

From: Gilbert, Joel <jgilbert@balch.com>
Sent: Monday, October 13, 2014 9:14 AM
To: 'Robert D. Tambling (rtambling@ago.state.al.us)'
Cc: Shaper, Linda <lshaper@balch.com>
Bcc: Gilbert, Joel <jgilbert@balch.com>; droberson@drummondco.com; Israel, Adam <aisrael@balch.com>
Subject: Draft Correspondence Concerning the Proposed Listing of the 35th Ave. Superfund Site on the NPL
Attach: Attachments to 35th Ave. NPL Letter from L. Strange.pdf; BHAMLIB-#1362660-v2-35th_Avenue_Site_Letter_from_L_Strange_to_Region_4_Administrator.DOCX

Robert -

Attached is a draft letter (and referenced attachments) we'd propose be sent by the AG to Administrator Toney concerning EPA's decision to list the 35th Ave Superfund Site on the NPL. Please review and let me know if you'd like to discuss. I understand your office is closed today but please let me know you received this email when you get back in on Tuesday.
Thanks.

Joel

BALCH
A B I N G H A M

Joel I. Gilbert, Partner, Balch & Bingham LLP
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2:17-cr-00419-AKK-TMP
6/25/18 Jury Trial

GOVT EXHIBIT NO. 183

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BB-FED2_00003620
BB-FED2_00003620

October 8, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA E-MAIL (MCTEERTONEY.HEATHER@EPA.GOV)

Ms. Heather McTeer Toney
Regional Administrator--Region 4
United States Environmental Protection Agency
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Re: **Non-compliance with July 25, 1997 Fields Memorandum Regarding 35th Avenue Site Proposed NPL Listing**

Dear Administrator Toney:

I am writing on behalf of the State of Alabama regarding EPA's proposed listing of the "35th Avenue" Superfund Site¹ on the National Priorities List ("NPL").² For the reasons outlined below, EPA's proposed listing is both premature based on EPA's own policies and procedures, and is futile based on the statutory and regulatory mandates regarding EPA's use of superfund money for fund-financed remedial action. Accordingly, the State requests that EPA revise Proposed Rule No. 61 to remove the 35th Avenue Superfund Site from the list of proposed additions to the General Superfund section of the NPL.

As you are aware, your office contacted the Alabama Department of Environmental Management ("ADEM") on April 2, 2014 regarding the State's position on potentially listing the 35th Avenue Superfund Site on the NPL. On June 11, 2014, ADEM advised your office that it did not concur in EPA's proposed listing and specifically advised your office that the State of Alabama would not provide any funding "to cover the State's share of cleanup costs."³ On September 16, 2014, ADEM sent your office a follow-up email making abundantly clear that "[t]he State **DOES NOT CONCUR** in the proposed listing for numerous reasons."⁴ Undeterred by the State's unambiguous statement that it did not concur with EPA's proposed listing, and despite its unqualified refusal to

¹ Docket ID No. EPA-HQ-SFUND-2014-0623.

² See National Priorities List, Proposed Rule No. 61, 79 Fed. Reg. 56538 (Sept. 22, 2014).

³ A copy of ADEM's June 11, 2014 letter is attached for your reference.

⁴ A copy of ADEM's September 16, 2014 email is attached for your reference.

allocate any State funds to assist in clean-up of the 35th Avenue Superfund Site, EPA nevertheless decided to move forward with its proposed NPL listing without any further involvement from the State.

As noted above, EPA's proposed rule listing the 35th Avenue Superfund Site on the NPL is premature. EPA failed to follow its own internal procedures, which it says "will be employed in cases where a Regional Office . . . recommends proposing or placing a site on the [NPL], but the State . . . opposes listing the site." That process is clearly laid out in the July 25, 1997 memorandum—titled "Coordinating with the States on National Priorities List Decisions—Issue Resolution Process"—from Timothy Fields, Jr., Acting Assistant Administrator for the Office of Solid Waste and Emergency Response, to EPA's regional administrators.⁵ According to that memorandum, in situations where a State does not agree that listing a site on the NPL is appropriate, the relevant EPA regional office "should work closely with the State to try to resolve the issue before raising it to EPA Headquarters." In doing so, "[t]he Region should take into account past, ongoing and planned response actions by the State. If the Region determines that the issue cannot be resolved at the Regional level, the Regional Superfund Division Director should inform the Director of the State, Tribal and Site Identification Center (ST/SI) of the Office of Emergency and Remedial Response (OERR) and/or the appropriate ST/SI Regional Coordinator." OERR would then brief the Assistant Administrator for Solid Waste and Emergency Response. And EPA's own memorandum regarding this "Issue Resolution Process" makes very clear that if the matter is escalated to the Assistant Administrator for Solid Waste and Emergency Response, "[t]he State should have the opportunity to present its position in writing."

EPA failed to follow this procedure and Alabama has not been afforded an opportunity to present its position in writing. Instead, after being informed that the State of Alabama did not concur with the proposed NPL listing and that no State funds would be allocated to assist in any clean-up effort at the 35th Avenue Superfund Site, EPA moved forward with its proposed NPL listing without any further involvement from the State of Alabama. Such a blatant disregard of EPA's own policies and procedures is textbook arbitrary and capricious decision-making. See, e.g., *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . ."). Because the decision to propose the listing has not been elevated for review and because the State was not given the "opportunity to present its position in writing," as the Fields memo mandates, EPA's proposed rule listing the 35th Avenue Superfund Site as an addition to the General Superfund section of the NPL is premature.

Moreover, EPA's decision to move forward with its proposed NPL listing is perplexing, still, given the State's clear statement that it will not allocate any funds to assist in any clean-up effort at the 35th Avenue Superfund Site. The very purpose of listing a site on the NPL is to make the site eligible for superfund monies. Indeed, as the regulations make clear, "[o]nly those releases included on the NPL shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1). But even if a site is listed on the NPL, "[a] Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) cannot proceed unless a state provides its applicable required assurances," 40 C.F.R. § 300.510(a) (emphasis added), including that "the State will pay or assure payment of . . . 10 per centum of the costs of the remedial action, including all future maintenance" 42 U.S.C. §9604(c)(3).

⁵ A copy of the July 25, 1997 Fields memo is attached for your reference.

The State of Alabama has been unmistakably clear that no State money will be expended to assist in any clean-up effort at the 35th Avenue Superfund Site. Although your October 1, 2014 email to ADEM Director Lance LeFleur indicates that EPA believes it has "flexibilities in how the state cost share is paid,"⁶ I see no statutory or regulatory basis for such flexibility. In fact, the regulations are quite clear that, in the absence of the State's agreement to shoulder 10% of the cost of EPA's remedial action, "[a] Fund-financed remedial action . . . cannot proceed." 40 C.F.R. § 300.510(a). Because Alabama will not provide any State funds to assist in any clean-up effort at the 35th Avenue Superfund Site, I must question why EPA would propose the site for listing at great expense to all concerned parties when listing the site will be futile and have no practical effect.

I would very much appreciate an explanation of EPA's position as it relates to these issues, which are so critical to the relationship between the State of Alabama and the federal government on environmental matters. For the reasons stated above, the State of Alabama also requests that EPA revise Proposed Rule No. 61 to remove the 35th Avenue Superfund Site from the list of proposed additions to the General Superfund section of the NPL. Should EPA persist in moving forward with listing the 35th Ave. Superfund Site in contravention of its own policies and procedures, the State of Alabama is prepared to file comments in opposition to this proposed rule.

Respectfully,

Luther J. Strange, III
Attorney General for the State of Alabama

Attachments

cc: Governor Robert Bentley
Administrator Gina McCarthy
Ms. Gwendolyn Keyes Fleming
Mr. Lance R. LeFleur
Mayor William A. Bell, Sr.

⁶ A copy of your October 1, 2014 email is attached for your reference.

Contribution Detail

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Committee Name: STRANGE, LUTHER
Committee ID: 24900
Committee Type: Principal Campaign Committee

Report Schedule: Campaign Finance Report - Weekly
Reporting Period: 10/11/2014 - 10/17/2014
Filing Due: 10/20/2014

Contribution Type: Cash (Itemized)
Contribution/Receipt Date: 10/17/2014
Amount: \$25,000.00

Contributor Type: Group/Business/Corporation
Amended: No

Contributor: DRUMMOND COMPANY, INC.
P.O. BOX 10246
BIRMINGHAM, AL 35202

Description:



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OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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(334) 242-7300
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October 23, 2014

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED
VIA E-MAIL (MCTEERTONEY.HEATHER@EPA.GOV)

Ms. Heather McTeer Toney
Regional Administrator--Region 4
United States Environmental Protection Agency
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, Georgia 30303

Re: Non-compliance with July 25, 1997 Fields Memorandum Regarding 35th Avenue Site Proposed NPL Listing

Dear Administrator Toney:

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As you are aware, your office contacted the Alabama Department of Environmental Management ("ADEM") on April 2, 2014, regarding the State's position on potentially listing the 35th Avenue Superfund Site on the NPL. On June 11, 2014, ADEM advised your office that it did not concur in EPA's proposed listing and specifically advised your office that the State of Alabama would not provide any funding "to cover the State's share of cleanup costs."³ On September 16, 2014, ADEM sent your office a follow-up email making it abundantly clear that "[t]he State **DOES NOT CONCUR** in the proposed listing for numerous reasons."⁴ Undeterred by the State's unambiguous

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Ms. Heather McTeer Toney

<October 23, 2014>

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statement that it did not concur with EPA's proposed listing, and despite its unqualified refusal to allocate any State funds to assist in clean-up of the 35th Avenue Superfund Site, EPA nevertheless decided to move forward with its proposed NPL listing without any further involvement from the State.

As noted above, EPA's proposed rule listing the 35th Avenue Superfund Site on the NPL is premature. EPA failed to follow its own internal procedures, which it says "will be employed in cases where a Regional Office . . . recommends proposing or placing a site on the [NPL], but the State . . . opposes listing the site." That process is clearly laid out in the July 25, 1997 memorandum—titled "Coordinating with the States on National Priorities List Decisions—Issue Resolution Process"—from Timothy Fields, Jr., Acting Assistant Administrator for the Office of Solid Waste and Emergency Response, to EPA's regional administrators.⁵ According to that memorandum, in situations where a State does not agree that listing a site on the NPL is appropriate, the relevant EPA regional office "should work closely with the State to try to resolve the issue before raising it to EPA Headquarters." In doing so, "[t]he Region should take into account past, ongoing and planned response actions by the State. If the Region determines that the issue cannot be resolved at the Regional level, the Regional Superfund Division Director should inform the Director of the State, Tribal and Site Identification Center (ST/SI) of the Office of Emergency and Remedial Response (OERR) and/or the appropriate ST/SI Regional Coordinator." OERR would then brief the Assistant Administrator for Solid Waste and Emergency Response. And EPA's own memorandum regarding this "Issue Resolution Process" makes very clear that if the matter is escalated to the Assistant Administrator for Solid Waste and Emergency Response, "[t]he State should have the opportunity to present its position in writing."

EPA failed to follow this procedure and Alabama has not been afforded an opportunity to present its position in writing. Instead, after being informed that the State of Alabama did not concur with the proposed NPL listing and that no State funds would be allocated to assist in any clean-up effort at the 35th Avenue Superfund Site, EPA moved forward with its proposed NPL listing without any further involvement from the State of Alabama. Such a blatant disregard of EPA's own policies and procedures is textbook arbitrary and capricious decision-making. *See, e.g., Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950 (D.C. Cir. 1986) ("[I]t is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . ."). Because the decision to propose the listing has not been elevated for review and because the State was not given the "opportunity to present its position in writing," as the Fields memo mandates, EPA's proposed rule listing the 35th Avenue Superfund Site as an addition to the General Superfund section of the NPL is premature.

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Ms. Heather McTeer Toney

<October 23, 2014>

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even if a site is listed on the NPL, "[a] Fund-financed remedial action undertaken pursuant to CERCLA section 104(a) **cannot proceed** unless a state provides its applicable required assurances." 40 C.F.R. § 300.510(a) (emphasis added), including that "the State will pay or assure payment of . . . 10 per centum of the costs of the remedial action, including all future maintenance . . ." 42 U.S.C. §9604(c)(3).

The State of Alabama has been unmistakably clear that no State money will be expended to assist in any clean-up effort at the 35th Avenue Superfund Site. Although your October 1, 2014 email to ADEM Director Lance LeFleur indicates that EPA believes it has "flexibilities in how the state cost share is paid,"⁶ I see no statutory or regulatory basis for such flexibility. In fact, the regulations are quite clear that, in the absence of the State's agreement to shoulder 10% of the cost of EPA's remedial action, "[a] Fund-financed remedial action . . . cannot proceed." 40 C.F.R. § 300.510(a). Because Alabama will not provide any State funds to assist in any clean-up effort at the 35th Avenue Superfund Site, I must question why EPA would propose the site for listing at great expense to all concerned parties when listing the site will be futile and have no practical effect.

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Respectfully,



Luther Strange
Attorney General

Attachments

cc: Governor Robert Bentley
Administrator Gina McCarthy
Ms. Gwendolyn Keyes Fleming
Mr. Lance R. LeFleur
Mayor William A. Bell, Sr.

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