



## AlaFile E-Notice

21-CV-2011-900033.00

Judge: HON. BURT SMITHART

To: NEAH LYN MITCHELL  
nmitchell@balch.com

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# NOTICE OF ELECTRONIC FILING

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IN THE CIRCUIT COURT OF CONECUH COUNTY, ALABAMA

TOWN OF REPTON, ALABAMA ET AL V. CONECUH COUNTY COMMISSION ET AL  
21-CV-2011-900033.00

The following matter was FILED on 1/31/2013 4:29:20 PM

**C002 TERRI CARTER MAYOR OF REPTON**

**C001 TOWN OF REPTON, ALABAMA**

BRIEF

[Filer: MITCHELL NEAH LYN]

Notice Date: 1/31/2013 4:29:20 PM

DAVID JACKSON  
CIRCUIT COURT CLERK  
CONECUH COUNTY, ALABAMA  
COURTHOUSE SQUARE  
EVERGREEN, AL 36401

251-578-2066  
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**STATE OF ALABAMA**

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CV-2011-900033.00

CIRCUIT COURT OF

CONECUH COUNTY, ALABAMA

DAVID JACKSON, CLERK

21-CONECUH

 District Court Circuit Court

CV20

TOWN OF REPTON, ALABAMA ET AL V.  
CONECUH COUNTY COMMISSION ET AL**CIVIL MOTION COVER SHEET**Name of Filing Party: C001 - TOWN OF REPTON, ALABAMA  
C002 - TERRI CARTER MAYOR OF REPTON

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

NEAH LYN MITCHELL

105 TALLAPOOSA STREET, STE. 200  
MONTGOMERY, AL 36104

Attorney Bar No.: MIT055

 Oral Arguments Requested**TYPE OF MOTION****Motions Requiring Fee**

- Default Judgment (\$50.00)  
Joinder in Other Party's Dispositive Motion (i.e. Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative Summary Judgment(\$50.00)  
Renewed Dispositive Motion(Summary Judgment, Judgment on the Pleadings, or other Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56(\$50.00)
- Motion to Intervene (\$297.00)
- Other \_\_\_\_\_  
pursuant to Rule \_\_\_\_\_ (\$50.00)

\*Motion fees are enumerated in §12-19-71(a). Fees pursuant to Local Act are not included. Please contact the Clerk of the Court regarding applicable local fees.

 Local Court Costs \$ \_\_\_\_\_**Motions Not Requiring Fee**

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other Brief  
pursuant to Rule Rule 56 (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees) 

Date:

1/31/2013 4:27:52 PM

Signature of Attorney or Party:

/s/ NEAH LYN MITCHELL

\*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.

\*\*Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



**IN THE CIRCUIT COURT OF CONECH COUNTY, ALABAMA**

<b>TOWN OF REPTON, ALABAMA and</b>	)	
<b>TERRI CARTER, MAYOR OF REPTON,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>CIVIL ACTION NO.:</b>
	)	
<b>CONECH COUNTY COMMISSION and</b>	)	<b>CV-2011-900033.00</b>
<b>CONECH WOODS LLC,</b>	)	
	)	
<b>Defendants.</b>	)	

**PLAINTIFFS' BRIEF IN SUPPORT OF SUMMARY JUDGEMENT**

Plaintiffs Town of Repton, Alabama (“Repton”) and Terri Carter (“Mayor Carter”) (together “Plaintiffs”) respectfully submit this brief in support of their motion for summary judgment. For the reasons set forth below, Plaintiffs are entitled to judgment in their favor as a matter of law against Defendants the Conecuh County Commission (“Commission”), Conecuh County, Conecuh Woods LLC (“Conecuh Woods”), and the Alabama-Tombigbee Regional Commission (“ATRC” or “Regional Commission”) (collectively referred to as “Defendants”) with respect to all claims asserted by Plaintiffs against Defendants.

Plaintiffs filed the current action against Defendants requesting declaratory and injunctive relief and a writ of certiorari on the grounds that the Commission improperly, arbitrarily and capriciously, and in violation of applicable law and procedure, approved Conecuh Woods’ Application for Approval of Proposed Conecuh Woods Solid Waste Management Facility, Conecuh County, Alabama (the “Application”) and entered into a “Municipal Solid Waste Landfill Development and Host Fee Agreement” (the “Host Fee Agreement”), and the ATRC improperly, arbitrarily, capriciously, and in violation of law, issued a Statement of Consistency for the proposed landfill. *See* Second Amended and Restated Complaint. Numerous

governmental entities have joined this action as Plaintiff-Intervenors, including the City of Orange Beach, Alabama; Town of Century, Florida; Escambia Soil and Water Conservation District; Escambia County, Florida; Escambia County, Alabama; City of Atmore, Alabama; City of Brewton, Alabama; and Town of Flomaton, Alabama. *See* Complaints of Plaintiff-Intervenors.

Based upon the undisputed facts and the applicable law, Repton and Mayor Carter ask the court (i) to declare the Commission's approval of the Application null and void because the Commission failed to evaluate the Application in accord with the Plan; (ii) to declare the Commission's approval of the Application null and void because it was made upon unlawful procedure; (iii) to declare the Host Fee Agreement null and void because it was entered into without proper authorization; (iv) to declare the Statement of Consistency purportedly issued by the ATRC null and void because it does not meet the statutory requirements; and (v) to declare the Statement of Consistency null and void because there was insufficient evidence before the ATRC to show that there was a need in the region for the proposed landfill and in fact the undisputed, reliable, probative, and substantial evidence showed that there was *not* a need in the region for the proposed landfill. A discussion of the facts and the law follows.

### **PROCESS FOR GOVERNMENT APPROVAL OF LANDFILLS**

The Alabama Solid Waste Disposal Act (The "Act"), *Ala. Code* §§ 22-27-1 to -94, governs the siting of landfills in Alabama. The Act was intended to serve the public and protect the public health:

The purpose of [the Act] is to protect the public health and the state's environmental quality and to serve the public by recognizing the responsibilities of units of local government for the orderly management of solid wastes generated within their jurisdictions, and to require that decisions about the management of solid wastes shall be based on comprehensive local, regional and state planning. The terms and obligations of this article shall be liberally construed to achieve remedies intended.

*Ala. Code* § 22-27-41. In furtherance of this purpose, the Act requires that local governments, regional planning commissions, and the state promulgate solid waste management plans/assessments. *Ala. Code* §§ 22-27-47(a), -46(a), -45. In addition, the Act provides independent and separate procedures and criteria for approval of landfills by local governments, regional planning commissions, and the state. *Ala. Code* § 22-27-48.

### **Local Government Approval**

First, a developer of a proposed landfill must submit an application to the local government in which the landfill is proposed to be located for approval. *Ala. Code* § 22-27-48. A local government must consider an application for a proposed landfill within its territory “in accord with its Solid Waste Management Plan” and the Act. *Id.* The Conecuh County Solid Waste Management Plan (the “Plan”)<sup>1</sup> requires that Commission (or if the landfill is proposed to be located within the limits of a city or town, the city or town) evaluate the application under three separate sets of criteria: (1) exclusionary criteria, which consist of state and federal siting requirements that have been incorporated into the Plan, each of which must be met for the proposed landfill to be approved, PX 20, § 12.2; (2) comparative criteria, each of which is assigned a score and the scores aggregated to determine whether the proposed landfill meets the minimum score for approval, *id.* at § 12.3; and (3) statutory criteria, which are focused on local interests such as need, relationship to planned or existing development, proximity to producers of wastes, costs and availability of public services needed by the proposed landfill, public health and safety, and social and economic impacts, *Ala. Code* § 22-27-48(a)(1)-(6) and PX 20, §

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<sup>1</sup> The Plan was adopted by the Commission on November 9, 2004 and approved by the Alabama Department of Environmental Management on March 17, 2005. PX 20.

11.1.1.<sup>2</sup> If a proposed landfill does not meet one or more of the exclusionary criteria, then it should not be approved. PX 20, § 12.2.

In addition, in considering a proposal for a landfill, the Commission must adhere to the statutory and plan requirements for public notice, comment and hearing. At a minimum, the Commission must hold a public hearing on the application for a proposed landfill and give notice of such hearing. *Ala. Code* § 22-27-48(a); PX 20, § 13.2. In addition, the Commission must make “[a]ll pertinent documents . . . available for inspection.” PX 20, § 13.2.

Upon consideration of the above requirements and criteria and after adequate public notice and hearing, the Commission may then vote to approve or to deny an application for the development of a proposed landfill in the Commission’s territory. PX 20, § 13.2 (“Any determination by the local governing body of the proposed issuance of or modification of a permit for a new or existing solid waste management site . . . shall be made in a public meeting only after public notice of such application or proposal and an opportunity for public comment is provided.”).

“The failure of the local governing body to act on the proposal within 90 days of receiving the application *shall constitute approval by said local governing body.*” *Ala. Code* § 22-27-48(a) (emphasis added). Therefore, if a local government fails to vote on an applicant’s request to locate a landfill within the local government’s territory within 90 days, the request is deemed approved. Without local government approval, the applicant cannot request a statement of consistency from the regional planning commission or a permit from the Alabama Department of Environmental Management (“ADEM”). *Id.* When a landfill application is approved, a local government typically enters into a host fee agreement with the applicant to memorialize the

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<sup>2</sup> Each of the exclusionary criteria, comparative criteria, and statutory considerations can be found attached at Appendix A.

guarantees, assurances, and commitments in the application. *See Beavers v. County of Walker*, 645 So. 2d 1365, 1369 (Ala. 1994).

### **Regional Planning Commission Approval**

The second independent step in Alabama's landfill permitting procedure is evaluation by the regional commission in whose jurisdiction the landfill is proposed to be located of whether the proposed landfill is consistent with the needs of the region. *Ala. Code* § 22-27-48(b). The touchstone is whether the region needs more waste disposal capacity:

[T]he commission shall evaluate the proposal using the provisions of the current regional solid waste management needs assessment. In particular, the regional commission shall evaluate the proposal as it relates to existing capacity within the region and the projected lifetime of such capacity. The evaluation shall also identify any proposed capacity which is in excess of expected regional needs.

*Id.*; *see also Riggs Dep.* 81:14-20. Without a Statement of Consistency, an applicant for a proposed landfill cannot request a permit from ADEM. *Id.* (“Following local review and approval of any proposal regarding services or activities described in the local solid waste management plan, the applicant shall obtain a statement of consistency from the regional planning and development commission.”); *Ala. Admin. Code* § 335-13-5-.02(1)(b) (ADEM) (applicants for proposed landfills shall submit, among other things, a Statement of Consistency, as provided in *Ala. Code* § 22-27-48).

### **ADEM Approval**

If the regional planning commission issues a statement of consistency, the applicant may then file an application for a landfill permit with ADEM. This application must include the local government approval and the statement of consistency; however, ADEM does not have the authority to disturb either. *Ala. Admin. Code* § 335-13-5-.02.

ADEM evaluates the permit based upon the various permit requirements listed in *Ala. Admin. Code* § 335-13-4. ADEM may provide notice and an opportunity for a public hearing on

a landfill permit if it receives a significant number of requests by interested persons. *Ala. Admin. Code* § 335-13-5-.03(1)(a), -.04(1). After its evaluation, ADEM will either deny or issue the permit. *Ala. Admin. Code* § 335-13-4(3)(a) and (b). The applicant, or any person aggrieved by ADEM's decision, may appeal the decision to the Alabama Environmental Commission. *Ala. Admin. Code* § 335-13-1-.07; 335-2-1-.03 and -.04.

## **NARRATIVE SUMMARY OF UNDISPUTED STATEMENT OF FACTS**

### **Conecuh Woods**

In 2006, Conecuh Woods was formed as an Alabama limited liability company. PX 25. Its sole purpose is to develop a proposed landfill in Conecuh County, Alabama. *Stone Dep.* 25:6-16 (testifying that Conecuh Woods is qualified to do business only in Alabama and does not own land or have business interests in any county other than Conecuh County). Shortly after its formation, Conecuh Woods entered into an option agreement with John Hancock Life Insurance to purchase 5,115 acres in Conecuh County, on which it proposes to develop a landfill. *Stone Dep.* 49:4-18.

Conecuh Woods does not have a commercial lender, but is instead funded by the capital contributions of members. *Stone Dep.* 20:3-6; 60:17-19. Conecuh Woods has ten or eleven members and no employees. *Stone Dep.* 12:22-13:2; 15:5-6. The members are corporations and individuals, some of whom live outside of Alabama. *Stone Dep.* 75:13-76:6; 86:17-19. The only publicly disclosed members are Donald W. Stone, Jr., who is the managing member of Conecuh Woods, and J.S. Investments I, LLC and JS Investments II, LLC, entities formed by Stone to



hold membership interests in Conecuh Woods.<sup>3</sup> *Stone Dep.* 20:13-14, 66:18-67:14. Conecuh Woods refuses to disclose the identities of any other members of Conecuh Woods.

Stone was the president of Timmons Corporation, a real estate investment and development company, which was sued by the United States Environmental Protection Agency for environmental law violations. *Stone Dep.* 183:2-21; *United States of America v. Timmons Corporation and Donald W. Stone, Sr.*, 1:03-CV-00951, United States District Court, Northern District of New York. The EPA eventually obtained a judgment against Timmons and Stone's father. *Stone Dep.* 183:22-184:9. Although he was president of the company when the environmental claims surfaced, Stone contends he was no longer involved with Timmons when the judgment was entered. *Stone Dep.* 183-2-185:19.

Conecuh Woods first expressed its interest in developing a landfill in Conecuh County in December 2006. PX 39. Stone spoke with the Commission regarding a possible landfill in January 2007 at its regular commission meeting. *Stone Dep.* 82:12-83:2; PX 40, ¶ 5. At this meeting, the Commission voted to deny the landfill, even before Conecuh Woods submitted an application. *See* PX 40, ¶ 5.

After this initial denial, on May 8, 2007, Conecuh Woods flew the Commissioners to St. Petersburg, Florida to tour a landfill. *Stone Dep.* 93:18-95:16. It is unclear why Conecuh Woods took the Commissioners to Florida rather than to the Timberlands Landfill, which is less than ten miles from the Conecuh Woods site and which Conecuh Woods' representatives have touted as an example of how much money the County could make if it approved the landfill. *See* PX 40, ¶ 5 ("In the year of 2005 from the operations of Timberlands Landfill, Escambia County realized

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<sup>3</sup> At the time of his deposition, Stone had a residence in Evergreen, where he lived up to a week a month. When he was not in Evergreen, he stayed with friends and family in New Hampshire, Florida, and New York. *Stone Dep.* 121:15-124:9.

some \$758 thousand dollars in that fiscal year in the form of host fees paid by Timberlands facility to Escambia County's Waste Management Authority. These are very real fees that the commission could utilize for the benefits of public citizens for public services.”).

### **Application**

After 2007, no further activity regarding the proposed landfill was conducted before the Commission until Conecuh Woods submitted its Application to the Commission on January 21, 2011. *See* PX 1; *Byrd Dep.* 97:14-99:15. The Application requested the Commission's approval of a proposed landfill to be located on 5,075 acres located one mile south of Repton, Alabama, in an unincorporated part of Conecuh County, less than 10 miles from the existing Timberlands Landfill in neighboring Escambia County.<sup>4</sup> PX 1 at pp. 1-2 to 1-6; *Stone Dep.* 79:4-7, 101:14-16. The proposed facility would serve “states east of the Mississippi River and Louisiana.” PX. 1 at p. 1-11.

At the Commission's next meeting, held on January 24, 2011, the Commission passed a motion setting a public hearing on the Application on March 10, 2011 at Reid State Technical College. *See* PX 49, ¶ 4. On January 27, 2011, the Commission issued notice of the public hearing on the Application. *See* PX 14.

### **March 10, 2011 Public Hearing**

At the March 2, 2011 regularly scheduled meeting of the Commission, the County Attorney alerted the Commission that the venue for the public hearing, Reid State, was inadequate for the expected attendance. *See* PX 51, ¶ 1. When informed that a thousand citizens may be in attendance, the president of Reid State had indicated that the venue for the hearing only had capacity for 425 people and there would not be any parking available on campus for

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<sup>4</sup> Conecuh County currently disposes of its waste at Timberlands, which has capacity for at least “several more years.” *Byrd Dep.* 30:14-31:19; PX 20, § 7.2.1.

attendees. *Id.*; *see also* Conecuh County 001955. Despite this warning, the Commission did not change the venue. PX 51, ¶ 1.

On Thursday, March 10, 2011, a public hearing was held at Reid State, starting at 9:00 a.m. *See* PX 14. Class was in session during the public hearing and parking was unavailable for non-students. *See* Conecuh County 001955. Numerous citizens were unable to attend due either to the inconvenient timing of the hearing (during work and school hours) or due to the unavailability of parking. *See* Plaintiff Town of Repton’s Responses to Conecuh Woods LLC’s First Interrogatories, ¶ 16. Of the 117 people who were able to speak at the meeting, only six who commented were in favor of the landfill, two of whom were Stone and his attorney. *See* PX 11.

Despite the limitations of the March 10, 2011 hearing, the Commission repeatedly denied additional requests by citizens to comment on the proposed landfill. *See* Plaintiff Town of Repton’s Responses to Conecuh Woods LLC’s First Interrogatories, ¶ 16. The Commission denied Conecuh County citizens the opportunity to comment on the proposed landfill at meetings held on January 24, 2011, February 14, 2011, and at a work session held on April 11, 2011, and refused to schedule additional hearings on the proposed landfill.<sup>5</sup> *Id.*

### **Engineering Evaluations and Work Session**

The Commission hired Engineering Service Associates (“ESA”) to evaluate and score the Application. *See* PX 48. A Conecuh County citizens group, Citizens for A Clean Southwest Alabama (“CCSA”), also hired an engineering firm, Southern Earth Sciences (“SES”), to conduct an independent evaluation of the Application. *See* PX 42, ¶ 1; PX 9. Both engineering firms conducted evaluations of the Application and issued reports detailing their findings and

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<sup>5</sup> *Ala. Code* § 22-27-48(a) requires “at a minimum” one public hearing on a proposed landfill, and that is all the Commission provided.

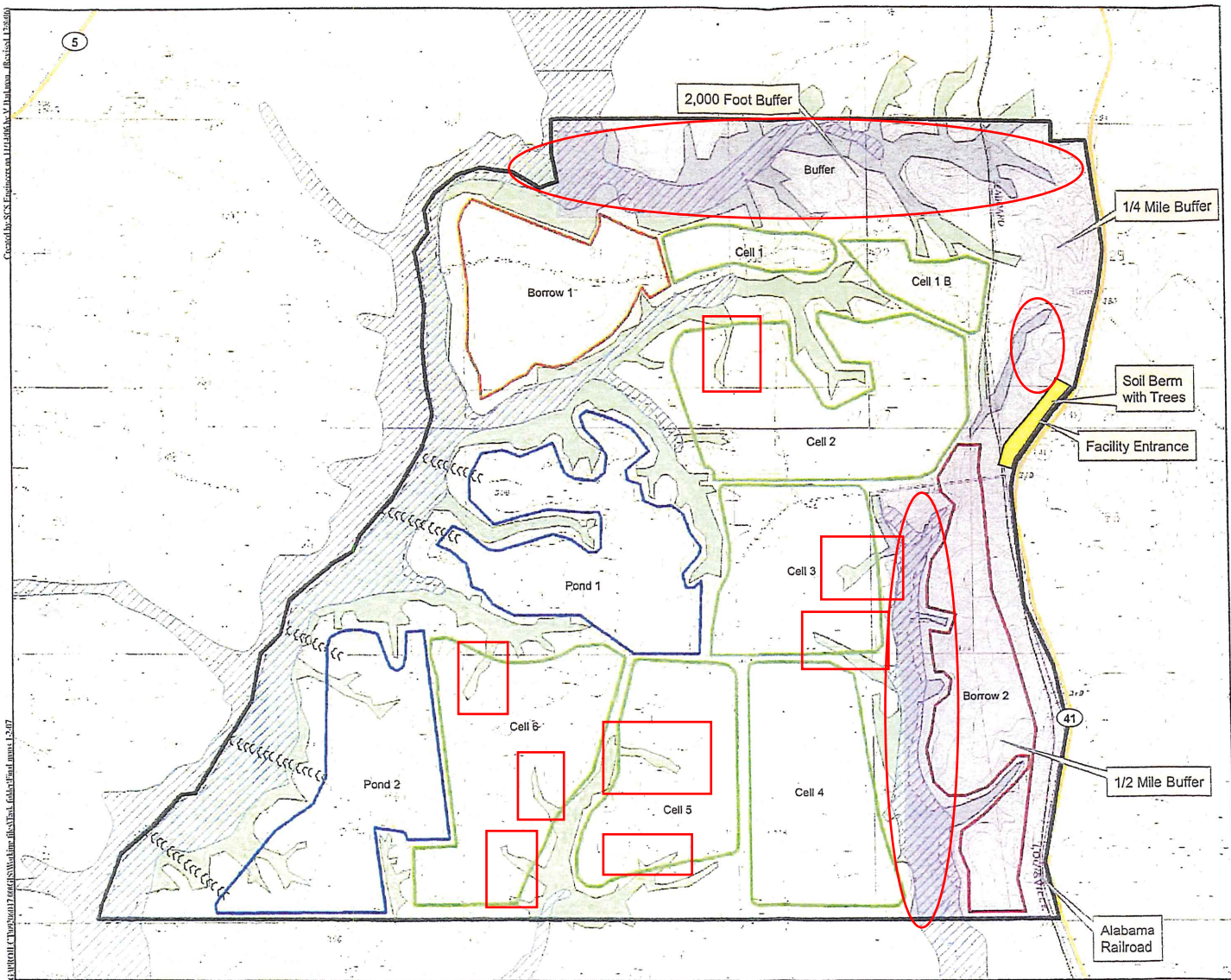
opinions on the Application's compliance, or lack thereof, with the exclusionary criteria, the comparative criteria, and the statutory criteria.

On February 28, 2011, ESA submitted its initial evaluation of the Application to the Commission. PX 8. In this evaluation, ESA found that "floodplains and wetlands are present but the conceptual design avoids these areas." PX 8, p. 7. It is unclear how ESA determined that the design avoided wetlands when Conecuh Woods' design, which was attached to the Application, shows that landfill cells (and buffer zones) would be located in wetlands.<sup>6</sup>

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<sup>6</sup> When the original Fig. 1-4 is copied, the colored shading fades, making it difficult to delineate wetlands and buffer zones. For the Court's convenience, Plaintiffs have placed red squares around the areas of the disposal cells that encroach upon the wetlands, and have placed red circles around the areas of the buffer zone that likewise encroach upon the wetlands. Plaintiffs will provide the original Fig. 1-4 to the Court at the hearing on their motion for summary judgment.

1A



**Legend**

- Proposed Site
- Buffer to Disposal
- Major Road
- Railroad
- 100 Year Flood Zone
- Wetlands
- Cells**
- Disposal Cell
- Soil Borrow
- Storm Water Pond
- Spreader Swale

Cell_names	Acres
Borrow 1	236
Borrow 2	252
Cell 1	64
Cell 1 B	63
Cell 2	345
Cell 3	234
Cell 4	270
Cell 5	238
Cell 6	322
Pond 1	300
Pond 2	301

Proposed Facility - Conecuh Woods Project - Conecuh County, Alabama

Figure 1-4

Specifically, the design shows that four of the seven landfill cells and some of the buffer zones would be located in wetlands.

SES conducted and submitted its evaluation to the Commission, determining that the proposed facility failed to meet exclusionary criteria, failed to meet the required point totals for comparative criteria, and failed to meet the statutory criteria. PX 9. In regards to the exclusionary criteria, SES found that the proposed landfill failed to meet many of the exclusionary criteria. Plaintiffs' motion for summary judgment focuses on one, the requirements that a proposed landfill not be located in wetlands:

Figure 1-4 in the Conecuh County Commission application shows buffer zones and landfill cell areas encroaching into wetland areas. Cells 2, 3, 5 and 6 contain wetlands. The application states that the facility will be designed with the intent of minimizing the filling of and impacts on jurisdictional wetlands and if wetlands are impacted, approved methods of mitigation would be used. The site should be designed to avoid filling of any wetlands. . . . The proposed plan does not meet this criterion.

PX 9, p. 10.

According to Figure 1-4 in the Conecuh County Commission application, waste disposal is proposed in wetland areas for Cells 2, 3, 5 and 6. The application states that the facility will be designed with the intent of minimizing the filling of and impacts on jurisdictional wetlands and if wetlands are impacted, approved methods of mitigation would be used. The site should be designed to avoid filling of any wetlands. This criterion has not been met.

PX 9, p. 10.

On April 4, 2011, ESA supplemented its initial evaluation. In this supplement, ESA ignored the fact that Conecuh Woods' design placed landfill cells and buffer zones in wetlands, and instead encouraged the Commission to disregard this deficiency:

If Host Government approval is granted, the applicant will then proceed with additional studies, including delineating wetlands. Once these features are investigated and their location is defined, changes to the proposed design may need to be made by the applicant in order to preserve wetlands and meet regulatory requirements; otherwise the Army Corp of Engineers (who has

jurisdiction over wetlands near waters of the U.S.) would deny permission to disturb, causing the permit to be denied by ADEM.

PX 10, p. 11.

The Commission held an engineering work session on April 11, 2011 to discuss the evaluations conducted by ESA and SES. At this session, the County Attorney asked prepared questions regarding the Application of the ESA representative and the SES representative. *See* PX 12. Despite requests, the Commission did not allow any public comment or follow-up questions at this meeting. *Id.*; PX 13; Plaintiff Town of Repton's Responses to Conecuh Woods LLC's First Interrogatories, ¶ 16.

#### **April 18, 2011 Vote**

On April 18, 2011, the Commission held a public meeting to vote on the Application. *See* PX 17. The Commission voted to approve the Application, 3-2, with Commissioners Wendell Byrd, Jerold Dean, and Leonard Millender voting yes, and Commissioners Hugh Barrow and D.K. Bodiford voting no. *Id.* The public was not allowed to comment at this meeting. *See id.*; Plaintiff Town of Repton's Responses to Conecuh Woods LLC's First Interrogatories, ¶ 16.

#### **Host Fee Agreement**

At no time before the Commission's vote on the Application was a host fee agreement (be it a draft or final version) between Conecuh Woods and the County ever discussed or disclosed to the public. *Stone Dep.* 136:2-14; *Byrd Dep.* 172:18-174:2 (host fee agreement was not discussed in public meeting notice or at the work session). An initial draft of the Host Fee Agreement, however, had been prepared by the County Attorney and presented to Conecuh Woods' attorney on April 13, 2011. *Stone Dep.* 119:21-120:9; *Byrd* 187:21-188:9; PX 35. Conecuh Woods' attorneys had then prepared a second draft, which was not provided to the County Attorney until shortly before the 9:00 a.m. meeting of the Commission on April 18,

2011. *Stone Dep.* 126:7-21; 131:4-132:14; PX 18. After the County Attorney and Conecuh Woods' attorney made handwritten changes to the second draft, Stone signed the document on behalf of Conecuh Woods. *Id.*; *Byrd Dep.* 225:8-226:23. The version of the Host Fee Agreement signed by Stone was then delivered to the Commission by the County Attorney minutes before the Commission's vote on the Application. *Byrd Dep.* 215:16-216:16, 240:7-11; *Stone Dep.* 151:17-21. The Commissioners who voted to approve the application for the proposed landfill admitted that none of the individual Commissioners had sufficient time to read the Agreement before the meeting.

- “Q. Nobody really had much time to read that contract between the time he brought it to you and the time you voted, did you? A. Not really read the whole contract. Correct.” *Byrd Dep.* 240:12-16.
- “Q. And is it fair to conclude that nobody on the Conecuh County Commission read the contract before you signed it? Other than your lawyer, no member of the commission read this contract before you signed it, did they? A. Not that – Didn't read the contract, but – didn't read the contract, no.” *Byrd Dep.* 240:17-241:1.
- “Q. And did you say – you didn't have time to read [the Host Fee Agreement] carefully, did you? A. No.” *Dean Dep.* 116:19-21.
- “Q. You never really have gone through [the Host Fee Agreement] in detail, have you? A. No.” *Millender Dep.* 60:13-15.
- “Q. And you didn't have time before – at the gathering, between the time you left that room and went to the public meeting, you didn't have time to study [the Host Fee Agreement], did you? A. No.” *Millender Dep.* 62:23-63:5.



As a consequence, the Commission accepted several unfavorable terms drafted by Conecuh Woods:

- **Indemnification:** The final version limited Conecuh Woods' environmental indemnity obligations by specifying that it would only indemnify the County for periods during which Conecuh Woods had ownership of the site. PX 18, § 5.01.
- **Exculpatory Clause:** The final version provides that in the event that Conecuh Woods defaults under the Agreement by ceasing operation or abandoning operation of the proposed landfill, the County's only recourse for the breach of contract is \$250,000.00 in liquidated damages and the right to make a claim against the performance bond. PX 18, § 14.03(b).
- **Assignment Provisions:** The final version provides that Conecuh Woods may assign the Agreement to third parties (with or without the County's consent) and that Conecuh Woods will be free from liability under the Agreement after such assignment. PX 18, § 18.02. This provision was not included in the Application or in the Commission's draft.
- **Performance Bond:** The initial draft required Conecuh Woods to submit a four million dollar performance bond to the County, PX 35, § 7.03, but the final draft required only a one million dollar bond. PX 18, § 13.02.

Sometime after the Commission voted to approve the Application, Commissioner Byrd, Chairman of the Commission at that time, signed the Agreement. *Byrd Dep.* 226:11-18.

### **Statement of Consistency**

Sometime later, Conecuh Woods and the Commission requested a statement of consistency from ATRC. PX 54; PX 56; PX 57. On July 13, 2013, ATRC held a meeting to consider whether to begin review of Conecuh Woods' request for a statement of consistency

regarding its Application. PX 61. Interested parties attended this meeting including Plaintiffs' attorney, Mayor Carter, Stone, Conecuh Woods' attorney, and the Commission's attorney. *Id.*

At the meeting, the Executive Director of the ATRC, John Clyde Riggs ("Executive Director"), indicated that the purpose of the meeting was to determine whether the ATRC should evaluate the Application. Plaintiffs asserted that the ATRC should refrain from acting on the request for a statement of consistency until issues regarding the County Commission's approval had been resolved (Plaintiffs had filed this litigation against the Commission) and a moratorium on the issuance of permits for landfills had expired.<sup>7</sup> PX 61. Plaintiffs also argued at the meeting that even if ATRC did evaluate the Application, the ATRC should find it inconsistent.<sup>8</sup> *Id.* At the conclusion of the meeting, ATRC voted to begin evaluation of the Application. *Id.*; *Riggs Dep.* 49:11-22, 57:9-13, 59:8-60:4.

The ATRC issued a purported Statement of Consistency on July 22, 2011. PX 22; PX 68. The alleged Statement of Consistency was prepared by the Executive Director and included language furnished to him by one of the attorneys for Conecuh Woods. PX 57; *Riggs Dep.* 39:20-40:12; 57:22-60:17. It was not reviewed or considered by the full ATRC, the executive committee of the ATRC, or any member of the ATRC before it was issued. *Riggs Dep.* 57:27-60:17.

The purported Statement of Consistency contained the following findings of fact:

- There currently appears to be adequate solid waste disposal capacity available to Conecuh County throughout the planning period of its solid waste management plan.

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<sup>7</sup> Both the Governor and the Legislature had issued moratoria on the permitting of landfills in the state. PX 53.

<sup>8</sup> Plaintiffs presented a letter brief summarizing these arguments. PX 59.

- A jurisdiction within the County may decide that it would be advantageous to site a landfill in the County due to collection, transportation and/or disposal costs.
- The landfill proposed by Conecuh Woods has a projected lifetime in excess of sixty years and a proposed service area far greater than any other landfill in the region.
- Any proposed disposal capacity in excess of expected regional needs during the initial years of the proposed facility's operation will be reduced over time as other municipal solid waste landfills in the region reach their total disposal capacity and close.
- Regional disposal can be substantially adversely affected by disasters such as hurricanes, tornadoes, and floods which overwhelm the existing capacity of construction and demolition landfills making resort to disposal of such debris in municipal solid waste landfills necessary.

PX 22; PX 68. Based on these findings, the purported Statement of Consistency concluded that "it appears that there are consistencies with the proposal, the Regional Solid Waste Needs Assessment and the County's Solid Waste Management Plan." PX 22; PX 68.

In a subsequent deposition in this case, the Executive Director acknowledged deficiencies in the evaluation process:

- The current regional needs assessment of the ATRC against which Conecuh Woods' proposed landfill was to be evaluated was outdated and essentially useless in determining whether the proposed landfill was needed. *Riggs Dep.* 97:16-20, 141:17-142:5.

- It was impossible for the ATRC to determine whether Conecuh Woods’ proposed landfill was consistent with the statutory criteria for the issuance of a statement of consistency because the ATRC’s regional needs assessment was not up to date. *Riggs Dep.* 152:5-12.
- The ATRC lacks the resources and expertise to perform regional needs assessments or to evaluate whether a proposed landfill meets the criteria necessary for a statement of consistency. *Riggs Dep.* 127:10-128:5.
- In considering whether to issue a statement of consistency in this case, the Executive Director tried to find **any** consistency he could between the proposed landfill and the regional needs assessment in order to keep the process moving. *Riggs Dep.* 67:19-69:2.
- He did not consider evidence of inconsistencies presented by opponents of the landfill, including a detailed letter with exhibits provided by the Town of Repton. *Riggs Dep.* 67:19-69:2; 63:16-64:22; 65:20-66:4.
- The Executive Director did not consider the projected lifetime of other landfills in the region, one of the statutory requirements, because “[he was] strictly looking for any consistency in [his] mind that [he could] put down as a statement of consistency to keep the process going[;]” *Riggs Dep.* 74:9-12; because he could not get that information. *Riggs Dep.* 76:19-22.

The Executive Director admitted on deposition that there were inconsistencies between the proposed landfill and the needs of the region. Specifically, Conecuh Woods did not demonstrate a need for the proposed landfill. *Riggs Dep.* 80:7-14; 81:10-82:12; 83:23-84:4. Notwithstanding that the current regional needs assessment was not up to date, the Executive Director was aware from having reviewed previous requests for statements of consistency to the ATRC that in addition to the proposed landfill, there are three subtitle D landfills in the ATRC

region – the Choctaw County landfill, the Turkey Trot landfill in Washington County, and the Arrowhead landfill in Perry County – and a fourth, Timberlands, outside the region in Escambia County but within 10 miles of Conecuh Woods’ proposed landfill. PX 59, pp. 2-4. These facilities provided ample existing capacity within the ATRC region. *Riggs Dep.* 81:14-82:12. In fact, there is currently *excess* capacity for waste generated within the region. *Riggs Dep.* 91:17-92:4.

Assuming that the projected lifetime of those facilities was half of that projected by Conecuh Woods for its proposed landfill and assuming that population and business development trends in the region continued, there was sufficient capacity for solid waste in existing landfills within the region for many years to come (*Riggs Dep.* 80-7-14; 81:10-82:12; 83:23-84:4), and any suggestion that there was a need for any additional capacity for industry or construction and demolition wastes was sheer speculation. *Riggs Dep.* 87:2-9; 87:14-88:20.

### **STANDARD FOR CONSIDERATION**

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Ala. R. Civ. P. 56(c)(3); *see also Warehouse Home Furnishing Distribs., Inc. v. Whitson*, 709 So. 2d 1144, 1151 (Ala. 1997). Once a moving party makes the showing that it is entitled to judgment as a matter of law, the non-moving party bears the burden of producing “substantial evidence” creating a genuine issue of material fact. *See* Ala. Code § 12-21-12; *see also Ex parte Lumpkin*, 702 So. 2d 462, 465 (Ala. 1997). “Substantial 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.” *Ex parte Lumkin*, 702 So. 2d at 465 (quoting *West v. Founders Life Assurance Co. of Fla.*, 547 So. 2d 870, 871 (Ala. 1989)).

## ARGUMENT

### **I. The Commission Failed to Evaluate the Application in Accord with the Plan.**

“[L]ocal governments may not arbitrarily exercise their discretionary powers, including the power to grant or to deny a permit[.]” *ECO Pres. Servs., LLC v. Jefferson County Comm’n*, 933 So. 2d 1067, 1071 (Ala. 2004). Judicial review of a county commission’s decision extends to “constitutional challenges, allegations of statutory violations, and conduct so arbitrary or capricious as to contravene lawfully constituted authority.” *Etowah County Comm’n v. Hayes*, 569 So. 2d 397, 398 (Ala. 1990). A county commission is not permitted “to exercise unfettered discretion” in the performance of its governmental functions. *Id.* at 399. The Commission’s approval of the Application was an abuse of its discretion and was arbitrary and capricious because it violated *Ala. Code* § 22-27-48(a) and contravened “lawfully constituted authority,” namely the exclusionary criteria previously adopted by the Commission in the Plan.

*Ala. Code* § 22-27-47(b)(11) requires that “[e]ach [local government solid waste management] plan, shall at a minimum” include the statutory considerations set forth in § 22-27-48(a)(1)-(6). This statute granted the County the authority to implement the Plan and to include additional requirements and considerations for proposed facilities, such as the exclusionary criteria and the comparative criteria in the Conecuh County Plan. Section 22-27-48(a) requires that a local government “approv[e] or disapprov[e] disposal sites in its jurisdiction *in accord with the plan approved for its jurisdiction.*” (emphasis added).

The Plan provides that the Commission is barred from further consideration of the Application if the proposed facility fails to meet the exclusionary criteria:

When considering approval of solid waste facilities, the County Commission should consider how well the planned facility addresses these requirements [i.e., the “specific State and Federal siting requirements for the particular type of

facility in question,” as set forth in Article III, Section 11 of the Plan]. ***Should a proposed facility not meet these siting requirements, it should be excluded from further consideration by the Commission.***

PX 20, § 12.2 (emphasis added). Under this section, the Commission is foreclosed from any further consideration of an application if a proposed facility fails to meet any of the exclusionary criteria. Here, the Application shows that the proposed facility fails to meet at least one of the exclusionary criteria.<sup>9</sup>

**A. The Proposed Facility Fails to Meet the Plan’s Wetlands Criterion.**

The wetlands exclusionary criterion prohibits landfills, including buffer zones, in wetlands and prohibits landfills where the disposal of solid waste might seriously degrade the wetlands. *Ala. Admin. Code* § 335-13-4-.01(2)(c) and (d); 40 C.F.R. § 258.12(a). Figure 1-4 of the Application shows buffer zones and landfill cells encroaching into wetland areas. PX 1A, Fig. 1-4. In fact, four of the seven disposal cells – 2, 3, 5, and 6 – are shown to be in wetlands. *Id.* Such encroachment is prohibited by the wetlands exclusionary criterion.

The Commission received the Technical Evaluation, prepared by SES, which noted that the landfill violated the wetlands exclusionary criterion. *Dean Dep.* 82:3-22; PX. 9, pp. 10-11. The Commission admits that certain landfill cells are proposed to be in wetlands, as provided in Conecuh Woods’ Application. *Byrd Dep.* 304:3-305:12; *Millender Dep.* 85:5-21. ESA glossed

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<sup>9</sup> The proposed facility also fails to meet many of the other exclusionary criteria because Conecuh Woods failed to give sufficient information for the Commission to evaluate these factors. *See* PX 9, p. 2 (the Application failed to delineate location of facility structures, whose placement could impede the floodplain); *id.* at p. 4 (no endangered species study conducted to determine if landfill will jeopardize continued existence of endangered or threatened species or will result in the destruction of adverse modification of critical habitats); *id.* at pp. 6-7 (the Application fails to demonstrate that all containment structures are designed to resist maximum horizontal acceleration in lithified earth material); *id.* at p. 8 (no study conducted to determine if the landfill is located on a site that is archaeologically or historically sensitive and no written certification provided from State Historic Preservation Officer); *id.* at p. 9 (no estimate of the volume or composition of leachate or details of how or where leachate will be treated to ensure that waters of the State will not be polluted).

over the Application's glaring violation of the wetlands criterion. In response to SES's statements that the Application showed that landfill cells and buffer zones would encroach on wetlands, and therefore did not meet this exclusionary criteria, ESA stated only that:

If Host Government approval is granted, the applicant will then proceed with additional studies, including delineating wetlands. Once these features are investigated and their location is defined, changes to the proposed design may need to be made by the applicant in order to preserve wetlands and meet regulatory requirements; otherwise the Army Corps of Engineers (who has jurisdiction over wetlands near waters of the U.S.) would deny permission to disturb, causing the permit to be denied by ADEM.

PX 10, p. 11. Essentially, ESA advised the Commission to ignore the wetlands violation which was apparent from the face of the Application on the premise that ADEM would address this violation later. Based in part upon this flawed advice, the Commission improperly approved the Application in violation of the Plan's requirements. The Application should have been denied based solely on its failure to meet this criterion. Therefore, the Commission's approval of the Application should be declared null and void.

**B. The Commission Cannot Defer Conecuh Woods' Compliance with the Exclusionary Criteria.**

ESA misinformed the Commission regarding its obligations to exclude the Application for non-compliance with the exclusionary criteria:

I would also like to add that it has never been the intention for the application presented to a Host Government to be a complete document ready for submittal to the regulatory agency (in this case ADEM) for evaluation in strict accordance with regulatory requirements. If Host Government Approval is granted for a facility, the applicant then proceeds with obtaining a Statement of Consistency from ATRC and, following this statement, obtaining more detailed information (i.e. groundwater, soils, endangered species, archaeological and historical studies, seismic data, etc.).

PX 10, p. 10. ESA further misquoted the language of the Plan by representing to the Commission that "[i]f the application fails to provide this information [required under the exclusionary criteria] or if the information does not adequately address all items, then the application *could* be



rejected.” PX 8, p. 4 (emphasis added). The Plan requires that “[s]hould a proposed facility not meet these siting requirements, it *should* be excluded from further consideration by the Commission.” PX 20, § 12.2 (emphasis added).

It is clear from the face of Conecuh Woods’ Application that the proposed facility fails to meet the wetlands criterion. This failure prohibited the Commission from approving the Application. PX 20, § 12.2 (“Should a proposed facility not meet these siting requirements, it should be excluded from further consideration by the Commission.”). In light of this, the Commission’s approval was arbitrary and capricious as it was in contravention of the Commission’s own regulations and procedures as set forth in the Plan. *See Etowah County Comm’n*, 569 So. 2d at 398 (“conduct so arbitrary or capricious as to contravene lawfully constituted authority” is subject to judicial review and reversal). Therefore, the Commission’s approval should be declared null and void.

## **II. The Commission’s Approval of the Application Was Made Upon Unlawful Procedures.**

Section § 22-27-48(a) of the Alabama Code requires that in conjunction with providing public notice of any landfill publication, “[a]ll pertinent documents shall be available for inspection during normal business hours at a location readily accessible to the public.” Despite this requirement, the Host Fee Agreement was not made available for inspection before the Commission’s vote on the Application.

A host fee agreement binds an applicant to the terms and conditions set forth in its application and may impose additional obligations and requirements related to the operation of the proposed landfill. A host fee agreement is a pertinent document to a local government’s approval of a landfill application. In *Brown’s Ferry Waste Disposal Center, Inc. v. Trent*, the Alabama Supreme Court determined that:

Unless notice was given to the citizens and a hearing was afforded to the affected citizenry, *an award of a contract* to a private corporation by a county under the provisions of the Solid Wastes Disposal Act violated the due process provisions of the Constitution of the United States and the Constitution of the State of Alabama.

611 So. 2d 226, 228 (Ala. 1992) (emphasis added). The Court noted that “[t]he citizens have a vital interest . . . in the contract awarding the right to operate the facility made between the County and a private corporation.” *Id.*

The public was entitled to see the terms upon which the Application was approved, as provided in the Host Fee Agreement. Some of these terms were included in the Application and some were not found in the Application, but several terms in the Host Fee Agreement failed to protect the interests of the County:

- **Assignment Provisions:** The Agreement provides that Conecuh Woods may assign the Agreement to third parties (with or without the County’s consent) and that Conecuh Woods will be free from liability under the Agreement after such assignment. PX 18, § 18.02. This provision was not included in the Application or the first draft of the Agreement. If Conecuh Woods assigned the Agreement to a financially insolvent entity, the County could incur substantial expenses related to the landfill and be left without recourse against Conecuh Woods. Under these terms, Conecuh Woods would be free to build and operate the landfill in any manner it deemed fit. It would then be able to assign the Agreement to a dummy corporation thereby avoiding any liability for its actions. For example, if Conecuh Woods assigned the Agreement, it could avoid the closure and post-closure requirements imposed by the Agreement in Article IV. PX 18, p. 6.

- **Performance Bond:** The Agreement requires Conecuh Woods to provide the County with a performance bond in the amount of one million dollars. PX 18, § 13.02. The amount required for a performance bond was not included in the Application. The amount of this performance bond was inadequate, and far less than the Commission's prior request for a performance bond in the amount of four million dollars. PX 35, § 7.03; *Dean Dep.* 60:2-8.
- **Exculpatory Clause:** The Agreement provides that in the event that Conecuh Woods defaults under the Agreement by ceasing operation or abandoning operation of the proposed landfill, the County's only recourse for the breach of contract is \$250,000.00 in liquidated damages and the right to make a claim against the performance bond. PX 18, § 14.03(b).

The public should have been given an opportunity to object to these terms because ultimately it is the citizens of the County who would suffer under the Agreement.<sup>10</sup>

The Host Fee Agreement was not made available for public review prior to the Commission's vote upon the Application. Conecuh Woods failed to present the final draft of the Agreement to the Commission until minutes prior to its meeting on April 18, 2011. *Byrd Dep.* 215:16-216:16, 240:7-11. The Commission not only lacked time to adequately evaluate the terms proposed by Conecuh Woods, it also lacked time to disclose the document to the public, as required by law. As a result, the Application was not presented for inspection, discussed at a public meeting, or made available for review in the county administrator's office prior to the

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<sup>10</sup> The Commission had to vote on the Application minutes after the Agreement was presented to it by Conecuh Woods or it would risk an automatic approval of the Application, with no contract in place. *See Millender Dep.* 108:5-109:18.

Commission's vote on the Application. *Dean Dep.* 71:18-72:7; *Byrd Dep.* 107:5-9, 108:19-109:1.

“If [a plaintiff] can establish that the statutory procedures set out in § 22-27-48(a) were not followed, ***then the local approval was unlawfully obtained.***” *Fitzjarrald v. Huntsville*, 597 So. 2d 1378, 1380 (Ala. Civ. App. 1992) (emphasis added). The Commission's failure to provide the Host Fee Agreement for inspection violates the statutory procedures set forth in *Ala. Code* § 22-27-48(a). Therefore, the Commission's approval was unlawfully obtained and should be declared null and void.

### **III. The Host Fee Agreement Was Signed Without Proper Authorization.**

*Ala. Code* § 11-3-7 provides that “[n]o ordinance, resolution, policy, or motion shall be voted on and approved by a county commission unless a quorum is present in the meeting chamber while the vote is taken and the matter is approved by an affirmative vote of the majority of the members.” This statute prohibits a Commissioner from acting without the authority of entire Commission (or at least a quorum). “If the county [commission] was without authority to make the contract, it is void[.]” *Stone v. State*, 223 Ala. 426, 428 (Ala. 1931)

The Commission testified that the Chairman gains the authority to sign contracts on behalf of the County from either a Commission vote of approval on a contract or from a Commission vote approving a resolution to authorize the Chairman's execution of a contract:

- “We approve that we're going to buy something. And sometimes it be a majority vote and don't have to be a resolution. In some cases a majority vote to give the chairman permission to sign it if it's approved.” *Byrd Dep.* 63:23-64:5.
- “Q. Isn't the issue [of a contract] always either brought up to a vote or a resolution passed?” A. Right.” *Dean Dep.* 67:6-8.

*See also Stone v. State*, 223 Ala. at 426 (by resolution the county commission authorized the board's attorney to draw up a contract with a private corporation for services to the county).

It is undisputed that Commissioner Byrd, Chairman of the Commission at the time, signed the Host Fee Agreement sometime on April 18, 2011, shortly after the Commission voted to approve the Application. *Byrd Dep.* 226:11-18, 238:9-239:16; *Dean Dep.* 72:23-73:10. It is further undisputed that the Agreement was not presented to the Commission until minutes before its April 18<sup>th</sup> meeting, that the Commissioners did not have time to read it before the meeting, that the Agreement was not discussed during the meeting, and that the Commission never voted to authorize Commissioner Byrd to enter into the Agreement on behalf of the County. *Byrd Dep.* 172:18-174:2, 240:12-241:1; *Dean Dep.* 116:19-21; *Millender Dep.* 62:23-63:5; *Stone Dep.* 136:2-14, 151:12-21.

The Commission may contend that a vote or resolution regarding the Host Fee Agreement was not required because its vote on the Application authorized the Agreement as well. *Dean Dep.* 70:18-20 (“[W]e voted on the contract – we voted on the application and the contract supposedly at the same time.”). However, the transcript from the meeting reflects that the vote was solely upon the Application; no mention was made of the Host Fee Agreement: “We have completed this meeting. It was for the roll call. We voted on the application yes and no. The no is two and the yes is three.” PX 17, 3:22-4:3. The Host Fee Agreement also included numerous provisions that were not included the Application, including the assignment provision allowing Conecuh Woods to assign the Agreement (and all ensuing liability) without restriction and the lower performance bond. PX 18, §§ 7.03, 18.02. These terms and conditions required the Commission's approval, separate and apart from its approval of the Application.

The lack of approval and proper authorization for execution of the Agreement renders the Agreement void. If the Agreement setting these terms and conditions underlying local government approval is void, local government approval should likewise be void. *Beavers v. County of Walker*, 645 So. 2d 1365, 1377 (Ala. 1994) (“Because we have ruled that the contract is void, the Commission’s grant of local approval based on that contract must also be held void.”). Thus, the Court should declare both the Host Fee Agreement and the Commission’s approval of the Application null and void.

#### **IV. The Statement of Consistency Does Not Meet the Statutory Criteria.**

##### **A. The ATRC Failed to Evaluate the Proposed Landfill in Accordance with the Statutory Criteria.**

There are serious questions about whether the ATRC followed proper procedure in issuing the Statement of Consistency regarding the proposed landfill. The purported Statement of Consistency was issued by the Executive Director after a vote by the executive committee of the ATRC authorizing him only *to begin evaluation* of the Application. PX 61. The Executive Director did not present his findings or conclusion to the executive committee or the full Regional Commission for consideration before he issued the Statement of Consistency. The statute governing statements of consistency appears to require the Regional Commission, not its delegee, to evaluate the statutory criteria for a statement of consistency, and to issue the Statement of Consistency if appropriate.<sup>11</sup> Under the circumstances, the Executive Director may

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<sup>11</sup> The statute, *Ala. Code* § 22-27-48(b), states that the “commission *shall*” perform the evaluation of the statutory criteria for a statement of consistency. “Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says.” *Ex parte Hope Elisabeth Ankrom*, 2013 WL 135748, at \*9 (Ala. Jan. 11, 2013) (quoting *Blue Cross & Blue Shield v. Nielsen*, 714 So.2d 293, 296 (Ala. 1998)). The statute’s use of the word “shall” indicates that the duty of the “commission” to evaluate the proposal is not optional. *Ex parte Brandon*, 2012 WL 5974851, at \*2 (Ala. 2012) (quoting *Ex parte Prudential Ins. Co. of*

have exceeded his authority in issuing the Statement of Consistency, in which case the Statement of Consistency is a nullity. *See, e.g., E.E. Carroll v. Ala. Pub. Serv. Comm'n*, 206 So. 2d 364 (Ala. 1968) (voiding an order of two members of the Public Service Commission who decided to issue the order without meeting as a body and without notifying the third member of the Commission that they were going to decide the matter).

But even if the Regional Commission could have properly delegated its statutory obligation to evaluate the proposed landfill to the Executive Director, and did so, the Statement of Consistency issued by the Executive Director is woefully short of meeting the statutory requirements, and, as a consequence, it cannot provide a basis for the application process to proceed. Indeed, the Executive Director's evaluation and Statement of Consistency, and the evidence before him, establish that there is *not* a need for the proposed landfill within the region. Failure to comply with statutory requirements renders a decision void. *See Ex parte Sutley*, 86 So. 3d 997, 1000 (Ala. 2011) (employee's failure to comply with the statutory requirements for perfecting an appeal in the circuit court waived his right to review the Board's decision); *Johnson v. Neal*, 39 So. 3d 1040, 1043 (Ala. 2009) (Alabama Supreme Court noted that a will contest procedure under § 43-8-199 "must comply exactly with the requirements of that statute"); *O'Barr v. Oberlander*, 679 So. 2d 261, 264 (Ala. Civ. App. 1996) (court ruled that failure to comply with the provisions of the tax sale statute rendered the sale void); *State v. Baker*, 268 Ala. 410, 412 (Ala. 1959) (Alabama Supreme Court invalidated prior judgment because the statutory notice requirements were not complied with).

The statute states that the Regional Commission "shall" evaluate the proposal using the current regional solid waste needs assessment. *Ala. Code* § 22-27-48(b). The Executive

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*America*, 721 So.2d 1135 (Ala. 1998)) ("The word 'shall' is clear and unambiguous and is imperative and mandatory.").

Director acknowledged that the ATRC's regional needs assessment was a useless document because it was outdated. *Riggs Dep.* 97:16-20; 116:5-17; 141:17-142:5. He admitted that a statement of consistency should not be evaluated based on a regional needs assessment that was useless. *Riggs Dep.* 145:4-12. And he recognized that it was impossible to determine whether the proposed landfill was consistent with the criteria in the statute, because the regional needs assessment was outdated. *Riggs Dep.* 152:5-14. Under the circumstances, the Statement of Consistency fails to meet the statutory requirements, and should be declared null and void.

Second, the statute requires evaluation of a proposed landfill as it relates to existing capacity within the region and the projected lifetime of such capacity. *Ala. Code* § 22-27-48(b). The purpose of these criteria is to determine whether there is a need in the region for the proposed landfill. *Id.* The Statement of Consistency issued by the Executive Director expressly acknowledges that there is adequate existing disposal capacity in the region. *Riggs Dep.* 72:13-73:20; 79:5-9. However, the only mention of the projected lifetime of capacity within the region in the Statement of Consistency is an oblique statement regarding the projected lifetime capacity of *the proposed landfill*:

[B]ecause the municipal solid waste landfill proposed by Conecuh Woods LLC has a projected lifetime in excess of sixty years and a proposed service area far greater than that of other landfills in the region, any proposed disposal capacity in excess of expected regional needs during the initial years of the proposed facility's operation will be reduced over the passage of time as other municipal solid waste landfills in the region reach their total disposal capacity and close ...

PX 22.

The Executive Director candidly admitted on deposition that he did not consider the projected lifetime of existing available capacity within the region, in part because the information was not available, but primarily because he was "strictly looking for any consistency in [his] mind that [he] could put down as a Statement of Consistency to keep the process going."



*Riggs Dep.* 74:5-12; 75:12-76:22; 81:14-82:12. The Executive Director ignored Plaintiffs' July 13, 2011 submission in opposition to Conecuh Woods' requests for a statement of consistency, in which Plaintiffs identified the three existing landfills in the region, and provided their annual capacities, and the dates on which they opened. *Riggs Dep.* 64:4-15; 149:16-150:1. He simply looked at the information provided to him by the landfill applicant (which did not include a projected lifetime of existing capacity), found some consistency, and issued the statement in order to "move the process forward."

Third, the statute requires consideration of proposed capacity in excess of expected regional needs. *Ala. Code* § 22-27-48(b). The Executive Director admitted that currently there is excess capacity for solid waste generated in the region. PX 22; *Riggs Dep.* 91:17-23. He agreed that with respect to household waste, there is currently not a need for a landfill in the region. *Riggs Dep.* 81:21-84:4. With respect to industrial waste, the Executive Director noted the potential for industrial development, but agreed that such development was speculative and that any large industry that would come into the region would likely site its own landfill. *Riggs Dep.* 80:20-81:4; 84:5-87:9.

The Executive Director testified that the ATRC did not have the resources, expertise or funding to perform regional needs assessments or to evaluate whether a proposed landfill meets the criteria necessary for a statement of consistency. *Riggs Dep.* 127:10-128:5. Plaintiffs are not unsympathetic. However, regional commissions are not excused from performing their statutorily mandated duties. In drafting the Alabama Solid Wastes Disposal Act, *Ala. Code* § 22-27-1, *et seq.*, the Legislature intentionally tasked the regional commissions with the role of determining whether the region needed a landfill in order to avoid the haphazard placement of landfills in areas where no need exists. As explained by the Alabama Court of Civil Appeals:

When enacting the Solid Waste Management Plan Act, § 22-27-40 et seq., Ala. Code 1975, our state legislature made several findings. Among those findings were that there was “an emerging crisis in solid waste management” and that “[t]he absence of comprehensive planning will result in the random, haphazard siting of waste disposal services without relation to the actual needs of particular localities in the state.” § 22-27-40(1) and (10), Ala. Code 1975.

*Ala. Dept. of Env'tl. Mgmt.*, 968 So. 2d 534, 535 (Ala. Civ. App. 2006). In its conclusion, the court noted that its decision “will have the additional benefit of ensuring that solid-waste-disposal sites will not be developed haphazardly, as they potentially could be during the previously installed moratoriums.” *Id.* at 543.

In sum, it is undisputed that: (i) the ATRC could not determine whether the proposal was consistent with the statutory criteria because the regional needs assessment was outdated; (ii) the Executive Director did not consider the projected lifetime of existing capacity, (iii) although the Executive Director did not consider the projected lifetime of such capacity (or any evidence that was submitted in opposition to the proposed landfill), there is adequate disposal capacity in the region without the proposed landfill for many years to come, and (iv) there is excess capacity for the solid waste generated in the region. Under the circumstances the Statement of Consistency does not meet the statutory criteria and it should be declared null and void.

**B. The Statement of Consistency was Affected by Error of Law.**

The ATRC and the Executive Director misapprehended the law. One of the Regional Commissioners who voted to authorize the Executive Director to begin evaluation of Conecuh Woods' request for a statement of consistency, voiced his view that the ATRC should defer to the Conecuh County Commission regarding the landfill:

I'm very adamant about the fact Conecuh County is a sovereign county. They elected five men in Conecuh County to handle Conecuh County business. I don't want Conecuh County to tell me what to do in Perry County. And I'm sure Perry County don't want me going down and telling Conecuh County what to do. I leave it to the folks in Conecuh County. If they elected them five men to the county commission, they voted, they done did with it. It's the same problem I

dealt with when we in Perry County pulled up for a landfill, I didn't want to hear nothing from nobody except from the folks that could vote for me. The folks that could vote for me said: [You] vote the way you want to, that's what we elected you to do. So that's what I'm telling Judge Dean and all of rest of them down there in Conecuh County, y'all deal with them folks down there.

PX 61, 53:18-54:15.

For his part, the Executive Director deferred to ADEM, trying to find any consistency between the proposed landfill and the regional needs assessment, so that he could keep the process moving:

. . . [I]f we don't issue a Statement of Consistency, the application does not go forward. Therefore, we become a regulatory agency, and we're not that. And so I did anything that I could to make sure there were some consistencies to stand on so that the application process would continue. We don't make the final determination whether a permit is issued, nor should we be in any position that we do or not.

*Riggs Dep.* 130:8-18.

Both were incorrect. Neither the evaluation of a proposed landfill performed by the local government nor the permitting criteria considered by ADEM in evaluating a proposed landfill addresses *need within the region* in which the landfill is proposed to be located. That evaluation was delegated exclusively by the Legislature to regional commissions like the ATRC, in order to “[e]nsur[e] that solid-waste-disposal sites will not be developed haphazardly...,” and only if there is a need for them. The ATRC's failure to evaluate the statutory criteria for a statement of consistency in apparent deference to the Conecuh County Commission and ADEM was an error of law that requires that the Statement of Consistency be declared void.

**C. The Undisputed Evidence Shows that There was No Need for a Landfill.**

Finally, the undisputed evidence shows that there is no need for a landfill in the region. Repton's letter and other information outlining the inconsistencies between the proposed landfill and the needs of the region, which the Executive Director chose not to consider, clearly show

that the region has more than adequate solid waste disposal capacity for many years to come. PX 59.

For example, as set forth in Repton's July 13, 2011 letter to the ATRC, since 2003, three Subtitle D landfills have been built in the region. PX 59 at pp. 2-4. Together, the capacity of those landfills is 4,745,000 tons per year. *Id.* at p. 3. The projected household waste generation for the region based on the 2011 population was 194,440 tons per year. *Id.* Thus, the capacity, even without the proposed landfill, is more than 29 times the current need. *Id.* In terms of landfill lifetimes, these landfills are fairly new and will provide sufficient disposal capacity to meet the region's solid waste disposal needs for many years to come. *Id.* Moreover, the very purpose of the proposed landfill is to provide excess capacity. The proposed landfill would accept 10,000 tons of waste per day from 28 states for 60 years. *Id.* This equals 3,650,000 tons of waste per year, which is millions of tons in excess of expected regional needs. PX 59 at p. 3. Additionally, assuming that the average subtitle D landfill operates for approximately 30 years,<sup>12</sup> the first of these landfills in the region to close would be the Choctaw County Regional Landfill, in 2033. *Id.* at p. 4.

Furthermore, there was insufficient evidence in the documents the Executive Director did review to determine that a need existed. The Application contains only a couple of paragraphs regarding regional needs, and neither of them discusses the projected lifetime of landfills in the region. PX 1, ¶ 5.2.1. Indeed, the Executive Director testified that he did not consider the projected lifetime of the landfills in the region because, among other things, it was not available

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<sup>12</sup> The proposed landfill projects available disposal capacity for approximately 63 years. PX 59, p. 4, n. 3; PX 1, p. 1-8.

to him.<sup>13</sup> *Riggs Dep.* 76:7- 77:12. This consideration is a requirement of the statute and Conecuh Woods should have provided the information necessary to evaluate the proposal compared to this consideration. Under the circumstances, issuance of the Statement of Consistency was arbitrary and capricious.

### **CONCLUSION**

For the foregoing reasons, the Plaintiffs' motion for summary judgment should be granted. The local government approval, the Host Fee Agreement, and the Statement of Consistency should all be declared null and void.

*/s/ Neah L. Mitchell*  
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<sup>13</sup> As the applicant for the proposed landfill, Conecuh Woods should have provided information necessary for the ATRC to determine whether there was a need for the proposed landfill. Although Conecuh Woods submitted some 5,000 pages of information to the ATRC, except for a couple of paragraphs in its Application, none of that information addressed the issue of need in the region, and the transcript of the meeting of the executive committee of the ATRC at which Conecuh Woods addressed the members is bereft of any mention of existing waste disposal capacity or the projected life of existing landfills in or near the region. Instead, Conecuh Woods argued that the Conecuh County Commission had considered the proposed landfill carefully and thoroughly, and granted host governmental approval, and, as a consequence, the ATRC should issue a letter of consistency. PX 61 8:5-16:9; 27:7-28:3.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the AlaFile system and service will be perfected upon any AlaFile participant(s) electronically and/or I have served a copy of the foregoing by United States Mail, postage prepaid, and properly addressed to any non-AlaFile participant(s) on this the 31st day of January, 2013.

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# Appendix A



## EXCLUSIONARY CRITERIA

an requires the Conecuh County Commission to consider whether a proposed landfill meets the exclusionary criteria:

<b>1</b>	“A [landfill] located in a floodplain shall not restrict the flow of the 100-year flood, reduce the temporary storage capacity of the floodplain or result in washout of solid waste, so as to pose a hazard to human health and the environment.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(a); 40 C.F.R. § 258.11(a).
<b>2</b>	“A [landfill] shall not jeopardize the continued existence of endangered or threatened species protected under the Endangered Species Act of 1973.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(b)(1).
<b>3</b>	“A [landfill] shall not result in the destruction or adverse modification of critical habitats protected under the Endangered Species Act of 1973.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(b)(2).
<b>4</b>	“A [landfill] shall not be sited within 10,000 feet of any airport runway end.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(c).
<b>5</b>	“Zones of active faults, seismic impact zones and unstable areas shall be avoided in locating facilities and practices unless a site specific evaluation . . . demonstrates minimum potential for adverse effects upon waters of the State.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(d).
<b>6</b>	“Landfill units shall not be located on a site that is archaeologically or historically sensitive as determined by the Alabama Historical Commission. Written certification must be provided from the State Historic Preservation Officer.” <i>Ala. Admin. Code</i> § 335-13-4-.01(1)(e).
<b>7</b>	“A [landfill] shall not cause a discharge of pollutants into waters of the State, including wetlands[.]” <i>Ala. Admin. Code</i> § 335-13-4-.01(2)(a).
<b>8</b>	“A [landfill] shall not cause non-point source pollution of waters of the State, including wetlands[.]” <i>Ala. Admin. Code</i> § 335-13-4-.01(2)(b).
<b>9</b>	“Landfill units including buffer zones shall not be permissible in wetlands, beaches or dunes.” <i>Ala. Admin. Code</i> § 335-13-4-.01(2)(c).
<b>10</b>	“Landfill units shall be permissible in any location where the disposal of solid waste would significantly degrade wetlands, beaches or dunes.” <i>Ala. Admin. Code</i> § 335-13-4-.01(2)(d).

### COMPARATIVE CRITERIA

The Plan requires that the Conecuh County Commission use the following comparative criteria to analyze proposed landfills:

<b>1</b>	“The consistency of the proposed facility with the County’s solid waste management needs as identified in the [Plan] Update or the Regional Planning Commission’s <i>Solid Waste Needs Assessment</i> , if available.” PX 20 § 12.3(1).
<b>2</b>	“The facility’s proximity to existing or proposed major solid waste producers.” PX 20 § 12.3(2).
<b>3</b>	“The facility’s accessibility to existing or proposed major transportation arteries or state primary and secondary roads.” PX 20 § 12.3(3).
<b>4</b>	“The number of lanes and condition of pavement on local access routes.” PX 20 § 12.3(4).
<b>5</b>	“The amount of existing traffic on local access routes, with larger amounts of traffic resulting in a lower point assignment.” PX 20 § 12.3(5).
<b>6</b>	“The number of households within one mile radius of the proposed facility, with fewer households resulting in a higher point assignment.” PX 20 § 12.3(6)
<b>7</b>	“The number of households along local access routes.” PX 20 § 12.3(7).
<b>8</b>	“The number of sensitive land uses (schools, churches, hospitals, etc.) within one mile radius of the proposed facility.” PX 20 § 12.3(8).
<b>9</b>	“The cost and availability of public services and improvements required to support the proposed facility (i.e. water, sewer, electricity, etc.)” PX 20 § 12.3(9).
<b>10</b>	“The availability of police, fire, medical and emergency response services.” PX 20 § 12.3(10).
<b>11</b>	“The perceptions of the facility’s impact on the local economy and local property values.” PX 20 § 12.3(11).
<b>12</b>	“The cost per ton-mile of solid waste transportation to the proposed facility.” PX 20 § 12.3(12).
<b>13</b>	“Host community benefits.” PX 20 § 12.3(13).
<b>14</b>	“Host community economic considerations.” PX 20 § 12.3(14).

## STATUTORY CRITERIA

*Ala. Code* § 22-27-48(a) and the Plan requires that the Conecuh County Commission consider each of the following criteria in evaluating an application for a proposed landfill:

<b>1</b>	“The consistency of the proposal with the jurisdiction’s solid waste management need as identified in its plan.” <i>Ala. Code</i> § 22-27-48(a)(1); PX 20 §11.1.1(1).
<b>2</b>	“The relationship of the proposal to local planned or existing development or the absence thereof, to major transportation arteries and to existing state primary and secondary roads.” <i>Ala. Code</i> § 22-27-48(a)(2); PX 20 § 11.1.1(2).
<b>3</b>	“The location of a proposed facility in relationship to existing industries in the state that generate large volumes of solid waste, or the relationship to the areas projected for development of industries that will generate solid waste.” <i>Ala. Code</i> § 22-27-48(a)(3); PX 20 § 11.1.1(3).
<b>4</b>	“Costs and availability of public services, facilities and improvements required to support a proposed facility and protect public health, safety and the environment.” <i>Ala. Code</i> § 22-27-48(a)(4); PX 20 § 11.1.1(4).
<b>5</b>	“The impact of a proposed facility on public safety and provisions made to minimize the impact on public health and safety.” <i>Ala. Code</i> § 22-27-48(a)(5); PX 20 § 11.1.1(5).
<b>6</b>	“The social and economic impacts of a proposed facility on the affected community, including changes in property values, and social or community perception.” <i>Ala. Code</i> § 22-27-48(a)(6); PX 20 § 11.1.1(6).