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

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

March 1, 2018

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In Reply Refer to:
EPA File No. 12R-13-R4

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

Re: Closure of Administrative Complaint, EPA File No. 12R-13-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 June 3, 2013, and the retaliation allegation filed on August 19, 2016, against the Alabama Department of Environmental Management (ADEM). The complaints 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 June 27, 2013, EPA's Office of Civil Rights (OCR)[1] accepted for investigation two issues raised in a May 2013 complaint (hereinafter referred to as the "May 2013 issues").[2] The two issues were:

> Whether ADEM violated Title VI and EPA's implementing regulations on September 27, 2011, by reissuing Permit No. 53-03 to Perry County Associates, LLC to construct and operate the Arrowhead municipal solid waste landfill in Perry County, Alabama, because

[1] EPA's Office of Civil Rights is now identified as the External Civil Rights Compliance Office.
[2] Letter from Vicki Simons, Director, OCR (signed by Helena Wooden-Aguilar, External Compliance Assistance Director) to David Ludder, Complainant, Acceptance of Administrative Complaint (June 27, 2013).

> the Arrowhead Landfill permit renewal will adversely and disparately impact the African-American residents in the nearby community; and
>
> Whether ADEM violated Title VI and EPA's implementing regulations on February 3, 2012, by authorizing a permit modification to expand the disposal area of the Arrowhead municipal solid waste landfill in Perry County, Alabama, by 169.17 acres (66%), because the modification will have the effect of adversely and disparately impacting the African-American residents in the surrounding community.

ECRCO investigated the May 2013 issues and finds that the record evidence does not establish a prima facie case of discrimination based on disparate impact. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2011 permit reissuance and 2012 permit modification.

While not legally required, ECRCO believes that ADEM could increase its leadership role by bringing together the Arrowhead community, permittees, as well as other local government entities to share important information, ensure that its citizens and stakeholders understand roles, rights and responsibilities and address issues constructively. If ADEM voluntarily chooses to play a leadership role and identify stakeholders in the affected community, although these actions are not legally required, ECRCO recommends ADEM make a concerted effort to create and/or re-engage partnerships with private and public entities to share information on its website and through standard media outlets. Such information sharing would ideally include the relevant community in the geographic area near the Arrowhead Landfill and those individuals and groups that have previously expressed an interest in environmental decision-making activities; environment and environmental justice organizations; religious institutions and organizations; public administration, environmental, law and health departments at colleges and universities; tribal governments; and relevant community service organizations.

In 2016, ECRCO received an additional allegation and accepted for investigation, to be addressed within the existing complaint:

> Whether ADEM's actions or inactions, violated 40 C.F.R. § 7.100, which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

ECRCO investigated the retaliation issue and finds insufficient evidence of discrimination based on retaliation. However, as more fully discussed below, although these actions are not legally required, we recommend ADEM improve its nondiscrimination complaint processes for addressing and resolving retaliation complaints. In addition, we believe there are ways for ADEM to improve the underlying processes and environmental complaint determinations which form the basis for some of Complainant's claims of retaliation.

Background

In conducting this investigation, ECRCO reviewed available information, including the original complaint submitted to ECRCO, ADEM's responses to ECRCO's acceptance of the complaint and requests for information, and all other supplemental information submitted to ECRCO through telephone interviews and conversations, letters, and emails by the Complainant and Recipient pertaining to the Arrowhead Landfill. ECRCO reviewed studies, water sample reports, and air quality modeling and dust sample reports. In addition, ECRCO conducted a site visit to Uniontown in August 2014. During the site visit, ECRCO conducted 14 in-person interviews with the complainants as well as with 6 other witnesses. ECRCO also conducted several telephonic interviews from 2014 to present day.

The ECRCO investigation included a review of ADEM's regulations[3] and administrative codes,[4] permitting documents, and inspection reports. In particular, ECRCO reviewed permit applications and correspondences; facility engineering designs and modification as completed by the facility's primary engineering consulting firms Jordan Jones & Goulding, Inc.; and, Hodges, Harbin, Newberry & Tribble, Inc. (HHNT); monitoring data and inspection reports, air permit applications, wetlands applications and certifications, waste acceptance certifications, operating permits, and public hearing transcripts. ADEM additionally submitted a copy of a legislated solid waste study completed by Auburn University.[5]

During the course of this investigation, ECRCO reviewed the Arrowhead Landfill's original engineering designs, including site suitability study, site layout, original surface and groundwater sampling reports, financial assurances, and host agreements/contracts. According to ECRCO's review, the Arrowhead Landfill is designed to meet the minimum design and operating standards for municipal solid waste (MSW) landfills.[6] For its part, ADEM has conducted regulated inspections of the Arrowhead Landfill and documented compliance and noncompliance issues and reviewed the Arrowhead's Landfill's waste certifications. ADEM has reviewed and approved permitting and operational variances for the Arrowhead Landfill, including operator requirements, alternative daily cover, and leachate recirculation, and has approved alternative daily covers for the Arrowhead Landfill.[7]

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[3] ADEM Admin. Code r. 335-3-19, and 335-13.

[4] The Code of Alabama 1975, Title 22, Chapter 27.

[5] Auburn University, *Administrative & Technical Support in Evaluating Public Input on Potential Enhancements to the State Solid Waste Program, Phase II. Framework for Changing Alabama's Approach to Solid Waste Management* (Final Report), November 3, 2013.

[6] 40 C.F.R. Part 258 and ADEM Admin. Code r. 335-13-4

[7] At the time of ECRCO's review, ECRCO found no Notices of Violations (NOVs) or Administrative Orders (AO) included in the available information reviewed. The reviews of the regulatory website did not show any non-compliance issues related to the state issued permits. Arrowhead Landfill, at the time of ECRCO's review, had permits for solid waste disposal, surface water discharges, wetlands, and air quality. Although no new permits were issued, Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) evaluations have been completed.

I. The May 2013 Issues

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.[8] EPA's regulation at 40 C.F.R. §7.35(b) states, in relevant 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."

With respect to the May 2013 issues ECRCO analyzed whether ADEM's methods of administering its permitting program had an adverse and disparate impact on the African-American residents in the surrounding community, in violation of Title VI, 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
(4) establish causation.[12]

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[8] Case Resolution Manual (Jan. 2017), at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

[9] *See, e.g. Guardians Ass'n. v. Civil Serv. Comm'n,* 463 U.S. 582, 593 (1983) (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination). Many subsequent cases have also recognized the validity of Title VI disparate impact claims. *See, e.g. Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996) (*citing Guardians)*; *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988) (internal citations omitted); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982, fn.10 (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). U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 4 (January 18, 2007). https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

[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. U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 4

[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) (internal citations omitted).

[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").

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.[18]

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?[19] 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.[20]

Analysis

If EPA does not have sufficient evidence to establish a prima facie case of adverse disparate impact, as explained above, it cannot determine that the recipient has engaged in discrimination. To determine whether an adverse disparate impact occurred as a result of ADEM's reissuance

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

[14] U.S. EPA's External Civil Rights Compliance Office Toolkit, January 18, 2017. p. 9.

[15] *See, e.g., Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079-81 (D. Ariz. 2012) (finding that plaintiffs stated a claim of disparate impact violation based on national origin 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. *See also, Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (noting the framework for proof developed in civil rights cases), *citing, Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

[17] *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659-660 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (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] *See*, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, https://www.justice.gov/crt/fcs/T6Manual7#U.

[19] *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 9.

[20] U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 9.

and subsequent modification of the permit, ECRCO examined whether the alleged harms were indeed adverse harms and whether there was a causal connection between the specific permitting actions related to the Arrowhead Landfill and the alleged adverse harms. As discussed more specifically below, as to each of the alleged harms relating to the 2011 and 2012, permit reissuance and permit modification, respectively and current Landfill operations, ECRCO finds insufficient evidence to establish a prima facie case of adverse disparate impact discrimination.

Alleged ADEM Discriminatory Policy or Practice

September 2011 (Permit #53-03)

On September 27, 2011, ADEM made a determination to renew Permit #53-03, which is a Solid Waste Disposal Facility Permit for the Arrowhead Landfill. The permitted facility boundaries consist of approximately 976.97 acres with ~256.151 acres permitted for disposal operations.[21]

February 2012 (Permit #53-03)

On February 3, 2012, ADEM approved the modification that increased the disposal acreage from ~256.151 acres to ~425.33 acres. The modification would result in an increase of 169.179 acres permitted for disposal operations. The permitted facility boundaries remained ~976.97 acres.[22]

The types of waste accepted, service area, and daily accepted waste volumes and the Landfill boundaries that were permitted, remained unchanged during this modification.

The Alleged Harms

The alleged harms that relate to the 2013 accepted issues were identified in two general categories – health-related and non-health related.[23] The health-related impacts included alleged harms stemming from the Landfill's effects on air quality and water quality. During the investigation, complainants also raised concerns about coal ash and its impact on their health and well-being. The non-health related impacts included degradation of the cemetery, increased roaming wild-life and dogs entering and exiting the Landfill property from lack of a fence, and diminution of property values. For purposes of analyzing whether there is a prima facie case of discrimination based on disparate impacts, ECRCO has grouped the alleged harms into health-related and non-health related subject headings to describe its review of evidence gathered to review potential disparate impact.

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[21]Municipal Solid Waste Landfill Permit Renewal 53-03 issued September 27, 2011; ADEM File No. 17668_53-03_105_20110927_PERM_Permit.pdf.

[22]Municipal Solid Waste Permit Modification 53-03 modification date November 4, 2011 and February 3, 2012; ADEM's Enforcement and Compliance Information eFile File Name 17668_53-03_105_20120203_PERM_Permit.pdf.

[23] Title VI Civil Rights Complaint and Petition for Relief or Sanction- Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4) from David A. Ludder, to Vicki Simons, Director, Office of Civil Rights (May 30, 2013).

Health-Related Impacts

- Air Related

Complainants raised concerns during the course of the investigation about the Landfill and its effect on air quality and their health. Some of the described health impacts included aggravation of asthma, wheezing, shortness of breath, sinus problems, persistent coughing, sore throats, runny eyes, respiratory issues, nosebleeds, headaches, and additional health impacts.[24] Complainants also raised concerns regarding acrid smell; increased dust in the air and negative impacts on vegetation. In regards to odor, Complainants have submitted a number of declarations which describe the smell as "heavy, stinky, horrible, powerful, foul, like ammonia, acrid, stench of rotten eggs, etc."[25] The Complainants have also described the effects of the odor, and stated that it has caused nausea and hindered outside activity.[26]

As part of ECRCO's prima facie analysis of "adverse harm," it reviewed an environmental report submitted by Complainants – the Stone Lions Environmental Corporation Report ("Stone Lions Report")[27] which included an air dispersion modeling study of the atmospheric emissions of total suspended solids, hydrogen sulfide, and non-methane organic compounds from the Arrowhead Landfill and the analysis of dust wipe and water samples submitted by the Complainant.[28] In addition, the Stone Lions Report attempted to correlate its study data to alleged health impacts and other harms in the community. For example, the Stone Lions Report states that hydrogen sulfide (H_2S) and total suspended particulates (TSP) air emissions at the Arrowhead Landfill resulted in a significant negative impact on the neighborhoods near the Landfill boundaries.[29]

In order to review the scientific methodology used for this study and the conclusions reached with respect to environmental and health impacts, ECRCO consulted environmental technical experts across EPA, including the Office of Air and Radiation, Office of Research and Development, Office of Land and Emergency Management, both in EPA headquarters and Region 4.[30] The EPA experts assisted with the assessment of available records and reports;

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[24] *Id.* Information also gathered through telephonic and in-person interviews conducted by ECRCO between 2014 through 2017 with Complainants.

[25] Letter from Marianne Engelman Lado, Senior Staff Attorney to Velveta Golightly-Howell, Director and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, USEPA. (March 8, 2016).

[26] ECRCO did not review Complainants' medical records to confirm the reports of health impacts nor did ECRCO conduct a health survey of the Landfill's adjacent residents as part of this investigation.

[27] Letter from David A. Ludder, Attorney for Complainants to Ms. Vicki Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency. (May 30, 2013). See (Exhibit T3) Stone Lion's Environmental Corporation Report: An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill. (August 13, 2012).

[28] Adam Johnston, Creek Keepers' Wipe and Water Sample Results February 24, 2011.

[29] Stone Lions Report, at p.6.

[30] See ECRCO Case Resolution Manual, at Chapter 1 – Deputy Civil Rights Officials and Title VI Case Management Protocol Orders (January 2017), at https://19january2017snapshot.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf. EPA Orders 47003 and 47014 establish a protocol for processing complaints of discrimination that brings program and regional offices throughout the agency into a collaborative process for coordinating and committing the analytical resources, expertise, and technical support

evaluated the Arrowhead Landfill's regulatory compliance; and reviewed the methodology and analysis utilized in the Stone Lions Report.

Specifically, the EPA experts conducted a review of the air dispersion model and calculations contained in the Stone Lions Report, and the dust wipe and water samples analyses submitted as part of the administrative complaint. Based on the review of this information, the EPA experts identified a number of deficiencies in how the modeling was conducted, including uncontrolled sample collection techniques, improper collection protocols, and inadequate quality control regarding documentation of sample locations and collection and handling methods.[31] Based on the deficiencies identified by the EPA experts, ECRCO determined that it could not rely on the Stone Lions Report modeling data and the Report's attempt to correlate its study data to alleged health impacts and other harms in the community.

To determine the air quality compliance status of the Arrowhead Landfill, the EPA experts assessed the permitting obligations for the Arrowhead Landfill. The Arrowhead Landfill is subject to the New Source Performance Standard (NSPS) Subpart WWW which addresses Standards of Performance for Municipal Solid Waste Landfills that commenced construction, reconstruction or modification on or after May 30, 1991.[32] This rule requires the owner/operator of a MSW landfill having a design capacity equal to or greater than 2.5 million megagrams and 2.5 million cubic meters to calculate the emission rate of non-methane organic compounds (NMOCs) and provide an annual report to the delegated authority.[33] At time of ECRCO's review and based upon the volume of in-place waste in 2014[34] and the review of available documents, the Arrowhead Landfill had never reported an NMOC emission rate equal to or greater than 50 megagrams per year (Mg/yr.) and therefore has no regulatory requirement for the installation of an active air pollution control device in order to maintain compliance with NSPS Subpart WWW. There were no additional air quality permit requirements at that time.

The EPA experts reviewed the air quality regulatory standards or requirements. Based on this review, there is a daily PM_{10} National Ambient Air Quality Standard (NAAQS) of 150

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needed to address civil rights compliance. Although ECRCO retains the primary authority and responsibility for carrying out the civil rights program, the orders clearly emphasize a "One-EPA" commitment with the support of a network of Deputy Civil Rights Officials (DCROs) established under Order 4700, to support the civil rights mission and ensure its success throughout EPA. The 2013 protocol (Order 4701) anticipated that ECRCO would develop specific procedures to improve implementation of the protocol and ensure the prompt, effective, and efficient resolution of civil rights cases. *Id.* at p.ii.

[31] *See* Stone Lions Report, at pp.2-6 (e.g., incorrectly equating total suspended particulates to PM10 throughout the report, calculations and map; analysis assumptions incorrect and/or improperly assumed; assumption of NMOC generation from coal ash is incorrect and the calculations are based on the coal ash emissions being similarly equal to emissions from MSW landfills).

[32] Code of Federal Register Title 40, Chapter I, Subchapter C, Part 60, Subpart WWW (40 C.F.R. 60 Subpart WWW).

[33] Per 40 C.F.R. §60.751 Design capacity means the maximum amount of solid waste a landfill can accept, as indicated in terms of volume or mass in the most recent permit issued by the State, local, or Tribal agency responsible for regulating the landfill, plus any in-place waste not accounted for in the most recent permit.

[34] The in-place waste volume is the maximum composition of volume deposited within the disposal unit. At the time of the ECRCO investigation, the maximum volume of in-place waste occurred in 2014. The in-place waste volume is the determinate to calculate the emission rate of NMOC and to assess the point of compliance for the MSW landfill subject to 40 C.F.R. 60 Subpart WWW.

micrograms per cubic meter ($\mu g/m^3$). In addition to the PM_{10} NAAQS, there is a PM_{10} Prevention of Significant Deterioration (PSD) Class II increment of 30 μg/m3 for 24-hour and 17 μg/m3 for an annual period. The more recent NAAQS standard is $PM_{2.5}$. The NAAQS for $PM_{2.5}$ includes annual (12 $\mu g/m^3$) and 24-hour (35 $\mu g/m^3$) values; and Class II PSD increment includes annual (4 $\mu g/m^3$) and 24-hour (9 $\mu g/m^3$) increments. The Arrowhead MSWLF is located in Perry County, Alabama, which is designated as attainment or unclassifiable/attainment for the PM_{10} and $PM_{2.5}$ NAAQS. [35]

The EPA has monitoring regulations which prescribe the number of required air monitors for individual pollutants as a function of population and ambient concentration levels (i.e., proximity to the NAAQS) – see 40 CFR Part 58, Appendix D. For $PM_{2.5}$ and PM_{10}, there is no requirement that the State of Alabama operate air monitors in Perry County. The PM_{10} measurements taken at the Arrowhead MSWLF during the period when coal ash was being disposed were done voluntarily by the Landfill's contractor.

The Arrowhead Landfill utilizes a SidePak™ Personal Aerosol Monitor to measure particulate matter (PM_{10}).[36] This aerosol monitoring equipment is not a federal reference or equivalent method (FRM/FEM) PM_{10} sampler. Nevertheless, the 2010 PM_{10} data found in the ADEM documents do not appear to have exceeded the daily PM_{10} NAAQS of 150 μg/m3. As noted previously, however, the data were not collected using FRM/FEM samplers and EPA experts would not necessarily consider the data comparable to the daily PM_{10} NAAQS. No monitoring data for $PM_{2.5}$ were provided.

In regards to odor, the Arrowhead Landfill operates 25 solar powered gas vent flares for the Landfill leachate collection system cleanout vents to mitigate odors.[37] The gas vent flares are not required by federal or state regulations, but are recognized mitigation techniques[38] to eliminate the potential release of odors. During past inspections, ADEM inspectors have not noted any problems with these flares during annual compliance evaluations.[39]

Based on the foregoing evidence, ECRCO was not able to establish a causal connection between the adverse harms alleged and the permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct

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[35] An "attainment" designation means the area is meeting the standard and not contributing to a nearby violation. As required by the Clean Air Act, states and tribes submit recommendations to the EPA as to whether or not an area is attaining the national ambient air quality standards (NAAQS) for criteria pollutants. The states and tribes base these recommendations on air quality data collected from monitors at locations in urban and rural settings as well as other information characterizing air quality such as modeling. After working with the states and tribes and considering the information from air quality monitors, and/or models, EPA will "designate" an area as attainment or nonattainment for the standard.

[36] http://www.tsi.com/sidepak-personal-aerosol-monitor-am510/

[37] ADEM's Enforcement and Compliance Information eFile File Name: 17668_53-03_105_20100211_PERM_Gas_Vent_Flares.pdf

[38] EPA/452/B-02-001, VOC Controls (OAQPS Sept. 2000)

[39] ADEM's Enforcement and Compliance Information eFile File Name: 17668_53-03_105_20100211_PERM_Gas_Vent_Flares.pdf

link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.[40] In this case, ECRCO also considered the complaint, supplemental information, information from a site visit, interviews, a review of ADEM's regulations and administrative codes, permitting documents, inspection reports, studies, and air quality modeling and dust sample reports. Here, the site-specific information did not establish that any alleged harms were caused by the permitting actions. Because causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity and adversity.

- Water Related

Complainants raised concerns about the quality of drinking water from both public drinking water systems and of their personal wells.[41] Specifically, Complainants state that the well water near the Landfill does not smell clean and that city drinking water comes out brown and dirty looking.[42] Complainants state that the uncertainty has led them to drinking bottled water because of their concerns about their water quality since the Landfill arrived.[43] In addition, Complainants state that bathing with city water causes itchiness.[44] Lastly, the alleged adverse impacts include risks of injury to health, the cost of bottled water, and anxiety related to the quality of water. Complainants also stated that "other visitors to the Landfill have noticed water draining from the Landfill in proximity to the mountain of coal ash on the site that appear to be unpermitted."[45]

With regard to water quality, ECRCO found that Arrowhead Landfill conducts detection monitoring of the groundwater, as regulated, on a semi-annual basis.[46] The groundwater analysis is conducted by a third-party, certified laboratory and submitted to ADEM. The detection monitoring system consists of a system of groundwater monitoring wells installed at appropriate locations and depths to yield groundwater samples from the uppermost aquifer in a manner that meets the requisite regulatory criteria for groundwater detection monitoring systems.[47] As a permit condition, the Landfill also conducts regular surface water monitoring.[48]

In addition to monitoring, the Landfill, as required by RCRA Subtitle D, utilizes a composite liner, consisting of two components: a flexible membrane liner (FML) made of 60-mil thick high density polyethylene (HDPE), installed in direct and uniform contact with an underlying two-

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[40] U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at https://www.justice.gov/crt/fcs/T6Manual7.

[41] Letter from Marianne Engelman Lado, Senior Staff Attorney to Velveta Golightly-Howell, Director and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, USEPA. (March 8, 2016). Information also gathered through telephonic and in-person interviews conducted by ECRCO between 2014 through 2017 with Complainants.

[42] *Id.* at page 8.

[43] *Id.*

[44] *Id.*

[45] *Id.* at page 10.

[46] Detection monitoring for appendix I constituents is required at MSWLF units. The monitoring frequency for all constituents listed in appendix I shall be at least semiannual during the active life of the facility (including closure) and the post-closure period. 40 C.F.R. §258.54 and ADEM Admin. Code r. 335-13-4-.27(3)(b)1.

[47] 40 C.F.R. 258 Subpart E and ADEM Admin. Code r. 335-13-4-.27.

[48] Water Division of ADEM has issued two (2) General National Pollutant Discharge Elimination System (NPDES) storm water permits (ALG160167 and ALG140902).

foot layer of compacted soil with a hydraulic conductivity of not more than 1 x 10^{-7} cm/sec.[49] Constructed on top of the composite liner is a leachate collection system that allows for the removal of leachate from the Landfill for proper treatment and/or disposal.[50]

The EPA experts and ECRCO reviewed information from the U.S. Geological Survey to identify the regional geology and the potential subsurface areas of concerns. This review showed that the Landfill location has natural features which provide protection for area groundwater. Specifically, the Arrowhead Landfill is underlain by Late Cretaceous-age Coastal Plain sediments comprised of the Selma Group (primarily chalk formations) overlying the Eutaw Formation (sand). Locally, the Selma Group consists of approximately 440 to 563 feet of lower permeability (1x10-6 to 1x10-8 cm/sec), gray clay and chalk. The upper 10-20 feet near the ground surface at the Landfill site consists of brown clay, which represents the weathered portion of the upper formation. The thick chalk formations of the Selma Group serve as a confining layer for the underlying Eutaw sands. The Eutaw Formation consists of gray, glauconitic, fine to medium grained sand and represents the regional water supply aquifer. Thus, in addition to the Landfill's engineered subsurface liner, each of these naturally-occurring underlying geologic layers have a low permeability which reduces the opportunity for releases impacting the groundwater.[51]

During the course of this investigation, the EPA experts and ECRCO reviewed permitting and site suitability documents related to the Arrowhead Landfill. The site suitability documents show a 2001 investigation[52] to identify water supply wells located within one mile of the then-proposed Landfill site boundaries.[53] The investigation included a reconnaissance by a consultant geologist to identify wells; a review of Geological Society of America (GSA) publications; and interviews with a Perry County Commissioner, City of Uniontown officials, ADEM personnel, and local residents or neighbors. The 2001 investigation reviewed a document entitled, "*Uniontown Utilities Local Wellhead Protection Plan.*" a second reconnaissance of water wells was performed by a consultant geologist in May 2005. The results of the investigation produced the following:

- Fourteen wells were identified within one mile of the Landfill site, and nineteen were identified in the township (*i.e.*, Uniontown).
- Eight of fourteen wells located within a mile of the site were reportedly either not in use or supplied water for agricultural purposes.
- A municipal drinking water system is supplied by three wells (as of 2001-2002) located in and east of Uniontown. The municipal system wells are located between two to three miles northwest of the existing disposal cells of the Landfill, and are hydraulically upgradient and/or hydraulically cross-gradient from the Landfill site. These wells

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[49] 40 C.F.R. Part 258.40 and ADEM Admin. Code r. 335-13-1-.03 and 335-13-4-.18

[50] *Id.*

[51] Jordan, Jones & Goulding, Inc., Solid Waste Permit Application Volume 1/2 Site Analysis Perry County Associates Landfill Perry County, Alabama, March 2002, ADEM's Enforcement and Compliance Information eFile File Name 17668_53_03_105_20020319_PERM_SW_Permit_App_Vol_1.pdf.

[52] *Id.*

[53] Jordan, Jones &Goulding, Inc., *Solid Waste Permit Application Volume 1/2 Landfill Design & Operations Plan For Perry County Associates Landfill*, September 2005, ADEM's Enforcement and Compliance Information eFile File Name XXX_53-03_105_20050928_PERM_Permit _Application.pdf

produce groundwater from the Eutaw Formation aquifer and reportedly range in depth from 915 to 1,300 feet.

- Water from the municipal system is used by the Uniontown Utilities District, which supplies water to southern Perry County. The supply system serves the residents and businesses in Uniontown, plus rural residents within about five miles of town.
- Of the fourteen wells identified within one mile of the Landfill site, local residents or neighbors verified that at least four (4) wells located south and southeast of the then-proposed Landfill site (*i.e.*, along CR-1–Cahaba Road and CR-21) were in use (in 2001-2002). The type(s) of usage of the groundwater from these wells (e.g., agriculture, potable, other) was not identified. The status of two (2) other wells in that specific vicinity was unknown. The investigation confirmed that three (3) other wells in that specific vicinity were no longer in use. Water wells in that specific vicinity (i.e., along CR-1–Cahaba Road and CR-21) for which well information was available were confirmed to be deep wells drilled into the Eutaw Formation regional aquifer.
- According to the Perry County Commissioners Office (in 2001-2002), all of the residents along CR-1 where these wells have been identified received drinking water from the Uniontown Utilities system.
- According to Uniontown officials (in 2001-2002), drinking water was being supplied to all residents near the then-proposed Landfill site from the three wells in town (*i.e.*, via Uniontown Utilities).

Based on their review, the EPA experts concluded that there were no significant potential threat(s) to groundwater resources from the then-proposed landfill project. Furthermore, the Landfill site is situated on a thick, dry, relatively impermeable confining layer (Selma Group chalks) that serves as a substantial natural barrier between the landfill's waste units and the underlying regional Eutaw Formation sand aquifer, and no surficial aquifer or saturated zones were identified that could be affected by the landfill project, or which were interconnected to the uppermost aquifer.

In addition, the EPA experts reviewed EPA's GeoPlatform resource which is used for mapping, analysis, and collaboration of various sources of data. That review revealed no public utility drinking water intakes from surface water for at least 50 miles from the Landfill.

The EPA experts reviewed reports generated by Arrowhead Landfill's consultants and submitted to ADEM. Those reports showed occurrences of barium, acetone, and 2-hexanonne. In multiple semi-annual detection monitoring events, groundwater analysis from the Landfill detected occurrences of barium, acetone, and 2-hexanonne. Similarly, each of these constituents have been detected in the background groundwater monitoring wells with barium being detected in the groundwater prior to waste placement in the disposal unit. However, the Landfill's consultants, HHNT and Bunnell-Lammons Engineering, Inc., and ADEM have concluded that barium is naturally occurring in the soil and groundwater throughout Alabama.[54] Furthermore, the consultants have determined that the source of the volatile organic compounds (VOCs) (e.g.,

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[54] Memorandum from Wesley S. Edwards, ADEM Groundwater Branch to Phillip D. Davis, ADEM Solid Waste Branch, February 21, 2012, ADEM's Enforcement and Compliance Information eFile File Name 17668_53-03_105_20120221_SWMR_GW_Review.pdf and ADEM's Enforcement and Compliance Information eFile File Name 17668_53-03_105_20121002_MONI_GW_Alternative_Source_Determination.pdf.

acetone, and 2-hexanonne) is attributed to the well construction materials (e.g., black paint of the steel risers). Ultimately, none of the detections exceeded maximum concentration levels (MCL).[55]

ECRCO notes that, in accordance with the prescribed regulations, Arrowhead Landfill performed annual statistical analyses of the groundwater to determine whether a release of leachate had occurred.[56] The statistical analyses do not show evidence of a statistically significant increase over background groundwater quality or a release of leachate from the Arrowhead Landfill, and accordingly no impact to groundwater. Furthermore, ECRCO reviewed materials showing that no National Pollutant Discharge Elimination System (NPDES) permitted discharges from the Landfill were above the MCL.

Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.[57] In this case, ECRCO also considered the complaint, supplemental information, information from a site visit, interviews, a review of ADEM's regulations and administrative codes, permitting documents, inspection reports, studies, and water sample reports. Here, the site-specific information did not establish that any of the alleged harms were caused by the permitting actions. Because causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adversity.

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[55] ADEM's Enforcement and Compliance Information efile File Names 17668_53-03_105_20110413_MONI_GW_rpt.pdf, 17668_53-03_105_20110414_MONI_GW_Rpt.pdf, 17668_53-03_105_20110815_SWMR_GW_Review.pdf, 17668_53-03_105_20111024_MONI_GW_Rpt.pdf, 17668_53-03_105_20120427_MONI_GW_Rpt.pdf (only barium detected), 17668_53-03_105_20121031_MONI_GW_Rpt.pdf, and 17668_53-03_105_20130110_MONI_GW_Revised_Rpt-Fall_2012.pdf.

[56] Each of the analyses were completed in accordance with EPA's Statistical Analysis of Groundwater Monitoring Data as RCRA Facilities-Unified Guidance (March 2009) and ADEM's solid waste management rule 335-13-4.27(2)(m). If the owner or operator determines, pursuant to 40 C.F.R. §258.53(g) documents that there is a statistically significant increase (SSI) over background for one or more of the constituents listed in appendix I, the owner or operator: (1) Must, within 14 days of this finding, place a notice in the operating record indicating which constituents have shown statistically significant changes from background levels, and notify the State director that this notice was placed in the operating record; and (2) Must establish an assessment monitoring program meeting the requirements of 40 C.F.R.258.55 within 90 days except as provided for in paragraph (c)(3) of this section, and (3) The owner/operator may demonstrate that a source other than a MSWLF unit caused the contamination or that the SSI resulted from error in sampling, analysis, statistical evaluation, or natural variation in ground-water quality. If a successful demonstration is made and documented, the owner or operator may continue detection monitoring as specified in this section. If, after 90 days, a successful demonstration is not made, the owner or operator must initiate an assessment monitoring program as required in 40 C.F.R. 258.55.

[57] U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at https://www.justice.gov/crt/fcs/T6Manual7.

- Coal Ash

ECRCO did not accept for investigation, as part of the May 2013 issues, an issue regarding coal ash. However, during subsequent conversations with Complainants, Complainants provided more details about current coal ash concerns and its possible adverse health impacts on the community given that Arrowhead Landfill is permitted to accept and maintain coal ash. Some of the described health impacts include respiratory problems, including coughing, severe stomach problems, and concerns regarding water quality in the area surrounding the Arrowhead Landfill.[58] These concerns related to both air and water.

Regarding these concerns, ECRCO found that on July 27, 2011, the ash disposal area of the Arrowhead Landfill was closed utilizing a Resource Conservation and Recovery Act (RCRA) Subtitle D final closure system to encapsulate the waste.[59] The final closure system consisted of a synthetic liner and a layer of soil capable of sustaining a vegetative cover to control erosion. ADEM certified the partial closure of the ash disposal area on October 11, 2011. The final closure system is designed to minimize the infiltration of surface water from entering the disposal cell and minimize erosion. For example, to date the groundwater monitoring system has not detected a release from this disposal unit, the final closure system is stabilized, and there is no evidence of liner failure.

There is insufficient evidence that in its encapsulated state the coal ash is causing any alleged environmental and health effects. Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. Because there is no causal connection, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adverse harm.

- Vectors

The Complainants alleged quality of life impacts due to the increased populations of flies and birds associated with the Arrowhead Landfill operations. ECRCO did not complete an on-site evaluation of the Arrowhead Landfill's operations or conduct interviews of the Landfill manager or certified operators as part of this complaint investigation. However, ECRCO reviewed available records, including the Landfill's operating plans,[60] permit requirements, such as cover requirements and special waste approvals, ADEM inspection records, and the Landfill's leachate

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[58] Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice and Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office to Velveta Golightly-Howell, Director, Office of Civil Rights and Jeryl Covington, Acting Assistant Director, Office of Civil Rights, U.S. Environmental Protection Agency, page 13. (March 8, 2016). Complainants also discussed this issue during telephone interview conducted in 2016 and 2017.
[59] 40 C.F.R. 258 Subpart F and ADEM Admin. Code r. 335-13-4-.20(2)(b).
[60] Permit Renewal Application for Arrowhead Landfill Permit #53-03 for Perry County Associates, LLC Perry County, Alabama Revised April 2011, Volume 1 of 2, ADEM File Name: 17668_53-03_105_20101229_PERM_Permit_Renewal_Vol_10f2.pdf; and, Permit Renewal Application for Arrowhead Landfill Permit #53-03 for Perry County Associates, LLC Perry County, Alabama December 2010, Volume 2 of 2, ADEM File Name: 17668_53-03_105_20101229_PERM_Permit_Application_for_Permit_Renewal_Vol_20f2.pdf.

management procedures[61] in an attempt to identify possible operational irregularities or violations that may result in the alleged quality of life harms.

At the time of ECRCO's review, the permitting documents did not show any occurrences of active leachate breakouts which could generate or attract an increase in the vector population; nor did the permitting documents produce evidence of distressed vegetation being identified along the sideslopes of the Landfill during routine inspections. The records did show that the Landfill's former leachate generation rate was 50,000 to 100,000 gallons per day, which also included management of an influx of storm water into the collection system.[62] The Landfill employed techniques to reduce the leachate generation rate by 35,000 gallons per day through operational changes that included segregating storm water via the utilization of rain covers, by continuing solidification, and recirculating leachate by direct discharge into the working face or through injection wells within the cells.[63] Reports showed that the remaining generated leachate was transported by tanker truck to publicly-owned treatment works for treatment and disposal.[64] Furthermore, and as previously stated above, the Arrowhead Landfill operates 25 solar powered gas vent flares for the landfill leachate collection system cleanout vents to mitigate odors that could attract vectors. ECRCO was unable to identify any functions related to leachate management that could result in the reported increased populations of flies and birds.

The Arrowhead Landfill's waste acceptance provisions include nonhazardous solid wastes, noninfectious putrescible and nonputrescible waste, and special waste including asbestos, foundry sand, petroleum contaminated waste, and municipal solid waste ash.[65] As an operational requirement, the Landfill confines and compacts the waste within the smallest working face of the disposal unit having a vertical thickness of less than eight (8) feet.[66] During periods of transition between former and newly constructed cells and for the management of construction and demolition materials, the Landfill received permitting variances from ADEM for the operation of two (2) working faces. ECRCO was unable to identify any functions related to the waste acceptance provisions or the waste placement requirements that could result in the alleged increased populations of flies and birds.

At the conclusion of each day's operations, the Arrowhead Landfill is required to cover the daily operating area with a minimum of six (6) inches of compacted earth or other alternative daily cover (ADC) materials.[67] ADEM has approved the following alternative daily covers for the Arrowhead Landfill: synthetic tarps, coal combustion by-products from electrical generators, petroleum contaminated soils, automotive shredder residue, and Posi-Shell®. As permitted, some

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[61] Hodges, Harbin, Newberry & Tribble, Inc. February 15, 2010 correspondence to ADEM, Perry County Associates Landfill, Leachate Handling Procedures, HHNT Project No. 6004-010-10, ADEM File Number 17688_53-03_105_20100217_CORR_Leachate_Hand_Proc.pdf.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Arrowhead Permit Modification ADEM's Enforcement and Compliance Information eFile File Name 17688_53-03_105_20121023_PERM_Permit.pdf (October 23, 2012); Arrowhead Landfill Permit Variance ADEM's Enforcement and Compliance Information eFile File Name: 17668_53-03_105_20130617_PERM_Permit.pdf (June 17, 2013)

[66] *Id.*

[67] ADEM Admin. Code r. 335-13-4-.22(1)(a)1.

of the ADCs have storage and placement limitations to prevent contact storm water runoff from leaving the limits of the lined cell area. ECRCO was unable to identify any functions related to the daily cover requirements or the utilization of ADCs that could result in the alleged increased populations of flies and birds.

Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and permitting actions underlying the May 2013 issues and the operations of the Arrowhead Landfill. While compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws, EPA recognizes a number of forms and types of evidence that could establish causation, including scientific proof of a direct link, prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities or other sources, and other complex methodologies.[68] In this case, ECRCO also considered the complaint, supplemental information, Landfill's operating plans, permit requirements, such as cover requirements and special waste approvals, ADEM inspection records, and the Landfill's leachate management procedures. Here, the site-specific information did not establish that any of the alleged harms were caused by the permitting actions. Because causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adversity.

Non-Health Related Impacts

- Degradation of Cemetery

During the course of the investigation, Complainants raised concerns regarding how ADEM's decision to permit Arrowhead Landfill has adversely affected the ability of the members of the Uniontown community to visit New Hope Church Cemetery. Specifically, Complainants stated that the proximity of the Landfill interferes with community members visiting the Cemetery due to acrid odor from the Landfill, the installation of water monitors on Cemetery grounds, failure to maintain access to the Cemetery premises and disturbing the Cemetery grounds with the use of heavy equipment. In addition, Complainants state that ADEM's permitting actions failed to ensure that the Cemetery was protected from the aforementioned instances of interference. ECRCO investigated this issue by visiting the Cemetery in August 2014 and by reviewing information submitted by Complainants, including pictures, documents submitted by ADEM and Green Groups Holdings, LLC.

ECRCO's review found that the owners of the Arrowhead Landfill owned the Cemetery property at the time Complainant's filed their Complaint and for some period prior. The Cemetery property, however, was never part of the ADEM-permitted Arrowhead Landfill and the Landfill maintained a minimum 100-foot buffer between the waste disposal unit and its property boundaries. In January 2016, the Arrowhead Landfill conducted an initial reconnaissance level site visit in which it was determined that clearing was needed of unwanted growth to accurately define the cemetery boundaries. During this visit funerary objects and historic, ornamental, or traditional landscape features and planting were identified as well as an older split cedar post and

[68] U.S. Department of Justice Title VI Legal Manual, Section VII (Proving Discrimination – Disparate Impact), at (C)(1)(d), at https://www.justice.gov/crt/fcs/T6Manual7.

a barbed wire fence. According to this report, all objects were marked and left in place where they were found. In February 2016, ADEM approved the Landfill's request to reduce its permitted Landfill property by ~3.12 acres that surrounded the Cemetery. The Landfill moved the 100-foot buffer boundary to maintain compliance with separation requirements and then deeded this ~3.12 acres parcel, along with the Cemetery property, to the New Hope Cemetery Foundation. Furthermore, this reduction in acreage required a minor permit modification to relocate required monitoring elements [e.g., four (4) methane monitoring points] located along the property boundary within the landfill's permitted footprint area, further away from the cemetery.

ECRCO was not able to establish a causal connection between the adverse harms alleged and ADEM's permitting actions underlying the May 2013 issues given that the Cemetery was never within the operational boundaries of the permitted Arrowhead Landfill property that ADEM permitted. Also, ADEM approved the Landfill's request to reduce the Landfill boundaries by ~3.12 acres surrounding the Cemetery. Thereafter, Arrowhead deeded this property and the Cemetery to the Cemetery Foundation. Because ECRCO is not able to establish a causal connection, ECRCO cannot determine a prima facie case of discrimination. ECRCO did not examine disparity or adverse harm.

Although not relevant to the Title VI analysis discussed above, ECRCO notes that information brought to our attention during this investigation suggests that there is conflicting information and apparent misunderstanding regarding the responsibility for upkeep and maintenance of the cemetery. Although these actions are not legally required, ECRCO believes that the Arrowhead community would benefit from ADEM's leadership in initiating conversation between ADEM, the Landfill, and members of the community to provide information and discuss the 2016 reduction of the permitted Landfill boundary and clarify the roles and responsibilities related to the overall management of the Cemetery and adjacent properties.

- Lack of Fence Around Landfill & Increased Roaming Wildlife

Complainants raised concerns that the Arrowhead Landfill does not have a physical fence that extends around the perimeter of the property, resulting in increased wildlife migration between the Landfill and the community. Complaints assert that a fence would reduce the number of animals entering and exiting the Landfill property. It is unclear what harm is actually being alleged as a result of the alleged "increased migration" between the landfill and the community. Based on the evidence presented, it is also unclear why Complainants believe this particular mitigation, a fence, would address the alleged migration of animals.

The Arrowhead Landfill encompasses approximately 980 acres and is permitted to utilize both a natural and an artificial (physical) barrier along its perimeter for the purpose of controlling public access and preventing unauthorized vehicular traffic and illegal dumping of wastes.[69] The

[69] ADEM Admin. Code r.335-13-4-.19 Access. The owner or operator of the facility must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment.

Landfill maintains a minimum 100-foot buffer between the waste disposal unit and its property boundaries.[70]

ECRCO has determined that there is insufficient evidence in the record to establish adverse harm resulting either from the alleged movement of animals or the absence of a fence around the Arrowhead Landfill.

- Diminution in Home Values

Complainants raised concerns related to diminution of property values due to ADEM's permitting actions underling the May 2013 issues. 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.[71] ECRCO determined that it would not investigate substantively the alleged harm of diminution of property values, in this case. There is insufficient evidence in the record to suggest that ADEM's permitting actions themselves resulted in a sufficiently significant harm with regard to property values.

II. The 2016 Retaliation Issue

In 2016, ECRCO accepted the following additional issue for investigation:

> Whether ADEM's actions or inactions, violated 40 C.F.R. § 7.100, which prohibits intimidating, threatening, coercing, or engaging in other discriminatory conduct against any individual or group because of actions taken and/or participation in an action to secure rights protected by the non-discrimination statutes OCR enforces.

With respect to this issue, ECRCO finds insufficient evidence of discrimination based on retaliation. However, as explained below, ECRCO has concerns about the transparency of ADEM's process for addressing and resolving retaliation complaints, as well as the underlying processes and environmental complaint determinations which form the basis for some of Complainant's claims of retaliation. Our investigation revealed that ADEM's failure to provide explanation and clarifying information to Complainants to support its retaliation and environmental complaint determinations lends to an atmosphere where complainants feel that ADEM is inattentive to their concerns about the Arrowhead Landfill and whether their complaints are handled by ADEM in an impartial manner.

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[70] ADEM Admin. Code r.335-13-4-.12 (2)(f), ADEM's Enforcement and Compliance Information eFile File Names 17668_53-03_105_20110412_PERM_Modificatioin_Application-Horzontal_Expansion-Drawings.pdf, and 17668_53-03_105_20160330_PERM-Application_Drawings.pdf

[71] *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, 305-6 (2001) (Stevens, J., dissenting).

Background

On August 19, 2016, Complainants in EPA File No. 12R-13-R4 requested to supplement the existing complaint in that matter due to allegations that ADEM, directly and through the actions of Green Group Holdings, engaged in and failed to protect Complainants from a continuing practice[72] of retaliation and intimidation.[73] The Complainants provided additional clarifying information about alleged instances of retaliation in a follow up conference call on September 15, 2016. In addition, Complainants submitted information in letters dated December 14, 2016, and July 28, 2017, which included specific examples and claims of "a broader pattern of intimidation and irregularities in ADEM's complaint process."[74] ECRCO also conducted an interview with one of the Complainants on September 7, 2017.

Legal Standard

The Title VI implementing regulation at 40 C.F.R. § 7.100, provides that "[n]o applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either: (a) For the purpose of interfering with any right or privilege guaranteed by the Acts of this part, or (b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part or has opposed any practice made unlawful by this regulation."[75]

To establish that retaliation has occurred, ECRCO first must determine whether: (1) An individual engaged in protected activity of which the recipient was aware; (2) the recipient took a significantly adverse action against the individual; and (3) a causal connection exists between the individual's protected activity and the recipient's adverse action.[76] If all of these elements are present, a prima facie case of retaliation has been established and ECRCO then inquires whether

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[72] In evaluating the Complainant's allegations, ECRCO determined that some of the discrete alleged acts described by the complainant fell outside of the 180-day regulatory filing requirement. (40 C.F.R. § 7.120) ECRCO analyzed these as part of an alleged continuing discriminatory practice. *See* Case Resolution Manual (Jan. 2017), at https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf. "The complainant must allege facts that are sufficient to indicate either a series of related, discrete acts of which one occurred within the 180-day filing period or a systemic policy or practice that operated within the 180-day period."

[73] Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Interim Director, Office of Civil Rights, U.S. Environmental Protection Agency. (August 19, 2016).

[74] Letter from Marianne Engelman Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at p.7 (July 28, 2017). See also Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Acting Director, Office of Civil Rights, U.S. EPA. (December 14, 2016).

[75] 40 C.F.R. § 7.100. Title VI gives authority for this investigation. *See* Peters v. Jenney, 327 F.3d 307, 316-18 (4th Cir. 2003) (concluding that under the Supreme Court's decision in Sullivan v. Little Hunting Park, Inc.396 US 229 (1969) (a prohibition on discrimination should be judicially construed to include an implicit prohibition on retaliation against those who oppose the prohibited discrimination) (internal citations omitted).

[76] U.S. Dept. of Justice Title VI Legal Manual, Section VIII (Proving Discrimination – Retaliation) (B)(3), at https://www.justice.gov/crt/fcs/T6Manual8; *see also* Peters v. Jenney, 327 F.3d 307, 320 (4th Cir. 2003) (internal citation omitted); Emeldi v. Univ. of Oregon, 673 F.3d 1218, 1223 (9th Cir. 2012) (applying Title VII framework to establish a prima facie case of retaliation under Title IX); Palmer v. Penfield Cent. Sch. Dist., 918 F. Supp. 2d 192, 199 (W.D.N.Y. 2013); Kimmel v. Gallaudet Univ. 639 F. Supp. 2d 34, 43 (D.D.C. 2009); Hickey v. Myers, 852 F. Supp. 2d 257, 268 (N.D.N.Y. 2012); Chandamuri v. Georgetown Univ., 274 F. Supp. 2d 71, 84 (D.D.C. 2003).

the recipient had a legitimate, non-retaliatory reason for taking action that was adverse. ECRCO then analyzes the evidence to determine whether the offered reason is merely an excuse or pretext for retaliation.[77]

In addition, Title VI's prohibition on retaliation may extend to third parties,[78] which may include lower-level recipient employees, program beneficiaries or participants, organizations with a relationship to the recipient such as contractors, and others.[79] Recipients have two key obligations related to third party retaliation: first, to protect individuals from potential retaliation, recipients are obligated to keep the identity of Complainants confidential except to the extent necessary to carry out the purposes of the Title VI regulations, including conducting investigations, hearings, or judicial proceedings; and second, recipients must investigate and respond when a third party engages in retaliatory conduct that Title VI prohibits. [80] As with other types of third party conduct, such as harassment, the extent of the recipient's obligation is tied to the level of control it has over the bad actor and the environment in which the bad acts occurred.[81] EPA makes these determinations on a case-by-case basis in light of the facts and totality of circumstances in a particular case.

Allegation 1: ***ADEM's Response to Complainant's March 25, 2016 Letter***

Complainants alleged that ADEM failed to investigate allegations of intimidation and retaliation by ADEM's permittee, Green Group Holdings , which Complainants brought to ADEM's attention through correspondence dated March 25, 2016.[82] Specifically, Complainants asserted that Green Group Holdings threatened to take legal action against "community members' speaking out about the threats and injuries endured and perceived in the town,"[83] including statements about alleged desecration of New Hope Church Cemetery and alleged unpermitted discharge leaving Arrowhead Landfill.[84]

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[77] *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 186-86 (noting the framework for proof developed in civil rights cases), *citing, Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *see also*, Bowers v. Bd. of Regents of the Univ. Sys. of Ga., 509 Fed. Appx. 906, 912 (11th Cir. 2013)(finding that in a retaliation claim under Titles VI and IX, an adverse action is one that would dissuade a reasonable person from making or supporting a claim of discrimination)(citing, Burlington Northern & Santa Fe Ry. v. White, 126 S.Ct. 2405, 2415 (2006)).

[78] *See* 40 C.F.R. § 7.100 (stating that "[n]o applicant, recipient, **nor other person** shall intimidate, threaten, coerce, or discriminate against any individual or group. . ..)" (emphasis added). *See also*, 28 C.F.R. § 42.107(e) (Department of Justice regulations); 34 C.F.R. § 100.7(e) (Department of Education regulations); U.S. Dept. of Justice Title VI Legal Manual, Section VIII (Proving Discrimination – Retaliation) § (B)(3), at https://www.justice.gov/crt/fcs/T6Manual8

[79] U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(3), at https://www.justice.gov/crt/fcs/T6Manual8.

[80] *Id.*

[81] *Id., citing, Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 644 (1999).*

[82] Letter from Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office and Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lance LeFleur, Director, Alabama Department of Environmental Management. (March 25, 2016).

[83] *Id.*

[84] Letter from Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lilian Dorka, Interim Director, Office of Civil Rights, U.S. Environmental Protection Agency, at Exh. 6 (August 19, 2016).

In addition, Complainants alleged that Landfill staff followed and observed community members and scientists near the Landfill in a way that Complainants perceived as threatening.[85] Also, Complainants allege that the Landfill disrupted the grounds at the New Hope Church Cemetery "by using a bulldozer to uproot trees, push up mounds of dirt, and widen a one-lane path into a 30 to 40-foot roadway through the cemetery grounds, possibly covering up some of the graves in the process."[86]

ADEM responded to the March 26, 2016 complaint about alleged retaliatory conduct by its permittee, Green Group Holdings, in a letter to Earthjustice on April 8, 2016.[87] ADEM stated that it reviewed the information and determined not to become involved in the dispute between Complainants and Green Group Holdings. ADEM explained that its permittee remained in compliance with the conditions set forth in the permit and further stated that New Hope Church Cemetery property is outside the boundaries of the Landfill. Therefore, according to ADEM, any activities occurring at the Cemetery are outside the purview of the permit and further constitute a private dispute about libel and slander, which has nothing to do with Complainant's Title VI complaint. As a result, ADEM concluded that it would not get involved in the matters brought forth by the Complainants.

As to Allegation 1, ECRCO has determined that the Complainants engaged in a protected activity when they filed a Title VI administrative complaint with EPA alleging discrimination on the basis of race in a letter dated May 20, 2013.[88] These activities are rights and privileges guaranteed by Title VI and EPA's implementing regulation that are protected from retaliation.[89]

Although it appears that ADEM may not have handled the complaint through its nondiscrimination grievance procedures, ECRCO has found insufficient evidence to clearly establish a causal connection between the alleged adverse action (failure to investigate) and the protected activity of filing a Title VI complaint. In particular, there is no evidence that ADEM's apparent failure to address the Complainant's retaliation complaint through its nondiscrimination grievance procedures in March 2016 was motivated by Complainant's Title VI complaint filing in June 2013,[90] other than the assertion by the Complainants that it was so.[91] As a result, there is

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[85] Letter from Matthew R. Baca, Associate Attorney, Earthjustice Northwest Office and Marianne Engelman Lado, Senior Staff Attorney, Earthjustice to Lance LeFleur, Director, Alabama Department of Environmental Management. (March 25, 2016).

[86] *Id.*

[87] Letter from Lance R. LeFleur, Director, ADEM to Matthew R. Boca, Esq. and Marianne Engelman Lado, Esq., Earthjustice. (April 8, 2016).

[88] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

[89] *See, e.g., Peters v. Jenney*, 327 F.3d at 320-21 (applying the same meaning to "protected activity" in the Title VI context as in other civil rights cases, which is opposition to an unlawful practice that complainant has reason to believe has occurred), *citing, Bigge v. Albertson's, Inc.*,894 F.2d 1497, 1503 (11th Cir. 1990).

[90] *See, e.g.,* Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1271 (11th Cir. 2017) (noting that temporal proximity between a protected activity and an adverse action may be sufficient to establish a claim of retaliation, but if temporal proximity alone is relied on, it must be "very close" to establish causation)(internal citations omitted)

[91] *See* U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(2),

no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

Notwithstanding ECRCO's conclusion of insufficient evidence of a violation, ECRCO has concerns about ADEM's lack of transparency regarding the process it utilized to address this retaliation complaint. In analyzing this issue, ECRCO specifically asked ADEM whether it has a process/procedures for addressing and responding to claims of retaliation, intimidation, harassment or other misconduct by permitted facilities against community members. ADEM responded by referring generally to its Nondiscrimination Statement and provided a copy of its Environmental Complaint Process (SOP #9303).[92] This SOP documents the process for filing environmental complaints with ADEM, but does not address the process for filing and investigating claims of discrimination, including those involving retaliation and intimidation.

The complaint at issue here, involving allegations of retaliation and intimidation by Green Group Holdings, is one of intentional discrimination[93] which is the type of complaint that should be handled through a recipient's nondiscrimination grievance procedures.[94] The nondiscrimination regulation requires that recipients adopt grievance procedures that assure the prompt and fair resolution of nondiscrimination complaints.[95] Although there is insufficient evidence in the record to conclude that ADEM did not conduct an appropriate review of this alleged retaliation action, ADEM's use of its grievance procedures, rather than its apparent use of its Environmental Complaint Process, would have provided Complainants with greater clarity and transparency and would have provided ADEM an opportunity to address this issue at the state level.

Given that it appears ADEM handled this particular complaint outside of its nondiscrimination grievance procedures, ECRCO has concerns regarding whether ADEM will utilize its grievance procedures to process retaliation complaints going forward. As a result, although not legally required under these specific facts, ECRCO strongly recommends that ADEM clarify and explain in the grievance procedures themselves that ADEM will investigate and resolve retaliation and intimidation claims in a prompt and impartial manner under the grievance procedures, just as ADEM states it would do so with any other discrimination claim.[96] Although not legally required, ECRCO further recommends that ADEM's grievance procedures inform the public that during the investigation of all claims, including retaliation, the "preponderance of the evidence" standard will be applied.

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at https://www.justice.gov/crt/fcs/T6Manual8 (there must be evidence of discriminatory intent that does not require support from inferences).

[92] Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017) (attaching Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011).

[93] *See, Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (finding that "[r]etaliation is, by definition, an intentional act and a form of discrimination because the complainant is being treated differently).

[94] *See* http://adem.alabama.gov/inside/files/CivilRightsProcess.pdf. ADEM stated that its grievance procedures have not changed in any substantial way since 2004. *See* Letter from Lance R. LaFleur, Director, ADEM to Lilian Dorka, Acting Director, Office of Civil Rights, EPA (September 1, 2016), at Attachment 2 - Response to Questions.

[95] 40 C.F.R. § 7.90 (each recipient with 15 or more employees shall adopt grievance procedures that assure the prompt and fair resolution of complaints).

[96] *See* 40 C.F.R. § 7.100 (stating that "[n]o applicant, recipient, **nor other person** shall intimidate, threaten, coerce, or discriminate against any individual or group. . ..)" (emphasis added).

Allegation 2: ***Environmental Management Commission Meeting***

Complainants alleged that some of them attended the Alabama Environmental Management Commission (EMC)[97] meeting held on August 16, 2013, to present to issues that were occurring in Uniontown related to Arrowhead Landfill and the wastewater treatment plant. Complainants further alleged that they were denied the opportunity to speak by EMC's board members due to the pending Title VI complaint.[98] For its part, ADEM denied that it or the EMC engaged in retaliatory conduct at the EMC meeting.

Regarding Allegation 2, ECRCO determined that the Complainants engaged in a protected activity when they filed a Title VI administrative complaint with EPA alleging discrimination on the basis of race.[99] ECRCO also found that the EMC took an adverse action against the Complainant(s) by denying them the opportunity to present during the August 2013 meeting. Complainants presented evidence that initially they would be allowed to speak at the EMC meeting, including providing a meeting agenda which made reference to their request to speak.[100] However, EMC ultimately precluded them from speaking due to their part in an active Title VI complaint dealing with the Arrowhead Landfill.[101] Complainants' participation in an active Title VI complaint and their preclusion from speaking for that reason provides the causal connection between the protected activity and the adverse action. Thus, ECRCO determined that the evidence supports the establishment of a prima facie case of retaliation.

Once a prima facie case has been established, the recipient must show that there was a legitimate non-discriminatory/retaliatory reason for the adverse action and that it was not a pretext for discrimination. As part of its investigation of this issue, ECRCO reviewed the EMC's August 16, 2013 hearing minutes, and requested further information from ADEM regarding the justification for the EMC's decision to preclude Complainants from speaking at the meeting. On August 9, 2017, ADEM provided its response. In doing so, ADEM referred to its rule which restricts public comments related to pending matters that are being addressed in another forum

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[97] The EMC is the oversight body for ADEM and serves in a quasi-judicial role in hearing appeals of administrative actions of ADEM (Ala. Code §§ 22-22A-6 and 7; ADEM Admin. Code r. 335-1-1-.03 and ADEM Admin. Code chap. 335-2-1). Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office. (August 9, 2017). ADEM's website adds that [t]he EMC is composed of seven members who are appointed to six-year terms by the governor and subject to confirmation by the Alabama Senate. EMC is charged with developing the state's environmental policy, hearing administrative appeals of permits, administrative orders and variances issued by the Department, adopting environmental regulations and selecting an ADEM director. *See* http://www.adem.state.al.us/commission/default.cnt .

[98] Conference call discussion between EPA representatives and Complainants on September 15, 2016.

[99] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

[100] EMC Meeting Agenda (August 17, 2012), at http://www.adem.state.al.us/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf.

[101] EMC Meeting Final Minutes, pp. 28-30 (August 13, 2013). http://www.adem.state.al.us/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf.

for investigation and determination. Specifically, ADEM Admin. Code Rule 335-2-3-.05(3)[102] states:

> After consideration of agenda items the Commission may consider comments from the members of the public. While the Commission encourages public participation at its meetings, for reasons of fairness and due process to the parties in administrative and legal proceedings involving the Commission, it specifically discourages the members of the Commission from engaging in the non-deliberative discussion of any case or legal proceeding pending before the Commission, or of any decision by the Commission or matter involving the Commission or Department that is subject of any ongoing case or legal proceeding. Parties to such proceedings and members of the general public shall not be permitted to use the public participation opportunities herein provided by the Commission to circumvent administrative or judicial procedures which specify the time and manner of presenting testimony, evidence, or comment to the Commission in a formal manner designed to provide due process to all parties.

Thus, according to ADEM, Complainants were not permitted to speak at the meeting because to do so would allow discussion relating to an ongoing case involving ADEM, and was not done so in retaliation for them filing a Title VI complaint. To support its position, ADEM provided additional examples where others who had pending proceedings unrelated to Title VI were likewise denied an opportunity to present for similar reasons pursuant to the same Rule.[103]

ECRCO has reviewed the evidence regarding Allegation 2 and determined that the EMC's decision to preclude Complainants from presenting at the August 16, 2013 EMC meeting was for a legitimate, non-retaliatory reason. In addition, ECRCO has determined that the information presented by ADEM shows that this same policy was applied in other circumstances during EMC meetings. That is, there is evidence to support that during other EMC meetings, prospective speakers were denied the opportunity to speak about other matters that were the

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[102] ADEM Admin. Code Rule 335-2-3-.05(3) found at http://www.alabamaadministrativecode.state.al.us/JCARR/JCARR-APR-16/ADEM%20335-2-3-.05.pdf

[103] Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office. (August 9, 2017). The email included an attached document identified as Exhibit A (archived minutes of EMC Meeting on 10/16/2009), Transcript Page Nos. 67-69. Additionally, the response included the following links to transcripts to show similar instances in which individuals who were not involved in Title VI matters were not allowed the opportunity to speak in front of the EMC due to pending matters that were currently being handled under a separate forum. Please find specific examples at the following web addresses:
http://www.adem.alabama.gov/commission/minutes/4-19-13EMCMeetingFinalMinutes6-21-13.pdf, Transcript at pp. 94-95;
http://www.adem.alabama.gov/commission/minutes/8-16-13EMCMeetingFinalMinutes10-18-13.pdf, Transcript at pp. 27-30;
-http://www.adem.alabama.gov/commission/minutes/10-18-13EMCMeetingFinalMinutes12-13-13.pdf, Transcript at pp. 37-38;
http://www.adem.alabama.gov/commission/minutes/6-20-14EMCMeetingFinalMinutes8-15-14.pdf, Transcript at pp. 42-45;
http://www.adem.alabama.gov/commission/minutes/10-21-16EMCMeetingFinalMinutes12-27-16.pdf, Transcript at pp. 52-71;
-http://www.adem.alabama.gov/commission/minutes/2-20-15RulemakingCommitteeMeetingFinalMinutes4-17-15.pdf, Transcript at pp. 133-147

subject of other pending administrative and legal proceedings, and also not Title VI matters. Thus, there is sufficient evidence to support ADEM's claim that the Policy is applied evenly in situations involving pending administrative and legal proceedings, regardless of the subject matter and thus, not a pretext for discrimination against the Complainants on the basis of engaging in the protected activity. Accordingly, ECRCO has determined that there is insufficient evidence to support a claim of retaliation against ADEM on this issue.

Allegation 3: ***Insufficient Attention to Environmental Concerns Raised by Complainants***

The Complainants have alleged that ADEM has engaged in retaliation based on several incidents relating to ADEM's processing of environmental complaints from Complainants. For example, one of the Complainants stated that he visited ADEM offices in August 2016 for a public meeting. After the meeting, the Complainant approached an ADEM staff member and attempted to file an in-person complaint regarding runoff from the Arrowhead Landfill. According to this Complainant, the ADEM representative stated that ADEM would file the complaint for him and follow up. The Complainant asserted that the ADEM staff member never followed up nor provided a complaint number.

In investigating this issue, ECRCO reached out to ADEM to ask about its environmental complaint intake process and whether it has a separate or different intake process for complaints filed in person at ADEM offices. In response, ADEM referred ECRCO to its internal document Environmental Complaint Process (SOP #9303).[104] Based on the SOP's *Environmental Complaint Process* flow chart, in-person complaints to ADEM should be assigned to a staff member for entry into a complaint database for investigation. Subsequently, the assigned staff member is to communicate with the complainant to provide a complaint number and obtain additional information, as needed.[105] ECRCO checked ADEM's e-File system and was unable to locate a complaint from the Complainant around the referenced date, but did find record of several other complaints submitted by the Complainant from 2015 through 2017 concerning water runoff from the Landfill.[106]

In this instance, ECRCO determined that the Complainant engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.[107] ECRCO also found that ADEM took an adverse action against the Complainant by failing to intake his complaint or follow up with him about his complaint. However, there is insufficient evidence that ADEM failed to intake the complaint due to Complainant's filing of the Title VI complaint because there is evidence of several other instances in which the Complainant was able to submit a complaint in which ADEM provided a complaint number and

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[104] Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011.

[105] Environmental Complaint Process SOP #9303 Rev. 0, Version Date December 6, 2011. (ADEM Environmental Complaint Process Diagram).

[106] Referencing Complaints found against Perry County Associates 2015-2017 EFILE – ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, at http://app.adem.alabama.gov/eFile/

[107] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

provided follow-up.[108] Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

The Complainant also asserted that ADEM has shown insufficient attention to Complainants who raise complaints about the Arrowhead Landfill. Specifically, Complainants cited to a November 13, 2015 incident where an ADEM employee responded to an environmental complaint submitted by two of the named Complainants by conducting an inspection of the Arrowhead Landfill.[109] According to Complainants, they witnessed ADEM employee and a Landfill representative concluding an inspection. At the time, Complainants stated that they were in the vicinity documenting continuing Landfill run-off. Complainants were able to get the attention of the ADEM employee to address their concerns about the runoff.[110] When the ADEM employee engaged Complainants, he did so in the in the presence of the Landfill representative. Complainants perceived this situation as intimidating. In addition, during the November 13 inspection the ADEM employee and the Landfill representative agreed to allow the Complainants to ride in the back seat of a vehicle on part of the facility grounds, but when one of the Complainants asked to visit specific areas of the Landfill related to their complaint, the ADEM employee ignored or dismissed their request.[111]

Here, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.[112] ECRCO also found that ADEM took an adverse action against the Complainants by engaging with them in the presence of a Landfill representative while aware that Complainants had filed environmental complaints against the Landfill; however, there is insufficient evidence that ADEM handled this inspection in this manner due to Complainant's filing of the Title VI complaint. Specifically, there is no evidence beyond the assertion itself[113] to suggest that the filing of the Title VI complaint in June 2013 was the substantial or motivating reason for how this engagement with Complainants in November 2015 was conducted.[114] To this point, ECRCO asked ADEM to explain the circumstances under which the public participate in such

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[108] *See* fn.95.

[109] Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at pp. 5-6 (July 28, 2017).

[110] Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters. (July 28, 2017).

[111] Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters. (July 28, 2017).

[112] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

[113] *See* U.S. Department of Justice Title VI Legal Manual, Section VIII: Proving Discrimination- Retaliation § (B)(2), at https://www.justice.gov/crt/fcs/T6Manual8 (there must be evidence of discriminatory intent that does not require support from inferences).

[114] *See, e.g. Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1271 (11th Cir. 2017)(noting that temporal proximity between a protected activity and an adverse action may be sufficient to establish a claim of retaliation, but if temporal proximity alone is relied on, it must be "very close" to establish causation)(internal citations omitted)*

environmental inspections; to which ADEM responded that "there are none."[115] Furthermore, there is no indication that the Complainants requested to meet with the ADEM employee separately and that the ADEM employee's failure to send the Landfill representative away was based on Complainant's status as Title VI complainants. Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

As another example of ADEM's alleged inattention to their complaints, Complainants described an instance in which separate individuals filed an environmental complaint, but received the same complaint number. Complainants identified Complaint No. 7k-002wd5e88 as an example of where this occurred. On or about November 11, 2015, one of the Complainants called in an environmental complaint about run-off at the Arrowhead Landfill. This Complainant received Complaint No. 7k-002wd5e88 for his complaint. On or about November 12, 2015, another Complainant called to complain about run-off at the Arrowhead Landfill, and was give the same complaint number as the Complainant on the day before. Then, on November 13, 2015, still another Complainant complained to ADEM about Arrowhead Landfill run-off and was also give the same complaint number as the other two Complainants.[116]

ECRCO asked ADEM about its environmental complaint intake process and how it determines whether to give complaints the same complaint number. ECRCO also specifically asked if the logging of complaint No. 7k-002wd5e88 followed the complaint intake process. ADEM responded as follows: "If similar complaints are received close in time regarding the same subject matter, or if a complaint is submitted by multiple Complainants (i.e. multiple signatures on a complaint, multiple form letters submitted together), those complaints may be assigned the same number. Whether complaints are assigned the same or different complaint numbers, each individual complainant is provided a complaint number for purposes of follow-up and tracking."[117]

In this instance, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.[118] ECRCO found no adverse action in ADEM assigning similar complaints with the same complaint number. All of the complaints were filed in consecutive days relating to the same environmental issue. ADEM explained that even though the same complaint number may be given to multiple complaints filed close in time with similar subject matter, each individual complainant is given the number for purposes of tracking. Accordingly, by referring to the assigned number, Complainants are still afforded the opportunity to follow-up with ADEM

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[115] Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017).

[116] Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at pp. 5-6 (July 28, 2017).

[117] Email from Tom Johnston, General Counsel, ADEM to Lilian Dorka, Director, External Civil Rights Compliance Office, EPA. (September 22, 2017).

[118] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

to ascertain the progress of their complaints. As a result, there is no adverse action to support a prima facie showing of retaliation.

In another instance, a Complainant filed an odor complaint in March 2016. However, Complainants contend that the odor complaint was not properly investigated because ADEM referred to an inspection of the facility conducted six months prior to the date the complaint was filed.[119] ECRCO asked ADEM how it determines whether a complaint warrants an onsite inspection and how past routine inspections are utilized to investigate newly received complaints. ADEM responded and stated that a follow-up inspection was not conducted due to similarity in the complaints and because ADEM was having continuing dialogue with the facility about the complaints and proposed response actions.[120]

Here, ECRCO determined that the Complainants engaged in a protected activity related to the filing of a Title VI administrative complaint with EPA alleging discrimination on the basis of race.[121] ECRCO also found that ADEM took an adverse action against the Complainants by not specifically investigating this odor incident, but instead referring to a previous inspection six months earlier. However, based on ADEM's explanation that it was addressing the matter with the facility, and in the absence of other evidence suggesting there was another motive, there is insufficient evidence that ADEM referred to the prior inspection in resolving Complainant's odor complaint due to the Complainant's filing of the Title VI complaint. Thus, there is no causal connection between the protected activity and the adverse action to support a prima facie showing of retaliation.

Conclusion

For the reasons set forth above, the record does not establish a prima facie case of discrimination, with respect to the alleged harms due to failure to meet one or more of the elements of a prima facie case of disparate impact discrimination as specifically discussed with respect to each of the May 2013 issues. Accordingly, ECRCO finds insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regarding ADEM's permitting actions as alleged. ECRCO also finds insufficient evidence of discrimination based on retaliation.

Thank you and your staff for your cooperation during this investigation. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or

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[119] Letter from Marianne Engelman-Lado, Visiting Clinical Professor of Law, Environmental Justice Clinic, Yale Law School to Lilian Dorka, Director, External Civil Rights Compliance Office, Office of General Counsel, U.S. Environmental Protection Agency Headquarters, at p. 8 (July 28, 2017) (referencing Complaint 1N-007RG7H01, EFILE – ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, at http://app.adem.alabama.gov/eFile/).

[120] Letter from Lance R. LeFleur, Director, ADEM to Lilian S. Dorka, Acting Director, Office of Civil Rights, U.S. Environmental Protection Agency. Re: EPA File No. 06R-03-R4; 12R-13-R4; 13R-16-R4 ADEM Response to EPA Follow-up Information Request. Attachment 1-02. (September 1, 2016).

[121] Letter from David A. Ludder to Vicki A. Simons, Director, Office of Civil Rights, U.S. Environmental Protection Agency Re: Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama (EPA OCR File No. 01R-12-R4). (May 30, 2013).

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,

Lilian S. Dorka, Director
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Office of General Counsel

cc: Elise Packard
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