CASE NO. 2060026

IN THE ALABAMA COURT OF CIVIL APPEALS

Alabama Department of Environmental Management,

Appellant,

v.

Legal Environmental Assistance Foundation,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY

CASE NO. CV-05-3042

BRIEF OF *AMICI CURIAE* BUSINESS COUNCIL OF ALABAMA AND ALABAMA COAL ASSOCIATION IN SUPPORT OF THE APPELLANT ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 28(j), Ala. R. App. P., *Amici Curiae* adopts the Statement Regarding Oral Argument of appellant, Alabama Department of Environmental Management.

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SUMMARY OF THE ARGUMENT

In its May 18, 2006 order, the circuit court held that ADEM's construction of the Alabama Environmental Management Act (AEMA) "would frustrate the purpose of [the 2003 amendments to the AEMA] which is to make Alabama law comparable to the Clean Water Act." (C. 102 at 11.) Business Council of Alabama (BCA) and Alabama Coal Association (ACA) do not dispute this characterization of the purpose of the 2003 amendments. However, the circuit court's conclusion that ADEM's interpretation would somehow "frustrate" that purpose is based on a misreading of the *McAbee* decision and a fundamental misunderstanding of the public participation provisions in the AEMA and the federal Clean Water Act (CWA).

Among other things, the 2003 amendments clarified that, to appeal a final penalty order issued by ADEM and obtain a hearing before the Alabama Environmental Management Commission, a person not directly subject to the order must both be "aggrieved" and have submitted timely comments on the proposed order. Contrary to the circuit court's opinion, this two-part statutory requirement is entirely

consistent the purpose of the 2003 amendments and maintains the AEMA’s comparability to federal law.

ARGUMENT

ADEM'S INTERPRETATION OF THE AEMA'S PUBLIC PARTICIPATION REQUIREMENTS IS CONSISTENT WITH LEGISLATIVE INTENT AND COMPARABLE TO FEDERAL LAW

The central issue in this appeal is straightforward—— whether a person who submitted comments to ADEM on a proposed penalty order, but who admittedly has not suffered any threatened or actual injury in fact, is entitled to appeal the final order to the Alabama Environmental Management Commission (Commission).[1]

The answer to this question involves the interpretation of amendments to the Alabama Environmental Management Act (AEMA), ALA. CODE § 22-22A-1 *et seq*., as they relate to the

[1] If the answer is "yes," it would represent a sea-change in the law of standing in Alabama. *See, e.g.*, *Caton v. City of Thorsby*, 855 So. 2d 1057 (Ala. 2003) (holding that former property owner lacked concrete interest in zoning decision and thus not an "aggrieved party" with standing to challenge decision); *Ex Parte Steadham*, 629 So. 2d 647, 648 (Ala. 1993) (stating that "aggrieved party" status necessary for standing must be based on showing of "adverse impact"); *Birmingham Racing Com'n v. Alabama Thoroughbred Ass'n*, 775 So. 2d 207 (Ala. Civ. App. 1999) (holding that association was not an "aggrieved party" with standing to challenge Racing Commission decision where association had no real or proprietary interest in decision); *State Health Planning & Dev. Agency v. AMI Brookwood Medical Center*, 564 So. 2d 54, 57-58 (Ala. Civ. App. 1989) (holding that medical center was "aggrieved" under Alabama Administrative Procedure Act where state health agency decision would result in specific economic injury to medical center), *rev'd on other grounds by*, 564 So. 2d 63 (Ala. 1990).

appeal of penalty orders issued by ADEM. As the circuit court correctly points out, the Alabama Legislature adopted these amendments in 2003 (Act No. 2003-297, hereinafter 2003 amendments) to address shortcomings identified by the Eleventh Circuit in *McAbee v. City of Fort Payne*, 318 F.3d 1248 (11th Cir. 2003), concerning the lack of public participation in ADEM's administrative enforcement procedures and comparability to the federal CWA, 33 U.S.C. § 1319. These amendments did two things: (1) they added a number of public participation requirements related to proposed ADEM penalty orders (hereinafter "pre-order" requirements), and (2) they established an additional two-part requirement for appeals of final penalty orders to the Commission by parties not directly subject to the order (hereinafter "post-order" requirements). With respect to the latter, the 2003 amendments clarified that, to appeal a final penalty order issued by ADEM and obtain a hearing before the Commission, a person not directly subject to the order must both 1) be "aggrieved" (i.e., have suffered an actual or threatened injury in fact) and 2) have submitted timely comments on the proposed order. ALA. CODE § 22-22A-

7(c).[2] Contrary to the circuit court's opinion and LEAF's assertions in the proceedings below, this two-part statutory requirement is entirely consistent with the *McAbee* decision, honors the legislature's intent, and fully maintains the comparability of the AEMA and the federal CWA. For the reasons given below, and for the reasons given by appellant ADEM and *amicus* Alabama Pulp and Paper Council, BCA and ACA respectfully maintain that the circuit court's order of May 18, 2006 should be reversed, and the Commission's order dismissing this case should be affirmed.

A. ADEM'S INTERPRETATION IS CONSISTENT WITH LEGISLATIVE INTENT

It is undisputed that the Alabama Legislature adopted the 2003 amendments to address shortcomings identified by the Eleventh Circuit concerning the lack of public participation in ADEM's administrative enforcement procedures and comparability to the federal CWA. In *McAbee*, the Eleventh Circuit held generally that to be "comparable" to the federal CWA, state law must contain

[2] LEAF does not contend that it is itself subject to the order. Therefore, throughout this brief our discussion is restricted to the rights of an "aggrieved" third-party to appeal an ADEM penalty order and obtain a hearing before the Commission.

penalty, public participation, and judicial review provisions that are "roughly comparable to [their] corresponding class of federal provisions." 318 F.3d at 1254.[3] In the case of then-existing Alabama law, the Eleventh Circuit held that the penalty provisions of the AEMA were comparable to the CWA, but that the public participation provisions were not. *Id.* at 1256.[4] The

[3] "Comparability" is important because, under the federal CWA, persons cannot be subject to duplicative enforcement actions under state law and federal law where the state action was conducted under "a State law comparable" to CWA § 309(g). *See* 33 U.S.C. § 1319(g)(6). For a general discussion of the importance of "comparability" between the AEMA and the federal CWA, *see* Thomas R. Head III & Jeffrey H. Wood, *No Comparison: Barring Citizen Suits in Dual Enforcement Actions*, 18 NATURAL RESOURCES & ENVIRONMENT 57 (Spring 2004). The federal Clean Air Act has an analogous bar to duplicative enforcement actions. *See* 42 U.S.C. § 7604(b).

[4] Given its holding on the public participation provisions, the Court did not have reason to address whether the provisions of Alabama law governing judicial review of ADEM penalty orders were "comparable" to the federal CWA judicial review provisions. It should be noted, however, that federal law, like Alabama law, requires a person to demonstrate "injury in fact" in order to challenge an agency's action in court. *See Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1252 (11th Cir. 2003). Indeed, "injury in fact" is a constitutional requirement for standing that cannot be changed even by Congressional action. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Moreover, while the Eleventh Circuit did not address the comparability of the AEMA and federal CWA judicial review provisions, the Tenth Circuit Court of Appeals, expressly relying on *McAbee*, found an analogous Oklahoma judicial

Eleventh Circuit based its holding on the following observations about the public participation provisions of the AEMA (as they existed prior to the amendments in 2003):

> Only the alleged polluter is allowed to participate in penalty proceedings before issuance of a final order. The public may not intervene in pre-order proceedings and may not submit comments, present evidence, or request a hearing on a proposed assessment and order. Once an order is final, only the violator and other persons "aggrieved" by the administrative action have the right to request a hearing to contest the order. Providing public notice only *after* enforcement decisions is problematic, but we are particularly troubled that the AEMA gives even "aggrieved" parties only fifteen days after the publication of newspaper notice to request a hearing to contest a penalty assessment. As submitted in oral argument, the fifteen-day deadline makes "proper requests for a hearing," *id.* at § 22-22A-7(c), nearly impracticable.
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> By comparison, the federal provisions allow members of the general public, even those who have not suffered a threatened or actual injury in fact, to participate in the enforcement process. Additionally, we agree with McAbee's contention that a right to pre-order participation is markedly different from the right to post-decision participation. In pre-order proceedings, an agency has not hardened its position, and interested persons are not subject to the same technical pleading requirements or burdens of proof that are imposed once the state has issued an order. *See* Ala. Admin. Code r. 335-2-1-.21(4).

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review provision to be comparable to the federal CWA judicial review provisions. *See Paper, Allied-Industrial v. Continental*, 428 F.3d 1285, 1295 (10th Cir. 2005).

McAbee, 318 F.3d at 1257 (emphasis added) (internal citations omitted).[5]

Thus, the Eleventh Circuit's clear concern was that, under then-existing Alabama Law, members of the general public had no opportunity to participate in the enforcement process leading up to a final order. The Alabama Legislature addressed this concern in 2003. Specifically, in reaction to the *McAbee* decision, the Alabama Legislature amended the AEMA to remedy these shortcomings and to allow members of the general public to participate in pre-order proceedings, regardless of their "aggrieved" status. Specifically, in the case of proposed orders issued by ADEM that assess a civil penalty, the amendments:

1) Require ADEM to issue public notice of the proposed order in a local newspaper and on ADEM's website;

2) Provide a thirty (30) day comment period during which any person may submit written comments to ADEM on the proposed order;

3) Provide a thirty (30) day opportunity for any person to request a hearing before ADEM on the proposed order;

[5] By citing to Ala. Admin. Code r. 335-2-1-.21(4) in its discussion in the *McAbee* case, the Eleventh Circuit implicitly approved of the requirement under Alabama law (including ADEM's regulations) that a person must be aggrieved to challenge an order of the Department once it is final.

4) Require ADEM to give written notice to all persons who submitted comments of the time, date, and location of any hearing held at least twenty (20) days prior to the hearing;

5) Provide the opportunity for any person who submitted comments to be heard at the hearing and to submit information to ADEM at the hearing; and

6) Require ADEM to accept written comments from any person (whether they commented previously or not) that are received on or before the date of the hearing.

ALA. CODE § 22-22A-5(18)a. Importantly, under the AEMA as amended in 2003, there is no requirement that a person be "aggrieved" in order to participate in this part of the administrative enforcement process—this "pre-order" part of the process is open to any person. In other words, the Alabama Legislature gave McAbee exactly what she asked for—"the right to pre-order participation" for "members of the general public." 318 F.3d at 1257. Indeed, LEAF has (at least partially) availed itself of this right with respect to the order underlying this appeal.[6]

[6] Although LEAF submitted written comments on the proposed order, it apparently did not even bother to request a hearing on the proposed order before the Department. One of the primary achievements of the 2003 amendments was to give the general public, including persons like LEAF who are not aggrieved and have no stake in the matter, an opportunity to request such a hearing.

B. ADEM'S INTERPRETATION MAINTAINS THE AEMA'S COMPARABILITY WITH FEDERAL LAW

The 2003 amendments insure that Alabama law is "comparable" to federal law, even though a person must be aggrieved to subsequently obtain a "post-order" appeal before the Commission. The 2003 amendments to the AEMA added public participation provisions to the statute that are comparable to corresponding federal provisions in the CWA. *Compare, e.g.*, ALA. CODE § 22-22A-5(18)a (requiring ADEM to issue public notice before issuing a civil penalty order, to provide opportunity for public comment, to allow commenters to request a hearing before the agency, and to allow commenters to present evidence at any hearing held), *with* 33 U.S.C. § 1319(g)(4) (requiring EPA to issue public notice before issuing a civil penalty order, to provide opportunity for public comment, to allow commenters to request a hearing before the agency, and to allow commenters to present evidence at any hearing held). These provisions added to the AEMA in 2003 are more than sufficient to meet the "roughly comparable" standard used by the Eleventh Circuit. *See McAbee*, 318 F.3d at 1256 ("Accordingly, we hold that for state law to be 'comparable,' each class of state-law provisions must be

roughly comparable to the corresponding class of federal provisions.").[7]

By holding otherwise, the lower court is confusing the right to participate in the administrative enforcement process prior to the agency's final decision (that is, pre-order) with the right to appeal after the agency has made a final decision (that is, post-order).[8] The right to appeal

[7] This "rough comparability" standard does not mean "identical." *See McAbee*, 318 F.3d at 1257 ("[W]e emphasize that the standard of rough comparability between classes of provisions is not stringent.") (emphasis added). *See also Allied-Industrial*, 428 F.3d at 1293 (noting "the Clean Water Act calls for something less than a rigorous comparability standard" in adopting the Eleventh Circuit's "rough comparability" approach).

[8] LEAF's arguments below suffer from the same confusion. (*See*, *e.g.*, C. 75 at 15)("Prior to enactment of [the 2003 amendments], any person who suffered a threatened or actual injury in fact had standing to challenge any order issued by ADEM. After enactment of [the 2003 amendments], ADEM claims that in order to have standing to contest a penalty order issued by ADEM, a person must have suffered a threatened or actual injury in fact *and* must have commented on the proposed penalty order. Thus, ADEM claims that [the 2003 amendments] made standing more burdensome with respect to orders imposing penalties. Clearly, that is not the intent of [the 2003 amendments].") (emphasis in original). The foregoing quote is limited to "post-order" standing requirements. LEAF conveniently fails to mention that the bulk of the 2003 amendments, while adding an additional standing requirement for "post-order" proceedings, provide numerous additional rights to the general public without regard to threatened or actual injury to participate in "pre-order" enforcement proceedings. The latter is what the *McAbee* case was all about and what the 2003 amendments

the Department's final decision to a separate oversight body (i.e., the Commission) is not a right that even exists under the federal CWA. The U.S. Environmental Protection Agency (EPA), which implements the federal CWA, is headed by an Administrator,[9] and decisions of the Administrator are appealed directly to federal court. 33 U.S.C. § 1319(g)(8).[10] The right to review by an intermediate oversight body provided under Alabama law is, therefore, an additional right, with no corresponding federal provision.[11] Thus, the fact that this "post-order" right can only be exercised by aggrieved persons who have submitted timely

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were intended to address with respect to comparability with the federal CWA. As discussed below, the right under Alabama law to a "post-order" hearing before the Commission is an additional right not even provided for in the federal CWA and has no effect whatsoever on a determination of comparability between Alabama law and the CWA.

[9] *See* 40 CFR § 1.23.

[10] And, as already explained, a party invoking the Clean Water Act's judicial review provision must establish standing to challenge the Administrator's decision. *See supra* fn. 4. The same is true of the Clean Air Act. *See id*.

[11] In fact, allowing persons, like LEAF, who are *not aggrieved* an *additional* opportunity to challenge an order duly issued by the Department would impermissibly expand the agency's jurisdiction beyond the limits established by the Legislature in the AEMA. *See Ex parte State Health Planning & Dev. Agency v. LithMedTec of Alabama, LLC, et al.*, 855 So. 2d 1098 (Ala. 2003).

comments on the proposed order or are the subject of the order does not make the AEMA any less "comparable" to the federal CWA. *See Allied-Industrial*, 428 F.3d at 1295. Accordingly, the Commission's order limiting the right to a hearing to "aggrieved" persons who also preserved their right to a hearing by submitting comments on the proposed order is entirely consistent with the *McAbee* decision and the administrative enforcement provisions of the CWA.

No one here disputes that the intent of the legislature in passing the 2003 amendments was to make the public participation provisions of the AEMA comparable to the federal CWA——and ADEM's interpretation is entirely consistent with this purpose. It is similarly clear, however, that the legislature did not intend to bestow upon anyone in the world with the wherewithal to get on ADEM's mailing list and who comments on a proposed order, the right to appeal and have a full hearing on the final order before the Commission. Doing so would not only go well beyond what the CWA requires, but would effectively bring the state administrative process to a halt. Allowing anyone, anywhere, who simply comments on proposed orders, but who is not otherwise aggrieved, to appeal to the

Commission would result in a substantial increase in the number of appeals of consent orders by groups or persons, like Petitioner, with no particular stake in the matter or the affected area.

CONCLUSION

LEAF's act of commenting on orders proposed by ADEM, without alleging some concrete interest at stake, does not give it standing to appeal ADEM's final orders and obtain a hearing before the Commission. For that kind of "post-order" process, Alabama law requires LEAF to be aggrieved, as a threshold matter, and to have submitted comments on the proposed order.

The 2003 amendments provide the general public, including organizations like LEAF, ample notice of, opportunity to comment on, and opportunity to request and participate in a hearing on, proposed penalty orders issued by ADEM. These rights to participate in ADEM enforcement proceedings are consistent with the legislative purpose of the 2003 amendments and the *McAbee* case, and are more than sufficient to meet the Eleventh Circuit's "rough comparability" standard. The limitations placed on standing to subsequently appeal final orders and obtain a

hearing before the Commission (an additional right not even provided for in the federal CWA) are also are consistent with the purpose of the 2003 amendments and the *McAbee* case, and do not affect the comparability between the AEMA and the CWA. Accordingly, *amici curiae* respectfully request this Court to reverse the circuit court's May 18, 2006 order and affirm the Commission's order dismissing the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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