

BEFORE THE  
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the matter of:

ENVIRONMENTAL DEFENSE  
ALLIANCE,

Petitioner.

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**PETITION FOR DECLARATORY RULING**

In accordance with Ala. Code 1975 § 41-22-11(a) and ADEM Admin. Code r. 335-1-1-.04(1), the Environmental Defense Alliance (hereinafter, “Alliance”) submits this Petition for Declaratory Ruling to the Alabama Department of Environmental Management (hereinafter, the “Department”) and provides the following information:

**I. Introduction**

Ala. Code 1975 § 41-22-11(a) and ADEM Admin. Code r. 335-1-1-.04(1) provide that any person substantially affected by a rule, order or statute may petition the Department for a declaratory ruling to determine the validity of the rule, the applicability of the rule or statute enforceable by the Department, or the meaning and scope of the order issued by the Department by making and filing a written petition therefor.

## II. Petitioner

ADEM Admin. Code r. 335-1-1-.04(1)(a) requires that a Petition for Declaratory Ruling shall include “the name, address and telephone number of the person making the petition[.]” In accordance therewith, the Alliance provides the following information:

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

Future contact with the Alliance concerning this Petition should be directed to the attorney identified below.

## III. Statute and Rule Provisions

ADEM Admin. Code r. 335-1-1-.04(1)(b) requires that a Petition for Declaratory Ruling shall include “a statement identifying the rule, statute or order, and provision thereof, on which the declaratory ruling is sought[.]” In accordance therewith, the Alliance identifies the following statute and rule provisions on which a declaratory ruling is sought:

A. Ala. Code 1975 § 36-12-40, provides *inter alia*:

Every citizen has a right to inspect and take a copy of any *public writing* of this state, except as otherwise expressly provided by statute. Provided however, registration and circulation records and information concerning the use of the public, public school or college and university libraries of this state shall be exempted from this section. Provided further, any parent of a minor child

shall have the right to inspect the registration and circulation records of any school or public library that pertain to his or her child. Notwithstanding the foregoing, records concerning security plans, procedures, assessments, measures, or systems, and any other records relating to, or having an impact upon, the security or safety of persons, structures, facilities, or other infrastructures, including without limitation information concerning critical infrastructure (as defined at 42 U.S.C. §5195c(e) as amended) and critical energy infrastructure information (as defined at 18 C.F.R. §388.113(c)(1) as amended) the public disclosure of which could reasonably be expected to be detrimental to the public safety or welfare, and records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section. Any public officer who receives a request for records that may appear to relate to critical infrastructure or critical energy infrastructure information, shall notify the owner of such infrastructure in writing of the request and provide the owner an opportunity to comment on the request and on the threats to public safety or welfare that could reasonably be expected from public disclosure on the records.

(Emphasis added).

B. Ala. Code 1975 § 36-12-41, provides:

Every public officer having the custody of a *public writing* which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.

(Emphasis added).

C. ADEM Admin. Code r. 335-1-1-.06, provides *inter alia*:

(1) **Public inspection of records**. Except as provided herein, any records, reports, rules, forms, or information obtained under the Act and the *official records* of the Department shall be available to the public for inspection. Requests for permission to inspect such records should be made to the Department of

Environmental Management at its Montgomery, Alabama office, unless otherwise directed in published organizational, procedural, or regulatory statements pertaining to specific records or classes of records. Such requests should state the general subject matter of the records sought to be inspected to permit identification and location.

(2) **Exceptions.** Upon a showing satisfactory to the Director by any person that records, reports, or information, or particular parts thereof (other than emission, effluent, manifest, or compliance data) to which the Department has access, if made public, would divulge production of sales figures or methods, processes, or production unique to such person, or otherwise tend to affect adversely the competitive position of such person by revealing trade secrets, the Director shall consider such records, reports, or information, or particular portion thereof, confidential. Any showing of confidentiality must be based on statutory authority which empowers the Department to grant confidentiality for the particular program in question and must accompany the documents, records, reports, or information provided to the Department. If a claim covering the information is received after the information itself is received, efforts, as are administratively practicable can be made, will be made to associate the late claim with the copies of the previously submitted information in the file.

(3) Requests for records and information must be made to the Office of the Director at the Department's Montgomery address. Responses to such requests shall be made within 10 working days after receipt in the Office of the Director.

\* \* \*

(5) **Denial of requests for, or non-existence of, information.** If it is determined pursuant to this Part that requested information will not be provided or that, to the best knowledge of the Director, requested information does not exist, the Director shall notify in writing the party requesting the information that the request is denied and shall state the reasons for denial and shall maintain a file of such denials.

\* \* \*

(Emphasis added).

#### **IV. Question Presented for Ruling**

ADEM Admin. Code r. 335-1-1-.04(1)(c) requires that a Petition for Declaratory Ruling shall include “a statement of the exact question presented to the Department for ruling[.]” In accordance therewith, the Alliance provides the following as the exact question presented for ruling:

Whether the Department may deny a request to inspect and copy “public writings” pursuant to Ala. Code 1975 §§ 36-12-40 and -12-41 or “official records” pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that the “public writings” or “official records” are exempt from disclosure because they are “internal emails” that are “deliberative?”

#### **V. Facts Showing the Petitioner is Substantially Affected**

ADEM Admin. Code r. 335-1-1-.04(1)(d) requires that a Petition for Declaratory Ruling shall include “a statement of the particular facts sufficient to show that the petitioner is substantially affected by the rule, statute or order on which the declaratory ruling is sought, and sufficient to answer the question presented to the Department for ruling[.]” In accordance therewith, the Alliance includes the following statement:

No reported Alabama appellate court decision has addressed the meaning of “substantially affected” in Ala. Code 1975 § 41-22-11(a).<sup>1</sup> “[T]he language ‘any person substantially affected by a rule’ is taken from Fla. Stat. § 120.56(1) (1977).” Commentary, Ala. Code 1975 § 41-22-11. The Florida statute provided then and provides now:

Any person *substantially affected* by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

Section 120.56(1), Fla. Stat. (1977) (emphasis added) (now codified at § 120.56(1)(a), Fla. Stat.). In *Office of Insurance Regulation and Financial Services Commission v. Secure Enterprises, LLC*, 124 So. 3d 332, 336 (Fla. 1st DCA 2013), the Court stated:

To establish standing under the “substantially affected” test, a party must show: (1) that the rule or policy will result in a real or immediate injury in fact; and (2) that the alleged interest is within the zone of interest to be protected or regulated. *Jacoby v.*

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<sup>1</sup> See, e.g., *Alabama Dep’t of Public Safety v. Clark*, 865 So. 2d 1199 (Ala. Civ. App. 2003) (whether petitioner was “substantially affected” not discussed); *Ex parte Ala. Dep’t of Public Health*, 142 So. 3d 650 (Ala. Civ. App. 2013), rev’d sub nom. *Ex parte Torbert*, 224 So. 3d 598 (Ala. 2016) (same); *HealthSouth of Ala., LLC v. Shelby Ridge Acquisition Corp.*, 207 So. 3d 14 (Ala. Civ. App. 2015) (“same), rev’d on other grounds, *Ex parte HealthSouth of Ala., LLC*, 207 So. 3d 39 (Ala. 2016); *Ala. State Personnel Bd. v. Brashears*, 575 So. 2d 1149 (Ala. Civ. App. 1991) (same).

*Fla. Bd. of Med.*, 917 So. 2d 358, 360 (Fla. 1st DCA 2005).<sup>[2]</sup> To satisfy the sufficiently real and immediate injury in fact element, an injury must not be based on pure speculation or conjecture. *Lanoue v. Fla. Dept. of Law Enforcement*, 751 So. 2d 94, 97 (Fla. 1st DCA 1999).<sup>[3]</sup>

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<sup>2</sup> In *Jacoby*, the Court stated:

To demonstrate that one is or will be “substantially affected by a rule or a proposed rule,” one must establish both that application of the rule will result in “a real and sufficiently immediate injury in fact” and that “the alleged interest is arguably within the zone of interest to be protected or regulated.” *See, e.g., Lanoue v. Fla. Dep’t of Law Enforcement*, 751 So. 2d 94, 96 (Fla. 1st DCA 1999); *Ward v. Bd. of Trs. of Internal Improvement Trust Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995); *All Risk Corp. of Fla. v. State Dep’t of Labor & Employment Sec.*, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); *Fla. Dep’t of Offender Rehab. v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978).

917 So. 2d at 360.

<sup>3</sup> In *Lanoue*, the Court stated:

“In order to meet the substantially affected test . . . , the petitioner must establish: (1) a real and sufficiently immediate injury in fact; and (2) ‘that the alleged interest is arguably within the zone of interest to be protected or regulated.’” *Ward v. Board of Trustees of the Internal Improvement Trust Fund*, 651 So. 2d 1236, 1237 (Fla. 4th DCA 1995) (quoting *All Risk Corp. of Fla. v. State, Dep’t of Labor & Employment Sec.*, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982)); *see Cole Vision Corp. v. Department of Bus. & Prof. Reg.*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997) (“A petitioner who establishes a substantial injury in fact that is within the ‘zone of interest to be protected or regulated’ by the promulgating statute or other related statutes meets the standing requirement.”); *Televisual Communications, Inc. v. State, Dep’t of Labor & Employ. Sec.*, 667 So. 2d 372, 374 (Fla. 1st DCA 1995) (“The hearing officer correctly noted that to demonstrate that it is

The Alliance is an Alabama not-for-profit membership corporation created to further the conservation, preservation, protection, maintenance, improvement, and enhancement of human health and the environment on behalf of its members and the public. Members of the Alliance include individuals and other not-for-profit membership corporations. Members of the Alliance, and members of the not-for-profit membership corporations that are themselves members of the Alliance, consume fish and shellfish from waters of the State. Fish and shellfish can become contaminated with toxic pollutants discharged by municipal, industrial, and other facilities into waters of the State through a process of bioconcentration (*i.e.*, the net accumulation of a toxic pollutant by an aquatic organism as a result of uptake directly from the ambient water, through gill membranes or other external body surfaces) and bioaccumulation (*i.e.*, the net accumulation of a toxic pollutant by an aquatic organism as a result of uptake from all environmental

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substantially affected by a proposed rule, a party must establish that, as a consequence of the proposed rule, it will suffer injury in fact and that the injury is within the zone of interest to be regulated or protected.”).

751 So. 2d at 97.

sources).<sup>4</sup> Human consumption of fish and shellfish contaminated with excessive amounts of toxic pollutants can be detrimental to human health.<sup>5</sup>

The Department has adopted maximum allowable criteria for toxic pollutants in waters of the State to protect human health. ADEM Admin. Code r. 335-6-10-.07. These criteria were last updated in 2008. Since that time, the science and biostatistical evidence related to the development of water quality criteria for toxic pollutants necessary to protect human health have advanced considerably, such that the maximum allowable criteria for many toxic pollutants in waters of the State previously adopted by the Department are no longer protective of human health and are no longer scientifically defensible. These insufficient criteria continue to be used as the basis for establishing effluent limits in municipal, industrial, and other wastewater discharge permits issued by the Department when technology-based effluent limits are not sufficiently protective of human health. *See Ala.*

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<sup>4</sup> Office of Science and Technology, U.S. Env'tl. Prot. Agency, EPA-822-B-00-004, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health* 5-6 (Oct. 2000), available at <https://www.epa.gov/sites/default/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf>.

<sup>5</sup> *See, e.g.,* Alabama Dep't of Public Health, *Alabama Fish Consumption Advisories 2022* (June 2022), available at <https://www.alabamapublichealth.gov/tox/assets/al-fish-advisory-2022.pdf> (“When chemical concentrations are elevated in fish, they can pose health risks to people who eat them”).

*Dep't of Env'tl. Mgmt. v. Ala. Rivers All., Inc.*, 14 So.3d 853, 859 (Ala. Civ. App. 2007) (criteria are used to establish water quality-based limits when technology-based limits are not sufficient to meet water quality standards); ADEM Admin. Code r. 335-6-6-.14(3)(f)1.

The Alliance maintains a toxics reduction program which it describes as follows:

Pollution of the air, water, and land by toxic chemicals that can endanger the health of humans or other creatures is a major concern of the Environmental Defense Alliance. Where measured or allowable toxic pollutant concentrations exceed levels necessary to protect human health or other creatures, the Alliance will seek to identify the sources and take action to reduce the measured or allowable toxic pollutants. These actions might include enforcement actions if a source is out of compliance or petitions for rulemaking to reduce the allowable discharge or emission of toxic pollutants.

Environmental Defense Alliance Toxics Reduction Program,

[https://www.environmentaldefensealliance.org/Toxics\\_Reduction.html](https://www.environmentaldefensealliance.org/Toxics_Reduction.html).

Pursuant to its toxics reduction program, on October 17, 2016, the Alliance submitted a “Petition to Amend Ala. Admin. Code R. 335-6-10-.07” to the Environmental Management Commission of the Department seeking the adoption of new and revised water quality criteria for toxic pollutants to protect human health and aquatic life<sup>6</sup> based largely on new science and

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<sup>6</sup> *Petition, In re Petition to Amend Ala. Admin. Code r. 335-6-10-.07* (Ala. Env'tl. Mgmt. Comm'n filed Oct. 18, 2016), reproduced at

biostatistical evidence developed by the U.S. Environmental Protection Agency.<sup>7</sup> After receiving a recommendation to deny the Petition from the Director of the Department,<sup>8</sup> on December 16, 2016, the Environmental Management Commission of the Department denied the Petition to Amend Ala. Admin. Code R. 335-6-10-.07 on the ground that “the issues raised in the Petition will be considered in the context of ADEM’s [2015 - 2017] triennial review of the State’s water quality standards.”<sup>9</sup> Since then, the Department completed the 2015 - 2017 and 2018 - 2020 triennial reviews of water quality standards without proposing any new or revised criteria for toxic pollutants in waters of the State to protect human health and rejected public comments

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<https://adobe.ly/3Sy5Xml>.

<sup>7</sup> See, e.g., Office of Water, U.S. Env’tl. Prot. Agency, EPA 820-F-15-001, *Human Health Ambient Water Quality Criteria: 2015 Update* (June 2015), available at <https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf>; 80 Fed Reg. 36986 (June 29, 2015).

<sup>8</sup> *Memorandum from Lance R. LeFleur, Director, Alabama Department of Environmental Management, to H. Lanier Brown, II, Chairman, Alabama Environmental Management Commission Rulemaking Committee* (Nov. 30, 2016), reproduced at <https://adobe.ly/3Sy5Xml>.

<sup>9</sup> *Order, In re Petition for Rulemaking to Amend ADEM Administrative Code Rule 335-6-10-.07 Water Quality Criteria for Toxic Pollutants, EMC Rulemaking Petition 17-02* (Ala. Env’tl. Mgmt. Comm’n Oct. 17, 2016), reproduced at <https://adobe.ly/3LZoWEF>.

seeking the adoption of new or revised criteria.<sup>10</sup> The Department has initiated the 2021 - 2023 triennial review of water quality standards but has already rejected public comments urging the adoption of new or revised criteria for toxic pollutants in waters of the State to protect human health.<sup>11</sup>

On January 20, 2022, the Alliance, Waterkeepers Alabama, and Alabama Rivers Alliance filed a request with the Administrator of the U.S. Environmental Protection Agency that he make a determination that new and revised water quality criteria for toxic pollutants are necessary to meet the requirements of Clean Water Act § 303, 33 U.S.C. § 1313, in Alabama waters.<sup>12</sup> If such a determination is made, the Agency is required to promptly

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<sup>10</sup> *Letter from Chris L. Johnson, Chief, Water Quality Branch, Water Division, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance* (May 23, 2016), reproduced at <https://adobe.ly/3BFiJIU>; *Letter from Chris L. Johnson, Chief, Water Quality Branch, Water Division, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance* (Sept. 9, 2019), reproduced at <https://adobe.ly/3UIx4Nu>.

<sup>11</sup> *Letter from Jennifer M. Haslbauer, Chief Standards and Planning Section, Water Quality Branch, Water Division, Alabama Department of Environmental Management to Whom it May Concern* (Aug. 17, 2022), reproduced at <https://adobe.ly/3favdAK>.

<sup>12</sup> *Letter from David A. Ludder, Attorney for Environmental Defense Alliance, Justin Overton, Chair of Waterkeepers Alabama, and Cindy Lowry, Executive Director of Alabama Rivers Alliance, to Hon. Michael S. Regan, Administrator, U.S. Environmental Protection Agency* (Jan. 20, 2022) (tables omitted), reproduced at <https://adobe.ly/3xQFI2I>.

prepare and publish proposed regulations to establish new and revised criteria for toxic pollutants in Alabama waters. Clean Water Act § 303(c)(4), 33 U.S.C. § 1313(c)(4). The request remains under consideration by the Agency.

On September 14, 2022, the Alliance submitted a request to inspect and copy the following writings and records in the possession, control or custody of any officials of the Department created subsequent to September 15, 2019:

(a) draft and final preliminary analyses or discussions of, or preliminary opinions or recommendations for, possible actions to be taken by the Department concerning the development, proposal or adoption of new or revised water quality criteria for toxic pollutants which have or have not been shared between Department officials or between Department officials and any entity or person outside of the Department;

(b) draft versions of administrative rules intended to establish new or revised water quality criteria for toxic pollutants;

(c) draft and final memoranda and correspondence, records of telephone conversations and meetings, and electronic mail messages between Department officials, or between Department officials and any other entity or person outside of the Department, concerning the development, proposal or adoption of new or revised water quality criteria for toxic pollutants.<sup>[13]</sup>

These requested writings and records are likely to provide the Alliance with additional information concerning the Department's rationale for its failure to

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<sup>13</sup> *Letter from David A. Ludder, Attorney for Environmental Defense Alliance, to Hon. Lance R. LeFleur, Director, Alabama Department of Environmental Management, and Azure Jones, Public Records Officer, Alabama Department of Environmental Management regarding "Request to inspect and copy ADEM writings and records" (Sept. 14, 2022) (Exhibit A).*

adopt new or revised water quality criteria for toxic pollutants in Alabama waters that may assist the Alliance in its efforts to secure the adoption of new or revised water quality criteria for toxic pollutants in Alabama waters through rulemaking by Environmental Management Commission of the Department or by U.S. Environmental Protection Agency.

On November 21, 2022, the Department responded to the Alliance's September 14, 2022 request to inspect and copy writings and records by providing thirteen final writings or records of communications between Department officials, U.S. Environmental Protection Agency officials, and private individuals and entities, and a reference to other final writings and records contained in the Department's e-File system which the Department regards as public writings or records.<sup>14</sup> The Department expressly withheld from disclosure an unspecified number of "internal emails" that it considers to be "deliberative" without further description, characterization, or explanation.<sup>15</sup>

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<sup>14</sup> *Emails from Chris Sasser, Associate General Counsel, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance* (Nov. 21, 2022) (Exhibits B - D. See List of Records Disclosed by ADEM on 11/21/2022 in Response to EDA Request of 9/14/2022 (Exhibit E).

<sup>15</sup> *Email from Chris Sasser, Associate General Counsel, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance* (Nov. 21, 2022) (Exhibit B).

The Department determined that an unspecified number of “internal emails” that it considers to be “deliberative” are exempt from disclosure under Ala. Code 1975 § 36-12-40 and -12-41 and ADEM Admin. Code r. 335-1-1-.06. The Department continues to withhold from disclosure to the Alliance an unspecified number of “internal emails” that it considers to be “deliberative.” Accordingly, the Department’s application of Ala. Code 1975 §§ 36-12-40 and -12-41 and ADEM Admin. Code r. 335-1-1-.06 will result in a real or immediate injury in fact to the Alliance, to wit: the deprivation of access to public writings and official records and continued threats to the health of Alliance members from exposure to toxic pollutants through their consumption of contaminated fish and shellfish from Alabama waters. These injuries are not speculative or conjectural. These injuries are to interests that are within the zone of interest to be protected or regulated under Ala. Code 1975 §§ 36-12-40 and -12-41 and ADEM Admin. Code r. 335-1-1-.06.

## **VI. Relevant Rules, Statutes, Orders or Statements**

ADEM Admin. Code r. 335-1-1-.04(1)(e) requires that a Petition for Declaratory Ruling shall include “a statement identifying all other rules, statutes, orders or statements from officials of the Department, whether formal or informal, which are relevant to the question presented by the petitioner[.]” In accordance therewith, the Alliance submits the following

identification of other rules, statutes, and statements from officials of the Department that are relevant to the question presented:

Ala. R. Evid. 501

Ala. R. Evid. 508

ADEM Admin. Code r. 335-6-10-.07

ADEM Admin. Code r. 335-6-6-.14(3)(f)1.

*Memorandum from Lance R. LeFleur, Director, Alabama Department of Environmental Management, to H. Lanier Brown, II, Chairman, Alabama Environmental Management Commission Rulemaking Committee (Nov. 30, 2016), reproduced at <https://adobe.ly/3Sy5Xml>*

*Order, In re Petition for Rulemaking to Amend ADEM Administrative Code Rule 335-6-10-.07 Water Quality Criteria for Toxic Pollutants, EMC Rulemaking Petition 17-02 (Ala. Env'tl. Mgmt. Comm'n Oct. 17, 2016), reproduced at <https://adobe.ly/3LZoWEF>*

*Letter from Jennifer M. Haslbauer, Chief Standards and Planning Section, Water Quality Branch, Water Division, Alabama Department of Environmental Management to Whom it May Concern (Aug. 17, 2022), reproduced at <https://adobe.ly/3favdAK>*

*Letter from Jennifer M. Haslbauer, Chief Standards and Planning Section, Water Quality Branch, Water Division, Alabama Department of Environmental Management to Whom it May Concern (Aug. 17, 2022), reproduced at <https://adobe.ly/3favdAK>*

*Letter from Chris L. Johnson, Chief, Water Quality Branch, Water Division, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance (May 23, 2016), reproduced at <https://adobe.ly/3BFiJIU>; Letter from Chris L. Johnson, Chief, Water Quality Branch, Water Division, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance (Sept. 9, 2019), reproduced at <https://adobe.ly/3UIx4Nu>*

*Letter from Jennifer M. Haslbauer, Chief Standards and Planning Section, Water Quality Branch, Water Division, Alabama Department of Environmental Management to Whom it May Concern (Aug. 17, 2022), reproduced at <https://adobe.ly/3favdAK>*

*Email from Shawn S. Sibley, Office of General Counsel, Alabama Department of Environmental Management, to David A. Ludder, Attorney (June 22, 2016) (denying access to correspondence with the U.S. Environmental Protection Agency as “non-final, deliberative and privileged intra-agency communications in ongoing enforcement investigations and negotiations for which there is a reasonable expectation of ensuing administrative appeals and litigation”)*

*Email from Shawn S. Sibley, Office of General Counsel, Alabama Department of Environmental Management, to David A. Ludder, Attorney (July 11, 2016) (denying access to letters exchanged with the U.S. Environmental Protection Agency as “non-final,” “deliberative,” “privileged”)*

*Email from Chris Sasser, Associate General Counsel, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance (Nov. 21, 2022) (Exhibit B)*

Defendant’s Response to Plaintiff Environmental Defense Alliance’s First Requests for Production, *Environmental Defense Alliance v. LeFleur*, Civil Action No. 03-CV-2020-900663.00 (July 22, 2020) (objecting to disclosure of document prepared by employee of Department for Director of Department as invading “the deliberative process and executive privilege”)

## **VII. Reasons for Petition**

ADEM Admin. Code r. 335-1-1-.04(1)(f) requires that a Petition for Declaratory Statement shall include “a statement of the reasons for submitting the petition, including a full disclosure of the petitioner’s interest in obtaining the declaratory ruling[.]” In accordance therewith, the Alliance submits the following statement:

Members of the Alliance consume fish and shellfish from Alabama waters that are insufficiently protected from contamination by toxic pollutants allowed to be present in Alabama waters by current toxic pollutant criteria in ADEM Admin. Code r. 335-6-6-10-.07. The Alliance seeks the adoption of new or revised criteria for toxic pollutants in Alabama waters to protect human health and make the human consumption of fish and shellfish safe. The Alliance seeks to inspect and copy internal writings and records of the Department (including emails) that are responsive to its September 14, 2022 request. Access to these writings and records will assist the Alliance in its efforts to secure the adoption of new or revised water quality criteria for toxic pollutants.

### **VIII. Pending Questions**

ADEM Admin. Code r. 335-1-1-.04(1)(g) requires that a Petition for Declaratory Ruling shall include “a statement as to whether the question presented by the petitioner is presently pending before or under consideration by the Department or any other adjudicative body[.]” In accordance therewith, the Alliance submits the following statement:

The Alliance is unaware that the question presented for ruling in this Petition is presently pending before, or under consideration by, the Department or any other adjudicative body.

## IX. Preliminary Inquiry

ADEM Admin. Code r. 335-1-1-.04(1)(h) requires that a Petition for Declaratory Ruling shall include “a statement certifying that the preliminary written inquiry of previously issued declaratory rulings has been made of the Department as required by rule 335-1-4-.03 and providing the details of any reply to his preliminary inquiry including a copy of any written response received[.]” In accordance therewith, the Alliance submits the following statement:

The Environmental Defense Alliance hereby certifies that the preliminary written inquiry of previously issued declaratory rulings required by ADEM Admin. Code r. 335-1-4-.03 was submitted to the Department on November 22, 2022.<sup>16</sup> The Department replied to this inquiry in a written response dated December 14, 2022 in which it states that there are no previously issued declaratory rulings on the quested presented in the Alliance’s November 22, 2022 preliminary inquiry. Exhibit G.

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<sup>16</sup> *Letter from David A. Ludder, Law Office of David A. Ludder, PLLC, to Hon. Lance R. LeFleur, Director, Alabama Department of Environmental Management (Nov. 22, 2022) regarding “Request for determination whether a previously issued declaratory ruling addresses the questions below” (Exhibit F).*

**X. Subscription and Verification**

ADEM Admin. Code r. 335-1-1-.04(1)(i) requires that a Petition for Declaratory Ruling shall include a “subscription and verification of the petition before a notary.” Accordingly, the Alliance provides below a subscription and verification of this Petition before a notary.

**Subscription and Verification**

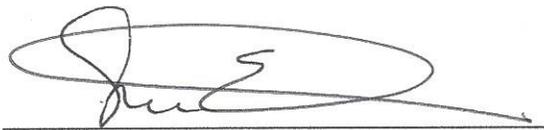
Before me, the undersigned authority, personally appeared Michael W. Mullen, who is known to me or presented an identification card to me, and who being duly sworn, deposes and says that he has read the foregoing Petition for Declaratory Ruling and that the facts stated therein are true and correct.

  
Michael W. Mullen, President  
Environmental Defense Alliance

State of Alabama  
County of Pike

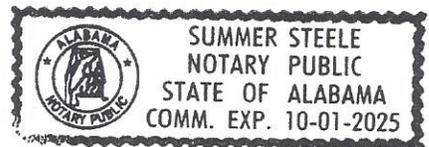
Sworn to and subscribed before me on the 3<sup>rd</sup> day of January, 2023, by

Michael W. Mullen.



Notary Public

(Seal)



Respectfully submitted,



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David A. Ludder  
Attorney for Petitioner  
Environmental Defense Alliance

Address & Phone:  
Law Office of David A. Ludder, PLLC  
9150 McDougal Ct.  
Tallahassee, FL 32312-4208  
(850) 386-5671

### Certificate of Service

I hereby certify that I have this date placed the original of the above and foregoing Petition for Declaratory Ruling in the United States

Mail as certified mail, return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered to:

Director  
Alabama Department of Environmental Management  
1400 Coliseum Boulevard  
Montgomery, Alabama 36110

Done this 6th day of January, 2023.



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David A. Ludder