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

January 3, 2012

Priority Mail
Ms. Helena Wooden-Aguilar, Assistant Director
External Complaints and Compliance Program
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Re: **Title VI Complaint - Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry 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 Alabama Department of Environmental Management (ADEM) violated Title VI and EPA's implementing regulations by reissuing Permit No. 53-03 to Perry County Associates, LLC for construction and operation of the Arrowhead Landfill, a municipal solid waste landfill in Perry County, Alabama which has the effect of adversely and disparately impacting African-American residents in the community.

I. Title VI Background

"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 for Investigating Title VI Administrative Complaints Challenging Permits (EPA, Feb. 5, 1998) at 2 (footnote omitted) (available at http://www.enviro-lawyer.com/Interim_Guidance.pdf).

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

Received
JAN - 6 2012

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). Id. at 6 (citing 40 C.F.R. § 7.120(b)(1),(2)). 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 allegedly adverse disparate 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 (citing 40 C.F.R. § 7.120(g); New York City Envtl. Justice Alliance v. Giuliani, 214 F.3d 65, 69 (2nd Cir. 2000)).

"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 for Investigating Title VI Administrative Complaints Challenging Permits at 11. "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." Id. "[A] justification offered will not be considered acceptable if it is shown that a 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.

"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." Id. 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

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

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy
[redacted]
Uniontown, AL 36786
(b) (6) Privacy, (b) (7)(C) Enforcement Pr

(b) (6) Privacy, (b) (7)(C) Enforcement Pr
[redacted]
Uniontown, AL 36786
(b) (6) Privacy, (b) (7)(C) Enforcement Priv

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy
[redacted]
Uniontown, AL 36786
(b) (6) Privacy, (b) (7)(C) Enforcement Priv

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy

[redacted]

(b) (6) Privacy, (b) (7)(C) Enforcement Privacy

[redacted]

The Complainants are represented by the undersigned. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

III. Recipient

ADEM was a recipient of financial assistance from EPA at the time of the alleged discriminatory act. For example, EPA recently awarded grants to ADEM as shown in Exhibit A (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html).

IV. Discriminatory Act

The alleged discriminatory act is the reissuance of Solid Waste Disposal Facility Permit No. 53-03 by ADEM to Perry County Associates, LLC for construction and operation of the Arrowhead Landfill, a municipal solid waste landfill. Exhibit B (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html). "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 for Investigating Title VI Administrative Complaints Challenging Permits at 7.

Permit No. 53-03 authorizes the disposal of "[n]onhazardous solid wastes, noninfectious putrescible wastes including but not limited to household garbage, commercial waste, industrial waste, construction and demolition debris, and other similar type materials" from thirty-three states. Id. The permit authorizes the disposal of 15,000 tons of waste per day – the largest authorized waste disposal volume in Alabama. Figure 1. The authorized disposal area is presently 256.151 acres, however Perry County Associates, LLC has recently applied for a 169.179 acre expansion. Exhibit C. The facility is located in Perry County, Alabama at approximately (b) (6) Privacy, (b) (7)(C) Enforcement Privacy. Figure 2.

V. Timeliness

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 reissuance of Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC occurred on September 27, 2011. This complaint is filed within 180 days after the permit was reissued.

Figure 1
AUTHORIZED WASTE DISPOSAL VOLUMES AT ALABAMA LANDFILLS
Source: Permitted Solid Waste Landfills in the State of Alabama (ADEM, June 29, 2011)
(available at http://www.adem.alabama.gov/programs/land/landforms/MSWLFMasterList08-11.pdf)

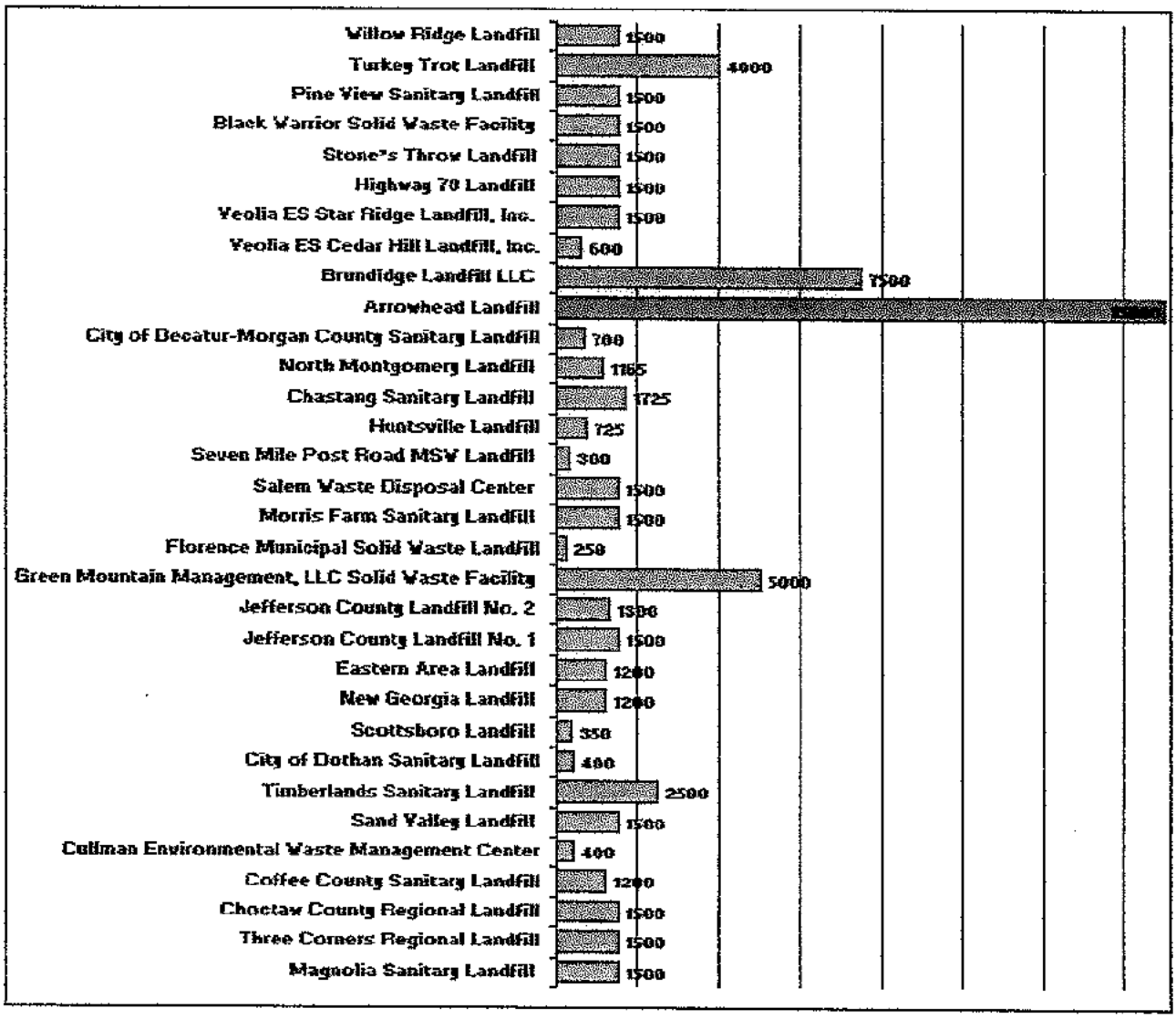
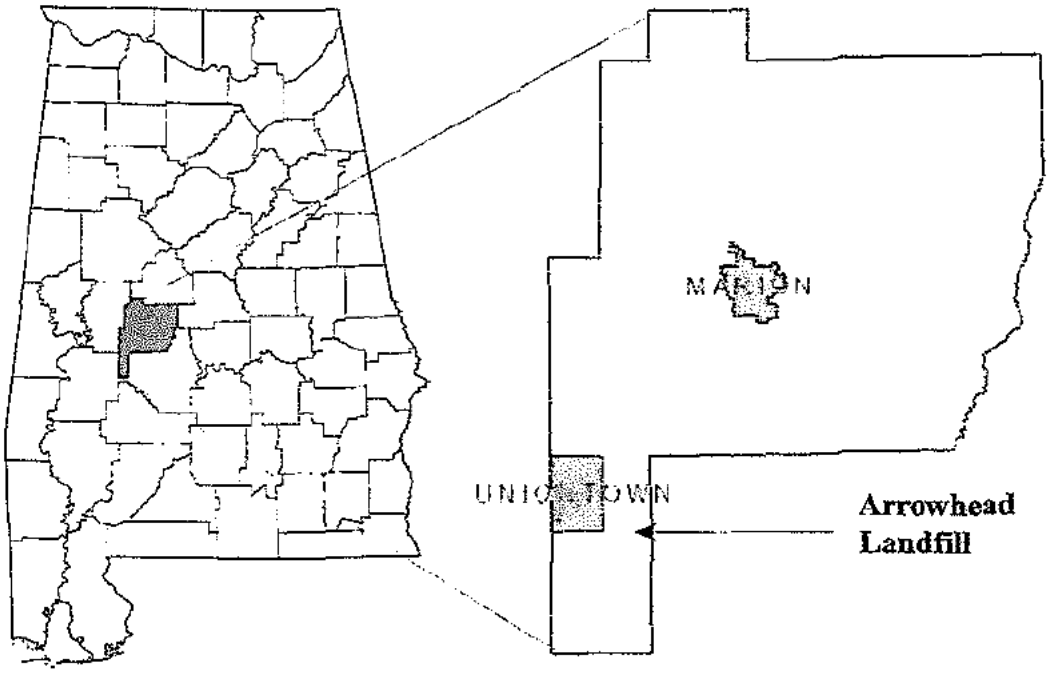
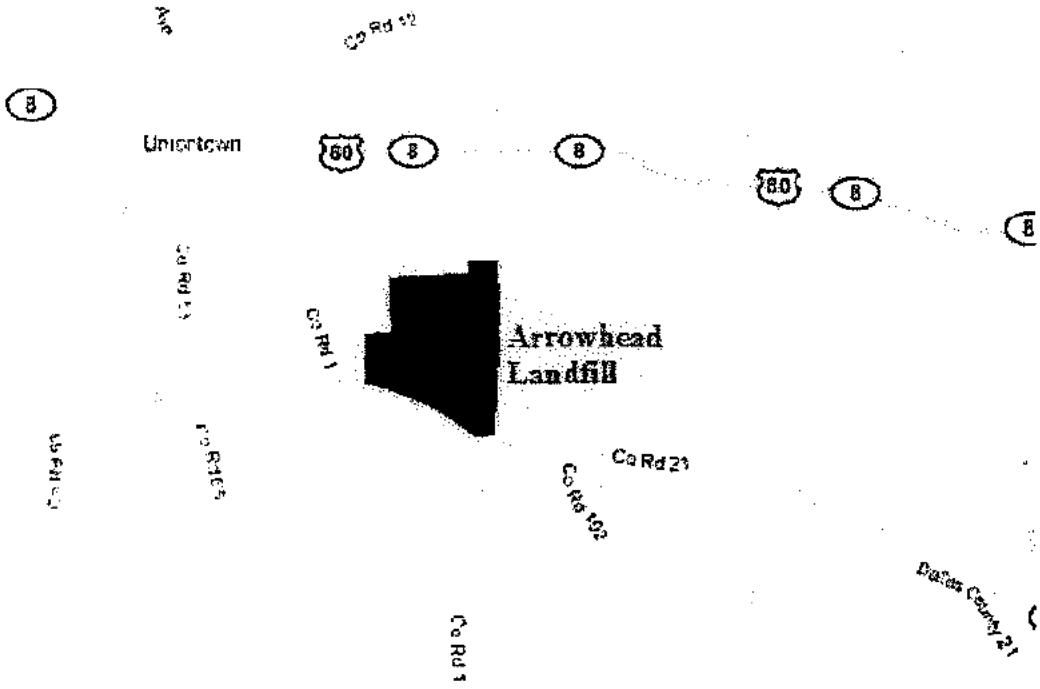


Figure 2
LOCATION OF THE ARROWHEAD LANDFILL
PERRY COUNTY, ALABAMA





VI. Impacts

The impacts resulting from the activities authorized by Permit No. 53-03 include the following:

1. The frequent emission of offensive odors from the landfill that cause lessened human food and water intake, interference with sleep, upset appetite, irritation of the upper respiratory tract (nose and throat) and eyes, headaches, dizziness, nausea, and vomiting among many of the Complainants. *See e.g.*, Exhibits D (ADEM Complaint List), E1 (Audio Complaints Jul-Dec 2010), E2 (Audio Complaints Jan-Jun 2011), and E3 (Audio Complaints Jul-Nov 2011) (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html).

2. The frequent emission of fugitive dust from the landfill that causes particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. *See e.g.*, Exhibit F (Dust Video) (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html).

3. The frequent tracking of dirt and other solids from the landfill onto County Road 1 where through traffic causes the dirt and other solids to become airborne particulates resulting in particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. See Exhibit G (Mud in Road Sign) (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html).

4. Increased noise from operation of heavy machinery (*e.g.*, bulldozers, trucks, railcars) 24-hours per day, 7-days per week causing interference with sleep and other activities within the homes of many of the Complainants.

5. Increased populations of flies that are bothersome in and around the homes of many of the Complainants.

6. Increased populations of birds that cause droppings around the homes of many of the Complainants.

7. Decreased property values of many of the Complainants.

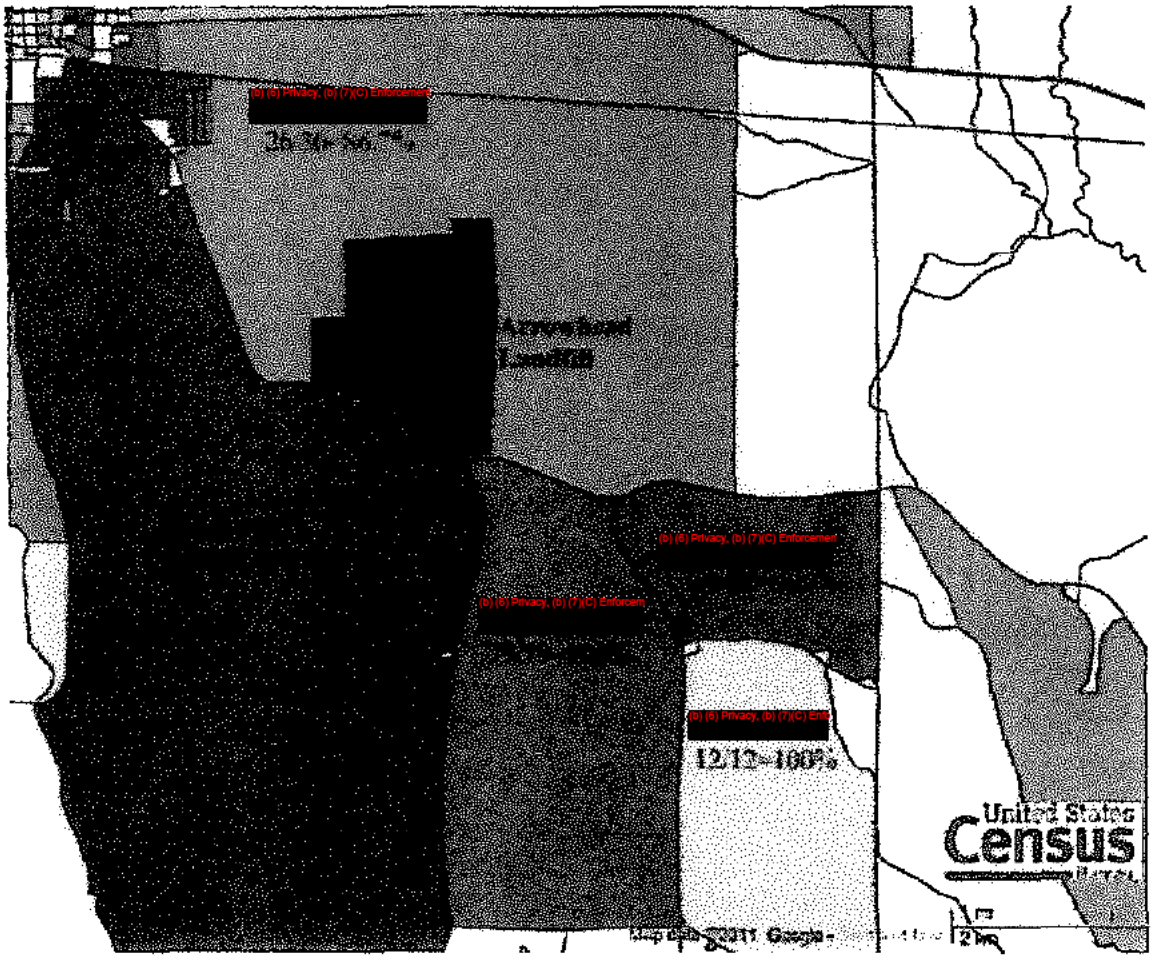
See also Exhibit H1 (EPA Listening Session Invitation), Exhibit H2 (EPA Listening Session Video (June 15, 2011)), and Exhibit H3 (ADEM Public Hearing on Permit Renewal (July 14, 2011)) (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html).

VII. Disparate Impacts

"EPA [compares] the percentage of African Americans in [the] affected population with the percentage of African Americans in the service area of [the] landfill and in the State to determine whether African Americans near the landfill[] [are] disproportionately affected by potential impacts." Yerkwood Landfill Complaint Decision Document at 5. *See* Investigative Report for Title VI Administrative Complaint File No. 28R-99-R4 (Yerkwood Landfill Complaint) (June 2003) at 10.

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated by the 2010 census block data included in Figures 3. The impacted census blocks are 87 to 100 percent African-American.

Figure 3
AFRICAN-AMERICAN POPULATION IN 2010 CENSUS BLOCKS SURROUNDING THE ARROWHEAD LANDFILL
Source: http://2010.census.gov/2010census/popmap/



The percentage of African-Americans among the total population in the designated thirty-three state service area is only 15.1%. The percentage of African-Americans among the total population in Alabama is 26%. Inasmuch as the percentage of African-Americans impacted by the Arrowhead Landfill far exceeds the percentage of African-Americans in the service area and State of Alabama, the alleged impacts are "disparate" impacts. *See* Yerkwood Landfill Complaint Decision Document at 5.

VIII. 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 for Investigating Title VI Administrative Complaints Challenging Permits 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 for Investigating Title VI Administrative Complaints Challenging Permits 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.

ADEM has not articulated a value to ADEM or the State of Alabama in the permitting of the Arrowhead Landfill. It is not likely that ADEM or the State of Alabama has a substantial, legitimate interest in the permitting of the Arrowhead Landfill.

The BFI-Selma Transfer Station is located at [redacted] in Selma, Alabama (b) (6) Privacy, (b) (7)(C) Enforcement Privacy), approximately 31miles east-southeast of Uniontown. "Marion and unincorporated Perry County's use of BFI-Selma assures them access to a facility that will be able to accommodate the changing MSW needs of its residents throughout the life of this plan. * * * BFI-Selma is expected to remain an active disposal option to the City of Marion and unincorporated Perry County through 2014." 10-Year Solid Waste Management Plan [for] Perry County, Alabama (Nov. 2004) at 22, Exhibit I (available at http://www.enviro-lawyer.com/News-LawOfficeNews.html). "[G]iven their market share and financial resources, BFI is not likely to run out of space to dispose of waste collected at BFI-Selma during the life of this plan." Id. at 38. There appear to be no more than a few residences within one mile of the BFI-Selma Transfer Station.

The designated service area for the Arrowhead Landfill is thirty-three states where the predominant race is White. Figures 4 and 5.

Figure 4
LARGEST RACIAL AND ETHNIC GROUPS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map

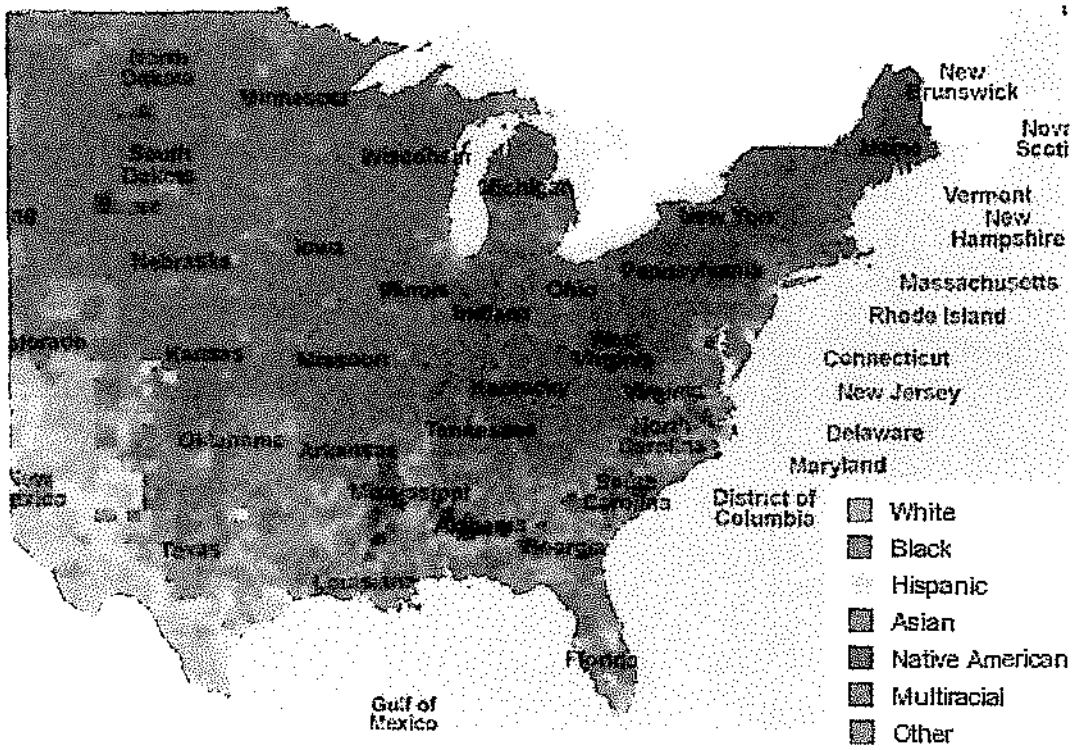
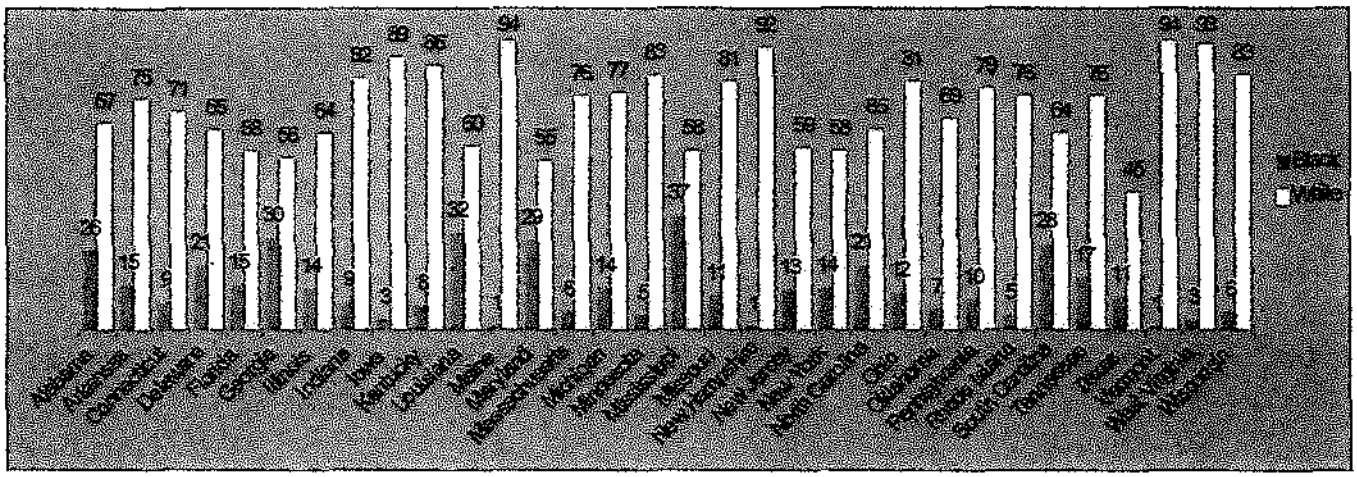


Figure 5
PERCENT AFRICAN-AMERICAN AND WHITE POPULATIONS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map and Exhibit B



The Pine Ridge Landfill is located at [redacted] in Meridian, Mississippi ([redacted]), approximately 70 miles west of Uniontown. "The City of Uniontown send[s] waste generated within its jurisdiction and the Town of Faunsdale to the Pine Ridge Landfill. Pine Ridge is a Subtitle D facility located approximately 75 miles west of Uniontown in Meridian [Mississippi] . . .." Id. "Pine Ridge's Landfill Operations Manager estimated that the facility has enough remaining capacity to dispose of waste for at least the next 30 years." Id. at 23. There appear to be a number of residences within one mile of the Pine Ridge Landfill along [redacted]. 2010 census data for Census Blocks 106.4000 and 106.5000 indicate that the African-American population surrounding the Pine Ridge Landfill is significantly less than that surrounding the Arrowhead Landfill.

The Choctaw County Regional Landfill is located at [redacted] in Butler, Alabama ([redacted]), approximately 52 miles southwest of Uniontown. The Choctaw County Regional Landfill is authorized to accept solid waste from all of Alabama. The Choctaw County Regional Landfill is located in an unpopulated area.

The BFI-Selma Transfer Station, Pine Ridge Landfill, and Choctaw County Regional Landfill offer less discriminatory and practicable alternatives to the Arrowhead Landfill for the disposal of municipal solid waste generated in Perry County.

IX. ADEM's Assurances and Defenses

With each application for EPA financial assistance, ADEM 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; . . .."). As mentioned above, 40 C.F.R. § 7.35(b) prohibits ADEM 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. However, ADEM has no authority to consider disparate racial impact issues in making permit decisions. *E.g.*, East Central Alabama Alliance for Quality Living and The Town of Loachapoka v. Alabama Dep't of Envtl. Mgmt., EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6, *28 (Mar. 13, 2003) ("ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit."); Holmes v. Alabama Dep't of Envtl. Mgmt., EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, *30-31 (Feb. 17, 1998) ("The governing statutes and regulations do not confer on the Department any power to consider [the racial makeup of the neighborhood] in deciding whether or not to issue a permit."). Without such authority, ADEM's assurances of compliance with Title VI and 40 C.F.R. Part 7 are empty promises.

In this case, as in others, ADEM alleges that it grants permits in accordance with applicable laws and regulations without regard to the racial composition of any impacted communities. This allegation is, in essence, a claim that ADEM's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize ADEM'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 for Investigating Title VI Administrative Complaints Challenging Permits at 2 (footnote omitted).

Often, ADEM asserts 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," ADEM suggests, ensures that racial minorities are impacted no differently than other races. This allegation ignores the fact that (1) members of the African-American race are disparately affected by the Arrowhead Landfill, notwithstanding compliance with the applicable criteria, and (2) the applicable criteria do not address many of the adverse effects suffered by members of the African-American race near the landfill. "[M]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification." Id. at 11.

In this case, as in others, ADEM alleges that it does not make landfill siting decisions and that its permitting of a landfill cannot cause adverse impacts on Complainants. *See* Summation of Comments Received and Response-to-Comments, Proposed Arrowhead Landfill Renewal, Permit 53-03 (Sept. 27, 2011) ("[A]ny alleged discriminatory impact would come as a result of the actual siting of the landfill near an area whose residents are protected by Title VI. ADEM, however, does not site landfills; that responsibility lies with the local host government."); Thistlewaite v. Alabama Dep't of Envtl. Mgmt., EMC Docket No. 06-08, 2008 AL ENV LEXIS 4, *9 (Aug. 22, 2008) ("The Department's position is that it does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in the administration of its programs or activities, in accordance with applicable laws and regulations. ADEM does not site landfills. This responsibility lies with the local host government."); Letter from James W. Warr, Director, ADEM, to Ann E. Goode, Director, EPA Office of Civil Rights, EPA OCR File No. 28R-99-R4 (February 4, 2000) (same). This position ignores several facts. First, the permit granted by ADEM to Perry County Associates, LLC is to construct and operate a landfill at a specific site – Sections 21, 22, 27, and 28, Township 17 North, Range 6 East in Perry County. Exhibit B. But for the ADEM permit authorizing construction and operation of the landfill at this specific site, adverse impacts to Complainants would not result. Second, ADEM determined that the landfill site is compliant with ADEM's "Landfill Unit Siting Standards" at Ala. Admin. Code R. 335-13-4-.01. But for ADEM's determination that the landfill site is compliant with the siting standards, the landfill could not be constructed at the site and could not result in adverse impacts to Complainants. Third, the permit allows operation of the landfill, including the disposal of 15,000 tons per day of solid waste, and authorizes certain operational practices (*e.g.*, recirculation of leachate, alternative daily cover, 24-hours per day, 7-days per week operation, etc.). Exhibit

B. Operation of the landfill is as much a cause of the adverse impacts to the Complainants as the siting of the landfill.

X. 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 ADEM 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 of Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC for construction and operation of the Arrowhead Landfill on September 27, 2011. If a violation is found and ADEM is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further request that EPA initiate proceedings to deny, annul, suspend, or terminate EPA funding to ADEM.

Sincerely,

David A. Ludder
Attorney for Complainants

cc (without enclosures):

Hon. Lisa P. Jackson, Administrator
U.S. Environmental Protection Agency
(via electronic mail: jackson.lisa@epa.gov)

Hon. Rafael DeLeon, Director
U.S. Environmental Protection Agency, Office of Civil Rights
(via electronic mail: deleon.rafael@epa.gov)

Hon. Gwendolyn Keyes-Fleming, Regional Administrator
U.S. Environmental Protection Agency, Region 4
(via electronic mail: keyesfleming.gwendolyn@epa.gov)

Hon. Lance LeFleur, Director
Alabama Department of Environmental Management
(via electronic mail: director@adem.state.al.us)

Hon. Robert J. Bentley, Governor
State of Alabama
(via electronic mail: info@governor.alabama.gov)

Hon. Terri A. Sewell, Congresswoman
U.S. House of Representatives, 7th District
(via fax: (334) 683-2201)

Hon. Bobby Singleton, Chair
Alabama Legislative Black Caucus
(via electronic mail: [redacted])

Hon. Linda Coleman, Chair
Alabama Senate Black Caucus
(via electronic mail: [redacted]net)

Hon. Ralph Howard, Representative
Alabama House of Representatives, 72nd District
(via electronic mail: ralph.howard@alhouse.org)

Hon. Thomas E. Perez, Assistant Attorney General
U.S. Department of Justice, Civil Rights Division
(via electronic mail: thomas.perez@usdoj.gov)

Hon. Kenyon R. Brown, U.S. Attorney
Southern District of Alabama
(via electronic mail: kenyen.brown@usdoj.gov)