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

May 30, 2013

Overnight Delivery
Ms. Vicki Simons, Director
Office of Civil Rights
U.S. Environmental Protection Agency
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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)**

Dear Ms. Simons:

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

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

Complainants allege that the Alabama Department of Environmental Management (ADEM) violated Title VI and EPA's implementing regulations by reissuing and modifying, on September 27, 2011 and February 3, 2012 respectively, Solid Waste Disposal Facility Permit No. 53-03 authorizing Perry County Associates, LLC to construct and operate the Arrowhead Landfill, a municipal solid waste landfill in Perry County, Alabama which has the effect of adversely and disparately impacting African-American residents in the adjacent community.

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

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I. Title VI Background

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

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

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

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

Guidance at 11. "[A] justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id. See Draft Guidance*, 65 Fed. Reg. at 39683.

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

II. Complainants

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

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

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

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

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

[redacted]

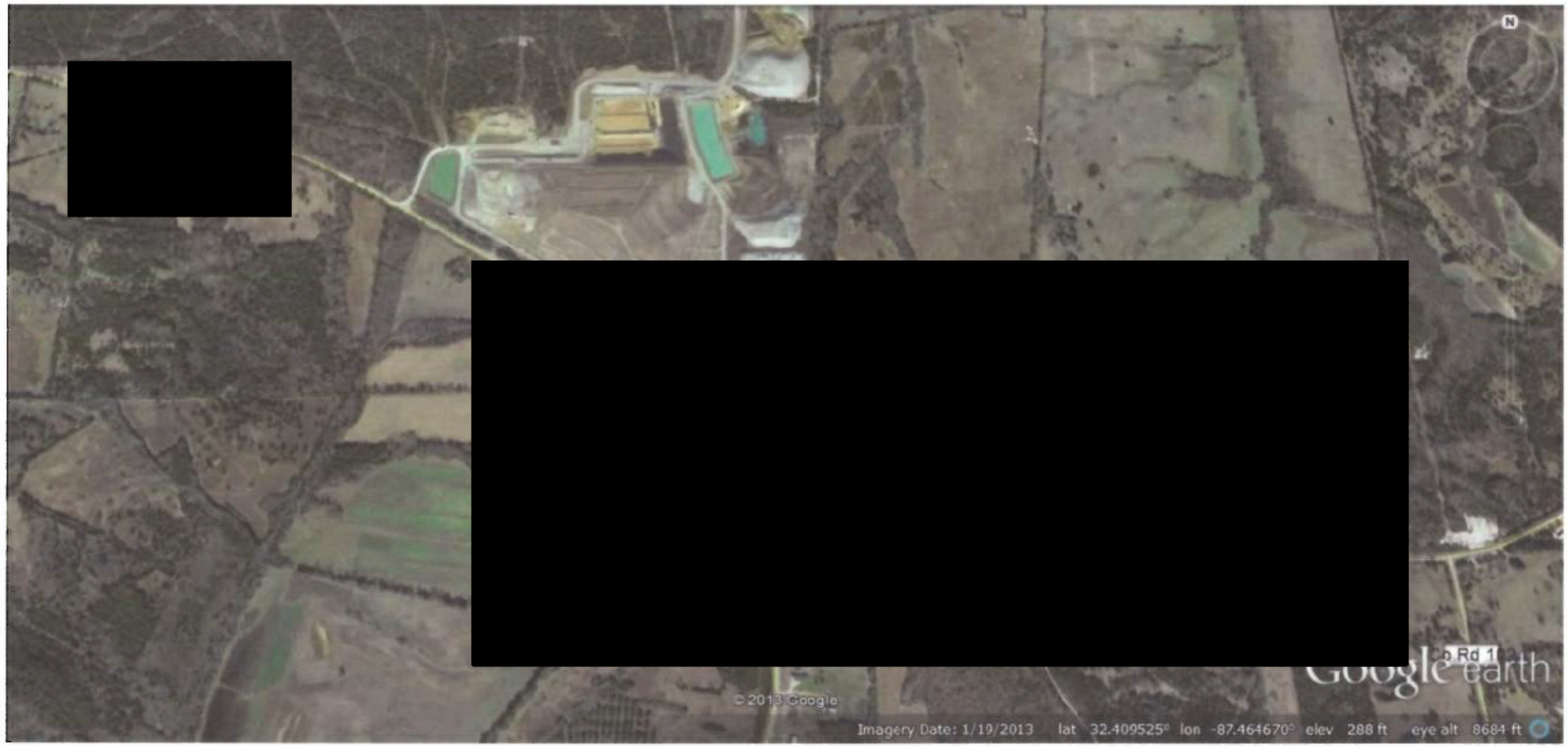
Many of the Complainants are African-Americans who live within one mile of the Arrowhead Landfill and who believe that they have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. **Figure 1**. A few of the Complainants are members of the African-American race who, though not themselves discriminated against by ADEM, believe that African-Americans as a class have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. In addition, several of the Complainants are not members of the African-American race who, though not themselves discriminated against by ADEM, believe that African-Americans have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7. The undersigned is the authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

III. Recipient

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

Under amendments made to Title VI by the Civil Rights Restoration Act of 1987, a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance.

Figure 1
PROXIMITY OF AFFECTED AFRICAN-AMERICAN COMPLAINANTS TO ARROWHEAD LANDFILL



> Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the actions they take under programs that do not derive their authority from EPA statutes (e.g., state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

Interim Guidance at 2-3 (footnotes omitted).

ADEM was a recipient of financial assistance from EPA at the time of the alleged discriminatory acts. For example, EPA recently awarded grants to ADEM as shown in **Exhibit A** (EPA Grants to ADEM).

IV. Discriminatory Acts

The first alleged discriminatory act is the reissuance (renewal) of Solid Waste Disposal Facility Permit No. 53-03 by ADEM to Perry County Associates, LLC on September 27, 2011. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011).[3] The permit authorizes Perry County Associates, LLC to construct and operate the Arrowhead Landfill, a municipal solid waste landfill. Permit No. 53-03 authorizes the disposal of "[n]onhazardous solid wastes, noninfectious putrescible wastes including but not limited to household garbage, commercial waste, industrial waste, construction and demolition debris, and other similar type materials" from thirty-three states. *Id.* The permit authorizes the disposal of 15,000 tons of waste per day – the largest authorized waste disposal volume in Alabama. **Figure 2.** The authorized disposal area is 256.151 acres. The facility is located in Perry County, Alabama at approximately Latitude 32.4115 ° North, Longitude 87.4675° West. **Figure 3.**

The second alleged discriminatory act is the modification of Permit No. 53-03 by ADEM on February 3, 2012. **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). The permit modification authorizes Perry County Associates, LLC to expand the disposal area at the Arrowhead Landfill by 169.179 acres (66%).[4]

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

[4] "Permit modifications that result in a net increase of pollution impacts, however, may provide a basis for an adverse disparate impact finding, and, accordingly, OCR will not reject or dismiss complaints associated with permit modifications without an examination of the circumstances to determine the nature of the modification." *Interim Guidance* at 7.

Figure 2
AUTHORIZED WASTE DISPOSAL VOLUMES AT ALABAMA LANDFILLS (TPD)
Source: Permitted Solid Waste Landfills in the State of Alabama (ADEM, June 29, 2011)
(available at http://www.adem.alabama.gov/programs/land/landforms/MSWLFMasterList08-11.pdf)

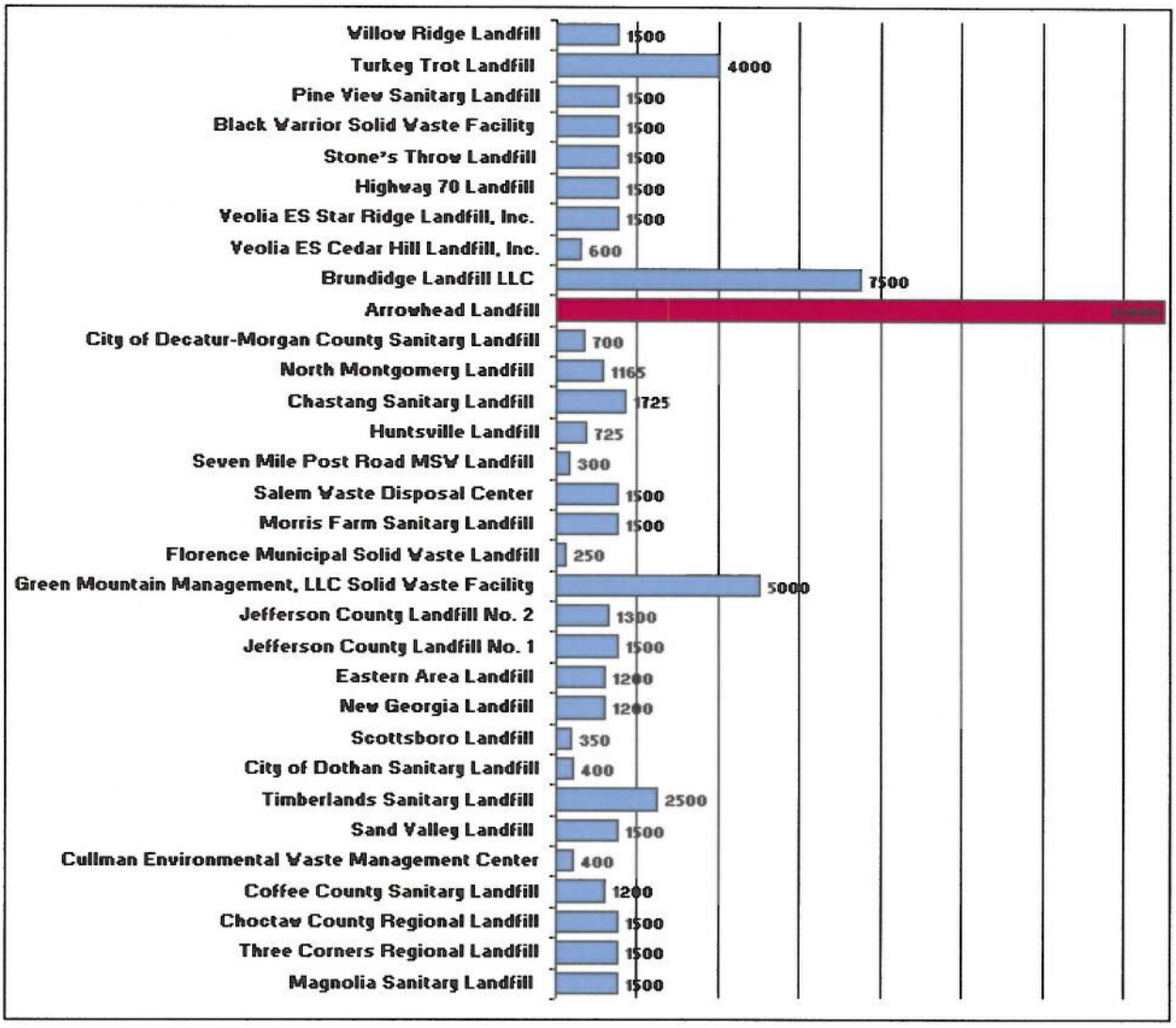
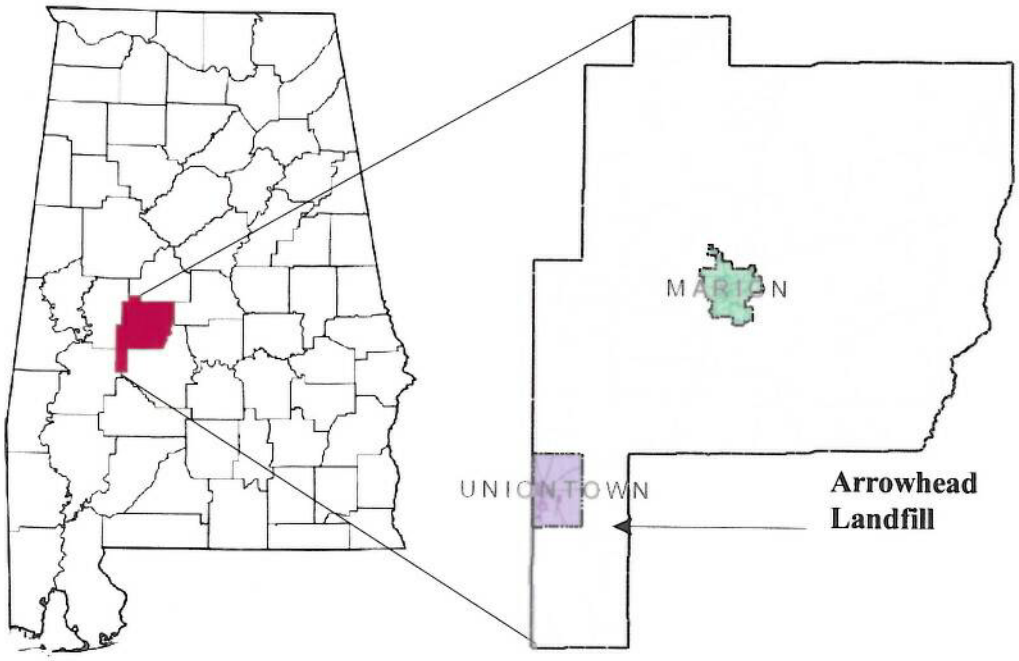


Figure 3
LOCATION OF THE ARROWHEAD LANDFILL
PERRY COUNTY, ALABAMA



V. Timeliness

40 C.F.R. § 7.120(b)(2) requires that a complaint alleging discrimination under a program or activity receiving EPA financial assistance must be filed within 180 days after the alleged discriminatory act. The reissuance of Solid Waste Disposal Facility Permit No. 53-03 to Perry County Associates, LLC occurred on September 27, 2011. A complaint dated January 3, 2012 was received by EPA 101 days after the permit was reissued, *i.e.*, on January 6, 2012. **Exhibit D** (*Letter from Rafael DeLeon to David A. Ludder dated June 14, 2012 Re: Acceptance of Administrative Complaints*). The modification of Solid Waste Disposal Facility Permit No. 53-03 was granted to Perry County Associates, LLC on February 3, 2012. A complaint dated February 16, 2012 was received by EPA 18 days after the permit was modified, *i.e.*, on February 21, 2012. *Id.*

On September 26, 2012, EPA dismissed the above-referenced complaints without prejudice to refiling "within 60 days following termination or conclusion of" litigation styled *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC*, No. No. 2:10-cv-00326-WS-N (S.D. Ala.) and *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC and Phillips & Jordan, Inc.* , Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). **Exhibit E** (*Letter from Rafael DeLeon to David A. Ludder dated September 26, 2012 Re: Dismissal without prejudice of Administrative Complaint*). The foregoing litigation was terminated on April 16, 2013. **Exhibit F** (*Ethel L. Abrahams, et al. v. Phill-Con Services, LLC*, No. 2:10-cv-00326-WS-N (S.D. Ala. Apr. 16, 2013), Doc. 44). Accordingly, refiling of this complaint is timely if received by EPA on or before June 15, 2013.

VI. Litigation

As previously noted by EPA,

> [I]n 2010, certain residents of Perry County filed a civil action in the U.S. District Court for the Southern District of Alabama, Northern Division, against Phill-Con Services, LLC, the operator of the Arrowhead Landfill, to enforce an emission standard or limitation under the Clean Air Act, 42 U.S.C. 7401–7671q, and to enforce a standard, regulation, requirement, or prohibition under the Solid Waste Disposal Act, 42 U.S.C. 6901-6992k. Also in 2010, certain residents of Perry County filed a civil action in state court against Phill-Con and Phillips & Jordan, Inc. (a contractor at the landfill), asserting state law claims including negligence, wantonness, nuisance, and trespass resulting from the construction and operation of the landfill. In addition to other remedies, the Plaintiffs seek a permanent injunction that the landfill ceases operating in such a manner as to cause certain impacts. Both of these actions were subsequently removed to the U.S. Bankruptcy County for the Southern District of Alabama, Selma Division, where the litigation has been consolidated. OCR understands that the litigation is still ongoing.

Exhibit E (*Letter from Rafael DeLeon to David A. Ludder dated September 26, 2012 Re: Dismissal without prejudice of Administrative Complaint*) at 1. On the basis of these findings, EPA dismissed the January 3, 2011 and February 16, 2012 complaints without prejudice pending results of the litigation.

> OCR may choose not to proceed with a complaint investigation if the allegations in the complaint were actually litigated and substantively decided by a Federal court. For example, if a Federal court reviewed evidence presented by both parties and issued a decision that stated the allegations of discrimination were not true, OCR may choose not to investigate allegations in the complaint that deal with those same issues. In addition, if a state court reviewed evidence presented by both parties and issued a decision, then OCR may consider the outcome of the court's proceedings to determine if they inform OCR's decision making process.
>
> Generally, OCR may choose to investigate if the complaint raises issues that were not actually litigated or substantively decided by a Federal court, or if it raises unique and important legal or policy issues.

Draft Guidance, 65 Fed. Reg. at 39673.

On April 16, 2013, the foregoing litigation was dismissed with prejudice on motion of the parties. **Exhibit F** (*Ethel L. Abrahams, et al. v. Phill-Con Services, LLC* , No. 2:10-cv-00326-WS-N (S.D. Ala. Apr. 16, 2013), Doc. 44). The Court did not review any evidence, make any findings of fact, or otherwise decide any substantive issues. Accordingly, the now terminated litigation does not present an impediment to EPA investigation and disposition of this Complaint.[5]

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[5] The permittee of the Arrowhead Landfill, Perry County Associates, LLC., was not a party to *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC* , No. No. 2:10-cv-00326-WS-N (S.D. Ala.) or *Ethel L. Abrahams, et al. v. Phill-Con Services, LLC and Phillips & Jordan, Inc.* , Adv. Proc. No. 10-00075 (Bankr. S.D. Ala.). Perry County Associates, LLC was a "debtor" in bankruptcy. *In re Perry County Associates, LLC*, No. 10-00277 (Bankr. S.D. Ala. filed Jan. 26, 2010). The only asset possessed by Perry County Associates, LLC was Permit No. 53-03. The landfill itself was owned by Perry-Uniontown Ventures I, LLC, which was also a "debtor" in bankruptcy. *In re Perry-Uniontown Ventures I, LLC* , No. 10-00276 (Bankr. S.D. Ala. filed Jan. 26, 2010). Perry-Uniontown Ventures I, LLC was the sole member of Perry County Associates, LLC. Phill-Con Services, LLC and Phillips and Jordan, Inc. ceased doing work at the landfill in October 2011. The Arrowhead Landfill is now owned by Howling Coyote, LLC, a wholly-owned subsidiary of Green Group Holdings, LLC. **Exhibit G** (*Letter from T. Shane Lovett to David A. Ludder dated November 5, 2012*). An application for permit transfer from Perry County Associates, LLC to Howling Coyote, LLC was submitted to ADEM on or about January 4, 2012. **Exhibit H** (*Application for Transfer of Permit dated December 27, 2012*). "A notification must be submitted to and approved by the Department prior to any proposed transfer from one person

VII. Impacts

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

A. The frequent emission of odors from the landfill that are unpleasant to persons and that cause lessened human food and water intake, interference with sleep, upset appetite, irritation of the upper respiratory tract (nose and throat) and eyes, headaches, dizziness, nausea, and vomiting among many of the Complainants; and interference with outdoor activities and the enjoyment of property of many of the Complainants. *See e.g.*, **Exhibit J1** (2010 Odor Complaints), **Exhibit J2** (2011 Odor Complaints), **Exhibit J3** (2012 Odor Complaints), and **Exhibit J4** (2013 Odor Complaints).

B. Increased populations of flies in and around the homes of many of the Complainants that are bothersome and that may be carriers of dozens of infectious viruses, bacteria, and parasites. **Exhibit K** (2013 Fly Complaints).

C. Increased populations of birds around the homes of many of the Complainants that deposit droppings and that may be carriers of dozens of infectious viruses, bacteria, and parasites. **Exhibit L1** (Video), **Exhibit L2** (2011 Bird Complaints), **Exhibit L3** (2012 Bird Complaints), and **Exhibit L4** (2013 Bird Complaints).

D. Increased noise from operation of heavy machinery (*e.g.*, steel wheel compactor, bulldozer, excavator, off-road haul truck, small farm tractor, clamshell buckets, railcars) 24-hours per day, 7-days per week causing headaches and interference with sleep, conversations, television and radio listening and other activities within and without the homes of many of the Complainants. **Exhibit M1** (2010 Noise Complaints), **Exhibit M2** (2011 Noise Complaints), **Exhibit M3** (2012 Noise Complaints), and **Exhibit M4** (2013 Noise Complaints).

E. The frequent emission of fugitive dust from the landfill that causes particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. *See e.g.*, **Exhibit N1** (2010 Dust Complaints), **Exhibit N2** (2011 Dust Complaints), **Exhibit N3** (2012 Dust Complaints), and **Exhibit N4** (2010 Dust Video).

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or company to another or name change of any permitted facility." Ala. Admin. Code R. 335-13-5-.07. There is no evidence in the ADEM eFile system that ADEM ever approved the transfer of Permit No. 53-03 to Howling Coyote, LLC. Perry County Associates, LLC was dissolved on October 31, 2012. **Exhibit I** (*Articles of Dissolution dated October 11, 2012*). If the permit transfer has not been approved by ADEM, the Arrowhead Landfill is being operated by a party that does not have a permit.

F. Decreased property values of many of the Complainants. *See e.g.*, **Exhibit O1** (Affidavit of Diane Hite), **Exhibit O2** (Cameron, T.A. "Directional Heterogeneity in Distance Profiles in Hedonic Property Value Models," *Journal of Environmental Economics and Management* 51(1) (2006): 26-45), **Exhibit O3** (Guntermann, K.L. "Sanitary Landfills, Stigma and Industrial Land Values," *Journal of Real Estate Research* 10(5) (1995): 531-542), **Exhibit O4** (Hirshfeld, S. et al. "Assessing the True Cost of Landfills," *Waste Management and Research* 10 (1992): 471-484), **Exhibit O5** (Hite, D. "A Random Utility Model of Environmental Equity," *Growth and Change* 31(4) (2000): 40-58), **Exhibit O6** (Hite, D. "Information and Bargaining in Markets for Environmental Quality," *Land Economics* 74(3) (1998): 303-316), **Exhibit O7** (Hite, D., et al. "Property Value Impacts of an Environmental Disamenity: The Case of Landfills," *Journal of Real Estate Finance and Economics* 22 (2001): 185-202), **Exhibit O8** (Kinnaman, T.C. "A Landfill Closure and Housing Values," *Contemporary Economic Policy* 27(3) (2009): 380-389), **Exhibit O9** (Lim, J.S., et al. "Does size really matter? Landfill scale impacts on property values," *Applied Economics Letters* 14 (2007): 719-723), **Exhibit O10** (Nelson, A.C., et al. "Price effects of landfills on house values," *Land Economics* (1992)), **Exhibit O11** (Ready, R.C., "Do Landfills Always Depress Nearby Property Values?," *Journal of Real Estate Research* 32(3) (2010): 321-339), **Exhibit O12** (Reichert, A.K., et al. "The Impact of Landfills on Residential Property Values," *Journal of Real Estate Research* 7(3) (1992): 297-314), **Exhibit O13** (Wilson, S.E., "Evaluating the potential impact of a proposed landfill," *Appraisal Journal* 77 (2009): 24-__), and **Exhibit O14** (Spector, K., et al. "Review of Current Property Valuation Literature," Industrial Economics, Inc. (1999)).

See also **Exhibit P1** (EPA Listening Session Invitation), **Exhibit P2** (EPA Listening Session Video, June 15, 2011), and **Exhibit P3** (ADEM Public Hearing on Permit Renewal, July 14, 2011)[6] and **Exhibit P4** (Nov 2012-May 2013 Written Complaints).

VIII. ADEM Authority

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

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[6] In the complaints filed on January 6, 2012 and February 21, 2012, Complainants also alleged "the frequent tracking of dirt and other solids from the landfill onto County Road 1 where through traffic causes the dirt and other solids to become airborne particulates resulting in particulate deposition on personal and real property of many of the Complainants, including homes, porches, vehicles, laundry, and plantings. *See* Exhibit M (Mud in Road Sign)." Subsequently, the Arrowhead Landfill relocated its entrance to Tayloe Road off U.S. Highway 82. **Exhibit Q** (*Letter from William F. Hodges to Scott Story dated October 30, 2012*). This relocation has eliminated tracking of dirt on County Road 1.

submit that both the *Interim Guidance* and *Draft Guidance* are wrong as a matter of law on this point.

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

As discussed below, ADEM has express authority under the Alabama Administrative Code to regulate landfill practices that may cause odor and disease vectors. It also has express authority to establish buffer zones to protect against adverse aesthetic impacts (*e.g.*, noise, odor, and fugitive dust). ADEM does not, however, have express authority to address reductions in property values that often occur as a consequence of landfill operations. Nevertheless, the permits granted by ADEM which authorize the construction and operation of the Arrowhead Landfill have had the disproportionate adverse effect of subjecting persons of a protected race to reductions in the value of their property. This adverse economic effect is cognizable under Title VI, notwithstanding EPA's contrary pronouncements in the *Interim Guidance* and *Draft Guidance*. To hold otherwise would allow state legislatures and state administrative agencies to define what is and is not actionable discrimination under Title VI and would frustrate the purpose of Title VI.

A. Odors

ADEM has ample authority to regulate and control odor emissions from landfills. For example, Ala. Admin. Code R. 335-13-4-.22(3)(a) provides:

> (a) Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

Ala. Admin. Code R. 335-3-1-.02(1)(d), 335-3-1-.02(1)(e), 335-3-1-.02(1)(ss) and 335-3-1-.08, discussed below, have been approved by the Administrator of the U.S. Environmental Protection Agency as part of the State Implementation Plan for Alabama under section 110 of the Clean Air Act, 42 U.S.C. § 7410. *See* 40 C.F.R. §§ 52.50, 52.53.[7]

Ala. Admin. Code R. 335-3-1-.08 provides:

> No person shall permit or cause air pollution, as defined in Rule 335-3-1-.02(1)(e) of this Chapter by the discharge of any air contaminant for which no ambient air quality standards have been set under Rule 335-3-1-.03(1).

"Air Pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property . . .." Ala. Admin. Code R. 335-3-1-.02(1)(e) (emphasis added). "Air Contaminant" means "any solid, liquid, or gaseous matter, any odor, or any combination thereof, from whatever source." Ala. Admin. Code R. 335-3-1-.02(1)(d) (emphasis added). "Odor" means "smells or aromas which are unpleasant to persons or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms or nausea, or which by their inherent chemical or physical nature or method or processing are, or may be, detrimental or dangerous to health. Odor and smell are used interchangeably herein." Ala. Admin. Code R. 335-3-1-.02(1)(ss).

Ala. Admin. Code R. 335-13-4-.22(1) provides:

> Daily Operation.
> (a) All waste shall be covered as follows:
> 1. A minimum of six inches of *compacted earth* or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by the Department shall be added at the conclusion of each day's operation *or as otherwise approved by the Department to control* disease vectors, fires, *odors*, blowing litter, and scavenging.

(Emphasis added).[8]

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[7] Permit No. 53-03 provides that "[t]his landfill may be subject to ADEM Admin. Code Division 3 . . . and the Federal Clean Air Act." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section VI; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section VI. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* provide that "[t]his facility will comply with all Clean Air Act requirements." **Exhibit R1** at 2-33; **Exhibit S1** at 2-33.

[8] Permit No. 53-03 grants a variance from the requirement to use compacted earth as daily cover and authorizes the use of alternative cover materials (petroleum contaminated soil, automotive shredder residue, synthetic tarps and posi-shell). **Exhibit B** (Permit No. 53-03, Sept.

Ala. Admin. Code R. 335-13-4-.22(1)(b) provides:

> All waste shall be confined to as small an area as possible and spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 4 to 1 (25%) or as otherwise approved by the Department.[9]

27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Alternative cover materials may be inferior to compacted earth cover in the control of odors. In any case, the use of alternative cover materials is contrary to Alabama law. Ala. Code § 22-27-2(23) defines a "municipal solid waste landfill" as a "sanitary landfill." Ala. Code § 22-27-2(32) defines "sanitary landfill" as "[a] controlled area of land upon which solid waste is deposited and is compacted and *covered with compacted earth each day* as deposited, with no on-site burning of wastes, and so located, contoured, and drained that it will not constitute a source of water pollution as determined by the department." (Emphasis added). ADEM is authorized to "adopt such rules and regulations as may be needed to meet the requirements of this article" and to "[a]dopt rules to implement this article." Ala. Code §§ 22-27-7 and 22-27-12(1). Ala. Code Title 22, Article 1 provides for no exceptions or variances from the requirement to use compacted earth as daily cover. Therefore, that language in Ala. Admin. Code R. 335-13-4-.22(1) which purports to permit ADEM to authorize the use of alternative cover materials is unlawful and void. *See Ex parte Crestwood Hosp. & Nursing Home, Inc.* , 670 So.2d 45, 47 (Ala. 1995) ("It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation"); *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala. 1991) ("An administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy."); *Jefferson County v. Alabama Criminal Justice Information Ctr. Comm'n*, 620 So.2d 651, 658 (Ala. 1993) (an administrative agency cannot "claim implied powers that exceed and/or conflict with those express powers contained in its enabling legislation"). The variance in Permit No. 53-03, Section III., H. is also unlawful and void.

Permit No. 53-03 currently authorizes *six inches* of compacted earth, petroleum contaminated soil, and automotive shredder residue as daily cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Greater depths of cover material are authorized and may be necessary to effectively control odors.

Permit No. 53-03 currently authorizes the same minimum cover frequency as provided in ADEM rules, *i.e. daily* cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. *See* Ala. Admin. Code R. 335-13-4-.22(1)(a)1. More frequent application of cover material is authorized and may be necessary to effectively control odors.

[9] Permit No. 53-03 requires that "[a]ll waste shall be confined to *an area as small as possible* . . .. Arrowhead Landfill is granted a variance to operate two working faces: one for the placement of MSW/Construction and Demolition waste, and one for the placement of coal ash waste (See Section X., A.). Each of the two working faces should still be confined to *as small an*

Ala. Admin. Code R. 335-13-4-.13(2)(f) provides:

> Buffer zones, screening and other aesthetic control measures. Buffer zones around the perimeter of the landfill unit shall be a minimum of 100 feet in width measured in a horizontal plane. No disposal or storage practices for waste shall take place in the buffer zone. Roads, access control measures, earth storage, and buildings may be placed in the buffer zone. [10]

Finally, Ala. Admin. Code R. 335-13-4-.22(3)(b) provides:

> Notwithstanding this Rule, additional requirements for operating and maintaining a MSWLF may be imposed by the Department, as deemed necessary, to comply with the Act and this Division. [11]

The foregoing authorize ADEM to require that landfill operations not result in offensive odors. In addition, the foregoing authorize ADEM to require the use of compacted earth as cover, to require that the depth of cover be more than six inches, to require that waste be covered

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area as possible." (Emphasis added.). **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., J.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., J. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that the maximum size of each of two working faces shall be 200 feet by 200 feet when waste receipts equal or exceed 1,500 tons per day and 150 feet by 100 feet when waste receipts are less than 1,500 tons per day. **Exhibit R1** at 2-28; **Exhibit S1** at 2-28. Reducing the size of the working face is authorized and would reduce the solid waste exposed to the air and thus odor emissions.

[10] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones for landfill odor impacts can be scientifically determined. *See e.g.*, **Exhibit T1** (Cooper, David C., *Atmospheric Dispersion Modeling for Odor Buffer Distances from Florida Landfills* , University of Central Florida (Report # 16207042, June 2009), **Exhibit T2** (Figueroa, V.K., *Determining Florida Landfill Odor Buffer Distances Using Aermod* , University of Central Florida (Masters Thesis, Summer 2008), and **Exhibit T3** (Tarr, J., *An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill* (Aug. 2012)).

[11] Permit No. 53-03 provides that "[t]he Department may enhance or reduce any requirements for operating and maintaining the landfill as deemed necessary by the Land Division." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., T.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., T.

more frequently than once each day, to prohibit leachate recirculation, [12] and to further restrict the size of the working face. Moreover, the foregoing authorize ADEM to establish a larger buffer zone for aesthetic purposes, including odor reduction.

B. Flies and birds

ADEM has ample authority to regulate and control disease vectors such as flies and birds. For example, Ala. Admin. Code R. 335-13-4-.22(1) provides:

> Daily Operation.
> (a) All waste shall be covered as follows:
> 1. A minimum of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by the Department shall be added at the conclusion of each day's operation *or as otherwise approved by the Department to control disease vectors* , fires, odors, blowing litter, and scavenging. [13]

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[12] Permit No. 53-03 currently authorizes leachate recirculation and states that leachate distribution *should* be at a rate and manner that does not cause odor. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section VII; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section VII . Recirculation accelerates organic decomposition and generates more off-gases. EPA "recognizes that potential operational problems associated with leachate recirculation, such as increase in leachate production, clogging of the leachate collection system, buildup of hydraulic head within the unit, increase in air emissions and odor problems, and increase in potential of leachate pollutant releases due to drift and/or run-off, may result in adverse impacts on human health and the environment." 56 Fed. Reg. at 51056 (1991). *See Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.10.3 ("In some cases, [leachate] discharge points have been a source of odor.").

[13] Permit No. 53-03 provides that "[t]he Permittee shall provide for vector control as required by ADEM Admin. Code Division 13." **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., Q.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., Q. The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* state that "[v]ectors shall be controlled by compaction and the use of daily cover, or approved ADC materials." **Exhibit R1** at 2-32; **Exhibit S1** at 2-32.

Permit No. 53-03 currently authorizes the use of alternative cover materials (petroleum contaminated soil, automotive shredder residue, synthetic tarps and posi-shell). **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Such alternatives are not authorized under Alabama law. *See supra* n. 8. Moreover, requiring compacted earth cover is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

Permit No. 53-03 currently authorizes *six inches* of compacted earth, petroleum

(Emphasis added).

Ala. Admin. Code R. 335-13-4-.22(2) (d) provides:

> Measures shall be taken to prevent the breeding or accumulation of disease vectors. If determined necessary by the Department or the State Health Department, additional disease vector control measures shall be conducted. [14]

Ala. Admin. Code R. 335-13-4-.22(1)(b) provides:

> All waste shall be confined to as small an area as possible and spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 4 to 1 (25%) or as otherwise approved by the Department. [15]

Finally, Ala. Admin. Code R. 335-13-4-.22(3)(b) provides:

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contaminated soil, and automotive shredder residue as daily cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. Increasing cover thickness is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

Permit No. 53-03 currently authorizes the minimum cover frequency provided in ADEM rules, *i.e. daily* cover. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section III., H.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section III., H. *See* Ala. Admin. Code R. 335-13-4-.22(1)(a)1. More frequent application of cover material is an authorized and recognized method for controlling disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

[14] EPA has recognized that "if cover material requirements prove insufficient to ensure vector control, this criterion would require that other steps be taken by the owner or operator to ensure such control." 53 Fed. Reg. at 33336. "[O]ther vector control alternatives may be required. These alternatives could include: reducing the size of the working face; other operational modifications (e.g., increasing cover thickness, changing cover type, density, placement frequency, and grading); repellents, insecticides or rodenticides; composting or processing of organic wastes prior to disposal; and predatory or reproductive control of insect, bird, and animal populations." *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

[15] *See supra* n. 9. EPA has recognized that reducing the size of the working face may be appropriate to control disease vectors. *Solid Waste Disposal Facility Criteria Technical Manual* (EPA530-R-93-017, Nov. 1993) at § 3.4.3.

> Notwithstanding this Rule, additional requirements for operating and maintaining a MSWLF may be imposed by the Department, as deemed necessary, to comply with the Act and this Division.[16]

The foregoing authorize ADEM to require that landfill operations incorporate controls on disease vectors, such as flies and birds, in addition to daily cover.

C. Noise

ADEM has ample authority to regulate and control noise impacts. For example, Ala. Admin. Code R. 335-13-4-.13(2)(f) provides:

> Buffer zones, screening and other aesthetic control measures. Buffer zones around the perimeter of the landfill unit shall be a minimum of 100 feet in width measured in a horizontal plane. No disposal or storage practices for waste shall take place in the buffer zone. Roads, access control measures, earth storage, and buildings may be placed in the buffer zone.[17]

In addition, Ala. Admin. Code R. 335-13-4-.22(3)(b) provides:

> Notwithstanding this Rule, additional requirements for operating and maintaining a MSWLF may be imposed by the Department, as deemed necessary, to comply with the Act and this Division.[18]

The foregoing authorize ADEM to require buffer zones exceeding 100 feet where necessary to control adverse impacts on aesthetics from landfill operation. Such aesthetics are not limited to visual aesthetics. They include auditory aesthetics. Thus, ADEM is authorized to require an increased buffer zone to reduce disturbing noise at the Complainants' residences

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[16] *See supra* n. 11.

[17] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones for landfill noise impacts can be scientifically determined. *See e.g.*, **Exhibit U1** (ARM Group Inc., *Noise Impact Assessment Resource Recovery Landfill* (ARM Project 04117, Mar. 2006)) and **Exhibit U2** (Barton & Loguidice, P.C., *County of Franklin Solid Waste Management Authority Proposed Landfill Expansion Noise Assessment*, (Sep. 2008)).

[18] *See supra* n. 11.

D. Fugitive Dust

ADEM has ample authority to regulate and control fugitive dust emissions from landfills. For example, Ala. Admin. Code R. 335-13-4-.22(3)(a) provides:

> (a) Owners or operators of all MSWLFs must ensure that the units do not violate any applicable requirements developed under a State Implementation Plan (SIP) approved or promulgated by the Administrator pursuant to Section 110 of the Clean Air Act, as amended.

Included in the EPA-approved State Implementation Plan is Ala. Admin. Code R. 335-3-4-.02. 40 C.F.R. § 52.50(c); http://www.epa.gov/region4/air/sips/al/content.htm. Rule 335-3-4-.02, as it appears in the approved State Implementation Plan, provides:

> **Fugitive Dust and Fugitive Emissions**
>
> (1) No Person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
>
> (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading or reads, or the clearing of land;
>
> (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems;
>
> (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dusty materials. Adequate containment methods shall be employed during sandblasting or other similar operations.
>
> (2) Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

Although ADEM's fugitive dust rule was declared to be unconstitutional by the Alabama Supreme Court in *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So.2d 82 (Ala. 1983), Alabama has neither repealed the rule nor sought or obtained EPA approval of a revision of the State Implementation Plan. Accordingly, the rule continues to be included in the "applicable implementation plan" under the Clean Air Act. *See e.g., Gen. Motors Corp. v. United States* , 496 US 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has

submitted a proposed revision."); *Safe Air for Everyone v. United States Envtl. Prot. Agency* , 475 F.3d 1096, 1105 (9th Cir. 2007) ("[A] state may not unilaterally alter the legal commitments of its SIP once EPA approves the plan").

In addition, Ala. Admin. Code R. 335-13-4-.13(2)(f) provides:

> Buffer zones, screening and other aesthetic control measures. Buffer zones around the perimeter of the landfill unit shall be a minimum of 100 feet in width measured in a horizontal plane. No disposal or storage practices for waste shall take place in the buffer zone. Roads, access control measures, earth storage, and buildings may be placed in the buffer zone. [19]

In addition, Ala. Admin. Code R. 335-13-4-.22(3)(b) provides:

> Notwithstanding this Rule, additional requirements for operating and maintaining a MSWLF may be imposed by the Department, as deemed necessary, to comply with the Act and this Division. [20]

The foregoing rules authorize ADEM to require controls on fugitive dust emissions and buffer zones exceeding 100 feet where necessary to control adverse impacts on aesthetics from landfill operation. Thus, ADEM is authorized to require reductions in the adverse impacts of fugitive dust at the Complainants' residences.

E. Property values

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Transportation's English-only language requirement for

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[19] Permit No. 53-03 contains no specific requirements for buffer zones. However, Permit No. 53-03 provides that the permittee shall operate and maintain the disposal facility consistent with ADEM Admin. Code Division 13. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) at Section II., A.; **Exhibit C** (Permit No. 53-03, Feb. 3, 2012) at Section II., A. Thus, the *minimum* buffer zone for all aesthetic impacts is 100 feet. Ala. Admin. Code R. 335-13-4-.13(2)(f). The *Arrowhead Landfill Permit Renewal Application* and *Arrowhead Landfill Permit Expansion Application* indicate that "[a] 100 foot minimum waste disposal buffer zone has been established around the perimeter of the site." **Exhibit R1** at 2-3; **Exhibit S1** at 2-3. Buffer zones to protect against adverse aesthetic impacts, such as from fugitive dust, are authorized. It may be possible to model these impacts. *See e.g.*, **Exhibit T3** (Tarr, J., *An Evaluation of Particulate Matter, Hydrogen Sulfide, and Non-Methane Organic Compounds from the Arrowhead Landfill* (Aug. 2012)).

[20] *See supra* n. 11.

motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because its adversely affected individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Similarly, the construction and operation of the Arrowhead Landfill, with all its associated odor, noise, birds, flies, and fugitive dust, has an adverse effect on the property values of Complainants and other members of the African-American race in the community. ADEM cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider property values. ADEM does have authority to regulate landfill construction and operation (including buffer zones) which directly impact property values.

VIII. Disparate Impacts

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

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated by the 2010 census block data included in **Figure 4**. The impacted census blocks are 87 to 100 percent African-American.

The designated service area for the Arrowhead Landfill is thirty-three states. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) and **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). The predominant race in these states is White. **Figures 5 and 6**. The percentage of African-Americans among the total population in the designated thirty-three state service area is only 15.1%. The percentage of African-Americans among the total population in Alabama is 26%. Inasmuch as the percentage of African-Americans impacted by the Arrowhead Landfill far exceeds the percentage of African-Americans in the service area and State of Alabama, the alleged impacts are "disparate" impacts. *See Yerkwood Landfill Complaint Decision Document* , EPA OCR File No. 28R-99-R4 at 5.

Figure 4
AFRICAN-AMERICAN POPULATION IN 2010 CENSUS BLOCKS SURROUNDING THE ARROWHEAD LANDFILL
Source: http://1.usa.gov/10MLwGe

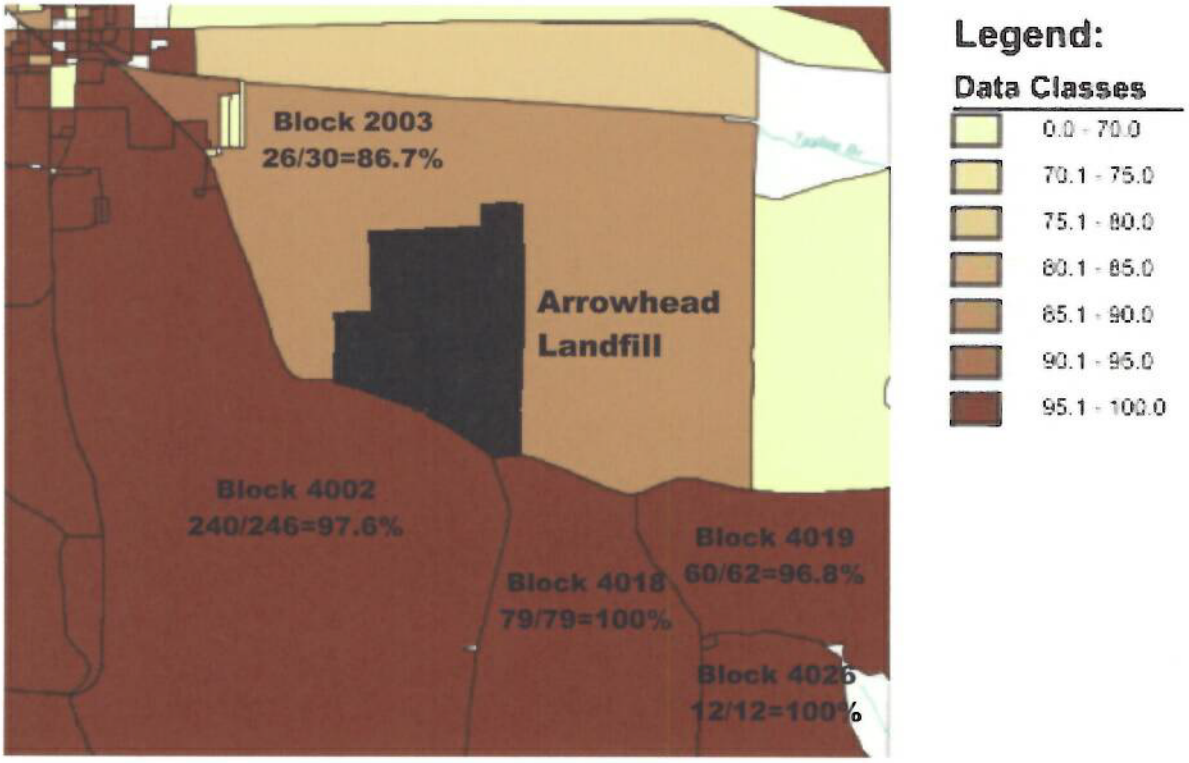


Figure 5
LARGEST RACIAL AND ETHNIC GROUPS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map

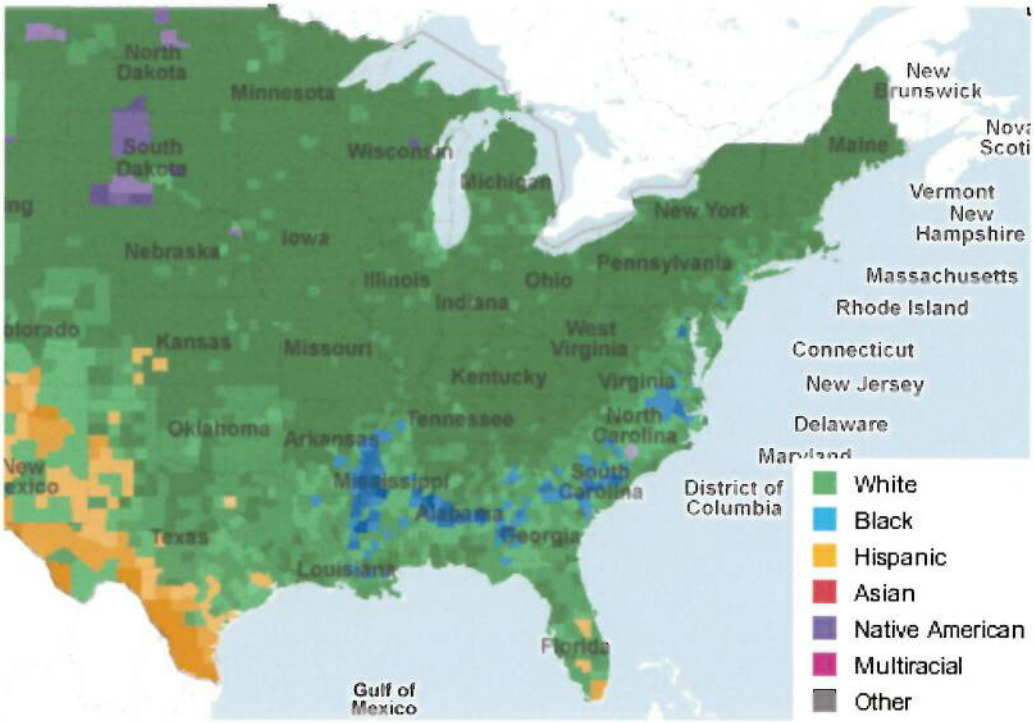
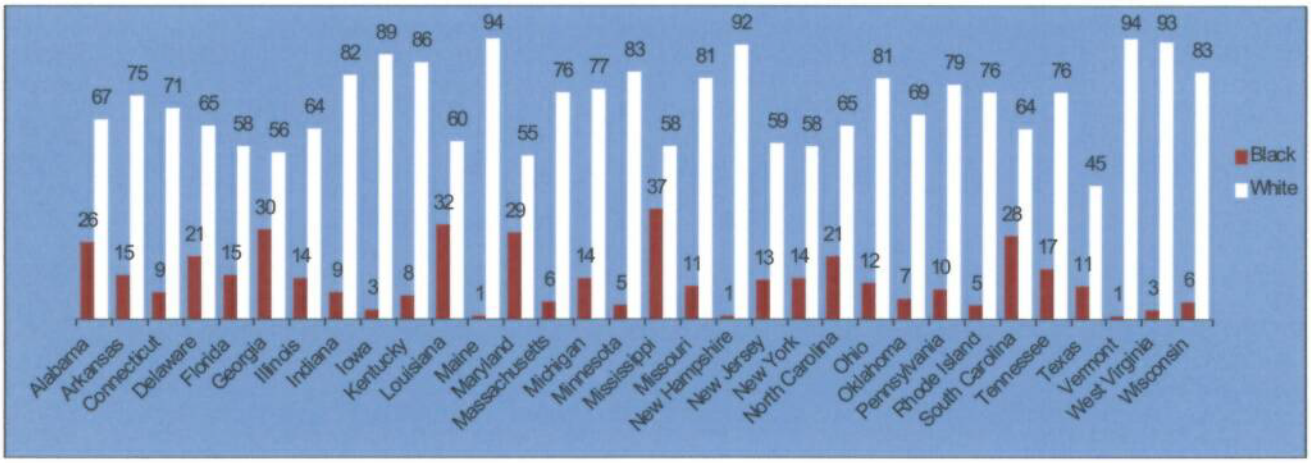


Figure 6
PERCENT AFRICAN-AMERICAN AND WHITE POPULATIONS IN SERVICE AREA STATES
Source: http://projects.nytimes.com/census/2010/map and Exhibits B and C



IX. Justification and Less Discriminatory Alternatives

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

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

Less discriminatory and practicable alternatives to the Arrowhead Landfill are available for the disposal of municipal solid waste generated in Perry County.

The BFI-Selma Transfer Station is located at 1478 Ala. Hwy. 41 in Selma, Alabama (Latitude 32.34773 ° North, Longitude 87.00067 ° West), approximately 31miles east-southeast of Uniontown. "Marion and unincorporated Perry County's use of BFI-Selma assures them access to a facility that will be able to accommodate the changing MSW needs of its residents throughout the life of this plan. * * * BFI-Selma is expected to remain an active disposal option to the City of Marion and unincorporated Perry County through 2014." **Exhibit V** (*10-Year Solid Waste Management Plan [for] Perry County, Alabama* (Nov. 2004)) at 22,. "[G]iven their market share and financial resources, BFI is not likely to run out of space to dispose of waste collected at BFI-Selma during the life of this plan." *Id.* at 38. There appear to be no more than a few residences within one mile of the BFI-Selma Transfer Station.

The Pine Ridge Landfill is located at 520 Murphy Road in Meridian, Mississippi (Latitude 32.37677 ° North, Longitude 88.61435 ° West), approximately 70 miles west of Uniontown. "The City of Uniontown send[s] waste generated within its jurisdiction and the Town of Faunsdale to the Pine Ridge Landfill. Pine Ridge is a Subtitle D facility located approximately 75 miles west of Uniontown in Meridian [Mississippi] . . .." *Id.* "Pine Ridge's Landfill Operations Manager estimated that the facility has enough remaining capacity to dispose of waste for at least the next 30 years." *Id.* at 23. There appear to be a number of residences within one mile of the Pine

Ridge Landfill along Murphy Road and Sweet Gum Bottom Road. 2010 census data for Census Blocks 106.4000 and 106.5000 indicate that the African-American population surrounding the Pine Ridge Landfill is significantly less than that surrounding the Arrowhead Landfill.

The Choctaw County Regional Landfill is located at 1106 Fire Tower Road in Butler, Alabama (Latitude 32.04541 ° North, Longitude 88.27016 ° West), approximately 52 miles southwest of Uniontown. The Choctaw County Regional Landfill is authorized to accept solid waste from all of Alabama. The Choctaw County Regional Landfill is located in an unpopulated area.

X. ADEM's Assurances and Defenses

With each application for EPA financial assistance, ADEM is required to provide assurances that it "will comply with the requirements of" 40 C.F.R. Part 7 implementing Title VI. 40 C.F.R. § 7.80(a)(1). *See* Standard Form 424B ("As the duly authorized representative of the applicant, I certify that the applicant: * * * Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; . . ..").[21] As mentioned above, 40 C.F.R. § 7.35(b) prohibits ADEM from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race.

In this case, as in others, ADEM alleges that it grants permits in accordance with applicable laws and regulations without regard to the racial composition of any impacted communities. *See* **Exhibit X** (*Letter from Lance LeFleur to Rafael DeLeon dated July 19, 2012*). This allegation is, in essence, a claim that ADEM's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize ADEM's obligation under Title VI to avoid unintentional discriminatory effects. "Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate

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[21] Effective January 23, 2013, EPA is requiring that grant recipients (including states) agree to the following grant condition:

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

Exhibit W (*Civil Rights Obligations*).

EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2 (footnote omitted).

Often, ADEM asserts that it grants permits in accordance with applicable laws and regulations ("criteria") that are designed to protect human health and the environment. Compliance with these "criteria," ADEM suggests, ensures that racial minorities are impacted no differently than other races. *See* **Exhibit X** (*Letter from Lance LeFleur to Rafael DeLeon dated July 19, 2012*). This allegation ignores the fact that members of the African-American race are disparately affected by the Arrowhead Landfill, notwithstanding ADEM's alleged compliance with the applicable criteria. **Exhibit Y** (*Draft Title VI Guidance Documents Questions and Answers*) at 4.[22]

ADEM has also been known to allege that it does not make landfill siting decisions and that its permitting of a landfill cannot cause adverse impacts on Complainants. *See* **Exhibit Z** (*Summation of Comments Received and Response-to-Comments, Proposed Arrowhead Landfill Renewal, Permit 53-03 (Sept. 27, 2011)*) ("[A]ny alleged discriminatory impact would come as a result of the actual siting of the landfill near an area whose residents are protected by Title VI. ADEM, however, does not site landfills; that responsibility lies with the local host government."). This position ignores several facts. First, the permit granted by ADEM to Perry County Associates, LLC is to construct and operate a landfill at a specific site – Sections 21, 22, 27, and 28, Township 17 North, Range 6 East in Perry County. **Exhibit B** (Permit No. 53-03, Sept. 27, 2011) and **Exhibit C** (Permit No. 53-03, Feb. 3, 2012). But for the ADEM permit authorizing construction and operation of the landfill at this specific site, adverse impacts to Complainants might not result. Second, ADEM determined that the landfill site is compliant with ADEM's "Landfill Unit Siting Standards" at Ala. Admin. Code R. 335-13-4-.01. But for ADEM's determination that the landfill site is compliant with the siting standards, the landfill might not have been constructed at the site and might not result in adverse impacts to Complainants. Finally, ADEM has imposed or failed to impose, permit conditions on the operations of the landfill that have allowed odors, leachate recirculation, minimal cover depth, minimal cover frequency, alternative daily cover, disease vectors (birds and flies), working face areas, noise,

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

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

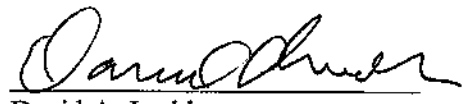
Exhibit Y (*Draft Title VI Guidance Documents Questions and Answers*) at 4.

nighttime and weekend operations, fugitive dust, minimal buffer zones and property devaluation. Operation of the landfill under these conditions causes adverse impacts to the Complainants.

XI. Request

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency - Office of Civil Rights accept this complaint and conduct an investigation to determine whether ADEM violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the issuance and modification of Solid Waste Disposal Facility Permit No. 53-03 on September 27, 2011 and February 3, 2012, respectively. If a violation is found and ADEM is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further petition the EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to ADEM, and after the conclusion of those proceedings, deny, annul, or terminate EPA financial assistance to ADEM.

Sincerely,



David A. Ludder
Attorney for Complainants

Enclosures:

Compact Disc 1 of 5 (Exhibits A thru L4)
Compact Disc 2 of 5 (Exhibits M1 thru O14)
Compact Disc 3 of 5 (Exhibits P1 thru R1)
Compact Disc 4 of 5 (Exhibits R2 thru S1)
Compact Disc 5 of 5 (Exhibits S2 thru Z)