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Re: **Title VI Civil Rights Complaint and Petition for Relief or Sanction – Alabama Department of Environmental Management Permitting of Stone's Throw Landfill in Tallapoosa County, Alabama, EPA File No. 6R-03-R4**

Dear Director Dorka and Ms. Biffl:

This letter has two purposes. First, it follows up on a January 19, 2017 phone call regarding the status of the investigation into allegations raised in the 2003 complaint filed by the Ashurst Bar/Smith Community Organization ("ABSCO," or the "Complainant") against the Alabama Department of Environmental Management ("ADEM") under Title VI of the Civil Rights Act of 1964 ("Title VI"). Though External Civil Rights Compliance Office ("ECRCO") staff provided information about ECRCO's investigation during the call, the opportunity for a full discussion was limited, and by emails dated January 19th and 23rd, counsel for complainants Leah Aden and Marianne Engelman Lado asked for more information about the investigation and time to provide additional evidence. We have not received additional information, and we thus write without the benefit of greater clarity on the reasoning outlined during that call. In this letter, we aim to clarify two issues that arose during the January 19, 2017, including ECRCO's interpretation of ABSCO's disparate impact claim and a factual assumption made in favor of ADEM. We also raise a new Title VI claim relating to the February 10, 2017 permit renewal of Stone's Throw Landfill.

Based on our understanding, ECRCO's analysis of ABSCO's disparate impact claim seemed based on both a mistaken legal belief and an unfounded factual assumption. As to the legal question, there seemed to be a belief that a finding of discrimination depended on the existence of

an independent obligation under state law requiring ADEM to evaluate whether the permit sought by Stone's Throw Landfill had a disparate impact. However, ADEM's obligation to evaluate whether the permit had an unjustified disparate impact springs from Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations, 40 C.F.R. Part 7. Of course, procedural irregularities such as the failure to conduct an analysis required by state law may be evidence of discrimination. As to the factual assumption, ECRCO seems to be making an assumption that the Tallapoosa County Commission ("TCC") must have evaluated racial demographics in considering the relevant Solid Waste Management Plan (SWMP) because it was legally obliged to do so. Clearly, an investigation should not assume compliance with the law. Ultimately, though, ABSCO claims that the permit had an unjustified disparate impact on the basis of race, and Complainants ask EPA to make a finding of discrimination or continue its investigation and—to that end—provide ABSCO with an opportunity to collect and submit further evidence.

Some of these questions are issues of fact: did the Tallappoosa County Commission in fact analyze whether granting or renewing permits to Stone's Throw Landfill had a disparate impact on the basis of race? Is there any evidence for the assumption that ECRCO seems to be making? Since our January conversation we have been trying to obtain County Commission Records and have submitted public disclosure requests to make sure complainants – and EPA – have the full record. In the interests of time, however, we are submitting this letter, and will supplement the record once we receive additional factual information.

Second, this letter raises a new Title VI claim against ADEM. On February 22, 2017, ADEM granted an application to renew the Landfill's permit until 2022—once again, without conducting a demographic analysis or otherwise considering whether the permit or its terms have an unjustified disproportionate impact on the basis of race in violation of the law. ADEM's failure and disregard for the mandates of Title VI and EPA's regulations is all the more egregious given that ADEM is currently the subject of a civil rights complaint because of the adverse disparate impacts of this very facility, and that ABSCO raised concerns about civil rights compliance during the

permitting process. ABSCO filed comments on November 17, 2017, which stated, among other things:

> ABSCO maintains that ADEM's grant of [the] current application would violate civil rights laws, regulations, and guidance. Indeed, the Tallapoosa County Commission's siting of the Landfill in the Ashurst Bar/Smith community and the various permits granted to the Landfill by ADEM have had and will continue to have an adverse, disproportionate, and unjustified impact on the 98% Black population that lives in closest proximity to the Landfill.

Attached please find ABSCO's comments, attached as Exhibit A. We urge EPA to find that ADEM's decision to permit the Stone's Throw Landfill in the heart of the historic African-American community of Ashurst Bar/Smith, without adequate protections for the health and well-being of the community, will have an unjustified disparate impact on African Americans in violation of Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations, 40 CFR Part 7.

I. ABSCO's Claim Arises Under Title VI Federal Law Which Prohibits Discrimination, Not State Law Requirements

A. The Complaint alleges that ADEM imposed racially disparate harms on the Ashurst Bar/Smith community.

ABSCO's Complaint alleges that ADEM administered its solid waste permitting program in a manner that failed to prevent, and imposed, a wide range of racially disparate harms on the residents of the Ashurst Bar/Smith community. First, the Complaint alleges that by failing to consider socioeconomic factors before issuing a permit renewal approval for the Landfill, ADEM engaged in a method of administering its program that had a discriminatory effect; and second, that the operation of the permit under the permit granted by ADEM has a disproportionate and adverse impact on the basis of race.

EPA agreed to investigate these allegations in a September 7, 2005 letter accepting the Complaint for investigation. EPA combined the two prongs of ABSCO's disparate impact claim,

and articulated the allegations thus: "ADEM's failure to require the Tallapoosa County Commission to properly use the siting factors in the EPA June 2003 Title VI Investigative Report has created a discriminatory effect for the African-American citizens since most of Tallapoosa County's municipal solid waste landfills are located in their communities." EPA agreed to investigate both ADEM's failure to require the Tallapoosa County Commission ("TCC") to use siting factors that consider social and economic impacts (as EPA recommended in EPA's June 2003 Title VI Investigative Report ("Yerkwood Report)"); and the discriminatory effect that failure imposed on African-Americans in the Ashurst Bar/Smith community.

In the "Yerkwood Report", EPA presciently stated that "the potential failure to consider safety or socio-economic impacts could lead to ADEM-permitted landfills that have an adverse disparate impact" on groups protected by Title VI. Yerkwood Report at 97. Indeed; this is exactly what happened with the permitting of the Landfill in the Ashurst Bar/Smith community.

As a starting point, the Complaint raises two interlocking claims of racially disproportionate harms that rest on Title VI and EPA's implementing regulations, and stem from ADEM's failure to require TCC to consider SES factors:

First, the Complaint alleged that ADEM administered its solid waste management permitting program for the residents of Ashurst Bar/Smith in a manner that failed to prevent—and increased the risk of—racially disparate harms. This included ADEM's failure to provide an adequate opportunity for comment, id. at 5; ADEM's failure to ensure that TCC considered statutorily required SES factors in approving the Permit, id. ¶ 34; and ADEM's failure to "undertake additional and independent analyses of such impacts during the State permitting phase for a facility if necessary," id. (quoting Yerkwood Report at 94).

Second, the Complaint alleged a broad range of racially disproportionate harms caused by the landfill, including water runoff, Letter from unnamed individual to redacted recipient ¶ 8 (Sept. 3, 2003) (attached hereto as Exhibit 2); heavy truck traffic and unsafe road conditions, id. at ¶¶ 10-14; proliferation of insects, rodents, and wild dogs that may serve as carriers of disease, id. at ¶ 16;

contamination of wetlands, natural springs, and groundwater, id. at ¶¶ 17, 25; negative effects on gardens and livestock, id. at ¶ 18; high methane gas emissions, id. at ¶ 19; and displacement of landowners, id. at ¶ 28. The Complaint cited census data to demonstrate that these harms have a disparate effect on African-Americans, noting that the community that surrounds the Landfill was 98% Black and that the communities serviced by the Landfill were 74% white. The Complaint questioned ADEM's racially disproportionate imposition of the burdens of waste disposal on the Ashurst Bar/Smith community:

> Tallapoosa County is a majority white county why is the African-American population bearing the burden for waste disposal in this county? The continued failure of the Commission to comply with Title VI in preventing a disparate impact on majority African-American communities (protected communities by EPA Part 7 regulation) only concerns us more that ADEM . . . are not performing its duties . . .

Id. at ¶ 32.

In sum, the Complaint contains claims under Title VI that ADEM failed to administer its solid waste management program in a manner that prevents racially discriminatory effects, and the occurrence of such racially discriminatory impacts.

B. Title VI prohibits methods of administration that fail to prevent racially disparate harms and state actions that cause racially disparate harms.

Title VI and EPA's implementing regulations prohibit ADEM from administering its programs and siting facilities in a manner that has unjustified racially disproportionate adverse impacts. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Section 602 of Title VI authorizes each federal agency to promulgate implementing regulations or issue generalized administrative orders that specify how the agency will determine whether recipients of federal funds are engaging in racially discriminatory practices prohibited by Title VI. Id. at § 2000d-1. Pursuant to these regulations, EPA promulgated implementing regulations for Title VI:

> 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, national origin, or sex, *or* have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

40 C.F.R. § 7.35(b) (2016) (emphasis added). EPA's implementing regulations impose a number of requirements on recipients of EPA funds, including, *first*, recipients must not impose racially disproportionate harms, and *second*, recipients must not "defeat[] or substantially impair[]" the objectives of such programs or activities in a racially disproportionate manner.

Recent 2017 EPA guidance re-emphasized the prohibition against disparate impact. As EPA's own External Civil Rights Compliance Office Complaince Toolkit states, "EPA's regulations clearly state that prohibitions against discriminatory conduct, whether intentional or through facially neutral means that have a disparate impact, apply to a recipient, whether committed directly or through contractual or other arrangements." U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit ("Toolkit"). EPA's implementing regulations unequivocally apply to ADEM, a recipient of federal EPA funding as defined in 40 C.F.R. § 7.35(c). See also S. Camden Citizens in Action v. N.J. Dep't of Envtl. Mgmt., 145 F.Supp.2d 446, 476 (D.N.J. 2001). Therefore, ADEM's administration of its solid waste management program should be evaluated according to the racially disproportionate harms imposed on the residents of Ashurst Bar/Smith.

C. ADEM Has Title VI Obligations Regardless of Alabama State Law.

Compliance with state law requirements is not a defense to a Title VI complaint. Title VI imposes obligations under federal law and Title VI and EPA's implementing regulations clearly contemplate that even if ADEM's permitting process for the Landfill were compliant with Alabama law, EPA can still find ADEM in violation of Title VI. As discussed in Section I.B, the statutory language of Title VI prohibits discrimination as defined by federal law, and nothing in Title VI requires the Complainant to demonstrate a violation of state law requirements, such as those enumerated in the Solid Waste Disposal Act ("SWDA") and its implementing regulations, to prove a Title VI violation. Nothing in Title VI allows ADEM to invoke its compliance with state law

requirements as a defense to a Title VI complaint. In fact, EPA's implementing regulations for Title VI, reproduced in Section I.B, clearly prohibit state actions that are racially discriminatory even if they were otherwise consistent with state law "criteria or methods of administ[ration]". 40 C.F.R. § 7.35(b) (2016).

EPA's focus on state procedures—namely, ADEM and TCC's establishment of state and local SWDAs in the early 1990s—undermines Title VI in two ways. *First*, the permit modification challenged in the Complaint took place in 2003, about a decade after TCC and ADEM had established their SWMPs. Allowing ADEM to defend itself against a Title VI claim by pointing to a causally and temporally distant SWMP process ignores the essence of the Complaint: the unbearable adverse effects of the Landfill that the Ashurst Bar/Smith community endures every day.

Second, EPA's interpretation is inconsistent with the "general . . . application and national . . . scope" of the 1964 Civil Rights Act. H.R. Rep. No. 88-914, at 18 (1963). This framework was established for a remedial purpose, because "it ha[d] become increasingly clear that progress has been too slow and that national legislation is required to meet a national need." Id. As the United States Commission on Civil Rights noted in a 1963 report that helped drive contemporary legislative efforts, many states were complicit in discrimination across a wide array of government functions including education, employment, housing, the administration of justice, and the provision of health facilities and services. See U.S. Comm'n on Civil Rights, Civil Rights '93: 1963 Report of the United States Commission on Civil Rights (1963). Against this backdrop, Title VI was designed to prohibit such discrimination "wherever Federal funds go to a State agency which engages in racial discrimination" and "insure the uniformity and permanence to the nondiscrimination policy." 110 Cong. Rec. 6544 (statement of Sen. Humphrey). Simply, Title VI applies uniformly to discriminatory actions throughout the United States, regardless of whether states approve such actions.

For these reasons, we urge EPA to center its investigation on the discriminatory harms alleged in the Complaint and ADEM's abject failure to administer its solid waste permitting program in a manner that prevents or mitigates such harms.

D. ADEM has plenary authority over waste permitting in Alabama, vesting ADEM with the authority to secure Title VI compliance in Alabama.

ADEM has consistently relied on Alabama state law to disclaim authority over the Tallapoosa County Commission's (TCC) siting decisions relating to landfill permitting and absolve itself of its Title VI obligations. In particular, ADEM has consistently averred that the agency has no authority to consider socioeconomic factors, including disparate racial impacts, when making permit decisions. For example, in its response to comments for the February 22, 2017 permit renewal, ADEM stated that "it does not site landfills, the local host government approves siting . . . as did the Tallapoosa County Commission . . . . ADEM . . . only permits the operation of landfills in the State." Ala. Dep't of Envtl. Mgmt., Summation of Comments Received and Response-to-Comments: Proposed Stone's Throw Landfill Renewal Permit 62-11, at 6 (Feb. 10, 2017). ADEM also stated, "the governing body of a county or municipality has the responsibility and authority to assure the proper management of solid wastes generated in its jurisdiction in accordance with its Solid Waste Management Plan." Id. at 12.

It appears that ADEM's statements may be an attempt to claim that TCC is the only state actor with Title VI obligations relating to the Landfill. However, ADEM's limited view of its authority has no reasonable basis in Alabama law. ADEM holds plenary authority over an integrated solid waste disposal planning and permitting program that regulates nearly every aspect of solid waste disposal in Alabama. The SWDA makes clear that Alabama does not bifurcate duties relating to solid waste management between the state and local governing bodies. Rather, SWDA expresses a "legislative purpose" of "comprehensive local, regional, and state planning," Ala. Code § 22-27-41, and a "legislative intent" "to develop an integrated system" in which the state and local

governing bodies work together to manage waste, id. § 22-27-42. Within this framework, ADEM holds broad supervisory powers:

- *First*, ADEM has "primary regulatory authority" over solid waste management in Alabama as "necessary to enforce the requirement and purposes of [SWDA]." Id. § 22-27-9; see also id. § 22-27-7 (conferring regulatory authority upon ADEM); id. § 22-27-11 (authorizing ADEM to issue administrative orders and initiate civil actions to enforce the SWDA and its regulations); id. § 22-27-12(1) (conferring regulatory authority upon ADEM).
- *Second*, ADEM may deny permit applications based on noncompliance with SWDA, its implementing regulations, or federal law. Id. § 22-27-12(2) ("The department may condition the issuance of a permit for any solid waste management or materials recovery facility upon the facility being consistent with applicable rules as are necessary to carry out the intent of this article and the department's responsibilities under this article. Permits shall be issued for a period of time based on design life of the facility and may include renewal periods as determined by rules and not inconsistent with federal law."); see also id. § 22-27-3(a) (requiring county commissions to "make available . . . disposal facilities for solid wastes in a manner acceptable to the department"); id. § 22-27-5(b) (clarifying that approval of ADEM is "in addition to other approvals which are necessary," such as approvals by county commissions).
- *Third*, local governing bodies like TCC are required to consider "[t]he social and economic impacts of a proposed facility on the affected community." Id. 22-27-48(a). As ADEM has the authority to deny permit applications based on noncompliance with the SWDA, ADEM may deny permit applications for failing to consider demographic factors including disparate impact.
- *Fourth*, ADEM has the authority to revoke permits for "good cause." This "good cause" includes disparate impacts caused by facilities such as the Landfill. Id. § 22-27-5(c) ("Such permit shall be based upon performance and may be revoked for cause, including failure to

perform under the provisions of this article and regulations adopted under authority of this article.”).

Moreover, this interpretation of ADEM’s authority is consistent with the EPA’s interpretation presented in the Yerkwood Report. Yerkwood Report at 94-96. Given ADEM’s broad powers and “primary regulatory authority” over solid waste permitting in Alabama, ADEM cannot shirk its Title VI obligations by claiming that it has insufficient authority over a permit that is issued in its name.

E. The Yerkwood Report supports the claims in the Complaint.

In the January 29 phone call, EPA appeared to place weight on the non-binding nature of the Agency’s recommendations in the Yerkwood Report. Although the Yerkwood Report was non-binding, the Complainant’s claims do not depend on whether the Yerkwood Report recommendations are binding. As we explained in Sections 1.A and 1.B, the Complaint rests on two Title VI claims that are independent of the Yerkwood Report.

Furthermore, EPA’s findings in the Yerkwood Report do not estop the claims in the Complaint. EPA did not find a disparate racial impact in the Yerkwood Report partly because two of the Alabama landfills investigated in the Yerkwood Report—Florence Landfill in Lauderdale County and Pineville Landfill in Walker County—were not located in communities with a disproportionate number of of Black residents in comparison to the reference group. In contrast, tthe Ashurst Bar/Smith community is approximately 98% African-American, presenting a very different case for EPA.

In fact, in the Yerkwood Report, EPA examined ADEM’s permitting process for landfills and expressed grave concerns about the absence of civil rights protections. EPA notably stated that “the potential failure to consider safety or socio-economic impacts could lead to ADEM-permitted landfills that have an adverse disparate impact” on groups protected by Title VI. Yerkwood Report at 97. It turns out that EPA was indeed correct: the harms suffered by the residents of Ashurst Bar/Smith are proof positive that EPA’s concerns were well-founded.

II. EPA Should Continue Its Investigation To Determine Whether a Disparate Impact Analysis Was Conducted for the Landfill, and To Assess the On-the-Ground Harms Imposed on the Ashurst Bar/Smith Community.

EPA seems to be making two unwarranted factual assumptions in favor of ADEM and TCC. It appears that, with no evidence, EPA has inferred that ADEM and TCC evaluated demographic factors under the theory that as governmental agencies, ADEM and TCC would act in ways consistent with state law. Both assumptions are factually unsubstantiated. In addition, assuming good-faith behavior by ADEM and TCC in an investigation of an allegation of discrimination subverts the remedial and protective purposes of Title VI. Due to the lack of factual clarity, we ask EPA to continue its investigation into the facts and offer the Complainant with an opportunity to collect and submit further evidence.

EPA assumes that since Alabama law requires local Solid Waste Management Plans ("SWMPs") to account for socioeconomic ("SES") factors, Ala. Code § 22-27-45(a), TCC's local SWMP for Tallapoosa County must have accounted for SES factors, including the possibility that Black residents of the Ashurst Bar/Smith community would bear disproportionate racial harms. Moreover, EPA also seems to assume that if the local SWMP for Tallapoosa County had accounted for SES factors, the Landfill's host agreement and permits must have also taken into accounted those SES factors and racially disparate harms.

EPA seems to have treated both assumptions as reasonable inferences based on the requirements of Alabama's solid waste management laws and regulations. We disagree with this investigative approach. On information and belief, ADEM has steadfastly refused to conduct demographic analyses of MSW facilities in Alabama including the Landfill in Tallassee. Moreover, to our knowledge, there is no evidence that the TCC has conducted such an analysis, neither in the process of creating its local SWMP or while permitting the Landfill.[1]

EPA's investigation should be based on evidence, not assumptions in favor of ADEM. As discussed in Section I.C, Title VI was created to protect against both intentional and unintentional

[1] Complainants' ongoing investigation of the county SWMP and permit process has found no evidence that TCC conducted such analyses.

state discrimination on the basis of race and ethnicity, and the history of the race discrimination is particularly significant for Black communities such as Ashurst Bar/Smith, which was founded by newly freed slaves and whose members have historically experienced intense discrimination by state authorities. Such instances of discrimination often involve asymmetries in information between the victims of discrimination and state decision-makers. Inferring compliance with Title VI from an absence of information tilts the scales in a way that is neither authorized by the history of enforcement of the Civil Rights Act and its regulations across agencies nor consistent with its basic civil rights principles.

III. ADEM violated Title VI by renewing the Landfill's permit on February 10, 2017.

In continued violation of Title VI, ADEM renewed the Solid Waste Disposal Facility Permit for the Landfill on February 10, 2017. Before issuing the permit renewal, ADEM did not, to our knowledge, address any of the Title VI allegations ABSCO formerly levied against it. Instead, ADEM's failure to conduct a disproportionality assessment to analyze the social, economic, and health consequences of the Landfill on the surrounding predominately Black Ashurst Bar/Smith community again resulted in a disparate impact on African-Americans. Complainants respectfully request that EPA consider this most recent Title VI violation in its ongoing investigation or open a new investigation in response to this complaint.

To the extent that EPA treats this request as an independent complaint, the complaint meets all jurisdictional requirements pursuant to EPA's Title VI regulations. First, the complaint is in writing. Second, the complaint alleges a cognizable claim; that is, ADEM's method of administration has an adverse disproportionate impact, and further, the permit renewal of the Landfill results in a disparate impact on African-Americans in the Ashurst Bar/Smith community in violation of Title VI and EPA regulations. To the extent that ADEM contends that it does not make siting decisions, but rather, Tallapoosa County Commission is responsible, section 1.D and EPA's own Yerkwood Report make clear that ADEM nonetheless is responsible for ensuring compliance

with Title VI. Third, we are filing within 180 days of the February 10 permit approval. Fourth, we are filing the complaint against ADEM, which is a recipient of federal funds.

ADEM continues to openly defy its obligation to abide by Title VI and EPA regulations. In response to public comments related to civil rights, ADEM completely ignored the specific claims of disparate impact. Instead, ADEM included a list of programs that the agency deems relevant, ignoring the requirement that ADEM's permit of the Stone's Throw Landfill also be consistent with Title VI and EPA regulations. Summation of Comments Received and Response-to-Comments Proposed Stone's Throw Landfill Renewal Permit 62-11 The sufficiency of Alabama's environmental justice and Title VI policies is subject for separate briefing, but even if they met general requirements, they would not shield ADEM from accountability under Title VI for discriminatory actions. ADEM's response to the Comments submitted by the Complainant were dismissive and non-specific. In addition, however, despite the outstanding civil rights complaint regarding the previous permit granted to the facility by ADEM and the community's continuing concerns about compliance with Title VI, ADEM extended a set of variances for the Landfill that exempt the Landfill from certain environmental requirements. ADEM determined that granting these variances would not "unreasonably create environmental pollution." Summation of Comments Received and Response-to-Comments Proposed Stone's Throw Landfill Renewal Permit 62-11. Given the adverse impacts the primarily Black Ashurst Bar/Smith community is facing, these variances are an additional slap in the face. ADEM's continued abdication of its Title VI obligations further the already-alleged discrimination perpetrated against Black residents of the Ashurst/Smith Bar community.

Once again, ADEM failed to conduct any analysis of whether the permit would violate Title VI and its regulations, and its action granting a permit to Stone's Throw Landfill without adequate protection for the health, welfare and environment of the community will have an unjustified

disproportionate impact on the basis of race. ADEM's methods of administration and permitting thus violate Title VI and its regulations.

Conclusion: EPA Should Make a Finding of Discrimination

The Ashurst Bar/Smith community has suffered racially disproportionate harms from a Landfill that operates under an ADEM permit. This permit was granted with a deficient method of administration that subjects Black residents of the Ashurst Bar/Smith community to racially disparate harms. These allegations are supported by data about the siting of landfills in Tallapoosa County, numerous declarations from community members, and ADEM and TCC's failure to ever conduct even a basic disparate impact assessment for the Landfill. On these bases, we respectfully ask EPA to make a finding of discrimination. If EPA believes that there are gaps in the administrative record that preclude a conclusive finding, we respectfully ask EPA to continue its investigation and provide ABSCO with a meaningful opportunity to present further evidence so that EPA can reach a fully informed decision.

Sincerely,

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On behalf of the Ashurst Bar/Smith Community Organization