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

March 2, 2015

Electronic Mail and Federal Express

Ms. Velveta Golightly-Howell, Director
Office of Civil Rights
Mail Code 1201A - Room 2450
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Title_VI_Complaints@epa.gov

Re: **Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7, and 40 C.F.R. Part 7 - Jefferson County [Alabama] Department of Health**

Dear Ms. Golightly-Howell:

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

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

Complainants allege that the Jefferson County Department of Health (JCDH) violated Title VI and EPA's implementing regulations by issuing, on October 3, 2014, Major Source Operating Permit No. 4-07-0355-03 authorizing Walter Coke, Inc. to operate a major source of air pollution in Jefferson County, Alabama which has the effect of adversely and disparately impacting African-American residents in the adjacent community without justification.

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

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I. TITLE VI BACKGROUND

"Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating." *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) ("*Interim Guidance*") at 2 (footnote omitted); *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39,667, 39,680 (June 27, 2000) ("*Draft Guidance*").[1] "Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance* at 2.

A complete or properly pleaded complaint must (1) be in writing, signed, and provide an avenue for contacting the signatory (*e.g.*, phone number, address); (2) describe the alleged discriminatory act(s) that violates EPA's Title VI regulations (*i.e.*, an act that has the effect of discriminating on the basis of race, color, or national origin); (3) be filed within 180 calendar days of the alleged discriminatory act(s); and (4) identify the EPA financial assistance recipient that took the alleged discriminatory act(s). *Interim Guidance* at 6; *Draft Guidance*, 65 Fed. Reg. at 39,672. In order to establish a *prima facie* case of adverse disparate impact, EPA must determine that (1) a causal connection exists between the recipient's facially neutral action or practice and the alleged impact; (2) the alleged impact is "adverse;" and (3) the alleged adversity imposes a disparate impact on an individual or group protected under Title VI. *Yerkwood Landfill Complaint Decision Document*, EPA OCR File No. 28R-99-R4 (July 1, 2003) at 3; *New York City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000); *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24,739, 24,741 (Apr. 26, 2013).

"If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to 'justify' the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient." *Interim Guidance* at 11. *See Draft Guidance*, 65 Fed. Reg. at 39,683. "Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity." *Interim Guidance* at 11. "[A] justification offered will not be considered acceptable if it is shown that a

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[1] On June 27, 2000, EPA published *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39,667-39,687 (June 27, 2000). The Preamble to the *Draft Guidance* states that "[o]nce the *Draft Revised Guidance for Investigating Title VI Administrative Complaints* is final, it will replace the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (*Interim Guidance*) issued in February 1998." 65 Fed. Reg. at 39,650. The *Draft Guidance* has never been made final and consequently, the *Interim Guidance* issued in February 1998 has not been replaced.

less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id. See Draft Guidance*, 65 Fed. Reg. at 39,683.

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

II. COMPLAINANTS

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

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

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[2] The *Draft Guidance* purports to establish more stringent "standing" requirements than are presently contained in 40 C.F.R. § 7.120(a). The *Draft Guidance* suggests that only the following persons may file a discrimination complaint:

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

Id., 65 Fed. Reg. at 39,672. Notably, the *Draft Guidance* requires that a complainant be the victim of the alleged discrimination or a member of the protected class that is the victim of discrimination. The *Draft Guidance* omits the option in 40 C.F.R. § 7.120(a) that *any person* – including a person who is not a member of a protected class – who believes that a specific class of persons has been discriminated against in violation of 40 C.F.R. Part 7 may file a complaint. An agency's interpretation of its regulations that does not sensibly conform to the purpose and wording of the regulations is invalid. *Legal Envtl. Assistance Found., Inc. v. U.S. Envtl. Prot. Agency*, 276 F.3d 1253, 1262 (11th Cir. 2001); *Sierra Club v. Johnson*, 436 F. 3d 1269, 1274 (11th Cir. 2006).

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Several of the foregoing Complainants are African-Americans who live within 1.0 mile of the Walter Coke facility and who believe that they have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. A few of the Complainants are members of the African-American race who, though not themselves discriminated against by JCDH, believe that African-Americans as a class have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. In addition, several of the Complainants are not members of the African-American race who believe that African-Americans have been discriminated against by JCDH in violation of Title VI and 40 C.F.R. Part 7. The undersigned is the authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

Table 1
EPA Financial Assistance to JCDH

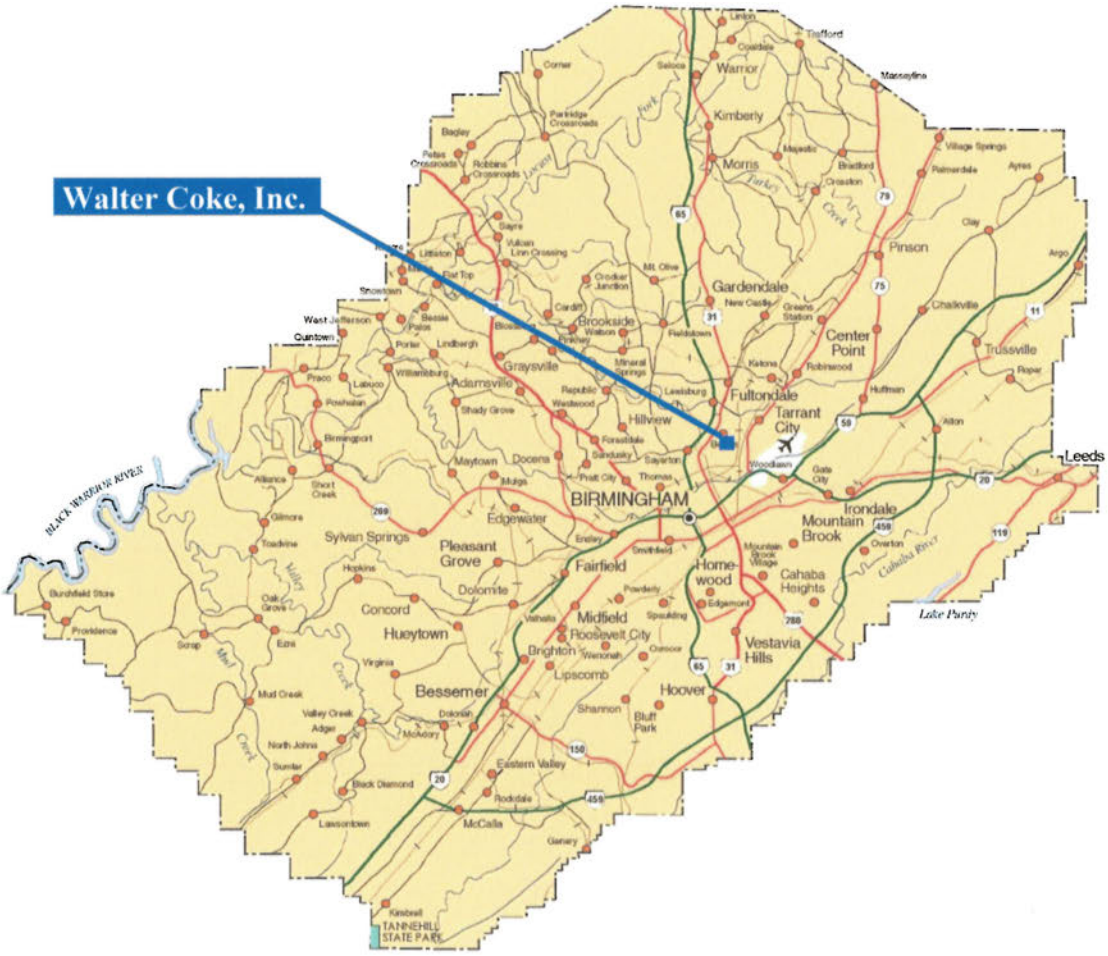
Grant Family ID	CFDA Number	Applicant Name	Address	Award Date	Cumulative Award	Project Start	Project End
95495212	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	JUL-31-2012	$200,000	JUL-01-2012	DEC-31-2013
96436505	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	SEP-29-2005	$1,931,750	OCT-01-2005	MAR-31-2008
96495608	66.034	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	MAY-21-2008	$10,232,617	APR-01-2008	MAR-31-2015
97412906	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	FEB-13-2006	$1,129,972	OCT-01-2005	SEP-30-2006
97412907	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	JAN-23-2007	$756,809	OCT-01-2006	SEP-30-2007
97412908	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	DEC-20-2007	$3,194,541	OCT-01-2007	SEP-30-2009
97412910	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	DEC-30-2009	$18,660,910	OCT-01-2009	SEP-30-2014
97412915	66.001	Jefferson County Dept of Health	1400 Sixth Avenue, South Birmingham, AL 35233	DEC-15-2014	$163,580	OCT-01-2014	SEP-30-2016

Source: EPA Integrated Grants Management System (IGMS),http://www.epa.gov/enviro/facts/igms/search.html

IV. DISCRIMINATORY ACT

The alleged discriminatory act is the issuance (renewal) of Major Source Operating Permit No. 4-07-0355-03 by JCDH on October 3, 2014.[3] The permit authorizes Walter Coke, Inc. to operate a major source of air pollution. The Walter Coke facility is located at 3500 F.L. Shuttlesworth Drive in Birmingham, Jefferson County, Alabama approximately 2.85 miles west-northwest of the Birmingham-Shuttlesworth International Airport Terminal (approximately Latitude 33.566022° North, Longitude 86.800024° West). *See* **Figure 1**.

Figure 1
Location of Walter Coke, Inc. Facility in Jefferson County, Alabama



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

The Walter Coke facility began operation in 1919 and has been in operation ever since. The facility has been owned by Walter Coke, Inc. since 2009. The Walter Coke facility is a coke by-products manufacturing facility and a utilities production facility. The facility includes three coke oven batteries comprised of 120 coke ovens. The utilities production facility includes three steam generators. The facility operates 24 hours per day, 7 days per week, and 52 weeks per year. Some of the emissions from the Walter Coke facility (estimated and reported by Walter Coke to EPA's Toxic Release Inventory and JCDH) are shown in **Tables 2**, **3**, and **4.**

Table 2
Toxic/Hazardous Air Pollutant Emissions from Walter Coke

TOXIC[1]/HAZARDOUS[2] AIR POLLUTANTS		2011 (TPY)		2012 (TPY)		2013 (TPY)
		TRI	JCDH	TRI	JCDH	JCDH
AMMONIA[1]	7664417	8.646	4.654	4.688	4.69	4.0858
ARSENIC/ARSENIC COMPOUNDS[12]	7440382/N020	NR	0.001	NR	0.0011	0.0019
BENZENE[12]	BENZENE/71432	9.0415	9.876	3.5875	3.587	2.791
COAL TAR/COKE OVEN EMISSIONS[2]	8007452	NR	6.879	NR	6.449	4.2502
O-CRESOL[12]	95487	0.2005	0.176	0.1835	0.183	0.1171
CYANIDE/CYANIDE COMPOUNDS[12]	57125/N106	1.431	1.416	1.411	1.375	1.2096
ETHYLENE DIBROMIDE[12]	100414	NR	0.082	NR	0.006	0.0497
ETHYLENE OXIDE[2]	75218	NR	6.19	NR	NR	3.0256
HYDROGEN SULFIDE[2]	7783064	NR		1.107	1.188	0.4503
MANGANESE/MANGANESE CMPDS[2]	13966319/N450	NR	0.002	NR	0.002	NR
NAPHTHALENE[12]	91203	1.1385	0.9633	0.918	0.873	0.5016
PHENOL[12]	108952	1.047	1.037	0.982	0.982	0.8209
PROPYLENE OXIDE	75569	NR	1.083	NR	NR	0.4384
POLYCYCLIC AROMATIC HYDROCARBONS[12]	130498292	0.272	0.036	0.2515	0.251	0.1026
STYRENE[12]	100425	0.0645	0.0573	0.0225	0.011	0.0272
TOLUENE[12]	108883	3.0695	2.965	2.1185	2.118	1.9273
XYLENE (MIXED ISOMERS)[12]	1330207	0.4495	0.443	0.2875	0.288	0.1574

Table 3
NAAQS Pollutant Emissions from Walter Coke

NAAQS AIR POLLUTANTS		2011 (TPY)		2012 (TPY)		2013 (TPY)
		TRI	JCDH	TRI	JCDH	JCDH
CARBON MONOXIDE	CO	NR	144.652	NR	135.448	128.7126
LEAD	7439921	0.00147	0.0013	0.00164	0.0016	0.0047
NITROGEN OXIDES	NOX	NR	681.608	NR	709.434	612.8969
PARTICULATE MATTER <2.5 microns Filterable	PM25-FIL	NR	274.416	NR	292.334	204.44904
PARTICULATE MATTER <10 microns	PM10	NR	332.702	NR	342.533	270.2519
SULPHUR DIOXIDE	SO2	NR	1772.531	NR	1799.234	1798.8897

Table 4
Other Air Pollutant Emissions from Walter Coke

OTHER AIR POLLUTANTS		2011 (TPY)		2012 (TPY)		2013 (TPY)
		TRI	JCDH	TRI	JCDH	JCDH
TOTAL SUSPENDED PARTICULATES	TSP	NR	568.419	NR	537.853	520.1099
VOLATILE ORGANIC COMPOUNDS	VOC	NR	93.339	NR	89.528	71.73834

V. ADVERSE IMPACTS

Many densely populated residential communities are located near the Walter Coke facility. An estimated 3,880 persons live within one mile of the facility; 33,914 live within 3.0 miles of the facility; and 169,497 live within 6.0 miles of the facility.[4]

The adverse impacts suffered by residents from the activities authorized by Major Source Operating Permit No. 4-07-0355-03[5] include the following:

A. Frequent emissions of particulate matter from the Walter Coke facility that result in deposition of particulate matter on personal and real property, including homes, porches, vehicles, laundry, yards and gardens.

B. Frequent emissions of odors from the Walter Coke facility that are unpleasant, tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea.

C. Frequent emissions of particulate matter, volatile organic carbons, and toxic contaminants from the Walter Coke facility that result in respiratory irritations, sinus headaches

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[4] Data provided by EJ View. The actual number is likely to be higher because the radii are measured from a central location at Walter Coke (Lat. 33.566022° North, Long. 86.800024° West) rather than at the property boundary of the Walter Coke facility.

[5] The alleged adverse impacts result from operations of the Walter Coke facility authorized by JCDH under Major Source Operating Permit No. 4-07-0355-03, not from the siting of the Walter Coke facility near African-American populations. EPA explains:

> Some have argued that the issuance of environmental permits does not "cause" discriminatory effects. Instead, they claim that local zoning decisions or siting decisions determine the location of the sources and the distribution of any impacts resulting from the permitted activities. However, in order to operate, the source's owners must both comply with local zoning requirements and obtain the appropriate environmental permit.
>
> In the Title VI context, the issuance of a permit is the necessary act that allows the operation of a source in a given location that could give rise to the adverse disparate effects on individuals. Therefore, a state permitting authority has an independent obligation to comply with Title VI, which is a direct result of its accepting Federal assistance and giving its assurance to comply with Title VI. In accordance with 40 CFR 7.35(b), recipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources. Accordingly, if the recipient did not issue the permit, altered the permit, or required mitigation measures, certain impacts that are the result of the operation of the source could be avoided. The recipient's operation of its permitting program is independent of the local government zoning activities.

Draft Guidance, 65 Fed. Reg. at 39,691.

and infections, and exacerbation of symptoms of Chronic Obstructive Pulmonary Disease (COPD) and Asthma.

D. Frequent emissions of toxic air contaminants from the Walter Coke facility that contribute to the presence in the outdoor atmosphere of one or more carcinogenic air contaminants in such quantities and duration as are, or tend to be, injurious to human health. These include Benzene, Naphthalene, and Arsenic which each present a cancer risk exceeding 1.0E-05 and a cumulative cancer risk from multiple air toxic contaminants that exceeds 1.0E-04. *See* **Table 5**.[6]

E. Frequent emissions of toxic air contaminants from the Walter Coke facility that contribute to contamination of soil.[7]

F. Frequent emissions of air contaminants from the Walter Coke facility that result in increased risk of low birth weight and pre-term births.[8]

G. Frequent emissions of particulate matter, odors, toxic air contaminants and other air contaminants from the Walter Coke facility that result in reduced property values.

In addition to being impacted by the emissions from Walter Coke, residents are also exposed to the emissions of air contaminants from the facilities of ABC Coke, A Division of Drummond Co., Inc.; Nucor Steel Birmingham, Inc.; Akzo Nobel Coatings, Inc.; American Cast Iron Pipe Co.; Bermco Aluminum; and others. The emissions of air contaminants from all of these facilities create a cumulative burden on the community that magnifies the adverse impacts identified above. *See* **Figures 2** and **3**.

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[6] JCDH and EPA have performed monitoring of air toxics at a number of locations, the closest of which is located across R.L. Shuttlesworth Drive between 42nd Avenue North and 43rd Avenue North (approximately 33.565280° North, 86.796390° West). U.S. Environmental Protection Agency - Region 4, *North Birmingham Air Toxics Risk Assessment* (Mar. 2013) at 36, *available at* http://www.epa.gov/region4/air/airtoxic/North-Birmingham-Air-Toxics-Risk-Assessment-final-03282013.pdf and Jefferson County Department of Health, *Birmingham Air Toxics Study* (Feb. 2009), *available at* http://www.jcdh.org/misc/ViewBLOB.aspx? BLOBId=182. The individual and cumulative cancer risks from air toxics are shown in **Table 5**.

[7] *See* EPA (2014), Hazard Ranking System Documentation Record for 35th Avenue Site *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.epa.gov%2Fsuperfund%2Fsites%2Fdocrec%2Fpdoc1897.pdf&ei=XWzmVL-lCsf-ywP8qoGQCw&usg=AFQjCNH62044z4119VuQoafibnxsVjb8dA&sig2=VWJAOlJwxBgjfFyUc-OK7Q.

[8] Porter, Travis R., et al., Spatiotemporal association between birth outcomes and coke production and steel making facilities in Alabama, USA: a cross-sectional study, *Environmental Health* 2014 13:85, *available at* http://www.ehjournal.net/content/13/1/85.

Table 5
Chronic Exposure Cancer Risk Near Walter Coke (Shuttlesworth Monitor)

Chemical	Jun 2011- Aug 2012 (EPA)		Jul 2005- Jun 2006 (JCDH)	
	Risk	Percent	Risk	Percent
Benzene	4.00E-05	37.22%	6.23E-05	40.03%
Naphthalene	2.81E-05	26.14%	1.94E-05	12.46%
Arsenic	1.16E-05	10.79%	3.49E-05	22.42%
1,3-Butadiene	5.22E-06	4.86%	7.35E-06	4.72%
Carbon Tetrachloride	4.42E-06	4.11%	9.82E-06	6.31%
1,2-Dichloroethane	4.11E-06	3.82%		
Benzo(a)pyrene	3.65E-06	3.40%	3.29E-06	2.11%
p-Dichlorobenzene	3.06E-06	2.85%	5.30E-06	3.41%
Acetaldehyde			3.56E-06	2.29%
Hexavalent Chromium	1.54E-06	1.43%	6.63E-07	0.43%
Ethylbenzene	1.46E-06	1.36%	2.81E-06*	1.81%
Cadmium	1.20E-06	1.12%	7.93E-07	0.51%
Dibenz(a,h)anthracene	1.20E-06	1.12%	7.35E-07	0.47%
Tetrachloroethylene	6.40E-08	0.06%	1.77E-06	1.14%
Beryllium	7.85E-08	0.07%	1.02E-06	0.66%
Benzo(a)anthracene	7.60E-07	0.71%	5.01E-07	0.32%
Benzo(b)fluoranthene	5.57E-07	0.52%	5.02E-07	0.32%
Indeno(1,2,3-cd)pyrene	1.88E-07	0.17%	3.03E-07	0.19%
Benzo(k)fluoranthene	1.68E-07	0.16%	3.97E-07	0.26%
Chrysene	6.09E-08	0.06%	6.68E-08	0.04%
Dichloromethane	4.57E-08	0.04%	5.91E-09**	0.00%
Methyl tert-Butyl Ether			1.42E-07	0.09%
Formaldehyde			2.26E-08	0.01%
CUMULATIVE CANCER RISK	1.07E-04	100%	1.56E-04***	100%

Table 5 (con't)
Chronic Exposure Cancer Risk Near Walter Coke (Shuttlesworth Monitor)

Table 5 notes:

* JCDH did not calculate cancer risk for Ethylbenzene. Risk calculation based on 95% UCL= 1.233 $\mu g/m^3$ (determined by JCDH) and Inhalation Unit Risk = 0.0000025 ($1/\mu g/m^3$) (determined by U.S. EPA).

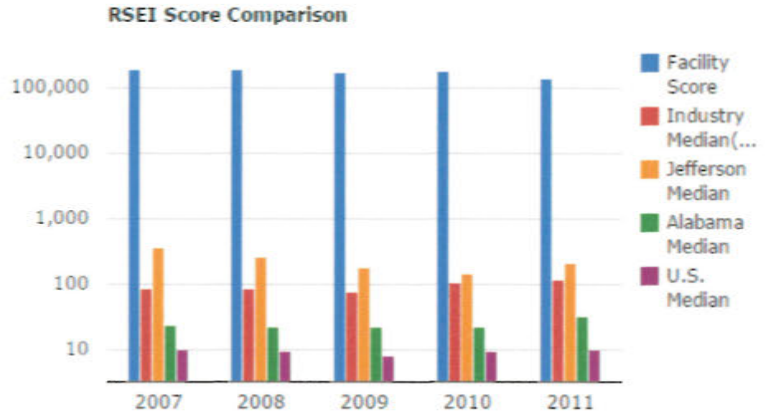
** JCDH did not calculate cancer risk for Dichloromethane. Risk calculation based on 95% UCL= 0.3475 $\mu g/m^3$ (determined by JCDH) and Inhalation Unit Risk = 0.000000017 ($1/\mu g/m^3$) (determined by U.S. EPA).

*** Jefferson County Department of Health reports the cumulative risk at the Shuttlesworth Monitor site to be 1.66E-04. *Birmingham Air Toxics Study* (February 2009) at 1, 31, and 44, *available at* http://www.jcdh.org/misc/ViewBLOB.aspx?BLOBId=182. However, the cancer risk values assigned to chemicals in Table D-4 of the *BATS* add up to 1.53E-04.

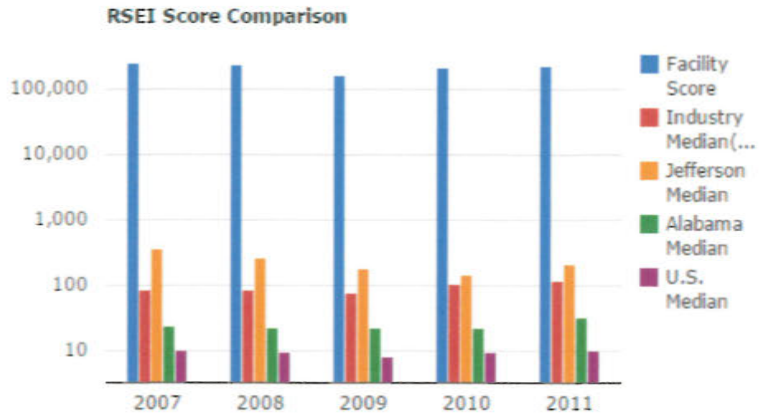
Figure 2
Significant Air Pollution Sources Near Walter Coke

Figure 3
Risk Screening Environmental Indicators (RSEI) Score Comparisons of Significant Air Pollution Sources Near Walter Coke

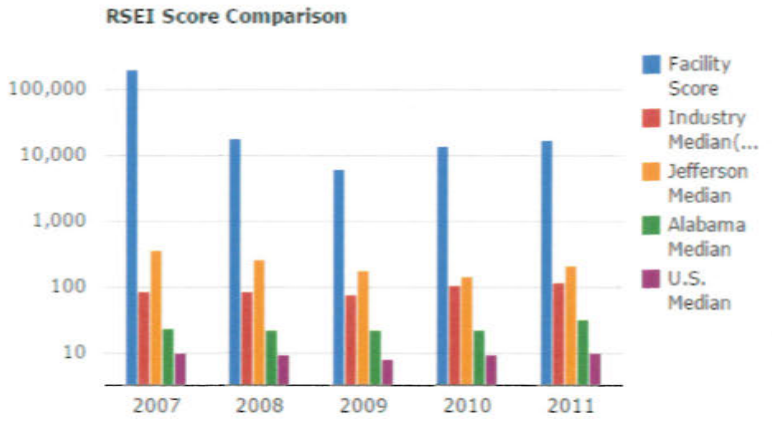
A. Walter Coke, Inc.



B. ABC Coke Division, Drummond Co., Inc.



C. Nucor Steel Birmingham, Inc.



D. Akzo Nobel Coatings, Inc.

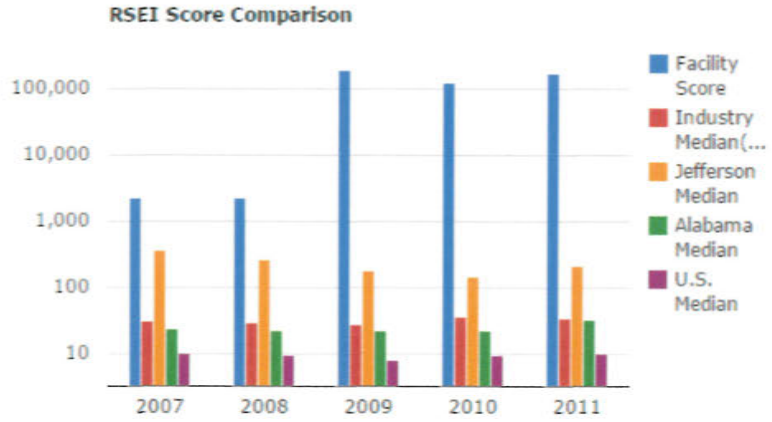
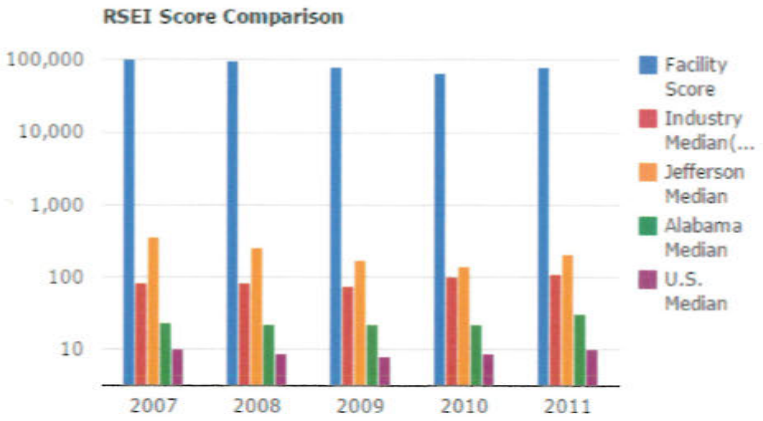
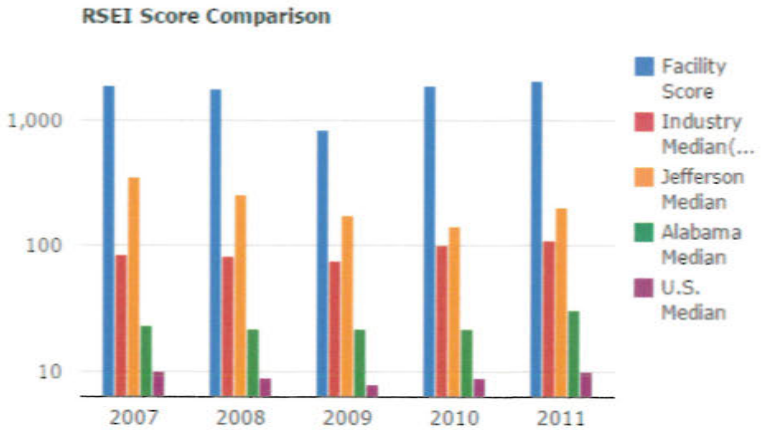


Figure 3 (con't)

E. American Cast Iron Pipe Co.



F. Bermco Aluminum



VII. DISPARATE IMPACTS

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated in **Table 6** below which compares the 2010 local census data to Jefferson County and Alabama census data. It is also illustrated in **Figures 4** and **5** which show the percent Black population in census blocks within 1.0 mile and 6.0 miles, respectively, from the Walter Coke facility.

Table 6
Total Population and Percent Black Population
within Three Radii of Latitude 33.566022° North, Longitude 86.800024° West
Compared to Jefferson County and State of Alabama
(Source: 2010 Census and EJView)

Distance	1.0 Mile	3.0 Mile	6.0 Mile	Jefferson County	Alabama
Total Population	3,880	33,914	169,497	658,466	4,779,736
Percent Black Population	88%	76%	59%	42.0%	26.2%

Figure 4
Percent Black Population
in Census Blocks (2010) within 1.0 Mile of Walter Coke Facility

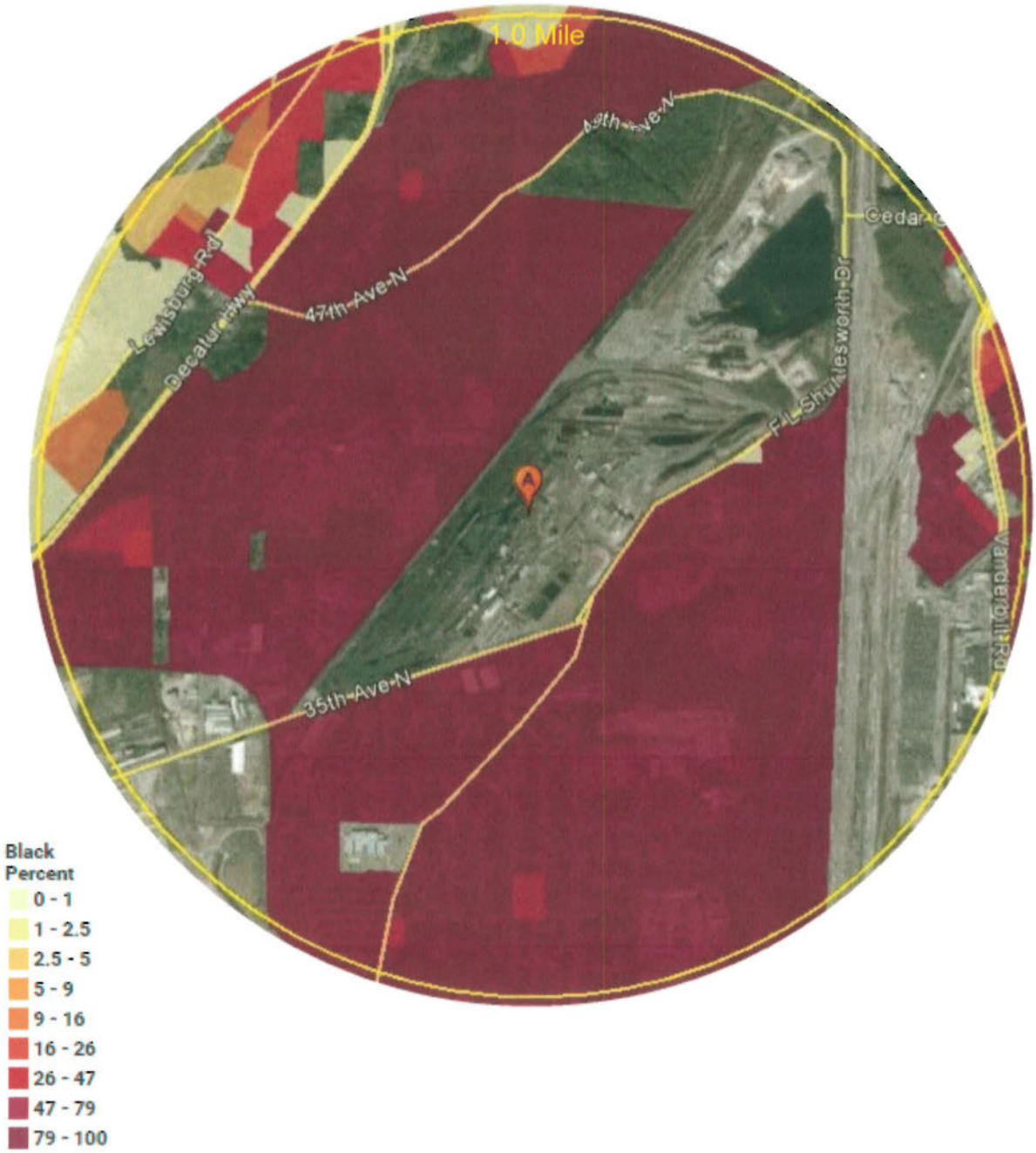


Figure 5
Percent Black Population
in Census Blocks (2010) within 1.0, 3.0, and 6.0 Miles of Walter Coke Facility

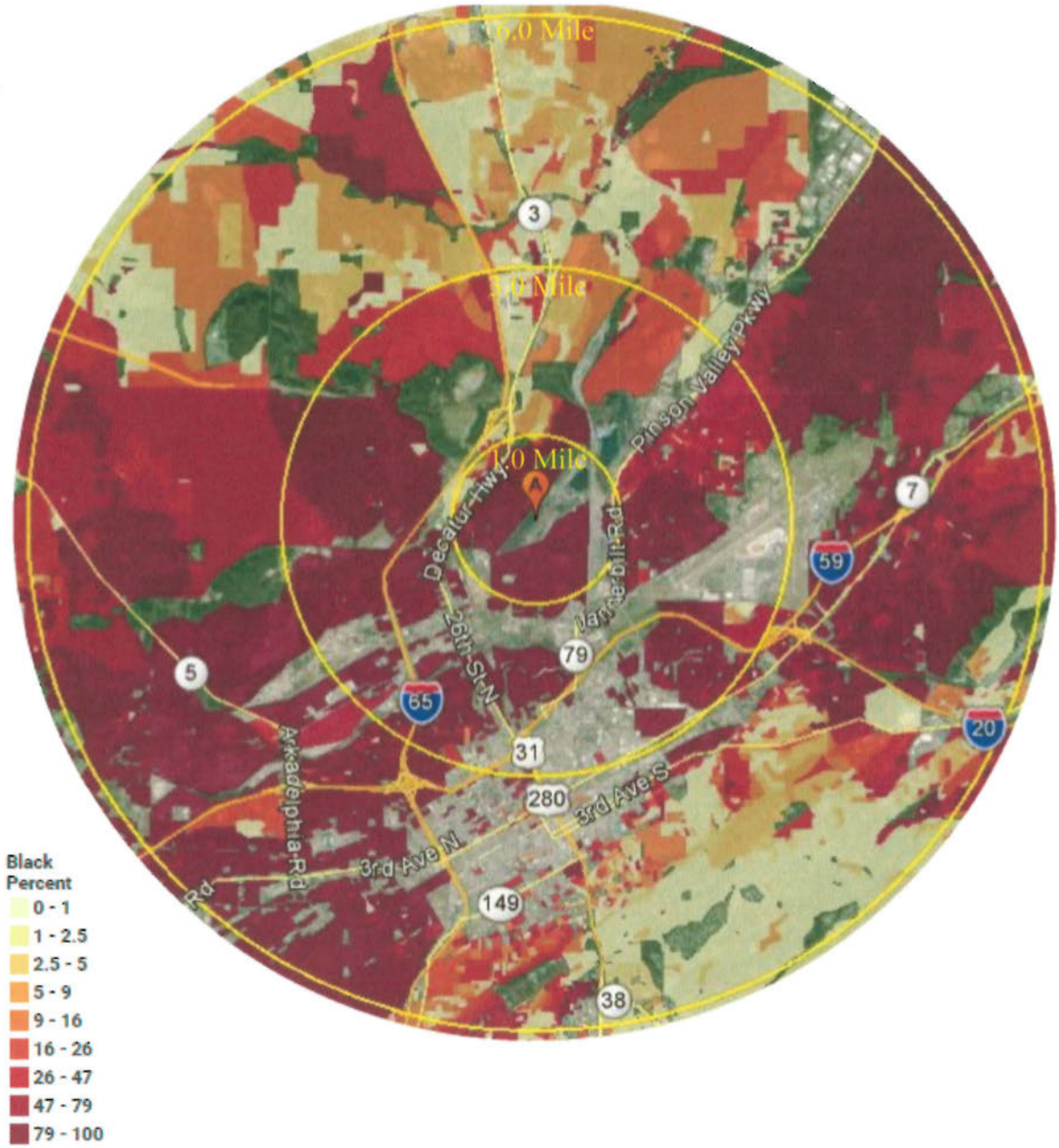


Figure 6 shows the location of the Walter Coke facility in relation to those Census Bock Groups in Jefferson County having a percent Black or African-American Alone population greater than the County average (*i.e.*, > 42.0%).

Figure 6
Census Block Groups in Jefferson County, Alabama Greater than 42.0% Black or African-American Alone (County Average)

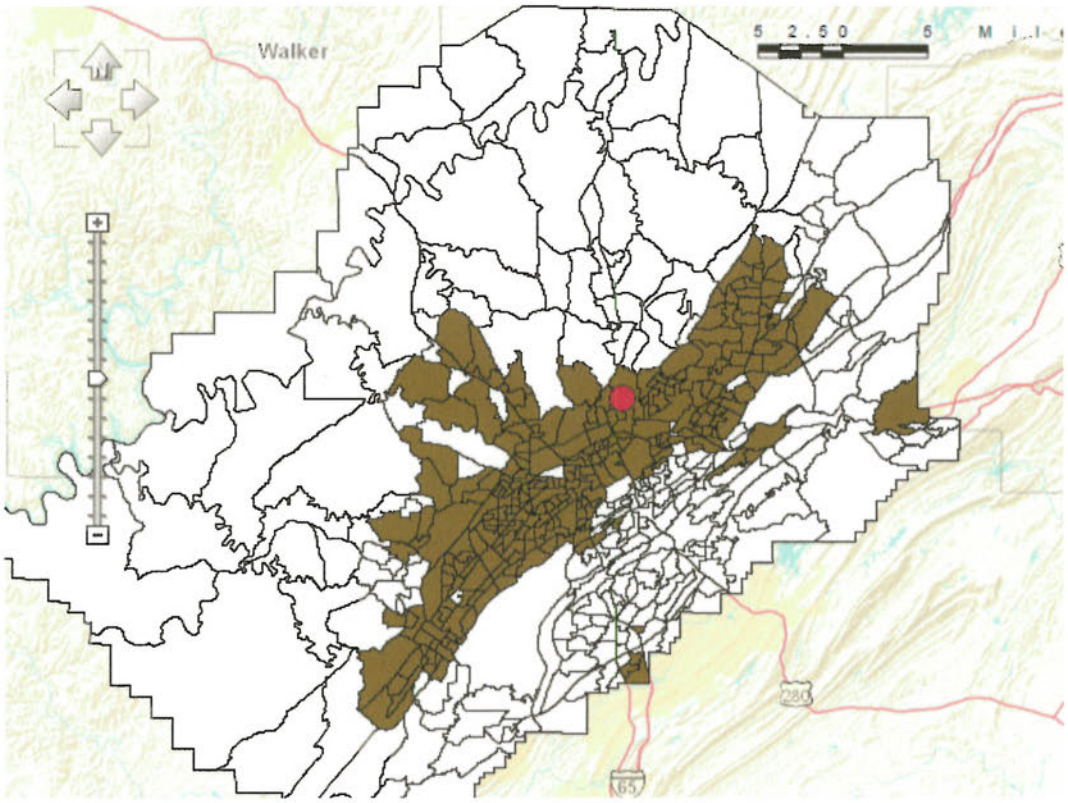
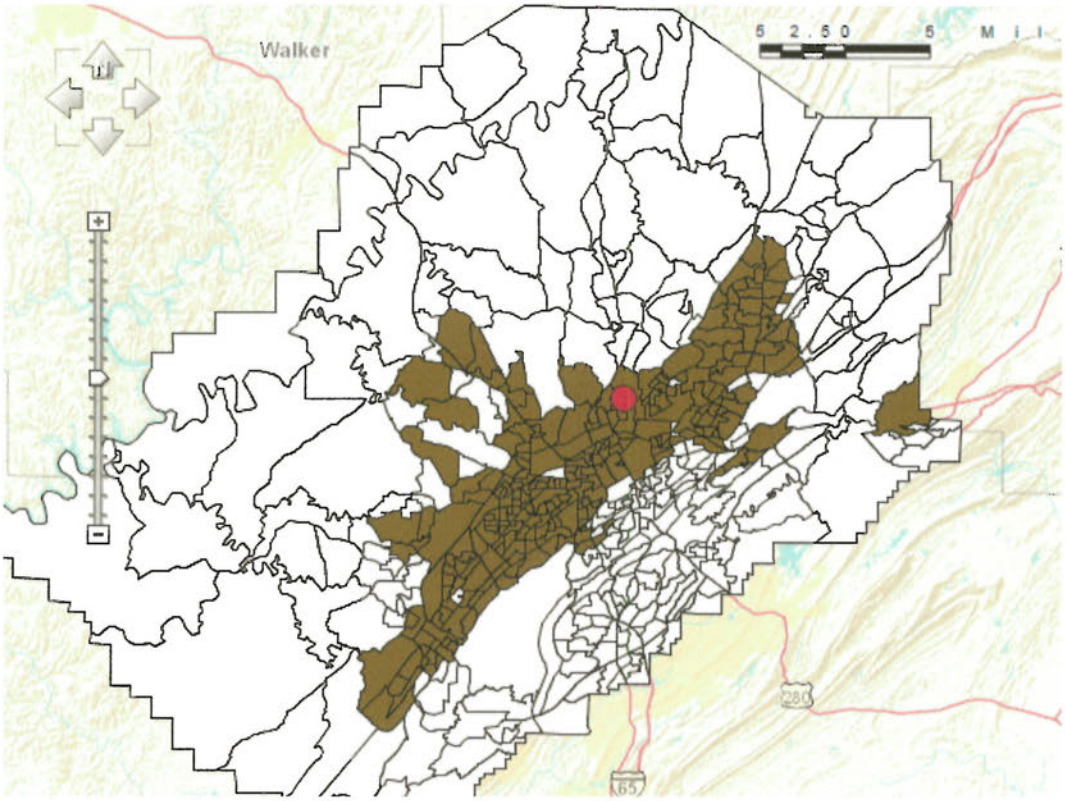


Figure 7 shows the location of the Walter Coke facility in relation to those Census Bock Groups in Jefferson County having a percent Black or African-American Alone population greater than 50.4% (*i.e.*, 20% higher than the County average).

Figure 7
Census Block Groups in Jefferson County, Alabama
Greater than 50.4% Black or African-American Alone



VII. JCDH AUTHORITY

EPA guidance provides that "OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program." *Interim Guidance* at 8; *Draft Guidance*, 65 Fed. Reg. at 39,678. "In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." *Draft Guidance*, 65 Fed. Reg. at 39,678. *See id.,* 65 Fed. Reg. at 39,670, 39,671. Complainants submit that both the *Interim Guidance* and *Draft Guidance* are wrong as a matter of law on this point.

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

As discussed below, JCDH has express authority under the Jefferson County Board of Health Air Pollution Control Rules and Regulations to regulate air pollution sources that may cause odors, emission of particulates, and emission of air toxics. JCDH does not, however, have express authority to address reductions in property values that often occur as a consequence of industrial operations. Nevertheless, the permits granted by JCDH which authorize the operation of the Walter Coke facility have had the disproportionate adverse effect of subjecting persons of a protected race to reductions in the value of their property. This adverse economic effect is cognizable under Title VI, notwithstanding EPA's contrary pronouncements in the *Interim Guidance* and *Draft Guidance*. To hold otherwise would contravene *Sandoval* and allow the Board of Health and similar local agencies to define what is and is not actionable discrimination under Title VI, thereby frustrating the purpose of Title VI.

A. Particulate Emissions

The Jefferson County Department of Health has ample authority to control particulate emissions and deposition on buildings and other places and things. For example, Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.l.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.

An "air contaminant" is "any solid . . . matter . . . , from whatever source." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3. Total Suspended Particulates (including particulate matter greater than 10 microns) are among the many air contaminants emitted into the air by Walter Coke. No "ambient air quality standards" have been set for these air contaminants under Jefferson County Air Pollution Control Rules and Regulations, Section 1.7.1.

In addition, Jefferson County Air Pollution Control Rules and Regulations, Part 6.2 provides:

> 6.2 Fugitive Dust.
>
> 6.2.1 No person shall cause, suffer, allow, or permit any materials to be handled, transported, or stored; or a building, its appurtenances, or a road to be used, constructed, altered, repaired or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne. Such reasonable precautions shall include, but not be limited to, the following:
>
> (a) Use, where possible, of water or chemicals for control of dust in the demolition of existing buildings or structures, construction operations, the grading of roads or the clearing of land;
>
> (b) Application of asphalt, oil, water, or suitable chemicals on dirt roads, materials stock piles, and other surfaces which create airborne dust problems; and
>
> (c) Installation and use of hoods, fans, and fabric filters (or other suitable control devices) to enclose and vent the handling of dust materials. Adequate containment methods shall be employed during sandblasting or other similar operations.

> 6.2.2 Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

In addition, Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When dust . . . escape[s] from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing provisions authorize JCDH to require controls on the emission of particulate matter.

B. Odor Emissions

JCDH has ample authority to control odors. For example, Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.l.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.

An "air contaminant" includes ". . . any odor . . . from whatever source." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3. "Odor" is defined in Part 1.3 as follows:

> "Odor" shall mean smells or aromas which are unpleasant to persons, or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or cause symptoms of nausea, or which by their inherent chemical or physical nature, or method of processing, are, or may be, detrimental or dangerous to health. Odor and smell are used interchangeable therein.

Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When . . . odorous matter . . . escape[s] from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing provisions authorize JCDH to require controls on the emission of odors.

C. Toxic Air Contaminants

Jefferson County Air Pollution Control Rules and Regulations, Part 1.13 provides:

> No person shall permit or cause air pollution, as defined in Part 1.3 of this Chapter by the discharge of any air contaminants for which no ambient air quality standards have been set under Section 1.7.l.

"Air pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, . . . or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby." Jefferson County Air Pollution Control Rules and Regulations, Part 1.3.[9]

An "air contaminant" is "any solid, liquid, or gaseous matter . . . or any combination thereof, from whatever source." Jefferson County Air Pollution Control Rules and Regulations,

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[9] Although Part 1.3 does not establish numerical standards for the quantity and duration of contaminants that are or tend to be injurious to human health, the Board of Health has established such standards on the granting of any variances, including variances from Part 1.13. Thus, a variance from the prohibition against permitting or causing "air pollution" in Part 1.13 may only be considered if the numerical standards in Section 3.1.2 are not exceeded. Section 3.1.2 provides:

> A variance will not be considered for approval under any circumstances if emissions from the source for which the variance is petitioned can be shown by computer modeling or ambient monitoring to cause outside the facility property line any of the following:
>
> * * *
>
> (c) If the toxic emission is a carcinogen, an amount equal to or greater than that which would result in an individual having more than one (1) in one hundred thousand (100,000) chance of developing cancer over a lifetime (70 years) of exposure to that amount.

Accordingly, the quantity and duration of toxic air contaminants that are or tend to be injurious to human health include those that present a cancer risk that exceeds 1.0E-05.

Part 1.3. Polycyclic Aromatic Compounds, Benzene, Naphthalene, and Arsenic are among the many toxic air contaminants emitted into the air by Walter Coke. No "ambient air quality standards" have been set for these air contaminants under Jefferson County Air Pollution Control Rules and Regulations, Section 1.7.1.

Jefferson County Air Pollution Control Rules and Regulations, Part 6.2.3 provides:

> When dust, fumes, gases, mist, odorous matter, vapors, or any combination thereof escape from a building or equipment in such a manner and amount as to cause a nuisance or to violate any rule or regulation, the Health Officer may order that the building or equipment in which processing, handling and storage are done be tightly closed and ventilated in such a way that all air and gases and air or gas-borne material leaving the building or equipment are treated by removal or destruction of air contaminants before discharge to the open air.

The foregoing rules authorize JCDH to require controls on toxic air contaminants.

D. Soil Contamination

As explained above, Title VI does not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Public Safety's English-only language requirement for motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because it adversely affected individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Similarly, the operation of the Walter Coke facility, with all its associated emissions of toxic air contaminants, has resulted in contamination of soils where members of the African-American race reside in the affected community. JCDH cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider soil contamination.

E. Property values

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Public Safety's English-only language requirement for motor vehicle license testing resulted in discrimination based on national origin in violation of Title VI because it adversely affected individuals in the form of lost economic opportunities, social services, and other quality of life pursuits. Similarly, the operation of the Walter Coke facility, with all its associated emissions of particulates, odors, and toxic air contaminants, has an

adverse effect on the property values of members of the African-American race in the affected community. JCDH cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider property values.

IX. JUSTIFICATION AND LESS DISCRIMINATORY ALTERNATIVES

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

The purpose of the Jefferson County Air Pollution Control Rules and Regulations administered by JCDH is "to achieve and maintain such levels of air quality as will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the social development of Jefferson County and facilitate the enjoyment of the natural attractions of this County." Jefferson County Air Pollution Control Rules and Regulations § 1.1.1. While the issuance of Major Source Operating Permit No. 4-07-0355-03 may be intended to achieve this legitimate and important goal, it does not justify disparate adverse impacts. Indeed, "[m]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification [for disparate adverse impacts]. Rather, there must be some articulable value to the recipient in the permitted activity." *Interim Guidance* at 11. It is not likely that JCDH can show that the operation of the Walter Coke facility provides some articulable value to JCDH.

X. JCDH'S ASSURANCES AND DEFENSES

With each application for EPA financial assistance, JCDH is required to provide assurances that it "will comply with the requirements of" 40 C.F.R. Part 7 implementing Title VI. 40 C.F.R. § 7.80(a)(1). *See* Standard Form 424B ("As the duly authorized representative of the

applicant, I certify that the applicant: * * * Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; . . ..”). Beginning January 23, 2013, EPA has required that grant recipients agree to the following additional grant condition:

> In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.[10]

As mentioned above, 40 C.F.R. § 7.35(b) prohibits JCDH from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race. JCDH may claim that it issues permits in accordance with the Jefferson County Air Pollution Control Rules and Regulations without regard to the racial composition of any impacted communities. Such a claim is, in essence, a claim that JCDH's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize JCDH's obligation under Title VI to avoid unintentional discriminatory effects. “Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.” *Interim Guidance* at 2 (footnote omitted).

JCDH may also claim that it issues permits in accordance with the Jefferson County Air Pollution Control Rules and Regulations (“criteria”) and thereby ensures that no adverse impacts will occur. However, compliance with environmental regulations is not *prima facie* evidence of the absence of adverse disparate impacts.[11] “EPA believes that presuming compliance with civil

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[10] JCDH does not have a Title VI compliance program. This omission warrants a post-award compliance review pursuant to 40 C.F.R. § 7.115(a) (“The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.”).

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

> 13. Does compliance with existing Federal and state environmental regulations constitute compliance with Title VI?
>
> A recipient's Title VI obligation exists independent from Federal or state environmental laws governing its permitting program. Recipients may have policies and practices that

(continued...)

rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health." *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24,740, 24,742 (Apr. 26, 2013). For example, "the existence of hot spots, cumulative impacts, the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold" may have to be considered in determining whether an adverse disparate impact exists. *Id.* In this regard, the EPA Office of Civil Rights should take notice of these facts: (1) JCDH did not evaluate the cumulative impacts of toxic emissions from multiple air pollution sources when it issued Major Source Operating Permit No. 4-07-0355-03;[12] (2) JCDH did not evaluate whether the emissions authorized by Major Source Operating Permit No. 4-07-0355-03 will cause "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property throughout the County and in such territories of the County as shall be affected thereby;"[13] (3) JCDH did not evaluate whether the emissions authorized by Major Source Operating Permit No. 4-07-0355-03 will include a carcinogen in an amount equal to or greater than that which would result in an individual having more than one in one hundred thousand (1 in 100,000) chance of developing cancer over a lifetime (70 years) of exposure to that amount;[14] (4) the emission limitations on hazardous air pollutants in Major Source Operating Permit No. 4-07-0355-03 (and EPA's NESHAPs for Coke

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[11](...continued)

> are compliant with Federal or state regulations but that have discriminatory effects (such as an adverse disparate impact) on certain populations based on race, color, or national origin, and are therefore noncompliant with Title VI.

Id. at 4.

[12] *See* discussion at p.11 *supra* and **Figures 2** and **3** *supra* and Howanitz, Jason (2014, Feb. 24), *Title V Operating Permit Evaluation Walter Coke, Inc. (Coke By-Products Plant, Utilities Plant, and Wastewater Treatment Plant) available at* https://www.dropbox.com/s/xzk9m5yhm18x5kz/Title%20V%20Operating%20Permit%20Evaluation.pdf?dl=0. In addition, the EPA has identified numerous parties as Potentially Responsible Parties (PRPs) for air deposition of toxics resulting in soil contamination in Fairmont, Collegeville, and Harriman Park. http://www2.epa.gov/north- birmingham-project/general-notice-letters-sent-prps.

[13] *See* Jefferson County Air Pollution Control Rules and Regulations, Part 1.3 and Part 1.13 and Howanitz, Jason (2014, Feb. 24), *Title V Operating Permit Evaluation - Walter Coke, Inc. (Coke By-Products Plant, Utilities Plant, and Wastewater Treatment Plant) available at* https://www.dropbox.com/s/xzk9m5yhm18x5kz/Title%20V%20Operating%20Permit%20Evaluation.pdf?dl=0.

[14] *See* n. 9 *supra* and Howanitz, Jason (2014, Feb. 24), *Title V Operating Permit Evaluation - Walter Coke, Inc. (Coke By-Products Plant, Utilities Plant, and Wastewater Treatment Plant) available at* https://www.dropbox.com/s/xzk9m5yhm18x5kz/Title%20V%20 Operating%20 Permit%20Evaluation.pdf?dl=0.

Ovens and Coke Batteries) are technology-based standards (largely work practice standards and visible and opacity emission limitations) rather than health-based standards; (5) Major Source Operating Permit No. 4-07-0355-03 does not impose any numerical emission limitations on Benzene, Naphthalene or Arsenic and does not require that Walter Coke perform regular ambient monitoring of air toxics; (6) JCDH has not measured emissions of air toxics from Walter Coke and instead, relies on emission estimates provided by Walter Coke;[15] and (7) JCDH has not investigated the presence of populations that may be particularly sensitive to the emissions of Walter Coke, such as persons with respiratory illnesses (*e.g.*, Asthma and COPD) and pregnant women and newborns.[16]

XI. TIMELINESS OF COMPLAINT

40 C.F.R. § 7.120(b)(2) requires that a complaint alleging discrimination under a program or activity receiving EPA financial assistance must be filed within 180 days after the alleged discriminatory act. The issuance of Major Source Operating Permit No. 4-07-0355-03 by JCDH to Walter Coke, Inc., occurred on October 3, 2014. The 180 day limitations period ends April 1, 2015. This complaint was sent by overnight delivery to the above address (provided by OCR) on March 2, 2015.

XII. PENDING ADMINISTRATIVE REVIEWS

In certain circumstances, EPA may decide that a complaint will be "closed" because a pending administrative review "could affect the circumstances surrounding the complaint and any investigation that OCR may conduct." In such cases, EPA "may waive the 180 day filing time limit if the complaint is filed within a reasonable time period after the conclusion of the administrative appeal process. Generally, that reasonable time period will be no more than 60 calendar days." *Draft Guidance*, 65 Fed. Reg. at 39,673.

A. Board of Health Review of Major Source Operating Permit No. 4-07-0355-03

Pursuant to Jefferson County Board of Health Air Pollution Control Rules and Regulations, § 12.4.1, any person aggrieved (*i.e.*, adversely affected) by the issuance of an air

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[15] Emission estimates are notoriously inaccurate. As a result of DIAL testing, it was determined that the Tonawanda Coke Corp. facility was emitting 90.8 tons/year of Benzene, rather than the 10 tons/year claimed by a company official. Benz, Doug (2010, Sep. 30). Tona Coke grossly underestimated benzene levels, *Tonawanda News*, *available at* https://www.dropbox.com/s/yoohlfu80qej5eu/Tona-Coke-grossly-underestimated-benzene-levels.pdf?dl=0; Environmental Integrity Project, *EPA Emission Factors vs. Actual Measurement: Summary of Recent DIAL/PFTIR Studies*, *available at* http://www.environmentalintegrity.org/news_reports/documents/SummaryofDIALANDPFTIRStudies.pdf; U.S. Environmental Protection Agency, *National Enforcement Initiative: Cutting Hazardous Air Pollutants*, *available at* http://www2.epa.gov/enforcement/national-enforcement-initiative-cutting-hazardous-air- pollutants ("Recent monitoring shows that facilities typically emit more HAP emissions than they actually report").

[16] *See* n. 8 *supra*.

pollution permit by the JCDH may request a hearing to contest such permit before the Jefferson County Board of Health within no more than 30 days after issuance of the permit. Thereafter, persons aggrieved by the issuance of an air pollution permit are foreclosed from seeking review by the Board of Health. On October 31, 2014, GASP, and only GASP, filed a timely Request for Hearing with the Jefferson County Board of Health seeking to have Major Source Operating Permit No. 4-07-0355-03 disapproved. *See* GASP Request for Hearing *available at* https://www.dropbox.com/s/skstdxmcvbl01au/2014.10.31_GASP_Request_for_Hearing.pdf?dl=0. All other aggrieved persons, including all other Complainants named herein, are foreclosed from seeking review of Major Source Operating Permit No. 4-07-0355-03 by the Board of Health because of the time bar in § 12.4.1. The Board is only empowered to determine whether JCDH issued Major Source Operating Permit No. 4-07-0355-03 in compliance with the Jefferson County Board of Health Air Pollution Control Rules and Regulations. It is not empowered to determine whether the permit results in discriminatory impacts or violates Title VI. A motion to dismiss the GASP Request for Hearing was filed by the Jefferson County Department of Health Air Pollution Control Program and remains pending. In the meantime, Major Source Operating Permit No. 4-07-0355-03 is effective as issued and emissions from the Walter Coke facility continue.

B. EPA Review of Major Source Operating Permit No. 4-07-0001-03

Pursuant to Clean Air Act § 505(b)(1), 42 U.S.C. § 7661d(b)(1), and 40 C.F.R. § 70.8(c)(1), EPA is authorized to object to a proposed Title V permit within 45 days after receipt of the proposed permit from the permitting authority. If EPA does not object within this 45-day review period, any person may, within 60 days after the expiration of the 45-day review period, petition EPA to object. Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d). Thereafter, all persons are foreclosed from petitioning EPA to object. On December 8, 2014, GASP, and only GASP, timely filed a petition with EPA requesting that it object to the issuance of Major Source Operating Permit No. 4-07-0355-03. *See* GASP Petition for Objection *available at* https://www.dropbox.com/s/t0rqg0eehu8jpii/2014.12.08_GASP_Petition_to_Object.pdf?dl=0. All other persons, including all other Complainants named herein, are foreclosed from filing such a petition because of the time bar in Clean Air Act § 505(b)(2), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d). EPA is only empowered to determine whether JCDH issued Major Source Operating Permit No. 4-07-0355-03 in compliance with the requirements of the Clean Air Act. EPA is not empowered to object to the permit because the permit results in discriminatory impacts or violates Title VI. The GASP petition remains pending. In the meantime, Major Source Operating Permit No. 4-07-0355-03 is effective as issued and emissions from the Walter Coke facility continue.

C. EPA Assessment, Removal and NPL Listing Actions to Address Contaminated Soils at "35th Avenue Site"

Assessment Action: From November 2012 until June 2013, the EPA collected soil samples from approximately 1,100 residential properties in Collegeville, Fairmont and Harriman

Park. These communities are the closest to the Walter Coke facility. Approximately 350 properties were found to contain concentrations of Benzo(a)pyrene TEQ ≥1.5 mg/kg and inorganic Arsenic ≥37.0 mg/kg.

Removal Action: EPA chose a cleanup level for Benzo(a)pyrene TEQ at a concentration of 1.5 mg/kg. According to EPA's Regional Screening Level Calculator (http://epa-prgs.ornl.gov/cgi-bin/chemicals/csl_search), this concentration in residential soil presents a cancer risk level of 9.8E-05. EPA chose a cleanup level for inorganic Arsenic at 37.0 mg/kg. According to EPA's Regional Screening Level Calculator, this concentration in residential soil presents a cancer risk level of 5.53E-05 and a hazard quotient of 1.09E-01 (adult) and 1.08E-00 (child). The Superfund Removal Program began Phase I of the soil removal activities in mid-February 2014. Approximately 50 properties were addressed in Phase I. Phase II of the soil removal activities is currently underway. Approximately 40 properties will be addressed in Phase II. As of October 2014, 67 properties had been remediated in both Phases I and II. Walter Coke, Inc. has been identified by EPA as a Potentially Responsible Party.

NPL Listing: On September 22, 2014, EPA proposed that the 35th Avenue Site be listed on the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act for soil contamination by Benzo(a)Pyrene and Arsenic in the Harriman Park, Collegeville and Fairmont communities of Birmingham. 79 Fed. Reg. 56,538 (Sep. 22, 2014).

D. Severance

None of the Complainants named herein are parties to any of the above-described administrative review proceedings, except GASP. It is clear from the *Draft Guidance* that EPA intends for this abstention policy to apply only to complainants who are participating in an administrative review proceeding. *Draft Guidance*, 65 Fed. Reg. at 39,673 ("This will *encourage complainants* to exhaust available administrative remedies available under the recipient's permit appeal process and foster early resolution of Title VI issues.") (emphasis added). The abstention policy does not require that any complainants exhaust available administrative remedies. If complainants do not pursue, or are foreclosed from pursuing, available administrative remedies, the terms of Major Source Operating Permit No. 4-07-0355-03 are final. To the extent that EPA determines that abstention is appropriate because GASP is participating in administrative review proceedings, all Complainants named herein request that EPA sever GASP from this Complaint and not abstain from processing this Complaint as to the other Complainants.

XIII. REQUEST

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency - Office of Civil Rights accept this Complaint and conduct an investigation to determine whether JCDH violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the issuance (renewal) of Major Source Operating Permit No. 4-07-0355-

03 on October 3, 2014. If a violation is found and JCDH is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further petition the EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to JCDH, and after the conclusion of those proceedings, deny, annul, or terminate EPA financial assistance to JCDH.

Sincerely,

David A. Ludder
Attorney for Complainants