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

July 6, 2017

Delivered Via Electronic Mail
Russell A. Kelly, Chief
Permits and Services Division
ADEM
P.O. Box 301463
Montgomery, AL 36130-1463

Re: **Application to modify Solid Waste Disposal Facility Permit for the City of Dothan Sanitary Landfill (Permit No. 35-06)**

Dear Mr. Kelly:

These comments are submitted in response to the public notice of the submission of a revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 by the City of Dothan and the proposed modification of Solid Waste Disposal Facility Permit No. 35-06 prepared by the Department. These comments are submitted on behalf of Ex. 6 Personal Privacy (PP)
Ex. 6 Personal Privacy (PP)

I. Prohibition against consideration of application

Ala. Code § 22-27-48(b), as amended by Ala. Act. No. 2017-366 (approved May 24, 2017), provides

> * * * The department may not consider an application for a modified permit for a facility unless such application has received approval pursuant to this section by the affected local governing body.

In addition, Ala. Admin. Code r. 335-13-5-.02(1)(a) requires that applications include "[h]ost government approval, as provided in the Code of Alabama 1975, § 22-27-48[.]"

The revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 that was submitted to the Department on or about March 6, 2017 is not for a simple renewal of Solid Waste Disposal Facility Permit No. 35-06 which is to be otherwise unchanged from Solid Waste Disposal Facility Permit No. 35-06 issued by the Department on October 21, 2013. Moreover, the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 is not for the limited purpose of changing liner and leachate collection design, changes in waste streams from within the facility's designated service area, changes in sequence of fill, changes to incorporate new technology or changes intended to bring a facility into compliance with statutes and regulations. Accordingly, the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 is not exempt from the requirement to receive

9150 McDougal Court ◆ Tallahassee ◆ Florida 32312-4208 ◆ Telephone 850-386-5671
Facsimile 267-873-5848 ◆ Email DavidALudder@enviro-lawyer.com ◆ Web www.enviro-lawyer.com

approval by the local governing body pursuant to Ala. Code § 22-27-48, as amended by Ala. Act. No. 2017-366. *See* Code § 22-27-48(d), as amended by Ala. Act. No. 2017-366.

The revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 is not the same as the application for modification of Solid Waste Disposal Facility Permit No. 35-06 that was reviewed and approved by the Board of Commissioners on September 16, 2014 pursuant to Ala. Code § 22-27-48. The revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 was not submitted to or received by the Board of Commissioners of the City of Dothan for review and approval pursuant to Ala. Code § 22-27-48, as amended by Ala. Act. No. 2017-366, at any time. The Board of City Commissioners did not publish public notice of the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 or conduct a public hearing on the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 as required by Ala. Code § 22-27-48, as amended by Ala. Act. No. 2017-366. The Board of Commissioners did not approve the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 pursuant to Ala. Code § 22-27-48, as amended by Ala. Act. No. 2017-366.

Accordingly, the Department is prohibited from considering the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 until such time as the Board of Commissioners of the City of Dothan approves the revised application for modification of Solid Waste Disposal Facility Permit No. 35-06 pursuant to Ala. Code § 22-27-48, as amended by Ala. Act. No. 2017-366.

II. Failure to provide notice to landowners

Ala. Admin. Code r. 335-13-5-.03(1) provides:

> (a) The Department shall provide notice and an opportunity for a public hearing on any landfill unit permit if determined necessary to meet the requirements of this Division.
>
> (b) The following procedures shall be observed.
>
> 1. The Department shall notify interested and potentially interested persons of the proposed landfill unit by publishing a notice in a newspaper of general circulation in the area.
>
> (i) The notice shall be given not less than 35 days prior to the proposed issuance of a permit.
>
> * * *
>
> 2. Landowners adjacent to a proposed landfill unit shall receive a copy of public notice.

The Department has a duty to identify the landowners adjacent to a proposed landfill or proposed landfill expansion and to provide them with a copy of the public notice. On May 17, 2017, the Department mailed notice to persons identified by CDG Engineers and Associates, Inc.

as adjacent landowners "as of October 24, 2016," apparently based on Houston County tax records. Among the identified adjacent landowners were "Ex. 6 Personal Privacy (PP) and Ex. 6 Personal Privacy (PP) These persons, however, were not "adjacent landowners" on May 17, 2017.

Ex. 6 Personal Privacy (PP) ceased being adjacent landowners on April 10, 2017. On that date, their land was transferred to "POFA Properties LLC, An Alabama Limited Liability Company." *See* Deed Book 784, Page 9, Houston County Probate Office. The recording of the deed operates as constructive notice to the Department that POFA Properties, LLC owned the property as of April 10, 2017. Ala. Code § 35-4-51. Accordingly, the May 17, 2017 notice should have been directed to POFA Properties, LLC. The registered agent and address for POFA Properties, LLC is identified by the Alabama Secretary of State as Floyd C. Davis, P.O. Box 792, Wedowee, Alabama 36278. There is no evidence that POFA Properties, LLC received a copy of the public notice as required by Ala. Admin. Code r. 335-13-5-.03(1)2.

When the notice sent to Ex. 6 Personal Privacy (PP) was returned to the Department undelivered, a duty of further inquiry arose to identify the current landowner(s). An inquiry to the City of Dothan should have disclosed that Ex. 6 Personal Privacy (PP) died in a house fire on September 14, 2016. *See* "Fire that killed elderly Dothan couple not considered suspicious," *Dothan Eagle*, Sept. 14, 2016; "Obituaries," *Dothan Eagle*, Sept. 16, 2016. Upon their death, the Ex. 6 Personal Privacy (PP) land devolved to those persons to whom the property was devised by Ex. 6 Personal Privacy (PP) in her will – subject to divestment for the payment of debts of the estate or costs and expenses for administration of the estate. Ala. Code § 43-2-830; *Ruf v. Ruf*, 769 So. 2d 923, 928 (Ala. Civ. App. 1999). The devisees of the real property were identified in the will of Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) Houston County Probate Office (filed Oct. 18, 2016). Probate of the estate of Ex. 6 Personal Privacy (PP) was commenced on October 18, 2016. *See Petition for Probate of Will*, Case No. 2016- Ex. 6 Personal Privacy (PP) Houston County Probate Office (filed Oct. 18, 2016). Thus, on September 14, 2016, Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) each acquired a separate and distinct interest in the property and each is deemed an owner of the entire property. 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 34 (2017). As adjacent landowners Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) were each entitled to receive notice from the Department. *See Howze v. Dew*, 7 So. 239 (Ala. 1890) (where law required notice to be served on land owner, all co-tenants were entitled to notice). Accordingly, the May 17, 2017 notice should have been directed to Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) There is no evidence that Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) received a copy of the public notice as required by Ala. Admin. Code r. 335-13-5-.03(1)2.

Had notice been provided to all persons who were adjacent landowners on May 17, 2017, additional comments on the revised application for modification of Solid Waste Disposal Facility

Permit No. 35-06 and the draft Solid Waste Disposal Facility Permit No. 35-06 might have been submitted. Such comments may have resulted in the denial of the application for modification of Solid Waste Disposal Facility Permit No. 35-06 or the issuance of Solid Waste Disposal Facility Permit No. 35-06 with more stringent terms and conditions than were contained in the draft Solid Waste Disposal Facility Permit No. 35-06. Such an outcome might have eliminated or reduced the injuries suffered by all adjacent landowners from the operation of the Dothan Sanitary Landfill. Thus, failure of the Department to notify some of the adjacent landowners is a procedural injury that is connected to the separate concrete interests of other adjacent landowners, notwithstanding that the other adjacent landowners received actual notice. *See Sierra Club v. Johnson*, 436 F. 3d 1269, 1275-1279 (11th Cir. 2006) (individual who received actual notice suffered a procedural injury when notice was not sent to others on mailing list); *Massachusetts v. Envtl. Protection Agency*, 549 U.S. 497, 518, 127 S. Ct. 1438, 1453 (2007) ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

Accordingly, the Department failed to provide notice to all adjacent landowners as required by Ala. Admin. Code r. 335-13-5-.03(1)2.

III. Title VI non-compliance

A number of Dothan residents filed a complaint with the U.S. Environmental Protection Agency (EPA) on February 3, 2016 alleging that a previous modification of Solid Waste Disposal Facility Permit No. 35-06 violated 40 C.F.R. § 7.35(b) because it would have the effect of subjecting individuals to discrimination because of their race or color. That complaint is attached for your reference. On June 10, 2016, the Department rescinded (revoked) the previous permit modification and EPA subsequently dismissed the discrimination complaint as moot.

The current proposed modification of Solid Waste Disposal Facility Permit No. 35-06 will also violate 40 C.F.R. § 7.35(b) because it will have the effect of subjecting individuals to discrimination because of their race or color as alleged in the attached complaint. Accordingly, the application for modification of Solid Waste Disposal Facility Permit No. 35-06 should be denied.

As a recipient of federal financial assistance from EPA, the Department "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." That obligation requires more than a statement that "[t]he Department does not discriminate on the basis of race, color, national origin, sex, religion, age or disability in the administration of its programs." It requires that the Department ensure that its actions do not have discriminatory effects.

The Department has previously asserted that it does not have statutory authority to ensure that its actions do not have discriminatory effects. In *Holmes v. Alabama Department of Environmental Management*, EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, 1998 WL 75094 (Ala. Envtl. Mgmt. Comm'n Feb. 17, 1998), Holmes and others challenged the issuance of air permits by ADEM to S&C Beef Processors, LLC for its proposed rendering operations and associated boilers at its Montgomery facility. The Hearing Officer summarized the testimony of Ron Gore, Chief of ADEM's Air Division, as follows:

> The Department also did not consider racial and economic demographics in deciding whether or not to issue the Permits. The Department does not have statutory authority to make such considerations a part of the permit process. Tr. at 55-56. The U. S. Environmental Protection Agency (EPA) has a division which deals with such issues (commonly called environmental justice issues), through a policy directive issued by the President. The Department is not charged with responsibility for administering this directive, which is not in the form of regulations. Parties complaining of environmental justice issues must go to the EPA. Tr. at 56-58. The EPA does not require the Department to deal with odor as an air pollutant, although the State has chosen to do so in its authorizing statute. EPA does not have any regulations concerning odor emissions. Nonetheless, a party is not precluded from pursuing an environmental justice claim on the basis of odor to the EPA. Id.

Id., 1998 AL ENV LEXIS 1, at *14-15, 1998 WL 75094, at *6. In his conclusions of law, the Hearing Officer held:

> Although it is not pled in the Request for Hearing, the Hearing Officer takes notice of Petitioners' contention that the Department should have considered the racial makeup of the neighborhood in deciding whether or not to issue the Permits. (See, e. g., Intervenor's Exhibit 1, Tab 6, Memorandum from Rep. Alvin Homes). The governing statutes and regulations do not confer on the Department any power to consider such factors in deciding whether or not to issue a permit. Respondent's Exhibit 3 and 4. Again, Ron Gore testified that the Department's interpretation of its regulations is consistent with this absence of delegation, i.e. that the Department has no such power.

Id., 1998 AL ENV LEXIS 1, at *30-31, 1998 WL 75094, at *11. *See id.*, 1998 AL ENV LEXIS 1, at *32, 1998 WL 75094, at *12 ("The Department, and the Commission, further lack jurisdiction to consider racial or socioeconomic factors in determining whether or not to issue a permit which otherwise complies with applicable regulations."). The Hearing Officer recommended that the Environmental Management Commission approve the permits issued to S&C Beef Processors, LLC. Id., 1998 AL ENV LEXIS 1, at *34, 1998 WL 75094, at *12. The Commission adopted the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation. Id., 1998 AL ENV LEXIS 1, at *1, 1998 WL 75094, at *1. *See E. Central*

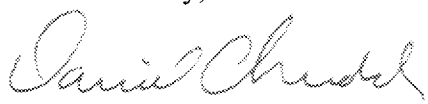
Ala. Alliance for Quality Living v. Alabama Dep't of Envtl. Mgmt., EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6, *28 (Ala. Envtl. Mgmt. Comm'n Mar. 13, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit."), *petition for review denied*, No. CV-2003-000356 (Lee County Cir. Ct. Nov. 20, 2003), *aff'd* 915 So. 2d 1186 (Ala. Civ. App. 2004) (Table).

"It is settled law in Alabama that an administrative agency is purely a creature of the legislature and has only those powers conferred upon it by the legislature." *Jefferson County v. Ala. Criminal Justice Info. Ctr. Comm'n*, 620 So. 2d 651, 658 (Ala. 1993). *Accord, Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So. 2d 45, 47 (Ala. 1995). "An administrative agency cannot usurp legislative powers or contravene a statute." *Id. Accord, City of Brundidge v. Ala. Dep't of Envtl. Mgmt.,* Nos. 2140325/2140342, 2016 Ala. Civ. App. LEXIS 37, *41 (Ala. Civ. App. 2016).

The Alabama Legislature has not granted the Department the authority to ensure that permits will not "have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." *See e.g.*, Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17; Alabama Solid Wastes and Recyclable Materials Management Act, Ala. Code §§ 22-27-1 to 22-27-18. The Department does not have statutory authority to ensure that its permit decisions do not have discriminatory effects. Moreover, the Department cannot develop, adopt, or implement policies, procedures, or regulations that will usurp legislative powers or enlarge upon statutory policy. *See Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 210 (Ala. 1991) (an agency may not adopt regulations that subvert or enlarge upon statutory policy).

Absent additional authority from the legislature, the Department cannot ensure that the modification of Solid Waste Disposal Facility Permit No. 35-06 will comply with 40 C.F.R. § 7.35(b).

Sincerely,



David A. Ludder

cc: Lillian S. Dorka, Director
dorka.lilian@epa.gov
Brittany Martinez, Case Manager
martinez.brittany@epa.gov
Office of General Counsel
External Civil Rights Compliance Office
U.S. Environmental Protection Agency

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

February 3, 2016

Overnight Delivery
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

Re: **Title VI Civil Rights Complaint and Petition for Relief or Sanction - Alabama Department of Environmental Management Permitting of City of Dothan Sanitary Landfill in Houston County, Alabama**

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 Alabama Department of Environmental Management (ADEM) violated Title VI and EPA's implementing regulations by modifying Solid Waste Disposal Facility Permit No. 35-06 and authorizing the City of Dothan to expand the City of Dothan Sanitary Landfill which adversely and disparately impacts African-American residents in the surrounding community.

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

9150 McDougal Court ◆ Tallahassee ◆ Florida 32312-4208 ◆ Telephone 850-386-5671
Facsimile 267-873-5848 ◆ Email DavidALudder@enviro-lawyer.com ◆ Web www.enviro-lawyer.com

I. Title VI Background

"Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating." *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) ("*Interim Guidance*") at 2 (footnote omitted); *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667, 39680 (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 39672. In order to establish a *prima facie* case of adverse disparate impact, EPA must determine that (1) a causal connection exists between the recipient's facially neutral action or practice and the alleged impact; (2) the alleged impact is "adverse;" and (3) the alleged adversity imposes a disparate impact on an individual or group protected under Title VI. *Yerkwood Landfill Complaint Decision Document*, EPA OCR File No. 28R-99-R4 (July 1, 2003) at 3; *New York City Envt'l Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000); *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24739, 24741 (April 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 39683. "Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value *to the recipient* in the permitted activity." *Interim Guidance* at 11 (emphasis added). "[A] justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is

---

[1] On June 27, 2000, EPA published *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39667-39687 (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 39650. The *Draft Guidance* has never been made final and consequently, the *Interim Guidance* issued in February 1998 has not been replaced.

practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id. See Draft Guidance*, 65 Fed. Reg. at 39683.

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

II. Complainants

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

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

Ex. 6 Personal Privacy (PP)

---

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

Ex. 6 Personal Privacy (PP)

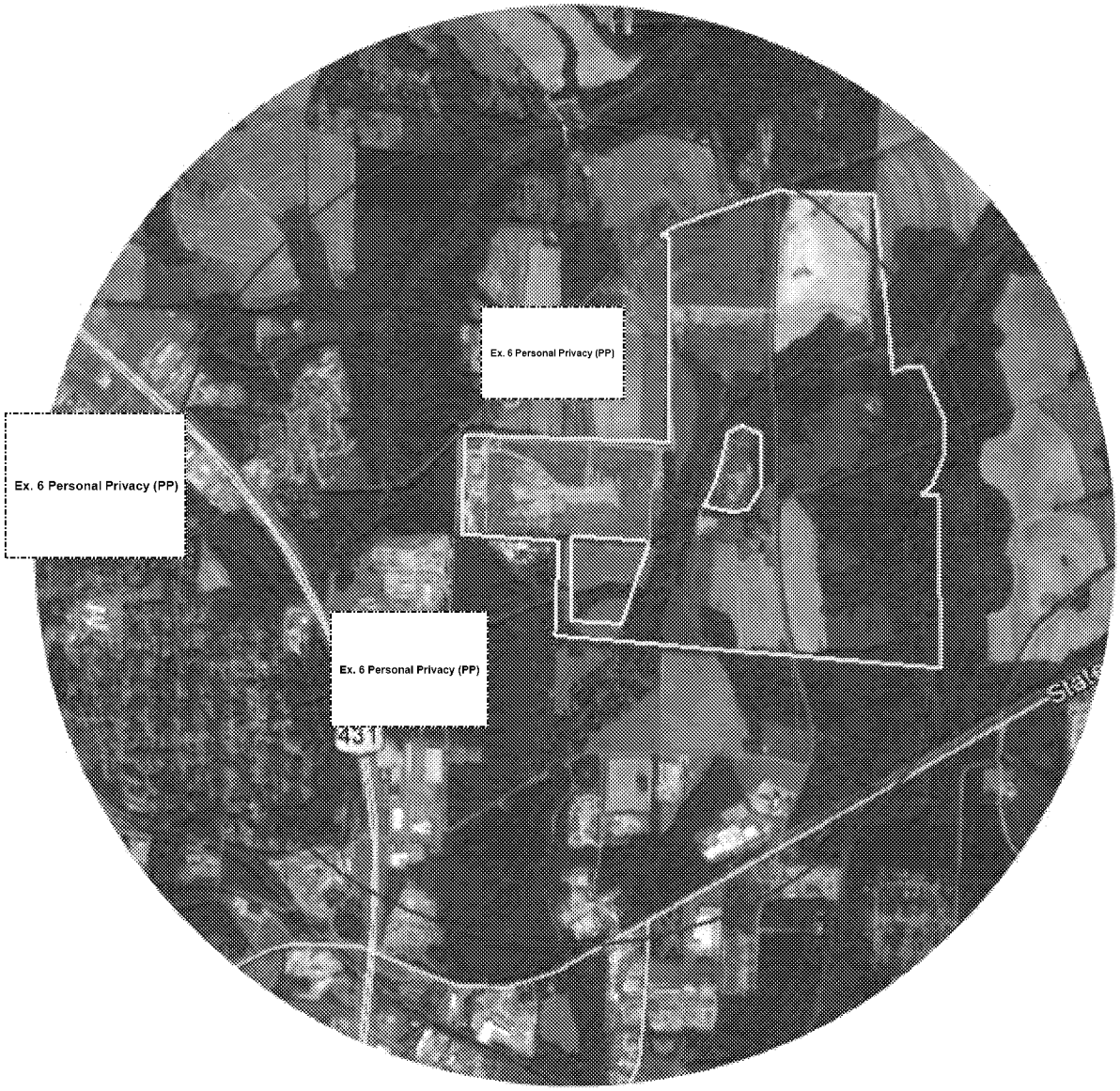
All Complainants are African-Americans who live within one mile of the perimeter of City of Dothan Sanitary Landfill and who believe that they, and other African-Americans, have been discriminated against by ADEM in violation of Title VI and 40 C.F.R. Part 7 as a result of ADEM's modification of Solid Waste Disposal Facility Permit No. 35-06. **Figure 1**. The undersigned is the authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

III. Recipient

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

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

Figure 1
PROXIMITY OF COMPLAINANTS
TO CITY OF DOTHAN SANITARY LANDFILL



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

Interim Guidance at 2-3 (footnotes omitted).

ADEM was a recipient of financial assistance from EPA at the time of the alleged discriminatory act. For example, EPA has awarded grants to ADEM as shown in **Table 1**.

IV. Discriminatory Act

The alleged discriminatory act is the modification of Solid Waste Disposal Facility Permit No. 35-06 by ADEM on January 8, 2016 (**Exhibit A**).[3] The permit authorizes the City of Dothan to construct and operate the City of Dothan Sanitary Landfill. The permit modification expands the total permitted area for the City of Dothan Sanitary Landfill from 78 to 534 acres (584% increase); expands the permitted municipal solid waste disposal area from 55 acres to 75.6 acres (37% increase); and authorizes the construction and operation of a new demolition disposal area of 13.6 acres which will include vertical expansion. The remaining acreage includes buffer zones, surface drainage structures, sediment ponds, borrow areas, and a previously closed Sanitary Landfill. Permit No. 35-06 authorizes the disposal of "non-hazardous, non-infectious, putrescible and non-putrescible waste including but not limited to household garbage, industrial waste, commercial solid wastes and construction and demolition waste and other similar type wastes" in the municipal solid waste disposal area. The permit authorizes the disposal of "construction and demolition waste, tires, limbs and stumps" in the construction and demolition disposal area. The permit authorizes a maximum daily average disposal of 400 tons of waste per day. The permitted service area of the City of Dothan Sanitary Landfill is Houston County, Alabama; the City of Dothan, Alabama; and the City of Headland, Alabama. *Id.* The facility is located in Houston County, Alabama at approximately Latitude Ex. 6 Personal Privacy (PP) Longitude Ex. 6 Personal Privacy (PP). **Figure 2**. Land use zoning around the City of Dothan Sanitary Landfill is shown in **Figure 3**.

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

Table 1
EPA Financial Assistance Awarded to ADEM

Grant Family ID	CFDA Number	Applicant Name	Address	Award Date	Cumulative Award	Project Start	Project End
00474715	66.454	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	DEC-11-2014	$417,000	OCT-01-2014	SEP-30-2016
00D08713	66.461	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-12-2013	$299,996	OCT-01-2013	OCT-01-2016
00D16513	66.472	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-24-2013	$1,504,000	OCT-01-2013	SEP-30-2016
00D17714	66.805	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	MAR-19-2014	$2,244,000	OCT-01-2013	MAR-31-2016
00D21014	66.040	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-07-2014	$305,393	OCT-01-2014	SEP-30-2016
00D21714	66.419	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-11-2014	$160,000	MAY-01-2014	DEC-31-2016
00D22914	66.461	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	DEC-03-2014	$549,014	OCT-01-2014	SEP-30-2017
00D28715	66.034	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	MAY-04-2015	$584,594	APR-01-2015	MAR-31-2016
00D34615	66.805	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUL-08-2015	$1,122,000	OCT-01-2014	SEP-30-2016
00D35715	66.802	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-24-2015	$73,146	OCT-01-2015	SEP-30-2017
00D35815	66.809	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-21-2015	$41,250	OCT-01-2015	SEP-30-2017
00D35915	66.802	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-21-2015	$41,378	OCT-01-2015	SEP-30-2017
01000112	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUN-12-2012	$15,803,000	JUL-01-2012	JUN-30-2016

Table 1 (con't)

01000112	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUN-12-2012	$15,803,000	JUL-01-2012	JUN-30-2016
01000113	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-20-2013	$14,929,000	JUL-01-2013	JUN-30-2017
01000114	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-07-2014	$15,678,000	JUL-01-2014	JUN-30-2018
01000115	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-04-2015	$15,597,000	AUG-01-2015	JUL-31-2019
95411115	66.804	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUL-08-2015	$646,383	OCT-01-2014	SEP-30-2016
95436609	66.818	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	APR-15-2009	$1,400,000	OCT-01-2002	SEP-30-2017
96464612	66.605	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-15-2011	$38,586,646	OCT-01-2011	SEP-30-2016
96464613	66.605	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-29-2012	$17,451,051	OCT-01-2012	SEP-30-2017
96464614	66.605	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-11-2013	$36,486,535	OCT-01-2013	SEP-30-2017
96464615	66.605	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-02-2014	$33,418,667	OCT-01-2013	SEP-30-2017
98447212	66.468	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUN-27-2012	$22,250,000	JUL-01-2012	JUN-30-2016
98447213	66.468	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-20-2013	$10,438,000	JUL-01-2013	JUN-30-2017
98447214	66.468	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-07-2014	$16,892,000	JUL-01-2014	JUN-30-2018
98447215	66.468	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-29-2015	$16,781,000	AUG-01-2015	JUL-31-2019

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

Figure 2
LOCATION OF THE CITY OF DOTHAN SANITARY LANDFILL
HOUSTON COUNTY, ALABAMA

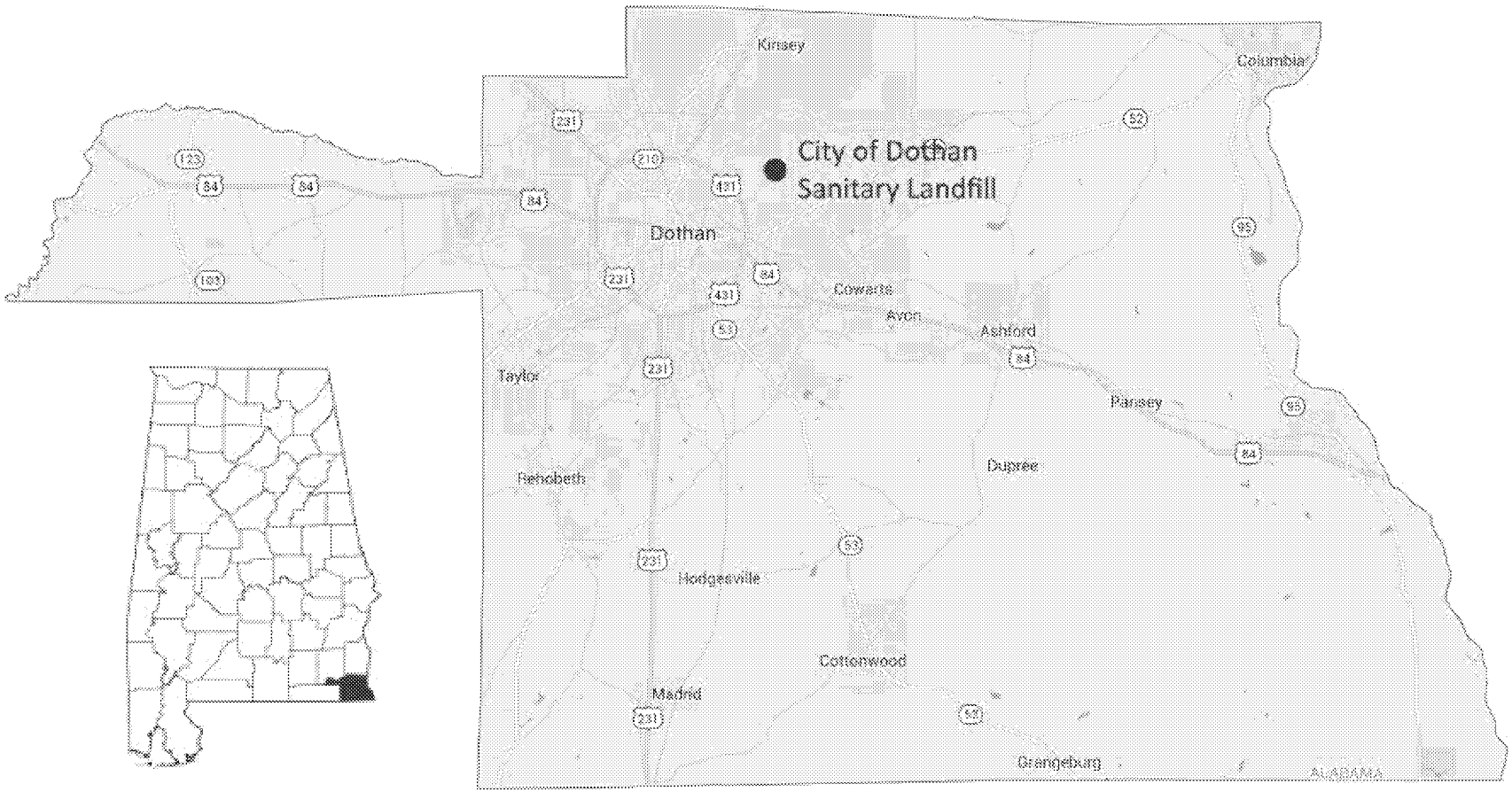
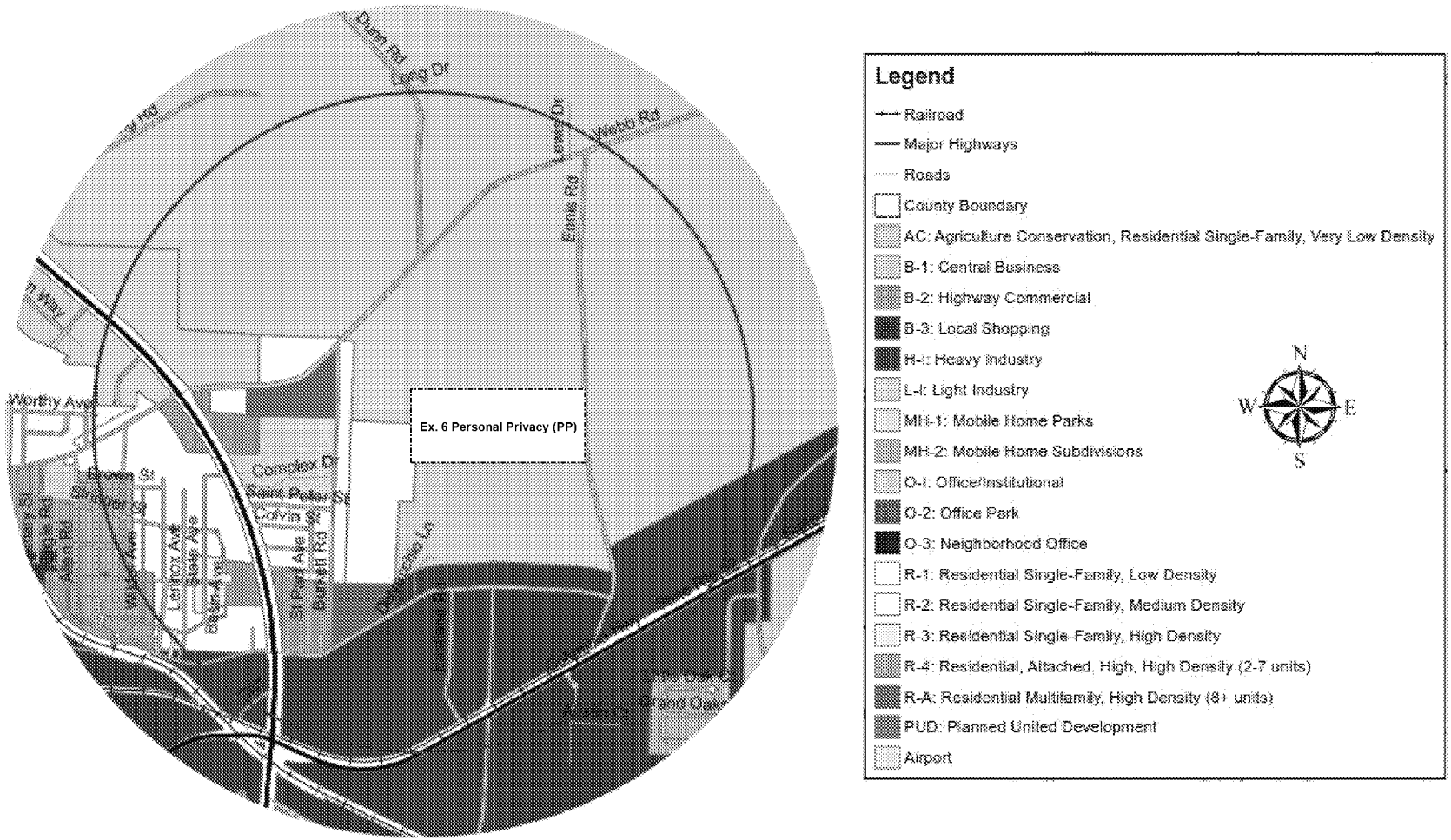


Figure 3
LAND USE ZONING SURROUNDING THE DOTHAN SANITARY LANDFILL



V. Timeliness

40 C.F.R. § 7.120(b)(2) requires that a complaint alleging discrimination under a program or activity receiving EPA financial assistance must be filed within 180 days after the alleged discriminatory act. The modification of Solid Waste Disposal Facility Permit No. 35-06 by ADEM occurred on January 8, 2016. Accordingly, the filing of this complaint is timely if received by EPA on or before July 6, 2016.

VI. Adverse Impacts

The adverse impacts suffered by the African-American population from the activities authorized by the January 8, 2016 modification of Permit 35-06 include the following:[4]

A. The frequent emission of odors from the landfill that are unpleasant to persons and that cause lessened human food and water intake; interference with sleep; irritation of the upper respiratory tract (nose and throat) and eyes; headaches; dizziness; nausea; vomiting; and interference with outdoor activities (*e.g.* cooking, eating, entertaining) and the enjoyment of property.

B. Increased populations of flies in and around homes that are bothersome and that may be carriers of infectious viruses, bacteria, and parasites.

C. Increased populations of buzzards that roost in trees around homes, that deposit droppings, and that may be carriers of infectious viruses, bacteria, and parasites.

D. Increased populations of rats, raccoons, and opossums around homes that may be carriers of infectious viruses, bacteria, and parasites.

E. Increased noise from the operation of vehicles (*e.g.*, dump trucks) and heavy machinery (*e.g.*, steel wheel compactor, bulldozer) at the landfill, including backup alarms and slamming tailgates, causing headaches and interference with sleep, conversations, and television listening.

F. The frequent emission of fugitive dust from the landfill that causes particulate deposition on personal and real property, including homes, porches, pool, vehicles, and laundry.

---

[4] Although disposal of waste in the expanded municipal solid waste landfill and construction/demolition landfill has yet to begin, Complainants assert that the adverse impacts described herein will result from operation of the expanded City of Dothan Sanitary Landfill because residents have suffered similar impacts from operation of the City of Dothan Sanitary Landfill from 1969 to 2014 (45 years). *See e.g.*, *2013 Public Comments* (**Exhibit B**); *2013 Hearing Record* (**Exhibit C**). The existing municipal solid waste landfill commenced operation in November 1990 and reached capacity in May 2014. A previous landfill commenced operation in 1969 and was closed in November 1995. The 20 acre expansion of the existing municipal solid waste landfill will permit continued disposal for 15 to 20 more years.

G. Decreased property values. *See e.g.,* Affidavit of Diane Hite (**Exhibit D**); Cameron, T.A. "Directional Heterogeneity in Distance Profiles in Hedonic Property Value Models," *Journal of Environmental Economics and Management* 51(1) (2006): 26-45; Guntermann, K.L. "Sanitary Landfills, Stigma and Industrial Land Values," *Journal of Real Estate Research* 10(5) (1995): 531-542; Hirshfeld, S. et al. "Assessing the True Cost of Landfills," *Waste Management and Research* 10 (1992): 471-484; Hite, D. "A Random Utility Model of Environmental Equity," *Growth and Change* 31(4) (2000): 40-58; Hite, D. "Information and Bargaining in Markets for Environmental Quality," *Land Economics* 74(3) (1998): 303-316; Hite, D., et al. "Property Value Impacts of an Environmental Disamenity: The Case of Landfills," *Journal of Real Estate Finance and Economics* 22 (2001): 185-202; Kinnaman, T.C. "A Landfill Closure and Housing Values," *Contemporary Economic Policy* 27(3) (2009): 380-389; Lim, J.S., et al. "Does size really matter? Landfill scale impacts on property values," *Applied Economics Letters* 14 (2007): 719-723; Nelson, A.C., et al. "Price effects of landfills on house values," *Land Economics* (1992); Ready, R.C., "Do Landfills Always Depress Nearby Property Values?," *Journal of Real Estate Research* 32(3) (2010): 321-339; Reichert, A.K., et al. "The Impact of Landfills on Residential Property Values," *Journal of Real Estate Research* 7(3) (1992): 297-314; Wilson, S.E., "Evaluating the potential impact of a proposed landfill," *Appraisal Journal* 77 (2009): 24-__; and Spector, K., et al. "Review of Current Property Valuation Literature," Industrial Economics, Inc. (1999). Some residents have been told by realtors that their property is worth less than it otherwise would be because of the proximity of the landfill. One resident had difficulty obtaining a loan to construct a house because of the proximity of the landfill.

VII. ADEM Authority

EPA guidance provides that "OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program." *Interim Guidance* at 8; *Draft Guidance*, 65 Fed. Reg. at 39678. "In determining the nature of stressors (*e.g.*, chemicals, noise, odor) and impacts to be considered, OCR would expect to determine which stressors and impacts are within the recipient's authority to consider, as defined by applicable laws and regulations." *Draft Guidance*, 65 Fed. Reg. at 39678. *See id.,* 65 Fed. Reg. at 39670-71. 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 Alabama Department of Public Safety to consider, the Court recognized them as sufficient to establish disproportionate adverse effects on a group protected by Title VI.

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

A. Control of odors.

"[One aspect of municipal solid waste] landfill emissions is the offensive odor associated with landfills. While the nature of the wastes themselves contribute to the problem of odor, the gaseous decomposition products are often characteristically malodorous and unpleasant. Various welfare effects may be associated with odors, but due to the subjective nature of the impact and perception of odor, it is difficult to quantify these effects. Studies indicate that unpleasant odors can discourage capital investment and lower the socioeconomic status of an area. Odors have been shown to interfere with daily activities, discourage facility use, and lead to a decline in property values, tax revenues, and payroll . . .." 49 Fed. Reg. 9905, 9917 (Mar. 12, 1996). Landfill odors can cause ill-effects such as lessened human food and water intake, interference with sleep, upset appetite, irritation of the upper respiratory tract (nose and throat) and eyes, headaches, dizziness, nausea, and vomiting. *Title VI Civil Rights Complaint and Petition for Relief or Sanction - Alabama Department of Environmental Management Permitting of Arrowhead Landfill in Perry County, Alabama* (EPA OCR File No. 01R-12-R4) at 12.

Odors are typically reduced by eliminating the direct contact of wind with disposed waste. *Solid Waste Disposal Facility Technical Manual*, § 3.3.3 (EPA530-R-93-017, Nov. 1993). ADEM has relied exclusively on minimum cover requirements to achieve odor control. *Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #1; *Response to Comments - City of Dothan Landfill*

Permit Renewal (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #3.[5] Permit No. 35-06, Section III, H. provides:

> Cover Requirements. The Permittee shall cover all wastes as required by 335-13. The municipal solid waste disposal area shall be covered at the conclusion of each day's activities. The construction and demolition waste disposal area shall be covered at the conclusion of each week's activities.

ADEM's reliance on the *minimum* cover requirements has proven to be ineffective in preventing adverse impacts on the neighboring community.

ADEM has ample authority to regulate and control odors from municipal solid waste landfills and construction/demolition landfills through imposition of additional requirements, including enhanced cover frequency, depth, or density; working face area reduction; aesthetic buffer zones; or other requirements,[6] including the following:

Ala. Admin. Code r. 335-13-4-.22(3)(a) (applicable to municipal solid waste landfills) provides:

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

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

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

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

---

[5] ADEM regards odors that are common to landfills to be permissible. *Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #1.

[6] *E.g.*, EPA has recognized that should unwanted effects persist after implementation of minimum cover requirements , the owner or operator may be required to increase the amount of soil used or apply it more frequently. *Solid Waste Disposal Facility Technical Manual*, § 3.3.3 (EPA530-R-93-017, Nov. 1993). *See* 56 Fed. Reg. at 51050.

[7] Permit No. 35-06, Section VI, provides that "[t]his landfill may be subject to ADEM Admin. Code Division 3 . . . and the Federal Clean Air Act."

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

Ala. Admin. Code r. 335-13-4-.15 (applicable to all landfills) provides:

> Cover. Daily, weekly, or *some other periodic cover* shall be required at all landfill units, as determined by the Department.
>
> (1) The suitability and volume of any soils for daily, intermediate and final cover requirements shall be determined by soil borings and analysis.
>
> (2) Any proposal to use alternate cover systems shall be submitted to and approved by the Department prior to implementation.

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.22(1) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.23(1)(a) (applicable to construction/demolition landfills) provides:

> All waste shall be covered as follows:
>
> 1. A *minimum* of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by the Department shall be added at the conclusion of each week's operation or *as otherwise specified* by the Department to control . . . odors . . ..

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.22(1)(b) (applicable to municipal solid waste landfills) provides:

> All waste shall be confined to *as small an area as possible* and spread to a depth not exceeding two feet prior to compaction . . ..

(Emphasis added).[8]

Ala. Admin. Code r. 335-13-4-.23(1)(c) (applicable to construction/demolition landfills) provides:

> All waste shall be confined to *as small an area as possible* . . ..

(Emphasis added).[9]

Ala. Admin. Code r. 335-13-4-.13(2)(f) (applicable to all landfills) provides:

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

(Emphasis added).

---

[8] Permit No. 35-06, Section III, J. provides:

> Daily Cells. All waste shall be confined to an area *as small as possible* and spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 4 to 1 or as otherwise approved by ADEM. The Permittee has been granted a variance to operate two working faces (See Section X.2.).

Section X, 2. provides:

> A variance is granted from ADEM Rule 335-13-4-.23(1)(c) requiring waste to be confined to *as small an area as possible*. The Permittee has been approved to operate two working faces. The working faces must be confined to as small an area as possible. (See Section III. J.).

The imprecise language used in Ala. Admin. Code rs. 335-13-4-.22(1)(b) and 335-13-4-.23(1)(c) and Permit No. 35-06, Section III, J. ("as small as possible") would likely be unenforceable from both a practical and legal standpoint. *See e.g., Ross Neely Express, Inc. v. Alabama Dep't of Envtl. Mgmt.*, 437 So. 2d 82 (Ala. 1983) (regulation requiring person to take "reasonable precautions" is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.").

[9] *Id.*

Ala. Admin. Code r. 335-13-4-.22(3)(b) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).[10]

Ala. Admin. Code r. 335-13-4-.23(3)(a) (applicable to construction/demolition landfills) provides:

> Notwithstanding this Rule, certain requirements for operating and maintaining a C/DLF or ILF *may be enhanced* or reduced by the Department as deemed necessary to comply with the Act and this Division. Any action by the Department to enhance or reduce the requirement(s) must be done in writing from the Department.

(Emphasis added).[11]

The foregoing provisions authorize ADEM to require that landfill operations incorporate practices as necessary to control odors.

B. Control of disease vectors.

A "disease vector" is "an organism that is capable of transmitting a disease from one host to another." Ala. Admin. Code r. 335-13-1-.03(37). *See* 40 C.F.R. § 258.22(b) ("disease vectors means any rodents, flies, mosquitoes, or other animals, including insects, capable of transmitting disease to humans"). "Municipal wastes are known to contain pathogenic bacteria, parasites, and viruses that can infect humans and animals. These wastes also provide food and harborage from rodents, flies, and mosquitoes that then transmit disease organisms to humans and animals." 53 Fed. Reg. at 33336. *See Draft Background Document - Operating Criteria (Subpart C), Criteria for Municipal Solid Waste Landfills (40 CFR Part 258)* (U.S. EPA, July 1988) at III-6.

Permit No. 35-06, Section III, Q. provides:

> Vector Control. The Permittee shall provide for vector control as required by [Ala. Admin. Code div.] 335-13.

Permit No. 35-06, Section III, H. provides:

---

[10] *See* Permit No. 35-06, Section III, T. ("Other Requirements. ADEM may enhance or reduce the requirements for operating and maintaining the landfill as deemed necessary by the Land Division.").

[11] *Id.*

> Cover Requirements. The Permittee shall cover all wastes as required by 335-13. The municipal solid waste disposal area shall be covered at the conclusion of each day's activities. The construction and demolition waste disposal area shall be covered at the conclusion of each week's activities.

ADEM has relied exclusively on *minimum* cover requirements to achieve disease vector control. *Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #1; *Response to Comments - City of Dothan Landfill Permit Renewal* (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #3. This reliance has proven to be ineffective in preventing adverse impacts on the neighboring community.

ADEM has ample authority to provide enhanced regulation and control of disease vectors from municipal solid waste landfills and construction/demolition landfills through imposition of any requirements necessary, including enhanced cover frequency, depth, or density; working face area reduction; use of repellents, insecticides or rodenticides; composting or processing of organic wastes prior to disposal; and predatory or reproductive controls.[12] These authorities include the following:

Ala. Admin. Code r. 335-13-4-.22(2)(d) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.15 (applicable to all landfills) provides:

> Cover. Daily, weekly, or *some other periodic cover* shall be required at all landfill units, as determined by the Department.
> (1) The suitability and volume of any soils for daily, intermediate and final cover requirements shall be determined by soil borings and analysis.
> (2) Any proposal to use alternate cover systems shall be submitted to and approved by the Department prior to implementation.

(Emphasis added).

---

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

Ala. Admin. Code r. 335-13-4-.22(1) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.23(1)(a) (applicable to construction/demolition landfills) provides:

> All waste shall be covered as follows:
> 1. A *minimum* of six inches of compacted earth or other alternative cover material that includes but is not limited to foams, geosynthetic or waste products, and is approved by the Department shall be added at the conclusion of each week's operation or *as otherwise specified* by the Department to control disease vectors . . ..

(Emphasis added).

Ala. Admin. Code r. 335-13-4-.22(1)(b) (applicable to municipal solid waste landfills) provides:

> All waste shall be confined to *as small an area as possible* and spread to a depth not exceeding two feet prior to compaction . . ..

(Emphasis added).[13]

Ala. Admin. Code r. 335-13-4-.23(1)(c) (applicable to construction/demolition landfills) provides:

> All waste shall be confined to *as small an area as possible* . . ..

(Emphasis added).[14]

---

[13] *See supra* note 8.

[14] *Id.*

Ala. Admin. Code r. 335-13-4-.22(3)(b) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).[15]

Ala. Admin. Code r. 335-13-4-.23(3)(a) (applicable to construction/demolition landfills) provides:

> Notwithstanding this Rule, certain requirements for operating and maintaining a C/DLF or ILF *may be enhanced* or reduced by the Department as deemed necessary to comply with the Act and this Division. Any action by the Department to enhance or reduce the requirement(s) must be done in writing from the Department.

(Emphasis added).[16]

The foregoing provisions authorize ADEM to require that landfill operations incorporate practices as necessary to control disease vectors.

C. Control of noise.

Problems related to noise include stress related illnesses, high blood pressure, speech interference, hearing loss, sleep disruption, and lost productivity. *See Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety* (EPA 550/9-74-004, Mar. 1974); *Noise Effects Handbook - A Desk Reference to Health & Welfare Effects of Noise* (EPA 500-9-82-106, Jul. 1981); Alice H. Suter, Administrative Conference of the United States, *Noise and Its Effects* (Nov. 1991); Berglund, B., & Lindvall, T. (Eds.), *Community noise*, Archives of the Center for Sensory Research, 1995, 2(1), 1-195.

ADEM asserts that it does not have authority to address noise impacts. *Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) at Response to Comment #4. ADEM cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider noise impacts. ADEM has ample authority to regulate and control noise from the operation of trucks and heavy machinery at municipal solid waste landfills and construction/demolition landfills through the imposition of adequate buffer zones. Buffer zones for landfill noise impacts can be

---

[15] *See* Permit No. 35-06, Section III, T. ("Other Requirements. ADEM may enhance or reduce the requirements for operating and maintaining the landfill as deemed necessary by the Land Division.").

[16] *Id.*

scientifically determined. *See e.g.*, ARM Group Inc., *Noise Impact Assessment Resource Recovery Landfill* (ARM Project 04117, Mar. 2006) (**Exhibit G**) and Barton & Loguidice, P.C., *County of Franklin Solid Waste Management Authority Proposed Landfill Expansion Noise Assessment*, (Sep. 2008) (**Exhibit H**).

Ala. Admin. Code r. 335-13-4-.13(2)(f) (applicable to all landfills) provides:

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

(Emphasis added).[17]

In addition, Ala. Admin. Code r. 335-13-4-.22(3)(b) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).[18]

Ala. Admin. Code r. 335-13-4-.23(3)(a) (applicable to construction/demolition landfills) provides:

> Notwithstanding this Rule, certain requirements for operating and maintaining a C/DLF or ILF *may be enhanced* or reduced by the Department as deemed necessary to comply with the Act and this Division. Any action by the Department to enhance or reduce the requirement(s) must be done in writing from the Department.

(Emphasis added).[19]

---

[17] Permit No. 35-06 contains no specific requirements for buffer zones, screening and other aesthetic control measures. However, Permit No. 35-06, Section II, A. provides that "[t]he permittee shall operate and maintain the disposal facility consistent with the Application, this permit, and [Ala. Admin. Code div.] 335-13." Thus, the *minimum* buffer zone for all aesthetic impacts is established as 100 feet. *See* Ala. Admin. Code r. 335-13-4-.13(2)(f).

[18] *See supra* note10.

[19] *Id.*

The foregoing rules authorize ADEM to require buffer zones exceeding 100 feet where necessary to control any adverse aesthetic impacts from landfill operations. Aesthetics are not limited to visual aesthetics. They include auditory aesthetics. Thus, ADEM is authorized to require a larger buffer zone to reduce disturbing noise impacts at residences.

D. Fugitive Dust

Fugitive dust is "solid air-borne particulate matter emitted from any source other than a flue or stack." Ala. Admin. Code r. 335-3-1-.01(ff). Fugitive dust emissions from landfills are created by mobile sources (*i.e.*, garbage trucks) traveling along paved and unpaved roads; and winds blowing across landfill cover storage piles and applied landfill cover. Fugitive dust emissions can cause a variety of health problems as well as nuisance effects.

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

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

Included in the EPA-approved State Implementation Plan is Ala. Admin. Code r. 335-3-4-.02. 40 C.F.R. § 52.50(c); http://www3.epa.gov/region4/air/sips/al/content.htm. Rule 335-3-4-.02, as it appears in the approved State Implementation Plan, provides:

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

> (2) Visible Emissions Restrictions Beyond Lot Line. No person shall cause or permit the discharge of visible fugitive dust emissions beyond the lot line of the property on which the emissions originate.

Although ADEM's fugitive dust rule was declared to be unconstitutional by the Alabama Supreme Court in *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So. 2d 82 (Ala. 1983), Alabama has neither repealed the rule nor sought or obtained EPA approval of a revision of the State Implementation Plan. Accordingly, the rule continues to be included in the "applicable implementation plan" under the Clean Air Act. *See e.g., Gen. Motors Corp. v. United States*, 496 US 530, 540 (1990) ("There can be little or no doubt that the existing SIP remains the "applicable implementation plan" even after the State has submitted a proposed revision."); *Safe Air for Everyone v. United States Envt'l Prot. Agency*, 475 F.3d 1096, 1105 (9th Cir. 2007) ("[A] state may not unilaterally alter the legal commitments of its SIP once EPA approves the plan").

In addition, Ala. Admin. Code r. 335-13-4-.13(2)(f) (applicable to all landfills) provides:

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

(Emphasis added).[20]

In addition, Ala. Admin. Code r. 335-13-4-.22(3)(b) (applicable to municipal solid waste landfills) provides:

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

(Emphasis added).[21]

Ala. Admin. Code r. 335-13-4-.23(3)(a) (applicable to construction/demolition landfills) provides:

> Notwithstanding this Rule, certain requirements for operating and maintaining a C/DLF or ILF *may be enhanced* or reduced by the Department as deemed necessary to comply with the Act and this Division. Any action by the

---

[20] *See supra* note 17.

[21] *See supra* note 10.

> Department to enhance or reduce the requirement(s) must be done in writing from the Department.

(Emphasis added).[22]

The foregoing rules authorize ADEM to require controls on fugitive dust emissions. Thus, ADEM is authorized to require reductions in the adverse impacts of fugitive dust at residences in the surrounding community.

E. Property values

As explained above, Title VI and its implementing regulations at 40 C.F.R. Part 7 do not limit the scope of cognizable discrimination to those adverse effects within the authority of the financial assistance recipient to regulate. *Sandoval v. Hagan*, 197 F.3d 484, 508 (11th Cir. 1999), *revs'd on other grounds*, *Alexander v. Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, the Court held that the Alabama Department of Transportation's English-only language requirement for 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 construction and operation of the expanded City of Dothan Sanitary Landfill, with all its associated odors, disease vectors, noise, and fugitive dust, has an adverse impact on the property values of residences in surrounding community. Although ADEM asserts that it does not have authority to address property values, *Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #4, *Response to Comments - City of Dothan Landfill Permit Renewal* (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #10, ADEM cannot escape its obligation to ensure that its actions do not have discriminatory effects merely because it does not have authority to regulate or consider property values. ADEM does have authority to regulate landfill construction and operation (including buffer zones) which directly impact property values.

VIII. Disparate Impacts

The adverse impacts described above have fallen and continue to fall disparately upon members of the African-American race. This is illustrated by the 2010 census data included in **Table 2 and Figure 4**.

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

---

[22] *Id.*

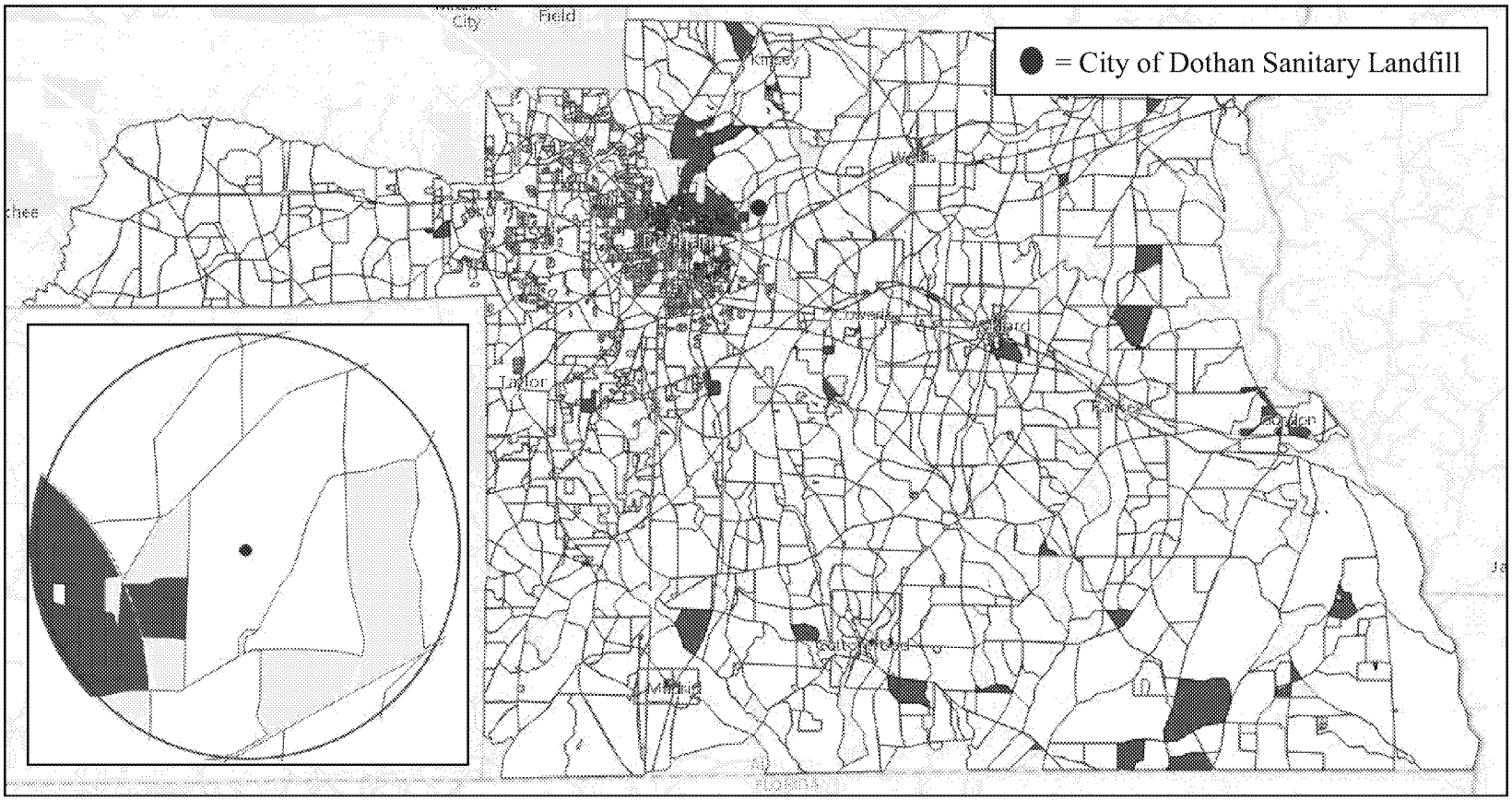
predominant race in these areas is White. **Table 2.** Inasmuch as the percentage of African-Americans impacted by the City of Dothan Sanitary Landfill far exceeds the percentage of African-Americans in the service area and State of Alabama, the alleged impacts are "disparate" impacts. *See Yerkwood Landfill Complaint Decision Document*, EPA OCR File No. 28R-99-R4 at 5.

Table 2
BLACK OR AFRICAN-AMERICAN POPULATIONS IN RELEVANT GEOGRAPHIES

Population Category	Radius from City of Dothan Sanitary Landfill[1]		City of Dothan[2]	City of Headland[2]	Houston County[2]	State of Alabama[2]
	1.0 Mile	1.5 Mile				
Total Population	565	1,900	65,496	4,510	101,547	4,779,736
Black or African-American	501	1,496	21,312	1,238	26,038	1,251,311
Percent Black or African-	89%	79%	32.5%	27.5%	25.6%	26.2%
White	53	365	41,298	3,162	71,053	3,275,394
Percent White	9%	19%	63.1%	70.1%	70.0%	68.5%

[1] All data from EPA's EJSCREEN Census 2010 Summary Report using center point of Lat. 31.237276°, Long. -85.352228°.
[2] All data from U.S. Census Bureau (2010).
[3] Black or African American alone - Not Hispanic or Latino.

Figure 4
CENSUS BLOCKS ≥ 89.0 PERCENT BLACK OR AFRICAN-AMERICAN IN HOUSTON COUNTY, ALABAMA AND WITHIN ONE MILE OF LANDFILL



IX. Justification and Less Discriminatory Alternatives

"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). "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." *Id.* at 4. "[M]erely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification." *Id.* at 11. "[T]here must be some articulable value to the recipient [ADEM] in the permitted activity." *Id.* "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. And, "[i]f a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations." *Id.*

ADEM has not articulated a value to it or the State of Alabama in the permitting of the City of Dothan Sanitary Landfill. It is not likely that ADEM or the State of Alabama has a substantial, legitimate interest in the permitting of the City of Dothan Sanitary Landfill. Even if ADEM can successfully demonstrate that it has a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact, a practicable less discriminatory alternative must be unavailable to justify the disparate impacts.

Alternatives to the expansion of the City of Dothan Sanitary Landfill are available for the disposal of municipal solid waste and construction/demolition waste. The *City of Dothan's Solid Waste Management Plan* (Aug. 2014) identifies a number of alternatives for municipal solid waste and construction/demolition waste disposal. The *Plan* states:

> If for any reason the City cannot continue to dispose at the Dothan Landfill, disposal options including expansion of the existing landfill, permitting of a new MSW landfill or choosing another disposal facility will be made in accordance with this plan. If the City chooses to dispose at a different landfill, the economics of disposal will be the primary factor in choosing a facility. The following list contains MSW disposal facilities in Alabama currently permitted to accept waste generated in the City of Dothan. The City also has the option to dispose of at any landfill in Florida or Georgia that is permitted to accept waste from the City of Dothan.

Id. at 6. *See Permitted Municipal Solid Waste Landfills in the State of Alabama* (ADEM, Oct. 23, 2016). The closest existing municipal solid waste landfills are the Coffee County Sanitary Landfill, Brundidge Landfill, and Springhill Regional Landfill - South.

The Coffee County Sanitary Landfill (Permit No. 16-10) is operated by the Coffee County Commission and authorized to accept municipal solid waste and construction/demolition waste from all areas in the States of Alabama, Florida and Georgia. It is located at Latitude Ex. 6 Personal Privacy (PP) in Coffee County, Alabama, 44.3 miles (49 minutes) from the city limits of the City of Dothan. The population within 1.0 mile of the landfill is 16% Black or African-American (5 individuals).

The Brundidge Landfill (Permit No. 55-07) is operated by Brundidge Acquisitions, LLC and authorized to accept municipal solid waste and construction/demolition waste from Louisiana and all states east of the Mississippi River. It is located at Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) in Pike County, Alabama, 40.6 miles (46 minutes) from the city limits of the City of Dothan. The population within 1.0 mile of the landfill is 34% Black or African-American (5 individuals).

The Springhill Regional Landfill - South (Permit Nos. 0000475-031-SO-01 and 0000475-032-SO-01) is operated by Waste Management of Leon County, Inc. and authorized to accept municipal solid waste and construction/demolition waste. It is located at Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) 1.5 miles from Campbellton, Jackson County, Florida and 15.8 miles (18 minutes) from the city limits of the City of Dothan. "Houston County takes a majority of its solid waste to the Springhill Landfill." *Solid Waste Management Plan - Houston County*, (Houston County Comm'n, Aug. 2006) at 9. "Houston County currently has a contract with Waste Management to take solid waste to the Springhill landfill in Campbellton, Florida. This contract gives Houston County a set price per ton for solid waste." *Id.* at 14. "Price paid per ton at the Springhill Landfill: $31.00." *Id.* at 21. "Price paid per ton at The City of Dothan Landfill: $34.50." *Id.* "The population within 1.0 mile of the landfill is 69% Black or African-American (52 individuals).

In addition to the foregoing alternative locations for municipal solid waste disposal, it is possible that a new municipal solid waste landfill might be established at a different location in the City of Dothan or elsewhere in Houston County.

Each of the foregoing alternative municipal solid waste disposal sites are less discriminatory than the City of Dothan Sanitary Landfill.

The closest existing construction/demolition waste landfills are the Southeastern Alabama Regional Construction/Demolition Landfill, Hughes C/D Landfill, and Rosehill Landfill. *See Permitted Construction/Demolition Landfills and Industrial Landfills in the State of Alabama* (ADEM, Oct.23, 2015).

The Southeastern Alabama Regional Construction/Demolition Landfill (Permit No. 35-07) is operated by Mid-South Paving, Inc.[23] and authorized to accept construction/demolition waste from Houston County, among many others. It is located at Ex. 6 Personal Privacy (PP), Ex. 6 Personal Privacy (PP), 9.6 miles (11 minutes) from the city limits of the City of Dothan. The population within 1.0 mile of the landfill is 2% Black or African-American (8 individuals).

The Hughes C/D Landfill (Permit No. 35-08) is operated by Hughes Farm, LLC and authorized to accept construction/demolition waste from the City of Dothan and Houston County. It is located at Ex. 6 Personal Privacy (PP), less than 1/10 mile (1 minute) from the city limits of the City of Dothan. "The C/D waste collected by the City is transported . . . to either the Dothan Landfill or Hughes Landfill." *Solid Waste Management Plan - City of Dothan*, AL (Aug. 2014) at 5. The population within 1.0 mile of the landfill is 65% Black or African-American (794 individuals).

The Rosehill Landfill (Permit No. 23-07) is operated by Rose Hill Landfill, LLC and authorized to accept construction/demolition waste from all counties in Alabama and elsewhere. It is located at Ex. 6 Personal Privacy (PP), near Midland City in southern Dale County, 5.7 miles (9 minutes) from the city limits of the City of Dothan. "Houston County takes all inert materials such as construction debris and other household trash to this landfill." *Solid Waste Management Plan - Houston County* (Houston County Comm'n, Aug. 2006) at 9. "Houston County currently has a contract with Rose Hill Landfill to take all inert waste." *Id.* at 14. The population within 1.0 mile of the landfill is 15% Black or African-American (70 individuals).

In addition to the foregoing alternative locations for construction/demolition debris disposal, it is possible that a new construction/demolition landfill might be established at a different location in the City of Dothan or elsewhere in Houston County.

Each of the foregoing alternative construction/demolition disposal sites are less discriminatory than the City of Dothan Sanitary Landfill.

X. ADEM's Assurances and Defenses

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

---

[23] *Permitted Construction/Demolition Landfills and Industrial Landfills in the State of Alabama* (ADEM, Oct.23, 2015) lists the permittee of the Southeastern Alabama Regional Construction/Demolition Landfill as APAC-Southeast, Inc. However, ADEM's permit file reflects that Permit No. 35-07 was transferred to APAC Mid-South, Inc. on November 9, 2011. Permit No. 35-07 was reissued to APAC Mid-South, Inc. on March 23, 2012. On November 14, 2013, APAC Mid-South, Inc. changed its name to Mid-South Paving, Inc.

. ..”). As mentioned above, 40 C.F.R. § 7.35(b) prohibits ADEM from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race. In addition, effective January 23, 2013, EPA has required that grant recipients (including ADEM) agree to the following grant condition:

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

U.S. Envt'l Protection Agency, Civil Rights Obligations (Jan. 25, 2013), *available at* http://www.enviro-lawyer.com/Civil_Rights_Obligations.pdf (last visited Dec. 7, 2015).[24]

In this case, as in others, ADEM claims that it grants permits in accordance with applicable laws and regulations without regard to the racial composition of any impacted communities. *See Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #2; *Response to Comments - City of Dothan Landfill Permit Renewal* (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #7. This claim is, in essence, a claim that ADEM's permitting actions do not *intentionally* have adverse impacts on racial minorities. While this may be so, it fails to recognize ADEM's obligation under Title VI to avoid unintentional discriminatory effects. As mentioned above, 40 C.F.R. § 7.35(b) prohibits ADEM from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race. “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).

ADEM asserts that it grants permits in accordance with applicable laws and regulations (“criteria”) that are designed to protect human health and the environment. Compliance with these “criteria,” ADEM suggests, ensures that racial minorities are impacted no differently than other races. *See Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #2; *Response to Comments - City of Dothan Landfill Permit Renewal* (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #7. However, compliance with environmental regulations is not *prima facie* evidence of the absence

---

[24] ADEM has been unable to document that it has an effective 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.”).

of adverse disparate impacts.[25] "EPA believes that presuming compliance with civil 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.* This allegation ignores the fact that members of the African-American race are disparately affected by the City of Dothan Sanitary Landfill, notwithstanding ADEM's alleged compliance with the applicable criteria. *Draft Title VI Guidance Documents Questions and Answers* at 4.

ADEM has also argued that it is the siting decision made by the City of Dothan that will cause any alleged disparate adverse impacts on Complainants, not the permitting decision made by ADEM. *See Response to Comments - City of Dothan Landfill Permit Modification* (ADEM, Jan. 8, 2016) (**Exhibit E**) at Response to Comment #2; *Response to Comments - City of Dothan Landfill Permit Renewal* (ADEM, Oct. 21, 2013) (**Exhibit F**) at Response to Comment #7. This argument has ben rejected by EPA.

> 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

---

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

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

Id. at 4.

> 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 39691.

ADEM's argument ignores several facts. First, the permit granted by ADEM to the City of Dothan is to construct and operate a landfill at a specific site – Section 17, Township 3 North, Range 27 East in Dothan, Houston County, Alabama. **Exhibit A**. But for the ADEM permit authorizing construction and operation of the landfill at this specific site, the landfill would not have been constructed at the site and adverse impacts to African-Americans would not result. Second, ADEM determined that the landfill site is compliant with ADEM's "Landfill Unit Siting Standards" at Ala. Admin. Code r. 335-13-4-.01. But for ADEM's determination that the landfill site is compliant with the siting standards, the landfill would not have been constructed at the site and adverse impacts to African-Americans would not result. Finally, ADEM has imposed or failed to impose, permit conditions on the operations of the landfill that have allowed odors, disease vectors, noise, and property devaluation. Operation of the landfill under these conditions causes adverse impacts to African-Americans.

XI. Request

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency - Office of Civil Rights accept this complaint and conduct an investigation to determine whether ADEM violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-7, and 40 C.F.R. Part 7 in the modification of Solid Waste Disposal Facility Permit No. 35-06 on January 8, 2016. If a violation is found and ADEM is unable to demonstrate a substantial, legitimate justification for its action and to voluntarily implement a less discriminatory alternative that is practicable, Complainants further petition the EPA to initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to ADEM, and after the conclusion of those proceedings, deny, annul, or terminate EPA financial assistance to ADEM.

Sincerely,

David A. Ludder
Attorney for Complainants