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Court of Civil Appeals of Alabama.

Ronald C. SMITH, Latonya Gipson, and William T. Gipson
v.
Lance R. LEFLEUR, in his official capacity as Director of the Alabama Department of Environmental Management

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|
October 11, 2019

Appeal from Montgomery Circuit Court (CV-17-900021)

Opinion

MOORE, Judge.

***1** Ronald C. Smith, Latonya Gipson, and William T. Gipson ("the appellants") appeal from a summary judgment entered by the Montgomery Circuit Court ("the trial court") in favor of Lance R. LeFleur ("the director"), in his official capacity as the director of the Alabama Department of Environmental Management ("ADEM"). We reverse the summary judgment and remand the case to the trial court with instructions to enter a summary judgment for the appellants.

Procedural History

Since 2004, Ronald C. Smith has resided near the Stone's Throw **Landfill** located in Tallapoosa County. [1] During that time, ADEM has permitted the operators of the Stone's Throw **Landfill** to use at least one material other than earth to cover solid waste deposited in the **landfill**. Since 2005, Latonya Gipson has resided near the Arrowhead **Landfill** located in Perry County. William T. Gipson, Latonya's brother, has resided with her at the same location for the last 10 years. Since 2009, ADEM has permitted the operators of the Arrowhead **Landfill** to use several materials other than earth to cover solid waste deposited in the **landfill**.

On January 9, 2017, the appellants [2] filed a multicount complaint seeking, among other things, a judgment declaring that ADEM had impermissibly adopted Ala. Admin. Code (ADEM), Rules 335-13-4-.15, -.22, and -.23 ("the alternative-cover-materials rules"), allowing **landfill** operators to use alternative materials to cover solid waste in violation of the Solid Wastes and Recyclable Materials Management Act ("the SWRMMA"), Ala. Code 1975, § 22-27-1 et seq., which, they argued, authorizes the use of only earth to cover solid waste. The appellants further requested that the trial court enjoin ADEM from enforcing the alternative-cover-materials rules and from permitting the continued use of alternative-cover materials at the Stone's Throw **Landfill** and the Arrowhead **Landfill**. The trial court dismissed the complaint, but, on appeal, this court reversed the judgment insofar as it dismissed the claims against the director. See Keith v. LeFleur, 256 So. 3d 1206 (Ala. Civ. App. 2018). [3]

Following the issuance of this court's opinion in Keith, the trial court entered a judgment dismissing the first five counts of the complaint as moot, [4] leaving for adjudication only the claims for a declaratory judgment and for injunctive relief. The appellants and the director both moved for a summary judgment as to those claims. The director argued that the appellants lacked standing to contest the validity of the alternative-cover-materials rules and asserted that those rules had been validly promulgated by ADEM pursuant to its statutory authority. The appellants asserted that they had standing to contest the alternative-cover-materials rules, which, they argued, had been adopted without statutory authority. On December 18, 2018, the trial court entered separate orders denying the appellants' summary-judgment motion and granting the director's summary-judgment motion. The appellants filed their notice of appeal to this court on January 23, 2019. [5] This court conducted oral arguments in the case on August 14, 2019.

Regulatory Background

***2** In 1965, the United States Congress enacted the federal Solid Waste Disposal Act, formerly codified at 42 U.S.C.

§§ 3521-3259, "primarily to provide federal support for development of state solid waste management plans." Kim Diana Connolly, Small Town Trash: A Model Comprehensive Solid Waste Ordinance for Rural Areas of the United States, 53 Cath. U.L. Rev. 1, 9 (2003). In response to the federal incentive, in 1969, the Alabama Legislature enacted this state's Solid Wastes Disposal Act ("the SWDA"). See Ala. Acts 1969, Act No. 771. The SWDA regulated the disposal of solid wastes within the state. The SWDA defined "solid wastes" to include "[a]ll putrescible and non-putrescible discarded materials," including, but not limited to, "garbage," [6] demolition materials, and industrial waste. Act No. 771, § 1(c). The Act provided that

> "[g]arbage and rubbish containing garbage shall be disposed of by sanitary **landfill**, approved incineration, composting, or by other means now available or which may later become available as approved by the Health Department and under the supervision and control of a governmental, private, or other agency acting within the provisions of this Act."

Act No. 771, § 2(b).

The SWDA defined "**landfill**" as

> "[a] method of compaction and earth cover of solid wastes other than those containing garbage or other putrescible wastes including but not limited to tree limbs and stumps, demolition materials, incinerator residues, and like materials not constituting a health or nuisance hazard, where cover need not be applied on a per day used basis."

Act No. 771, § 1(i), (now codified at Ala. Code 1975, § 22-27-2(20)) (emphasis added). The SWDA defined "sanitary **landfill**" as

> "[a] controlled area of land upon which solid waste is deposited and is compacted and covered with compacted earth each day as deposited, with no on-site burning of wastes, and so located, contoured, and drained that it will not constitute a source of water pollution as determined by the Alabama Water Improvement Commission."

Act No. 771, § 1(h) (now codified at Ala. Code 1975, § 22-27-2(32)) (emphasis added).

In 1976, Congress completely restructured federal laws regulating solid-waste disposal through the passage of the Resource Conservation and Recovery Act ("RCRA") of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as 42 U.S.C. §§ 6901-6992k). Through the RCRA, Congress ordered the United States Environmental Protection Agency ("the EPA") to establish regulations "containing criteria for determining which facilities shall be classified as sanitary **landfills** and which shall be classified as open dumps ...." 42 U.S.C. § 6944(a). In 1979, the EPA acted on that legislative directive by promulgating regulations defining the minimum standards for sanitary **landfills**, 40 C.F.R. Part 257, which included regulations requiring "[p]eriodic application of cover material" described as "soil or other suitable material." 40 C.F.R. §§ 257.3-6(c)(4) and 257.3-8(e)(6) (emphasis added).

Although the EPA regulations recognized that material other than soil could be used to cover solid waste at a sanitary **landfill**, the first comprehensive rules and regulations adopted pursuant to the SWDA in 1981 established that solid waste disposed into any "sanitary **landfill**" operated within the state "shall be covered" by "[a] minimum of six inches of compacted earth" "at the conclusion of each day's operation." Ala. Admin. Code, Rule 335-13-4-.22(1)(a)1 (1981). The regulations did not, at that time, authorize the use of any alternative materials to cover solid waste.

***3** In 1982, the Alabama Legislature created ADEM, Ala. Acts 1982, Act No. 32-612, § 4(i), and appointed ADEM as the state agency responsible for regulating solid-waste disposal. See Act No. 32-612, § 3(n); see also Ala. Code 1975, § 2-27-9 (enacted in 2008). On July 21, 1988, ADEM revised Rule 335-13-4-.22(1) to provide:

> "(a) All waste [deposited in a sanitary **landfill**] shall be covered as follows:
>
> > "1. A minimum of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by [ADEM] shall be added at the conclusion of each day's operation

> or as otherwise approved by [ADEM]."

Rule 335-13-4-.22(1)(a)1. (1988) (emphasis added). That 1988 amendment introduced into Alabama the option for sanitary-**landfill** operators to cover solid waste by materials other than earth.

In 1991, the EPA promulgated regulations regarding the disposal of household waste in "municipal solid waste **landfills**," see 40 C.F.R. Part 258, pursuant to Subtitle D of the RCRA. See 42 U.S.C. §§ 6941-6949a. In response, on November 2, 1993, ADEM adopted new regulations incorporating the federal definition of "municipal solid waste **landfill**," see 40 C.F.R. § 258.2, as

> "a discrete area of land or an excavation that receives household waste and that is not a land application unit, surface impoundment, injection well, or waste pile, as those terms are defined in this Rule. A MSWLF [municipal solid waste **landfill**] unit also may receive other types of solid wastes, such as commercial solid waste, nonhazardous sludge, conditionally exempt small quantity generator waste, industrial solid waste, construction/demolition waste and/or rubbish. Such a **landfill** may be publicly or privately owned. A MSWLF unit may be a new MSWLF unit, an existing MSWLF unit or a lateral expansion...."

Ala. Admin. Code (ADEM), Rule 335-13-1-.03 (1993) (a substantially similar definition is currently found in Ala. Admin. Code (ADEM), Rule 335-13-1-.03(88)). ADEM further clarified in the definition that "[a] municipal solid waste **landfill** is a sanitary **landfill**." Id.

In 1993, ADEM also amended Rule 335-13-4-.22(1) to provide:

> "(a) All waste [deposited at a municipal solid waste **landfill**] shall be covered as follows:
>
> > "1. A minimum of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by [ADEM] shall be added at the conclusion of each day's operation or as otherwise approved by [ADEM] to control disease vectors, fires, odors, blowing litter, and scavenging." [7]

Ala. Admin. Code (ADEM), Rule 335-13-4-.22(1)(a)1. (1993) (emphasis added). ADEM furthermore introduced the terms "construction/demolition inert **landfill**" and "industrial **landfill**," see Ala. Admin. Code (ADEM), Rule 335-13-1-.03 (1993) (the definitions for these terms can now be found at Rule 335-13-1-.03(28) and (67)), and recognized that those types of **landfills** could use alternative-cover materials by amending Rule 335-13-4-.23(1) to provide:

> "(a) All waste [deposited at a construction/demolition-inert **landfill** or industrial **landfill**] shall be covered as follows:
>
> ***4** "1. A minimum of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by [ADEM] shall be added at the conclusion of each day's operation or as otherwise approved by [ADEM] to control disease vectors, fires, odors, blowing litter, and scavenging."

Rule 335-13-4-.23(1)(a)1. (1993) (emphasis added). Finally, ADEM amended Rule 335-13-4-.15 to provide that

> "[d]aily, weekly, or some other periodic cover shall be required at all **landfill** units, as determined by [ADEM].
>
> "(1) The suitability and volume of any soils for daily, intermediate and final cover requirements shall be determined by soil borings and analysis.
>
> "(2) Any proposal to use alternate cover systems shall be submitted to and approved by [ADEM] prior to implementation."

Rule 335-13-4-.15 (emphasis added). Those 1993 amendments established the alternative-materials-cover rules challenged by the appellants in this litigation. The alternative-materials-cover rules have remained in effect since 1993 without substantive change. [8]

In 2005, the Alabama Legislature adopted ADEM's definition of "municipal solid waste **landfill**," providing that "[a] municipal solid waste **landfill** is a sanitary **landfill**." Ala. Acts 2005, Act No. 2005-302, § 1 (now codified at Ala. Code 1975, § 22-27-2(23)). The Alabama Legislature has not enacted any statute specifically addressing construction/demolition-inert **landfills** or industrial **landfills** but, instead, has maintained the general definition of "**landfill**," since the inception of the SWDA, as a method of disposing of construction/demolition materials and industrial waste by "compaction and earth cover." Ala. Code 1975, § 22-27-2(20).

As noted earlier, in 2008 the Alabama Legislature renamed the SWDA, and it is now known as the SWRMMA. See Ala. Acts 2008, Act No. 2008-151, § 1. The SWRMMA, as currently drafted, maintains much of the regulatory framework established in the SWDA, including maintaining that ADEM shall have regulatory control over solid waste disposal. See Ala. Code 1975, § 22-27-7. The SWRMMA continues to define "**landfill**," see Ala. Code 1975, § 22-27-2(20), and "sanitary **landfill**," § 22-27-2(32), as did the SWDA as methods of disposal of solid waste by "compaction and earth cover" or by "compact[ing] and cover[ing] with compacted earth." The SWRMMA also continues to define "municipal solid waste **landfill**," as did the 2005 amendment to the SWDA, to provide that "[a] municipal solid waste **landfill** is a sanitary **landfill**." § 22-27-2(23). As under the SWDA, the SWRMMA provides that "garbage and rubbish containing garbage shall be disposed of by sanitary **landfill**, approved incineration, composting, or by other means now available or which may later become available as approved by [ADEM]." Ala. Code 1975, § 22-27-3(d).

In adopting the SWRMMA, the legislature added Ala. Code 1975, § 22-27-10(a), which provides, in pertinent part:

> "Solid waste shall be collected, transported, disposed, managed, or any combination thereof, according to the requirements of this article, and the rules of [ADEM] ..., as authorized by this article, and if disposed of in this state, shall be disposed in a permitted **landfill** or permitted incineration, or reduced in volume through composting, materials recovery, or other existing or future means approved by and according to the requirements of [ADEM], under authorities granted by this article."

***5** Finally, the 2008 amendments also added Ala. Code 1975, § 22-27-17, which provides, in pertinent part:

> "(a) Beginning on October 1, 2008, the following disposal fees are levied upon generators of solid waste who dispose of solid waste at solid waste management facilities permitted by [ADEM] subject to this chapter, which shall be collected in accordance with subsection (b):
>
> "....
>
> "(4) Regulated solid waste that may be approved by [ADEM] as alternate cover materials in **landfills** shall be assessed the disposal fees applicable in subdivisions (1) and (2)."

(Emphasis added.)

Issues

The appellants request that this court reverse the judgment of the trial court insofar as it granted the director's summary-judgment motion and denied the motion for a summary judgment filed by the appellants. See Mountain Lakes Dist., North Alabama Conference, United Methodist Church, Inc. v. Oak Grove Methodist Church, 126 So. 3d 172, 180 (Ala. Civ. App. 2013) ("Where cross-motions for a summary judgment are filed in the trial court, the party whose motion was not granted is entitled to have that motion reviewed on appeal from the grant of the opponent's motion."). As framed by the parties, the issues before this court are: (1) whether the appellants have standing to contest the alternative-cover-materials rules and (2) whether ADEM exceeded its statutory authority in adopting the alternative-cover-materials rules.

Standard of Review

"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review

as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952–53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797–98 (Ala. 1989); Ala. Code 1975, § 12–21–12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038–39 (Ala. 2004).

Discussion

I. Standing

In Keith, supra, this court explained:

" 'A party establishes standing to bring a ... challenge ... when it demonstrates the existence of (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." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). A party must also demonstrate that "he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth [v. Seldin], 422 U.S. [490,] 518, 95 S.Ct. 2197, 45 L.Ed.2d 343 [(1975)].'

***6** "Alabama Alcoholic Beverage Control Bd. v. Henri–Duval Winery, L.L.C., 890 So. 2d 70, 74 (Ala. 2003). See also Ex parte Alabama Educ. Television Comm'n, 151 So. 3d 283, 287 (Ala. 2013)."

256 So. 3d at 1210-11. Section 41-22-10, Ala. Code 1975, a part of the Alabama Administrative Procedure Act, Ala. Code 1975, § 41-22-1 et seq., incorporates the requirement of standing by providing that

"[t]he validity or applicability of a rule may be determined in an action for a declaratory judgment or its enforcement stayed by injunctive relief in the circuit court of Montgomery County, unless otherwise specifically provided by statute, if the court finds that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff...."

(Emphasis added.)

In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the United States Supreme Court explained that a party asserting standing to contest environmental regulations bears the burden of proving each element of standing. In response to a motion for a summary judgment, the party asserting standing cannot rest on mere allegations, but must set forth specific facts in affidavits or other evidence proving each element of standing. 504 U.S. at 561.

To meet their burden, the appellants presented evidence in support of their summary-judgment motion indicating that the Stone's Throw **Landfill** and the Arrowhead **Landfill** have been permitted by ADEM to use, and have used, alternative-cover materials in their operations pursuant to the alternative-cover-materials rules adopted by ADEM.[9] The evidence presented by Smith in his affidavit indicates that he lives within 2,500 feet of the Stone's Throw **Landfill**; that he had observed tarps being used as alternative cover at that **landfill**; that he had observed vultures accessing solid waste through holes in those tarps; that the operation of that **landfill** has generated and exposed him on an almost daily basis to offensive odors that have negatively affected his use and enjoyment of his property; that the operation of the **landfill** has exposed him to vultures, feral dogs, and coyotes, among other pests, that have entered his property; and that the value of his property has declined as a result of the operation of that **landfill**.

The evidence presented by the Gipsons in their affidavits indicates, among other things, that they live within 120 feet

of the Arrowhead **Landfill**; that the operation of that **landfill** has generated and exposed them on an almost daily basis to offensive odors that have affected them physically and have negatively affected their use and enjoyment of their property; that the operation of the **landfill** has exposed them to buzzards and flies, among other pests, that have entered their property; and that the value of their property has declined as a result of the operation of that **landfill**.

***7** The director asserted in his summary-judgment motion that the appellants had not demonstrated standing because, he argued, they could not show a causal link between their claimed injuries and the alternative-cover materials permitted at the nearby **landfills** from which they were claiming injury. The United States Supreme Court has observed that "there must be a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.' " Lujan, 504 U.S. at 561 (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

The appellants presented evidence indicating that their rights to the use and enjoyment of their properties had been adversely affected by the operation of the **landfills** near their homes and that those **landfills** have been authorized to use, and have used, alternative-cover materials in lieu of earth cover or compacted earth. The director argues that the appellants did not prove specifically that they suffered increased adverse environmental impacts due to the use of alternative-cover materials in lieu of earth cover or compacted earth. We conclude that this argument is misplaced. In order to have standing to contest the alternative-cover-materials rules, the appellants did not have to prove that the alternative-cover materials were not as effective as earth cover or compacted earth at controlling odors, disease vectors, and other harmful environmental effects of solid-waste disposal.[10] They only had to present substantial evidence indicating that the use of alternative-cover materials was causing or threatening to cause injury to their private-property interests, which they did. Compare Student Pub. Interest Research Grp. of New Jersey, Inc. v. Tenneco Polymers, Inc., 602 F. Supp. 1394, 1397 (D.N.J. 1985) (holding that the plaintiffs in that case had proved standing by showing that pollution of waters had adversely affected their interests and stating that the plaintiffs were not required to further prove the degree of pollution caused by particular discharges in order to maintain standing). We conclude that the appellants have presented sufficient evidence from which it can be reasonably inferred that the use of alternative-cover materials at the Arrowhead **Landfill** and the Stone's Throw **Landfill** "interferes with or impairs, or threatens to interfere with or impair," the appellants' legal rights or privileges. See § 41-22-10 and Medical Ass'n of State of Alabama v. Shoemake, 656 So. 2d 863, 865-68 (Ala. Civ. App. 1995) (discussing the "liberal construction" of § 41-22-10). Therefore, the appellants have established standing to challenge the alternative-cover-materials rules.

In Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 518 (2007), the United States Supreme Court stated, in pertinent part:

> "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. [Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7, (1992)]; see also Sugar Cane Growers Cooperative of Fla. v. Veneman, 289 F.3d 89, 94–95 (C.A.D.C. 2002) ('A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result')."

***8** In Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), the United States Supreme Court considered the standing of certain landowners who lived in close proximity to nuclear-power plants to contest an act limiting the liability of the owners of those plants in the event of a single nuclear accident. The Supreme Court concluded that, because the nuclear-power plants that were allegedly injuring the landowners would not have been in operation absent the act at issue, the injury suffered by the landowners would likely be redressed by the invalidation of the act. 438 U.S. at 77-78. Thus, it held that the landowners had standing to contest the act. Id.

The appellants in the present case have presented evidence indicating that the Stone's Throw **Landfill** and the Arrowhead **Landfill** each qualify as a municipal solid-waste **landfill**, an industrial **landfill**, and a construction/demolition-inert

landfill.[11] The appellants have further presented evidence indicating that ADEM approved the use of materials other than earth cover or compacted earth to cover solid waste at the landfills pursuant to the permitting process outlined in Rule 335–13–4–.15(2). It is undisputed that ADEM relies exclusively on Rule 335–13–4–.22(1)(a)1. and Rule 335–13–4–.23(1)(a)1. to permit the use of alternative-cover materials at municipal solid-waste landfills and industrial and construction/demolition-inert landfills, respectively. Thus, like in Duke Power Co., the appellants in this case have shown a likelihood that, but for the rules pursuant to which the permits for the use of alternative-cover materials had been granted, the Stone's Throw Landfill and the Arrowhead Landfill would not have been permitted to use alternative-cover materials in their daily operations. Accordingly, we conclude that the appellants have demonstrated standing to challenge ADEM's alternative-cover-materials rules, and we hold that the trial court erred in granting ADEM'S motion for a summary judgment and in denying the appellants' motion for a summary judgment on the ground that the appellants lacked standing.

II. Whether the Challenged Rules Are Valid

Section 41-22-10, Ala. Code 1975, provides 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 rule-making procedures provided for in this chapter." The appellants argue that the alternative-cover-materials rules are invalid because, they assert, the rules exceed the statutory authority granted by the SWRMMA and, by implication, its predecessor statute, the SWDA. An administrative rule out of harmony with statutory law is a nullity, Alabama Dep't of Revenue v. Jim Beam Brands Co., 11 So. 3d 858, 864 (Ala. Civ. App. 2008), because an administrative agency has no power to adopt a rule or regulation that subverts or enlarges upon statutory policy. Ex parte Jones Mfg. Co., 589 So. 2d 208, 210 (Ala. 1991). The appellants argue that the alternative-cover-materials rules impermissibly enlarge upon the statutory law that requires that solid waste be covered by earth.

As explained in our discussion of the regulatory background, ADEM adopted the alternative-cover-materials rules in 1993. At that time, the SWDA provided that garbage and rubbish containing garbage could be disposed of by, among other methods, "permitted landfills" or "by other means" "approved by [ADEM]." Ala. Code 1975, § 22-27-3(d). In his summary-judgment motion, the director argued that the reference to "other means" in the SWDA empowered ADEM to promulgate rules providing for coverage of garbage at landfills within the state by material other than earth. We disagree.

***9** The SWDA listed a variety of methods of disposing of garbage, such as by disposal in a "sanitary landfill," by "approved incineration," by "composting," "or by other means." Ala. Code 1975, § 22-27-3(d). In general, the term "or" is conjunctive and is used as a function word to indicate an alternative. Merriam Webster's Collegiate Dictionary 872 (11th ed. 2003). The word "other" is defined as "not the same" or "different." Merriam Webster's Collegiate Dictionary 878 (11th ed. 2003). "Means" is defined as "something useful or helpful to a desired end." Merriam Webster's Collegiate Dictionary 769 (11th ed. 2003). In context, the phrase "or by other means" as contained in the SWDA referred to methods of disposing of solid waste distinct and different from those specifically listed in the statute, such as disposal in a sanitary landfill.

In adopting the alternative-cover-materials rules, ADEM did not establish a new, distinct, and different means of disposing of solid waste. In his deposition, Eric Sanderson, the chief of the solid-waste branch of the land division of ADEM, explained that, in 1993, when ADEM adopted the definition of "municipal solid waste landfill" in rule 335-13-1-.03, ADEM did not attempt to recognize some new type of useful method for achieving the purpose of disposing of solid waste. Instead, he explained, ADEM merely intended to update its terminology to conform to EPA regulations.[12] As ADEM made explicit in its definition of "municipal solid waste landfill" in Rule 335-13-1-.03, which our legislature later adopted in 2005, see Ala. Acts 2005, Act No. 2005-302 (now codified at Ala. Code 1975, § 22-27-2(23)), "[a] municipal solid waste landfill is a sanitary landfill." Therefore, in adopting the new term "municipal solid waste landfill," ADEM did not approve a new means of disposing of solid waste. Instead, ADEM actually maintained the former method of disposing of solid waste by deposit into a sanitary landfill for compaction and coverage by compacted earth.

The 1993 amendments to ADEM's administrative code also introduced the new descriptive terms "industrial **landfill**" and "construction/demolition-inert **landfill**." However, the introduction of those terms, which we note have never been codified, did not establish any new type of **landfill** previously unrecognized in Alabama. The SWDA had already defined "**landfill**" as "[a] method of compaction and earth cover of solid wastes other than those containing garbage or other putrescible wastes ...." Ala. Code 1975, § 22-27-2(20). We further note that the ADEM regulations themselves have consistently defined the term "**landfill**" identically to the statute as "a method of compaction and earth cover of solid wastes other than those containing garbage or other putrescible wastes ...." Ala. Admin. Code (ADEM), Rule 335-13-1-.03(75). By that broad definition, "**landfill**" refers to a method of disposing of all nonputrescible solid waste, including industrial waste and construction/demolition materials, through compaction and earth cover. Indeed, when it amended Rule 335-13-4-.23(1)(a)1. in 1993, ADEM simply substituted the new terms "industrial **landfill**" and "construction/demolition-inert **landfill**" for the previous term "**landfill**." Those new terms can be described only as more specific descriptions of the general term "**landfill**." The definitions of "industrial **landfill**" and "construction/demolition-inert **landfill**" adopted by ADEM, see Ala. Admin. Code (ADEM), Rule 335-13-1-.03(67) & (28), do not in any way alter the meaning of the general term "**landfill**" as being a method of disposing of solid waste through compaction and earth cover.

***10** We conclude that, in adopting the alternative-cover-materials rules, ADEM did not approve "other means" of disposing of garbage and other solid waste. Instead, ADEM only recognized new terminology describing the same methods of disposal of solid waste by **landfill** and sanitary **landfill**. Under the alternative-cover-materials rules, solid waste would still be disposed of at **landfills**, i.e., the same means as before, only now the **landfill** operators could be permitted to use material other than earth cover or compacted earth to cover the solid waste. [13]

The SWDA granted ADEM the authority to "adopt such rules and regulations as may be needed to meet the requirements of this article." Ala. Code 1975, § 22-27-7. Thus, ADEM was autorized to make only such rules as were consistent with the requirements of the SWDA. Because the SWDA required that solid waste deposited at any **landfill** be covered by earth, ADEM had no authority to adopt rules permitting coverage of solid waste deposited at **landfills** by alternative materials.

When the legislature amended the SWDA in 2005 to adopt the definition of "municipal solid waste **landfill**," the legislature maintained that "[a] municipal solid waste **landfill** is a sanitary **landfill**." Ala. Acts 2005, Act No. 2005-302, § 1 (now codified at Ala. Code 1975, § 22-27-2(23)). The 2005 act carried forward the previous definition of "sanitary **landfill**" contained in the SWDA as a "controlled area of land upon which solid waste is deposited and is compacted and covered with compacted earth ...." Id. (now codified at Ala. Code 1975, § 22-27-2(32)). The 2005 amendments did not in any way alter the previous statutory scheme requiring solid waste deposited at **landfills** to be covered by earth.

When the legislature amended the SWDA in 2008 to establish the SWRRMA, the legislature maintained the same definitions of "**landfill**," see Ala. Code 1975, § 22-27-2(20), "sanitary **landfill**," see § 22-27-2(32) and "municipal solid waste **landfill**," see § 22-27-2(23), indicating the legislative intent that solid waste disposed of in **landfills** within the state shall continue to be covered by earth. The legislature also reenacted § 22-27(3)(d), the statute authorizing ADEM to approve of of disposing of garbage "by other means," and enacted § 22-27-10(a), the statute authorizing ADEM to approve of disposing of solid waste by "other existing or future means." In so doing, the legislature continued to recognize that ADEM could adopt rules permitting the disposal of solid waste in a manner other than by deposit into a **landfill**, a municipal solid-waste **landfill**, or a sanitary **landfill**, but the legislature did not authorize ADEM to alter the statutory definitions of those terms.

The director argues that § 22-27-17(a)(4), Ala. Code 1975, which was added to the SWRMMA in 2008, "specifically acknowledges that ADEM may approve the use of 'alternative' cover materials." Section 22-27-17(a)(4) provides:

> "(a) Beginning on October 1, 2008, the following disposal fees are levied upon generators of solid waste who dispose of solid waste at solid waste management facilities permitted by [ADEM] subject to this chapter, which shall be collected in accordance with subsection (b):

"....

> "(4) Regulated solid waste that may be approved by [ADEM] as alternate cover materials in **landfills** shall be assessed the disposal fees applicable in subdivisions (1) and (2)."

***11** Section 22-27-17(a)(4) assesses a fee for regulated solid waste "that may be approved by" ADEM "as alternative cover materials" and that is deposited into **landfills**. However, nowhere in the SWRRMA does the legislature authorize ADEM to approve the use of regulated solid waste or any other alternative materials to cover solid waste in **landfills**. To the extent that ADEM asserts that § 22-27-17(a)(4) implies that authority, we note that that statute was part of the same 2008 amendments that established the SWRRMA and reenacted the definitions of "**landfill**," "municipal solid waste **landfill**," and "sanitary **landfill**," see See Ala. Acts 2008, Act No. 2008-151, § 1, which maintain the requirement that solid waste be covered by earth. Accordingly, § 22-27-17(a)(4) cannot be construed to have impliedly repealed the requirement that solid waste be covered by earth, as contained in those definitions. See Fletcher v. Tuscaloosa Fed. Sav. & Loan Ass'n, 294 Ala. 173, 177, 314 So. 2d 51, 54 (1975) (recognizing that a new law impliedly repeals an old law when the new law amends the old law in substantial part so that the new law is inconsistent with the old law). We do not believe that the legislature intended to alter the consistent statutory scheme requiring that solid waste be covered by earth in such an indirect manner.

In Department of Public Safety v. Freeman Ready-Mix Co., 292 Ala. 380, 384, 295 So. 2d 242, 245 (1974), our supreme court considered the interplay between Ala. Code 1940 (Recomp. 1958), Tit. 36, § 89 ("the truck-weight statute"), a statute establishing the maximum weight for trucks traveling on Alabama's highways, and Ala. Code 1940 (Recomp. 1958), Tit. 51, § 697 ("the truck-taxing statute"), a statute establishing fees and taxes to be collected on trucks traveling on Alabama's highways. The truck-weight statute made it a crime for a truck using Alabama's highways to exceed a certain weight limit, but the truck-taxing statute imposed fees and taxes on trucks that arguably could exceed that limit. Freeman Ready-Mix Company and other companies using trucks to transport goods on Alabama's highways argued that the latter statute had impliedly repealed the former statute. Our supreme court rejected that argument, holding that the truck-taxing statute did not grant a license for trucks to exceed the weight limits established by the truck-weight statute. The truck-taxing statute imposed taxes based on the weight of the trucks, but it did not grant a license or privilege for trucks to exceed the weight limits established by the truck-weight statute. The supreme court noted that a state "may constitutionally tax that which it prohibits." 292 Ala. at 386, 295 So. 2d at 246. The court concluded that the two statutes were not in conflict even though the truck-taxing statute taxed trucks unlawfully exceeding the weight limits set forth in the truck-weight statute.

In this case, § 22-27-17(a)(4) imposes a fee on regulated solid waste approved by ADEM as alternative-cover materials when deposited in Alabama **landfills**. By instituting a fee-schedule that essentially taxes at least one form of alternative-cover materials approved by ADEM, the legislature did not thereby authorize ADEM to adopt rules broadly permitting the use of alternative-cover materials to cover solid waste in the **landfills** within the state. As in Freeman Ready-Mix Co., we conclude that § 22-27-17 was intended solely to generate revenue for ADEM and not to grant ADEM a license to permit the use of alternative-cover materials. Section 22-27-17(a)(4) does not make lawful the use of alternative-cover materials otherwise prohibited by § 22-27-2(20), (23) & (32).

ADEM last argues that its interpretation of the law should be given deference because, it says, it would disrupt the operation of the **landfills** at issue in this case, as well as other **landfills** throughout the state, to revoke the permits allowing the use of alternative-cover materials.

> "The correct rule is that an administrative interpretation of the governmental department for a number of years is entitled to favorable consideration by the courts; but this rule of construction is to be laid aside where it seems reasonably certain that the administrator's interpretation has been erroneous and that a different construction is required by the language of the statute."

***12** Boswell v. Abex Corp., 294 Ala. 334, 336, 317 So. 2d 317, 318 (1975). We are not convinced that ADEM

construed any particular provision of the SWDA to allow it to adopt the alternative-cover-materials rules. Instead, it appears rather conclusively that, in 1993, ADEM, without awaiting enabling legislation, simply adopted the relatively new EPA regulations allowing **landfills** to use materials other than earth to cover solid waste. ADEM effectively determined that Alabama should follow federal guidelines and enlarged upon the law regulating **landfills** to meet those guidelines without first receiving legislative authorization. However, "[a]n administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy." Ex parte Jones Mfg. Co., 589 So. 2d at 210 (citation omitted). To the extent that ADEM may have interpreted some provisions of the SWDA and the SWRMMA to authorize it to make rules allowing for alternative-cover materials, we hold that ADEM's interpretation is erroneous and that it is, in fact, inconsistent with the language in the SWDA and the SWRMMA requiring solid waste deposited at **landfills** to be covered by earth. [14]

Despite the language in the SWDA and the SWRMMA requiring that solid waste deposited at **landfills** be covered by earth, Rule 335-13-4-.15 specifically allows ADEM to permit **landfill** operators to use alternative-cover materials to cover solid waste. Rule 335-13-4-.22(1)(a)1. allows solid waste deposited at municipal solid-waste **landfills** to be covered either by "[a] minimum of six inches of compacted earth or other alternative cover material" approved by ADEM. Rule 335-13-4-.23(1)(a)1. allows solid waste deposited at industrial and construction/demolition-inert **landfills** to be covered either by "[a] minimum of six inches of compacted earth or other alternative cover material" approved by ADEM. Those rules assume the power of ADEM to designate certain materials as effective to manage the adverse environmental effects of solid waste and to permit the use of those materials as suitable substitutes for earth cover or compacted earth. We find that the SWDA and the SWRMMA do not contain any language authorizing the use of alternative-cover materials to cover solid waste and imbuing ADEM with the power to make rules regulating the use of such alternative-cover materials. Thus, we conclude that ADEM exceeded its statutory authority in promulgating the alternative-cover-materials rules.

ADEM was not authorized by the SWDA or the SWRMMA to amend Rule 335-13-4-.15, Rule 335-13-4-.22, or Rule 335-13-4-.23 to permit the use of alternative-cover materials. Accordingly, we conclude that the trial court erred in entering a summary judgment in favor of the director with regard to the appellants' challenge to those rules, and, thus, that the trial court should have entered a summary judgment in favor of the appellants.

Conclusion

We hold that the trial court erred in entering a summary judgment in favor of the director. We therefore reverse that summary judgment and remand the case to the trial court with instructions that it vacate the summary judgment that it entered in favor of the director, that it enter a summary judgment in favor of the appellants, and for it to take such other actions as are consistent with this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Thompson, P.J., and Donaldson, Edwards, and Hanson, JJ., concur.

All Citations

--- So.3d ----, 2019 WL 5091863

Footnotes

1 The Stone's Throw **Landfill** was previously known as the Tallassee Waste Disposal Center.

2 In addition to the appellants, Anthony Keith and Esther Calhoun were named as plaintiffs in the complaint. Keith and Calhoun have not appealed, so we do not refer to them or their claims further in this opinion.

3 The complaint originally named ADEM as the defendant, but the complaint was later amended to name the director as a codefendant. In Keith, supra, this court affirmed the judgment insofar as it dismissed ADEM as a defendant.

