

Black Warrior RIVERKEEPER®
712 37th Street South
Birmingham, AL 35222
Tel: (205) 458-0095
Fax: (205) 458-0094
edillard@blackwarriorriver.org
www.BlackWarriorRiver.org



July 30, 2018

Personnel Committee
Environmental Management Commission
Alabama Department of Environmental Management
P. O. Box 301463
Montgomery, AL 36130

Via electronic mail only to aemc@adem.alabama.gov

Re: Performance Evaluation of ADEM Director Lance LeFleur

Dear Committee:

Please consider these comments as part of your evaluation of the performance of Alabama Department of Environmental Management (“ADEM”) Director Lance LeFleur. Sworn testimony in the public corruption case of *U.S. v. Gilbert, et al.*, No. 2:17-cr-00419-AKK-TMP (N. D. Ala. 2018) has revealed bias and corruption at both the Environmental Management Commission (“EMC”) and ADEM.¹ Public trust in both institutions has been severely eroded over the past weeks. In order to repair that trust, there must be new leadership at ADEM. When an organization like ADEM stumbles, its director must take responsibility. Director LeFleur has failed to lead the Department in a manner that advances the mission of ADEM “to assure for all citizens of the State a safe, healthful and productive environment.” He must resign or be terminated.

Director’s Failure to Maintain Department’s *Independence and Integrity*

The trial of *U.S. v. Gilbert, et al* has revealed many disturbing things, but none more disturbing than the failures of the Director and ADEM to separate their interests from those whom they regulate. Instead of carefully weighing all the evidence and allowing the Department to make decisions that would protect the health and safety of North Birmingham residents, Director LeFleur’s testimony at trial shows how he failed not only those residents but his job. He apparently did not express opposition to EPA’s efforts to clean up toxic pollution at the 35th Avenue Superfund Site in North Birmingham until

¹ Because these comments are directed to Director LeFleur’s evaluation, this is not an appropriate forum to discuss EMC members who are also tainted by trial testimony. We remain deeply concerned about what the testimony has revealed about the operations of the EMC and ADEM. We will ask for the resignation of any involved EMC members separately.

lawyer Joel Gilbert and lobbyists David Roberson and Trey Glenn, among others, began to exert pressure on behalf of their clients Balch & Bingham and/or Drummond Co. When Governor Bentley and the EMC joined in, the Director succumbed to that pressure and began to publicly and actively oppose EPA's efforts. Even worse, he sent a letter to EPA in his capacity as Director opposing EPA's cleanup in North Birmingham. Although trial testimony indicates that Director LeFleur may not have known this, the letter he sent was drafted at least in part by Gilbert, whose client Drummond Company, had the most to lose if EPA expanded the cleanup and placed the 35th Ave. site on the National Priorities List. Gilbert apparently routed the draft letter through Governor Bentley's office, which then sent it to Director LeFleur to send.

Director LeFleur testified that it was not uncommon for lobbyists/consultants to draft letters for him to sign --- and that he sees nothing wrong with the practice. It is beyond wrong: the trial testimony in *U.S. v. Gilbert, et al* persuasively provides the "why." The Director unwittingly took a letter resisting EPA's efforts to clean up toxic neighborhoods in North Birmingham — written by a lawyer for a potentially responsible party — and slapped it on ADEM letterhead over his signature before sending it to EPA as ADEM's considered position. And he apparently thinks that actions like this one are acceptable for an ADEM director.

We could not disagree more. The closeness of the relationship between the Director and those he is supposed to regulate should disqualify him from this important position of public service. He is ultimately answerable not to Drummond Co. or Balch & Bingham, but to the citizens of Alabama, for whom he is supposed to ensure a safe, healthful and productive environment. As a result of testimony at this trial, public confidence in ADEM and other institutions of government has plummeted. In light of this fact, the Director and the Commission must know it is time to make significant changes at ADEM.

Leak of Proposed Public Presentation(s)

Like many groups who appear frequently before the EMC, the undersigned were disappointed, but not entirely surprised, to learn that Director LeFleur and ADEM were part of a leak of a planned EMC public presentation. Ala. Admin. Code r. 335-2-3-.05(2) provides in pertinent part that "[i]n order for the *Commission* to be better prepared on the subjects to be discussed, members of the public wishing to make presentations at regularly scheduled Commission meetings must first submit to the Commission Office a written request along with a description of their presentation." (Emphasis added.)

Testimony and evidence offered in *U.S. v. Gilbert* indicates that Director LeFleur and his staff, along with others, communicated and/or discussed a proposed presentation submitted by Gasp, with parties outside the Department, and subsequently discussed the substance of that proposal. Gasp is an environmental nonprofit whose mission is to reduce air pollution through education and advocacy. Gasp made a timely request to the EMC to address the Commission about expanding the North Birmingham 35th Avenue Superfund site and placing it on EPA's National Priorities List. Gasp provided the EMC

with a copy of the presentation prior to the December 12, 2014 meeting so that they might be better informed, just as the regulation prescribes.

At least one member of the EMC, together with Director LeFleur and/or his staff abused the purpose and intent of this regulation. The presentation was communicated directly to affected industry and their lawyers. Without attribution or disclosure, these biased individuals were allowed to selectively **attack and rebut Gasp's presentation behind the scenes, before it was even delivered** to the public. It was wrong to give them advance copies of the presentation for these purposes. It was even worse to allow them what appears to be secret access to ADEM and the Commission to have their questions and rebuttal points aired as if they originated with the Department and the Commission. There is no suggestion that the EMC or ADEM solicited or neutrally evaluated all available information and reached a considered decision. **They apparently took talking points directly from the industry's lawyer and uncritically adopted them as their own.**

More than just violating traditional notions of fair play and transparency, these actions reflect poorly on the judgment of the Director and the Department. These actions reinforce the appearance of favoritism and bias on the part of the Director and ADEM. There is no indication that the Director or his staff reached out similarly to residents of North Birmingham or any other potentially affected parties. Members of the undersigned organizations have been presenting to the EMC for years. We have never been offered similar access, notice or advantage when a presentation or issue that affects our mission or interests is offered. Knowing that public presentations may be secretly shared and deconstructed in this way has had a chilling effect on the willingness of members of the public to bring their concerns to the EMC or ADEM. This is especially true when the public is not given a similar opportunity to rebut the positions of the industries that may be targeted by the presentations. We lack the absolute access of industry leaders like Drummond Vice-president David Roberson, who testified that "speaking in public [before the EMC] does not help" and you must go directly to the bosses instead. We similarly lack the access of a Steven McKinney, another Balch & Bingham attorney and defendant in the public corruption **case, with whom Director LeFleur frequently spoke about "non-confidential"** matters that might affect Balch clients. Public participation and involvement, which is the bedrock of U. S. environmental laws, has been dealt a stunning blow in Alabama.

We can all agree that there are important and sometimes contentious environmental issues confronting Alabama. We can also agree that these issues have different perspectives and constituencies; these views should *all* be aired publicly and debated robustly. *All* data should be reviewed and considered. However, we look to the Director and the Department to be the honest broker in these matters. We do not ask for a directed outcome, but we do ask for a fair shot and a level playing field. The testimony in *U.S. v. Gilbert* suggests that fair play or neutrality at ADEM is currently a myth. The Director and the Department have broken trust not just with us, but with the public that ADEM is supposed to serve. A group worried about health consequences in a poor, polluted area wanted to present information to state regulators about appropriate cleanup in the area --- and the presentation

was sent straight to a lawyer who represented one of the companies most likely responsible for the pollution. The Director knew this and did not blow the whistle. Secretly sharing information with favored parties, then allowing their point of view to masquerade as the EMC's or ADEM's is beyond wrong. This subterfuge occurred outside the public view and was only exposed by a criminal prosecution where Director LeFleur and others were subpoenaed to testify.

We also note that, in response to a document request made relative to a Petition to Improve Public Notification of Sanitary Sewer Overflows (ADEM Admin. Code r. 335-6-6-.12), it appears that ADEM staff reached out to some number of wastewater treatment operators via telephone about the Petition. But for the email replies of some of these operators, there would be no record of this request. During the December 2017 sewage public notification roundtable, it was clear that a select number of operators were asked to participate, and there was a preconceived plan to lobby against the Petition to maintain the notification status quo. Director LeFleur appeared to be more interested in shutting down the discussion over what kind of public notification was desirable and practicable, rather than be the neutral convener of the parties for a constructive discussion. There is no record of how the Petition was presented to these operators or how they were chosen; there was little disclosed about what information they may have received. If this contact was in the regular course of ADEM's operations, why wasn't it done via email and why did only select operators appear to be notified?

While there could be an innocent explanation, the bias made public in *U.S. v. Gilbert* calls into question both the context and propriety of these contacts. We will be updating this document request because it appears, due to testimony in *U.S. v. Gilbert*, that documents responsive to an Open Records request submitted by *The Birmingham News* were wrongfully withheld by the Alabama Attorney General's Office. Because some of the same personnel are involved, we want to make sure that all documents responsive to any Open Records requests by the undersigned were actually turned over.

We believe all of these actions should be condemned and carefully considered in evaluating the Director's job performance, as he leads ADEM. Regardless of whether Director LeFleur's tenure at ADEM ends, we ask the EMC to authorize a neutral, independent investigator to determine whether the actions revealed by *U.S. v. Gilbert* are an isolated event or represent routine practice at the EMC and ADEM. We ask the EMC to share the method and the results of this investigation with the public in order to begin the process of restoring the public's trust. Finally, we ask the EMC to implement any procedures as necessary that will ensure that this kind of dishonesty and favoritism ends.

Director's Failure to Promulgate Required Policies

Federal regulation prohibits a recipient of financial assistance from the U.S. Environmental Protection Agency ("EPA") from using criteria or methods of administering its programs or activities that subject individuals to discrimination because of their race or color, among other things. 42 U.S.C. § 2000; 40 C.F.R. § 7.35(b). Each recipient of the EPA's financial assistance (including ADEM) is

required to adopt grievance procedures to assure the prompt and fair resolution of complaints that allege a violation of that regulation. 42 U.S.C. § 2000; 40 C.F.R. § 7.90(a). To comply with the requirement that ADEM adopt grievance procedures, Director LeFleur, together with a least one of his predecessors, developed and adopted a document entitled "Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints" on or about October 18, 2004, and another document entitled "ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process" on or about April 12, 2016.

Even though these documents are "rules," as defined in Ala. Code § 41-22-3(9), they were adopted without substantial compliance with the notice and comment requirements of the Alabama Administrative Procedure Act, Ala. Code § 41-22-1 *et seq.*, and the notice and hearing requirements of the Alabama Environmental Management Act, Ala. Code § 22-22A-1 *et seq.* In 2017 when these rules were challenged as invalid, the Director chose to defend the challenge on lack of standing. He **apparently considered no alternate strategy or "Plan B" to protect the Department** in the likely event his defense was unsuccessful. The Alabama Civil Court of Appeals ruled against the Department on January 18, 2018, holding that affected members of the public had standing to challenge the rules.

While the wisdom of fighting the challenge is debatable, the **Department's** failure to prepare for the loss of that challenge is not. Even though the Court ruled in January on the standing issue, the Department waited until June 5 to withdraw the challenged policy, which effectively rescinds ADEM's discrimination grievance procedures. Currently there are no procedures and there has been no public indication of rulemaking to replace them. Millions of dollars in EPA grant funds hang in the balance.

On July 2, 2018, EPA's Office of Civil Rights opened an investigation into whether ADEM "is complying with the regulatory requirement" under federal civil rights laws, and "specifically whether ADEM has adopted grievance procedures that assure the prompt and fair resolution of complaints which allege violation of the regulation." ADEM receives the majority of its operating funds from the EPA; without a properly developed and implemented grievance procedure, that funding is now at risk.

Ensuring that ADEM complies with requirements of state and federal law and providing the public with valid policies to combat discrimination should have been key priorities for Director LeFleur and the Department. Evidently they were not. We urge the EMC to work with the ADEM Director to ensure that this issue is quickly and decisively addressed through valid rulemaking.

Hand in hand with valid rulemaking, the EMC and the Director must ensure that ADEM obtains any necessary legislative authority to comply with other EPA regulations. For example, 40 C.F.R. § 7.35(b) requires that EPA financial assistance recipients, including ADEM, "shall not use criteria or methods of administering its programs or activities which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex" However, the Alabama Legislature has not granted ADEM the authority to consider whether a permit will "have the effect of

subjecting individuals to discrimination because of their race, color, national origin, or sex.” See e.g., Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17; Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23; Alabama Solid Wastes and Recyclable Materials Management Act, Ala. Code §§ 22-27-1 to 22-27-18. Absent additional authority from the legislature, ADEM cannot develop, adopt, and implement policies and procedures to ensure compliance with 40 C.F.R. § 7.35(b). See *Holmes v. Alabama Department of Environmental Management*, EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, 1998 WL 75094(Ala. Env’tl. Mgmt. Comm’n Feb. 17, 1998). Absent compliance, ADEM again risks losing its top funding source.

Rather than passively wait for an EPA investigation or further litigation, a director must take proactive measures to ensure that the Department has all necessary legal authority to meet EPA’s funding requirements. Delay invites the substantial risk of litigation, another EPA investigation, or the catastrophic loss of the Department’s federal funding. Director LeFleur’s failure in this regard reflects poorly on his job performance and should be considered in the EMC’s evaluation.

Director’s Failure to Lobby Legislature for Adequate Funding

ADEM ranked dead last in per capita funding among state environmental agencies in a recent study published by the Environmental Council of States.² The survey found ADEM received an average of just \$10.85 per person, per year from 2013 to 2015. Mississippi, Tennessee, Georgia and Florida’s general funds all contribute millions to their state environmental agencies. In recent years, ADEM has received little from the state’s General Fund and in one year actually had to return money (earmarked for scrap tire cleanup) to the General Fund. This lack of funding has real world consequences for the state; for example, the Department lacked the necessary resources to respond to the Colonial Pipeline diesel spill in 2016 and had to turn over emergency response to EPA.³

Part of the Director’s job is to make the public case for the adequate funding of his agency. The Director must do more than give a bleak picture of the Department’s funding every year. As ADEM’s leader, he or she must be an advocate for its full funding by the Legislature. We urge the EMC to ensure that ADEM’s Director does more than lobby behind the scenes. Where the adequate funding of ADEM is concerned, he must be prepared to make the case for full funding to the public who elects these representatives.

Director’s Failure to Incentivize Enforcement as a Necessary and Meaningful Compliance and Funding Initiative

Director LeFleur often talks of the importance of collaboration, not enforcement, as a means to foster permit compliance among permittees. The problem is, a lack of aggressive inspections,

² <https://www.ecos.org/news-and-updates/green-report-on-status-of-environmental-agency-budgets/>

³ https://www.al.com/news/index.ssf/2017/04/alabama_environmental_agencys.html

investigations, and enforcement sends the wrong message to the Department's permittees. When permittees' interactions with ADEM after permit noncompliance involve warning letters, notices of violation, long compliance schedules, and nominal fines rather than meaningful enforcement actions, the message ADEM sends is clear. Occasional enforcement is a cost of doing business and is cheaper than investing in compliance. Deterrence of future violations lost, as is a financial opportunity for the state. If ADEM had a director that prioritized effective enforcement, the Department could levy millions of dollars of fines every year. Those fines go to the General Fund and could be a bargaining chip for the Director to demand adequate funding for ADEM's operations.

Conclusion

ADEM's mission is "to assure for all citizens of the State a safe, healthful and productive environment." Director LeFleur has failed to lead ADEM in a manner that advances that mission. He must resign or be terminated. When the EMC puts together the appropriate search committee for his replacement, we ask that at least one representative from the undersigned organizations be a part of that committee.

Thank you for consideration of our comments. We look forward to your response.

Sincerely,

Black Warrior Riverkeeper
Alabama Rivers Alliance
Cahaba River Society
Cahaba Riverkeeper
Choctawhatchee Riverkeeper
Environmental Defense Alliance
Friends of Hurricane Creek
Friends of the Locust Fork River
Gasp
Little River Waterkeeper
Tennessee Riverkeeper

cc: Lance LeFleur, Director
ADEM

Trey Glenn, Administrator
USEPA Region 4