

## Alternative Daily Cover/Landfill: Alabama Appellate Court Addresses Challenge to State Rules



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The Court of Civil Appeals of Alabama (“Court”) addressed in an October 11th opinion a challenge to certain Alabama Department Environmental Management (“ADEM”) rules applicable to solid waste landfills. See *Smith v. Lefleur*, 2019 WL5091863.

The challenged provisions provide landfill operators the ability to use alternative materials to cover solid waste. See ADEM Alternative-Cover Material Rules [(ACM Rules)] Rules 335-13-4-.15.-22, and -.23.

Alternative daily cover is often described as cover material other than earthen material placed on the surface of the active face of a municipal solid waste landfill at the end of each operating day. It is utilized to control vectors, fires, odors, blowing litter, and scavenging. Federal and various state regulations require landfill operators to use such earthen material unless other materials are allowed as alternatives.

Soil cover can use valuable air space. Further, it can generate the need to excavate and haul soil to the facility. Alternative daily covers are often advocated to be a more efficient and cost-effective means of cover.

Three individuals (collectively, “Smith”) challenged in Montgomery Circuit Court (“Circuit Court”) ADEM’s rules allowing the operators of the Stone’s Throw Landfill (“Stone’s Throw”) located in Tallapoosa County to use at least one material other than earth as alternative daily cover.

Smith’s Complaint included an argument that ADEM impermissibly adopted the previously referenced rules in violation of the Alabama Solid Waste and Recyclable Materials Management Act (“SWRMMA”). Smith argued that the SWRMMA only authorized the use of earth to cover solid waste.

The Circuit Court rejected a request that ADEM be enjoined from permitting the continued use of such materials and dismissed the Complaint.

The Court reviewed on appeal the history of solid waste regulation in the United States beginning with the Congressional enactment in 1965 of the Solid Waste Disposal Act (“SWDA”). The subsequent enactment by the Alabama Legislature of the Alabama Solid Waste Disposal Act and the ADEM regulations that were promulgated are also considered. A focus of the Court’s analysis was whether the federal regulations promulgated by the United States Environmental Protection Agency or the Alabama statutes allow material other than soil to be used to cover solid waste at a sanitary landfill.

The Court first addressed the issue of whether Smith had standing to challenge the ADEM rules. It held that Smith had shown a likelihood that, but for the ADEM rules pursuant to which the permits for the use

of the materials had been granted, the landfill would not have been permitted to use them in their daily operations. As a result, it concluded that they had demonstrated standing to challenge the ADEM rules.

The Court then determined whether the ADEM rules were valid. It noted that a trial court can declare an administrative rule invalid:

. . . if it finds that [the rule] violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without substantial compliance with the rule-making procedures provided for in this chapter.

Smith argued that the rules were invalid because they exceed the statutory authority granted by the SWRMMA and, by implication, its predecessor statute, the SWDA.

The Court undertook a detailed analysis of the applicable Alabama statutory and regulatory language to determine whether ADEM had the authority to allow the use of alternative daily cover. It concluded that the Alabama Legislature's amendment of the SWDA in 2008 to establish the SWRMMA maintained similar definitions of landfill and municipal solid waste landfill. This was deemed an indication that the legislative intent was that solid waste disposal in landfills continue to be covered by earth.

ADEM also argued that its interpretation should be given deference because otherwise landfill operations will be disrupted throughout the state. The possibility of having to revoke landfill permits allowing alternative-cover materials is cited.

The Court rejects the argument stating that an administrative agency cannot usurp legislative powers or contravene a statute. Further, it holds that the SWDA and SWRMMA do not contain language authorizing the use of alternative-cover materials and therefore the state agency exceeded its statutory authority in promulgating these rules. It reverses the trial court's entry of summary judgment for ADEM and issues a summary judgment in favor of Smith.

A copy of the opinion can be downloaded [here](#).