UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

April 28, 2017

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Lance LeFleur, Director
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P.O. Box 301463
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In Reply Refer to:
EPA File No. 06R-03-R4

Re: Closure of Administrative Complaint, EPA File No. 06R-03-R4

Dear Director LeFleur:

This letter is to notify you that the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is resolving and closing, as of the date of this letter, the administrative complaint filed with EPA on December 8, 2003, against the Alabama Department of Environmental Management (ADEM). The complaint generally alleged that ADEM violated Title VI of the Civil Rights Act of 1964, as amended, 42 United States Code 2000d et seq. (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7. With respect to the specific issues addressed in this case, EPA ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation.

EPA ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance from the EPA. On September 7, 2005, EPA accepted for investigation two allegations raised in the December 2003 complaint.[1] On January 25, 2013, EPA issued a letter dismissing one of those allegations.[2] EPA's 2013 letter concluded that, with respect to the allegation that ADEM intentionally discriminated against the African American residents of the Ashurst Bar/Smith community during the public involvement process for the permitting of a modification to the Tallassee Waste Disposal Center, Inc. in 2003, there was insufficient evidence of non-compliance.

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[1] Letter from Karen D. Higginbotham, Director, OCR to (b) (6) Privacy, Complainant, Acceptance of Administrative Complaint (September 7, 2005).

[2] Letter from Rafael DeLeon, Director, OCR to Lance LeFleur, Director, ADEM (January 25, 2013); Partial Dismissal of Title VI Administrative Complaint.

The remaining allegation (as originally accepted for investigation) was:

> Whether ADEM's failure to require the Tallapoosa County Commission to properly use the siting factors listed in the EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4)[3] in considering for approval the 2003 application to modify Permit #62-11 for the Tallassee Waste Disposal Center, Inc.,[4] located in Tallassee, Tallapoosa County, Alabama, had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race.

With respect to this issue, as investigated, ECRCO finds that the record does not establish a prima facie case of discrimination based on disparate impact with respect to allegations set forth in this complaint regarding the 2003 permit modification. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2003 permit modification at issue in this case and EPA File No. 06R-03-R4 is closed as of the date of this letter. As explained later in this letter, information gathered during the course of this investigation and additional pending investigations involving ADEM have raised issues not addressed by this letter. ECRCO will be contacting ADEM to discuss these issues and possible options for addressing them.

Clarification of Issue Investigated in This Case

EPA originally accepted for investigation the allegation that ADEM's failure to require the Tallapoosa County Commission to properly use the siting factors listed in the EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4)[5] in the 2003 permit modification process for the Tallassee Waste Disposal Center, Inc., had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community. However, during the course of the investigation, ECRCO determined that whether ADEM properly considered the siting factors in its decision to approve the 2003 permit modifications is not germane to ECRCO's determination of whether there was an adverse disparate impact that resulted from ADEM's approval of the 2003 permit modification. Specifically, as discussed more fully below, there is insufficient evidence that the 2003 permit modifications themselves – whether or not they were considered in light of the six solid waste management planning criteria (i.e. the six "siting factors") – were sufficiently causally connected to the disparate adverse harms alleged by Complainants.[6]

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[3] Letter from Karen D. Higginbotham, Director, OCR to Luke Cole, Director, Center for Race Poverty and the Environment (CRPE) and James W. Warr, Director, ADEM; Re: EPA File No. 28R-99-R4 (July 1, 2003).
[4] Tallassee Waste Disposal Center, Inc. is now known as Stone's Throw Landfill.
[5] Letter from Karen D. Higginbotham, Director, OCR to Luke Cole, Director, Center for Race Poverty and the Environment (CRPE) and James W. Warr, Director, ADEM; Re: EPA File No. 28R-99-R4 (July 1, 2003).
[6] Ultimately, Complainants' allegations of harm appear to be related to the initial permitting and siting of the Tallassee Waste Disposal Center, Inc. ADEM's decision to permit the Tallassee Waste Disposal Center, Inc. occurred in 2001, several years prior to the filing of this complaint.

The following provides additional context and background regarding the six "siting factors"[7] listed in the EPA June 2003 Title VI Investigative Report. In response to a 1999 Title VI complaint alleging adverse and disparate impact violations by ADEM in connection with the issuance and modification of permits at four specific municipal solid waste landfills in Alabama (not including the Tallassee Waste Disposal Center, Inc.), EPA issued its legal and factual findings in a decision letter dated July 1, 2003, and accompanying June 2003 Investigative Report. EPA found no violation of Title VI with respect to disparate impact claims for each of the four landfills, as well as an intentional discrimination claim asserted with regard to the permitting of all municipal solid waste landfills in Alabama.

At the time of EPA's 2003 investigation of EPA File No. 28R-99-R4, it was ADEM's position that the "siting factor" assessments were the responsibility of local governments and that it could only deny a permit if the site was environmentally unsuitable from a technical perspective (and not for siting factor reasons). The 2003 Investigative Report and Decision Letter stated: "... EPA notes that the administration of ADEM's Solid Waste Program may nevertheless lead to violations of EPA's Title VI regulations in the future because the potential failure to consider safety or socio-economic impacts could lead to ADEM-permitted landfills that have an adverse disparate impact on a population protection by EPA's Part 7 regulations."[8] EPA did not, however, determine that failure to ensure that such criteria were considered by ADEM or local governments was in and of itself a Title VI violation. Ultimately, a Title VI violation would arise if an ADEM-approved permit actually caused adverse and disproportionate impacts.

Consequently, our investigation of the allegations arising in this complaint focused on whether or not ADEM's 2003 permit modification decision for the Tallassee Waste Disposal Center, Inc. resulted in an adverse and disparate impact to the predominantly African-American residents of the Ashurst Bar/Smith community.

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[7] Under the Alabama Code at § 22-27-47 and § 22-27-48, the state legislature specifically directs the requirements outlined relating to permit applications at the local host jurisdiction. ADEM has consistently taken a position that such responsibilities are outside their purview. Under ADEM Admin. Code r. §335-13-9-.06, local authorities must develop Solid Waste Management Plans that are consistent with the various outlined procedures, which are inclusive of the six criteria outlined under Alabama Code § 22-27-47(b)(11) and submit them to ADEM. The six criteria are as follows:

a. The jurisdiction's solid waste management needs as identified in its plan;
b. The relationship of the proposed location or locations to planned or existing development, to major transportation arteries and to existing state primary and secondary roads;
c. The relationship of the proposed location or locations to existing industries in the jurisdiction or state that generate large volumes of solid waste and to the areas projected by the state or local regional planning and development commission for development of industries that will generate solid waste;
d. The costs and availability of public services, facilities and improvements which would be required to support a facility in this location and protect public health, safety and the environment;
e. The potential impact a facility in the proposed location or locations would have on public health and safety, and the potential that such locations can be utilized in a manner so as to minimize the impact on public health and safety; and
f. The social and economic impacts that a facility at the proposed location would have on the affected community, including changes in property values, community perception and other costs.

[8] EPA June 2003 Title VI Investigative Report (EPA File No. 28R-99-R4, Yerkwood, 95-96, June 2003.)

In conducting the investigation, ECRCO gathered and reviewed all of the information relevant to the complaint. This information included the complaint submitted to ECRCO, ADEM's responses to ECRCO's acceptance of the complaint, and all other letters and emails ECRCO received from the complainant and recipient pertaining to the 2003 permit modification for the Tallassee Waste Disposal Center, Inc. ECRCO also considered information gathered through various emails from, and telephone interviews with, the Complainants and community members in 2016 and 2017.

Legal Standard

EPA's investigation was conducted under the authority of Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Part 7) and consistent with EPA's Case Resolution Manual. EPA's regulation at 40 C.F.R. §7.35(b) states, in part, 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, color, or national origin."

The issue of whether ADEM's approval of the 2003 application to modify Permit #62-11 for the Tallassee Waste Disposal Center, Inc. had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race, was analyzed under a *disparate impact* or *discriminatory effects* standard.[9]

In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the prima facie case. To establish an adverse disparate impact, EPA must:

(1) identify the specific policy or practice at issue;
(2) establish adversity/harm;[10]
(3) establish disparity;[11] and

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[9] *Guardians Ass'n. v. Civil Serv. Comm'n,* 463 U.S. 582, 593 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985). Many subsequent cases have also recognized the validity of Title VI disparate impact claims. *See, e.g. Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984). In addition, by memorandum dated July 14, 1994, the Attorney General directed the Heads of Departments and Agencies to "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of [f]ederally financed programs." Attorney General Memorandum on the use of the Disparate Impact Standard in Administrative Regulations under Title VI of the Civil Rights Act of 1964 (July 14, 1994) (http://www.justice.gov/ag/attorney-general-july-14-1994-memorandum-use-disparate-impact-standard-administrative-regulations).

[10] Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm.

[11] In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003).

(4) establish causation.[12]

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.[13] The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as "standard operating procedure" by recipient's employees.[14] Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.[15]

If the evidence establishes a prima facie case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a "substantial legitimate justification" for the challenged policy or practice.[16] "Substantial legitimate justification" in a disparate impact case is similar to the Title VII employment concept of "business necessity," which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.[17] The analysis requires balancing recipients' interests in implementing their policies with the substantial public interest in preventing discrimination.

If a recipient shows a "substantial legitimate justification" for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. In other words, are there "less discriminatory alternatives?"[18] Thus, even if a recipient demonstrates a "substantial legitimate justification," the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that "less discriminatory alternatives" exist.

Analysis

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[12] *See N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

[13] *Lau v. Nichols*, 414 U.S. 563, at 568 (1974).

[14] If as part of a recipient's permitting of a facility, a recipient makes a decision with respect to the siting of a facility, such decision may not intentionally discriminate or have a discriminatory effect on a protected population. EPA's regulation states, "A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart." 40 C.F.R. § 7.35(c).

[15] *See, e.g., Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

[16] *Georgia State Conf.*, 775 F.2d at 1417.

[17] *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-36 (1971). The concept of "business necessity" does not transfer exactly to the Title VI context because "business necessity" does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. *See Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

[18] *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

The issue being investigated in the instant complaint is whether ADEM's approval of the 2003 modification to Permit #62-11 for the Tallassee Waste Disposal Center, Inc. had a discriminatory effect on the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race.

Consistent with the legal standard outlined above for determining whether a prima facie case is established, EPA looks to determine whether a causal connection exists between a recipient's facially neutral policy or practice and an adverse disparate impact.[19] Specifically, in a case such as this one where the policy or practice relates to a permit modification, EPA generally looks at the modification at issue and the modification's effects. While permit modifications can trigger Title VI violations, there must be some causal connection between the permit modification actions that appear to be facially neutral and the alleged adverse (harmful) and disparate effects.[20] If EPA cannot establish that each of the prima facie elements has been met, then EPA does not have sufficient evidence to establish a prima facie case of adverse disparate impact and cannot determine that the recipient has engaged in discrimination.

To determine whether a disparate impact occurred as a result of ADEM's issuance of the 2003 permit modification, with or without consideration of the siting factors, ECRCO examined the proposed permit modification actions and whether they could have caused the alleged disproportionate harms. As discussed more specifically below, as to each of the alleged harms relating to the 2003 permit modifications, ECRCO finds insufficient evidence to establish a prima facie case of disparate impact discrimination.

October 2001 Permit (Permit #62-11)

In October 2001, ADEM granted Permit #62-11, for a Resource Conservation and Recovery Act (RCRA) Subtitle D[21] municipal solid waste permit for the Tallassee Waste Disposal Center, Inc., an approximately 123.47-acre disposal area.[22] Within the boundaries of the Tallassee Waste Disposal Center, Inc. there was a formerly operated, but closed sanitary landfill.

The 2003 Permit Modification

The permit modification considered and approved the following:[23]

- Design and construction of cells 2A and 2B, an approximately 5.11-acre municipal solid waste (MSW) disposal area;

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[19] *See New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (citing *Brown v. Coach Stores, Inc.*, 163 F.3d 706,712 (2d Cir. 1998); *New York Urban League, Inc. v. New York*, 71 F.3d at 1036).
[20] *See New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").
[21] 40 C.F.R. Part 258 (RCRA Subtitle D regulation for municipal solid waste landfill.)
[22] ADEM, Public Hearing Transcript, August 26, 2003, at 11.
[23] ECE Letter to ADEM, Request for Major Modification, April 30, 2003. In the original ECE Letter to ADEM, Request for Major Modification, April 30, 2003, there had been a request to add an 80-acre parcel to the permitted area. This request was withdrawn by ECE in a Letter to ADEM, Revision to Major Modification Request, May 30, 2003, and therefore, the addition of the 80-acre parcel was not ultimately considered for approval by ADEM.

- Design and construction of an approximately 6.56-acre construction and demolition (C/D) materials landfill;
- Relocation of the facility's sedimentation pond; and
- Operational changes.[24]

The types of waste accepted, service area, and daily accepted waste volumes and the landfill boundaries that were permitted in 2001, remained unchanged in the proposed and approved 2003 permit modification.[25]

The Alleged Harms

The alleged harms that relate to the 2003 permit modification were as follows:[26]

- **Environmental and Community Health Concerns**
  - Impact from methane exceedances for the entire first year after reopening and lack of notification;
  - Impact from proximity to natural gas line;
  - Impact to wetlands, natural springs, environmental balance in region;
  - Air pollution from landfill emissions into populated areas due to wind patterns;
  - Impact to hunting and wildlife from surface water contamination and impacts to foliage;
  - Increase in disease vectors;
  - Drinking water well contamination concerns;
  - Impact on the Tuscaloosa Aquifer;
  - Impact of sedimentation pond relocation and storm water runoff;
  - Impact on the Gleeden Branch and other streams that leave the area and eventually contribute to water sources of downstream municipalities
  - Impact of landfill on farmers' animals and food gardens;

- **Transportation and Safety Concerns**
  - Lack of an evacuation and decontamination plan;

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[24] On June 4, 2003, ECE submitted a request to ADEM for operational changes as follows: 1) for an alternative design for the drainage layer that continued to meet the permeability standard and an equivalent hydraulic flow rate; 2) for leachate recirculation; and 3) for implementation for the use of alternative daily covers. ECE Letter to ADEM, Re: Comments on Draft Permit, June 4, 2003.

[25] ADEM, Public Hearing Transcript, August 26, 2003, at 11; ADEM, Public Hearing Notice, July 17, 2003.

[26] Letter from (b) (6) Privacy, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from (b) (6) Privacy to James W. Warr, Director, ADEM (August 29, 2003) as attachment; Letter from (b) (6) Privacy, to Karen D. Higginbotham, Director, OCR (December 15, 2003), at 3. Many of the issues raised in the complaint were phrased in the form of questions to ADEM. ECRCO has grouped and listed these items as alleged harms relating to the issues investigated. Items remaining after the dismissal of allegation 1 and included in list are items 5-29, 33 on pages 1-3, 5 of the letter from (b) (6) Privacy to James W. Warr, Director, ADEM, August 29, 2003. In addition, ECRCO considered information gathered through various emails from, and telephone interviews with, the Complainants and community members in 2016 and 2017.

- Lack of emergency response equipment and infrastructure (ambulances, fire trucks, etc.);
- Impact to church due to proximity of landfill;
- Impacts resulting from traffic and roadway design;
- Impacts to homes due to close setbacks of residences to roadway;
- Impacts from landfill traffic coming from prohibited directions;
- Large service area; and
- Issues relating to line of sight, lack of signage, and traffic speed enforcement.

- **Non-Environmental Concerns Raised by Complainants**

  - Diminution of property value;
  - Displacement of landowners; and
  - Stigma of living near a landfill.

For purposes of analyzing whether there is a prima facie case of discrimination based on disparate impacts, ECRCO has grouped the alleged harms into the same topical categories utilized above.

1. **Environmental and Community Health Concerns**

- Methane Gas Exceedances and Lack of Notification:

Complainants raised concerns regarding "numerous non-compliance reports of high methane gas levels" at Tallassee Waste Disposal Center, Inc. since its reopening and the initial placement of waste in 2002 and also raised concern that "the community was not notified and to date there is not in place a mechanism to alert the community of such dangers."[27] With respect to the concern regarding "notification," ECRCO has found that current state[28] and federal[29] regulations

[27] Letter from (b) (6) Privacy, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from (b) (6) Privacy to James W. Warr, Director, ADEM (August 29, 2003) at 3.

[28] Alabama state requirements outlined at ADEM Admin. Code r. §335-13-4-.16(3) are as follows: 3. If explosive gas levels exceeds the limits specified in this Rule, the permittee shall:
(i) Immediately take all necessary steps to ensure protection of human health and property and notify the Department;
(ii) Within 7 days of detection, place in the operating record of the facility the explosive gas levels detected and the immediate steps taken to protect human health and property;
(iii) Within 20 days of detection, submit to the Department for approval a remedial plan for the explosive gas releases. This plan shall describe the nature and extent of the problem and the proposed remedy. The plan shall be implemented upon approval by the Department, but within 60 days of detection. Also within 60 days of detection, a copy of the plan shall be placed in the operating record of the facility and the Department notified that the plan has been implemented.

[29] Under RCRA, the requirements at 40 C.F.R. §258.23(c) are the following: (c) If methane gas levels exceeding the limits specified in paragraph (a) of this section are detected, the owner or operator must:
(1) Immediately take all necessary steps to ensure protection of human health and notify the State Director;
(2) Within seven days of detection, place in the operating record the methane gas levels detected and a description of the steps taken to protect human health; and

do not require public notification when or if a landfill detects an emission exceedance during the course of their quarterly monitoring. The permitted facility is required to notify the state regulatory office within a prescribed time period and take the necessary steps to protect human health and the environment.

With respect to the concern raised in the complaint regrading "reports of high methane gas levels," ECRCO examined whether the high methane gas levels detected in 2002 were causally related to the 2003 permit modification actions. ECRCO confirmed that the landfill engineers reported that there was an increased production of methane gas due to a portion of the Tallassee Waste Disposal Center, Inc. having a tendency to hold water and maintain moisture.[30] This portion of the landfill had soils introduced to modify the side slopes and improve positive drainage resulting in both less saturated soils and methane gas generation. This portion of the landfill was closed prior to the 2003 permit modification.[31] ECRCO determined that, although located within the property boundaries of the Tallassee Waste Disposal Center, Inc., this closed sanitary landfill was a separate and completely independent disposal unit. The Subtitle D municipal solid waste landfill related to the 2003 permit modification was just being designed for construction in 2003 and, at that time, would not have contributed to any increase in methane gas levels since waste disposal activities and methane gas generation had not begun. As such, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm of increased methane gas levels – exceedances as articulated in the complaint.

- Natural Gas Line:

Complainants raised concerns about the landfill's overall proximity to a natural gas line. ECRCO confirmed that, based on the landfill's engineering drawings, a 100-foot "power easement" bisects the landfill's property.[32] The actual existence of a natural gas line within the 100-foot easement was not confirmed by ECRCO's investigation as the survey does not depict the description of the type of utility or the easement owner(s). Any gas line, as well as the land on which the gas line would be found, are within the control and purview of the appropriate utility company. The 100-foot easement existed before the 2003 permit modification; and, the modification did not impact the easement.[33] Accordingly, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm related to a natural gas line or the easement for that line.

- Wetlands:

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(3) Within 60 days of detection, implement a remediation plan for the methane gas releases, place a copy of the plan in the operating record, and notify the State Director that the plan has been implemented. The plan shall describe the nature and extent of the problem and the proposed remedy.

[30] ECE, Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary, Permit No. 62-11 Response Letter (October 15, 2002).
[31] ECE, Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary, Permit No. 62-11 Response Letter (October 15, 2002).
[32] ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A. Cell 2B, C&D Cell (March 2003).
[33] ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A. Cell 2B, C&D Cell (March 2003).

The complaint raised a concern about the alleged environmental harm to wetlands resulting from the relocation of the sedimentation pond under the 2003 permit modification. Under the 2003 permit modification, although wetlands were impacted, the facility proposed and the Department of the Army, Mobile District, Corps of Engineers (COE) approved, payment into a mitigation bank to develop relocated wetlands within the same watershed in order to address any impact on water quality that would result from the permitted construction activities.[34] Once the mitigation was approved, the COE issued a permit to the landfill to fill in the wetlands located within the permitted area.[35] In light of the approved wetlands mitigation and relocation, there is insufficient evidence in the record to conclude that there was adverse harm with respect to the wetlands[36]

- Wind Blown Pollution:

Complainants assert harm due to wind patterns carrying pollution and landfill emissions into populated areas. While operation of the 2003 expansion area could potentially increase the landfill's overall emissions, ECRCO found that the facility has taken measures to monitor and address emissions. ECRCO found that the facility implemented quarterly landfill gas monitoring,[37] and installed an emissions control system in the closed sections of the MSW landfill.[38] The facility further extended the control system over time into the former sanitary landfill operation,[39] and into the closed C/D cells, and into portions of the active phase of the landfill. Therefore, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and alleged increased air pollution.

- Hunting:

Complainants alleged harms to the surface water and foliage used by the wildlife and impacts to hunting within the community due to the 2003 permit modification. However, ECRCO could not establish a prima facie case of disparate adverse harm with respect to this allegation. First, ECRCO could not find any information in the record with respect to the condition of the surface water and foliage used by wildlife prior to the 2003 permit modification. As such, ECRCO could not find that the record established a baseline upon which to measure potential impact to surface water and foliage used by wildlife which could have resulted from any of the 2003 permit modification actions. Therefore, ECRCO finds insufficient evidence in the record to

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[34] ADEM Administrative Code Division 13 prohibits the disposal of solid wastes in wetlands. The relocation of wetlands requires approval from the U.S. Department of the Army, Mobile District, Corps of Engineers (COE) and the State of Alabama. 40 C.F.R. §258.12 (Wetlands); ADEM Admin. Code r. §335-13-4-.01(2)(c) Landfill Unit Siting Standards - Landfill units including buffer zones shall not be permissible in wetlands, beaches or dunes.

[35] ADEM Response to Comments, October 20, 2003, at 3.

[36] Section 404 of the Clean Water Act establishes a program to regulate the discharge of fill materials into the waters of the U.S. The program through permitting activities allows for restoration through compensatory mitigation. *See* 40 C.F.R. 230 Subpart J—Compensatory Mitigation for Losses of Aquatic Resources. There are three (3) options for compensatory mitigation to address restoration of the permitted activities. The operator (permittee) proposes which option they would like to employ for such activities. These options include the mitigation bank, fee program to government or non-profit, or the operator (permittee) undertakes the mitigation. Here, the permittee has selected the mitigation bank as their compensatory mitigation option.

[37] *See* i.e., Environmental Consulting & Engineering, Inc. (ECE), March 24, 2005 Tallassee Waste Disposal Center, Inc. Explosive Gas Report Summary First Quarter 2005, Permit No. 62-11.

[38] ADEM Engineering Analysis, Stone's Throw Landfill LLC, Facility No. 205-0015 (April 13, 2010).

[39] ADEM Engineering Analysis, Stone's Throw Landfill LLC, Facility No. 205-0015 (April 13, 2010).

conclude that there was adverse harm with respect to the surface water and foliage used by wildlife and its impact on hunting.

- Disease Vectors:

Complainants raised a concern that the 2003 modification's approval of a switch from use of daily soil cover to use of an alternative daily cover material would increase exposure to rodents, insects, and other wildlife including wild dogs and the resulting potential for transmission of diseases. During a 2016 interview, Complainants stated that they had observed increases in vultures, wild dogs, deer and crows since the 2003 modification.[40]

ECRCO found that alternative materials may be approved in lieu of daily soil cover if the operator shows that they are protective of human health and the environment[41] and minimize and manage the impact from animals and other disease vectors.[42] ECRCO found that, in this case, ADEM approved use of alternative cover materials on a daily basis, as well as the use of a soil cover at least once per week at the end of the operational work week.[43]

ECRCO confirmed that prior to the 2003 permit modification, previous construction activities conducted within the ~500-acre site removed natural habitats, re-graded the site, and prepared the property for the landfill's development. ECRCO also confirmed that the 2003 permitting actions continued the site development/re-development -- specifically, the development of cells 2a and 2b, the C&D unit, and the associated sediment and erosion control units. ECRCO acknowledges that it is possible that these 2003 permit activities could have impacted animal population numbers, but, there is insufficient evidence in the record for ECRCO to conclude that the 2003 permit modification actions themselves resulted in sufficiently significant harm with regard to increases in the animal population. As such, ECRCO could not establish a causal link between the 2003 permit modification and any changes in animal population numbers.

- Drinking Water Wells:

Concerns were raised about pre-existing safety hazards related to drinking water, such as the presence of toluene, including in well water and naturally occurring springs, and how the continued development of the landfill could contribute to these safety hazards.

ECRCO found that prior to the permitting of the Tallassee Waste Disposal Center, Inc. Subtitle D municipal solid waste landfill in October 2001, a preliminary environmental investigation report and a hydrogeological evaluation were completed.[44] The report documented pre-existing

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[40] February 10, 2016 Interview with Complainants.
[41] 40 C.F.R. §258.21 (provisions related to alternative cover material requirements).
[42] 40 C.F.R. §258.22 (provisions related to disease vectors).
[43] On June 4, 2003, ECE submitted a request to ADEM for operational changes as follows: 1) for an alternative design for the drainage layer that continued to meet the permeability standard and an equivalent hydraulic flow rate; 2) for leachate recirculation; and 3) for implementation for the use of alternative daily covers. ECE Letter to ADEM, Re: Comments on Draft Permit, June 4, 2003.
[44] Mid-South Testing Inc. Tallassee Waste Disposal Center Inc. Preliminary Environmental Assessment prepared for Whatley Drake LLC (August/September 2000) and Southern Environmental Resources, Inc. Tallassee Waste Disposal Center Inc. Hydrogeologic Evaluation (June 14, 2000).

impacts from metals and various pollutants to a local naturally occurring spring and residential drinking water wells located south, and southeast, respectively, from the landfill property. The consultants' recommendations from these assessments included the need to establish an alternative source of drinking and domestic water as well as utilization of a water purification system for two properties.[45] ADEM concurred with these recommendations.[46]

With respect to whether the continued development of the landfill contributed to the pre-existing safety hazards, the composite liner and leachate collection system were designed to prevent leachate migration into the groundwater.[47] The groundwater monitoring system was designed to evaluate groundwater quality at the landfill property boundary.[48] Moreover, ECRCO found that the permanent and temporary drainage control features were designed to protect surface water quality.

ECRCO did not identify any evidence to suggest that the composite liner and leachate collection system, and the site's permanent and temporary drainage control features in the 2003 modification would contribute to pre-existing hazards. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged increased impact on drinking water.

- Tuscaloosa Aquifer:

Complainants raised a concern regarding impact to the Tuscaloosa Aquifer resulting from this permit modification. Impacts to water quality could occur from the land disturbing activities associated with the permit modification. However, the landfill addressed any potential impacts from the facility's drainage and discharges that could result from land disturbing activities through the landfill's construction of measures designed to be protective of human health and the environment – a composite liner and leachate collection system, and the site's permanent and temporary drainage control features that protect surface waters that feed local aquifers.[49] The groundwater monitoring system was designed to detect groundwater impact and evaluate groundwater quality at the landfill property boundary.[50]

Complainants supplied evidence of a sediment erosion control feature that failed due to an extreme storm.[51] ECRCO's investigation found that permanent and temporary sediment control features are designed to control runoff from routine storm events and not designed to manage high volume rain events rising to the level of an "Act of God." ECRCO did not identify any

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[45] Furthermore, the consultants noted that a local water authority provided service to one property, but at the time of their report, this service had not been routed into the residence. *Id.*
[46] ADEM Memorandum, Review of Preliminary Environmental Investigation (January 4, 2001).
[47] ADEM Admin. Code r. §335-13-4-.18 (requirements relating to liners and leachate collection), 40 C.F.R. §258.40 (requirements relating to liners and leachate collection).
[48] ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).
[49] ADEM Admin. Code r. §335-13-4-.17 (requirements relating to drainage); §335-13-4-.18 (requirements relating to liners and leachate collection).
[50] ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).
[51] Photographs provided by Complainants, March 4, 2016.

evidence to suggest that the composite liner and leachate collection system, the groundwater monitoring system, or the site's permanent and temporary drainage control features did not adequately address any potential impacts from routine storm events to the Tuscaloosa Aquifer. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm to the water quality of the Tuscaloosa Aquifer.

- Sedimentation Pond and Storm Water Runoff:

While not making an allegation of harm related to the movement of the sedimentation pond, the Complainants did express concern as to why the pond was being moved. Movement of the sedimentation pond facilitated the development of the proposed landfill cells.[52] While the acts carried out under the 2003 permit modification could have contributed to runoff from the landfill, evidence shows that mitigating measures were put in place at the time to address these issues. The movement of the sedimentation pond was requested "to better collect and treat storm water runoff from the site."[53] ADEM reviewed the request and determined that the new sedimentation pond location adequately removed sediments from the storm water runoff prior to release onto adjacent properties or waters, and its relocation would have no adverse impact on quality of surface waters discharged from the site.[54] ECRCO did not identify any evidence to suggest that sediments were not adequately removed from the storm water runoff prior to release. Therefore, there is insufficient evidence to show a causal link between the 2003 permit modification, including the movement of the sedimentation pond, and alleged increased runoff.

- Gleeden Branch and Other Surface Water:

Complainants raised a concern regarding impacts resulting from the 2003 permit modification to Gleeden Branch and other surface waters that eventually contribute to water sources for downstream municipalities. Impacts to water quality could occur from the facility, including the land disturbing activities associated with permit modification; however, the facility's permanent and temporary drainage control features are designed to reduce the impact to surface waters.[55] ECRCO found that, at the time, the management of surface water discharges were addressed by the relocation of the sedimentation pond and other permanent and temporary drainage control features associated with the site's development. Therefore, ECRCO finds insufficient evidence in the record to conclude that there was adverse harm with respect to Gleeden Branch and other surface waters as alleged.

- Farming and Gardens:

A concern was raised "about the impact of the landfill on our farmers' animals and the gardens that people use for food."[56] A subsequent concern was conveyed by Complainants on behalf of

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[52] ECE Permit Drawings for Modification of Sunflower Landfill Inc. Cell 2A. Cell 2B, C&D Cell (March 2003).
[53] ADEM, Response to Comments, October 20, 2003, at 4.
[54] ADEM, Response to Comments, October 20, 2003, Response to Comment 10, page 4.
[55] ADEM Admin. Code r. §335-13-4-.17 (requirements relating to drainage); §335-13-4-.18 (requirements relating to liners and leachate collection).
[56] Letter from (b) (6) Privacy, to Karen D. Higginbotham, Director, OCR (September 3, 2003), includes letter from (b) (6) Privacy to James W. Warr, Director, ADEM (August 29, 2003) at 3.

an unnamed landowner about the harm to farming and gardening due to alleged contaminated soil and water from the landfill.[57]

With regard to the 2003 modification, as mentioned above, the composite liner and leachate collection system were designed to prevent leachate migration into the groundwater.[58] The groundwater monitoring system was designed to detect groundwater impacts and evaluate groundwater quality at the landfill's property boundary.[59] Moreover, ECRCO found that the permanent and temporary drainage control features were designed to protect not only surface waters, but also adjoining properties from runoff.

ECRCO did not identify any evidence to suggest that the composite liner and leachate collection system, the groundwater monitoring system, or the site's permanent and temporary drainage control features did not adequately prevent leachate migration into the groundwater or failed to protect adjoining properties from runoff. As a result, there is insufficient evidence in the record to show a causal link between the 2003 permit modification and the alleged harm to farms and gardens on adjoining properties.

2. <u>Transportation and Safety Concerns</u>

Complainants raised concerns about the lack of an evacuation or decontamination plan for the community and inadequate emergency response infrastructure. Complainants also alleged impacts to residents and a local church relating to transportation, including those resulting from traffic and roadway design.

EPA's regulations implementing RCRA Subtitle C require evacuation and decontamination plans for communities at some hazardous waste disposal facilities.[60] The Tallassee Waste Disposal Center, Inc. receives non-hazardous solid waste, such as household garbage and construction and demolition materials which are regulated under RCRA Subtitle D, not Subtitle C. Landfill owners and operators of RCRA D facilities like the Tallassee Waste Disposal Center, Inc. must ensure that the concentration level of explosive gases including methane gas must not exceed the lower explosive limits of methane at the property boundary.[61] Furthermore, ECRCO found that Tallassee Waste Disposal Center, Inc. has an explosive gas monitoring and reporting plan, conducts quarterly monitoring of landfill gas, and has installed a landfill gas control system.[62]

The proposed 2003 permit modification did not impose any new or modified roadway, safety, emergency response, roadway setbacks, or other transportation conditions. The proposed permit modification did not alter the existing landfill service area or the truck route for landfill access. Furthermore, the proposed permit modification did not request an adjustment in the daily waste

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[57] February 10, 2016 Interview with Complainants.
[58] ADEM Admin. Code r. §335-13-4-.18 (requirements relating to liners and leachate collection), 40 C.F.R. §258.40 (requirements relating to liners and leachate collection)
[59] ADEM Admin. Code r. §335-13-4-.14 and §335-13-4-.27 (requirements relating to groundwater monitoring systems), 40 C.F.R. §258.51 (requirements relating to groundwater monitoring systems).
[60] 40 C.F.R. Part 267, Subpart D, *Contingency Plan and Emergency Procedures*.
[61] ADEM Admin. Code r. §335-13-4-.16; 40 C.F.R. Part 258.23.
[62] *Explosive Gas Monitoring and Reporting Plan*, Appendix N of the Tallassee Waste Disposal Center Solid Waste Disposal Facility Permit Application, June 2000.

acceptance rates (which remained at 1,500 tons per day) or the types of waste approved for acceptance at the Tallassee Waste Disposal Center, Inc. ECRCO found that issues relating to the proximity to the church, roadway design, line of sight, signage, and traffic speed enforcement, and emergency infrastructure are not impacted by the permit modification. Instead, for example, the specific route used by trucks in proceeding to the landfill was addressed by the 1999 local host agreement between the operator and Tallapoosa County,[63] which was in effect at the time of the 2003 permit modification. As a result, there is insufficient evidence to show a causal link between the 2003 permit modification and the alleged harm resulting from traffic and roadway design.

3. Non Environmental Concerns Raised by Complainants

Complainants raised concerns related to diminution of property values, displacement of landowners, and stigma of living near a landfill, and that these were impacted by the 2003 permit modification actions. For its part, EPA has substantial discretion to determine the types of harms, on a case by case basis, that warrant investigatory resources and are sufficiently harmful to violate Title VI.[64] ECRCO determined that it would not investigate substantively the alleged harms of diminution of property values, displacement of landowners, and stigma of living near a landfill in this instance because, although the 2003 permit modification activities (*i.e.* the development of cells 2A and 2B, the C&D unit, and the associated sediment and erosion control units) could conceivably have resulted in diminution of property values, displacement of landowners, and contributed to stigma, there is insufficient evidence in the record to suggest that the permit modification actions themselves resulted in a sufficiently significant harm with regard to stigma, displacement of landowners and property values. Instead, as previously noted, Complainants' allegations of harm generally, and with respect to these identified concerns in particular, appear to be related to the initial permitting and siting of the Tallassee Waste Disposal Center in 2001, rather than to the 2003 permit modification at issue in this case.

Conclusion

For the reasons set forth above, the record does not establish a prima facie case of discrimination based on disparate impact with respect to allegations set forth in this complaint regarding the 2003 permit modification. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2003 permit modification at issue in this case. In light of the findings set forth in this letter, this case is closed as of the date of this letter.

While there is insufficient evidence for finding a violation of EPA's nondiscrimination regulation relative to the specific issue raised in this case and the 2003 permit modification

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[63] Tallapoosa County Commission. Local Host Agreement (November 15, 1999). This agreement specified a particular route that traffic was to take to the landfill. The application for the 2003 permit modification did not request changes to this route.

[64] *See Choate*, 469 U.S. at 293–94: "Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impact upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts." *See also Alexander v. Sandoval*, 532 U.S. 275, 306 (2001) (Stevens, J., dissenting).

actions, ECRCO has continued to hear community concerns regarding alleged discrimination relating to environmental permitting actions in Alabama, including with respect to whether ADEM examines the decision-making processes of the local host governments and the regional planning authorities relative to permitting actions. In addition, ECRCO has received information and complaints with respect to ADEM's public participation program as well as ADEM's implementation of a foundational non-discrimination program that establishes appropriate procedural safeguards for addressing civil rights complaints and implementing policies and procedures to ensure access for persons with disabilities and limited-English proficiency to ADEM programs and activities. These allegations, filed formally with ECRCO as separate complaints against ADEM and/or voiced during interviews or provided as documentary evidence as part of this investigation, raise broader systemic issues regarding ADEM's methods of administering its solid waste permitting process in general, as well as its non-discrimination program. Accordingly, ECRCO will be contacting ADEM to discuss these issues and possible options for addressing them through the resolution of the pending complaints.

This letter sets forth ECRCO's disposition of EPA File No. 06R-03-R4. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. This letter and any findings herein do not affect ADEM's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulation at 40 C.F.R. Part 7, including §7.85, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter.

If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,

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