

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



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The Supreme Court of Alabama (“SCT”) addressed in a November 6th Opinion a challenge to certain Alabama Department of Environmental Management (“ADEM”) rules applicable to solid waste landfills. See *Ex Parte Lance R. Lefleur, in his official capacity as Director of the Alabama Department of Environment In re: Ronald C. Smith, et al., v. Lance R. LeFleur, in his official capacity as Director of the Alabama Department of Environmental Management*, 2020 WL 6536081.

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.

The Court of Civil Appeals of Alabama (“Appellate Court”) had in 2019 reversed the Montgomery Circuit Court (“Circuit Court”) and held ADEM did not have the authority to promulgate these rules. See *Smith v. Lefleur*, 2019 WL 5091863 (2019).

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 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”). They 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.

In reviewing the Circuit Court decision, the Appellate Court reviewed 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 Appellate

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.

After addressing various ADEM arguments, the Appellate Court holds that the Alabama Solid Waste Disposal Act ("SWDA") and the Alabama Solid Waste and Recyclable Materials Management Act ("SWRMMA") do not contain language authorizing the use of alternative-cover materials. As a result, the Appellate Court determined that ADEM exceeded its statutory authority in promulgating the rules.

The SCT granted ADEM a Petition for a Writ of Certiorari seeking review of the Appellate Court decision. In addressing the appeal, the SCT undertakes a review of the SWDA along with the federal Resource Conservation and Recovery Act including the related promulgated regulations.

ADEM argued that Smith had not established that they had standing to challenge the alternative-cover materials rules. The SCT, therefore, reviewed the determination of whether a party had standing in the Alabama courts, noting there must be:

1. an actual, concrete and particularized "injury in fact" (i.e., 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."

In determining whether Smith had standing, the SCT focuses primarily on whether they sufficiently alleged that an injury in fact was suffered.

Discussed by the SCT was evidence that had been presented by Smith regarding their proximity to the landfill and issues such as offensive odors and other alleged problems including an impact on the value of adjacent property. The ADEM Director had argued that standing was not demonstrated because there was not an indication of a causal link between the claimed injuries and the alternative-cover materials permitted at the nearby landfills for which Smith was claiming injury.

The SCT noted that the Smith did not challenge the operation of the landfills. Instead, they challenged the rules allowing the use of alternative-cover materials instead of earth or compacted-earth cover. As a result, it held that they had not shown a causal connection between the rules authorizing the use of alternative-cover materials and the alleged injury. Smith was deemed to have failed to establish that the use of the alternative-cover materials threatened to result in the generation of more frequent and more offensive odors and vectors, etc. It further noted that:

If earth and compacted-earth covers are not more effective than the approved alternative-cover materials in controlling odors and disease vectors, the respondents would continue to suffer the same negative impacts from the landfills even if ADEM no longer permitted the use of alternative-cover materials.

Therefore, it held that the Appellate Court erroneously held that for purposes of establishing standing, Smith was not required to present substantial evidence that alternative-cover materials were less effective than earth or compacted-earth in controlling odors and disease vectors.

The SCT ultimately held that Smith had not established that, but for the rules permitting the use of alternative-cover materials, they would be exposed to less frequent and less offensive odors and fewer disease vectors from the landfills in question.

The SCT upholds the trial court's granting ADEM's Motion for Summary Judgment based on an absence of standing.

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