LAW OFFICE OF
DAVID A. LUDDER
A Professional Limited Liability Company

February 5, 2015

Overnight Delivery
Ms. Helena Wooden-Aguilar, Assistant Director
Office of Civil Rights
Mail Code 1201A - Room 2450
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: **Title VI Civil Rights Complaint**
Jefferson County Department of Health
Major Source Operating Permit No. 4-07-0001-03
ABC Coke, A Division of Drummond Company, Inc.
Jefferson County, Alabama

Dear Ms. Wooden-Aguilar:

This Complaint is filed pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and 40 C.F.R. Part 7. 40 C.F.R. § 7.35(b) provides:

> A recipient [of EPA financial assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Complainants allege that the Jefferson County Department of Health (JCDH) violated Title VI and EPA's implementing regulations by issuing, on August 11, 2014, Major Source Operating Permit No. 4-07-0001-03 authorizing ABC Coke, A Division of Drummond Company, Inc. to operate a major source of air pollution in Jefferson County, Alabama which has the effect of adversely and disparately impacting African-American residents in the adjacent community.

Complainants request that the EPA Office of Civil Rights accept this Complaint and conduct an investigation to determine whether JCDH violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7. If a violation is found and JCDH is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants petition EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to JCDH.

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9150 McDougal Court • Tallahassee • Florida 32312-4208 • Telephone 850-386-5671
Facsimile 267-873-5848 • Email DavidALudder@enviro-lawyer.com • Web www.enviro-lawyer.com

I. Title VI Background

"Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating." *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) ("*Interim Guidance*") at 2 (footnote omitted); *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39680 (2000) ("*Draft Guidance*").[1] "Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2.

A complete or properly pleaded complaint must (1) be in writing, signed, and provide an avenue for contacting the signatory (*e.g.*, phone number, address); (2) describe the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act that has the effect of discriminating on the basis of race, color, or national origin); (3) be filed within 180 calendar days of the alleged discriminatory act(s); and (4) identify the EPA financial assistance recipient that took the alleged discriminatory act(s). *Interim Guidance* at 6; *Draft Guidance*, 65 Fed. Reg. at 39672. In order to establish a *prima facie* case of adverse disparate impact, EPA must determine that (1) a causal connection exists between the recipient's facially neutral action or practice and the alleged impact; (2) the alleged impact is "adverse;" and (3) the alleged adversity imposes a disparate impact on an individual or group protected under Title VI. *Yerkwood Landfill Complaint Decision Document*, EPA OCR File No. 28R-99-R4 (July 1, 2003) at 3; *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000); *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24739, 24741 (2013).

"If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to 'justify' the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient." *Interim Guidance* at 11. *See Draft Guidance*, 65 Fed. Reg. at 39683. "Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity." *Interim Guidance* at 11. "[A] justification offered will not be considered acceptable if it is shown that a

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[1] On June 27, 2000, EPA published *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667-39687 (2000). The Preamble to the *Draft Guidance* states that "[o]nce the *Draft Revised Guidance for Investigating Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*) issued in February 1998." 65 Fed. Reg. at 39650. The *Draft Guidance* has never been made final and consequently, the *Interim Guidance* issued in February 1998 has not been replaced.

less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id. See Draft Guidance*, 65 Fed. Reg. at 39683.

"In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding." *Interim Guidance* at 3 (footnotes omitted) (citing 40 C.F.R. §§ 7.115(e), 7.130(b), 7.110(c)). "EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation. In appropriate cases, DOJ may file suit seeking injunctive relief." *Id.*

II. Complainants

"A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint. The complaint may be filed by an authorized representative." 40 C.F.R. § 7.120(a).[2]

The names, addresses and telephone numbers of the persons making this complaint are as follows:

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[2] The *Draft Guidance* purports to establish more stringent "standing" requirements than are presently contained in 40 C.F.R. § 7.120(a). The former authorizes the following persons to file a discrimination complaint:

> (a) A person who was allegedly discriminated against in violation of EPA's Title VI regulations;
> (b) A person who is a member of a specific class of people that was allegedly discriminated against in violation of EPA's Title VI regulations; or
> (c) A party that is authorized to represent a person or specific class of people who were allegedly discriminated against in violation of EPA's Title VI regulations.

Id., 65 Fed. Reg. at 39672. Notably, the *Draft Guidance* requires that a complainant be the victim of the alleged discrimination or a member of the protected class that is the victim of discrimination against. The *Draft Guidance* omits the option in 40 C.F.R. § 7.120(a) that *any person* – including a person who is not a member of a protected class – who believes that a specific class of persons has been discriminated against in violation of 40 C.F.R. Part 7 may file a complaint. An agency construction of its regulations that is inconsistent with the plain language of those regulations is unlawful. *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 276 F.3d 1253, 1263 (11th Cir. 2001); *Sierra Club v. Johnson*, 436 F. 3d 1269, 1274 (11th Cir. 2006).

GASP
Stacie M. Propst, Executive Director
732 Montgomery Highway #405
Birmingham, AL 35216
Phone (205) 541-3746

Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35211
Ex. 6 / Ex. 7(c) - Privacy

Greater Birmingham Ministries
Scott Douglas, Executive Director
2304 12th Avenue North
Birmingham, AL 35234
Phone (205) 326-6821

Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35207
Ex. 6 / Ex. 7(c) - Privacy

PANIC (People Against Neighborhood Industrial Contamination)
Charlie Powell, President
7727 7th Avenue South
Birmingham, AL 35206
Ex. 6 / Ex. 7(c) - Privacy

Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35207
Ex. 6 / Ex. 7(c) - Privacy

Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35204

Ex. 6 / Ex. 7(c) - Privacy
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Birmingham, AL 35215

Ex. 6 / Ex. 7(c) - Privacy
Tarrant, AL 35217
Ex. 6 / Ex. 7(c) - Privacy

Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35207
Ex. 6 / Ex. 7(c) - Privacy

Ex. 6 / Ex. 7(c) - Privacy
Tarrant, AL 35217

Ex. 6 / Ex. 7(c) - Privacy
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Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35205

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Ex. 6 / Ex. 7(c) - Privacy
Birmingham, AL 35216

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Irondale, AL 35210

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Several of the foregoing Complainants are African-Americans who live within 1.0 mile of the ABC Coke facility and who believe that they have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. A few of the Complainants are members of the African-American race who, though not themselves discriminated against by JCDH, believe that African-Americans as a class have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. In addition, several of the Complainants are not members of the African-American race who, though not themselves discriminated against by JCDH, believe that African-Americans have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. The undersigned is the authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

III. Recipient

EPA awards grants on an annual basis to many state and local agencies that administer continuing environmental programs under EPA's statutes. As a condition of receiving funding under EPA's continuing environmental program grants, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. EPA's Title VI regulations define a "[r]ecipient" as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient . . .." Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.

> Under amendments made to Title VI by the Civil Rights Restoration Act of 1987, a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance.
>
> Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the actions they take under programs that do not derive their authority from EPA statutes (*e.g.*, state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

Interim Guidance at 2-3 (footnotes omitted).

As shown in **Table 1** below, JCDH was a recipient of financial assistance from EPA at the time of the alleged discriminatory act and remains a recipient of financial assistance from EPA.

IV. Discriminatory Act

The alleged discriminatory act is the issuance (renewal) of Major Source Operating Permit No. 4-07-0001-03 by JCDH on August 11, 2014.[3] The permit authorizes ABC Coke, A Division of Drummond Company, Inc., to operate a major source of air pollution. The ABC Coke facility Ex. 6 / Ex. 7(c) - Privacy Jefferson County, Alabama approximately 1.9 miles northwest of the Birmingham-Shuttlesworth International Airport Ex. 6 / Ex. 7(c) - Privacy *See* **Figure 1**.

[3] "Generally, permit renewals should be treated and analyzed as if they were new facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes." *Interim Guidance* at 7.

Table 1
EPA FINANCIAL ASSISTANCE TO JCDH

Grant Family ID	CFDA Number	Applicant Name	Address	Award Date	Cumulative Award	Project Start	Project End
95495212	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	JUL-31-2012	$200,000	JUL-01-2012	DEC-31-2013
98409304	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	SEP-23-2004	$1,485,726	SEP-01-2004	MAY-31-2008
98436505	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	SEP-29-2005	$1,931,750	OCT-01-2005	MAR-31-2008
98495608	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	MAY-21-2008	$10,232,617	APR-01-2008	MAR-31-2015
97412905	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	JAN-04-2005	$946,896	OCT-01-2004	SEP-30-2005
97412906	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	FEB-13-2006	$1,129,972	OCT-01-2005	SEP-30-2006
97412907	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	JAN-23-2007	$756,809	OCT-01-2006	SEP-30-2007
97412908	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	DEC-20-2007	$3,194,541	OCT-01-2007	SEP-30-2009
97412910	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	DEC-30-2009	$18,660,910	OCT-01-2009	SEP-30-2014

Source: EPA Integrated Grants Management System (IGMS), http://www.epa.gov/enviro/facts/igms/search.html

Figure 1
Location of ABC Coke Facility in Jefferson County, Alabama

The ABC Coke facility was constructed in 1918 and has been in operation ever since. The facility has been owned by Drummond Company, Inc. since 1985. The facility produces coke and coke by-products that are sold or used in the coking process. ABC Coke is the largest merchant producer of foundry coke in the United States. The facility includes 132 coke ovens with an annual capacity of 730,000 tons of saleable coke. In 2012, ABC Coke produced 731,611 tons of coke. The facility includes a utilities production facility consisting primarily of three boilers that burn primarily coke oven gas. The facility operates 24 hours per day, 7 days per week, and 52 weeks per year.

Some of the emissions from the ABC Coke facility (estimated and reported by ABC Coke) are shown in **Tables 2, 3,** and **4.**

Table 2
Toxic/hazardous Air Pollutant Emissions from ABC Coke

TOXIC[1]/HAZARDOUS[2] AIR POLLUTANTS		2011 (Tons/Year)			2012 (Tons/Year)	
		TRI	JCHD Web	JCDH Inv	TRI	JCDH Web
1 2 4-TRIMETHYLBENZENE[1]	95636	0	NR	NR	0.027	NR
AMMONIA[1]	7664417	8.177	8.063	8.063	7.377	8.063
ANTHRACENE[1]	120127	0.09	NR	NR	0.091	NR
ARSENIC/ARSENIC COMPOUNDS[2]	7440382/N020	NR	0.002	0.002	NR	0.002
BENZENE[2]	BENZENE/71432	8.6855	8.686	8.686	5.7475	5.854
CADMIUM/CADMIUM COMPOUNDS[2]	7440439/N078	NR	0	0	NR	0
COAL TAR/COKE OVEN EMISSIONS[2]	8007452	NR	7.628	7.628	NR	7.327
CYANIDE/CYANIDE COMPOUNDS[2]	57125/N106	2.403	2.403	2.403	2.187	2.403
DIBENZOFURAN[2]	132649	0.068	0.068	0.068	0.069	0.068
ETHYLENE[1]	74851	10.1055	NR	NR	8.8345	NR
ETHYLENE DIBROMIDE[2]	100414	NR	0.086	0.086	NR	0.086
ETHYLENE OXIDE[2]	75218	NR	6.787	NR	NR	0
HYDROGEN SULFIDE[2]	7783064	NR	NR	NR	1.6305	NR
LEAD/LEAD COMPOUNDS[2]	7439921/N420	0.0023	0.0023	0.0016	0.0016	0.0016
MANGANESE/MANGANESE CMPDS[2]	13966319/N450	NR	0.003	0.003	NR	0.003
NAPHTHALENE[2]	91203	2.445	2.56	2.56	2.204	2.671
PHENANTHRENE[1]	85018	0.3505	NR	NR	0.3525	NR
PHENOL[2]	108952	0.63	0.63	0.63	0.563	0.561
POLYCYCLIC AROMATIC HYDROCARBONS/CMPDS/ORGANIC MATTER[1]	N590	0.6295	0.112	0.112	0.6325	0.626
PROPYLENE[1]	115071	1.411	NR	NR	0.898	NR
PROPYLENE OXIDE[2]	75569	NR	0.843	0.843	NR	0
STYRENE[2]	100425	0.0195	0.019	0.019	0.031	0.031
TOLUENE[2]	108883	3.5835	3.583	3.583	3.0975	3.097
XYLENE (MIXED ISOMERS)[2]	1330207	0.478	0.478	0.478	0.403	0.403

Table 3
NAAQS Pollutant Emissions from ABC Coke

NAAQS AIR POLLUTANTS		2011 (Tons/Year)			2012 (Tons/Year)	
		TRI	JCHD Web	JCDH Inv	TRI	JCHD Web
Carbon Monoxide	CO	NR	854.091	854.091	NR	15723.74
Lead	7439921	0.0023	0.0023	0.0016	0.0016	0.0016
Nitrogen oxides	NOX	NR	1157.35	1157.35	NR	1071.685
Particulate Matter <2.5 microns Filterable	PM25-FIL	NR	189.344	189.344	NR	168.774
Particulate Matter <10 microns	PM10	NR	255.812	255.812	NR	230.859
Sulfur dioxide	SO2	NR	2142.017	2142.017	NR	1950.473

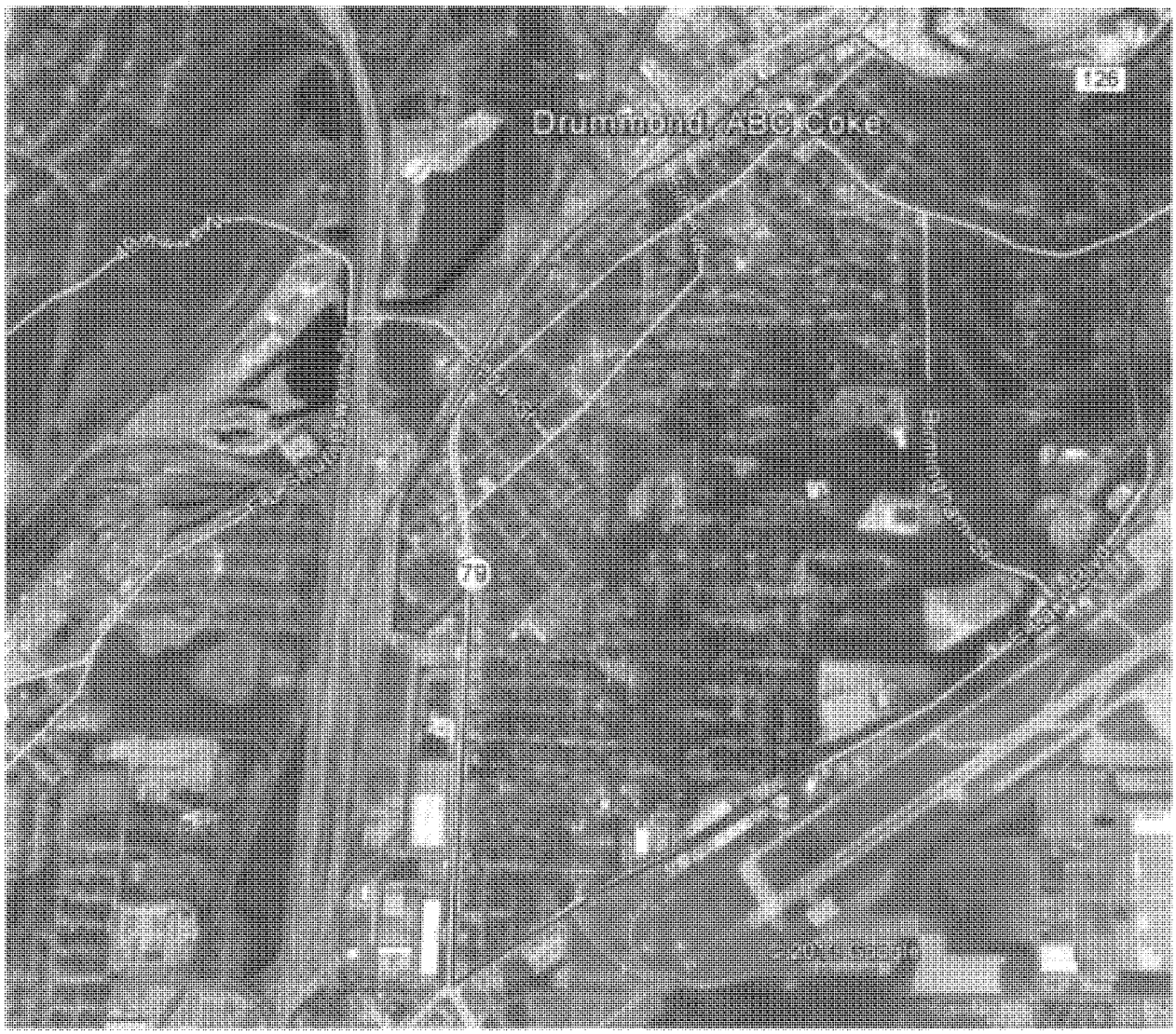
Table 4
Other Air Pollutant Emissions from ABC Coke

OTHER AIR POLLUTANTS		2011 (Tons/Year)			2012 (Tons/Year)	
		TRI	JCHD Web	JCDH Inv	TRI	JCHD Web
Total Suspended Particulates	TSP	NR	541.171	541.171	NR	483.5123
Volatile Organic Carbons	VOC	NR	170.14	170.14	NR	147.695

V. Adverse Impacts

A densely populated residential community is located adjacent to the ABC Coke facility and outlined in red in **Figure 2**.

Figure 2
Proximity of Residential Community to ABC Coke Facility



The adverse impacts suffered by residents from the activities authorized by Major Source Operating Permit No. 4-07-0001-03 include the following:

A. Frequent emissions of particulate matter from the ABC Coke facility that result in deposition of particulate matter on personal and real property, including homes, porches, vehicles, laundry, yards and gardens.

B. Frequent emissions of odors from the ABC Coke facility that are unpleasant, tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea.

C. Frequent emissions of particulate matter, volatile organic carbons, and toxic contaminants from the ABC Coke facility that result in respiratory irritations, sinus headaches and infections, and exacerbation of symptoms of Chronic Obstructive Pulmonary Disease (COPD) and asthma.

D. Frequent emissions of toxic air contaminants that result in the presence in the outdoor atmosphere of one or more carcinogenic air contaminants in such quantities and duration as are, or tend to be, injurious to human health.[4]

E. Frequent emissions of toxic air contaminants that result in contamination of soil.

F. Frequent emissions of air contaminants that result in increased risk of low birth weight and pre-term births.[5]

G. Reduced property values.

In addition to being impacted by the emissions from ABC Coke, residents are also exposed to the emissions of air contaminants from Ex. 6 / Ex. 7(c) - Privacy Ex. 6 / Ex. 7(c) - Privacy others. The emissions of air contaminants from all of these facilities create a cumulative

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[4] Neither JCDH nor ABC Coke has performed modeling or monitoring of air toxics near the ABC Coke facility. JCDH and EPA have performed monitoring of air toxics at other locations, the closest of which is approximately 1.5 miles from ABC Coke. U.S. Environmental Protection Agency - Region 4, *North Birmingham Air Toxics Risk Assessment* (Mar. 2013) at 36, *available at* http://www.epa.gov/region4/air/airtoxic/North-Birmingham-Air-Toxics-Risk-Assessment-final-03282013.pdf and Jefferson County Department of Health, *Birmingham Air Toxics Study* (Feb. 2009), *available at* http://www.jcdh.org/misc/ViewBLOB.aspx?BLOBId=182.

[5] Porter, Travis R. et al, Spatiotemporal association between birth outcomes and coke production and steel making facilities in Alabama, USA: a cross-sectional study, *Environmental Health* 2014 13:85, *available at* http://www.ehjournal.net/content/13/1/85.

burden on the community that magnifies the adverse impacts identified above. *See* **Figures 3** and 4.

Figure 3
Significant Air Pollution Sources Near ABC Coke

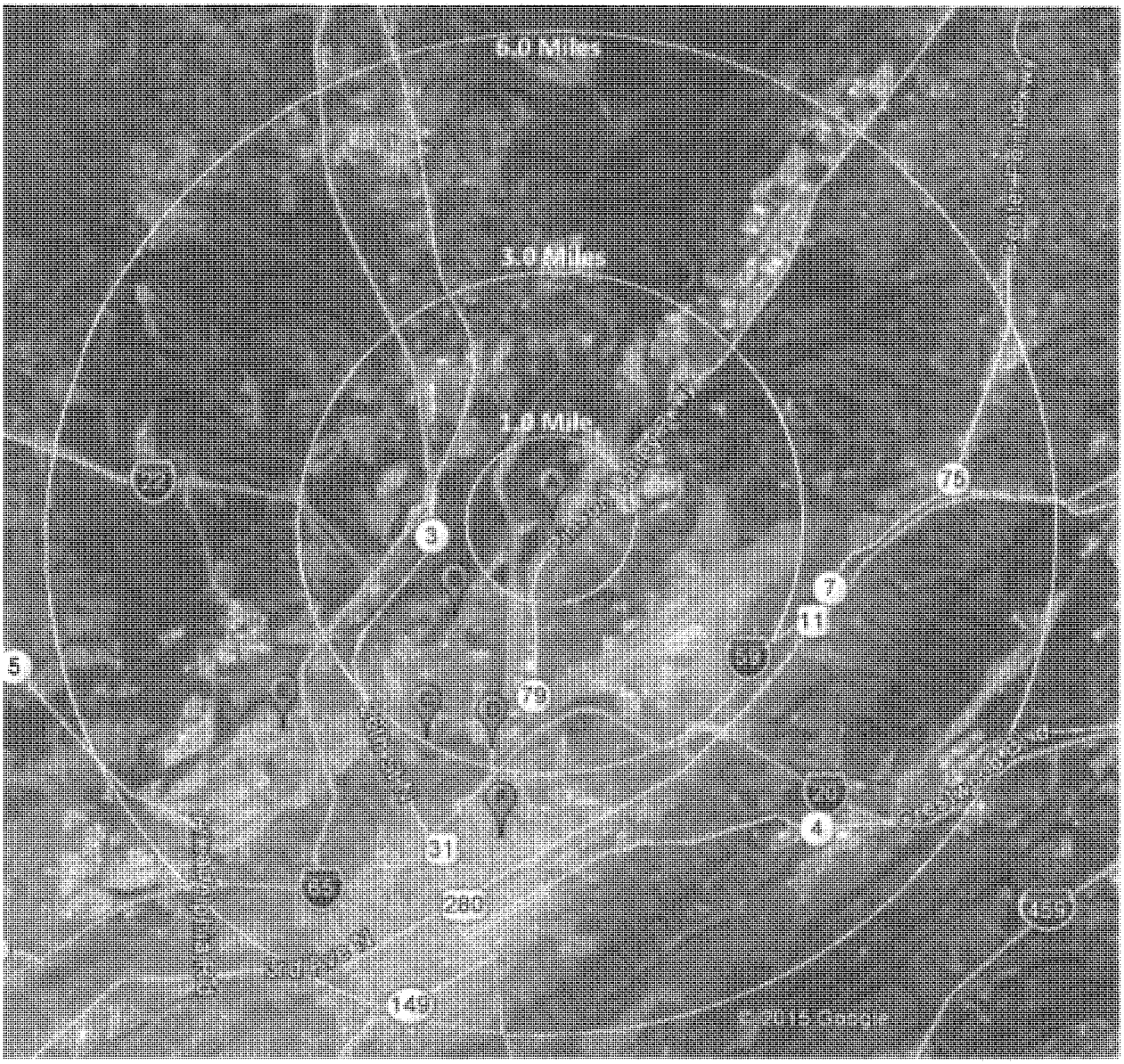
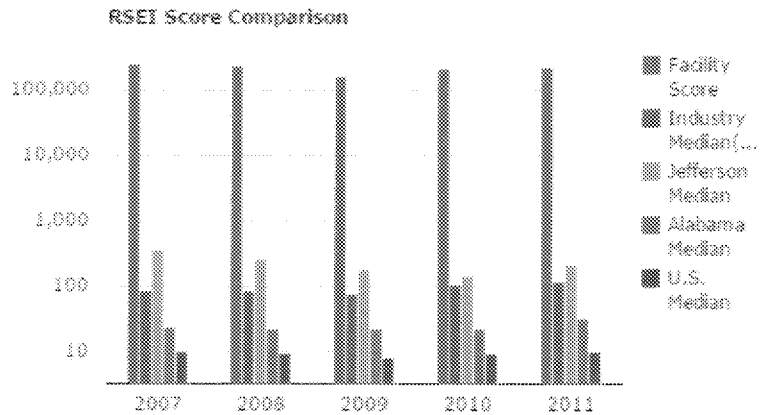
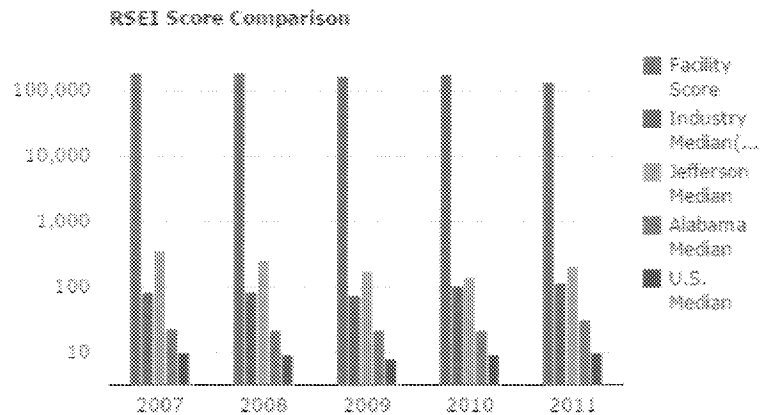


Figure 4
Risk Screening Environmental Indicators (RSEI) Score Comparisons of Significant Air Pollution Sources Near ABC Coke

A. ABC Coke Division, Drummond Co., Inc.



Ex. 6 / Ex. 7(c) - Privacy



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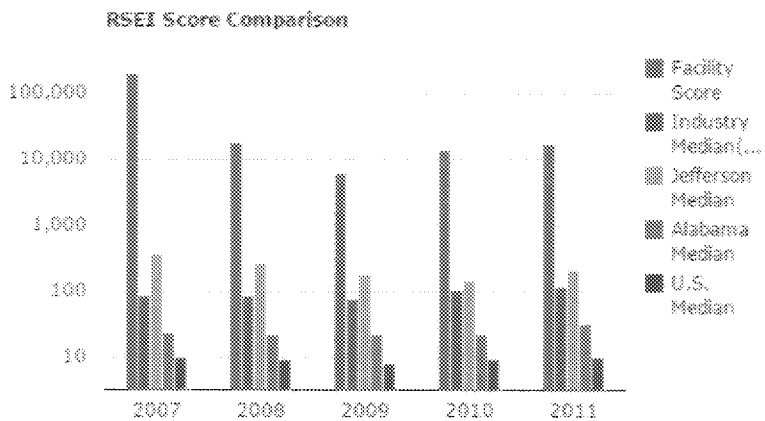

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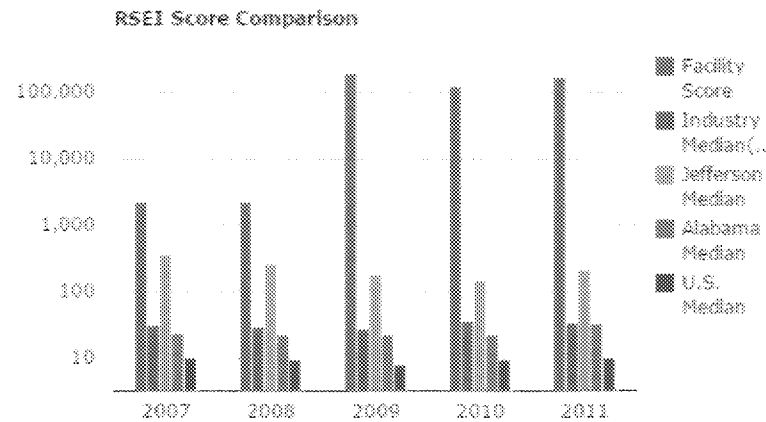
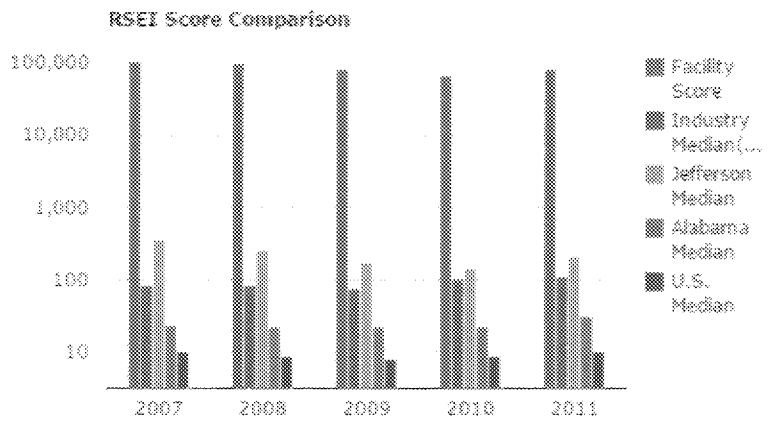


Figure 4 (con't)

E. Ex. 6 / Ex. 7(c) - Privacy



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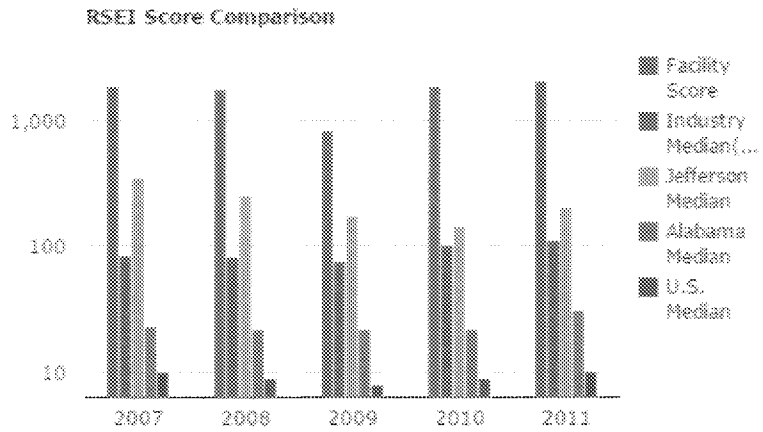

VII. Disparate Impacts

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated below by comparing the 2010 local census data to Jefferson County and Alabama census data. In all of the State of Alabama, the percent Black or African-American Alone population in 2010 was 26.2%. The percent Black or African-American Alone population in all of Jefferson County in 2010 was 42.0%.

Figure 5 and **Table 5** show the racial demographics of the residential area closest to ABC Coke. The percent Black or African-American Alone population in these census block groups range from 48.3% to 90.06%. The aggregate average is 66.7%.

Figure 5
Census Block Groups near ABC Coke

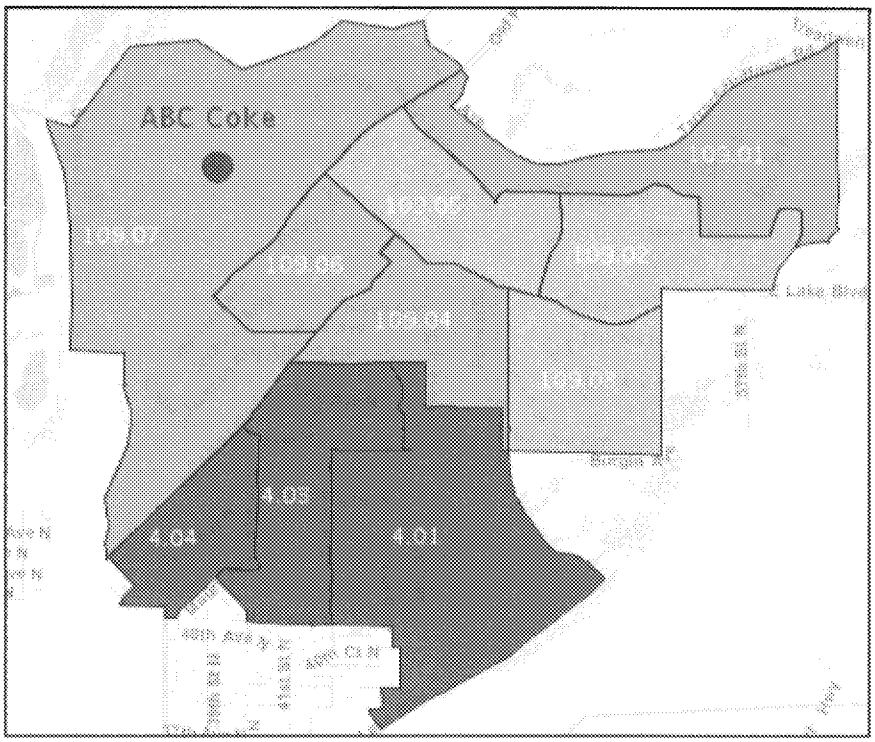

Table 5
2010 Census Block Group Data near ABC Coke

Tract.Block Group	4.01		4.03		4.04	
Total Population	619		788		476	
Black or African-American Alone	561	90.06%	703	89.2%	427	89.7%
Tract.Block Group	109.01		109.02		109.03	
Total Population	615		526		596	
Black or African-American Alone	380	61.8%	254	48.3%	320	53.7%
Tract.Block Group	109.04		109.05		109.06	
Total Population	1,050		711		684	
Black or African-American Alone	679	64.7%	372	52.3%	427	62.4%
Tract.Block Group	109.07		TOTAL (All Selected Block Groups)			
Total Population	807		6,872			
Black or African-American Alone	463	57.4%	4,586	66.7%		

Table 6 shows the racial demographics within 1.0 mile (65.2% Black), 3.0 miles (66.1% Black), and 6.0 miles (57.8% Black) of ABC Coke.

Figure 6 shows those Census Bock Groups in Jefferson County having a percent Black or African-American Alone population greater than the County average (*i.e.*, >42.0%). **Figure 7** shows those Census Bock Groups in Jefferson County having a percent Black or African-American Alone population greater than 50.4% (*i.e.*, 20% higher than the County average).

Table 6

US Census 2010 Race Ethnicity Comparison

GALE CENGAGE Learning

Geography: 1 Mile: ABC Coke, 3 Miles: ABC Coke, 6 Miles: ABC Coke

Date: February 1, 2015

Census 2010 Demographics:

Total Population	4,134	25,870	144,637
Race and Ethnicity			
American Indian	0.8%	0.3%	0.2%
Asian	0.2%	0.3%	0.7%
Black	65.2%	66.1%	57.8%
Hawaiian/Pacific Islander	0.5%	0.2%	0.0%
White	27.3%	27.5%	37.8%
Other	4.1%	4.0%	2.1%
Multi-Race	1.6%	1.2%	1.1%
Hispanic Ethnicity	7.6%	6.3%	3.8%
Not of Hispanic Ethnicity	92.3%	93.6%	96.1%
Race of Hispanics			
Hispanics	315	1,651	5,620
American Indian	7.3%	1.6%	1.0%
Asian	0.0%	0.0%	0.0%
Black	4.3%	3.8%	4.9%
Hawaiian/Pacific Islander	3.1%	1.6%	1.0%
White	25.9%	25.1%	33.5%
Other	53.9%	63.0%	54.3%
Multi-Race	5.1%	4.6%	5.0%
Race of Non Hispanics			
Non Hispanics	3,819	24,219	139,017
American Indian	0.3%	0.2%	0.2%
Asian	0.3%	0.3%	0.7%
Black	70.3%	70.4%	59.9%
Hawaiian/Pacific Islander	0.2%	0.1%	0.0%
White	27.4%	27.7%	37.9%
Other	0.0%	0.0%	0.0%
Multi-Race	1.3%	0.9%	0.9%

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Figure 6
Census Block Groups in Jefferson County, Alabama Greater than 42.0% Black or African-American Alone (County Average)

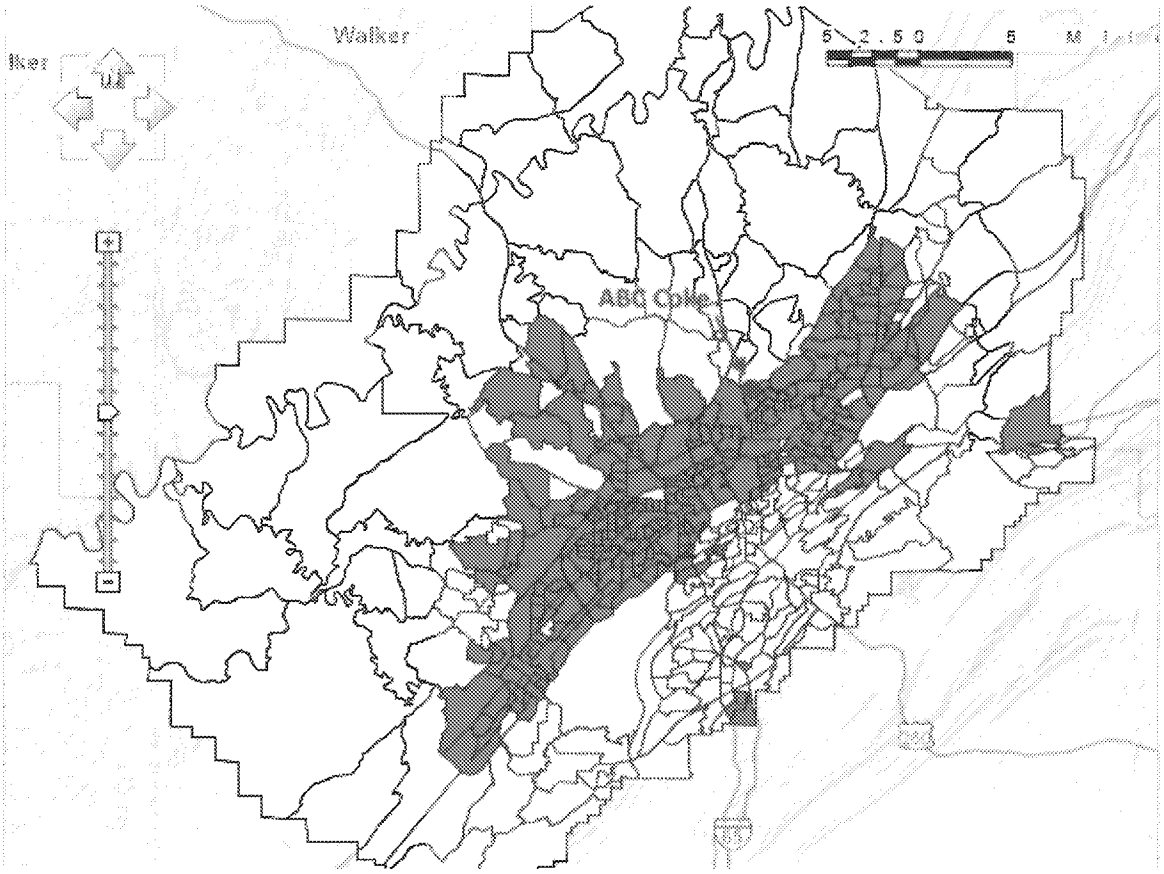
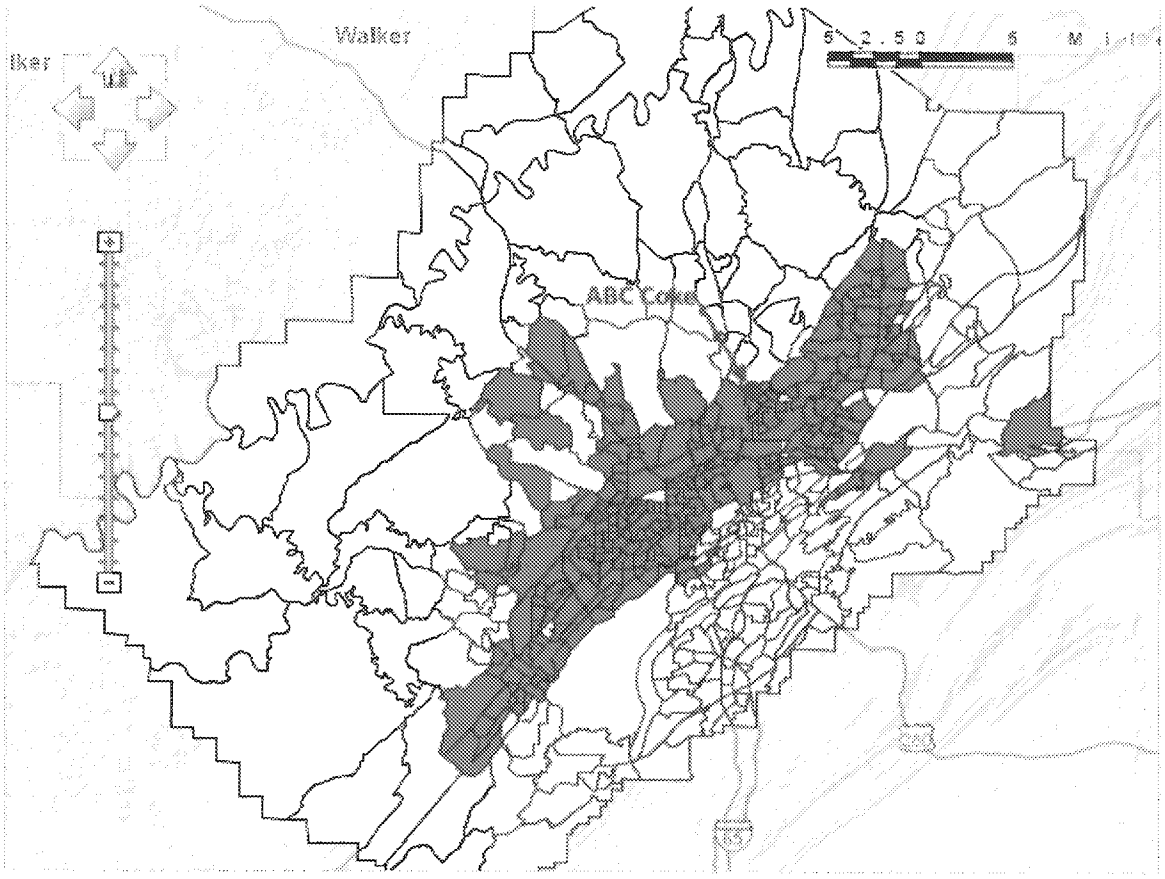


Figure 7
Census Block Groups in Jefferson County, Alabama
Greater than 50.4% Black or African-American Alone



VII. JCDH Authority

EPA guidance provides that "OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program." *Interim Guidance* at 8; *Draft Guidance*, 65 Fed. Reg. at 39678. "In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." *Draft Guidance*, 65 Fed. Reg. at 39678. *See id.*, 65 Fed. Reg. at 39670, 39671. Complainants submit that both the *Interim Guidance* and *Draft Guidance* are wrong as a matter of law on this point.

40 C.F.R. § 7.30 provides that "[n]o person shall . . . be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race . . .." In addition, 40 C.F.R. § 7.35(b) provides that "[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race . . .." To establish discrimination under these provisions, EPA must find that "first, a facially neutral policy casts an effect on a statutorily-protected group; second, the effect is adverse; and finally, the effect is disproportionate." *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999) (citing *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir.1993)), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Director of the Alabama Department of Public Safety had imposed an English-only language requirement for giving driver's license examinations. Sandoval sued contending that the requirement violated Title VI of the Civil Rights Act of 1964. The Court held that Sandoval was correct – the English-only language requirement resulted in discrimination based on national origin because "the inability to drive a car adversely affects individuals in the form of lost economic opportunities, social services, and other quality of life pursuits." *Id.* Although these adverse effects were not within the authority of the Department to consider, the Court recognized them as sufficient to establish disproportionate adverse effects on a group protected by Title VI.

As discussed below, JCDH has express authority under the Jefferson County Board of Health Air Pollution Control Rules and Regulations to regulate air pollution sources that may cause odors, emission of particulates, emission of air toxics. JCDH does not, however, have express authority to address reductions in property values that often occur as a consequence of industrial operations. Nevertheless, the permits granted by JCDH which authorize the operation of the ABC Coke facility have had the disproportionate adverse effect of subjecting persons of a protected race to reductions in the value of their property. This adverse economic effect is cognizable under Title VI, notwithstanding EPA's contrary pronouncements in the *Interim Guidance* and *Draft Guidance*. To hold otherwise would contravene *Sandoval* and allow the Board of Health and similar local agencies to define what is and is not actionable discrimination under Title VI, thereby frustrating the purpose of Title VI.

A. Particulate Emissions

The Jefferson County Department of Health has ample authority to control particulate emissions and deposition on buildings and other places and things. For example, Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.

An "air contaminant" is "any solid . . . matter . . . , from whatever source." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3. Total Suspended Particulates (including particulate matter greater than 10 microns) are among the many air contaminants emitted into the air by ABC Coke. No "ambient air quality standards" have been set for these air contaminants under Jefferson County Air Pollution Control Rules and Regulations, Section 1.7.1.

In addition, Jefferson County Air Pollution Control Rules and Regulations, Part 6.2 provides:

> 6.2 Fugitive Dust.
>
> 6.2.1 No person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
>
> (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;
>
> (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems; and
>
> (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dust materials. Adequate containment methods shall be employed during sandblasting or other similar operations.
>
> 6.2.2 Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

In addition, Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When dust . . . escape[s] from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing provisions authorize JCDH to require controls on the emission of particulate matter.

B. Odor Emissions

JCDH has ample authority to control odors. For example, Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.

An "air contaminant" includes ". . . any odor . . .from whatever source." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3. "Odor" is defined in Part 1.3 as follows:

> "Odor" shall mean smells or aromas which are unpleasant to persons, or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea, or which by their inherent chemical or physical nature, or method of processing, are, or may be, detrimental or dangerous to health. Odor and smell are used interchangeable therein.

Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When . . . odorous matter . . . escape[s] from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing,

> handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing provisions authorize JCDH to require controls on the emission of odors.

C. Toxic Air Contaminants

Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.1.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, . . . or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.[6]

An "air contaminant" is "any solid, liquid, or gaseous matter . . . or any combination thereof, from whatever source." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3. Polycyclic Aromatic Compounds, Benzene, Naphthalene, and Arsenic are among the many toxic air contaminants emitted into the air by ABC Coke. No "ambient air quality

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[6] Although Part 1.3 does not establish numerical standards for the quantity and duration of contaminants that are or tend to be injurious to human health, the Board of Health has established such standards on the granting any variances, including variances from Part 1.13. Thus, a variance from the prohibition against permitting or causing "air pollution" (Part 1.13) may only be considered if the numerical standards in Section 3.1.2 are not exceeded. Section 3.1.2 provides:

> A variance will not be considered for approval under any circumstances if emissions from the source for which the variance is petitioned can be shown by computer modeling or ambient monitoring to cause outside the facility property line any of the following:
>
> * * *
>
> (c) If the toxic emission is a carcinogen, an amount equal to or greater than that which would result in an individual having more than one (1) in one hundred thousand (100,000) chance of developing cancer over a lifetime (70 years) of exposure to that amount.

standards" have been set for these air contaminants under Jefferson County Air Pollution Control Rules and Regulations, Section 1.7.1.

Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When dust, fumes, gases, mist, odorous matter, vapors, or any combination thereof escape from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing rules authorize JCDH to require controls on toxic air contaminants.

D. Soil Contamination

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Transportation's English-only language requirement for motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because it adversely affected individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Similarly, the operation of the ABC Coke facility, with all its associated emissions of toxic air contaminants, has resulted in contamination of soils where members of the African-American race reside in the affected community. JCDH cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider soil contamination.

E. Property values

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Transportation's English-only language requirement for motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because it adversely affected individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Similarly, the operation of the ABC Coke facility, with all its associated emissions of particulates, odors, and toxic air contaminants, has an adverse effect on the property values of members of the African-American race in the affected community. JCDH cannot escape its obligation to ensure that its actions do not have

discriminatory effects merely because it does not have authority to regulate or consider property values.

IX. Justification and Less Discriminatory Alternatives

"If the recipient can neither rebut the initial finding of disparate impact nor develop an acceptable mitigation plan, then the recipient may seek to demonstrate that it has a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact." *Interim Guidance* at 4. "[T]here must be some articulable value to the recipient [ADEM] in the permitted activity." *Id.* at 11. "The justification must be necessary to meet 'a legitimate, important goal integral to [the recipient's] mission." *Investigative Report for Title VI Administrative Complaint File No. 28R-99-R4* at 60. "Even where a substantial, legitimate justification is proffered, OCR will need to consider whether it can be shown that there is an alternative that would satisfy the stated interest while eliminating or mitigating the disparate impact." *Interim Guidance* at 4. "Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Id.* at 2 (footnote omitted). "[M]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification." *Id.* at 11. And, "[i]f a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id.*

JCDH has not articulated a value to JCDH in the permitting of ABC Coke. It is not likely that JCDH has a substantial, legitimate interest in the permitting of ABC Coke.

X. JCDH's Assurances and Defenses

With each application for EPA financial assistance, JCDH is required to provide assurances that it "will comply with the requirements of" 40 C.F.R. Part 7 implementing Title VI. 40 C.F.R. § 7.80(a)(1). *See* Standard Form 424B ("As the duly authorized representative of the applicant, I certify that the applicant: * * * Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; . . .."). Beginning January 23, 2013, EPA has required that grant recipients agree to the following additional grant condition:

> In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.

As mentioned above, 40 C.F.R. § 7.35(b) prohibits JCDH from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race. JCDH may claim that that it grants permits in accordance with applicable laws and regulations without regard to the racial composition of any impacted communities. Such a claim is, in essence, a claim that JCDH's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize JCDH's obligation under Title VI to avoid unintentional discriminatory effects. "Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2 (footnote omitted).

JCDH may also claim that it grants permits in accordance with applicable laws and regulations ("criteria") that are designed to protect human health and the environment. Compliance with these "criteria," JCDH may suggest, ensures that racial minorities are impacted no differently than other races. This assertion ignores the fact that members of the African-American race are *disparately* affected by the emissions from the ABC Coke facility, notwithstanding JCDH's alleged compliance with the applicable criteria.[7]

XI. Timeliness of Complaint

40 C.F.R. § 7.120(b)(2) requires that a complaint alleging discrimination under a program or activity receiving EPA financial assistance must be filed within 180 days after the alleged discriminatory act. The issuance of Major Source Operating Permit No. 4-07-0001-03 by JCDH to ABC Coke, A Division of Drummond Company, Inc., occurred on August 11, 2014. The 180 day limitations period ends February 7, 2015. This complaint was sent by overnight delivery to the above address (provided by OCR) on February 5, 2015.

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[7] EPA's *Draft Title VI Guidance Documents Questions and Answers* states:

> 13. Does compliance with existing Federal and state environmental regulations constitute compliance with Title VI?
>
> A recipient's Title VI obligation exists independent from Federal or state environmental laws governing its permitting program. Recipients may have policies and practices that are compliant with Federal or state regulations but that have discriminatory effects (such as an adverse disparate impact) on certain populations based on race, color, or national origin, and are therefore noncompliant with Title VI.

Id. at 4.

XII. Pending Administrative Reviews

In certain circumstances, EPA may decide that a complaint will be "closed" because a pending administrative review "could affect the circumstances surrounding the complaint and any investigation that OCR may conduct." In such cases, EPA may "may waive the 180 day filing time limit if the complaint is filed within a reasonable time period after the conclusion of the administrative appeal process. Generally, that reasonable time period will be no more than 60 calendar days." *Draft Guidance*, 65 Fed. Reg. at 39673.

A. Board of Health Review of Major Source Operating Permit No. 4-07-0001-03

On August 26, 2014, GASP, and GASP alone, filed a Request for Hearing with the Jefferson County Board of Health pursuant to Jefferson County Board of Health Air Pollution Control Rules and Regulations, Chap. 12 seeking to have Major Source Operating Permit No. 4-07-0001-03 disapproved by the Board. The Board is only empowered to determine whether JCDH issued Major Source Operating Permit No. 4-07-0001-03 in compliance with the Jefferson County Board of Health Air Pollution Control Rules and Regulations. It is not empowered to determine whether the permit results in discriminatory impacts or violates Title VI. Motions to dismiss were filed by the Jefferson County Department of Health Air Pollution Control Program and ABC Coke and remain pending. In the meantime, Major Source Operating Permit No. 4-07-0001-03 is effective as issued and emissions from the ABC Coke facility continue.

B. EPA Review of Major Source Operating Permit No. 4-07-0001-03

On October 6, 2014, GASP, and GASP alone, petitioned EPA to object to the issuance of Major Source Operating Permit No. 4-07-0001-03 pursuant to Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d). EPA is only empowered to determine whether JCDH issued Major Source Operating Permit No. 4-07-0001-03 in compliance with the requirements of the Clean Air Act. EPA is not empowered to object to the permit because the permit results in discriminatory impacts or violates Title VI. The petition remains pending. In the meantime, Major Source Operating Permit No. 4-07-0001-03 is effective as issued and emissions from the ABC Coke facility continue.

C. EPA Preliminary Assessment of Hazards from Release of Hazardous Substances

On July 1, 2014, GASP filed a Petition for Preliminary Assessment of Release of Hazardous Substances with EPA pursuant to 42 U.S.C. § 9605(d) and 40 C.F.R. § 300.420(b)(5). This petition requests that EPA perform a preliminary assessment of the hazards to public health and the environment which are associated with the release of hazardous substances by the ABC Coke facility in the residential area shown in **Figure 2**. On October 9, 2014, EPA granted the petition to determine if a threat to the public or the environment exists in the Tarrant neighborhood in Birmingham, Alabama. EPA will <u>not</u> determine whether the permit results in discriminatory impacts or violates Title VI. EPA has yet to release its preliminary assessment.

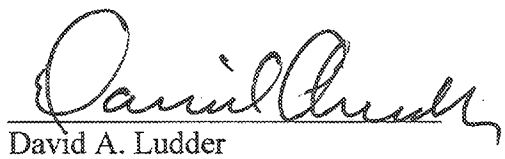
In the meantime, Major Source Operating Permit No. 4-07-0001-03 is effective as issued and emissions from the ABC Coke facility continue.

Many of the Complainants herein are not parties to the above-described administrative review proceedings. It is clear from the *Draft Guidance* that EPA intends for this abstention policy to apply only to Complainants who are participating in an administrative review proceeding. *Draft Guidance*, 65 Fed. Reg. at 39673 ("This will encourage *complainants* to exhaust administrative remedies available under the recipient's permit appeal process and foster early resolution of Title VI issues.") (emphasis added). To the extent EPA determines that abstention is appropriate because GASP is participating in administrative review proceedings, all Complainants named herein request that EPA sever GASP from this complaint and not abstain from processing this complaint as to the other Complainants.

XIII. Request

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency - Office of Civil Rights accept this complaint and conduct an investigation to determine whether JCDH violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the issuance (renewal) of Major Source Operating Permit No. 4-07-0001-03 on August 11, 2014. If a violation is found and JCDH is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further petition the EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to JCDH, and after the conclusion of those proceedings, deny, annul, or terminate EPA financial assistance to JCDH.

Sincerely,



David A. Ludder
Attorney for Complainants