case on the ground that Plaintiffs failed to demonstrate that their injuries are causally related to the Director's development and adoption of the NGIPs.

The issue of standing presents a pure question of law. Morrow v. Bentley, 261 So. 3d 278, 283 (Ala. 2017). "[A] party asserting standing to contest environmental regulations bears the burden of proving each element of standing." Smith v. LeFleur, 2019 Ala. Civ. App. LEXIS 141, at *14, rev'd on other grounds sub nom., Ex parte LeFleur, 2020 Ala. LEXIS 160.

A party establishes standing to bring a challenge in a public-law case when it demonstrates the existence of (1) an actual, concrete and particularized injury in fact – an invasion of a legally protected interest; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. Munza v. Ivey, No. 1200003, 2021 Ala. LEXIS 20, at *11-12 (Ala. Mar. 19, 2021); Keith v. LeFleur, 256 So. 3d at 1210-11.

The Defendants did not assert, and the trial court did not hold, that Plaintiffs failed to demonstrate that they suffered a cognizable injury in fact or that it is likely that the injury will be redressed by a favorable decision. Rather, Defendants and the trial court focused solely on whether Plaintiffs demonstrated a causal connection between the invalidity of the

NGIPs and Plaintiffs' injuries. Nevertheless, Plaintiffs address the other prongs of the standing analysis as well.

Injury in fact

On a summary judgment motion, Plaintiffs must establish the existence of an injury in fact – an invasion of a legally protected interest. A "legally protected interest" is a "judicially cognizable interest." See Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997) (standing requires "an invasion of a judicially cognizable interest"); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63, 112 S. Ct. 2130, 2137 (1992) ("desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing"). Accord, Sierra Club v. Jewell, 764 F.3d 1, 10 (D.C. Cir. 2014); Ctr. for Reprod. Law v. Bush, 304 F.3d 183, 191 (2nd Cir. 2002); Bonds v. Tandy, 457 F.3d 409, 413 n.8 (5th Cir. 2006); Green Party of Tenn. v. Hargett, 767 F.3d 533, 543 (6th Cir. 2014); Carlsen v. GameStop, Inc., 833 F.3d 903, 908 (8th Cir. 2016); E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 665 (9th Cir. 2021); In re Special Grand Jury 89-2, 450 F.3d 1159 (10th Cir. 2006); Corbett v. Transp. Sec. Admin., 930 F.3d 1225, 1228 (11th Cir. 2019).

A judicially cognizable interest may be economic, aesthetic, conservational, recreational, or environmental. E.g., Black Warrior Riverkeeper, Inc. v. E. Walker County Sewer Auth., 979 So. 2d 69, 75-76 (Ala. Civ. App. 2007); Ex parte Fowl River Protective Ass'n, Inc., 572 So. 2d 446, 456 n.2 (Ala. 1990). The Alabama Supreme Court has twice entertained actions under Ala. Code § 41-22-10 where the plaintiffs sought to protect their environmental interests from being adversely affected by the adoption of invalid "rules." 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).

An injury to a judicially cognizable interest is "concrete" if it is distinct and palpable, real and not abstract. Spokeo, Inc. v. Robins, __ U.S. __, __, 136 S. Ct. 1540, 1548 (2016). An injury is "particularized" if it affects the plaintiff in a personal and individual way. Ex parte Merrill, 264 So. 3d 855, 863-64 (Ala. 2018).

The Legislature "has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Massachusetts v. Envtl. Protection Agency, 549 U.S. 497, 516, 127 S. Ct. 1438, 1453 (2007) (quoting Lujan, 504 U.S. at 580, 112 S.

Ct. at 2146 (Kennedy, J., concurring in part and concurring in judgment)). Accord, Spokeo, Inc. v. Robins, ___ U.S ___, ___,136 S. Ct. 1540, 1549 (2016). Thus, the Legislature may accord a procedural right to a litigant to challenge the lawfulness of a government official's or agency's action or inaction. See, e.g., Massachusetts, 549 U.S. at 518, 127 S. Ct. at 1453 (statutory right to petition for judicial review of agency action unlawfully withheld).

The Alabama Administrative Procedure Act (AAPA) accords a procedural right to challenge the validity of agency rules that exceed the agency's statutory authority, or that were adopted without substantial compliance with the rule-making procedures in Ala. Code 1975 § 41-22-5. Ala. Code 1975 § 41-22-10. This procedural right is extended to persons whose "legal rights or privileges" are interfered with or impaired, or threatened with interference or impairment. Id. This language incorporates the actual, concrete and particularized injury in fact requirement of standing. Munza, 2021 Ala. LEXIS 20, at *20; Ex parte LeFleur, 2020 Ala. LEXIS 160, at *20.

The Declaratory Judgment Act (DCA) also accords a procedural right to challenge the validity of agency rules that exceed the agency's statutory

authority, or that were adopted in violation of statutory procedural requirements. Ala. Code 1975 § 6-6-222.[114] "[ ]Its purpose is to settle and to afford relief from uncertainty and insecurity with respects to rights, status, and other legal relations and is to be liberally construed and administered." Ala. Code 1975 § 6-6-221. "[C]ontroversy touching the legality of acts of public officials or public agencies challenged by parties whose interests are adversely affected is one of the favored fields for declaratory judgment." Bedsole v. Goodloe, 912 So. 2d 508, 520 (Ala. 2005) (quoting Smith v. Ala. Dry Dock & Shipbuilding Co., 309 So. 2d 424, 429-430 (Ala. 1975)). Under the DJA, a controversy is justiciable where present legal rights are thwarted or affected [so as] to warrant proceedings under the Declaratory Judgment statutes." Ex parte Town of Summerdale, 252 So. 3d 111, 122 (Ala. 2016) (quotation marks and citations omitted). "A declaratory-judgment action is a unique form of action in that it is often filed before an actual breach of a right has occurred, and so an 'actual injury' has not yet been sustained by the

[114] ADEM "rules" may be challenged under both Ala. Code 1975 §§ 41-22-10 and 6-6-222. Coosa River Basin Initiative, Inc., 826 So. 2d at 118.

plaintiff. A declaratory judgment often seeks to avoid harm before it happens." Id., at 121.

To invoke the aid of the circuit court in declaring the NGIPs to be invalid and in obtaining injunctive relief to prevent the implementation of such invalid NGIPs, Plaintiffs must demonstrate that the invalidity of the NGIPs presents a threat of harm to a judicially cognizable interest that is both concrete and particularized. In a procedural rights case, a threatened injury need not be imminent. Lujan, 504 U.S. at 572 n.7, 112 S. Ct. at 2142 n.7 (injury may not materialize for years); Massachusetts, 549 U.S. at 521, 127 S. Ct. at 1456 (injury may not materialize for decades).

In the present case, Plaintiffs aver that they presently suffer actual and threatened exposures to (1) offensive and unpleasant odors that cause them to limit outdoor activities, to suffer ill-effects such as headaches, irritation of nasal passages, sinus drainage, lung congestion, difficulty breathing, and nausea; (2) disease vectors such as buzzards that drop feces on their houses, trees, cars, and cattle watering and feeding troughs, and flies, both of which pose a risk of bacterial and viral contamination; and (3) fugitive dust emissions that cause particulate

deposits on outdoor furniture, cars, and trucks. Plaintiffs also aver that they these exposures impair their use and enjoyment of property and reduce their property values. Plaintiffs aver that they desire to curb these harms by filing discrimination complaints with ADEM and obtaining valid and effective resolutions of those complaints which may include modifications to facility permits requiring additional measures to reduce or abate their harmful exposures. They aver, however, that the invalidity of the NGIPs precludes them from obtaining valid and effective resolutions of their complaints. See Brunson Constr. & Envtl. Services v. City of Prichard, 664 So. 2d 885, 893 (Ala. 1995) ("Noncompliance with these provisions voids every 'agency rule, order, or decision' taken in any case in which the provisions are applicable. Section 41-22-4(b)."); Stiff v. Ala. Alcoholic Bev. Control Bd., 878 So. 2d 1138, 1146 (Ala. 2003) (same).

In Keith v. LeFleur, this Court held that plaintiffs alleged a judicially cognizable "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 [discrimination] complaint. The threat is actual or imminent, as required by Lujan, because the plaintiffs' ultimate injury is current and ripe to be addressed." 256 So. 3d at 1211-

13. Just as plaintiffs' interest in Keith v. LeFleur was adjudged to be a judicially cognizable interest sufficient to support standing, so should Plaintiffs' interest here be adjudged to be a judicially cognizable interest sufficient to support standing.

Causation

Plaintiff must show a causal connection between the invalid NGIPs and their injury. See Ex parte LeFleur, 2020 Ala. LEXIS 160, at *29 (A plaintiff "must show a causal connection between the [invalid] rules [or environmental policy]. . . and the alleged injury."). The injury must 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, 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). The challenged government action need not be the proximate cause (i.e., direct and immediate cause) of a plaintiff's injury; rather, plaintiff's injury need only be "fairly traceable" to the challenged government action. Bennett v. Spear, 520 U.S. at 168-169, 117 S. Ct. at 1164.

Once again, Keith v. LeFleur provides the most relevant analysis. There, the Court said:

> 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. ADEM and the director assert, however, that the plaintiffs fail to allege a connection between their alleged procedural injuries and a separate concrete interest.
>
> * * *
>
> In the present case, unlike in Summers, 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 1211-12.

Plaintiffs do not rely on the allegations of their Complaint to support the causal connection. They rely on the terms of the NGIPs and facts established in admissions and sworn answers to interrogatories. Specifically, the NGIPs describe the process that ADEM will follow to assure the prompt and fair resolution of all complaints which allege 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; the NGIPs are applicable to all complaints filed by persons alleging discrimination by ADEM; the NGIPs were developed and adopted by the Director rather than the Environmental Management Commission of ADEM; the NGIPs were adopted without observance of the requirements for prior notice and opportunity for comment or hearing in Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b); and but for the invalidity of the NGIPs, Plaintiffs would file complaints of discrimination with ADEM in hopes of obtaining valid resolutions of their complaints that will reduce or abate their injuries. This evidence is sufficient to demonstrate that "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." Keith v. LeFleur, 256 So. 3d at 1212.

According, the trial court erred in dismissing the case on the ground that Plaintiffs failed to demonstrate that their injuries are causally related to the Director's development and adoption of the invalid NGIPs.

Redressability

"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. 'A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result')." Massachusetts, 549 U.S. at 518, 127 S. Ct. at 1453 (citation omitted). See Keith v. LeFleur, 256 So. 3d at 1212 ("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.").

If the NGIPs are declared to be invalid by the Court, ADEM is likely to adopt new nondiscrimination grievance procedures for at least three reasons.

First, as an EPA financial assistance recipient, ADEM is obligated to adopt grievance procedures by 40 C.F.R. § 7.90(a). Failure to adopt new grievance procedures to replace the invalid NGIPs will leave ADEM in violation of 40 C.F.R. § 7.90(a) and in jeopardy of losing EPA financial assistance. See 40 C.F.R. § 7.130 (EPA may deny, annul, suspend, or terminate financial assistance to a recipient for non-compliance with 40 C.F.R. Part 7). Second, Plaintiffs are likely to seek EPA commencement of "proceedings to deny, annul, suspend, or terminate EPA assistance to ADEM" if ADEM does not adopt new grievance procedures to replace the invalid NGIPs just as they did once before. And third, EPA is likely to investigate a complaint alleging ADEM's failure to adopt grievance procedures in compliance with 40 C.F.R. § 7.90(a) as it has done before.

Thus, it is likely that ADEM would adopt new grievance procedures to replace the invalid NGIPs. See Keith v. LeFleur, 256 So. 3d at 1212 ("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."). If the new grievance procedures are validly adopted, Plaintiffs aver that they are likely to submit discrimination complaints to ADEM that would have some possibility of achieving valid and effective resolutions that would abate or reduce the harms Plaintiffs presently suffer.

II. The Director's adoption of the NGIPs was in violation of the notice and comment and hearing requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b).

A. The NGIPs are statements of general applicability that implement or prescribe law or policy, or describe the procedure of ADEM.

Subject to specified exceptions, an agency statement of general applicability that implements or prescribes law or policy or that describes agency procedure is defined as a "rule." Ala. Code 1975 § 41-22-3(9).

An agency statement has "general applicability" if it is directed at a class of persons by description. Health Care Auth. of Athens v.

Statewide Health Coordinating Council, 988 So. 2d 574, 584 (Ala. Civ. App. 2008) (Bryan, J., concurring specially) (quoting Arthur Earl Bonfield, State Administrative Rule Making §§ 3.3.1 and 3.3.2(b) (1986)). See, e.g., Ex parte Traylor Nursing Home, Inc., 543 So. 2d 1179, 1184 (Ala. 1988) (swing bed amendment to State Health Plan "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."); Brunson Constr. & Envtl. Servs., 664 So. 2d at 893 (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); 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 by permit applicants to demonstrate that those criteria have been met, constitute a statement of general applicability).

The NGIPs are a statement that is, at least in part, "directed" to that class of persons who submit complaints to ADEM alleging discrimination resulting from ADEM actions and to that class of persons who are "third party entities" which are the beneficiaries of ADEM actions

that are claimed to be discriminatory. The NGIPs also "affect" these classes of persons. Thus, the NGIPs have general applicability.

Agency statements of general applicability that implement law are "rules." Ala. Code 1975 § 41-22-3(9). The Director adopted the NGIPs on or about November 5, 2018 in response to the requirement of 40 C.F.R. 7.90(a). 40 C.F.R. § 7.90(a) requires 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." By its terms, the NGIPs were adopted to "assure the prompt and fair resolution of complaints which allege unlawful discrimination under Title VI, and the other civil rights laws covered under 40 C.F.R. Parts 5 and 7." (Upper case text modified to lower case text). Title VI, § 601, Pub. L. 88–352, 78 Stat. 252, 42 U.S. Code § 2000d, dictates that "[n]o person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, § 602, 42 U.S. Code § 2000d-1, also directs federal agencies extending federal financial assistance to any program or activity to adopt rules to effectuate this prohibition against discrimination. 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).[115] EPA has adopted rules to effectuate the Title VI prohibition against discrimination. 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). Thus, the NGIPs implement law, i.e., 40 C.F.R. §§ 7.90(a), 7.30 and 7.35(b), and 42 U.S.C. § 2000d. See Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d at 66 (ADEM's antidegradation implementation procedures implement law, i.e., the State antidegradation policy at Ala. Admin. Code r. 335-6-10-.04).

Agency statements of general applicability that implement or prescribe policy are "rules." Ala. Code 1975 § 41-22-3(9). Neither the Alabama Administrative Procedure Act nor the Alabama Environmental Management Act define the term "policy." The courts regularly look to dictionary definitions to ascertain the plain meaning of words used in a statute. State v. City of Birmingham, 299 So. 3d 220, 226 (Ala. 2019). A

[115] Such regulations "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are [not intentional]." Alexander v. Sandoval, 532 U.S. 275, 281-282, 121 S. Ct. 1511, 1517 (2001).

"policy" is defined as "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. See Fed'n of City Employees v. Arrington, 432 So. 2d 1285, 1287 (Ala. 1983) (Mayor's executive order forbidding supervisory, managerial, or confidential employees from associating with rank and file employees was a "policy" and one that only the City Council was authorized to adopt). The NGIPs describe the process that ADEM will follow to assure the prompt and fair resolution of all complaints which allege 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. Thus, the NGIPs describe the course of action, i.e., "policy," to be followed by ADEM when a discrimination complaint is received. Furthermore, ADEM has published a Nondiscrimination Statement which is a statement of principle, i.e., "policy," regarding how ADEM will conduct its activities. The NGIPs implement ADEM's "policy" of nondiscrimination as expressed in its Nondiscrimination Statement. See Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d at 66

(ADEM's antidegradation implementation procedures are "rules" because they implement the State's antidegradation policy and prescribe pollution policy for the State); Stiff, 878 So. 2d at 1145 (ABC Board's procedure for marking up the price of table wine are "rules" because it implements or prescribes pricing policy).

Agency statements of general applicability that describe agency procedures are also "rules." Ala. Code 1975, § 41-22-3(9). The NGIPs describe ADEM's procedure for processing complaints submitted by the public alleging discrimination resulting from ADEM actions. See NGIPs ("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") (underscoring added). Thus, the NGIPs describe agency procedures and are "rules." See Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d at 66 (ADEM's antidegradation implementation procedures describe the procedure and practice requirements of ADEM); Brunson Constr. & Envtl. Services, 664 So. 2d at 894 (ADEM's procedures describe how permitted volumes for Alabama waste facilities are

established); Ex parte Traylor Nursing Home, Inc., 543 So. 2d at 1183 (Statewide Health Coordinating Council's swing bed amendment of State Health Plan describes procedures or requirements for health care providers).

Accordingly, the NGIPs are an agency statement of general applicability that implements or prescribes law or policy or describes agency procedure. Accordingly, the NGIPs meet the general definition of "rule" in Ala. Code 1975 § 41-22-3(9).

B. The NGIPs are not excepted from the definition of "rule."

Ala. Code 1975 § 41-22-3(9) includes eight exceptions to the definition of "rule." Among these are two exceptions that the Defendants argue apply to the NGIPs. These are:

> a. Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public.

and

> c. Intergovernmental, interagency, and intra-agency memoranda, directives, manuals, or other communications which do not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

Because these are exceptions to the definition of "rule" in Ala. Code 1975 § 41-22-3(9), the Defendants have the burden of proof at trial to demonstrate that one or both of these exceptions apply to the NGIPs. See Wood v. State Pers. Bd., 705 So. 2d 413, 416 (Ala. Civ. App. 1997) (quoting J. O'Reilly, Administrative Rulemaking § 3.06 at 47-48 (1983)). Accord, Byrne v. Galliher, 39 So. 3d 1049, 1056 (Ala. 2009); Hartford Healthcare, Inc. v. Williams, 751 So. 2d 16, 21 (Ala. Civ. App. 1999). As the movant for summary judgment with the burden of proof at trial on this issue, the Director must support his motion with credible evidence, using any of the material specified in Rule 56(c), Ala. R. Civ. P. ("pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits") sufficient to demonstrate that the NGIPs fall within the scope of either or both of these exceptions. Hon v. Hon, 2021 Ala. LEXIS 48, at *19. The Defendants proof must be such that he would be entitled to a judgment as a matter of law if this evidence was not controverted at trial. Id. (citing Ex parte Gen. Motors Corp., 769 So. 2d 903, 909 (Ala. 1999)). The burden to present evidence that will establish a genuine issue of material fact on the issue of whether the NGIPs are excepted from the definition of "rule" does not shift to the Plaintiffs unless the Defendants

first satisfy their burden to present credible evidence that the NGIPs are excepted from the definition of "rule." See Denmark v. Mercantile Stores Co., 844 So. 2d 1189, 1193 (Ala. 2002) (quoting O'Barr v. Oberlander, 679 So. 2d 261, 263 (Ala. Civ. App. 1996)).

To meet their burden of proof, the Defendants must present evidence demonstrating that the NGIPs (1)(a) concern only the internal management of ADEM and (b) do not affect private rights or procedures available to the public; or (2)(a) are an intra-agency memorandum or directive and (b) do not substantially affect the legal rights of, or procedures available to, the public or any segment thereof. The Defendants have presented no such evidence and failed to carry their burden of proof. Accordingly, the burden of proof did not shift to Plaintiffs and the Defendants are not entitled to a summary judgment.

Plaintiffs have a constitutional right to submit a complaint alleging discrimination resulting from ADEM actions (e.g., permits) and to seek modifications of those actions to abate the alleged discrimination. Art. I, § 25, Ala. Const. 1901 (Off. Recomp.). The NGIPs describe how ADEM will process, investigate, and resolve such complaints. Among other things (see supra pp. 18-22),the NGIPs provide that ADEM will provide

the complainant with a written acknowledgment of receipt of the complaint and notice of how the complaint will be investigated. The NGIPs provide that if ADEM determines that the complainant has not submitted sufficient information to allow ADEM to make a determination of jurisdiction or investigative merit, ADEM may request additional information from the complainant. The NGIPs provide that ADEM will notify the "third party entity" (e.g., applicant or permittee) that the complaint has been received and ask the "third party entity" to provide information necessary for ADEM to investigate the complaint. The NGIPs provide that "ADEM will use the information provided by the third party entity and the complainant in resolving the complaint." The NGIPs provide that "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." Finally, the NGIPs provide that "ADEM will implement the recommendations approved by the Office of the Director." These provisions demonstrate that the NGIPs do not "concern only" the internal management of ADEM. They also concern the interests of complainants and "third party entities." Moreover, ADEM's publication of the NGIPs

on its internet website and in its Guide for Citizen Participation (revised Nov. 2018) belies any claim that they "concern only" the internal management of ADEM. See Carey v. Comm'r of Corr., 95 N.E.3d 220, 225 (Mass. 2018) ("Given the department's efforts to publicize the policy, the commissioner cannot credibly argue that the policy concerns only internal management issues"). Thus, the exception in Ala. Code 1975 § 41-22-3(9)a. does not apply to the NGIPs.

The exception in Ala. Code 1975 §§ 41-22-3(9)a. also requires that the agency statement not affect private rights or procedures available to the public. Similarly, the exception in Ala. Code 1975 § 41-22-3(9)c. requires that an intra-agency memorandum or directive not substantially affect the legal rights of, or procedures available to, the public or any segment thereof.

In Green Party of Hawai'i v. Nago, 378 P.3d 944 (Haw. 2016), the Office of Elections adopted and implemented a procedure used to (1) determine the number of election ballots to be delivered to the precincts, (2) request additional ballots when a precinct runs out of paper ballots, and (3) count the votes cast on a ballot for a precinct in which the voter is not entitled to vote. The Hawai'i Administrative Procedure Act (HAPA)

provides a definition of "rule" and an exception for agency statements that (a) concern only the internal management of the agency and (b) do not affect private rights or procedures available to the public. This exception is comparable to Ala. Code 1975 § 41-22-3(9)a. The Court said that agency procedures that are directed to agency staff are "generally considered to be a matter of internal management." Id. at 954. "However, even 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." Id. at 954-55. The Court held that the ballot procedures meet the general definition of "rule" because they implement state law and have general applicability and future effect. Id. at 956. The Court then determined that the procedures affect a person's ability to exercise the right to vote and affect the procedures for voting that are available to the public. Id. at 956-57. Accordingly, the Court held that the ballot procedures did not fall within the scope of the statutory exception and were required to be adopted pursuant to the rulemaking procedures of the HAPA.

In Stiff the ABC Board established a table wine markup pricing procedure that Stiff alleged was adopted in violation of the rulemaking procedures in Ala. Code 1975 § 41-22-5. Six justices held that the Board's pricing procedure implements or prescribes a pricing policy and meets the definition of "rule" in Ala. Code 1975 § 41-22-3(9). Two justices dissented concluding that one or both of the exceptions in Ala. Code 1975 § 41-22-3(9)a. and -3(9)c. applied to the pricing procedure. Obviously, the majority of the justices were not persuaded by the dissent.

In Anderson v. Iowa Department of Human Services, 368 N.W.2d 104 (Iowa 1985), Anderson sought and was denied medical assistance benefits for three months by the Department of Human Services. Id. at 105. This denial was based on a provision in an agency employee manual that prescribed eligibility requirements to receive benefits. The Court concluded that the agency's reliance on the manual to determine eligibility for benefits "substantially affects the public" and that the manual must be promulgated properly as a "rule." Id. at 108.

In Schinzel v. Department of Corrections, 333 N.W.2d 519 (Mich. 1983), the Department of Corrections denied an inmate the right to receive postage stamps sent through the mail. Id. This denial was based

on a policy established by an intra-agency memorandum. Id. The Department claimed that the policy was excepted from the definition of "rule" because it was embodied in an "intra-agency memorandum, directive or communication which does not affect the rights of, or procedures and practices available to, the public." Id. at 520. The Court concluded: "The inmates must have been receiving their postage stamps mainly from members of the general public, i.e., families and friends, rather than solely from inmates in other facilities. The effect of the new prohibition is to deny members of the general public their legal right to send postage stamps to inmates. As such, the policy directly affects and interferes with the rights and practices available to the public." Id. The Court held that the policy established by the intra-agency memorandum was invalid and had to be adopted as a "rule" under the proper procedures set out by the State's APA. Id.

Here, Plaintiffs have a constitutional right to submit a complaint alleging discrimination resulting from ADEM actions (e.g., permits) and to seek modifications of those actions to remedy the alleged discrimination.[116] Art. I, § 25, Ala. Const. 1901 (Off. Recomp.). See

[116] C. 796; C. 961; C. 1073-74; C. 1202-03.

Courtyard Manor Homeowners' Ass'n v. City of Pelham, 295 So. 3d 1061, 1065 (Ala. 2019) ("The right to petition or complain about governmental action or inaction is clearly within the Alabama Constitution; nothing can prevent citizens from asking their government to consider a request."). This right may be exercised by Plaintiffs to redress ADEM's non-compliance with the prohibitions against discrimination in 42 U.S.C. § 2000d and 40 C.F.R. §§ 7.30 and 7.35(b). The NGIPs establish the procedures that ADEM will use to process, investigate and resolve complaints. Just as the agency procedures in Green Party of Hawa'i., Stiff, and Schinzel affected the legal rights of the public, Plaintiffs' ability to secure the benefits of 42 U.S.C. § 2000d and 40 C.F.R. §§ 7.30 and 7.35(b) is substantially affected by the provisions of the NGIPs that have not been adopted properly. Thus, the NGIPs substantially affect the legal rights of, or procedures available to, the public. Accordingly, the NGIPs are not excepted from the definition of "rule" by the provisions of Ala. Code § 41-22-3(9)a. or -3(9)c.

C. The NGIPs were adopted without substantial compliance with the notice and comment and hearing requirements of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b).

Ala. Code 1975 § 41-22-5(a) requires publication of notice of the proposed adoption of rules in the Alabama Administrative Monthly and reasonable opportunity for all interested persons to submit data, views, or arguments thereon, orally or in writing prior to adoption of the rule. It is not disputed that the NGIPs were adopted without prior publication of notice of the proposed adoption thereof in the Alabama Administrative Monthly and without affording all interested persons a reasonable opportunity to submit data, views, or arguments thereon, orally or in writing.

Ala. Code 1975 § 22-22-8(a) and -8(b) require public advertisement in the three newspapers of this State with the largest regional circulation of the date, time, and place of a public hearing on the proposed adoption of a rule and the provision of a public hearing at which persons are afforded a reasonable opportunity to be heard with respect thereto prior to adoption of the rule. It is not disputed that the NGIPs were adopted without prior public advertisement in the three newspapers of this State with the largest regional circulation of the date, time, and place of a public hearing on the proposed adoption thereof and without providing a public

hearing at which persons were afforded a reasonable opportunity to be heard with respect thereto.

Failure to comply with the notice and comment and hearing procedures of Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a)and -8(b) makes the NGIPs invalid. See Ala. Code 1975 § 41-22-4(b) ("No 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."); Ala. Code 1975 § 41-22-5(d) ("No rule adopted after October 1, 1982, is valid unless adopted in substantial compliance with this section."). See Ex parte Legal Envtl. Assistance Found., Inc., 832 So. 2d at 67 (failure to observe the procedures required by Ala. Code 1975 §§ 41-22-5(a) and 22-22A-8(a) and -8(b) prior to adoption of ADEM's antidegradation implementation procedures makes those procedures invalid).

III. The Director's development and adoption of the NGIPs exceed his and ADEM's statutory authority.

A. The Director does not have statutory authority to adopt rules or develop environmental policies.

As discussed supra pp. 43-49, the NGIPs are "rules." The authority to adopt rules for ADEM resides exclusively with the Environmental

Management Commission of ADEM. Ala. Code 1975 § 22-22A-6(a)(2). It is undisputed that the Commission did not adopt the NGIPs. The Director is not authorized to adopt rules. Ala. Code 1975 § 22-22A-4(b). It is not disputed that the Director adopted the NGIPs. He did so in excess of his statutory authority. Accordingly, the NGIPs are invalid "rules."

The NGIPs are a statement prescribing 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 environmental permits, result in discrimination. Thus, the NGIPs are a "policy." See supra pp. 46-48. The NGIPs relate to or are associated with the environment.[117] As such, the NGIPs are an "environmental policy."

The authority to develop "environmental policies" for ADEM resides exclusively with the Environmental Management Commission of ADEM. Ala. Code 1975 § 22-22A-6(a)(3). It is undisputed that the Environmental Management Commission of ADEM did not develop the NGIPs. The

[117] The word "environmental" in the phrase "environmental policy" is an adjective describing "policy." It means "[r]elating to or associated with the environment." American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=environmental, accessed Feb. 14, 2021. See OED Online, https://www.oed.com/view/Entry/63090, accessed Feb. 14, 2021 ("Of or relating to the surroundings, physical context, or (particular) environment of a person, animal, or thing.").

Director is not authorized to develop "environmental policies." Ala. Code 1975 § 22-22A-4(b). It is undisputed that the Director developed the NGIPs. He did so in excess of his statutory authority. Accordingly, the NGIPs are invalid "environmental policies."

B. ADEM does not have statutory authority to adopt the NGIPs.

Administrative agencies are purely creatures of the legislature and have only those powers conferred on them by the legislature. Jefferson Cnty. v. Ala. Criminal Justice Info. Ctr. Comm'n, 620 So. 2d 651, 658 (Ala. 1993). "[A]n administrative agency may not expand its own jurisdiction by its interpretation of a statute (or by any other means) . . .." Ex parte State Health Planning & Dev. Agency, 855 So. 2d 1098, 1103 (Ala. 2002). An administrative agency cannot claim implied powers that exceed those express powers contained in its enabling legislation. Id. An administrative regulation cannot enlarge upon statutory policy. 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 40 C.F.R. Part 7 or to "resolve" such complaints by any means, including the

revocation or modification of permits issued to owners or operators of regulated facilities. See Ala. Code 1975 §§ 22-22A-5 (delineating powers of ADEM) and 22-22A-6 (delineating powers of the Environmental Management Commission of ADEM). Indeed, the Environmental Management Commission of ADEM – the body granted the power to hear and determine appeals of ADEM administrative actions, Ala. Code 1975 § 22-22A-6(a)(4), and whose decisions become the final actions of ADEM, Ala. Code 1975 § 22-22A-7(c)(6) – has twice held that ADEM does not have the authority to consider racial impacts in its permit decisions. See Holmes v. Ala. Dep't of Envtl. Mgmt., EMC Dkt. No. 98-04, 1998 AL ENV LEXIS 1 (EMC 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");[118] E. Cent. Ala. Alliance for Quality Living v. Ala. Dep't of Envtl. Mgmt., EMC Dkt. No. 03-01 & 03-02, 2003 AL ENV LEXIS 6 (EMC Apr. 22, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the

[118] Slip op. at C. 1472-87 (quoted text at C. 1485).

granting of a permit"),[119] aff'd, No. CV-2003-000356.00 (Lee Cnty. Cir. Ct. Nov. 20, 2003), aff'd, 915 So. 2d 1186 (Ala. Civ. App. 2004) (mem.). See also Mem. from James W. Warr, Director of ADEM, to Dr. William M. Sanders, Chairman, Envtl. Mgmt. Comm'n (Oct. 19, 2004) ("The Department is not aware of any basis in the Environmental Management Act, or any of the individual state environmental laws administered by the Department, for consideration of [racial or other] demographics in permitting decisions.").[120]

Defendants now claim that ADEM's statutory authority to adopt the NGIPs is derived from Ala. Code 1975 § 22-22A-2(2).[121] This provision is merely a declaration of intent that provides a rule of construction which 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

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[119] Slip op. at C. 1431-70 (quoted text at C. 1454).

[120] C. 1489-91 (quoted text at 1490).

[121] C. 765-66; C. 775-76.

command.'") (quoting Dorchy v. Kansas, 264 U.S. 286, 290, 44 S. Ct. 323, 325 (1924))). 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 NGIPs 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, or 40 C.F.R. §§ 7.30 and 7.35(b). EPA is not authorized to expand upon the 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). Moreover, the lack of discrimination grievance procedures 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 discrimination grievance procedures. At most, ADEM's lack of valid discrimination grievance procedures will result in the denial, annulment, termination or suspension of financial assistance to ADEM by EPA, 40 C.F.R. § 7.130, not the surrender of any State control over its air, land and water resources or ADEM's ability to cooperate with other State agencies, agencies of other states, interstate agencies, or the federal government.

Defendants also claim that ADEM's statutory authority to adopt the NGIPs is derived from Ala. Code 1975 § 22-22A-4(a).[122] This subsection merely explains why ADEM was established. It does not expressly confer any specific authorities on ADEM.

Defendants also claim that ADEM's statutory to adopt the NGIPs is derived from Ala. Code1975 § 22-22A-4(n).[123] This subsection provides that ADEM is "authorized to take all actions necessary and appropriate to secure to this state the benefits of federal environmental laws." For the same reasons that the lack of discrimination grievance procedures do not result in the loss of State control over the State's air, land and water resources or loss of cooperation between the State, other states, interstate agencies, and the federal government, they will not result in the loss of the benefits of federal environmental laws except perhaps grant money. Nevertheless, grant agreements between EPA and ADEM cannot expand ADEM's statutory authority to include compliance with 42 U.S.C. § 2000d, or 40 C.F.R. §§ 7.30, 7.35, 7.90(a), and 7.95. Such an expansion would

[122] C. 765-66; C. 775-76.

[123] C. 765-66; C. 775-76.

usurp the power reserved exclusively to the Legislature and violate Art. III, § 42(c), Ala. Const. 1901 (Off. Recomp.).

Defendants also claim that ADEM's statutory authority to adopt the NGIPs is derived from Ala. Code 1975 §§ 22-22A-5(8) and -5(14).[124] These subsections empower ADEM to enter into agreements and contracts with the EPA for the purpose of "carrying out any of the functions, purposes, or provisions of this chapter." Accepting the Defendants' position would allow ADEM to expand its authority beyond the express limits of §§ 22-22A-5 and 22-22A-6 simply by entering into an agreement with EPA. Such an expansion of authority would usurp the power reserved exclusively to the Legislature and violate Art. III, § 42(c), Ala. Const. 1901 (Off. Recomp.).

Finally, ADEM rules provide that permits may be modified, denied, suspended, or revoked only for specific causes. See, e.g., Ala. Admin. Code rs. 335-3-16-.13 (major source air pollution permits), 335-6-6-.17 (water pollution permits), and 335-13-5-.05 and -.06 (solid waste disposal facility permits). No rule in Ala. Admin. Code div. 335-3, chap. 335-6-6, or div. 335-13 authorizes ADEM to unilaterally modify, deny, suspend or revoke

[124] C. 765-66; C. 775-76.

a major source air pollution permit, a water pollution permit, or a solid waste disposal facility permit solely on the basis of a finding that the activity authorized by the permit results in discrimination in violation of 40 C.F.R. Parts 5 or 7.[125] The absence of any such provisions suggests that ADEM has never considered itself to have the authority to remedy a violation of 40 C.F.R. Parts 5 or 7 through permit modifications, denials, suspensions, or revocations.

ADEM's development and adoption of the NGIPs without statutory authority is an usurpation of the power conferred exclusively on the Legislature – an usurpation which is prohibited by Art. III, § 42(c), Ala. Const. 1901 (Off. Recomp.). Accordingly, the NGIPs are invalid and a nullity because they are in excess of ADEM's statutory authority.

CONCLUSION

The circuit court's judgment in favor of Defendants on the ground of Plaintiffs' lack of standing is erroneous and due to be reversed. The circuit court's refusal to grant Plaintiffs' motion for summary judgement is also due to be reversed. The case should be remanded to the circuit court to enter summary judgment in favor of Plaintiffs.

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[125] C. 482-83.

Respectfully submitted,

s/ David A. Ludder
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ADDENDUM

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DIRECTOR

KAY IVEY
GOVERNOR

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DATE: November 5, 2018

TO: Marilyn Elliot, Deputy Director
ADEM Nondiscrimination Coordinator

FROM: Lance R. LeFleur, Director LRL

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 COMPLIANCE

This brief complies with the word limit of Ala. R. App. P. 28(j)(1) because, excluding the parts of the brief exempted, because this brief contains 13,650 words as computed by the word count function in Word Perfect X7.

This brief complies with the font type and size requirements of Ala. R. App. P. 32(a)(7) because it uses Century Schoolbook 14 throughout.

Done this 27th day of August, 2021.

s/ David A. Ludder
David A. Ludder

CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that I served the following parties by electronic service, as authorized by R. 57(h)(5), Ala. R. App. P.:

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S. SHAWN SIBLEY
PAUL CHRISTIAN SASSER JR. (SAS006)
Assistant Attorneys General
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Done this 27th day of August, 2021.

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