UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 25 2013

OFFICE OF
CIVIL RIGHTS

Return Receipt Requested
Certified Mail#: 7009-2820-0002-1763-5613

In Reply Refer to:
EPA File No. 06R-03-R4

Mr. Lance R. LeFleur, Director
Alabama Department of Environmental Management
P.O. Box 301463
Montgomery, AL 36130-1463

Re: Partial Dismissal of Title VI Administrative Complaint

Director LeFleur:

This letter is to notify the Alabama Department of Environmental Management (ADEM) that the U.S. Environmental Protection Agency (EPA), Office of Civil Rights (OCR) is partially dismissing the administrative complaint dated December 8, 2003, filed with OCR pursuant to EPA's regulations implementing Title VI of the Civil Rights Act of 1964, as amended (Title VI),[1] by [redacted] (Complainant) against ADEM on behalf of herself and the African American members of the Ashurst Bar/Smith Community.[2] ADEM is a recipient of EPA funds.

OCR accepted two allegations concerning ADEM's process of permitting the Tallassee Waste Disposal Center (TWDC) landfill, currently Stone's Throw Landfill (but hereinafter referred to as TWDC), in Tallassee, Tallapoosa County, Alabama.[3] The first allegation is 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 TWDC in 2003. The second allegation is 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 has created a discriminatory effect for the African American citizens since most of Tallapoosa County's municipal solid waste landfills are located in their communities.

The investigation of the Complaint has been bifurcated. This letter includes the results of the investigation of 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 TWDC in 2003 (Allegation 1).

[1] 42 U.S.C. § 2000d et. seq.
[2] Letter from [redacted], Complainant, to Karen D. Higginbotham, Director, OCR (September 3, 2003).
[3] Letter from Karen D. Higginbotham, Director, OCR to [redacted], Complainant (September 7, 2005).

The investigation of Allegation 2 is still ongoing and will be addressed in subsequent correspondence.

The Complaint met EPA's four jurisdictional requirements set forth in 40 C.F.R. Part 7. OCR accepted the Complaint for investigation on September 7, 2005. Following its investigation of the first allegation of intentional discrimination by ADEM regarding public involvement, OCR finds that the facts do not substantiate the Complainant's allegation. Therefore, OCR finds no violation of EPA's Title VI regulations and is dismissing the allegation of intentional discrimination in public involvement (Allegation 1).

I. LEGAL FRAMEWORK

A. Statutory Background

Title VI prohibits discrimination based on race, color, or national origin under any program or activity[4] receiving federal financial assistance.[5] Under Section 601 of Title VI,

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[6]

This section prohibits intentional discrimination.[7] In addition, Section 602 "authorize[s] and direct[s]" federal departments and agencies that extend federal financial assistance "to effectuate the provisions of section [601] . . . by issuing rules, regulations, or orders of general applicability."[8] At least forty federal agencies have adopted regulations that prohibit disparate impact discrimination pursuant to this authority.[9] The Supreme Court has recognized that such regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory.[10] The United States Environmental Protection Agency's Title VI implementing regulations are codified at 40 C.F.R. Part 7. Under these regulations, a recipient of EPA financial assistance may not

---

[4] The Civil Rights Restoration Act of 1987 broadly defines "program or activity" to include all of the operations of an entity, any part of which receives federal assistance. 42 U.S.C. § 2000d-4a.

[5] 42 U.S.C. §§ 2000d et seq. ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

[6] *Id.*

[7] *See Alexander v. Choate,* 469 U.S. 287, 293 (1985); *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582, 607-08 (1983).

[8] 42 U.S.C. § 2000d-1.

[9] *See Guardians,* 463 U.S. at 619 (Marshall, J. dissenting).

[10] *See Alexander,* 469 U.S. at 292-94; *Guardians,* 463 U.S. at 582; *Elston v. Talladega County Bd. Of Educ.,* 997 F.2d 1394, 1406, *reh'g denied,* 7 F.3d 242 (11th Cir. 1993).

intentionally discriminate or use policies or practices that have a discriminatory effect based on race, color, or national origin.

As provided at 40 C.F.R. section 7.120, administrative complaints alleging discriminatory acts in violation of 40 C.F.R. Part 7 may be filed with the Agency. EPA reviews accepted complaints in accordance with 40 C.F.R. Part 7, Subpart E (§§ 7.105-7.135).

B. Regulatory Background – Intentional Discrimination

EPA's Title VI implementing regulations prohibit intentional discrimination:

> No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . .[11]

In addition, EPA regulations specifically provide, in part, that recipients shall not "[d]eny a person any service, aid or other benefit of the program,"[12] "[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program,"[13] or "[r]estrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program."[14]

Where direct proof of discriminatory motive is unavailable, it is necessary to evaluate whether any circumstantial evidence of discriminatory intent exists. Such evidence may be found in various sources including statements by decision-makers, the historical background of the events at issue, the sequence of events leading to the decision at issue, a departure from standard procedures, the minutes of meetings, a past history of discriminatory conduct, and evidence of a substantial disparate impact on a protected group.[15]

In addition, claims of intentional discrimination may be analyzed using the Title VII burden-shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green.*[16] The elements of a prima facie case may vary depending on the facts of the

---

[11] 40 C.F.R. § 7.30.
[12] 40 C.F.R. § 7.35(a)(1).
[13] 40 C.F.R. § 7.35(a)(2).
[14] 40 C.F.R. § 7.35(a)(3).
[15] *See Arlington Heights v. Metropolitan Hous. Redevelopment Corp.*, 429 U.S. 252 at 266-68 (1977) (evaluation of intentional discrimination claim under the Fourteenth Amendment).
[16] 411 U.S. 792 (1973). *See also Baldwin v. Univ. of Texas Med. Branch at Galveston*, 945 F.Supp. 1022, 1031 (S.D.Tex. 1996); *Brantley v. Independent Sch. Dist. No. 625, St. Paul Public Schools,* 936 F. Supp. 649, 658 n.17 (D.Minn. 1996).

complaint, but such elements often include the following:

1. that the aggrieved person or group belonged to a protected class;
2. that this person applied for, and was eligible for, a benefit provided by a federally assisted program;
3. that despite the group's or person's eligibility for the benefit, the group or person was denied or failed to receive the benefit; and,
4. that the recipient provided the benefit to other similarly situated individuals, or otherwise denied the person or group the benefit because of race, color, or national origin.[17]

If the prima facie case can be established, the burden shifts to the recipient to provide a justification or "establish [ ] that the same decision would have resulted even had the impermissible purpose not been considered."[18] If the recipient can make such a showing, the inquiry shifts back to EPA to show whether the justification proffered by the recipient is actually a pretext for discrimination.[19] While the *McDonnell Douglas* analysis concerns the burden of producing evidence, for purposes of this administrative investigation, the ultimate burden of proof remains with EPA.[20]

II. ALLEGATIONS

On September 7, 2005, EPA OCR accepted the following allegations for investigation:

(1) ADEM intentionally discriminated against the African American citizens of the Ashurst Bar/Smith community by:

a. providing information prior to the August 26, 2003, public hearing regarding the size of the landfill facility, acreage of the facility's property, and inclusion of wetlands, that was inconsistent with the information provided by the U.S. Army Corps of Engineers (COE), and,

b. limiting the length and scope of the public hearing held on August 26, 2003, so that none of the concerns raised by the impacted community were addressed at the hearing or in ADEM's Response-to-Comments report.

---

[17] *McDonnell Douglas Corp.*, 411 U.S. 792 (1973); *Cf. Bass v. Bd. of Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1104 (11th Cir. 2001)(describing elements of a *prima facie* case under Title VII).
[18] *Arlington Heights*, 429 U.S. at 271 n.21; *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986).
[19] *See generally McDonnell Douglas Corp.*, 411 U.S. 792 (1973).
[20] *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)(notwithstanding *McDonnell Douglas's* burden shifting analysis, the burden of proof remains with the plaintiff).

III. POSITION STATEMENT FROM THE RECIPIENT

OCR sent a letter to the Complainant and a courtesy copy of the letter to ADEM indicating that it had accepted the Complaint.[21] EPA received a letter from ADEM responding to the accepted allegations in the Complaint.[22] In its response, ADEM stated that it had not, intentionally or otherwise, discriminated against the African American citizens of the Ashurst Bar/Smith community in violation of Title VI. ADEM subsequently submitted additional information and statements that reiterated its position regarding the allegations.[23] ADEM's responses to allegation (1) included the following:

***Allegation 1(a): Providing information prior to the August 26, 2003 public hearing regarding the size of the landfill facility, acreage of the facility's property, and inclusion of wetlands, that was inconsistent with the information provided by the* COE.**

ADEM stated that on June 13, 2003, the COE issued a joint public notice with ADEM's water quality certification for a proposed placement to fill in 7.46 acres of wetlands within two recently purchased land tracts adjacent to the existing waste disposal facility. This application, pursuant to section 404 of the Clean Water Act (33 U.S.C. section 1344), was to expand the capabilities of the TWDC to accommodate "current and future expansion demands of the region."[24] The joint public notice also states that the 200-acre project will provide additional disposal cells to accommodate current and future expansion demands of the region.[25]

Additionally, ADEM stated that it issued a public notice requesting to modify the TWDC's solid waste permit to add 5.11 acres to the municipal solid waste area of the landfill, and 6.56 acres to the construction and demolition waste disposal area.[26] The notice indicates that the total permitted area for the TWDC shall be 123.47 acres with a municipal solid waste disposal area of 17.91 acres. ADEM stated that the July 17, 2003 public notice requesting to modify the TWDC's solid waste permit was a different action, which contained information

[21] Letter from Karen D. Higginbotham, Director, OCR to [redacted], Complainant (September 7, 2005).
[22] Letter from Onis "Trey" Glenn, III, Director, ADEM to Karen D. Higginbotham, Director, OCR (October 7, 2005) (hereinafter "Oct. 7, 2005 ADEM letter").
[23] Letter from Onis "Trey" Glenn, III, Director, ADEM to Karen D. Higginbotham, Director, OCR (February 26, 2007) (hereinafter "Feb. 26, 2007 ADEM letter").
[24] *See* Oct. 7, 2005 ADEM letter.
[25] *See* Feb. 26, 2007 ADEM letter at Attachment A.
[26] *See* Oct. 7, 2005 ADEM letter. Note: ADEM initially responded that it issued the public notice requesting to modify the TWDC's solid waste permit on June 17, 2003. ADEM subsequently corrected this date and confirmed that the notice was issued on July 17, 2003.

unlike that in the June 13, 2003 ADEM/COE joint public notice. ADEM explained its belief that the Complainant assumed both notices were for the same action proposed at the TWDC. [27]

ADEM subsequently reiterated its explanation for why the information in the June 13, 2003 public notice jointly published by the COE and ADEM was inconsistent with the information in the July 17, 2003 public notice published by ADEM. ADEM stated that the Complainant's confusion between the two notices might have stemmed from the proximity in time of the two different regulatory actions, the proximity in location of the two parcels of land involved in the respective regulatory actions, and the fact that the applicant was the same for both actions. Finally, ADEM stated that there are no facts to support the allegation that ADEM intentionally discriminated against the citizens of the Ashurst Bar/Smith community.

On October 28, 2011, OCR sought and received on November 30, 2011 from ADEM, further clarification on the information regarding wetlands fill permit approvals.[28] ADEM's Summation of Comments Received and Response-to-Comments document (hereinafter Response-to-Comments)[29] includes a comment (comment #6) regarding the landfill's impact on wetlands.[30] ADEM's initial response to this comment in the Response-to-Comments stated that "On August 22, 2002, the TWDC received a permit from the US Corps of Engineers to fill in the wetlands located within the permitted area."[31] ADEM clarified to OCR that the August 22, 2002 wetland fill permit approved by the COE and the June 13, 2003 joint public notice issued by the COE for a wetland fill, were for two different sets of wetlands on two different parcels of land. ADEM indicated that the August 22, 2002 permit was to fill in 1.16 acres of wetlands within the 123.47 acres permitted solid waste facility boundary, while the June 13, 2003 joint public notice issued by the COE was to fill in wetlands on a 200-acre parcel of land also owned by TWDC but not included as a part of the proposed solid waste permit.[32]

Allegation 1(b): Limiting the length and scope of the public hearing held on August 26, 2003, so that none of the concerns raised by the impacted community were addressed at the hearing or in ADEM's Response to Comments report.

In ADEM's October 7, 2005 response to OCR,[33] it stated that at the public hearing, the hearing officer explained that the purpose of the public hearing was to provide the citizens with

---

[27] *Id.*
[28] E-mail from Jonathan Crosby, Solid Waste Engineering Section, Land Division, ADEM, to Karen Randolph, OCR (November 30, 2011) (hereinafter "Nov. 30, 2011 ADEM e-mail").
[29] *See* Summation of Comments Received and Response-to-Comments for 07/17/2003 Public Hearing, letter from James L. Bryant, Chief, Solid Waste Branch, Land Division, ADEM to Public Commenters, October 20, 2003 (hereinafter Response-to-Comments).
[30] *See* Nov. 30, 2011 ADEM e-mail.
[31] *See* Response-to-Comments.
[32] *See* Nov. 30, 2011 ADEM e-mail.
[33] *See* Oct. 7, 2005 ADEM letter.

an opportunity to present oral comments concerning the proposed landfill permit application. ADEM's response also indicated that at the hearing ADEM requested that, along with oral presentations, commenters submit lengthy statements and statements containing technical or complex data in writing. ADEM indicated that it also informed the citizens of its limited authority to consider issues only related to solid waste permitting, and that the hearing was not a question-and-answer session, but rather an opportunity for the citizens to make comments concerning the draft permit modification. ADEM also indicated that it informed the public that the public hearing process is the standard routine procedure used at any public hearing, and it believes it is reasonable and helps to ensure that all who wish to speak have an opportunity.

In its February 26, 2007 response to OCR,[34] ADEM subsequently reiterated its position of not limiting the length of the hearing. ADEM indicated that although it requested speakers limit comments to five minutes, it did not interrupt or rush any speaker to finish his or her comments. In fact, ADEM stated that after all registered speakers had spoken, the hearing officer opened the floor for others to speak, at which time ADEM allowed two additional people to provide comments. ADEM contends that it conducted the hearing in a fair and reasonable manner following EPA regulations (40 C.F.R. § 271.14).

Regarding the allegation that ADEM did not address concerns raised by the impacted community at the public hearing, ADEM stated that it provided a Response- to-Comments, which included thorough responses to the technical and legal comments received. ADEM indicated that it sent a copy of this document to each commenter who attended the public hearing or submitted written comments during the public comment period. ADEM acknowledged receiving comments regarding issues ADEM contended were outside of its statutory and regulatory jurisdiction, and indicated that it responded to those comments by acknowledging the legitimacy of the concerns and informing commenters of the issues over which other state, federal, or local governments had jurisdiction. ADEM restated that the allegation of its efforts failing to address the concerns raised by the community is incorrect. ADEM also stated that it believes it acted appropriately and consistently in conducting the August 26, 2003 public hearing and addressing the public's concerns during the comment period.

IV. FINDINGS OF FACT

1) On June 13, 2003, the COE and ADEM jointly published a public notice (Public Notice No. AL03-01881-R, hereinafter June 13, 2003 public notice) regarding the proposed filling of wetlands to expand the use capabilities of the TWDC.[35] The applicant proposed to fill 7.46 acres of wetlands within two recently purchased land tracts adjacent to the existing waste

[34] *See* Feb. 26, 2007 ADEM letter.
[35] ADEM / COE Public Notice No. AL03-01881-R (June 13, 2003).

disposal facility.[36] This project was intended to provide additional disposal cells to accommodate current and future expansion demands on the region.[37]

2) The June 13, 2003 public notice listed the project area of TWDC as 200 acres.[38] This public notice does not refer to the permitted area of the TWDC landfill.[39]

3) On July 17, 2003, ADEM issued the public hearing notice for the proposed modification of the TWDC landfill permit (hereinafter July 17, 2003 public hearing notice).[40] The proposed modification consisted of adding 5.11 acres to the municipal solid waste disposal area and adding 6.56 acres for construction and demolition waste disposal.[41] The July 17, 2003 public hearing notice states that the maximum average daily volume of waste disposed at the TWDC landfill will remain at 1500 tons per day.[42] The notice states that the new disposal areas are within the permitted facility boundary.

4) The July 17, 2003 public hearing notice lists the total permitted area of TWDC landfill facility as 123.47 acres.[43]

5) The June 13, 2003 public notice and the July 17, 2003 public hearing notice apply to different proposed permit actions.

6) On August 22, 2002, the TWDC landfill received a permit from the U.S. Army Corps of Engineers to fill in the wetlands located within the permitted area. The permit allowed the TWDC to buy into the Corps wetlands mitigation bank which purchases land in other locations for the creation of new wetlands to offset those destroyed by permits. The mitigation bank is located in the same watershed as the project site for the permit modification.[44]

7) The August 22, 2002 wetland fill permit and the June 13, 2003 joint public notice for a wetland fill permit were for two different sets of wetlands.[45]

8) On August 26, 2003, ADEM held a public hearing regarding the proposed modification of the TWDC landfill permit. The hearing was held at the Tallassee City Hall in Tallassee,

---

[36] *See id.*
[37] *See id.*
[38] *See id.*
[39] *See id.*
[40] Public Hearing Notice-422, Tallassee Waste Disposal Center Landfill (July 17, 2003).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 29.
[45] *See* Nov. 30, 2011 ADEM e-mail.

Alabama. A total of 14 attendees spoke. The hearing commenced at 6:02 p.m. and concluded at 7:12 p.m.[46]

9) ADEM accepted written comments regarding the proposed modification of the TWDC landfill permit.

10) Written comments from several members of the Ashurst Bar/Smith community were submitted on June 26, 2003, before the public hearing was held.[47]

11) A total of 14 people voiced concerns at the August 26, 2003 public hearing regarding the proposed permit modification of the TWDC landfill; of those, three people identified themselves as current members of the Ashurst Bar/Smith community.[48] No written comments were submitted at the public hearing.

12) On August 29, 2003, the Complainant submitted comments to ADEM regarding the proposed permit modification of the TWDC landfill and how the August 26, 2003 public hearing was held.[49]

13) On October 20, 2003, ADEM issued a Response-to-Comments report.[50] The report was sent to all adjacent landowners of the TWDC and the public commenters who submitted attendance cards at the hearing and requested a copy of the report.[51]

14) ADEM's Response–to-Comments report acknowledges and lists examples of the comments received regarding issues ADEM contends were outside of its jurisdiction. The report states that such issues may be regulated/addressed by other federal or state agencies, and county or local government, or the civil law process. The report also categorizes comments received and provides summary responses addressing the comments.[52]

15) The demographics of the community within .5, 1, 2 and 3 miles of the TWDC landfill are 90.6%, 88.2%, 57.1% and 44.1% African American, respectively.[53]

---

[46] *See* Feb. 26, 2007 ADEM letter at Attachment E.
[47] E-mail from Jonathan Crosby, Solid Waste Engineering Section, Land Division, ADEM, to Karen Randolph, OCR (January 17, 2012). Also noted in Note to File Re: Complaint 06R-03-R4 from Karen Randolph, OCR (May16, 2012).
[48] *See* Feb. 26, 2007 ADEM letter at Attachment E.
[49] *See* Letter from [redacted], Complainant, to Karen D. Higginbotham, Director, OCR (September 3, 2003).
[50] *See* Response-to-Comments.
[51] *See* Note to File Re: Complaint 06R-03-R4 from Karen Randolph, OCR (Jan. 17, 2012).
[52] *See* Response-to-Comments.
[53] Note: EPA used the Geographic Information System (GIS) to obtain the demographic data. The GIS analysis involved: determining the fence line using satellite imagery, buffering to the proper distances, determine the area of the Census blocks, clipping the Census files to the appropriate distances, calculating the clipped areas of the

16) From 2002 – 2003, ADEM's other public hearings regarding landfills and hazardous waste facilities included the following:

(a) On May 14, 2002, ADEM held a public hearing at the Sylvan Springs Community Center, Sylvan Springs, Alabama regarding the Sylvan Springs Waste Complex, L.L.C. proposed permit to construct and operate a construction and demolition landfill in Jefferson County, Alabama. A total of 29 people submitted verbal comments. The hearing commenced at 6:31 p.m. and concluded at 8:13 p.m.[54] The demographics of the community within .5, 1, 2 and 3 miles of the facility are 37.2%, 48.6%, 25%, and 15.5% African American, respectively.[55]

(b) On September 3, 2002, ADEM held a public hearing at the City Meeting Center, Anniston, Alabama regarding the permit modification of the Anniston Chemical Demilitarization Hazardous Waste facility in Anniston, Alabama. The major modifications concerned plans for conducting agent trial burns using the chemical agent BG in the liquid incinerator and the deactivation furnace system, and revision of a screening level risk assessment protocol. A total of 25 people submitted verbal comments. The hearing commenced at 7:05 p.m. and concluded at 8:43 p.m.[56] The demographics of the community within .5, 1, 2 and 3 miles within the facility are 26.2%, 5.3%, 5.9%, and 8.8% African American, respectively.[57]

(c) On April 22, 2003, ADEM held a public hearing at the Loxley Town Hall in Loxley, Alabama regarding the permit modification of the MacBride Landfill in Baldwin County, Alabama. The MacBride Landfill modification included an expansion of the permitted area to 152.7 acres and the permitted disposal area to 49.8 acres. None of the attendees spoke at the meeting. The hearing commenced at 6:00 p.m.; the transcript did not indicate what time the public hearing concluded.[58] The demographics of the community within .5, 1, 2 and 3 miles within the facility are 66.8%, 47.4%, 29.9%, and 19.7% African American, respectively.[59]

(d) On June 10, 2003, ADEM held a public hearing at the Choctaw County Courthouse, Butler, Alabama regarding the Choctaw County solid waste permit application to operate a municipal solid waste landfill in Choctaw County, Alabama. The total permitted area consists

---

Census blocks and determining the area proportions to the entire blocks, and estimating the populations based on the proportions. EPA's analysis used Alabama State Plane coordinates.

[54] *See* Feb. 26, 2007 ADEM letter at Attachment J.

[55] *See supra* fn. 53.

[56] *See* Feb. 26, 2007 ADEM letter at Attachment H.

[57] *See supra* fn. 53.

[58] *See* Feb. 26, 2007 ADEM letter at Attachment G.

[59] *See supra* fn. 53.

of approximately 40.06 acres, with a disposal area of 28.85 acres. Two people submitted verbal comments. The hearing commenced at 6:00 p.m. and concluded at 6:15 p.m.[60] The demographics of the community within .5, 1, 2 and 3 miles within the facility are 0.0%, 10%, 6.4%, and 10.5% African American, respectively.[61]

(e) On December 4, 2003, ADEM held a public hearing at the Anniston City Meeting Center, Anniston, Alabama regarding the proposed permit modification of the Anniston Chemical Demilitarization Hazardous Waste facility in Anniston, Alabama. The major modifications pertained to the submittal of a RCRA Part B permit application for hazardous waste storage at the Anniston Army Depot. No one submitted verbal comments. The hearing commenced at 6:33 p.m. and concluded at 6:46 p.m.[62] The demographics of the community within .5, 1, 2 and 3 miles within the facility are 26.2%, 5.3%, 5.9%, and 8.8% African American, respectively.[63]

V. METHODOLOGY OF THE INVESTIGATION

In conducting the investigation, OCR gathered and reviewed all of the information relevant to the Complaint. This information included the Complaint submitted to OCR,[64] ADEM's responses to OCR's acceptance of the Complaint,[65] and all other letters and emails OCR received from the Complainant and Recipient pertaining to the permit modification for TWDC.

VI. ANALYSIS

In order to establish a *prima facie* case of intentional discrimination under the *McDonnell Douglas* framework, (1) the aggrieved person must belong to a protected class; (2) the person must apply for, and be eligible for, a benefit provided by a federally assisted program; (3) despite the person's eligibility for the benefit, the person was denied or failed to receive the benefit; and, (4) the recipient provided the benefit to other similarly situated individuals, or otherwise denied the person the benefit because of race, color, or national origin.

Allegation 1(a): ADEM intentionally discriminated against the African American citizens of the Ashurst Bar/Smith community by providing information prior to the August 26, 2003 public hearing regarding the size of the landfill facility, acreage of the facility's

[60] *See* Feb. 26, 2007 ADEM letter at Attachment K.
[61] *See supra* fn. 53.
[62] *See* Feb. 26, 2007 ADEM letter at Attachment I.
[63] *See supra* fn. 53.
[64] Letter from [redacted], to Karen D. Higginbotham, Director, OCR (December 15, 2003).
[65] Oct. 7, 2005 ADEM Letter; Feb. 26, 2007 ADEM Letter.

property, and inclusion of wetlands, that was inconsistent with the information provided by the US Army Corps of Engineers.

Complainant alleges that she and protected members of her community were intentionally provided with inconsistent information regarding the TWDC. Therefore, EPA reviewed ADEM's July 17, 2003 public hearing notice, as well as the public notice jointly published by the COE and ADEM on June 13, 2003. The July 17, 2003 notice related to modification of the TWDC permit. This request was to add 5.11 acres to the municipal solid waste disposal area and add 6.56 acres for construction and demolition waste disposal. This notice stated that the total permitted area for the TWDC shall remain at 123.47 acres, with a municipal waste disposal area increased to a total of 17.91 acres, and a construction and demolition waste disposal area added with a total area of 6.56 acres.

The joint public notice published by the COE and ADEM on June 13, 2003, proposed to fill 7.46 acres of wetlands within two recently purchased land tracts adjacent to the existing waste disposal facility to expand the use capabilities of the TWDC. Although the notice mentioned that the 200-acre project would provide additional disposal cells to accommodate current and future expansion demands of the region, this notice only proposed the filling in of the wetlands. Therefore, facts show that the two separate notices applied to two different actions.

Accordingly, facts obtained in OCR's investigation do not support the allegations in the complaint that ADEM provided inconsistent information in the notices regarding TWDC. Both notices show that the proposed actions were separate actions. Although the July 17, 2003 notice refers to current acreage (123.47) of the TWDC, and the joint June 13, 2003 notice refers to current and future acreage (200) to allow additional disposal cells to accommodate future expansion, the actions proposed in the notices are unrelated. Therefore, OCR is dismissing this allegation because the factual basis of the allegation is not supported by the record.

Allegation 1(b): ADEM intentionally discriminated against the African American citizens of the Ashurst Bar/Smith community by limiting the length and scope of the public hearing held on August 26, 2003, so that none of the concerns raised by the allegedly adversely impacted community were addressed at the hearing or in ADEM's Response to Comments report.

Applying the *prima facie* framework to this allegation, the record establishes that the members of the Ashurst Bar/Smith community are members of a protected class based on their race and they were eligible to participate in the public hearing. In order to determine whether ADEM limited the length and scope of the hearing, to impact the African American members of the Ashurst/Bar Smith community, OCR reviewed the transcript of the August 26, 2003 public hearing. OCR also reviewed transcripts of five other public hearings ADEM previously

held throughout Alabama between May 2002 and December 2003.[66] Four of these public hearings concerned proposed permit actions for facilities/landfills located in Alabama communities comprised of predominately white residents within .5, 1, 2, and 3 miles from the facilities/landfills.[67] One public hearing transcript pertained to a landfill in a community comprised of slightly more than half African Americans residents within .5 miles of the facility and a greater percentage of white residents within 1, 2, and 3 miles from the facility.[68] OCR compared the manner in which ADEM conducted the August 26, 2003 public hearing to the manner in which ADEM conducted the five other public hearings. OCR also reviewed EPA's Public Participation regulations found at 40 CFR 271.14 to ensure that ADEM conducted all public hearings according to EPA's public participation regulations applicable to State RCRA programs.

A thorough review of all transcripts revealed that the manner in which ADEM conducted the August 26, 2003 public hearing was consistent with the manner in which it conducted five previous public hearings. At these hearings, as with the August 26, 2003 hearing, ADEM generally informed the attendees that:[69]

1) Public officials would be allowed to speak first, followed by the attendees in the order which they filed their registration card;
2) Lengthy statements or statements containing considerable, technical or other complex data should be submitted in writing; however, summaries of such statements could be submitted orally;
3) The hearing served to allow the public with an opportunity to offer comments to help assure that ADEM considers all relevant factors before the final permit decision is made;
4) ADEM is limited to the factors it can consider when making a permit decision, and factors on whether the permit applicant has satisfied the requirements of the applicable statutes and regulations;
5) The Department does not exercise zoning authority and may only consider comments relating to solid waste issues;
6) The proceeding is not a question-and-answer session, but rather an opportunity

[66] New Sylvan Springs Waste Complex, L.L.C (Sylvan Springs Community Center, Sylvan Springs, Alabama, May 14, 2002), modification of hazardous waste facility at Anniston Army Depot (Anniston City Meeting Center, Anniston, Alabama, September 3, 2002), modification of the MacBride Landfill (Loxley Town Hall, Hickory, Loxley, Alabama, April 22, 2003), new Choctaw County Regional Landfill (Choctaw County Courthouse, Butler, Alabama, June 10, 2003), and modification of the hazardous waste facility at Anniston Army Depot (Anniston City Meeting Center, Anniston, Alabama, December 4, 2003). ADEM included these transcripts as attachments to the Feb. 26, 2007 ADEM letter.
[67] *See* Feb. 26, 2007 ADEM letter at Attachments H, I, J and K.
[68] *See supra* fn 53.
[69] See Feb. 26, 2007 ADEM letter at Attachments G, H, I, J and K.

for the public to submit comments for the Department to consider in the final review of the permit application; and,

7) Attendees should limit their statements (in some cases to five minutes) to allow others enough time to speak.

Additionally, OCR's review of the August 26, 2003 public hearing transcript concludes that the manner in which ADEM conducted the TWDC public hearing was also consistent with EPA's regulations. The manner in which ADEM conducted the public hearing was consistent with 40 CFR 25.5 for submitting oral and written comments. For example, ADEM informed the audience of the issues involved regarding the draft permit, and considerations taken into account in arriving at the tentative decision regarding the draft permit. Consistent with 40 CFR 124.12(c), ADEM solicited oral and written comments from the public regarding the draft permit and informed the public of the limited but reasonable time allotted for everyone to have an opportunity to speak. Finally, consistent with 40 CFR 124.17, ADEM issued the Response-to-Comments report that briefly describes and responds to all significant comments on the draft permit raised during the hearing and the public comment period.[70]

Therefore, a comparison of the August 26, 2003 public hearing to ADEM's other public hearings and a review of the applicable EPA public participation regulations reveal that ADEM did not limit the length and scope of that public hearing. In addition, a comparison of the August 26, 2003 public hearing to ADEM's other public hearings, most of which were in communities that were not predominantly African American, do not reveal significant differences in the manner in which public hearings were conducted by ADEM.

Allegation 1(b) alleges that none of the concerns raised by the allegedly adversely impacted community were addressed at the hearing or in ADEM's Response-to-Comments. However, according to the transcript of the August 26, 2003 public hearing, before the hearing began, ADEM informed attendees that the hearing was not a question-and-answer session, but rather an opportunity to submit comments for ADEM to consider.[71] In addition, as in previous public hearings held by ADEM, the August 26, 2003 transcript indicates that the presiding officer informed the attendees that they could submit written or oral statements regarding the proposed action, and asked that attendees limit their time for responding. The transcript also states that ADEM informed the attendees of its (ADEM's) limited authority to consider issues related to the proposed action, and that it could not consider concerns and comments outside of that area.

Although the presiding officer asked that attendees limit their time for responding, as the transcript reads, ADEM did not rush any speaker through his or her comments, but allowed

[70] 40 C.F.R. §§ 124.12(c), 124.17, 25.5(e).
[71] *See* Feb. 26, 2007 ADEM letter at Attachment E, p. 7.

time for additional speakers, not previously registered, to speak.[72] Written comments from several members of the Ashurst Bar/Smith community were submitted before the hearing; no community members submitted written comments at the August 26, 2003 public hearing. After the public hearing, on October 20, 2003, ADEM sent its Response-to-Comments to persons that attended the public hearing and completed a registration card, individuals who submitted written comments on the draft permit, and the owners of the property adjacent to the landfill site. ADEM's Response-to-Comments generally addresses written comments submitted before the public hearing was held, vocal comments raised at the public hearing, and the written comments submitted after the public hearing.[73] OCR's investigation did not reveal that ADEM failed to respond to any comments submitted by the complainants. OCR has determined that the concerns raised by the impacted community were acknowledged at the hearing or in ADEM's Response-to-Comments.

Analysis of the five hearing transcripts for the other public hearings also show that ADEM did not limit the length and scope of the August 26, 2003 public hearing regarding the TWDC permit modification. OCR concludes that ADEM conducted the hearing consistently with the five other public hearings previously held in other locations in Alabama, some of which were in predominantly white communities. In addition, ADEM also provided the attendees ample opportunity to speak, and addressed or acknowledged concerns raised either at the August 26, 2003 public hearing or in the Response-to-Comments.

Based on this evidence, EPA concludes that ADEM did not disparately treat or deny African Americans in the Ashurst Bar/Smith community the benefits they were entitled to regarding ADEM's public hearing for the TWDC's permit modification action. Hence, because the African Americans in the Ashurst Bar/Smith community were not denied benefits that were granted to others regarding ADEM's permitting of the TWDC modification, a *prima facie* case of intentional discrimination by ADEM cannot be established for Allegation 1(b).

VII. CONCLUSION

Based on the facts established during this investigation and the applicable legal standards, OCR concludes that the Complainant's allegations of unlawful intentional discrimination as stated in Allegation (1) are not supported by the record. Thus, OCR finds no violation of EPA's regulations, and hereby dismisses Allegation (1) of the Complaint against ADEM, pursuant to 40 C.F.R. section 7.120(g). As previously stated in this letter, Allegation (2) of this Complaint will be addressed in subsequent correspondence.

---

[72] *Id.*
[73] *See id.*

If you have any questions, please contact Helena Wooden-Aguilar, Assistant Director, Office of Civil Rights by telephone at 202-564-0792, by email at Wooden-Aguilar.Helena@ epa.gov or by mail at U.S. EPA, 1200 Pennsylvania Ave., NW, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,

Rafael DeLeon
Director

cc: [redacted]

Stephen G. Pressman, Associate General Counsel
Civil Rights & Financial Law Office (MC 2399A)

Teresa Murray, EEO Officer
EPA Region IV

Naima Halim-Chestnut, Title VI Contact
EPA Region IV