



AlaFile E-Notice

03-CV-2023-900512.00

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

ENVIRONMENTAL DEFENSE ALLIANCE V. ALABAMA DEPT OF ENVIRONMENTAL MGMT E
03-CV-2023-900512.00

The following complaint was FILED on 4/21/2023 8:35:54 AM

Notice Date: 4/21/2023 8:35:54 AM

GINA J. ISHMAN
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL, 36104

334-832-1260

State of Alabama

Unified Judicial System

Form ARCiv-93 Rev. 9/18

Cover Sheet

Circuit Court - Civil Case

(Not For Domestic Relations Cases)

Case No:

03

Date of Filing:

04/21/2023

Judge Code:

Circuit Court Of Montgomery County, Alabama
Gina J. Ishman, Clerk

GENERAL INFORMATION

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMAENVIRONMENTAL DEFENSE ALLIANCE v. ALABAMA DEPT OF ENVIRONMENTAL MGMT ET AL

First Plaintiff:

☒ Business☐ Individual☐ Government☐ Other

First Defendant:

☐ Business☐ Individual☒ Government☐ Other

NATURE OF SUIT: Select primary cause of action, by checking box (check only one) that best characterizes your action:

TORTS: PERSONAL INJURY

☐ WDEA - Wrongful Death☐ TONG - Negligence: General☐ TOMV - Negligence: Motor Vehicle☐ TOWA - Wantonness☐ TOPL - Product Liability/AEMLD☐ TOMM - Malpractice-Medical☐ TOLM - Malpractice-Legal☐ TOOM - Malpractice-Other☐ TBFM - Fraud/Bad Faith/Misrepresentation☐ TOXX - Other:

OTHER CIVIL FILINGS (cont'd)

☐ MSXX - Birth/Death Certificate Modification/Bond Forfeiture Appeal/Enforcement of Agency Subpoena/Petition to Preserve☐ CVRT - Civil Rights☐ COND - Condemnation/Eminent Domain/Right-of-Way☐ CTMP - Contempt of Court☐ CONT - Contract/Ejectment/Writ of Seizure☐ TOCN - Conversion☐ EQND - Equity Non-Damages Actions/Declaratory Judgment/Injunction Election Contest/Quiet Title/Sale For Division☐ CVUD - Eviction Appeal/Unlawful Detainer☐ FORJ - Foreign Judgment☐ FORF - Fruits of Crime Forfeiture☐ MSHC - Habeas Corpus/Extraordinary Writ/Mandamus/Prohibition☐ PFAB - Protection From Abuse☐ EPFA - Elder Protection From Abuse☐ QTLB - Quiet Title Land Bank☐ FELA - Railroad/Seaman (FELA)☐ RPRO - Real Property☐ WTEG - Will/Trust/Estate/Guardianship/Conservatorship☐ COMP - Workers' Compensation☐ CVXX - Miscellaneous Circuit Civil Case

ORIGIN:

F☒ INITIAL FILING

R☐ REMANDED

A☐ APPEAL FROM DISTRICT COURT

T☐ TRANSFERRED FROM OTHER CIRCUIT COURT

O☐ OTHER

HAS JURY TRIAL BEEN DEMANDED?

☐ YES☒ NO

Note: Checking "Yes" does not constitute a demand for a jury trial. (See Rules 38 and 39, Ala.R.Civ.P., for procedure)

RELIEF REQUESTED:

☐ MONETARY AWARD REQUESTED☒ NO MONETARY AWARD REQUESTED

ATTORNEY CODE:

LUD001

4/21/2023 8:35:50 AMDate

/s/ DAVID ALAN LUDDERSignature of Attorney/Party filing this form

MEDIATION REQUESTED:

☐ YES☒ NO☐ UNDECIDED

Election to Proceed under the Alabama Rules for Expedited Civil Actions:

☐ YES☐ NO



ELECTRONICALLY FILED
4/21/2023 8:35 AM
03-CV-2023-900512.00
CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

**IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA**

**ENVIRONMENTAL DEFENSE
ALLIANCE,**

Petitioner,

vs.

**ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGE-
MENT and LANCE R. LEFLEUR,
Director of the Alabama Depart-
ment of Environmental Manage-
ment,**

Respondents.

_____ /

**PETITION FOR REVIEW
OF AGENCY DECLARATORY RULING**

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I. Nature of Agency Actions

The agency actions which are the subject of this petition for review are the issuance of a declaratory ruling pursuant to Ala. Code 1975 § 41-22-11(a) and the failure of the agency to issue a declaratory ruling within 45 days after the filing of a request therefor.

II. Particular Agency Actions

One particular agency action appealed from is the February 23, 2023 Declaratory Ruling issued by Lance R. LeFleur, Director of the Alabama Department of Environmental Management (hereinafter, “Department”), which determined that “internal emails” that are “deliberative” are excepted from disclosure under Ala. Code 1975 § 36-12-40. See Declaratory Ruling at Appendix A. Another particular agency action appealed from is the failure of the Department to issue a declaratory ruling on the merits of the question whether the Department may deny a request to inspect and copy “official records” pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that “internal emails” that are “deliberative” are exempt from disclosure. Such failure constitutes a denial of the request as well as a denial of the merits of the request. See Ala. Code 1975 § 41-22-11(b).

III. Subject Matter Jurisdiction and Venue

Ala. Code 1975 § 41-22-11(b) provides that the circuit courts have subject matter jurisdiction to review agency declaratory rulings and agency failures to issue declaratory rulings and establishes appropriate venue in the Circuit Court of Montgomery County. Such reviews are to be provided “in the manner provided in Section 41-22-20 for the review of decisions in contested cases.”

Ala. Code 1975 § 41-22-20(b) provides that “[a]ll proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review” Ala. Code 1975 § 41-22-20(d) provides that a “notice of appeal or review shall be filed within 30 days after the receipt of the notice of or other service of the final decision of the agency upon the petitioner” Ala. Code 1975 § 41-22-20(d) further provides that “[a]ny notice required herein which is mailed by the petitioner, certified mail return receipt requested, shall be deemed to have been filed as of the date it is postmarked.” In turn, Ala. Code 1975 § 41-22-20(d) provides that “[t]he petition for judicial review in the circuit court shall be filed within 30 days after the filing of the notice of appeal or review.” See Brunson v. Alabama State Bd. of Med. Exam’rs, 69 So. 3d 913, 914-15 (Ala. Civ. App. 2011) (describing statutory procedures for obtaining judicial review of agency decisions under Ala. Code 1975 § 41-22-20).

On February 23, 2023, the Director of the Department issued a Declaratory Ruling to the Environmental Defense Alliance (hereinafter, “Alliance”) addressing the question whether the Department may deny a request to inspect and copy “public writings” pursuant to Ala. Code 1975 §§ 36-12-40 and -12-41 on the basis that the “public writings” are exempt from disclosure because they are “internal emails” that are “deliberative.” The Declaratory Ruling did not address the question whether the Department may deny a request to inspect and copy “official records” pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that “internal emails” that are “deliberative” are exempt from disclosure under r. 335-1-1-.06. See Declaratory Ruling at Appendix A.

On March 23, 2023, the Alliance mailed by certified mail return receipt requested a Notice of Appeal and Cost Bond to Lance R. LeFleur, Director of the Department. See Notice of Appeal and Cost Bond at Appendix B.

On April 21, 2023, the Alliance filed this Petition for Review in the Circuit Court for Montgomery County.

Accordingly, the Alliance timely and correctly filed a Notice of Appeal and Cost Bond with the Department and timely and correctly filed this Petition for Review in the Circuit Court of Montgomery County in accordance with requirements of Ala. Code 1975 § 41-22-20.

IV. Factual Background¹

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 sources).² Human

¹ These facts are taken largely from the Petition for Declaratory Ruling filed with the Department by the Alliance on January 6, 2023 in compliance with ADEM Admin. Code r. 335-1-1-.04(2). See Petition for Declaratory Ruling at Appendix C. The Department has not disputed any of these facts.

² 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), at <https://www.epa.gov/sites/> (continued...)

consumption of fish and shellfish contaminated with excessive amounts of toxic pollutants can be detrimental to human health.³ 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. 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

²(...continued)
 default/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf.

³ See, e.g., Alabama Dep't of Public Health, Alabama Fish Consumption Advisories 2022 (June 2022), 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”).

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, at 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 life⁴ based largely on new science and biostatistical

⁴ Petition, In re Petition to Amend Ala. Admin. Code r. 335-6-10-.07 (Ala. Env'tl. Mgmt. Comm'n filed Oct. 18, 2016), at <https://adobe.ly/3Sy5Xml>.

evidence developed by the U.S. Environmental Protection Agency.⁵ After receiving a recommendation to deny the Petition from the Director of the Department,⁶ 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.”⁷ 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 seeking the adoption of new or revised criteria.⁸ The Department has initiated the 2021 - 2023 triennial

⁵ 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), at <https://www.epa.gov/sites/default/files/2015-10/documents/human-health-2015-update-factsheet.pdf>; 80 Fed Reg. 36986 (June 29, 2015).

⁶ 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), at <https://adobe.ly/3Sy5Xml>.

⁷ 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), at <https://adobe.ly/3LZoWEF>.

⁸ Letter from Chris L. Johnson, Chief, Water Quality Branch, Water
(continued...)

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.⁹

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.¹⁰ If such a determination is made, the Agency is required to promptly prepare and publish proposed federal regulations to establish new and revised criteria

⁸(...continued)

Division, Alabama Department of Environmental Management, to David A. Ludder, Attorney for Environmental Defense Alliance (May 23, 2016), 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), *at* <https://adobe.ly/3UIx4Nu>.

⁹ 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), at <https://adobe.ly/3favdAK>

¹⁰ 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), *at* <https://adobe.ly/3xQFI2I>.

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.^[11]

See Request for Writings and Records at Appendix D. These requested writings and records are likely to provide the Alliance with additional information concerning the Department's rationale for its failure to adopt new or revised

¹¹ 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 (Sept. 14, 2022).

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's attorney, Paul Christian Sasser, responded to the Alliance's September 14, 2022 request to inspect and copy writings and records by providing a number of 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. The Department expressly withheld from disclosure an unspecified number of "internal emails that we are withholding as deliberative." See Response to Request for Writings and Records at Appendix E. With respect to the documents withheld from disclosure, Sasser did not identify the sender or recipients of the e-mails, the dates of the e-mails, the subject matter of the e-mails, or an explanation as to why the e-mails are considered to be "deliberative." Moreover, Sasser did not explain why the e-mails are considered to be excepted from disclosure under Ala. Code 1975 § 36-12-40 or ADEM Admin. Code r. 335-1-1-.06.

On January 6, 2023, the Alliance submitted a Petition for Declaratory Ruling under Ala. Code 1975 § 41-22-11(a) and ADEM Admin. Code chap. 335-1-4¹² propounding the following question for ruling by the Department:

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?”

Petition for Declaratory Ruling at Appendix C.

On February 23, 2023, Lance R. LeFleur, Director of the Department, issued the following declaratory ruling:

Yes. The right to copy public writings is not without exception. *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678, 681 (Ala. 1981). In *Stone*, the court applied the “rule of reason” to § 36-12-40 and held that “[r]ecorded information received by a public officer in confidence, . . . and records the disclosure of which would be

¹² ADEM Admin. Code r. 335-1-4-.02 defines a “declaratory ruling” as “a written decision identified as a declaratory ruling and issued by the Department with respect to the validity of a rule, the applicability of any rule or statute enforceable by the Department to any person, property, or existing state of facts or facts certain to arise, or the meaning and scope of any order issued by the Department.” (Underscoring added). ADEM Admin. Code r. 335-1-4-.03 provides that “[a]ny 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 in accordance with rule 335-1-4-.04.” (Underscoring added). See also ADEM Admin. Code r. 335-1-4-.04 (requiring the petitioner to identify the rule, statute, or order in question and to present facts sufficient to show that the petitioner is substantially affected by the rule, statute or order).

detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure.” *Id.* Later, the legislature amended this statute to exclude “records the disclosure of which would otherwise be detrimental to the best interests of the public.” Act 2004-487, Ala. Code §§ 36-12-40.

In another context, the U.S. Supreme Court has noted the “policy of protecting the decision-making processes of government agencies.” *NLRB. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (U.S. 1975) (cleaned up.) The *Sears* court explained that the point of this policy is this: “the frank discussion of legal or policy matters in writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result.” *Id.* (citing S. Rept. No. 813, 89th Congress, 1st Sess., p. 9.) The Court further noted that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process. 421 U.S. at 151 (cleaned up.) The same concerns are present here, so the “rule of reason” should apply. Well-reasoned decisions depend on robust debate and frank discussions and deliberations. Making public those discussions would chill those discussions and diminish the quality of agency decisions and policies, to the detriment of the public.

Declaratory Ruling at Appendix A. The Declaratory Ruling does not specifically address the question whether the Department may deny a request to inspect and copy “official records” pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that the “official records” are exempt from disclosure because they are “internal emails” that are “deliberative.”

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

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 ADEM Admin. Code r. 335-1-1-.06.

V. Administrative Standing

Ala. Code 1975 § 41-22-11(a) provides that a petition for an administrative declaratory ruling shall state with particularity facts sufficient to show the person seeking relief is “substantially affected” by Department rule or application of a rule or statute to a state of facts.

No reported Alabama appellate court decision has addressed the meaning of “substantially affected” in Ala. Code 1975 § 41-22-11(a).¹³ “[T]he language

¹³ 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), 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).

‘any person substantially affected’ is taken from Fla. Stat. § 120.56(1) (1977).”

Ala. Code 1975 § 41-22-11 Commentary. 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 Florida Home Builders Association v. Department of Labor and Employment Security, 412 So. 2d 351, 353 n. 5 (Fla. 1982), the Court said that it believed the standing requirement of § 120.56(1), Fla. Stat. (1979) (“substantially affected”) is similar to the standing requirement of 5 U.S.C. § 702 (“adversely affected or aggrieved”). In a later case, the Court described its holding in Florida Home Builders as requiring a showing that a proposed rule change would have a substantial effect on the rule challenger. NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294, 300 (Fla. 2003). In the present case, the Alliance is substantially affected by the Department’s application of Ala. Code 1975 § 36-12-40 and ADEM Admin. Code r. 335-1-1-.06 to the Alliance’s September 14, 2022 request for writings and records and the Department’s refusal to disclose internal emails allegedly containing deliberative information.

The Department did not contest the Alliance’s standing to seek and obtain an administrative declaratory ruling under Ala. Code 1975 § 41-22-11(a).

VI. Judicial Standing

In Alabama Department of Environmental Management v. Friends of Hurricane Creek, 114 So. 3d 47, 52 (Ala. Civ. App. 2012), the Court made clear that the judicial standing requirements imposed by interpretations of the Alabama Constitution are a separate matter for consideration from the administrative standing requirements imposed by statute. For a person to demonstrate standing to seek relief in the courts of Alabama, that person must show (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.” Ex parte Merrill, 264 So. 3d 855, 862-63 (Ala. 2018); Gulf Shores City Bd. of Educ. v. Mackey, No. 1210353, 2022 Ala. LEXIS 123, at *31, 2022 WL 17843037, at * __ (Ala. Dec. 22, 2022).

Injury in fact

Here, the Alliance has been denied access to internal (intra-agency) emails containing deliberative information. That denial was affirmed by the Department’s February 23, 2023 Declaratory Ruling declaring that internal emails containing deliberative information are not subject to public disclosure.

The deprivation of access to internal emails containing deliberative information is an actual, concrete and particularized injury in fact sustained by the Alliance – an invasion of an interest arguably protected by Ala. Code 1975 § 36-12-40 and ADEM Admin. Code r. 335-1-1-.06.¹⁴

Causation

The conduct complained of in this case is the Department’s denial of access to internal emails containing deliberative information and the issuance of the February 23, 2023 Declaratory Ruling affirming the Department’s authority to deny such access. That conduct is causally connected to the Alliance’s injury – the deprivation of access to internal emails containing deliberative information.

Redressability

The Alliance requests herein that the Court grant the following relief:

In accordance with Ala. Code 1975 §§ 41-22-11(b) and 41-22-20(k), the Alliance seeks a judgment (1) finding that the Declaratory Ruling issued by the Director declaring that internal

¹⁴ The focus of an inquiry into standing is on whether the plaintiff is the proper party to bring the action, not on the viability of plaintiff’s legal theory. Wyeth, Inc. v. Blue Cross & Blue Shield of Ala., 42 So. 3d 1216, 1219-20 (Ala. 2010); K.S. v. V.G. (In re V.G.), Nos. CL-2022-0993 & CL-2022-0994, 2023 Ala. Civ. App. LEXIS 1, at *4-6, 2023 WL 118363, at *__ (Ala. Civ. App. Jan. 26, 2023). When evaluating standing, the court must assume that plaintiff has stated a viable claim. Ex parte Boys & Girls Clubs of S. Ala., Inc., 163 So. 3d 1007, 1012-13 (Ala. 2014).

emails that are deliberative are categorically excepted from public disclosure under Ala. Code 1975 § 36-12-40 prejudices the substantial rights of the Petitioner because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as discussed herein; (2) finding that the failure of the Department to issue a declaratory ruling on the question of whether internal emails that are deliberative are excepted from public disclosure under ADEM Admin. Code r. 335-1-1-.06 is a denial of the merits of the Petitioner's Petition for Declaratory Ruling which prejudices the substantial rights of the Petitioner because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as discussed herein; (3) setting aside the Declaratory Ruling issued by the Director because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as discussed herein or altering the Declaratory Ruling issued by the Director to declare that internal emails that are deliberative are not categorically excepted from the disclosure requirements of Ala. Code 1975 § 36-12-40 and are not excepted from the disclosure requirements of ADEM Admin. Code r. 335-1-1-.06; (4) ordering the Director to disclose to Petitioner the internal emails that are alleged to be deliberative and that were previously withheld from disclosure; and (5) granting Petitioner such other relief to which it may be entitled.

If the Alliance prevails on the merits of its claim that Ala. Code 1975 § 36-12-40 and ADEM Admin. Code r. 335-1-1-.06 do not authorize the Department to withhold internal emails containing deliberative information, the above-requested relief will likely result in the disclosure of such emails to the Alliance.

VII. Standard of Review

The standard of review of an administrative declaratory ruling issued pursuant to Ala. Code 1975 § 41-22-11(b) is that specified in Ala. Code 1975 § 41-22-20(k):

Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency or if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

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

E.g., State Personnel Bd. v. Wallace, 659 So. 2d 683, 686 (Ala. Civ. App. 1995); Torbert v. Ala. Dep’t of Pub. Health, 224 So. 3d 598, 599 (Ala. 2016).

VIII. Grounds for Relief

A. **The Director is not authorized to withhold from disclosure internal emails that are “deliberative” under an executive privilege founded upon the Alabama Constitution.**

In United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090 (1974), the Court recognized the existence of a “presidential communications privilege” that affords protection to “communications between high Government officials and those who advise and assist them in the performance of their manifold duties; . . .” Id. at 705, 94 S. Ct. at 3106. This “presidential communications privilege” extends to communications that have been authored, or solicited and received by the President or his immediate advisors in the Office of the President because the President exercises powers granted by Article II of the U.S. Constitution which cannot be impaired by courts established under Article III of the U.S. Constitution. Judicial Watch, Inc. v. Dep’t of Justice, 365 F.3d 1108, 1123 (D.C. Cir. 2004). Thus, the privilege is “rooted in the separation of powers under the Constitution.” United States v. Nixon, 418 U.S. at 708, 94 S. Ct. at

3107-08. The privilege does not extend to communications between officials in executive branch agencies. Judicial Watch, Inc., 365 F.3d at 1123.¹⁵

“While the Alabama constitution contains no express provision granting an executive privilege, it would be within the power of the courts to imply such a privilege from the separation of powers principle.” Ala. R. Evid. 508(b), advisory committee’s notes (citing United States v. Nixon). Thus, it might be argued that the Alabama Constitution implies a privilege that extends to communications between the Governor¹⁶ and her immediate advisors based on the separation of powers doctrine codified in Article III, § 42(c), Alabama Constitution 2022. “To be subject to the privilege, however, the document in question must have been authored, or solicited and received, by either the Governor or an immediate adviser with broad and significant responsibility for

¹⁵ Congress granted federal Executive Branch agencies the authority to withhold from public disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested[.]” 5 U.S.C. § 552(b)(5). Federal Rules of Evidence 501 recognizes common law privileges as interpreted by the United States Courts. Numerous federal courts have recognized the “deliberative process privilege” as a common law privilege.

¹⁶ This privilege might arguably extend to other constitutional officers identified in Article V, § 112, Alabama Constitution 2022, however, because the Director is not a constitutional officer, it is not necessary to resolve that issue in this action.

assisting the Governor with his or her decisionmaking.” Republican Party v. N.M. Taxation & Revenue Dep’t, 283 P.3d 853, 869 (N.M. 2012) (internal quotation marks and citations omitted). “[T]he privilege, rooted as it is in separation of powers, is not available to the entire executive branch . . . , but instead reserved to the constitutionally-designated head of the executive branch – the Governor.” Id.¹⁷ Moreover, the privilege may only be invoked by the Governor. Id. Accord, State ex rel. Dann v. Taft, 853 N.E.2d 263, 269-70 (Ohio 2006).

Thus, internal emails of executive branch agencies that are deliberative are not protected from disclosure by any executive privilege founded upon the Alabama Constitution.

B. The Director is not authorized to withhold from disclosure internal emails that are “deliberative” under any common law privilege.

Courts generally have looked to the common law rather than the Constitution to determine the scope of an agency official’s evidentiary privilege. See Nixon v. Fitzgerald, 457 U.S. 731, 753, 102 S. Ct. 2690, 2703 (1982) (citing United States v. Nixon, 418 U.S. at 708, 94 S. Ct. at 3107-08). In In re Sealed Case, 121 F.3d 729 (D.C. Cir. 1997), the Court explained the different origins of

¹⁷ The Governor of the State of Alabama is designated as “[t]he supreme executive power of this state” Art. V, § 113, Ala. Const. 2022.

the “presidential communications privilege” and the “deliberative process privilege” as follows:

While the presidential communications privilege and the deliberative process privilege are closely affiliated, the two privileges are distinct and have different scopes. Both are executive privileges designed to protect executive branch decisionmaking, but one applies to decisionmaking of executive officials generally, the other specifically to decisionmaking of the President. The presidential privilege is rooted in constitutional separation of powers principles and the President’s unique constitutional role; the deliberative process privilege is primarily a common law privilege.

Id. at 745. See Russell L. Weaver & James T. R. Jones, The Deliberative Process Privilege, 54 Mo. L. Rev. 279, 283-290 (1989) (explaining the common law origin and development of the “deliberative process privilege”). Numerous federal courts have recognized the “deliberative process privilege” as a common law privilege.¹⁸

¹⁸ E.g., Rodriguez v. City of Chicago, 329 F.R.D. 182, 186 (N.D. Ill. 2019) (the federal common law deliberative process privilege protects communications that are part of a government agency’s decision-making process); Merritt v. Arizona, No. CV-17-04540-PHX-DGC, 2018 U.S. Dist. LEXIS 131609, at *15, 2018 WL 3729757, at *__ (D. Ariz. Aug. 6, 2018) (federal common law recognizes deliberative process privilege); Alliance for the Wild Rockies v. Pena, No. 2:16-CV-294-RMP, 2017 U.S. Dist. LEXIS 220958, at *4, 2017 WL 8778579, at *__ (E.D. Wash. Dec. 12, 2017) (The deliberative process privilege is a qualified, common law executive privilege); Survivors v. United States DOI, No. 16-cv-01165-JCS, 2017 U.S. Dist. LEXIS 66189, at *3, 2017 WL 1549373, at *__ (N.D. Cal. May 1, 2017) (the deliberative process privilege is a common law privilege); CFTC v. Royal Bank of Canada, No. 12 Civ. 2497 (AKH), 2013 U.S. Dist. LEXIS 69400, at *2, 2013 WL 1932120, at *__ (S.D. N.Y. May 8, 2013) (the deliberative process privilege derives from the common law); Gingerich v. City of Elkhart Prob. Dep’t, 273 F.R.D. 532, 539 (N.D. Ind. 2011) (the deliberative process privilege is a federal common law privilege); EEOC v. Albertson’s LLC,
(continued...)

The federal common law deliberative process privilege is given effect in Federal Rules of Evidence 501 which provides:

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

A number of state courts have also recognized that the deliberative process privilege is a common law privilege. E.g., Fuller v. City of Homer, 75 P.3d 1059 (Alaska 2000) (state law includes common law deliberative process privilege); City of Colorado Springs v. White, 967 P.2d 1042, 1049-50 (Colo. 1998) (deliberative process privilege is based on common law principles); Aland v. Mead, 327 P.3d 752, 759-763 (Wyo. 2014) (deliberative process privilege existed in Wyoming common law); Las Vegas Review-Journal v. City of Henderson, No. 73287, 2019 Nev. Unpub. LEXIS 606, at *10, 2019 WL 2252868, at *__ (Nev. 2019) (the deliberative process privilege is a creature of common law); News &

¹⁸(...continued)

No. 06-cv-01273-CMA-BNB, 2008 U.S. Dist. LEXIS 95146, at *2, 2008 WL 4877046, at *__ (D. Colo. Nov. 12, 2008) (federal common law recognizes the deliberative process privilege); Scott v. Bd. of Educ. of E. Orange, 219 F.R.D. 333, 336 (D. N.J. 2004) (under federal common law, the deliberative process privilege protects the decision making processes of government agencies); Lawrence v. Van Aken, No. 4:03-cv-20, 2004 U.S. Dist. LEXIS 956, at *22, 2004 WL 228989, at *__ (W.D. Mich. Jan. 14, 2004) (the deliberative process privilege is a well-established common law privilege).

Observer Publ'g Co. v. Poole, 412 S.E.2d 7, 20 (N.C. 1992) (deliberative process privilege is a common-law privilege); People ex rel. Birkett v. City of Chicago, 705 N.E.2d 48, 50 (Ill. 1998) (deliberative process privilege is a common-law privilege); Sands v. Whitnall Sch. Dist., 754 N.W.2d 439, 458 (Wis. 2008) (Wisconsin does not recognize the common law deliberative process privilege); Republican Party v. N.M. Taxation & Revenue Dep't, 283 P.3d 853, 867 (N.M. 2012) (New Mexico does not recognize the common law deliberative process privilege).

In Assured Investors Life Insurance Co. v. National Union Associates, Inc., 362 So. 2d 228 (Ala. 1978), overruled on other grounds, Ex parte Norfolk Southern Railway Company, 897 So. 2d 290 (Ala. 2004), the Court granted a conditional writ of mandamus directing the trial court to vacate a protective order barring discovery in a civil action of a statement obtained by a district attorney's office in an ongoing criminal investigation that the district attorney claimed to be privileged under a broad claim of executive or "Crown" privilege. Id. at 231-232. The Court said "[e]xecutive privilege" is a privilege claimed by a governmental body when it fears that discovery of its confidential information will seriously impair its ability to function. Id. at 232. The Court described the asserted privilege as "[t]he executive privilege applicable to information held by

the government during an ongoing criminal proceeding . . .” Id. at 233 (citing Wood v. Breier, 54 F.R.D. 7 (E.D. Wis. 1972)). The Court noted:

In deciding to uphold or overrule claims of executive privilege, the role of the trial court is limited to a determination of three fundamental questions: (1) Whether the claim falls within one of the categories of privileges recognized in the law of evidence; (2) Whether the claim has been properly invoked; and (3) Whether the circumstances of the case under consideration are appropriate for the exercise of the claim.

Id. at 233 (underscoring added).

In LaMonte v. Personnel Board of Jefferson County, 581 So. 2d 866 (Ala. Civ. App. 1991), the Personnel Board of Jefferson County issued an administrative subpoena to LaMonte to obtain his notes of conversations with the employees and former employees of the Birmingham Museum of Art who had grievances against the Museum’s director. LaMonte asserted executive privilege and the Board denied him relief from the subpoena. The trial court also denied LaMonte relief. On appeal, the Court quoted the definition of “executive privilege” adopted in Assured Investors and went on to conclude that the employees and former employees had a compelling interest in obtaining the information sought by the subpoena and that disclosure of the information would not seriously impair the City of Birmingham’s ability to function.

In Sierra Club v. Alabama Environmental Management Commission, 627 So. 2d 923 (Ala. Civ. App. 1992), the trial court denied the Sierra Club a writ of

mandamus to compel an administrative hearing officer to allow the Club to make certain inquiries during depositions of Department decision-makers. On appeal, the Court of Civil Appeals recognized a qualified deliberative process privilege that protects intra-agency communications of tentative recommendations or opinions without precedential significance or operative effect and remanded the case to the trial court. Id. at 926 (citing Exxon Corp. v. Dep't of Energy, 91 F.R.D. 26, 43 (N.D. Tex.1981)). However, the decision of the Court of Civil Appeals was reversed by the Supreme Court on other grounds. Ex parte Alabama Department of Environmental Management, 627 So. 2d 927 (Ala. 1993).

Assured Investors, LaMonte, and Sierra Club were all decided before the effective date of the Alabama Rules of Evidence on January 1, 1996. These rules abrogated all common law privileges, including the deliberative process privilege. See Ala. R. Evid. 501 and 508 and discussion below.¹⁹

¹⁹ In W.A.A. v. Board of Dental Examiners of Alabama, 180 So. 3d 25, 30 (Ala. Civ. App. 2015), the Court ordered the circuit court to determine whether the matters sought to be discovered are ‘reasonably calculated to lead to the discovery of admissible evidence’ . . . and if so, whether those matters are subject to a valid claim of executive, deliberative-process . . . privilege.” The Court did not affirm the validity of deliberative process privilege and did not address whether the privilege recognized in Sierra Club survived the subsequent adoption of the Alabama Rules of Evidence.

The Alabama Rules of Evidence, effective on January 1, 1996, represents the codification of Alabama evidence law. Charles W. Gamble, Drafting, Adopting and Interpreting the New Alabama Rules of Evidence: A Reporter's Perspective, 47 Ala. L. Rev. 1, 1-4 (1995). Rules appertaining to privileges are contained in Article V. Dean Gamble explained the Advisory Committee's rationale for drafting Article V differently from Federal Rules of Evidence 501. He said:

The Advisory Committee was guided throughout the drafting process, however, by the premise that Alabama lawyers would be best served by minimizing the number of instances when they would be required to look outside the rules for the answer to an evidence issue.^[20] * * *

Perhaps the most important application of this inclusivity principle is the incorporation of privileges within the Alabama Rules of Evidence. * * * The Advisory Committee drafting the Alabama Rules of Evidence could have followed the Federal Rules' example and allowed the communication privilege principles to be governed by preexisting common law. However, remaining true to the inclusivity principle, the Advisory Committee decided to include privilege principles in the Alabama Rules of Evidence. * * *

Id. at 8-9. Consequently, Alabama Rules of Evidence 501 provides:

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or

²⁰ This was denominated as the principle of inclusivity.

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

“This introductory rule, serving as a preface to the evidentiary privileges, embraces the historic common law principle that no privilege exists where none has been granted.” Ala. R. Evid. 501, advisory committee’s notes. See also Gregory S. Cusimano & Michael L. Roberts, Proposed Alabama Rules of Evidence: What’s the Same – What’s Different, 45 Ala. L. Rev. 109, 119-120 (1993) (“This Rule reflects traditional common law that, except as provided by statute, rules, or constitution, no person is privileged to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or to prevent another from being a witness or disclosing matters or producing objects or writings.”). Thus, all privileges not provided by constitution, statute, or court rules (e.g., any deliberative process privilege that existed at common law in Alabama prior to January 1, 1996) were abrogated on the effective date of the Alabama Rules of Evidence – January 1, 1996.

Alabama Rules of Evidence 508(b) specifically addresses governmental privileges recognized under State law. Like Rule 501, it states:

No other governmental privilege is recognized except as created by the Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama.

“The only available governmental privileges . . . arise under the Alabama constitution, Alabama statutes, or rules promulgated by the Supreme Court of Alabama.” Ala. R. Evid. 508, advisory committee’s notes. This rule also abrogates any deliberative process privilege that may have existed at common law in Alabama.

In Republican Party v. N.M. Taxation & Revenue Department, 283 P.3d 853 (N.M. 2012), the Republican Party of New Mexico and Lyn Ott requested certain records from the Motor Vehicle Division of the New Mexico Taxation and Revenue Department under the New Mexico Inspection of Public Records Act. The Department withheld some documents on several grounds, including executive privilege. The trial court granted the Department’s motion for summary judgment in part, concluding that executive privilege was properly invoked and not overcome by a showing of need. An appeal was taken to the Court of Appeals which concluded that the deliberative process privilege shielded the documents at issue from disclosure. The New Mexico Supreme Court granted certiorari and reversed. The Court held that no common law deliberative process privilege exists under New Mexico law and that the executive privilege derived from the State Constitution is limited to “communications” that (1) concern the Governor’s decisionmaking in the realm of his or her core duties; and (2) are authored, or solicited and received, by either

the Governor or an “immediate adviser,” with “broad and significant responsibility” for assisting the Governor with his or her decisionmaking. The privilege is reserved to the constitutionally-designated head of the executive branch – the Governor, and is not available to the entire executive branch. Like the Alabama Rules of Evidence, the Court observed that the New Mexico Rules of Evidence R. 11-501 recognize only those privileges required by the constitution, the rules of evidence, or other rules adopted by the Supreme Court and concluded that “we hold emphatically that no deliberative process privilege exists under New Mexico law.”

As the Assured Investors court correctly held, the role of the trial court is first to determine whether a claim of privilege falls within one of the categories of privileges recognized in the law of evidence. Assured Investors, 362 So. 2d at 233. Alabama Rules of Evidence 508(b) provides that “[n]o other governmental privilege is recognized except as created by the Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama.” Because the “deliberative process privilege” is not created by the Alabama Constitution or statutes of this State or rules promulgated by the Supreme Court of Alabama, it is not a recognized evidentiary privilege in Alabama.

Regardless of the policy reasons supporting the common law deliberative process privilege, it is not recognized under the Alabama Rules of Evidence and

does not authorize the Director to withhold from disclosure internal emails that are “deliberative.”

C. The Director is not authorized to withhold from disclosure all internal emails that are “deliberative” under the Open Records Act.

As stated above, since the effective date of the Alabama Rules of Evidence (January 1, 1996), internal (intra-agency) emails that are deliberative may not be withheld from disclosure under the Open Records Act based on a common law deliberative process privilege. Consequently, the Director must assert some other recognized exception in order to withhold such records from disclosure.

The exceptions that the Director asserts are applicable to internal emails that are deliberative is “[r]ecorded information received by a public officer in confidence, . . . and records the disclosure of which would be detrimental to the best interests of the public . . .” Declaratory Ruling at Appendix A.

1. Recorded information received by a public officer in confidence

In Stone v. Consolidated Publishing Company, 404 So. 2d 678 (Ala. 1981), the Court allowed that “recorded information received by a public officer in confidence” *may* not be subject to public disclosure. *Id.* at 681. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public

in having the business of government carried on efficiently and without undue interference. Id. The exception must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure. Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989). The exception should not come into play merely because of some perceived necessity on the part of a public official or established office policy. Id. Because there is a presumption of required disclosure, the public officer refusing disclosure bears the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them. Id. at 856-857.

In Health Care Authority for Baptist Health v. Central Alabama Radiation Oncology, LLC, 292 So. 3d 623 (Ala. 2019), the Board of Baptist Health provided redacted meeting minutes of the Board to CARO, contending that the redactions contained confidential information protected from disclosure by the Stone exception for “recorded information received by a public officer in confidence.” CARO filed suit under the Open Records Act to obtain copies of the unredacted minutes of the Board. The Alabama Supreme Court said:

[T]he [Stone]exception for confidentiality concerns “information received by a public officer in confidence.” Stone, 404 So. 2d at 681 (emphasis added). Baptist Health never alleged that the redacted

information was received in confidence; it merely asserted that it believed the information was confidential. Absent a fuller explanation, Baptist Health appears to be using the exception “as an avenue for public officials to pick and choose what they believe the public should be made aware of.” Chambers v. Birmingham News Co., 552 So. 2d 854,] 857 [(Ala. 1989)].

Id. at 634 (underscoring in original). Here, the Director has not alleged that all internal emails that are deliberative are received by a public officer in confidence. Absent such a showing, the Director has failed to meet his burden of proving that the exception applies to all such emails. See also Chambers v. Birmingham News Co., 552 So. 2d 854 (Ala. 1989) (Court affirmed judgment requiring disclosure of applications, resumes, and other related materials received by the Shelby County Commission where applicants did not request and were not promised confidentiality).

Moreover, a public officer’s promise of confidentiality is not determinative of the applicability of the exception for recorded information received by a public officer in confidence. In Tennessee Valley Printing Co., Inc. v. Health Care Authority of Lauderdale County, 61 So. 3d 1027 (Ala. 2010), the Court reversed the judgment of the trial court refusing to require disclosure of four bid proposals and a letter of intent to purchase a publicly owned hospital received by the Health Care Authority under a promise of confidentiality where there was no evidence indicating that the bids or letter of intent required

confidentiality. Here, the Director has presented no evidence that confidentiality is required for all internal emails that are deliberative. Absent such a showing, the Director has failed to meet his burden of proving that the exception applies to all such emails.

Finally, the Director claims a categorical exception from disclosure on the basis that all internal emails that are deliberative are records received by public officers in confidence. Such a claim is speculative at best and without any evidentiary support.

2. Records the disclosure of which would be detrimental to the best interests of the public

Ala. Code 1975 § 36-12-40 allows that “records the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from disclosure . . .” This language is a codification of one of the exceptions recognized in Stone. See Ala. Act No. 2004-487 (signed May 17, 2004). Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference. Stone, The exception must be applied only in those cases where it is readily apparent that disclosure will result in undue harm or embarrassment to an individual, or where the public interest will

clearly be adversely affected, when weighed against the public policy considerations suggesting disclosure. Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989). The exception should not come into play merely because of some perceived necessity on the part of a public official or established office policy. Id. Because there is a presumption of required disclosure, the public officer refusing disclosure bears the burden of proving that the writings or records sought are within an exception and warrant nondisclosure of them. Id. at 856-57.

In his Declaratory Ruling, the Director states that internal emails that are deliberative are excepted from disclosure because disclosure would be detrimental to the best interests of the public. He concludes, without presenting any evidence whatsoever, that disclosure of such records would “chill” robust and frank discussions and deliberations and diminish the quality of agency decisions and policies, to the detriment of the public.

In Allen v. Barksdale, 32 So. 3d 1264 (Ala. 2009), Mary Barksdale and others sued Richard F. Allen, the commissioner of the Alabama Department of Corrections (“DOC”), to compel his production of certain incident reports under the Open Records Act. The Commissioner “testified that no incident reports generated by employees of DOC are made available to the public. When asked if there was a ‘blanket’ policy prohibiting the disclosure of incident reports

under the Open Records Act, he responded that it was DOC's policy not to release any incident reports." Id. at 1270. Among other reasons for this policy, the Commissioner argued that investigations would be compromised if all incident reports are subject to the Open Records Act because:

"[t]here would also be a chilling effect on the investigative process by the correctional officers and the I & I division if they believed every incident report would be subject to public access under the Open Records Act. The investigative process would possibly not be as accurate or extensive as it is presently. Officers would not pursue leads with vigor as they do now. Also, officers would be less likely to fully and completely report an incident or the security measures they took to remedy an incident or breach in security. This would impact how a supervisor monitors the trends within his/her institution."

Id. at 1273-74 (quoting from Commissioner's brief). The Court summarily rejected this argument explaining: "Suffice it to say, we find it hard to believe that a corrections officer would neglect his or her job because the public would have access to certain records reflecting actions of the officer as a government employee." Id. at 1274.

In the present case, the Director similarly argues in his Declaratory Statement that public disclosure of internal (intra-agency) emails that are "deliberative" would "chill" future intra-agency deliberations to the detriment of the public. Suffice it to say, it is hard to believe that a Department official or employee would willfully neglect his or her responsibility to engage in frank

deliberations to formulate agency policies or make agency decisions because the public would have access to records of such deliberations.

N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 95 S. Ct. 1504 (1975), cited by the Director is his Declaratory Statement, is clearly inapposite. It interprets Exemption 5 of the Freedom of Information Act which protects from public disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). This statutory exemption incorporates the privileges available to Government agencies in civil litigation, including the deliberative process privilege, attorney-client privilege, and attorney work-product privilege. United States Fish & Wildlife Serv. v. Sierra Club, Inc., __ U.S. __, __, 141 S. Ct. 777, 785 (2021). The deliberative process privilege is recognized under federal common law and Federal Rules of Evidence 501. However, it is not a recognized privilege under Alabama Rules of Evidence 501 and 508. Moreover, the language of the exemption in 5 U.S.C. § 552(b)(5) is not the same as the language in the Open Records Act. In Graham v. Alabama State Employees Association, 991 So. 2d 710 (Ala. Civ. App. 2007), the Court declined to superimpose a balancing test in Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(C), onto the rule of reason test established

in Stone under the Open Records Act, noting that the language of the two statutes are not the same.

Finally, the Director claims a categorical exception from disclosure under Ala. Code 1975 § 36-12-40 on the basis that all internal emails that are deliberative are records the disclosure of which would be detrimental to the best interests of the public. Such a claim is speculative at best and without any evidentiary support. Application of the exception requires a record-by-record analysis and evidentiary support.

D. The Director is not authorized to withhold from disclosure internal emails that are deliberative under ADEM Admin. Code r. 335-1-1-.06.

The Director's Declaratory Ruling did not specifically address whether the Department may deny a request to inspect and copy "official records" pursuant to ADEM Admin. Code r. 335-1-1-.06 on the basis that the . . . "official records" are exempt from disclosure because they are internal emails that are deliberative. See Declaratory Ruling at Appendix A. Pursuant to Ala. Code 1975 § 41-22-11(b), the failure of an agency to issue a declaratory ruling on the merits within 45 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

ADEM Admin. Code r. 335-1-1-.06 provides:

(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.

(Underscoring added in paragraph (1)).

The language used in an administrative regulation should be given its natural, plain, ordinary, and commonly understood meaning, just as language in a statute. Fraternal Order of Police, Lodge No. 64 v. Personnel Bd. of Jefferson Cnty., 103 So. 3d 17, 25 (Ala. 2012); Black Warrior Riverkeeper, Inc. v. Ala. Dep't of Env'tl. Mgmt., No. 2200609, 2022 Ala. Civ. App. LEXIS 17, at *12, 2022 WL 497466, at *___ (Ala. Civ. App. Feb. 18, 2022). As used in r. 335-1-1-.06(1), the word “records” is a noun which means “something that records: such as . . . an official document that records the acts of a public body or officer.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/record> (accessed Jan. 5, 2022). See The American Heritage Dictionary of the English Language, Fifth Edition, <https://ahdictionary.com/word/search.html?q=record> (accessed Jan. 5, 2022) (“An account, as of information or facts, set down especially in writing as a means of preserving knowledge”). As used in r. 335-1-1-.06(1), the word “official” is an adjective to describe “records.” It means “of or relating to an office.” Merriam-Webster.com Dictionary, Merriam-Webster,

<https://www.merriam-webster.com/dictionary/official> (accessed Jan. 5, 2022). See The American Heritage Dictionary of the English Language, Fifth Edition, <https://ahdictionary.com/word/search.html?q=official> (accessed Jan. 5, 2022) (“[o]f or relating to an office or a post of authority”). Thus, the natural, plain, ordinary, and commonly understood meaning of the term “official records” in ADEM Admin. Code r. 335-1-1-.06(1) is writings or documents that record the acts of a public officer relating to the administration of his office. This meaning is not ambiguous or subject to interpretation. Internal (intra-agency) emails that are deliberative are writings or documents that record the acts of a public officers relating to the administration of their offices. Accordingly, such emails are “official records” of the Department.

ADEM Admin. Code r. 335-1-1-.06(2) provides for exceptions to the availability of official records of the Department for public inspection. Those exceptions are limited to “sales figures or methods, processes, or production unique to such person, or [which would] otherwise tend to affect adversely the competitive position of such person by revealing trade secrets.” “Under the principle expressio unius est exclusio alterius, the express inclusion of one exception implies the exclusion of others.” Ivey v. Estate of Ivey, 261 So. 3d 198, 212 (Ala. 2017). Accord, White-Spunner Constr., Inc. v. Constr. Completion Co., LLC, 103 So. 3d 781, 792 (Ala. 2012); Sustainable Forests, LLC v. Ala. Dep’t of

Revenue, 80 So. 3d 270, 273 (Ala. Civ. App. 2011). Thus, no exception or exclusion is implied in ADEM Admin. Code r. 335-1-1-.06 for internal emails that are deliberative.²¹

The use of the word “shall” in an administrative rule is considered presumptively mandatory. Kids’ Klub, Inc. v. State Dep’t of Human Res., 874 So. 2d 1075, 1097 (Ala. Civ. App. 2003). Accordingly, the Director has a mandatory duty under r. 335-1-1-.06 to make “official records” of the Department, including internal (intra-agency) emails that are deliberative, available to the public for inspection.

In ABC Coke v. GASP, 233 So. 3d 999, 1008 (Ala. Civ. App. 2016), the Court said:

“[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them.” Hand v. State Dep’t of Human Res., 548 So. 2d 171, 173 (Ala. Civ. App. 1988). The AAPA allows agencies to

²¹ Neither the Stone exceptions nor the statutory exceptions to mandatory disclosure under the Open Records Act compel public officers to withhold any records from disclosure. Cf. Something Extra Publ’g, Inc. v. Mack, 350 So. 3d 663, 669 (Ala. 2021) (Shaw, J., concurring specially) (a statutory exclusion from the Open Records Act by no means prevents law-enforcement departments from opening for inspection sensitive records related to criminal investigations from premature disclosure when serious ramifications in bringing offenders to justice and protecting victims do not exist). Thus, the Open Records Act does not compel the Director to withhold from public disclosure any records that may be subject to an exception under the Act.

promulgate rules, and “so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required – and since such an alternative to the AAPA procedure is authorized by § 41-22-20(b) – the agency must be held to its own standard.” Id. at 174.

The Department is authorized to promulgate rules pursuant to the Alabama Administrative Procedure Act, Ala. Code 1975 § 41-22-4 and 41-22-5, and the Alabama Environmental Management Act, Ala. Code 1975 § 22-22A-5, 22-22A-6, and 22-22A-8. ADEM Admin. Code r. 335-1-1-.06 was promulgated pursuant to these statutory provisions. See id., statutory authority note. Accordingly, r. 335-1-1-.06 has the force of law and the Director must vigorously comply with its requirements and make “official records” available to the public.

In Graham v. Alabama State Employees Association, 991 So. 2d 710 (Ala. Civ. App. 2007), the State Personnel Department (“SPD”) designated by rule certain portions of its personnel files as “confidential records” not subject to public disclosure under Ala. Code 1975 §§ 36-12-40 or 36-26-44. It did not, however, designate the complete personnel files as “confidential records.” “Hence, those parts of the personnel files not expressly designated as confidential by the SPD are not exempt from disclosure by any rule promulgated by the SPD.” Id. at 721. “Because the operative statutes unequivocally direct the SPD to produce nonconfidential public documents, any

production would be considered a ministerial act that a circuit court may properly compel by a writ of mandamus.” Id. at 718.

Like the State Personnel Department, the Department designated by rule certain “official records” that are not subject to public disclosure under ADEM Admin. Code r. 335-1-1-.06(1). See ADEM Admin. Code r. 335-1-1-.06(2) (“sales figures or methods, processes, or production unique to such person, or [which would] otherwise tend to affect adversely the competitive position of such person by revealing trade secrets”). Thus, those “official records” not expressly designated as exempt by the Department are subject to disclosure under r. 335-1-1-.06(1). Because r. 335-1-1-.06(1) unequivocally directs the Department to produce non-exempt “official records,” any production would be considered a ministerial act. Consequently, the Director has no discretion to withhold the disclosure of internal emails that are deliberative in nature.

IX. The Relief Sought

In accordance with Ala. Code 1975 §§ 41-22-11(b) and 41-22-20(k), the Alliance seeks a judgment (1) finding that the Declaratory Ruling issued by the Director declaring that internal emails that are deliberative are categorically excepted from public disclosure under Ala. Code 1975 § 36-12-40 prejudices the substantial rights of the Petitioner because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as

discussed herein; (2) finding that the failure of the Department to issue a declaratory ruling on the question of whether internal emails that are deliberative are excepted from public disclosure under ADEM Admin. Code r. 335-1-1-.06 is a denial of the merits of the Petitioner's Petition for Declaratory Ruling which prejudices the substantial rights of the Petitioner because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as discussed herein; (3) setting aside the Declaratory Ruling issued by the Director because it is in violation of statutory provisions, in excess of statutory authority, or affected by other error of law as discussed herein or altering the Declaratory Ruling issued by the Director to declare that internal emails that are deliberative are not categorically excepted from the disclosure requirements of Ala. Code 1975 § 36-12-40 and are not excepted from the disclosure requirements of ADEM Admin. Code r. 335-1-1-.06; (4) ordering the Director to disclose to Petitioner the internal emails that are alleged to be deliberative and that were previously withheld from disclosure; and (5) granting Petitioner such other relief to which it may be entitled.

Respectfully submitted,

s/ David A. Ludder

David A. Ludder (LUD001)

Attorney for Environmental Defense Alliance

Law Office of David A. Ludder, PLLC

9150 McDougal Ct.

Tallahassee, Florida 32312-4208

Phone (850) 386-5671

Email davidaludder@enviro-lawyer.com

APPENDICES

Appendix A
Declaratory Ruling

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

PETITION FOR DECLARATORY RULING

Environmental Defense Alliance

QUESTION PRESENTED:

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?”

DECLARATORY RULING:

Yes. The right to copy public writings is not without exception. *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678, 681 (Ala. 1981). In *Stone*, the court applied the “rule of reason” to § 36-12-40 and held that “[r]ecorded information received by a public officer in confidence, . . . and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure.” *Id.* Later, the legislature amended this statute to exclude “records the disclosure of which would otherwise be detrimental to the best interests of the public.” Act 2004-487, Ala. Code §§ 36-12-40.

In another context, the U.S. Supreme Court has noted the “policy of protecting the decision-making processes of government agencies.” *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (U.S. 1975) (cleaned up.) The *Sears* court explained that the point of this policy is this: “the frank discussion of legal or policy matters in

writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result.” Id. (citing S. Rept. No. 813, 89th Congress, 1st Sess., p. 9.) The Court further noted that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process. 421 U.S. at 151 (cleaned up.)

The same concerns are present here, so the “rule of reason” should apply. Well-reasoned decisions depend on robust debate and frank discussions and deliberations. Making public those discussions would chill those discussions and diminish the quality of agency decisions and policies, to the detriment of the public.

Issued this 23rd day of February 2023.

A handwritten signature in black ink, appearing to read "Lance R. LeFleur", is written over a horizontal line.

Lance R. LeFleur
Director

Appendix B

Notice of Appeal and Cost Bond

BEFORE THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

**PETITION FOR DECLARATORY
RULING**

Environmental Defense Alliance,

Petitioner.

_____ /

NOTICE OF APPEAL

Pursuant to Ala. Code § 41-22-20(b), notice is hereby given that the Environmental Defense Alliance appeals to the Circuit Court of Montgomery County, Alabama, from the declaratory ruling issued by the Alabama Department of Environmental Management on February 23, 2023 which determined that “internal emails” that are “deliberative” are excepted from disclosure under Ala. Code 1975 § 36-12-40 and ADEM Admin. Code r. 335-1-1-.06. The declaratory ruling is attached hereto as Exhibit A.

A cost bond to pay the Alabama Department of Environmental Management the reasonable costs of preparing the record and transcript of the above-captioned matter for review by the Circuit Court is attached hereto as Exhibit B.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

DAVID A. LUDDER

Attorney for Petitioner

ASB-4513-E63D

Law Office of David A. Ludder, PLLC

9150 McDougal Court

Tallahassee, Florida 32312-4208

Tel (850) 386-5671 Fax (203) 306-4110

E-mail DavidALudder@enviro-lawyer.com

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

**PETITION FOR DECLARATORY
RULING**

Environmental Defense Alliance

QUESTION PRESENTED:

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?"

DECLARATORY RULING:

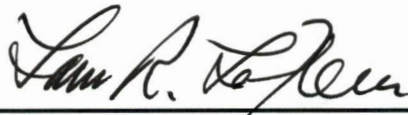
Yes. The right to copy public writings is not without exception. *Stone v. Consolidated Pub. Co.*, 404 So. 2d 678, 681 (Ala. 1981). In *Stone*, the court applied the "rule of reason" to § 36-12-40 and held that "[r]ecorded information received by a public officer in confidence, . . . and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure." *Id.* Later, the legislature amended this statute to exclude "records the disclosure of which would otherwise be detrimental to the best interests of the public." Act 2004-487, Ala. Code §§ 36-12-40.

In another context, the U.S. Supreme Court has noted the "policy of protecting the decision-making processes of government agencies." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (U.S. 1975) (cleaned up.) The *Sears* court explained that the point of this policy is this: "the frank discussion of legal or policy matters in

writing might be inhibited if the discussion were made public; and that the decisions and policies formulated would be the poorer as a result.” Id. (citing S. Rept. No. 813, 89th Congress, 1st Sess., p. 9.) The Court further noted that “those who expect public dissemination of their remarks may well temper candor with a concern for appearances to the detriment of the decision making process. 421 U.S. at 151 (cleaned up.)

The same concerns are present here, so the “rule of reason” should apply. Well-reasoned decisions depend on robust debate and frank discussions and deliberations. Making public those discussions would chill those discussions and diminish the quality of agency decisions and policies, to the detriment of the public.

Issued this 23rd day of February 2023.

A handwritten signature in black ink, appearing to read "Lance R. LeFleur", is written over a horizontal line.

Lance R. LeFleur
Director

Exhibit B

BEFORE THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

**PETITION FOR DECLARATORY
RULING**

Environmental Defense Alliance,

Petitioner.

_____ /

COST BOND

The Environmental Defense Alliance, as principal, and we, Mark Johnston, and Eva Dillard, as sureties, agree to pay the Alabama Department of Environmental Management the reasonable costs of preparing the record and transcript of the above-captioned proceeding under review by the Circuit Court of Montgomery County.

We hereby severally certify that we have property valued over and above all debts and liabilities that have a fair market value equal to or greater than the amount of the reasonable costs of preparing the record and transcript of the above-captioned proceeding. We, and each of us, waive the benefit of all laws exempting property from levy and sale under execution or other process for the collection of debt, by the Constitution and Laws of the State of Alabama.

Executed with my seal this 28th day of Feb., 2023.

Environmental Defense Alliance
(an Alabama corporation)
(Principal)

By: Michael W. Mullen (L.S.)
Michael W. Mullen, President

Executed with my seal this 15th day of March, 2023.

Mark Johnston (L.S.)
Mark Johnston (Surety)
16266 Highway 195
Nauvoo, Alabama 35578

Executed with my seal this 13th day of March, 2023.

Eva Dillard (L.S.)

Eva Dillard (Surety)
1449 Ridge Road
Birmingham, Alabama 35209

CERTIFICATE OF SERVICE

I, David A. Ludder, hereby certify that I have served the foregoing Notice of Appeal and Cost Bond on the following persons by electronic mail and certified mail return receipt requested addressed as follows:

Lance R. LeFleur, Director
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463
director@adem.alabama.gov

Shawn S. Sibley
P. Christian Sasser
Assistant Attorneys General
and Associate General Counsels
Office of General Counsel
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463
Ssibley@adem.alabama.gov
pcsasser@adem.alabama.gov

Done this 23rd day of March, 2023.



David A. Ludder

Appendix C

Petition for Declaratory Ruling

BEFORE THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

In the matter of:

ENVIRONMENTAL DEFENSE
ALLIANCE,

Petitioner.

_____ /

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).¹ “[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.*

¹ 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).^[2] 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).^[3]

² 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.

³ 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

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

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.*

⁴ 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>.

⁵ *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.

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 life⁶ based largely on new science and

⁶ *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.⁷ After receiving a recommendation to deny the Petition from the Director of the Department,⁸ 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.”⁹ 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

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

⁷ 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).

⁸ *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>.

⁹ *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.¹⁰ 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.¹¹

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.¹² If such a determination is made, the Agency is required to promptly

¹⁰ *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>.

¹¹ *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>.

¹² *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.^[13]

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

¹³ 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.¹⁴ The Department expressly withheld from disclosure an unspecified number of "internal emails" that it considers to be "deliberative" without further description, characterization, or explanation.¹⁵

¹⁴ *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).

¹⁵ *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, 2022.¹⁶ 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 requested presented in the Alliance’s November 22, 2022 preliminary inquiry. Exhibit G.

¹⁶ *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

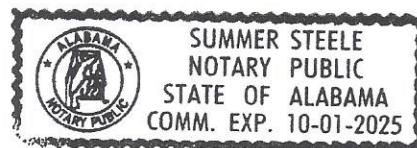
State of Alabama
County of Pike

Sworn to and subscribed before me on the 3rd day of January, 2023, by
Michael W. Mullen.



(Seal)

Notary Public



Respectfully submitted,



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.



David A. Ludder

Appendix D
Request for Writings and Records

Subject: Request for Writings and Records
From: "David A. Ludder" <davidaludder@enviro-lawyer.com>
Sent: 9/14/2022 11:16:22 AM
To: "Lance LeFleur" <director@adem.alabama.gov>; "ADEM Records" <records@adem.alabama.gov>;
Attachments: Request for Writings and Records.pdf
Signed by: David A. Ludder

Please find attached a request for writings and records.

DAVID A. LUDDER

Law Office of David A. Ludder, PLLC
9150 McDougal Ct. | Tallahassee, FL 32312-4208
Tel 850.386.5671 | Web www.enviro-lawyer.com



September 14, 2022

Sent Via Electronic Mail

Hon. Lance R. LeFleur, Director
Office of the Director
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, Alabama
director@adem.alabama.gov

Sent Via Electronic Mail

Ms. Azure Jones, Public Records Officer
Permits and Services Division
Alabama Department of Environmental Management
1400 Coliseum Boulevard
Montgomery, Alabama
records@adem.alabama.gov

Re: Request to inspect and copy ADEM writings and records

Dear Mr. LeFleur and Ms. Jones:

On behalf of the Environmental Defense Alliance, an Alabama non-profit corporation, and pursuant to the Open Records Law, Ala. Code 1975 §§ 36-12-40 and -41, and ADEM Admin. Code r. 335-1-1-.06(1), I request permission to inspect and copy the following writings and records in the possession, control or custody of any officials of the Alabama Department of Environmental Management 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.

Pursuant to ADEM Admin. Code r. 335-1-1-.06(5), if it is determined that any of the requested writings or records will not be provided or that, to the best knowledge of the Director, any of the requested writings or records do not exist, I request to be notified in writing that the request is denied and the reasons for denial. If the reasons for denial are based on a claim of exemption or privilege permitting non-disclosure, I request that you identify the claimed exemption or privilege and provide sufficient information as to the nature of the writings or records withheld from disclosure to permit me to determine the validity of the claim of exemption or privilege.

Please do not hesitate to contact me to obtain clarification of the writings and records sought, if necessary.

Sincerely,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

David A. Ludder
Attorney for Environmental Defense Alliance

Appendix E

Response to Request for Writings and Records

Subject: Records Request - New or Revised Water Quality Criteria for Toxics
From: "Sasser, Chris" <PCSasser@adem.alabama.gov>
Sent: 11/21/2022 5:33:28 PM
To: "David A. Ludder" <davidaludder@enviro-lawyer.com>;
CC: "Records Review" <records@adem.alabama.gov>;
Attachments: 2021 Triennial Review RTC (FINAL).pdf; AL Triennial Kick Off Letter 2021.pdf; EPA human health criteria adoptions nationally.....eml; Followup on Arsenic Issues.eml; FW_ 2021 Selenium Revised Criteria Document for Footnote Errata.eml; FW_ Rulemaking.eml; Human Health Criteria Status Update for PFOA and PFOS.eml; Proposed Rule_ PFOA_PFOS Superfund Hazardous Substances Designation.eml; RE_ EPA recommended human health criteria.eml; RE_ Triennial Review Question - OAW.eml

David, we are sending the requested documents not on eFile in three e-mails. This is No 1 of 3. E File documents such as public comments are available on our eFile page located at <http://app.adem.alabama.gov/eFile>. Check "Water" in "Media Area" and enter "Triennial Review" in "File Name." Not included are internal e-mails that we are withholding as deliberative.

Chris Sasser
Associate General Counsel
Alabama Department of Environmental Management
P. O. Box 301463
Montgomery, Alabama 36130-1463
Telephone 334-271-7857
adem.alabama.gov

pcsasser@adem.alabama.gov



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Attachments Omitted

Subject: Records Request - New or Revised Water Quality Criteria for Toxics
From: "Sasser, Chris" <PCSasser@adem.alabama.gov>
Sent: 11/21/2022 5:36:08 PM
To: "David A. Ludder" <davidaludder@enviro-lawyer.com>;
CC: "Records Review" <records@adem.alabama.gov>;
Attachments: RE_ Human Health Criteria approvals & Criteria Search tool (State Director's Meeting follow-up).eml; RE_ Human Health Criteria approvals (2nd email - North Dakota).eml

David, this is No. 2 of 3.

Chris Sasser
 Associate General Counsel
 Alabama Department of Environmental Management
 P. O. Box 301463
 Montgomery, Alabama 36130-1463
 Telephone 334-271-7857
adem.alabama.gov

pcsasser@adem.alabama.gov



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Attachments Omitted

Subject: Records Request - New or Revised Water Quality Criteria for Toxics
From: "Sasser, Chris" <PCSasser@adem.alabama.gov>
Sent: 11/21/2022 5:37:53 PM
To: "David A. Ludder" <davidaludder@enviro-lawyer.com>;
CC: "Records Review" <records@adem.alabama.gov>;
Attachments: RE_ Human Health Criteria approvals (3rd email - Nebraska).eml

David, this is No 3 of 3.

Chris Sasser
Associate General Counsel
Alabama Department of Environmental Management
P. O. Box 301463
Montgomery, Alabama 36130-1463
Telephone 334-271-7857
adem.alabama.gov

pcsasser@adem.alabama.gov



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Subject: Records Request - New or Revised Water Quality Criteria for Toxics
From: "Sasser, Chris" <PCSasser@adem.alabama.gov>
Sent: 11/21/2022 5:36:08 PM
To: "David A. Ludder" <davidaludder@enviro-lawyer.com>;
CC: "Records Review" <records@adem.alabama.gov>;
Attachments: RE_ Human Health Criteria approvals & Criteria Search tool (State Director's Meeting follow-up).eml; RE_ Human Health Criteria approvals (2nd email - North Dakota).eml

David, this is No. 2 of 3.

Chris Sasser
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Attachments Omitted

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the above and foregoing Petition for Review of Agency Declaratory Ruling by placing a copy of same in the United States Mail, postage prepaid and addressed as follows:

Alabama Department of Environmental Management
% Lance R. LeFleur, Director
P.O. Box 301463
Montgomery, Alabama 36130-1463

Lance R. LeFleur, Director
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

Done this 21st day of April, 2023.

s/ David A. Ludder
David A. Ludder