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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
External Civil Rights Compliance Office
Office of General Counsel
EPA File No.

In the Matter of

Violation of 40 C.F.R. § 7.35(b) by the
Alabama Department of Environmental Management
(Renewal and Modification of Solid Waste Disposal Facility
Permit No. 35-06 for the City of Dothan Sanitary Landfill)

COMPLAINT FOR RELIEF AND SANCTIONS

David A. Ludder
Attorney for Complainants

LAW OFFICE OF DAVID A. LUDDER, PLLC
9150 McDougal Court
Tallahassee, Florida 32312-4208
(850) 386-5671
davidaludder@enviro-lawyer.com

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I. Introduction

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pursuant to 42 U.S.C. § 2000d-1, the U.S. Environmental Protection Agency (EPA) is authorized to issue regulations to achieve the objectives of 42 U.S.C. § 2000d. In accordance therewith, EPA has promulgated 40 C.F.R. § 7.30 which provides:

> No person shall . . . be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race . . ..

EPA has also promulgated 40 C.F.R. § 7.35(b)which provides *inter alia*:

> 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 . . . or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race . . ..

This Complaint is filed pursuant to 40 C.F.R. § 7.120(a) which provides, *inter alia*:

> 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.

Complainants allege herein that the Alabama Department of Environmental Management (ADEM) violated 40 C.F.R. § 7.35(b)by renewing and modifying *Solid Waste Disposal Facility Permit No. 35-06*[1] and thereby authorizing the City of Dothan to continue to operate an existing municipal solid waste landfill, to construct and operate an expansion of the existing municipal solid waste landfill, and to construct and operate a construction and demolition landfill, in close

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[1] *Solid Waste Disposal Facility Permit No. 35-06* (ADEM, May 6, 2019) (**Exhibit 1**).

proximity to a predominantly Black population which has the effect of adversely and disparately impacting that Black population.

Complainants request that EPA accept this Complaint and conduct an investigation to determine whether ADEM has violated 40 C.F.R. § 7.35(b). If a violation is found, Complainants request that EPA secure voluntary and full compliance by ADEM with 40 C.F.R. § 7.35(b). Absent such compliance, Complainants request that EPA initiate proceedings to deny, annul, suspend, or terminate EPA financial assistance to ADEM.

II. Title VI Background

"Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating."[2] "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."[3]

A complete or properly pleaded complaint must (1) be in writing; (2) describe the alleged discriminatory act that violates EPA's Title VI regulations (*e.g.*, an act that has the effect of discriminating on the basis of race); (3) identify the EPA financial assistance recipient that

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[2] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998), 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).

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 Revised 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 Revised Guidance* has never been made final and consequently, the *Interim Guidance* issued in February 1998 has not been replaced.

[3] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2.

committed the alleged discriminatory act; and (4) be filed within 180 calendar days of the alleged discriminatory act.[4]

"In a disparate impact case, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin."[5] In order to establish a *prima facie* case of adverse disparate impact, EPA must (1) identify a specific policy or practice of the recipient; (2) establish that persons have suffered adversity/harm; (3) establish that persons protected under Title VI have suffered disparate adversity/harm; and (4) establish a causal connection between the recipient's policy or practice and the adversity/harm suffered.[6]

"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."[7] "If the evidence establishes a prima facie case of adverse disparate

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[4] 40 C.F.R. § 7.120. *See also Case Resolution Manual*, Section 2.4 (EPA, Jan. 2017), at 7; *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 6; *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39,672; *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes* (U.S. Dep't of Justice, Sep. 1998), at 16.

[5] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), File No. 06R-03-R4* (EPA, Apr. 28, 2017), at 4 (footnotes omitted). *Accord*, *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), File No. 12R-13-R4* (EPA, Mar. 1, 2018), at 4.

[6] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), File No. 06R-03-R4*, *supra* note 5, at 4-5. *Accord*, *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), File No. 12R-13-R4*, *supra* note 5. *See also Yerkwood Landfill Complaint Decision Document, File No. 28R-99-R4* (EPA, July 1, 2003), at 3; *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 (April 26, 2013); *New York City Envt'l Justice Alliance v. Giuliani*, 214 F.3d 65, 69 (2nd Cir. 2000).

[7] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2.

impact, . . . EPA must then determine whether the recipient has articulated a "substantial legitimate justification"' for the challenged policy or practice."[8]

"If a recipient shows a 'substantial legitimate justification' for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. In other words, are there 'less discriminatory alternatives?' Thus, even if a recipient demonstrates a 'substantial legitimate justification,' the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that 'less discriminatory alternatives' exist."[9]

"In the event that EPA finds discrimination in a recipient's 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."[10] 40 C.F.R. § 7.130(a). "EPA also may use any other means authorized by law to obtain compliance, including referring

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[8] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), File No. 06R-03-R4*, *supra* note 5, at 5. *Accord*, *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), File No. 12R-13-R4*, *supra* note 5, at 5. *See also Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 11; *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39683.

[9] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), File No. 06R-03-R4*, *supra* note 5, at 5. *Accord*, *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), File No. 12R-13-R4*, *supra* note 5, at 5. *See Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 11 ("If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations."); *Title VI Legal Manual*, Section VII (U.S. Dep't of Justice, undated), at 37 ("Title VI requires recipients to implement a 'less discriminatory alternative' if it is feasible and meets their legitimate objectives.").

[10] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 3 (footnotes omitted) (citing 40 C.F.R. §§ 7.115(e), 7.130(b), 7.110(c)).

the matter to the Department of Justice (DOJ) for litigation. In appropriate cases, DOJ may file suit seeking injunctive relief."[11] 40 C.F.R § 7.130(a).

III. 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).[12]

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

Ex. 6 Personal Privacy (PP)

The Complainants are Black who believe that they and other Blacks have been discriminated against by ADEM in violation of 40 C.F.R. § 7.35(b) as a result of ADEM's renewal and

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[11] *Id.*

[12] *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, purports to establish more stringent standing requirements than are contained in 40 C.F.R. § 7.120(a). The *Draft Revised 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 (emphasis added). Notably, the *Draft Revised Guidance* requires that a complainant be the victim of the alleged discrimination or a member of the protected class discriminated against. The *Draft Revised 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. "If the text of a regulation is unambiguous, a conflicting agency interpretation will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 211, 131 S. Ct. 871, 882 (2011). *Accord, 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).

modification of *Solid Waste Disposal Facility Permit No. 35-06*.[13] The undersigned is the attorney for and authorized representative of the Complainants. All contacts with the Complainants should be made through the undersigned or with the express permission of the undersigned.

IV. Recipient

A "recipient" includes any State, any instrumentality of a State, any public agency, institution, organization, or other entity to which Federal financial assistance is extended. 40 C.F.R. § 7.25. "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."[14] "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."[15]

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[13] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

[14] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 2.

[15] *Id.*, at 2 (footnote omitted).

"Program or activity" and "program" includes all of the operations of a department, agency, or other instrumentality of a State, any part of which is extended Federal financial assistance.[16]

> 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.[17]

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**.

Table 1
EPA FINANCIAL ASSISTANCE AWARDED TO ADEM

00D61418	66.805	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	JUL-30-2018	$1,122,000	OCT-01-2017	SEP-30-2019
01000118	66.458	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-18-2018	$17,948,000	OCT-01-2018	SEP-30-2022
95411118	66.804	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	AUG-03-2018	$646,000	OCT-01-2017	SEP-30-2019
95464619	66.605	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	DEC-12-2018	$12,513,498	OCT-01-2018	SEP-30-2023
98447218	66.468	AL Dept of Environmental Management	1400 Coliseum Blvd Montgomery, AL 36110	SEP-19-2018	$23,944,000	OCT-01-2018	OCT-01-2022

[16] 40 C.F.R. § 7.25; Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28.

[17] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 2-3 (footnotes omitted).

V. Discriminatory Act

The alleged discriminatory act is the renewal and modification of *Solid Waste Disposal Facility Permit No. 35-06* by ADEM on May 6, 2019.[18] The permit renewal authorizes the City of Dothan to continue to operate an existing 78-acre solid waste disposal facility, including an existing 55-acre municipal solid waste landfill. The permit modification authorizes the City of Dothan to expand the solid waste disposal facility to 522.19 acres, to construct and operate a new 20.6-acre lateral expansion of the municipal solid waste landfill, and to construct and operate a new 15.0-acre construction and demolition landfill. These modifications will extend the active life of the facility for up to 20 years.[19] *Solid Waste Disposal Facility Permit No. 35-06*[20] authorizes the disposal of "[n]on-hazardous, non-infectious putrescible and non-putrescible wastes including but not limited to municipal solid waste, industrial waste, commercial waste, construction and demolition waste, rubbish, sludge and special waste approved by ADEM" in the municipal solid waste disposal area. The permit authorizes the disposal of "[n]on-putrescible and non-hazardous construction and demolition waste, and rubbish as defined by ADEM Rule 335-13-1-.03" in the construction and demolition disposal area. The permit authorizes a

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[18] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1. "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 for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 7. "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." *Id.*

[19] The City of Dothan Sanitary Landfill commenced operation at or adjacent to its present location in 1969. Under Permit No. 35-01, the City operated a municipal solid waste landfill until completion of closure in November 1995. Under Permit No. 35-06, the City operated a 55-acre municipal solid waste landfill from November 1990 until June 2014. On May 6, 2019, ADEM issued a modification of Permit No. 35-06 to add a 20.6-acre expansion to the existing municipal solid waste landfill as well as a new 15.0-acre construction/demolition waste landfill.

[20] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

maximum daily average disposal volume 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.

VI. 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 renewal and modification of *Solid Waste Disposal Facility Permit No. 35-06*[21] by ADEM occurred on May 6, 2019. Accordingly, the filing of this Complaint is timely if received by EPA on or before November 2, 2019.

VII. Adversities/Harms Suffered

The adversities/harms that will be suffered by persons from the activities authorized by renewal and modification of *Solid Waste Disposal Facility Permit No. 35-06*[22] include the following:[23]

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[21] *Id.*

[22] *Id.*

[23] Although disposal of waste in the expanded municipal solid waste landfill and new construction/demolition landfill has not yet begun, Complainants assert that the adverse impacts described herein will result from operation of the expanded City of Dothan Sanitary Landfill because residents have suffered such adverse impacts from operation of the City of Dothan Sanitary Landfill from 1969 to 2014 (45 years) and the renewal and modification of Permit No. 35-06 includes no new requirements that would mitigate the historical adverse impacts. *See, e.g.*, *Public Hearing for the Proposed Renewal of Municipal Solid Waste Landfill Permit No. 35-06* (ADEM, June 6, 2013) (**Exhibit 2**); *Public Comments on Proposed Renewal of Permit No. 35-06* (ADEM, June 2013) (**Exhibit 3**); *Response to Comments on Proposed Renewal of Permit No. 35-06* (ADEM, Oct. 21,2013) (**Exhibit 4**); *Public Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 2015) (**Exhibit 5**); *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**); *Public Hearing – Proposed Modification of Dothan Municipal Solid Waste Landfill Permit No. 35-06* (ADEM, June 29, 2017) (**Exhibit 7**); *Public Comments on Draft Modification of Permit No. 35-06* (ADEM, June 2017) (**Exhibit 8**); *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 1, 2017) (**Exhibit 9**); *Public Hearing for Proposed Renewal of Municipal Solid Waste Permit No. 35-06* (ADEM, Feb. 28, 2019) (**Exhibit 10**); *Public Comments on Proposed Renewal and Modification of Permit No. 35-06* (ADEM, Mar. 2019) (**Exhibit 11**);
(continued...)

A. Frequent exposure to unpleasant odors from the landfill that interfere with the enjoyment of life and property.[24]

B. Exposure to disease vectors from the landfill, including buzzards, racoons, opossums, foxes, snakes, and flies that may be carriers of infectious viruses, bacteria, and parasites.[25]

C. Exposure to visible emissions of fugitive dust from the landfill that cause particulate deposition on personal and real property.[26]

D. Reduced property values.[27]

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[23](...continued)
Response to Comments on Proposed Renewal and Modification of Permit No. 35-06 (ADEM, May 6, 2019) (**Exhibit 12**).

[24] These odor emissions are a violation of Ala. Admin. Code r. 335-3-1-.08 and the Alabama State Implementation Plan approved by the Administrator of the U.S. Environmental Protection Agency at 40 C.F.R. § 52.50. *See* Ala. Admin. Code rs. 335-3-1-.02(e) (definition of "air pollution"); 335-3-1-.02(d) (definition of "air contaminant"); 335-3-1-.02(ss) (definition of "odor"). These provisions are made applicable to solid waste disposal facilities by Ala. Admin. Code rs. 335-13-4-.01(3) and 335-13-4-.22(3)(a).

[25] The breeding and accumulation of disease vectors at the landfill is a violation of Ala. Admin. Code r. 335-13-4-.22(2)(d).

[26] These visible fugitive dust emissions are a violation of the Alabama State Implementation Plan approved by the Administrator of the U.S. Environmental Protection Agency at 40 C.F.R. § 52.50. The Alabama State Implementation Plan is made applicable to solid waste disposal facilities by Ala. Admin. Code r. 335-13-4-.22(3)(a).

[27] *See, e.g.,* Cameron, T.A., *Directional Heterogeneity in Distance Profiles in Hedonic Property Value Models*, 51 J. Envtl. Econ. and Mgmt. 26-45 (2006); Guntermann, K.L., *Sanitary Landfills, Stigma and Industrial Land Values*," 10 J. Real Estate Research 531-542 (1995); Hirshfeld, S. et al., *Assessing the True Cost of Landfills*, 10 Waste Mgmt. and Research 471-484 (1992); Hite, D., *A Random Utility Model of Environmental Equity*, 31 Growth and Change 40-58 (2000); Hite, D., *Information and Bargaining in Markets for Environmental Quality*, 74 Land Econ. 303-316 (1998); Hite, D., et al., *Property Value Impacts of an Environmental Disamenity: The Case of Landfills*, 22 J. Real Estate Fin. and Econ. 185-202 (2001); Kinnaman, T.C., *A Landfill Closure and Housing Values*, 27 Contemporary Econ. Policy 380-389 (2009); Lim, J.S., et al., *Does Size Really Matter? Landfill Scale Impacts on Property Values*, 14 Applied Econ. Letters 719-723 (2007); Nelson, A.C., et al., *Price Effects of Landfills on House Values*, 68 Land Econ. 359-365 (1992); Ready, R.C., *Do Landfills Always Depress Nearby Property Values?*, 32 J. Real Estate Research 321-339 (2010); Reichert, A.K., et al., *The Impact of Landfills on Residential Property Values*, 7 J. Real Estate Research 297-314 (1992); Wilson, S.E., *Evaluating the Potential Impact of a Proposed Landfill*, 778 Appraisal Journal 24-36 (2009); Spector, K., et al., *Review of Current Property*
(continued...)

VIII. Disparate Adversities/Harms

The adversities/harms described above have fallen and will continue to fall disparately upon persons of the Black race. This is illustrated by the 2010 census data included in **Table 2.**

Table 2
BLACK POPULATIONS IN RELEVANT GEOGRAPHIES

Population Category	1.0 Mile Radius from 20.6 Acre MSW Landfill Expansion[1]	City of Dothan[2]	City of Headland[2]	Houston County[2]	State of Alabama[2]
Total Population	705	65,496	4,510	101,547	4,779,736
Black Population[3]	608	21,312	1,238	26,038	1,251,311
Percent Black[3]	86%	32.5%	27.5%	25.6%	26.2%
White Population	83	41,298	3,162	71,053	3,275,394
Percent White	12%	63.1%	70.1%	70.0%	68.5%

[1] All data from EPA's EJSCREEN Census 2010 Summary Report.
[2] All data from U.S. Census Bureau (2010).
[3] Black or African American alone - Not Hispanic or Latino.

[27](...continued)
Valuation Literature, Indus. Econ., Inc. (1999); and *Property Values* (Ctr. Health, Env't and Justice, June 2015).

"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."[28] The designated service area for the City of Dothan Sanitary Landfill is the City of Dothan, the City of Headland, and Houston County. The predominant race in these areas is White. **Table 2.** Inasmuch as the percentage of Blacks suffering adversities/harms from the City of Dothan Sanitary Landfill far exceeds the percentage of Blacks in the service area and State of Alabama, the alleged adversities/harms are "disparate."[29]

IX. Justification

"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."[30] "Substantial legitimate justification" in a disparate impact case requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate interest of the recipient.[31] "The analysis requires balancing recipients' interests in implementing

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[28] *Yerkwood Landfill Complaint Decision Document, File No. 28R-99-R4* (EPA, July 1, 2003), at 5. *See Investigative Report for Title VI Administrative Complaint (Yerkwood Landfill Complaint), File No. 28R-99-R4* (EPA, June 2003), at 10.

[29] *See Yerkwood Landfill Complaint Decision Document, EPA OCR File No. 28R-99-R4, supra* note 28, at 5.

[30] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits, supra* note 2, at 4. *Accord, Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), EPA File No. 06R-03-R4, supra* note 5, at 5; *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), EPA File No. 12R-13-R4, supra* note 5, at 5.

[31] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), EPA File No. 06R-03-R4, supra* note 5, at 5; *Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry*

(continued...)

their policies with the substantial public interest in preventing discrimination."[32] "Merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification."[33] "[T]here must be some articulable value to the recipient in the permitted activity."[34]

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.

X. Recipient's Authorities

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

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[31](...continued)
Cnty. Assoc., LLC), EPA File No. 12R-13-R4, *supra* note 5, at 5. *See also Investigative Report for Title VI Administrative Complaint (Yerkwood Landfill Complaint), File No. 28R-99-R4*, *supra* note21, at 60 ("The justification must be necessary to meet 'a legitimate, important goal integral to [the recipient's] mission."); *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 11 (the recipient may 'justify' the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient."); *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39,654 ("Generally, the recipient would attempt to show that the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission."); *Title VI Legal Manual*, Section VII, *supra* note 9, at 31 ("'Substantial legitimate justification' in a disparate impact case . . . requires [a recipient] to show that the policy or practice in question is demonstrably related to a significant, legitimate [environmental] goal.").

[32] *Closure of Admin. Compl. Against Ala. Dep't of Envtl. Mgmt. (Tallassee Waste Disposal Ctr., Inc.), EPA File No. 06R-03-R4*, *supra* note 5, at 5; *Accord, Closure of Admin. Complaint Against Ala. Dep't of Envtl. Mgmt. (Perry Cnty. Assoc., LLC), EPA File No. 12R-13-R4*, *supra* note 5, at 5. *See also Title VI Legal Manual,* Section VII, *supra* note 9, at 31 ("analysis requires a delicate balancing of recipients' interests in implementing their policies with the substantial public interest in preventing discrimination.").

[33] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 11.

[34] *Id. See also Title VI Legal Manual*, Section VII, *supra* note 9, at 35 ("Mere compliance with rules unrelated to civil rights prohibitions does not legitimize a justification that would otherwise be insufficient under Title VI to justify adverse disparate impacts. In most instances, determining compliance with other rules or requirements involves reasoning based exclusively on those rules and does not include considerations required by Title VI.") (quotation marks omitted).

impacts that are relevant under the recipient's permitting program."[35] "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."[36] Complainants submit that this position is wrong as a matter of law.

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."[37] In *Sandoval v. Hagan*,[38] 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

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[35] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 8; *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39678.

[36] *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39678. *See id.,* 65 Fed. Reg. at 39670-71.

[37] *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)), *rev'd on other grounds sub nom.*, *Alexander v. Sandoval*, 532 U.S. 275 (2001).

[38] *Id.*

"the inability to drive a car adversely affects individuals in the form of lost economic opportunities, social services, and other quality of life pursuits."[39] 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 odors, fugitive dust, and disease vectors. It also has express authority to establish buffer zones to protect against adverse aesthetic impacts (*e.g.*, odor, fugitive dust). Ala. Admin. Code r. 335-13-4-.12(2)(f). ADEM does not, however, have express authority to address reductions in property values that often occur as a consequence of landfill operations. Nevertheless, the permit modification granted by ADEM which authorizes the construction and operation of the expanded City of Dothan Sanitary Landfill will have 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. 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 undermine achievement of the objectives of Title VI.

A. 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

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[39] *Id.*

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 . . ..”[40]

ADEM has ample authority to prohibit and control odors from municipal solid waste landfills and construction/demolition landfills through imposition of permit requirements, including enhanced cover frequency, depth, or density; working face area reduction; aesthetic buffer zones; or other requirements.

1. Prohibited odors

Solid Waste Disposal Facility Permit No. 35-06 provides that “[t]his landfill may be subject to ADEM Admin. Code Division 3 and the Federal Clean Air Act.”[41] This same provision was included in two previous permits.[42] This permit condition has proven to be ineffective in preventing the emission of odors from the City of Dothan Sanitary Landfill that are unpleasant to persons and interfere with the enjoyment of life or property. The Complainants suffered these adverse effects from the operation of the City of Dothan Sanitary Landfill from 1969 to June 2014, at which time the landfill ceased disposal of most waste and the odors

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[40] *Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills*, 61 Fed. Reg. 9,905, 9,917 (Mar. 12, 1996).

[41] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1, at Section VI.

[42] *Solid Waste Disposal Facility Permit No. 35-06* (ADEM, Oct. 21, 2013) (**Exhibit 13**); *Solid Waste Disposal Facility Permit No. 35-06* (ADEM, Apr. 21, 2008) (**Exhibit 14**).

significantly decreased. With the expansion of the municipal solid waste landfill and new construction/demolition landfill as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[43] – subject to the same ineffective permit condition – Complainants will again suffer these adverse effects for many more years.

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 rs. 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.

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

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

"Air Pollution" means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as are, or tend to be, injurious to human health or welfare, animal or plant life, or property, or would interfere with the enjoyment of life or property . . . ." Ala. Admin. Code r. 335-3-1-.02(1)(e) (emphasis added). "Air Contaminant" means "any solid,

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[43] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

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). No ambient air quality standards have been set under Rule 335-3-1-.03(1) for odors.

Thus, ADEM could have imposed permit conditions that require that the City of Dothan Sanitary Landfill not emit odors that violate Ala. Admin. Code r. 335-3-1-.08. However, ADEM did not include any such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[44]

2. Enhanced cover requirements

Odors are typically reduced by eliminating the direct contact of wind with disposed waste.[45] Notwithstanding the prohibition of Ala. Admin. Code r. 335-3-1-.08, ADEM has relied almost exclusively on *minimum* cover requirements to achieve odor control.[46] EPA has recognized that should unwanted effects persist after implementation of minimum cover

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[44] *Id.* ADEM has acknowledged that odors are common to landfills, *e.g., Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**) at Response to Comment #1, but has failed to determine whether such odors violate the EPA-approved State Implementation Plan or Ala. Admin. Code r. 335-3-1-.08.

[45] *Solid Waste Disposal Facility Technical Manual* (EPA530-R-93-017, Nov. 1993), at § 3.3.3.

[46] *Response to Comments on Proposed Renewal of Permit No. 35-06* (ADEM, Oct. 21,2013) (**Exhibit 4**), at Response to Comment #3; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**), at Response to Comment #1; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 1, 2017) (**Exhibit 9**), at 1; *Response to Comments on Proposed Renewal and Modification of Permit No. 35-06* (ADEM, May 6, 2019) (**Exhibit 12**), at 1-2.

requirements, the owner or operator may be required to increase the amount of soil used or apply it more frequently.[47]

Solid Waste Disposal Facility Permit No. 35-06 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.[48]

ADEM relies on this cover requirement to "control" odors. This same permit requirement was included in two previous permits.[49] ADEM's reliance on the *minimum* cover requirements has proven to be ineffective in preventing the emission of odors from the City of Dothan Sanitary Landfill that are unpleasant to persons and interfere with the enjoyment of life or property. The Complainants suffered these adverse effects from the operation of the City of Dothan Sanitary Landfill from 1969 to June 2014, at which time the landfill ceased disposal of most solid waste and the odors decreased significantly in frequency and intensity. With the expansion of the municipal solid waste disposal area and construction/demolition disposal area at the City of Dothan Sanitary Landfill as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[50] – subject to the same ineffective cover requirements – Complainants will again suffer these adverse effects for many more years.

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

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[47] *Solid Waste Disposal Facility Technical Manual*, *supra* note 45, at § 3.3.3. *See Solid Waste Disposal Facility Criteria*, 56 Fed. Reg. 50,978, 51,050 (Oct. 9, 1991).

[48] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1, at Section III, H.

[49] *See supra* note 42.

[50] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

> 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). Thus, ADEM could have imposed permit conditions that require periodic cover more often than at the conclusion of each day's operation in the case of the expanded municipal solid waste disposal area at the City of Dothan Sanitary Landfill and more often than at the conclusion of each week's operation in the case of the new construction/demolition disposal area at the City of Dothan Sanitary Landfill to reduce the emission of odors. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[51]

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). Thus, ADEM could have imposed permit conditions that require cover of municipal solid waste at the City of Dothan Sanitary Landfill with more than six inches of earth at the conclusion of each day's operation and could have required cover of municipal solid waste at the City of Dothan Sanitary Landfill more often than at the conclusion of each day's operation

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[51] *Id.*

to reduce the emission of offensive odors. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[52]

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). Thus, ADEM could have imposed permit conditions that require cover of construction/demolition waste at the City of Dothan Sanitary Landfill with more than six inches of earth at the conclusion of each week's operation and could have required require cover of construction/demolition waste at the City of Dothan Sanitary Landfill more often than at the conclusion of each week's operation to reduce the emission of offensive odors. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[53]

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

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[52] *Id.*

[53] *Id.*

> 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). Thus, notwithstanding the minimum depth and frequency of cover requirements for municipal solid waste landfills specified in Ala. Admin. Code r. 335-13-4-.22(1)(a)1. and for construction/demolition solid waste landfills specified in Ala. Admin. Code r. 335-13-4-.23(1)(a), ADEM could have imposed permit conditions that establish more protective requirements for the disposal of solid waste at the City of Dothan Sanitary Landfill to control the emission of unpleasant odors. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[54]

3. Limitations on size of working faces

Odors are typically reduced by eliminating the direct contact of wind with disposed waste.[55] Restricting the size of landfill working faces will reduce the amount of waste that is exposed to direct contact with wind, thereby reducing the generation of odors.

Solid Waste Disposal Facility Permit No. 35-06 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. Two working faces have been approved as follows: the first for the placement of MSW waste and the second for the placement of Construction and Demolition waste. The working faces must be confined to *as small an area as possible*. (See Section X.2.).

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[54] *Id.*

[55] *Solid Waste Disposal Facility Technical Manual*, *supra* note 45, at § 3.3.3.

(Emphasis added).[56] It also provides:

> A variance is granted from ADEM Rule 335-13-4-.22(1)(b) requiring waste to be confined to *as small an area as possible*. The Permittee has been approved to operate two working faces. Two working faces have been approved as follows: the first for the placement of MSW waste and the second for the placement of Construction and Demolition waste. The working faces must be confined to *as small an area as possible*. (See Section 111. J.).

(Emphasis added).[57] ADEM relies on this "small an area as possible" working face requirement to aid in the "control" of odors. A substantially similar requirement was included in two previous permits.[58] This requirement has proven to be ineffective in preventing the emission of odors from the City of Dothan Sanitary Landfill that are unpleasant to persons and interfere with the enjoyment of life or property. The Complainants suffered these adverse effects from the operation of the landfill from 1969 to June 2014, at which time the landfill ceased disposal of most waste and the odors substantially abated. With the expansion of the municipal solid waste disposal area and new construction/demolition disposal area at the City of Dothan Sanitary Landfill as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[59] – subject to the same ineffective requirement that working faces be limited to "as small an area as possible" – Complainants will again suffer these adverse effects for many more years.

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

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[56] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1, at Section III, J.

[57] *Id.*, at Section X, 2.

[58] *See supra* note 42.

[59] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

> 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). In addition, 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). These requirements are unconstitutionally vague because "men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *See, e.g., Ross Neely Express, Inc. v. Ala. Dep't of Envtl. Mgmt.*, 437 So. 2d 82 (Ala. 1983) (ADEM regulation requiring person to take "reasonable precautions" to control air pollution is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.").

These indefinite and unenforceable requirements could have been made more definite and enforceable by specifying in the permit the maximum size of the "working face" at the municipal solid waste disposal area and construction/demolition disposal area to reduce the emission of offensive odors. However, ADEM did not include more definite and enforceable maximum size requirements for active working faces in *Solid Waste Disposal Facility Permit No. 35-06*.[60]

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.

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[60] *Id.* The imprecise language used in Ala. Admin. Code rs. 335-13-4-.22(1)(b) and 335-13-4-.23(1)(c) and *Solid Waste Disposal Facility Permit No. 35-06*, Section III, J. ("as small as possible") and Section X,2. ("as small an area as possible") are unenforceable from both a practical and legal standpoint.

(Emphasis added). Similarly, 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). Thus, notwithstanding the indefinite "as small as possible" working face requirement for municipal solid waste landfills specified in Ala. Admin. Code r. 335-13-4-.22(1)(b) and the indefinite "as small as possible" working face requirement for construction/demolition waste landfills specified in Ala. Admin. Code r. 335-13-4-.23(1)(c), ADEM could have imposed permit conditions that establish more definitive working face size requirements to control the emission of unpleasant odors from the City of Dothan Sanitary Landfill. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[61]

4. Increased buffer zones

Buffer zones are often required around landfills to reduce aesthetic impacts to persons residing outside the landfill boundary. *Solid Waste Disposal Facility Permit No. 35-06* does not include an explicit buffer zone requirement.[62] However, the permit requires that the City operate and maintain the facility consistent with the Application, the permit, and Ala. Admin. Code ch. 335-13.[63] The application provides:

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[61] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

[62] *Id.*

[63] *Id.*, at Section II., A.

> ***4. 7 BUFFER ZONES***
> A minimum 100-ft buffer zone has been established around the boundary of the landfill property and wetlands as required by ADEM Administrative Code R. 335-13-4-.12(2)(f). * * * [64]

Thus, *Solid Waste Disposal Facility Permit No. 35-06* requires a 100 foot buffer zone. This is the same buffer zone that was required under a previous permit.[65]

This requirement has proven to be ineffective in preventing persons residing near the City of Dothan Sanitary Landfill from suffering exposure to unpleasant odors that interfere with the enjoyment of life or property. The Complainants suffered these adverse effects from the operation of the City of Dothan Sanitary Landfill from 1969 to June 2014, at which time the landfill ceased disposal of most solid waste and the odors significantly decreased in frequency and intensity. With the expansion of the municipal solid waste disposal area and construction/demolition disposal area as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[66] – subject to the same ineffective minimum buffer zone requirement – Complainants will again suffer these adverse effects for many more years.

Ala. Admin. Code r. 335-13-4-.12(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).

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[64] *Operations Manual for Dothan Landfill* (CDG, rev. July 2018).

[65] *Solid Waste Disposal Facility Permit No. 35-06* (ADEM, Oct. 21, 2013), *supra* note 42.

[66] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

Aesthetics are not limited to visual aesthetics. They include olfactory aesthetics. Thus, ADEM could have imposed permit conditions that require a larger buffer zone or other control measures to reduce odor impacts at nearby residences. However, ADEM did not include any such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[67]

B. 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 [sic: for] rodents, flies, and mosquitoes that then transmit disease organisms to humans and animals."[68]

Solid Waste Disposal Facility Permit No. 35-06 includes the following provision:

> Vector Control. The Permittee shall provide for vector control as required by 335-13.[69]

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. * * *

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[67] *Id.*

[68] *Solid Waste Disposal Facility Criteria*, 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. Envtl. Prot. Agency, July 1988) at III-6 ("MSWLFs can provide food, shelter, and breeding areas for disease vectors.").

[69] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1, at Section III, Q.

ADEM has relied exclusively on *minimum* cover requirements to achieve disease vector control.[70] ADEM's reliance on *minimum* cover requirements has proven to be ineffective in controlling populations of flies in and around homes near the City of Dothan Sanitary Landfill that are bothersome and that may be carriers of infectious viruses, bacteria, and parasites; populations of buzzards that roost in trees around homes near the City of Dothan Sanitary Landfill that deposit droppings, and that may be carriers of infectious viruses, bacteria, and parasites; and populations of rats, raccoons, opossums, foxes, snakes, and around homes near the City of Dothan Sanitary Landfill that may be carriers of infectious viruses, bacteria, and parasites. The Complainants suffered these adverse impacts from the operation of the City of Dothan Sanitary Landfill from 1969 to June 2014, at which time the landfill ceased disposal of most solid waste and the disease vectors significantly decreased. With the expansion of the municipal solid waste disposal area and construction/demolition disposal area as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[71] – subject to the same ineffective permit condition on vector control – Complainants will again suffer these adverse impacts for many more years.

"Application of cover at the end of each operating day generally is sufficient to control disease vectors; however, other 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);

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[70] *See supra* note 46.

[71] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

repellents, insecticides or rodenticides; composting or processing of organic wastes prior to disposal; and predatory or reproductive control of insect, bird, and animal populations."[72]

ADEM has ample authority to impose permit conditions that require enhanced measures to effectively prevent disease vectors from breeding or accumulating at municipal solid waste landfills and construction/demolition landfills. 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). Thus, ADEM could have imposed permit conditions that require additional disease vector controls measures such as reducing the size of the working face; increasing cover thickness; changing cover type, density, placement frequency, and grading; use of repellents, insecticides or rodenticides; composting or processing of organic wastes prior to disposal; and predatory or reproductive controls. However, ADEM did not include such conditions in *Solid Waste Disposal Facility Permit No. 35-06.*[73]

C. 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

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[72] *Solid Waste Disposal Facility Criteria Technical Manual, supra* note 45, at § 3.4.3. *Accord, Solid Waste Disposal Facility Criteria*, 53 Fed. Reg. at 33336 ("if cover material requirements prove insufficient to ensure vector control, this criterion [40 C.F.R. § 258.22] would require that other steps be taken by the owner or operator to ensure such control.").

[73] *Solid Waste Disposal Facility Permit No. 35-06, supra* note 1.

emissions can cause a variety of health problems, including respiratory irritation, as well as nuisance effects.

Solid Waste Disposal Facility Permit No. 35-06 does not include an explicit requirement to control fugitive dust emissions.[74] The permit includes a provision that provides that "[t]his landfill may be subject to ADEM Admin. Code Division 3 and the Federal Clean Air Act."[75] This same condition was included in previous permits.[76] This permit provision has proven to be ineffective in preventing the frequent emission of fugitive dust from the City of Dothan Sanitary Landfill that causes visible fugitive dust emissions beyond the property line of the City of Dothan Sanitary Landfill and particulate deposition on personal and real property. Complainants and others suffered these adverse effects from the operation of the City of Dothan Sanitary Landfill from 1969 to June 2014, at which time the landfill ceased disposal of most solid waste and the emission of fugitive dust significantly decreased. With the expansion of the municipal solid waste disposal area and construction/demolition disposal area as authorized by *Solid Waste Disposal Facility Permit No. 35-06*[77] – subject to the same ineffective permit provision – Complainants and others will again suffer these adverse effects for many more years.

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

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[74] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

[75] *Id.*, at Section VI.

[76] *See supra* note 42.

[77] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

(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). Rule 335-3-4-.02, as it appears in the EPA-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 "applicable implementation plan" under the Clean Air Act continues to include Rule 335-3-4-.02.

See e.g., Gen. Motors Corp. v. United States, 496 U.S. 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 the Matter of ABC Coke Plant, et al.*, Order on Petition Nos. IV-2014-5 and IV-2014-6 (EPA Adm'r, July 15, 2016) at 6-7 ("A state court cannot invalidate or remove a requirement from the state's federally enforceable SIP, and the State of Alabama has not requested that the EPA remove the fugitive dust control requirement in Ala. Admin. Code R. 335-3-4-.02 from Alabama's SIP"). Thus, ADEM could have imposed a permit condition that prohibits visible fugitive dust emissions beyond the lot line of the landfill facility. However, ADEM did not include such a condition in *Solid Waste Disposal Facility Permit No. 35-06*.[78]

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). Thus, ADEM could have imposed a permit condition that requires a larger buffer zone to prevent visible fugitive dust emissions from traveling beyond the lot line of the

[78] *Id.*

City of Dothan Sanitary Landfill. However, ADEM did not include such a condition in *Solid Waste Disposal Facility Permit No. 35-06*.[79]

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). Thus, notwithstanding the specific requirements for municipal solid waste landfills in Ala. Admin. Code r. 335-13-4-.22, ADEM could have imposed permit conditions that establish additional requirements to prevent visible fugitive dust emissions from traveling beyond the lot line of the City of Dothan Sanitary Landfill. However, ADEM did not include any such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[80]

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). Thus, notwithstanding the specific requirements for construction/demolition landfills in Ala. Admin. Code r. 335-13-4-.23, ADEM could have imposed permit conditions that establish additional requirements to prevent visible fugitive dust emissions from traveling

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[79] *Id.*

[80] *Id.*

beyond the lot line of the City of Dothan Sanitary Landfill. However, ADEM did not include any such conditions in *Solid Waste Disposal Facility Permit No. 35-06*.[81]

D. 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 sub nom*, *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, and fugitive dust, has an adverse impact on property values in the surrounding community. Although ADEM asserts that it does not have authority to address property values,[82] 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

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[81] *Id.*

[82] *Response to Comments on Proposed Renewal of Permit No. 35-06* (ADEM, Oct. 21,2013) (**Exhibit 4**), at Response to Comment #10; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**), at Response to Comment #4; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 1, 2017) (**Exhibit 9**), at 4; *Response to Comments on Proposed Renewal and Modification of Permit No. 35-06* (ADEM, May 6, 2019) (**Exhibit 12**), at 10.

regulation of odors, disease vectors, fugitive dust emissions) which directly impact property values.

XI. Less Discriminatory Alternatives

"Even where a substantial, legitimate justification is proffered, EPA 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."[83] And, "[i]f a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations."[84] Alternatives to the expansion of the City of Dothan Sanitary Landfill are available for the disposal of municipal solid waste and construction/demolition waste.

A. Existing Alternative Landfills

The *Solid Waste Management Plan – City of Dothan* identifies a number of alternatives for municipal solid waste and construction/demolition waste disposal.[85] 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 [sic: waste] at any landfill in Florida or Georgia that is permitted to accept waste from the City of Dothan.

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[83] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 4.

[84] *Id.*

[85] *Solid Waste Management Plan – City of Dothan* (City of Dothan, Aug. 2014), at 6. *See, e.g., Permitted Municipal Solid Waste Landfills in the State of Alabama* (ADEM., Mar. 6, 2018).

The closest existing municipal solid waste landfills are the Springhill Regional Landfill – South, Brundidge Landfill, and Coffee County Sanitary Landfill.

The Springhill Regional Landfill – South is operated by Waste Management of Leon County, Inc. and authorized to accept municipal solid waste and construction/demolition waste.[86] "The landfill will primarily serve the state of Florida and all contiguous states."[87] "Springhill Regional Landfill will serve the states of Florida, Georgia, and Alabama."[88] It is located at 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. Its operational life is projected to end in 2074.[89] On May 6, 2014, the Board of City Commissioners of the City of Dothan authorized the City to enter into an agreement with Waste Away Group, Inc. for the transport and disposal of municipal solid waste at the Springhill Regional Landfill – South at a cost of $37.00 per ton.[90] The agreement was entered into the same day.[91] In 2017, the City paid about $38.00 per ton.[92] Houston County takes all solid waste to the "Waste Management Solid Waste Transfer Station off Mance Newton Road in Dothan, AL. * * * The solid waste from this

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[86] *Permit No. 0000475-031-SO* (Nov. 19, 2015).

[87] *Application for Solid Waste Permit Renewal – Springhill Regional Landfill* (Jan. 26, 2015) at Section 1, Part A11.

[88] *Proposed Lateral Expansion and Substantial Modification Permit Renewal Application – Springhill Regional Landfill, Vol. 1* (July, 2009) at Section II, Part A11.

[89] *Springhill Regional Landfill - Annual Remaining Capacity Report* (Waste Mgmt., Inc., Mar. 17, 2017); *Letter from Dawn Templin (FDEP) to Brian Dolihite (Waste Management)* (Mar. 24, 2017).

[90] *Minutes of the Board of Commissioners of the City of Dothan* (May 6, 2014); *Resolution No. 2014-108* (May 6, 2014).

[91] *Solid Waste Tipping, Transportation and Disposal Agreement* (May 6, 2014).

[92] *Appeal places landfill project on hold*, Dothan Eagle (Dec. 14, 2017).

facility is then transported to the Springhill Landfill in Campbellton, FL."[93] "Houston County currently has a contract with Waste Management to take solid waste to the Dothan Transfer Station in Dothan, Alabama. This contract gives Houston County a set price per ton for solid waste."[94] In 2018, Houston County paid $38.39 per ton for transportation and disposal of solid waste at the Springhill Regional Landfill.[95] The population within 1.0 mile of the Springhill Regional Landfill is 69% Black (52 individuals).[96]

The Coffee County Sanitary Landfill 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.[97] It is located at Ex. 6 Personal Privacy (PP) 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 Coffee County Sanitary Landfill is 16% Black (5 individuals).[98]

The Brundidge Landfill is operated by Brundidge Acquisitions, LLC and authorized to accept municipal solid waste and construction/demolition waste from Louisiana and all states

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[93] *Solid Waste Management Plan – Houston County* (Houston County Comm'n, Mar. 2016), at 9.

[94] *Id.*, at 14; *Solid Waste Tipping, Transportation and Disposal Agreement* (May 27, 2014). "Should the City of Dothan expand or open another landfill, Houston County would likely return to taking solid waste to the City of Dothan Landfill. Houston County would either have a contract or pay the rate per ton as set by the City of Dothan." Solid Waste Management Plan – Houston County, at 14.

[95] *Invoice* (Waste Mgmt., Feb. 1, 2018).

[96] *EJ Census 2010 Summary Report – Springhill Regional Landfill* .

[97] *Solid Waste Disposal Facility Permit No. 16-10* (ADEM, Jan. 22, 2015).

[98] *EJ Census 2010 Summary Report – Coffee County Sanitary Landfill.*

east of the Mississippi River.[99] It is located a 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 Brundidge Landfill is 34% Black (5 individuals).[100]

Each of the foregoing alternative municipal solid waste disposal sites are less discriminatory than the 20.6 acre municipal solid waste landfill expansion at the City of Dothan Sanitary Landfill. **Table 3**.

Table 3
COMPARISON OF BLACK POPULATIONS WITHIN 1.0 MILE OF ALTERNATIVE MSW LANDFILLS

Population Category	20.6 Acre Dothan MSW Landfill Expansion	Springhill Regional Landfill	Coffee County Sanitary Landfill	Brundidge Landfill
Percent African-American	86%	69%	16%	34%
African-American Population	608	52	5	5

All data from EPA's EJSCREEN Census 2010 Summary Reports.

The closest existing construction/demolition waste landfills to the City of Dothan are the Hughes C/D Landfill, Southeast Alabama Regional Construction/Demolition Landfill, and Rosehill Landfill.[101]

The Hughes C/D Landfill (a/k/a Omussee C&D Landfill) is operated by Hughes Farm, LLC and authorized to accept construction/demolition waste from the City of Dothan and

[99] *Solid Waste Disposal Facility Permit No. 55-07* (ADEM, Aug. 17, 2017).

[100] *EJ Census 2010 Summary Report – Brundidge Landfill.*

[101] *See Permitted Construction/Demolition Landfills and Industrial Landfills in the State of Alabama* (ADEM, Mar. 6, 2018).

Houston County.[102] 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."[103] On May 20, 2014, the Board of City Commissioners of the City of Dothan authorized the City to enter into an agreement with Omussee C&D Landfill for the disposal of non-hazardous yard waste (including construction and demolition wastes) generated at residential households at a cost of $13.50 per ton.[104] The agreement was entered into the same day.[105] The population within 1.0 mile of the Hughes C/D Landfill (a/k/a Omussee C&D Landfill) is 65% Black (794 individuals).[106]

The Rosehill Landfill is operated by Rose Hill Landfill, LLC and authorized to accept construction/demolition waste from all counties in Alabama and elsewhere.[107] 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 will occasionally take inert materials and household trash to this landfill."[108] "Houston County currently has a

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[102] *Solid Waste Disposal Facility Permit No. 35-08* (Ala. Dep't of Envtl. Mgmt., Dec. 2, 2015).

[103] *Solid Waste Management Plan – City of Dothan*, AL (City of Dothan, Aug. 2014) at 5.

[104] *Minutes of the Board of Commissioners of the City of Dothan* (Bd. of Comm'rs of City of Dothan, May 20, 2014); *Resolution No. 2014-128* (Bd. of Comm'rs of City of Dothan, May 20, 2014).

[105] *Solid Waste Disposal Agreement* (City of Dothan, May 20, 2014).

[106] EJ Census 2010 Summary Report – Hughes C/D Landfill.

[107] *Solid Waste Disposal Facility Permit No. 23-07* (Ala. Dep't of Envtl. Mgmt., July 31, 2018).

[108] *Solid Waste Management Plan – Houston County* (Houston County Comm'n, Mar. 2016), at 14.

contract with Rose Hill Landfill to take all inert waste."[109] The population within 1.0 mile of the Rosehill Landfill is 15% Black (70 individuals).[110]

The Southeast Alabama Regional Construction/Demolition Landfill is operated by APAC Mid-South, Inc. and authorized to accept construction/demolition waste from Houston County and nine other Alabama counties.[111] 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 Southeast Alabama Regional Construction/Demolition Landfill is 2% Black (8 individuals).[112]

Each of the foregoing alternative construction/demolition waste disposal sites are less discriminatory than the 15.0 acre construction and demolition waste landfill expansion at the City of Dothan Sanitary Landfill. **Table 4**.

Table 4
COMPARISON OF BLACK POPULATIONS
WITHIN 1.0 MILE OF ALTERNATIVE C&D LANDFILLS

Population Category	15.0 Acre Dothan C&D Landfill Expansion	Hughes C/D Landfill	Rosehill Landfill	Southeast Alabama Regional Construction/Demolition Landfill
Percent Balck	**86%**	**65%**	**15%**	**2%**
Balck Population	**608**	**794**	**70**	**8**

All data from EPA's EJSCREEN Census 2010 Summary Reports.

[109] *Id.*

[110] *EJ Census 2010 Summary Report – Rosehill Landfill.*

[111] *Solid Waste Disposal Facility Permit No. 35-07* (Ala. Dep't of Envtl. Mgmt., June 28, 2017).

[112] *EJ Census 2010 Summary Report – Southeast Alabama Regional Construction/Demolition Landfill.*

B. Existing Alternative Landfill Sites

In addition to the foregoing alternative locations for municipal solid waste and construction/demolition waste disposal, it is possible that the City of Dothan might establish a landfill at a different location within or without the City limits.

C. Alternative Mitigation Measures

"Practicable mitigation measures associated with the permitting action could be considered as less discriminatory alternatives, including, in some cases, modifying permit conditions to lessen or eliminate the demonstrated adverse disparate impacts."[113]

ADEM solid waste program rules allow the imposition of many permit conditions that are more protective than minimum requirements. *E.g.*, Ala. Admin. Code rs. 335-13-4-.15 (ADEM may require increased frequency of periodic cover); 335-13-4-.22(1) (ADEM may approve depth of earth cover greater than six inches at MSW landfills); 335-13-4-.23(1)(a) (ADEM may approve depth of earth cover greater than six inches at C&D landfills); 335-13-4-.22(1)(b) (ADEM may determine what constitutes "as small as possible" for size of active working face at MSW landfill); 335-13-4-.23(1)(c) (ADEM may determine what constitutes "as small as possible" for size of active working face at C&D landfill); 335-13-4-.13(2)(f) (ADEM may determine that minimum 100 foot buffer zone is not sufficient); 335-13-4-.22(3)(b) (ADEM may impose additional requirements at MSW landfills); 335-13-4-.23(3)(a) (ADEM may impose enhanced requirements at C&D landfills); 335-13-4-.22(2)(d) (ADEM may require additional vector control measures). However, once a permit is issued, the only modification allowed is one

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[113] *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39683.

requested by the permittee. Ala. Admin. Code r. 335-13-5-.06. "[W]here an agency prescribes rules and regulations for the orderly accomplishment of its statutory duties, its officials must vigorously comply with those requirements; regulations are regarded as having the force of law and, therefore, become a part of the statutes authorizing them. . . . [A]nd so long as the agency holds out, through a duly adopted and promulgated agency regulation having the force of law, that a [specific] procedure is required . . . the agency must be held to its own standard." *Ala. Dep't of Revenue v. Downing*, 272 So. 3d 184, 189 (Ala. Civ. App. 2018) (quoting *ABC Coke v. GASP*, 233 So. 3d 999, 1008 (Ala. Civ. App. 2016) (in turn quoting *Hand v. State Dep't of Human Res.*, 548 So. 2d 171, 173 (Ala. Civ. App. 1988), *aff'd*, 548 So. 2d 176 (Ala. 1988)). *Accord*, *Health Care Auth. v. Statewide Health Coordinating Council*, 988 So. 2d 574, 582 (Ala. Civ. App. 2008); *Ex parte Wilbanks Health Care Servs.*, 986 So. 2d 422, 424-425 (Ala. 2007). Thus, absent a request from the City of Dothan, ADEM may not modify *Solid Waste Disposal Permit No. 35-06* to avoid discriminatory effects.

Moreover, a solid waste disposal permit may be revoked only for specific causes. Ala. Admin. Code r. 335-13-5-.05. Among these causes is "the design operations creates a nuisance . . .." Thus, ADEM may not revoke and reissue *Solid Waste Disposal Permit No. 35-06* simply to avoid discriminatory effects. It is possible, but unlikely, that ADEM can be convinced to revoke *Solid Waste Disposal Permit No. 35-06* on the basis that the disparate impacts on black residents amount to a nuisance. *See* Ala. Admin. Code r. 335-13-5-.05(1)(e). "A 'nuisance' is anything that works hurt, inconvenience or damage to another. The fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful or such as would affect only one of a fastidious taste, but it should be such as would

affect an ordinary reasonable man." Ala. Code § 6-5-120. However, the lawfulness of the act complained of, though irrelevant to a claim for money damages, does affect the availability of injunctive relief. "[P]roof of negligence is required to sustain injunctive relief ordering abatement of a nuisance when the conduct giving rise to the conditions complained of was expressly authorized by legislative act." *City of Birmingham v. City of Fairfield*, 375 So. 2d 438, 441 (Ala.1979). *Accord*, *Kennedy v. City of Montgomery*, 423 So. 2d 187, 190 (Ala. 1982); *Fricke v. City of Guntersville*, 251 Ala. 63, 64, 36 So. 2d 321, 322 (1948). Ala. Code 1975 §§ 11-47-135 and 22-27-3 authorize cities to establish garbage disposal systems. *See Town of Eclectic v. May*, 547 So. 2d 96, 103 (Ala. 1989) (Ala. Code 1975 §§ 11-47-135 and 22-22-1 through -7 authorize municipalities to establish garbage/solid waste disposal systems). Thus, municipal operation of a garbage/solid waste disposal system is not an actionable nuisance without negligence. *See, e.g.*, *City of Birmingham v. Scogin*, 269 Ala. 679, 689, 115 So. 2d 505, 514 (1959) ("if there was no negligence on the part of the City of Birmingham in the operation of the disposal area, the injunction should have been denied"); *City of Bessemer v. Chambers*, 242 Ala. 666, 669, 8 So. 163, 165 (1942) ("a trash dump is not an actionable nuisance unless its injurious condition is the result of neglect, carelessness or unskillfulness of a city employee or officer"); *City of Bessemer v. Abbott*, 212 Ala. 472, 473, 103 So. 446, 447 (1925) (City operation of incinerator for disposal of garbage cannot be nuisance without negligence).

XII. Insufficient 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).[114] 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.[115]

This condition has been incorporated into *EPA General Terms and Conditions* every year since.[116]

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.[117] This claim is, in essence, that ADEM's permitting actions do not *intentionally*

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[114] *See Assurances for Non-Construction Programs – Standard Form 424B* (Rev. 7-97) ("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; . . ..").

[115] *Civil Rights Obligations* (EPA, Jan. 25, 2013).

[116] *See, e.g., EPA General Terms and Conditions Effective October 1, 2018* (EPA, Oct. 1, 2018), at 17.

[117] *See Response to Comments on Proposed Renewal of Permit No. 35-06* (ADEM, Oct. 21,2013) (**Exhibit 4**), at Response to Comment #7; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**), at Response to Comment #2; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 1, 2017) (**Exhibit 9**), at 2; *Response to Comments on Proposed Renewal and Modification of Permit No. 35-06* (ADEM, May 6, 2019) (**Exhibit 12**), at 3. *See also Summation of Comments Received and Response-to-Comments – Proposed Arrowhead Landfill* (ADEM, Feb. 3, 2012), at 7; *Summation of Comments Received and Response-to-Comments – Proposed Arrowhead Landfill* (ADEM, Sep. 27, 2011), at 13; *Summation of Comments Received and Response-to-Comments – Perry County Associates Landfill* (ADEM, July 20, 2009), at Response to Comments 12-15; *Summation of Comments Received and Response-to-Comments – Proposed Perry County Associates Landfill* (ADEM, July 6, 2006), at Response to 16-18; *Summation of Comments Received and Response-*
(continued...)

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."[118]

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.[119] However, compliance with environmental regulations is not *prima facie* evidence of the absence of adverse disparate impacts.[120] "EPA believes that presuming compliance with

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[117](...continued)
to-Comments – Tallassee Waste Disposal Center (ADEM, Oct. 20, 2003), at Response to Comment 3.

[118] *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, *supra* note 2, at 2 (footnote omitted).

[119] *See supra* note 117

[120] EPA's *Draft Title VI Guidance Documents – Questions and Answers* (EPA, July 25, 2000; rev. May 20, 2009) 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.

(continued...)

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."[121] 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.[122] This allegation ignores the fact that members of the Black race are disparately affected by the City of Dothan Sanitary Landfill, notwithstanding ADEM's alleged compliance with the applicable criteria.[123]

ADEM has also argued that it is the siting decision made by the Board of Commissioners of the City of Dothan that will cause any alleged disparate adverse impacts on Complainants, not the permitting decision made by ADEM.[124] This argument has ben rejected by EPA.

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[120](...continued)
Id. at 4.

[121] *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).

[122] *Id.*

[123] *Draft Title VI Guidance Documents Questions and Answers*, *supra* note 120, at 4.

[124] *See Response to Comments on Proposed Renewal of Permit No. 35-06* (ADEM, Oct. 21,2013) (**Exhibit 4**), at Response to Comment #7; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Jan. 8, 2016) (**Exhibit 6**), at Response to Comment #2; *Response to Comments on Draft Modification of Permit No. 35-06* (ADEM, Nov. 1, 2017) (**Exhibit 9**), at 2; *Response to Comments on Proposed Renewal and Modification of Permit No. 35-06* (ADEM, May 6, 2019) (**Exhibit 12**), at 3. *See also Summation of Comments Received and Response-to-Comments – Proposed Arrowhead Landfill* (ADEM, Feb. 10, 2017), at 18-19; *Summation of Comments Received and Response-to-Comments – Proposed Arrowhead Landfill* (Feb. 3, 2012), at 7; *Summation of Comments Received and Response-to-Comments – Proposed Arrowhead Landfill* (Sep. 27, 2011), at 13; *Summation of Comments Received and Response-to-Comments – Perry County Associates Landfill* (ADEM, July 20, 2009), at Comments 12-15; *Summation of Comments Received and Response-to-Comments – Proposed Perry County Associates Landfill* (July 6, 2006), at Response to 16-18; *Summation of Comments Received and Response-to-Comments – Proposed*
(continued...)

> 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.[125]

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.[126] 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 Complainants and other Blacks 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

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[124](...continued)
Stone's Throw Landfill Renewal (ADEM, Feb. 10, 2017) at 6; *Summation of Comments Received and Response-to-Comments – Tallassee Waste Disposal Center* (ADEM, Oct. 20, 2003), at Response to Comment 3.

[125] *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. at 39691.

[126] *Solid Waste Disposal Facility Permit No. 35-06*, *supra* note 1.

site is compliant with the siting standards, the landfill would not have been constructed at the site and adverse impacts to the Complainants and other Blacks 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, fugitive dust, and property devaluation. Operation of the landfill under these conditions causes adverse impacts to the Complainants and other Blacks.

XIII. Pending Administrative Appeal

On June 4, 2019, seven persons who are not the Complainants herein, filed an administrative appeal of *Solid Waste Disposal Facility Permit No. 35-06* with the Alabama Environmental Management Commission.[127]

XIV. Request for Relief and Sanctions

Based upon the foregoing, Complainants request that the U.S. Environmental Protection Agency grant them the following relief and impose the following sanctions:

(A) acknowledge receipt of this Complaint. *See* 40 C.F.R. § 7.120(c) ("The [EPA] will notify the complainant and the recipient of the agency's receipt of the complaint within five (5) calendar days");

(B) accept this Complaint for investigation. *See* 40 C.F.R. § 7.120(d)(1)(i) ("Within twenty (20) calendar days of acknowledgment of the complaint, the [EPA] will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency");

(C) promptly conduct an investigation of this Complaint. *See* 40 C.F.R. § 7.120 ("The [EPA] shall promptly investigate all complaints filed under [40 C.F.R. § 7.120]");

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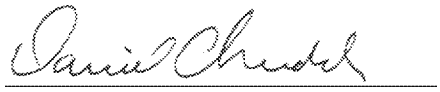
[127] *Request for Hearing* in *Bobby Lewis, et al. v. Ala. Dep't of Envtl. Mgmt.*, Dkt. No. 19-06 (Ala. Envtl. Mgmt. Comm'n, June 4, 2019).

(D) make a preliminary finding of ADEM's noncompliance with 40 C.F.R. § 7.35(b). *See* 40 C.F.R. § 7.115(c)(1) ("Within 180 calendar days from the start of the . . . complaint investigation, [EPA] will notify the recipient . . . of . . . [p]reliminary findings . . ..");

(E) issue a formal determination of ADEM's noncompliance with 40 C.F.R. § 7.35(b). *See* 40 C.F.R. § 7.115(d) ("If the recipient does not take one of [three specified] actions within fifty (50) calendar days after receiving [the] preliminary notice, [EPA] shall, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient . . .."); and

(F) commence proceedings to deny, annul, suspend or terminate EPA financial assistance to ADEM. *See* 40 C.F.R. § 7.115(e) ("The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, the [EPA] must start proceedings under [40 C.F.R. § 7.130(b)].").

Sincerely,



David A. Ludder
Attorney for Complainants