UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

December 10, 2018

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In Reply Refer to:
EPA Complaint No. 16R-17-R4

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Re: Preliminary Findings Letter, EPA Administrative Complaint No. 16R-17-R4

Dear Ms. Engelman Lado, Ms. Aden, Mr. Fisher, Ms. Novak, and Mr. Smith:

This letter conveys preliminary findings of the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) in the administrative complaint filed with EPA on April 28, 2017, by Yale Law School Environmental Justice Clinic, the NAACP Legal Defense & Educational Fund, and Earthjustice on behalf of the Ashurst Bar/Smith Community Organization (ABSCO) against the Alabama Department of Environmental Management (ADEM). The complaint generally alleged that ADEM violated Title VI of the Civil Rights Act

of 1964, as amended, 42 United States Code 2000d et seq. (Title VI) and the EPA's nondiscrimination regulation found at 40 Code of Federal Regulations (C.F.R.) Part 7.

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 May 18, 2017, ECRCO accepted for investigation the following issues:[1]

1) Whether ADEM's issuance of the February 10, 2017 operating permit renewal for the Stone's Throw Landfill discriminated against the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7; and

2) Whether ADEM's method of administering its Solid Waste Disposal permitting program subjects the predominantly African-American residents of the Ashurst Bar/Smith community to discrimination on the basis of race in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

With respect to the first issue, ECRCO specifically focused its investigation on whether ADEM took actions related to the February 10, 2017 renewal permit[2] that treated residents of the Ashurst Bar/Smith community differently on the basis of race. In particular, ECRCO examined whether ADEM responded differently to complaints about odors emanating from the Stone's Throw Landfill raised by Ashurst Bar/Smith community residents than they did when complaints about landfill odors were made by similarly situated predominantly White communities. The evidence regarding this issue is insufficient to support a finding of intentional discrimination on the basis of race.

As to the second issue, ECRCO finds insufficient evidence of a violation with respect to whether ADEM's method of administering its Solid Waste Disposal permitting program subjects the predominantly African-American residents of the Ashurst Bar/Smith community to discrimination on the basis of race with respect to air, water and land quality and health. With respect to ADEM's method of administering its monitoring and inspection process regarding daily cover at the Stone's Throw Landfill, we find by a preponderance of the evidence that a lack of enforcement did result in adverse impacts but, because the evidence does not support that the enforcement was carried out differently at Stone's Throw Landfill than at other landfills, the adverse impacts were not disparate based on race.

ECRCO's investigation included a review of ADEM's regulations[3] and Alabama laws,[4] ADEM's publicly available documents regarding their permitting processes,[5] Stone's Throw Landfill

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[1] Letter from Lilian Dorka, Director, ECRCO, EPA, to Lance R. LeFleur, Director, ADEM, Acceptance of Administrative Complaint 16R-17-R4 (May 18, 2017).

[2] ADEM Permit no. 62-11, Permittee Name: Tallassee Waste Disposal Center, Inc.; Facility Name: Stone's Throw Landfill.

[3] ADEM Admin. Code r. §335-13 Land Division - Solid Waste Program

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

[5] *See* e.g. ADEM, Guide for Citizen Participation, http://adem.alabama.gov/moreInfo/pubs/citizensguide.pdf (Last Rev. March 2014); ADEM, Public Participation in the ADEM Rulemaking and Permitting Processes,

permitting documents for the February 2017 renewal, and various enforcement, monitoring and inspection reports. [6] In particular, ECRCO reviewed permit applications and related correspondence; monitoring data and inspection reports, operating permits, and public hearing transcripts and responses to comment for Stone's Throw Landfill and several other municipal solid waste (MSW) landfills throughout the state. ECRCO conducted interviews of Complainant's witnesses by telephone and onsite, and examined photographs submitted by Complainants. ECRCO reviewed reports and studies submitted by the Complainants and publicly available health reports. In addition, ECRCO requested and reviewed pertinent documents related to ADEM's monitoring and inspection procedures and interviewed members of ADEM staff who were involved in permitting, monitoring and inspecting permit compliance of municipal solid waste landfills, including the Stone's Throw Landfill.

ECRCO is obligated by its nondiscrimination regulation to "attempt to resolve complaints informally whenever possible."[7] In this case, ECRCO met with ADEM's Director on August 1, 2018. Among other things, ECRCO and ADEM discussed the possibility of informal resolution of this case. During that meeting, ADEM's Director stated that he had no interest in informally resolving this case through an informal resolution agreement. He stated that ADEM had done nothing wrong and expressed his desire to receive ECRCO's written findings with respect to this investigation. In addition, on December 6, 2018, ECRCO contacted ADEM to share its preliminary findings of fact and discuss recommendations to address the issues identified with respect to enforcement of the daily cover requirement. ADEM responded that it is not interested in discussing the identified issues and will wait for ECRCO's Letter of Findings.

I. Background

There are 32 municipal solid waste landfills in Alabama and 7 are in predominantly African-American communities. [8] The Stone's Throw Landfill is one of the seven.[9] The Stone's Throw Landfill is located within the Ashurst Bar/Smith community, which surrounds the Landfill. The Ashurst Bar/Smith community is an unincorporated area near the City of Tallassee and within Tallapoosa County, Alabama. The Ashurst Bar/Smith community is at least 73% Black.[10]

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http://adem.alabama.gov/moreInfo/pubs/PublicParticipation.pdf (August 2015).

[6] On November 30, 2018, ECRCO received an email from Leah C. Aden and Louis Fisher of the NAACP Legal Defense & Educational Fund, Inc., referencing EPA's Enforcement & Compliance History Online (ECHO) compliance records for the Stone's Throw Landfill. However, prior to the receipt of this email, and during the course of the investigation, ECRCO reviewed and considered all relevant regulatory compliance records for the Stone's Throw Landfill and any possible impact on this investigation and determination.

[7] 40 C.F.R. § 7.120(d)(2); Case Resolution Manual, at § 3.12 (Jan. 2017).
https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf.

[8] ADEM, Land Division, "Permitted Solid Waste Landfills in the State of Alabama," updated March 6, 2018. See at http//www.adem.state.al.us/programs/land/landforms/MSWLFMasterList18.pdf.

[9] To identify the racial characteristics of communities in proximity to landfills, EPA utilized a 1-mile radius from a latitude/longitude point within each landfill and Census 2010 SF1 block level data. Based on this analysis, seven of these 32 MSW Landfills, including Stone's Throw, are within a community which is at least 50% Black.

[10] To establish this figure, EPA utilized a 1-mile radius from the Stone's Throw Landfill. Census 2010 SF1 block level data indicates that multiple areas of the Ashurst Bar/Smith community are as high as 100% black, however other areas of the 1-mile radius encompassing the Ashurst Bar/Smith community had somewhat lower percentages. The aggregated percentage for the 1-mile radius was 73%. EPA utilized a Geographic Information System (GIS) to analyze the demographic data obtained from the Census Bureau 2010 SF1 block level data files for the state of Alabama. The GIS analysis involved: determining an appropriate latitude and longitude point for each landfill analyzed using satellite imagery, calculating the beginning area of the polygon, generate a ring or rings of the

On October 6, 2016, ADEM published the required public notice that Hodges, Harbin, & Tribble, Inc. on behalf of Tallassee Waste Disposal Center, Inc. applied for a permit to continue to operate a municipal solid waste landfill known as the Stone's Throw Landfill (Permit 62-11).[11] The renewal did not involve any proposed modifications. ADEM subsequently extended the period allotted for submission of public comments from November 17, 2016 to December 19, 2016[12].

On November 10, 2016, ADEM held a public hearing at Tallassee City Hall to receive oral testimony on the Stone's Throw Landfill permit renewal. A certified transcript of the hearing is available to the public via the ADEM eFile service.[13] ADEM published a collection of the received written comments on the ADEM eFile service on December 19, 2017[14] and a written Response to Comments on the ADEM eFile service on February 10, 2017.[15] Ultimately, the Stone's Throw Landfill permit was renewed on February 10, 2017.[16]

According to the renewed permit, the Permittee Name is Tallassee Waste Disposal Center, Inc., and the Facility Name is Stone's Throw Landfill, and has the following characteristics:

1. The waste stream for the Stone's Throw Landfill remained non-hazardous solid wastes, non-infectious, putrescible and non-putrescible wastes including but not limited to household garbage, commercial waste, industrial waste, construction and demolition debris, sludge from wastewater treatment plants, and other similar type materials. Special waste approved by ADEM may also be accepted.
2. The service area for the Stone's Throw Landfill remained all 67 counties in the State of Alabama, and three neighboring counties in the State of Georgia: Harris, Muscogee, and Troup.
3. The maximum average daily volume of waste disposed at the Stone's Throw Landfill remained 1,500 tons/day. All previously approved variances and special conditions were requested to be included in the permit renewal and then granted in the renewed permit.
4. The permitted facility consisted of 175.39 acres with 124.57 acres permitted for MSW disposal operations and 5.80 acres permitted for construction and demolition (C&D)

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required diameters; intersecting the demographics with population polygons; adding new fields to contain the post-intersect polygon area; calculating the new population values; using the statistics command to sum all demographics data; altering the number definition so that only integers are only displayed.

[11] ADEM, Public Notice (October 6, 2016), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/; File name: 14950_62-11_123_20161006_PNSW_Public_Hearing_Notice(1).pdf.

[12] ADEM, Comment Period Extension Notice, at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/; File name: 14950_62-11_123_20161117_PNSW_Public_Notice_-_Comment_Period_Extension_Notice.pdf

[13] ADEM, Public Hearing Record (November 10, 2016), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20161110_PERM_Public_Hearing_Record.pdf.

[14] ADEM, Public Comments (December 19, 2016), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20161219_CORR_Public_Comments.pdf

[15] ADEM, Response to Public Comments (February 10, 2017), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20170210_CORS_Response_to_Public_Comments.pdf.

[16] ADEM, FINAL DETERMINATION – PERMIT RENEWAL (February 10, 2017), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20170210_PERM_Renewal_Permit.pdf.

disposal operations. The Total 5.80 acres for C&D disposal operations has been closed.[17]

Stone's Throw Landfill's February 2017 renewal included the following variances and special conditions carried forward from prior requests for variances and permit modifications:

1. The Permittee is granted a variance from Rule 335-13-4-.12(2)(f) requiring a 100-foot buffer zone. The variance is only for the South and East boundary of the construction and demolition disposal area.
2. The Permittee has been approved for leachate recirculation. Leachate recirculation will be accomplished by installing small diameter polyvinyl chloride (PVC) pipes within the waste lifts similar to a field bed. The pipes will be abandoned in place as the next lift of waste is placed and new pipes will be installed in the next waste lift. The Permittee has been approved to re-circulate leachate on the working face.
3. As part of the December 17, 2008 modification, the Permittee included plans for addition of a Waste Solidification Mixing Pit to the Design and Operation Plan. This installation is not an ADEM Administrative Code Division 13 requirement.
4. As part of the April 13, 2010 modification, the Permittee included plans for addition of a temporary side slope drainage system, to control recurring side slope outbreaks, to the Design and Operation Plan. The side slope drainage system shall be installed after other conventional methods, such as a clay plug, has failed. The system will either be removed or abandoned in place as the filling sequence dictates and outbreaks are controlled.
5. The Permittee has been granted a variance from ADEM Rule 335-13-4-.22(1)(b) requiring all waste to be confined to as small an area as possible. The Permittee shall be allowed to [sic] an additional working face in order to place a fluff layer in each newly constructed cell while at the same time continuing to reach final elevation in the current cell. The purpose of this second working face is to limit types of material that might damage the liner during the initial placement of waste in the new cell. All waste shall be spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 3 to 1 or as otherwise approved by the Department. (See Section III.J [of this permit].)
6. The Permittee may utilize tarps as an alternate daily cover (ADC). The Permittee may utilize contaminated soils and petroleum contaminated soils as an alternate daily cover. The Permittee may utilize automotive shredder residue as an alternate daily cover. Contaminated soils and petroleum contaminated soils and the auto shredder residue may only be used to cover the cell's interior slopes, deck and workface. If an alternate cover is utilized, The Permittee shall be required to cover the active cell with six inches of earthen cover at the conclusion of each week's activities. (See Section III.H [of this permit].)[18]

Residents of the Ashurst Bar/Smith community submitted written comments before and after the

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[17] ADEM, FINAL DETERMINATION – PERMIT RENEWAL (February 10, 2017), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20170210_PERM_Renewal_Permit.pdf.

[18] ADEM, FINAL DETERMINATION – PERMIT RENEWAL (February 10, 2017), at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/ - File Name: 14950_62-11_123_20170210_PERM_Renewal_Permit.pdf.

permit hearing during the public comment period from October 6 to December 19, 2016. At the hearing, twelve individuals spoke and expressed concerns about the impact of the Landfill on the Ashurst Bar/Smith community. In writing and through their comments, residents stated that the Landfill created a strong, noxious odor. Residents said "I can smell the landfill when I come home from work all the way down to the gas line."[19] A local pastor stated that the congregation was unable "to have a picnic on a church grounds because the stench is so strong. . . ."[20] In written comments, residents described the "putrid smells emanating from the landfill. . . ."[21] Residents also raised concerns about the unsightly appearance of the Landfill, the lack of buffer between the Landfill and the Ashurst Bar/Smith community, the truck traffic to and from the Landfill, and a suspicion that substances released by the Landfill as run-off or groundwater discharges, or other pollutants might contaminate their air and drinking water.[22]

ADEM aggregated and categorized the comments received and responded to them, as described in greater detail below. The permit was renewed without modification on February 10, 2017, and the Stone's Throw Landfill is in operation as of this writing.

II. Legal Standards

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.[23] EPA's Title VI implementing regulation prohibits *intentional discrimination* (or *disparate treatment*).[24] The regulation, at 40 C.F.R. §7.35(a), states that "a recipient shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity."

A claim of intentional discrimination under Title VI alleges that a recipient intentionally treated individuals differently or otherwise knowingly cause them harm because of their race, color, or national origin. Intentional discrimination requires a showing that a "challenged action was motivated by an intent to discriminate."[25] Evidence of bad faith, ill will or any evil motive on the part of the [recipient] is not necessary.[26] Evidence in a disparate treatment case will generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.[27] EPA will

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[19] Transcript, ADEM Permit Hearing, November 10, 2016.
[20] Transcript, ADEM Permit Hearing, November 10, 2016.
[21] Letter from Marianne Engelmann Lado of Earthjustice, to Russell A. Kelly, Chief, Permits and Services Division, ADEM, November 17, 2016.
[22] Transcript, ADEM Permit Hearing, November 10, 2016.
[23] 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.
[24] 40 C.F.R. §7.35(a); *see, also, Alexander v. Choate*, 469 U.S. 287, 292-293 (1985); *Guardians Ass'n. v. Civil Serv. Comm'n.* 463 U.S. 582, 593 (1983).
[25] *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).
[26] *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).
[27] Congress has prohibited acts of intentional discrimination based on the protected bases identified. These protections are statutory, not constitutional, and the analysis under the civil rights statutes at issue here may differ from the different levels of protections the Equal Protection Clause provides to classifications based on sex; disability; and race, color, and national origin.

evaluate the "totality of the relevant facts" including direct, circumstantial, and statistical evidence to determine whether intentional discrimination has occurred.[28]

Under the burden shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.[29] EPA must determine that:

> (1) the complainant is a member of a protected class;
> (2) the complainant was eligible for the recipient's program, activity or service;
> (3) the complainant was excluded from that program, activity or service or was otherwise treated in an adverse manner; and
> (4) an individual who was similarly situated with respect to qualifications, but was not in the complainant's protected group, was given better treatment.

If all of these elements are present, a prima facie case of intentional discrimination has been established and ECRCO then inquires whether the recipient had a legitimate, non-discriminatory reason for the challenged policy or decision and the different treatment.[30] If the recipient articulates such a reason, EPA must then determine if there is evidence that the proffered reason is false, *i.e.*, that the nondiscriminatory reason or reasons or the defendant gives for its actions are not the true reasons and are actually a pretext for discriminatory intent.[31]

EPA's regulation also prohibits disparate impact (or discriminatory effects) discrimination.[32] The 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."

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. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

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[28] *See Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

[29] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Baldwin v. Univ. of Texas Med. Branch at Galveston*, 945 F. Supp. 1022, 1031 (S.D. Tex. 1996); *Brantley v. Indep. Sch. Dist. No. 625, St. Paul Pub. Sch., 936 F. Supp. 649, 658 n.17 (D. Minn. 1996).*

[30] The recipient's explanation of its legitimate reason(s) must be clear and reasonably specific. Not every proffered reason will be legally sufficient to rebut a prima facie case. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55, 258 (1981).

[31] *See Burdine*, 450 U.S. at 255-56; *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1162-63 (11th Cir. 2006).

[32] 40 C.F.R. §7.35(b); *see, also, Guardians*, 463 U.S. at 593 (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. at 293 (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases have cited *Guardians* in recognizing the validity of Title VI disparate impact claims. *See, e.g. Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995) (internal citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (internal citations omitted); *Larry P. v. Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984); *see also* U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 8 (January 18, 2017). https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

(1) identify the specific policy or practice at issue;
(2) establish adversity/harm;[33]
(3) establish disparity;[34] and
(4) establish causation.[35]

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.[36] 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. 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.[37]

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.[38] "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.[39] The analysis requires balancing recipients' interests in implementing their policies with the substantial public interest in preventing discrimination.[40]

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

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[33] 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, at 18, fn. 41.
[34] 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).
[35] *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").
[36] *Lau v. Nichols*, 414 U.S. 563, 568 (1974).
[37] *See, e.g. , Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).
[38] *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, 254 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973).
[39] *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).
[40] *See*, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, https://www.justice.gov/crt/fcs/T6Manual7#U.

less adverse impact. In other words, are there less discriminatory alternatives?[41] 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.[42]

III. The Issues Investigated

A. Whether ADEM's issuance of the February 10, 2017 operating permit renewal for the Stone's Throw Landfill discriminated against the predominantly African-American residents of the Ashurst Bar/Smith community on the basis of race in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

ADEM's Response to Community Complaints About Odors and Pests from Stone's Throw Landfill

ECRCO analyzed the issue of whether ADEM discriminated against Ashurst Bar/Smith community residents on the basis of race in how it responded to complaints about odor and pests at the Stone's Throw Landfill under the *intentional discrimination* (or *disparate treatment*) standard.[43]

ADEM's Treatment of a Similarly-Situated Community

Because the residents of the Ashurst Bar/Smith community complained to ADEM that they were being subjected to excessive odor and pests from Stone's Throw Landfill, and because of the connection between those alleged harms and the use of daily cover outlined above, EPA investigated whether ADEM treated the residents of the Ashurst Bar/Smith community the same as residents of other, non-predominantly African-American communities near a landfill with respect to complaints about enforcement of daily cover permit requirements.

During the investigation, ECRCO identified Eastern Area Landfill as an MSW landfill which was permitted to accept the same type of waste as was Stone's Throw Landfill at a similar scale,[44] which was located proximate to a predominantly white neighborhood[45] and which was subject to enforcement activity by ADEM in response to complaints related to the application of daily cover.

Specifically, ECRCO determined that in mid-December, 2012, ADEM received three complaints

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[41] *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, at 9.

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

[43] *See, e.g. Alexander v. Choate*, 469 U.S. at 293 (1985); *Guardians Ass'n. v. Civil Serv. Comm'n.* 463 U.S. 582 (1983).

[44] Eastern Area Landfill was permitted to receive 1200 tons per day of solid waste while Stone's Throw Landfill was permitted to receive 1500 tons per day.

[45] The population residing within a 1mile radius of Eastern Area Landfill was 23% Black while the population residing within 1miles of the Stone's Throw Landfill was 73% Black, Proximity demographic calculations and GIS mapping for Eastern Area Landfill using Census 2010 SF1 data for the state of Alabama.

from members of the Magnolia Place homeowners' association (HOA).[46] Magnolia Place is a subdivision within sight of the landfill. The letters alleged that the operators of Eastern Area Landfill failed to apply daily cover and that, as a result, the landfill was "unsightly, smelly and the many vultures flying over make the area more noticeable."[47] On December 20, 2012, the HOA President sent ADEM an e-mail which stated, "I understand that Brent Watson has been assigned to this case." The HOA president forwarded date and time stamped photographs of hawks flying low over Eastern Area Landfill, allegedly hunting rodents.[48] On January 3, 2013, an ADEM inspector conducted a "complaint inspection" of the landfill and noted that waste was visible. The inspector, however, attributed this to rain which she thought "had caused cover to wash off some of the slopes."[49] The report was shared with the HOA president, who had filed one of the complaints. The HOA president filed an additional complaint with ADEM, dated April 25, 2013, stating that Eastern Area Landfill was not using daily cover as required. This letter was accompanied by multiple date and time stamped photographs of exposed waste visible from the Magnolia Place subdivision outside of the landfill's hours of operation.[50] An ADEM inspector conducted a complaint investigation on May 29, 2013.[51] As a result of this inspection, a warning letter was issued to the City of Birmingham, the entity which owned and operated the landfill. The letter stated that the "Department personnel documented that slopes were not adequately covered," as is required by regulation "to control disease vectors, fires, odors, blown liter and scavenging."[52] Between May 2013 and June 2014, ADEM inspected Eastern Area Landfill on a monthly basis.

After an inspection on August 12, 2013, ADEM issued a Notice of Violation to the City of Birmingham, citing them for failing to comply with daily cover requirements. On September 2, 2014, ADEM entered into a consent decree with the City which included a fine of $5,000.

Eastern Area Landfill differs from Stone's Throw Landfill in that the communities located within 1 mile of Eastern Area Landfill consist of predominantly non-Black residents. Within 1 mile of the Eastern Area Landfill, the population is 23% Black as compared to the population within 1mile of Stone's Throw, which is 73% Black. Moreover, the subdivision which elevated concerns about Eastern Area Landfill to ADEM, Magnolia Place, is located in a census tract which is less than 1% Black.[53]

ECRCO asked ADEM to explain the apparent difference in their response to complaints received from residents of Magnolia Place about the Eastern Area Landfill and complaints made by residents of the Ashurst Bar/Smith community during the re-permitting process for Stone's Throw. ADEM representatives stated that the agency responds differently to complaints received through the Complaint website or through correspondence than they do to complaints

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[46] Complaints filed through ADEM e-file records, dated 12/15/2012, 12/16/2012, and 12/19/2012.
[47] Complaint filed by President of Magnolia Place HOA, ADEM eFile record, dated 12/19/2012.
[48] ADEM e-file record, dated December 20, 2012.
[49] ADEM e-file record, Inspection Form dated January 3, 2013.
[50] Complaint filed through ADEM e-file record, dated April 25, 2013.
[51] ADEM e-file record, Inspection Form dated May 29, 2013.
[52] Letter from Brent Watson, Chief, Enforcement and Remediation Section, Solid Waste Branch, ADEM, to Mr. Adlai Trone, dated May 31, 2013.
[53] Federal Financial Institution Examination Council, data source https://geomap.ffiec.gov/FFIECGeocMap/GeocodeMap1.aspx. Census Tract is 13820-01-0730-0107.03.

received during the permitting process. In particular, ADEM representatives noted that complaints received outside of the permitting process are typically more specific as to the time that a problem was observed and the nature of the problem. ADEM representatives maintained that the comments received during the public hearing for the permit renewal of the Stone's Throw landfill were too general to be actionable.

Furthermore, ADEM has asserted that Eastern Area Landfill had "numerous multimedia compliance issues over the last several years." ADEM also stated that the Eastern Area Landfill "should not be considered a 'typical' landfill with respect to compliance or necessary enforcement."[54]

ECRCO's review of the comments provided by the Ashurst Bar/Smith community to ADEM during the Stone's Throw public hearing supported that the comments did not provide ADEM with specific dates of alleged permit violations. During the investigation members of the Ashurst Bar/Smith community were asked if they had ever filed a formal environmental complaint with ADEM about excessive odor or other specific problems related to the Stone's Throw Landfill. None of the Complainant witnesses interviewed claimed to have ever filed a formal environmental complaint about the Landfill with ADEM.[55] In addition, Complainants did not submit to ADEM the photographs they shared with ECRCO.[56]

Also, ECRCO reviewed a sample of ADEM's record of permitting, inspecting and responding to complaints about the 32 MSW landfills operating within Alabama. Although the investigation revealed other instances of neighbors to landfills complaining during the permitting process,[57] ECRCO found no instance of ADEM responding to concerns raised during the permit renewal process by taking specific actions such as additional inspections. This was true even when the complaints raised during the permitting process originated from a predominately White community.

Accordingly, the evidence is insufficient to establish that a similarly-situated, predominantly non-Black community was treated differently by ADEM than it treated the Ashurst Bar/Smith community with respect to its response to complaints about daily cover permit requirements. Because the similarly-situated requirement was not established, and therefore no prima facie case of intentional discrimination, ECRCO did not examine the other elements of the intentional discrimination burden-shifting framework.

B. Whether ADEM's method of administering its Solid Waste Disposal permitting

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[54]Email from Shawn Sibley, ADEM attorney, to Betsy Biffl, EPA attorney advisor, dated November 28, 2018 (attaching documentation concerning enforcement actions by ADEM).

[55]Witness interviews, November 8, 2017; November 13, 2017; November 14, 2017; July 31-August 2, 2018.

[56]Witness interviews, November 8, 2017; November 13, 2017; November 14, 2017; July 31-August 2, 2018.

[57] For example, during the most recent permit renewal process for the Pineview Landfill, the president of the Citizens Advisory Committee wrote to ADEM on February 17, 2015 with a complaint of "dust, odors, road conditions, trash on the road and the suffering of the elderly in our community," in relation to the landfill. E-File records support that ADEM took no action in response to this complaint. Less than 1% of the population living within 1 miles of Pineview Landfill are Black. Proximity demographic calculations for Pineview Landfill using Census 2010 SF1 data for the state of Alabama. U.S. Census Bureau, https://www2.census.gov/census_2010/04-Summary_File_1/Alabama/.

program subjects the predominantly African-American residents of the Ashurst Bar/Smith community to discrimination on the basis of race in violation of Title VI of the Civil Rights Act and EPA's implementing regulation at 40 C.F.R. Part 7.

1. Environmental and Community Health Concerns Raised by the Complainants

Complainants raised concerns during the investigation about ADEM's decision to renew the permit at Stone's Throw Landfill and that decision's impact on air, water and land quality and the health of Ashurst Bar/Smith community residents. ECRCO analyzed these concerns using a *disparate impact* or *discriminatory effects* standard.

Health-Related Impacts

Ashurst Bar/Smith community residents documented within the complaint[58] and the community health surveys[59] allegations of chronic illnesses (e.g., asthma, cancer, chronic obstructive pulmonary disease, and diabetes) reportedly related to the Landfill's operations. ECRCO conducted telephone and onsite interviews with the residents to verify the information received, obtain clarification, and to seek additional evidence.[60]

As part of this investigation of the Ashurst Bar/Smith community's health concerns, ECRCO did not conduct independent health evaluations but conducted a literary search of publicly available health documentation specific to the State of Alabama[61] and Tallapoosa County.[62] Limited health documentation or references resulted from this search with the most recent documentation for Tallapoosa County, Alabama, dated April 2013. Each of the health references contrasted health statistics to race, age, gender, and components of socio-economic status and compared them to state and national statistics. Likewise, the health reports included conclusions linking the differences in the State of Alabama's county health indicator statistics to individual health practices, social and economic factors, human behavior, and access to health care.[63] Each report generalized the data for the entire county and not to unique areas within county boundaries. Furthermore, due to the limited number of statistical events in the health indicator data (rates per 100,000 population), some of the reported health indicators for Tallapoosa County were not statistically reliable in contrast to state or U.S. populations estimates and none of the health indicator information were specific to Ashurst Bar Smith community. Based on the publicly available health documentation, ECRCO could not establish through these health reports and

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[58] EPA Administrative Complaint No. 16R-17-R4 filed on April 28, 2017, by Yale Law School Environmental Justice Clinic, the NAACP Legal Defense & Educational Fund, and Earthjustice on behalf of the Ashurst Bar/Smith Community Organization against the Alabama Department of Environmental Management.

[59] "Air Quality Impacts of the Stone's Throw Landfill in Tallassee Alabama: A Pilot Study," Courtney Ahern, Mikaela Bradbury, Laura Brush, Katherine Mertens and Jessica Swindon, received October 12, 2018, pages 72 – 86.

[60] Telephone interviews occurred on November 8, 2017 and November 13, 2017. Onsite interviews occurred July 31, 2018 through August 1, 2018.

[61] Alabama Department of Public Health's 2017 Annual Report.

[62] The Office of Primary Care and Rural Health, Alabama Department of Public Health and The Alabama Rural Health Association's Selected Health Status Indicators for Tallapoosa County, April 2013; and A Robert Wood Johnson Foundation's 2018 County Health Rankings Report.

[63] The Office of Primary Care and Rural Health, Alabama Department of Public Health and The Alabama Rural Health Association's Selected Health Status Indicators for Tallapoosa County, April 2013; and A Robert Wood Johnson Foundation's 2018 County Health Rankings Report, p. 6.

statistics that the operations of the Stone's Throw Landfill have direct health impacts on the Ashurst Bar Smith community.

Complainants additionally submitted the results of a pilot study of the health and air quality impacts from the Stone's Throw Landfill. The pilot study completed by graduate students in the Yale School of Public Health and in collaboration with the Environmental Justice Clinic of Yale Law School was conducted between March 12, 2018 and March 23, 2018. Although the report concludes that "[t]he research presented in this pilot study is highly preliminary and limited,"[64] the pilot study "aimed to provide a preliminary baseline assessment of ambient air quality and community health in the Ashurst Bar Smith community..."[65] The pilot study assessed air quality, monitored ambient noise levels, conducted a vehicle count along Washington Boulevard, conducted a community health survey, and reviewed local area ordinances and community planning documentation to identify potential community enhancement recommendations.

The pilot air quality study monitored six (6) locations within a 1.5-mile radius of the landfill for hydrogen sulfide (H_2S), particulate matter [less than 2.5 micrometers ($PM_{2.5}$)], asbestos, and total non-methane volatile organic compounds (NMVOCs). The air quality results revealed that the H_2S levels ranged from 0 parts per billion (ppb) to 5 ppb; the $PM_{2.5}$ concentrations ranged from 0 to 58.5 micrograms (one-millionth of a gram) per cubic meter ($\mu g/m^3$), with average concentrations ranging from 3.2 to 14.5 ug/m^3; and the one-day sampling for asbestos revealed no results. The pilot study contrasted the $PM_{2.5}$ air quality results to the World Health Organization's 2005 guideline limits[66] and compared the H_2S results to olfactory effects per the Agency for Toxic Substances and Disease Registry (ATSDR). The minimum monitoring requirements per the National Ambient Air Quality Standards (NAAQS) for $PM_{2.5}$ are based on a combination of factors such as population, the level of monitored pollutants, and the Core Based Statistical Area boundaries as defined in the latest U.S. Census information.[67] Currently, Tallapoosa County does not meet the Core Based Statistical Area and is not required to have $PM_{2.5}$ monitors per the NAAQS.[68] Also, although the results for NMVOC levels ranged from 0 ppb to 4336 ppb, there are no federal standards for NMVOC.

Currently, the Municipal Solid Waste Landfill New Source Performance Standards (NSPS) and Emission Guidelines (EG) regulate sources with a design capacity greater than or equal to 2.5 million megagrams (Mg) and 2.5 million cubic meters (m^3). If such sources emit more than 50 Mg/yr. of non-methane organic compounds (NMOC), they are required to comply with the emission control requirements of the NSPS (new landfills) or the EG (existing landfills). The

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[64] "Air Quality Impacts of the Stone's Throw Landfill in Tallassee Alabama: A Pilot Study," Courtney Ahern, Mikaela Bradbury, Laura Brush, Katherine Mertens and Jessica Swindon, received October 12, 2018, page 5.
[65] "Air Quality Impacts of the Stone's Throw Landfill in Tallassee Alabama: A Pilot Study," Courtney Ahern, Mikaela Bradbury, Laura Brush, Katherine Mertens and Jessica Swindon, received October 12, 2018, p. 8.
[66] World Health Organization. (2005). "WHO Air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulfur dioxide: Global update 2005." (http://apps.who.int/iris/bitstream/handle/10665/69477/WHO_SDE_PHE_OEH_06.02_eng.pdf?sequence=1&isAllowed=y); p. 9. World Health Organization's 2005 guideline limits the maximum exposures of $PM_{2.5}$ is 10 $\mu g/m^3$ annual mean and 25 $\mu g/m^3$ 24-hour mean.
[67] Core Based Statistical Area (CBSA) is a collective term for both Metropolitan Statistical Areas (MSA) and Micropolitan Statistical Areas (μSA).
[68] 40 C.F.R. Part 50.

Stone's Throw Landfill has a landfill gas (LFG) collection system constructed and implements landfill gas flares to control landfill gas emissions and reports landfill emissions to ADEM on a quarterly basis. ECRCO examined quarterly landfill gas monitoring reports for Stone's Throw Landfill and did not identify any evidence of noncompliance relating to the landfill gas collection system.

Based on the foregoing evidence, ECRCO was not able to establish a causal connection between the adverse health harms alleged and ADEM's method of administering the permitting program in regard to the operations of the Stone's Throw Landfill. As causation was not established, and, therefore no prima facie case of discrimination, ECRCO did not examine adversity or disparity.

Water Related

Complainants raised concerns[69] about their drinking water, stating that water authority supplied water was discolored and had a taste they did not like and that they questioned whether it was safe.[70] During this investigation, review of the survey of residents submitted by complainants and interviews conducted with residents revealed that all residents are currently using water authority supplied drinking water and have been doing so for more than a decade.[71] Though several complainants and other local residents interviewed noted that their water service is provided through the Wall Street Water Authority, the actual water supplied to the Ashurst Bar/Smith community is provided by Walnut Hill Water Authority, who receives its water from the Adam's Filter Plant located in Alexander City.[72] Alexander City is approximately 55 miles from Stone's Throw Landfill and the source of Alexander City's water is the Tallapoosa River (Lake Martin). As ECRCO has been able to confirm that the source of the public drinking water that Ashurst Bar/Smith community resident receive is derived from the Adam's Filter Plant located in Alexander City, the evidence does not establish that the alleged harms regarding the drinking water were caused by ADEM's method of administering its permitting program. We note also that, per the Alexander City's Water Department's 2018 Annual Water Quality Report (Testing Performed January through December 2017), "[b]ased on the results of the

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[69] Resident Interviews, July31 – August 2, 2018.

[70] Complainants also raised in their complaint that that they had previously used well water and could no longer safely do so and that they were, as a consequence, burdened by the cost of public drinking water and the additional cost of bottled water for persons who were dissatisfied with the taste or appearance of the public drinking water. Complainants did not allege that ADEM treated their community differently than predominantly White communities with regard to protection from water contamination but did allege that existence of the Landfill within their community had an impact on their access to clean drinking water. The issue of whether the Stone's Throw Landfill had caused water quality impacts to the surface or groundwater was examined during ECRCO's investigation of EPA Complaint #06R-03-R4. During that investigation, ECRCO found that in October 2001 prior to the permitting of the landfill now known as Stone's Throw Landfill, a preliminary environmental investigation report and a hydrogeological evaluation were completed. (*See* Mid-South Testing, Inc. Tallassee Waste Disposal Center Inc., Preliminary Environmental Assessment prepared for Whatley Drake LLC (August/September 2000) and Southern Environmental Resources, Inc. Tallassee Waste Disposal Center Inc., Hydrogeologic Evaluation (June 14, 2000)). The report documented pre-existing impacts from metals and various pollutants to a local naturally occurring spring and residential drinking water wells located south, and southeast respectively from the Landfill. Based on these assessments, consultants recommended an alternative source of drinking and domestic water for some Ashurst Bar/Smith community residents. Public water service is available for the overall community beyond these individuals.

[71] Resident Interviews July 31 - August 2, 2018.

[72] Review of Walnut Hill Water Authority's 2018 Consumer Confidence Report.

susceptibility analysis conducted for the potential contaminants identified in our assessment area, our source water has a low susceptibility to contamination." The Alexander City Water Department further documents that its "drinking water meets or exceeds federal and state requirements."

Therefore, ECRCO was not able to establish a causal connection between the adverse harms alleged and ADEM's permit renewal actions or ADEM's monitoring of the operations of the Stone's Throw Landfill. As causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine adversity or disparity.

Truck Traffic Related

Finally, community members consistently complained about the impact of heavy truck traffic on the rural roads serving their community. Complainants interviewed stated that they feared for their children's safety when boarding and disembarking from school buses because of truck traffic into and out of the landfill. Complainants stated that the heavy trucks traveling to the landfill damaged their roads and that trash blew off of the trucks and littered the landscape. Complainants also stated that they were awakened in the early morning hours by the noise of trucks traveling to the landfill. A school bus driver interviewed by ECRCO described having to pull her bus off the road to allow trucks headed to the landfill to pass her.[73] The President of ABSCO stated in a letter to ADEM in advance of the re-permitting "it has been reported by school bus drivers and residents that they are often run off the Washington Boulevard by landfill traffic. It is a known fact that these tractor trailers exceed the 25-mph posted speed limit on Washington Boulevard."[74] Complainants also submitted photographs to ECRCO (but apparently not to ADEM) from the time period of the re-permitting process documenting such truck traffic. Additionally, as part of the previously mentioned pilot study, complainants included a truck count along this portion of Washington Boulevard.

As ADEM noted in the Response-to-Comments previously cited, the "Tallapoosa County Commission originally granted local approval to this landfill on June 10, 1991," and entered into a host agreement with the operator. The Host Agreement between the Landfill operator and the County set forth arrangements to address the impact of Landfill operations on local roads. Specifically, the Host Agreement specified that the customers of the Contractor (the Landfill operator) would be required to use a previously agreed upon, authorized route; that the Contractor would maintain the roads utilized by Landfill customers, and that the contractor would "clean up any litter along Washington Road from Highway 49 to the entrance of the landfill not less than twice weekly." ADEM's permitting regulations require that they verify that a County or other local host government agree that a landfill can operate within their jurisdiction. ADEM does not, however, review or enforce the terms of a Host Agreement that has been entered into by a landfill operator and a local government. ADEM also does not monitor or enforce noise levels as part of their landfill permitting program – this is incumbent on local governments.

As a result, ECRCO was not able to establish a causal connection between the adverse harm

[73] ECRCO interview of school bus driver conducted November 14, 2017.
[74] Letter from ABSCO to Russell Kelley dated November 15, 2016, page 5.

alleged regarding truck traffic and ADEM's permit renewal actions or ADEM's monitoring of the operations of the Stone's Throw Landfill. As causation was not established, and therefore no prima facie case of discrimination, ECRCO did not examine disparity or adversity.

Diminution in Home Values

Complainants raised concerns related to diminution of property values due to ADEM's renewal of the Stone's Throw Landfill permit. 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.[75] ECRCO determined that it would not investigate substantively the alleged harm of diminution of property values, in this case. There is insufficient evidence supplied by Complainants to suggest that ADEM's permitting actions themselves resulted in a sufficiently significant harm with regard to property values.

2. *Daily Cover*

Finally, ECRCO specifically analyzed the issue of ADEM's method of administering the monitoring and inspection of daily cover at the Stone's Throw Landfill under its Solid Waste Disposal permitting program. ECRCO reviewed this issue using a *disparate impact* or *discriminatory effects* standard.

The Alleged Harms

In an informal survey of forty residents attending a community meeting on the topic of the Stone's Throw Landfill, all but two of the forty indicated that odor from the Landfill was a problem, using terms such as "odor of decay, gas, rot and dead animals, during all times of day."[76] In written and oral comments prior to the permit renewal hearing, residents of the Ashurst Bar/Smith community complained to ADEM about odor from Stone's Throw Landfill and about the attraction of vultures. Residents stated that "[t]here is always a strong pungent smell in the air around the landfill and throughout the community. There is a chemical smell that will burn your eyes and nostrils."[77] Residents stated that the odor from the Landfill was sufficient to cause them to curtail all outdoor activities.[78] In interviews conducted by EPA during the investigation, residents reiterated that they could not enjoy spending time outside and stated that the odor was strong enough to make them nauseous.[79] Residents also complained to ADEM that buzzards were attracted to the landfill and congregated in their yards and on top of their houses.[80] On December 16, 2016, ADEM's land division received letters from the

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[75] *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).

[76] Response of Resident to survey designed and circulated by Earthjustice during a community meeting on March 29, 2016, submitted to ECRCO by Earthjustice on January 16, 2018.

[77] Letter from Ashurst Bar/Smith community Resident to Russell Kelly, Chief, ADEM permit section, dated 12/17/2016, submitted during the public comment period prior to the Stone's Throw Landfill permit renewal.

[78] Transcript, ADEM Permit Hearing, November 10, 2016.

[79] Transcript, ADEM Permit Hearing, November 10, 2016.

[80] Response by "Congregant #3" to Earthjustice Survey submitted to ECRCO January 16, 2018.

N.A.A.C.P. Alabama Annual Conference and from Baskin Chapel A.M.E. Zion Church, expressing concern over the Stone's Throw Landfill's "[f]ailure to haul new dirt from outside of the landfill to cover trash daily" and "[f]ailure to plant sod or grass" to cover filled cells within the Landfill, and complaining of the "putrid" odor, dust and vultures associated with the Landfill.[81]

ADEM acknowledged receipt of community concerns about inconsistent use of daily cover at Stone's Throw Landfill in its "Response-to-Comments," dated February 10, 2017 that were distributed to the community in tandem with the announcement of the renewal of the Stone's Throw Landfill permit. Based on ECRCO's review of ADEM's permit hearing documents for the Stone's Throw Landfill, ADEM aggregated the comments received during the hearing process, grouped them into categories by the type of issues raised in the complaint and responded in writing to all persons who provided their name and address at the hearing. In their "Response to Comments" on the topic of odor, ADEM wrote "[o]dor and disease vector issues that may result from landfill operations are controlled, in part, by meeting the daily cover requirements."[82] ADEM stated further that "ADEM Admin. Code r.335-13-4-.22(1)(a)1 requires a minimum of six inches of compacted earth or other specifically approved alternative cover materials shall be added at the conclusion of each day's operation to control disease vectors, fires, odors, blowing litter and scavenging." Further, ADEM wrote "The Department conducts at least quarterly Solid Waste inspections of the landfill to ensure compliance with the terms and conditions of the permit."[83]

Facially Neutral Policy or Practice

Given the harms alleged by complainants, (odor and attraction of pests) and the connection ADEM explicitly makes between the use of daily cover and the mitigation of these harm, ECRCO identified ADEM's obligation under its Solid Waste Disposal permitting program to monitor through inspection Stone's Throw Landfill's adherence to permit requirements with respect to daily cover as the facially neutral policy to be evaluated. ECRCO has considered whether evidence demonstrates that this facially neutral policy is causing an impact on the Black residents of the Ashurst Bar Smith community who live in proximity to the Stone's Throw Landfill.

In their complaint to ECRCO, Complainants described a variety of harms they had experienced and which they attributed to the proximity of Stone's Throw Landfill to their community. The investigation sought to establish whether ADEM's inspection procedures for the Stone's Throw Landfill addressed or required mitigation of odors and the related attraction of pests (such as

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[81] Letter dated December 16, 2016, from Leon Henderson, to Russell A. Kelly, ADEM Permits and Services Division.

[82] Response to Comments, dated February 10, 2017, at 1. EPA has also noted the connection between consistent use of daily cover and a reduction in odor and pest attraction. Background documents which were relied upon when EPA's Resource Conservation and Recovery Act (RCRA) regulations were drafted state that, "Daily cover helps to control disease vectors by curbing birds, insects and rodents. Daily cover prevents direct contact of wind and disposed waste and thereby reduces odors and air emissions that might be caused by daily disposal of waste." (US. EPA, 1988b) – Memorandum re: Daily Cover Requirements for MSWLFs, July 24, 1997, RCRC Dockets F-97-FLXF-FFF & F-87-FLXP-FFFF.

[83] Response to Comments dated February 10, 2017, at 1.

buzzards) by ensuring that permit requirements were enforced by ADEM staff with respect to daily cover.

ECRCO's investigation also found that residents of the Ashurst Bar/Smith community had observed that waste delivered to the Stone's Throw Landfill was left uncovered overnight and/or over the weekend. Residents reported seeing uncovered waste as they traveled to and from work in the evening and or in the early morning, when the Landfill would not be expected to be in operation.[84] To support their observations, complainants submitted to ECRCO photographs of Stone's Throw Landfill outside of the hours of operation for waste acceptance with waste not covered. In addition, complainants provided a photograph of a tarp in use at Stone's Throw which contained a large rip, allowing waste to remain uncovered.[85]

During this investigation, ECRCO examined how ADEM conducts inspections to determine whether daily cover is being applied in compliance with permit requirements. ECRCO reviewed reports of inspections of Stone's Throw Landfill conducted by ADEM inspectors and interviewed ADEM staff responsible for conducting and overseeing the inspections. ECRCO asked ADEM whether it increased or altered its monitoring or inspection practices of Stone's Throw Landfill in response to the concerns raised by the Ashurst Bar/Smith community and others during the permit renewal process. The ADEM representatives interviewed stated that they had not changed the frequency or any other aspects of their inspection process at the Stone's Throw Landfill as a result of the comments submitted during the permitting process. Instead, ECRCO's investigation revealed that the Stone's Throw Landfill inspections were conducted during business hours, when the Landfill was in operation. ADEM inspectors stated that, in general, inspections are conducted by utilizing a checklist which inspectors complete by checking either "yes" or "no" to questions about "General Operational Requirements for All Landfills." Questions contained on the form which relate to daily cover include "[a]lternative daily cover approved or used," and "all waste covered daily with 6 inches soil or alternative cover." ECRCO reviewed the inspection reports related to Stone's Throw Landfill and confirmed that this was the process used for these specific inspections. In each of the Stone's Throw Landfill inspection reports reviewed by ECRCO, the inspectors checked "yes" to indicate that daily cover was in use.[86]

During interviews, ADEM staff confirmed that, with respect to Stone's Throw Landfill, inspections did not take place before or after the Landfill's operating hours for waste acceptance so that the application of daily cover was not witnessed.[87] A review of records showed that between 2015 and October 2018, ADEM had not conducted an inspection at Stone's Throw Landfill outside of ADEM's normal operating hours to assess whether the facility was complying with daily cover requirements. On November 13, 2018, however, after being told of

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[84] For example, residents submitted photographs to ECRCO showing visible exposed waste at Stone's Throw Landfill at approximately 6:10 pm on March 17, 2016; at about 6:30 p.m. and 7:00 p.m. on April 4, 2016; at 6:49 p.m. on March 15, 2018; at 7:50 pm on July 11, 2018; at 7:12 a.m. on July 12, 2018 and at 6:12 a.m. on July 13, 2018. Additionally, another resident reported seeing exposed waste on the grounds of the Landfill while traveling from home at 6:45 in the evening in May 2018.

[85] Complainants have never represented to ECRCO that this and other photographs were provided to ADEM.

[86] See Inspection Reports, Stone's Throw Landfill, at ADEM Enforcement and Compliance Information eFile, http://app.adem.alabama.gov/eFile/.

[87] ADEM response to ECRCO's Request for Information dated July 24, 2018.

photographs provided by complainants to ECRCO, ADEM inspectors did conduct an inspection of the daily cover in use at Stone's Throw Landfill before the landfill's normal operating hours. During that inspection they were able to observe daily cover in use and inspect the integrity of the tarps. They submitted photographs from this inspection to ECRCO.

ADEM representatives also asserted to ECRCO that they can and do conduct inspections outside of ADEM working hours when they receive a community complaint about landfill operations. ADEM representatives specifically claimed to have visited a construction and demolition landfill called Eagle's Bluff on a Sunday.[88] ECRCO invited ADEM to submit records documenting inspections occurring outside of business hours and ADEM responded by providing a table of 60 actions taken after an inspection raised an issue of daily cover compliance. Timestamps indicating when the inspection took place were provided for twelve of the 60 inspections and one of the times recorded appeared to be outside of working hours (on a Sunday.)[89]

In interviews, ADEM further confirmed to ECRCO that it had no written procedure or training materials to which an inspector might refer for guidance on how to evaluate whether daily cover was being applied. When inspectors were asked how they evaluated whether a landfill operator was applying daily cover given that they were observing the landfill at a time at which the waste would necessarily be uncovered, inspectors stated that they evaluate whether the working face looks too large to be covered daily, they review landfill records, they look for evidence of daily cover, and that they ask the operator about the application of daily cover.

ADEM managers further advised ECRCO that inspectors were expected to have reviewed the permit requirements related to each landfill they were inspecting prior to going onsite. The inspectors that ECRCO interviewed, however, were not aware that the Stone's Throw Landfill had been permitted to use 'alternative daily cover' which includes the utilization of tarps. Thus, the investigation revealed that inspectors may have been arriving at inspection sites unprepared and unaware of the types of evidence to review to determine regulatory compliance with respect to daily cover.

ADEM acknowledges that the renewal permit requires daily cover at the Landfill and that daily cover mitigates odor and pests, such as buzzards. The evidence shows that ADEM and its inspectors did not ensure that daily cover was consistently and effectively applied at the Stone's Throw Landfill. Even though ADEM inspectors were expected to review the relevant operating permit and any variances granted therein, including variances related to daily cover, the evidence shows that this process was not followed on a consistent basis by staff inspecting Stone's Throw Landfill.[90] Further, as previously stated, ADEM had no written procedure or training materials to which an inspector might refer for guidance on how to evaluate whether daily cover was being applied at the Landfill. Finally, ADEM did not, with respect to Stone's Throw, at a minimum, during the period covered by this permit renewal and before November, 2018, conduct inspections before or after business hours, even though ADEM was aware of the odor and pest

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[88] November 1, 2018 interview with ADEM staff.

[89] Email correspondence from Shawn Sibley, attorney for ADEM, to Betsy Biffl, attorney for EPA, November 28, 2018, Exhibit 1. Inspection Report for Madison County District 1 Landfill, (a construction and demolition landfill.)

[90] Interviews of ADEM inspectors, conducted August 1, 2018.

complaints and concerns from the community based on comments received and acknowledged during the permit renewal process.

Based on the foregoing evidence, ECRCO is able to establish a causal connection between the adverse harms alleged and ADEM's failure to monitor and properly inspect Stone's Throw Landfill for its adherence to permit requirements with respect to daily cover. However, given the facts described above, we find there is insufficient evidence to establish a prima facie case of disparate impact discrimination. As the evidence demonstrates, ADEM uniformly applies a requirement in all RCRA Subtitle D permits, or a neutral policy, that municipal solid waste landfills must apply daily cover at the end of each operational day, and that requirement is imposed to, among other things, mitigate odor and pest. Because this neutral policy is not applied solely to Stone's Throw Landfill but, rather, is applied at all municipal solid waste landfills in the state, the Agency must look at all the communities potentially impacted by this neutral policy. That is, the Agency must consider whether other communities, beyond the Ashurst Bar/Smith community were impacted by ADEM's lack of enforcement of the daily cover requirements.[91]

The record reflects that ADEM received odor complaints about another municipal solid waste landfill (Eastern Area) regarding the facility's compliance with the application of daily cover and census data reveals that this landfill is adjacent to a predominantly white community. [92] The investigation further revealed that during the public comment period prior to the permit hearing for another MSW landfill, Pineview Landfill, a complaint was filed by the Citizens Advisory Committee, which alleged that the landfill was causing problems with odors and trash on the road – two problems that can be associated with a failure to use daily cover. The population residing within one mile of the Pineview Landfill is entirely White, according to census statistics.[93] Since ADEM's regulations and its response to comments received during the permit renewal process reveal that odor is a consequence of a lack of application of daily cover, the Agency finds that it is reasonable to assume that complaints filed by persons living in proximity to Eastern Area Landfill and Pineview Landfill also concerned ADEM's enforcement of daily cover requirements. Yet, given this small sample size (3 out of 32 MSW landfills), the Agency finds that there is insufficient evidence in this record to demonstrate that the method that ADEM employed to enforce the application of daily cover had a disparate impact based on race.[94]

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[91] See *Tsombanidis v. W. Haven Fire Dep't*, 322 F3d 565, 577 (2nd Cir. 2003)(finding the legally relevant population bases was everyone who lived in the city where the allegedly discriminatory fire code applied); *Betsey v. Turtle Creek Assoc.*, 736, F2d 983, 987 (4th Cir. 1984)(finding that because the no-children policy was only applied to Building Three the correct inquiry was whether the policy in question had a disproportionate impact on the minorities in the total group to which the policy was applied). *See also EPA's Recipient's Toolkit*, pg. 15 ("EPA must evaluate population or demographic information of the impacted community as compared to an appropriate comparison population that is similarly situated.")

[92] Utilizing geomapping, drawing a one-mile radius from a longitude/latitude point within Eastern Area and referring to census data from the 2010 census, SF1 Block level data.

[93] Utilizing geomapping, drawing a one-mile radius from a longitude/latitude point within Pineview and referring to census data from the 2010 census, SF1 Block level data.

[94] *See e.g. Valenti v. City of Chicago*, 93 Fair Employment Practice Case 689, 2004 U.S. Dist. LEXIS 2779, *15 (N.D. IL 2004)(finding that plaintiff failed to establish disparate impact because the sample size of four women having been transferred was too small to draw an inference of discrimination); *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663-64 (9th Cir. 2002)(holding that "the fact that three of the four casuals singled out for lay off that night were white" was not deserving of "much weight" because of the small sample size); *Sengupta v.*

Nonetheless, the record reveals several concerns about the consistency of ADEM's inspection programs with respect to the application of daily cover. Accordingly, the Agency encourages ADEM to address the impact of odors and pests from the Stone's Throw Landfill, on the Ashurst Bar Smith community, by conducting more thorough and consistent inspections of this Landfill with respect to daily cover. Specifically, ADEM could revise its training program for those inspectors reviewing daily cover practices at Stone's Throw Landfill, especially for those inspectors with less experience, to ensure that its inspectors more thoroughly and consistently understand their inspection responsibilities with respect to the daily cover requirements for Stone's Throw Landfill– including all other permit requirements. In addition, ADEM could develop and implement "standard operating procedures" related specifically to the inspection and monitoring of daily cover at Stone's Throw Landfill to ensure that the Landfill is consistently and appropriately applying daily cover as required by its renewal operating permit and state and federal regulations. Another possibility would be for ADEM to increase the frequency of inspections at Stone's Throw Landfill from the current practice of once a quarter and to commit to some inspections taking place outside of normal operating hours.

IV. Conclusion

Based on the foregoing, ECRCO finds insufficient evidence of discrimination under Title VI and EPA's nondiscrimination regulation with respect to whether ADEM took actions related to the February 10, 2017 issuance of the renewal permit that treated residents of the Ashurst Bar/Smith community differently on the basis of race. With respect to whether ADEM's method of administering its Solid Waste Disposal permitting program subjects the predominantly African-American residents of the Ashurst Bar/Smith community to discrimination on the basis of race with respect to air, water and land quality and health as well as with respect to whether ADEM has a method of administering its inspection and oversight of daily cover requirements that has a disparate impact on the basis of race, ECRCO finds insufficient evidence of discrimination under Title VI and EPA's implementing regulation as well.

This letter sets forth ECRCO's disposition of EPA File No. 16R-17-R4. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. If you have any questions, please feel free to contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

Sincerely,

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

Morrison-Knudsen Co., 804 F.2d 1072, 1076 (9th Cir. 1986)(holding that "statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded" (internal quotation marks omitted)).

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